

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

**THE ADOPTION OF THE
UNCITRAL MODEL LAW OF ARBITRATION**

(TOPIC 17)

We, the following members of the Law Reform Commission of Hong Kong, present our report on the Adoption of the UNCITRAL Model law of Arbitration.

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Introduction

On 7 May 1985 the Chief Justice and the Attorney General referred to the Law Reform Commission the following: -

"To consider whether the Model law on International Commercial Arbitration adopted by UNCITRAL's Working Group on International Contract Practices should be adopted as part of the law of Hong Kong and, if so, with what modifications to the Model Law and the Arbitration Ordinance, and to make recommendations."

A sub-committee was appointed to consider the matter, under the chairmanship of the Honourable Mr. K.F. Hu, OBE, JP, a member of the Commission. The other sub-committee members were: -

Mr Robert Greig	American Attorney, Partner Cleary, Gottlieb, Steen & Hamilton
The Honourable Mr Justice Hunter	Judge of the High Court of Hong Kong, Chairman Management Committee HK International Arbitration Centre
Mr Neil Kaplan QC	Barrister, Chairman Chartered Institute of Arbitrators HK Branch
Mr Wolfgang Knapp	American, German and Belgian Attorney, Partner Cleary, Gottlieb, Steen & Hamilton
Mr Andrew K N Li	Barrister
Mr Phillip T Nunn	Solicitor, Partner Simmons & Simmons
Mr Robert Phillips	Solicitor, Partner McKenna & Co.
Dr the Honourable Helmut Sohmen	Member of the Legislative Council, Chairman World Wide Shipping Agency Limited

Mr Charles Stevens

American Attorney
Partner Coudert Brothers

Mr Brian Tisdall

President Law Society of Hong Kong
1985-87
Secretary-General Hong Kong
International Arbitration Centre

Mr George Rosenberg
(Secretary)

Senior Crown Counsel
Attorney General's Chambers

In April 1987 the sub-committee submitted its report to the Commission which considered the subject at its 53rd, 54th, 55th and 56th meetings.

We wish to record our appreciation of the assistance given to the Commission by the sub-committee. We are particularly indebted to its members who all gave unstintingly of their time and energy over a period of almost 2 years. We wish also to express our gratitude to the secretary of the sub-committee, Mr. George Rosenberg, upon whom fell the main burden of drafting this report.

Chapter 1

Background

1.1 The first topic dealt with by the Hong Kong Law Reform Commission was that of Commercial Arbitration. The legislation which resulted from its recommendations has been described by Sir John Donaldson, Master of the Rolls as pointing "the way in which the English law of arbitration should go."¹

1.2 The recommendations and the Ordinance resulting from them make special provision for non-domestic commercial arbitrations, but, subject to some exceptions, such arbitrations continue to be dealt with in Hong Kong in a way similar to domestic arbitrations.

1.3 In the light of the recent establishment of the Hong Kong International Arbitration Centre, and the increasing recognition, not only by Chinese trading organisations and those involved in trade with China, but also by those involved in trade and other commercial business through Hong Kong, that Hong Kong is an ideal venue for international commercial arbitrations, the Commission watched with interest the progress of the drafting of a model law for International Commercial Arbitration, by the United Nations Commission on International Trade Law (UNCITRAL).

1.4 The UNCITRAL initiative in this field was prompted by the problems that practitioners of international arbitration and their clients found in dealing with the widely differing regimes under which arbitration operates in differing jurisdictions. The major differences relate to the conditions under which the courts may assist or interfere with the arbitral process, but regardless of the differences, the sheer lack of accessible information about the way another system works can deter parties from designating it for an arbitration. The result is that at present the vast bulk of international arbitrations are conducted at traditional venues. UNCITRAL took the view that if a common procedural base could be established parties might be able to concentrate on the fairness and convenience of a venue, instead of worrying about procedural aspects.

1.5 UNCITRAL therefore established a working group which met for the first time in February 1982 to draft a Model Law. It finally produced an agreed draft in June 1985. On 11 December 1985 the General Assembly of the United Nations passed a resolution (resolution 40/72) that "all States give due consideration to the Model Law on International Commercial Arbitration,

¹ "Commercial Arbitration - 1979 and After" by Sir John Donaldson MR, published 1 BL June 1983 Vol. II (vi) pp 192/3.

in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."

1.6 Well before this resolution was passed a sub-committee of the Hong Kong Law Reform Commission had begun considering whether the Model Law should be adopted as part of the law of Hong Kong. Although the membership of the sub-committee is set out elsewhere in this report it is perhaps significant to note its truly international character - reflecting the cosmopolitan nature of the legal community, and the wide range of experience available to those who wish to conduct their arbitrations here. The sub-committee was made up of two Chinese, an Austrian, five Englishmen, two Americans and a German.

1.7 The Model Law is formed in a way which differs from the Ordinances which up till now have constituted the enacted law of Hong Kong. It reads much more as though it were drafted by a civil, as opposed to a common law draftsman. Furthermore, the way in which it deals with the law of arbitration differs quite markedly from the present structure of the law in Hong Kong. Given these factors it would not be surprising if it attracted the adverse criticism of some lawyers brought up in the Common Law tradition and accustomed to using a system of arbitration, which, particularly since the reforms of 1981, generally operates smoothly and effectively and to the satisfaction of the parties. Indeed such criticism has been voiced in England, from whose arbitration laws Hong Kong's are derived. One of the strongest critics of the Model Law has been Lord Justice Kerr, the President of the Chartered Institute of Arbitrators. He has argued that in the ultimate analysis the effectiveness of the private process of arbitration must rest upon the binding, and even coercive powers which the state entrusts to its courts. It will be seen that the Model Law substantially reduces these binding and coercive powers, at least as compared with the way they have historically applied in England and Hong Kong. He points out that only recently (in 1979 in England and in 1982 in Hong Kong) have moves been made to move away from a rather strict regime of control and has expressed strong reservations as to whether the time is yet ripe to take yet another, and much longer step, along this path. He has said it goes much too far in giving uncontrollable powers to arbitrators, free from all the checks and balances on unrestricted authority which a highly developed legal system has found to be necessary and beneficial. However, it is fair to say that in more recent public pronouncements, Lord Justice Kerr's criticisms have become more muted. Even in England, there are many strong supporters of the Model Law, and a committee of the Department of Trade and Industry is currently considering whether, and to what extent, it should be implemented. In answer to the sort of criticism advanced by Lord Justice Kerr, supporters of the Model Law have pointed out that in practice the courts are very rarely called on to intervene in arbitrations. In fact since the Nema decision,² the powers of the court to intervene have become so circumscribed, that they are not substantially greater than those proposed under the Model Law. In the case of non-

² See footnote on p.16.

domestic arbitrations, Hong Kong law already allows the parties to agree to exclude most of the court's power to intervene.

1.8 For our part we rapidly, and unanimously, came to the view that it would be greatly to Hong Kong's benefit if the Model Law were adopted here as part of Hong Kong domestic law, subject only to a very few minor changes, none of which have any effect on its basic philosophy. While we have sympathy for some of the views expressed by Lord Justice Kerr, we feel, after a close analysis of the Model Law, that it does not constitute as dramatic a departure from the English tradition as he seems to feel. A considerable number of vital controls remain, and arbitrators operating under it will be far from uncontrollable. Some measure of the extent to which it interferes with existing checks and balances can be gauged from chapters 2 and 3 of this report and we have also prepared a comparative commentary on the existing Ordinance and the Model Law, which is annexed to this report. Finally, the fact that this new arbitration regime will be limited to disputes of an international character will limit any damage which might otherwise be done. International parties always have a choice of the jurisdictions in which they wish to arbitrate. If they want a regime with more, or less, court control they can go elsewhere. In fact under our recommendation 6.9 they can elect to arbitrate under Hong Kong's domestic arbitration law. Domestic parties have less choice and so, for them, we do not recommend any lessening of their present protections.

1.9 In broad summary we came to that view because of the following reasons: -

- (a) The Model Law provides a sound framework within which international arbitrations can be conducted.
- (b) There is great benefit to be gained from Hong Kong's point of view in its role as a burgeoning centre for international arbitrations.
- (c) The general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to lawyers and parties who are not infused with English concepts of arbitration.
- (d) If the Model Law is adopted widely it will encourage international arbitration as a way of settling commercial disputes. This can only work to the advantage of Hong Kong as a leading international commercial centre in the Far East, and we would like Hong Kong to be in the vanguard when adopting the new law.
- (e) The Model Law has been drafted in the languages of the United Nations. Although Hong Kong will initially adopt the law in English only, the basic framework will thus be accessible to lawyers and businessmen in all countries.

Because our primary reason for recommending the adoption of the Model Law as part of the Law of Hong Kong is the need to make knowledge of our legal rules for international commercial arbitration more accessible to the international community a constant theme will run through this report. The objects of adoption of the Model Law can best be achieved if it is changed as little as possible and is instantly recognisable for what it is - the adoption by Hong Kong of what we hope will eventually become the international standard for international commercial arbitration laws. Thus where change is avoidable, we have avoided recommending it. We are convinced that it is much better to approach its implementation that way, than by trying to improve what is already the result of many years work by an international group of experts collectively far more experienced than we are.

Chapter 2

Hong Kong's International Arbitration Law

The basic structure and problem

2.1 Hong Kong's international arbitration law is to be found in the Arbitration Ordinance Cap. 341, and, as in any common law jurisdiction, in the reported decisions of the courts.

2.2 Although there are many Hong Kong practitioners who are familiar with the niceties of the law, the practical reality is that knowledge about arbitration law is not readily available to those who do not have a regular practice in the field. Part of the problem is the necessity to refer to legal precedent and textbooks in addition to the Arbitration Ordinance. This is a necessity well known to all practitioners of law in common law jurisdictions. In the case of arbitration this is compounded, because it is an essentially private process and most of the legal research and decision making is never made public. It is only in the most unusual circumstances that a reasoned judgment is given in open court, and reaches the public domain as a result of its being published in the law reports.

2.3 In the field of international arbitration this naturally causes some nervousness on the part of parties whose place of business is outside Hong Kong. To what extent do the courts have the power to interfere? How final is an arbitrator's decision in Hong Kong? What sort of mechanisms does an obstructive party have at his disposal to delay or interfere with a rapid and just award by an arbitrator? Arbitration practitioners in Hong Kong know there are ready answers to all these questions, but the fact remains that the information is not readily ascertainable except by resort to local expert knowledge. Rather than make detailed enquiries before selecting a venue for arbitration, a contracting party or adviser is much more likely to go to a familiar jurisdiction.

The Law

2.4 The Arbitration Ordinance is closely modelled on the English Arbitration Act modified in the light of the LRC's 1981 recommendations. There are some specific provisions relating to non-domestic arbitration. A brief summary of the effect of the Ordinance follows: -

An arbitration can take place if the parties to an agreement so agree in writing. The agreement to arbitrate may be included as part of an original contract, or may be reached at a later stage, before or after a dispute has arisen. If the parties to a domestic agreement have agreed

to arbitrate, and one of them attempts to have the matter dealt with through the courts, the courts may in their discretion act to stay proceedings. In the case of non-domestic arbitrations the court is obliged to stay proceedings. Although the parties can agree on the number of arbitrators, the Ordinance provides that in the absence of agreement there should be one arbitrator only. Provision is made for the situation where the arbitrators fail to agree. In the circumstances where an agreed method of appointing an arbitrator breaks down, the courts may intervene to appoint one or more. The courts are given extensive powers to assist arbitrations by issuing summonses to witnesses, and by making various preliminary orders such as for security for costs, discovery or for the preservation of evidence. If an arbitrator fails to act promptly there is power for the court to remove him. There are a series of provisions giving powers to the arbitrator in the absence of agreement to the contrary. These powers include the power to examine witnesses on oath, to order specific performance, to correct accidental mistakes in an award, and to award costs and interest on awards. Perhaps the most significant series of provisions - distinguishing the Ordinance from the laws of many other jurisdictions - is that providing for review of arbitrators' decisions by the courts. The review powers cover errors of law but are very limited. The court is also given the power to decide preliminary questions of law. These review powers apply automatically in the case of both domestic and non-domestic arbitrations, but in the latter case, the parties may by agreement exclude the jurisdiction of the courts. The courts also have power to intervene to remit an award to an arbitrator for reconsideration, to remove an arbitrator for misconduct, and to revoke the authority of an arbitrator and perhaps even the award where misconduct, lack of impartiality, or fraud is proved. Finally there is a series of provisions allowing the court to assist in the enforcement of awards.

2.5 It will be seen from the above very sketchy description that Hong Kong law at present makes a distinction between domestic and non-domestic arbitrations in only two situations - when a stay of proceedings is sought or when the courts' power to review is established. The powers of the courts to review are a matter of considerable concern to many parties because one of their reasons for resorting to arbitration is often a desire for rapid finality, perhaps at the risk of an occasional error. The provision of the Hong Kong law allowing the parties to "contract out" of these review powers in non-domestic arbitrations is a recognition of this concern. Although the term "international" is not used in the Ordinance, those arbitrations which are defined as non-domestic are effectively international. We will be making some recommendations regarding the definition of what is an international arbitration which differ in some respects from the present Hong Kong definition. Although we do not think the present Hong Kong definition is entirely satisfactory, our reason for making these recommendations is primarily a desire to ensure consistency between the Hong Kong and Model Law provisions.

2.6 Although our recommendation will be that a new law based on the UNCITRAL model replace existing Hong Kong law on international arbitration, we are not aware of any serious criticism of the law as it stands. We are simply making a recommendation for internationalisation in an area of law which must of necessity have an international context. Our recommendations will, of course, leave the law of domestic arbitration in Hong Kong virtually intact.

Chapter 3

The UNCITRAL Model Law on International Commercial Arbitration

3.1 In the course of the next chapters we will be dealing in detail with the law, but in this chapter we will give a brief outline of the content of the law to draw attention to the significant areas of similarity and of difference between the Model Law and the existing Hong Kong Ordinance. The Model Law is annexed to this report as part of the Comparative Commentary.

3.2 It is of course limited in its application to international commercial arbitrations, and these terms are defined. An arbitration agreement must be in writing, and if there is an agreement the courts are given power to intervene to prevent either party resorting to litigation instead of arbitration. Although the parties can specify the number of arbitrators the law provides that in the absence of such a specification the number shall be three. There is provision for the court to appoint arbitrators if the parties fail to do so, and there is provision for the court to intervene in the event of a dispute over the appointment of arbitrators.

3.3 Once the UNCITRAL tribunal is appointed it enjoys considerable autonomy. It can determine points of procedure where the parties have not done so themselves. It can rule on its own jurisdiction. It can also order interim measures to protect the subject matter of the dispute. There are some rules of procedure set out in the law, but in general the procedure is set by the parties or the tribunal. There is power for the tribunal to continue to act in the absence of co-operation by one party or the other.

3.4 Once the award is given there is power to refer it back for correction. There are also limited powers of recourse to the courts to set aside an award made under an invalid agreement, contrary to the agreement or contrary to the public policy of the state. Where a tribunal has made a ruling on its own jurisdiction, there is a right of appeal on this point to the courts.

3.5 Finally there are a number of enforcement provisions, allowing enforcement of foreign awards in the adopting jurisdiction.

3.6 Although none of these procedures is in terms identical to the Hong Kong Ordinance, most of them are philosophically indistinguishable. There are however some fundamental differences which are as follows: -

- (a) There is no power for the court to rule on questions of law, either prior to an arbitration, during its course, or on a review of the award;
- (b) The court's powers to assist the arbitral tribunal by way of witness summons, discovery orders and the like are much more limited;
- (c) The arbitrator himself has the right in certain circumstances to rule on his own jurisdiction.

3.7 It can be seen that the arbitral tribunal is granted more autonomy under the Model Law than under our Ordinance. In fact, however, if parties choose to contract out of the review provisions of our Ordinance, the regime under which they then operate is not significantly different philosophically from that under the Model law. Even where the full review procedures under the Ordinance apply they are only available by leave of the court. Such leave is very sparingly given.¹ Our recommendation that the Model Law become part of the law of Hong Kong is therefore not a particularly radical one, and, as we have already suggested, it has the advantage of making our law internationally recognisable and accessible.

¹

In the absence of consent by the parties, the review powers will only be exercised where the arbitrator has clearly erred in law or, in a dispute involving the interpretation of a standard form of contract, there is a strong prima facie case that the arbitrator has erred in law (Pioneer Shipping Limited and Others v B T P Tioxide Ltd (the "Nema") [1982] AC 724, followed in Hong Kong in Attorney General v Technic Construction Company Limited, [1986] HKLR 541).

Chapter 4

Adoption of the Model Law in Hong Kong

4.1 The provisions of the Model Law can be divided into three categories for the purpose of analysis and of consideration as to whether they should be adopted as part of the law of Hong Kong. There are those provisions whose effect does not differ markedly from the provisions of the existing law, those whose provisions have a broadly similar basis, but where the approach adopted is different in some respects from Hong Kong law, and finally those whose fundamental concept departs substantially from the law now existing in Hong Kong.

4.2 In the following chapter we will deal with the law by reference to these categories.

4.3 During the course of our deliberations it became clear that there are certain provisions which will need to be added to the Model Law if it is to work effectively in Hong Kong. None of these provisions make any significant difference to the Model Law itself. They can be regarded as refinements, probably relevant only in Hong Kong. We will deal with these proposals later in this chapter.

4.4 Finally there are a number of consequential amendments to the Arbitration Ordinance, which we feel will be necessary if the Model Law is to be integrated into the Hong Kong legal system.

Our basic philosophy

4.5 As we have already pointed out, the major benefit we envisage accruing to Hong Kong if the Model Law is adopted as part of our law will be the confidence which international parties will feel when considering Hong Kong as an arbitration venue. This confidence will stem from a feeling of familiarity with an arbitration law which will be readily available, recognisable, and, in many cases similar, to the domestic law of the parties concerned. The foreign lawyer, seeking to find out what law applies in Hong Kong to international commercial arbitrations will need only 2 references - the model law and the UNCITRAL rules (which control the procedure before and at the hearing - the parties can agree to abide by these rules, or any others they choose to follow). The latter are already in use at the Hong Kong International Arbitration Centre. We were also aware that the Model Law was the product of the work of arbitration experts from many countries, that to some extent it represented a compromise between the differing views represented by differing legal systems, and that there might be respects in

which it could be improved. Finally some of our members were strong advocates of the English style of arbitration which is still the basis of the law in Hong Kong.

4.6 There were thus two competing approaches available to us. One was to give primacy to the international recognisability and acceptability of the law and to leave it as little changed as possible. The other was to make an attempt to improve it, and perhaps modify it to bring it more in line with the English / H.K. concept of arbitration.

4.7 At a very early stage we decided to adopt the first approach, and resist the temptation to tinker with the Model Law. We felt that if the Model Law was not acceptable on this basis, there would be little point in our recommending the adoption of a modified version. To do so would be to risk losing all the advantages which stem from the fact that it provides a standard and recognisable mode of international arbitration.

4.8 A number of the provisions which we have recommended should be adopted unchanged are not in our view entirely satisfactory. Nonetheless we think it far better to leave them as they stand, rather than tinker with them in an attempt to improve them, thereby causing only confusion to those foreign parties who wish to be sure they know what Hong Kong's law for international commercial arbitration is.

Provisions which we recommend be adopted unchanged

4.9 These constitute the majority of the articles of the Model Law. They fall into two categories:

- (a) Those whose adoption in their present form we unhesitatingly recommend.
- (b) Those in respect of which we considered, but rejected modification.

The following are the articles we recommend be adopted unchanged. Where we considered, but rejected modification we have explained why:

Article 1 - Scope of application
(1, 2 & 5)

Article 1 - Definition of International
(3 & 4)

"International." The definition of the term is at variance with that under the Arbitration Ordinance, in a number of respects.

In summary, the UNCITRAL definition emphasises the location of the transaction which is the subject matter of the contract, but the Hong Kong definition pays more

attention to the residence of the parties.

To take one example only, if one or both companies involved in an international arbitration have a place of business in Hong Kong, but their central base elsewhere, and the dispute relates to a transaction in Hong Kong carried out by the local branch, the dispute will be treated as international under present Hong Kong law. Under the UNCITRAL definition it would be treated as domestic.

We took the view that the UNCITRAL definition is preferable and gives rise to less anomalies, but we had to consider the relationship between the Model Law and the Arbitration Ordinance should the Model Law become part of Hong Kong law. We think it would be wrong for there to be two definitions in existence and since we prefer the UNCITRAL one we recommend that the Arbitration Ordinance be amended to incorporate this definition instead of the present one.

- Article 2 - Definitions of "arbitration", "arbitral tribunal", "court". Right to decide who determines issue.
- Article 3 - Receipt of written communications.
- Article 4 - Waiver of right to object
- Article 5 - Extent of court intervention

This article has been described as pivotal to the law. It reads as follows:

"In matters governed by this law, no court shall intervene except where so provided in this law."

On the face of it the intention of the provision is plain - it is intended to isolate the operation of the law from court supervision, except when court supervision is expressly permitted. Such a provision would allay the fears of those who regard court intervention in the arbitral process as contrary to the spirit of arbitration. We support the intention of the provision, but were concerned at the ambiguity in the way it is expressed. The analytical commentary on the draft text of the Model Law, prepared by the Secretary General of UNCITRAL¹ states that the intention is to limit court intervention to "those issues which are in fact regulated, whether expressly or impliedly, in the model law." This is the interpretation we would wish to see

¹ A/CN.9/264 25 March 1985 p 19, para 4.

placed on it. Notwithstanding the risk of misinterpretation we decided to leave the provision untouched, rather than tinker with it and thus raise the suggestion that we were trying to give it a meaning different to that intended by UNICITRAL.

Article 6 - Court or other authority for certain functions of arbitration assistance and supervision.

This article allows enacting jurisdictions to select the court, courts, or other authority which will carry out certain of the supervisory functions given by the Model Law. We considered recommending the giving of some of these functions to the Hong Kong International Arbitration Centre, but in the end decided to recommend they be given to the High Court. Although certain of the functions (for example the appointment and dismissal of arbitrators) would clearly be within the Centre's scope, others (e.g. appeals against arbitrators' rulings on their own jurisdiction, or requests to set aside awards) are clearly not. It was, in our view, undesirable to divide the functions, and the Court can easily handle them all.

Article 7 - Definition and form of arbitration agreement.

Article 8 - Duty of court to refuse to hear claim subject of arbitration agreement.

This article empowers the court to order a stay of proceedings where a party to an arbitration agreement attempts to side-step the agreement by resorting to court action. The article uses the expression "first statement on the substance of the dispute", and appears to allow intervention at a different stage than s. 6A of the Arbitration Ordinance. Some members were concerned that the courts would have difficulty in interpreting the provision, partly because of the unfamiliarity of the language. In the end, however, we decided that the provision was not difficult to interpret and that once again we should avoid tampering with the language of the model law.

Article 9 - Interim measures by the court.

Article 10 - Number of arbitrators.

Article 11 - Appointment of arbitrators.

Article 12 - Grounds for challenge of arbitrator.

Article 13 - Challenge of arbitrators - procedure.

Article 14 - Failure or impossibility of arbitrator to act.

Article 15 - Appointment of substitute arbitrator.

Article 16 - Competence of tribunal to rule on its own jurisdiction.

This article would give the arbitrator the power to rule on his own jurisdiction and on the validity of the contract in which the arbitration clause is contained. In this respect it goes beyond the Hong Kong and English law on the matter. At present, in the absence of a provision in the agreed arbitration rules the arbitrator cannot rule on the validity of the contract from which his authority stems. Even with an agreement he may only determine continuing validity where initial validity is not in issue. Although the provision represents a departure from the present law it is a valuable reform which might not be out of place in our domestic law. There is a right of appeal to the court, so the arbitrator cannot be said to be pulling himself up by his own bootstraps.

Article 17 - Interim measures by the tribunal.

Article 18 - Equal treatment of parties.

This is a particularly significant Article, guaranteeing the rights of the parties to equal treatment. We think it will allow the courts to intervene under Article 34 in cases where for example there has been a failure to abide by the rules of natural justice.

Article 19 - Rules of procedure.

Article 20 - Place of arbitration.

Article 21 - Commencement of proceedings.

Article 22 - Language.

Article 23 - Statements of claim and defence.

Article 24 - Hearings and written proceedings.

Article 25 - Default of a party.

Article 26 - Expert appointed by tribunal.

Article 27 - Court assistance in taking evidence.

- Article 28 - Rules applicable to substance of dispute.
- Article 29 - Decision by majority of panel.
- Article 30 - Settlement.
- Article 31 - Form and content of award.
- Article 32 - Termination.
- Article 33 - Correction and Interpretation of Award.
- Article 34 - Applications to set aside award.
- Article 34 - Action when court finds award in conflict with public policy (2)(b)(ii) of the state.

This sub article allows an award to be set aside where it "is in conflict with the public policy of this state". We were initially concerned at the apparent ambiguities of this provision - what is "public policy" in this context, and does the provision allow the setting aside of an award where the process leading up to the award (for example fraud or partiality on the part of the tribunal) is at fault, rather than the award itself? In fact the provision incorporates the same formula as Article V(2)(b) of the New York Convention, which has been interpreted both in the United States and the United Kingdom to allow awards to be set aside where the "public policy" element relates to the conduct of the arbitration.

The expression "public policy" is one which sounds somewhat vague and out of context to the common lawyer. It is, however, well known in this context, because the same expression already appears in the 1958 New York Convention in the same context. Hong Kong courts would undoubtedly be able to refer to the many decisions made under the Convention. The civil law concept of "order publique" (translated in the English language version of the Model law as "public policy") covers fundamental principles of law and justice in procedural as well as substantive respects. These include corruption, bribery, fraud and other serious cases, as well as the elements of the common law concept of natural justice. They would also include a violation of Article 18 (equal treatment of parties).

Some commentators have criticised the fact that the rights set out in Article 34 to apply to have the award set aside apply only after the award is made. What is a party to do if obvious partiality or fraud becomes apparent during the

course of proceedings? The only remedies appear to be those under Articles 13 (challenging of an arbitrator) and 14 (termination because of failure to act). We considered recommending that there be some right where there was manifest misconduct by the tribunal to refer the matter to a court during the course of the hearing. Such a provision would, however, be contrary to the whole spirit of the model law's concept of minimising the opportunity for delay through interference by the judicial process. We did not feel we could recommend an exception in this case.

Article 35 - Recognition and enforcement.

We recommend the adoption of this provision. We considered recommending that the present provisions in Parts III and IV of the Arbitration Ordinance, which provide for enforcement of awards made outside Hong Kong, be repealed and replaced by Article 35. The idea appealed to us, because it would make the system of enforcement of foreign awards in Hong Kong both clearer and simpler. It would not, however cater for domestic awards made elsewhere and sought to be enforced here. Problems might also arise in relation to the treaty obligations pursuant to which Part III and IV were introduced. Article 35 will therefore apply where the award is made in an international arbitration, but the existing provisions will apply in other cases.

Article 36 - Grounds for refusing recognition or enforcement.

Deletion from and additions to the model law

4.10 We propose only one deletion from the Model Law, but there are a number of additions we feel are necessary.

Deletion

Definition of "Commercial"

4.11 The Model Law is intended to apply only to international commercial arbitration, and contains a lengthy definition of "commercial" as a footnote to Article 1. We considered this definition with both curiosity and care. Curiosity because in English and Hong Kong law the term has an easily understood meaning, and we could not at first understand why there was a need for such a comprehensive definition, and care, because we did not wish to engage in any unnecessary tinkering.

4.12 The need to define the term "commercial" stems from the fact that in certain jurisdictions it is a term of art, applying only to transactions

between business enterprises, and not to those between entities not customarily involved in trade. The definition is clearly intended for use in those jurisdictions, because it does not refer to the nature of the parties involved in the transactions, only to the nature of the transactions themselves. Thus, in terms of the Model Law definition, a transaction involving the sale of goods by one non-trading institution such as, for example, a university, to another would constitute a commercial transaction, whereas under the law of some countries it would not. There is no such problem under Hong Kong law, and to introduce a definition might in fact have the effect of limiting the law's scope by excluding certain transactions which would otherwise undoubtedly be considered commercial. We at first felt that the most sensible course would be to delete the definition of "commercial" altogether, thus giving the law the widest possible scope.

4.13 On further reflection, however, we were convinced that it would be dangerous to act in this way. While we have no doubt about the meaning of the term "commercial" in Hong Kong law and a Hong Kong context, there are undoubtedly differences in its meaning in other jurisdictions. Given the fact that the parties to arbitrations under the new law will inevitably come from other jurisdictions it would invite problems to omit a definition. In the end we felt the best solution to the dilemma was to remove the reference to "commercial" altogether. This will have the effect of making the law apply to all international arbitrations - not just commercial ones.

4.14 We were aware when we made this decision, that this very option was discussed at UNCITRAL and rejected. The arguments are recorded in the "Analytical compilation of comments by Governments and international organisations" prepared by the Secretary-General of UNCITRAL (Document A/CN 9/263). The Japanese delegation expressed the view that the term "commercial" would not be necessary when a state incorporated the model law in its domestic law. It suggested it would suffice to provide a clarification to the effect that the law deals with disputes of a private nature. By way of contrast Mexico was concerned that questions of sovereign debt and foreign investment might fall within the law's ambit and sought a limited definition to prevent this. The US and the Federal Republic of Germany wanted a further clarification of the definition by the addition of a provision that the nature or character of the parties should not prevent a dispute being treated as commercial.

4.15 We feel that our proposal will avoid all these problems. Arbitration is after all a voluntary process. If a party has submitted itself to the process by agreeing to an arbitration clause in a contract, we do not think it right that it should later have the possibility of escaping the arbitration on the basis of technical arguments about the nature of the dispute or the status of the parties. We have in mind particularly the problem of state trading bodies carrying on commercial business.

4.16 Thus, in the interests of giving the law the widest possible scope, we recommend that the term "commercial" be deleted.

Additions

4.17 There are four additions to the Model Law we consider necessary in order to meet the special needs of Hong Kong.

I. Interpretation

4.18 As we have said above, there are certain provisions in the Model Law which are possibly ambiguous. Rather than alter them and run the risk of altering their meaning we have preferred to leave them as they are. We were also concerned at the risk that Hong Kong courts, in interpreting the provisions of the Model Law, might reach a different view from the courts of other jurisdictions where the law had been adopted. This would detract from its international acceptability.

4.19 The law was drafted in meetings of a working group of UNCITRAL, and we have expressed our view of the intended meaning of some of its provisions in this report. The courts are entitled to refer to these travaux préparatoires (officials working papers) if they find it necessary, when interpreting ambiguous provisions. Despite this, and in order to make it clear beyond doubt that this law is to be interpreted in an international rather than a purely Hong Kong context, we recommend that provision be added to the law specifically permitting the courts to consider certain specified documents when interpreting this law.

4.20 At present we are aware of three documents which we think would assist courts in interpreting the Model Law. One of these is the report of the Secretary General of UNCITRAL, entitled "International Commercial Arbitration. Analytical commentary on draft text of a Model Law on International Commercial Arbitration" (A/CN.9/264 26 March 1985). This is a very useful commentary dealing with the Model Law clause by clause. At the stage the commentary was prepared, however, the Model Law was not quite in its final form, and no commentary has been prepared on the final Model Law. The Legal Office of UNCITRAL has informed us that there is no intention at present of producing a commentary on the Model Law as it now stands. The differences between the draft upon which the commentary was prepared, and the Model Law are not substantial, but UNCITRAL has published a further document which helps clarify the intention behind the changes. This is the report on the eighteenth session (3-21 June 1985 A/40/17), and this is the second document to which we think the courts ought to be able to refer. The third document to which we feel the courts ought to be able to refer is this Report. This recommendation is an unusual one, and we set out the reasons for it below.

4.21 It is not unusual for the courts, both in Hong Kong and in England to refer to documents of the sort we have recommended be referred to. This is particularly so for documents prepared by international organisations. In construing legislation the courts are entitled to have regard to the mischief which the legislation was intended to avoid. If there is any

doubt about what this mischief is, it can obviously be quickly resolved by reference to any reports on which the legislation was based. In a House of Lords decision in 1975² Lord Simon said the following in regard to commentaries on draft bills:

"To refuse to consider such a commentary, when Parliament has legislated on the basis and faith of it is for the interpreter to fail to put himself in the real position of the promulgator of the instrument before essaying its interpretation. It is refusing to follow what is perhaps the most important clue to meaning. It is preversely neglecting the reality while chasing shadows. As Aneurin Bevan said: 'Why read the crystal when you can read the book?' Here the book is already open: it is merely a matter of reading on. Certainly, a court of construction cannot be precluded from saying that what a committee thought as to the meaning of a draft was incorrect. But that is one thing: to dismiss out of hand and for all purposes, an authoritative opinion in the light of which Parliament has legislated is quite another."

4.22 Lord Roskill has recently written³ that "it is now at least legitimate to look at reports of some expert committees upon which the legislation under consideration was based." Lord Scarman commented as follows in another recent House of Lords decision⁴: "It may be that, since membership of the European Communities has introduced into our law a style of legislation (regulations having direct effect) which by means of a lengthy recital (or preamble) identifies material to which resort may be had in construing its provisions, Parliament will consider doing likewise in statutes where it would be appropriate, e.g. those based on a report by the Law Commission, a royal commission, department committee or other law reform body."

4.23 Our suggestion is therefore very much in line with the modern trend. We feel that it is particularly important that a provision of this sort be included in this Bill for a number of reasons which we set out below. These reasons are peculiar to this proposal, and we do not necessarily feel that they will apply to all legislation which results from a report of the Law Reform Commission. The issue of aids to statutory interpretation is, however, an important one. The Commission is at present considering whether to launch a full scale study of the topic.

4 24 Our recommendation is made in the light of the peculiar nature of the Model Law. We have recommended that a law, drafted in a style of language which will not be familiar to Hong Kong lawyers be adopted in Hong Kong. It will not replace the existing law on arbitration, but will supplement it. It is therefore quite possible that if a question of interpretation comes before a court, the court will be more open than usual to technical arguments about the

² *Black-Clawson v Papierwerke* [1975] AC 591.

³ *Statute Law Review* 1981, p. 77.

⁴ *Davis v Johnson* [1978] 1 All E.R. 1132.

interpretation of its terms, and will also be inclined to interpret the new law by comparison with the old. This could lead to misinterpretations.

4.25 The simplest way to deal with such problems would have been to redraft the model law using the normal style of Hong Kong statutes. We rejected this approach because we did not want to do anything which would detract from the recognisability of the Model law. We explain this reasoning elsewhere in this Report. This information itself should be available to any court which attempts to interpret the Model Law. If a court does not know this, it might well start the interpretation process on the wrong footing.

4.26 It will be important that the following passages in this Report are available to be referred to in the courts:

- (a) The Report makes the general point at paras 3.6 and 3.7 that the Model Law is generally not philosophically distinguishable from the existing law. It is important that judges take this view into account when considering arguments about the meaning of the terms of the model law, and do not allow themselves to be seduced by arguments based on subtle differences in the meaning of words.
- (b) In the comments on articles 5 and 8 (at pages 20 and 22) the Report expresses a view on the meaning of two possibly ambiguous provisions of the model law. It does this to avoid tampering with the language of the provisions and with the thought in mind that the courts would be able to refer to the Report to resolve any ambiguity.
- (c) The term "public policy" in article 34 is one which is not well known to Hong Kong law. It is, however well known in the context of international arbitration, and in interpreting it in the context of the Model Law it will be important that Hong Kong courts pay regard to the meaning that has been given to it there. This is set out in the Report.

II. Confidentiality

4.27 The Arbitration Ordinance makes limited provision for the confidentiality of court proceedings relating to arbitrations, but we consider these to be inadequate for international arbitrations. Parties to such arbitrations often choose this method of resolving their disputes precisely because they wish to avoid any publicity - even of the fact that they are in dispute with one another. While Hong Kong law does not give the public any rights of access to arbitral proceedings, neither does it impose any sanctions for breach of confidentiality. There is provision for proceedings to be held before a court sitting in private when a judicial review is being dealt with, or a preliminary point being considered by the court. In cases of application for remission of the award on the grounds of misconduct or fraud, however, there is no power to proceed before a court sitting in private.

4.28 As the law stands at present, however, it is not possible to guarantee the confidentiality of proceedings relating to arbitrations held in private. Eight types of application set out in Order 73 r.2 have to be dealt with in open court rather than in chambers, and although the public are not admitted when other matters are dealt with in chambers, judgments given in these proceedings are not under current Hong Kong practice protected against disclosure under the Judicial Proceedings (Regulation of Reports) Ordinance⁵. This situation is unsatisfactory and anomalous and we therefore recommend that a provision be added to the Ordinance and the Model Law providing that all proceedings under the Ordinance in the High Court or Court of Appeal should, on the application of any party, be held otherwise than in open court. Where such proceedings are held in private, the court should, on the application of either party and subject to the qualifications we set out below, have power to forbid the publication of information relation to such proceedings. This would have the effect of making any unauthorised publication of proceedings held in a closed court a contempt of court.

4.29 There is, however, another side to the issue. It is important for parties and their professional advisers to find out what is the law and practice in the jurisdiction in which they intend to arbitrate. The law reports do at present publish judgments where a point of law comes before the courts. In Hong Kong, at least, these reports invariably name the parties, and often also go into some detail on the substance of the dispute. But neither here nor elsewhere is there any systematic method of reporting arbitral awards. If they were published it would give potential parties the opportunity not only to assess their chances, but to assess the arbitrators - certainly helpful when the time came to name some for their dispute.

4.30 The situation in respect of arbitral proceedings themselves is, however, different. As arbitration is a matter of contract between the parties the courts should not be able to intervene either to enforce confidentiality or to require that arbitral awards be reported. We would like to see some arrangement whereby the Hong Kong International Arbitration Centre sought permission from arbitral parties and subsequently systematically published awards. It is not, however, an appropriate subject for legislation.

4.31 As far as the decisions of the courts are concerned we would not like to see the extended confidentiality we have recommended interfere with the access of outside parties to judgments on the law. In most cases confidential information, including the identity of parties can be hidden by

⁵ The Judicial Proceedings (Regulations of Reports) Ordinance, Cap 287, sets out certain limited categories of court proceedings held in public, reporting of which may be forbidden by order of the court. These categories do not include any arbitration proceedings. The Ordinance goes on to provide that even where proceedings are held before a court sitting in private or in chambers, it is not contempt of court to publish information relating to the proceedings except where the subject matter of the hearing falls into one of the following categories: (a) Wardship, adoption, guardianship custody or maintenance of infants. (b) Mental Health. (c) National Security. (d) Proceedings related to secret processes. (e) where the court has some special power to forbid publication. Our proposal would bring arbitration related proceedings within the last category.

judicious editing. In the rare case where the facts so obviously identify the parties that confidentiality is not possible shortly after the event, the passage of time will remedy the problem. We therefore recommend that notwithstanding the general confidentiality requirements, reports in law reports and professional journals be permitted on the following conditions: -

- a) that such steps be taken as are reasonably practicable to hide any matter, including the identity of the parties, that any party reasonably wishes to remain confidential,
- b) that if the court is satisfied that such matter cannot be hidden, the publication may be embargoed for such period not exceeding ten years as the court thinks appropriate.

III. Conciliation

4.32 The Arbitration Ordinance contains a provision (s. 2A) which permits the appointment of a conciliator, and, in the event of the conciliation being unsuccessful, for the same person to be appointed as arbitrator. Before this provision was introduced it was regarded as improper for a conciliator to become an arbitrator and an arbitration could be set aside on this basis.

4.33 The provision reflects the strong preference in China for conciliation rather than arbitration. Many contracts with Chinese trading organisation include a conciliation clause.

4.34 The present Hong Kong provision goes some way towards overcoming the legal obstacles to conciliation as an adjunct to arbitration. It is, however, inadequate in that it refers only to conciliation prior to an arbitration, and not to conciliation during the course of an arbitration. In the present state of the law an arbitrator who saw one party alone for the purpose of attempting to reach a settlement would probably be said to be acting in breach of the rules of natural justice, and his award might be set aside on that basis. It also requires that the parties have included a conciliation clause in their contract - not a common event.

4.35 Conciliation is a valid and useful part of the arbitral process, and we see no reason at all why, if the parties wish it to be available, its use should be as restricted as the present law makes it. These arguments apply as much to conciliation under the domestic as under any new international arbitration law, and we therefore recommend that a new section, applying both to domestic and international arbitrations, be substituted for the existing s. 2A of the Arbitration Ordinance. This provision would follow the present to the extent that it allows the court to intervene to appoint a conciliator where the appointment procedure in the agreement has broken down, and would allow a conciliator to go on and act as arbitrator. It would also contain an anti-delay procedure similar to the present one. The section should go on to provide that the parties may agree in writing after the commencement of an arbitration that any arbitrator or umpire may act as a conciliator. During the time he acts

as conciliator he should be permitted to see the parties separately or together, and unless a party giving information agrees otherwise he should treat information given him by either party as confidential while he continues to act as conciliator. If the arbitration recommences after the completion of conciliation, the arbitrator should disclose any material information given him in confidence during the period of conciliation. The purpose of these proposals is to provide a statutory framework within which an arbitrator can conciliate without committing misconduct by breaching the rules of natural justice. He is permitted access to the parties alone subject to the two important safeguards of:

- (i) overt continuing consent, and
- (ii) post failure disclosure of material facts.

We accept that (ii) may inhibit frankness, but we think this is better than compelling an arbitrator to try to ignore material information. We do not anticipate procedural difficulty. If the arbitrator were to send to each party a list of the information he regarded as material and disclosable, and then consider that party's views before acting, the chances of error should be slight. We therefore think that this framework should enable an arbitrator fairly and effectively to conciliate, if and so long as that is what the parties want, without misconduct, and without impairing his capacity to make an award thereafter. Finally, an agreement reached under conciliation should be able to be treated as an award on the arbitration agreement. We have taken the opportunity to suggest some minor modifications to s. 2A. These simplify the procedure, but do not affect its substance.

Funding of Hong Kong international arbitration centre

4.36 Although it is not strictly within our terms of reference we were interested to note a provision in the British Columbian Act which has put the Model Law (slightly modified) into effect in that jurisdiction. This Act provides for permanent funding for the British Columbia Arbitration Centre. In many respects Hong Kong and British Columbia are in similar positions, both having recently established International Arbitration Centres. If international arbitrations are to be attracted away from the traditional centres it is vital that contracting parties feel absolute confidence in the permanency and stability of the institutions they nominate to carry out arbitration in the event of a future dispute. A contract may cover relations between the parties for many years into the future, so if there is any risk that the institution named will not continue to exist, the parties would be foolish to specify it in their agreement.

4.37 The Hong Kong International Arbitration Centre is the centrepiece of Hong Kong's international arbitration machinery and is already attracting international arbitrations. We are confident that with the UNCITRAL Model Law in place it will be an even more attractive alternative to the traditional arbitral institutions. But it may be 5 or more years before a dispute arising from an agreement signed today reaches arbitration. It is vital that parties be confident that the Centre will still flourish then, if they are to select it as a venue. We are confident of its stability and permanence, given the

government and private backing it now has, but our confidence will not necessarily be shared by those who do not know Hong Kong as well as we do. Recognition of the Centre in the law, and provision for its permanent funding, at least on a standby basis, would do a great deal to assist its image and reputation. Such recognition and provision would not be without precedent in Hong Kong.

4.38 In Victoria and British Columbia, the centres have been financed and backed by the Government. We are aware of the risks that government funding may lead to interference with a centre's independence. But in the final resort there may be no other way to guarantee its existence, and in a place like Hong Kong where the independence of the judiciary is firmly respected, the risks are not great. The parallel with the judicial system is also relevant in another way. Both involve a strong public service element in providing an orderly and legitimate way to settle disputes. And a public service like the Centre is a vital adjunct to Hong Kong's role as an international financial and shipping centre. Much of the funding of the Centre will eventually come from the fees paid by its users, so it will never be as expensive to operate as a court. It will certainly not be self-supporting for many years - the first contracts stipulating the centre are only being signed today - so it is vital that it have some form of subsidy. We recommend that provision should be made for the permanent funding of the Centre.

Additional provisions considered but rejected

4.39 There are a number of provisions of the Arbitration Ordinance, some of them incorporated as a result of the LRC's report on Commercial Arbitration, which would not conflict with the Model Law's provisions and which we therefore considered as potential additions. In the event we decided none of them ought to be incorporated. Our views on these provisions are as follows: -

S. 6B: Consolidation of arbitrations

4.40 This section of the Ordinance permits the High Court to order that separate arbitration proceedings having common questions of fact or law, arising out of the same transaction or series of transactions, or where for some other reason it is desirable, should be consolidated and heard together. Such an order may be made with or without the consent of the parties.

4.41 The power has been used in Hong Kong⁶, and its availability here has been commented on favourably in England where it is lacking. In a situation where, for example, a whole series of disputes arises as a result of a ship casualty, with different interests such as ship owner, charterer, and cargo owner, governed by different contracts, the factual issues related to liability

⁶ *Shui On v Moon Yik & anor, Schindler Lifts v Shui On* Unrep No MP 2114 1985 12/9/86 Rhind J.

may, in the absence of a consolidation, have to be reconsidered in a multiplicity of arbitrations. In the worst case conflicting rulings may be made on similar facts. This can undermine confidence in the arbitral process. Of course the various parties have it within their power to agree to have all the disputes dealt with together. Unfortunately if only one recalcitrant party refuses consent the arbitrations must proceed separately.

4.42 One factor which particularly drew our attention to the possibility of incorporating a consolidation clause was the fact that British Columbia has included one. Their provision differs from the Hong Kong domestic one in that it allows the court to act only by consent. We can see little point in a provision which can only operate by consent because, as we said above, if the parties can agree to consolidate they do not need the intervention of a court to enable this end to be achieved.

4.43 We therefore considered this question entirely on the basis of whether or not a compulsory provision should be included. While the virtues of a consolidation provision are readily apparent, five considerations swayed us against one. Firstly it would introduce an element of court control into the arbitration process. One of the fundamental features of the Model Law is that, by and large, it seeks to avoid court intervention and control. Secondly, in the international context it is much more difficult to devise a workable procedure for consolidation than in the domestic context. The parties may not all be subject to the jurisdiction of the Hong Kong courts. Thirdly, in the international context a compulsory consolidation provision could easily be misunderstood by contracting parties and read to mean that the courts could interfere where disputes were unrelated except for the legal question involved. This might discourage them from selecting Hong Kong as a venue. Fourthly it was felt that parties who wished to keep their dispute, and possibly even the fact that they had a dispute, secret from the public and, specifically, from their competitors, would view a consolidation procedure as a threat to that secrecy. Fifthly, it has been suggested in some jurisdictions that the provision of the New York Convention which is incorporated in our Ordinance as s. 44(2)(e) may make an award made in a consolidated arbitration unenforceable in other New York Convention countries. The paragraph provides that enforcement of a Convention award may be refused where the composition of the arbitral authority was not in accordance with the agreement of the parties. By its very nature at least one party to a consolidated arbitration will normally be dealing with a tribunal of someone else's choosing.

4.44 All these considerations, plus our general reluctance to tamper with the Model Law led us to decide that no consolidation procedure should be included.

S. 29A Delay

4.45 S. 29A of the Arbitration Ordinance provides that a term is to be implied into every arbitration agreement that the claimant will exercise due diligence in the prosecution of his claim. In the event that there has been

undue delay, the arbitrator, umpire or a party to the proceedings may ask the court to make an order terminating the proceedings and prohibiting the claimant from instituting further arbitration proceedings.

4.46 This provision was inserted as a result of the 1981 Law Reform Commission report and we regard it as a valuable provision in the domestic context. In the international context, however, we were not so enthusiastic. Firstly, we thought delays of the magnitude sometimes experienced in domestic arbitrations were unlikely internationally at least where there are 3 arbitrators. Secondly, we doubted its efficacy in the international context. A claimant prohibited from proceeding in Hong Kong would probably be able to launch his claim again in another jurisdiction.

4.47 S. 29A(1) which imports the implied term that the claimant is under a duty to exercise due diligence might let in the proper law of the contract relative to frustration and to this extent might be useful, but this alone would not justify this small addition.

Discovery

4.48 The Arbitration Ordinance permits the same extensive pre-trial discovery of documents to which parties to litigation in Hong Kong are entitled. In contrast, under the Model Law, discovery is not envisaged at all. This accords with the European view on discovery. Parties there view the prospect of discovery with antipathy. We felt that it would be unwise to tamper with the Model Law in this respect. Parties who wish the process to include the right of discovery can specify an appropriate set of arbitration rules in their arbitration agreement. In addition the tribunal has a wide discretion under Article 19 as to under what procedures the arbitration will be conducted. It is likely that common law arbitrators will require discovery.

Security for costs, costs and interest

4.49 These are not specifically provided for in the Model Law, although they can be ordered under the Arbitration Ordinance. As with discovery the practical situation will depend on the rules chosen by the parties and the discretion of the tribunal. We think that these matters are best left on that basis.

Chapter 5

Integrating the model law into Hong Kong law

5.1 We have recommended that the Model Law be adopted, largely unchanged, as part of Hong Kong law. The mechanics of how this should be done are essentially technical and matters for the draftsman and the legislature. We do, however, have views on the subject which we express below.

5.2 There will also have to be some consequential amendments to the Arbitration Ordinance. In particular we feel it is essential that the means by which parties can ascertain whether an arbitration is to be dealt with under the domestic or the international law be clear and unambiguous.

Mode of Adoption

5.3 If the Model Law is to become part of the law of Hong Kong it will have to pass through the normal legislative procedure. This will involve its being introduced as a Bill into the Legislative Council, and being passed into law as an Ordinance or as an addition to an existing Ordinance. Although procedures for international arbitration will be considerably different from those for domestic arbitrations, we think it better that all the arbitration law in Hong Kong be incorporated in one Ordinance. Notwithstanding the differences in system, there are still many similarities, and in certain areas inter-relationship, and we feel a combined Ordinance would enhance the law's accessibility.

5.4 It will of course be necessary for there to be a very clear dividing line, so that parties can be absolutely certain of the law under which their dispute is being arbitrated. The definition of the term "international arbitration" will provide the clear dividing line, and the present Ordinance will have to be amended to substitute the Model Law definition for the present definition of non-domestic arbitration. Even if this is done however, there remains a potential for problems. For example, under the Model Law definition an arbitration is international if (inter alia) the parties have, at the time of the agreement, their places of business in different states. "Place of business" for the purpose of this definition is the place of business which has the closest relationship to the arbitration agreement. In itself this definition opens up the possibility of dispute - if the head office is in Tokyo, and all accounts and negotiations for a Hong Kong project are channelled through there, while a one man Hong Kong office simply deals with day to day problems on the ground, where is the place of business and which has the closest relationship? Worse, it raises problems of manipulation of jurisdiction. Whether or not the

place of business is in Hong Kong or elsewhere may depend on whether the contract is concluded with the parent company or a subsidiary.

5.5 Many parties will prefer to see their disputes arbitrated under the Model Law rather than under the present Ordinance, and there may be parties who wish to arbitrate under the existing system rather than under the Model Law. In the interests of clarity and to avoid encouraging manipulation of the system to bring arbitrations within one law or the other think it better to allow parties to make an election in their agreement. We therefore recommend that the Arbitration Ordinance be amended to provide that the parties may elect whether to have their disputed arbitrated as if it were a domestic or an international one. In the absence of an election, the question of whether the international or domestic law should apply would be resolved by application of the definition of the term "international arbitration."

5.6 We have given consideration to the implications that this proposal may have for palpably domestic contracts where one party is in a much weaker bargaining position than the other and therefore stands the risk of having the more powerful party impose the less protective regime of the new law on him - for example consumer contracts, or contracts where standard forms are used. We feel that this risk can be avoided if the law provides that where parties to a domestic contract wish to contract into the international law, they can only make a binding agreement to this effect after the dispute has arisen. We therefore recommend that in order to protect weaker domestic parties from having the international regime forced on them by a stronger party it should only be possible for parties to a domestic contract to contract into the international law after a dispute has arisen.

Conciliation

5.7 We have recommended (para 4.35 p38) that a conciliation provision be added to the Model Law. The provision we recommend would, we believe, also enhance Hong Kong's domestic law and it would be best therefore to amend the present provision and apply it to the Model Law.

Definitions

5.8 If the Model Law is adopted as part of Hong Kong law by incorporation in the Arbitration Ordinance, one of the definitions in s. 2 of the Ordinance will have to be changed. The definition of "arbitration agreement" is framed differently from that in the Model Law, but the effect is much the same. In the interests of consistency we feel the same definitions should apply in both the domestic and international law. A definition of "international arbitration" will also need to be incorporated in the domestic law. We therefore recommend that: -

- i) s. 2 of the Arbitration Ordinance apply to both the domestic and international parts of Hong Kong arbitration law;

- ii) the existing definition of "arbitration agreement" be replaced by the Model Law definition;
- and iii) that the Model Law definition of "international arbitration" be inserted.

Enforcement

5.9 Where a party seeks to have an international award made in Hong Kong enforced in Hong Kong, he will have to rely upon the existing enforcement provision in s. 28 of the Ordinance. This section will need to apply to both domestic and international awards.

Language

5.10 The Model Law is written in clear and generally unambiguous English, but it does not conform to the drafting conventions applied in Hong Kong in a number of respects. We will not specify these because we do not consider them to be of any importance. The important thing is that the law be readily understood, and we see no problems in this regard.

5.11 While there must be a temptation to alter the language and system of the Model Law to make it read similarly to other Hong Kong Ordinances and this can readily be done without affecting the meaning, we think the temptation should be resisted. Our attitude on this issue stems from the general view we have taken that the Model Law should remain as recognizable and accessible as possible to foreign parties. We have avoided any recommendation which may be seen as tinkering and we consider cosmetic changes to the language and system would fall into the same category. An additional factor which further emphasises our point is that authentic translations of the Model Law into the official languages of the United Nations are already in existence, and as long as we do not tamper with the language of the English version we can take advantage of these in publicising the Hong Kong law. We therefore recommend that the language and system of the Model Law not be changed when it is adopted as part of the Arbitration Ordinance.

Miscellaneous Amendments to Arbitration Ordinance and Supreme Court Rules

5.12 i) Confidentiality

We have recommended (para 4.28) that a new confidentiality provision apply to both domestic and international arbitrations. This will require an amendment to the existing Ordinance, which

at present contains only one provision relating to confidentiality (s. 23A(4)).

ii) Conciliation

Our recommendation on conciliation (para 4.35) also applies to domestic arbitrations.

iii) Evidence

Article 19(2) of the Model Law provides that the arbitral tribunal has "the power to determine the admissibility, relevance, materiality and weight of any evidence". Such a provision is in our view thoroughly desirable. It has the effect of allowing the tribunal to admit any evidence whether or not it would normally be admissible. The view is generally held in arbitration circles that arbitrators are not bound by the normal rules of evidence, and arbitrators usually adopt a flexible approach. Parties often choose to submit their disputes to arbitration, rather than to the courts precisely because they do not wish to have a just resolution stymied by the normal rules of evidence. But, although in continental jurisdictions, and in the United States, this need has been recognised in the law, at least one leading English textbook¹ states that the normal rules of evidence apply in arbitrations, and it is arguable that this view is correct in law. It is obviously highly undesirable that the law and practice should part company in this way, and the situation is so unclear as to be unsatisfactory. We would not like to let slip this opportunity to clarify the domestic law.

We therefore recommend that in order to avoid any doubt a provision similar to Rule 23(H) of the Hong Kong International Arbitration Centre's Domestic Rules be introduced by way of amendment to the Arbitration Ordinance. This Rule states:

"The arbitrator shall be entitled to receive or take into account such evidence as he shall determine to be relevant whether or not strictly admissible in law."

¹ Mustill, Sir M.J. & Boyd, S. Commercial Arbitration, Butterworths 1982.

Transitional

5.13 A transitional provision similar to s. 34 of the existing Ordinance will be needed to apply to international arbitrations commenced before the new law comes into effect.

Repeals

5.14 Section 6A of the Arbitration Ordinance, which applies exclusively to non-domestic arbitrations, will no longer be necessary and should consequently, be repealed.

Chapter 6

Summary of recommendations

6.1 A new law based on the UNCITRAL model should replace existing Hong Kong law on international arbitration. The existing law relating to domestic arbitrations should remain virtually intact (para 2.6).

6.2 The following articles of the UNCITRAL Model Law should be adopted unchanged (para 4.9):

Article 1 - Scope of application

Article 2 - Definitions of "arbitration", "arbitral tribunal", "court". Right to decide who determines issue.

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Article 13 - Challenge of arbitrators - procedure.

Article 14 - Failure or impossibility of arbitrator to act.

Article 15 - Appointment of substitute arbitrator.

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- Article 17 - Interim measures by the tribunal.
- Article 18 - Equal treatment of parties.
- Article 19 - Rules of procedure.
- Article 20 - Place of arbitration.
- Article 21 - Commencement of proceedings.
- Article 22 - Language.
- Article 23 - Statements of claim and defence.
- Article 24 - Hearings and written proceedings.
- Article 25 - Default of a party.
- Article 26 - Expert appointed by tribunal.
- Article 27 - Court assistance in taking evidence.
- Article 28 - Rules applicable to substance of dispute.
- Article 29 - Decision by majority of panel.
- Article 30 - Settlement.
- Article 31 - Form and content of award.
- Article 32 - Termination.
- Article 33 - Correction and Interpretation of Award.
- Article 34 - Applications to set aside award.
- Article 35 - Recognition and enforcement.
- Article 36 - Grounds for refusing recognition or enforcement.

6.3 The term "commercial" should be deleted from the Model Law (para 4.16).

6.4 The Courts should be permitted to consider certain specified documents when interpreting the new law (para 4.19).

6.5 A provision should be added to the Ordinance and the Model Law providing that all applications to the court arising out of, or alleged to arise out of or in respect of, any arbitration including those based upon an

arbitration clause where an arbitration has not commenced should, on the application of any party, be held otherwise than in open court. On the application of either party, the court should, subject to the qualifications set out below, have power to forbid the publication of any such proceedings. This would have the effect of making any unauthorized publication a contempt of court. Publication should however be permitted in law reports and professional journals on the following conditions:

- a) that such steps be taken as are reasonably practicable to hide the identity of the parties;
- b) that if the court is satisfied that the parties' identities cannot be hidden, the publication may be embargoed for such period not exceeding ten years as the court thinks appropriate (paras 4.28 and 4.31).

6.6 A new conciliation provision, allowing an arbitrator to attempt conciliation during the course of a reference, should be added both to the Model Law and the Arbitration Ordinance (para 4.35).

6.7 Provision should be made for the permanent funding of the Hong Kong International Arbitration Centre (para 4.38).

6.8 The new law should be incorporated into one Ordinance together with the existing domestic law (para 5.3).

6.9 The Arbitration Ordinance should be amended to provide that the parties may elect whether to have their dispute arbitrated as if it were a domestic or an international one. In the absence of an election, the question of whether the domestic or international law should apply would be resolved by application of the definition of the term "international arbitration". The legislature will, however have to consider some safeguards for palpably domestic contracts, such as consumer contracts, where a standard form is used, or one party has a much weaker bargaining position than the other (paras 5.5 and 5.6).

6.10 The conciliation provision we recommend for the new law should also apply to domestic arbitrations (para 5.7).

6.11 S. 2 of the Arbitration Ordinance should apply both to the domestic and international parts of Hong Kong arbitration law (para 5.8).

6.12 The existing definition of "arbitration agreement" in the Arbitration Ordinance should be replaced by the Model Law definition (para 5.8).

6.13 The Model Law definition of "international arbitration" should be inserted in s. 2 of the Arbitration Ordinance (paras 4.9 and 5.8).

6.14 S. 28 of the Arbitration Ordinance which applies to the enforcement in Hong Kong of an award made in Hong Kong should be applied to awards under the new law (para 5.9).

6.15 The language and system of the Model Law should not be changed when it is adopted as part of the Arbitration Ordinance (para 5.11).

6.16 The Arbitration Ordinance should be amended so that arbitrators in domestic arbitrations are not bound by the normal rules of evidence (para 5.12(iii)).

6.17 A transitional provision similar to s. 34 of the present Ordinance should apply to arbitrations under the new law (para 5.13).

6.18 Section 6A of the Arbitration Ordinance, which applies exclusively to non-domestic arbitrations will no longer be necessary and should consequently be repealed (para 5.14).

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**Hong Kong Arbitration Law and the
UNCITRAL Model Law - Comparative Provisions**

The following pages contain a comparison of the UNCITRAL Model Law and the Hong Kong law on Arbitration, the first part consists of the text of the UNCITRAL model law with commentary following each article, the second the text of the Arbitration Ordinance Cap. 341, with a similar commentary.

The following reservations should be noted.

- (1) The comments on the UNCITRAL provisions attempt to take into account not only the Arbitration Ordinance Cap. 341, but also the common law.
- (2) The reverse comparison cannot be comprehensive, because, without writing a treatise on, arbitration law in Hong Kong it is not possible to set out all aspects of the law as it applies here for comparison with the UNCITRAL model.

The comments in the boxes following the Model Law Articles state the comparable position under current Hong Kong law. The references to sections are to the Arbitration Ordinance Cap 341.

**UNCITRAL MODEL LAW ON
INTERNATIONAL COMMERCIAL ARBITRATION**

(As adopted by the
United Nations Commission on International Trade Law
on 21 June 1985)

CHAPTER I. GENERAL PROVISIONS

Article I. Scope of application*

- (1) This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.

* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

not limited as to type of arbitration.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(3)(b)(i) is similar to the effect of ss. 6A(3) and 23B(8) but (ii) is a further refinement.

- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

This goes further than Hong Kong.

(4) For the purposes of paragraph (3) of this article:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- (b) If a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

(5) would preserve the position of the Arbitration Ordinance.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;

"Court means "High Court".

- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

HK law similar.

- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

Although the parties have the right to agree on their own rules certain provisions apply to all arbitrations (e.g. ss. 14(4), (5) (6)).

- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

See s. 8 Cap. 1 and s. 31 Cap. 341.
The Model Law provision seems slightly less liberal.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, If a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

This is the approach that a HK court would take.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Because the HK Ordinance is not a code no similar provision is necessary. The object of this provision in the context of the model law is to create the position that all rights of resort to the courts in matter arising out of arbitrations covered by the model law are incorporated in the model law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

The relevant HK court would be the High Court.

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

While the Hong Kong provision (s. 2) is differently worded the effect is the same. The HK provision is more economical in its wording. "Writing" is more broadly defined in the model law.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

HK law makes provision to the same general effect in s. 6A(1). In fact the words underlined are used in the HK provision. The HK provision may however give slightly broader powers to the courts

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

S. 14(6) provides to this effect.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

10(1) is similar to HK law, but under HK law (s. 8) the number of arbitrators in the absence of agreement is one.

Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

HK law similar.

- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

HK law similar.

- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

HK law makes no provision for a standard method of appointment.

- (4) where, under an appointment procedure agreed upon by the parties,
- (a) a party fails to act as required under such procedure, or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

HK law also provides for reference to the court (s. 12). The provision is to the same general effect. HK law provides (s. 12(2)) for notice to be served on a person required to exercise a power of appointment requiring him to act.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Under HK law there is a right of appeal. The factors to be taken into account would be taken into account under the common law in H.K.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an

arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

The words underlined are to the opposite effect of the HK law. (s. 26(1))

The self-disclosure provisions are law in HK. There are wider provisions in HK for challenging an arbitrator - generally encompassed under the term "misconduct". (ss. 25, 26)

HK law also makes specific provision for the case of an arbitrator designated in an agreement who subsequently proves not to be impartial. (s. 26)

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

There is no such procedure set out in HK.
The right in HK is simply to apply to the court
- there is no time limit (s. 25).

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article

6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Some of these actions will equate to misconduct under HK law. HK law also provides that the award may be set aside (s. 25). Court decisions in this context are appealable.

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

HK s. 12 provides a procedure for the appointment of a substitute. There is no provision, such as that underlined, referring back to the original appointment provisions.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Not the law in HK. The arbitrator's view on matter of jurisdiction is always subject to the overriding jurisdiction of the courts.
The question of severability of the arbitration clause is not the subject of a general rule.

Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

There is power to make interim orders but this resides in the courts (s. 14(6)).
Article 17 itself is not coupled with any enforcement powers, and thus falls far short of the HK provisions.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 17. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

A requirement that the tribunal abide by the rules of natural justice.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The HK law is to the same general effect, but the powers given to arbitrators (e.g. examination on oath) and to the courts in connections with arbitrations (e.g. discovery, interrogatories) are much more substantial (s. 12).

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

There is no equivalent HK provision.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

S. 31 is to the same effect.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

There is no provision relating to this in HK. It is probably a procedural matter within the power of the arbitrator.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statement all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Effectively the position in HK is that the arbitrator controls the procedure. This may or may not be the procedure he selects.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

These provisions reflect the powers and obligations of arbitrators in HK.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any

expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

There are specific provisions in HK relating to discovery (s. 12). Article 24 is essentially codifying rules which in HK would be regarded as rules of natural Justice.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

The relevant HK provision is s. 29A, which contains powers exercisable only by the courts, but covering other defaults as well.

- (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

This reflects the HK position.

- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Allows ex parte awards.
Also permitted in HK.

Article 26. Expert appointed by arbitral tribunal

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
 - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
 - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Under HK law an arbitrator may appoint an expert, and has similar power in that regard. Of course the expert is also subject to cross-examination. There is no specific provision in the Ordinance to this effect, but the powers have been recognised in the authorities. The model law provision is, however, very much a reflection of the continental system, where experts have a much larger and more persuasive role. (cf. Rules of the Supreme Court, Order 40)

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

There is provision to this effect in Hong Kong (s. 14(6)(d)).

CHAPTER VI.

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

This reflects the law of Hong Kong.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The HK law requires the arbitrator to determine the "proper law" applying to the contract. Whether this is the same test is not clear.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all case, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

This is similar to the H. K. position.

Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

The same principle applies in HK, with the modification under s. 11 that if 3 arbitrators all reach different conclusions, the decision of the chairman stands.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect an any other award on the merits of the case.

Hong Kong law makes the same provision.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Under the law of Hong Kong, the reasons need only be given on the request of a party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue in order for the termination of the arbitral proceedings when:

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

There is no specific provision in HK relating to these matters, but the article does not conflict with HK practices.

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The Interpretation shall form part of the award.

- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

There is no such elaborate procedure in H.K. The arbitrator has power to correct clerical mistakes and accidental errors, so the effect of the law is much the same as regards mistakes. As regards interpretation there is no equivalent provision.

- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If, the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

There is provision for reopening proceedings in some circumstances (s. 24).

- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

- (5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

- (2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

HK law allows appeals or the setting aside of awards -
(a) for error of law (in very limited circumstances),
(b) for gross error of fact, serious unfairness, bias or fraud.

Article 34 does not contemplate any appeal on the basis of error of law

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.***

This reflects the HK provision (s. 28) - except that in HK leave of the court is required.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or

*** The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

of the arbitral proceedings, or was otherwise unable to present his case; or

- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Nothing like this is spelt out in HK, but such matters could obviously be taken into account by a court when considering an application for leave to enforce.

The comments in the boxes following the Arbitration Ordinance Sections state the comparable position under the Model Law. The references to Articles are to the Model Law.

CHAPTER 341

ARBITRATION

To make provision for arbitration in respect of civil matters

[5 July 1963.]

PART 1

CITATION AND INTERPRETATION

1. This Ordinance may be cited as the Arbitration Ordinance

2. In this Ordinance, unless the context otherwise requires-

"arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration whether an arbitrator is named therein or not; *(Replaced, 85 of 1975, s. 2)*

The definition of "arbitration agreement" coincides with Article 7.

"Convention award" means an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or territory, other than Hong Kong, which is a party to the New York Convention; *(Added, 85 of 1975, s. 2)*

"Court" means the High Court; *(Amended, 92 of 1975, s. 59)*

"foreign award" means an award to which Part III applies;

"the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 the text of which is set out in the Third Schedule. *(Added, 85 of 1975, s. 2)*

Original
22 of 1963.
85 of 1975.
92 of 1975.
10 of 1985.
17 of 1984.
1 of 1985.
LN262/85
75 of 1985
Short title.

Interpretation.
1975 c.3
s.7(1).

Third
Schedule.

PART IA

CONCILIATION

2A. (1) In any case where an arbitration agreement provides for the appointment of a conciliator by a person who is not one of the parties and that person refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time not exceeding 2 months of being informed of the existence of the dispute, any party to the agreement may serve the person in question with a written notice to appoint a conciliator (and shall forthwith serve a copy of the notice on the other parties to the agreement) and if the appointment is not made within 7 clear days after service of the notice the Court or a judge thereof may, on the application of any party to the agreement, appoint a conciliator who shall have the like powers to act in the conciliation proceedings as if he had been appointed in accordance with the terms of the agreement.

Appointment of
conciliator

(2) Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties: -

- (a) no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connexion with some or all of the matters referred to arbitration;
- (b) if such person declines to act as an arbitrator any other person appointed as an arbitrator shall not be required first to act as a conciliator unless a contrary intention appears in the arbitration agreement.

(3) Unless a contrary intention appears therein, an arbitration agreement which provides for the appointment of a conciliator shall be deemed to

contain a provision that in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties within 3 months, or such longer period as the parties may agree to, of the date of the appointment of the conciliator or, where he is appointed by name in the arbitration agreement, of the receipt by him of written notification of the existence of a dispute the proceedings shall thereupon terminate.

(4) If the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement (hereinafter referred to as the "settlement agreement") the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the agreement.

(Part IA added, 10 of 1982. s. 2)

There is no specific provision for conciliation in the draft law, although its existence as a form of arbitration is assumed (e.g. Art 28(3)).

PART II

ARBITRATION WITHIN THE COLONY

Effect of Arbitration Agreements, etc.

Authority of arbitrators and umpires to be irrevocable 1950 c. 27. s.1.

3. The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the Court or a judge thereof.

There is no specific provision to this effect in the model law.

4. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

Death of party 1950 c. 27. s.2

(2) The authority of an arbitrator shall not

be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

There is no provision equivalent to s. 4.

5. (1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connexion therewith shall be referred to arbitration, the said term shall, if the trustee in bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

Bankruptcy
1950 c. 27. s.3

(2) Where a person who has been adjudged bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and any matter to which the agreement applies requires to be determined in connexion with or for the purposes of the bankruptcy proceedings, then, if the case is one to which subsection (1) does not apply, any other party to the agreement, or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the Court for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

There is no provision equivalent to s. 5.

6. (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at

Staying court
proceedings
where there is
submission to
arbitration
1950 c. 27. s. 4.

the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(2) *[Deleted. 85 of 1975, s. 3]*

See Art 8. S. 6 does not apply to international arbitrations.

6A. (1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Staying court proceedings where party proves arbitration agreement. 1975 c. 3. s.1.

(2) Subsection (1) -

- (a) does not apply in relation to a domestic arbitration agreement, but
- (b) applies, in relation to other arbitration agreements, instead of section 6(1).

(3) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State or territory other than Hong Kong and to which neither -

- (a) an individual who is a national of, or habitually resident in, any State or territory other than Hong Kong; nor
- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State or territory other than Hong Kong

is a party at the time the proceedings are commenced.

(Added, 85 of 1975, s. 4)

See Art 8. S. 6A is specifically applicable to international arbitrations.

Consolidation of arbitrations.

6B. (1) Where in relation to two or more arbitration proceedings it appears to the Court -

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this section,

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated under subsection (1) and all parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings the same shall be appointed by the Court but if all parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.

(Added, 10 of 1982, s. 3)

(3) Where the Court makes an appointment under subsection (2) of an arbitrator or umpire for consolidated arbitration proceedings, any appointment of any other arbitrator or umpire that has been made for any of the arbitration proceedings forming part of the consolidation shall for all purposes cease to have effect on and from the appointment under subsection (2).

(Added, 75 of 1985, s. 2)

There is no equivalent provision to s. 6B.

7. Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the Court may direct the issue between the claimants to be determined in accordance with the agreement.

Reference of interpleader issues to arbitration.
1950 c. 27, s. 5.

There is no equivalent provision to s. 7 - but see Art 8.

Arbitrators and Umpires

8. Unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

When reference is to a single arbitrator.
1950 c. 27, s. 6.

9 Where an arbitration agreement provides that the reference shall be to 2 arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein -

Power of parties in certain cases to supply vacancy.
1950 c. 27, s. 7.

- (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;
- (b) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for 7 clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a judge thereof may set aside any appointment made in pursuance of this section.

There is a different set of rules to those set out in sections 8 - 12 (see Art 11).

10. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to 2 arbitrators, be deemed to include a provision that the 2 arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree.

Umpires.
1950 c 27. s. 8
1979 c. 42.
s. 6(1).

(Amended, 10 of 1982, s. 4)

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(3) At any time after the appointment of an umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Majority award
of 3 arbitrators.
cf. 1979 c. 42.
s. 6(2).

11. Unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to 3 arbitrators, the award of any 2 of the arbitrators shall be binding and in the event that no 2 of the arbitrators agree the award, the award of the arbitrator appointed by the arbitrators to be chairman shall be binding.

(Replaced, 10 of 1982, s. 5)

See note following s. 8.

Power of Court
in certain cases
to appoint an
arbitrator or
umpire.
1950 c. 27.
s.10. 1979 c.
42.
s. 6(3) & (4).

12. (1) In any of the following cases -

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

- (b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- (c) where a party or an arbitrator is required or is at liberty to appoint, or concur in the appointment of, an umpire or an arbitrator and does not do so; (*Replaced, 17 of 1984, s. 2*)
- (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint, or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within 7 clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

- (2) In any case where -
 - (a) an arbitration agreement provides for the appointment of an arbitrator or umpire by a person who is neither one of the parties nor an existing arbitrator (whether the provision applies directly or in default of agreement by the parties or otherwise); and
 - (b) that person refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time,

any party to the agreement may serve the person in question with a written notice to appoint an arbitrator or umpire and, if the appointment is not made within 7 clear days after the service of the notice, the Court or a judge thereof may, on the application of the party who gave the notice, appoint an arbitrator or umpire who shall have the like powers to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement.

(Added, 10 of 1982, s. 6)

13. Where an arbitration agreement provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge thereof as to transfer or otherwise, hear and determine the matters agreed to be referred.

Reference to official referee. 1950 c.27. s. 11.

There is no equivalent provision to s. 13.

13A. (1) Subject to the following provisions of this section a judge, District Judge, magistrate or public officer, may, if in all the circumstances he thinks fit, accept appointment as a sole or joint arbitrator, or as umpire, by or by virtue of an arbitration agreement.

Power of judges to take arbitrations. 1970 c. 31. s. 4.

(2) A judge, District Judge or magistrate shall not accept appointment as an arbitrator or umpire unless the Chief Justice has informed him that, having regard to the state of business in the courts, he can be made available to do so.

(3) A public officer shall not accept appointment as an arbitrator or umpire unless the Attorney General has informed him that he can be made available to do so.

(4) The fees payable for the services of a judge, District Judge, magistrate or public officer as an arbitrator or umpire shall be paid into the general revenue of the Colony.

(5) The Fourth Schedule shall have effect for modifying, and in certain cases replacing, provisions of this Ordinance in relation to arbitration by a judge as a sole arbitrator or umpire and, in particular, for substituting the Court of Appeal for the Court in provisions whereby arbitrators and umpires,

Fourth Schedule.

their proceedings and awards, are subject to control and review by the Court.

(6) Subject to section 23C(3) any jurisdiction which is exercisable by the Court in relation to arbitrators and umpires otherwise than under this Ordinance shall, in relation to a judge appointed as a sole arbitrator or umpire, be exercisable instead by the Court of Appeal.

(Added, 10 of 1982, s. 7)

There is no equivalent provision to s. 13A.

Conduct of Proceedings, Witnesses, etc.

14. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrator or umpire may require.

Conduct of proceeding witnesses, etc. 1950 c. 27. s. 12.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the witnesses on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) An arbitrator or umpire shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement.

(4) Any party to a reference under an arbitration agreement may sue out a writ of *subpoena ad testificandum* or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the Court or a judge thereof may

order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before an arbitrator or umpire of a witness wherever he may be within the Colony.

(5) The Court or a judge thereof may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an arbitrator or umpire.

(6) The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of -

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) the giving of evidence by affidavit;
- (d) examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- (f) securing the amount in dispute in the reference;
- (g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any person to enter upon or into any land or building in the possession of any party to the reference, or authorizing any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence; and

- (h) interim injunctions or the appointment of a receiver,

as it has for the purpose of and in relation to an action or matter in the Court:

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

The equivalent provision is Article 19. It is in much more general terms. The model law omits all reference to enforcement procedures for orders of the arbitrator. Such orders as may be made are made by the arbitrator, not the court. See e.g. Art 5, 9, 18. There is no power expressly given equivalent to ss 14(1), 14(4), 14(5), 14(6)(a) - (c), (e) - (h). S14 (d) is covered by Article 27.

Provisions as to Awards

15. (1) Subject to the provisions of section 24(2) and anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time.

Time for making award.
1950 c. 27.
s. 13.

(2) The time, if any, limited for making an award, whether under this Ordinance or otherwise, may from time to time be enlarged by order of the Court or a Judge thereof, whether that time has expired or not.

(3) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the Court under this subsection shall not be entitled to receive any remuneration in respect of his services.

For the purposes of this subsection, the expression "proceeding with a reference" includes, in a case where 2 arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

There is no equivalent provision to s. 15.

16. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part to an award includes a reference to an interim award.

Interim awards.
1950 c. 27.
s.14.

There is no equivalent provision to s. 16.

17. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.

Specific performance.
1950 c. 27.
s.15.

There is no equivalent provision to s. 17.

18. Unless a contrary is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Awards to be final.
1950 c. 27.
s. 16.

There is no equivalent provision to s.18, but see Articles 31 - 32.

19. Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Power to correct slips.
1950 c. 27. s.
17.

See Article 33 - which goes a long way further.

Costs, Fees and Interest

Costs.
1950 c.27,
s.18

20. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the

amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

(2) Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable in the Court.

(Cap. 159)

(2A) Section 50 of the Legal Practitioners Ordinance, (which provides that no costs in respect of anything done by an unqualified person acting as a solicitor shall be recoverable in any action suit or matter) shall not apply to the recovery of costs directed by an award.

(Added, 10 of 1982, s. 8)

(3) Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void, and this Part shall, in the case of an arbitration agreement containing any such provision, have effect as if that provision were not contained therein:

Provided that nothing in this subsection shall invalidate such a provision when it is a part of an agreement to submit to arbitration a dispute which has arisen before the making of that agreement.

(4) If no provision is made by an award with respect to the costs of the reference, any party to the reference may, within 14 days of the publication of the award or such further time as the Court or a judge thereof may direct, apply to the arbitrator for an order directing by and to whom those costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

(Cap. 159.)

(5) Section 70 of the Legal Practitioners Ordinance, which empowers a court before which any proceeding is being heard or is pending to declare a solicitor employed in the proceedings entitled to a charge on the property recovered or preserved in the proceedings, for his taxed costs in reference thereto, shall apply as if an arbitration were a proceeding in the Court, and the Court may make declarations and orders accordingly.

There is no reference to costs, fees or interest in the model law.

Taxation of arbitrator's or umpire's fees. 1950 c. 27. s. 19

21. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

See note on s. 20.

22. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Interest on awards. 1950 c. 27. s. 20.

22A. (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, award interest at such rate as he thinks fit -

Interest for period prior to payment.

(a) on any sum which is the subject of the reference but which is paid before the award, for such period ending not later than the date of payment as he thinks

fit; and

- (b) on any sum which he awards, for such period ending not later than the date of payment of that sum as he thinks fit.

(2) The power to award interest conferred on an arbitrator or umpire by subsection (1) is without prejudice to any other power of an arbitrator or umpire to award interest.

(Added, 17 of 1984. s. 3)

See comment on s. 20.

Judicial Review, Determination of Preliminary Point of Law, Exclusion Agreements, Interlocutory Orders, Remission and Setting aside of Awards, etc.

23. (1) Without prejudice to the right of appeal conferred by subsection (2) the Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

Judicial review of arbitrator awards. 1979 c. 42. s.1

(2) Subject to subsection (3) an appeal shall lie to the Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the Court may by order -

- (a) confirm, vary or set aside the award; or
- (b) remit the award to the reconsideration of the arbitrator or umpire together with the Court's opinion on the question of law which was the subject of the appeal,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months after the date of the order.

(3) An appeal under this section may be brought by any of the parties to the reference -

- (a) with the consent of all the other parties to the reference; or

- (b) subject to section 23B, with the leave of the Court.

(4) The Court shall not grant leave under subsection (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the Court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

(5) Subject to subsection (6), if an award is made and, on an application made by any of the parties to the reference -

- (a) with the consent of all the other parties to the reference; or
- (b) subject to section 23B, with the leave of the Court,

it appears to the Court that the award does not or does not sufficiently set out the reasons for the award, the Court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the Court, should an appeal be brought under this section, to consider any question of law arising out of the award.

(6) In any case where an award is made without any reason being given, the Court shall not make an order under subsection (5) unless it is satisfied -

- (a) that before the award was made one of the parties to the reference gave notice to the arbitrator or umpire concerned that a reasoned award would be required; or
- (b) that there is some special reason why such a notice was not given.

(7) No appeal shall lie to the Court of Appeal from a decision of the Court on an appeal under this section unless the Court or the Court of Appeal gives leave.

(8) Where the award of an arbitrator or umpire is varied on appeal, the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

(Replaced, 10 of 1982, s. 9)

Compare Article 34.

Determination of preliminary point of law by Court. 1979 c. 42. s. 2.

23A. (1) Subject to subsection (2) and section 23B, on an application to the Court made by any of the parties to a reference -

- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with his consent, or
- (b) with the consent of all the other parties,

the Court shall have jurisdiction to determine any question of law arising in the course of the reference.

(2) The Court shall not entertain an application under subsection (1)(a) with respect to any question of law unless it is satisfied that -

- (a) the determination of the application might produce substantial savings in costs to the parties; and
- (b) the question of law is one in respect of which leave to appeal would be likely to be given under section 23(3)(b).

(3) A decision of the Court under subsection (1) shall be deemed to be a judgment of the Court within the meaning of section 14 of the Supreme Court Ordinance (appeals to the Court of Appeal), but no appeal shall lie from such a decision unless the Court or the Court of Appeal gives leave.

(Cap. 4.)

(4) In the absence of such circumstances as may be prescribed by rules of court proceedings in the Court or Court of Appeal under this section and section 23 shall, on the application of any party to the proceedings, be conducted otherwise than in open court.

(Added, 10 of 1982, s. 10)

Article 5 expresses the opposite position. See also Article 16.

23B. (1) Subject to the following provisions of this section and section 23C -

Exclusion agreements affecting rights under sections 23 and 23A. 1979 c. 42. s. 3.

- (a) the Court shall not, under section 23(3)(b), grant leave to appeal with respect to a question of law arising out of an award; and
- (b) the Court shall not, under section 3(5)(b), grant leave to make an application with respect to an award; and
- (c) no application may be made under section 23A(1)(a) with respect to a question of law,

if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an "exclusion agreement") which excludes the right of appeal under section 23 in relation to that award or, in a case falling within paragraph (c), in relation to an award to which the determination of the question of law is material.

(2) If the parties to an exclusion agreement subsequently enter into an agreement in writing to revoke the exclusion agreement the provisions of subsection (1) shall cease to apply to the reference or references in question until such time as a further exclusion agreement is entered into by the parties.

(3) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular reference or to any other description of awards, whether arising out of the same reference or not; and an agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the passing of this Ordinance and whether or not it forms part of an arbitration agreement.

(4) In any case where -

- (a) an arbitration agreement, other than a

domestic arbitration agreement, provides for disputes between the parties to be referred to arbitration; and

- (b) a dispute to which the agreement relates involves the question whether a party has been guilty of fraud; and
- (c) the parties have entered into an exclusion agreement which is applicable to any award made on the reference of that dispute,

then, except in so far as the exclusion agreement otherwise provides, the Court shall not exercise its powers under section 26(2) in relation to that dispute.

(5) Except as provided by subsection (1), sections 23 and 23A shall have effect notwithstanding anything in any agreement purporting -

- (a) to prohibit or restrict access to the Court; or
- (b) to restrict the jurisdiction of that Court; or
- (c) to prohibit or restrict the making of a reasoned award.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under, a statutory arbitration, that is to say, such an arbitration as is referred to in section 33 (1).

(7) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under, an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises.

(8) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for

arbitration in a State or territory other than Hong Kong and to which neither -

- (a) an individual who is a national of, or habitually resident in, any State or territory other than Hong Kong; nor
- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State or territory other than Hong Kong,

is a party at the time the arbitration agreement is entered into?

(Added, 10 of 1982, s. 10)

This section is only relevant in the light of s. 23A of which there is no equivalent.

Interlocutory
orders.
1979 c. 42.
s. 5.

23C. (1) If any party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is so specified, within a reasonable time to comply with an order made by the arbitrator or umpire in the course of the reference, then, on the application of the arbitrator or umpire or of any party to the reference, the Court may make an order extending the powers of the arbitrator or umpire as mentioned in subsection (2).

(2) If an order is made by the Court under this section, the arbitrator or umpire shall have power, to the extent and subject to any conditions specified in that order, to continue with the reference in default of appearance or of any other act by one of the parties in like manner as a judge of the Court might continue with proceedings in that court where a party fails to comply with an order of that court or a requirement of rules of court.

(3) Section 13A(6) shall not apply in relation to the power of the Court to make an order under this section, but in the case of a reference to a judge-arbitrator or judge-umpire that power shall be exercisable as in the case of any other reference to arbitration and also by the judge-arbitrator or judge-umpire himself.

(4) Anything done by a judge-arbitrator or judge-umpire in the exercise of the power conferred by subsection (3) shall be done by him in his

capacity as judge of the Court and have effect as if done by that court.

(5) The preceding provisions of this section have effect notwithstanding anything in any agreement but do not derogate from any powers conferred on an arbitrator or umpire, whether by an arbitration agreement or otherwise.

(6) In this section "judge-arbitrator" and "judge-umpire" have the same meaning as in the Fourth Schedule.

(Added, 10 of 1982, s. 10)

There is no equivalent sanction, although the arbitrator does have power to make orders relating to procedure (Arts 19, 20, 22, 23, 24). The only sanctions are in Article 25.

24. (1) In all cases of reference to arbitration the Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

Power to remit award. 1950 c. 27. s. 22.

(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months after the date of the order.

Art 33 makes it possible to remit awards after the final award. It is possibly in narrower terms than s. 24, although apparently s. 24 has not been considered in the context of post-award remission. There is no provision for matters to be remitted during the course of proceedings.

25. (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.

Removal of arbitrator and setting aside of award. 1950 c.27. s.23

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.

(3) Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the

determination of the application.

26. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connexion with the subject referred, might not be capable of impartiality.

Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud. 1950 c. 7. s. 24.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

(3) In any case where by virtue of this section the Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke the authority of an arbitrator or umpire, the Court may refuse to stay any action brought in breach of the agreement.

Power of Court where arbitrator is removed or authority of arbitrator is revoked. 1950 c. 27. s.25.

27. (1) Where an arbitrator, not being a sole arbitrator, or 2 or more arbitrators, not being all the arbitrators, or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an

umpire who has entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, either -

- (a) appoint a person to act as sole arbitrator in place of the person or persons removed, or
- (b) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(4) Where it is provided, whether by means of a provision in the arbitration agreement or otherwise, that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders, whether under this section or under any other enactment, that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

There is no equivalent provision to s. 27.

Enforcement of Award

Enforcement of award.
1950 c. 27.
s. 26.

28. An award on an arbitration agreement may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Article 35 provides an equivalent procedure

Miscellaneous

29. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given

Power of Court to extend time for commencing arbitration proceedings.
1950 c. 27.

or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

s. 27.

There is no equivalent provision to s. 29.
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29A. (1) In every arbitration agreement, unless the contrary be expressly provided therein, there is an implied term that in the event of a difference arising which is capable of settlement by arbitration it shall be the duty of the claimant to exercise due diligence in the prosecution of his claim.

Delay in prosecuting claims.

(2) Where there has been undue delay by a claimant in instituting or prosecuting his claim or pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the arbitration proceedings, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

(3) The Court shall not make an order under subsection (2) unless it is satisfied that -

(a) the delay has been intentional and contumelious; or

(b) (i) there has been inordinate and inexcusable delay on the part of the claimant or his advisers; and

(ii) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings either as

between themselves and the claimant or between each other or between them and a third party.

(4) A decision of the Court under subsection (2) shall be deemed to be a judgment of the Court within the meaning of section 14 of the Supreme Court Ordinance (appeals to the Court of Appeal) but no appeal shall lie from such a decision unless the Court or the Court of Appeal gives leave. (Cap 4.)
(Added, 10 of 1982, s. 11)

There is no equivalent provision to s. 29A.

30. Any order made under this Part may be made on such terms as to costs or otherwise (including, in the case of an order under section 6B or 29A, the remuneration of the arbitrator or umpire in respect of his services) as the authority making the order thinks just. Terms as to costs, etc. 1950 c. 27. s. 28. LN 262/85. 75 of 1985. s.3
(Amended, 85 of 1975, s. 5 and 10 of 1982, s. 12)

There is no equivalent provision to s. 30.

Commencement of arbitration. [cf. 1950 c. 27. s. 29.]

31. (1) An arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint or concur in appointing an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

Article 21 coincides with s. 31(1).

(2) Any such notice as is mentioned in subsection (1) may be served either -

- (a) by delivering it to the person on whom it is to be served; or
- (b) by leaving it at the usual or last known place of abode in the Colony of that person; or
- (c) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in the Colony,

as well as in any other manner provided in the arbitration agreement, and where a notice is sent by post in manner prescribed by paragraph (c), service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

Article 2(e) provides similar rules to s. 31(2) (but not limited to this situation).

Crown to be bound.
1950 c. 27.
s. 30.

32. This Part shall apply to any arbitration to which the Crown is a party.
(Amended, 85 of 1975, s. 6)

There is no equivalent provision to s. 32.

Application of Part II to statutory arbitrations.
1950 c. 27.
s.31.

33. (1) Subject to the provisions of section 34, this Part, except the provisions thereof specified in subsection (2), shall apply to every arbitration under any other enactment, whether passed before or after the commencement of this Ordinance, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Ordinance is inconsistent with that other enactment or with any rules or procedure authorized or recognized thereby.

(2) The provisions referred to in subsection (1) are sections 4(1), 5, 7, 20(3), 26, 27 and 29.

(Amended, 85 of 1975, s. 7)

Not applicable.

Transitional Part II.
1950 c. 27.
s. 33.

34. This Part shall not affect any arbitration commenced, within the meaning of section 31(1), before the commencement of this Ordinance, but shall apply to an arbitration so commenced after the commencement of this Ordinance under an agreement made before the commencement of this Ordinance.

Not applicable.

PART III

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

The only reference to enforcement of foreign awards appears in Article 35.

35. This Part shall apply to any award made after 28 July 1924 -

Awards to which Part III applies [cf 1950 c. 27. s. 35].

(a) in pursuance of an agreement for arbitration to which the protocol set out in the First Schedule applies; and

First Schedule.

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as Her Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the convention set out in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and

Second Schedule

(c) in one of such territories as Her Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies.

36. (1) A foreign award shall, subject to the provisions of this Part, be enforceable in the Colony either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 23.

Effect of Foreign awards. 1950 c. 27. s. 36.

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Colony, and any references in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

37. (1) In order that a foreign award may be enforceable under this Part it must have -

Conditions for enforcement of foreign awards. 1950 c. 27. s. 37.

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of the Colony;

and the enforcement thereof must not be contrary to the public policy or the law of the Colony.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part if the court dealing with the case is satisfied that -

- (a) the award has been annulled in the country in which it was made; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or

order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in subsection (1)(a), (b) and (c), or the existence of the conditions specified in subsection (2)(b) and (c), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence.
1950 c. 27.
s. 38.

38. (1) The party seeking to enforce a foreign award must produce -

- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and
- (b) evidence proving that the award has become final; and
- (c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in section 37(1)(a), (b), and (c) are satisfied.

(2) In any case where any document required to be produced under subsection (1) is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of the Colony.

(3) Subject to the provisions of this section, rules of court may be made under the Supreme Court Ordinance with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part.

(Cap. 4.)

(Amended, 92 of 1975, s. 58)

39. For the purposes of this Part, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Meaning of "final award".
1950 c. 27.
s. 39.

40. Nothing in this Part shall -

Saving for other rights, etc.
1950 c. 27,
s. 40.

(a) prejudice any rights which any person would have had of enforcing in the Colony any award or of availing himself in the Colony of any award if this Part had not been enacted; or

(b) apply to any award made on an arbitration agreement governed by the law of the Colony.

PART IV

ENFORCEMENT OF CONVENTION AWARDS

41. This Part shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part III, that Part shall not apply to it.

Replacement of former provisions.
1975 c. 3. s. 2.

42. (1) A Convention award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 28.

Effect of Convention awards.
1975 c. 3,
s. 3(1)(a), (2)

(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award.

43. The party seeking to enforce a Convention award must produce -

Evidence
1975 c. 3. s. 4.

(a) the duly authenticated original award or a duly certified copy of it;

(b) the original arbitration agreement or a

duly certified copy of it, and

- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

44. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section. Refusal of enforcement.
1975 c. 3. s. 5.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
- (f) that the award has not yet become binding on the parties, or has been set

aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

Saving.
1975 c. 3, s. 6.

45. Nothing in this Part shall prejudice any right to enforce or rely on an award otherwise than under this Part or Part III.

Order to be
conclusive
evidence.
1975 c. 3,
s. 7(2).

46. If the Governor by Order declares that any State or territory specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State or territory is a party to that Convention.

(Part IV added, 85 of 1975, s. 8)

SUMMARY

Provisions of Cap. 341 dealt with similarly in the UNCITRAL Model Law.

ss. 2, 6A, 16, 28, 31

Provisions of Cap. 341 dealt with differently in the UNCITRAL Model Law.

ss. 7, 8, 9, 10, 11, 12, 14, 18, 19, 23, 23A, 23C, 24

Provisions of Cap. 341 not dealt with in the UNCITRAL Model Law.

ss. 2A, 3, 4, 5, 6, 6B, 13, 13A, 15, 17, 20, 21, 22, 22A, 23B, 25,
26, 27, 29, 29A, 30, 32

A BILL

To

Amend the Arbitration Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title.

1. This Ordinance may be cited as the Arbitration (Amendment) Ordinance 1987.

Amendment of section 2. (Cap. 341.)

2. Section 2 of the principal Ordinance is amended -

(a) by being renumbered as subsection (1) thereof;

(b) in subsection (1) -

(i) by deleting the definition of "arbitration agreement" and substituting the following -

"arbitration agreement" means an agreement in writing by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

(ii) by inserting, after the definition of "Court", the following -

"dispute" includes a difference;;

(iii) by inserting, after the definition of "foreign award", the following -

"international arbitral award" means an award made in pursuance of an international arbitration agreement;;

(iv) in the definition of "the New York Convention", by deleting the full stop and substituting a semicolon;

(v) by inserting, after the definition of "the New York Convention", the following -

Fifth
Schedule.

"the UNCITRAL Model Law" means the law set out in the Fifth Schedule.";

(c) by inserting, after subsection (1), the following -

"(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An agreement is in writing if it is contained in -

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(4) A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

(5) An arbitration agreement is international if, and only if, -

- (a) the parties to the agreement have, at the time of the conclusion of the agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business -
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(5) - (6) For the purposes of the subsection

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(7) A domestic arbitration agreement is any arbitration agreement which is not an international arbitration agreement.

(8) In ascertaining the meaning of any provision of the UNCITRAL Model Law, regard may be had to the documents specified in the Sixth Schedule."

Sixth
Schedule.

Amendment of
heading to
Part IA.

3. Part IA of the principal Ordinance is amended by deleting the heading "CONCILIATION" and substituting the following -

"GENERAL".

Amendment of
section 2A.

4. Section 2A of the principal Ordinance is amended -

(a) in subsection (1), by deleting "not exceeding 2 months of being informed of the existence of the

dispute, any party to the agreement may serve the person in question with a written notice to appoint a conciliator (and shall forthwith serve a copy of the notice on the other parties to the agreement) and if the appointment is not made within 7 clear days after service of the notice" and substituting the following -

"of being requested by any party to the agreement to make the appointment,";

(b) by deleting subsection (4).

Addition of
new sections
2B, 2C, 2D,
2E, 2F, 2G and
2H.

5. The principal Ordinance is amended by adding, after section 2A, the following -

"Power of
arbitrator
to act as
conciliator.

2B. (1) If all parties to a reference consent in writing and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator -

(a) may communicate with the parties to the reference collectively or separately;

(b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitration proceedings disclose to all other parties to the reference as much of that information as is material to the arbitration proceedings.

(4) No objection shall be taken to the conduct of arbitration proceedings by a person solely on the ground that that person had acted

previously as a conciliator in accordance with this section.

Settlement
agreements.

2C. If the parties to an arbitration agreement reach agreement in settlement of their dispute and enter into an agreement in writing containing the terms of settlement (hereinafter referred to as the "settlement agreement") the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the agreement.

Proceedings
to be heard
otherwise
than in open
court.

2D. Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court.

Restrictions
on reporting of
proceedings
heard otherwise
than in open
court.

2E. (1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court.

(2) A court hearing proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published unless -

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any

party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives a reasoned judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall -

- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
- (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

Enforcement of award.

2F. An award on an arbitration agreement may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

Crown to be bound.

2G. This Part shall bind the Crown.

Governor in Council may amend Sixth Schedule.

2H. The Governor in Council may by order in the Gazette amend the Sixth Schedule."

Amendment of heading to Part II

6. Part II of the principal Ordinance is amended by deleting the heading "ARBITRATION WITHIN THE COLONY" and substituting the following -

"DOMESTIC ARBITRATION".

Addition of new sections 2I, 2J and 2K.

7. Part II of the principal Ordinance is amended by adding under the heading "DOMESTIC ARBITRATION" the following -

"Application

Application to domestic arbitration agreements.

2I. This Part shall apply to an arbitration pursuant to an domestic arbitration agreement, except where the parties to the reference agree in writing after the dispute in question has arisen that -

- (a) Part IIA is to apply; or
- (b) the dispute is to be arbitrated as an international arbitration.

Application to International arbitration agreements.

2J. This Part shall apply to an arbitration pursuant to an international arbitration agreement if, but only if, the agreement provides or the parties to the reference agree in writing that -

- (a) this Part is to apply; or
- (b) the dispute is to be arbitrated as a domestic arbitration.

Application of Part IA.

2K. An arbitration to which this Part applies is also subject to Part IA."

Amendment of section 5.

8. Section 5(1) of the principal Ordinance is amended by deleting "differences" wherever it occurs and substituting the following -

"dispute".

Repeal of section 6A.

9. Section 6A of the principal Ordinance is repealed.

Amendment of section 12.

10. Section 12(1)(a) of the principal Ordinance is amended by deleting "differences" and substituting the following -

"disputes".

Amendment
of section 13A.

11. Section 13A(4) of the principal Ordinance is amended by deleting "of the Colony".

Amendment
of section 14.

12. Section 14 of the principal Ordinance is amended by inserting, after subsection (3), the following -

"(3A) An arbitrator or umpire may receive any evidence which he considers relevant and shall not be bound by the rules of evidence."

Amendment
of section 23A.

13. Section 23A of the principal Ordinance is amended by deleting subsection (4).

Amendment
of section 23B.

14. Section 23B of the principal Ordinance is amended by deleting subsections (4) and (8).

Repeal of
section 28.

15. Section 28 of the principal Ordinance is repealed.

Amendment
of section 32.

16. Section 32 of the principal Ordinance is amended by deleting "apply to any arbitration to which the Crown is a party" and substituting the following -

"bind the Crown".

Addition of
new Part IIA.

17. The principal Ordinance is amended by adding, after Part II, the following -

"PART IIA

INTERNATIONAL ARBITRATION

Application

Application to
international
arbitration
agreements.

34A. This Part shall apply to an arbitration pursuant to an international arbitration agreement, except where the agreement provides or the parties to the reference agree in writing that -

- (a) Part II is to apply; or
- (b) the dispute is to be arbitrated as a domestic arbitration.

Application to domestic arbitration agreements.

34B. This Part shall apply to an arbitration pursuant to a domestic arbitration agreement if, but only if, the parties to the reference agree in writing after the dispute in question has arisen that -

- (a) this Part is to apply; or
- (b) the dispute is to be arbitrated as an international arbitration.

Crown to be bound.

34C. This Part shall bind the Crown.

Application of Part IA.

34D. An arbitration to which this Part applies is also subject to Part IA.

Application of the UNCITRAL Model Law

Application of UNCITRAL Model Law.

34E. (1) An arbitration agreement to which this Part applies is governed by Chapters I to VII inclusive of the UNCITRAL Model Law.

(2) Where this Part applies to an arbitration agreement by virtue of section 34B, the agreement is not governed by Article 1(1) of the UNCITRAL Model Law.

Transitional - Part IIA.

(of 1987.)

34F. This Part shall not affect any arbitration commenced, within the meaning of section 31(1), before the commencement of the Arbitration (Amendment) Ordinance 1987, but shall apply to an arbitration so commenced after the commencement of that Ordinance under an agreement made before the commencement of that Ordinance."

Amendment of section 36.

18. Section 36(1) of the principal Ordinance is amended by deleting "28" and substituting the following -

"2F".

Amendment of section 42.

19. Section 42(1) of the principal Ordinance is amended by deleting "28" and substituting the following -

"2F".

Addition of new Part V.

20. The principal Ordinance is amended by adding, after Part IV, the following -

"PART V

RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

Application.

47. This Part shall apply to an international arbitral award that is -

- (a) made in a State or territory other than Hong Kong;
- (b) not a foreign award within the meaning of Part III; and
- (c) not a Convention award in respect of which Part IV has effect.

UNCITRAL
Model Law
to govern.

48. The recognition and enforcement of an international arbitral award to which this Part applies shall be governed by Chapter VIII of the UNCITRAL Model Law and by section 49.

Enforcement
of international
arbitral award.

49. An international arbitral award that is recognized and enforceable under this Part -

- (a) may be enforced in Hong Kong either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2F;
- (b) shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference in this Part to enforcing an international arbitral award shall be construed as including references to relying on such an award.

Saving.

50. Nothing in this Part shall prejudice any right to enforce or rely on an award otherwise than under this Part."

Deletion of
"the Colony".

21. The principal Ordinance is amended in sections 14(4), 31(2), 36(1) and (2), 37(1), 38(2) and 40 by deleting "the Colony" wherever it occurs and substituting the following -

"Hong Kong".

Amendment
of Fourth
Schedule.

22. The Fourth Schedule to the principal Ordinance is amended -

(a) by inserting, after paragraph 1, the following -

"1A. The leave required by section 2F (enforcement in Court) for an award on an arbitration agreement to be enforced as mentioned in that section may, in the case of an award by a judge-arbitrator or a judge-umpire, be given by the judge-arbitrator or judge-umpire himself.";

(b) by deleting paragraph 8A and substituting the following -

"8A. In the application of section 23 (appeal on a question of law) to the award of a judge-arbitrator or judge-umpire the Court of Appeal shall be substituted for the Court and section 23 shall have effect as if subsection (7) were omitted.";

(c) in paragraph 8B by deleting", other than subsection (4) thereof as modified by virtue of paragraph 8A,";

(d) by deleting paragraph 12.

Addition of
new Fifth
and Sixth
Schedules.

23. The principal Ordinance is amended by adding, after the Fourth Schedule, the following -

"FIFTH SCHEDULE [s. 2]

THE UNCITRAL MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION

[The full text of the Model Law will appear in this schedule, subject to the following two modifications:

- (a) it will include necessary references to Hong Kong and to the High Court of Hong Kong; and
- (b) it will apply to international arbitration and not just to international commercial arbitration.

In this report the full text of the Model Law can be found in Annexure 3.]

SIXTH SCHEDULE [ss. 2 & 2H.]

- 1. The report of the Secretary General of the United Nations Commission on International Trade Law dated 25 March 1985 and entitled "International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration" (reference number A/CN.9/264).
- 2. The report of the United Nations Commission on International Trade Law on the work of its eighteenth session (3-21 June 1985) (reference number A/40/17).
- 3. The report of the Law Reform Commission of Hong Kong on the Adoption of the UNCITRAL Model Law dated

Consequential amendments.
(Cap. 4, sub. leg.)

25. The Rules of the Supreme Court are amended in Order 73 -

- (a) in rule 2(1) by deleting "Every" and substituting the following -

(Cap. 341.) "Subject to section 2D of the Arbitration ordinance, every";

(b) in rule 7(1)(c) by deleting "2A(4)" and substituting the following -

"2C";

(c) in rule 10(1) -

(i) by deleting from sub-paragraph (a) "2A(4)" and substituting the following -

"2C";

(ii) by deleting from sub-paragraph (b) "28" and substituting the following -

"2F";

(d) in rule 10(3) -

(i) by deleting from sub-paragraph (a)(i) "2A(4)" and substituting the following -

"2C";

(ii) by deleting from sub-paragraph (a)(ii) "28" and substituting the following -

"2F".