

Law Reform Commission Calls for New Arbitration Laws

The Law Reform Commission recommended today (Wednesday, September 2) that a new law based on the United Nations model be adopted to replace the existing Hong Kong law on international arbitration.

The proposal to internationalise Hong Kong's arbitration law is contained in the Commission's report on "The Adoption of the UNCITRAL Model Law of Arbitration" published today.

UNCITRAL stands for the United Nations Commission on International Trade Law. The Model Law on International Commercial Arbitration was drafted by a working group of arbitration specialists working with UNCITRAL between 1982 and 1985.

The UNCITRAL initiative 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 different countries.

The final draft was approved in June 1985, and in December, 1985, the General Assembly of the United Nations passed a resolution that "all states give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitratral procedures and the specific needs of international commercial arbitration practice."

In calling for the adoption of the Model Law, the Commission recognised the fact that, given Hong Kong's position as a leading international commercial centre and the large number of contracts involving an international element, the adoption of the Model Law would help to make Hong Kong's law on arbitration internationally recognisable and accessible.

This in turn would help to boost the confidence of international parties when considering Hong Kong as an arbitration venue.

The Commission's report is the result of more than two years work, first by a sub-committee of the Commission chaired by the Honourable Mr F.K. Hu, OBE, JP and then later by the Commission itself.

Hong Kong's 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. The existing law is very similar to that applying in England but the Model Law is much closer to the systems adopted in Europe, the United States and a number of other countries including China.

If the Commission's recommendations are accepted, Hong Kong will be one of the first territories in the world to adopt the Model Law as part of

its domestic law.

On 7 May, 1985 the Chief Justice and the Attorney General referred to the 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 modification to the Model Law and the Arbitration Ordinance, and to make recommendations."

The sub-committee appointed to consider the matter submitted its report to the Commission in April 1987.

"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 was adopted here as part of Hong Kong domestic law, subject only to a very few minor changes, none of which have any adverse effect on its basic philosophy," the Commission said in its report.

It explained that the primary reason for making this recommendation was prompted by the need to make knowledge of our legal rules for international commercial arbitration more accessible to the international community.

Said Mr Hu: "The Commission is keen to encourage international parties to choose Hong Kong as a place to hold their arbitrations.

"At present, it is common for parties in the Far East or for western businessmen doing business in this area to specify arbitration in some of the more well-known arbitral centres such as Geneva, Stockholm, Paris or London.

"Part of the reason for this is that given Hong Kong's small size, parties are, not surprisingly, unaware of the legal rules applying to arbitration here."

He said that if the Model Law was adopted by Hong Kong, international parties would immediately be aware of the legal rules applying here and the decision to choose Hong Kong as an arbitral centre would be taken with more confidence.

Said Mr Hu: "Hong Kong has all the facilities necessary to become a leading centre for arbitrations in the Far East.

"It has excellent legal services, communications, and accommodation, and since 1985, its own international arbitration centre. With the Model Law in place it should begin to attract international arbitrations even where neither the subject matter nor the parties have a Hong Kong relationship.

"There will be no reason, for example, why an American and a German company in dispute over a construction contract in Korea should not choose to make use of the law and facilities here to resolve their differences."

The report makes it clear that the recommendations apply only to Hong Kong's existing law on international arbitration. The law of domestic arbitration would remain virtually intact.

While the main recommendation of the report is that the Model Law be adopted largely unchanged as part of the Hong Kong law, the Commission also made a number of subsidiary recommendations.

One recommendation is that the term "commercial" be deleted from the Model Law. The effect of this deletion is to extend the scope of the law. To cover all disputes between parties who elect arbitration where the dispute has an international element.

The Commission also recommended that if the Model Law was to become part of the law of Hong Kong, international parties should have the right to elect to have their dispute dealt with under existing Hong Kong arbitration law, which would otherwise apply only to domestic arbitrations.

At the same time, the Commission has recommended that domestic parties should have the right, after a dispute has arisen, to agree that the international rather than the domestic law should apply.

This recommendation recognises the international and cosmopolitan character of Hong Kong, and the fact that many companies, while locally based, are subsidiaries of foreign companies, and often managed by people who are more familiar with other systems of law.

Another recommendation which has particular importance in Hong Kong is a proposal that would apply both to domestic and international arbitrations in Hong Kong.

At present there is provision in Hong Kong's arbitration law for the enforcement of agreements to submit disputes to conciliation rather than arbitration. But attempts at conciliation have to occur before the start of arbitration proceedings .

This means of dispute resolution is particularly popular both here and in the People's Republic of China.

It is proposed that these provisions be extended to the Model Law and that in addition both laws be modified providing that conciliation can take place either before or during the arbitration.

At present an arbitrator who did this might be accused of breaching the rules of natural justice, when, for example, he saw one of the

parties on its own, and then tried to persuade the parties to settle their differences.

Comments on the report would be welcomed and should be sent to the Solicitor General, Attorney General's Chambers, 4/F Queensway Government Offices, Queensway, Hong Kong.

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