THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON COMMERCIAL ARBITRATION

(TOPIC 1)

TERMS OF REFERENCE

WHEREAS :

On 15 January 1980 His Excellency the Governor of Hong Kong Sir Murray MacLehose, GBE, KCMG, KCVO in Council directed the establishment of the Law Reform Commission of Hong Kong and appointed it to report upon such of the laws of Hong Kong as may be referred to it for consideration by the Attorney General and the Chief Justice;

On 15 June 1980 the Honourable the Attorney General and the Honourable the Chief Justice referred to this Commission for consideration a Topic in the following terms :

"Commercial Arbitration

(1) To what extent do current laws and practice in Hong Kong meet the needs of the local and international community;

(2) What changes, if any, are necessary desirable or possible to meet those needs?"

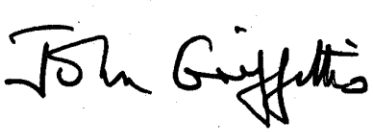
On 15 June 1980 the Commission appointed a sub-committee to research, consider and then advise it upon the said matter;

On 28 September 1981 the sub-committee reported to the Commission, and the Commission considered the topic at meetings on 4 October and 13 November 1981;

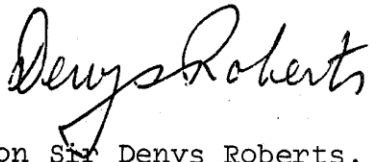
We are agreed that the current laws and practice in Hong Kong meet only some of the needs of the local and international community, for reasons set out in our report;

We have made in our report recommendations which we consider possible, desirable and necessary the better to meet these needs;

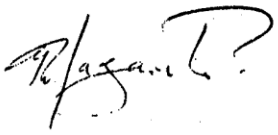
NOW DO WE THEREFORE THE UNDERSIGNED MEMBERS OF THE LAW REFORM COMMISSION OF HONG KONG PRESENT THE REPORT OF THE LAW REFORM COMMISSION OF HONG KONG ON COMMERCIAL ARBITRATION.



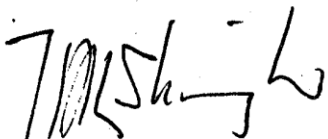
Hon John Griffiths, QC
(Attorney General)



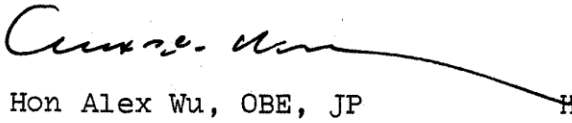
Hon Sir Denys Roberts, KBE
(Chief Justice)



Hon G.P. Nazareth, OBE, QC

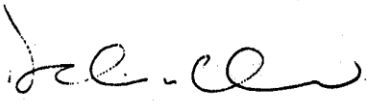


Hon T.S. Lo, OBE, JP

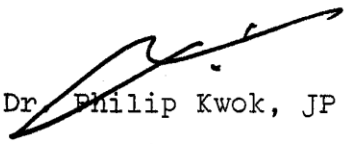


Hon Alex Wu, OBE, JP

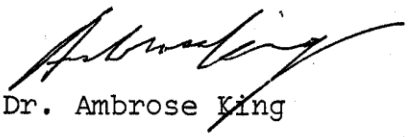
Hon HU Fa-kuang, JP



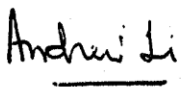
Hon Mrs. Selina Chow, JP



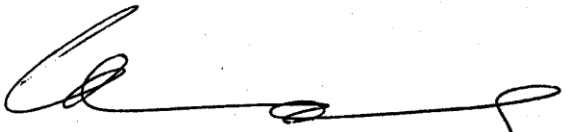
Dr. Philip Kwok, JP



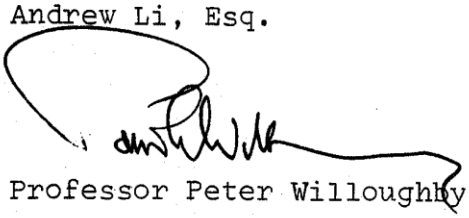
Dr. Ambrose King



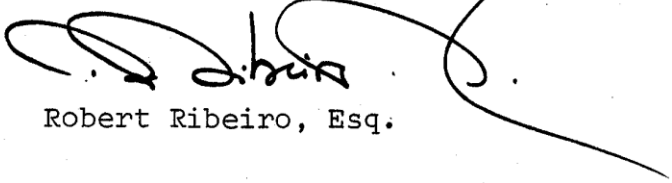
Andrew Li, Esq.



Edmund Cheung, Esq.



Professor Peter Willoughby



Robert Ribeiro, Esq.

Dated this 11th day of December 1981

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

COMMERCIAL ARBITRATION

INDEX

REPORT

OF

THE LAW REFORM COMMISSION OF HONG KONG

ON

COMMERCIAL ARBITRATION

I INTRODUCTION

1 On 15 June, 1980, the Law Reform Commission received a background paper on this topic and appointed a Sub-committee. Its terms of reference were those set out in the Notice of Reference. Its membership is set out in Annexure 1. The Law Reform Commission wishes, at the outset of this Report, to record the debt owed to the members of the Sub-committee for the time and effort each of them gave to their task, and for their report to us.

II SUMMARY OF WORK

2.1 The Sub-committee held formal meetings and also a number of further meetings of groups within the Sub-committee to deal with various specific topics. They also held discussion sessions with various visitors referred to in paragraph 2.5 below.

2.2 The Sub-committee was naturally concerned to learn as much as possible about developments in the field of arbitration both in Hong Kong and overseas, as well as the views of those who might be interested in using Hong Kong as a venue for arbitration. They endeavoured to do this in a number of ways.

2.3 First, they studied an extensive selection of the literature about the subject. A Bibliography is set out in Annexure 2.

2.4 Second, they invited the public and interested bodies to submit information and views. In July, 1980, the public were invited through the press to make submissions on this topic, amongst others. There were no responses to this invitation. In September, 1980, they wrote to the eighty-eight local bodies set out in Annexure 3. There were twenty-nine responses which varied in length and depth. In September, 1980, they wrote to the sixteen bodies overseas set out in Annexure 4. There were nine responses. In October, 1981, we sent the Report of the Sub-committee, together with a paper on Economic and Financial implications, to a number of affected

agencies or departments of Government for comment. All responded and we have taken their views into account.

2.5 Third, a number of distinguished individuals who have considerable expertise and experience in the arbitration field visited Hong Kong during the period of the Sub-committee's work and the Commission's deliberations upon their report and we are most privileged and grateful that they gave us an opportunity to discuss our project with them. We set out a list of all those both from overseas and from Hong Kong whom we have consulted personally at Annexure 7.

2.6 We found these oral discussions most helpful, particularly on the current thinking in these areas. The Chairman of the Sub-committee, at an early stage of their deliberations in August 1980, had the opportunity of discussing this subject in London with Sir Michael Kerr (then Chairman of the Law Commission in England). Thereafter, when visiting Hong Kong, Mr. Robert L. Clare Jr.of Shearman & Sterling, New York, gave most valuable advice and help. At a later stage, by way of further example, both the Hon F.K. Hu (Commission and Sub-committee member) and a member of the Commission staff, when in Kuala Lumpur, met and discussed the subject with the Secretary of the International Arbitration Centre based in Malaysia. In October, 1981, various members of the Commission and its staff were fortunate to be able to consult Lord Justice Donaldson and also Mr. Martin Hunter of Freshfields in London when they were in Hong Kong on the occasion of an international conference held in Hong Kong by the Chartered Institute of Arbitrators of London.

2.7 The Sub-committee did not formally consult the Government of the People's Republic of China, or its trading agencies, but they were fortunate in having the valuable opportunity of meeting on a social occasion Mr. Ren Jianxin (who heads the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade) and Professor HO Tian Kui (of the Research Institute of Laws, the Academy of Social Sciences of China). In addition, many of those consulted in Hong Kong had considerable knowledge of and trading links with the Peoples Republic and its agencies.

III OUR BROAD APPROACH

3.1 Arbitration is a method for resolving civil disputes which affords an alternative to litigation in the Courts. A litigant properly served with legal process has no choice as to court rules or procedure but must litigate under rules imposed compulsorily by the court or submit to the claim. In contrast, arbitration takes place under rules voluntarily agreed between the parties themselves, either before or after the dispute has arisen. Where parties, in the exercise of their free choice, wish to settle a commercial dispute by arbitration rather than litigation, it is desirable that the laws and practices in Hong Kong should allow their needs to be met, so far as practicable, and that

their wishes are not frustrated by inflexible rules of law or procedure. Only thus will Hong Kong become a popular and satisfactory forum for arbitration.

3.2 We first survey, in this Report, the present scope of arbitration activities in Hong Kong; then we discuss its potential to develop into an arbitration centre; next we consider what improvements and changes may be needed to the legislative framework, and to the practicable availability of arbitration facilities before such potential can be achieved; lastly we set out our recommendations to achieve our object.

IV PRESENT SCOPE OF ARBITRATION ACTIVITIES IN HONG KONG

4.1 At present very few arbitrations are conducted in Hong Kong. This is borne out by the information contained in the submissions to us.

4.2 The Chartered Institute of Arbitrators, founded in London in 1915, has its largest foreign branch in Hong Kong. This was established in 1972. Its aim is to promote arbitration. It organises talks and discussions. It encourages and assists students to sit the examinations of the Institute. Membership is restricted to those persons who qualify by virtue of their membership of another professional body or by having passed the Institute's examinations. There are over 200 members resident in Hong Kong drawn from a variety of professions.

4.3 The Institute maintains several panels of arbitrators specialising in areas such as shipping, building, civil engineering, insurance and so on. It appoints arbitrators upon the request of parties. Thereafter the control of the arbitration proceedings rests with the arbitrator and costs and fees are determined at his discretion. The Institution has published "Regulations for the conduct of arbitrations" which parties can adopt by reference.

4.4 Unfortunately, the Hong Kong branch of the Institute does not have any statistics of the appointments of arbitrators it has made, or the arbitrations its members in Hong Kong have conducted. The only precise figure available is that, in the last three years (1978 - 1980), its Hong Kong members conducted three arbitrations per annum in the construction field. It estimates that, during this period, they conducted an additional two arbitrations per annum. Currently, its Hong Kong members are conducting six arbitrations.

4.5 The other institution which has played an important role in Hong Kong in recent years is the Hong Kong General Chamber of Commerce. It has an arbitration committee which appoints arbitrators for submissions to arbitration under the Chamber's auspices. It appoints an expert in the particular field. These submissions can be made by members of the Chamber as well as by outside parties. During the period 1976 to 1980 an average of about four arbitrations per annum were submitted and dealt with. The Chamber has by-laws which contain arbitration rules as well as a model

arbitration clause. It has been the agent in Hong Kong of the International Chamber of Commerce (ICC). We understand that the ICC is actively considering moving its Southeast Asian regional office from Bangkok to Hong Kong and that, if this materialises, the Chamber will, in effect, act as its regional office.

4.6 A newly formed organisation is the Hong Kong Maritime Law and Arbitration Association. This consists of a group of barristers and solicitors practising in Hong Kong. One of its objects is to promote maritime arbitration in Hong Kong. It will maintain a panel of arbitrators. But it has at present no premises or full time staff. What is envisaged by its organisers is a modest beginning and gradual growth into an organisation which eventually might well be able to provide ready arbitration facilities.

4.7 In addition, a number of arbitrations have been conducted by individual members of the Bar. Two members each held a total of nine arbitrations in the last three years. Another member conducted two arbitrations under ICC Rules in recent years. A few individuals from other professions have also conducted the occasional arbitration, but we have been unable to obtain any firm figures.

4.8 The average number of arbitrations in Hong Kong in the last three years (1978 - 1980) specifically referred to in the responses to our questionnaire was only fourteen per annum. In our estimate, there were probably an additional five or six arbitrations in Hong Kong per annum during this period. They involved a variety of subject matter including maritime, insurance, construction and sale of goods. But the number of arbitrations is increasing; for instance, whereas two years ago Government was then only involved in three arbitrations in the construction field, currently it is engaged in fourteen.

4.9 A few organisations resolve disputes between their own members in a domestic and informal way. It is probable that these arrangements do not amount to arbitrations, in the legal sense. The Far East Stock Exchange is an example of such an organisation; another is the Chinese Manufacturers Association of Hong Kong which mediates, each year, in about twenty five disputes involving members.

V WHY SO FEW ARBITRATIONS IN HONG KONG?

5.1 In our view, the basic reason why comparatively few arbitrations take place in Hong Kong is the lack of ready arbitration facilities. There is no body which provides premises and the usual back-up services which are needed, such as secretarial assistance, shorthand writers and translators. Parties who wish to arbitrate in Hong Kong have to organise these facilities for the particular occasion. They have to find premises, such as a conference room in a solicitor's office, in counsel's, chambers or in one of the hotels, though the two Courtrooms of the Inland Revenue Board of Review are available at a reasonable rent for this purpose. The parties have themselves

to organise the various facilities for each arbitration. This takes considerable effort and time. Furthermore, such costs for a single occasion tend to be expensive, for no economies of scale are achieved.

5.2 Moreover there is a shortage of experienced manpower. We have very few experienced arbitrators. Further, the local legal profession, which one might usually expect to be involved in conducting arbitrations on behalf of the parties, is heavily weighted with younger practitioners at present, although time and growth will in due course right this. Fortunately, many international legal firms have established branches in Hong Kong and a number of London counsel have been admitted, on a case-by-case basis, to conduct litigation. These factors ameliorate, to a large extent, the present situation in the profession. Nevertheless, we have concluded that many of the possible advantages of arbitration, such as the choice of a tribunal which is expert and experienced in the particular type of dispute, thus promoting speed and cost-saving, cannot be achieved in Hong Kong at present.

5.3 In these circumstances those who wish to resolve their disputes in Hong Kong prefer the Courts. This appears to be the firm weight of opinion in the legal profession; there are indeed some members who appear to view arbitration as a delay. Such preference is strengthened by the recent dramatic change in the speed with which cases move up the lists to trial in the High Court; the time it now takes to get a civil action to trial compares very favourably with most other jurisdictions. It is perhaps significant that even when there was congestion in the court's lists some 5 to 6 years ago, there did not appear to be any tendency to favour arbitrations. This appears to us to indicate the enormous trouble, effort and expense involved in organising an arbitration in the absence of ready arbitration facilities. Those who wish to arbitrate naturally chose an established arbitration centre such as London unless the events in question were so intimately connected with Hong Kong as to make arbitration elsewhere impracticable. A clear example of this is in the maritime field. Charterparties entered into in Hong Kong usually provide for the arbitration to take place in London, with English law as the proper law.

VI HONG KONG'S POTENTIAL TO DEVELOP INTO AN ARBITRATION CENTRE

6.1 The submissions to us indicate that there is a strong and widespread belief that Hong Kong has the potential to develop into the leading arbitration centre in the region. It is significant that strong supporters of this idea include the Legal and Finance Committee of the American Chamber of Commerce and the newly formed Hong Kong Maritime Law and Arbitration Association. These bodies include members of the leading law firms practising in Hong Kong and the Far East, including branches of firms of international reputation based in London and New York. Their strong support indicates that, given appropriate circumstances, they would consider it in their clients' best interests to arbitrate in Hong Kong.

6.2 In our view, this belief is well-founded. It is based on a number of inter-related considerations. First, Hong Kong has of course now, developed into a leading financial and commercial centre, and arbitration facilities are among the services that should be available in such a centre. Second, there is rapid economic development throughout the whole region. Large supra-national contracts, parties to which generally prefer arbitration, are a feature of such development and there is as yet no well-established arbitration centre in the region. Hong Kong is conveniently located geographically and has the status and facilities of one of the largest financial centres in the world. Third, the vitality and increased size of the economy of Hong Kong itself, evidenced by its place as the third-busiest container port in the world, the size of the shipping-fleets owned here, the number and scope of building and engineering contracts, the international trade financially serviced by local and international institutions based here, the size and sophistication of the financial and commercial sectors, all point to a potential market arising within Hong Kong itself for arbitration services. Fourth, trade with China is rapidly growing, the number of joint ventures within China is increasing, and parties thereto generally prefer arbitration as a means of resolving any disputes that might arise.

6.3 As regards the last consideration, China has its own arbitration institutions, principally the Foreign Economic and Trade Arbitration Commission and the Maritime Arbitration Committee which function in Peking under the aegis of the China Committee for the Promotion of International Trade. Further, we understand that consideration is being given to the setting up of arbitration centres outside Peking in coastal cities, particularly those that are close to special economic zones. It is recognised, however, that arbitration in China is not always acceptable to the other contracting party in many cases. A flexible attitude has therefore been adopted and arbitrations have been held outside China in venues such as Stockholm, London, Zurich and Geneva. It appears to us likely that Hong Kong, too, would be acceptable in suitable cases as a venue for arbitration.

6.4 We would note that the most recent initiative in the Far East is the establishment in 1978 of a Regional Centre for Arbitration at Kuala Lumpur by the Asia-African Legal Consultative Committee. This Centre provides facilities for arbitration and maintains an international panel of arbitrators. It has adopted arbitration rules based on the UNCITRAL Rules sponsored by the United Nations Commission on International Trade Law. We understand that to date this centre has not conducted any significant number of arbitrations.

6.5 But if Hong Kong is to develop into an arbitration centre, then both the legislative framework and the practical availability of arbitration facilities require consideration and improvement so that they meet better the needs both of the local and of the international business community.

VII LEGISLATIVE FRAMEWORK IN HONG KONG

7.1 The Arbitration Ordinance (Chapter 341) was enacted in 1963 and was amended in 1975. The court's role is laid down. It has a discretion to stay court proceedings where there is a domestic arbitration agreement, a stay being mandatory for a non-domestic agreement. It has the power to remove an arbitrator who has misconducted himself. It can assist in the conduct of arbitrations by making appropriate orders, such as those for discovery of documents. Further it has power, through the special case-stated procedure, to review any award and to determine any question of law arising in the course of a reference. There are many other less important provisions dealing with arbitrations in Hong long, some of which are subject to any contrary intention in the arbitration agreement.

7.2 The Ordinance, as amended, is based entirely on the English Arbitration Act 1950, as amended by the Arbitration Act 1975. Recent developments in England are therefore most significant.

VIII THE POSITION IN ENGLAND

RECENT DEVELOPMENTS

8.1 London has long been an established international arbitration centre. It has well-known institutions, such as the London Maritime Arbitrators Association and London Court of Arbitration, and English arbitrators enjoy a pre-eminent reputation. It has been estimated that, in London arbitration bodies (including those of trade associations) are now dealing with about 10,000 new disputes each year, of which 75% to 80% have some international aspect.

8.2 However, in the mid 1970's, there developed growing concern that London's position was being seriously undermined. There were indications that existing users were becoming dissatisfied. More seriously, it was felt that London was not attracting arbitrations arising from the vast "natural development" contracts which were a new feature of economic progress in many parts of the world. The amounts involved in such disputes are substantial. The parties often include consortia involving foreign governments and their agencies. It was believed that the resulting loss to the U.K. national economy was not inconsiderable.

8.3 As a result, the Commercial Court Committee, under the Chairmanship of Mr. justice Donaldson (as he then was), considered the matter. This committee has long been established to provide a direct link between the Commercial Court and its users. Its judges are ex-officio members. The other members represent the main categories of users : bankers, shipowners, charterers, shippers, underwriters, commodity merchants and dealers, brokers, professional arbitrators, solicitors and barristers.

8.4 The Committee's Report on Arbitration (Cmnd 7284) was presented to Parliament in July 1978. Most of its recommendation were enacted in the Arbitration Act 1979. It is convenient to discuss the reforms achieved by the Act and the developments that have since taken place under four headings : Judicial review; Contracting out of judicial review; Sanctions in case of delay or failure to comply with the arbitrator's directions; Miscellaneous reforms.

JUDICIAL REVIEW

Before 1979

8.5 Before the 1979 Act, English law provided two forms of judicial review. First, an award could be set aside for error on its face if it appeared from the award itself or documents incorporated in it that the arbitrator had reached some erroneous conclusion of fact or law. The existence of this power explains the general practice that English awards were given without reasons; where these were given, they would be contained in a separate document which expressly stated that it was not part of the award. This avenue of judicial review was therefore seldom available leaving, as the only effective appeal, the second form.

8.6 This was the special case-stated procedure. The Arbitration Acts before 1979 provided that an arbitrator may, and if so directed by the High Court must, state his award, or part of that award, or any question of law arising in the course of the reference, in the form of a special case for the opinion of the High Court (section 21 of the Arbitration Act 1950). This procedure came to be exploited by unmeritious parties for the purposes of delay. This was a relatively new phenomenon in England, but a most serious one in the context of a world of rapid inflation and fluctuating exchange rates.

First, such a party sought to delay the proceedings by repeatedly forcing the arbitrator to state a special case whenever a shadow of a point of law arose. In practice, if the arbitrator refused to state a special case, the court rarely refused an application for an order directing him to do so, for at that stage the arbitrator had not made any findings of fact, and it was very difficult for a court to conclude that no serious point of law could arise for decision. It was possible to appeal from the arbitrator to the Commercial Court judge, then to the Court of Appeal and sometimes to the House of Lords.

Second, he could delay the enforcement of any award by making the arbitrator state his award in the form of a special case. This was not a final award for enforcement purposes and the other party had to await the outcome of any appeals.

The 1979 Act

8.7 The solution adopted in the Arbitration Act 1979 was the abolition of that system of judicial review (both the case-stated procedure and the setting aside of awards for errors on their face) and its replacement by a new system with the following features :

(a) It is based on reasoned awards, with the High Court given power to order the arbitrator to give sufficient reasons. An application for such an order can only be made with the consent of all parties, or with the leave of the court. Further, notice must be given to the arbitrator before the award that a reasoned award is required, or there must be some special reason why this was not done;

(b) There is a right of appeal to the High Court on a question of law. This right is restricted to cases in which either the High Court gives leave to appeal, or all parties so agree. The High Court may only give leave when satisfied that the question of law involved could substantially affect the rights of one or more of the parties, and it can impose such conditions as it considers appropriate (such as the provisional payment of the sum in dispute to the successful party, or satisfactory security therefor),

(c) The right of further appeal from a decision of the High Court to the Court of Appeal is strictly limited. Leave has to be obtained from the High Court or the Court of Appeal. Further, the High Court must certify either that the question of law involved is one of general importance, or that the matter for some other special reason should be considered by the Court of Appeal;

(d) It was recognised that it would be helpful in some circumstances to obtain a decision from the High Court on a point of law arising in the course of the reference. The High Court is given the power to do so where all parties consent. Where, on the application of one party, only the arbitrator consents to this course, the court has to be satisfied that it might produce substantial savings in costs to the parties, and that it is one in respect of which leave to appeal is likely to be given.

After 1979

8.8 The 1979 Act has been interpreted by the English Courts. In *B.T.P. Tioxide Ltd. v Pioneer Shipping (The Nema)* [1981] 3 W.L.R. 292 (July 1981) the House of Lords ruled, that as the new system is intended to favour finality in arbitral awards, the criteria to be applied by the court, in deciding whether to grant leave to appeal on a point of law, were intended to be much stricter than those used in exercising the former discretion to require the arbitrator to state a special case. The new criteria [as interpreted by the subsequent decisions of the Court of Appeal in *Italmare Shipping Co. v Ocean*

Tanker Co. (The Rio Sun) (31st July 1981 unreported) and Mr. Justice Parker in *BVS v Kerman Shipping Co. S.A.* (reported in the Times Newspaper on 22nd October, 1981), and assuming compliance with the statutory condition that the appeal could substantially affect the rights of one or more of the parties is already satisfied] are as follows :

(a) Where the question of law concerns the construction of a one-off contract, leave should not normally be given unless, on the conclusion of argument on the application for leave, the court has formed the provisional view that the arbitrator was wrong and considers that it would need a great deal of convincing that he was right;

(b) A less strict approach should apply where the question of law involves the construction of a standard-form contract or clause, because legal decisions on it would promote the development of commercial law. Leave should be granted where the judge forms the provisional view that a strong prima facie case has been made out that the arbitrator was wrong. But if the question involves the application of a standard form clause to "one-off" events, then the criteria is the same as in (a). This is because the legal decision is unlikely to assist the business community by clarifying the legal position, thereby leading to the settlement of other cases arising out of the same events;

(c) Where other questions of law arise, such as frustration or fundamental breach, which are not concerned with the construction of documents, and the events in question are "one-off", leave should not normally be given unless the court, at the conclusion of argument on the application for leave, reaches the provisional view that the arbitrator had misdirected himself in law, or that his decision was one that no reasonable arbitrator could reach, and that it would take a great deal of convincing to the contrary. Where the events are common events which will undoubtedly affect other commercial transactions (e.g. the closure of Suez Canal), then the more liberal test applies : leave should be granted where the judge forms the provisional view that a strong prima facie case has been made out that the arbitrator was wrong.

8.9 In *Mondial v Gill & Duffus* [1980] 2 Lloyd's Rep. 376 (December 1980) Mr. Justice Goff considered the nature of the court's discretion when imposing conditions on granting leave to appeal. In that case, security for costs was ordered as a condition. The judge emphasised that it was a new jurisdiction and had to be worked out in its own context. Having regard to the policy of the Act, he held that this power is conferred for the purpose of restraining, by the imposition of conditions, the pursuit of cases on dubious questions of law. He suggested that the court might impose conditions in cases where, for example, the court infers that the matter is being pursued for

the purposes of delay, or where the court comes to the conclusion that the applicant's argument is flimsy.

8.10 Section 148 of the Supreme Court Act 1981 amended the Arbitration Act 1979 to make it clear that, where the High Court decides to grant or refuse leave to appeal, or decides to entertain a preliminary point of law, no appeal lies against that decision to the Court of Appeal without the leave of the High Court.

CONTRACTING OUT OF JUDICIAL REVIEW

8.11 In its deliberations the Commercial Court Committee found it necessary to divide arbitration agreements into :

(a) Domestic arbitration agreements; in substance these are defined by the Arbitration Act 1975 as agreements which do not provide for arbitration abroad and to which no foreign national or resident or foreign company is a party;

(b) Non-domestic arbitration agreements, which necessarily are foreign or international in character. These were further sub-divided into :

(i) The supra-national contract group, comprising disputes under the large new development contracts which it was felt London had failed to attract;

(ii) The special-category disputes group, comprising disputes which traditionally have been resolved in London, arising out of contracts which relate to maritime, or insurance matters, or to commodities of types which are dealt with on established United Kingdom markets. A majority of these contracts involve foreign nationals or companies.

8.12 The Committee defined the issues, some conflicting, as follows :

(a) There are cogent public policy considerations for the rule established in the classic decision of the Court of Appeal in 1922 (*Czarniknow v. Roth, Schmidt and Company*, [1922] 2 KB 478) that the right to judicial review by means of the case-stated procedure is entrenched in the law, and that parties to an arbitration agreement could not contract out of their statutory right to such judicial review. As the Committee explained it : "there should in principle be no sphere of national activity in which the King's writ did not run, there should be but one system of law, and those who were commercially weak should be protected by law from those who were commercially strong";

(b) There are, however, some situations in which speed and finality of decision are of the utmost importance. In such cases, the parties might be prepared to accept some risk that the arbitrator's decision is not correct. Whether such a situation has arisen can only be determined by the parties, after a particular dispute has arisen and in relation to that dispute;

(c) It was believed that many parties to supra-national contracts would have liked to adopt English law as the proper law of the contract, and to have their disputes resolved in England by English professional arbitrators. They would not do so because of the entrenched right to judicial review, for many were reluctant to submit to the jurisdiction of any national court ;

(d) It was believed that, in contrast to the supra-national contracts group, there was no evidence of any widespread desire to be able to contract out of a right to judicial review in the case of the special category disputes group. More importantly, it was felt that judicial review in this area has formed the backbone of the development of English commercial law, which in turn led to its being the first choice of law in international commerce. It was therefore believed that retention of judicial review in this area was very important if this position were to be maintained.

8.13 The solution adopted in the Act was twofold. For all types of arbitration agreement, after a dispute has arisen and been referred to arbitration, parties are free by mutual agreement to exclude any right to judicial review in relation to that dispute. So far as contracting out of review before a dispute has arisen, a different approach was adopted :

(a) Domestic arbitration agreements : The right to judicial review remains entrenched and cannot be excluded by agreement;

(b) Special-category disputes : The right to judicial review also remains entrenched for the time being. It was felt in Parliament that this decision should be reviewed two to three years after the introduction of the new system of judicial review based on reasoned awards. The Secretary of State was given the power, under the 1979 Act, to lift the entrenchment of this right, subject to such conditions as he may impose;

(c) Other non-domestic arbitration agreements including supra-national contracts : The right to judicial review is not entrenched, thus allowing parties to contract out at any stage and to arbitrate in England without the slightest fear that they may end up in the High Court.

8.14 We understand that it is felt in London that, these reforms are achieving their desired effect. Parties to supranational contracts are now much more willing to provide in their contracts for arbitrations in London, often

agreeing, to exclude judicial review. It is difficult, if not impossible, to obtain statistics on how frequently this occurs. We understand that there is unlikely to be any modification, in the near future, of the entrenchment of the right to judicial review for the special-category disputes.

8.15 An interesting development is the establishment of the London International Arbitration Trust. It is financed mainly by contributions from solicitor firms in the City of London. It is directed by a Council and Executive Committee. Lord Roskill is Chairman, and Lord Justice Donaldson and Mr. Justice Goff are members of its Council. Its broad objective is : Now that the substantive law has been reformed, what improvements can be made to arbitration facilities in London?

SANCTIONS IN CASE OF DELAY OR FAILURE TO COMPLY WITH THE ARBITRATOR'S DIRECTIONS

8.16 The principal criticism of the special-case procedure was the opportunity it provided for an undeserving party to deploy delaying tactics. Prior to the 1979 Act, the High Court itself was able to make various types of interlocutory orders in aid of arbitrations and to apply sanctions in default of compliance. The 1979 Act fortified the court's power to counter delay by permitting the arbitrator, whose interlocutory order is not obeyed, to continue with the arbitration, in the same manner as a Judge could in the High Court where a party fails to comply with an interlocutory order or the rules of court.

8.17 The need for powers to counter delaying tactics is underlined by the decision in January 1981 of the House of Lords in *Bremer Vulkan v. South India Shipping Corporation* [1981] 1 Lloyd's Rep. 253. The issue was whether the court can grant an injunction, restraining a claimant from proceeding with an arbitration, where he has been guilty of such inexcusable and inordinate delay as to render impossible a fair hearing. In ordinary court proceedings, in these circumstances, an action is dismissed for want of prosecution.

The House of Lords unanimously held that an arbitrator has no power to dismiss the claim in these circumstances, because his arbitral duty is limited to making an award on the merits. The nearest he could get to dismissal on the ground of delay would be to fix a day for hearing and to make an award upon the merits based on whatever evidential material is then before him.

By a majority, the House held that the court has no general powers, to supervise the conduct of arbitrations, more extensive than those specifically conferred by the Arbitration Acts. The basis of arbitration is, of course, contractual. The submission of a dispute to arbitration under a private arbitration agreement is, therefore, purely voluntary by both claimant and respondent. In contrast, the submission by the defendant in legal proceedings to the jurisdiction of the High Court to determine that dispute is compulsory. As with any other, the contract containing an arbitration agreement may be brought to an end by frustration or by repudiatory breach

at the election of the innocent party. The court can grant injunctions for the protection or enforcement of rights arising out of the arbitration agreement. But no right is infringed where the claimant delays in the prosecution of the arbitration proceedings. The majority decided that a term could not be implied that only the claimant should exercise due diligence. Nor could delay on the part of the claimant entitle the other party to treat an arbitration agreement as at an end, on the basis that it constituted repudiatory breach, because where there was delay in an arbitration both parties were under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay; and if both parties failed to take any action, both would be in breach. Unlike a defendant in legal proceedings, a respondent to an arbitration is not entitled to sit back, remain entirely passive and then rely on the claimant's delay.

8.18 The principles so laid down were analysed and applied by Mr. Justice Mustill in Turiff *Ltd. v. Richards & Wallington (Contracts) Ltd.* [1981] Commercial Law Reports 39. It is now established that the court's jurisdiction to deal with delay in the court's of arbitrations is founded on the application of the principles of the law of contract to the very special type of contract represented by the agreement to arbitrate. In deciding whether such a contract has been discharged by a repudiatory breach the following considerations are relevant :

(a) Were the claimants in breach of an order of the arbitrator? The defendant should in the first instance have obtained such an order since the House of Lords held that both parties are under a mutual obligation to apply to the arbitrator for appropriate directions to put an end to any delay;

(b) Did failure to comply constitute a repudiatory breach? The test would be the degree of risk that a fair trial is impossible having regard to the cumulative effect of the various individual failures by the claimant to comply with the arbitrator's directions. The effect of any period during which the claimant is inactive but not in breach of an order from the arbitrator could not be taken into account but this might make it all the more important that future activity is carried on at a brisk pace;

(c) Has the defendant elected to treat the arbitration agreement as discharged?

(d) Was there any act or omission on the part of the defendant which disentitles him from treating the contract as being at an end?

8.19 Subsequently, in April 1981, the Court of Appeal considered the *Bremer Vulkan* decision in *Andre et Companie v. Marine Transocean Ltd.* [1981] 3 W.L.R. 43 (Lord Denning M.R., Eveleigh and Fox LJJ). It was distinguished on the facts. There was total inactivity by both parties to an arbitration for about 7 years. It was held that the parties had, by their conduct

of total inactivity for such a long time, abandoned or rescinded their agreement to arbitrate. This conclusion was not precluded, by the decision in the *Bremer Vulkan*, which did not deal with rescission or abandonment. But Lord Denning went further and criticized the reasoning of the majority in that case, boldly stating it is "so capable of being misunderstood that we should await its further consideration before acting upon it".

8.20 The factual evidence giving rise to the claims in these cases occurred prior to the 1979 Act. After that Act, where a claimant fails to comply with an interlocutory order of the arbitrator himself, the defendant can now apply to the court to confer on the arbitrator the power to continue with the arbitration notwithstanding such failure.

MISCELLANEOUS MATTERS

8.21 The Commercial Court Committee recommended various miscellaneous reforms, only some of which were enacted in the 1979 Act. It is convenient to divide them into those which have been implemented, and those which have not.

Enacted in 1979 Act

8.22 Under the 1950 Act (section 10) the court had the power to appoint an arbitrator or umpire in various circumstances. But there was no power to make an appointment if the arbitration agreement provides that it shall be made by a stranger (e.g. the President of a professional body) and he fails or refuses to make the appointment. This was remedied by the 1979 Act.

8.23 Where an agreement provides that the reference should be to three arbitrators, one to be appointed by each party and the third by those arbitrators, the 1950 Act (section 9(1)) converts the third arbitrator into an umpire who has no jurisdiction unless and until the other two arbitrators disagree. This ran counter to the parties' intention that, in providing for three arbitrators, the third arbitrator should act as such from the beginning. The 1979 Act remedies this.

Recommendations not yet implemented
Arbitration Rules Committee

8.24 Because Parliamentary time at Westminster is at a premium, it is difficult to obtain time for minor amendments to the legislation on arbitration. An Arbitration Rules Committee with powers to make subsidiary legislation similar to those of the Supreme Court Rules Committee can relieve Parliament of the need to consider such amendments. In particular it can consider the various miscellaneous reforms recommended by the Commercial Court Committee itself from time to time.

Consolidation

8.25 The High Court should have, in relation to arbitrations, the same power to make consolidation and similar orders which it has in legal proceedings. This would be most useful and can produce substantial savings in costs.

Costs

8.26 Under the 1950 Act (section 18(1)) arbitrators have the Power to tax or settle the amount of the costs of the reference. There is considerable doubt as to whether they can allow the costs of a foreign lawyer. It should be clarified that they can do so. At present, the arbitrator can either tax the costs personally or leave it to the High Court. It is desirable that arbitrators should also have the power to refer the taxation to an outside expert, because this may be much speedier.

Offers to settle and payment into Court

8.27 In legal proceedings a defendant can make a payment into court. It is a strict rule that a Judge cannot be informed even of the fact of payment-in, let alone the amount involved, until he has given judgment. If the plaintiff accepts this offer within a limited period in satisfaction of his claim, he is entitled to be paid his legal costs by the defendants. But if he defends in the hope of recovering more, but fails to do so, he will only be entitled upon judgment to costs up to the date of payment-in, and will have to pay the defendant's costs after that date.

8.28 Such a procedure is obviously useful. There is difficulty in adapting it directly to arbitrations since the award usually deals with all relief, including costs, in the same document and the parties have no opportunity of making submissions about costs after the other issues have been determined. The practice that has grown up in arbitrations is for the respondent to make a "sealed offer" of settlement. If the claimant rejects it, it is placed in a sealed envelope and handed to the arbitrator on terms that it shall not be opened until after he has decided upon all issues other than costs. This is open to the objection that the arbitrator will know that some offer has been made. The Commercial Court Committee recommended that the arbitrator should make his award on all issues including costs without being told that any offer of settlement has been made, but that he should have the power to re-open so much of the award as relates to costs upon subsequent proof that an offer of settlement was made before or during the hearing. It is, of course, one thing to make an offer of settlement, but quite another to produce the necessary money to back that offer. It was therefore recommended that, as with legal proceedings, respondents in arbitration proceedings who wish to make an offer of settlement should be obliged to pay the amount offered into court.

"Misconduct"

8.29 The 1950 Act (section 23) provides certain remedies if the arbitrator "has misconducted himself in the proceedings". This connotes dishonesty or a breach of business morality. But it has been held to apply to procedural errors or omissions by arbitrators who are doing their best to uphold the highest standards of their profession. The Commercial Court Committee, recognising that arbitrators were understandably sensitive about this terminology, recommended that there be substituted for “misconducted” some other term which reflects the idea of irregularity, while recognising also that such a change would merely be cosmetic.

8.30 We understand that these miscellaneous reforms are not controversial. They were not enacted in the 1979 Act because of the pressure of time to rush that Act through Parliament, shortly before its dissolution. We understand that, whilst they have not been accorded priority by the present Government, their implementation in due course is expected.

IX APPLICABILITY TO HONG KONG

9.1 We would firmly reject any suggestion that because these recent developments took place in England, they are necessarily appropriate in the circumstances of Hong Kong. But we have considered them, and set them out in some detail, for three reasons.

9.2 First, as we have noted, the present Hong Kong Ordinance is based entirely on the English legislation prior to the 1979 Act. Our knowledge and experience of the ways other jurisprudential systems deal with these matters is, inevitably, not complete. But we see no justification for Hong Kong law to depart from the basic English scheme and to adopt some wholly different system, or to strike out entirely on its own. Any such fundamental departure would, in our view, run contrary to the needs of the local and international business community. This is especially so as Hong Kong's commercial (and, indeed, other) law is based upon the English common law and has generally followed the direction of development of English law. Today in Hong Kong, the civil law is identical, in most areas, to English law.

Second, the submissions to us, both from overseas and from local bodies, overwhelmingly support the view that Hong Kong should basically follow the lines of the 1979 Act in England.

Third, as we have noted, London is an established international arbitration centre. The reforms achieved by the 1979 Act were aimed to maintain that position. They therefore provided a useful pointer to the needs of the international community.

9.3 We have concluded that the main reason why so few arbitrations take place in Hong Kong is the lack of ready arbitration facilities. The Hong Kong legislation is therefore untested; it has not been proved to be

unsatisfactory. Nevertheless, in our view, the present legislation in Hong Kong is unsatisfactory in a number of areas and would be so proved by any extensive use; these aspects may, indeed, have the effect of discouraging users in the first instance. These areas are set out below; except for the process of conciliation, they have been considered by the Commercial Court Committee. But it will be seen that, so as the better to meet the needs of Hong Kong, in a few important respects our proposals are more extensive than, or are different from, those contained in the 1979 Act.

X OUR RECOMMENDATIONS

10.1 We now consider and recommend reforms needed under the following headings : Judicial review; Sanctions in case of delay or of failure to comply with the arbitrator's directions; Contracting out of judicial review; Miscellaneous; The process of conciliation.

Judicial Review

10.2 The experience in England clearly demonstrates that the present system of judicial review by the special case-stated procedure is unsatisfactory, as it can easily be abused by unmeritorious parties for the purposes of delay. In our view the new system provided by the 1979 Act for reasoned awards is appropriate for Hong Kong. We accordingly RECOMMEND that the procedure contained in the Arbitration Act 1979 be followed in Hong Kong, save in one minor respect.

10.3 In that Act, the right of further appeal to the Court of Appeal (from a decision of the High Court on an appeal on a point of law from an arbitrator) is limited in two ways. First, leave has to be obtained from the High Court or the Court of Appeal and, second, the High Court must certify either that the question of law involved is one of general importance or that, for some other reason, it should be considered by the Court of Appeal. We find the second limitation unsatisfactory because its effect is that, without the certificate from the High Court, an application to the Court of Appeal for leave cannot be launched, even though that Court might have found that the High Court was wrong in refusing the certificate. This contrasts with the position of cases litigated in the High Court, where there is an unrestricted right of appeal to the Court of Appeal. In our view, therefore, it is sufficient to have only the first limitation, and we so RECOMMEND.

10.4 We have noted that section 148 of the Supreme Court Act 1981 in England provides that the right of further appeal to the Court of Appeal is limited in another respect : where the High Court grants or refuses leave to appeal or decides to entertain a preliminary point of law, no appeal lies to the Court of Appeal without the leave of the High Court. It is the "end of the road" if the High Court refuses leave. In our view such a severe restriction is unjustified and the appropriate restriction is that, when appealing from a decision of the High Court, granting or refusing leave to appeal or deciding to

entertain a preliminary point of law, leave has to be obtained either from the High Court or from the Court of Appeal. We accordingly RECOMMEND that this should be provided in the proposed legislation.

10.5 It has been suggested to us that the legislation, even if only for declaratory purposes, should express the principle that the right of appeal should be limited to cases where the applicable law is Hong Kong law. Since the legal principle is that law foreign to Hong Kong is dealt with in evidence in the same way as matters of fact, and this principle is well known to those engaged in the field of international arbitration, we reject this suggestion.

Appeals in Camera

10.6 One of the reasons parties choose arbitration is because the matter can be dealt with in private if they so wish. Equally, the fear of publicity, may discourage parties from seeking relief in the courts by way of appeal. There is presently no provision which permits such appeals to be heard in private. English courts have traditionally preserved as a fundamental bulwark of justice the precept that '"it must be seen to be done", so that, with certain well known exceptions, such as wardship proceedings, civil proceedings are not held in camera. Any member of the public may attend the court hearing.

10.7 On the other hand, why should parties who deliberately chose to arbitrate their dispute in private either be forced into the public arena on appeal or be discouraged, by this very reason, from pursuing their legal remedies?

10.8 We have been informed that, so far as law-reporting is concerned, judgments edited to protect the identity or commercial secrets of parties can, as a practical matter, be easily issued by the Judge. Such a procedure would permit the court's decision on the principles of law involved to be disseminated, so that the development of the commercial law was not hindered, whilst at the same time protecting the interests of the parties in maintaining their privacy.

10.9 Accordingly we RECOMMEND that, under the proposed legislation, appeals in arbitration matters shall be heard in camera if either party so applies, save in such exceptional circumstances as may be prescribed by rules of court; and that such rules should also make provision for the issue of edited judgments in all cases heard in camera.

Sanctions in Case of Delay or Failure to Comply with The Arbitrator's Directions

10.10 The 1979 Act enabled the court to confer on the arbitrator the power to proceed with the arbitration in default of appearance, or of any other default, by one of the parties, in the same manner as a Judge could continue

in similar circumstances. This is certainly an effective power for countering delaying tactics and we RECOMMEND its adoption in Hong Kong.

Further Sanctions

10.11 But we doubt whether it is a sufficient sanction in all cases of delay in a world of rapid inflation and fluctuating exchange rates. An application to the court by one of the parties seeking powers for the arbitrator to proceed with the arbitration notwithstanding the failure of the other party to comply with an interlocutory step has to be served on the other party. If he then takes the interlocutory step in question, the basis for the exercise of this power has gone. There is no sanction to prevent this occurring again and again with consequent delays.

10.12 The majority decision of the House of Lords in *Bremer Vulkan* shows that the sanctions for delay under the common law are somewhat limited, for, as explained in paragraph 8.17 above, neither the court nor the arbitrator has the power to strike out a claim.

As previously explained, the court's only jurisdiction to deal with delay is founded on the application of the principles of the law of contract. Did the delay amount to a repudiatory breach which has been accepted or amount to abandonment of the contract? If so, the agreement to arbitrate is discharged and the court may grant an injunction to restrain the continuation of the arbitration proceedings. But delay on the part of claimant alone is not sufficient. At the least, the defendant must have first applied to the arbitrator for directions and the claimant been in breach thereof.

10.13 It is interesting to consider whether the Commercial Court Committee would have recommended further sanctions for dealing with delay, if the common law position had been authoritatively laid down when it deliberated.

10.14 Arbitration and litigation are both but means of resolving civil disputes to achieve justice between the parties. They are both adversarial in character. In litigation there are effective remedies for dealing with delay. The defendant is entitled to remain inactive and the court may, in the interests of justice, strike out the plaintiff's claim either (a) where there has been intentional or contumelious default such as disobedience to the peremptory order of the court, or (b) where there has been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial is not possible, or to serious prejudice to the defendant. In contrast, the remedies for delay are less effective in arbitrations. We feel that businessmen would consider this anomalous. Stale or delayed claims should not be allowed to hang over the defendant in either field.

10.15 In our view, the court should have the overriding power to strike out a claim in arbitration proceedings in cases of delay where it is in the interests of justice so to do. In *Bremer Vulkan* this was the view expressed in

the dissenting opinions of Lord Scarman and Lord Fraser in the House of Lords. It was also one of the approaches on which reliance was placed in the judgments given in the Court of Appeal ([1980] 2 W.L.R. 905; Lord Denning, M.R., Roskill and Cumming-Bruce LJJ) which were overruled by the majority in the House of Lords. (The judgments in the Court of Appeal relied also on the implication of a term in the arbitration agreement, as had Mr. Justice Donaldson at first instance : [l979] 3 W.L.R. 471). In our view, just as the court has the power to make various kinds of orders to assist arbitration proceedings to achieve justice, so it should have a power to strike out claims for the same reasons. We accordingly RECOMMEND that the proposed legislation confer on the court a power to strike out claims in cases of delay where the interests of justice so require. The criteria for exercise of the power need not be further defined, for the court would no doubt rely by analogy on the principles developed in striking out claims in legal proceedings, making such modifications to the principles as may be appropriate. In practice this proposed new power will be more effective than, and cumulative to, the existing power (which will remain) in the court to grant injunctions where, for example; the delay amounts to a repudiatory breach which is accepted. The new power will be independent of the arbitrator's present power to proceed, notwithstanding failures to comply with interlocutory orders.

10.16 In *Bremer Vulkan* the majority in the House of Lords held that, where the was delay in arbitration proceedings, both parties were obliged to put an end to it. They rejected the argument that a term could be implied into the arbitration agreement that only the claimant should exercise due diligence. In our view, such an implied term is desirable and should be effected by statute. Without it, the effectiveness of the court's new power to strike out will be prejudiced. This term should be implied, subject to any contrary intention of the parties. Such intention should not, however, be inferred from the mere fact that the parties had concluded an arbitration agreement.

10.17 These reforms will, in our opinion, provide the court with that armoury which is essential in present day circumstances to counter delaying tactics in arbitration.

10.18 We have considered two further matters. We have been referred to the procedure available in some civil code countries for severing or striking out only the arbitration clause from the contract. It has also been suggested that it would be possible, after a party's arbitration proceedings had been struck out (pursuant to our recommendations above), for that party to institute fresh proceedings under the contract if the limitation period had not expired, and thereby to prolong the agony. Taking into account either or both matters, it has been proposed to us that, in the interests of finality, the court should be empowered once and for all to settle the rights of the parties under the contract at that time.

We RECOMMEND that (subject to the rules of the institution under which the arbitration is held not so providing) neither suggestion should be followed. They constitute, at this time, too radical an invasion of the law of contract, the full consequences of which are difficult to foresee. In addition,

sufficient safeguards presently exist under the law, in any event, to deal with vexatious proceedings.

Contracting out of Judicial Review

10.19 We RECOMMEND that, with one modification relating to special-category disputes, the methods of dealing with judicial review adopted in the Arbitration Act 1979 are appropriate for Hong Kong, and should be adopted. The considerations which led to the 1979 Act are equally relevant for Hong Kong. The distinction, drawn between contracting-out before, and contracting-out after a dispute has arisen, is sound. Parties should be able by mutual agreement to contract out of judicial review after a dispute has arisen for, at that stage, there is much less danger that a party would succeed in using the stronger bargaining power which he may have to coerce the other party to forego the right of judicial review. The main inducement, especially in common form contract situations, compelling the weaker party to forego the right, is the threat of a refusal to enter into the contract with him unless he does so. But at the stage when the dispute arises the contract has already been made. Similarly, in respect of contracting-out after a dispute has arisen, we consider the distinction between domestic and non-domestic agreements is also sound. It is in the latter category that there appears to be the justifiable need and desire for the freedom to be able to contract-out of judicial review. For reasons set out in paragraph 10.21, we also consider that provision should be made for these parties to be able, if they wish, to contract back in.

10.20 The Arbitration Act 1979 sub-divided non-domestic agreements into special-category (maritime, insurance, commodities) and other disputes. The right to judicial review in the special-category (as opposed to the other) group remains mandatorily entrenched in the law in England, at least for the time being, principally because it was Pelt that as judicial review has formed the backbone of the development of English commercial law, it should be maintained in the special-category area at least. Further, in that area there was apparently no evidence of any widespread desire for the freedom to contract out. It is interesting to note that in adopting the 1979 Act, the Singapore legislation (The Arbitration (Amendment) Act 1980) has also followed England in leaving the right to review entrenched for disputes in this category. But in our view there is no justification for doing so in Hong Kong and we RECOMMEND accordingly. Unlike England, judicial review of arbitration awards in this category has not contributed to any significant extent to the development of commercial law in Hong Kong. As we have noted, there have been few arbitrations here and, as far as we are aware, there have been no instances of such judicial review in recent years. Further, in our view, this category is no different from other non-domestic agreements as far as the desire for the freedom to contract out is concerned; many considerations bearing on this desire, such as speed and finality, are the same. England may well have been different in this respect for disputes in this category have played a dominant part in the development of London as an established arbitration centre. Businessmen in this field became used to judicial review and, on the whole, quite satisfied with it, except for the case-stated procedure,

and saw no particular reason to lobby for a change to its entrenchment. In Hong Kong, we feel that there are many businessmen who would prefer to opt for quick finality, even at the expense of losing some legal precision.

In passing, we note that adoption of our recommendations would not, in our view, infringe any constitutional principle specifically affecting Hong Kong, such as the right of appeal to the Privy Council.

Contracting in

10.21 On the other hand, we see no reason why parties to international contracts, who have contracted out of the jurisdiction of the Hong Kong court in their arbitration agreement, should be bound by this election. Circumstances may change and the parties may wish to agree to contract back in or, indeed, subsequently to contract out again and so on, either generally or for a particular point. It is desirable that parties should have the flexibility to vary their agreement from time to time in the light of changing circumstances. Doubt has been expressed whether legislation is needed to achieve such flexibility. But to put this matter beyond argument, we RECOMMEND that legislation be enacted to make this clear.

Appointment of Arbitrators

10.22 The Commercial Court Committee recommended a number of miscellaneous reforms. Due to the rush to get the 1979 Act through Parliament, only two were implemented. The court was given the power to appoint the arbitrator where the agreement provided that a stranger should make the appointment, but he failed or refused to do so. It was also provided that, on a reference to three arbitrators, the award of any two shall be binding. This replaced the previous provision which only permitted the umpire to play any part when the other arbitrators had already disagreed. We are of the view that these two reforms are sound and RECOMMEND their adoption in Hong Kong. But another problem has been drawn to our attention. Sometimes, for instance, all three arbitrators may disagree, for instance upon what sum to award for damages. We therefore further RECOMMEND that, where three or more arbitrators cannot agree upon the award, then the award of the Chairman shall be the award of the tribunal for purposes of enforcement.

Miscellaneous reforms

10.23 Of the other recommendations, the following are sound, in our view, for the reasons put forward by the Commercial Court Committee and are appropriate for Hong Kong (save for the modifications suggested below) and we RECOMMEND their implementation as follows :-

(a) The High Court should be given the same power, to make consolidation and similar orders in relation to arbitrations, which

it has in legal proceedings. The power to order consolidation should apply only where arbitration proceedings in respect of two or more claims have already been instituted. In the event of disagreement between the parties as to which of the existing arbitrators should hear the consolidated proceedings, the court should be empowered to direct which should do so or to order the appointment of a different arbitrator or arbitrators.

(b) Provision should be made for a payment-into-court procedure in arbitration proceedings, and enabling the arbitrator to re-open so much of the award as relates to costs in view of any such payment. Statutory provision should be made for the payments to be made to the Registrar, Supreme Court, or for acceptable bank guarantees to be given in lieu.

(c) The Commercial Court Committee also recommended the creation of an Arbitration Rules Committee with powers to make subsidiary legislation similar to those of the Supreme Court Rules Committee. As we understand the recommendation, this subsidiary legislation would be limited to rules of court prescribing the court's power over the procedural aspects of arbitration such as consolidation, payment into court, and, in Hong Kong in the light of our previous recommendations, hearings in camera and law reports thereof. Although parliamentary time is not as difficult to obtain in Hong Kong as in Westminster, we RECOMMEND that the power of the Supreme Court Rules Committee be expanded to include the power to make such subsidiary legislation. Were its membership to be slightly expanded, that body has the expertise required for this purpose, and the volume of work does not merit the creation of a separate committee.

(d) In relation to costs, arbitrators should be permitted to allow the costs of a foreign lawyer.

Reforms rejected

10.24 There are three reforms recommended which we do not think are appropriate for Hong Kong. First, we reject the suggestion that arbitrators should have the power to refer taxation of costs to an outside expert, because there are at present no such experts in Hong Kong and there are unlikely to be any in the foreseeable future. Second, it has been suggested that the term "misconduct" in section 23 of the Arbitration Act 1980 (section 25 of our Arbitration Ordinance) be changed (albeit cosmetically) to accommodate the sensitivity of arbitrators. We should, in our view, follow England in this respect, because English case-law on this provision will be of considerable assistance in Hong Kong, and might be affected by a change in terminology. Third, we have been invited to consider extending the powers of courts in connection with security for costs and attachment. Quite apart from the fact

that such orders would not be covered by the New York Convention, we reject this suggestion because the court presently has powers which are, in our view, sufficient.

The process of Conciliation

10.25 The term conciliation is often used inter-changeably with mediation. The process involves the appointment of a third party to assist the parties in reaching a reasonable settlement after a dispute has arisen; it is up to the parties whether to accept or reject the solution proposed. In short, the mediator/conciliator tries to achieve a compromise between the parties, thus avoiding the expenses, time, trouble and, very often, the acrimony of contested proceedings. Quite often, the arbitration agreement itself contains provision for the appointment of a conciliator, lays down a time limit for the conciliation process, and provides that, if no solution is achieved, the conciliator will then proceed to arbitrate the matter.

10.26 This conciliation process is a common feature of many agreements involving trade in the Far East, including China. But there are signs that it is beginning to be adopted more widely : for instance UNCITRAL has recently developed a set of Conciliation Rules.

10.27 We see no justification for imposing a compulsory conciliation process by legislation, however desirable it may be, in some cases, from a practical point of view. But where businessmen voluntarily provide expressly for it, either directly or by incorporating the arbitration rules of an institution which contain a conciliation procedure, the law should ensure its effective implementation. In our view there are four appropriate areas for legislative action.

10.28 First, where the agreement provides for the appointment of a conciliator and the appointor fails to make the appointment, we RECOMMEND that the High Court should have the residual power to do so. Otherwise the parties' agreement for a conciliation process would be frustrated.

10.29 Second, where the parties agree, either in the contract (whether directly, or indirectly by the incorporation of rules), or after a dispute has arisen, that the person appointed conciliator should, in the event that no solution is achieved by the conciliation-process, also act as arbitrator, there may be doubt as to whether such appointment, or the arbitration proceedings themselves, can be successfully challenged as invalid on this ground alone. It is arguable that his status as an independent arbitrator might have been compromised, since he might have indicated his views and would have participated, and perhaps taken the initiative, in "without prejudice" negotiations. We do not share this reservation in principle. Without prejudice negotiations are not sacrosanct. In legal proceedings a judge can be informed of them with the agreement of all parties and those proceedings are not invalidated for this reason. In the arbitration situation there is, in effect, an

agreement in advance of the negotiations. There being no objection in principle, we are of the view that the parties, express choice of the same person as both conciliator and arbitrator should be respected and upheld. We accordingly RECOMMEND that legislation be enacted to remove any doubts in this matter. If, however, the person appointed himself feels embarrassed in conducting the arbitration, after acting as conciliator, he should be entitled to decline appointment. The new arbitrator appointed in his place should embark on the arbitration without the necessity of repeating the conciliation process.

10.30 Third, in providing for the process of conciliation prior to arbitration, the parties' intentions are that this process will assist, rather than obstruct, the satisfactory resolution of such disputes as may arise. Conciliation provisions often prescribe a time limit for the process. Where parties do not so prescribe, the conciliation process can potentially be used for the purposes of delay and thus obstruct the satisfactory resolution of disputes. We accordingly RECOMMEND that legislation be enacted to prescribe a time limit of three months for the conciliation process to take place unless a contrary intention appears in the agreement; the three months should run from the time when the conciliator is appointed or, where the agreement itself names the conciliator, from the time when either party gives written notice to him that a dispute exists. In either case, by mutual agreement, the three-month time limit may be extended.

10.31 Fourth, if the conciliation solution is accepted by the parties, it should be made as effective for enforcement purposes as an arbitration award. Two methods have been suggested to us, and we RECOMMEND adoption of both. First, the rules of the institution may provide but, in their absence, legislation should provide, for a conciliated settlement to become, by consent, an arbitration award. Second, conciliated settlements should be made subject to summary judgment procedures so that, as far as foreign parties are concerned, they may thereafter be enforced abroad in the same way as other court judgments. The parties may choose to pursue either or both of these opportunities. There are differing views as to whether the former would receive recognition under the New York Convention of 1958; the better view may be that they would. The latter procedure would not be so enforceable, but would instead be subject to the treaties and laws relevant to the reciprocal enforcement of judgments. If the use of conciliation becomes widespread, and if problems arise as to enforceability, then no doubt the relevant authorities would take this into account when the ambit and working of the New York Convention is reviewed in due course.

Arbitration Institutions and Rules

10.32 In our view, the reforms recommended above would accord with the needs of the local and international community and would provide a sound legislative framework for arbitration in Hong Kong. But we have earlier concluded that the main reason why there are, at present, few arbitrations in Hong Kong is the lack of ready arbitration facilities. In our view, if Hong Kong

is to be able to exploit its potential as a centre for arbitrations in the Far East, these facilities must also develop, the reform of the legislative framework being a prerequisite but, by itself, insufficient. We therefore turn to consider what practical measures we can recommend to this end.

10.33 It is through arbitration institutions that arbitration facilities can be made readily available and economical. We have surveyed the present ones in Hong Kong. We considered whether in Hong Kong there should be an institution in which Government played an important part by providing the finance and/or the management. We unhesitatingly reject this idea, which we believe would be contrary to the policy of positive non-intervention adopted by the Hong Kong Government. Moreover businessmen would, in our view, dislike strongly the idea of having their disputes resolved through an institution controlled by Government. Indeed, the responses to our questionnaires dealing with this issue all opposed the idea of any Government participation in an arbitration institution.

10.34 In our view arbitration facilities should be provided through private institutions. If the demand is there, then the present ones will grow. With increasing demand, new ones (including Hong Kong branches of existing arbitration institutions) may well be established. There is, and there should be, no legal impediment to this. Government should not play any direct role in these private institutions. But it can usefully assist in the development of arbitration in Hong Kong in three specific respects.

Role of Government

10.35 First, the Government can help to publicise and promote Hong Kong as an arbitration centre. Second, it can assist in the provision of accommodation for arbitrations, for instance when possible by making suitable accommodation controlled by Government (such as the court rooms of the Inland Revenue Board of Review), when not otherwise required, available for arbitrations at reasonable cost. In the event that major advances are made in the development of Hong Kong as an international arbitration centre, and that the availability of accommodation poses a serious problem, Government may wish to consider how accommodation can best be made available to arbitration institutions on a long term basis. Third, Government should stimulate and assist, so far as it can, the development of these private institutions and, in the light of such development, it may in due course have a co-ordinating role to play.

Manpower

10.36 As Hong Kong is short of arbitrators and persons who have experience of appearing in arbitrations, there should be as little impediment as possible to overseas personnel coming to Hong Kong. We RECOMMEND that Government should examine this question particularly in relation to the various professions. But we recognise that other aspects of the public interest,

such as the proper local development of these professions, must be taken into account. Possibly a distinction should be drawn between arbitrations the subject matter of which is local to Hong Kong, and those whose sole connection with Hong Kong is that one of the parties conducts business in Hong Kong (say, a dispute concerning the supply of equipment by a foreign Company through its Hong Kong branch for installation and use outside Hong Kong). It may also be that different criteria should apply in this regard to arbitrators, and to those who appear in arbitrations.

Judges and others as Arbitrators

10.37 In England, the Administration of justice Act 1970 enables judges of the Commercial Court to accept, subject to the agreement of the Lord Chancellor, appointment as sole arbitrator or umpire under an arbitration agreement within the Arbitration Acts where the dispute appears to him to be of a commercial character. In such instances, the appellate jurisdiction of the High Court over arbitrations is exercised by the Court of Appeal.

10.38 In view of the shortage of arbitrators in Hong Kong, we RECOMMEND that similar legislation be enacted, with the modifications that (a) any judge of the High Court or District Court can accept any appointment as arbitrator (not merely sole arbitrator) or umpire, and (b) the dispute need not be of a commercial character. There are those who express doubt about the necessity for legislation in this area. We take the view that an express statutory provision is desirable for the avoidance of doubt and for the benefit of the overseas reader of our legislation.

10.39 We RECOMMEND, also, that the proposed legislation should make provision for the appointment as arbitrators of Government servants, such as lawyers in Attorney General's Chambers or quantity surveyors employed by the Public Works Department. But in respect of Judges and of public servants, appointment should be permissible only with the agreement of the Chief justice or Attorney General respectively who would have regard to the public interest, including other work priorities of the appointee. Naturally, fees for these services would be payable by the parties to the Government at such rates as the Chief Secretary should, from time to time, require.

Education

10.40 In our view, useful measures could also be taken with regard to education. We note that the School of Law already provides some teaching in arbitration law and practice in its P.C.LL. course (the professional examination for both the Bar and Solicitors), and we welcome this. We have considered the possibility of greater emphasis being placed on the teaching of arbitration law and practice in the LL.B. and P.C.LL. courses but fear that this may not be a practical possibility, bearing in mind the core subjects that are already included in the curriculum. We RECOMMEND that :

(a) The Universities and the Polytechnic should consider teaching arbitration law and practice as part of their business administration or studies courses.

(b) The School of Law and the Extra-Mural Department of the University of Hong Kong, in conjunction with the Chartered Institute of Arbitrators, should consider running part-time courses on arbitration law and practice, geared towards the examinations of that Institute.

(c) There is a case made for a postgraduate course by the School of Law for Diploma or LL.M., by course work, which could include Commercial Arbitration as one of the subjects offered.

XI SUMMARY OF RECOMMENDATIONS

Judicial Review

11.1 The new system of judicial review based on reasoned awards contained in the Arbitration Act 1979 should be adopted, with the modification that the right of further appeal to the Court of Appeal from a decision of the High Court on an appeal on a point of law from an arbitrator, or from a decision of the High Court granting or refusing leave to appeal or deciding to entertain a preliminary point of law, should be limited only in one respect, by requiring leave from the High Court or the Court of Appeal (paragraphs 10.2 - 10.5).

Appeals in Camera

11.2 Legislation should empower the court to hear all appeals in arbitration matters in camera, on the application of either party, in the absence of such exceptional circumstances as may be prescribed by rules of court (paragraphs 10.6 - 10.9).

Sanction for Delay

11.3 The sanction for delay contained in the 1979 Act, whereby the High Court can confer on the arbitrator the power to proceed with the arbitration in default of appearance, or of any other act by one of the parties, should be adopted (paragraph 10.10).

Further Sanctions

11.4 To provide a further sanction for delay, legislation should confer on the High Court the power to strike out a claim in arbitration proceedings on the ground of delay where it is in the interests of justice. Legislation should

provide further that, subject to any contrary intention, there is to be implied in an arbitration agreement a term that in the event of a dispute it shall be the duty of the claimant to exercise due diligence in the prosecution of his claim, but such contrary intention should not be found to exist in the mere fact that the parties had concluded an arbitration agreement (paragraphs 10.11 - 10.18).

Contracting Out

11.5 The contracting out provisions in the 1979 Act should be adopted with one modification : the special-category disputes (maritime, insurance, commodity) should be dealt with in Hong Kong in the same way as other non-domestic arbitration agreements (paragraphs 10.19 - 10.20).

Contracting In

11.6 There should be provision for parties to international contracts (who have contracted out of the jurisdiction pursuant to the recommendation contained in paragraph 11.5) to vary that agreement from time to time, either generally, or on a particular point (paragraph 10.21).

Arbitrators

11.7 The provisions in the 1979 Act giving the court the power to appoint the arbitrator where a stranger should have made the appointment but failed to do so; and the provision that where there is a reference to three arbitrators the award of any two shall be binding, should be adopted. Where there are three or More arbitrators, legislation should also provide that, in the event of disagreement, not amounting to a majority, the award of the Chairman shall be "the award" (paragraph 10.22).

Legislation should be Enacted *(paragraph 10.23)*

Consolidation Orders

11.8(a) To give the High Court the power to make consolidation and similar orders in relation to arbitrations. This power should apply only where arbitration proceedings in respect of two or more claims have already been instituted. In the event of disagreement between the parties as to which of the existing arbitrators should hear the consolidated proceedings, the court should be empowered to direct the appointment of an arbitrator to undertake the enlarged arbitration hearing.

Payment into Court

11.8(b) To provide for a payment into court procedure for arbitrations by way of payment to the Registrar of the Supreme Court and to enable the arbitrator to re-open so much of the award as relates to costs.

Rules of Court

11.8(c) To expand the powers of the Supreme Court Rules Committee so that it could make subsidiary legislation dealing with the court's powers over the procedural aspects of arbitration, including hearings in camera and editing of reports of such cases to protect identity.

Costs of Foreign Lawyers

11.8(d) To provide that arbitrators can allow the costs of a foreign lawyer.

Conciliation

11.9 Legislation should be enacted

(a) To give the High Court the power to appoint a conciliator where the agreement between the parties provides for his appointment which the appointor fails to make (paragraph 10.28).

(b) To ensure that the appointment by the parties of the same person as conciliator and arbitrator would not render such appointment or the arbitration proceedings invalid, that such person is entitled to decline to act as arbitrator and that the new arbitrator appointed need not conduct the conciliation process over again (paragraph 10.29).

(c) To provide that, unless a contrary intention appears in the agreement, there be a time limit for the conciliation process to take place of three months from the time of the appointment of the conciliator or, where the agreement itself contains the appointment, from the time of a dispute arising (paragraph 10.30).

(d) To provide that a conciliated settlement (i) becomes enforceable as an arbitration award by consent, and (ii) is easily convertible into a summary judgment of the court and is enforceable accordingly (paragraph 10.31).

Arbitration Institutions

11.10 Ready arbitration facilities should be provided through private institutions (paragraph 10.34). Government should play no role in these

institutions but can assist in the development of arbitration in Hong Kong generally in the three respects set out in paragraph 10.35.

Manpower

11.11 In view of the shortage of arbitrators and persons who have experience of appearing in arbitrations in Hong Kong, Government should examine (particularly in relation to the professions) the impediments that exist at present to overseas experts conducting and appearing in arbitration proceedings in Hong Kong and whether any changes are desirable (paragraph 10.36).

Judges as Arbitrators

11.12 Legislation, similar to the Administration of justice Act 1970, should be enacted to enable any judge of the High Court or District Court and any civil servant to accept appointment as arbitrator or umpire (paragraph 10.38).

Education

11.13 The Universities and the Polytechnic should examine the suggestions for the teaching of arbitration law and practice set out in paragraph 10.40.

XI 建議摘要

司法檢討

11.1 根據一九七九年仲裁法所載之合理裁處而制訂之新司法檢討制度應予採納，惟須略加修改，即規定當某方不服仲裁人之決定而根據法律論點向高院原訟庭提出上訴，而高院原訟庭亦經就此作出裁決後，或當高院原訟庭准許或不批准上訴，或當高院原訟庭決定接納一項初步之法律論點時，如欲再向高院上訴庭提出上訴，則須先獲高院原訟庭或高院上訴庭之許可（第 10.2 及第 10.5 段）。

清堂聆訊上訴

11.2 如無法庭規則所指定之特別情形時，法例應授權法庭根據訴訟任何一方所作之申請，清堂聆訊一切與仲裁事宜有關之上訴（第 10.6 至第 10.9 段）。

延誤之罰則

11.3 一九七九年仲裁法爲延誤一事所規定之罰則，即高院原訟庭可授權仲裁人任何一方缺席或未有採取必需之行動時，可進行裁處之罰則，應予採納（第 10.10 段）。

另一項罰則

11.4 爲避免任何一方利用延誤取巧，有關法例須進一步授權高院原訟庭，爲維護公正起見，基於延誤之理由而將仲裁訴訟中任何一方之聲請撤銷。法例並須規定，除有相反之意向外，仲裁協定須隱含下述條件，即遇有爭執時，聲請人有責任儘速進行控訴，惟上述相反之意向不得僅因雙方經已簽訂仲協定而視爲存在（第 10.11 至第 10.18 段）。

雙方協議一同免受法例約束

11.5 一九七九年仲裁法所載有關雙方協議一同免受法例約束之條款應予採納，惟須修訂如下：在香港處理之特別種類爭執（例如海事、保險、期貨等）應與其他非在本地簽訂之仲裁協定同樣處理（第 10.19 至第 10.20 段）。

雙方協議同受法例約束

11.6 法例須規定雙方所簽訂之國際合約（即上文第 11.5 段所述經協議一同免受法例約束者）可隨時作一般性之修改，或祇修改其中某一項條款（第 10.21 段）。

仲裁人

11.7 一九七九年仲裁法規定第三者如須委出仲裁人而未有照辦時，法庭有權委出仲裁人；該法之另一項規定爲三位仲裁人其中之兩位如作出同一裁處，則該項裁處將具約束力。上述兩項規定均應採納。如爲數達三位或以上之仲裁人對應作之裁處未能達成一致或大多數相同之意見時，則法例預規定以主席所作之裁處爲準（第 10.22 段）。

應制訂之法例（第 10.23 段）

綜合命令

11.8 (甲) 授權高院原訟庭爲仲裁事宜，頒佈綜合及類似之命令，惟此項權力祇在兩項或多項聲請之訴訟程序經已進行時，方可適用。如各方未能同意原有仲裁人中何人應聆訊綜合訴訟時，則法庭須有權委派仲裁人，以聆訊合而爲一之仲裁訴訟。

向法庭繳款

(乙) 爲仲裁事宜規定向法庭繳款之程序，所有款項須繳予最高法院經歷司。此外，並規定仲裁人可根據訟費而對裁處作出相應之修訂。

法院規則

(丙) 擴大最高法院規則委員會之權力，使其可制訂附屬法例，規定法庭處理仲裁程序所具之權力，包括清堂聆訊及規定該等案件之法庭報告不得披露訴訟人之身份。

外地律師之訟費

(丁) 規定仲裁人可批准支付外地律師之訟費。

調停

11.9 應制訂之法例如下：

(甲) 如雙方簽訂之協議規定須委任調停人而結果未有委出，則高院原訟庭有權委任調停人（第 10.28 段）。

(乙) 明確規定如雙方協議委任同一人爲調停人及仲裁人，則該人之獲委任及其進行之仲裁程序人會因此而成爲無效；該人亦可拒絕担任仲裁人，而委出之仲裁人不必重新進行調停之程序（第 10.29 段）。

(丙) 除非協議有相反之規定，否則蓮行調停程序之期限爲三個月，由委任調停人之日起計，惟協議載有委任調停人之規定時，則由雙方發生爭執之日起計（第 10.30 段）。

(丁) 規定調停和解（i）一如雙方同意之裁處而可强制執行，及（ii）容易轉爲法庭之簡易判決，故亦可强制執行（第 10.31 段）。

Annexure 1

Commercial Arbitration Sub-committee

Membership

(Chairman)	Mr. Andrew Li *	Barrister
	The Hon F.K. Hu *	Ryoden Engineering
	Dr. Philip Kwok *	Wing On Group
	Mr. Ernest Low	Engineer, Chairman, Chartered Institute of Arbitrators in Hong Kong
	Mr. Andrew Powell	Solicitor, Norton Rose Botterell & Roche (Resigned in August 1981 on return to U.K.)
	Mr. David Li	Bank of East Asia
	Mr. Anthony Dicks	Barrister
	Mr. John Bullitt	American Attorney, Shearman & Sterling (Resigned in June 1981 on return to U.S.A.)
	Mr. TONG Kay-tak	Solicitor, Johnson Stokes & Master
(Secretary)	Mr. Andrew Hodge	Attorney General's Chambers

* Commission member

Annexure 2

COMMERCIAL ARBITRATION
(Topic 1)

MATERIALS

I GENERAL :

1. P.I. Benjamin, "The Developing Nations and Certain Legislative Obstacles in the Field of International Commercial Arbitration", in International Arbitration Liber Amicorum for Martin Domke 1 (Pieter Sanaers ed. 1967)

2. Chun Pyo Shong, "The Settlement of Disputes arising form International Trade and Investment", LawAsia 21 (December, 1969)

3. A. Redfern, "Arbitration : Myth and Reality". (Supplied the School of Law, University of Hong Kong; source unknown)

4. "Selected Arbitration Clauses" Summary by the School of Law, University of Hong Kong

5. R.E. Lerner, "International Arbitration and Developing Countries of Asia and Africa", Reprinted from New York Law Journal (29 November 1979)

6. J.T. McLaughlin, "Arbitration and Developing Countries", (1979) 13 International Law 211

7. H.M. Holtzmann, "Dispute Resolution Procedures in East-West Trade", (1979) 13 International Law 233

8. S.V. Goekjian, "The Conduct of International Arbitration" in (1979) 11 Lawyer of the Americas 409 (University of Miami)

9. Sir Michael Kerr, "Resolution of Commercial Disputes : Arbitration v. Litigation", in Law Lectures for Practitioners (Hong Kong Law Journal Limited, 1979, page 27)

10. Conor D. Reilly, "The Role of International Commercial Arbitration in Asia". Paper delivered to LawAsia Conference, Bangkok (August, 1981)

11. B.W. Vigrass, "The Role of Arbitration Institutions" Paper delivered to International Arbitration Conference, Hong Kong (October, 1981)

II UNITED NATIONS

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Text Approved 10/6/58 by the United Nations Conference)

2. P. Sanders, "A Twenty Years' Review of the Convention", (1979) 13 International Lawyer 269

3. A.J. van den Berg, "The New York Arbitration Convention of 1958" (1981, T.M.C. Asser Institute, The Hague)

4. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (adopted 15/12/76 by U.N. General Assembly)

5. Uncitral Conciliation Rules (1980)

6. United Nations Economic Commission for Asia and the Far East (ECAFE) Centre for Commercial Arbitration, "International Commercial Arbitration by the Centre for Commercial Arbitration of the Economic Commission for Asia and the Far East - Report Submitted to the Seminar on International Commercial Arbitration" (New Delhi, March 18 - 19, 1968)

7. Professor P. Sanders, "E.C.A.F.E. Rules for international Commercial Arbitration", in International Arbitration Liber Amicorum for Martin Domke 252 (Pieter Sanders ed. 1967)

8. Dr. P.J. Slot, "Survey of Maritime Legislation in Bangladesh, Indonesia, Philippines, Singapore and Thailand" for Economic and Social Commission for Asia and the Pacific United Nations (ESCAP) (April, 1981, Bangkok)

9. Suwit Suwan, "International Commercial Arbitration and Enforcement of Foreign Judgements" Paper delivered to LawAsia Conference, Bangkok (August, 1981)

III ENGLAND :

A. BACKGROUND

1. Viscount Kilmuir, "The Future of the Commercial Court" [1961] Journal of Business Law 8 (Stevens and Sons Ltd., London)

2. Sir Michael Kerr, "The English Courts and Arbitration", address to the British Institute of International and Comparative Law, (October, 1974)

3. Professor C.M. Schmitthoff, "The Reform of the English Law of Arbitration", [1978] Journal of Business Law 305 (Stevens and Sons Ltd., London)

4. Lord Diplock, "The Case Stated - It's Use and Abuse", [1978] Arbitration 107 (Fourth Alexander Lecture delivered to "the Institute of Arbitrators on 28 February 1978)

5. Sir John Donaldson, "Future Trends in Arbitration", [1978] Arbitration 236 (Text of paper given at Sixth Annual Conference of Institute of Arbitrators, Bristol, England)

6. M. Littman, Q.C., "England Reconsiders 'The Stated Case'", (1979) 13 International Lawyer 253

7. Russell on the Law of Arbitration (19th Edition) 1979 (ed. Anthony Walton, Q.C, Stevens, London)

B. HISTORY OF 1979 LEGISLATION

1. House of Lords 15/5/78 - Question by The Lord Hacking to the Lord Chancellor

2. Commercial Court Committee Report on Arbitration, the Hon. Mr. Justice Donaldson, Chairman (Cmnd. 7284) published July 1978

3. Arbitration Bill (presented to the House of Lords on 28/11/78)

4. House of Lords, First Reading, 28/11/78

5. House of Lords, Second Reading, 12/12/78

6. Amendments to be moved in Committee by the Lord Hacking (11/1/79)

7. Amendments to be moved in Committee by Lord Lloyd of Kilgerran (15/1/79)

8. Amendments to be moved in Committee by the Lord Chancellor (16/1/79)

9. Marshalled list of amendments to be moved in Committee (17/1/79)

10. House of Lords, in Committee (18/1/79)

11. Arbitration Bill [as amended in Committee] (18/1/79)

12. Amendments to be moved on report by the Lord Hacking (26/1/79)

13. Amendments to be moved on report by Lord Lloyd of Kilgerran (30/1/79)

14. Amendments to be moved on report by the Lord Chancellor (l/2/79)

15. Marshalled list of amendments to be moved on report

16. House of Lords, Report of Amendments received (5/2/79)

17. Arbitration Bill [as amended on report] (5/2/79).

18. Marshalled list of amendments to be moved on Third Reading (13/2/79)

19. Revised Marshalled list of amendments to be moved on Third Reading (14/2/79)

20. House of Lords, Third Reading (15/2/79)

21. House of Commons, Second Reading Committee (14/3/79)

22. House of Commons, Second Reading (16/3/79)

23. House of Commons, Considered in Committee (2/4/79)

24. Arbitration Act 1979 (assented to, 4/4/79)

C. ARTICLES AND COMMENTS

1. "Arbitration Bill 1978", New Law journal 1191 (7 December, 1978)

2. The Lord Hacking, "International Commercial Arbitrations - Recent Developments in London, Paris and Stockholm", (Text of Address to Society of Maritime Arbitrators, New York, 2 February, 1979)

3. The Lord Hacking, "The 'Stated Case' Abolished U.K. Arbitration Act (1979)", reprinted from The International Lawyer

4. "Arbitration Act 1979", Comment in 123 Solicitors' Journal 359 (1979)

5. Dr. E.A. Marshall, "The Arbitration Act 1979", [1979] Journal of Business Law 241

6. P.S. Smedresman, "The Arbitration Act 1979", (1980) 11 Journal Maritime Law and Commerce 319

7. Sir Michael Kerr, "The Arbitration Act 1979", (1980) 43 Modern Law Review 45

8. Dr. J. Trappe, "Looking to the Future – What Further Changes are Needed in Law and Procedure?"[1980] Arbitration 14

9. R.J. Soper, "English Arbitration - Use and Abuse", [1980] Arbitration 20

10. W.W. Park, "Judicial Supervision of Transnational Commercial Arbitration : The English Arbitration Act of 1979", (1980) 21 Harvard International Law Journal 87

11. B.A. Hermann, "London's Opportunity in Arbitration", Financial Times (31 July, 1980)

12. D. Rhidian Thomas, "An appraisal of the Arbitration Act 1979" (1981) Lloyds Maritime and Law Quarterly 199

13. Raymond Hughes "Law Lords Ruling shifts power to Arbitrators" (commentary on "The Nema") Financial Times, 17 July, 1981

14. Lloyds Maritime Law Newsletters Issues Nos. 1 – 10 (1979 - 1980) Ed. Wendy Evans

D. DECISIONS OF THE COURTS

1. The Delian Leto [1979] 2 Lloyds Rep. 179

2. Lind v. Hart [1979] 2 Lloyds Rep. 248

3. The Furness Bridge [1979] 2 Lloyds Rep. 267

4. The Archipelagos [1979] 2 Lloyds Rep. 289

5. Finney Lock Seeds v George Mitchell [1979] 2 Lloyds Rep. 301

6. Congimex v. C.G.E.C [1979] 2 Lloyds Rep. 346

7. Mertens & Co. v. Veevoeder Import [1979] 2 Lloyds Rep. 372

8. The Rena K [1979] 1 Q.B. 377

9. The Ciechocinek, [1980] 1 Lloyds Rep. 97

10. The Betis [1980] 1 Lloyds Rep. 107

11. The Nema, C.A., The Times (24/5/80)

12. Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema) [1980] 3 All E.R. 117, C.A.

13. B.T.P. Tioxide Ltd. v. Pioneer Shipping (The Nema) [1981] 2 W.L.R. 292

14. B.V.C. v. Kerman Shipping Co. S.A., The Times (22/10/81)

15. Mondial v. Gill & Duffus [1980] 2 Lloyds Rep. 376

16. Czarniknow v. Roth, Schmidt and Company [1922] 2 K.B. 478

17. Bremer Vulkan v. South India Shipping Corporation [1981] 1 Lloyds Rep. 253

18. Turiff Ltd. v. Richards & Wallington (Contracts) Ltd. [1981] Commercial Law reports 39

19. Andre et Compagnie v. Marine Transocean Ltd. [1981] 3 W.L R. 43

E. CHARTERED INSTITUTE OF ARBITRATORS

1. Professor C. Schmitthoff, Draft of Arbitration Rules, London Court of Arbitration (1980 Edition)

2. Professor C. Schmitthoff, Draft of Arbitration Rules, Chartered Institute of Arbitrators (1980)

3. International Arbitration Rules, London Court of Arbitration (1981)

4. Draft of Scottish Arbitration Rules of the Chartered Institute of Arbitrators (as amended by Professor c. Schmitthoff)

5. Notes on Arbitration Practice under Scottish Law

6. "Arbitration" : The journal of the Chartered Institute of Arbitrators

   (i) July 1979 (Volume 45, Number 3)

   (ii) February 1980 (Volume 46, Number 1)

7. R. Gibson-Jarvie and G. Hawker, "A Guide to Commercial Arbitration Under the 1979,Act" (Chartered Institute of Arbitrators, London. 1980)

8. Examinations

   a. Syllabus for the Associateship Examination, Part I

   b. Part I Examination, Past Papers, June 1976 - June 1979

IV THE FAR EAST

1. AUSTRALIA

1. J. Goldring, "Australia", [1977] 2 Y.B. Comm. Arb. 3

2. INDIA

1. N. Krishnamurthi, "India", [1977] 2 Y.B. Comm. Arb. 31

3. INDONESIA

1. Arbitration in Indonesia and International Conventions on Arbitration (Indonesian National Board of Arbitration, Penerbit Alumni, 1979) (International Conventions Omitted)

2. R.N. Hornick. "The Recognition and Enforcement of Foreign Judgments in Indonesia, (1977) 18 Harvard International Law Journal 97

4. JAPAN

1. T. Doi, "Japan", [1979] 4 Y.B. Comm. Arb. 115

2. T. Doi, "International Commercial Arbitration in Japan" in International Arbitration Liber Amicorum for Martin Domke 65 (Pieter Sanders ed. 1967)

3. T. Kawakami and D.F. Henderson, "Arbitration in U.S./Japanese Sales Disputes", (1967) 42 Wash. L. Rev. 541

4. J. Goldring, Commercial Arbitration in Japan-Australia Trade Disputes (1973)

5. H.A. Gardner, "Japanese Arbitration Law", 8 Arb. J. 89 (1953)

6. T. Kitagawa, "Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective" in International Arbitration Liber Amicorum for Martin Domke 133 (Pieter Sanders ed. 1967)

7. T. Sawaki, "Arbitration Clause and Governing Law Clause Under Japanese Law" in 54 Quarterly of the Japan Commercial Arbitration Association 2 (1974)

8. T. Kitagawa and F. Fukushima, "Japan : the Japan Commercial Arbitration Association" in Handbook of

Institutional Arbitration in International Trade 115 (E.J. Cohn, M Domke, F. Eisemann, eds. 1977)

9. Commercial Arbitration Rules of the Japan Commercial Arbitration Association, as amended and in effect February 1, 1971

10. H. Hattori, International Commercial Arbitration Practised by the Japan Commercial Arbitration Association "communication" of the Japan Commercial Arbitration Association (October, 1969)

11. Agreement between the Japan Commercial Arbitration Association and the American Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade between Japan and the United States of America, September 16, 1952

12. "Japan American Commercial Arbitration Agreement", (1952) 7 Arb. J. 237

13. Agreement between the Inter American Commercial Arbitration Commission and the Japan Commercial Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade Between Latin American Countries and Japan

14. Agreement between the Federation of Chambers of Commerce and Industries, Pakistan and The Japan Commercial Arbitration Association Regarding the Use of Arbitration Facilities in Trade Between Pakistan and Japan

15. Agreement between the Board of Trade of Thailand and the Japan Commercial Arbitration Association

16. Teruo Doi "Recognition and Enforcement of Foreign Judgments : A Review of Japanese Court decisions under Article 200 of the Code of Civil Procedure". Paper delivered to LawAsia Conference, Bangkok (August, 1981)

5. **KOREA (SOUTH)**

1. Arbitration Law of Korea, promulgated March 16. 1976, amended on February 17, 1973

2. Commercial Arbitration Rules, approved by the Supreme Court and Put in Effect 3 April, 1973

3. Song Kun Liew, Commercial Arbitration in Korea – with Special Reference to the UNCITRAL Rules (Organising Committee for Seoul Conference ed. 1977)

4. Arbitration Guide, What it is and How it Serves (The Korean Commercial Arbitration Committee)

5. Agreement between the American Arbitration Association and the Korean Commercial Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade between the United States of America and the Republic of Korea

6. SONG Kun Liew, "The Recognition and Enforcement of Foreign Arbitral Awards in Korea" Paper delivered to LawAsia Conference, Bangkok (August, 1981)

7. SONG Won Lee, "Legal Protection to Foreign Investments in Korea" Paper delivered to LawAsia Conference, Bangkok (August, 1981)

8. BYOUNG Kook Min, "Role of Multinational Corporations - The Korean Case" Paper delivered to LawAsia Conference, Bangkok (August, 1981)

6. MALAYSIA

1. Industrial Relations Act, 1967 (Revised - 1976). Published 12/8/76 in His Majesty's Government Gazette, effective 1/9/76

2. Arbitration Act, 1952 (Revised - 1972) Published 12/10/72, Effective 1/11/72

3. Memorandum on Integrated Regional Disputes Settlement System in International Trade and Commerce under the Auspices of the Asian-African. Legal Consultative Committee

4. Asian-African Legal Consultative Committee Report on the Inauguration of the AALCC's Regional Centre for Arbitration at Kuala Lumpur

5. Text of the Speech by the Rt. Hon. The Prime Minister of Malaysia at the Opening of the Regional Centre for Arbitration, at Kuala Lumpur (17 October, 1978)

6. Text of the Statement by the Secretary General of the African - Asian Legal Consultative Committee at the opening of the Regional Centre at Kuala Lumpur

7. "Arbitration Under the Auspices of the Kuala Lumpur Centre" 1979 Publication of the Regional Centre

8. International Panel of Arbitrators, Regional Centre for Arbitration, Kuala Lumper 1980 publication of the Regional Centre

9. Z.M. Yatim : "Regional Centre for Arbitration, Kruala Lumpur", The Malayan Law Journal, October, 1978

10. Mohammed Nizar Idris, "Regional centre for Arbitration, Kuala Lumpur, Malaysia" (1980) International Business Lawyer, Vo. 8, No. 4

11. Conference of Government officials and Representatives of Chambers of Commerce on Modalities for settlement of disputes in International Commercial Transactions - Kuala Lumpur (Report) 3 - 6 July 1979

12. Press statement by the Rt. Hon Minister of Trade and Industries on the occasion of the signing of a New Agreement Between Malaysia and the Asian-African Legal Consultative Committee relating to the Regional Centre for Arbitration, Kuala Lumpur on 29th July, 1981

13. Press Release

Agreement between the Government of Malaysia and the Asian-African Legal Consultative Committee on Regional Centre for Arbitration at Kuala Lumpur

7. MONGOLIA

1. D. Dashdondog, "Mongolia", [1976] 1 Y.B. Comm. Arb. 63

8. NEW ZEALAND

1. James Green, "The New Zealand Experience" Paper delivered to International Arbitration Conference, Hong Kong (October, 1981)

9. PEOPLE'S REPUBLIC OF CHINA

(i) TRADE AND LAW

1. V.H. Li, "Legal Aspects of Trade with Communist China", 3 Col. J. of Trans'l. Law 57 (1964)

2. J.A. Cohen "Chinese Mediation on the Eve of Modernisation", 54 Calif. L. Rev. 1201 (1966)

3. S.B. Lubman, "Mao and Mediation Politics and Dispute Resolution in Communist China", 55 Calif. L. Rev. 1284 (1967)

4. G.T. Hsiao, "Communist China's Trade Treaties and Agreements (1949 - 1964)", 21 Vand. L. Rev. 623 (1,968)

5. G.T. Hsiao, "Communist China's Foreign Trade Contracts and Means of Settling Disputes", 22 Vand. L. Rev. 503 (1969)

6. G.T. Hsiao, "The Fourth Sino-Japanese Trade, Agreement", in China's Practice of International Law : Some Case Studies 141 - 43 (J. Cohen ed. 1972)

7. A collection of Papers on Trade with China in 38 Law and Contemp. Problems 173 - 273 (1973)

   (a) K. Gryzbowski, "Control of U.S. Trade with China : An Overview", ibid., 1975

   (b) K. Wang, "Foreign Trade Policy and Apparatus of the People's Republic of China", ibid., 182

   (c) Tung-pi Chen, "Legal Aspects of Canadian Trade with the People's Republic of China" ibid., 201

   (d) C.E. Kroese, "Dutch Trade with the People's Republic of China", ibid., 230

   (e) M. Tsuchiya, "Recent Developments in Sino-Japanese Trade", ibid., 240

   (f) Liang-shing Fan, "The Economy and Foreign Trade of china", ibid., 249

8. S.B. Lubman, "Legal, Financial and Practical Aspects of Trade with the People's Republic of China" in Private Investors Abroad - Problems and Solutions in International Business 112 - 59 (1973)

9. D.C. Buxbaum, "American Trade with the People's Republic of China : Some Preliminary Perspectives", 12 Col. J. f Trans'l. law 39 (1973)

10. "Japan-China Trade Agreement Concluded", 54 Quarterly of the Japan Commercial Arbitration Association 1 (1974)

11. J.K. Fairbank, "East Asia : Our One-China Problem" (Source unknown)

12. S.H. Chou, "China's Foreign Trade", Current History 68 (September 1976)

13. V.K. Ranganathan, "An Introduction to the Economy of China", Outline accompanying Lecture delivered in Hong Kong (October 7, 1976)

14. L. Goodstadt, "Better Prospects for the Foreign Trader", Insight 46 (December 1976)

15. E.A. Theroux, "Legal Resources for Trade with China", in U.S. - China Bus. Rev. 33 (January - February) (1976)

16. S.B. Lubman, "Trade between the United States and the People's Republic Of China : Practice, Policy and Law", 8 Law & Policy in Int'l. Bus. 1 (1976)

17. G.T. Hsiao, "The Ministry of Foreign Trade", in The Foreign Trade of China : Policy, Law & Practice 71 - 101 (1977)

18. M. Palay, "Legal Aspects of China's Foreign Trade Practices and Procedures", 12 J. of Int'l. Law and Economics 105 (1977)

19. R. O'Brien, "The Marxist System in Action China's International Trade Law with Particular Reference to Trade with the West", Lecture Outline and bibliography (University of Hong Kong, 1977)

20. "China invests in Real Estate", South China Morning Post (28/4/77)

21. Liu Yiu-chu, "China Trade Forum", The China Trade Report (Date unknown)

22. B. Parry, "The Chinese Connection", in Law Society Gazette, 3/5/78

23. "Peking pushes joint ventures", Hong Kong Standard, 30/11/78

24. Liu Yiu-chu, "An approach to the Study of the Legal Aspects of Trading with China", Text of address to the Law School of the University of Hong Kong (Date unknown)

25. "Compensation Trade : Specimen Agreements", China Economic Times, 16/11/78

26. Tseng Chun-wei, "China Council for the Promotion of International Trade – Its Functions and Activities", in A Seminor on China's Foreign Trade and Its Management 113, 120 – 25 (UNCTAD and PRC Ministry of Foreign Trade eds., 1978)

27. J.C. Young, "United States - China Aviation Relations - A Case of Control, Conflict and Compromise", 2 Air Law 219 (1978)

28. Professor J.A. Cohen and W.G. McAfee, "China Builds Legal Framework for Modernisation", National Law Journal 130, 21/5/79

29. Professor J.A. Cohen and O.D. Nee, Jr., "Joint Ventures : Behind the Headlines", Asian Wall Street Journal, 23, 23/7/79

30. Professor J.A. Cohen, "Has Justice a Fairer Future in China?" Article ASIA 3 (January/ Feburary 1979)

31. J. Kaufman, "Gripes could go to Peoples Court", South China Morning Post, 15/3/79

32. D. Bonavia, "Hua Spells Out Deng's Brave New World", Far Eastern Economic Review 10, 6/7/79

33. Wen Wei Po, ed. Law of the P.R.C. on Joint Ventures Using Chinese and Foreign Investment (Beijing, 1979)

34. Professor P. Willoughby, "Joint Ventures in China - The Law of the P.R.C. on Joint Ventures Using Chinese and Foreign Investments", South China Morning Post, 2/8779

35. Julie Au-Yeung, "Professor Liu Chao-jin [Director of Foreign Trade Department of Peking Foreign Trade Institute] Makes China Trade Picture Clearly, South China Morning Post, 18/9/79

36. Julie Au-Yeung, "Joint Firms Must Pay Better", South China Morning Post, 19/9/79

37. Julie Au-Yeun, "Local Experts to 'pave the way' for China", South China Morning Post, 25/9/79

38. "Text of Trade Agreement between United States and china", Bureau of National Affairs, 9/7/79

39. "Trade Policy : U.S. - China Agreement Provides Reciprocal MFN Treatment" Commentary in the Bureau of National Affairs, 9/7/79

40. Commentary in the U.S. Department of Commerce, Office of International Trade Policy, Industry Consultations Bulletin, Vol. II No. 6, 8/6/79

41. "Chinese Trade Fact is sent to Congress", New York Times, 24/10/79

42. "China's Impact on World Trade - the Hong Kong Position", Conference sponsored by Hong Kong Management Association, 30/11/79

Papers Presented :

(a) Lord Hartley Shawcross, "China's Impact on World Trade"

(b) A.D.A.G. Mosley, "Hong Kong as a Financial Centre with Special Reference to China"

(c) Liu Nyap Tse, "How the Hong Kong Businessman Can Assist China in its Modernisation,,

(d) S.B. Lubman, "Practical Aspects of China's Emerging Institutions for Trade and Investment"

43. H.M. Holtzmann, "A New Look at Resolving Disputes in U.S. - China Trade" in A New Look at Legal Aspects of Doing Business with China (Practising Law Institute, New York, H.M. Holtzmann & W.S. Surrey eds. 1979)

44. "Trade with China", 65 A.B.A.J. 1063 (1979)

45. L. Nicholls, "CFIC Gives Nod to Three More Joint Ventures" Hong Kong Business Standard 1 (8/7/80)

46. P. Loong, "Arguing for Arbitration : China May Establish Special Centres to Help Resolve the Growing Number of Disputes", in Far Eastern Economic Review 144 (19/9/80)

47. G. McAfee, China's Route to Production Sharing Contracts for off-shore Oil Exploration (Coudert Brothers, Hong Kong, 1980)

48. Karl P. Herbst, "The Baoshan Dilemma : A Legal Viewpoint" (1981)

(ii) **TRADE MARKS**

1. Regulations Governing Trade Marks, promulgated 10/4/63

2. Implementing Rules under the Regulations Governing Trade Marks, promulgated 25/4/63

3. Classification of goods

4. Copy of Home Registration

5. Requirements for Filing Trade Mark Applications in China

6. Power of Attorney

7. Application for Trade Mark Registration

8. Schedule of charges for Trade Mark Application, effective as from 1/1/79

(iii) **ARBITRATION**

1. China Council for the Promotion of International Trade :

   (a) Foreign Trade Arbitration Commission (established 6/5/54 by decision of the Government Administration Council)

   (b) Provisional Rules of Procedure of the F.T.A.C. of the CCPIT (adopted 31/3/56)

   (c) C.C.P.I.T. Maritime Arbitration Commission (established 21/11/58 by decision of the State Council)

   (d) Peking Adjustment Rules (effective 1/1/75)

   (e) List of members of the Foreign Trade Arbitration Commission of C.C.P.I.T.

   (f) List of Members of the Maritime Arbitration Commission of C.C.P.I.T.

   (g) Maritime Arbitration Commission Standard Form, Agreement in Cases of Collision

(h) Maritime Arbitration Commission Salvage Contract

2. J.B. McCobb, Jr., "Foreign Trade Arbitration in the People's Republic of China", 5 N.Y.U.J. of International Law & Politics 205 (1972)

3. Arbitration and Dispute Settlement in Trade with China (National council for United States China Trade, Washington, D.C., 1974)

4. Jen Tsien-hsin, "Foreign Trade and Maritime Arbitration in China", 37 China's Foreign Trade 50 (1975)

5. D.B. Straus, "AAA visit to FTAC of the People's Republic of China, January 16 - 28, 1975" (New York, American Arbitration Association, 1975)

6. Liu Yiu-chu, "Foreign Trade and Maritime Arbitration" (Hong Kong, 1976)

7. Jen Tsien-hsin and Liu Shao-shan, "Arbitration in China", Foreign Trade Arbitration Commission and Maritime Arbitration Commission, Beijing, (unknown date)

8. Liu Yiu-chu, "Foreign Trade and Maritime Arbitration in the P.R.C." Guardian Gazette, 24/6/77

9. Jen Tsien-hsin and Liu Shao-shan, "People's Republic of China", [1978] 3 Y.B. Comm. Arb. 153

10. D.M. Bosco, "US - PRC Maritime Trade : The Role of Arbitration and the Maritime Arbitration Commission" (Fordham University School of Law, December 8, 1978)

11. Arbitration Clause in Bank of China 1979 Loan Agreement

12. "China Amends Arbitration Law", South China Morning Post, 10/1/80

13. "China's Arbitration Institutions and Their Functions", China Economic News (circa 7/7/80)

14. Professor J.A. Cohen, "Arbitration's Role in Economic Cooperation With China" (1980). Unpublished draft article

10. **PHILIPPINES**

1. G.G. Bongco, "The Enforcement of Foreign Arbitration Agreements and Awards in the Philippines", 21 Arb. J. 34 (1966)

2. B.C. Ambion, "Commercial Arbitration Facilities and Procedure", 2 Philippine International L.J. 7

3. M. Herras, "Problems of Commercial Arbitration and the Philippine Experience", 5 World Law Review 194 (The 1971 Belgrade World Conference on world Peace Through Law and the Third World Assembly of judges, 1972)

4. E.V. Villanueva, Jr., "International Law of Sales, Contracts and Arbitration", 7 International Law 830 (1973)

11 **SINGAPORE**

1. Arbitration Act, 1970 Edition, Chapter 16

2. Arbitration (Amendment) Act, 1980, effective 21/3/80

3. Industrial Relations Act, 1970 Edition, Chapter 124

4. Industrial Relations (Amendment) Act, 1972, effective 1/7/82

5. Arbitration Act, 1979, Chapter 42

12. **TAIWAN**

1. Journal of the Commercial Arbitration Association of the Republic of China (April 1980)

   (a) Lam Ying-fung, "A Study of Equitable Arbitration in Practice, Draft English translation of article from April 1980 Journal

   (b) Or Chok-tung, "The Role of International Commercial Arbitration in Eastern Europe' Foreign Trade", Draft English translation of article from April 1980 Journal

13. **THAILAND**

1. D.H. Erickson, "Enforcement of American Arbitral Awards in Thailand", 16 Arb. J. 143 (1961)

2. G.E. Vahanvati, "Enforcement of Foreign Judgments", Paper delivered to LawAsia Conference, Bangkok (August, 1981)

V INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

1. Thirteenth Annual Report, 1978/1979

2. Phijaisakdi Horayangkura, "The International Centre for Investment Disputes", Paper delivered to LawAsia Conference, Bangkok (August, 1981)

3. Gita Gopal, "The International Centre for Investment Disputes : An Evaluation", Paper delivered to LawAsia Conference, Bangkok (August, 1981)

VI INTERNATIONAL CHAMBER OF COMMERCE

1. ICC seminar in Hong Kong on 14/11/77

2. Rules for the ICC Court of Arbitration (in force from 1/6/75)

3. Y. Derains, "Arbitration and Its Advantages" (Date unknown)

4. Y. Derains, "Practical Application of the ICC Rules for Arbitration" (Date unknown)

5. Y. Derains, "The Applicable Law in Arbitration Matters" (Date unknown)

6. Draft Rules for ICC - IMC International Maritime Arbitration Centre and Model Clause

7. Sample ICC Awards

8. Extract from Letter of International Union of Credit and Investment Insurers (the Berne Union) concerning Arbitration Clauses

9. S.V. Goekjian, "Conducting an I.C.C. Arbitration Proceeding", Middle East Executive Reports 2 (February, 1980)

10. Commission on International Arbitration, Meeting on 16th October, 1980

    (a) "Appointment of Arbitrators in Countries Which have No National Committees"

    (b) Note on the Results of the Meeting on 5th September, 1980 of the Working Party "Arbitration and Related Contracts"

VII UNITED STATES OF AMERICA

A. American Arbitration Association

SELECTED DOCUMENTS :

1. Commercial Arbitration Rules (as amended and in effect 1/4/79)

2. Rules of procedure of Inter-American Commercial Arbitration Commission (as amended and in effect 1/1/78)

3. Uniform Arbitration Act (1955)

4. "A Businessman's Guide to Commercial Arbitration"

5. Brochure, "The AAA : Your Dispute Resolution Forum"

6. Brochure, "Election Services of the AAA"

7. Catalog, "For Business People & Those who Represent them"

8. Newsletter, "The Punchlist", Spring 1979

9. Brochure for Training Film, "All Things Considered The Case of the Militant Shop Steward"

10. State of New York Arbitration Rules Article 75, New York Code of Civil Practice Law and Rules

11. Commercial Arbitration Rules (as amended and in effect 1/1/80)

12. American Arbitration Association Procedures for Cases Under the Uncitral Arbitration Rules

13. Annual Report 1979 - 1980

B. Kazuo Iwasaki, "U.S. Cases and New York Convention : Their Trend and Problems in relation to International Commercial

Arbitration", Paper delivered to LawAsia Conference, Bangkok (August, 1981)

C. Design Professionals Financial Corporation and Association of Soil and Foundation Engineers

(a) "Penetrating the Spectrum of Conflict in Construction"

(b) "Mediation/Arbitration : A New Concept for Conflict Resolution"

VIII CANADA

1. J.R. Cunningham, "Maritime Arbitrations" (Harbour and Shipping, September 1979)

2. P.G. Bernard, "Marine Arbitration - British Columbia" (Canadian Bar Association Maritime Law Subsection, August 1980)

IX SWEDEN

1. J.G. Wetter, "East Meets West in Sweden", 13 International Law 261 (Spring 1979)

2. Stockholm Chamber of Commerce, ed., Arbitration in Sweden (Stockholm, 1977)

X THE NETHERLANDS

1. Professor P. Sanders, "The Netherlands" VI Yearbook Commercial Arbitration (1981)

2. A.J. van den Berg, "Arbitration in The Netherlands" Paper presented to International Arbitration Conference, Hong Kong (October, 1981)

XI HONG KONG

1. Arbitration Ordinance, vol. 19, Chapter 341 (Rev. ed. 1977)

2. "Centre to Solve China Disputes", South China Morning Post, 25/9/79

3. "Arbitration in Hong Kong", published by the Institute of Arbitrators, Hong Kong Branch, 1977

4. Extract of Documents concerning the Hong Kong Maritime Law and Arbitration Association

5. Hong Kong Chamber of Commerce Extract from By-Laws concerning Arbitration

6. "Arbitration in Hong Kong" A study paper by Baker & McKenzie (H.K.) to the Legal and Finance Committee of the American Chamber of Commerce in Hong Kong (April, 1980)

7. Building Contractors' Association Note on Settlement of Disputes (September, 1981)

8. William W.Y. Lee, "The Development of Hong Kong as a Centre of Maritime Arbitration" Paper delivered to International Arbitration Conference, Hong Kong (October,.1981)

9. Elmer Tsui, "The Role of the Hong Kong General Chamber of Commerce in Arbitration" Paper delivered to International Arbitration Conference, Hong Kong (October, 1981)

10. G.J.R. Hickmott, "Insurance and Reinsurance" Paper delivered to International Arbitration Conference, Hong Kong (October, 1981)

Annexure 3

Local Bodies Invited to make Submissions
(Those who responded are marked*)

Professional

* Hong Kong Society of Accountants
The Association of Certified Accountants
* The Chartered Institute of Arbitrators
Hong Kong Institute of Architects
The Hong Kong Bar Association
The Chinese Bankers Association Ltd.
Hong Kong Institution of Engineers
Insurance Association of Hong Kong
Chinese Insurance Association of Hong Kong
The Hong Kong Law Society
The Institute of Chartered Shipbrokers
* Hong Kong Management Association
The Institute of Quantity Surveyors
The Association of the Institute of Chartered Secretaries and Administrators in Hong Kong
* The Royal Institution of Chartered Surveyors A. Bilborough & Co. Ltd.

Exchanges

Chinese Gold and Silver Exchange Society
The Hong Kong Commodity Exchange Limited
* Far East Stock Exchange Limited
* Hong Kong Stock Exchange Ltd.
Kam Ngan Stock Exchange Ltd.
Kowloon Stock Exchange Ltd.
Hong Kong Property Exchange Ltd.

Chambers of Commerce

* American Chamber of Commerce in Hong Kong
* The Chinese General Chamber of Commerce
* Hong Kong General Chamber of Commerce
The Hong Kong Japanese Chamber of Commerce and Industry
Hong Kong junior Chamber of Commerce
* The Indian Chamber of Commerce
Kowloon Chamber of Commerce
New Territories General Chamber of Commerce

Trade Commissions

Commission of Australia
* The Austrian Trade Commissioner in Hong Kong
Bangladesh Trade Commission
British Trade Commission
* Royal Danish Trade Commission
French Trade Commission
* Italian Trade Commission
Japan Trade Centre H.K. (Jetro)
Korea Trade Centre (Kotra)
New Zealand Government Trade Commission

Trade

Hong Kong Trade Development Council
The Air Conditioning & Refrigeration Association
The Building Contractors' Association Ltd.
* The Composers & Authors Society of - Hong Kong
* The Chinese Manufacturers' Association of Hong Kong
The Real Estate Developers Association of Hong Kong
* Hong Kong Export Credit Insurance Corporation
The Hong Kong Shipowners Association Ltd.
Hong Kong Association of Travel Agents
* Hong Kong Tourist Association
The Federation of Hong Kong Cotton Weavers
Federation of Hong Kong Garment manufacturers
Federation of Hong Kong Industries
* Consumer Council
* Hong Kong Exporters Association
Hong Kong Shippers Council
* Fire et al. Insurance Associations of Hong Kong
* The Exchange Banks' Association, Hong Kong
Bank of Japan Representative Office

Public Bodies

Community Advice Bureau
* Public Works Department (Architectural Office)

Legal and individuals

* S.V. Gittins, Q.C.
* M.H. Jackson-Lipkin, Q.C.
* Henry Litton, Q.C.
* Richard Mills-Owens, Q.C.
Denis Chang, Q.C.

* Mr. Christopher Mumford
Mr. William Wang
Baker McKenzie
Coudert Brothers
Deacons
Denton Hall & Burgin
Holman, Fenwick & Willan
Gallant Y.T. Ho & Co.
Ince and Partners
Johnson Stokes & Master
C.Y. Kwan & Co.
Linklaters & Paines
Lo & Lo
Milbank Tweed
Norton Rose Botterell & Roche
Charles Russell & Co.
Shearman & Stirling
Simmons & Simmons
Sinclair Roche
Slaughter & May
Stephenson Harwood & Co.
Wilkinson & Grist
Woo Kwan Lee & Lo
P.C. Woo & Co.
Mr. Alistair Inglis
Mr. Peter Scales

Annexure 4

Overseas Bodies Invited to make Submissions
(Those who responded are marked*)

* American Arbitration Association
* Maritime Law Association of the United States of America
* Canadian Maritime Law Association
Union Internationale des Avocats
Comite Maritime International
Intertanko
Maritime Law Association of Australia
The Shipping Corporation of India
* Japan Line Ltd.
* Mr. B.W. Vigrass
* The Law Society
International Law Association
London Maritime Arbitrators Association
* Committee of Lloyds
General Council of British Shipping
The Baltic and International Maritime Conference
* R. Miller & Son
Ceylon Shipping Corporation
Malaysian International Corporation Berhad
Neptune Orient, Lines Limited
Philippine International Shipping Corporation
* International Association of Independent Tanker Owners

Annexure 5

ACKNOWLEDGEMENTS

In the course of the deliberations on this topic, we have been grateful for the suggestions and assistance of the following people :

Malcolm Barnett	–	Hong Kong Shanghai Bank
Philip Bowering	–	Financial correspondent, The Times
J.H. Bremridge	–	Swires
Peter C.K. Chan	–	Barrister (H.K.)
Steve Chu	–	Solicitor, Baker & McKenzie (H.K.)
Robert L. Clare Jr.	–	American Attorney, Shearman & Sterling(N.Y.)
Professor J. Cohen	–	Professor of Law Harvard Formerly consultant to Messrs. Coudert Brothers, American Attorneys (H.K.)
Warren Cooke	–	American Attorney Milbank Tweed (H.K.)
John Currie	–	Shipbroker S.S. & Y. (H.K.) Ltd.
Sir John Donaldson	–	Lord Justice of Appeal (U.K.)
Barry Evert	–	Shipbroker S.S. & Y. (H.K.) Ltd.
S.V. Gittins, Q.C	–	Barrister (H.K.)
Tony Grant	–	Solicitor, Denton, Hall and Burgin (H.K.)
The Lord Hacking	–	Solicitor, Lane and Partners (U.K.)
Andrew Hicks	–	Law Faculty, University of Hong Kong
Professor HO Tian Kui	–	The Research Institute of Laws The Academy of Social Science of China
Martin Hunter	–	Solicitor, Freshfields (U.K.)

Robert Jewkes	–	Solicitor, Denton, Hall and Burgin (H.K.)
Peter Jolly	–	Solicitor, Deacons (H.K.)
Neil Kaplan	–	Attorney General's Chambers (H.K.)
Sir Michael Kerr	–	Lord justice of Appeal (U.K.)
Warren Kitson	–	Solicitor, Peter Mo & Co. (H.K.)
Mike Langley	–	Hong Kong Shanghai Bank
Charles Lee	–	Solicitor, Woo, Kwan, Lee & Lo (H.K.)
LIU Yiu Chu (Miss)	–	Solicitor, Liu, Chan and Lam (H.K.)
Robert A. MacCrindle, Q.C.	–	Shearman & Sterling (Paris)
Gage McAfee	–	American Attorney Coudert Brothers (H.K.)
Ian McCallum	–	Solicitor, Wilkinson and Grist (H.K.)
James McGregor	–	Hong Kong General Chamber of Commerce
Arthur Marriott	–	Solicitor, Marriott & Co. (U.K.)
Jeremy Mathews	–	Attorney General's Chambers (H.K.)
Percy Mistry	–	Trafalgar Investments (H.K.)
Michael Mustill	–	Justice of the High Court (U.K.)
D.K. Newbigging	–	Jardine Matheson (H.K.)
Phlilip Nunn	–	Attorney General's Chambers (H.K.)
Tony Payne	–	Mass Transit Corporation (H.K.)
Ren Jianxin	–	China Council for the Promotion of International Trade
James Rider	–	Solicitor, Baker & McKenzie (H.K.)
Conor Reilly	–	American Attorney, Coudert Brothers (H.K.)

Bernard Rix	–	Barrister (U.K.)
Andrew Sheppard	–	Solicitor, Baker & McKenzie (H.K.)
Dr. Piet J. Slot	–	United Nations, ESCAP
David Sutton	–	Solicitor, Allen & Overy (U.K.)
Albert J. van den Berg	–	Secretary, Netherlands Arbitration Institute
Graham Wheatley	–	Attorney General's Chambers (H.K.)
Carl-Henrik Winqwist	–	Secretary General, International Chamber of Commerce (Paris)

ANNEXURE 6

Text of the Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) indicating the amendments* contained in a Bill prepared by the Law Drafting Division of the Attorney General's Chambers.

[*Note:*

(a) insertions proposed by the Bill are printed in bold face; and

(b) deletions proposed by the Bill are printed in italics within square brackets.]

* In addition, to give effect to the recommendations concerning the expansion of the powers of the Supreme Court Rules Committee, section 54 of the Supreme Court Ordinance (Chapter 4 of the Laws of Hong Kong) will have to *be* appropriately amended.

CHAPTER 341

ARBITRATION ORDINANCE

ARRANGEMENT OF SECTONS

[Note: insertions proposed by the Bill are printed in bold face.]

[Note: insertions proposed by the Bill are printed in bold face.]

[Note: insertions proposed by the Bill are printed in bold face.]

CHAPTER 341

ARBITRATION

Originally 22 of 1963.

To make provision for arbitration in respect of civil matters.

85 of 1975. 92 of 1975. of 1982.

[5th July, 1963.]

PART I

CITATION AND INTERPRETATION

Short title.

1. This Ordinance may be cited as the Arbitration Ordinance.

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

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)*

"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 10th June 1958 the text of which is set out in the Third Schedule. *(Added, 85 of 1975, s. 2)*

Third Schedule.

PART IA

CONCILIATION

Appointment of conciliator.

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 the is so specified, within a reasonable time not exceeding 2 months of being informed of the existence of the dispute, the parties to the agreement may jointly serve the person in question with a written notice to appoint a conciliator and if the appointment is not made within 7 days after the service of the notice the Court or a judge thereof may, on the joint application of the parties, 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.

(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,

[Note: insertions proposed by the Bill are printed in bold face.]

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 he 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, cl. 2 of Bill)

PART II

ARBITIRATION 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.

Death of party. 1950 c. 27, s.2.

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.

(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.

Bankruptcy. 1950 c. 27, s.3.

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.

[Note: insertions proposed by the Bill are printed in bold face.]

(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.

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

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 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*]

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

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.

(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)

[Note: insertions proposed by the Bill are printed in bold face.]

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 beard 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, cl. 3 of Bill)

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

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.

Arbitrators and Umpires

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

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.

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

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 -

(*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.

[Note: insertions proposed by the Bill are printed in bold face.]

Umpires. 1950 c. 27, s.8

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 [*shall appoint an umpire immediately after they are themselves appointed]* **may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree.** *(Amended, cl. 4 of Bill)*

(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, cl. 5 of Bill)

Power of Court in certain cases to appoint an arbitrator or umpire. 1950 c. 27, s. 10.

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 the parties or 2 arbitrators are **required or are** at liberty to appoint an umpire or third arbitrator and do not appoint him [, *or where 2 arbitrators are required to appoint an umpire and do not appoint him*]*;*
(Amended, cl. 6 of Bill)

(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.

[Note: (a) insertions proposed by the Bill are printed in bold face;
(b) deletions proposed by the Bill are printed in italics within square brackets.]

(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, cl. 6 of Bill)*

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

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.

Power of judges and public officers to take arbitrations. 1970 c. 31, s 4.

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, to take accept appointment as a sole or joint arbitrator, or as umpire, by or by virtue of an arbitration agreement.

(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.

Fourth Schedule.

(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, 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, cl. 7 of Bill)

Conduct of Proceedings, Witnesses, etc.

[Note: (a) insertions proposed by the Bill are printed in bold face;
(b) deletions proposed by the Bill are printed in italics within square brackets.]

Conduct of proceedings, Witnesses, etc. 1950 c. 27, s. 12.

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.

(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 he 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.

Provisions as to Awards

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

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.

(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.

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

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.

Specific performance. 1950 c. 27, s 15.

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.

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

18. 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 award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

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

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.

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 he recoverable in any action suit or matter) shall not apply to the recovery of costs directed by an award. (*Added, cl. 8 of Bill*)

(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.

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.

Interest on awards. 1950 c. 27, s.

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.

[Note: insertions proposed by the Bill are printed in bold face.]

20.

Judicial review, Determination of preliminary point of law, Exclusion agreements, Interlocutory orders, Remission and Setting aside of Awards, etc.

Judicial review of arbitration awards. cf. 1979 c. 42, s. 1.

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.

(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 way 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 he required; or

---

[Note: insertions proposed by the Bill are printed in bold face.]

(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, cl. 9 of Bill)

Detemination of Prefinainary point of law by Court. Cf. 1979 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 he given under section 23(3)(b).

(Cap. 4.)

(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.

(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, cl. 10 of Bill)

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

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

(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 23(5)(b), grant leave to make an application with respect to an award; and

(c) no application may he made under section 23A(1)(a) with respect to a question of law,

---

[Note: insertions proposed by the Bill are printed in bold face.]

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) above, 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

---

[Note: insertions proposed by the Bill are printed in bold face.]

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, cl. 10 of Bill)

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.

Fourth Schedule.

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

(Added, cl. 10 of Bill)

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

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.

(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.

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

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

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

[Note: insertions proposed by the Bill are printed in bold face.]

23. 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.

Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud. 1950 c. 27, s. 24.

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.

(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 o{ 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.

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.

Miscellaneous

Power of Court to extend time for commencing arbitration proceeding. 1950 c. 27, s. 27.

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 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.

Delay in prosecuting claims.

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.

(2) Where there has been undue delay by a claimant in instituting or prosecuting his claim 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.

(Cap. 4)

(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.

(Added, cl. 11 of Bill)

[Note: insertions proposed by the Bill are printed in bold face.]

Terms as to costs. etc. 1950 c. 27, s. 28.

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 29A, the remuneration of the arbitrator in respect of his services)** as the authority making the order thinks just.

(Amended, 85 of 1975, s. 5 and cl. 12 of Bill)

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.

(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, the deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

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)

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)

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.

PART III

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

[Note: insertions proposed by the Bill are printed in bold face.]

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

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

First Schedule.

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

(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.

Effect of foreign awards. 1950 c. 27, s. 36.

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 28.

(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.

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

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

(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 sub-section (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 maybe 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. *(Amended, 92 of 1975, s. 58)*

(Cap. 4.)

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

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.

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

40. Nothing in this Part shall -

(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

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

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.

Effect of Covention awards. 1975 c. 3, s. 3(1)(a), (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 virture of section 28.

(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.

Evidence. 1975 c. 3, s. 4.

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

(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.

Refusal of enforcement. 1975 c. 3, s. 5.

44. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(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 maybe 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.

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

FIRST SCHEDULE [s. 35.]

PROTOCOL ON ARBITRATION CLAUSES SIGNED ON BEHALF OF HIS MAJESTY AT A MEETING OF THE ASSEMBLY OF THE LEAGUE OF NATIONS HELD ON THE 24TH SEPTEMBER 1923

The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions -

1. Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connexion with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary - General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by

its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being sized of a dispute regarding a contract made between persons to whom Article I applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary - General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present Protocol shall come into force as soon as 2 ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary - General of the deposit of its ratification.

7. The present Protocol may be denounced [by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary - General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary - General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary - General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary - General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

SECOND SCHEDULE [s. 35.]

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS SIGNED AT GENEVA ON BEHALF OF HIS MAJESTY ON THE 26TH SEPTEMBER 1927

Article 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called a

"submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary -

(a) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied

(a) that the award has been annulled in the country in which it was made;

(b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) that the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4

The party relying upon an award or claiming its enforcement must supply, in particular -

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made,

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2(a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must he certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

Article 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8

The present Convention shall come into force 3 months after it shall have been ratified on behalf of 2 High Contracting Parties. Thereafter, it shall take effect. in the case of each High Contracting Party, 3 months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Artibration Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect 3 months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11

A certified copy of the present Convention shall he transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

THIRD SCHEDULE [s. 2.]

CONVENTION ON THE RECOGNITION AND ENFORCEMENT

OF FOREIGN ARBITIRAL AWARDS. DONE AT NEW YORK, ON 10 JUNE 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply -

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

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that -

(a) the parties to the agreement referred to in article II were, under the law applicable to them, 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

(b) the party against whom the award is invoked 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

(c) the award deals with a difference 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

(d) the composition of the arbitral authority 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

(e) 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, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied, upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply

(a) with respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) a federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following -

(a) signatures and ratifications in accordance with article VIII;

(b) accessions in accordance with article IX,

(c) declarations and notifications under articles I, X and XI;

(d) the date upon which this Convention enters into force in accordance with article XII;

(e) denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

(Third Schedule added, 85 of 1975, s. 9)

FOURTH SCHEDULE [s. 13A.]

APPLICATION OF THIS ORDINANCE TO JUDGE-ARBITRATORS

1. In this Schedule "judge-arbitrator" and "judge-umpire" mean a judge appointed as sole arbitrator or, as the case may be, as umpire by or by virtue of an arbitration agreement.

2. In section 3 (authority of arbitrator to be irrevocable except by leave of the court), in its application to a judge-arbitrator or judge-umpire, the Court of Appeal shall be substituted for the Court.

3. The power of the Court under section 9 (vacancy among arbitrators supplied by parties) to set aside the appointment of an arbitrator shall not be exercisable in the case of the appointment of a judge-arbitrator.

4. Section 10(3) (power of Court to order umpire to enter immediately on reference as sole arbitrator) shall not apply to a judge-umpire; but a judge-umpire may, on the application of any party to the

[Note: insertions proposed by the Bill are printed in bold face.]

reference and notwithstanding anything to the contrary in the arbitration agreement, enter on the reference in lieu of the arbitrators and as if he were the sole arbitrator.

5. (1) The powers conferred on the Court or a judge thereof by section 14(4), (5) and (6) (summoning of witnesses, interlocutory orders, etc.) shall be exercisable in the case of a reference to a judge-arbitrator or judge-umpire as in the case of any other reference to arbitration, but shall in any such case be exercisable also by the judge-arbitrator or judge-umpire himself.

(2) Anything done by an arbitrator or umpire in the exercise of powers conferred by this paragraph shall he done by him in his capacity as judge of the Court and have effect as if done by that court; but nothing in this paragraph prejudices any power vested in the arbitrator or umpire in his capacity as such.

6. Section 15(2) and (3) (extension of time for making award; provision for ensuring that reference is conducted with reasonable dispatch) shall not apply to a reference to a judge-arbitrator or judge-umpire; but a judge-arbitrator or judge-umpire may enlarge any time limited for making his award (whether under this Ordinance or otherwise), whether that time has expired or not.

7. (1) Section 20(4) (provision enabling a party in an arbitration to obtain an order for costs) shall apply, in the case of a reference to a judge-arbitrator, with the omission of the following -- "within 14 days of the publication of the award or such further time as the Court or a judge thereof may direct,".

(2) The power of the Court to make declarations and orders for the purposes of section 20(5) (charging order for solicitor's costs) shall be exercisable in the case of an arbitration by a judge-arbitrator or judge-umpire as in the case of any other arbitration, but shall in any such case be exercisable also by the judge-arbitrator or judge-umpire himself.

(3) A declaration or order made by an arbitrator or umpire in the exercise of the power conferred by sub-paragraph (2) shall be made by him in his capacity as judge of the Court and have effect as if made by that court.

8. (1) Section 21 (power of Court to order delivery of award on payment of arbitrators' fees into court) shall not apply with respect to the award of a judge-arbitrator or judge-umpire.

(2) A judge-umpire may withhold his award until the fees payable to the arbitrators have been paid into the Court.

(3) Arbitrators' fees paid into court under this paragraph shall be paid out in accordance with rules of court, subject to the right of any party to the reference to apply (in accordance with the rules) for any fee to he taxed, not being a fee which has been fixed by written agreement between him and the arbitrator.

(4) A taxation under this paragraph may he reviewed in the same manner as a taxation of the costs of an award.

(5) On a taxation under this paragraph, or on a review thereof, an arbitrator shall be entitled to appear and be heard.

[Note: insertions proposed by the Bill are printed in bold face.]

9. In sections 24 and 25 (remission and setting aside of awards, etc.), in their application to a judge-arbitrator or judge-umpire, and to a reference to him and to his award thereon, the Court of Appeal shall he substituted for the Court.

10. (1) Section 26(2) (removal of issue of fraud for trial in the Court) shall not apply to an agreement under or by virtue of which a judge-arbitrator or judge-umpire has been appointed; nor shall leave be given by the Court under that subsection to revoke the authority of a judge-arbitrator or judge-umpire.

(2) Where, on a reference of a dispute to a judge-arbitrator or judge-umpire, it appears to the judge that the dispute involves the question whether a party to the dispute has been guilty of fraud, he may, so far as may be necessary to enable that question to be determined by the Court, order that the agreement by or by virtue of which he was appointed shall cease to have effect and revoke his authority as arbitrator or umpire.

(3) An order made by a judge-arbitrator or judge-umpire under this paragraph shag have effect as if made by the Court.

11. Section 27 (powers of Court on removal of arbitrator or revocation of arbitration agreement) shall be amended as follows

(a) after the words "the Court" where they first occur in subsection (1), where they occur for the first and second time in subsection (2), and in subsections (3) and (4), there shall be inserted the words "or the Court of Appeal"; and

(b) after those words where they occur for the second time in subsection (1) and for the third time in subsection (2) there shall be inserted the words "or the Court of Appeal, as the case may be".

12. The leave required by section 28 (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.

(Fourth Schedule added, cl. 13 of Bill)

[Note: insertions proposed by the Bill are printed in bold face.]