



**Asia-Pacific
Economic Cooperation**

2010/EC/WKSP3/002

Alternative Dispute Resolution in Hong Kong, China

Submitted by: Hong Kong, China



JAPAN 2010

**Workshop on Enforcing Contracts
Seoul, Korea
21-22 June 2010**



EoDB Workshop on Enforcing Contracts

Alternative Dispute Resolution (“ADR”) in Hong Kong, China



Reform of the Law of Arbitration in Hong Kong

- In 2005, the Department of Justice set up a Working Group to reform the Law of Arbitration in Hong Kong
- In July 2009, the Administration introduced the Arbitration Bill (“the Bill”) to the Legislative Council to implement the recommendations of the Working Group



Main Features of the Bill

- Objective: unification of the separate regimes for “domestic” (based on the Eng. Arbitration Act 1996) and “international” arbitration on the basis of the *UNCITRAL Model Law*
- Confidentiality
- Interim measures
- limitation of appeals
- User-friendly format of the Bill



New Provisions on Confidentiality

- The UNCITRAL Model Law is silent on confidentiality
- The Bill specifies that, as a starting point, court proceedings relating to arbitration are to be heard **otherwise than in open court**
- The Bill further provides that on the application of any party, or in any particular case where the court is satisfied that any court proceedings relating to arbitration ought to be heard in open court, **the court may order for an open hearing**
- The Bill also provides for **exceptions for disclosure of confidential information** to government body as obliged by law or to a professional or adviser of the parties



Recognition and Enforcement of Foreign Interim Measures

- Part 6 of the Bill includes the recent proposal initiated in 2006 via the amendment to the Model Law
- The Bill gives power to the Hong Kong court to recognise and enforce interim measures ordered (e.g. to maintain the status quo) by an arbitral tribunal sitting outside Hong Kong
- This will facilitate arbitration proceedings even where they are held outside Hong Kong.



Limited right to appeal

- General principle: **“in matters governed by this Law, no court shall intervene except where so provided in this Law.”** (Article 5 of the Model Law)
- No appeal from the court or other authority specified in Article 6:
 - appointment of arbitrators [Article 11(3), (4) and (5)]
 - procedure for challenging an arbitrator [Article 13(3)]
 - decision on the termination of the mandate of the arbitrator [Article 14]
 - decision on the competence of arbitral tribunal [Article 16(3)]



Limited right to appeal (Cont'd)

- Added local provisions to the Model Law specify that there will be no appeal from the court in relatively minor procedural proceedings :
 - court direction that the proceedings ought to be heard in open court [clause 16(3)]
 - court direction on reporting restrictions of proceedings [clause 17]
 - court decision on taxation of costs of arbitral proceedings [clause 75(3)]



User-friendly Format of the Bill

- The Bill is intended to be self-contained so that it will be easier for users to find all relevant provisions in one place
- The Bill gives legal effect to those provisions of the UNCITRAL Model Law that are to be applied in Hong Kong
- Those provisions, with such modifications or supplements where necessary, are arranged in the same order as the Model Law



Sample Provision of the Bill

55. Article 27 of UNCITRAL Model Law (Court assistance in taking evidence)

(1) Article 27 of the UNCITRAL Model Law, the text of which is set out below, has effect –

"Article 27. Court assistance in taking evidence

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


(2) The Court may order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence.

(3) The Court may also order a writ of habeas corpus ad testificandum to be issued requiring a prisoner to be taken before an arbitral tribunal for examination.



Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (the Scheme)

- More than 48,000 investors in Hong Kong had invested approximately USD\$2.5 billion in structured products issued or guaranteed by Lehman Brothers, which is colloquially known as '**minibonds**'
- The Scheme is a platform dedicated to resolve disputes between investors and banks by means of ADR, in particular, by mediation.



Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (Cont'd)

- The Scheme is available to qualified candidates (i.e. investors who have made complaints to the regulatory authorities; or one of the regulatory authorities has a finding against the bank or bank officer concerned)
- The HK Monetary Authority will pay half the fee and the bank concerned the other half.



Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (Cont'd)

- A total of 200 requests for mediation have been made under the Scheme. The amounts involved range from **USD \$5,000 to over \$640K** in each individual case
- There were also 37 mediations initiated by the banks. Another 37 cases have been settled by direct negotiations between the investors and the banks after mediation was requested
- **81 cases proceeded to mediation and the settlement rate is 88%**



Lessons learnt from the Scheme

- Cf: 48,000 investors affected by the bankruptcy of Lehman Brothers, over 20,000 complaints lodged with HKMA and over 10,000 complaints filed with the Consumer Council
- The number of enquiries received (about 1,100) by the Scheme and the number of mediation requests (200) are small



Lessons learnt from the Scheme (Cont'd)

- Public education in three areas is needed:
 - To change the perception that mediators are conciliators who are government officials and are there to advise parties as to the amount of settlement
 - To provide initial assistance to investors with low education level and to familiarise them with the mediation process
 - To change the preconception with fault finding and the mentality of “**who is at fault shall compensate**”



Initiatives of the DoJ Working Group on Mediation

- **“Mediate First” Pledge campaign** with more than 100 companies and trade organizations pledging to consider the use of mediation first w/o resorting to litigation
- Promulgation of **HK Mediation Code** which sets out the min. professional standards expected of mediators. Services providers are encouraged to adopt the Code and set up complaints and disciplinary processes to enforce the Code



Back up slides



The Advantages of Arbitration

- A **fair and speedy** method of resolution of disputes by arbitration without unnecessary expense
- Arbitral proceedings are not open to the public and the award is **confidential**, unless both parties decide otherwise. This protects trade secrets and avoid bad publicity
- Arbitration limits the extent to which the court may interfere and **an award is final and binding** on the parties. It can be enforced quickly both locally and internationally (e.g. through NY Convention)




Speed of Arbitration

- document-only arbitration (e.g. some maritime arbitrations) can be completed in 2 - 3 months if the parties are cooperative
- cases involving complex legal or technical issues (i.e. some international commercial or construction arbitrations) take longer and can be completed within 1 – 2 years
- Cf: court's decision can be appealed against to higher courts which delays the outcome of the case and escalates costs.



Hong Kong International Arbitration Centre (HKIAC)

- HKIAC is Hong Kong's home-grown arbitration body which is totally independent and free from governmental interference
- In 2009 the HKIAC handled 429 arbitration cases:
 - 309 cases international and 120 domestic
 - 93 involved construction disputes, 182 involved commercial disputes and 154 involved shipping.



The International Court of Arbitration of the International Chamber of Commerce (ICC)

- ICC, which is based in Paris, has opened a branch of its Secretariat in Hong Kong in November 2008 to serve ICC arbitration in the Asia-Pacific Region
- The Secretariat currently handles more than 150 arbitration cases