



Module 2: International Arbitration

Mr. Samuel Wong

President, HKI Arb; Barrister-at-law; FHKI Arb, FCI Arb, Chartered Arbitrator

The Legal Structure of International Arbitration

- United Nations Commission on International Trade Law (UNCITRAL) is an international group dedicated to harmonising and facilitating modern fair international business and trade
- UNCITRAL is the core legal body of the United Nations that promotes conventions, model laws and rules that are acceptable worldwide: to be legal and legislative guides and recommendations of great value.
- Key instruments produced by UNCITRAL (for arbitration) are:
 - New York Convention
 - UNCITRAL Model Law
 - UNCITRAL Arbitration Rules
- Soft Laws: (i) IBA Guidelines on Conflict of interests; (ii) IBA Rules on taking of evidence in international arbitration

New York Convention



- Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- Key instrument in international arbitration
- Adopted in 1958 and entered into force in 1959
- Over 150 jurisdictions are signatories
- Facilitates award's portability by allowing recognition and enforcement in member states

New York Convention (cont'd)



- NY Convention also provides for recognition by state courts of agreements to arbitrate
- Hong Kong became member of NY Convention without reservations while a territory of Great Britain (before resumption of sovereignty of China 1997)
- Mainland China is also a party to NY Convention, but subject to the commercial and reciprocity reservations
- Hong Kong, under Chinese sovereignty, remains party to NY Convention, but subject to the reservations

New York Convention (cont'd)



- Art.1.1: recognition and enforcement of arbitral awards made in a State other than the the State where recognition and enforcement is sought
- Art. 2.1: recognition of an agreement to arbitration in writing to submit to arbitration in respect of all or any difference which may arise between the parties in respect of defined legal relationship , whether contractual or not, concerning a subject matter capable of settlement by arbitration
- Art. 2.3: for the court to refer the parties to arbitration if seized with an action in respect of a matter which the parties have made an agreement to arbitrate
- Art 4.1: for enforcement: certified copy of (1) award; (2) arbitration agreement
- Art 5 : 1(a) to (e) and 2 (a) and (b): grounds under which recognition and enforcement may be refused.

UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”)



- The Model Law was adopted by UNCITRAL on 21 June 1985. It was recommended for “all States to give due consideration to the Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”
- It constitutes a sound basis for the desired harmonization and improvement of national arbitration laws
- Not in itself legislation, but a model to be copied by states in adopting their own arbitration laws
- Some states adopt it verbatim, examples: International Arbitration Act Cap 143A of Singapore (Schedule 1) and New Zealand Arbitration Act of 1996
- Hong Kong Arbitration Ordinance (Cap 609) that is the procedural law governing Hong Kong arbitrations follows closely the Model Law, with modifications and amendments

UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") continue



- The provisions of the ML covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award. It reflects the worldwide consensus on the principles and important issues of international arbitration practice.
- Inadequacy and disparity between national arbitration laws: unfamiliar provisions and procedures points to the need for certainty and smooth functioning of arbitration
- Limiting court intervention in international arbitration save for what are provided in the ML for court assistance and supervision
- For “International” and “commercial” arbitration
- Requirement of arbitration agreement to be in writing (following Art. 2(2) of the New York Convention)
- Obliges any court to refer the parties to arbitration unless it finds the arbitration agreement to be null and void, inoperative or incapable of being performed

UNCITRAL Arbitration Rules



- Important to distinguish between UNCITRAL Model Law (the procedural law of the seat of arbitration) and UNCITRAL arbitration rules (“the Rules”)
- Rules regulate the conduct of arbitral proceedings such as the Institution rules of ICC; HKIAC; GAFTA; FOSFA; LCIA; CIETAC
- UNCITRAL arbitration rules of 1976 (amended in 2010) can be used for *ad hoc* arbitration
- It can also be adopted for used in connection with arbitrations administered by institutions (such as HKIAC and CIETAC Hong Kong Center)
- It can be amended to fit parties’ circumstances and agreement: party autonomy; case management power of the arbitral tribunal

Hong Kong Arbitration Ordinance (Cap.609)



- Came into effect 1 July 2011
- Ordinance streamlines and improves readability and accessibility of law
- Abolishes distinction between domestic and international arbitration procedures in the repealed ordinance Cap 341 (opt in options at Schedule 2)
- Follows those provisions of UNCITRAL Model Law (Schedule 1) that are adopted entirely, or with modifications and supplements

Hong Kong Arbitration Ordinance (Cap.609)



- Section 3 – Object and principles of the Hong Kong Ordinance
 - Fair and speedy resolution of disputes by arbitration without unnecessary expenses
 - Parties are free to agree on how the disputes should be resolved
 - Court can only intervene as provided for in the Ordinance
- Section 4- The provisions of ML expressly stated in Cap 609 shall have the force of law in Hong Kong subject to modifications and supplements expressed stated in the Ordinance

Hong Kong Arbitration Ordinance (Cap.609)



- Notable features of new Arbitration Ordinance:
 - Cap 609 applies to an arbitration under an arbitration agreement if the place of arbitration is Hong Kong (s. 5(1))
 - confidentiality of arbitral proceedings (ss.17-18)
 - Requires arbitration agreement to be in writing, but the writing requirement is given wide meaning (s.19/ Option I of ML Art. 7)
 - Competence of arbitral tribunal to rule on its jurisdiction (s. 34(1)/ ML Art 16)
 - Power of Tribunal to grant interim measures to maintain status quo (s.35/ ML Art. 35)
 - Power of Court to order interim measures (s. 45 /ML Art. 17J)
 - Special regime for enforcement of arbitral awards

Hong Kong's Arbitration Ord. (Cap.609) continue

- Notable features of new Arbitration Ordinance:
 - Parties must be treated with equality (s 46(2))
 - To act fairly and impartially and giving the parties "a reasonable opportunity to present their cases". Compare ML Art. 18 – "full opportunity"(s. 46(3)(ii)). Pacific China v Grand Pacific
 - To use procedures that are appropriate to the particular case (s. 46(3)(iii))
 - Default of a party (s. 53/ ML Art. 25)
 - Tribunal's General Power (s. 56(1)) – security for costs, discovery of documents etc.
 - Tribunal's may decide whether and to what extent it should take the initiative to ascertain the facts and the law relevant to the proceedings (s56(7))

Hong Kong - Mainland China - Macao



- Notable features of new Arbitration Ordinance:
 - Form and Content – reasoned award (s. 67/ ML Art. 31)
 - Recourse against an award (s.81/ ML Art 34): validity of arbitration agreement; due process; arbitrability; public policy grounds
 - Enforcement: (i) with leave from court (s. 84); (ii) convention awards (s. 87); (iii) Mainland awards (s. 92)
 - Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region
 - Schedule 2 opt in provisions: (i) sole arbitrator; (ii) consolidation; (iii) preliminary question of law by Court; (iv) challenge on grounds of serious irregularity; (v) appeal against award on question of law

Some Recent Developments



- Emergency arbitrator provisions (Part 3A of Cap 609)
- Third-party funding of arbitration in Hong Kong (Part 10A of Cap 609)
- Intellectual Property Rights Arbitration (Part 11A of Cap 609)
- Enforcement of Macao Awards (ss 98A-98D of Cap 609)
- Restriction on concurrent enforcement in Mainland and Hong Kong
- Assistance by PRC Courts – PRC Court injunctions to assist Hong Kong arbitrations

Q&A



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