

## **EXECUTIVE SUMMARY**

The Department of Justice published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill on 31 December 2007 (“Consultation Paper”) to seek views on reform of the law of arbitration in Hong Kong.

### **A Unitary Regime for Arbitration**

2. The current Arbitration Ordinance (Cap 341) (“the current Ordinance”) has created two different regimes for “domestic” and “international” arbitrations. The Consultation Paper and the consultation draft of the Arbitration Bill (“draft Bill”) attached to it propose the creation of a unitary regime of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.

3. The purpose of the reform is to make the law on arbitration more user-friendly. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this would have the benefit of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. Hong Kong would be seen as a Model Law jurisdiction thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings. The reform of the law of arbitration will also promote Hong Kong as a regional centre for legal services and dispute resolution.

### **The framework and contents of the draft Bill**

4. The draft Bill adopts the structure of the Model Law as its framework. The relevant provisions of the Model Law including some of the revised articles recently adopted by the UNCITRAL in 2006 are reproduced in the draft Bill and are supplemented by other provisions

having regard to the proposals made in the *Report of Committee on Hong Kong Arbitration Law* published in 2003 (“*Report*”) and the relevant existing provisions of the current Ordinance that are to be retained. The major issues in the draft Bill are summarised below.

### *Part 1 Preliminary*

5. Part 1 sets out the object and principles of the draft Bill. It gives effect to the provisions of the Model Law as expressly stated in the draft Bill subject to such modifications and supplements as provided for in the draft Bill. Part 1 also defines the scope of application of the draft Bill. It provides that the draft Bill applies to any arbitration agreement and any arbitration to which the Government of the Hong Kong Special Administrative Region is a party.

### *Part 2 General Provisions*

6. Part 2 sets out the principle for the interpretation of the Model Law. It provides for the procedural rules for delivery of written communications including new forms of electronic communications. It further states that the Limitation Ordinance (Cap 347) and any other Ordinances relating to the limitation of actions shall apply to arbitrations as they apply to actions in the court. It is also provided in this Part that proceedings are to be heard in open court. However, upon application of any party, the court shall order those proceedings to be heard otherwise than in open court, unless the court is in any particular case satisfied that those proceedings ought to be heard in open court. The court is also empowered to give directions as to what information relating to proceedings heard otherwise than in open court may be published.

### *Part 3 Arbitration Agreement*

7. Part 3 requires an arbitration agreement to be in writing and defines what constitutes writing for this purpose. It also provides for disputes under an arbitration agreement to be referred to arbitration.

8. In view of the concern that employees with weaker bargaining power could be denied access to the court by standard arbitration clauses in their employment contracts, provision is made under Part 3 to empower the court to decide whether or not to refer to arbitration, not just disputes involving a claim or other matter that is within the jurisdiction of the Labour Tribunal as provided for in the current Ordinance, but also matters involving claims or disputes made pursuant to or arising under any employment contract.

#### *Part 4 Composition of Arbitral Tribunal*

9. Part 4 contains provisions relating to the number of arbitrators and their appointment and sets out the grounds and procedures for challenging such appointment. It further provides for the appointment of umpires and their functions in arbitral proceedings and the appointment of mediators. It also specifies that an arbitrator may act as a mediator upon consent of all parties in writing after the commencement of arbitral proceedings.

#### *Part 5 Jurisdiction of Arbitral Tribunal*

10. An arbitral tribunal is empowered under Part 5 to rule on its own jurisdiction. Where an arbitral tribunal rules that it has jurisdiction to decide a dispute, a party may, within a 30-day period, request the Court of First Instance to decide on the issue. No appeal lies from a decision of the Court of First Instance on the issue. If an arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall, if it has jurisdiction, decide the dispute.

#### *Part 6 Interim Measures and Preliminary Orders*

11. Part 6 empowers an arbitral tribunal to grant interim measures and preliminary orders and to specify the grounds and procedures relating to the application for and the grant, modification, suspension or termination of such interim measures and preliminary orders.

12. It further provides that the Court of First Instance may grant an interim measure in relation to arbitral proceedings conducted in or outside Hong Kong. If the arbitral proceedings are conducted outside Hong Kong, an interim measure may be granted only if those proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under the new Arbitration Ordinance (“new Ordinance”) or any other Ordinance and that the interim measure sought belongs to a type or description of interim measures that may be granted in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

13. An alternative proposal, which we do not recommend, has been made that where arbitral proceedings take place outside Hong Kong, the Court of First Instance should only be able to make an order to grant an interim measure in relation to such proceedings if a court in the corresponding place of arbitration will act reciprocally to grant a similar order in aid of arbitral proceedings conducted in Hong Kong.

#### *Part 7 Conduct of Arbitral Proceedings*

14. Part 7 states that the parties may agree on the procedures to be followed, which otherwise are to be determined by the arbitral tribunal. It further sets out the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings.

15. Part 7 preserves the present statutory position in respect of the enforcement of orders or directions, including interim measures, made by an arbitral tribunal in relation to arbitral proceedings conducted in or outside Hong Kong. A new requirement is however added which provides that leave for enforcement of such order or direction made outside Hong Kong shall not be granted by the court in Hong Kong unless it can be demonstrated that the order or direction belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

16. An additional proposal, with which we do not agree, has been made that where an arbitral proceeding takes place outside Hong Kong, leave should only be granted for the enforcement of any order or

direction, including any interim measure, made by such arbitral tribunal in a foreign jurisdiction if a court in the corresponding place of arbitration will act reciprocally in respect of such order or direction made in arbitral proceedings conducted in Hong Kong.

#### *Part 8 Making of Award and Termination of Proceedings*

17. Part 8 prescribes the procedures for deciding on the choice of substantive law that is applicable to the substance of the dispute. It sets out the requirements for the form and contents of an arbitral award and provides for the correction and interpretation thereof and the making of an additional award. It provides for the award on costs of the arbitral proceedings including the fees and expenses of the tribunal to be made by an arbitral tribunal. Proposal has also been made to empower an arbitral tribunal to order payment of interest on award of costs in arbitral proceedings. Part 8 further states the circumstances under which arbitral proceedings are to be terminated and the mechanism for doing so.

#### *Part 9 Recourse against Award*

18. Part 9 provides that recourse to the court against an arbitral award may be made by a party by an application for setting aside the award. It further provides that the Court of First Instance may set aside an award on the grounds specified in Article 34 of the Model Law but may not set aside an award on the ground of error of fact or law on the face of the award.

#### *Part 10 Recognition and Enforcement of Awards*

19. The statutory scheme under the current Ordinance for the enforcement of awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is retained under Part 10 subject to certain modifications. Leave of the court is required for enforcement of an arbitral award made by an arbitral tribunal whether in or outside Hong Kong.

20. In the case of the enforcement of an arbitral award made outside Hong Kong which is neither a Convention award nor a Mainland award, a new provision is added under Part 10 to provide that no leave shall be granted by the court unless the party seeking to enforce such award can demonstrate that the court in the place where the award is made will act reciprocally in respect of awards made in Hong Kong in arbitral proceedings by an arbitral tribunal. The new requirement proposed is to ensure that the enforcement of arbitral awards made outside Hong Kong, whether a Convention award, a Mainland award or an award which is neither a Convention award nor a Mainland award, is granted on the same principle of reciprocity of enforcement.

*Part 11 Provisions that may be Expressly Opted for or Automatically Apply*

21. Certain provisions under the current Ordinance that only apply to domestic arbitrations have been retained as opt-in provisions under Schedule 3 to the draft Bill. It is provided under Part 11 that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the provisions in Schedule 3 shall apply.

22. To address the concern raised by the construction industry where users of standard form contracts may continue to use the term “domestic arbitration” in such contracts either before or for sometime after the commencement of the new Ordinance, it is provided under Part 11 that, where an arbitration agreement entered into before, or at any time within a period of 6 years after, the commencement of the new Ordinance stipulates that an arbitration under that arbitration agreement shall be a “domestic arbitration”, all the opt-in provisions under Schedule 3 shall automatically apply to that arbitration agreement subject to any express agreement to the contrary between the parties.

23. A deeming provision is included under Part 11 to ensure that, subject to some exceptions, all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the subcontracting process.