Kluwer Arbitration Blog

What does Hong Kong's new look Arbitration Ordinance mean in practice?

Justin D'Agostino (Herbert Smith Freehills) · Friday, January 14th, 2011 · Herbert Smith Freehills

Hong Kong has unveiled its new Arbitration Ordinance. We take a look in this blog at how this is likely to affect parties and practitioners dealing with, or considering, arbitration in Hong Kong.

After a lengthy and detailed consultation process, the Hong Kong Legislative Council has passed the new Arbitration Ordinance (Cap. 609) ('new Arbitration Ordinance'), which is anticipated to come into effect later this year. Legislators have opted to base the provisions of the new arbitration regime heavily on the internationally recognised and accepted framework of the UNCITRAL Model Law ('Model Law') – but with some modifications and supplements tailored to suit the specific features of the jurisdiction. An immediate attraction of the new legislation is its organisation. It (generally) follows the Model Law's headings and chapters, making it significantly easier to navigate than its predecessor, the Arbitration Ordinance (Cap. 341) ('previous Arbitration Ordinance').

Far and away one of the most significant changes introduced by the new legislation, and one which will be celebrated by most practitioners and parties alike, is the abolition of the dual regime for 'international' and 'domestic' arbitrations. Under the previous regime (and a source of not inconsiderable woe to many users) a distinction was drawn between 'international' and 'domestic' arbitrations, with different sets of provisions of the previous Arbitration Ordinance applying accordingly.

In practice, what this new reform means is that practitioners no longer need concern themselves with analysing the characteristics of the parties and the dispute in order to work out which particular provisions apply to any given arbitration. Instead, all arbitrations in Hong Kong are to be governed by a single unified regime based on the Model Law and the drafting of arbitration agreements seated in Hong Kong need not differentiate international from domestic proceedings.

There is a caveat to this. Under pressure from certain sectors (most notably the construction industry), Hong Kong legislators chose to retain the key features of the 'domestic' regime in a series of 'opt-in' provisions set out in Schedule 2 of the new Arbitration Ordinance. These will apply in place of certain of the Model-Law based provisions, where parties so choose. These specialised provisions include:

– disputes to be determined by sole arbitrators;
– the courts to determine preliminary points of law;

– appeals to the courts allowed on questions of law arising from arbitral awards;
– challenges to awards permitted on grounds of serious irregularity; and
– consolidation of arbitrations or hearings,

all of which may be of use to particular parties depending on their circumstances.

Parties wishing to benefit from the greater court intervention and other specialised provisions of the old 'domestic' regime may specify the applicability of any or all of the 'opt-in' provisions in their arbitration agreements. In addition, the 'opt-ins' will apply automatically where an arbitration agreement entered into before or within six years of the new Arbitration Ordinance coming into effect provides for 'domestic arbitration'. Although it is anticipated that parties in the construction industry will be the primary users of the 'opt-in' system, this inbuilt flexibility may well appeal to other international parties as well.

One of the central themes underpinning the new legislation is the notion of minimal court intervention, with provisions of the new Arbitration Ordinance vesting as much power as possible with arbitral tribunals. Adopting the Model Law's provisions regarding interim measures, arbitral tribunals seated in Hong Kong are able to grant temporary measures, for example, to preserve assets or evidence, or to maintain or restore the status quo – and the new Arbitration Ordinance expressly confirms that this power includes the granting of injunctions. In addition, and again in line with the Model Law, Hong Kong arbitral tribunals can award preliminary orders preventing parties from frustrating any interim measure.

Separately, arbitral tribunals seated in Hong Kong are empowered *inter alia* to award security for costs and direct the discovery of documents or delivery of interrogatories – retaining the 'general powers' of an arbitral tribunal provided under the previous regime. Moreover, and an important feature of the new legislation, arbitral tribunals may make peremptory orders which in other jurisdictions are a useful but underused resource of arbitral tribunals, specifying time limits for parties' compliance in order to assist with the enforcement of their orders or directions.

Another feature of the new legislation likely to prove attractive to many parties is the inclusion of express provisions in relation to confidentiality. The new Arbitration Ordinance expressly prohibits parties from disclosing any information relating to the arbitral proceedings or the award. In addition, court proceedings in support of arbitration are to be conducted in closed court as the default. Parties with arbitrations seated in Hong Kong can therefore rest assured that duties of confidentiality will bind their proceedings, and no additional drafting or argument is required in relation to this factor.

Another specialised feature of the new Arbitration Ordinance is the provision for mediator-arbitrators. Under the new regime, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided all parties give their written consent. In addition, where a third party specified in an arbitration agreement has failed to appoint a mediator (presumably in a tiered dispute resolution clause) the HKIAC may step in and do so, on the application of a party.

These provisions follow the spirit of the recent Civil Justice Reforms in Hong Kong in promoting ADR (at present, if a litigant in the Hong Kong courts fails unreasonably to engage in mediation, they face potential adverse costs consequences), albeit in a much more limited and flexible framework. However, the utility and acceptance of these provisions within the context of

arbitration remains to be seen. For example, one drawback of the mediator-arbitrator – which will undoubtedly trouble many parties – is the requirement that, following a failed mediation, an arbitrator disclose to all parties as much confidential information he obtained during the mediation proceedings as he considers 'material to the arbitral proceedings'. The controversial topic of mediator-arbitrators will be considered further in a forthcoming blog.

The new Arbitration Ordinance departs from the provisions of the Model Law in relation to the enforcement of arbitral awards, and instead retains the enforcement procedure established under the previous regime (i.e. arbitral awards are enforceable in the same manner as a court judgment but leave of the court is required.) However, separate provisions in the new Arbitration Ordinance distinguish between the enforcement of (i) Mainland awards, (ii) New York Convention awards and (iii) non-Mainland and non-New York Convention awards (e.g. Taiwan). These provide a comprehensive system for the enforcement of arbitral awards, removing any ambiguities which existed under the previous regime.

Hong Kong is already a major centre for international arbitration in Asia. As the gateway to China, enjoying the rule of law and New York Convention signatory status, Hong Kong is a natural option for international parties looking to trade in the region. The welcome reforms brought in by the new Arbitration Ordinance are likely to bolster Hong Kong further as a heavyweight competitor for arbitrations in the Asia-Pacific region. It will be interesting to see how the new legislation plays out in practice and whether some provisions are favoured over others.

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