Kluwer Arbitration Blog

New Hong Kong Arbitration Ordinance comes into effect

Justin D'Agostino (Herbert Smith Freehills) · Wednesday, June 1st, 2011 · Herbert Smith Freehills

The new Hong Kong Arbitration Ordinance (Cap. 609) (the "Ordinance") comes into effect today, having been approved by the Hong Kong Legislative Council at the end of last year. The Ordinance represents the culmination of many years of discussion and consultation and marks a significant milestone in the development of Hong Kong as a world-class international arbitration centre. Its stated intention is to facilitate the "fair and speedy" resolution of disputes, providing for maximum party autonomy and minimal court intervention (Section 3). In that respect, the Ordinance draws heavily on the internationally-recognised and accepted framework of the UNCITRAL Model Law (the "Model Law"), with certain modifications (and additions) which reflect the specific features of arbitration in the region.

Overview

The new Ordinance will be of considerable interest (and importance) to all parties and practitioners dealing with or considering arbitration in Hong Kong. In this blog we provide a brief overview of certain key features of the new regime including:

1. the abolition of the distinction between 'domestic' and 'international' arbitration (and the transitional provisions which apply in the context of domestic proceedings);

2. the influence of the Model Law;

3. the availability of interim measures (including the basis on which the Hong Kong Courts may grant interim measures in support of foreign arbitral proceedings);

4. the new codified obligation of confidentiality;

5. the promotion of alternative dispute resolution (including the specific provisions of the Ordinance relating to so-called 'med-arb' and 'arb-med'); and

6. the particular provisions which apply with regard to the enforcement of arbitral awards (including awards rendered in Mainland China).

1. Abolition of the distinction between domestic and international proceedings

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 legislation, and in keeping with the practice adopted in many other major arbitral centres (including Singapore), a distinction was drawn between 'international' and 'domestic' arbitrations, with different provisions of the previous Arbitration Ordinance (Cap. 341) 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, the intention is that all arbitrations in Hong Kong will 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 Ordinance. These will apply in place of certain of the Model Law-based provisions, where parties so choose. These specialised 'opt-in' provisions include, for example: (i) the ability of the courts to determine preliminary points of law; (ii) appeals to the courts allowed on questions of law arising from arbitral awards; (iii) challenges to awards permitted on grounds of serious irregularity; and (iv) provision for the consolidation of arbitrations or hearings. These features may, of course, be of use to many users of arbitration depending on their particular circumstances, but a distinguishing feature of the Hong Kong legislation (and one which sets it apart from other jurisdictions, notably England & Wales) is that these are 'opt-in' provisions; parties will only be subject to the greater court intervention prescribed under Schedule 2 if they expressly provide for this in their arbitration agreement.

A further caveat which is important to note – albeit one which is transitional in nature – is that the various 'opt-in' provisions set out in Schedule 2 will apply automatically to all arbitration agreements which provide for 'domestic arbitration' and which are entered into before or within six years of the new Ordinance coming into effect. In the longer term, however, it is anticipated that parties in the construction industry will be the primary users of the 'opt-in' system, albeit that other international parties may choose to avail themselves of this regime should they wish.

2. The influence of the Model Law

As noted above, the drafters of the new Ordinance have opted to rely heavily on the internationally-recognised and accepted framework of the Model Law. The new Ordinance generally follows the Model Law's headings and chapters, which, in turn, mirror the chronological steps of a typical arbitration procedure. The Ordinance states clearly which features of the Model Law have been adopted (whether in whole or in part) and which aspects of the Ordinance are unique to Hong Kong.

The fact that the Ordinance draws heavily on the Model Law is a positive development which reflects Hong Kong's position as a leading centre for arbitration. The Model Law (which was last updated in 2006) establishes certain minimum standards for national arbitration legislation. Amongst other things, the Model Law describes the (limited) circumstances in which domestic courts should be permitted to intervene in the arbitral process, confirming that arbitral tribunals are empowered to grant a wide-range of interim measures and rule on their own jurisdiction (the principle of kompetenz-kompetenz). The Model Law also provides that parties should be free to agree upon the procedure of any arbitration (subject to certain fundamental safeguards) and

provides an outline framework which can be adopted in the absence of agreement (including provision for what is to happen in the event of default by any party). These features can all be found in the new Hong Kong Ordinance.

It would not be correct, however, to suggest that the Ordinance follows the Model Law slavishly. In certain instances, the language of the Model Law has been modified in order to impose a slightly different standard. For example, Article 18 of the Model Law provides that parties should have a "full" opportunity to present their respective cases, whereas the equivalent provision in the Hong Kong Ordinance (Section 46) provides that parties should have a "reasonable" opportunity to do so. In other instances, the provisions of the Model Law have been replaced entirely with bespoke clauses which reflect the peculiarities of arbitration in the region (the regime for the enforcement of arbitral awards being one such example, as described in greater detail below). Generally speaking, however, Hong Kong has adopted many of the salient features of the Model Law with little or no amendment. In that respect, the new Ordinance can be said to reflect best international practice.

3. Interim measures

One of the central themes underpinning the new legislation is the notion of minimal court intervention, with provisions of the new 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 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.

Section 45 of the Ordinance also empowers the Hong Kong Courts to grant certain interim measures in support of arbitral proceedings – whether seated in Hong Kong or not – albeit that the Courts may decline to grant such relief if it is considered more appropriate for the interim measure sought to be granted by the arbitral tribunal. Furthermore, the Hong Kong Courts may only grant interim measures in support of proceedings seated outside of Hong Kong if: (a) the arbitral proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong; and (b) the interim measure sought belongs to a type or description of interim measure which may be granted in Hong Kong.

4. Confidentiality

A feature of the new legislation likely to prove attractive to many parties is the inclusion of express provisions in relation to confidentiality. Although confidentiality is often perceived as a major advantage of arbitration, it is not always guaranteed. In certain jurisdictions (including, for example, Singapore and England & Wales) an obligation of confidentiality is said to be 'implied'

into the arbitration agreement between the parties, albeit that the precise boundaries of this obligation are somewhat uncertain. In other jurisdictions, notably Australia, the concept of imposing any obligation of confidentiality in arbitral proceedings by law has been rejected by the national courts.

The new Hong Kong Ordinance expressly prohibits parties from disclosing any information relating to the arbitral proceedings or the award, subject to the usual exceptions regarding disclosure to professional advisors or disclosure required by law. In addition, and marking another significant change from the previous regime, the default position under the new Ordinance is that court proceedings relating to arbitration are to be conducted in closed court. Parties with arbitrations seated in Hong Kong can therefore assume that duties of confidentiality will bind their proceedings without the need for any additional drafting in this regard.

5. Mediation

A further specialised feature of the new Ordinance, and one which has been borrowed and enhanced from the old regime, is that express provision is made for both 'med-arb' (where a mediator is appointed to try and resolve the dispute before arbitral proceedings are commenced) and 'arb-med' (where the arbitral tribunal assumes the role of mediator part way through the proceedings in an effort to bring about an early settlement). These provisions follow the spirit of the recent Civil Justice Reform in Hong Kong in promoting ADR (at present, if a litigant in the Hong Kong courts fails unreasonably to engage in mediation, they face potentially adverse costs consequences) and set Hong Kong apart from other leading arbitration centres.

Under the Ordinance, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided that all parties give their written consent. The Ordinance provides that, in these circumstances, the proceedings are to be stayed in order to afford the mediation the maximum chance of success – although if the mediation fails, the arbitrator-mediator is required to disclose to all parties any confidential information obtained during the mediation which he considers to be "material to the arbitral proceedings". This latter requirement may deter some parties from engaging in frank discussions during any mediation (particularly during any caucus sessions with the arbitrator-mediator), which may impede the effectiveness of the overall process. Furthermore, parties should also be wary of anything which might jeopardise the enforceability of a subsequent arbitral award; whilst the Ordinance states that the existence of the 'arb-med' process will not in itself give rise to a ground for challenge if the relevant provisions of the legislation are respected, recent case law from the Hong Kong Courts illustrates that awards may be set aside on grounds of public policy if the 'arb-med' process is conducted in such a manner as to create an impression of bias (*Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 514).

6. Enforcement of arbitral awards

One final feature of the new Ordinance which is worth flagging concerns the regime for the enforcement of arbitral awards, which departs from the provisions of the Model Law in favour (largely) of the enforcement procedure established under the previous regime. The key point is that arbitral awards are enforceable in the same manner as a court judgment but leave of the court is required. Moreover, separate provisions in the new Ordinance distinguish between: (i) awards rendered in Mainland China; (ii) awards rendered in New York Convention states (referred to in the Ordinance as "Convention Awards"); and (iii) other awards (e.g. awards rendered in Taiwan).

Whilst the evidentiary requirements are the same for all three categories of award (the party seeking enforcement must produce an original or certified copy of both the award and the underlying arbitration agreement), the rules which govern enforcement will depend on the place in which the award was rendered. For example, subject to certain limitations, awards rendered in Mainland China may not be enforced in Hong Kong if an application for enforcement is also outstanding on the Mainland (Section 93 of the Ordinance). These features illustrate that, whilst the Hong Kong Ordinance largely reflects international practice, there are certain aspects of the legislation which are tailored to the particular circumstances of the region.

Conclusion

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 reforms introduced by the new Ordinance, couple with the recently promulgated HKIAC Administered Arbitration Rules and the opening by the ICC of a branch of its Secretariat in Hong Kong, are likely to enhance further Hong Kong's position as a major hub for dispute resolution in the Asia-Pacific region and as an important centre for international arbitration more generally.

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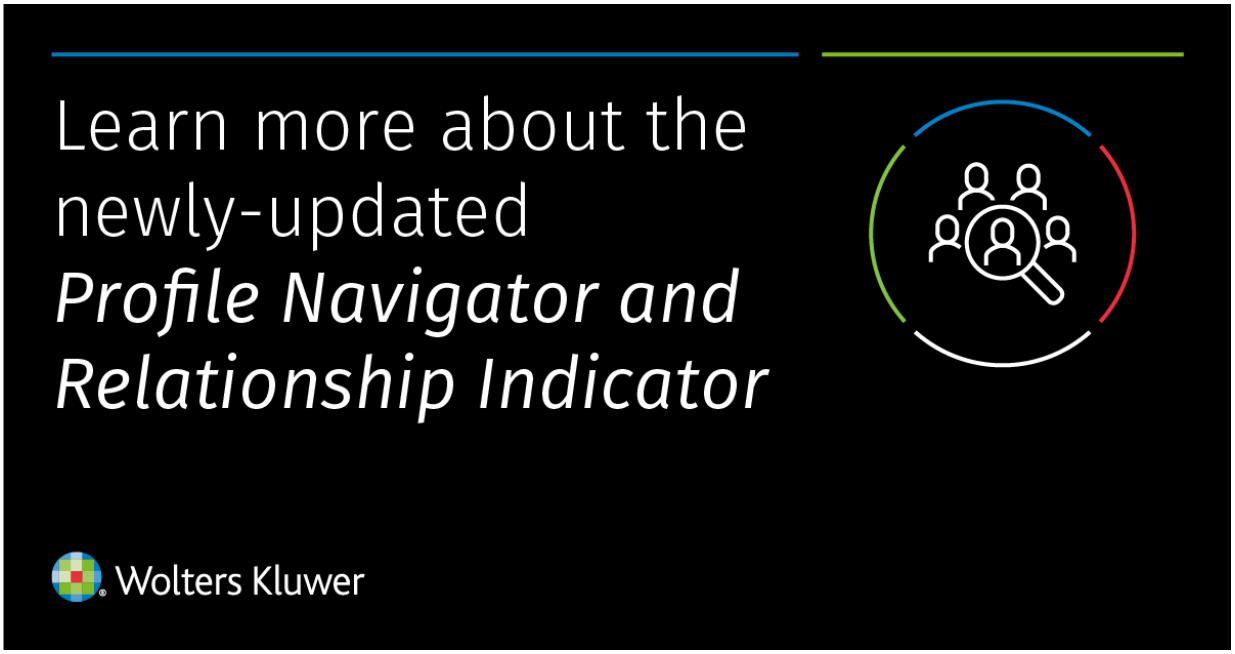

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