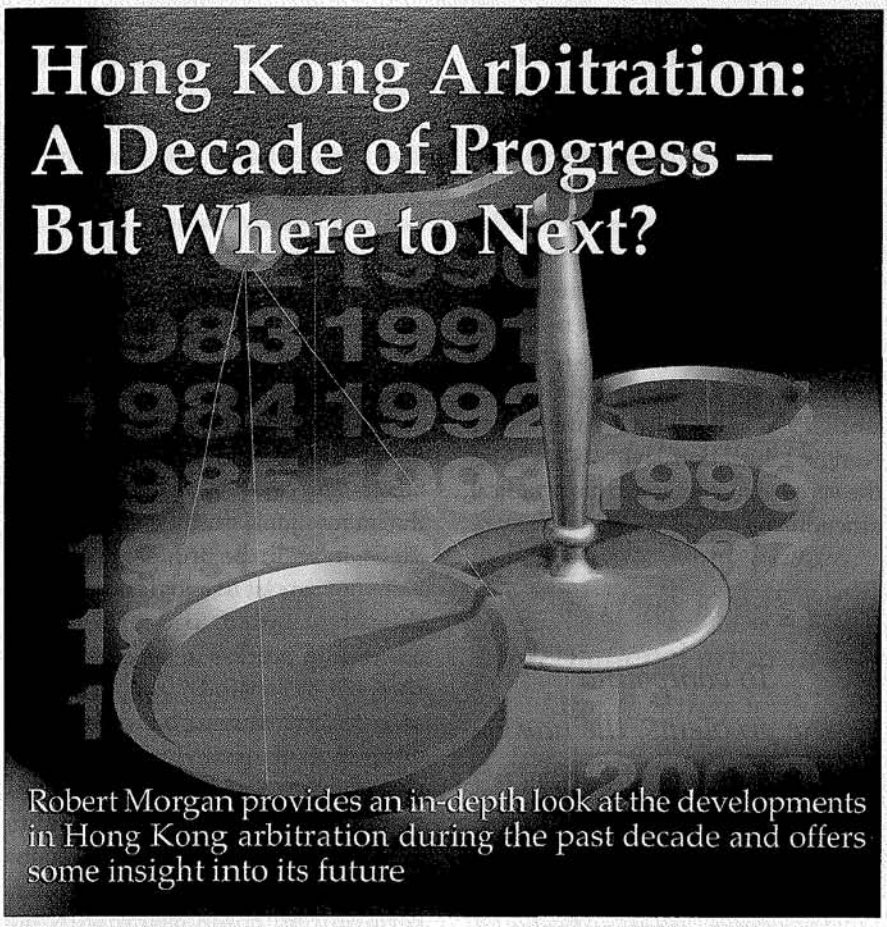
Hong Kong Arbitration: A Decade of Progress – But Where to Next?



Robert Morgan provides an in-depth look at the developments in Hong Kong arbitration during the past decade and offers some insight into its future

Introduction

The 1990s was, and on the eve of the Millennium continues to be, a momentous decade for arbitration in Hong Kong. This period witnessed the success of Hong Kong as both an international and regional arbitration centre and phenomenal growth in arbitration activity. The territory's arbitration law was transformed, for international cases, from a narrow, English-based system to one based upon an internationally accepted model, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Under the influence of that model, the law subsequently underwent further reform so as to introduce the former's underlying concepts and certain of its provisions into Hong Kong's domestic arbitration law. The territory came into its own as a forum for the enforcement of international arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), particularly after 1987 with regard to Mainland Chinese awards. Existing arbitral institutions thrived and new ones sprang up. Greater emphasis than ever before was given to education and training, not only in arbitration, but also other forms of private dispute resolution, such as mediation and its variants.

A number of initiatives were introduced during this period to promote greater use of arbitration as an alternative to litigation in a number of fields, most notably construction and financial services. These initiatives included procedures co-ordinating arbitration and other procedures, such as mediation and adjudication. Such multi-tiered, or 'staged' dispute resolution procedures, rapidly gained acceptance as the norm. Their most high profile use was in connection with the Hong Kong Government forms of construction contracts, those in use for the Airport Core Programme Civil Engineering Works and the Mass Transit Railway forms for the Lantau Airport Railway. At the other end of the scale, a Dispute Resolution Scheme for consumer disputes, which offers any chosen permutation of independent expert appraisal, mediation and arbitration procedures, has been prepared jointly by the Hong Kong International Arbitration Centre, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators and the Hong Kong Mediation Council and will be publicly launched shortly. Such multi-tiered approaches, which combine assisted negotiation with ultimate compulsion in reserve, dovetail neatly into Chinese dispute resolution culture.

Hong Kong's success as an arbitration centre also manifested itself in ways which were more subtle, but which at the same time showcased its position in the regional arbitration realm and demonstrated the faith of the international arbitration community in the territory's continuing success. A number of major arbitration conferences were held in Hong Kong throughout the decade and in 1997 the International Chamber of Commerce (ICC) established a foothold in East Asia, setting up office in Hong Kong under the name ICC Asia. Finally, the territory – and indeed, East Asia as a whole – at long last received its own home-grown journal on arbitration and alternative dispute resolution, *Asian Dispute Review*, the inaugural edition of which was published in June 1999.

Of course, for every positive there is, regrettably, a negative. Arbitration received some of the latter form of ➤

attention during the period under discussion. Much of this centred around the issues of the quality of arbitrators and their awards, the over-formalisation of the arbitral process and the costs of the process, particularly legal costs. It is at least to Hong Kong arbitration's credit that most criticisms tended to stem from one industry – construction – rather than from across the broad spectrum of users. On the other hand, given the size and importance of the construction industry as a user of dispute resolution services and as a provider of work, these criticisms need to be seriously addressed. Addressing them will, without doubt, be the greatest challenge to arbitration in the opening years of the twenty-first century. Another serious criticism was the length of time taken to negotiate new arrangements for the mutual enforcement of arbitral awards between Hong Kong and Mainland China, necessitated by the Mainland's resumption of sovereignty over Hong Kong on 1 July 1997. Significantly though this was a criticism more of the long drawn-out inter-governmental negotiation process than of arbitration itself.

This article is an historical review of arbitration in Hong Kong since 1990. In addition to discussing these and other issues, it will examine prospects for further law reform and the prognosis for Hong Kong arbitration in the early twenty-first century.

Hong Kong's Arbitration Law and Law Reform, 1963-1990

The Arbitration Ordinance (Cap 341) (the Ordinance) was passed in 1963 and has been much amended ever since, in ways both modest and radical. As originally enacted, it was almost identical to the English Arbitration Act 1950. By and large and with few exceptions, subsequent amendments to the Ordinance tended to mirror amendments to the 1950 Act and the passage of the Arbitration Act 1979. The first tentative steps away from the English model came, however, with the enactment of the Arbitration (Amendment) Ordinance 1982, which introduced provisions dealing with (inter alia) consolidation of arbitrations and dismissal of claims for want of prosecution. Indeed, the latter provision stole an eight-year march on England & Wales, no dismissal provision appearing in the 1950 Act until 1990 – by which time Hong Kong's arbitration law was itself on the verge of moving on to more radical amendment.

To compound the problems, the law was fragmented between statute and common law, making it difficult to access, particularly for foreign users

In 1987 the LRCHK published its *Report on the Adoption of the UNCITRAL Model Law of Arbitration*. It regarded the recent establishment of the Hong Kong International Arbitration Centre (HKIAC) in 1985 and the adoption of the Model Law by the United Nations as catalysts for promoting Hong Kong's position as a leading arbitration centre. Among the rationales given for this view were that the principal legal rules would become more recognisable and accessible to the international community and that the civil law flavour of the Model Law's drafting would make it appeal to users of arbitration who came from civil law-type backgrounds, such as Mainland China. At the same time, however, because the Model Law was a compromise draft to which experts from both common law and civil law jurisdictions had contributed (including the United Kingdom), common lawyers would not be alienated by it.

The Ordinance as originally enacted, whilst it had generally served Hong Kong well for domestic arbitrations, was, in the LRCHK's view, suited neither to the territory's nascent role as an international arbitration centre nor to the needs of the international business community. To begin with, the original provisions were not set out in a logical order and thus they failed to deal with the arbitration process in a systematic or chronological manner, from arbitration agreement through to judicial enforcement or review. Secondly, whilst those provisions were intended to promote party autonomy and to confer fundamental protections on the parties, they were not comprehensive, certainly by comparison with the Model Law. Thirdly, they did not (or did not explicitly) vest fundamental powers in arbitral tribunals to take control of and progress references, including the power to rule on their own jurisdiction. Fourthly, a number of interlocutory powers, in particular those concerned with interim measures of protection, were vested in the former High Court; these could quite appropriately have been exercised by the arbitral tribunal, subject to the court retaining a residual jurisdiction with regard to the exercise only of certain of those powers. Lastly, there was a perception (to a greater or lesser degree) that international users of arbitration favoured finality over detailed judicial supervision and were therefore content to see fewer opportunities for judicial control, both during and after the reference to arbitration, than were provided for by the Ordinance. To compound the

problems, the law was fragmented between statute and common law, making it difficult to access, particularly for foreign users.

To adopt the Model Law would, the LRCHK believed, go a long way towards alleviating these concerns. The Model Law goes much further than the original Ordinance in promoting party autonomy, defining the powers of the arbitral tribunal and delimiting the powers of the courts to intervene in live arbitrations and to review awards. It emphasises the primacy of the arbitral tribunal's authority, vests essential powers in it and concomitantly restricts the role of the courts. The general principles of the Model Law governing intervention in arbitrations, which are influenced by and in line with those of the New York Convention, are that (i) the court has no jurisdiction to deal with allegations of procedural injustice during a live arbitration; (ii) the arbitral tribunal should remain free to continue the proceedings and make an award, even pending the outcome of a challenge on the grounds of lack of jurisdiction, qualifications, impartiality or independence; and (iii) allegations of procedural injustice should be raised when resisting enforcement of the award.

It was beyond the LRCHK's terms of reference to examine the Ordinance insofar as it affected purely domestic arbitrations. The adoption of the Model Law was therefore recommended only for international arbitrations conducted in Hong Kong, in order to achieve 'internationalisation in an area of law which must of necessity have an international context'. This did not mean, however, that the domestic arbitration law was irrelevant, for what the LRCHK proposed would lead to a bifurcated system of arbitration law in Hong Kong, with one stream for domestic arbitrations and the other for international. The LRCHK saw no insuperable problems with this approach, although it would necessitate clear criteria to determine what was or was not a domestic or international arbitration agreement. Furthermore, party autonomy would be maximised by giving parties to arbitrations the opportunity to opt into or out of one system or the other.

The Government accepted the LRCHK's recommendation to adopt the Model Law as Hong Kong's international arbitration law, together with a number of 'add on' provisions

The Model Law, in common with national arbitration laws around the world, does not provide a code of arbitration procedure. That is a matter for detailed arbitration rules agreed between the parties or directed by the arbitral tribunal. Likewise, it does not purport to lay down a complete code of arbitration law. This is not a criticism of the Model Law, but reflects recognition by UNCITRAL that the Model Law is a compromise text containing only core provisions which state commonly accepted principles of international arbitration law with regard to a number of issues. These include such matters as form and content of arbitration agreements (art 7), number of arbitrators (art 10), default appointments of arbitrators (art 11), challenges to arbitrators and revocation of their mandates (arts 12-14), *Kompetenz-Kompetenz* (art 16), equality of treatment (art 18), powers of arbitral tribunals as to procedure generally (art 19), interim measures of protection (art 17) and hearings (art 24), form of statements of case (art 23), party defaults (art 25), form and content of awards (art 31), court assistance generally (art 6) and in relation to such matters as the taking of evidence (art 27) and challenges to awards (art 34). There would, inevitably, be areas in which individual jurisdictions would differ radically in their approach and for which national legislation would remain appropriate. To give three examples: (i) whilst it is entirely normal for Western jurisdictions and also those of South and East Asia to make provision for the award of interest, Arab and other jurisdictions governed by Moslem *shar 'a* law would regard this as usurious; (ii) in jurisdictions such as Hong Kong and Singapore, the 'English rule' as to recovery of party costs is the norm, viz that the winning party is entitled to recover lawyers' fees as part of its costs, by contrast with the 'American rule', whereby attorneys' fees are not recoverable from the unsuccessful party; and (iii) many jurisdictions do not entertain appeals against awards on points of law, whereas such appeals lay against both domestic and international awards made in Hong Kong prior to 6 April 1990 and this remains the case today for domestic awards. National jurisdictions adopting the Model Law are therefore entirely free to continue legislating their own provisions on matters outwith its terms. Furthermore, because the Model Law is not an international convention but truly a 'model' law, national jurisdictions are free to adapt it in such manner as they see fit, whether on its face (as in New Zealand) or by enacting 'add on' provisions (as in Hong Kong and Singapore).

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the Model Law as Hong Kong's international arbitration law, together with a number of 'add on' provisions. In order to establish Hong Kong internationally as a Model Law jurisdiction, therefore, there would be no amendments to its face. The relevant legislation was embodied in the Arbitration (Amendment) (No 2) Ordinance 1989 (64 of 1989), which took effect on 6 April 1990. Further such provisions were added by the Arbitration (Amendment) Ordinance 1991 (56 of 1991).

The 1989 amendments brought about the first large-scale restructuring of the original Ordinance of 1963. Part II of the Ordinance, which was retained substantially intact, was henceforth limited in application to domestic arbitrations. A new Part IIA gave effect in Hong Kong to the Model Law, which was incorporated into the Ordinance as the present Fifth Schedule. New Parts I and IA set out provisions of common application to domestic and international arbitrations.

The 'add on' provisions of the Ordinance were, and remain, spread between Parts I, IA, II and IIA of the Ordinance. Their objectives were fourfold: (i) to confer complete freedom of choice on parties in deciding whether to arbitrate under the domestic or the international régimes; (ii) to aid the construction and interpretation of the Model Law; (iii) to make provision with regard to a limited number of matters which were not dealt with by the Model Law; and (iv) to allocate arbitral assistance and supervision functions under art 6 of the Model Law. Some of these provisions were brand new, others re-enacted provisions of the 1963 Ordinance. The most significant 'add on' provisions of the Ordinance incorporated by the 1989-1991 amendments dealt with the following matters:

(1) *Interpretation of the Model Law:* in interpreting and applying the Model Law, regard shall be had to its international origins (s 2(3)). The object of this provision is to promote uniformity of approach to the Model Law as between states and territories that have enacted it and also as between the Model Law and the New York Convention, on which the Model Law is philosophically based and for the monitoring of which UNCITRAL is also responsible. An example of what this means in practice is that case law on art V of the Convention, which sets out limited grounds for refusal to enforce overseas awards, will be persuasive in construing and interpreting art 34 of the Model Law, which sets out limited grounds for setting aside international awards made in Hong Kong and to which art V of the New York Convention is substantially similar. This is important to practitioners dealing with Model Law cases in Hong Kong because there is as yet no local case law on art 34 of the Model Law. Section 2(3) also enacted the present Sixth Schedule of the Ordinance, which lists certain *travaux préparatoires* to which reference shall be made by arbitrators and the courts in construing and interpreting the Model Law.

The Model Law has served Hong Kong well in practice, both internationally and domestically

(2) *Enforcement of awards:* s 2H, a verbatim re-enactment of an earlier provision, provided for the summary enforcement of awards. This provision was itself repealed and replaced in 1997 by s 2GG of the Ordinance which, though of wider application than its predecessor, has been demonstrated by post-1 July 1997 case law on the enforcement of Mainland Chinese awards not to be on all fours with it. This is discussed below.

(3) *Opting into/out of either régime:* by virtue of s 2L, a party to a domestic arbitration agreement may opt out of the domestic régime (Part II) and into the international (Part IIA). Section 2M has the reverse effect although, by contrast with s 2L, an agreement under s 2M may be made at any time. An opting out agreement under either provision must be in writing. Case law has held that such an agreement must be unequivocal, that is to say, it must reflect exactly the terms of the relevant provision of the Ordinance. Thus, it is not enough that parties to an international arbitration agreement should, without more, agree to adopt domestic arbitration rules, or vice versa (see *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493). A model form of agreement that meets these requirements is available from HKIAC. Furthermore, it is incumbent upon the parties to be clear in their own minds as to which of the régimes governs the arbitration and if necessary to make an opting in/out agreement at the earliest possible stage after a dispute has arisen. Thus, a party to what in all the circumstances is an international arbitration cannot, in an attempt to increase its rights of challenge, reserve until after an award has been made the question of which régime governed the arbitration (*Ananda Non-Ferrous*

Metals Ltd v China Resources Metal and Minerals Co Ltd [1993] 2 HKLR 331).

(4) *Disputes that may be referred to arbitration under the Model Law:* by virtue of s 34C(2), any type of dispute, not only one of an international commercial nature, may be referred to arbitration under the Model Law. This provision not only dispenses with sterile arguments as to what is or is not 'commercial' but also promotes complete freedom to arbitrate disputes.

Some further provisions which were technically 'add ons' established the Model Law's first tentative foothold on domestic arbitration. Firstly, by virtue of three additions to s 2(1) of the Ordinance (interpretation), a common definition of 'arbitration agreement' was applied to both domestic and international arbitrations, by reference to art 7(1) of the Model Law, together with a definition of 'international arbitration agreement', which is referable to criteria set out in art 1(3) of the Model Law, and a definition of 'domestic arbitration agreement' as one which is not international. As a result of the broad criteria expressed in art 1(3) of the Model Law, many arbitrations that would, prior to 6 April 1990, have been classified as domestic are now international. This has arisen primarily as a result of art 1(3)(b)(ii) of the Model Law, whereby an arbitration is international if the place where a substantial part of the parties' commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is outside Hong Kong (see principally *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40).

The Model Law has served Hong Kong well in practice, both internationally and domestically. In international terms, it has contributed towards substantially raising the territory's profile as an international arbitration centre. Hong Kong case law has been at the cutting edge of the Model Law's development and interpretation and is widely cited in other jurisdictions, both Model Law jurisdictions, such as Singapore and the Canadian provinces, and jurisdictions that have adopted arbitration laws based upon the Model Law, such as England & Wales. In local terms, the Model Law has, for the most part, fitted well into Hong Kong's arbitration superstructure, despite some initial misgivings by practitioners about the practicality of working within a bifurcated system.

So far as arbitration agreements were concerned, the real problem with art 7(2) of the Model Law was what constituted an 'agreement in writing'

The courts made clear at an early stage how the Model Law should fit into the existing arbitration system so as to minimise the risk of any dislocation brought about by bifurcated laws. Thus, where parties were in dispute about which of the régimes governed an arbitration, and in the absence of an opting in/out agreement under s 2L or s 2M of the Ordinance making the matter clear, it was open to them to bring alternative applications to the court under Parts II or IIA of the Ordinance with regard to such matters as referring to arbitration disputes in respect of which litigation had been commenced and the appointment of arbitrators by the court (*Heung Cheuk Kei v Pacific Enterprises (Holdings) Co Ltd* (1995) 10 Mealey's Int Arb Rep 7, 11). Furthermore, the courts stated emphatically that, with regard to questions as to jurisdiction of the arbitral tribunal that might arise in connection with such applications (eg as to whether the dispute falls within the ambit of the arbitration agreement), the tribunal should determine this matter first and the role of the court would be very much one of last resort, viz to review the tribunal's jurisdiction rather than to determine it at the outset (*Star (Universal) Co Ltd v Private Company 'Triple V' Inc* [1995] 2 HKLR 62). This approach was very much in line with art 5 of the Model Law, a core provision of which states that, in matters governed by the Model Law, no court shall intervene except where the Model Law so provides.

Law Reform, 1992-1997

As has already been indicated, the adoption of the Model Law was not all plain sailing. Whilst few problems arose with it in practice, those that did arise were significant. The problems were threefold: (i) the form of arbitration agreements required by art 7(2) of the Model Law; (ii) the number of arbitrators to be appointed in Model Law cases (art 10); and (iii) default appointments of arbitrators by the court (art 11).

So far as arbitration agreements were concerned, the real problem with art 7(2) of the Model Law was what constituted an 'agreement in writing'. Most of the requirements as to form in that provision were uncontroversial. What did cause trouble, however, was the requirement that an agreement should be signed by both parties. Whilst in most commercial cases this was clearly done, there were types of contractual documents containing an arbitration agreement that were not signed, such as bills of lading, shipbrokers' notes and salvage ➤

agreements (eg the Lloyd's Open Form). The Model Law also did not recognise arbitration agreements made by course of conduct or arbitration agreements which, whilst undoubtedly in writing, did not carry a signature, such as cases where one party failed to sign and return a copy of the other's terms and conditions of contract, including arbitration provisions.

With regard to the number of arbitrators, the parties were, by virtue of art 10 of the Model Law, free to agree this matter. Failing such agreement, however, it was a mandatory requirement of the Model Law that three arbitrators be appointed. Plainly, this would be inappropriate for those international cases involving relatively small or medium-sized claims, as is often the case in shipping. For such cases, a tribunal of three arbitrators would be organisationally and procedurally over-elaborate and, therefore, expensive. In such cases, weaker parties would be discouraged from pursuing or defending their rights in arbitration.

The third matter, default appointments of arbitrators, was not a weakness on the part of the Model Law as such but a result of the allocation to the courts of the appointing function under art 11 of the Model Law. In drafting art 6, UNCITRAL left it free to each adopting jurisdiction to decide which national authority should be responsible for appointing arbitrators, failing agreement by the parties. It was, and is, not a requirement of art 6 that that authority should be a court. In Hong Kong, however, the forum for default appointments with which parties were traditionally familiar was the High Court. Section 34C(3) of the Ordinance allocated this function accordingly. The downside to this was that seeking appointments from the court took time, that judges were not necessarily familiar with whom to appoint as arbitrator and that applications to the court and the court's order had to be served out of the jurisdiction, with all the accompanying difficulties that complying with local legal requirements would involve.

Provided that the parties have made an agreement as to the conduct of the arbitration that would not breach public policy, their agreement is paramount

In January 1992, nearly two years after the Model Law became law in Hong Kong, the Attorney General asked HKIAC to establish a Committee on Arbitration Law (the HKIAC Committee) to consider whether the Arbitration Ordinance should be amended, by reference in particular to emerging draft arbitration legislation in England & Wales. The Committee was a joint body comprising representatives of all interested professional and trade bodies in Hong Kong. In its report to the Government in 1996, which followed a consultation exercise among Hong Kong's arbitration practitioners, the Committee expressed the view that there should be a two-stage reform of the law. The first stage would (i) implement initial steps to harmonise the domestic and international arbitration laws by reference to the Model Law; (ii) remedy the deficiencies outlined above; (iii) make further common provisions; and (iv) fill a number of gaps in the Model Law. The second stage would comprise root and branch reform, with a new Arbitration Ordinance adopting the Model Law for all arbitrations, both domestic and international, but with a number of 'add-on' or exclusionary provisions for domestic arbitration.

Despite the greater emphasis expressly laid by the Model Law on maximising arbitral authority and minimising the role of the courts, the LRCHK had concluded in its 1987 report that there were no great philosophical differences between the original 1963-1982 provisions of the Ordinance and the Model Law. This theme permeated the recommendations of the HKIAC Committee, which were ultimately enacted as the Arbitration (Amendment) Ordinance 1996 (75 of 1996) (the 1996 Ordinance), which took effect on 27 June 1997. For this reason, two provisions of the Model Law were applied directly to domestic arbitrations. Firstly, art 8 was applied by an amended s 6(1) of the Ordinance, with the result that henceforth a court to which application was made to stay legal proceedings to domestic arbitration ceased to have an overriding discretion as to whether to order a stay. Secondly, art 16 was applied by a new s 13B, so that domestic arbitrators were vested with express authority to make binding rulings determining their own jurisdiction, subject to the Court of First Instance having the final say on the matter. A number of the further provisions of common application added to the principal Ordinance by the 1996 Ordinance reflected the same confluence of philosophy, albeit with some refinements:

(1) *Party autonomy:* s 2AA(2) declares that, subject to such safeguards as are necessary in the public interest, the parties are free to agree how their dispute should be resolved. The phrase 'the parties are free to agree' permeates the Model Law and UNCITRAL takes the view that the duty of equality laid down by art 18 of the Model Law embraces

fair treatment of each party by its opponent as well as by the arbitral tribunal.

(2) *Arbitral supremacy:* s 2GA(1)(b) of the Ordinance imposes an overriding duty on tribunals to use procedures that are appropriate to the particular case in order to avoid unnecessary delay and expense. Provided that the parties have made an agreement as to the conduct of the arbitration that would not breach public policy, their agreement is paramount. Section 2GA(1)(b) underpins the adoption of case management principles and techniques by arbitral tribunals, particularly when read in tandem with the statutory object of the Ordinance declared by s 2AA(1), viz to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. Furthermore, in tandem with other new statutory powers regarding security for costs, interim measures of protection, evidentiary orders, extensions of time for commencing arbitrations and dismissal for want of prosecution, in relation to which the jurisdiction of the Court of First Instance is either restricted or excluded, this provision emphasises the supremacy of the tribunal's authority and follows the Model Law's philosophy of greatly limiting pre-award challenges to tribunals.

(3) *Natural justice:* s 2GA(1)(a) imposes an overriding duty on arbitral tribunals to act fairly and impartially and to give each party a reasonable opportunity to present its case and deal with that of its opponent. Whilst this provision translates the common law rules of natural justice into statutory form, it is essentially little more than the duty imposed on tribunals by art 18 of the Model Law to treat the parties with equality.

(4) *Judicial intervention:* s 2AA(2)(b) declares that the court should interfere in an arbitration only as expressly provided by the Ordinance. Though expressed with a different emphasis in wording, the aim of this provision is essentially the same as art 5 of the Model Law. Thus, in relation to a live reference, the court's powers of intervention, whether during or after the arbitration, are limited to the exercise of those powers conferred by the Ordinance, whether under Part IA, II, IIA or the Model Law, as the case may be.

The powers of the courts in respect of the same subject matter were concomitantly severely limited or excluded altogether by ss 2GC, 2GD and 2GE

The 1996 Ordinance also addressed the three principal criticisms of the post-1990 system discussed above. Thus, s 2AC introduces a new definition of 'agreement in writing' which brings within the ambit of the Ordinance arbitration agreements which (i) though in writing, are not signed; or (ii) have been perpetuated by conduct, or (iii) have been made orally; or (iv) though oral at the outset, have been evidenced in writing. By virtue of a new s 34C(5), a tribunal of three arbitrators is no longer, failing party agreement, to be automatically appointed in Model Law cases; rather, a statutory duty is imposed on HKIAC to determine the number of arbitrators. An amended s 34C(3), a provision inspired by Singapore's International Arbitration Act 1994, imposes an exclusive statutory duty on HKIAC to make default appointments of arbitrators in both domestic and Model Law cases (under, respectively, s 12 of the Ordinance and art 11 of the Model Law). HKIAC's functions under both provisions are performed in accordance with statutory requirements and criteria laid down by the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341 sub leg B).

Finally, the 1996 Ordinance added a number of other provisions which, whilst filling gaps in the Model Law, were also applied to domestic arbitrations. Thus, powers previously vested either normally or exclusively in the courts were vested in arbitral tribunals. These include security for costs, interim measures of protection and certain evidentiary orders (s 2GB), extending time for commencing arbitrations (s 2GD) and dismissal for want of prosecution (s 2GE). The powers of the courts in respect of the same subject matter were concomitantly severely limited or excluded altogether by ss 2GC, 2GD and 2GE. Case law on ss 2GB and 2GC has since made clear that, in cases where tribunals and the courts have parallel jurisdiction to order interim measures of protection or to make evidentiary orders, a court should not exercise these powers unless the order requested involves a third party or the tribunal is unable for any reason to grant all the interim relief sought within a single order (see *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347). Pre-1997 powers regarding awards of costs and interest were also re-enacted with amendments (ss 2GH, 2GI and 2GJ), the principal one being that henceforth tribunals would have jurisdiction to ➤

award compound interest. The 1996 Ordinance also introduced clarificatory provisions, principally with regard to the remedies that may be granted by arbitral tribunals (s 2GF) and extended the court's powers of summary enforcement to arbitral orders and directions as well as to awards (s 2GG). The case management function of the arbitral tribunal was underwritten by a new power under s 2GL enabling it to limit in advance the amount of costs that a party could recover in pursuing its case.

The China Syndrome 1997-2000

Prior to 1 July 1997, Mainland Chinese awards were summarily enforceable in Hong Kong as Convention awards by virtue of ss 2H and 42 of the Ordinance, the People's Republic of China having acceded to the New York Convention in April 1987. Under s 44, there were a limited number of exclusive defences to the enforcement of Convention awards. Furthermore, the courts applied a 'pro-enforcement bias', refusing to set aside leave to enforce such awards unless it could be shown that a party's rights had been substantially prejudiced. As a result, leave to enforce was rarely set aside, so that the overwhelming majority of Chinese awards were enforced. The fact that between one-half and two-thirds of all awards brought to Hong Kong for enforcement during the period 1987-1997 were Mainland awards speaks for itself.

With the resumption of sovereignty, Hong Kong became part of the PRC, albeit as a separate law district. Clearly, the New York Convention no longer applied to cross-border awards, as they were no longer 'foreign'. By the same token, because of Hong Kong's status as a Special Administrative Region under the 'one country, two systems' policy, such awards could not be considered to be domestic either. Mainland awards therefore acquired a sui generis status. As early as 1992, and many times since, dire warnings were uttered of an impending legal vacuum if alternative enforcement arrangements were not put in place in time for the transition. The initial warning was given in October 1992 by the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters (the Edwards Committee), a body which advised the Sino-British Joint Liaison Group on a number of cross-border legal issues, and was echoed by a number of learned commentators, including Neil Kaplan, who was also a member of the Edwards Working Party. Regrettably, replacement arrangements were indeed not in place on SAR Establishment Day. As events transpired, however, the difficulties that arose were not entirely a function of the transition but very largely a consequence of the enactment of the 1996 Ordinance. Before 27 June 1997, the now repealed s 2H of the Ordinance permitted the summary enforcement of domestic awards and Model Law awards made in Hong Kong. It applied to the enforcement of Convention awards because s 42 of the Ordinance said so. Overseas awards which were not Convention awards, such as those made in Taiwan, were also enforceable under s 2H, albeit at the discretion of the court, thus obviating the need to enforce by way of a common law action on the award.

Clearly, urgent action to restore the status quo ante was needed in order to minimise damage to Hong Kong's position as an arbitration centre and place of enforcement

With effect from 27 June 1997, however, s 2H was repealed and replaced by s 2GG of the Ordinance, which provides in almost identical terms for the enforcement of awards and, by virtue of s 42, applies to Convention awards. It had been assumed in many quarters that s 2GG would avail the enforcement of Chinese awards even though they were no longer Convention awards. This impression was dispelled by the decision of Findlay J in *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213, in which the learned judge held that s 2GG had to be read subject to s 2AD of the Ordinance, which declared the scope of Part IA of the Ordinance. In Findlay J's view, Part IA, of which s 2GG was also a provision, when read together with art 1 of the Model Law, applied to domestic and international arbitrations conducted, and therefore to the enforcement only of awards made in Hong Kong. As Mainland awards were no longer Convention awards and s 2GG was narrower in application than its predecessor, they would have to be enforced by action on the award – which takes longer, is more costly and subject to a greater number of defences. The old certainties were, therefore, lost. The judgment carried identical implications for the enforcement of Taiwanese awards.

Findlay J's judgment, which was rendered in February 1998, confirmed the existence of the long-anticipated legal vacuum in the enforcement of cross-border awards. Clearly, urgent action to restore the status quo ante was needed in order to minimise damage to Hong Kong's position as an arbitration centre and place of enforcement. Indeed, there is much anecdotal evidence of Hong Kong-PRC arbitrations going to Singapore in

order to get around the problem. Regrettably, swift action was not forthcoming. New arrangements based on the New York Convention were not announced by the Secretary for Justice until November 1998. Despite expressing hope that the necessary juridical assistance agreement under art 95 of the Basic Law would be signed by the end of the 1998, the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region was not in fact signed until 21 June 1999.

Even so, the signing of the agreement is not the end of the story. It requires implementation on both sides of the border. In Hong Kong, an Arbitration (Amendment) Bill was gazetted on June 1999. The Legislative Council will not, however, commence formal consideration of the Bill until October 1999. This means that, subject to the pace at which promulgatory measures are introduced on the Mainland, new arrangements are unlikely to be in place much before the end of 1999 or even early 2000.

Whilst seeking to introduce New York Convention-type enforcement arrangements for PRC awards (and finally updating O 73 r 10 of the Rules of the High Court in the process), the Hong Kong Bill requires some fine-tuning to achieve this aim. HKIAC and other interested bodies are co-ordinating appropriate representations to the Department of Justice.

The Bill is also silent on the subject of Taiwan. Whilst the 'renegade province' across the Straits is always a touchy subject, there is no reason why enforcement arrangements carrying no suggestion whatsoever of sovereignty for Taiwan should not be included in the Bill. The simple expedient of a single clause applying s 2GG to the enforcement of any awards made overseas or outside of Hong Kong, other than Convention and Mainland awards, would suffice. Such a provision would, without mentioning the names of any territories, embrace not only Taiwan but also Macau and the few remaining states, such as Pakistan, that have not acceded to the New York Convention.

Hong Kong's profile as an international arbitration centre would benefit from its continuing to be seen as a Model Law jurisidiction ...

Law Reform, 1998 and Beyond

With regard to root and branch law reform in the longer term, the HKIAC Committee, chaired by Neil Kaplan, whilst putting forward a number of specific ideas, was content to state broad principles for the guidance of a future committee. It recommended that:

> 'The Arbitration Ordinance ... should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other Model Law jurisdictions, both necessary and desirable.'

The task of giving detailed consideration to the shape and content of a new Arbitration Ordinance fell to a successor body created by the Hong Kong Institute of Arbitration (HKIArb) with the encouragement of the Secretary for Justice. The Committee on Hong Kong Arbitration Law (the HKIArb Committee), like its predecessor, is a joint committee. Its Chairman is Mr Robin S Peard, a solicitor and eminent maritime arbitrator.

The HKIArb Committee has not yet reported to the Government, but the following is a summary of its conclusions to date. Hong Kong's profile as an international arbitration centre would benefit from its continuing to be seen as a Model Law jurisidiction if and when a new Arbitration Ordinance is enacted. The Committee has therefore endorsed the concept of a unitary system of arbitration law governed by the Model Law, together with any necessary or desirable amendments. Its guiding principle for reform is that any provisions additional to the Model Law should only be recommended where there is good reason for doing so, such as where a domestic provision of the present Ordinance has been widely accepted or where a proposed provision was not contemplated at the time the Model Law was adopted in Hong Kong. The amendments will therefore be relatively few in number, in order that there should not be too great a divergence from UNCITRAL's drafting. Their principal functions will therefore be (i) to provide a corpus of essential provisions without seeking to codify Hong Kong's arbitration law; (ii) to make further necessary provision with regard to matters not dealt with by the Model Law (for example with regard to the seat of the arbitration, the appointment and functions of umpires, a general duty on the parties to progress a reference and to comply with the tribunal's orders and directions, sanctions for party defaults and assessment of the parties' costs and arbitrators' fees); (iii) to clarify certain provisions of the Model Law, such as the power of the court under art 34(4) to remit an international award made in Hong Kong; and (iv) to remove a number of internal

inconsistencies and conflicts between Part IA of the present Ordinance and the Model Law. There are also likely to be a small number of special provisions for domestic arbitrations, in particular rights to opt into determination of a preliminary point of law by the court and appeals on a point of law. The state of play of the HKIArb Committee's deliberations is discussed in greater detail by Robin Peard in his article, *The Arbitration Ordinance: What Further Changes are Needed?* [1999] Asian DR 33.

It is hoped that the HKIArb Committee will be in a position to report to the Government by the end of 1999 or early 2000 and that Government's reactions to the recommendations will be positive.

And what of the Future?

Even assuming that the Hong Kong Government is prepared to take forward the next stage of law reform, there must be in place an arbitral infrastructure which ensures that it is implemented effectively, efficiently, fairly and in the public interest. The criteria for determining whether such an infrastructure meets these requirements are conveniently encapsulated by Lord Woolf MR's basic principles for an accessible civil justice system. For he himself has said that his reforms, and the English Arbitration Act 1996 on which the latest Hong Kong amendments are based, are two sides of the same coin, subject of course to such modifications as are necessary to reflect the voluntary nature of arbitration (*Patel v Patel* [1999] BLR 227 at 229). These principles, which are addressed to what Lord Woolf MR identified as the triple excesses of cost, delay and complexity, are as follows:

(1) *The results should be just:* substantive justice depends upon adequately trained professionals, both lawyers and non-lawyers, to present their clients' cases effectively, and on the existence of trained and experienced arbitrators, both legal and lay. Whilst the primary professional bodies are responsible for training their members in substantive law and advocacy skills, it is for the arbitral institutions to provide adequate and up to date training in arbitration law and practice to all those involved in the process.

Arbitrators have a responsibility to avoid 'over-judicialising' arbitration procedure ... by tailoring it to the needs of the particular case, or encouraging the parties to do so

(2) *The system should be fair in fact and in appearance:* whilst the duty to observe natural justice is now enshrined in statute, that is only part of the picture. Arbitrators must be capable in the first place of exercising judicial capacity, an ability which is arguably more inherent than learned. They must not apply case management techniques in such a way as to prejudice compliance with the rules of natural justice (*Damond Lock Grabowski & Partners v Laing Investments (Bracknell) Ltd* (1992) 60 BLR 112). They must also be competent and conversant with what they can and cannot do with a live reference, as failure to do so of itself generates unfairness. Most parties are arguably satisfied with the way in which their cases are handled, even if ultimately they are unsuccessful, if they can feel they have had their 'day in court'. Regrettably, however, there are arbitrators who, regardless of whether they are legal or lay or of how much training they may have received, are not competent to handle real world references. The failures of such a minority give the arbitral process a bad name. Those who doubt the veracity of this assertion are referred to the decision of Findlay J in *Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens* [1998] 4 HKC 171 for an object and abject lesson in how an arbitration should not be conducted.

(3) *Procedures should be proportionate to the issues involved and the process should be reasonably speedy:* this principle is enshrined in the object declared in s 2AA(1) of the Ordinance and in the overriding duty on arbitrators to adopt appropriate procedures so as to avoid unnecessary delay and expense. This principle is not limited in application to cases where an arbitrator decides procedure; it applies equally where an arbitrator directs the way in which parties should implement their chosen procedure. One example of this is the use of the power under s 2GL of the Ordinance to limit a party's recoverable costs and thus achieve proportionality to the issues involved and the amounts at stake.

(4) *The process should be understandable and responsive to users:* foreign users and their lawyers and unrepresented domestic users and lay professionals should, so far as possible, have access to a comprehensible and cohesive corpus of arbitration law. A unified body of arbitration law would go some way towards meeting this objective. Once again, however, this is only part of the picture.

Arbitrators have a responsibility to avoid 'over-judicialising' arbitration procedure (a criticism frequently voiced by the construction industry in particular) by tailoring it to the needs of the particular case, or encouraging the parties to do so. They must ensure that the parties understand what the process involves and the implications of decisions taken, particularly if they are unrepresented. Subject to contrary agreement by the parties, s 2GB(6) of the Ordinance allows arbitral tribunals to adopt inquisitorial procedures, thus liberating them from strict adherence to the adversarial system, provided that natural justice is not compromised. Arbitral institutions must 'sell' their procedures and services to users at large, keep under review their model arbitration clauses, arbitration rules and associated procedural guidance and develop new procedures and services, both generally and for particular sectors, including 'multi-tiered' procedures such as mediation/arbitration or adjudication/arbitration. In so doing, they will also 'sell' Hong Kong as an arbitration centre.

(5) *The process should provide as much certainty as the circumstances of the case allow:* users should know in advance what they can expect of the process and how it differs from other dispute resolution processes, in terms both of processual differences and likely outcomes. Arbitral institutions have a role to play in providing such information and helping users to make informed choices. It should not be forgotten that business is the biggest user of arbitration and that business people value certainty above all.

(6) *The process should be effective in terms of resourcing and organisation:* arbitral institutions must, in addition to producing model clauses and arbitration rules, maintain and review panels of arbitrators from whom they may confidently make default appointments should the parties fail to agree. They must also provide adequate administration and support services for arbitrations, particularly international commercial arbitrations. Keeping panels of arbitrators under review is of critical importance as institutional appointments are regularly condemned as a 'lottery', particularly by the construction industry. For their part, arbitrators must be prepared to accept only so many appointments as they can realistically handle.

Hong Kong arbitration enters the new Millennium in a state of flux, having developed exponentially during the relatively short period commencing in 1985

Compliance with all of the above criteria will also impact upon the costs of the process, particularly legal costs. Lawyer's fees are a critically sensitive topic in Hong Kong at the moment and the level of fees has come under attack from a number of directions, including by a member of the Bench who sees high fees as threatening to price Hong Kong out of the market as a centre for arbitration or litigation (*Glencore International AG v Tianjin Huarong Mineral Products Co Ltd* [1998] 3 HKC 68 at 73, per Cheung J). This is, of course, not an issue that is unique to or generated by arbitration per se. The continued health and use of the arbitral process will, however, be gravely threatened if it is not addressed.

Conclusion

Hong Kong arbitration enters the new Millennium in a state of flux, having developed exponentially during the relatively short period commencing in 1985. The territory's experience of the UNCITRAL Model Law has been a beneficial one, in terms both of the development of Hong Kong arbitration generally and of Hong Kong's international image. There is now in place an effective and more modern (if at presently somewhat messily organised) Arbitration Ordinance which expressly aims to promote arbitral efficiency, speed and economy. An unfortunate hiatus in the summary enforcement of cross-border awards will hopefully soon come to an end, perhaps allowing the territory to start winning back business lost to Singapore in the interim. These are positive indicators. If Hong Kong at least enters 2000 with an arbitration community that is better informed of what needs to be done to minimise the triple excesses of cost, delay and complexity, there is good cause for optimism in arbitration's future in the territory. In these circumstances, a new Arbitration Ordinance, if enacted, will be the icing on the cake.

Robert Morgan
Associate Professor
Faculty of Law
University of Hong Kong

香港仲裁法制：回顧與前瞻

莫勤保深入探討香港仲裁法制過去十年來的發展，並展望將來

引言

對很多人來說，九十年代標誌著二十世紀即將結束，但對於香港的仲裁制度來說，這十年光景有著另一種意義，因為它印證了香港晉身為亞太區以至國際間數一數二的仲裁中心的成就，以及仲裁活動在香港的驚人增長。香港的仲裁法制，本是一個建基於英國法律的狹窄制度，但為了迎合國際需要，香港把制度轉化為一個建基於全球公認的聯合國國際貿易法委員會《國際商事仲裁示範法》（以下簡稱《示範法》）的制度。在《示範法》的影響下，香港對本土仲裁法律進行改革，引進了《示範法》背後的基本原則概念和當中一些條文。根據 1958 年在紐約簽訂的《承認及執行外國仲裁裁決公約》（以下簡稱《紐約公約》），香港自立門戶，成為國際仲裁裁決的執行地，自 1987 年起範圍更伸展至中國大陸的仲裁裁決。香港境內的仲裁機構，工作量有增無減；新的仲裁機構亦如雨後春筍，相繼成立。與此同時，香港較以往更強調教育和人才培訓工作，範圍不僅限於仲裁，而是遍及各種私人糾紛解決方式，例如調解和其變體。

政府為了鼓勵各界人士（特別是建築界和財經服務界）使用仲裁作為訴訟以外的解決糾紛方法，推行了一系列措施，包括各項籌統仲裁和其他工作（如調解和審裁）的程序。這些包含多重「階段」的解決糾紛程序，很快便廣被接納為典範和標準。採納這些程序的最矚目例子，要算是香港政府的建築合約格式，特別是關於新機場核心計劃的土木工程以及地下鐵路機場快線的格式。在另一端，香港國際仲裁中心、特許仲裁員學會（東亞分支）、香港仲裁員學會及香港調解局已攜手籌備一個為消費者糾紛而設的「糾紛解決計劃」，這個旨在提供各種獨立專家評估、調解和仲裁程序組合的計劃，將於短期內全面實施。這種調解糾紛方式，既能讓各方在得到獨立人士協助下進行和談，也有助抑制爭議各方的憤怒情緒，正正迎合了中國傳統的「友好協商」文化。

香港作為仲裁中心的成就，也在其他方面得以彰顯，它們雖不及上述的那樣高調，但不僅展現了香港在亞洲區內的仲裁中心地位，而且反映了國際仲裁界對香港的信賴和期望。過去曾有不少大型仲裁會議在香港舉行，而於 1997 年，國際總商會更在香港設立辦事處，作為踏足東南亞地區的第一步。此外，香港（以至整個東亞地區）終於擁有一本區內親自出版的仲裁調解期刊 — 《亞洲糾紛評論》(*Asian Dispute Review*)，其創刊號已於本年 6 月出版。

然而，凡事有正面也有負面。過去十年來，就在仲裁不斷發展的同時，不少人對種種事項表達了關注甚至提出了批評，主要包括仲裁員的水準和其判決的質量、仲裁過程過份形式化，以及仲裁過程涉及的費用（特別是律師費）。也許值得安慰的是大部分的批評只是來自建築界，而並非廣泛的批評。縱然如此，鑒於建築界使用糾紛調解服務的比率以及他們作為本地職位和工作提供者的重要性，故此我們仍要認真研究他們的言論。無可否認，踏入二十一世紀，本地仲裁制度先要面對的最大挑戰之一，會是如何應付上述批評。此外，另一項指責是，自中國大陸對香港恢復行使主權後，中港兩地要重新協定互相執行仲裁裁決的安排，而有關安排卻遲遲未有定案。但平心而論，這種批評實與仲裁本身無關，問題在於政府部門之間的談判過程過於冗長。

本文旨在回顧香港仲裁自 1990 年以來的發展，以及探討進一步法律改革的可行性和預視下世紀初期香港仲裁的前景。

香港仲裁法律與改革（1963 至 1990 年）

《仲裁條例》（第 341 章）（以下簡稱《條例》）自從於 1963 年通過生效以來，經歷了無數次大大小小的修訂。原本制定的《條例》，內容與英國《1950 年仲裁法令》幾乎完全相同，而《條例》隨後的各項修訂，大致上亦反映《1950 年仲裁法令》的修訂和《1979 年仲裁法令》的通過。直至 1982 年，《1982 年仲裁（修訂）條例》的制定，代表著香港首次嘗試脫離英國的模式。該次修訂引入的條文，包括仲裁案件的合併及以無人作出行動為理由而撤銷申索。實際上，英國和威爾斯到了 1990 年才把類似撤銷申索的條文引進其仲裁法令內，但於 1990 年，香港的仲裁法律已預備面對更重大和徹底的變革了。

1987 年，香港法律改革委員會（以下簡稱「法改會」）發表了一份《關於採納聯合國國際貿易法委員會仲裁示範法的報告》，當中指出，香港國際仲裁中心於

1985 年的成立以及聯合國《示範法》的採納，促使了香港晉升為首屈一指的仲裁中心。法改會所持的理據，是國際社會從而更明瞭有關的法律原則和規定；而且《示範法》一方面帶有大陸法特色，故能吸引來自大陸法系背景（例如中國大陸）的人使用，與此同時，《示範法》是來自普通法國家（包括英國）和大陸法國家的專家共同草擬的法律，故此普通法制下的律師也不會對之感到陌生。

法改會認為，原本制定的《條例》雖然在香港本土運作良好，但無助於香港發展成國際仲裁中心，亦不能滿足國際商業社會的需要。第一個原因是原本的條文安排欠缺邏輯性，未能有系統地為整個仲裁過程（由仲裁協議直至裁決的執行或覆核）作出規定。第二，儘管條文的用意是促進各方的自主權及賦予各方基本保障，但至少跟《示範法》比較起來，條文還是未夠全面。第三，條文沒有（或沒有明確地）授權仲裁庭控制仲裁過程，包括對本身管轄權作出裁定的權力。第四，不少的非正審權力 — 特別是關於臨時性保全措施的權力 — 都歸屬於當時的高等法院，而這些權力其實應可由仲裁庭行使，唯一的規限是法院在行使某些權力時仍有殘餘的司法管轄權。第五，很多人或多或少覺得國際間使用仲裁制度的人較著重案件的最終結果而非司法界對仲裁過程的管控，因此即使《條例》減少司法控制的機會，使用仲裁者亦不會在意。使問題更加嚴重的是仲裁法律既出現在成文法規內，也可在普通法中找到，使有關法律看來支離破碎、深澀難明。

法改會相信，採納《示範法》將大大有助解決以上各種問題。《示範法》在促進各方自主權、訂明仲裁庭的權力以及界定法院干預仲裁過程和覆核仲裁裁決的權力各方面，都比原本的《條例》來得更加詳盡。《示範法》強調仲裁庭的權威性居於首位，亦向仲裁庭賦予各項重要權力，同時限制了法院的權力。《示範法》內關於法院干預仲裁過程的一般原則，與《紐約公約》的一致，它們分別是：（一）仲裁過程中即使出現程序不公平的指稱，法院也沒有司法管轄權受理；（二）即使出現針對仲裁庭的指稱或異議，例如欠缺管轄權、資格、不偏不倚或獨立性等，仲裁庭仍可繼續審理案件及作出裁決，不須等待該些指稱或異議受法院審理的結果；及（三）所有關於程序不公平的指稱，應在反對仲裁裁決的執行時始可提出。

跟全球各國的
全國性仲裁法律一樣，
《示範法》沒有提供
一套仲裁程序守則。
這些守則，
是藉著各方的協議
或仲裁庭的指示
而訂立

法改會檢討工作的範圍，並不包括檢視《條例》對本地仲裁的影響。因此，有關採納《示範法》的建議，只適用於香港進行的國際仲裁，以期「令一個無可避免地需要有國際層面的法律範圍達致國際化」。但這不代表我們可對本地仲裁法律置之不理，原因是法改會的建議獲得接納後，將把香港仲裁法分成兩大部分，分別適用於本地仲裁和國際仲裁。法改會認為這做法要求訂立一套清楚的標準去決定某仲裁協議屬於本地還是國際協議，但除此以外，法改會並不覺得上述做法會產生太大問題。此外，參與仲裁的各方可獲給予機會選擇棄用某種制度而轉用另一種制度，這會確保各方得到最大的自主權。

跟全球各國的全國性仲裁法律一樣，《示範法》沒有提供一套仲裁程序守則。這些守則，是藉著各方的協議或仲裁庭的指示而訂立。同樣地，《示範法》的意旨並不在於訂下一套完整的仲裁法典。這不是一種指責，只是反映出聯合國國際貿易法委員會承認《示範法》是一部具「妥協」性質的法律，內容單單包括就各項廣被接受的原則訂下的核心條文。這些原則涉及的事宜，包括仲裁協議的形式和內容（第 7 條）、仲裁員人數（第 10 條）、仲裁員的指定（第 11 條）、對仲裁員提出異議和仲裁員任命的撤銷（第 12 至 14 條）、仲裁庭對自己的管轄權作出裁定的權力（第 16 條）、平等相待（第 18 條）、仲裁庭在一般程序上的權力（第 19 條）、臨時性保全措施（第 17 條）和開庭審理（第 24 條）、申訴書等的形式（第 23 條）、仲裁各方不履行責任（第 25 條）、裁決的形式和內容（第 31 條）、一般的法院協助（第 6 條）、獲取證據方面的法院協助（第 27 條）以及質疑仲裁裁決方面的法院協助（第 34 條）等等。無可避免地，在某些問題上，不同司法管轄區的處理手法可以相當迥異，因此各國制定本身的法律是無可厚非的。舉幾個例子說：（一）在西方及東南亞國家，有關頒判利息的規定相當正常和普遍；但對於亞拉伯國家和其他受伊斯蘭教教條管轄的國家來說，這些規定便等同於放高利貸；（二）就討回與訟方訟費方面，香港和新加坡等地採用的是「英式規則」，即勝訴一方有權討回律師費作為該方訟費的一部分；相反地，美國等地則採用「美國規則」，則勝訴一方不能向敗訴一方討回律師費；及（三）對於以法律論點為理據而針對仲裁裁決提出的上訴，不少司法管轄區都不會受理，但在香港，就 1990 年 4 月 6 日前頒判的本地及國際裁決以及現時頒判的本地裁決而言，這些上訴會得到受理。因此，採納《示範法》的國家，可自行就《示範法》範圍以外的事宜立法作出規定。此外，鑒於《示範法》不是國際公約，而是一部真正的「示範」法，故此各國可自由因應本身的需要而作出修改，不論是直接修改「示範」條文（此乃新西蘭等地的做法）還是制定「附加」條文（此乃香港和新加坡等地的做法）。

政府接納了法改會的建議，採納《示範法》為香港的國際仲裁法，同時引入一系列的「附加」條文。政府不接納直接修改「示範」條文的建議，因它希望香港成為國際間奉行《示範法》的司法管轄區。首項引入「附加」條文的條例，是於 1990 年 4 月 6 日生效的《1989 年仲裁（修訂）（第 2 號）條例》（1989 年第 64 號條例）；其後的《1991 年仲裁（修訂）條例》（1991 年第 56 號條例），進一步引入了「附加」條文。

1989 年的修訂，首次對原本的《條例》進行大規模重組。該項修訂引進了《條例》第 IIA 部，確認《示範法》在香港的適用，而《示範法》本身則被納入《條例》內（見現時的附表 5）。修訂亦 ▶

新增了《條例》第 I 及 IA 部，內容包括各項適用於本地及國際仲裁的一般條文。至於大致上得以完整保留的《條例》第 II 部分，其適用範圍則被規限於本地仲裁。

《條例》的「附加」條文，遍布《條例》第 I、IA、II 及 IIA 各部。它們的用意如下：（一）賦予各方絕對自由，決定在本地制度抑或國際制度下進行仲裁程序；（二）協助解釋《示範法》；（三）為小部分《示範法》未有處理的事宜作出規定；及（四）按照《示範法》第 6 條分配仲裁協助和監察職能。這些條文當中，一些是簇新的，其他則重新制定原先《條例》的條文。1989 至 1991 年的修訂中，最值得注意的「附加」條文，關於以下各項：

一、*《示範法》的釋義*：《條例》第 2(3) 條規定，凡解釋及引用《示範法》的條文，須顧及其國際性根源。這項條文的目的，是促進各個國家和領土在處理《示範法》時採取統一貫徹的做法，以及促進《示範法》與《紐約公約》間的貫徹性。（《示範法》在理念上乃植根於《紐約公約》，而聯合國國際貿易法委員會也有責任監察《紐約公約》。）這在實際上的意思為何？舉例說，《紐約公約》第 V 條訂下拒予執行海外裁決的有限理據，而《示範法》第 34 條則訂下撤銷在香港作出的國際裁決的理據，鑒於兩項條文內容極為相似，故此有關《紐約公約》第 V 條的案例，在《示範法》第 34 條的釋義上具有說服力。這點對於香港處理受《示範法》管轄的案件的律師來說相當重要，因為香港本身現時仍未出現關於《示範法》第 34 條的案例。《條例》第 2(3) 條亦規定，仲裁員和法院在解釋和引用《示範法》時，可顧及《條例》附表 6 所列明的各份文件。

二、*裁決的執行*：《條例》第 2H 條為簡易執行裁決一事作出了規定。這條可說是把早前條文搬字過紙、重新制定的條文，到了 1997 年被《條例》第 2GG 條廢除。第 2GG 條的應用範圍較第 2H 條為廣，但正如 1997 年 7 月 1 日後關於執行中國大陸裁決的案例顯示，該兩項條文並不完全一致。下文將詳細探討這點。

三、*在兩個制度之間選擇*：根據《條例》第 2L 條，本地仲裁協議各方可選擇棄用本地仲裁制度（第 II 部）而採用國際仲裁制度（第 IIA 部）。《條例》第 2M 條則容許反向的情況，但它跟第 2L 條的不同之處，在於第 2M 條下的協議可在任何時間訂立。任何根據第 2L 或 2M 條的協議，必須以書面方式訂立。此外，據有關案例指出，此等協議必須明確，即必須準確反映《條例》內的有關條文，因此，國際仲裁各方單單同意採納本地仲裁規則（或反之亦然），是不足夠的（見 *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493 一案）。一份符合有關規定的協議格式，可從香港國際仲裁中心索取。各方務須清楚確定其仲裁個案受哪個制度管轄，若有需要的話，更應在糾紛出現後儘早訂立選擇仲裁制度的協議。故此，當所有情況清楚顯示某個案屬於國際仲裁個案，該個案的任何一方不能留待仲裁庭作出裁決後才提出有關管轄制度的問題，以圖增加該方提出異議的權利（見 *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1993] 2 HKLR 331 一案）。

1989 年的修訂，首次對原本的《條例》進行大規模重組。該項修訂引進了《條例》第 IIA 部，確認《示範法》在香港的適用

四、*可按照《示範法》轉交仲裁的糾紛*：根據《條例》第 34C(2) 條，任何種類的糾紛（不僅是國際商業糾紛）都可按照《示範法》轉交仲裁。這條文不但免去了何謂「商業」與否等的惱人問題，而且也與促進各方選擇仲裁的自由這個目的互相呼應。

除此以外，有一些嚴格上屬於「附加」性的條文，為《示範法》立足本地仲裁範疇鋪路。首先，《條例》第 2 條（釋義部分）新增了以下三個定義：「仲裁協議」引述《示範法》第 7(1) 條，適用於本地及國際仲裁；「國際仲裁協議」引述《示範法》第 1(3) 條訂下的準則；及「本地仲裁協議」，指非屬國際仲裁協議的仲裁協議。由於《示範法》第 1(3) 條訂下的標準頗為寬鬆，不少在 1990 年 4 月 6 日前應被分類為本地仲裁的，現在都屬於國際仲裁。原因是《示範法》第 1(3)(b)(ii) 條規定，若各方履行商事關係的大部分義務的地點或與爭議標的關係最密切的地點是在香港以外，有關仲裁便屬國際仲裁（見 *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40 一案）。

在香港，不論在本地層面還是國際層面，《示範法》均運作得相當良好。在國際層面上，《示範法》在提升香港作為國際仲裁中心方面貢獻良多。香港的案例對於《示範法》的發展和解釋起著關鍵作用，不論直接採納《示範法》的司法管轄區（如新加坡和加拿大各省）還是採納以《示範法》為基礎的仲裁法的司法管轄區（如英格蘭和威爾斯），都廣泛引述香港的案例。在本地層面上，儘管初時有執業律師擔心兩個仲裁制度並存的可行性，但《示範法》大致上都可以跟香港的仲裁架構互相配合、和諧共處。

法院一早已清楚表明《示範法》應如何融入現存的仲裁制度，以儘量減少兩套法律並存可能帶來的風險。舉例說，若各方在仲裁個案受哪個制度管轄的問題上發生爭拗，而他們又未有根據《條例》第 2L 或 2M 條訂立選擇制度的協議（見上文）的話，他們可就各種事項 — 例如把訴訟已告展開的糾紛轉介至仲裁一事，或法院委任仲裁員一事 — 按《條例》第 II 部或第 IIA 部向法院提出另擇申請（見 *Heung Cheuk Kei v Pacific Enterprises (Holdings) Co Ltd* (1995) 10 Mealey's Int Arb Rep 7, 11 一案）。此外，法院曾經極力強調，關於此等申請可能引起的仲裁庭管轄權問題（例如糾紛是否在仲裁協議涵蓋的範圍內），應先由仲裁庭裁斷，而法院擔當的角色應是最後的協助者，即負責覆檢仲裁庭的管轄權，而不是一開始便斷定仲裁庭的管轄權（見 *Star (Universal) Co Ltd v Private*

Company 'Triple V' Inc [1995] 2 HKLR 62 一案）。這種做法與《示範法》第 5 條是一致的，該條文包括這項重要的規定：在受《示範法》管轄的事宜上，除非《示範法》另作規定，否則法院不得干擾。

1992 至 1997 年的法律改革

正如上文提到，《示範法》的採納過程並非暢通無阻。儘管實際上出現的問題數目不多，但該些問題都是令人關注的。問題可分以下三方面：

（一）《示範法》第 7(2) 條要求的仲裁協議格式為何？

《示範法》第 7(2) 條的真正問題，在於確定什麼才能構成「書面協議」。縱使該條文內有關形式的大部分規定都沒有爭議的空間，但要求雙方簽署協議的規定，成了問題的根源。誠然，大部分商業交易中，雙方都會簽署文件，但有一些包含仲裁協議的合約性文件是未經簽署的，例如提單、船舶經紀人的單據及救助協議（例如英國勞埃德保險社（Lloyd's）的公開格式）。同樣地，《示範法》未有照顧到經一連串行為而訂立的仲裁協議，以及書面但未有附帶簽署的仲裁協議，例如合約一方未有簽署和交還另一方所擬備的合約條款和條件（包括仲裁條款）。

（二）受《示範法》管轄的案件中須委任多少名仲裁員？

根據《示範法》第 10 條，仲裁各方可自行就仲裁員的數目達成協議，但若沒有協議，《示範法》規定須委任三名仲裁員。問題是，若案件涉及的金額不大（例如一般的船務案件），各方根本沒有理由委任三名仲裁員並承擔其所帶來的複雜程序和高昂費用。因此，這種規定會令處於較弱勢的一方望而卻步，不願使用仲裁程序行使或捍衛權益。

（三）法院委任仲裁員以填補空缺

有關問題的癥結，在於《示範法》第 11 條把委任仲裁員的職能交由法院行使。聯合國國際貿易法委員會草擬《示範法》第 6 條的要旨是，當仲裁各方未有達成協議時，採用《示範法》的司法管轄地可自行決定哪個國家權力機構負責委任仲裁員。第 6 條從來沒有規定該機構必須是法院。就香港而言，高等法院一向以來都被公認為負責委任以填補空缺的機關，《條例》第 34C(3) 條也是據此而編配有關職能的。然而，把職能交由法院行使，有以下弊端：（一）向法院申請委任的過程需時；（二）法官未必有能力決定委任誰人為仲裁員；及（三）有關申請與法院命令均須送達司法管轄區以外的地方，這從而涉及遵守當地法律規定的複雜問題。

當所有情況
清楚顯示某個案
屬於國際仲裁個案，
該個案的任何一方不能
留待仲裁庭作出裁決後
才提出有關
管轄制度的問題，
以圖增加該方
提出異議的權利

1992 年 1 月，適值《示範法》已在香港運作了兩年，當時的律政司要求香港國際仲裁中心成立一個關於仲裁法的委員會（以下簡稱「仲委會」），在特別顧及英格蘭及威爾斯正著手草擬的仲裁法例的情況下，考慮是否有需要修訂《條例》。仲委會的成員，包括來自所有有關的本地專業及商貿團體的代表。在廣泛諮詢本地仲裁執業者的意見後，仲委會於 1996 年向政府呈交報告，認為仲裁法律應分兩階段進行改革。首階段將包括：（一）以《示範法》為參考，採取初步行動把本地與國際仲裁法協調起來；（二）彌補上文提及的各項不足；（三）進一步訂立通用的條文；及（四）填補《示範法》的各個漏洞。第二階段則會是徹底的改革，制定新的《仲裁條例》，規定《示範法》適用於所有本地與國際的仲裁，但同時為本地仲裁訂立「附加」或豁除性的條文。

儘管《示範法》明確強調了儘量增加仲裁庭的權力及把法院的角色減至最輕微，但仲委會在上述報告中指出，《條例》原有的條文（1963 至 1982 年）在理念上跟《示範法》沒有大分別。這觀點貫徹了仲委會的建議，該些建議最終被制定成《1996 年仲裁（修訂）條例》（1996 年第 75 號條例）（以下簡稱《1996 年條例》），並自 1997 年 6 月 27 日起生效。《示範法》其中兩項條款，被直接應用到本地仲裁上：（一）經修訂的《條例》第 6(1) 條，規定《示範法》第 8 條適用，結果是，即使法院收到暫緩法律程序的申請，它在決定是否暫緩一事上不再有凌駕性的酌情權；及（二）新增的《條例》第 13B 條，規定《示範法》第 16 條適用，結果是，在受到原訟法庭的最終裁決所約束的限制下，本地仲裁員明確享有權利就他們本身的管轄權作出具約束力的決定。此外，以下各項經《1996 年條例》引進《條例》內的適用條文，也反映了上述有關理念一致的觀點，並將其進一步推展：

（一）*爭議各方的自主權：*《條例》第 2AA(2) 條訂明，除須遵守為公眾利益所需的保障措施外，爭議各方有權自由協議解決爭議的方法。「各方有權自由協議」，是《示範法》的主題之一，聯合國國際貿易法委員會認為，《示範法》第 18 條訂下的平等責任的意思是，不論爭議另一方還是仲裁庭，都應公平地對待爭議方。

（二）*仲裁的凌駕地位：*《條例》第 2GA(1)(b) 條，向仲裁庭施予一項首要的責任，就是採用適合有關個別案件的程序，以避免不必要的拖延和省卻不必要的開支。只要爭議各方就仲裁進行程序所訂立的協議不會違反公共政策，該協議便是至高無上的。第 2GA(1)(b) 條表明了仲裁庭採用案件管理原則和技巧，這一點在把該條文與第 2AA(1) 條一併理解時更為明顯，第 2AA(1) 條指出《條例》的目的是促進在省卻不必要開支的情況下以公平而迅速的方式解決爭議。此外，第 2GA(1)(b) 條聯同其他關於訟費保證、臨時保護措施、證據上的命令、展開仲裁時限的延展以及因無人作出行動而撤銷案件等等的新增法定權力（同時原訟法庭在這些事宜上的管轄權被削弱甚或豁除），全都強調了仲裁庭的凌駕性權力，而且大幅度限制對仲裁庭頒下判決前向該庭提出質疑的可能性，這也緊守著《示範法》背後的理念。 ▶

（三）*自然公義*：《條例》第 2GA(1)(a) 條向仲裁庭施加另一項首要的責任，這便是在各方之間公平和公正地行事，並給予各方合理的機會以提出他們的案件和處理他們的對手所提出的案件。這條文其實是以法例形式重申普通法下的自然公義原則，與《示範法》第 18 條施加的「平等相待」責任沒有大分別。

（四）*司法干預*：《條例》第 2AA(2)(b) 條指出，只有在《條例》明文規定的情況下，法院才會干預爭議的仲裁。除了字眼上的著眼點不同外，第 2AA(2)(b) 條的目的大致與《示範法》第 5 條相同。因此，不論在仲裁前或後，法院的干預權力，僅限於《條例》第 IA、II 或 IIA 各部所賦予的或者《示範法》所賦予的（視乎情況而定）。

《1996 年條例》也有正視針對 1990 年以前的仲裁制度的各種批評（見上文）。《條例》第 2AC 條替「書面協議」引進了新的定義，以下各類仲裁協議均屬《條例》範圍之內：（一）以書面形式作出但未經各方簽署的協議；（二）經各方行為而訂立的協議；（三）以口頭方式訂立的協議；及（四）起初以口頭方式訂立但以書面方式記錄的協議。此外，根據新增的《條例》第 34C(5) 條，若《示範法》適用於某仲裁而爭議各方未有就仲裁員人數達成協議，將不會自動委任三名仲裁員；反而在這情況下，香港國際仲裁中心有法定責任決定仲裁員數目。此外，受新加坡《1994 年國際仲裁法令》的驅使而作出修訂的《條例》第 34C(3) 條，向香港國際仲裁中心施加獨有的法定責任，在本地仲裁個案及《示範法》適用的個案中委任仲裁員以填補任何空缺（分別見《條例》第 12 條及《示範法》第 11 條）。這些條文賦予的職能，須按《仲裁（仲裁員及公斷人的委任）規則》（第 341 章附例 B）訂下的規定和準則而行使。

最後，《1996 年條例》新增了不少條文，既填補《示範法》的漏洞，也適用於本地仲裁個案。從前正常地或完全歸屬於法院的權力，包括訟費保證、臨時保護措施及某些證據上的命令、延長仲裁程序的時限及因無人作出行動而撤銷案件，全都歸屬於仲裁庭了（分別見《條例》第 2GB、2GD 及 2GE 條）。與此同時，法院在上述各項事宜上的權力，亦相應地被大幅削弱甚或完全豁除：見《條例》第 2GC、2GD 及 2GE 條。隨後關於第 2GB 及 2GC 條的案例表明，若在某個案中仲裁庭及法院同時享有並行管轄權須下臨時保護措施令或證據上的命令，除非有關命令涉及第三方或仲裁庭基於任何理由而不能在同一命令內頒發所有有關的臨時濟助，否則法院不應行使其管轄權（見 *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347 一案）。至於訟費及利息的頒判，1997 年以前的有關權力亦重新被制定和修訂（見《條例》第 2GH、2GI 及 2GJ 條），當中最主要一項是仲裁庭獲賦予管轄權頒判複息。《1996 年條例》亦引入一些以澄清為目的的條文，主要關於仲裁庭可頒判的補救（見《條例》第 2GF 條）及把法院的簡易執行權伸展至仲裁庭發出或作出的命令、指示以至於裁決（見《條例》第 2GG 條）。《條例》第 2GL 條是證明仲裁庭擁有案件管理職能的例子，該條文容許仲裁庭預先限制某方在追索過程中可討回的訟費額。

自 1992 年起，
有關方面
在不少場合上已警告，
若不及時替〔中國內地〕
裁決的執行另作安排，
嚴重的「法律真空」
便會在香港
回歸後出現

中國內地裁決的問題：1997 至 2000 年

中華人民共和國於 1987 年 4 月加入《紐約公約》為締約國，故此，1997 年 7 月 1 日前，根據《條例》第 2H 及 42 條，中國內地的仲裁裁決可作為《紐約公約》裁決在香港簡易執行。《條例》第 44 條列出數項足以阻止強制執行《紐約公約》裁決的絕對抗辯理由。此外，法院採取了「贊同執行」的態度，除非可證明執行裁決將令某方的權益遭受重大損害，否則法院不會隨便將執行許可作廢。結果是絕大部分的中國內地裁決都得以在香港執行；事實上，1987 至 1997 年間帶到香港執行的裁決當中，佔了一半至三分之二都是來自中國大陸，執行的普遍程度可見一斑。

但隨著中國對香港恢復行使主權，香港作為擁有獨立法制的特別行政區，已回歸成為中國的一部分。《紐約公約》顯然不再適用於跨境裁決，原因是它們已不再屬「海外」裁決。與此同時，鑒於香港在「一國兩制」政策下是一個特別行政區，因此上述裁決亦不屬「本地」裁決。換句話說，中國內地裁決可說是自成一類。自 1992 年起，有關方面在不少場合上已警告，若不及時替該些裁決的執行另作安排，嚴重的「法律真空」便會在香港回歸後出現。首先發出警告的是一個簡稱為 Edwards 委員會的有關中港民事及商業事宜上的法律和程序安排的工作小組，它曾就一系列的跨境法律事宜向中英聯合聯絡小組提供意見。隨後，不少評論員，例如身兼 Edwards 委員會成員之一的 Neil Kaplan，亦相繼發出類似的警告。可惜的是，到了香港特別行政區成立日，還未有任何安排出現。但事實顯示，困難的源頭不在於過渡期本身，而是在於《1996 年條例》的制定。1997 年 6 月 27 日前，現已被廢除的《條例》第 2H 條，容許本地裁決及在香港頒判的《示範法》裁決的簡易執行，而《條例》第 42 條規定第 2H 條適用於《紐約公約》裁決的執行。至於不屬《紐約公約》裁決的海外裁決（例如在台灣頒判的裁決），根據上述第 2H 條，法院亦可酌情容許在香港執行該些裁決。這樣，仲裁的勝方便毋須提出普通法訴訟來執行裁決了。

然而，自 1997 年 6 月 27 日起，上述第 2H 條被廢除，取而代之的是第 2GG 條，這項有關裁決的執行的條文，其內容跟第 2H 條幾乎完全一樣，而根據第 42 條，第 2GG 條亦適用於《紐約公約》裁決。不少人假設，即使中國內地裁決已不屬《紐約公約》裁決，它們仍可藉第 2GG 條而得以執行。但這假設已被當時高等法院法官范達理推翻，他於 1998 年 2 月在 *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213 一案的

判詞內指出，第 2GG 條的解釋受制於《條例》第 2AD 條，該條文界定了《條例》第 IA 部的適用範圍。范達理法官認為，在與《示範法》第 1 條一併理解的情況下，《條例》第 IA 部（包括第 2GG 條）適用於在香港進行的本地及國際仲裁，因此也只適用於在香港頒判的裁決的執行。鑒於中國內地裁決已不屬《紐約公約》裁決，而第 2GG 條的應用範圍較第 2H 條狹窄，因此執行中國內地裁決的唯一途徑，便是就裁決另行提出訴訟。這方法既費時且昂貴，而可供使用的抗辯理由眾多；我們也許可以說，香港回歸前有關法律條文的明確性和肯定性，現已盪然無存。上述的判詞，對於在台灣作出的裁決的執行，亦帶有相同含意。

范達理法官在上述判詞中承認，人們早前預見的跨境裁決的執行出現的「法律真空」情況的確存在。為了避免香港作為國際仲裁中心和裁決執行地的地位受到損害，儘快恢復原來狀況是刻不容緩的。事實上，已有證據顯示愈來愈多的中港仲裁移師至新加坡進行，以避過香港的「法律真空」問題。但有關方面顯得毫不著緊，直至 1998 年 11 月，律政司司長才宣布已按《紐約公約》達成新安排。雖然她曾表示希望根據《基本法》第 95 條所達致的司法互助協議可於 1998 年底前簽署，但一份題為《關於中國大陸與香港特別行政區之間的交互強制執行仲裁裁決的協議》，到了本年 6 月 21 日才正式簽訂。

然而，上述協議的簽訂，並不代表事件告一段落。問題是中港雙方需要確切地實行協議。在香港，一份《仲裁（修訂）條例草案》（以下簡稱《草案》）已於本年 6 月刊登憲報，但立法會到本年 10 月才會正式研究《草案》內容。這就是說，視乎中方引入實行協議措施的步伐，新安排很可能要到本年底甚或明年初才可正式運作。

《草案》旨在替中國內地裁決引進類似《紐約公約》形式的執行安排，並在過程當中把《高等法院規則》（第 4 章）第 73 令第 10 條更新，但《草案》內容須作出修整，方可達致以上目標。據了解，香港國際仲裁中心與其他有關團體現正籌集意見以呈交律政司考慮。

此外，《草案》對於台灣裁決隻字不提。誠然，台灣相對於中國的地位和海峽兩岸關係，一向都是非常敏感的問題，但這不表示《草案》不能夠包括任何毫不涉及兩岸關係等問題的仲裁裁決執行安排。事實上，只要《草案》包括條文規定第 2GG 條適用於任何在海外或香港以外作出而不屬於《紐約公約》裁決及中國內地裁決的裁決，便足以解決問題。這條款沒有提及任何地區的名字，但已足可包括台灣、澳門以及餘下數個仍未加入《紐約公約》的地區（例如巴基斯坦）。

仲裁員有責任
防止把程序
「過於司法化」〔…〕，
他們須自行或鼓勵
各方因應個別案件
的需要而「度身訂造」
適當的程序

未來的法律改革

就長遠的徹底改革而言，以 Neil Kaplan 為首的仲委會雖然曾特別提出各項意見，但仍道出以下的大原則，作為未來委員會的指引：

> 「《仲裁條例》〔…〕應重新擬定，目的在於令《示範法》同樣適用於本地和國際仲裁及仲裁協議，以及引入根據香港和其他採納《示範法》的司法管轄區的經驗而被視為必需和合事宜的附加條文。」

至於詳細研究新條例形式和內容的任務，已交由一個由香港仲裁員學會成立並得到律政司司長支持的團體負責。這團體名叫香港仲裁法委員會（以下簡稱「港仲會」），它與仲委會的性質同屬聯合委員會。港仲會的主席是知名海事糾紛仲裁員白樂天律師。

港仲會尚未向政府呈交任何報告，但直至目前為止，它的研究結果大致如下。香港繼續被公認為採納《示範法》的司法管轄區，將有助香港維持其國際仲裁中心的形象。港仲會贊同建立一個由《示範法》管治的單一仲裁法制，並作出必要或合宜的修訂。改革的指導原則是，只有在充分理由支持下，方可建議制定《示範法》以外的附加條文，這些理由包括：現行《條例》內某項本地條文已得到廣泛接納，又或香港最初採納《示範法》時未有預料需要有關條文。因此，修訂的數目將會較少，目的是避免太偏離聯合國國際貿易法委員會的草擬。修訂的主要作用將是：（一）在不試圖編纂香港仲裁法的情況下增加必需的條文；（二）就《示範法》未有涵蓋的事宜作出必需的規定，這些事宜包括仲裁所在地、公斷人的委任和職能、各方推進仲裁過程和遵守仲裁庭的命令和指示的一般責任、失責一方的懲罰，以及各方訟費和仲裁員費用的評估；（三）澄清《示範法》內某些條文，例如法院根據第 34(4) 條發還在香港作出的國際裁決的權力；及（四）移除現行《條例》第 IA 部與《示範法》之間的不一致和矛盾之處。此外，修訂很可能包括一些專為本地仲裁 — 特別是選擇由法院審理法律論點以及就法律論點提出上訴的權利 — 而設的條文。欲知港仲會研究進展的詳情，可參閱白樂天先生著「《仲裁條例》需要哪些進一步改革？」，載於《亞洲糾紛評論》（1999 年）第 33 頁。

一般期望港仲會最遲可於本年底或明年初向政府匯報，亦希望港仲會的建議得到政府的積極回應。

展望將來

即使假設政府會進行下一步的法律改革，我們仍需要一個仲裁基本架構，確保法律改革得以有效、公平和合符公眾利益地實施。決定架構是否符合上述要求的準則，與英國法官 Lord Woolf 就一個公眾可更有效地使用的民事訴訟制度而訂下的基本原則不謀而合。Lord Woolf 自己曾經說過，他提倡的訴訟制度改革與香港仲裁法最近修訂所建基的《1996 年仲裁法令》，其實是同一事情的兩方面，只不過把建議應用在仲裁制度時要作出適當修改以反映仲裁的自願性質罷了（見 *Patel v Patel* [1999] BLR 227 一案，在第 229 頁）。以下是各項針對 Lord Woolf 所指的「三害」— 訟費過高、過度延誤及過份複雜的原則：

（一）*結果必須公平*：實質公義能否達致，有賴於受過足夠訓練的專業人 ➤

士（不論是否律師）有效地替當事人闡述案情，以及受過訓練和具備經驗的仲裁員（不論是否來自法律界）的存在。專業團體有責任向會員提供實體法律和訟辯技巧的訓練，仲裁機構則有責任向所有參與仲裁過程的人提供足夠和最新的仲裁法律及實務訓練。

（二）*不論在表面上還是實際上，制度都必須公正*：遵守成文法例內的有關條文，只是遵守自然公義責任的一部分。仲裁員先要有能力行使其司法功能，而這能力可說是與生俱來而不是後天培養而成的。仲裁員運用案件管理技巧的方式，絕不能有損其遵守自然公義原則（見 *Damond Lock Grabowski & Partners v Laing Investments (Bracknell) Ltd* (1992) 60 BLR 112 一案）。他們亦必須稱職和清楚了解在仲裁過程中可否行任何一步，否則便會導致不公平情況的出現。若各方感到他們在仲裁庭受到公平和公正的對待，那麼不論仲裁結果如何，他們都應不會有什麼怨言。但可惜的是，少數仲裁員，不管他們是否來自法律界或曾經受過多少訓練，都未能稱職地審理仲裁案件，令整個仲裁制度聲名狼藉。若讀者不相信這些說話，請參閱范達理法官在 *Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens* [1998] 4 HKC 171 一案的判詞，這對於不知道如何進行仲裁過程的人來說，是痛苦但寶貴的一課。

（三）*程序須與涉案爭議點相稱，過程亦須合理地迅速*：其實這項原則已藉著《條例》第 2AA(1) 條而得以彰顯，該條文規定仲裁員有首要責任使用適用程序以省卻不必要的延誤和開支。這項原則不僅適用於由仲裁員決定程序的案件；它亦同樣適用於仲裁員指示各方進行其選擇的程序的案件。一個例子是行使《條例》第 2GL 條賦予的權力以限制某方可討回的訟費，這樣，訟費與涉案的爭議點和金額便可達致相稱。

（四）*過程須易於明瞭和切合使用者的需要*：在可能的情況下，不論是本地還是海外的專業或非專業人士，所使用的仲裁法律都應既清楚又完整。制定統一的仲裁法，應有助達致上述目標。除此以外，仲裁員有責任防止把程序「過於司法化」（這是本地建築界經常提出的批評），他們須自行或鼓勵各方因應個別案件的需要而「度身訂造」適當的程序。他們亦須確保各方明瞭程序的各個環節以及他們所作的決定有何含意，這在各方沒有律師代表的時候尤為重要。根據《條例》第 2B(6) 條，除非各方另作協議，否則仲裁庭可以在不損害自然公義的情況下採用糾問式 (inquisitorial) 程序，這就是說仲裁庭不再局限於傳統的對訟式 (adversarial) 程序。仲裁機構須向廣大使用者「推銷」它們的程序和服務；不斷檢討標準仲裁條款、規則和相關的程序指引；以及為普羅大眾和指定界別發展新的程序和服務，包括「多重」程序如調解加仲裁或審裁加仲裁。這亦可有助它們宣揚香港作為仲裁中心的形象。

若果仲裁界更能了解和掌握去除訟費高昂、過份延誤和過度複雜這「三害」的方法，香港仲裁的前景將會一片光明

（五）*過程須提供案件情況所容許的確切性*：使用者應可事先知道他們藉著過程可望達致的目標，以及過程與其他糾紛調解過程之間的分別，不論在程序上還是在可能結果上。仲裁機構在提供此等資料和協助使用者作出選擇上擔當著重要的角色。我們要緊記，商務是仲裁的最主要用戶，而商人最需要和關心的莫過於確切性。

（六）*過程在資源分配和組織方面都要具有效率*：除了擬定標準條款和仲裁規則外，仲裁機構必須維持和檢討仲裁員名單，以便機構在仲裁各方未能達成協議時能夠無慮地委任仲裁員來填補空缺。仲裁機構亦須為仲裁案件（特別是國際商業仲裁）提供足夠的行政和支援服務。經常檢討仲裁員名單是非常重要的，因為機構委任仲裁員的過程往往被各界（特別是建築業人士）指摘為相等於「碰碰運氣」。另一方面，仲裁員本身應該量力而為，不要只顧接受委託而漠視或高估自己所能應付的工作量。

遵守上述所有準則，對於過程的費用（特別是法律費用）也會造成影響。律師的收費水平，現時在香港是一個敏感的議題，不少人曾批評律師費過於高昂，而一位法官更曾警告，高昂的費用很可能會令香港喪失其作為仲裁或訴訟中心的地位（見 *Glencore International AG v Tianjin Huarong Mineral Products Co Ltd* [1998] 3 HKC 68 一案，在第 73 頁，高等法院法官張澤祐的判詞）。這當然並非仲裁獨有或單由仲裁引起的問題，但若問題得不到正視，便會對仲裁過程的使用造成嚴重的負面影響。

結語

香港仲裁制度在過去短短十數年間迅速發展、不斷變化，預料制度將在這情況下邁向二十一世紀。《示範法》在香港的採用，對於本地仲裁的整體發展及香港國際形象的提升，均起著積極的作用。現時的《條例》，旨在提高仲裁的效率和速度並把過程簡化，雖然《條例》內容稍欠條理，但它總算能有效地運作。至於簡易執行跨境仲裁裁決方面的漏洞，筆者寄望能儘快得到填補，好讓香港取回給新加坡奪去了的事務和工作。若果仲裁界更能了解和掌握去除訟費高昂、過份延誤和過度複雜這「三害」的方法，香港仲裁的前景將會一片光明，這樣，制定新的《仲裁條例》，便是錦上添花了。

莫勤保
香港大學法律系教授