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THE HONG KONG ARBITRATION ORDINANCE

COMMENTARY AND ANNOTATIONS

SECOND EDITION

GENERAL EDITORS

JOHN CHOONG
ROMESH WEERAMANTRY

SWEET & MAXWELL

The Hong Kong Arbitration Ordinance

Commentary and Annotations
Second Edition

General Editors

John Choong
Freshfields Bruckhaus Deringer

Romesh Weeramantry
Clifford Chance

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Foreword to the First Edition

By Lord Hoffmann

—

Business people choose to have their disputes determined by arbitration for a number of different reasons. Sometimes they think it will be quicker and cheaper than going to court; an expectation which may be disappointed. Sometimes it may be to obtain the confidentiality of arbitral proceedings, although this is probably not often the dominant motive. The main reason, in the case of international commerce, is that one party at least does not want to have to litigate in the national courts of the other. He is concerned about the possibilities of bias, incompetence and delay. Even if he could choose a competent and impartial court elsewhere, he may think that when it comes to enforcement in the other party's home state, the New York Convention will provide a more certain remedy than having to take his chance on the recognition of the judgment he has obtained.

If, for one or more of these reasons, the parties choose arbitration, the next question is where the seat of the arbitration should be. Here the choice is likely to depend upon a combination of geographical convenience for the parties, ready access to good legal services and a local legal system which can be relied upon to be impartial and exercise unobtrusive supervision over the arbitration, intervening only when things have gone badly wrong. There are not many places in the world which can satisfy all of these requirements: New York, London, Paris, Geneva and Singapore are names which regularly come up. But Hong Kong also satisfies the requirements which I have mentioned, and its unique amphibious position in relation to China, being part of the territory of the People's Republic of China but equipped with good legal services and an excellent court system, is coming to be recognised.

The rule of law in Hong Kong is in good shape, as I can testify after 14 years of participation in the work of its Court of Final Appeal. But a good seat of arbitration also requires a simple and accessible arbitration law, which will assure parties that their chosen method of dispute resolution will remain in their hands but be supported when necessary. The Arbitration Ordinance (Cap. 609) provides the necessary assurance, mainly by the continued adoption of the now familiar UNCITRAL Model Law.

This book provides a ready guide to the Ordinance, with notes and annotations referring to the now fairly substantial body of jurisprudence on the Model Law which has been built up in various jurisdictions. The growing number of arbitration practitioners in Hong Kong will I am sure find it invaluable.

Leonard Hoffmann
Brick Court Chambers, London
April 2011

Foreword to the First Edition

By Neil Kaplan CBE QC SBS

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In less than 30 years the Hong Kong Arbitration Ordinance has changed from being a mere copy of the English 1950 Act to being the latest and one of the most up-to-date arbitration statutes in the world. In the intervening years Hong Kong has made cutting edge changes on a piecemeal basis but now it has all come together in this new Ordinance.

This Commentary and Annotation is timely bearing in mind the coming into force of the Ordinance on 1st June 2011. This is commendable. The Ordinance itself enjoyed a rather leisurely period of gestation but it was worth waiting for. The General Editors, both experienced in the practice and law of arbitration, have put together an experienced team which brings a wide range of knowledge to bear on the issues at hand.

As one who was involved with the evolution of Hong Kong's arbitration law from 1981 onwards it gives me great pleasure to see in place, at last, an Ordinance which is well structured and in a logical order. The move to a unitary regime is, I believe, justified because the Model Law has enjoyed such success since 1985 and is either the law of arbitration in many jurisdictions or is the basis of it. In this way the aim of harmonisation has almost been achieved.

Hong Kong has always ticked all the boxes in the "*user friendly*" check list. At the top of the list has always been the requirement for an up-to-date Arbitration Law based on the Model Law. That Hong Kong has from the beginning made improvements to the Model Law especially where it was silent on issues does not in any way detract from the Model Law being at the core of the Ordinance. The decision to make the Model Law regime apply to domestic as well as international arbitrations was bold and sensible.

As case law develops on the new sections it is hoped that the publishers will find a way to keep us all regularly updated.

This book will be invaluable to local and international practitioners and parties and will also be an invaluable teaching tool. All involved with this excellent project who have given so generously with their time and knowledge are to be congratulated.

Neil Kaplan
April 2011

Preface to the First Edition

There is no doubt that today, Hong Kong is one of the world's major arbitration centres.

This was not always the case. Exactly 30 years ago, when the Hong Kong Law Reform Commission was requested to examine commercial arbitration, the picture it painted was very different. It noted that the average number of arbitrations in Hong Kong from 1978–1980 was no more than 20 per annum. Additionally, the Commission observed that "those who wish to resolve their disputes in Hong Kong prefer the Courts" and that those choosing arbitration opted for "an established arbitration centre such as London ..."[1] However, it also noted that "there [was] a strong and widespread belief that Hong Kong ha[d] the potential to develop into the leading arbitration centre in the region."[2]

How prescient those last words were. Since the Law Reform Commission issued its 1981 Report, the growth of arbitration in Hong Kong has been exceptional. In 1985, the year the HKIAC was established, it handled only nine cases. This figure steadily increased annually and by 2009, the number of arbitrations the HKIAC handled for that year was 429.[3]

The development of Hong Kong into a leading international centre for arbitration has also been reflected in changes to Hong Kong's arbitration legislation. Prior to the 1990s, Hong Kong's arbitration law echoed its English counterpart. This had been a dominant feature of its arbitration regime since its early colonial years. However, from the 1990s, the international perspective of the Model Law increasingly became the source of inspiration for Hong Kong's arbitration law. After many years of careful consideration, this ongoing shift in emphasis has now culminated in the enactment of the Arbitration Ordinance (Cap. 609). The new Ordinance embodies a fundamental reorientation of Hong Kong's arbitration regime. Through it, Hong Kong has now decisively aligned itself with the Model Law and moved further away from the English arbitration regime. It marks the start of a new and exciting era in Hong Kong arbitration law and practice.

This book seeks to provide a detailed commentary on the complete text of the new Ordinance, as passed by the Legislative Council on 10 November 2010. In preparing it, two principal aims were kept in mind:

(a) First, to continue to recognise the importance of both the old and the new, by ensuring that authorities under the old arbitration regime which

[1] Law Reform Commission Report 1981, para. 5.3.

[2] Law Reform Commission Report 1981, para. 6.1.

[3] These numbers include both international and domestic arbitrations. See *http://www.hkiac.org*. [Accessed 17 March 2011].

are of relevance continue to be cited, while also focusing particular attention on amendments or provisions which have been introduced under the new regime;

(b) Second, to provide detailed reference to the travaux préparatoires and related authorities concerning the UNCITRAL Model Law, in recognition of its growing importance to all kinds of arbitration conducted in Hong Kong.

In conceptualising this book, one of the immediate questions we faced was whether it should take the form of a traditional "annotation", with a brief commentary on every single key word or phrase in the legislation, or if it should be a commentary, giving particular attention to key features and issues raised by each section. The decision was taken that the book should be closer in form to a commentary, with a free flow discussion of key issues raised by each section, rather than for a rigid annotation style to be adopted. This produces two benefits. First, a commentary approach allows for more indepth discussion of key issues than is appropriate in an annotation. Second, the commentary approach is designed to be more reader-friendly, allowing for a more natural progression of ideas in the discussions on each section than would be possible in an annotation. Where appropriate, sub-headings have also been included for ease of reference.

Many commentators have suggested that the new arbitration regime will only impact on domestic arbitrations, with limited impact on international arbitrations conducted in Hong Kong. However, the new Ordinance may well have a mutually beneficial impact on both types of arbitration. Domestic arbitrations will no doubt be impacted by the adoption of wording that is directly based on the UNCITRAL Model Law, and this will be the case notwithstanding the presence of the automatic opt-in provisions which limit to some extent the immediate impact of the new Ordinance.[4] Conversely, however, the adoption of Model Law provisions to govern domestic arbitrations will also have a significant impact on the development of international arbitration in Hong Kong. This is because, by bringing domestic arbitrations under the Model Law umbrella, an increase will occur in the overall volume of arbitrations conducted in Hong Kong under the Model Law regime. This will in turn contribute to greater awareness and sophistication among users of the unified regime, leading to a positive influence on the overall development of international arbitration in Hong Kong, and enhancing the global reputation of Hong Kong as a truly international arbitration centre.

In the past, it had sometimes been suggested that the Hong Kong courts adopted a different approach to dealing with arbitration-related applications, depending on whether the application arose from an international or a domestic arbitration. Under the old Ordinance, this difference could be justified on the basis that two

[4] See commentary on ss.100 and 101.

different (albeit overlapping) regimes applied. However, under the new Ordinance, the same provisions now apply to all kinds of arbitrations conducted in Hong Kong.[5] One of the exciting developments in the future will be to see how the Hong Kong courts deal with such applications, under a unitary regime.

The contributors to this book are all Hong Kong-based practitioners with considerable experience in international and domestic arbitration, coming from a wide range of backgrounds and with experience in many industry sectors. This is a clear reflection of the breadth and depth of arbitral experience now available in Hong Kong. It is hoped that this broad range of experience has resulted in commentaries which are relevant to the full range of arbitrations which will be conducted under the unitary provisions found in the new Arbitration Ordinance.

Work on this book only started in earnest in October 2010. We are especially grateful to all our contributors and their assistants, for the extraordinary effort they have made in preparing their respective contributions within the strict timelines which were imposed, and for the deference they have shown to our suggested editorial changes. We are also grateful to Christopher To for his kind suggestions, and to our publishers at Sweet & Maxwell/Thomson Reuters, particularly Jason Tom, Neerav Srivastava, Natalie Lee and Jane Ritchie for their unstinting support and enthusiasm throughout the publication process, which helped to bring this book to fruition in just six months.

John Choong and Romesh Weeramantry
Hong Kong, March 2011

[5] Save for the Schedule 2 provisions; see commentary on ss.100 and 101. This, however, will not directly impact the interpretation and application of the remaining provisions in the Ordinance, which apply in equal measure to international and domestic arbitrations.

Preface to the Second Edition

The first edition of this book was published when the Arbitration Ordinance (Cap. 609) had just been enacted. That groundbreaking piece of legislation unified the law relating to domestic and international arbitrations conducted in Hong Kong.

It has now been five years since the enactment of the Ordinance. The transition from a dual to a unified regime has taken place smoothly, and the many strengths of the Ordinance have become increasingly apparent. To cite but two examples, the provisions of the Ordinance dealing with interim measures and confidentiality have both been well received.

Two amendments to the Arbitration Ordinance have also been made. In 2013, the first set of amendments was introduced, expressly permitting the courts to enforce urgent relief ordered by emergency arbitrators. In 2015, further amendments were made, to clarify that parties opting for domestic arbitrations may decide on the number of arbitrators, without losing their right to seek the court's assistance on other matters – a point of ambiguity in the Ordinance as originally enacted, as noted in the first edition of this book.

Since 2011, Hong Kong has continued to grow as a major international arbitration centre, while retaining its position as the pre-eminent seat for China-related arbitrations. Notably, over this period, there has been no known case where the PRC courts have refused to enforce an arbitral award rendered in Hong Kong.[1] Since the introduction of a unified regime, the number of arbitrations handled by the HKIAC under its own Administered Arbitration Rules has increased more than sixfold, and the number of international cases has now grown to about 90 per cent of the HKIAC's administered caseload.

Case law has also not stood still. Important decisions from the past few years have included the landmark decision in *FG Hemisphere v Congo*,[2] *Pacific China v Grand Pacific*,[3] and *Xiamen Xinjingdi Group v Eton Properties*.[4]

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[1] Teresa Cheng S.C. and Joe Liu, "Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends", (2014) 31 *Journal of International Arbitration*, Issue 5, pp. 651–673.

[2] *FG Hemisphere Associates LLC v Democratic of the Congo* (2011) 14 HKCFAR 395, (2011) 14 HKCFAR 95.

[3] *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* (unrep., FAMV 18/2012, [2013] HKEC 248).

[4] *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* (unrep., FAMV 5/2011, 4 May 2011).

As with the previous edition, the contributors to this book are all leading Hong Kong-based arbitration practitioners with considerable experience in both international and domestic arbitration, coming from a wide range of backgrounds and with experience across a range of sectors. Their insights into the practice of arbitration in Hong Kong and the application of the Arbitration Ordinance, reflected in the pages that follow, are invaluable.

We remain ever grateful to all our contributors and their assistants for their efforts in updating the previous edition of this book. We are also grateful to our Editorial Assistant, Michal Čáp, and to our additional assistants Thai MacDonald and Stephanie Chan, for their extraordinary efforts in helping to put this second edition together, as well as to our publishers at Sweet & Maxwell/Thomson Reuters.

John Choong and Romesh Weeramantry
Hong Kong, August 2015

General Editors

John Choong is a Partner with the International Arbitration Group of Freshfields Bruckhaus Deringer. Over the course of 15 years, John has handled disputes involving more than 10 jurisdictions in Asia, and has been based in both Hong Kong and Singapore. Many of his matters are cross-border in nature, and cover a wide range of industries and subject matter. John has particular expertise in handling China and Hong Kong-related arbitrations. His matters have ranged in value and complexity, and have included a number of billion dollar arbitrations. John is a Fellow of the Chartered Institute of Arbitrators, and the Hong Kong and Singapore Institute of Arbitrators, and is admitted in Hong Kong, England and Wales, and Singapore. John has lectured and written regularly on arbitration, and has contributed to books from Oxford University Press, Kluwer and Juris. He is co-Editor of the *Asia Arbitration Handbook*, and a General Arbitration Editor of the *Hong Kong White Book*.

Romesh Weeramantry is a Foreign Legal Consultant in the Hong Kong office of Clifford Chance. He specialises in complex arbitrations involving cross-border commercial disputes and investment treaty claims relating to Asia. He is also an Adjunct Professor at the University of Hong Kong. His prior professional experience includes work at the Iran-United States Claims Tribunal (The Hague) and the United Nations Compensation Commission (Geneva) on inter-government disputes arising from Iraq's invasion of Kuwait. He has advised major international organisations on dispute settlement and has trained government officials and judges in developing nations on arbitration and international law issues. His publications include *Treaty Interpretation in Investment Arbitration* (Oxford UP 2012); and *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge UP 2011). He is an editor of the *Asian Dispute Review* and the *Hong Kong White Book Arbitration and ADR Volume*. He is also a member of the Editorial Board of the *ICSID Review*.

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Catherine Mun is a partner at Bird & Bird with over 15 years of experience as a disputes lawyer. She specialises in commercial arbitrations, particularly those with a China flavour, as well as construction and engineering disputes. She has represented clients in many international arbitrations involving parties from Mainland China, the US, Europe and Asia and different sets of rules (including the HKIAC, CIETAC and ICC rules). She sits as arbitrator and has acted as arbitrator in HKIAC, CIETAC, ICC and SCIA arbitrations. She has law degrees from Hong Kong University (LLB), Oxford University (BCL) and Tsinghua University (2nd LLB).

James Rogers is a partner with Norton Rose Fulbright based in Hong Kong. James has practiced law in New Zealand, China, Japan and the UK and has advised clients in relation to projects and investments in numerous jurisdictions across North America, Africa, Europe, the Middle East and particularly Asia. He has also represented clients in many of the major arbitral centers of the world and is familiar with the arbitration rules of all the leading arbitration institutions. His is a uniquely international practice, serving clients' needs across multiple jurisdictions as the relevant project, dispute and/or seat of arbitration require.

Kathryn Sanger is a consultant in the litigation and dispute resolution practice of Clifford Chance Hong Kong. She is admitted in Hong Kong and England & Wales and has a BA (Hons) from Oxford University in Oriental Studies (Chinese) and a PRC Law Diploma from Hong Kong University. Kathryn is a member of the HKIAC Council, sits on the HKIAC's Executive Committee and is Chair of the HKIAC Arbitrator Appointment Committee. Kathryn also assisted the Department of Justice with drafting the 2013 amendments to the Hong Kong Arbitration Ordinance dealing with the enforcement of emergency relief granted by an emergency arbitrator.

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