New Arbitration Ordinance makes Hong Kong An Even Friendlier Place to Arbitrate

May 26, 2011

Hong Kong's long-awaited new Arbitration Ordinance (Cap 609) (the “new AO”) comes into effect on 1 June 2011. This alert discusses the purposes of the new AO, the significant amendments to the old Arbitration Ordinance (Cap 341) (the “old AO”) and how such amendments may further advance Hong Kong as the regional hub of choice for international commercial arbitration.

Purposes of the New Legislation

Enacted in 1963, the old AO (based largely on the UK Arbitration Act 1950) underwent numerous amendments to accommodate and adopt the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), the establishment of the Hong Kong International Arbitration Centre, and the statutory regime for the reciprocal enforcement of arbitral awards between Mainland China and Hong Kong. The numerous legislative changes have made the old AO increasingly difficult to navigate.

The ultimate purpose of the new AO is to make Hong Kong friendlier for both local and international parties by unifying the domestic and international arbitral regimes under the old AO along the structure of the Model Law. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this will enable all parties to operate in Hong Kong without having to take into account different local systems as they would have had to in the past.
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Key Amendments

Abolition of the bifurcated regime

The biggest (and most welcome) change is the abolition of the bifurcated regime between “international” and “domestic” arbitrations.

Under the old bifurcated regime, domestic awards were subject to appeal on questions of law arising out of the award. Subject to certain conditions, parties to a domestic arbitration could also apply to the court for determination of preliminary points of law. By contrast, recourse to the courts in international arbitral awards was allowed only in very limited circumstances.

Arbitrations in Hong Kong will now be governed by a unitary regime. Consequently, domestic arbitrations will be subject to the same provisions applicable to international arbitral awards under the old AO. This will mean minimal court intervention and the abolition of the right of appeal in many instances.

Adoption of the Model Law Framework

The new AO follows the same order as the Model Law, makes use of the same headings and chapters and (subject to certain modifications) contains number references to corresponding provisions in the Model Law.

The Opt-in System

Schedule 2 of the new AO, which contains a number of opt-in provisions, allows parties to opt-in to some/all provisions governing domestic arbitrations under the old AO. Subject matters covered include:

- submission of a dispute to a sole arbitrator;
- consolidation of arbitrations;
- decision by the court on a preliminary question of law;
- challenging an arbitral award on the ground of serious irregularity; and
- appeals against an arbitral award on a question of law.

Although the new AO intends to reduce court intervention, the opt-in system provides an alternative for parties who prefer greater court intervention provided under the old AO.

In addition, due to the frequent use of standardized agreements in Hong Kong (particularly in the construction industry where many contracts refer to
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The new AO brings about a simpler, more user-friendly arbitration law that standardizes the evidential requirement for enforcement procedure, the new AO.

In addition, in line with the new AO’s objective to make the legislation more user-friendly and to further streamline and increase the efficiency of the proceedings, the new AO:

- Reform which strongly promotes the use of mediation, the new AO has introduced a Mediation-Arbitration Procedures
- A new section in the new AO (separate from the provisions providing for the enforcement of arbitral awards) is also created to provide for the mediation
- Provides an alternative for parties who prefer greater court intervention in arbitration by unifying the domestic and international arbitration regimes
- Express Duty of Confidentiality
- Interim Measures and Preliminary Orders
- Adoption of the Model Law Framework

Express Duty of Confidentiality

Another key amendment is the inclusion of express provisions relating to confidentiality.

With regard to arbitral proceedings, the new AO expressly prohibits the parties from disclosing any information relating to the arbitral proceedings or arbitral award.

As for any ancillary court proceedings arising from or in connection with the new AO, the new AO sets out the default position that court proceedings under the new AO are to be conducted in closed court. However, it should be noted that the court has the discretion to order the proceedings to be heard in open court on the application of any party, or if the court is satisfied that those proceedings ought to be heard in open court. This is a significant change from the starting presumption under the current regime that hearings be held in open court unless requested by a party. This change affirms the importance of confidentiality of the arbitral process, but at the same time seeks to balance public interest considerations relating to transparency of the judicial process and public accountability. An order made by the court directing proceedings to be heard in open court is not subject to appeal. This is in line with the objective of facilitating speedy resolution of disputes by arbitration.

Interim Measures and Preliminary Orders

Under the old AO, a Hong Kong seated arbitral tribunal could grant “interim measures” and “preliminary orders”, although these terms were undefined. The new AO, adopting many of the amendments to the Model Law in 2006, now explicitly states which “interim measures” may be granted by an arbitral tribunal. These include injunctive relief and orders for (i) maintaining the status quo of the parties pending determination, (ii) preventing harm or prejudice to the arbitral process, (iii) the preservation of assets out of which a subsequent award may be satisfied and (iv) the preservation of evidence that may be relevant and material to the resolution of the dispute.

Under the new AO Hong Kong courts may also grant interim measures in aid of arbitration proceedings commenced in Hong Kong and (subject to certain conditions - set out below) outside Hong Kong as well. In order for a court to grant interim measures for a non-Hong Kong seated arbitrations, the following conditions must be satisfied:

- the arbitration proceedings must be capable of giving rise to an award
- the party seeking interim measures must have a serious case on the merits that the party will succeed
- there must be a risk of irreparable harm if the interim measures are not granted
- the granting of interim measures will not seriously prejudice any other party
- the party seeking interim measures must provide security for costs
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The numerous legislative changes have made the old AO increasingly outdated, particularly in a Hong Kong context (whether interim or final) that is enforceable in Hong Kong; and

- the interim measures sought must be a type which may be granted by the Hong Kong courts in relation to Hong Kong seated arbitrations.

Separately, a specific and detailed regime for granting “preliminary orders” (including orders for security for costs, discovery of documents etc.) is also set out in the new AO. Under these provisions, an arbitral tribunal is empowered to make a preliminary order on an ex parte basis (in other words, without having to notify any other party of the application for the interim measures or preliminary orders) provided it considers that “prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure”.

A new section in the new AO (separate from the provisions providing for the enforcement of arbitral awards) is also created to provide for the enforcement of orders and directions (i.e. interim measures and preliminary orders), thereby permitting orders and directions made by an arbitral tribunal (in relation to arbitrations seated in or outside of Hong Kong) to be enforced in the same manner as those made by a Hong Kong court, provided that leave is granted by the court. Leave to enforce any orders and directions will not be granted unless a party can demonstrate that the order or direction in question belongs to a type or description that may be made in a Hong Kong arbitration.

Mediation-Arbitration procedures

With the increased use of mediation in Hong Kong over the past decade, and in particular following the recent implementation of the Civil Justice Reform which strongly promotes the use of mediation, the new AO has sought to provide a statutory framework to support parties who agree to submit their dispute to mediation. This new regime specifically empowers the HKIAC to appoint a mediator where a third party chosen by the parties fails to make the appointment. The new AO also allows an arbitrator sitting on a Hong Kong seated arbitration to act as mediator in respect of those same proceedings after the arbitral proceedings have been commenced, as long as all parties provide their consent in writing.

Similar to the old AO, if the mediation fails, the new AO protects the parties’ rights to natural justice by requiring the arbitrator to disclose to the parties all confidential information obtained during the mediation that the arbitrator considers to be material. This however raises an obvious concern that parties may be discouraged from engaging in a full and frank discussion of their respective positions during the mediation, in the fear that the information may be used against them at a later stage if the matter is not resolved.

Enforcement of Awards

Although the new AO does not adopt the exact wording of the Model Law regarding the enforcement of arbitral awards, and retains the enforcement procedure established under the old AO, a clearer and more
A comprehensive system has been set out in the new AO whereby separate provisions apply to (i) New York Convention awards; (ii) Mainland awards; and (iii) non-Convention and non-Mainland awards (e.g. awards made in Taiwan), removing any ambiguity existing under the current regime. This separate regime approach is similar to that in the United States and England and Wales, whereby different enforcement regimes apply depending on whether an award is a Convention or a non-Convention award. The grounds for refusing enforcement in the new AO remain the same as those in the old AO for Convention and Mainland awards. However, where non-Convention and non-Mainland awards are concerned, courts may refuse enforcement where it considers it is “just” to do so.

In addition, in line with the new AO’s objective to make the legislation more user-friendly and to further streamline and increase the efficiency of the enforcement procedure, the new AO standardizes the evidential requirements for applications to enforce all types of arbitral awards.

Conclusion

The new AO brings about a simpler, more user-friendly arbitration law that closely follows the structure of the Model Law. It also seeks to accord enhanced protection to the arbitral process and a greater degree of autonomy to the parties. These changes will no doubt fortify Hong Kong’s standing as a key regional centre for international arbitration.