

Chapter 9

CONDUCT OF ARBITRAL PROCEEDINGS

PART 7	CONDUCT OF ARBITRAL PROCEEDINGS
Section 46	Article 18 of the UNCITRAL Model Law (Equal treatment of parties)
Section 47	Article 19 of UNCITRAL Model Law (Determination of rules of procedure)
Section 48	Article 20 of UNCITRAL Model Law (Place of arbitration)
Section 49	Article 21 of UNCITRAL Model Law (Commencement of arbitral proceedings)
Section 50	Article 22 of UNCITRAL Model Law (Language)
Section 51	Article 23 of UNCITRAL Model Law (Statements of claim and defence)
Section 52	Article 24 of UNCITRAL Model Law (Hearings and written proceedings)
Section 53	Article 25 of UNCITRAL Model Law (Default of a party)
Section 54	Article 26 of UNCITRAL Model Law (Expert appointed by arbitral tribunal)
Section 55	Article 27 of UNCITRAL Model Law (Court assistance in taking evidence)
Section 56	General powers exercisable by arbitral tribunal
Section 57	Arbitral tribunal may limit amount of recoverable costs
Section 58	Power to extend time for arbitral proceedings
Section 59	Order to be made in case of delay in pursuing claims in arbitral proceedings
Section 60	Special powers of Court in relation to arbitral proceedings
Section 61	Enforcement of orders and directions of arbitral tribunal
Section 62	Power of Court to order recovery of arbitrator's fees
Section 63	Representation and preparation work

Part 7 of the Arbitration Ordinance gives effect to Chapter V of the UNCITRAL Model Law and sets out important provisions dealing with the conduct of arbitral proceedings prior to the making of an award. Section 46 is adapted from Article 18 and sets out the fundamental principle of equal treatment of the

parties and the essential duties of the tribunal. Part 7 also deals with the rules of procedure that apply (section 47/Article 19); the determination of the place of arbitration (section 48/Article 20); the question of when an arbitration commences (section 49/Article 21); the language of the proceedings (section 50/Article 22); the submission of statements of claim and defence (section 51/Article 23); the default position that oral hearings shall be held (section 52/Article 24); and the appointment of tribunal-appointed experts (section 54/Article 26). In addition, it deals with how the tribunal should respond to default by one party (section 53/Article 25), including when peremptory orders may be made; and addresses the question of when the Court of First Instance may assist in the taking of evidence (section 55/Article 27).

Sections 56 to 63 supplement the Model Law provisions, by expressly setting out a list of a tribunal's general powers (section 56); allowing the tribunal to limit recoverable costs in the arbitration (section 57), and to extend the time for commencing the dispute resolution process (section 58); and empowering the tribunal to grant appropriate orders where there has been unreasonable delay in pursuing a claim (section 59).

In turn, sections 60 to 62 grant the court special powers to assist the arbitration, including the power to make orders relating to the subject matter of the arbitration (section 60); the power to enforce a tribunal's order or direction in the same manner as an order or direction of the Court of First Instance (section 61); and the power to limit recovery of an arbitrator's fees where his mandate has been terminated due to a challenge, or due to impossibility or failure to act (section 62). Lastly, section 63 allows parties to select legal representatives of their choice, regardless of whether they are legally qualified or not, and whether they are Hong Kong or foreign lawyers.

**PART 7
CONDUCT OF ARBITRAL PROCEEDINGS**

**46. Article 18 of UNCITRAL Model Law
(Equal treatment of parties)**

(1) Subsections (2) and (3) have effect in substitution for Article 18 of the UNCITRAL Model Law.

(2) The parties must be treated with equality.

(3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required—

- (a) to be independent;
- (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and

- (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

NOTES

Introduction

Section 46 sets out certain fundamental requirements of equality of treatment, independence and impartiality of the tribunal, fairness and due process. These requirements are mandatory and are therefore not susceptible to any agreement to the contrary by the parties, in contrast to the principle of party autonomy that pervades sections 47 to 57 in general and section 47 in particular. The coexistence of the mandatory principles set out at section 46 and the general support for party autonomy in the following sections is a reflection of the objects and principles of the Ordinance as set out at section 3(2)(a), namely "that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved." Section 46 is at the heart of such "safeguards", and the principles articulated within section 46 are stated in advance of the freedoms subsequently enshrined in section 47 and the following sections.

46.01

Section 46 equates to Article 18 of the Model Law, with the notable modifications discussed below. Article 18 is the most uniformly-adopted provision in the Model Law and has been described as "one of the 'pillars' of the Model Law" and indeed "one of the pillars of any modern judicial system: its essence of guaranteeing the parties equal treatment and an opportunity to present their cases is the basis of a fair trial."¹

46.02

Equivalent Provisions in Arbitration Ordinance (Cap. 341)

Article 18 of the Model Law applied to international arbitrations by virtue of section 34C(1) of the Arbitration Ordinance (Cap. 341). However Article 18 does not directly have effect in the new Arbitration Ordinance, being replaced by the specific provisions of section 46.

46.03

Section 46(1) is a new provision and does not have a counterpart under the Arbitration Ordinance (Cap. 341).²

46.04

Section 46(2) essentially reflects the first part of Article 18 of the Model Law (equality of treatment) which applied to international arbitrations by virtue of section 34C(1) of the Arbitration Ordinance (Cap. 341).

46.05

The express requirement of "independence" at section 46(3)(a) was not included in section 2GA(1) of the Arbitration Ordinance (Cap. 341). However, the requirements

46.06

¹ Binder, para. 5-005.

² Legislative Council Comparison Table, p. 20.

of both independence and impartiality of arbitrators are also addressed at Article 12 of the Model Law in relation to challenges to arbitrators, and Article 12 applied to international arbitrations by virtue of section 34C(1) of the Arbitration Ordinance (Cap. 341).

46.07 Section 46(3)(b) and (c) reflect section 2GA(1)(a) and (b) of the Arbitration Ordinance (Cap. 341) which applied to both international and domestic arbitrations.

Modifications to UNCITRAL Model Law

46.08 Section 46(2) and 46(3) represent a notable, if subtle, departure from the text of the Model Law in the Arbitration Ordinance. Article 18 provides that “The parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.”

46.09 Section 46 replicates the two limbs of Article 18 namely that the parties be treated with equality and be given an opportunity to present their cases. Beyond this, however, Article 18 of the Model Law is modified in one important respect, and expanded in other respects. The modification is that the Article 18 requirement that each party be given a “full” opportunity of presenting its case is amended in section 46(3)(b) to become a “reasonable” opportunity. The expansions are that section 46 addresses the requirements of independence, impartiality and fairness, none of which are expressly included in Article 18, and that section 46(3)(c) imposes certain specific requirements upon the tribunal in relation to procedure which are not found in Article 18.

Section 46(1)

46.10 Section 46(1) provides that section 46(2) and (3) have effect in substitution for Article 18 of the Model Law, which, as noted above, provides that “The parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.” While Article 18 is therefore not directly incorporated into the Arbitration Ordinance, the remainder of section 46 does require equality of treatment and that the parties be given a “reasonable” opportunity to present their cases. Accordingly, save for the change of language from a “full” to a “reasonable” opportunity to present one’s case, section 46 effectively encompasses the two key protections set out in Article 18 of the Model Law.

Section 46(2)

46.11 This subsection incorporates the first part of Article 18, namely the tribunal’s obligation to treat the parties with equality. This means that no party shall be given an advantage over the other.

46.12 Equal treatment is also enshrined in Article 17.1 of the UNCITRAL Rules, Article 14.1 of the HKIAC Administered Arbitration Rules and Article 19 of the CIETAC Rules. The ICC and LCIA Rules do not expressly mention equality but simply require the tribunal to act fairly and impartially. Indeed, the requirement that the tribunal act “fairly and impartially” under section 46(3)(b) must include treating the parties with equality.³ Thus, while the Model Law and the UNCITRAL and HKIAC Administered

³ See *Rodfern and Hunter*, para. 6.12, fn. 16.

Arbitration Rules refer to the parties being treated with equality, and other sets of rules instead refer to the tribunal acting fairly and impartially, section 46 includes both requirements for good measure.

One aspect of treating the parties with equality (as well as fairly and impartially) is the avoidance of communications taking place between the tribunal and one party only, save for the limited circumstances in which a tribunal may deal with applications for interim measures on a “without notice” basis under section 37.⁴ Such communications have given rise to challenges. For example, the LCIA Court held that an arbitrator had failed to act fairly and impartially where he had met with representatives of the respondent in the absence of the claimant or its representatives, albeit not in a formal hearing.⁵ Similarly, the Court of First Instance granted an application to remove an arbitrator where he had met with party alone.⁶

46.13

Section 46(3)

Section 46(3)(a)

As noted above, the requirement of “independence” at section 46(3)(a) was not included in section 2GA(1) of the Arbitration Ordinance (Cap. 341) but was nevertheless effectively a requirement under the previous law by virtue of Article 12 of the Model Law, under which an arbitrator could be challenged for a lack of independence or impartiality.

46.14

Independence is generally considered to be distinguishable from impartiality (which is a separate requirement under section 46(3)(b)) in that the former concerns the objective question of whether the arbitrator has an interest in the dispute or a relationship with a party which prevents him from being properly regarded as neutral, whereas impartiality is a more subjective concept relating to the arbitrator’s state of mind and the existence of actual or apparent bias.⁷ An indication of this distinction is that under section 46(3)(a) the tribunal must “be” independent, whereas under section 46(3)(b) it must “act” impartially. However the two concepts obviously overlap considerably. The requirements of independence and impartiality are discussed in more detail in relation to section 25 above.⁸

46.15

Section 46(3)(b)

Section 46(3)(b) and (c) reflect section 2GA(1)(a) and (b) of the Arbitration Ordinance (Cap. 341) and also section 33(1)(a) and (b) of the English Arbitration Act.

46.16

⁴ Also a tribunal may legitimately find itself hearing only one party in the event of a party’s default in the circumstances contemplated under s.53.

⁵ Decision 10 (13 Feb 2002) in G. Nicholas and C. Parasides, “LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish” (2007) 23 *Arbitration Int.* pp. 16–17.

⁶ *Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens* [1998] 4 HKC 171. This case arose under the previous law in which Art. 17B of the Model Law did not apply and hence there was, at that time, no power on the part of an arbitrator to grant ex parte injunctions.

⁷ See *Rodfern and Hunter*, at para. 4.77 and Born, at pp. 1473–1475.

⁸ See commentary on s.25.

98. Saving of certain Mainland awards

Despite the fact that enforcement of a Mainland award had been refused in Hong Kong at any time during the period between 1 July 1997 and the commencement of section 5 of the Arbitration (Amendment) Ordinance 2000 (2 of 2000) under the repealed Ordinance as then in force, the award is, subject to section 96(2), enforceable under this Division as if enforcement of the award had not previously been so refused.

NOTES

Introduction

98.01 This section specifically provides that any Mainland award, the enforcement of which had been refused during the period between 1 July 1997 and 1 February 2007, may still be enforceable under this Division. The section is intended to deal with the legislative vacuum between 1 July 1997 and 1 February 2000 during which time Mainland awards were said to be unenforceable under the summary enforcement regime under the old Arbitration Ordinance (Cap. 341) (see commentary on section 92). Since a number of otherwise enforceable awards during this period were refused enforcement because of this legislative vacuum, this section was introduced specifically to rectify that situation.

Equivalent Provisions in Arbitration Ordinance (Cap. 341)

98.02 This section applied under the Arbitration Ordinance (Cap. 341) pursuant to section 40G, save as to textual changes.

Chapter 13

OPT-IN PROVISIONS

PART 11	PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR AUTOMATICALLY APPLY
Section 99	Arbitration agreements may provide expressly for opt-in provisions
Section 100	Opt-in provisions automatically apply in certain cases
Section 101	Opt-in provisions that automatically apply under section 100 deemed to apply to Hong Kong construction subcontracting cases
Section 102	Circumstances under which opt-in provisions not automatically apply
Section 103	Application of provisions under this Part

The provisions in Part 11 were some of the more contentious provisions during the consultation process leading up to the Arbitration Ordinance. Part 11 effectively allows parties to reapply some of the key features of domestic arbitrations under the old Arbitration Ordinance (Cap. 341), to arbitrations under the new ordinance. These optional provisions, which are found in Schedule 2, deal with the following matters:

- Disputes are to be submitted to a sole arbitrator only;
- Consolidation of arbitrations;
- Decisions by the court on a preliminary question of law;
- Challenging an award for serious irregularity;
- Appeals against an arbitral award on a question of law.

The optional provisions in Schedule 2 apply in two situations:

- First, by agreement of the parties, under section 99; or
- Secondly, and more significantly, under the automatic opt-in provisions set out in sections 100 and 101, but subject to section 102.

Section 100 provides that the opt-in provisions in Schedule 2 automatically apply to "domestic arbitration" agreements entered into before or within 6 years after commencement of the Ordinance. Section 101 builds on this, by specifically extending the application of these opt-in provisions to Hong Kong construction subcontracts.

**PART II
PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR
AUTOMATICALLY APPLY**

99. Arbitration agreements may provide expressly for opt-in provisions

An arbitration agreement may provide expressly that any or all of the following provisions are to apply—

- (a) section 1 of Schedule 2;
- (b) section 2 of Schedule 2;
- (c) section 3 of Schedule 2;
- (d) sections 4 and 7 of Schedule 2;
- (e) sections 5, 6 and 7 of Schedule 2.

NOTES

Introduction

99.01 The Arbitration Ordinance establishes a unitary regime for arbitration in Hong Kong by abolishing the distinction between domestic and international arbitrations that previously existed under the Arbitration Ordinance (Cap. 341).¹ However, the sections in Schedule 2 constitute opt-in provisions that effectively enable parties to domestic arbitrations to continue to use certain provisions of the Arbitration Ordinance (Cap. 341) that applied only to domestic arbitrations.

99.02 This section is to be read together with sections 100 and 101.

Equivalent Provisions in Arbitration Ordinance (Cap. 341)

99.03 Section 99 is a new provision and does not have an exact counterpart under the Arbitration Ordinance (Cap. 341). However, section 2M of the Arbitration Ordinance (Cap. 341) enabled parties to an international arbitration agreement to opt into the domestic arbitration regime.

Section 99

99.04 The operation of section 99 is to some extent similar to section 2M of the Arbitration Ordinance (Cap. 341). Section 2M of the Arbitration Ordinance (Cap. 341) allowed parties to an international arbitration agreement to opt into the domestic regime

¹ Under the Arbitration Ordinance (Cap. 341), "domestic arbitration agreement" means an arbitration agreement that is not an international arbitration agreement; and "international arbitration agreement" means an arbitration agreement pursuant to which an arbitration is, or would if commenced be, international within the meaning of Art. 1(3) of the UNCITRAL Model Law. These definitions have not been repeated in s.2; see commentary on s.2.

under Part II of the Arbitration Ordinance (Cap. 341), by an agreement in writing.² There was no restriction on when this agreement had to be made. However, whereas section 2M generally assumed that parties Part II would apply in its entirety, or not at all, that is not the case with section 99, which expressly allows parties to opt into "any or all" of the provisions of Schedule 2.

Possible Combinations of Sections Which may be Opted into

Although Schedule 2 comprises 7 sections, in reality, there are only 5 distinct provisions. This is because sections 6 and 7 are not standalone provisions, but must be read in conjunction with some of the earlier provisions. The 5 distinct provisions are as follows:

- (a) Section 1, which states that disputes are to be submitted to a sole arbitrator only;
- (b) Section 2, which deals with the consolidation of arbitrations;
- (c) Section 3, which deals with decisions by the court on a preliminary question of law;
- (d) Section 4, which must be read with section 7, and which together deal with challenging an award for serious irregularity;
- (e) Section 5, which must be read with sections 6 and 7, and which together deal with appeals against an arbitral award on a question of law.

Section 99, as drafted, suggests that in the case of sections 4 and 5, the parties may not opt into these sections by themselves, but must do so together with the corresponding ancillary sections as set out in the list above. However, difficulties may arise if parties only expressly refer to one of the sections, without referring to the corresponding section.

In these cases, it seems that the following approach may be taken:

- (a) If parties expressly provide that section 4 should apply but do not refer to section 7, it is submitted that section 7 will nonetheless also apply automatically. This is because section 7 expressly refers to and qualifies section 4. Therefore, by providing that section 4 applies, in most cases, this should also be construed as an agreement by the parties that section 7 will also govern.
- (b) If parties only expressly provide that section 5 should apply but do not refer to section 6 and/or 7, it is submitted that based on the same reasoning as above, both sections 6 and 7 will also automatically apply.
- (c) However, if the parties expressly provide only that section 6, or section 7, apply, then it is submitted that this is unlikely to be considered as an agreement by the parties that sections 4 or 5 will apply. This is because both sections 6 and 7 are clearly ancillary provisions which generally limit the operation of sections 4 and 5. However, since the parties have not agreed that sections 4 and 5 apply, then correspondingly, there is no provision which may be qualified.

² Arbitration Ordinance (Cap. 341), s.34A(2) provided that those provisions applicable to an international arbitration do not apply where, by virtue of s.2M of the Arbitration Ordinance, Pt II of the Arbitration Ordinance (Cap. 341) applies.