

CHAPTER 609

ARBITRATION ORDINANCE

An Ordinance to reform the law relating to arbitration, and to provide for related and consequential matters.

[1 June 2011]
L.N. 38 of 2011
(Originally 17 of 2010)

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PART 1

PRELIMINARY

1. Short title and commencement

- (1) This Ordinance may be cited as the Arbitration Ordinance.
 (2) (Omitted as spent)

[1.01] General Note

The Arbitration Ordinance (Cap 609) (Ordinance) replaced the Arbitration Ordinance (Cap 341).

When the Ordinance was in its early stages (then known as the Arbitration Bill), s 1(2) provided that 'This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.' The Ordinance came into effect on 1 June 2011.

For a list of other legislation that applies alongside the Ordinance, see: Halsbury's Laws of Hong Kong (2010) (Vol 1(2)) [25.006].

2. Interpretation

(1) In this Ordinance-

'arbitral tribunal' (仲裁庭) means a sole arbitrator or a panel of arbitrators, and includes an umpire;

'arbitration' (仲裁) means any arbitration, whether or not administered by a permanent arbitral institution;

'arbitration agreement' (仲裁協議) has the same meaning as in section 19;

'arbitrator' (仲裁員), except in sections 23, 24, 30, 31, 32 and 65 and section 1 of Schedule 2, includes an umpire;

'claimant' (申索人) means a person who makes a claim or a counter-claim in an arbitration;

'Commission' (貿法委) means the United Nations Commission on International Trade Law;

'Convention award' (公約裁決) means an arbitral award made in a State or the territory of a State, other than China or any part of China, which is a party to the New York Convention;

'Court' (原訟法庭) means the Court of First Instance of the High Court;

'dispute' (爭議) includes a difference;

'function' (職能) includes a power and a duty;

'HKIAC' (香港國際仲裁中心) means the Hong Kong International Arbitration Centre, a company incorporated in Hong Kong under the Companies Ordinance (Cap 32) and limited by guarantee;

'interim measure' (臨時措施) -

- (a) if it is granted by an arbitral tribunal, has the same meaning as in section 35(1) and (2); or
 (b) if it is granted by a court, has the same meaning as in section 45(9),

and 'interim measure of protection' (臨時保全措施) is to be construed accordingly;

'the Mainland' (內地) means any part of China other than Hong Kong, Macao and Taiwan;

'Mainland award' (內地裁決) means an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China;

'mediation' (調解) includes conciliation;

'New York Convention' (《紐約公約》) means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958;

'party' (一方、方) -

- (a) means a party to an arbitration agreement; or
 (b) in relation to any arbitral or court proceedings, means a party to the proceedings;

'recognized Mainland arbitral authority' (認可內地仲裁當局) means an arbitral authority that is specified in the list of recognized Mainland arbitral authorities published by the Secretary for Justice under section 97;

'repealed Ordinance' (《舊有條例》) means the Arbitration Ordinance (Cap 341) repealed by section 109;

'respondent' (被申請人) means a person against whom a claim or a counterclaim is made in an arbitration;

'UNCITRAL Model Law' (《貿法委示範法》) means the UNCITRAL Model Law on International Commercial Arbitration as adopted by the Commission on 21 June

1985 and as amended by the Commission on 7 July 2006, the full text of which is set out in Schedule 1.

(2) If-

- (a) a provision of this Ordinance refers to the fact that the parties have agreed, or in any other way refers to an agreement of the parties, the agreement includes any arbitration rules referred to in that agreement; or
- (b) a provision of this Ordinance provides that the parties may agree, the agreement, if any, may include any arbitration rules by referring to those rules in that agreement.

(3) If-

- (a) a provision of this Ordinance (other than sections 53 and 68) refers to a claim, that provision also applies to a counter-claim; or
- (b) a provision of this Ordinance (other than section 53) refers to a defence, that provision also applies to a defence to a counter-claim.

(4) A note located in the text of this Ordinance, a section heading of any provision of this Ordinance or a heading of any provision of the UNCITRAL Model Law is for reference only and has no legislative effect.

(5) If the Chinese equivalent of an English expression used in any provision of this Ordinance is different from the Chinese equivalent of the same English expression used in any provision of the UNCITRAL Model Law, those Chinese equivalents are to be treated as being identical in effect.

[2.01] Arbitral Tribunal

The definition of Arbitral Tribunal adds to Article 2(b) of the Model Law by including 'umpire'. The Model Law does not provide for the appointment of an umpire to the arbitral tribunal. Section 30 of the Ordinance provides that an umpire may be appointed to the arbitral tribunal. The Arbitration (Amendment) Ordinance (75 of 1996) made specific inclusion of umpires within the definition of an arbitral tribunal.

Part 4 (where s 30 is found) is titled 'Composition of Arbitral Tribunal'. Note that section 2(4) provides that section headings have no legislative effect. Mediators are arguably included within the definition of Arbitral Tribunal because section 33, which provides that mediators may be appointed, is also found under Part 4.

The Model Law uses the particular formulation of 'arbitral tribunal' because:

- (1) Certain European languages, such as Spanish and French, refer to a Court as 'tribunal' (e.g. Tribunal Supremo);

- (2) 'Court' in a European context may be a shortened reference to an arbitral institute (e.g. Permanent Court of Arbitration, ICC Court of Arbitration): See UNCITRAL Analytical Commentary on Draft Text A/CN 9/264 (25 March 1985), Commentary on Article 2, paragraph 1 at Page 15.

The need to have a distinctive definition is in line with the purposes of the Ordinance, which aims to be user-friendly for an international population.

[2.02] Arbitration

This term is found in Article 2(a) of the Model Law. It includes ad hoc and institutional arbitration. The Ordinance makes no attempt at defining what these two types of arbitration because these terms are not easily defined: See First Working Group Report on Article 2 of the Model Law A/CN 9/216 (23 March 1982).

Halsbury's Laws of Hong Kong defines arbitration as:

'the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined in a judicial manner, with binding effect, by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law': see Halsbury's Laws of Hong Kong (2010) (Vol 1(2)) [25.001].

Arbitration, within the meaning of 'international commercial arbitration' (see Article 1 of the Model Law) includes the preparation and conduct of arbitration proceedings based on arbitration agreements whether or not administered by a permanent arbitral institution: See UNCITRAL Analytical Commentary on Draft Text A/CN 9/264 (25 March 1985), Commentary on Article 1, paragraphs 13-14 at pages 9-10.

This definition is not all encompassing. The Model Law is designed for arbitration based on consent. Thus, the Model Law definition of 'arbitration' may not encompass compulsory arbitration. States have the option of specifically excluding this limitation: See First Working Group Report on Article 2 of the Model Law A/CN 9/216 (23 March 1982). Notwithstanding this view, 'arbitration' may include compulsory arbitration since s 3(b) of the Ordinance specifically provides that the Ordinance applies to statutory arbitration.

[2.03] Arbitration Agreement

Section 19 reproduces Option I of Article 7 of the Model Law. See s 19.

Option I of Article 7 of the Model Law sets a higher threshold for the validity of an arbitration agreement than Option II of Article 7. Option II does not include a writing requirement. Article 7 provides multiple Options because of the view that the writing requirement essentially makes the issue of an arbitration agreement a matter of evidence as opposed to a matter of validity: See Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session A/CN 9/589 (12 October 2005).

defendant is not ready and willing to refer the whole dispute, see: *Davis v Starr* (1889) 41 Ch D 242, (1889) 58 LJ Ch 808; *Renshaw v Queen Anne Residential Mansions and Hotel Co Ltd* [1897] 1 QB 662, (1897) 66 LJQB 496; *Parry v Liverpool Malt Co* [1900] 2 QB 606, (CA) (Eng); *Hodson v Railway Passengers Assurance Co* [1904] 2 KB 833 at 841, (1904) 73 LJKB 1001 at 1004, (CA) (Eng) per Collins MR.

The defendant must submit an affidavit of readiness and willingness to refer in support of his application for a stay. For discussion of this procedure, see: *Piercy v Young* (1879) 14 Ch D 200, (1873) 8 Ch App 473. The plaintiff can only rebut the defendant's statement in his affidavit that he was and is ready and willing to proceed to arbitration by extrinsic evidence as to the latter's state of mind. The only such evidence will be of defendant's conduct, as instanced by *Manchester Ship Canal Co Ltd v S Pearson Ltd* (above). A request by the defendant to the plaintiff to adduce a further and better particular of his statement of claim, in order to enable defendant to decide whether to insist upon arbitration, will not ordinarily indicate a lack of willingness by the defendant to arbitrate at the outset, so as to defeat his application for a stay. For authorities and commentary, see: *Empresa Navegacion 'Mambisa' v Taikoo Dockyard & Engineering Co of Hong Kong Ltd* [1977] HKLR 105.

[20.25] Application to the court with effect from 1 June 2011

See Introduction - Two different regimes of arbitration above.

[20.26] General Note - Paragraph (3)

This provision was added by s 15 of the Control of Exemption Clauses Ordinance (Cap 71) [cf s 20 Control of Exemption Clauses Ordinance 1989]. It maintains the objective in s 6 of the previous Ordinance to prevent any attempt at enforcement of a consumer arbitration agreement. In here, it refers an agreement to submit in mandatory terms [cf s 1 of the Consumer Arbitration Agreement Act 1988 (Eng)] which a "consumer" (as defined in s 4 of that Ordinance) is a party. Such agreement cannot be enforced against a consumer unless he consents in writing to arbitration after a dispute has arisen or he institutes arbitration (see: s 15(1) of the Control of Exemption Clauses Ordinance (Cap 71)).

The wordings and interpretation in s 15 of the Control of Exemption Clauses Ordinance is similar to the Consumer Arbitration Agreement Act 1988 and Unfair Terms in Consumer Contracts Regulation 1999 (which is still implemented by the European Community Directive 93/13/EEC of 1993 on Unfair Terms in Consumer Contracts). The Regulations, in Articles 3 (definition of 'consumer'), 8 (consequence of inclusion terms in contracts) and Sch 2 paragraph 1 (indicative and illustrative list of terms which may be regarded as unfair - mandatory arbitration provisions) are substantially but not entirely similar to the Hong Kong provisions. Sections 89-91 of the Arbitration Act 1996 (Eng) has made the following further provision to the consumer arbitration agreements. This includes:-

- (i) A definition of 'arbitration agreement' [cf s 89(1) of the Arbitration Act 1996 (Eng)];
- (ii) Expand the scope of 'consumer' in the Regulations to include legal as well as natural persons [cf s 90 of the Arbitration Act 1996 (Eng)];
- (iii) Provision that an arbitration agreement within the meaning of the Act 1996 and for the purposes of the Regulations is unfair if it purports to compel a consumer to go to arbitration to recover a modest sum, which clearly defined by the statutory order, subject to s 91 of the Arbitration Act 1996.

In contrast, such approach is neither adopted in the previous Ordinance (Cap 341) nor in the present Ordinance. However, it is noteworthy that the Arbitration Act 1996 (Eng) contains no measures reinforcing the objectives of the Regulations by overtly outlawing any attempt to enforce a consumer arbitration agreement through the mechanism of an application for a stay.

[20.27] Definitions - Paragraph (3)

For the meaning of 'arbitration agreement', 'dispute', see s 2(1) above. For 'court', 'judge' and 'person', see s 3 Interpretation and General Clauses Ordinance (Cap 1). For 'Labour Tribunal', see ss 2 and 3 Labour Tribunal Ordinance (Cap 25).

[20.28] General Note - Paragraph (4)

This provision is to ensure that the court has the discretionary power and refuse to grant the stay of legal proceeding. In general, if the court finds that it will be inappropriate to refer the dispute to arbitration, the court can refuse to grant a stay. For discussion, see *Cox Adrian John v Group Employment Management Ltd* (above) (In this case, the party had applied for the stay at the very late stage of the proceedings. Thus, a party shall apply for stay at the appropriate time. Failure to do so may cause the application of stay become fatal.)

[20.29] General Note - Paragraph (5)

If the court is satisfied that the plaintiff has established the three criteria as mentioned herein above (See: [20.22]-[20.24] above), it shall refer the dispute to arbitration. However, in *Cox Adrian John v Group Employment Management Ltd*, the Court of Appeal expressed that "... The Labour Tribunal would probably be slow to exercise its power of stay in favour of arbitration' (For discussion, see: paragraph 6 of the judgment held by Hon Rogers VP in the case of *Cox Adrian John*). Thus, this will disrupt and may cause unnecessary expenses and delay towards the proceeding. Nevertheless, it is noteworthy that the dictum held in the above was made prior to the present Arbitration Ordinance. Despite the fact that there is no authority in Hong Kong that provides further indications or explanation towards the meaning of paragraph (5), it is likely that if the criteria mentioned herein above is established, the court is entitled to exercise its power to refer the dispute to arbitration.

[20.30] General Note - Paragraph (6)

Paragraph (6) is a provision that is not included in Article 8 of the UNCITRAL Model Law. Prior to the present Ordinance, the amendment

made in ss 12B-12E of the High Court Ordinance (Cap 4) (since 1 June 2011) suggested that the court shall now refer admiralty dispute to arbitration. The approach as stated in ss 12B-12E are retained and strengthened by this provision. Under the current Ordinance, although the court must stay the proceeding and refer the case to arbitration, granting a stay does not mean the vessel can be released. In fact, as stated in paragraph (6), the court has the discretionary power to grant an order, i.e. arrest or retain the ship, until the dispute is resolved by arbitration. For further discussion in this aspect, see [20.31] below. Paragraph (6) shall read together with s 12B of the High Court Ordinance (Cap 4) below.

[20.31] Staying the proceeding ... order that the property arrested, or the bail or security given, be retained as security for the satisfaction of an award

In an admiralty proceeding, if a contract has included an arbitration clause, the court must grant the stay and refer the dispute to the arbitration. Nevertheless, there are circumstances where the dispute is unlikely to be resolved by arbitration. In such case, this may require the court to grant interim measures against the ship. Prior to the present Ordinance, the question 'whether the court has the jurisdiction to grant an order to arrest a ship' was answered by various case laws. For authorities and discussion, see: *The Tuyuti* [1984] 2 Lloyd's LR 51; *The Bazias 3* [1993] QB 673; *Lady Muriel (Owners) v Transorient Shipping Ltd, The Lady Muriel* [1995] 2 HKC 320, [1995] 10 Mealey's Int Arb Rep 7, J1, (CA); *The Britannia* [1998] 1 HKC 221 (It was held that the court has the jurisdiction to arrest a vessel even the stay is mandatory. As long as the arrest is made for the purpose of providing security for the judgment in the action in rem rather than for an arbitral award.). Such approach is now adopted in paragraph (6). Hence, the court must, as stated in paragraph (6)(a), grant the stay of proceeding and refer the case to arbitration. In addition, the court is now empowered to grant an order, such as arrest or retain the ship, provided that the order is made for the purpose of security for the judgment in rem rather than for an arbitral award.

[20.32] General Note - Paragraph (7)

This provision ensures that even if there is any amendment made in the current Ordinance or any other Ordinance (i.e. the High Court Ordinance), the court retains the same power as stated in paragraph (6). This includes the power to grant an order i.e. arrest or retain against the ship, provided that the order is made for the purpose of security for the judgment in rem rather than for arbitral award. For discussion about the court's jurisdiction to grant the arrest order, see [20.31] above.

[20.33] General Note - Paragraph (8)

The decision made by the Court of First Instance in (i) s 20(1) about the validity and nullity of an arbitration agreement or (ii) s 20(2) about referring the employment dispute to arbitration, shall be final and binding. This means the unsatisfied party is unable to appeal against the decision unless the court has granted a leave. However, if the party is not satisfied with the decision made in an arbitration tribunal, it is entitled to rely on the grounds as outset in s 81 below to set aside the award. For further discussion about setting aside an arbitration award, see: [81.03]-[81.16] below.

[20.34] General Note - Paragraph (9)

If a party wishes to appeal against the decision made by the court in (i) s 20(1) about the validity and nullity of an arbitration agreement or (ii) s 20(2) about referring the employment dispute to arbitration, the party has to acquire a leave from the court.

[20.35] General Note - Paragraph (10)

This provision ensures that the decision made by the court in respect of admiralty proceeding is final and binding. Hence, the decision made by the court in respect of paragraph (6) is not subject to appeal.

21. Article 9 of UNCITRAL Model Law (Arbitration agreement and interim measures by court)

Article 9 of the UNCITRAL Model Law, the text of which is set out below, has effect-

'Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'

[21.01] Historical Note

The wordings and interpretation of s 21 is same as the Article 9 of the UNCITRAL Model Law (cf Schedule 5 Chapter II, Article 9 of the previous Ordinance). The key emphasis of this provision is that the party is entitled to (i) request the court to grant an interim measure; (ii) no matter it is before or during the arbitral proceeding.

[21.02] Derivation

This provision is based on UNCITRAL Arbitration Rules (2010 Ed) Article 26(3). Cf LCIA Rules (1998 Ed) Article 25 and ICC Rules of Arbitration (1998 Ed) Article 23(2).

[21.03] General Note

This is one of two provisions in this Ordinance dealing with interim measures of protection. The other is s 35 below, which deals with the power of the arbitral tribunal to order interim measures. For comparing the differences between the powers of the court and the arbitral tribunal to order the interim measures of protection, see s 35 below.

This is also one of the two provisions which apply in Hong Kong where the seat of an arbitration is overseas (the other being is s 20 above); see also, in particular, *Lady Muriel (Owners) v Transorient Shipping Ltd, The Lady Muriel* [1995] 2 HKC 320, [1995] 10 Mealey's Int Arb Rep 7, J1, (CA), per Godfrey LJ.

For discussion of interim measures, see Halsbury's Laws of Hong Kong Vol

1. Arbitration [25.127]-[25.129] (powers of the court) and at [25.123]-[25.126] (powers of the tribunal); Kaplan, Spruce & Cheng Hong Kong Arbitration Cases and Materials (1991, Butterworths Asia, Hong Kong) pp 176-177; A Refem & Hunter on International Arbitration (5th Edition, Oxford University Press, 2009) pp 444-449; Simon Greenberg, Christopher Kee, J Romesh Weeramantry: International Commercial Arbitration (2010, Cambridge) pp 357-370; Walter Sempfle, The UNCITRAL Model Law and Provisional Measures in International Arbitration [1994] ADRLJ 269; SR Bond, The Nature of Conservatory and Provisional Measures, in Conservatory and Provisional Measures in International Arbitration (1993, International Chamber of Commerce, Paris); DD Reichert, Provisional Remedies in the Context of International Commercial Arbitration (1986) 3 Intl Tax & Bus Law 373; A Broches, Commentary on the UNCITRAL Model Law on International Commercial Arbitration (1990, Kluwer, Deventer) pp 51-52; HM Holtzmann & J Neuhaus, A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (1989, Kluwer, Deventer) pp 332-346; UNCITRAL Report, International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (A/CN.9/264, 25 March 1986) Article 9, paragraphs 1-5 (set out verbatim in Kaplan Spruce & Moser Hong Kong and China Arbitration Cases and Materials (1994, Butterworths Asia, Hong Kong) App 34).

[21.04] Not incompatible with an arbitration agreement

HM Holtzmann & J Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration Legislative History and Commentary (1989, Kluwer, Deventer) p 332 described this provision consisted of two principles: (i) a party does not waive its right to resolve the dispute by arbitration when requested for interim measures of protection from a national court, and (ii) that a national court is not prevented from granting such measures by the exercise of an arbitration agreement. When considering whether to grant the interim measures, the court shall consider (i) whether the plaintiff's merit is strong enough to grant the protection (ii) respect party's autonomy on choosing arbitration as a medium to resolve the dispute (iii) whether it is just and convenient to grant the protection [for authorities and discussion, see: *Channel Tunnel Group Ltd & Ors v Balfour Beatty Construction Ltd & Ors* [1993] 1 Lloyd's Rep 291; *Patel v Patel* Unreported, Court of Appeal, 24 March 1999].

Like s 20 above, this provision is concerned with the recognition and enforcement of arbitration agreements. Clearly, an interim order by the court which is designed to protect the applicant from the risk of being unable to enforce an award is not incompatible with the arbitration agreement. For discussion and interpretation, see: *Trade Fortune Inc v Amalgamated Mill Supplies Ltd* [1996] ADRLJ 132, SC (BC). However, whereas s 35 confers positive authority on the arbitral tribunal to order interim measures of protection, the present provision is permissive, providing merely that certain other action permitted outside the scope of s 35 may still be taken by the court even if it is inconsistent with the arbitration agreement, subject to s 49 below.

This provision is not a mechanism for seeking enforcement of interim measures of protection ordered by the tribunal under s 61; for court enforcement of measures ordered by the tribunal, see [61.02]-[61.03]. Also see [61.04] below.

The High Court has a parallel jurisdiction to the tribunal which may be invoked in support of the tribunal where the powers of the tribunal are inadequate, subject to s 45 below. For example, the tribunal may need to request the court to grant an order binding a non-party and where a party defaults in compliance with an order of the tribunal under s 35 below. This wording makes it clear that the status of the arbitration and authority of the tribunal are left unaffected by the exercise of those powers (note also that the UNCITRAL Arbitration Rules (2010 Ed) Article 26(3) provides further that resort to the High Court does not amount to a waiver of the arbitration agreement) and, furthermore, that the court is not barred from granting interim remedies by the mere existence of an arbitration agreement (on this last point, see A Broches, Commentary on the UNCITRAL Model Law on International Commercial Arbitration (1990, Kluwer, Deventer) p 51. For further discussion about the application of interim measure of protection, see [21.07] below.

[21.05] Arbitration proceedings

This is synonymous with 'arbitration'. For the meaning of 'arbitration', see s 8 (cf Sch I, Art 2(a) of the Ordinance).

[21.06] Court

For the meaning of 'court', see s 8 above (cf Sch I, Art 2(c) of the Ordinance). See also note, 'Application to the court' below.

[21.07] Interim measure of protection

For the meaning of interim measure, see s 2(1) above. In general, interim measures of protection have been identified as orders of the court serving one or more of three basic objectives: (i) ensuring that the purpose of the tribunal's award is not frustrated pending the pronouncement and enforcement of the tribunal's award (e.g. by the concealment or disposal of the subject-matter of the arbitration or the dissipation of assets from which the award should be satisfied) (ii) Regulating the conduct of and the relations between the parties during the proceedings (for example, by requiring the parties to do or refrain from doing certain acts); and (iii) conserving evidence and regulating its administration (e.g. by preserving a piece of evidence which may otherwise become permanently unavailable through an act of a party or through the ordinary course of events). For authorities and discussion about the propositions mentioned herein above, see: SR Bond, The Nature of Conservatory and Provisional Measures in Conservatory and Provisional Measures in International Commercial Arbitration (1993, International Chamber of Commerce, Paris) pp 9-10; Walter Sempfle, The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (1989, Kluwer, Deventer) p 332 state that this article is not limited to any particular kind of interim measures. Its ambit therefore include measures designed (i) to conserve the subject-matter of the dispute, (ii) to protect trade secrets and proprietary information, (iii) to preserve evidence,