

Client Alert

Latham & Watkins
Litigation Department

The New Arbitration Ordinance — A Major Reform to Bolster Hong Kong's Status as the Preeminent Arbitration Forum in the Greater China Region

The new Arbitration Ordinance

The expansion of cross-border investment and trade in Asia in recent years has led to increased and evermore sophisticated commercial relationships between businesses, investors and states. In light of the diverse political, economic and social dynamics operating within the Greater China region, it is an unfortunate but inevitable fact that some of these relationships break down. Increasingly, parties to complex transactions in Asia are turning to arbitration as their preferred method of dispute resolution.

Hong Kong has long been a popular venue for arbitration proceedings in the Greater China region and has historically sought to maintain its position as the forum of choice for the handling of international arbitral disputes.

With the imminent coming online of the new Arbitration Ordinance (the Ordinance) on 1 June 2011, Hong Kong has taken another significant legislative step in maintaining its position as the preeminent arbitral forum for commercial arbitration in the region, notwithstanding the domicile of the parties involved in the dispute.

A unitary regime that ensures an efficient arbitral process

The Ordinance aims to streamline the administration of the Hong Kong arbitration process by abolishing the distinction between domestic and international arbitrations prevailing under the current Ordinance. Under the Ordinance, there will be a single unitary regime based on the widely used UNCITRAL Model Law and its internationally recognized principles.

The UNCITRAL Model Law, which previously applied only to international arbitrations, will now apply to all arbitrations commenced in Hong Kong. This user-friendly regime will make the administration of arbitration proceedings in Hong Kong more efficient and will provide greater certainty for both domestic and foreign parties in respect of issues such as procedural fairness and ease of enforcement in non-New York Convention jurisdictions.

More certainty regarding confidentiality

Under the current regime, matters and documents disclosed in arbitration

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proceedings are kept confidential by virtue of the common law. The Ordinance adds greater certainty and assurance to this by codifying the common law duty of confidentiality. Disclosure of information relating to arbitration proceedings and awards made in such proceedings will now be expressly prohibited.

The current regime permits arbitration-related court proceedings (save for Court of Appeal hearings) to be heard in private. The Ordinance maintains this position, subject to a proviso that the court may now order these proceedings to be heard in open court on the application of a party or if it is satisfied that those proceedings ought to be heard in open court.

Reinforced legitimacy of interim measures and relief granted by an arbitral tribunal

It has been suggested, in relation to the current Ordinance, that the term “interim measure” applies only to measures that are protective of the subject matter of arbitration rather than measures that are protective of the personal or financial interest of the parties (such as a *Mareva* injunction over the assets of the opponent) or orders that are merely ancillary (such as orders for security for costs and orders securing the production of evidence).

The Ordinance provides greater specificity as to the interim measures that might be ordered and preliminary orders that might be granted directing a party not to frustrate the purpose of the interim measure requested. The term “interim measure” is expressly defined and includes an injunction. Hence, there is no longer any doubt that a party can apply to an arbitral tribunal or the court for a *Mareva* injunction over the assets of its opponent. The Ordinance also expressly provides that the UNCITRAL Model Law provisions that are applicable to interim measures are also applicable to an order for the preservation of assets (*i.e.*, an *Anton Pillar* Order).

The legitimacy of these interim measures is further reinforced as these measures are now enforceable, with the leave of the court, in the same manner as similar orders or directions made by the court.

The Ordinance also offers more certainty regarding the scope of the powers exercisable by an arbitral tribunal by setting out in detail such powers, including the ordering of security for costs, the directing of discovery of documents, that evidence be given by affidavit and for the inspection of relevant property, amongst other matters.

Wide recognition of arbitral awards

The Ordinance does not adopt the enforcement provisions of the UNCITRAL Model Law but takes a similar approach to that under the current regime.

As such, an arbitral award is enforceable in the same manner as a court judgment, with the leave of the court. The provisions of the current regime covering awards that are made in a New York Convention state or in mainland China are retained, recognising Hong Kong’s obligations to enforce Convention awards and Mainland awards. A new section covering enforcement of awards that are not made in a New York Convention state or in mainland China is added, so that the court is empowered to enforce such awards on a discretionary basis without the need to demonstrate reciprocity.

The wide recognition of arbitral awards and the extensive provisions for their enforcement will help to foster Hong Kong as an ideal arbitration centre for international entities engaging in China-related businesses and transactions.

Flexibility in recourse

Under the current Ordinance, recourse to the court against an arbitral award (in particular, international arbitral awards) is only permitted in limited circumstances. For international arbitral

awards, the UNCITRAL Model Law applies and the only recourse is to make an application to set aside the award on one of six grounds, with no right of appeal on the merits.

In respect of domestic awards, the court has a wider role than is permitted by the UNCITRAL Model Law. It may set aside an award where misconduct is shown or where the arbitration proceedings or an award has been improperly procured. A party may also appeal to the court on any question of law arising out of an award made pursuant to an arbitration agreement.

The Ordinance gives flexibility to parties desiring wider court involvement in their arbitration by allowing them to “opt-in” the existing domestic provisions in the current Ordinance (which are set out in Schedule 2 to the Ordinance) to provide for a right to challenge an arbitral award on the ground of serious irregularity and/or to appeal on a question of law as if the arbitral award were a domestic one.

The automatic opt-in to Schedule 2 and its application to construction sub-contracts

Further, for arbitration agreements entered into before or within six years after the commencement of the Ordinance and which specify that the arbitration will be subject to the domestic regime of the current Ordinance, the existing domestic provisions in the current Ordinance as set out in Schedule 2 to the Ordinance will be automatically opted-in. In addition, if a construction contract results in an automatic opt-in to Schedule 2, then any sub-contract (of any tier) which includes an arbitration agreement will also be deemed to have opted-in automatically. These special deeming provisions do not, however, apply where a sub-contractor is not a Hong Kong company.

Therefore, if the parties to an arbitration under the domestic regime do not wish to opt-in to the Schedule 2 provisions, they should agree in writing, or expressly provide that the automatic opt-in provisions do not apply or indicate which of the provisions in Schedule 2 do apply (or which do not).

Detailed provisions on costs, fees and expenses of the arbitration proceedings

Under the current Ordinance, an arbitral tribunal has a wide discretion in awarding costs, including the parties' costs and the costs of the award, and may include directions in respect of the costs of the arbitration proceedings in its award. Unless the award directs otherwise, the costs of the arbitration proceedings (excluding the fees and expenses of the arbitral tribunal) are taxable by the court.

In view of the increasingly contentious issues over costs in arbitrations, the Ordinance now includes detailed provisions as to the taxation of costs and the court's determination of an arbitral tribunal's fees and expenses in cases of dispute, enhancing efficiency and certainty in the taxation process.

Hong Kong as an ideal commercial arbitration forum

The Ordinance will create a more streamlined system in accordance with widely accepted international practice. It is expected that Hong Kong, with a more user-friendly, efficient, certain and flexible regime established under the new arbitration law, together with its geographical advantage in the Greater China region, will move to solidify its leading position as an ideal arbitration venue for parties who want to do business in the region.

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