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Asia Alert

Hong Kong Arbitration Ordinance

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Hong Kong has long been a regional centre for international arbitration, a position which recent legislation is designed to reinforce.

Enacted on 11 November 2010 and due to come into force on 1 June this year, the new Hong Kong Arbitration Ordinance ("**Ordinance**") is expected to further enhance Hong Kong's credentials as a venue for international arbitration.

The Ordinance aims to simplify the arbitration process in Hong Kong, and abolishes the distinction which previously existed between international and domestic arbitrations by implementing a unified regime based largely on the UNCITRAL Model Law. However, it is not prescriptive in its approach, and allows parties to "opt-in" to provisions previously applicable only to domestic arbitrations under the old law. The Ordinance also introduces an express duty of confidentiality both in respect of arbitral proceedings and arbitral awards, and includes more extensive provisions in relation to interim measures and judicial intervention in arbitral proceedings.

Opt-ins

Although the new unified regime will apply to all arbitrations (domestic and international) seated in Hong Kong, the Ordinance gives parties a wide discretion to opt-in to various provisions which modify its default provisions. This discretion allows for the creation of a bespoke arbitration regime, and parties should consider their standard arbitration clauses in light of these opt-ins, which relate to:

- the default number of arbitrators;
- the consolidation of related arbitration proceedings;
- court decisions on preliminary points of law;
- challenges to arbitral awards based on procedural irregularity; and
- appeals against arbitral awards based on points of law.

Duty of confidentiality

In an effort to strengthen the confidential nature of arbitration, the Ordinance expressly prohibits parties from publishing, disclosing, or communicating any information relating to arbitral proceedings and awards. It also modifies the rules relating to the confidentiality of court proceedings taken in aid of arbitration, such that these proceedings will now be conducted in private, unless all parties agree or the court orders otherwise. Given the existing expectation amongst users that arbitration is a confidential process, this is a welcome development.

Interim measures

To allow arbitral tribunals to operate with minimum intervention from

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the courts, the Ordinance adopts the Model Law's provisions relating to interim measures and preliminary relief. Hong Kong-based tribunals are now expressly authorized to grant orders in relation to, for example, the preservation of assets. Tribunals also have the express power to award security for costs, make directions as to the discovery of documents, and grant injunctive relief.

Enforcement of awards

The enforcement provisions under the Ordinance depart

from the provisions of the Model Law, and the provisions previously in force remain unchanged. Therefore, an arbitral award is enforceable in Hong Kong as if it were a court judgment, subject to obtaining the court's permission. The grounds for refusing enforcement essentially follow those set out in the New York Convention.

Costs

The Ordinance grants arbitral tribunals the power to assess and make orders for the payment of costs (including the fees of the tribunal), and

permits costs assessments to be undertaken by the court only with consent of the parties.

The Ordinance will apply to any arbitration seated in Hong Kong commencing on or after 1 June 2011. However, to ease the transition to the new regime, the opt-in provisions (listed in Schedule 2 to the Ordinance) will automatically apply to "domestic" arbitration agreements entered into within 6 years of the Ordinance coming into force.

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