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A Comparative Study

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Commentary

The New Arbitration Legislation in Hong Kong and France A Comparative Study

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I. Introduction

Hong Kong and France are both strong promoters of arbitration as a means of alternative dispute resolution. They both have legal systems that are well developed and arbitration friendly. And coincidentally, both have recently enacted new arbitration legislation. Hong Kong's new Arbitration Ordinance (the "**Hong Kong Ordinance**") came into force on 1 June 2011, and France's new arbitration law, Decree 2011-48 of 13 January 2011 (the "**French Decree**") came into force on 1 May 2011.

The writer does not profess to be an expert on French law. Nevertheless, the differences between the two new regimes are so striking that it hardly matters. This article highlights some of them.

II. Split regime for domestic and international arbitrations

While Hong Kong has decided to do away with the distinction between the domestic and international arbitration regimes, France has not. Under the French Decree, there are differences between the domestic and international regimes in terms of both procedure and the rights of recourse against awards. An international arbitration under the French Decree is defined as an arbitration in which "*international trade interests are at stake*". It does not appear that parties can, by agreement, switch between the French domestic regime and the international regime. This is different from the old Hong Kong Arbitration Ordinance. That contained a split regime but allowed the parties, by agreement, to select either the domestic or the international regime, notwithstanding that the arbitration would not otherwise have fallen within the chosen regime.

III. Arbitration agreement in writing

The existing position under Hong Kong law, that arbitration agreements must be in writing, remains unchanged by the Hong Kong Ordinance: arbitration agreements must be recorded in writing, albeit that there is no need for the agreement to be formalised in any way, or signed.

The French Decree, on the other hand, eliminates this requirement for international arbitrations. This is an innovation which echoes the new Option II

requirement under Article 7 of the 2006 UNCITRAL Model Law. The decision to reduce the formalities under the French Decree seems in principle to be a welcome one, although it remains to be seen how many disputes will arise concerning the existence and scope of an oral agreement to arbitrate.

IV. Judicial assistance in aid of arbitration

Under the French Decree, the President of the High Court of Paris is designated as the judge supporting the arbitration process. The supporting judge can order the taking of evidence, impose provisional or conservatory measures before the appointment of an arbitral tribunal (Article 1449), order conservatory attachments and judicial security (Article 1468), and, subject to the leave of the arbitral tribunal (when appointed), the production of documents and evidence by third parties (Article 1469). This is a considerable extension of the powers available to the court under the prior French legislation.

The assistance which the Hong Kong court can provide under the Hong Kong Ordinance is more extensive. For instance, the court has the same powers as the arbitral tribunal has in granting interim measures (Section 45). The Hong Kong court also has power to assist in the taking of evidence (Section 55).

By contrast with the French Decree, an application to invoke the Hong Kong court's powers referred to above can be made freely, without the need to obtain the leave of the arbitral tribunal. Further, the court's special powers under Section 60 of the Hong Kong Ordinance are much more extensive than those available under the French Decree, and can be exercised before or after the commencement of arbitration proceedings. The Hong Kong court's powers under Section 60 include making orders directing the inspection, photographing, preservation, custody, detention or sale of any property which is the subject of arbitral proceedings or in respect of which questions have arisen in the arbitration. The court may also direct samples to be taken from, observations to be made of, or experiments to be conducted upon, any such property.

There is a general trend, in international arbitration, towards reducing the amount of judicial intervention. In this respect, the French Decree seems to be somewhat more aggressive, i.e. permitting less intervention, than the Hong Kong Ordinance. However, one might

say that, given the Hong Kong court's pro-arbitration stance and its ability to decline to grant interim measures under Sections 45(4) and 60(4) of the Hong Kong Ordinance, one should not be too concerned about excessive judicial involvement in arbitrations in Hong Kong.

A further innovation made by the French Decree in terms of judicial assistance is Article 1505(4), under which a party may invoke the assistance of the supporting judge in an international arbitration in circumstances where the party is "*exposed to a risk of a denial of justice*". This power may be invoked regardless of whether the case has any connection with France. There is no equivalent provision under the Hong Kong Ordinance.

V. Confidentiality

This is an area in which the Hong Kong Ordinance and the French Decree have moved in totally opposite directions. Section 18 of the Hong Kong Ordinance, which prohibits the disclosure of information relating to arbitral proceedings and awards, may be regarded as a codification of the common law position as to the confidential nature of arbitrations. Under the French Decree, however, the provisions which preserve the confidentiality of arbitral proceedings are simply not applicable to *international* arbitrations. Parties who desire confidentiality have to agree this separately. This may be a response to an increasing demand for transparency in international arbitrations, particularly investment arbitrations.

VI. Recourse against awards and enforcement

In terms of recourse against awards, both the Hong Kong Ordinance and the French Decree, so far as international arbitrations are concerned, maintain the principle that arbitral awards cannot be appealed against, to the courts, on their merits. Such awards may only be set aside on certain limited technical grounds. Where the two jurisdictions diverge concerns the manner in which the Hong Kong Ordinance has included provisions permitting the parties to agree upon judicial intervention, and how the French Decree includes provisions which enable the parties to *exclude* judicial intervention.

The Hong Kong Ordinance permits parties to opt in to the provisions of Schedule 2, and avail themselves

of the court's powers to consolidate arbitrations, to determine preliminary questions of law, and to challenge awards on the grounds of serious irregularity, and on questions of law. What is innovative about the Hong Kong Ordinance is that it allows the parties to pick and choose amongst the Schedule 2 provisions, and thereby opt in to or out of certain provisions, thereby enabling bespoke arbitration regimes to be created.

The French Decree, on the other hand, contains provisions enabling parties to waive their right to apply to the court to set aside awards made in international arbitration. Upon this option being exercised, the award will immediately be final upon publication, although this would not affect a party's entitlement to resist enforcement under whatever provisions of Article V of the New York Convention that are available. In terms of enforcement, the French Decree includes new provisions enabling simpler and speedier notification of awards to facilitate speedier enforcement of awards, and provisions to the effect that the enforcement of an award will not be suspended despite an application being made to set aside the award. The court's discretion to stay enforcement can only be exercised on the

ground that enforcement would severely prejudice the rights of one of the parties.

Under the Hong Kong Ordinance, an application to set aside an award will likewise not operate as an automatic stay of execution. However, a court may adjourn the enforcement proceedings pending the outcome of the set aside application. In order to protect the party in whose favour the award is made, however, the court may require the other party to give security as a condition for the grant of the stay.

VII. Conclusion

The Hong Kong and French legislation are both designed with modern trends in international arbitration, and user friendliness, in mind. The French Decree appears to have a stronger tendency towards excluding the court than the Hong Kong Ordinance. This, however, may be better understood having regard to the jurisprudential background of the two jurisdictions, one having a common law system and the other a civil law system. However, given the pro-arbitration stance of the Hong Kong court, it seems unlikely that parties will see excessive interference by the Hong Kong court notwithstanding the powers available to it. ■

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