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An Introduction to Arbitration 仲裁簡介

Introduction 引言

The new Arbitration Ordinance (Cap. 609) came into operation on 1 June 2011. The significant changes, which are intended to keep the state of law in line with the international practice, include: (a) the new Arbitration Ordinance substantially follows the UNCITRAL Model Law (示範法); and (b) the separate regimes for international arbitration and domestic arbitration are abolished. The new Arbitration Ordinance represents an overhaul and reform of the Hong Kong arbitration law and will usher Hong Kong to a new arbitration era. While the impacts of the new Arbitration Ordinance are to be seen, we would like to share some characteristics of arbitration here.

(A) What is arbitration 什麼是仲裁?

Arbitration is a means of alternative dispute resolution (另類解決爭議方法) outside the court. In practice, arbitration is a confidential and consensual process where the parties voluntarily agree to refer the dispute to be resolved privately by an arbitrator (仲裁員) who acts like a “private judge” (私人法官). The decision of the arbitrator is legally binding on the parties in the same manner as a court judgment.

(B) Advantages of arbitration 仲裁優點

(1) Trade expertise of arbitrator 仲裁員對當事人行業的專業認識. Arbitration is particularly welcomed by certain industries such as construction, investment, information technology and shipping. The people in these fields prefer arbitration to litigation because the arbitrators know their industries well and understand the trade practices. Such expertise may not be possessed by a judge in our court system.

(2) Confidentiality 保密性. If a dispute is dealt with in open court, the proceedings and outcome will be reported in the newspapers and law reports. All commercial and sensitive information will thereby become public knowledge. In contrast, arbitration proceedings and awards are confidential. Secrecy also helps the losing party avoid a public embarrassment

to his reputation.

(3) Costs 費用. Costs issue is significant to businessmen. Arbitration offers certain procedural flexibilities which will permit the users to manage and control their legal costs. The users may choose an arbitrator at a fee to be agreed in advance. Also, the users could appoint a single arbitrator rather than 3 arbitrators and opt for less formal arbitration rules and procedures in order to save costs.

(4) Speed 進度. Fair and speedy resolution of dispute by arbitration remains the objective of the new Arbitration Ordinance. The users are free to agree on how the arbitration proceedings will be conducted. For example, if the parties do not wish to conduct oral hearing, they may request the arbitrator to dispense with oral hearings and proceed with a determination based on “arbitration by documents” (文件仲裁) only.

(5) Finality 終極裁決. Hong Kong courts adopt the ruling not to intervene the arbitral awards (仲裁裁決). When an award has been made by the arbitrator for the parties, the decision is regarded as final and conclusive unless, for instance, (i) the arbitration agreement is invalid; (ii) the subject matter is not arbitrable; and (iii) the proceedings or award are based upon fundamentally wrong legal principles.

(C) Disadvantages of arbitration 仲裁缺點

(1) Matters relating to a third party 與第三者有關之事宜. Since arbitration is purely a consensual process between the two parties, an arbitral order or award cannot have any effect on a third party without the court’s intervention. Unlike court proceedings, a third party witness may refuse to give oral evidence before an arbitrator if he does not wish to.

(2) Precedent 先例. When a court judge considers a judgment, he is bound by case law of similar facts and legal principles made previously by the higher courts. In contrast, arbitrators are not bound by any previous decision (i.e. precedent 先前案例) and each case can be considered by the arbitrator on its own merits. The downside is that the arbitration outcome may vary from case to case and thus lack certainty and consistency.

(3) Costs 費用. Arbitration costs are not necessarily low. The users must be careful in managing costs throughout the proceedings. In a High Court case *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co. Ltd* [HCCT 66/2007], the court learnt that each party incurred more than US\$10 million as legal costs in the arbitration for a commercial dispute involving about US\$90,000 only. Rigid application of rules and procedures may render the arbitration costs disproportionate to the amount in dispute. For court proceedings, parties do not have to bear the costs of a court judge. In arbitration, parties

have to pay the arbitrator for his time and work.

(4) Finality 終極裁決. Hon Reyes J said in a High Court case A v R [HCCT 54/2008] that “by choosing arbitration, the parties must be deemed to have undertaken the risk that an arbitrator might get matters wrong in his decision.” In court system, a person is normally given the right to appeal twice against a court judgment. However, in arbitration, the arbitral decision is conclusively binding. Parties normally lose the right to appeal against an undesirable arbitral decision.

(D) Conclusion 總結

Arbitration has become a global trend for resolving commercial, financial and private disputes. It is hoped that the new Arbitration Ordinance will help promote arbitration in Hong Kong so much so that arbitration will become more popular and well received amongst the different sectors in Hong Kong.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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