

立法會
Legislative Council

LC Paper No. CB(2)593/09-10
(These minutes have been
seen by the Administration)

Ref : CB2/BC/9/08

Bills Committee on Arbitration Bill

Minutes of the 4th meeting
held on Thursday, 5 November 2009, at 8:30 am
in Conference Room B of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun
- Members absent** : Hon Ronny TONG Ka-wah, SC
Hon CHIM Pui-chung
- Public Officers attending** : Mr Frank POON
Deputy Solicitor General (General)
- Ms Phyllis KO
Senior Assistant Law Draftsman
- Mr LEE Tin-yan
Senior Government Counsel
- Mr Christopher NG
Senior Government Counsel
- Ms Angie LI
Government Counsel

Clerk in attendance : Miss Betty MA
Chief Council Secretary (2) 4

Staff in attendance : Mr Kelvin LEE
Assistant Legal Adviser 1

Miss Florence WONG
Senior Council Secretary (2)5

Miss Maggie CHIU
Legislative Assistant (2)4

Action

I. Meeting with the Administration

[The Bill, Legislative Council Brief, LC Paper Nos. CB(2)144/09-10(01) to (02), CB(2)2261/08-09(01) to (02), CB(2)2469/08-09(02) to (03), and CB(2)2546/08-09(03) to (05)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Admin

2. The Administration was requested to –
 - (a) provide information, if any, on arbitration institutions which had simplified or fast track procedures;
 - (b) review the applicability of the automatic opt-in provisions for subcontracting cases having regard to the views of the construction industry and other stakeholders, and revert to the Bills Committee in due course;
 - (c) provide a breakdown of arbitration cases that adopted domestic arbitration regime by industries, if any; and
 - (d) provide the relevant court cases regarding arbitrators who were liable in law for the consequences of doing or omitting to do an act dishonestly in the performance of arbitral functions.

3. Noting that the Department of Justice was discussing with the relevant Mainland authorities to make express provisions that foreign investment enterprises having the status of a Chinese legal person were free to choose where disputes were to be arbitrated, members requested and the Administration agreed to report the development to the Panel on Administration of Justice and Legal Services in due course. Members of the Bills Committee should be invited to join the discussion of the Panel.

Action

II. Any other business

4. The Chairman reminded members that the next meeting would be held on 19 November 2009.
5. There being no other business, the meeting ended at 10:36 am.

Council Business Division 2
Legislative Council Secretariat
18 December 2009

**Proceedings of the 4th meeting of the
Bills Committee on Arbitration Bill
on Thursday, 5 November 2009, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker(s)	Subject(s)	Action required
<i>Agenda item I – Meeting with the Administration</i>			
000000 - 000443	Chairman	Opening remarks	
000444 - 000855	Administration Chairman	<p>Explanation on the rationale for not expanding the types of employment-related cases in which the court might decide whether or not to refer the parties to arbitration where there was an arbitration agreement in order to give effect to arbitration agreement in employment contracts [LC Paper No. CB(2)144/09-10(01)]</p> <p>The Administration's advice that having taken into account the recommendation and deliberation of the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (Working Group), the Court of Final Appeal's decision in the case of <i>Paquito Lima Buton v Rainbow Joy Shipping Ltd. Inc.</i>, and the submissions received including the views of the Labour Department, the Department of Justice (DoJ) considered that there should be no change to the existing position provided for in section 6(2) of the current Arbitration Ordinance</p>	
000856 - 001122	Chairman Administration	<p>Enquiry about the types of employment-related cases under the provision of clause 20(2) of the Arbitration Bill (the Bill)</p> <p>Clause 20(2) of the draft Bill had been amended to retain the provision in section 6(2) of the current Arbitration Ordinance (i.e. the court was empowered, at its discretion, to stay court proceedings and refer the parties to a dispute involving a claim or other matters that was within the jurisdiction of the Labour Tribunal to arbitration where there was a valid arbitration agreement between the parties), whereas claims under the Employees' Compensation Ordinance (Cap. 282) would not fall within the category of claims made pursuant to or arising under an employment contract as referred to in clause 20(2) of the Bill</p>	
001123 - 001305	Chairman Administration	Examples of existing legislation that contained material which was intended for ease of reference only [LC Paper No. CB(2)144/09-10(02)]	
001306 - 002237	Administration Ms Miriam LAU Chairman	<p>Briefing on LC Paper No. CB(2)2546/08-09(03) regarding –</p> <p>(a) costs of conducting arbitral proceedings in Hong Kong;</p> <p>(b) ways in which the provisions of the Bill could facilitate the fair and speedy resolution of disputes; and</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		(c) simplified procedures for arbitral proceedings	
002238 - 002624	Ms Miriam LAU Administration Chairman	<p>Whether simplified procedures for arbitral proceedings were set out in the legislation on arbitral procedures elsewhere</p> <p>The Administration's advice that the UNCITRAL Model Law (Model Law) did not provide for simplified or fast track procedures, but Article 19 of the Model Law provided procedural autonomy by granting the parties maximum freedom in the choice of their procedural rules. While Article 19 was considered to be sufficient in itself to vest the necessary procedural authority upon the arbitral tribunal, simplified procedures were either found as part of an arbitration agreement or in the rules of arbitration institution. The Arbitration Rules of the Hong Kong International Arbitration Centre provided for the possibility that arbitrations might be conducted on document-only basis</p> <p>The Administration was requested to provide information on arbitration institutions which had simplified or fast track procedures</p>	Admin
002625 - 003436	Ms Miriam LAU Administration Chairman	<p>Annex to LC Paper No. CB(2)2546/08-09(05)</p> <p>Reasons for fast-growing of arbitration cases conducted in the Mainland and how the enactment of the Bill could enhance Hong Kong's competitiveness over the Mainland and enable the business community and arbitration practitioners to conduct arbitral proceedings in Hong Kong</p> <p>The Administration's response that –</p> <p>(a) under the Mainland system, the general rule appeared to be that only where a contract had a foreign element could the parties agree to arbitrate outside the Mainland. DoJ was discussing with the relevant Mainland authorities to make express provisions that foreign investment enterprises having the status of a Chinese legal person were free to choose where disputes were to be arbitrated; and</p> <p>(b) the Mainland was not regarded as a Model Law jurisdiction. Hong Kong would be seen as a Model Law jurisdiction following the enactment of the Bill. It was anticipated that Hong Kong would have comparative advantages over the Mainland as an international arbitration centre</p> <p>The Administration was requested to report the progress of the discussion with the Mainland on item (a) above to the Panel on Administration of Justice and Legal Services in due course. Members of the Bills Committee should be invited to join the discussion of the Panel</p>	Admin

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003437 - 003754	Ir Dr Raymond HO Administration	<p>Whether contracts entered into by foreign investment enterprises set up in the Mainland involved a foreign element</p> <p>To the understanding of the Administration, foreign investment enterprises, such as Chinese-foreign joint ventures, that had the status of a Chinese legal person did not necessarily involve a foreign element. Factors amounting to a foreign element included where the subject matter of the contract was located in a foreign country, one or both parties to the contract were foreign nationals or foreign legal persons, or the contracts were to be performed in a foreign country</p>	
003755 - 004536	Chairman Administration	<p>Arbitration practices adopted by Hong Kong's major competitors [LC Paper No. CB(2)2546/08-09(05)]</p> <p>The Administration's advice that most of Hong Kong's major competitors had adopted a unitary regime for domestic and international arbitration. Hence, a unitary regime based on the Model Law would enable Hong Kong to operate an arbitration regime which accorded with international arbitration practices and enhance Hong Kong's competitiveness</p>	
004537 - 005014	Prof Patrick LAU Chairman Administration	<p>Enquiry about the development of international arbitration centres in the Mainland</p> <p>The Administration's response that in addition to its two centres in Beijing and Shanghai, the China International Economic and Trade Arbitration Commission (CIETAC), had recently set up two new centres in Shenzhen and Chongqing. Besides, the Mainland Government had from time to time refined its arbitration law since 1980s with a view to attracting the business community and arbitration practitioners to choose CIETAC to handle international arbitration cases. The Administration was discussing with CIETAC about the establishment of a centre in Hong Kong with a view to facilitating more cooperation between the two places. With a well-established legal system, strong judiciary and a wealth of some 8 000 legal practitioners, as well as its ideal location for handling arbitration cases involving Mainland or Taiwan element, Hong Kong could enhance its cooperation with the Mainland</p>	
005015 - 010636	Chairman Administration	<p>Briefing on LC Paper No. CB(2)2546/08-09(04) pertaining to concerns raised by the construction industry on the proposed arbitration regime</p> <p>The Administration's advice that a meeting with relevant stakeholders, including the representatives from the construction industry and other deputations which had given views on the Bill and the draft Bill, was convened on 29 October 2009. There were diverse views on whether clause 102 of the draft Bill (i.e. the automatic opt-in provisions would be applicable to subcontracting cases) should be reinstated. Specifically, the construction industry insisted that clause 102 of the draft Bill should be reinstated. While the Administration had no strong views against the construction industry's</p>	

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		demand, it was concerned about the impact of the proposal on other industries (e.g. shipping and insurance industries) where subcontracting was not uncommon. The Administration was studying various options, such as stating explicitly that the automatic opt-in provisions for subcontracting cases were applicable to the construction industry only. It would revert to the Bills Committee in due course	Admin
010637 - 011501	Ir Dr Raymond HO Administration Chairman Prof Patrick LAU	Concern – (a) about the criteria for differentiating local and overseas contractors and subcontractors; (b) whether contracts for renovation/fitting out works fell within the scope of construction contracts/subcontracts The Administration's response that it was studying the viability of providing a definition of "construction industry"	
011502 - 011908	Ms Miriam LAU Chairman	Whether it was a good practice to amend the Bill to suit the specific needs of an industry simply because it dared to sound out its concerns The Administration was requested to provide a breakdown of arbitration cases that adopted domestic arbitration regime by industries	Admin
011909 - 012333	Chairman Administration	Differences between provisions of the Bill and international arbitration practices with regard to confidentiality in arbitral proceedings and the enforcement of arbitral awards [LC Paper No. CB(2)2546/08-09(04)]	
012334 - 012727	Mr Albert HO Administration Chairman	Whether parties could choose to conceal their particulars in the reports of judgment to be published The Administration's response that clause 17 of the Bill imposed restrictions on the reporting of court proceedings that were heard otherwise than in open court, and clause 18 of the Bill prohibited the disclosure of information relating to arbitral proceedings and awards made in those arbitral proceedings. If the court directed that the report not to be published until after the end of a period, that period should not exceed 10 years	
012728 - 012826	Chairman Administration	Continuation of discussion of LC Paper No. CB(2)2469/08-09(03) Members raised no question on Issue 8 of the Administration's paper	
012827 - 013146	Chairman Administration Mr Albert HO	Issue 9 of the Administration's paper The Administration's advice that it agreed with the Working Group's view that no appeal should be provided if the provision was only concerned with a matter of procedure	

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		<p>Mr Albert HO's enquiry whether the proposal would be in breach of the Basic Law and relevant case law</p> <p>The Administration's response that the proposal would not violate the Basic Law based on the principle of proportionality given that both parties had expressly agreed to resolve disputes by arbitration</p>	
013147 - 013713	Dr Priscilla LEUNG Administration Chairman	<p>Examples of issues that were subject to appeal</p> <p>The Administration's response that if the court decided that the arbitration agreement was not valid, or the enforcement of an arbitral award should be refused, e.g. it was contrary to public policy, such decision of the court would be subject to appeal with leave</p>	
013714 - 014502	Chairman Administration	Members raised no question on Issues 10 to 19 of the Administration's paper	
014503 - 014518	Chairman	<p>Issue 20 of the Administration's paper</p> <p>The Administration would review the applicability of the automatic opt-in provisions in contracting cases having regard to the views of the construction industry and other stakeholders, and revert to the Bills Committee in due course</p>	Admin
014519 - 015603	Chairman Administration Mr Albert HO Ms Miriam LAU ALA1 Dr Priscilla LEUNG	<p>Issue 21 of the Administration's paper</p> <p>Definition and meaning of "dishonesty", and whether failure to declare a conflict of interest by an arbitrator in performing the arbitral functions would be liable in law for omissions</p> <p>The Administration's advice that the reference to "dishonesty" meant that the threshold for establishing liability against an arbitrator was relatively high.</p> <p>ALA1's advice that clause 25 of the Bill which sought to give effect to Article 12 of the Model Law (Grounds for challenge) provided that an arbitrator could be challenged if there were justifiable doubts as to his impartiality or independence</p> <p>The Administration was requested to provide the relevant court cases regarding arbitrators who were liable in law for the consequences of doing or omitting to do an act dishonestly in the performance of arbitral functions</p>	Admin
015604 - 015807	Chairman Administration	Members raised no question on Issues 22 to 23 of the Administration's paper	
015808 - 020646	Chairman Administration Mr Abraham SHEK Ms Miriam LAU	<p>Issue 24 of the Administration's paper</p> <p>View of Mr Abraham SHEK that the President of the Hong Kong Federation of Electrical & Mechanical Contractors Limited should be added to the Appointment Advisory Board as electrical and mechanical contractors were also major arbitration users</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		View of Ms Miriam LAU that the Administration should set out clear guidelines for the appointment of members of the Appointment Advisory Board	
<i>Agenda item II – Any other business</i>			
020647 - 020704	Chairman	Date of next meeting	

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