

Arbitration Bill
Draft Committee Stage Amendments

This paper sets out the Administration's proposal to introduce Committee Stage Amendments ("CSAs") to the Arbitration Bill ("the Bill"). The CSAs are primarily intended to address various issues discussed by the Bills Committee which held thirteen meetings from 28 July 2009 to 12 May 2010.

2. Attached as **Annex A** is a draft of the complete set of CSAs in English and Chinese that the Administration proposes to move in connection with the resumption of the Second Reading debate of the Bill. These CSAs will, among other things:

- (a) amend clause 18(2)(a) of the Bill so that a party may publish, disclose or communicate any information relating to the arbitral proceedings or award for the purposes of protecting or pursuing a legal right or interest of the party, or of enforcing or challenging the award, in legal proceedings before a court or other judicial authority in or outside Hong Kong;
- (b) delete the reference to "subsection (2)" in clause 20(3) of the Bill, taking into account that section 15 of the Control of Exemption Clauses Ordinance (Cap. 71) deals with agreements involving consumers but not employment-related cases;
- (c) make it clear that clause 32 of the Bill only applies to the appointment of mediator as provided for under an arbitration agreement;
- (d) delete references to experts and legal advisers from clauses 54(2) and 77(3)(b)(ii) of the Bill and allow the arbitral tribunal only to appoint assessors to advise on question of costs;
- (e) amend clause 75(1) of the Bill to provide for taxation of costs by the court if the parties have so agreed, unless the arbitral tribunal otherwise directs in the arbitral award;
- (f) reinstate the deemed application of the opt-in provisions that automatically apply under clause 100 of the Bill for Hong Kong construction subcontracting cases by inserting a new clause 100A into the Bill, and amend clause 101 of the Bill so

that the circumstances in which those opt-in provisions are not applicable would also apply to the new clause 100A;

(g) make it clear that, in relation to mediation, clauses 103 and 104 of the Bill only apply to the situations as provided for in clauses 32 and 33 of the Bill, thus confining the immunity available to mediators to mediation that is conducted within the framework of arbitration under clauses 103 and 104 of the Bill; and

(h) update the list of parties to the New York Convention as specified in the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 341 sub. leg. A).

Department of Justice
May 2010

#355092

ARBITRATION BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	(a) In the definition of “interim measure”, by deleting “保護” and substituting “保全”. (b) In the definition of “respondent”, by deleting “應訴” and substituting “被申請”.
8(2)	By adding “(other than section 2(5))” after “section 2”.
18(2)	By deleting paragraph (a) and substituting – “(a) if the publication, disclosure or communication is made – (i) to protect or pursue a legal right or interest of the party; or (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Hong Kong;”.
20(3)	By deleting “Subsections (1) and (2) have” and substituting

“Subsection (1) has”.

- 32(1)(a) By deleting “written agreement” and substituting “arbitration agreement”.
- 32(3) By deleting “written agreement” where it twice appears and substituting “arbitration agreement”.
- 53(3) In the Chinese text, by deleting “最終命令” and substituting “敦促遵行令”.
- 53(4) In the Chinese text, by deleting “最終命令” where it twice appears and substituting “敦促遵行令”.
- 54(2) By deleting paragraph (a) and substituting –
 “(a) the arbitral tribunal may appoint assessors to assist it on technical matters, and may allow any of those assessors to attend the proceedings; and”.
- 54(2)(b) By deleting “experts, legal advisers or”.
- 55 (a) By deleting subclause (3).
(b) By adding –
 “(6) Section 81 (Warrant or order to bring up prisoner to give evidence) of the Evidence Ordinance (Cap. 8) applies as if a reference to any proceedings, either criminal or civil, in that section were any arbitral proceedings.”.

- 60(5) By deleting everything after “in part,” and substituting “when the arbitral tribunal makes an order for the cessation.”.
- 75 By deleting subclause (1) and substituting –
“(1) Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are to be taxed by the court, then unless the arbitral tribunal otherwise directs in an award, the award is deemed to have included the tribunal’s directions that the costs (other than the fees and expenses of the tribunal) are –
(a) to be taxed by the court; and
(b) to be paid on any basis on which the court can award costs in civil proceedings before the court.”.
- 77(3)(b)(ii) By deleting “expert, legal adviser or”.
- 86(2)(a) By adding “under the law of Hong Kong” after “arbitration”.
- 90(1) By adding “in Council” before “may, by order”.
- 98 By adding “under the repealed Ordinance as then in force” after “(2 of 2000)”.
- New By adding –
“100A. Opt-in provisions that automatically apply under section 100 deemed to apply to Hong Kong construction subcontracting cases

- (1) If –
 - (a) all the provisions in Schedule 2 apply under section 100(a) or (b) to an arbitration agreement, in any form referred to in section 19, included in a construction contract;
 - (b) the whole or any part of the construction operations to be carried out under the construction contract (“relevant operation”) is subcontracted to any person under another construction contract (“subcontract”); and
 - (c) that subcontract also includes an arbitration agreement (“subcontracting parties’ arbitration agreement”) in any form referred to in section 19,

then all the provisions in Schedule 2 also apply, subject to section 101, to the subcontracting parties’ arbitration agreement.

(2) Unless the subcontracting parties’ arbitration agreement is an arbitration agreement referred to in section 100(a) or (b), subsection (1) does not apply if –

- (a) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract is –
 - (i) a natural person who is ordinarily resident outside Hong Kong;
 - (ii) a body corporate –

- (A) incorporated under the law of a place outside Hong Kong; or
 - (B) the central management and control of which is exercised outside Hong Kong; or
 - (iii) an association –
 - (A) formed under the law of a place outside Hong Kong; or
 - (B) the central management and control of which is exercised outside Hong Kong;
 - (b) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract has no place of business in Hong Kong; or
 - (c) a substantial part of the relevant operation which is subcontracted under the subcontract is to be performed outside Hong Kong.
- (3) If –
- (a) all the provisions in Schedule 2 apply to a subcontracting parties' arbitration agreement under subsection (1);
 - (b) the whole or any part of the relevant operation that is subcontracted under the subcontract is further subcontracted to another person under a further

construction contract (“further subcontract”); and

- (c) that further subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule 2 apply, subject to section 101, to the arbitration agreement so included in that further subcontract as if that further subcontract were a subcontract under subsection (1).

- (4) In this section –

“construction contract” (建造合約) has the meaning given to it by section 2(1) of the Construction Industry Council Ordinance (Cap. 587);

“construction operations” (建造工程) has the meaning given to it by Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).”.

101 By deleting “Section 100 does” and substituting “Sections 100 and 100A do”.

101(b)(i) By adding “or 100A” after “section 100”.

103 By adding –

“(3) In this section, “mediator” (調解員) means a mediator appointed under section 32 or referred to in section 33.”.

- 104 By deleting subclause (5) and substituting –
- “(5) In this section –
- “appoint” (委任) includes nominate and designate;
- “mediator” (調解員) has the same meaning as in section 103,
- and “mediation proceedings” (調解程序) is to be construed accordingly.”.
- Schedule 1, Article 1(4)(b) In the Chinese text, by deleting “爲准” and substituting “爲準”.
- Schedule 1, Article 11(5) In the Chinese text, by deleting “交托” and substituting “交託”.
- Schedule 2 By adding “, 100A” before “& 101]”.
- Schedule 2, section 7(9) By adding “, direction” after “An order”.
- Schedule 4 By adding –

“Arbitration (Parties to New York Convention) Order

34A. Schedule amended

(1) The Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 341 sub. leg. A) is amended by repealing “Bosnia-Herzegovina” and substituting “Bosnia and Herzegovina”.

(2) The Schedule is amended by repealing “Kazakstan” and substituting “Kazakhstan”.

(3) The Schedule is amended by repealing “Korea, Republic of” and substituting “Republic of Korea”.

(4) The Schedule is amended by repealing “Macedonia, the former Yugoslav Republic of” and substituting “The former Yugoslav Republic of Macedonia”.

(5) The Schedule is amended by repealing “Netherlands (including Netherlands Antilles and Surinam)” and substituting “Netherlands (including Netherlands Antilles)”.

(6) The Schedule is amended by repealing “Slovak Republic” and substituting “Slovakia”.

(7) The Schedule is amended, in the English text, by repealing “Tanzania, United Republic of” and substituting “United Republic of Tanzania”.

(8) The Schedule is amended by repealing “United Kingdom (including Belize, Bermuda, Cayman Islands, Gibraltar, Guernsey and Isle of Man)” and substituting “United Kingdom of Great Britain and Northern Ireland (including Bailiwick of Jersey, Cayman Islands, Bermuda, Gibraltar, Guernsey and Isle of Man)”.

(9) The Schedule is amended by repealing “Venezuela” and substituting “Venezuela (Bolivarian Republic of)”.

(10) The Schedule is amended, in the English text, by repealing “Vietnam” and substituting “Viet Nam”.

(11) The Schedule is amended by repealing “Yugoslavia”.

(12) The Schedule is amended, in the Chinese text, by repealing “丹麥(包括法羅群島及格陵蘭)” and substituting “丹麥(包括法羅群島及格陵蘭島)”.

(13) The Schedule is amended, in the Chinese text, by

repealing “文萊” and substituting “文萊達魯薩蘭國”.

(14) The Schedule is amended, in the Chinese text, by repealing “尼日尼亞” and substituting “尼日利亞”.

(15) The Schedule is amended, in the Chinese text, by repealing “吉爾吉斯” and substituting “吉爾吉斯斯坦”.

(16) The Schedule is amended, in the Chinese text, by repealing “多米尼加” and substituting “多米尼克”.

(17) The Schedule is amended, in the Chinese text, by repealing “安提瓜及巴布達” and substituting “安提瓜和巴布達”.

(18) The Schedule is amended, in the Chinese text, by repealing “沙地阿拉伯” and substituting “沙特阿拉伯”.

(19) The Schedule is amended, in the Chinese text, by repealing “孟加拉” and substituting “孟加拉國”.

(20) The Schedule is amended, in the Chinese text, in the entry relating to “法國”, by adding “所有” before “領土”.

(21) The Schedule is amended, in the Chinese text, in the entry relating to “美利堅合眾國”, by adding “所有” before “領土”.

(22) The Schedule is amended, in the Chinese text, by repealing “特立尼達及多巴哥” and substituting “特立尼達和多巴哥”.

(23) The Schedule is amended, in the Chinese text, in the entry relating to “澳大利亞”, by adding “，巴布亞新畿內亞除外” after “領土”.

(24) The Schedule is amended by adding –

“Afghanistan

Albania

Azerbaijan

Bahamas

Brazil

Cook Islands

Dominican Republic

Gabon

Honduras

Iceland

Iran (Islamic Republic of)

Jamaica

Lao People's Democratic Republic

Lebanon

Liberia

Malta

Marshall Islands

Republic of Moldova

Montenegro

Mozambique

Nepal

Nicaragua

Oman

Qatar

Rwanda

Saint Vincent and the Grenadines

Serbia

United Arab Emirates

Zambia".".

Schedule 4,
section 56(a)

By deleting “55(2) and (3)” and substituting “55(2) and (6)”.

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