

立法會
Legislative Council

LC Paper No. LS101/08-09

**Paper for the House Committee Meeting
on 10 July 2009**

**Legal Service Division Report on
Arbitration Bill**

I. SUMMARY

- 1. Objects of the Bill** To reform the law relating to arbitration and to provide for related and consequential matters.

- 2. Comments** The Bill proposes to –
 - (a) give certain provisions of the Model Law of the United Nations Commission on International Trade Law, subject to modifications and supplements, the effect of law in Hong Kong;
 - (b) unify the existing domestic and international regimes of arbitration and to repeal the Arbitration Ordinance (Cap. 341); and
 - (c) make provisions for other related and consequential matters.

- 3. Public Consultation** According to the LegCo Brief, arbitration institutes, the Law Society of Hong Kong, the Hong Kong Bar Association, academics, relevant government bureaux and departments, and various public authorities and private organizations concerned have been consulted.

- 4. Consultation with LegCo Panel** The Panel on Administration of Justice and Legal Services has been consulted. Members did not disagree with the proposals in the draft Bill but raised various issues.

- 5. Conclusion**
 - (a) The Bill proposes to reform substantially the existing law on arbitration. Members may wish to examine the Bill in detail.
 - (b) The scrutiny of the Bill is continuing.

II. REPORT

Objects of the Bill

To reform the law relating to arbitration and to provide for related and consequential matters.

LegCo Brief

2. LP 19/00/3C Pt. 38 issued by the Department of Justice dated 24 June 2009.

Date of First Reading

3. 8 July 2009.

Comments

Background

4. At present, the Arbitration Ordinance (Cap. 341) (the Ordinance) has created two different regimes of arbitration, namely, domestic and international. Domestic arbitration is largely based on the United Kingdom arbitration legislation whereas international arbitration is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law). Members may refer to the background brief prepared by the Secretariat dated 17 February 2009 (LC Paper No. CB(2)899/08-09(07)) (the Background Brief) for further information on the differences between the two regimes.

5. In 1998, the Hong Kong Institute of Arbitrators, in co-operation with the Hong Kong International Arbitration Centre, set up a Committee on Hong Kong Arbitration Law on the reform of the arbitration law. The report of the Committee was issued in April 2003 (the Report) and was forwarded to the Department of Justice (DoJ) for consideration. One of the recommendations of the Report is to abolish the distinction between domestic and international arbitrations in the Ordinance, and to adopt the Model Law as the law for both domestic and international arbitrations.

6. As recommended by the Report, the Bill proposes to create a unitary regime of arbitration on the basis of the Model Law and to abolish the distinction between domestic and international arbitrations. Upon enactment, clause 108 of the Bill will repeal the Ordinance.

7. According to the LegCo Brief, the purposes of the reform are –
- (a) to make the law on arbitration more user-friendly;
 - (b) to enable Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international practices and development as the Model Law is familiar to practitioners from both civil law and common law jurisdictions;
 - (c) to attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings, as Hong Kong will be seen as a Model Law jurisdiction; and
 - (d) to promote Hong Kong as a regional centre for legal services and dispute resolution.

The Bill

8. The Bill is divided into 14 Parts. Part 1 of the Bill provides, among other things, that -
- (a) certain provisions of the Model Law have the force of law in Hong Kong subject to modifications and supplements as expressly provided for in the Bill (clause 4); and
 - (b) the Bill applies to the Government and the Offices set up by the Central People's Government in Hong Kong (clause 6).
9. Parts 2 to 9 of the Bill follow the structure of the Model Law with modifications. In summary –
- (a) Part 2 contains the general provisions which sets out, among other things, the principles for the interpretation of the Model Law, the procedural rules in respect of the delivery of written communications, the application of the Limitation Ordinance (Cap. 347) to arbitrations. Further, court proceedings under the Bill are, in general, to be heard otherwise than in open court;
 - (b) Part 3 contains provisions relating to arbitration agreements, including the definition and form of arbitration agreements, and the circumstances under which an action in court, the dispute of which is the subject of an arbitration agreement, should be referred to arbitration;

- (c) Division 1 of Part 4 contains provisions relating to the composition of an arbitral tribunal, including the appointment of arbitrators and grounds and procedure for challenging the appointment of arbitrators. Division 2 of Part 4 contains provisions relating to the appointment of a mediator, including a provision (clause 33) that with the consent of parties, an arbitrator may act as a mediator after the arbitral proceedings have commenced and may obtain information from parties. If the mediation proceedings terminate without reaching a settlement, the arbitrator may resume the arbitral proceedings;
- (d) Part 5 empowers an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitral agreement;
- (e) Part 6 concerns the power of an arbitral tribunal to grant interim measures and preliminary orders;
- (f) Part 7 specifies the procedures for the conduct of arbitral proceedings and sets out the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings;
- (g) Part 8 prescribes the procedures for the making of arbitral awards, including the award on costs and interest on awards of costs of the arbitral proceedings. It also provides for the circumstances under which arbitral proceedings are to be terminated; and
- (h) Part 9 provides for the recourse to the court against an arbitral award by an application for setting aside the award to the court on specified grounds, such as the arbitration agreement is not valid under the law to which the parties have subjected.

10. Part 10 of the Bill concerns the recognition and enforcement of awards, including Mainland awards. It retains the scheme under the Ordinance for the enforcement of arbitral awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal.

11. Part 11 provides that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the "opt-in" provisions in Schedule 2 to the Bill shall apply. The opt-in provisions enable users of arbitration to continue to use certain provisions that only apply to domestic arbitration under the Ordinance. Subject to any express agreement to the contrary, those provisions will be automatically applied if the arbitration agreement is a domestic arbitration agreement –

- (a) entered into before the commencement of the Bill; or

- (b) entered into at any time within a period of 6 years after the commencement of the Bill.

12. Part 12 of the Bill contains miscellaneous provisions relating to the liability of an arbitral tribunal and a mediator, and other relevant bodies.

13. Part 13 of the Bill contains provisions relating to the repeal of the Ordinance and the relevant savings and transitional arrangements.

14. Part 14 of the Bill provides for the consequential and related amendments.

Commencement

15. The Bill, upon enactment, will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public Consultation

16. DoJ published a "Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill" on 31 December 2007. The Consultation Paper has been sent to arbitration institutes, representatives of the legal profession including the Law Society of Hong Kong and the Hong Kong Bar Association, academics, relevant government bureaux and departments, and various public authorities and private organizations concerned to seek their views on the proposals. The consultation documents were also available on the websites of the Government and DoJ. The consultation ended on 30 June 2008. According to DoJ, over 40 responses have been received by the DoJ.

17. Members may refer to the paper entitled "Reform of the law of arbitration in Hong Kong" for the discussion of the Panel on Administration of Justice and Legal Services (the Panel) issued by DoJ in February 2009 (LC Paper No. CB(2)899/08-09(06)) and the LegCo Brief for further information on public consultation.

Consultation with LegCo Panel

18. According to the LegCo Brief, the Panel has been consulted on the proposed reform and was briefed at its meetings on 27 June 2005, 28 May 2007, 28 January 2008 and 23 February 2009.

19. At the meeting on 23 February 2009, the Panel was briefed on the draft Bill. While Members did not disagree with the proposals in the draft Bill, they raised various issues, including whether –

- (a) court proceedings under the Bill should be conducted in open court;
- (b) arbitral awards should be made available for public reference;
- (c) judges should be appointed as arbitrators or umpires; and
- (d) an arbitrator should act as a mediator.

20. Members also queried why reciprocity requirement should be introduced for the enforcement of arbitral awards.

21. The Administration responded to some of the issues at the said meeting. Members may refer to the minutes of the meeting (LC Paper No. CB(2)1326/08-09) and the Background Brief for further information on consultation with the Panel.

Conclusion

22. The Bill proposes to reform substantially the existing law on arbitration. Members may wish to examine the Bill in detail.

23. The scrutiny of the Bill is continuing.

Prepared by

Kelvin Ka-yun LEE
Assistant Legal Adviser
Legislative Council Secretariat
7 July 2009