

For discussion
on 23 February 2009

LegCo Panel on Administration of Justice and Legal Services

Reform of the law of arbitration in Hong Kong

Introduction

The reform of arbitration law was discussed at the meetings of the Panel in June 2005, May 2007 and January 2008. As indicated in the paper presented to the Panel in January 2008, the Department of Justice (“DoJ”) published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (“the Consultation Paper”) and invited comments on the proposals and on the consultation draft of the Arbitration Bill attached to the Consultation Paper (“the draft Bill”) on 31 December 2007. The initial consultation period of four months was extended for two months. The consultation ended on 30 June 2008. The object of this paper is to report to the Panel on the progress of the proposed reform.

The responses on the Consultation Paper

2. Over 40 responses in respect of the Consultation Paper and the draft Bill, some with very substantial comments, have been received by the DoJ. A List of the Respondents is attached at the Annex.

3. Upon receiving those responses, the DoJ conducted an initial review over them with the assistance of the Sub-committee (“Sub-committee”) of the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (“Working Group”).

The major issues to be considered by the Working Group

4. The DoJ, with the help of the Sub-committee, has identified a number of issues and has provided its recommendations for further consideration by the Working Group. Some of the major issues are listed below:

(a) *Approach to Reform*

The Consultation Paper proposes the creation of a unitary regime of arbitration on the basis of the Model Law on International Commercial Arbitration (the “Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Arbitration Ordinance (Cap. 341). The Articles of the Model Law are set out in the draft Bill and given the force of law where appropriate. Some of the Articles have been modified and adapted. There is general support in the submissions for a unitary regime. There are however dissenting views from a small number of respondents who express concern with the way in which the Model Law has been adopted. They take the view that this may lead to misconception that Hong Kong is not a Model Law jurisdiction.

(b) *Proceedings to be heard in open court unless otherwise ordered - Clause 16 of the draft Bill*

Clause 16(1) of the draft Bill provides that court proceedings under the draft Bill shall be heard in open court. Clause 16(2) further provides that upon application of any party, the court shall order those proceedings to be heard otherwise than in open court unless, in any particular case, the court is satisfied that those proceedings ought to be heard in open court. Some respondents take the view that the presumption of confidentiality in arbitral proceedings should take precedence and suggest that Clause 16 should provide that court proceedings under the draft Bill shall be heard otherwise than in open court, unless on the application of any party or on the court’s initiatives in any particular case, the court is satisfied that the proceedings ought to be heard in open court.

(c) *Appointment of Judges as arbitrators or umpires - Clause 32 of the draft Bill*

Clause 32 of the draft Bill provides for the possible appointment of judges as arbitrators or umpires. An

alternative proposal has been made in the Consultation Paper that judicial officers should not serve as arbitrators or umpires unless under two exceptions.¹ Most of the respondents are in favour of the alternative proposal.

(d) *Competence of arbitral tribunal to rule on its jurisdiction - Clause 35 of the draft Bill*

Clause 35(1) of the draft Bill gives effect to Article 16 of the Model Law which enables an arbitral tribunal to rule on its own jurisdiction. It provides that a ruling of an arbitral tribunal that it has jurisdiction may be appealed to the court but not a ruling that it does not have jurisdiction. Some respondents suggest that Clause 35 should also provide for an appeal from an arbitrator's negative ruling on jurisdiction.

(e) *Enforcement of awards of arbitral tribunal - Clause 85 of the draft Bill*

A new provision has been added under Clause 85(2) of the draft Bill which states that no leave shall be granted by the court unless the party seeking to enforce an arbitral award made outside Hong Kong can demonstrate that the court in the place where the award is made will act reciprocally in respect of arbitral awards made in Hong Kong.² Under section 2GG of the current Arbitration Ordinance (Cap 341), the courts in Hong Kong can enforce an arbitral award without proof of reciprocity. There are therefore reservations in the submissions about the introduction of the reciprocity requirement under Clause 85(2) for the enforcement of arbitral awards.

¹ The first exception is that a judicial officer may accept appointment as a sole arbitrator only in relation to arbitral proceedings of which he or she has been acting as a sole arbitrator prior to his or her taking up appointment as a judicial officer. The second exception is when a judicial officer is required to act as a sole arbitrator in any particular arbitral proceedings for any constitutional reason although it has been suggested that the second exception should be amended to refer to "any statutory requirement" rather than "any constitutional reason".

² The adding of the new requirement under Clause 85(2) is to ensure that the enforcement of arbitral awards made outside Hong Kong, whether a Convention award, a Mainland award or an award which is neither a Convention award nor a Mainland award, are all granted on the same principle, namely that there will be reciprocity of enforcement of an award made by an arbitral tribunal in Hong Kong in the corresponding place, State or territory where the arbitral award sought to be enforced in Hong Kong is made.

- (f) *Opt-in provisions that automatically apply under Clause 101 deemed to apply in subcontracting cases - Clause 102 of the draft Bill*

Under Clause 102 of the draft Bill, where all the provisions in Schedule 3 automatically apply to an arbitration agreement under Clause 101 and where the whole or any part of the subject matter of the contract which includes that arbitration agreement is subcontracted to any person under a subcontract which also includes an arbitration agreement, all the provisions in Schedule 3 would also apply to the arbitration agreement in the subcontract. The submissions are overwhelmingly against the proposal.³ There are however views in support of the retention of Clause 102.

The way forward

5. The Working Group will hold a meeting on 20 February 2009 to consider the major issues highlighted in this paper and other submissions on the Consultation Paper and the draft Bill. Upon completion of the review by the Working Group, the Department of Justice will revise the draft Bill having regard to the deliberations and decisions of the Working Group as well as the views submitted in response to the Consultation Paper.

6. We intend to introduce the Bill into the Legislative Council in June 2009.

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³ Clause 102 is criticised as creating a complicated system under which subcontractors would be deemed to have opted-in to the provisions in Schedule 3. The reasons for objections are threefold. Firstly, it is against party autonomy. Secondly, this is unnecessary given that most of the subcontract situations may be covered by Clause 101. Main contractors may also apply the Schedule 3 provisions to subcontracts if they wish to do so by using Clause 100. Thirdly, there is an arbitrary distinction between the application of the provision to local and overseas subcontractors.

List of respondents

	Name
1.	Legislative Council Secretariat Legal Service Division Legal Adviser (Jimmy Ma)
2.	Robin Peard
3.	Marine Department
4.	Herbert Smith
5.	Agriculture, Fisheries and Conservation Department
6.	The Hong Kong Federation of Insurers
7.	The Hong Kong Institution of Engineers
8.	The Hong Kong Federation of Electrical and Mechanical Contractors Limited
9.	Mandatory Provident Fund Scheme Authority
10.	Department of Health
11.	Hospital Authority
12.	Hong Kong Construction Association
13.	Buildings Department
14.	Doris Lo
15.	Environmental Protection Department
16.	Lands Department
17.	Commissioner of Insurance (Insurance Authority)
18.	Urban Renewal Authority
19.	Home Affairs Department
20.	Civil Aviation Department
21.	Samuel Wong Chat Chor
22.	The Law Society of Hong Kong
23.	Commerce and Economic Development Bureau
24.	Anderson Chan Che Bun, Barrister
25.	The Hong Kong Institute of Surveyors
26.	Housing Department
27.	Ian Cocking & John Eaton
28.	Home Affairs Bureau
29.	Hong Kong Institute of Arbitrators
30.	Lovells
31.	Peter Scott Caldwell
32.	Leisure and Cultural Services Department
33.	Hong Kong Monetary Authority
34.	Labour and Welfare Bureau & Labour Department
35.	Hong Kong General Chamber of Commerce
36.	Hong Kong Bar Association
37.	International Chamber of Commerce – Hong Kong China
38.	Hong Kong International Arbitration Centre
39.	Chartered Institute of Arbitrators (East Asia Branch)
40.	The Hong Kong Institute of Architects
41.	Pinsent Masons
42.	Judiciary