

立法會
Legislative Council

LC Paper No. CB(2)950/09-10(10)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 22 February 2010**

Arbitration in Hong Kong of Mainland-related disputes

Purpose

This paper provides background information on issues relating to arbitration in Hong Kong of Mainland-related disputes.

Background

2. Awards made in Hong Kong can be enforced in more than 135 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Hong Kong Special Administrative Region's (HKSAR's) membership of that Convention has, since 1 July 1997, been by virtue of the fact that China is a signatory to the New York Convention and has applied it to Hong Kong. Being an international treaty, the New York Convention is not applicable to mutual enforcement of arbitral awards between HKSAR and the Mainland. Pursuant to Article 95 of the Basic Law (which provides for juridical assistance between HKSAR and other parts of China), an arrangement for reciprocal enforcement of arbitral awards between the Hong Kong and the Mainland was entered into in June 1999 and came into effect on 1 February 2000.

3. At the Panel meeting on 26 November 2001, the Administration briefed the Panel on Administration of Justice and Legal Services (the Panel) on its proposal to promote Hong Kong as a place where China-related contracts could be negotiated and made and as a dispute resolution centre whether through arbitration, litigation or other forms of alternative dispute resolution. According to the Administration, on the basis that the free choice of the parties to a China-related contract should continue to be respected, the Mainland authorities expressed a positive initial response to the proposal that Hong Kong be developed as a regional centre for dispute resolution by way of arbitration. The Administration would increase its promotion of Hong Kong's arbitration service through bodies such as Trade Development Council, Invest Hong Kong, Hong Kong Economic and Trade Offices and the Office of the HKSAR Government in Beijing.

4. The lack of specific figures showing whether or not the enforcement of Hong Kong arbitral awards on the Mainland is satisfactory has been a concern of the Panel. Dr Hon Margaret NG raised an oral question on enforcement of arbitral awards and judgments in commercial matters at the Council meeting on 26 January 2005. Members may wish to note that the Administration has provided the Panel with information on disputes handled by the Hong Kong International Arbitration Centre in 2006, a copy of which is in **Appendix I**.

Recent development

New initiative of the Department of Justice

5. During his briefing on the 2009-2010 Policy Initiatives of the Department of Justice (DoJ) at the Panel meeting on 22 October 2009, the Secretary for Justice (SJ) informed the Panel that the Administration would enhance legal cooperation in civil and commercial matters between Hong Kong and the Mainland and facilitate the resolution of civil and commercial disputes in a more convenient and cost-effective manner. Taking advantage of the status as one of the leading arbitration centres in Asia, the Administration would seek to improve Hong Kong's capacity to serve as a venue for resolution of Mainland-related commercial disputes, in particular disputes involving foreign investment enterprises and other Mainland legal persons. The Administration would monitor the three existing Arrangements on mutual legal assistance with the Mainland with a view to improving the enforcement mechanism where so required.

6. Members may wish to note that in his speech delivered at the Third Regional Arbitration Institutes Forum on 16 June 2009, SJ has elaborated on the recent work to develop Hong Kong as a regional centre for international arbitration and Mainland-related arbitration in particular. A copy of SJ's speech is in **Appendix II**.

Referral by the Bills Committee on Arbitration Bill

7. During the scrutiny of the Arbitration Bill, the Administration has informed the Bills Committee that the general rule under the Mainland system appears to be that only where a contract has a foreign element can the parties agree to arbitrate outside the Mainland. DoJ is discussing with the relevant Mainland authorities to make express provisions that foreign investment enterprises having the status of a Chinese legal person are free to choose where disputes are to be arbitrated. At the request of the Bills Committee, the Administration has agreed to report the progress of the discussion with the Mainland authorities to the Panel.

Disputes involving Hong Kong International Arbitration Centre in 2006 (1 January 2006 to 31 December 2006)

In 2006, the number of cases in which HKIAC was involved with stood at 394 as compared with 281 cases in 2005 and 280 cases in 2004 (please refer to website <http://www.hkiac.org> for further details). The amounts in dispute range from HK\$370,531 to over HK\$369 million and parties' nationalities range from American, Australian, British, Chinese (Hong Kong SAR), Chinese (Macau SAR), Chinese (Mainland China), Dutch, Filipino, French, German, Hungarian, Indian, Japanese, Korean, Nigerian, Polish, Qatari, Singaporean, Swiss, Taiwanese, Thai, Vietnamese.

Of the 394 cases, 18 cases were from Mainland China, where both parties were entities/nationals of Mainland China in which the arbitration clause specified Hong Kong as the place of arbitration. This compares with 15 cases in 2005, 20 cases in 2004, 14 cases in 2003, 13 cases in 2002, 7 cases in 2001 and 5 cases in 2000.

HKIAC 2006 statistics

	Arbitration	Mediation
Construction	181	30
Commercial	102	8
Shipping	18	0
Joint Venture	0	0
Others (Not classified)	0	0
Community	0	0
Total	301	38
Domain Names	93	N/A

- Of the 301 Arbitrations (excluding Domain Names)
 - 99 cases involve Hong Kong and other Countries
 - 42 cases involve non-Hong Kong parties
 - 160 cases involve Hong Kong parties

- Of the 99 cases involving Hong Kong parties
 - 62 cases from Hong Kong and the Mainland of China
 - 37 cases from Hong Kong and other countries
 - 78 cases involve contracts performed in Hong Kong

- 21 cases involve contracts performed elsewhere

- Of the 42 cases involving non-Hong Kong Parties
 - 18 Mainland of China/Mainland of China
 - 8 United States of America/Mainland of China
 - 3 Japan/Mainland of China
 - 3 United Kingdom/Mainland of China
 - 2 Switzerland/Mainland of China
 - 1 Germany/Mainland of China
 - 1 Holland/Mainland of China
 - 1 Vietnam/Mainland of China
 - 1 Singapore/Mainland of China
 - 1 Australia/Singapore
 - 1 Philippines/Korea
 - 1 Japan/Japan
 - 1 Qatar/India

#332946

Appendix II (English version only)

Press Releases

Speech by Secretary for Justice at Third Regional Arbitration Institutes Forum (English only)

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Third Regional Arbitration Institutes Forum today (June 16):

Russell, distinguished guests, ladies and gentlemen,

Good afternoon. Thank you for giving me the opportunity to address this gathering of distinguished arbitration professionals and practitioners. It is indeed my pleasure to welcome all of you, particularly those of you who are visiting. I hope apart from attending the conference, you will find some time to experience our hospitality and attractions.

The world has undergone very significant changes since your last Forum held in Brunei last August. The financial crisis has knocked the wind off our sails. But fortunately, in Asia, we saw the storm clouds gathering in the US and Europe, and that had given us a little time to prepare for a direct hit. Moreover, the Asian financial crisis a decade ago did teach us some painful but constructive lessons. This is perhaps why the Asia Pacific region appears better able to cope with the current difficulties than many other places. And, touch wood, we in Asia are also less hard hit by the Swine Flu though there is no room for any complacency.

The path to economic recovery is long and winding. But many will agree that the long-term outlook for this region is definitely upbeat. The Asian Development Bank reported last year in its Strategy 2020 report that the Asia Pacific region will account for some 45% of global GDP by 2020 in terms of purchasing power parity. It also forecasts the region to contribute about one third of the world trade by 2020.

While markets are slowing down, commercial disputes are on the rise. Many of these disputes relate to breach of contracts, obligations or enforcement of security. These turbulent times call for more honest and anxious reflection on the best way to resolve commercial disputes. Many more people are cornered with questions like: whether they should go to court to litigate, or whether they should go for arbitration or mediation, whether the business relationship with the would-be opponent in court is one which they would like to maintain rather than destroy through acrimonious litigation. Many will be asking very practical questions: Can arbitration really be cheaper? Does mediation really work?

For the Government and at the more macro level, there are other questions to ask: How should limited resources be utilised in terms of improving the access to justice, in terms of resolving different types of disagreements ranging from the high-end commercial disputes to the everyday squabbles between neighbours, in terms of integrating ADR into the traditional judicial system, and in terms of developing dispute resolution as a business rather than just a service?

The development and promotion of alternative dispute resolution is even more important and relevant for a growing and dynamic region such as the Asia Pacific. Instead of becoming more litigious, there is a chance for economies in the region to foster among their population a culture for harmony and less confrontational means of settling disputes amid economic growth and higher standards of living.

As you may have heard, a major reform in civil proceedings has been introduced in Hong Kong. The Civil Justice Reform was implemented in April this year to improve the cost-effectiveness of our civil justice system. One of the focuses of the Reform is greater use of ADR, in particular, mediation, within the judicial system. In promoting mediation even more generally, I am now chairing a dedicated cross-sector Working Group on Mediation with the objective of encouraging and facilitating the wider use of mediation to resolve disputes ranging from higher end commercial disputes to community disputes.

We are now working on specific issues including promotion of mediation in the commercial sector, strengthening of mediation training in law schools, promulgation and implementation of a code of practice for mediators, accreditation standards and the continued training of mediation professionals. We have just launched the "Mediate First" Pledge under which the signatories pledge to explore the use of mediation before resorting to other means of alternative dispute resolution or legal proceedings. As of today, more than 100 companies and organisations have signed the Pledge. I am encouraged by these developments which will surely put a positive spin towards promoting a more harmonious and less litigious society.

As this is a Forum on arbitration, I should focus more on our work on arbitration and what we see are important in our growth as a regional centre for international arbitration. You would of course be familiar with the Hong Kong International Arbitration Centre (HKIAC), who is doing a very good job in terms of enlarging Hong Kong arbitration capacity. It handled over 600 international arbitration cases last year, which puts it, in terms of quantity of such cases, No 2 in Asia. The Government is discussing with HKIAC to explore how we can further facilitate its development.

In addition to developing our home-grown arbitration body, we believe Hong Kong can offer an ideal landing for international arbitration bodies interested in extending their activities into the Mainland China market. As you know, the International Court of Arbitration of the International Chamber of Commerce (ICC) established a branch of its secretariat in Hong Kong in November 2008. This is the ICC's first ever branch of the Secretariat outside Paris and oversees the conduct of ICC arbitrations in the region. ICC's decision to come to Hong Kong bears testimony to the attraction of Hong Kong as a venue for international arbitration. I am heartened and excited to learn that the Hong Kong branch of the Secretariat is receiving new cases every week and that it is now handling over 100 ICC arbitration cases.

Admittedly, operation costs in Hong Kong are not cheap. But because of Hong Kong's special status as the only common law jurisdiction in the People's Republic of China enjoying a high degree of autonomy and judicial independence,

there is every reason for international arbitration bodies to consider coming here.

Anyone engaged in international arbitration practice like most of you here would agree that large international arbitration cases involving Chinese parties are clearly on the rise. China is undeniably the most influential emerging economy of the world. She has become a key engine of global economic growth. She is perceived by many to be a stabilising force in turbulent times.

While record foreign direct investments are flowing into the country, enterprises from China are also investing heavily outside China. The volume of business is such that it is essential for there to be an effective means of settling business disputes among companies in China and between Chinese companies and foreign companies.

The increase in Mainland-related arbitrations is reflected by the statistics of the HKIAC and other international arbitration institutions such as CIETAC. I also understand from the Hong Kong office of the ICC that one third of the cases that it is handling involve Hong Kong or Mainland Chinese parties.

Hong Kong's proximity to the Mainland and the economic integration of the two economies under the Closer Economic Partnership Arrangement (CEPA) concluded in 2003 have made Hong Kong an ideal venue for arbitration of commercial disputes with international elements. Today, more than 6 600 Mainland and overseas companies have a base in Hong Kong, and nearly 60% of them serve as regional headquarters or regional offices. These figures speak for themselves.

Recently, relationship across the Taiwan Strait is warming up rapidly. Apart from establishing direct transportation links, Mainland and Taiwan may also conclude an economic pact that is similar to CEPA. This will no doubt lead to more direct investment between Mainland and Taiwan. Apart from servicing the trade and economy of the Mainland and Taiwan, Hong Kong has huge potential to position itself as the perfect neutral venue to handle commercial arbitration between parties from Mainland and Taiwan. This will benefit the development of arbitration in Hong Kong and may well be another reason why international arbitration institutions are attracted to Hong Kong.

To facilitate arbitration involving Mainland parties, as long as ten years ago in 1999 we had already concluded and implemented an arrangement with the Mainland on reciprocal enforcement of arbitral awards. We are constantly monitoring the implementation of the arrangement and looking for room for betterment.

Hong Kong arbitral awards, and in fact awards from many countries, may be enforced in Taiwan under its domestic law. Hong Kong has amended its law more than a decade ago to facilitate the enforcement of arbitral awards from non-New York Convention parties such as Taiwan by offering facilities under our legislation to enforce such awards. We look forward to furthering our co-operation with Taiwan by putting the regime for recognition and enforcement of arbitral awards on a firmer footing.

We shall not take for granted the advantages we are

enjoying by virtue of our close connection with the Mainland and the recent improvement of cross-strait relationship. It is imperative for Hong Kong to work hard and to develop our own inherent strength so that our position can be firmly anchored on the arbitration map of the world.

Under the "One Country, Two Systems" principle enshrined in our Basic Law, Hong Kong has its own legal system and an independent judiciary, which mark us out from the rest of China. Our legal system is rooted in the English common law, which is being enriched since 1997 as precedents from other common law jurisdictions can be cited in our courts.

And of course talents and human recourses are paramount. We have a strong and independent judiciary with an excellent reputation for robustly safeguarding the rule of law. We have a wealth of legal practitioners and internationally renowned arbitrators. In terms of numbers, Hong Kong has nearly 8,000 local lawyers and over 1000 foreign lawyers. We also have the highest concentration of foreign law firms in the region.

There are many arbitration experts among them. Many of them are familiar with Mainland law and international commercial practices and are experienced in handling commercial documentation in both Chinese and English. We also have a deep pool of experienced professionals from all over the world specialising in different fields such as finance, IT, shipping and construction. They can assist arbitration by serving as advisers to parties, arbitrators or expert witnesses.

Another major milestone we are about to reach is the reform of our domestic arbitration law. With a view to reforming and improving our arbitration law, a Working Group of my department has been set up to make recommendations on changes. Years of hard work have come to fruition in the form of an Arbitration Bill which I will introduce into our Legislative Council in July. The Bill will unify the domestic and international arbitration regimes.

After the enactment of the new legislation, arbitration in Hong Kong will be based on the UNCITRAL Model Law. Under the proposed law, the court should only intervene in an arbitration to support arbitration. The Bill is also intended to be self-contained so that it will be easier to find all relevant provisions in one place. The Bill will also implement innovations recently introduced by the UNCITRAL to the Model Law. One such innovations relates to the court's ability to make orders for interim measures of protection to support arbitrations. We will be among the first jurisdictions in the world to strengthen the powers of our courts to make such orders, and enforce such orders made by a foreign court or arbitral tribunal, in relation to arbitral proceedings conducted outside Hong Kong.

We are confident that with these changes, Hong Kong's arbitration regime will be even more user-friendly. We will strive to provide the best environment for conducting international arbitration in Hong Kong by strengthening our legislation. Many of you here are arbitration practitioners and experts and no doubt you can give us your judgment once you have seen the new law on paper and in action.

The policy to develop Hong Kong as a centre for dispute resolution and legal services has been endorsed by our Chief Executive in his Policy Address. Our Government as a whole, and not just the Department of Justice, will continue to work hard to promote understanding in the Mainland and the rest of the world of the advantages offered by Hong Kong in legal services and dispute resolution.

We will also continue our dialogue with international arbitration institutions and will be as innovative and flexible as we can in fostering cooperation. We welcome any initiative that they may have on developing their business in the Asia Pacific region, including the establishment of a physical presence in Hong Kong.

Ladies and gentlemen, I believe that the global economic turmoil provides a genuine opportunity for us to re-think, to re-prioritise and to re-invent our wheels to come out stronger, more resilient, and to make wise use of globalisation. This is also a time to call for unity and co-operation. I am glad that this conference provides a platform for arbitration experts in this region to share ideas, to explore collaboration and to respond more effectively to the dynamics of changes in arbitration. Issues such as how we can reduce costs, and how we can integrate arbitration and mediation, and how the judiciary can help reinforce arbitrations are just some of the subjects coming to mind which are worthy of study and experience sharing.

On that note, ladies and gentlemen, I wish you all a very successful conference and a very enjoyable and memorable stay in Hong Kong. Thank you very much.

Ends/Tuesday, June 16, 2009
Issued at HKT 17:00

NNNN