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Panel on Administration of Justice and Legal Services

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for the meeting on 28 February 2011**

Reciprocal recognition/enforcement of arbitral awards with Macao

Purpose

This paper provides background information on issues relating to reciprocal recognition and enforcement of arbitral awards with the Mainland and Macao and recent developments relating to arbitration.

Legal framework

2. Arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap. 341). The existing statute is based on a split regime - an international regime, which is based on the UNCITRAL Model Law (i.e. the model law drafted by the United Nations Commission on International Trade Law), and a domestic regime. The new Arbitration Ordinance, enacted by the Legislative Council in November 2010 and yet to come into force, unifies the two regimes on the basis of the UNCITRAL Model Law, thereby enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development.

Reciprocal recognition/enforcement of arbitral awards with the Mainland

3. Awards made in Hong Kong can be enforced in more than 140 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). 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 Hong Kong and the Mainland, based on the spirit of the New York Convention, was entered into in June 1999 and came into effect on 1 February 2000 ("the 1999 Arrangement").

Enforcement of Macao awards in Hong Kong

4. At present, enforcement in Hong Kong of an arbitral award which is neither a Mainland award or a convention award (including Taiwan and Macao awards) may be summarily enforced under section 2GG of the former Arbitration Ordinance (Cap. 341). Under that section, an award made or given, whether in or outside Hong Kong, by an arbitral tribunal is enforceable in the same way as a judgment of the court, but only with the leave of the court. If leave is given, the court may enter a judgment in terms of the award. Members may wish to note that the new Arbitration Ordinance retains the statutory scheme under the former Ordinance for the enforcement of arbitral awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal, including the existing arrangement under section 2GG.

5. In his speech delivered at the Ceremonial Opening of the Legal Year 2011 on 10 January 2011, the Secretary for Justice ("SJ") stated that to foster closer legal co-operation with Macao, the Department of Justice ("DoJ") will actively seek the signing of an arrangement on reciprocal recognition and enforcement of arbitral awards with Macao which is based on the New York Convention and the 1999 Arrangement.

Other recent developments relating to arbitration

Number of arbitration cases handled in Hong Kong

6. In his 2007-2008 policy address, the Chief Executive stated that it was HKSAR's policy objective to develop Hong Kong as a centre for dispute resolution in the Asia-Pacific region. During his briefing on the 2010-2011 Policy Initiatives of DoJ at the meeting of the Panel on Administration of Justice and Legal Services ("the Panel") on 22 October 2010, SJ informed the Panel that there had been a continuous rise in the number of arbitration cases conducted in Hong Kong. In 2009, the Hong Kong International Arbitration Centre handled a total of 429 arbitration cases, representing an increase of 15% on top of the record number achieved in 2008. As at June 2009, the Asian Office of the International Court of Arbitration of the International Chamber of Commerce had already handled more than 150 cases since its opening in Hong Kong in November 2008.

Initiatives to enhance co-operation with the Mainland

7. At the Panel meeting on 22 February 2010, the Administration briefed members on developments in arbitration in Hong Kong of Mainland-related disputes. The Administration advised members that according to the relevant provisions and judicial interpretation of Mainland laws, it appeared that the parties to a contract with any foreign-related element might by agreement choose a place other than the Mainland (including Hong Kong) as the venue for arbitration. However, it was uncertain whether the parties concerned (including a foreign investment enterprise with the status of a Mainland legal person) could choose Hong Kong as the venue of arbitration for a dispute arising from a contract which did not contain any foreign-related element and whether the awards obtained in such arbitral proceedings conducted in Hong Kong could be enforced on the Mainland. Members noted that the Administration had been in discussion with the relevant Mainland authorities since 2007 with a view to seeking a written clarification on the issue as soon as possible.

8. Members may wish to note that on 25 October 2010, Hong Kong signed the "Co-operation Arrangement on Legal Services for Commercial Matters and Arbitration" with the China Council for the Promotion of International Trade, the overseeing body of the China International Economic and Trade Arbitration Commission. The Arrangement seeks to foster exchanges and co-operation between Hong Kong and Mainland legal services and arbitration bodies, including providing assistance to the legal services and arbitration sectors in both places in organising experience-sharing activities and facilitating enterprises in both places to provide training in commercial and arbitration law to encourage the establishment of dispute resolution mechanisms for commercial matters.

Meeting on 28 February 2011

9. At the upcoming Panel meeting on 28 February 2011, the Administration will brief members on the proposed arrangement with Macao on reciprocal recognition and enforcement of arbitral awards. The Administration has been requested to also brief the Panel on any other issues relating to arbitration as appropriate.