For discussion
on 24 November 2014

Legislative Council Panel on Administration of Justice and Legal Services

Proposed Amendments to the Arbitration Ordinance (Cap. 609)

This paper seeks Members' views on the Administration's proposal to amend the Arbitration Ordinance (Cap. 609) ("the Ordinance").

PROPOSALS

2. The Administration proposes to introduce legislative amendments to –

(a) remove some legal uncertainties relating to the opt-in mechanism provided for domestic arbitration under Part 11 of the Ordinance; and

(b) update, for the purposes of the Ordinance, the list of parties to the New York Convention[1].

JUSTIFICATIONS

Amendments to the opt-in mechanism for domestic arbitration

3. The Ordinance, which came into operation on 1 June 2011, has unified the arbitration regimes for domestic and international arbitration under the now repealed Arbitration Ordinance (Cap. 341).

[1] The New York Convention refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

4. However, in response to the request of some users of arbitration[2], a limited exception to this unified regime is provided in Part 11 of and Schedule 2 to the Ordinance. It retains the rights formerly granted to parties under the domestic regime for seeking the Court's assistance on certain matters by way of opt-in provisions in sections 2 to 7 of Schedule 2 to the Ordinance[3]. In addition, section 1 of Schedule 2 provides that "[d]espite section 23 [of the Ordinance], any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration[4]."

5. According to section 100 of the Ordinance, all of the provisions (sections 1 to 7) in Schedule 2 to the Ordinance automatically apply to parties to two types of domestic arbitration agreements[5]. This is subject to section 102. In particular, section 102(b)(ii) provides that section 100 does not apply if the arbitration agreement concerned has provided expressly that "any of the provisions in Schedule 2 applies or does not apply".

6. The arbitration sector has expressed, through the Hong Kong International Arbitration Centre (HKIAC), its concern over whether parties opting for domestic arbitration and specifying the number of arbitrators in the arbitration agreement may still retain their rights to seek

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[2] For example, parties from the construction industry in Hong Kong have been using standard forms of contracts with an arbitration agreement specifying that arbitration under the agreement is a "domestic" arbitration.

[3] Section 2 of Schedule 2 provides that the Court may order 2 or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another. Section 3 of Schedule 2 empowers the Court to decide any question of law arising in the course of arbitral proceedings. Sections 4 and 7 of Schedule 2 allow an arbitral award to be challenged at the Court on the ground of serious irregularity affecting the arbitral tribunal, the arbitral proceedings or the award. Sections 5, 6 and 7 of Schedule 2 enable a party to appeal to the Court against an arbitral award on a question of law.

[4] Section 23(1) of the Ordinance provides that parties are free to determine the number of arbitrators. Section 23(2) provides that parties are free to authorize a third party to make the determination. Section 23(3) provides that the Hong Kong International Arbitration Centre is the default authority to decide on the number of arbitrators if parties fail to agree on this matter. Currently the effect of section 1 of Schedule 2 of the Ordinance is to dis-apply section 23 of the Ordinance.

[5] The agreement must be either: (a) an arbitration agreement entered into before the commencement of the Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or (b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of the Ordinance which provides that arbitration under the agreement is a domestic arbitration.

the Court's assistance for matters set out in sections 2 to 7 of Schedule 2[6]. Arguably, if parties specify the number of arbitrators in a domestic arbitration agreement, be it one or any number other than one, it would have the effect of expressly providing that section 1 of Schedule 2 applies or does not apply. This would arguably be caught by section 102(b)(ii) and would in turn result in the disapplication of section 100. Such legal uncertainties would give rise to doubts (and litigation) as to whether parties to a domestic arbitration agreement which specifies the number of arbitrators would be able to seek the Court's assistance on matters set out in sections 2 to 7 of Schedule 2.

7. The arbitration sector has therefore requested, through HKIAC, that the matter be put beyond doubt, so that parties opting for domestic arbitration should be free to decide on the number of arbitrators, whilst retaining their right to seek the Court's assistance on the matters set out in sections 2 to 7 of Schedule 2. In June 2014, the Administration conducted consultation with the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties on the proposed amendments. A copy of the consultation paper is at **Annex A**[7]. It is proposed in the Consultation Paper that section 1 of Schedule 2 and section 102(b)(ii) of the Ordinance should be amended to remove the legal uncertainties mentioned above. At the end of the consultation period, responses from 14 consultees were received, which are summarised at **Annex B**. None of the consultees in these responses has raised any in-principle objection to the proposed amendments.

Amendments to the Arbitration (Parties to New York Convention) Order (Cap. 609A)

8. In addition to the proposed amendment to the opt-in mechanism outlined above, the Administration also proposes to update, for the purpose of the Ordinance, the list of parties to the New York

[6] See John Choong & J. Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (2011), paras 102.10 to 102.15.

[7] The detailed legal analysis, which was based largely on Choong & Weeramantry (see footnote 6 above), was set out in paragraphs 8 to 15 of the consultation paper at **Annex A**.

Convention by:

(1) adding the new parties (namely, Bhutan, Burundi and Guyana);

(2) adding British Virgin Islands to the entry for the United Kingdom; and

(3) amending "Bolivia" to "Bolivia (Plurinational State of)"

in the Schedule to the Arbitration (Parties to New York Convention Order) (Cap. 609A).

WAY FORWARD

9. Subject to Members' comments, the Administration intends to implement the above legislative proposals by introducing into the Legislative Council a bill to amend the Ordinance in 2015.

Department of Justice
November 2014

Annex A

Consultation Paper on the Arbitration (Amendment) Bill 2014

Introduction

1. It is proposed that the Arbitration Ordinance (Cap. 609) be amended so as to:

(1) make it clear that parties opting for domestic arbitration and specifying the number of arbitrators in the arbitration agreement may still retain their rights by virtue of section 100 of Cap. 609 to seek the Court's assistance for matters set out in sections 2 to 7 of Schedule 2 of Cap. 609; and

(2) update the list of state parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") as set out in the Arbitration (Parties to New York Convention) Order (Cap. 609A).

The Problems

The opt-in mechanism

2. Sections 2 to 7 of Schedule 2 of Cap. 609 contain provisions which allow parties to seek the Court's assistance on certain matters.[1] The Court's power to deal with these matters was previously provided in the domestic arbitration regime under the now repealed Arbitration Ordinance (Cap. 341) but is no longer available under the new regime in Cap. 609 which has unified the domestic and international regimes under the repealed Cap. 341. According to section 100 of Cap. 609, which is subject to section 102, all of the provisions (sections 1 to 7) in Schedule 2 of Cap. 609 apply to parties to the two types of domestic arbitration

[1] Section 2 of Schedule 2 provides that the Court may order 2 or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another. Section 3 of Schedule 2 empowers the Court to decide any question of law arising in the course of arbitral proceedings. Sections 4 and 7 of Schedule 2 allow an arbitral award to be challenged at the Court on the ground of serious irregularity affecting the arbitral tribunal, the arbitral proceedings or the award. Sections 5, 6 and 7 of Schedule 2 enable a party to appeal to the Court against an arbitral award on a question of law.

agreement set out in section 100.[2]

Legal uncertainties of the opt-in mechanism

3. Section 1 of Schedule 2 of Cap. 609 provides that "[d]espite section 23, any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration".[3] Arguably, if parties specify the number of arbitrators in a domestic arbitration agreement, be it 1 or any number other than 1, it would have the effect of expressly providing that section 1 of Schedule 2 applies or does not apply. This would fall within the scenario in section 102(b)(ii) of Cap. 609, which provides that section 100 of Cap. 609 does not apply if the arbitration agreement concerned has provided expressly that "any of the provisions in Schedule 2 applies or does not apply". Such legal uncertainties would give rise to doubts (and litigation) as to whether parties to a domestic arbitration agreement which specifies the number of arbitrators would be able to seek the Court's assistance on matters set out in sections 2 to 7 of Schedule 2 of Cap. 609.

The arbitration sector's concern

4. The arbitration sector has expressed, through the Hong Kong International Arbitration Centre (HKIAC), its concern over the above legal uncertainties. They have requested that the matter be put beyond doubt, so that parties opting for domestic arbitration should be free to decide on the number of arbitrators, whilst retaining their right to seek the Court's assistance on the matters set out in sections 2 to 7 of Schedule 2 of Cap. 609. Accordingly, the Department proposes that Cap. 609 be amended to achieve the purpose as set out in paragraph 1(1) above.

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[2] See paragraph 8 below.

[3] Section 23(1) of Cap. 609 provides that parties are free to determine the number of arbitrators. Section 23(2) provides that parties are free to authorize a third party to make the determination. Section 23(3) provides that the Hong Kong International Arbitration Centre is the default authority to decide on the number of arbitrators if parties fail to agree on this matter. Currently the effect of section 1 of Schedule 2 of Cap. 609 is to dis-apply section 23 of Cap. 609.

Updating the Arbitration (Parties to New York Convention) Order (Cap. 609A)

5. Moreover, it is noted that the list of state parties to the New York Convention has recently been updated. In order to comply with the obligations under the New York Convention to recognize and enforce arbitral awards made in the relevant jurisdiction(s), it is necessary to correspondingly update the Arbitration (Parties to New York Convention) Order (Cap. 609A) (see paragraph 1(2) above).

Domestic Arbitrations and Schedule 2 to the Arbitration Ordinance

6. The current Arbitration Ordinance (Cap. 609), which came into operation on 1 June 2011, has unified the arbitration regimes for domestic and international arbitration under the now repealed Arbitration Ordinance (Cap. 341). Under the unified regime, the rights formerly granted to parties under the domestic regime for seeking the Court's assistance on certain matters are no longer available.

7. During the consultation conducted before the enactment of Cap. 609, some users of arbitration had expressed their wish to retain these rights. For example, parties from the construction industry in Hong Kong have been using standard forms of contracts with an arbitration agreement specifying that arbitration under the agreement is a "domestic" arbitration. As a result, Schedule 2 was included in Cap. 609 at the time of its enactment for parties to decide whether to retain the rights previously granted under the domestic regime to access the Court for assistance on matters which are now set out in sections 2 to 7 of Schedule 2. In addition, section 1 of Schedule 2 provides that "[d]espite section 23 [of Cap. 609], any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration." The rights to seek the Court's assistance on the matters set out in sections 2 to 7 of Schedule 2 are considered to be important for some users of arbitration.

8. Parties would be deemed to have automatically opted in all the provisions in Schedule 2 of Cap. 609 if the arbitration agreement they

have entered into could satisfy one of the conditions set out in section 100 of Cap. 609, i.e., (a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or (b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement is a domestic arbitration.

9. Section 102(b)(ii) of Cap. 609 provides that section 100 of Cap. 609 does not apply if the arbitration agreement concerned has provided expressly that "any of the provisions in Schedule 2 applies or does not apply". Some parties to a domestic arbitration agreement might wish to specify the number of arbitrators. When parties made reference to the appointment of either a sole arbitrator ("**first situation**") or a tribunal of three arbitrators ("**second situation**") in their domestic arbitration agreement, this would raise the issue of whether parties have expressly provided that section 1 of Schedule 2 applies or does not apply.

10. According to John Choong & J. Romesh Weeramantry, "*The Hong Kong Arbitration Ordinance: Commentary and Annotations*" (2011), the **first situation** raises the question of whether expressly affirming in the arbitration agreement that there shall be a sole arbitrator would amount to "providing expressly" that section 1 of Schedule 2 shall apply. In the **second situation**, it would raise the question of whether an agreement that the tribunal shall comprise three arbitrators would amount to providing expressly that section 1 of Schedule 2 shall not apply, since an agreement for three arbitrators is plainly inconsistent with section 1 of Schedule 2.[4]

11. That said, it may be argued that neither of the above situations satisfy the requirement in section 102 that the arbitration agreement "provide[s] expressly" that any provision in Schedule 2 applies or does not apply. On plain reading, the requirement under section 102(b)(ii) is that "the arbitration agreement concerned has <u>provided expressly</u> that …any of the provisions in Schedule 2 applies or does not apply". If this view is accepted, then none of the first or second

[4] See the commentary in para. 102.13 of Choong & Weeramantry.

situations above would meet this express provision test fully. [5]

12. On the other hand, if a contrary view were taken, then if the arbitration agreement expressly provides that there shall be a sole arbitrator, then even though such a proviso would be entirely consistent with section 1 of Schedule 2, it would have the effect of dis-applying all the remaining provisions in Schedule 2.

13. However, if the view in paragraph 11 above is accepted, Choong & Weeramantry (para. 102.15) takes the view that:

> "… the less than satisfactory result would be that if the parties to a domestic arbitration agreement expressly state that their tribunal shall comprise three arbitrators (or otherwise provide differently from what is set out in Schedule 2), such an agreement would be of no effect, because section 102 would not permit them to reach a contrary agreement unless they provide expressly that any of the provisions in Schedule 2 [applies] or [does] not apply. Accordingly, section 100, which is drafted as a deeming provision (and indeed, which prevails over the provisions in any other Part of the Ordinance),[6] may instead be taken to have the effect of overriding the parties' election."[7]

14. If answers to questions in both situations in paragraph 10 above are in the affirmative, it follows that, by virtue of section 102(b)(ii) of Cap. 609 (which dis-applies section 100 of Cap. 609), Schedule 2 of Cap. 609 would not apply. This would have the effect of depriving parties of their right to access the Court for assistance on matters stated in sections 2 to 7 of Schedule 2 of Cap. 609.

15. If, instead, the views set out in paras. 102.14 and 102.15 of Choong & Weeramantry above prevail, parties to a domestic arbitration

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[5] See the discussion in para. 102.14 of Choong & Weeramantry.

[6] At this juncture, the authors' footnote refers to section 103 of Cap. 609, which provides that if there is any conflict or inconsistency between any provision that applies under Part 11 (which includes section 102) and any other provision of Cap. 609, the first-mentioned provision prevails, to the extent of the conflict or inconsistency, over that other provision.

[7] Matters relating to parties' determination of the number of arbitrators are provided in section 23, Part 4 of Cap. 609.

agreement would be bound by the sole arbitrator provision in section 1 of Schedule 2 of Cap. 609, even when they have expressly provided differently from what is set out in section 1.

HKIAC's proposal

16. Given the above legal uncertainties and the concern of the arbitration sector, HKIAC considers it necessary that parties to a domestic arbitration agreement should be free to decide on the number of arbitrators, whilst retaining their rights to seek the Court's assistance on matters set out in sections 2 to 7 of Cap. 609. To this end, HKIAC has proposed the following amendments:

1st Proposal

(1) To amend section 1 of Schedule 2 of Cap. 609 as follows:

"~~Despite section 23~~Subject to any determination as to the number of arbitrators under section 23(1) or (2), any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration."

2nd Proposal

(2) To amend section 102(b)(ii) of Cap. 609 by including the words "(other than section 1)" after "Schedule 2" as follows:

"Sections 100 and 101 do not apply if—

…

(b) the arbitration agreement concerned has provided expressly that—

…

(ii) any of the provisions in Schedule 2 (other than section 1) applies or does not apply."

Proposal for Consultation

17. The Administration has reviewed HKIAC's proposals and considers it advisable to amend **both** section 1 of Schedule 2 **and** section 102(b)(ii) of Cap. 609 as set out in paragraph 16 above.

18. It should be noted that the opt-in mechanism is a short-term measure which would only apply to arbitration agreements on or before 31 May 2017 (6 years after the commencement of Cap. 609)[8] and the present proposal to amend Cap. 609 is only a technical clarification of its detailed provisions. This technical clarification is considered necessary as it would still be relevant to disputes arising from the underlying contracts of these arbitration agreements that are left unresolved after 31 May 2017.

Savings Provision

19. Subject to the results of this consultation exercise, it is proposed that the Bill would be introduced into the Legislative Council in the last quarter of 2014, so that the proposed amendments as set out in paragraph 16 above, when enacted, could come into operation upon gazettal of the amendment ordinance in 2015. Following the approach of the savings provision in section 1 of Schedule 3 to Cap. 609, the amendment would not apply to an arbitration that has commenced prior to the commencement of the Amendment Ordinance[9].

Parties to the New York Convention

20. It is noted that the list of state parties to the New York Convention has recently been updated as follows:

> "On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. …"[10]

21. In view of the above, it is proposed that the entry for the United Kingdom in the Schedule of Cap. 609A be amended to include "British Virgin Islands" as follows:

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[8] See section 100 of Cap. 609 referred to in paragraph 8 above.

[9] Under Art 21 of the UNCITRAL Model Law as implemented by Section 49 of Cap. 609, "[u]nless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent".

[10] See note (g) of http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last checked on 30 May 2014)

"United Kingdom of Great Britain and Northern Ireland (including Bailiwick of Jersey, Cayman Islands, Bermuda, British Virgin Islands, Gibraltar, Guernsey and Isle of Man)"

Consultation

22. The Department invites comments on the proposal, as set out in paragraph 1 of this Consultation Paper. In particular, views are sought on the following issues:

(a) the proposed amendments to section 1 of schedule 2 and section 102(b)(ii) of Cap. 609 (see paragraph 16 above); and
(b) the proposed savings provision (see paragraph 19 above).

23. The consultation period will end on **Thursday, 10 July 2014**.

Legal Policy Division
Department of Justice
June 2014

Annex B

Summary of comments received from the consultees for the consultation paper of June 2014 (at Annex A)

Item	Name of consultee	Comments on HKIAC's proposals to amend section 1 of Schedule 2 and section 102(b)(ii) of Cap. 609[1]	Comments on the proposed savings provision[2]	Administration's response
1	The Law Society of Hong Kong	The Arbitration Committee of the Law Society of Hong Kong supports the proposed amendments. However, one of the Committee members suggested a minor amendment to be made to the 1st proposal as follows: "*Subject to any determination as to the number of arbitrators under section 23(1) ~~or (2)~~, any dispute arising between the parties to an arbitration agreement is to be submitted to [a] sole arbitrator for arbitration.*"	No comments.	The Administration agrees with the comments on the proposed amendments to section 1 of Schedule 2 of Cap. 609 and will revise the drafting of the proposed amendments accordingly.
2	The Hong Kong Bar Association	Supports the proposed amendments.	Supports the proposed savings provision.	N/A

[1] Paragraph 16 of the consultation paper of June 2014.

[2] Paragraph 19 of the consultation paper of June 2014.

Item	Name of consultee	Comments on HKIAC's proposals to amend section 1 of Schedule 2 and section 102(b)(ii) of Cap. 609[1]	Comments on the proposed savings provision[2]	Administration's response
3	Hong Kong General Chamber of Commerce	Supports the proposed amendments	The following is extracted from the 2nd para. of the reply letter: '…… We note, however, that the consultation proposal does not give the amendments retrospective effect on a "for avoidance of doubt" basis but only applies to arbitration agreements entered into after the amendments come into effect. Although this is in line with which most legislative amendments are enacted, however, it does create problems for arbitration agreements entered into between the period when Cap 609 and the amendments come into effect. We would therefore suggest that the amendments be made retrospective so as to avoid doubt or uncertainty, which may in turn give rise to litigation.'	The Administration is concerned that the retrospective application of the amendment to contracts since the commencement of Cap. 609 in June 2011 may upset all existing contracts that have already been concluded. The Administration is of the view that the remaining problems for arbitration agreements entered into between June 2011 and the coming into effect of the amendments do not constitute sufficient justifications for the proposed amendments to take effect retrospectively up to June 2011. Therefore the Administration proposes that the proposed amendments shall come into operation upon the gazettal of

Item	Name of consultee	Comments on HKIAC's proposals to amend section 1 of Schedule 2 and section 102(b)(ii) of Cap. 609[1]	Comments on the proposed savings provision[2]	Administration's response
				the Amendment Ordinance and that the proposed amendments would not apply to an arbitration that has commenced prior to the commencement of the Amendment Ordinance.
4	Development Bureau	No comments	No objection to the proposed savings provision	N/A
5	The Chartered Institute of Arbitrators (CIArb)	Supports the proposed amendments.	Supports the proposed savings provision.	N/A
6	The Hong Kong Institute of Architects	Supports the proposed amendments.	No comments received.	N/A
7	The Hong Kong Federation of Electrical and Mechanical Contractors Limited	No adverse comments and views on the proposed amendments.	Supports the proposed savings provision.	N/A

Item	Name of consultee	Comments on HKIAC's proposals to amend section 1 of Schedule 2 and section 102(b)(ii) of Cap. 609[1]	Comments on the proposed savings provision[2]	Administration's response
8	The Hong Kong Institute of Surveyors	No comments.	No comments.	N/A
9	The Hong Kong Institution of Engineers	Agrees with HKIAC's proposals.	Supports the proposed savings provision.	N/A
10	The Hong Kong Federation of Insurers	Supports the proposed amendments.	No comments received.	N/A
11	The Hong Kong Construction Association	Supports the proposed amendments.	Supports the proposed savings provision	N/A
12	Hong Kong Trade Development Council	No objection to the proposed amendments.	No objection to the proposed amendments.	N/A

Item	Name of consultee	Comments on HKIAC's proposals to amend section 1 of Schedule 2 and section 102(b)(ii) of Cap. 609[1]	Comments on the proposed savings provision[2]	Administration's response
13	The Hong Kong Maritime Law Association	No comments.	No comments.	N/A
14	The Hong Kong Mediation and Arbitration Centre	Most of the members support the proposed amendments.	Also of the same view as paragraph 19 of the consultation paper.	N/A