

立法會  
*Legislative Council*

LC Paper No. CB(2)2016/99-00  
(These minutes have been  
seen by the Administration)

Ref : CB2/BC/33/98

**Legislative Council**  
**Bills Committee on Arbitration (Amendment) Bill 1999**  
**Minutes of the first meeting**  
**held on Tuesday, 9 November 1999 at 8:30 am**  
**in Conference Room B of the Legislative Council Building**

**Members Present** : Hon Margaret NG (Chairman)  
Hon HO Sai-chu, SBS, JP  
Hon Eric LI Ka-cheung, JP  
Hon NG Leung-sing  
Hon Ronald ARCULLI, JP

**Member Absent** : Hon Albert HO Chun-yan

**Public Officers Attending** : Ms Miranda CHIU  
Deputy Director of Administration  
  
Mr Stephen WONG  
Deputy Solicitor General (Advisory)  
  
Ms Rosanna LAW  
Assistant Director of Administration  
  
Mr K F CHENG  
Senior Assistant Law Draftsman  
  
Mr Paul TSANG  
Government Counsel

Mr Ryan CHIU  
Assistant Secretary (Administration)

**Clerk in Attendance** : Mrs Percy MA  
Chief Assistant Secretary (2)3

**Staff in Attendance** : Miss Anita HO  
Assistant Legal Adviser 2

Mr Paul WOO  
Senior Assistant Secretary (2)3

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## **I. Election of Chairman**

Miss Margaret NG was elected Chairman of the Bills Committee.

## **II. Meeting with the Administration**

2. The Chairman invited the Administration to brief members on the major provisions in the Arbitration (Amendment) Bill 1999 (the Bill).

3. Deputy Director of Administration (DD(A)) informed members that before 1 July 1997, reciprocal enforcement of arbitral awards between the Mainland and Hong Kong was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 ("New York Convention"). The New York Convention continued to apply to the Hong Kong Special Administrative Region (HKSAR) as part of the People's Republic of China after the reunification. However, being an international agreement, the Convention was no longer applicable to the enforcement of arbitral awards between the Mainland and the HKSAR. To re-establish a reciprocal arrangement for the enforcement of arbitral awards between the Mainland and the HKSAR, an Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region ("the Arrangement") had been agreed. The Arrangement reflected the spirit of the New York Convention and set out the procedural requirements for enforcement and the grounds for refusal of enforcement. The Bill sought to amend the Arbitration Ordinance (the Ordinance) to give effect to the Arrangement.

4. DD(A) then took members through the major features of the Bill.

Enforcement of certain foreign awards

5. The Chairman enquired about the repeal of Part III of the Ordinance as proposed under clause 4 of the Bill. In response, DD(A) said that the existing Part III dealt with enforcement of certain foreign awards made after 28 July 1924. With the coming into force of the New York Convention, as soon as a participating State which came under Part III of the Ordinance became a signatory to the Convention, Part III no longer applied in respect of the enforcement in Hong Kong of an arbitral award made by that country concerned. In addition, the relevant conventions covered by Part III (i.e. the Protocol on Arbitration Clauses 1923 and the Convention on the Execution of Arbitral Awards 1927) had ceased to apply to Hong Kong after the reunification. Therefore, Part III should be repealed, and Clause 4 was in effect an adaptation amendment.

Administration's response to issues raised in Assistant Legal Adviser's letter  
(LC Paper Nos. CB(2)274/99-00(03) and 351/99-00(01))

6. The Chairman invited the Administration to elaborate its reply (LC Paper No. CB(2)351/99-00(01) tabled at the meeting) to the queries raised by Assistant Legal Adviser (ALA) in a letter previously issued to the Administration on 27 October 1999 (LC Paper No. CB(2)274/99-00(03)).

*Clause 3(c) - Enforcement of awards between Hong Kong and Macau*

7. Assistant Director of Administration (AD(A)) advised that "Mainland" was defined in clause 3(c) as any part of China other than Hong Kong, Macau and Taiwan. The Arrangement which was agreed between the Mainland and the HKSAR was drawn up for the enforcement of arbitral awards made in the Mainland and HKSAR only. The mutual enforcement of arbitral awards between Hong Kong and Macau after the reunification of Macau on 20 December 1999 would be looked at in the context of treatment of Macau in general. At present, the enforcement of arbitral awards between Hong Kong and Macau was done through normal civil debt claims procedures in the local courts. This arrangement would prevail for the time being.

8. Members considered that arrangements for mutual enforcement of arbitral awards between Hong Kong and Macau should be finalized as soon as possible.

Adm

*Clause 5 - Proposed section 40D*

9. In her letter under reference, ALA had pointed out that the documents which a party should produce in applying for enforcement of a Mainland award

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in Hong Kong as specified in Article 4 of the Arrangement (e.g. the relevant notarization and authentication materials) were not strictly identical to those set out in proposed section 40D. On this query, AD(A) said that it was the intention that actual implementation of the Arrangement should be done in accordance with local legislation. Application for enforcement of a Mainland award in Hong Kong should follow as closely as possible the existing procedural requirements applicable to a Convention award. The relevant pre-unification requirements were set out in order 73, rule 10 of the Rules of the High Court. With the consequential amendments proposed in clause 15 of the Bill, the relevant Rule of the High Court would apply in relation to an application for enforcement of a Mainland award. Although the requirement of submitting the relevant notarization and authentication materials was not specifically provided for in the Bill, it would be up to the court to order such documents as it saw fit.

10. Senior Assistant Law Draftsman (SALD) supplemented that proposed section 40D as drafted basically followed the formulation adopted for section 43 in Part IV of the Ordinance in relation to enforcement of Convention awards.

11. Members were of the opinion that the local arbitration community should be left in no doubt as to how the mechanism for enforcement of Mainland awards would operate. Members requested the Administration to provide a written clarification to -

- (a) explain why the documents required to be submitted under proposed section 40D needed not follow those specified in Article 4(3) of the Arrangement; and
- (b) explain the implementation of section 43(a) of the Ordinance on which proposed section 40D was modelled.

Adm

*Proposed section 40F*

12. Referring to Article 10 of the Arrangement, ALA enquired whether an application for enforcement of a Mainland award which had been refused in Hong Kong after 1 July 1997 should be made within six months after the signing of the Memorandum of Understanding (MOU) by the Secretary for Justice and the Vice-President of the Supreme People's Court on 21 June 1999 in relation to the agreed Arrangement. Such applications for enforcement had been refused because of the fact that there were no agreed arrangements in place between Hong Kong and the Mainland after 1 July 1997 and before the coming into force of this Bill.

13. AD(A) clarified that the MOU expressly provided that the effective date

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for the implementation of the Arrangement would only be confirmed after the necessary amendments to the Arbitration Ordinance had taken effect and the Mainland had promulgated the requisite judicial interpretation. Such being the case, whereas the MOU had been signed on 21 June 1999, the Arrangement had yet to come into effect pending the passage of the Bill. As far as Article 10 of the Arrangement was concerned, the time limit for application for enforcement stipulated therein should count from the commencement date for the implementation of the Arrangement, which had yet to be appointed.

14. In response to members, Deputy Solicitor General (Advisory) (DSG(A)) said that Article 10 of the Arrangement provided a one-off cut-off date to deal with those applications which for some reasons could not be enforced during the "void" between 1 July 1997 and the coming into force of the Arrangement.

15. Mr Ronald ARCULLI was concerned about whether the commencement date for the amendment Ordinance should be left to the administrative decision of the Secretary for Justice alone, given the fact that the Bill concerned the implementation of a mutual agreement between Hong Kong and the Mainland.

16. In response, the Administration said that agreements between Hong Kong and another jurisdiction usually contained a commencement clause stipulating that the agreement should come into operation on a date agreed between the parties. Where legislation was required for the implementation of an agreement in Hong Kong, the usual practice was for a provision to be made in the legislation to empower a government official to specify a commencement date as agreed between the parties by way of a notice in the Gazette. Clause 2 of the Bill contained the relevant commencement provisions.

17. For the purpose of clarification, the Chairman requested the Administration to provide a copy of the MOU for members' information, and -

- (a) explain the procedures for implementing the Arrangement in both the Mainland and the HKSAR; and
- (b) illustrate with a few examples the practice for appointment of commencement date of ordinances implementing a mutual agreement between Hong Kong and another jurisdiction.

Adm

*Clause 9 - Application of Ordinance*

18. AD(A) advised that proposed section 47 reflected the intention that the Ordinance as amended by the Bill should apply to or in relation to any arbitral agreement, irrespective of who a party to the agreement was. The list in proposed section 47 was widely drawn up to cover all possible classes of

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persons or bodies, whether public or private, who might become a party to an arbitration agreement. She added that proposed section 47 as drafted represented a considered formula which had been adopted in some other legislation for the purpose of setting out their applicability.

19. ALA pointed out that the wordings used in other Bills were somewhat different. For example, in the Trade Marks Bill, it was stated that "*the rights provided are enforceable against any public body, public authority, private body or organ in like manner, as against any individual*".

20. The Chairman said that the existing section 47 simply stipulated that "*This Ordinance (other than Parts III and IV) binds the Government*". By operation of section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), the "State" including the Government was presumed not to be bound by statute, save by express provision to the contrary or by necessary implication. In Cap.1, "State" was defined to include the HKSAR Government as well as organs of the State in Hong Kong. The Chairman opined that given the policy intent that the Arbitration Ordinance as amended by the Bill should bind anybody who was a party to an arbitration agreement including the Government and organs of the State, section 47 could be amended to "*This Ordinance binds the State*". An express provision like this would effectively remove the presumption of exclusion of the State in section 66 of Cap.1, and hence avoid possible misinterpretation that the Arbitration Ordinance bound everybody except the State. The Chairman requested the Administration to consider the proposal.

Adm

Administration's response to issues raised in Hon Margaret NG's letter  
(LC Paper Nos. CB(2)274/99-00(04) and 351/99-00(01))

*Clause 5 - proposed section 40E(2)(c)*

21. Under the proposed section 40E(2)(c) in clause 5, enforcement of a Mainland award might be refused if the person against whom it was invoked proved that he was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case. The Chairman proposed that the words "or of the arbitration proceedings" should be added after "the appointment of the arbitrator" to cover the situation where no proper notice of the arbitration proceedings had been given.

22. AD(A) said that the Administration had consulted arbitration practitioners on this issue. The Administration was of the view that the expression "otherwise unable to present his case" was already broad enough to cover the irregularity of failure to give proper notice of the arbitration proceedings. She added that proposed section 40E(2)(c) mirrored Article 7(2) of the Arrangement. To preserve the wordings used in the latter would

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achieve the specific purpose of giving effect to the Arrangement.

23. The Chairman pointed out that the existing section 44(2)(c), which dealt with enforcement of Convention awards, contained the same reference to "or of the arbitration proceedings". The omission of this reference from proposed section 40E(2)(c) might lead to misunderstanding of the underlying intention of the legal provision and result in unnecessary litigation to the costs of the parties concerned. She said that unnecessary changes to the law should be avoided.

24. The Chairman further opined that given the intention to implement the Arrangement by way of local legislation, there was no absolute need for proposed section 40E(2)(c) to follow the exact wordings of Article 7(2) of the Arrangement.

25. Mr Ronald ARCULLI supported the Chairman's views. He said that to leave out the phrase "or of the arbitration proceedings" might lead one to think that the legislature intentionally excluded failure to give proper notice of the proceedings from the wider meaning of "otherwise unable to present his case". He considered that to retain the phrase "or of the arbitration proceedings" would not depart from the intention of Article 7(2) of the Arrangement.

Adm

26. The Administration was requested to reconsider the drafting of proposed section 40E(2)(c) having regard to the views expressed.

*Clause 3 - List of recognized arbitral authorities*

27. AD(A) informed members that the list of recognized arbitral bodies on the Mainland would be provided from time to time to the HKSAR Government by the Legislative Affairs Office of the State Council through the Hong Kong and Macau Affairs Office. The Administration had considered the Chairman's suggestion that the list should be officially published in Hong Kong to enable practitioners in the arbitration community to be aware of all the recognized arbitral bodies. The Administration would amend clause 3 to provide that the list of recognized arbitral bodies and any subsequent updated list should be published in the form of a General Notice in the Gazette.

*Section 2GG of the Ordinance*

28. The Chairman informed the meeting that arbitration practitioners had expressed concern about a judgment given by Findlay J. in NG Fung Hong Ltd v ABC (1998) 1 HKC 213 in which it was held that section 2GG of the Arbitration Ordinance applied only to awards made in Hong Kong. She suggested that section 2GG should be reviewed and amended if necessary to ensure that the summary enforcement procedure provided under the section applied to both arbitration awards made in or outside Hong Kong.

29. AD(A) said that the Administration was of the view that an amendment to section 2GG fell outside the scope of the present Bill, whose purpose was to give effect to the agreed arrangement for reciprocal enforcement of arbitral awards between the Mainland and Hong Kong, and to make the necessary adaptation amendments to the Ordinance. The Administration proposed to address the issue of section 2GG in the context of a separate on-going exercise to review the overall operation of the Arbitration Ordinance.

30. On this issue, DSG(A) informed members that there was a case pending the hearing of the Court of Final Appeal (CFA) shortly which might have a bearing on the application of section 2GG of the Ordinance. He said that the Administration considered it desirable to defer dealing with the matter of amending section 2GG until it had the opportunity to study the CFA's judgment on the case in question.

Adm

31. The Chairman requested the Administration to give a written reply on its position on a review of section 2GG. The issue would be further discussed at the next meeting.

*Proposed section 40C(1)*

32. The Chairman suggested to substitute "pending" for "has been made" in proposed section 40C(1) so as to spell out more clearly the intention that enforcement in Hong Kong of a Mainland award was not permitted while enforcement proceedings were going on in the Mainland.

33. AD(A) advised that the intention had always been to prevent double enforcement of an arbitral award. Reading the proposed sections 40C(1) and 40C(2)(b) together, it should be clear that only if a Mainland award had been fully satisfied in the Mainland would a person be restricted from seeking enforcement of that award in Hong Kong. For those Mainland awards of which applications for enforcement in the Mainland had been made but not fully satisfied, enforcement could still be sought in Hong Kong. The Administration believed that proposed section 40C(1) as drafted was adequate to serve its intended purpose.

Clause-by-clause examination of the Bill

34. The meeting proceeded to examine the Bill clause-by-clause.

*Clause 3 - section 2(1)*

35. SALD advised that the reason for repealing "Hong Kong" and substituting "China or any part thereof" in the definition of "Convention award"

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was to make it clear that a Convention award did not include an award made in pursuance of an arbitral agreement between the Mainland and Hong Kong, as Hong Kong had become a part of China after the reunification. With the enactment of the Bill, reciprocal enforcement of awards between the Mainland and Hong Kong would not be carried out in the same manner as a Convention award, but under the new Part IIIA of the Arbitration Ordinance as proposed in the Bill.

*Clause 5 - proposed section 40B(1)*

36. The Chairman enquired about how a Mainland award was enforceable in Hong Kong by virtue of proposed section 40B(1). SALD explained that section 2GG of the Ordinance provided a summary way of enforcing an award in the same manner as a judgment of the court was enforceable. Action in the court, on the other hand, involved instituting litigation proceedings by the parties.

37. Mr Ronald ARCULLI asked whether a party could make multiple applications for enforcement of an award on the Mainland. AD(A) responded that according to Article 2 of the Arrangement, if the place where the party against whom the application was filed was domiciled or the place where the property of the said party was situated fell within the jurisdiction of different Intermediate People's Courts of the Mainland, the applicant might apply to any one of the People's Courts to enforce the award. The applicant should not file his application with two or more People's Courts. On the other hand, if the place where the party against whom the application was filed was domiciled or the place where the property of the said party was situated was in the Mainland as well as in the HKSAR, the applicant should not file applications with relevant courts of the two places at the same time. Only when the result of the enforcement of the award by the court of one place was insufficient to satisfy the liabilities might the applicant apply to the court of another place for enforcement of the outstanding liabilities.

*(Post-meeting note : The Administration's response to the issues raised at the meeting has been circulated to members vide LC Paper No. CB(2)444/99-00(01) dated 19 November 1999.)*

**III. Any other business**

38. The Chairman requested the Secretariat to write to the two legal professional bodies and the Hong Kong International Arbitration Centre for further submissions, if any, on the Bill.

*(Post-meeting note : Written replies from the above organizations have*

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been circulated to members vide LC Paper Nos. CB(2)413/99-00(01), (02) and (03) dated 17 November 1999.)

**IV. Date of next meeting**

39. The next meeting was scheduled for 19 November 1999 at 8:30 am.
40. The meeting ended at 10:30 am.

Legislative Council Secretariat  
22 March 2000