

立法會
Legislative Council

LC Paper No. CB(2)2451/99-00

(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 second meeting
held on Friday, 19 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 NG Leung-sing
Hon Ronald ARCULLI, JP

Members Absent : Hon Albert HO Chun-yan
Hon Eric LI Ka-cheung, JP

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. Administration's written response to the points raised at the meeting on 9 November 1999
(LC Paper No. CB(2)444/99-00(01))

Deputy Director of Administration (DD(A)) took members through the paper prepared by the Administration in response to the points raised at the last meeting.

Clause 2(1)

2. Members noted the Memorandum of Understanding signed by the Secretary for Justice (SJ) and the Vice-President of the Supreme People's Court on 21 June 1999 in relation to the agreed Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region ("the Arrangement").

3. DD(A) advised that where legislation was required for the implementation of a bilateral agreement between Hong Kong and another jurisdiction, the usual practice was for a provision to be made in the legislation to empower a government official to specify a commencement date by way of a notice in the Gazette. Clause 2(1) of the Bill, which stated that the Ordinance should come into operation on a date to be appointed by the SJ, followed this practice. To give effect to this clause, the Administration would inform the Mainland authorities in advance of the date when the Second Reading debate of the Bill would be resumed, and give an indication of the date when the Bill could be expected to commence. The Supreme People's Court would within two weeks promulgate the requisite judicial interpretation. After the completion of action by both parties, SJ would then appoint the agreed date as the commencement date of the Ordinance.

Clause 3(c)

4. DD(A) informed members that it was the intention of the Administration to deal with issues concerning the treatment of Macau under the Ordinances in general, and on the establishment of mutual legal assistance with Macau in particular, after the reunification of Macau.

5. The Chairman suggested and members agreed that the Panel on Security and the Panel on Administration of Justice and Legal Services, as appropriate, should follow up the related issues in due course.

Clause 5

Documents required to be submitted under the proposed section 40D and Article 4(3) of the Arrangement

6. DD(A) advised that Article 4(3) of the Arrangement related to an application made by an applicant who was a foreign legal entity or any other foreign organization, while the proposed section 40D was in relation to arbitral award and arbitration agreement. On application for enforcement, Article 6 of the Arrangement stated that the relevant court should handle the application and enforce the award according to the legal procedure of the place of enforcement. Hence, with the passage of the Bill, Order 73, rule 10 of the Rules of High Court would apply to an application relating to a Mainland award. Unlike the Civil Procedure Law of the People's Republic of China (PRC), the laws of Hong Kong did not differentiate between local and foreign legal entities. Therefore, the question of requesting additional notarization and authentication materials for foreign legal entities did not arise.

Implementation of section 43(a) of the Arbitration Ordinance on which the proposed section 40D was modelled

7. DD(A) said that Hong Kong courts had all along accepted different practices for the purpose of proving a "duly authenticated original award". These practices included -

- (a) production by the plaintiff of what purported to be the original award during the course of hearing;
- (b) exhibition of the original award to an affidavit depositing its authenticity and accuracy; and
- (c) certification of the original award by either the solicitor handling the application or a notary public of the place of award.

Proposed section 40E(2)(c)

8. DD(A) said that in the light of members' views expressed at the last meeting, the Administration was prepared to move a Committee Stage amendment to insert the words "or of the arbitration proceedings" after "the appointment of the arbitrator" in the proposed section 40E(2)(c).

Clause 9

Proposed section 47

9. DD(A) advised that the Administration was still considering the drafting of the proposed new section 47 on application of the Ordinance in the light of members' concern.

II. Other issues

Section 2GG of the Arbitration Ordinance

10. Deputy Solicitor General (Advisory) (DSG(A)) informed members that the Court of Final Appeal (CFA) was scheduled to hear in mid-December an appeal from the Court of Appeal concerning the enforcement in Hong Kong of a bankruptcy order made by a Taiwanese court. As the CFA's judgment might have a bearing on the enforcement of Taiwanese arbitral awards in Hong Kong, the Administration considered it desirable to defer any amendment to section 2GG of the Ordinance until it had reviewed the CFA's judgment. The Administration also proposed to take forward any amendment to section 2GG outside the context of the Bill.

11. The Chairman pointed out that the view all along held by practitioners was that section 2GG of the Ordinance, which provided for summary enforcement of arbitral awards, should operate in the same way as its predecessor, i.e. section 2H in that the summary enforcement procedure applied to awards made either in or outside Hong Kong, until Justice Findlay ruled in a case in 1998 that section 2GG only applied to awards made in Hong Kong. In view of Justice Findlay's judgment, the Administration should consider whether section 2GG would need to be amended so as to reflect clearly the legislative intent, in order to remove any doubt created by the judgment concerning the applicability of the section.

12. The Chairman added that the case to be decided by CFA in December seemed to involve issues relating to the status of Taiwan and whether a judgment of a Taiwanese court would be given recognition in the Hong Kong Special Administrative Region (HKSAR). She said that these issues were separate from and therefore bore no relevance to the issue of whether section

2GG should apply to awards made either in or outside Hong Kong. She did not see how the decision of CFA in the case could have a bearing on the application of section 2GG.

13. Echoing the Chairman's view, Mr Ronald ARCULLI said that as the CFA case in question was not an appeal from Justice Findlay's decision, it would not affect the need for reviewing and if necessary amending section 2GG. Furthermore, he opined that a bankruptcy order in the nature of that involved in the CFA case appeared to be different from an arbitral award for the purpose of section 2GG.

14. The Chairman said that a summary enforcement process, as opposed to enforcement by action, would save a lot of time and expense for parties engaged in arbitration proceedings. Therefore, the sooner the problem with section 2GG was resolved, the better.

15. Members decided that the issue should be further discussed at the next meeting. Meanwhile, the Administration was requested to provide details of the following judgments for the consideration of the Bills Committee -

- (a) judgment of the Court of First Instance (Justice Findlay) on section 2GG; and
- (b) judgment of the Court of Appeal concerning the enforcement in Hong Kong of a Taiwanese bankruptcy order, the appeal from which would be decided by CFA.

(Post-meeting note - The two judgments have been circulated to members vide LC Paper Nos. CB(2)473/99-00(02) and 473/99-00(03))

Further submission on the Bill from the Law Society of Hong Kong
(LC Paper No. CB(2)413/99-00(02))

16. The Chairman informed the meeting that the Law Society of Hong Kong had made two additional queries regarding the Arrangement -

- (a) whether the prohibition in Article 2 of the Arrangement of an applicant to file his application with two or more People's Courts meant a single enforcement judgment obtained in the Mainland would cover both zones in which a Mainland respondent had property, or the claimant had to choose a zone which was likely to be more productive to seek enforcement; and
- (b) regarding the non-enforcement provision in Article 7(5)(3) of the Arrangement, how the phrase "public interests" was to be

interpreted as opposed to "public policy" considerations under local law.

17. Concerning (a) above, DSG(A) explained that under the Civil Procedure Law and the Arbitration Law of the PRC, an arbitral award which was recognized by and enforceable in the jurisdiction of one People's Court was likewise enforceable in the jurisdiction of another People's Court, provided that other conditions of enforcement were met. Hence, even if a claimant had commenced execution proceedings in the wrong court, say because the property situated within the jurisdiction of the court was insufficient to meet the award, such court could still entrust another court which had jurisdiction over the property of the respondent to carry out the execution on its behalf.

18. On the second query, DSG(A) advised that "public interests" and "public policy" were terms used in the laws of the Mainland and the HKSAR respectively. There might be differences between the legal interpretation of the two. He said that Article 6 of the Arrangement stated that "*Upon receipt of an application for enforcement from an applicant, the relevant court shall handle the application and enforce the award according to the legal procedure of the place of enforcement.*" Furthermore, Article 7(5)(3) of the Arrangement specified that "*The enforcement of the award may be refused ...if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR.*" This meant that the notion of "public policy", as opposed to "public interests", would continue to apply when the local court decided whether the application for enforcement should be refused.

19. The Chairman requested the Administration to provide a written response to the above queries raised by the Law Society.

(Post-meeting note - The Administration's letter dated 29 November 1999 to the Law Society has been circulated to members vide LC Paper No. CB(2)510/99-00(01))

III. Clause-by-clause examination of the Bill

Clauses 8, 10 and 13

20. Members noted that the above clauses were adaptation of laws amendments.

Clause 15

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21. The Administration explained that this clause specified the consequential amendments to Order 73, rule 10 of the Rules of High Court so that it would apply to the proposed Part IIIA of the Ordinance upon the commencement of that Part.

IV. Date of next meeting

22. The next meeting was scheduled for 30 November 1999 at 2:30 pm to continue discussion of the outstanding issues arising from this meeting.

23. The meeting ended at 9:40 am.

Legislative Council Secretariat
10 April 2000