

立法會
Legislative Council

LC Paper No. CB(2)2486/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref : CB2/BC/33/98

Legislative Council
Bills Committee on Arbitration (Amendment) Bill 1999

Minutes of the third meeting
held on Tuesday, 30 November 1999 at 2:30 pm
in Conference Room B of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon NG Leung-sing
Hon Ronald ARCULLI, JP

Members Absent : Hon HO Sai-chu, SBS, JP
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 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

Action
Column

I. Administration's response dated 29 November 1999 to the points raised by the Law Society of Hong Kong
(LC Paper No. CB(2) 510/99-00(01))

Members noted that the Administration had replied in writing to the queries raised by the Law Society on Articles 2 and 7(5)(3) of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region ("the Arrangement"). The points had been discussed by the Bills Committee at the last meeting on 19 November 1999. Members raised no further questions on those issues.

II. Draft Committee Stage amendments (CSAs) proposed by the Administration
(LC Paper No. CB(2)510/99-00(02) tabled at the meeting)

2. Senior Assistant Law Draftsman informed members that having considered members' views, the Administration was prepared to amend clause 5 of the Bill to -

- (a) add "or of the arbitration proceedings" after "arbitrator" in the proposed section 40E(2)(c); and
- (b) specify that the Secretary for Justice should from time to time publish in the Gazette an updated list of the recognized Mainland arbitral authorities. Such list was not subsidiary legislation.

3. Members accepted the proposed CSAs.

III. Other issues

Section 2GG of the Arbitration Ordinance

4. Members noted the following court judgments provided by the Administration -

- (a) LC Paper No. CB(2)473/99-00(02) : judgment of the Court of First Instance (Justice Findlay) in the case of *NG Fung Hong v ABC [1998]*. The judgment was quoted by Mr R S Peard in his letter dated 23 October 1999 to Hon Margaret NG (circulated to members vide LC Paper No. CB(2)413/99-00(03)); and
- (b) LC Paper No. CB(2)473/99-00(03) : judgment of Court of Appeal in the case of *Ting Lei Miao and Chen Li Hung & Others (Civil Appeal No. 178 of 1997)* concerning the enforcement in Hong Kong of a bankruptcy order made by a Taiwanese court. The judgment was quoted by the Administration in its letter dated 18 November 1999 (circulated to members vide LC Paper No. CB(2)444/99-00(01)).

5. In case (a) above, Justice Findlay held that "*Part 1A of the Arbitration Ordinance (Cap. 341), of which section 2GG was a part, applied only to arbitration (whether domestic or international) conducted in Hong Kong. Having regard to other relevant provisions of the Ordinance, in particular section 2AD, to which it was subject, section 2GG could not apply where the place of arbitration was outside Hong Kong. The award in the present case was not, therefore, enforceable under section 2GG.....This conclusion, although perhaps inconvenient, is not surprising when one considers section 2GG in the context of the whole of Part 1A. When one does that, it is clear that every other section of that Part is intended to only apply to arbitration taking place in Hong Kong. It would be strange, in that context, if section 2GG was the one and only section in Part 1A that applied also to arbitration outside Hong Kong.*"

6. In case (b), the Court of Appeal held that a relevant issue was whether, in spite of the non-recognition by the People's Republic of China of the Taiwanese government and courts, Hong Kong courts could give effect to orders of Taiwanese courts, specifically in the particular case concerned, a bankruptcy order. The Court of Appeal ruled, by majority, that recognition of the status of the trustees in bankruptcy appointed by the Taiwanese court was not contrary to public policy, and did not involve any recognition of the legality of the Taiwanese court. Nor was a recognition of the rights of the trustees to sue in Hong Kong in any way inimical to the interests of the sovereign power.

7. Members noted that an appeal from the decision of the Court of Appeal in case (b) would be heard by the Court of Final Appeal (CFA) in mid-December.

8. Members enquired how the outcome of the CFA's future ruling on case (b) would affect the proposed amendment to section 2GG of the Arbitration Ordinance (the Ordinance) to specify that the section applied to awards made either in or outside Hong Kong.

9. Deputy Solicitor General (Advisory) (DSG(A)) replied that the CFA's decision would impact on the issue of validity of awards made by unrecognized courts of a territory and whether such awards could be given effect in Hong Kong. An issue which the Administration was concerned about was that in considering an application for enforcement of a Taiwanese arbitral award, the local court would have to consider whether those laws governing the award were valid laws recognized by Hong Kong. If not, the local court would have to refuse enforcement. He said that the Administration would need to consider in detail the implications of the CFA's decision on the case.

10. In response to the Chairman, DSG(A) said that before Justice Findlay's decision in the *Ng Fung Hong* case, the view held by the Administration was that section 2GG of the Ordinance applied to awards made either in or outside Hong Kong.

11. The Chairman pointed out that the proposal of arbitration practitioners to amend section 2GG of the Ordinance actually arose from the judgment of Justice Findlay. The purpose was to clarify that the summary enforcement procedure specified under the section applied to awards made whether in or outside Hong Kong. She opined that even if section 2GG was so amended, it did not follow that all awards made outside Hong Kong would automatically be enforceable under the section, because the court would still have to determine whether a particular award was a valid award, and if the answer was negative, the court could refuse enforcement.

12. Deputy Director of Administration (DD(A)) said that the Administration's position was that it would be in the best interests of the arbitration community for the Bill to be passed as soon as possible so that the agreed Arrangement could be implemented. She suggested that in view of the fact that an amendment to section 2GG was not directly relevant to the implementation of the Arrangement, and since the Administration was already in the course of conducting an overall review of the Ordinance, any amendment to section 2GG might be taken forward at a later stage outside the context of the Bill. She said that the Administration would revert to members on how it proposed to deal with the issue of section 2GG after it had considered the judgment of the CFA.

13. After some further discussion, members agreed to the Administration's proposal to follow up the issue of section 2GG outside the context of the Bill to

enable the Bill to be enacted at the earliest opportunity. As suggested by members, the Administration undertook to consult the Panel on Administration of Justice and Legal Services after it had finished studying the CFA's decision and come up with any recommendation as to how section 2GG could be suitably amended.

Clause 9 - Application of Ordinance

14. DD(A) advised that the Administration was still considering how the proposed revised section 47 of the Ordinance should be refined in view of the queries raised by members at the meeting on 9 November 1999.

15. The Chairman said that the existing section 47 stated that "*This Ordinance (other than Parts III and IV) binds the Government*". Clause 9 of the Bill (proposed new section 47) sought to repeal the existing section 47 and substitute it with a new section which read "*This Ordinance applies to and in relation to any arbitration agreement, irrespective of whether a party to the agreement is an individual, public body, public authority, private body, organ or any other class of person.*" She pointed out that by virtue of section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), the "State" including the Government of the Hong Kong Special Administrative Region (HKSAR) was not bound by statute save by express provision or by necessary implication. As clause 9 did not expressly provide that State organs in Hong Kong and the HKSAR Government were bound, they were presumed not to be bound by the Arbitration Ordinance under the presumption of exclusion in section 66 of Cap. 1. The Chairman considered that the proposed section 47 of the Ordinance failed to reflect the policy intent that State organs in the HKSAR and the HKSAR Government were bound by the Ordinance.

16. In response, DD(A) confirmed that the policy intent was that the Arbitration Ordinance, as amended by the Bill, should apply to any arbitration agreement, including those entered into by the HKSAR Government or any offices set up in the HKSAR by the Central People's Government. She added that the proposed section 47 followed the formulation adopted in other jurisdictions such as England, Australia and South Africa where the expression of "applies to" was used in place of "binds" in legislation providing for enforcement of arbitral awards. The present method of drafting section 47 was meant to make it all-embracing so that the Ordinance would apply to any individual or organ, including State organs in the HKSAR and the HKSAR Government, as and when they entered into an arbitration agreement.

17. The Chairman maintained the view that as a matter of statutory interpretation, the formulation of the proposed section 47 did not appear to have the effect of displacing the presumption of exclusion in section 66 of Cap.1 by express provision so that the State would be bound.

18. DD(A) reiterated that the Administration was reviewing the drafting of section 47 in the light of policy intention and the views expressed by the Bills Committee. She said that the Administration would provide an early response to the concerns raised by the Bills Committee and a proposal to address the issue.

IV. Legislative timetable

19. Members were appreciative of the expectation of the arbitration community that the Bill should be enacted as soon as possible. Members agreed that, subject to the Administration's proposed solution to deal with clause 9 of the Bill, the Bills Committee should aim at resuming the Second Reading debate on the Bill at the Council meeting on 5 January 2000.

(Post-meeting note - The Administration has subsequently proposed (in a letter dated 11 December 1999 circulated to members vide LC Paper No. CB(2)606/99-00(01)) that as an interim arrangement, it would move a CSA to replace clause 9 with a formulation that retains the existing scope of application of the Ordinance, i.e. the Ordinance applies to the Government. The Administration undertakes to continue to work upon an appropriate formula to extend the application of the Ordinance to achieve its policy intention. It is intended that a bill to give effect to that will be introduced at a later stage. The Bills Committee has accepted the proposed arrangement. The Bill was passed on 5 January 2000.)

20. The meeting ended at 3:30 pm.

Legislative Council Secretariat
10 April 2000