

R. S. PEARD, J.P., F.C.I. Arb., F.H.K.I.Arb., F.S.I. Arb.,

19th Floor, Prince's Building,

10 Chater Road, Central, Hong Kong.

Tel: 28434433 Fax: 28459121 (Office) 25171106 (Home)

Our Ref.: RSP/410

15th November 1999

Mrs. Percy Ma,
Clerk to Bills Committee,
c/o Legislative Council Building,
Hong Kong.

By Fax No.25099055
(Total no. of pages: 4)

Dear Mrs. Ma,

Bills Committee on Arbitration (Amendment) Bill 1999

I refer to your letter of 10th November addressed to Mr. Christopher To, the Secretary General of the Hong Kong International Arbitration Centre.

The views of the Hong Kong International Arbitration Centre, the Hong Kong Institute of Arbitrators, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Bar Association and the Law Society of Hong Kong have already been communicated to Hon. Margaret Ng, the Chairman of Bills Committee at a meeting on 22nd October and in my letter to her of 23rd October 1999 (copy attached). She has already dealt with these points in her letter of 25th October 1999 to Ms. Anita Ho.

All the organisations mentioned in this letter are most anxious that the Bill should become law by the end of this year.

Please let me know whether I can be of any further assistance.

Yours sincerely

R. S. Peard

c.c. Mr. Christopher To - by fax no. 25242171 (w/o encl)
Mr. Clive Grossman SC - by fax no. 28100612 (w/o encl)
Mr. Fred Kan - by fax no. 25881318 (w/o encl)
(total no. of pages: 1)

R. S. PEARD, J.P., F.C.I. Arb., F.H.K.I.Arb., F.S.I. Arb.,

19th Floor, Prince's Building,

10 Chater Road, Central, Hong Kong.

Tel: 28434433 Fax: 28459121 (Office) 25171106 (Home)

Our Ref.: RSP/410

23rd October 1999

Ms, Margaret Ng,
New Henry House, 10th Floor,
10 Ice House Street,
Hong Kong.

By Fax No. 28017134
(Total no. of pages: 3)

Dear Margaret,

Arbitration (Amendment) Bill

First of all, thank you for sparing the time to see us on 22nd October. The Hong Kong International Arbitration Centre, The Hong Kong Institute of Arbitrators, The Chartered Institute of Arbitrators (East Asia Branch), The Hong Kong Bar Association and The Law Society of Hong Kong are all anxious that the Bill be passed into law as soon as possible. We think that the aim should be for this to happen by the end of the year.

This letter will confirm the joint views of the various organisations which we hope you will be able to reflect in your discussions with Government and in the Bills Committee:-

1. The Memorandum of Understanding is intended to reflect the principles relating to mutual enforcement set out in the New York Convention. Section 44(2)(c) of the existing Ordinance (which deals with enforcement under the New York Convention) states:-

“that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

In Section 40E(2)(c), the words “or of the arbitration proceedings” are omitted. We understand that the reason for this is that the Memorandum of Understanding omits these words and Government does not think it necessary to reinstate them because they would be included under the words “or was otherwise unable to present his case”.

We think that uncertainty may arise here because it may be argued that the words must have been omitted for a particular reason. Since the Government considers that the Memorandum of Understanding covers the situation envisaged by the

omitted words, it is difficult to understand why these words cannot be put into the subsection so that the position is clear.

2. The Government agree that there should be some mechanism whereby the list of recognised Mainland arbitral authorities (see Section 3 of the Bill) is officially published in Hong Kong so that practitioners have a reference point (again for the sake of certainty). We suggest that something along the following lines be added to the definition in Clause 3:-

“and published in the Government Gazette from time to time”.

3. We are not clear as to the reason for Section 9 of the Bill. Two points arise:-

- a. The original Section 47 states:-

“This Ordinance (other than Parts III and IV) binds the Government”.

If this is deleted from the Ordinance, then it may well be argued that the Ordinance does not bind the Hong Kong SAR Government although we understand that it is intended that it should continue to bind the Government.

- b. The Hong Kong SAR Government is often a party to an arbitration agreement particularly in construction cases. It is not clear that the Hong Kong SAR Government is included in the new wording. Perhaps it would be better merely to state:-

“This Ordinance applies to and in relation to any arbitration agreement”.

4. We have raised a point in regard to Section 2GG of the Ordinance.

Prior to this section coming into force in June 1997, its predecessor Section 2H of the Ordinance allowed summary enforcement (i.e. by originating summons) of any award made either in Hong Kong or outside Hong Kong in contrast to the original common law method of enforcement by action. It was generally thought when Section 2GG was enacted that it would also apply both to arbitration awards made in Hong Kong and outside Hong Kong. However Findlay J. in *Ng Fong Hong Limited v. ABC* (1998) 1HKC 213 held that Section 2GG for somewhat obscure technical reasons applied only to awards made in Hong Kong.

We have suggested that Section 2GG should be amended so as to allow awards made both inside and outside Hong Kong to be enforced under it. There are several reasons for this:-

- a. Since enforcement under the Geneva Convention is being abolished by the Bill, it seems appropriate to allow summary enforcement of awards from countries who are not parties to the New York Convention as a substitute for Geneva Convention enforcement.

- b. The pre-amendment philosophy of allowing general summary enforcement of arbitration awards should continue as part of Hong Kong's efforts to remain a services centre for Asia.
5. Under the Memorandum of Understanding, enforcement in Hong Kong of a Mainland award is not permitted while enforcement proceedings are going on in the Mainland. For clarity's sake, we suggest that in Section 40C(1) the words "has been made" should be deleted and the words "is pending" should be inserted. We would not wish a party against whom an award is being enforced to argue that it is not legitimate to enforce in Hong Kong once an application has been made to enforce on the Mainland.

I hope that the above is clear. Please do not hesitate to contact me if you need further clarification.

I would appreciate being kept up to date as to progress.

With best regards,

Yours sincerely,

R. S. Peard