

CSO/ADM/CR 1/3221/87(99)

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8 November 1999

Ms Anita Ho
Assistant Legal Adviser
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8 Jackson Road
Central
Hong Kong

Dear Ms Ho,

Arbitration (Amendment) Bill 1999

Thank you for your letter of 27 October, which sought clarification on some points with regard to the Arbitration (Amendment) Bill 1999, and for forwarding the Honourable Margaret Ng's letter of 25 October to us. I would like to set out our response to the issues raised in both your and Ms Ng's letters in the paragraphs that follow.

A. The Issues Raised in Your Letter

Clause 3(c) of the Bill

You enquired how arbitral awards between Hong Kong and Macau would be mutually enforced after 20 December 1999. At present, while Portugal is a party to the New York Convention, and is so designated in the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 341 Sub. Leg.), there is no indication that Portugal has extended the application of the Convention to

territories for the international relations of which it is responsible. The enforcement of arbitral awards between Hong Kong and Macau is being done currently through normal civil debt claims procedures in the local courts.

The arrangement for reciprocal enforcement of arbitral awards, which was agreed between the Mainland and the HKSAR and which the Arbitration (Amendment) Bill seeks to implement, was drawn up for the enforcement of awards made in the Mainland and the HKSAR only. The mutual enforcement of arbitral awards between Macau and Hong Kong after the reunification of Macau will be looked at in the context of treatment of Macau in general with regard to other Ordinances. For the time being, the existing arrangement for the treatment of Macanese awards will prevail.

Clause 5 of the Bill

(a) Proposed Section 40D

You pointed out that the documents which should be submitted for enforcement of Mainland awards in Hong Kong as specified in the Arrangement and the proposed section 40D is not strictly consistent. It should be noted that the main purpose of the Bill is to make provisions for the enforcement of a Mainland award in Hong Kong. Actual implementation of the Arrangement will be done in accordance with local legislation. In relation to the manner in which an application for enforcement should be made, the intention is to follow as closely as possible the procedural requirements applicable to a Convention award, which were followed prior to the reunification. With the consequential amendments contained in clause 15 of the Bill, order 73, rule 10 of the Rules of the High Court would apply in relation to a Mainland award. The requirement of submitting the relevant notarisation materials is not specifically provided for in the Bill, but it should be up to the court to order additional information, including notarisation materials as specified in the Arrangement as necessary.

(b) Proposed Section 40F

You 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 MOU. The answer is negative. The MOU provides that the effective date for the implementation of the Arrangement will only be confirmed after the HKSAR has completed the amendment to the

Arbitration Ordinance and the Mainland has promulgated a relevant judicial interpretation. Such being the case, the time limit stipulated in Article 10 of the Arrangement has not commenced to run yet.

Clause 9

You enquired on the meaning of “any other class of persons” in the proposed section 47. The intention of the proposed section 47 is that the Arbitration Ordinance, as amended by the Bill, shall apply to or in relation to any arbitration agreement, irrespective of who a party to the agreement is. The list of persons is therefore widely drawn up to cover all possible classes of persons who might be a party to an arbitration agreement. The words “any other class of persons” in the proposed section are meant to cover any residual class of persons in case the specific classes of persons mentioned in the same section do not exhaust all classes of persons.

For the sake of clarity and consistency, the words “類別” may be added after “其他” and before “人士” in the proposed Section 47 in the Chinese text of the Bill by way of a Committee Stage Amendment.

B. The Issues Raised in the Hon Margaret Ng’s Letter

Point 1

The Hon Margaret Ng proposed to add the words “or of the arbitration proceedings” to the proposed section 40E(2)(c) after “the appointment of the arbitrator” to achieve consistency between the MOU and the existing section 44(2)(c) of the Arbitration Ordinance. We have considered the suggestion but are of the view that the expression “otherwise unable to present his case” in the proposed section 40E(2)(c) is broad enough to cover the irregularity that there was no proper notice to the other party of the arbitration proceedings. This point has also been brought up by the arbitration practitioners during our meeting with them. We have explained to them our view that insertion of the words as suggested is not necessary, and our rationale for coming to such a conclusion.

Point 2

The Hon Margaret Ng proposed that the list of recognised Mainland arbitral authorities provided by the Legislative Affairs Committee (LAC) of the State Council through the HKMAO be published in the Government Gazette from time to time. It is our intention to provide the Judiciary and the two legal professional bodies with an updated list of recognised Mainland arbitral authorities as soon as we receive one from the LAC through the HKMAO. However, in the light of Ms Ng's suggestion we will publish the list of recognised Mainland arbitral authorities, and any subsequent updated lists, in the form of a General Notice in the Gazette.

Point 3

The Hon Margaret Ng sought clarification on the applicability of the Arbitration Ordinance as amended by the Bill. We confirm that the intention is for the Arbitration Ordinance to apply to all persons and bodies who is a party to or in relation to any arbitration agreement, and if the HKSAR Government or any offices set up in the HKSAR by the Central People's Government are to enter into any arbitration agreement, the Arbitration Ordinance will be applicable to them.

Point 4

The Hon Margaret Ng suggested that section 2GG be made applicable to both arbitration made in or outside Hong Kong in the light of the judgment of Findlay J. in the *Ng Fong Hong Ltd v ABC* (1998) 1 HKC 213. As explained in the Explanatory Memorandum of the Bill, the main purpose of the present exercise is to give effect to the agreed arrangement for reciprocal enforcement of arbitral awards between the Mainland and the HKSAR, and to adapt the Arbitration Ordinance to bring it into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region. We are reviewing the operation of the Arbitration Ordinance in a separate on-going exercise. The proposed amendment to section 2GG is outside the context of the present Bill, and will be looked into the context of the general review.

Point 5

The Hon Margaret Ng suggested to substitute "pending" for "has been

made” in the new section 40C(1) under clause 5, so as to spell out more clearly the intention that enforcement in Hong Kong of a Mainland award is not permitted while enforcement proceedings are going on in the Mainland. We have considered the suggestion. We believe that, reading the new sections 40C(1) and 40C(2)(b) together, it should be clear that only if a Mainland award has been fully satisfied in the Mainland would a person be restricted from seeking enforcement of that award in Hong Kong. For those Mainland awards on which application for enforcement in the Mainland has been made but not fully satisfied, enforcement may still be sought in Hong Kong. As such, we believe that the proposed section 40C(1) is adequate for our purpose, and amendment as suggested is not strictly necessary.

We look forward to discussing the above issues and any other points which Members may be interested on in the Bills Committee.

Yours sincerely,

(Ms Rosanna Law)
for Director of Administration

c.c. D of J (Attn: Mr Stephen Wong, DSG
Mr Paul Tsang, LPD
Mr K F Cheng, LDD)