

CSO/ADM CR 1/3221/87(99)Pt.12

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URGENT BY FAX (2509 9055)

Mrs Percy Ma
Clerk to Panel on Administration of Justice
and Legal Services
Legislative Council Secretariat
3/F, Citibank Tower
3 Garden Road
Hong Kong

Dear Mrs Ma,

**Bills Committee on
Arbitration (Amendment) Bill 1999**

Thank you for your letter of 10 November. Our response to the points raised by Members at the Bills Committee meeting on 9 November 1999, in seriatim, is as follows-

Clause 2(1)

As requested by Members, I attach at Annex A a copy of the relevant Memorandum of Understanding signed by the Secretary for Justice and the Vice-President of the Supreme People's Court.

Clause 2(1) of the Bill states that the Ordinance shall come into operation on a date to be appointed by the Secretary for Justice. To give effect to this Clause, we shall inform the Mainland authorities in advance of the date when the Second Reading debate of the Arbitration (Amendment) Bill 1999 will be resumed, and give an indication of the date when the Bill could be expected to commence. The Supreme People's Court will within two weeks promulgate the requisite judicial interpretation.

After the completion of action by both parties, the Secretary for Justice will then appoint the agreed date as the commencement date of the Ordinance.

Agreements between Hong Kong and another jurisdiction usually contains a commencement clause, stipulating that the agreement shall come into force on a date agreed between the parties, and after notification to each other that the requisite actions, legislative or administrative, to implement the agreement have been completed. Where legislation is required for the implementation of an agreement in Hong Kong, the usual practice is 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. Orders made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) and those made under section 3 of the Fugitive Offenders Ordinance (Cap. 503) are relevant examples. For ease of reference, the commencement sections of these Orders and the commencement articles of the respective agreements are attached at Annexures B and C.

Clause 3(c)

Issues with regard to the treatment of Macau under our Ordinances in general, and on the establishment of mutual legal assistance with Macau in particular, will be followed up after the reunification of Macau.

Clause 5

A. Proposed Section 40D

Members seek clarification on two issues under this section. Firstly, why the documents required to be submitted under proposed section 40D need not follow those specified in Article 4(3) of the Arrangement. Secondly, details with regard to the implementation of section 43(a) of the Arbitration Ordinance, on which the proposed section 40D is modelled.

On the first issue, we would like to point out that Article 4 of the Arrangement sets out the contents of an application for enforcement and Article 4(3) relates to an application made by an applicant who is a foreign legal entity or any other foreign organisation, while the proposed section 40D relation to arbitral award and arbitration agreement. On application for enforcement, Article 6 of the Arrangement states that the relevant court shall 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 with regard to an application relating to a Mainland award. For ease of reference, an extract of the relevant rule is attached at Annex D. It should also be noted that unlike the Civil Procedure Law of the PRC, our laws do not differentiate between local and foreign legal entities; the question of requesting additional

notarisation and authentication materials for foreign legal entities do not therefore arise.

On the second issue, we understand that Hong Kong courts have all along accepted different practices for the purpose of a “duly authenticated original award”-

- (a) **Production by the plaintiff of what purported to be the original award during the course of hearing.** The former High Court held in the *Guangdong New Technology Import and Export Corp Jiangmen Branch v Chiu Shing (t/a BC Property and Trading Co)[1992] 2 HKC 459* that this would serve as prima facie proof that the document produced was the duly authenticated original award;
- (b) **Exhibition of the original award to an affidavit depositing its authenticity and accuracy.** This practice, described in Mustill and Boyd’s *The Law and Practice of Commercial Arbitration in England* (2nd edition), was cited with apparent approval by Barnes J in the case mentioned in (a) above.

The Registrar of the High Court advises that this is the practice adopted by the High Court for proving authenticity or accuracy as a true copy of a document. We understand from the Hong Kong International Arbitration Centre that local practitioners also adhere to this practice in the majority of cases;

- (c) **Certification of the original award by either the solicitor handling the application or a notary public of the place of award.** The Registrar of the High Court advises that Findlay J, who was until recently in charge of the Construction and Arbitration List of the High Court, also accepted this practice.

The operation of the proposed section 40D will follow the above practices, which should be familiar to practitioners.

B. Proposed Section 40E(2)(c)

In the light of Members’ views, we will move a Committee Stage Amendment to insert the words “or of the arbitration proceedings” to the proposed section 40E(2)(c).

Clause 9

We are aware of Members’ concern over the proposed section 47 and are looking further into the matter.

Section 2GG of Arbitration Ordinance

An effect of amending section 2GG, as suggested by the Hon. Margaret Ng in her letter of 25 October to the Assistant Legal Adviser of LegCo, would be that arbitral awards made in Taiwan may be summarily enforced in Hong Kong.

As the CFA is 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, and the CFA's judgment may have a bearing on the enforcement of Taiwanese arbitral awards in Hong Kong, we consider it desirable to defer any amendment to section 2GG until the Administration has reviewed the CFA's judgment and propose to take it outside the context of the present exercise.

Yours sincerely,

(Ms Miranda Chiu)
for Director of Administration

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

b.c.c. D of J (Attn: Mr R C Allcock)
SCA (Attn: Mr Clement C H Mak)