

LEGISLATIVE COUNCIL BRIEF

ARBITRATION (AMENDMENT) BILL 2000

INTRODUCTION

At the meeting of the Executive Council on 23 May 2000, the Council ADVISED and the Chief Executive ORDERED that the Arbitration (Amendment) Bill 2000, at the **Annex**, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Background

2. Before June 1997, it was the general understanding that section 2H of the Arbitration Ordinance (Cap 341) (the Ordinance) allowed, with the leave of the court, summary enforcement of any award made either in or outside Hong Kong, as an alternative to the common law method of enforcement by action. In June 1997, section 2H of the Ordinance was replaced by section 2GG. It was generally thought that section 2GG had the same effect. However, in a recent decision of the Court of First Instance, section 2GG was held to apply only to awards made in Hong Kong.

3. Awards made on the Mainland by a recognized Mainland arbitral authority or awards made in a state or territory (other than China or any part thereof) which is a party to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention) can be enforced summarily under other Parts of the Ordinance. However, in the light of the recent judgment, awards made elsewhere are not summarily enforceable in Hong Kong under section 2GG. These awards include non-

Convention awards made in such countries or territories as Albania, Brazil, Iraq, Newfoundland, Taiwan and Macau.

4. In response, the legal and arbitration professional bodies proposed, when the Ordinance was last amended earlier this year, that section 2GG be amended to make it clear that it does apply to awards made either in or outside Hong Kong. The effect of this would be that awards made in those countries or territories which are not parties to the New York Convention will be summarily enforceable in Hong Kong with the leave of the court. This proposal was supported by the Bills Committee formed to study the Arbitration (Amendment) Bill 1999.

5. The Administration agreed to follow-up the proposal after it had the chance to study the judgment of the Court of Final Appeal (CFA) on the enforcement in Hong Kong of a bankruptcy order made by a Taiwan court. That judgment was delivered on 27 January 2000.

CFA's judgment

6. The CFA in its recent decision held that the bankruptcy order made by a Taiwan court, which related to private rights of the parties concerned and was not for the benefit of the Taiwan government, was enforceable in Hong Kong. This followed the common law principle that particular acts of a government (which is recognized neither *de jure* nor *de facto*) may, in the interests of justice and common sense and for the preservation of law and order, be recognized by domestic courts where private rights are concerned and where no consideration of public policy to the contrary has to prevail. As was explained by the CFA, that common law principle does not involve recognizing any unrecognized entity; it only goes purely and simply to protecting private rights.

7. Following the enactment of the Bill, if an application is made under the amended section 2GG for summary enforcement in Hong Kong of an award made in a state or territory with an unrecognized government, the CFA's recent judgment will provide guidance to the court in dealing with the application.

8. In the Mainland, the *Rules of the Supreme People's Court Concerning the Recognition by the People's Court of Civil Judgments Delivered in Taiwan District* (which were promulgated on 15 January 1998 and became effective on 26 May 1998) make provisions for application to the People's Court for

recognition of civil judgments delivered in Taiwan. Those Rules are expressed to apply to awards made by Taiwan arbitration authorities (Article 19). Hence, a party to a Taiwan arbitral award may apply to the Mainland courts for recognition and enforcement of the award in the Mainland in accordance with those Rules.

The Proposal

9. In the light of the above, and for the benefit of the local arbitration community as well as confidence in Hong Kong's arbitration system, the Administration considers that there is a sound case to amend section 2GG as proposed.

THE BILL

10. Clause 2 makes it clear that section 2GG is applicable to awards whether made in or outside Hong Kong.

LEGISLATIVE TIMETABLE

11. The legislative timetable is as follows:

Publication in the Gazette	26 May 2000
First Reading and commencement of Second Reading debate	31 May 2000
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

12. The Department of Justice advises that the Bill is consistent with the Basic Law.

HUMAN RIGHTS IMPLICATIONS

13. The Department of Justice advises that the Bill has no human rights implications.

BINDING EFFECT OF THE LEGISLATION

14. The provisions of the Bill do not affect the current binding effect of the Ordinance to which the Bill relates.

FINANCIAL AND STAFFING IMPLICATIONS

15. There are no additional financial or staffing implications.

PUBLIC CONSULTATION

16. The Administration briefed the Lego Panel on Administration of Justice and Legal Services (AJLS Panel) on 21 March 2000 on the legislative proposal. The AJLS Panel supported it and urged the amendment bill to be enacted within this LegCo session since early implementation of the proposal would save public money and time, avoid wasting court time in unnecessary proceedings, and generally enhance Hong Kong's prestige and efficiency as an international arbitration centre. In addition, the AJLS Panel noted that the proposal was straight-forward and involved no policy change.

17. The AJLS Panel made a report on the proposed amendment to section 2GG to the House Committee of the LegCo on 24 March 2000. Members of the House Committee raised no objection to the proposal that an amendment bill be introduced by the Administration within this LegCo session. With that consensus, the Chairman of the House Committee considered that early amendment to section 2GG as a tidying up exercise had the support of Members and urged the Administration to introduce an amendment bill within this current LegCo term as far as possible.

PUBLICITY

18. A spokesman will be available to handle press enquiries.

ENQUIRIES

19. For enquiries on the brief, please contact Mr Stephen Kai-yi Wong, Deputy Solicitor General (Advisory) at 2867 4752.

Department of Justice

May 2000

File ref: LP CLU 5037/7/1C VI

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