

立法會
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**Paper for the House Committee meeting
on 17 December 1999**

**Report of the Bills Committee on
Arbitration (Amendment) Bill 1999**

Purpose

This paper reports on the deliberations of the Bills Committee on Arbitration (Amendment) Bill 1999.

Background

2. Arbitration in the context of the Bill refers to the voluntary submission by the parties of a commercial dispute for decision by a recognised and regular procedure. It offers an alternative method of adjudicating disputes that is usually more efficient and less costly than litigation.

3. Before 1 July 1997, reciprocal enforcement of arbitral awards between the Mainland and Hong Kong was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 ("New York Convention"). Detailed arrangements for the enforcement of Convention awards (including awards made on the Mainland) are set out in Part IV of the Arbitration Ordinance (Cap. 341). The New York Convention continues to apply to the Hong Kong Special Administrative Region (HKSAR) as part of the People's Republic of China (PRC) after the reunification. However, being an international agreement, the Convention is no longer applicable to the enforcement of arbitral awards between the Mainland and the HKSAR.

4. A reciprocal arrangement for the enforcement of arbitral awards between the Mainland and HKSAR has been agreed. The new arrangement reflects the spirit of the New York Convention (the Arrangement).

The Bill

5. The main purpose of the Bill is to amend the Arbitration Ordinance to give effect to an agreement reached between the Mainland of China and HKSAR on the

arrangement for the reciprocal enforcement of arbitral awards. The Bill also seeks to adapt the Ordinance to bring it into conformity with the Basic Law and with the status of Hong Kong as a SAR of the PRC.

The Bills Committee

6. At the House Committee meeting on 9 July 1999, members agreed to form a Bills Committee to scrutinize the Bill in detail. The membership list of the Bills Committee is at **Appendix I**.

7. Under the chairmanship of Hon Margaret NG, the Bills Committee has held three meetings with the Administration. It has also considered the views of the local arbitration community and the legal professional bodies.

Deliberations of the Bills Committee

Commencement date of the Bill

8. Members note that under the Memorandum of Understanding on the Arrangement (MOU) signed by the Secretary for Justice and the Vice-President of the Supreme People's Court on 21 June 1999, 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. However, 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. Having regard to the arrangement set out in the MOU, members ask the Administration to explain the procedure to give effect to clause 2(1).

9. The Administration has explained that it will inform the Mainland authorities in advance of the date of resumption of the Second Reading debate on the Bill and give an indication of the commencement date of the Bill. 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.

10. In response to members' request for information on the existing practice for appointment of commencement date of agreements between Hong Kong and another jurisdiction, the Administration has advised that such an agreement 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. The Bill follows the existing practice.

Application of the Bill

11. Members note that the Arbitration Ordinance is one of the 17 Ordinances which the Government has committed to review in terms of their applicability to State organs in Hong Kong. Section 47 of the Ordinance provides that the Ordinance (other than Parts III and IV) binds the Government, but is silent on its applicability to the State organs in Hong Kong. Under clause 9 of the Bill, this section is repealed and substituted by a new section : "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."

12. The Administration has clarified that the intention of clause 9 is 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. The phrase "any other class of persons" in the proposed section is 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.

13. Some members point out that under the principle of presumption of exclusion in section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), the "State" including the HKSAR Government is not bound by statute save by express provisions. As clause 9 does not expressly provide that State organs in Hong Kong and the Government are bound, they are presumed not to be bound by the Bill by operation of section 66 of Cap. 1. They have doubts that the present formulation in the Bill could reflect the policy intent that State organs in Hong Kong and the HKSAR Government are bound by the Ordinance, and have requested the Administration to reconsider the drafting of clause 9.

14. The Administration, while confirming that this is the policy intent, has explained that "apply" is the more appropriate expression in the present context. The Arbitration Ordinance should be amended so that it applies to all persons and organs, including the HKSAR Government and the offices set up by the Central People's Government in Hong Kong. The Ordinance would apply to any individual or organ as and when the party entered into or in any way became involved in an arbitration agreement that is subject to Hong Kong Law. It maintains its view that clause 9 of the Bill would have achieved that policy intention. However, the Administration agrees that there may be better ways to do so and would like to explore this further. In the light of members' views on clause 9, and having regard to the expectation of members of the arbitration community that the Bill should be enacted as soon as possible, the Administration has made a

proposal for members' consideration. As an interim arrangement, the Administration will move a CSA to replace clause 9 with a formulation that would retain the existing scope of application i.e. it applies to the HKSAR Government. It will continue to work upon an appropriate formula to extend the application of the Ordinance as indicated above. On timing, the Administration has advised that while it will try its best to implement that formula in a Bill to be introduced in this session, it cannot guarantee to do so. The Bills Committee agrees to accept the proposed arrangement.

Enforcement of decisions of arbitral tribunal - section 2GG of the Ordinance

15. In a submission made by practitioners to the Bills Committee, they have pointed out that prior to section 2GG coming into force in June 1997, its predecessor section 2H allowed summary enforcement (i.e. by originating summons) of any award made either in or outside Hong Kong in contrast to the original common law method of enforcement by action. It was generally thought that section 2GG would have the same effect. However, Judge Findlay J. in the *Ng Fong Hong Limited v. ABC* (1998) 1 HKC 213 held that section 2GG applied only to awards made in Hong Kong. Members support the proposal of practitioners that section 2GG should be amended to make clear that it is applicable to arbitration made both in or outside Hong Kong.

16. The Administration has advised that the effect of the proposed amendment would be that arbitral awards made in Taiwan may be summarily enforced in Hong Kong. The Court of Final Appeal (CFA) is scheduled to hear in mid-December 1999 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. The Administration considers it desirable to defer any amendment to section 2GG until it has reviewed the CFA's judgment and proposes to take it outside the context of the present exercise.

17. Noting that the Administration is reviewing the Arbitration Ordinance and that it would be best for the Bill to be passed as early as possible to give effect to the Arrangement, the Bills Committee agrees that the issue relating to section 2GG be followed up by the Panel on Administration of Justice and Legal Services after the Administration has a chance to study the CFA's judgment.

Enforcement of arbitral awards between Hong Kong and Macau

18. Under clause 3 of the Bill, the term "the Mainland" is defined to mean any part of China other than Hong Kong, Macau and Taiwan. Members have sought clarification as to how arbitral awards between Hong Kong and Macau would be mutually enforced following resumption of sovereignty of Macau by China on 20 December 1999.

19. The Administration has advised that 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. Issues regarding treatment of Macau under HKSAR Ordinances in general, and on the establishment of mutual legal assistance with Macau in particular, will be followed up after the reunification of Macau. For the time being, the existing arrangement for the treatment of Macanese awards will prevail.

20. The Bills Committee agrees that the relevant issues should be followed up by the Panel on Security and the Panel on Administration of Justice and Legal Services, as appropriate, in due course.

List of Mainland arbitral authorities

21. Members note that under the Arrangement, awards made on the Mainland in accordance with the Arbitration Law of the PRC by Mainland arbitral authorities recognised by the State Council of the PRC will be enforceable in HKSAR. The list of recognised Mainland arbitral authorities will be provided from time to time to the Government by the Legislative Affairs Office of the State Council through the Hong Kong and Macau Affairs Office.

22. Members share the view of practitioners that the list of recognized Mainland arbitral authorities should be officially published in Hong Kong. The Administration has agreed to publish the list and any subsequent updated lists in the form of a General Notice in the Gazette. It will amend clause 5 by adding a new section 40EA to provide for this arrangement.

Evidence for enforcement of a Mainland award

23. Proposed section 40D under clause 5 provides for the evidence that needs to be provided before seeking to enforce a Mainland award. Members ask why "notarisation and authentication materials" as specified in Article 4(3) of the Arrangement are not required to be submitted under proposed section 40D.

24. The Administration has clarified that Article 4 of the Arrangement sets out the contents of an application for enforcement. 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 relates 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. 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. 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. The Administration has also pointed out that unlike the Civil Procedure Law of the PRC, HKSAR 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.

25. On the implementation of section 43(a) of the Arbitration Ordinance on which the proposed section 40D is modelled, the Administration has explained that Hong Kong courts have all along accepted different practices for the purpose of a "duly authenticated original award", namely, production by the plaintiff of what purported to be the original award during the course of hearing; exhibition of the original award to an affidavit depositing its authenticity and accuracy; and certification of the original award by either the solicitor handling the application or a notary public of the place of award. The operation of the proposed section 40D will follow the above practices which should be familiar to practitioners.

Refusal of enforcement

26. Under proposed section 40E(2)(c) of clause 5, enforcement of a Mainland award may be refused if the person against whom it is invoked proves that he was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case. Members share the view of practitioners that the words "or of the arbitration proceedings" should be added after "the appointment of the arbitrator" to achieve consistency between the MOU and the existing section 44(2)(c) of the Arbitration Ordinance which deals with enforcement under the New York Convention.

27. While the Administration is 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 part of the arbitration proceedings, it has nevertheless agreed to introduce an amendment to address members' concern in this respect.

Committee Stage amendments (CSAs)

28. A full set of CSAs to be moved by the Administration is at **Appendix II**.

Recommendation

29. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed at the Council meeting on 5 January 2000.

Advice sought

30. Members are invited to note the recommendation of the Bills Committee in paragraph 29 above.

Legislative Council Secretariat
17 December 1999

Bills Committee on Arbitration (Amendment) Bill 1999

Membership List

Hon Margaret NG (Chairman)

Hon HO Sai-chu, SBS, JP

Hon Albert HO Chun-yan

Hon Eric LI Ka-cheung, JP

Hon NG Leung-sing

Hon Ronald ARCULLI, JP

Total : 6 Members

Legislative Council Secretariat

9 November 1999

Appendix II

ARBITRATION (AMENDMENT) BILL 1999

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

Clause

Amendment Proposed

5 (a) In the proposed section 40E(2)(c), by adding "or of the arbitration proceedings" after "arbitrator".

(b) By adding -

**"40EA. Publication of list of
recognized Mainland
arbitral authorities**

(1) The Secretary for Justice shall from time to time publish in the Gazette a list of the recognized Mainland arbitral authorities.

(2) A list published under subsection (1) is not subsidiary legislation."

9

By deleting the clause and substituting -

"9. Government to be bound

Section 47 is amended by repealing
"Parts III and" and substituting "Part".