Extract from minutes of meeting on
Panel on Administration of Justice and Legal Services on 27 June 2005

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IV. Reform of the law of arbitration

(LC Paper No. CB(2)1792/04-05(01) – Paper provided by the Administration on the Report of the Committee on Hong Kong Arbitration Law of The Hong Kong Institute of Arbitrators

LC Paper No. CB(2)2049/04-05(01) – Submission from the Hong Kong Construction Association Ltd. on the recommendations in the Report of the Hong Kong Institute of Arbitrators

LC Paper No. CB(2)2049/04-05(02) – Letter dated 21 June 2005 from the Law Society of Hong Kong on reform of the law of arbitration)

8. Deputy Solicitor General (DSG) briefed members on the Administration's paper on the Report issued by the Committee on Hong Kong Arbitration Law of The Hong Kong Institute of Arbitrators (HKIArb) in April 2003, the views of professional bodies on the Report and the Department of Justice (DOJ)'s proposal to take forward the recommendations.

9. In the main, the Report recommended that the Arbitration Ordinance (Cap. 341) should be redrawn to make it more user-friendly, in view of criticisms that the Ordinance was too complex and difficult to understand. At present, the Ordinance provided for two regimes for the conduct of arbitrations in Hong Kong, depending on whether the arbitration agreement was international or not. The regime for domestic arbitrations was largely based on UK arbitration legislation, while the regime for international arbitrations was based on the Model Law of the United Nations Commission on International Trade Law (the Model Law). In comparison with the law for domestic arbitration, the Model Law limited opportunities for judicial intervention and supervision, while granting more autonomy to the parties and the arbitral tribunal. The Report proposed to apply the Model Law equally to both domestic and international arbitrations in Hong Kong. This would result in a unitary regime whereby the distinction between the two types of arbitrations in the Ordinance would be abolished.

10. DSG informed members that having considered the opinion of concerned bodies, DOJ shared the view that the Arbitration Ordinance should be simplified. DOJ believed that the adoption of the HKIArb Committee's proposals, which had been modified after taking into account the views of concerned parties, including the Hong Kong Construction Association (HKCA) which represented probably the largest user of domestic arbitrations in Hong Kong, could meet many of the objections to a

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unitary regime for arbitrations. DOJ proposed to set up a working group consisting of representatives of the profession to assist it in preparing drafting instructions and draft legislation to implement those proposals. DOJ also proposed to issue the draft legislation as a consultative document before deciding on its ultimate form. It would further consult the Panel on progress in due course.

Views of HKCA

11. Mr Dean LEWIS said that the HKCA was fully in agreement that the Arbitration Ordinance was in need of simplification. Regarding the adoption of a unitary regime for arbitrations, the HKCA's position was that it preferred the retention of a domestic regime for the construction industry, because nearly all arbitrations in the construction industry were domestic arbitrations. The domestic regime had carried with it certain fundamental rights and protections of domestic users of arbitrations, including the right to appeal to the court and other opportunities of judicial supervision and assistance. The HKCA was concerned that the adoption of a unitary regime would remove these protections. Mr LEWIS further said that in the course of consultation, HKCA's concerns had been raised and considered by the HKIArb's Committee. The Report of the Committee had tried to address these concerns by allowing, in construction cases, an easier way for users of standard form contracts to opt in to certain provisions of the current domestic regime which provided for the protections. The HKCA considered the proposal satisfactory, and was prepared to accept it subject to the final drafting of the legislation.

12. Members noted the written submission from the HKCA to the Panel. In the submission, HKCA explained that subsequent to the publication of the Report, it had further proposed the inclusion of a deeming provision in the draft legislation to the effect that where a principal contract opts-in to the provisions in the domestic regime, then all sub-contracts and associated contracts would be deemed to have also done so.

Views of the Chartered Institute of Arbitrators (East Asia Branch)

13. Mr Glenn HALEY said that the Chartered Institute of Arbitrators (East Asia Branch) supported redrawing and simplifying the Arbitration Ordinance. It also supported the adoption of a unitary regime for arbitrations in Hong Kong, subject to detailed consideration of the concerns stated in the HKCA's submission.

Views of the Bar Association

14. Mr Russell COLEMAN said that the Bar Association had been fully involved in the preparation of the Report of the HKIArb's Committee as it had two members sitting on the Committee. He said that the Bar Association supported the recommendations in the Report and the adoption of a unitary regime for arbitrations in Hong Kong.

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Views of the Law Society

15. The Chairman referred members to the letter dated 21 June 2005 from the Law Society to the Panel. She said that the Law Society had stated that it was in broad agreement with the need for a new Arbitration Ordinance and for the approach set out in the Administration's paper. The Law Society had also stated that it would like to be represented on the working group to be set up to assist the Administration in the drafting of the legislation.

Declaration of interest

16. Ms Emily LAU declared that the Frontier had received a donation of $250,000 from the HKCA in 2004 to undertake a research project on long-term housing strategy. The Frontier was among some of the political groups which received the funding from HKCA. Mr Albert HO also declared that the Democratic Party had received a donation from HKCA for research.

Issues raised

17. Mr Martin LEE enquired about overseas jurisdictions which had adopted a model similar to the present proposed unitary regime. Senior Government Counsel replied that DOJ had examined the position in about 60 jurisdictions. It was found that about 20 jurisdictions provided for separate regimes for domestic and international arbitrations, while about 30 jurisdictions provided for a unitary arbitration regime. He added that different jurisdictions approached the subject differently in the light of their particular circumstances. Mr Robin PEARD pointed out that Annex 6 to the Administration's paper set out the jurisdictions with a unitary arbitration regime, covering both Model Law and non-Model Law jurisdictions.

18. Ms Emily LAU said that despite support from respondents for redrawing the Arbitration Ordinance to provide for a unitary regime for both domestic and international arbitrations, reservations about the proposal had been raised by interested parties, including the HKCA. She considered that the concerns should be fully addressed to ensure that the protections accorded to users of arbitration under the current system would not be diminished.

19. Mr Dean LEWIS said that the position of the HKCA was that it would prefer to retain the current domestic arbitration regime. However, as it was the wish of the HKCA not to hold back the development of arbitration, particularly international arbitration, in Hong Kong, HKCA was prepared to accept the proposed adoption of a unitary regime, provided that there would be a simple method of opting in to the provisions under the current domestic regime with the associated rights and protections.

20. Mr Robin PEARD, Chairman of the HKIArb's Committee, responded that there was a broad consensus among all parties that the Arbitration Ordinance should be simplified as far as possible for arbitration users, taking into account, among others,

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the increasing number of arbitration cases conducted in Hong Kong and arbitrators from other places to conduct the arbitrations, including a large number of arbitrators from the Mainland of China. Referring to the concerns of the HKCA set out in its submission to the Panel, Mr PEARD said that the HKIArb's Committee was of the view that they could be addressed by the modified proposals, under which users of standard form contracts in the construction industry who wished to opt-in to the provisions of the former domestic regime of arbitration would automatically be permitted to do so. Such provisions included appeal on point of law, determination of a preliminary point of law by the court, consolidation provisions and one arbitrator in default of agreement etc. Mr PEARD added that the revised proposals could also address many of the issues set out in paragraph 19 of the Administration's paper on the counter arguments for a unitary regime. He said that these matters would be further pursued in detail in the working group to be set up by the Administration.

21. DSG referred members to paragraphs 25 to 28 of the Administration's paper, which explained the HKCA's concerns and how they might be addressed.

22. Mr Samuel WONG said that as the terms in the standard form contracts were not individually negotiated by the parties concerned, there was a case for allowing a greater scope of court intervention and supervision under appropriate circumstances in order to provide better protection to users of the standard form contracts. In this regard, he supported that assistance of the court should be provided, where necessary, in cases where the arbitration was conducted between two domestic entities, and certain provisions under the existing domestic arbitration regime could be automatically opted in by the parties.

23. Mr Martin LEE asked whether, notwithstanding that the Administration was in general support of the proposals of the HKIArb's Committee, there were justified arguments against adopting a unitary regime on the basis of the Model Law. DSG responded that the arguments against a unitary regime had been listed out in paragraphs 19(a) to (v) of the Administration's paper. DOJ's preliminary view was that the arguments in paragraphs 19(a) to (c) were of particular relevance. They were –

> "(a) Domestic parties are less likely to be on an equal footing and the weaker parties may require special protection from the courts.
>
> (b) Parties to domestic arbitrations are not as likely as parties to international arbitrations to be able to select other jurisdictions as the place of arbitration. If a unified system were adopted they would, in practice, be subject to it by default.
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> (c) The SAR Government may wish to exercise tighter control over domestic arbitrations which involve its own residents, than it would wish to exercise in relation to international arbitrations which may only take place in Hong Kong because of geographical convenience."

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24. Referring to the argument stated in paragraph 19(a) of the Administration's paper, Mr Philip YANG said that UK retained a unitary system of arbitration law governing domestic and international arbitrations under the Arbitration Act 1996. The Act contained specific provisions which provided protection of domestic users of arbitration. He considered that protection of domestic parties to arbitration was not a sufficient ground for rejecting a unitary regime, and the issue could be dealt with in the perspective of appropriate law drafting to decide which particular types of users of arbitration would require protection and how such protection could be offered.

25. Mr Philip YANG further informed members that the regime for domestic arbitrations in Hong Kong was still largely based on the UK Arbitration Act 1950, which was already outdated. Hence, the arbitration legislation in Hong Kong was urgently in need of modernisation.

26. Mr Russell COLEMAN referred to paragraph 19(p) of the Administration's paper, which stated that an argument against adopting a unitary regime was that individual arbitrators in domestic arbitrations might not be familiar with the law, and hence the right to apply for permission to appeal against a domestic arbitration award on a question of law should be retained. Mr COLEMAN expressed the view that the argument only pinpointed the need for competent arbitrators to handle arbitrations and deal with questions of law, rather than be used as a ground for opposing the adoption of a unitary arbitration regime. Ms Sylvia SIU supplemented that there were no formal qualifications required of arbitrators. To redraft and simplify the Arbitration Ordinance, which was extremely difficult to comprehend even for the arbitrators, would facilitate understanding of the law and the working of the arbitration system.

27. Mr Albert HO asked whether it was anticipated that the adoption of a unitary regime for arbitration would create greater demand for arbitration services in Hong Kong, and whether the supply of competent arbitrators was sufficient to cope with the demand. Ms Sylvia SIU responded in the positive. She said that the HKIArb and other arbitration bodies had been making every effort to promote arbitration in Hong Kong and Hong Kong as an arbitration centre in the region, as well as providing courses and training for arbitrators in Hong Kong. She added that jurisdictions elsewhere had reckoned the high standard of arbitration services provided in Hong Kong and more and more of them had turned to Hong Kong for settling disputes through arbitrations. Mr Samuel WONG opined that the Government should engage more local arbitrators to conduct arbitration cases so as to provide more opportunities for local arbitrators to build up their experience and expertise.

28. The Chairman noted that there was a difference between domestic and international arbitrations concerning the appointment of arbitrators in default of an agreement. She suggested that the Administration's working party should consult arbitrators in detail in relation to the arrangement.

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29. Mr Martin LEE and Ms Miriam LAU expressed the view that while the arbitration bodies and the practitioners were generally in support of a unitary regime, it was important that the consumers, i.e. the parties seeking arbitrations, could be

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benefited. Ms Miriam LAU called upon the Administration to include a broad representation of stakeholders in its working group so that a wide body of opinions could be solicited and considered. Mr Martin LEE asked whether the views of the Consumer Council had been sought. DSG noted the views. He said that the Consumer Council had not been consulted at this stage but it could be asked to provide comments in future discussions.

30. Mr Robin PEARD drew members' attention to footnote 14 of the Administration's paper, which stated that section 15 of the Control of Exemption Clauses Ordinance (Cap. 71) provided protection to consumers who were parties to a domestic arbitration agreement. The concerns about applying the Model Law to domestic arbitration related only to business-to-business contracts.

31. Ms Audrey EU referred to the recent arbitration of the Eastern Harbour Crossing toll increase, which had given rise to tremendous public outcry. She pointed out that the Administration had explained that it was very difficult to appeal the arbitration decision, which allowed the toll increase. The public, however, had no knowledge about the arbitration proceedings which had been held in private. Ms EU sought the deputations' views on whether, in domestic arbitration cases involving substantial public interest and the Government as a party to the arbitration, and where there was no avenue of appeal of the decision, the arbitration proceedings should be open to the public.

32. Mr Philip YANG responded that an important feature of arbitration was that confidentiality should be respected. Mr Robin PEARD considered that it was reasonable to allow arbitration proceedings to be made public under justifiable circumstances. However, it might require legislative measures for its implementation. Mr Samuel WONG said that arbitration was conducted by consent of the parties concerned. Hence, in his view, subject to agreement by the parties at the time of entering into the arbitration agreement, the arbitration proceedings could be made public.

Way forward

33. The Chairman concluded that the Panel supported the Administration to proceed to the next stage of the work, i.e. formation of a working group to draft legislation and to issue the draft legislation as a consultative document. She requested the Administration to revert to the Panel on progress and development in due course.

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