(1) Drafting of clause 75(1) of the Bill in respect of the taxation of costs of arbitral proceedings by the court

(2) Considerations for modelling clause 77 of the Bill on the UK Arbitration Act 1996

(3) Whether power of the court to award interest is similar to that of an arbitral tribunal under clause 79 of the Bill

(4) The reciprocal enforcement of arbitral awards between Hong Kong and the Mainland

(5) Review of the subsidiary legislation made under the existing Arbitration Ordinance

and

(6) Case law in the UK concerning application for challenging arbitral award on ground of serious irregularities as proposed in section 4(2) of Schedule 2 to the Bill

I. Introduction

Following the discussion and requests for information by Members at the meetings of the Bills Committee of the Legislative Council held on 10 and 23 February 2010, this paper addresses the following matters:

(a) refining the drafting of clause 75(1) of the Bill in respect of the taxation of costs of arbitral proceedings by the court;

(b) the considerations for modelling clause 77 of the Bill on the UK Arbitration Act 1996;

(c) whether a court has similar power as that of an arbitral tribunal under clause 79 of the Bill to award compound interest in respect of civil cases before it;

(d) update of the reciprocal enforcement of arbitral awards arrangement between Hong Kong and the Mainland, including

the number of applications made, their enforceability as well as the reasons for not being enforced;

(e) review of the provisions in the subsidiary legislation made under the existing Arbitration Ordinance which would not continue to be in force upon the commencement of the Bill as a result of clause 109 of the Bill; and

(f) information about relevant court cases in the United Kingdom, if any, pertaining to application for challenging arbitral award on the ground of serious irregularities proposed in section 4(2) of Schedule 2 to the Bill.

II. Drafting of clause 75(1) of the Bill in respect of the taxation of costs of arbitral proceedings by the court

2. At the meeting of the Bills Committee held on 10 February 2010, Members requested the Administration to consider refining the drafting of clause 75(1) of the Bill, as the current draft may not cover the situation where an arbitral tribunal had failed to direct taxation of costs by the court where the parties have so agreed.

3. Clause 75(1) of the Bill is as follows:

> *"Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are taxable by the court, the arbitral tribunal must direct in an award that the costs (other than the fees and expenses of the arbitral tribunal) -*
>
> *(a) are taxable by the court; and ..."*

4. Members' primary concern is that the clause might not be able to deal with the situation where the arbitral tribunal has inadvertently omitted to make an order for taxation by the court.

5. Having considered Members' comments, the Administration agrees that clause 75(1) may be refined to provide for any omission by the arbitral tribunal to make an order for taxation of costs by the court. We propose that clause 75(1) be amended as follows:

> *"(1) Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are ~~taxable~~ to*

be taxed by the court, then unless the arbitral tribunal ~~must direct~~ otherwise directs in an award, the award is deemed to have included the tribunal's directions that the costs (other than the fees and expenses of the ~~arbitral~~ tribunal) are –

> *(a) ~~are taxable~~ to be taxed by the court; and*
>
> *(b) ~~are~~ to be paid on any basis on which the court can award costs in civil proceedings before the court.".*

III. Considerations for modelling clause 77 of the Bill on the UK Arbitration Act 1996

6. Clause 77(2) provides for the application by a party to the Court of First Instance for determination of an arbitral tribunal's fees and expenses where the arbitral tribunal refuses to deliver an award to the parties except upon full payment of the fees and expense of the tribunal. Members enquired whether clause 77 would be effective in ensuring that arbitration fees and expenses would be duly settled where, even when the arbitral tribunal has invoked its power to refuse to deliver award under clause 77(1), no party (particularly, the losing party responsible for fees and expenses might not want to apply and make "payment in" on fees and expenses) applies for court intervention under clause 77(2).

7. The existing law of Hong Kong provides for the assessment of fees demanded by arbitrator and umpire by the Court of First Instance in a case when a party disputes the fees of the arbitral tribunal. Section 21(1) of the Arbitration Ordinance (Cap. 341) provides as follows:

> *"If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant."*

8. The wording of this section is the same as section 19 of the UK Arbitration Act 1950 which has been replaced in substance by section 56 of the UK Arbitration Act 1996.

9. Clause 77 is modelled on section 56 of the UK Arbitration Act 1996 which sought to provide for a further and alternative means of dispute resolution over the arbitral tribunal's fees and expenses. This is explained as follows:

> *"Fees and expenses demanded by a person exercising an arbitrator's lien must be challenged by any available arbitral process for appeal or review: subsection 56(4)* [equivalent to clause 77(4)(a) of the Bill]. *If, but only if, there is no such process available, the party making the challenge may apply to the court under subsection 56(2) which contains provision for the sum demanded, or a lesser sum, to be paid into court, to be paid out to the arbitrator or the applicant in accordance with the decision of the court as to the fees and expenses properly payable.* ***This derives from the Arbitration Act 1950 section 19, although the power to order a lesser sum to be paid into court than the sum demanded is new, and is added to give the parties protection against exorbitant demands."***[1] (Emphasis added)

10. In other words, where an arbitral tribunal refuses to deliver an award to the parties unless an extortionate amount of its fees and expenses are paid under clause 77(1), clause 77(2) gives the party a chance to seek assistance from the court.

11. In this context, the Administration considered that the situation where no party would apply under clause 77(2) to take the matter further is rare, but even if so, the parties to the arbitral proceedings would be jointly and severally liable to pay the arbitration fees and expenses under clause 78(1) of the Bill.

IV. Whether power of the court to award interest is similar to that of an arbitral tribunal under clause 79 of the Bill

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[1] Lord Mustill and Steward C Boyd, *Commercial Arbitration*, (2nd ed., 2001 Companion), at p. 339.

12. Under clause 79 of the Bill, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest on money awarded or on money claimed but paid before the award is made or on costs awarded or ordered by the tribunal. This clause preserves the existing statutory power under sections 2GH and 2GI of the Arbitration Ordinance (Cap. 341) for the arbitral tribunal to award compound interest. It also implements the recommendation of the Committee on Hong Kong Arbitration Law as follows:

> *"In Hong Kong, the matter of interest is dealt with by section 2GH and section 2GI of the Arbitration Ordinance (Cap. 341). These sections are substantially similar to those in the English Arbitration Act 1996. It also confers statutory power on the arbitral tribunal to award compound interest.*
>
> *[...] We are of the view that this matter had been sufficiently dealt with in the present version of section 2GH and section 2GI of the Arbitration Ordinance (Cap. 341). We* ***recommend*** *that section 2GH and section 2GI are to be retained without amendment."*[2]
> (original emphasis)

13. As for the power of the court, under section 48 of the High Court Ordinance (Cap. 4), the Court of First Instance may award simple interest on any sum for which judgment is given for the recovery of a debt or damages in proceedings before it or on any sum of the debt or damages paid before judgment[3]. Other than such power in statute, the courts have powers to award compound interest at common law and in equity.

14. Under the common law, the court has a common law jurisdiction to award interest, simple or compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort, subject to proof of loss, remoteness of damage and obligations to mitigate the loss.[4] The court also has jurisdiction to award compound interest where a claimant is seeking restitution of money paid under mistake (in the exercise of the court's common law restitutionary

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[2] Hong Kong Institute of Arbitrators, *Report of Committee on Hong Kong Arbitration Law*, 30th April 2003, paragraphs 42.6 – 42.7

[3] Similar power of the District Court can be found in Section 49 of the District Court Ordinance (Cap 336). Section 13 of the High Court Ordinance (Cap 4) and Section 17 of the Hong Kong Court of Final Appeal Ordinance (Cap 484) provides that the Court of Appeal and the Court of Final Appeal may exercise the same powers of the court from which the appeal lies.

[4] *Sempra Metals Ltd v Revenue and Customs Commissioners* [2008] 1 A.C. 561

jurisdiction or discretionary equitable jurisdiction) when assessing the amount of money required to achieve full restitution and reverse unjust enrichment to the defendant. In other words, it is an award of compound interest *as* damages/restitutionary relief instead of an award of compound interest *on* damages/restitutionary relief.[5]

15. In equity, compound as well as simple interest is available in cases that lie within equity's exclusive jurisdiction. The court has jurisdiction to award compound interest, when it thought that justice so demanded, that is to say, in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary relationship.[6]

V. <u>The reciprocal enforcement of arbitral awards between Hong Kong and the Mainland</u>

16. At the meeting of the Bills Committee held on 23 February 2010, Members asked for an update of the reciprocal enforcement of arbitral awards between Hong Kong and the Mainland including the number of applications made on both places, their enforceability as well as the reasons for not being enforced.

17. The "Arrangement Concerning Mutual Enforcement of Arbitral Awards" ("the Arrangement") between Hong Kong and the Mainland was concluded in June 1999 and it came into effect on 1 February 2000. With a view to improving the implementation of the Arrangement, clarification has been sought from the Supreme People's Court ("SPC") regarding the enforceability of awards made in "*ad hoc*" arbitral proceedings (i.e. proceedings not managed or overseen by an arbitration institution like the Hong Kong International Arbitration Centre) in the HKSAR. In October 2007, the SPC has issued a reply confirming that awards made in "*ad hoc*" arbitral proceedings in the HKSAR are enforceable in the Mainland.

18. Recently in December 2009, the SPC has issued a notification confirming that arbitral awards made in the HKSAR, whether by the International Court of Arbitration of the International Chamber of Commerce or other foreign arbitration institutions, are enforceable in the Mainland in accordance with the provisions of the Arrangement.

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[5] *Sempra Metals Ltd v Revenue and Customs Commissioners* [2008] 1 A.C. 561 at para 114.

[6] *President of India v La Pintada Compania Navigacion SA (The La Pintada)* [1985] AC 104 at p.116, cited in *China Everbright-IHD Pacific Ltd v Ch'ng Poh* [2003] 2 HKLRD 594 at para 59.

19. According to the information provided by the Judiciary at Annex 1, during the period from 2000 to 2009, the High Court of Hong Kong has processed 84 applications to enforce arbitral awards made in the Mainland ("Mainland arbitral awards") in Hong Kong. All applications were granted. There were 18 applications to set aside the orders given for the enforcement of the awards. The court allowed 5 applications to set aside the original orders. We are given to understand that the parties in a majority of such cases set aside the original orders by consent.

20. Upon earlier requests, the SPC has provided the statistics regarding applications for the recognition and enforcement of arbitral awards made in the HKSAR ("Hong Kong arbitral awards") in the Mainland during the period from 2000 to April 2008. The SPC has explained that due to the absence of a uniform system to compile information and statistics, the figures set out in Annex 2 are not complete.

21. From the information received, during the period from 2000 to April 2008, 33 applications have been processed by the People's Courts in different provinces and municipalities in the Mainland for the recognition and enforcement of Hong Kong arbitral awards. 24 applications were allowed and 9 cases were refused.

VI. Review of the subsidiary legislation made under the existing Arbitration Ordinance

22. Clause 109 of the Bill provides that any subsidiary legislation made under the existing Arbitration Ordinance (Cap. 341) and in force at the commencement of the new Ordinance, so far as it is not inconsistent with the new Ordinance, continues in force and has the like effect for all purposes as if made under the new Ordinance.

23. A review of the provisions in the subsidiary legislation shows that, subject to those consequential and related amendments made to the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B) which have already been set out in sections 35 to 39 of Schedule 4 to the Bill, there are no inconsistencies between the subsidiary legislation and the Bill.

VII. Case law in the UK concerning application for challenging arbitral award on the ground of serious irregularities as proposed in section 4(2) of Schedule 2 to the Bill

24. At the meeting on 23 February 2010, Members raised the concern of whether the element of "has caused or will cause substantial injustice to the applicant" in section 4(2) of Schedule 2 to the Bill was independent from or would follow automatically upon proof of any of the irregularities.

25. Serious irregularity is defined in section 4(2) of Schedule 2 as an irregularity of one or more of the kinds listed in paragraphs (a) to (i) of that section which the Court of First Instance considers has caused or will cause substantial injustice to the applicant. This section is based on section 68 of the UK Arbitration Act 1996.

26. There is serious irregularity if any of the grounds set out is met, AND provided that the applicant has suffered or will suffer substantial injustice from the irregularity. This is clearly explained in the following passage from the report of the UK's Departmental Advisory Committee on Arbitration Law:

> *"Here we consider that it is appropriate, indeed essential, that [these challenges on serious irregularity grounds] have to pass the test of causing 'substantial injustice' before the Court can act. The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process.* ***Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action.*** *The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate.* ***Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice.*** *In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the*

arbitration that justice calls out for it to be corrected.[7]"(Emphasis added)

27. There are numerous cases decided under this provision of the UK Arbitration Act 1996. The following are just some illustrations to the general principle stated above:

(a) In *Petroships Pte Ltd v. Petec Trading and Investment Corporation, the Petro Ranger*[8], Cresswell J held that even if there was a breach by tribunal of the principle of fairness under section 68(2)(a) (equivalent to section 4(2)(a) of Schedule 2 to the Bill) there can be court intervention only "*where it can be said that what has happened is so far removed from what can reasonably be expected of the arbitral process.*".

(b) An allegation that an award does not deal with all the issues that were put to it under section 68(2)(d) (equivalent to section 4(2)(d) of Schedule 2 to the Bill) will fail unless the claimant can show that an "issue" for these purposes is one which is of decisive effect on the outcome, and not an incidental or peripheral matter whose resolution is largely immaterial to the overall result or which falls away in the light of other holdings.[9]

(c) What is required to trigger section 68(2)(g) (equivalent to section 4(2)(g) of Schedule 2 to the Bill) is fraud on the part of the successful party in the arbitration. A negligent or innocent failure to produce evidence or the absence of unconscionable behaviour in the conduct of the arbitration will not suffice[10].

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[7] UK's Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, (February 1996), at para 280.

[8] [2001] 2 Lloyd's Rep 348.

[9] *Weldon Plant Ltd v. Commission for the New Towns* [2000] BLR 496 and *Checkpoint Ltd v. Strathclyde Pension Fund* [2003] 1 EGLR 1.

[10] *Profilati Italia Srl v. Paine Webber Inc* [2001] 1 Lloyd's Rep 715 and *Cuflet Chartering v. Carousel Shipping Ct Ltd, The Marie H* [2001] 1 Lloyd's Rep 707.

28. In the light of the above case law on the equivalent provision under the UK Arbitration Act 1996, the Court of First Instance would consider whether the alleged serious irregularity under section 4(2) of Schedule 2 to the Bill has caused or will cause substantial injustice to a party to arbitral proceedings before coming to the conclusion that whether relief should be granted when an application to challenge an arbitral award is made.

Department of Justice
May 2010

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Annex 1

Enforcement of Mainland Arbitral Awards in Hong Kong during the period of 2000 – 2009

Year	Name of Mainland Arbitral Authority	No. of Applications to Enforce Arbitral Awards		No. of Applications to Set Aside Order	
		Granted	Refused	Granted	Refused
2000	CIETAC[Note] (Beijing)	15	0	0	4
	CIETAC (Shanghai)	7	0	1	2
	CIETAC (Shenzhen)	6	0	0	1
	Changzhou Arbitration Commission	2	0	1	0
	Annual Total	**30**	**0**	**2**	**7**
2001	CIETAC (Beijing)	5	0	1	0
	CIETAC (Shanghai)	1	0	0	1
	CIETAC (Shenzhen)	3	0	1	0
	Chongqing Arbitration Commission	1	0	0	1
	Shantou Arbitration Committee	1	0	0	0
	Annual Total	**11**	**0**	**2**	**2**
2002	CIETAC (Beijing)	3	0	0	0
	CIETAC (Shenzhen)	1	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	Shanghai Arbitration Commission	1	0	0	0
	Nangtong Arbitration Committee	1	0	0	0
	Annual Total	**7**	**0**	**0**	**0**
2003	CIETAC (Beijing)	1	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	CIETAC (Shenzhen)	3	0	0	1
	Shenzhen Arbitration Commission	1	0	0	0
	Beijing Arbitration Committee	2	0	0	0
	Guangzhou Arbitration Commission	1	0	0	0
	Qingdao Arbitration Committee	1	0	0	0
	Annual Total	**10**	**0**	**0**	**1**
2004	CIETAC(Beijing)	1	0	0	0
	CIETAC (Shenzhen)	1	0	0	0
	China Maritime Arbitration Commission	1	0	0	1
	Annual Total	**3**	**0**	**0**	**1**

[Note] CIETAC : China International Economic and Trade Arbitration Commission
中國國際經濟貿易仲裁委員會

Year	Name of Mainland Arbitral Authority	No. of Applications to Enforce Arbitral Awards		No. of Applications to Set Aside Order	
		Granted	Refused	Granted	Refused
2005	CIETAC(Beijing)	2	0	0	0
	Xian Arbitration Committee	1	0	1	0
	Haikou Arbitration Commission	1	0	0	0
	Annual Total	**4**	**0**	**1**	**0**
2006	CIETAC(Beijing)	4	0	0	2
	CIETAC(Shenzhen)	2	0	0	0
	Annual Total	**6**	**0**	**0**	**2**
2007	Beijing Arbitration Commission	1	0	0	0
	CIETAC (Beijing)	1	0	0	0
	CIETAC (Shenzhen)	1	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	Annual Total	**4**	**0**	**0**	**0**
2008	Nil	0	0	0	0
	Annual Total	**0**	**0**	**0**	**0**
2009	Shanghai Arbitration Commission	1	0	0	0
	CIETAC (Beijing)	5	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	CIETAC (Shenzhen)	2	0	0	0
	Annual Total	**9**	**0**	**0**	**0**
Total : 2000 – 2009		**84**	**0**	**5**	**13**

Annex 2

Recognition and Enforcement of Hong Kong Arbitral Awards in the Mainland during the period of 2000 – April 2008
(incomplete statistics)

Year	Province	Applications	Award Not Recognized	Award Recognized	Cases Enforced
2000	Xinjiang	2	0	2	2
	Tianjin	1	0	0	0
	Annual Total	**3**	**0**	**2**	**2**
2001	Shanghai	1	0	1	1
	Tianjin	3	0	2	2
	Annual Total	**4**	**0**	**3**	**3**
2002	Zhejiang	2	1	1	1
	Shanghai	1	0	1	1
	Annual Total	**3**	**1**	**2**	**2**
2003	Shanghai	1	0	1	1
	Tianjin	1	0	2	2
	Fujian	1	1	0	0
	Annual Total	**3**	**1**	**3**	**3**
2004	Xinjiang	1	0	1	1
	Tianjin	0	0	1	1
	Fujian	1	1	0	0
	Annual Total	**2**	**1**	**2**	**2**
2005	Hunan	1	1	0	0

Year	Province	Applications	Award Not Recognized	Award Recognized	Cases Enforced
	Shangtong	1	0	1	1
	Tianjin	1	0	0	0
	Fujian	4	4	0	0
	Guangdong	1	0	0	0
	Annual Total	**8**	**5**	**1**	**1**
2006	Shanghai	1	0	1	1
	Tianjin	2	0	2	2
	Annual Total	**3**	**0**	**3**	**3**
2007	Hunan	1	1	0	0
	Shanghai	2	0	2	2
	Zhejiang	1	0	1	1
	Shandong	2	0	2	2
	Tianjin	0	0	1	1
	Guangdong	0	0	1	0
	Annual Total	**7**	**1**	**8**	**6**
2008 (up to April)	Guangdong	0	0	0	1
	Annual Total	**0**	**0**	**0**	**1**
Total: 2000 - April 2008		**33**	**9**	**24**	**23**