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13 July 2010

Miss Betty Ma
Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

via Miss Michelle Tsang, DSG(G)(Ag.)

Dear Betty,

Bills Committee on Arbitration Bill ("the Bill")
Issues Discussed at the Meeting Held on 1 June 2010

The Administration has set out the draft Committee Stage Amendments ("draft CSAs") to the Bill in LC Paper No. CB(2)1620/09-10(02). Following the discussion at the meeting of the Bills Committee of the Legislative Council held on 1 June 2010, the Administration has carefully considered the various issues arising from the draft CSAs. This letter sets out the Administration's views on these issues. It also deals with a few minor technical amendments to be added to the draft CSAs. A complete set of the revised draft CSAs, in both English and Chinese, that the Administration proposes to move in connection with the resumption of the Second Reading debate of the Bill is attached as **Annex A**.

Definitions in Clause 2(1) of the Bill

The Administration has proposed in the draft CSAs to revise the Chinese rendition of the definition of "respondent" in Clause 2(1) of the Bill, following that in the UNCITRAL Model Law, from "應訴人" to "被申請

人". Members questioned whether it is necessary to adopt this rendition and the necessity of retaining this definition together with that of "claimant" in Clause 2(1) of the Bill.

We have carefully considered comments from Members and re-examined the context of the Bill where the terms "claimant" and "respondent" appear. The terms "claimant" and "respondent" often appear in parallel in the Bill. For example, in Article 23 of the UNCITRAL Model Law, given effect to by Clause 51 of the Bill (statements of claim and defence), both claimant and respondent are referred to and may submit their statements of claim or defence respectively. Since both terms are used not only in the context of claims made in an arbitration but also in that of counter-claims, we are of the view that it is advisable to define both terms in Clause 2(1) of the Bill.

As regards the use of "被申請人" as the Chinese rendition of the definition of "respondent" in Clause 2(1) of the Bill, we acknowledge that this has not been so used in other local legislation. However, "被申請人" is the rendition adopted in the Chinese text of the UNCITRAL Model Law for "respondent". We have to follow this rendition in the definition of "respondent" because, insofar as the Bill is concerned, "respondent" only appears in the provisions of the UNCITRAL Model Law set out in the Bill and, accordingly, only the Chinese rendition of this term as adopted in the UNCITRAL Model Law (i.e. "被申請人") can be found in the Bill.

In view of the aforesaid, we would advise that no amendment to the draft CSAs in relation to Clause 2(1) of the Bill is necessary.

Clause 8(2) of the Bill

Members raised the question of whether it is necessary for the draft CSAs to add "(other than section 2(5))" after "section 2" in Clause 8(2) of the Bill.

Clause 8(2) of the Bill provides that a reference to the Ordinance in Clause 2 of the Bill (i.e. including Clause 2(5)) is to be construed as to include the UNCITRAL Model Law. However, Clause 2(5) of the Bill makes separate reference to: (a) the Chinese equivalent of an English expression used in any provision of the Ordinance; and (b) the Chinese equivalent of the same English expression used in any provision of the UNCITRAL Model Law. According to Clause 2(5), even if those

Chinese equivalents are different, they are to be treated as being identical in effect. Hence, for the purposes of Clause 2(5), the reference to the Ordinance does not include the reference to the UNCITRAL Model Law and these 2 references are to be construed separately. It is therefore clear that Clause 8(2) of the Bill is not intended to have effect on Clause 2(5) of the Bill. The suggested amendment to carve out Clause 2(5) from Clause 8(2) in the draft CSAs would facilitate the construction of the two provisions.

After careful consideration, the Administration has decided not to propose further change to the draft CSAs in relation to Clause 8(2) of the Bill.

Clause 53(3) and (4) of the Bill

Members have made suggestions on further refining the Chinese equivalent to the English expression "peremptory order" in the draft CSAs in relation to Clause 53(3) and (4) of the Bill. Taking into account the views expressed by Members that "敦促遵行令" may not convey the time limit set for compliance with the order or direction of the arbitral tribunal, the Administration suggests to render "peremptory order" as "最後敦促令", as an alternative to "敦促遵行令". It is believed that the words "最後" are a clearer indication of the temporal limit within which the order or direction of the arbitral tribunal has to be complied with.

Clause 60(5) of the Bill

Members have suggested ways to further improve the drafting of Clause 60(5) of the Bill and the draft CSAs in relation to this clause. Having considered the various suggestions and having regard to the useful discussion between the Administration and the Chairperson of the Bills Committee immediately after the meeting on 1 June 2010, the Administration proposes to adopt the following English and Chinese versions of Clause 60(5):

> "(5) An order made by the Court under this section may provide for the cessation of that order, in whole or in part, when the arbitral tribunal makes an order for the cessation."

"(5) 原訟法庭根據本條作出的命令，可規定該命令在仲裁庭作出使該命令完全或局部停止有效的命令時，按該仲裁庭命令停止有效。".

In our view, the above versions of Clause 60(5) have incorporated those suggestions made in the discussion, and they have reflected the policy intent behind the provision by defining clearly the roles of the Court and the arbitral tribunal in relation to the orders concerned.

The Administration also proposes to make the following technical amendments to the Bill and revise the draft CSAs accordingly:

Clause 13(3) of the Bill

After the submission of the draft CSAs to the Bills Committee, the Administration has received further representation from the Hong Kong International Arbitration Centre ("HKIAC") on Clause 13(3) of the Bill. Clause 13(3) provides that "The HKIAC may, with the approval of the Chief Justice, make rules to facilitate the performance of its functions under section 24 or 32(1).". HKIAC pointed out that Clause 13(3) of the Bill does not expressly include the power for HKIAC to make rules to govern its procedures in deciding the number of arbitrators under Clause 23(3) of the Bill. Clause 23(3) provides that: "Subject to section 1 of Schedule 2 (if applicable), if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by the HKIAC in the particular case.".

Having considered the views of HKIAC, we think that it is appropriate to amend Clause 13(3) of the Bill to provide expressly that HKIAC does have the power to make rules, with the approval of the Chief Justice, dealing with the decision on the number of arbitrators under Clause 23(3). This amendment is to be effected by adding "23(3)," after "section" in Clause 13(3).

Clause 24(1) of the Bill

Another minor technical amendment has to be made to the Chinese text of clause 24(1). The Administration suggests to delete "交托" and substitute "交託" so as to tally with an identical technical amendment

made to Article 11(5) of the Model Law in Schedule 1 to the Bill.

Rule 10(1) of Cap. 341 sub. leg. B

The Administration wishes to introduce a further minor amendment to rule 10(1) of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B) in order to rectify an existing anomaly that was only discovered recently.

Rule 10 of Cap. 341 sub. leg. B relates to a statutory power of the Hong Kong International Arbitration Centre ("HKIAC") under section 34C(5) of the current Arbitration Ordinance (Cap. 341) to decide either 1 or 3 arbitrators are to be appointed where the parties to an arbitration agreement fail to agree on the number of arbitrators. Rule 10(1) of Cap. 341 sub. leg. B provides that, before HKIAC decides on the number of arbitrators, it must allow a party served with a copy of the document under rule 6(2) of Cap. 341 sub. leg. to give reasons if the party wishes to contend. However, the reference to rule 6(2) is anomalous as that rule deals with the appointment of arbitrator instead of the number of arbitrators. The appropriate reference should be rule 8(2) of Cap. 341 sub. leg. B which deals with the number of arbitrators. It is noted that both rules 8 and 10 are under Part IV of Cap. 341 sub. leg. B on "Number of Arbitrators" while rule 6 is under Part III of Cap. 341 sub. leg. B on "Procedure for Appointment of an Arbitrator or Umpire".

Having consulted HKIAC, we suggest to substitute "rule 8(2)" for "rule 6(2)" in rule 10(1) of Cap. 341 sub. leg. B. The draft CSAs will be revised to give effect to this amendment by inserting a new section 38A into Schedule 4 to the Bill.

Reference to rules 6 & 8 in the Schedule to Cap. 341 sub. leg. B

The Administration has noticed recently that, in the square brackets in the top right hand corner of the English text of the Schedule to Cap. 341 sub. leg. B, "[ss. 6 & 8]" is cited. The correct citation should, however, be "rules 6 & 8". Therefore, we now propose to revise the draft CSAs to include this technical amendment by adding a new subsection (1A) before section 39(1) of Schedule 4 to the Bill. This new subsection (1A) will provide for the repeal of "[ss. 6 & 8]" and its substitution by "[rules 6 & 8]".

The suggested way forward

We would be grateful if you could let us know whether the revised draft CSAs attached as **Annex A** hereto are acceptable to Members of the Bills Committee. Subject to the views of Members, our intention is to resume the Second Reading debate of the Bill in early November 2010.

Yours sincerely,

(Lee Tin Yan)
Senior Government Counsel
Legal Policy Division

Encl.

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Annex A

ARBITRATION BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

Clause	Amendment Proposed
2(1)	(a) In the definition of "interim measure", by deleting "保護" and substituting "保全". (b) In the definition of "respondent", by deleting "應訴" and substituting "被申請".
8(2)	By adding "(other than section 2(5))" after "section 2".
13(3)	By adding "23(3)," after "section".
18(2)	By deleting paragraph (a) and substituting – "(a) if the publication, disclosure or communication is made – (i) to protect or pursue a legal right or interest of the party; or (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial

authority in or outside Hong Kong;".

20(3) By deleting "Subsections (1) and (2) have" and substituting "Subsection (1) has".

24(1) In the Chinese text, by deleting "交托" and substituting "交託".

32(1)(a) By deleting "written agreement" and substituting "arbitration agreement".

32(3) By deleting "written agreement" where it twice appears and substituting "arbitration agreement".

53(3) In the Chinese text, by deleting "最終命令" and substituting "最後敦促令".

53(4) In the Chinese text, by deleting "最終命令" where it twice appears and substituting "最後敦促令".

54(2) By deleting paragraph (a) and substituting –

"(a) the arbitral tribunal may appoint assessors to assist it on technical matters, and may allow any of those assessors to attend the proceedings; and".

54(2)(b) By deleting "experts, legal advisers or".

55 (a) By deleting subclause (3).

(b) By adding –

"(6) Section 81 (Warrant or order to bring up prisoner to give evidence) of the Evidence Ordinance (Cap. 8) applies as if a reference to any proceedings, either criminal or civil, in that section were any arbitral proceedings.".

60 By deleting subclause (5) and substituting –

"(5) An order made by the Court under this section may provide for the cessation of that order, in whole or in part, when the arbitral tribunal makes an order for the cessation.".

75 By deleting subclause (1) and substituting –

"(1) Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are to be taxed by the court, then unless the arbitral tribunal 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 tribunal) are –

(a) to be taxed by the court; and

(b) to be paid on any basis on which the court can award costs in civil proceedings before the court.".

77(3)(b)(ii) By deleting "expert, legal adviser or".

86(2)(a) By adding "under the law of Hong Kong" after "arbitration".

90(1) By adding "in Council" before "may, by order".

98 By adding "under the repealed Ordinance as then in force" after "(2 of 2000)".

New By adding –

"**100A. Opt-in provisions that automatically apply under section 100 deemed to apply to Hong Kong construction subcontracting cases**

(1) If –

(a) all the provisions in Schedule 2 apply under section 100(a) or (b) to an arbitration agreement, in any form referred to in section 19, included in a construction contract;

(b) the whole or any part of the construction operations to be carried out under the construction contract ("relevant operation") is subcontracted to any person under another construction contract ("subcontract"); and

(c) that subcontract also includes an arbitration agreement ("subcontracting parties' arbitration agreement") in any form referred to in section 19,

then all the provisions in Schedule 2 also apply, subject to section 101, to the subcontracting parties' arbitration agreement.

(2) Unless the subcontracting parties' arbitration agreement is an arbitration agreement referred to in section

100(a) or (b), subsection (1) does not apply if –

(a) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract is –

(i) a natural person who is ordinarily resident outside Hong Kong;

(ii) a body corporate –

(A) incorporated under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong; or

(iii) an association –

(A) formed under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong;

(b) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract has no place of business in Hong Kong; or

(c) a substantial part of the relevant operation which is subcontracted under the subcontract is to be performed outside Hong Kong.

(3) If –

(a) all the provisions in Schedule 2 apply to a subcontracting parties' arbitration agreement under subsection (1);

(b) the whole or any part of the relevant operation that is subcontracted under the subcontract is further subcontracted to another person under a further construction contract ("further subcontract"); and

(c) that further subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule 2 apply, subject to section 101, to the arbitration agreement so included in that further subcontract as if that further subcontract were a subcontract under subsection (1).

(4) In this section –

"construction contract" (建造合約) has the meaning given to it by section 2(1) of the Construction Industry Council Ordinance (Cap. 587);

"construction operations" (建造工程) has the meaning given to it by Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).".

101 By deleting "Section 100 does" and substituting "Sections 100 and 100A do".

101(b)(i)	By adding "or 100A" after "section 100".
103	By adding – "(3) In this section, "mediator" (調解員) means a mediator appointed under section 32 or referred to in section 33.".
104	By deleting subclause (5) and substituting – "(5) In this section – "appoint" (委任) includes nominate and designate; "mediator" (調解員) has the same meaning as in section 103, and "mediation proceedings" (調解程序) is to be construed accordingly.".
Schedule 1, Article 1(4)(b)	In the Chinese text, by deleting "爲准" and substituting "爲準".
Schedule 1, Article 11(5)	In the Chinese text, by deleting "交托" and substituting "交託".
Schedule 2	By adding ", 100A" before "& 101]".
Schedule 2, section 7(9)	By adding ", direction" after "An order".
Schedule 4	By adding – "**Arbitration (Parties to New York Convention) Order** 34A. **Schedule amended** (1) The Schedule to the Arbitration (Parties to New

York Convention) Order (Cap. 341 sub. leg. A) is amended by repealing "Bosnia-Herzegovina" and substituting "Bosnia and Herzegovina".

(2) The Schedule is amended by repealing "Kazakstan" and substituting "Kazakhstan".

(3) The Schedule is amended by repealing "Korea, Republic of" and substituting "Republic of Korea".

(4) The Schedule is amended by repealing "Macedonia, the former Yugoslav Republic of" and substituting "The former Yugoslav Republic of Macedonia".

(5) The Schedule is amended by repealing "Netherlands (including Netherlands Antilles and Surinam)" and substituting "Netherlands (including Netherlands Antilles)".

(6) The Schedule is amended by repealing "Slovak Republic" and substituting "Slovakia".

(7) The Schedule is amended, in the English text, by repealing "Tanzania, United Republic of" and substituting "United Republic of Tanzania".

(8) The Schedule is amended by repealing "United Kingdom (including Belize, Bermuda, Cayman Islands, Gibraltar, Guernsey and Isle of Man)" and substituting "United Kingdom of Great Britain and Northern Ireland (including Bailiwick of Jersey, Cayman Islands, Bermuda, Gibraltar, Guernsey and Isle of Man)".

(9) The Schedule is amended by repealing "Venezuela" and substituting "Venezuela (Bolivarian Republic of)".

(10) The Schedule is amended, in the English text, by

repealing "Vietnam" and substituting "Viet Nam".

(11) The Schedule is amended by repealing "Yugoslavia".

(12) The Schedule is amended, in the Chinese text, by repealing "丹麥(包括法羅群島及格陵蘭)" and substituting "丹麥(包括法羅群島及格陵蘭島)".

(13) The Schedule is amended, in the Chinese text, by repealing "文萊" and substituting "文萊達魯薩蘭國".

(14) The Schedule is amended, in the Chinese text, by repealing "尼日尼亞" and substituting "尼日利亞".

(15) The Schedule is amended, in the Chinese text, by repealing "吉爾吉斯" and substituting "吉爾吉斯斯坦".

(16) The Schedule is amended, in the Chinese text, by repealing "多米尼加" and substituting "多米尼克".

(17) The Schedule is amended, in the Chinese text, by repealing "安提瓜及巴布達" and substituting "安提瓜和巴布達".

(18) The Schedule is amended, in the Chinese text, by repealing "沙地阿拉伯" and substituting "沙特阿拉伯".

(19) The Schedule is amended, in the Chinese text, by repealing "孟加拉" and substituting "孟加拉國".

(20) The Schedule is amended, in the Chinese text, in the entry relating to "法國", by adding "所有" before "領土".

(21) The Schedule is amended, in the Chinese text, in the entry relating to "美利堅合眾國", by adding "所有" before "領土".

(22) The Schedule is amended, in the Chinese text, by repealing "特立尼達及多巴哥" and substituting "特立尼達和

多巴哥".

(23) The Schedule is amended, in the Chinese text, in the entry relating to "澳大利亞", by adding "，巴布亞新畿內亞除外" after "領土".

(24) The Schedule is amended by adding –

"Afghanistan

Albania

Azerbaijan

Bahamas

Brazil

Cook Islands

Dominican Republic

Gabon

Honduras

Iceland

Iran (Islamic Republic of)

Jamaica

Lao People's Democratic Republic

Lebanon

Liberia

Malta

Marshall Islands

Republic of Moldova

Montenegro

Mozambique

Nepal

Nicaragua

Oman

Qatar

Rwanda

Saint Vincent and the Grenadines

Serbia

United Arab Emirates

Zambia".".

Schedule 4

By adding –

"38A. **Decision by HKIAC**

Rule 10(1) is amended by repealing "6(2)" and substituting "8(2)".".

Schedule 4, section 39

By adding before subsection (1) –

"(1A) The Schedule is amended, in the English text, by repealing "[ss. 6 & 8]" and substituting "[rules 6 & 8]".".

Schedule 4, section 56(a)

By deleting "55(2) and (3)" and substituting "55(2) and (6)".