Clause 20(2) of the Draft Bill
Arbitration for Employment Matters

Introduction

1. Following request of Members at the second meeting of the Bills Committee of the Legislative Council held on 16 September 2009, this paper addresses the proposal under clause 20(2) of the draft Bill attached to the *Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* published in December 2007 (the "Consultation Paper") and explains the reasons why that proposal was not adopted in the Arbitration Bill.

The Problem

2. During the drafting process of the Consultation Paper, a concern was raised about the need to expand the scope of section 6(2) of the Arbitration Ordinance (Cap. 341). In summary, section 6(2) of the current Arbitration Ordinance empowers the court, at its discretion, to stay court proceedings and refer the parties to a dispute involving a claim or other matters that is within the jurisdiction of the Labour Tribunal to arbitration where there is a valid arbitration agreement between the parties.

3. The Consultation Paper proposed to expand the types of employment-related cases in which the court may decide whether or not to refer the parties to arbitration where there is an arbitration agreement in order to give effect to arbitration agreement in employment contracts. The proposal is to include not only matters falling within the jurisdiction of the Labour Tribunal but also matters involving claims or disputes made pursuant to or arising under an employment contract.

4. Under this proposal, claims under the Employees' Compensation Ordinance (Cap. 282) (ECO) would also fall within the category of claims made pursuant to or arising under an employment contract as referred to in clause 20(2). Therefore, the court could, subject to the conditions set out in paragraphs (a) and (b) of that clause, either refer or refuse to refer the parties to arbitration.

The Court of Final Appeal's Decision

5. In April 2008, the Court of Final Appeal, in *Paquito Lima Buton v Rainbow Joy Shipping Ltd. Inc.*[1], considered the question of whether or not the District Court had exclusive jurisdiction to deal with all ECO claims under section 18A of the ECO despite the presence of an arbitration agreement.

6. The Court of Final Appeal held that on its true construction, section 18A(1) of the ECO conferred exclusive jurisdiction on the District Court to deal with all ECO claims save in the cases expressly excepted. There was no overriding right to insist on arbitration. The parties' freedom to agree on how their dispute was to be resolved was 'subject to the observance of such safeguards as are necessary in the public interest'. Accordingly, there was no power to stay employees' compensation proceedings in favour of arbitration.

7. The Court of Final Appeal made the following observation on section 6(2) of the Arbitration Ordinance ("AO"):

> *"[R]eference to AO section 6(2) is instructive. It is clear that section 7 of the Labour Tribunal Ordinance confers exclusive jurisdiction on the Labour Tribunal to deal with specified claims. However, AO section 6(2) creates an exception, giving the court a discretion to stay claims which fall within the Tribunal's exclusive jurisdiction in favour of arbitration. Significantly, such exception was expressly created by statute. No parallel provision exists regarding arbitration of ECO claims falling within the exclusive jurisdiction of the District Court.".*

8. The Court of Final Appeal also said that the ECO's policy was to provide a framework of legal protection for injured and incapacitated employees, operated by the Commissioner for Labour and the District Court. That policy favours a construction of section 18A(1) which restricts the parties' freedom to contract in favour of arbitration with a view to preventing the employee being thereby removed from the protective framework. Furthermore, to permit ECO claims to be interrupted by stay applications in favour of non-legally aided arbitrations is not conducive to the objectives of the statutory scheme.

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1 [2008] 4 HKC 14

Submissions Received

9. The comments by respondents of the Consultation paper on the proposal on clause 20(2) were mixed. It is clear that some of the comments have not taken into account the decision of the Court of Final Appeal in the *Paquito* case which was only available at the end of April 2008, almost five months after the publication of the Consultation Paper.

10. The Labour Department, having regard to the Court of Final Appeal's decision in the *Paquito* case, submitted that the exclusive jurisdiction of the District Court on ECO claims and of Minor Employment Claims Adjudication Board[2] should not be eroded. The following is extracted from the submissions of the Labour Department:

> "*The CFA has taken heed of the policy considerations in respect of ECO claims in restricting the liberty to arbitration. We see that such considerations are in fact valid to all claims arising from employment contracts. Employees are generally in a weaker bargaining position, in particular at the stage of entering into contract. Their rights would be severely prejudiced if they are bound by standard arbitration clauses and denied access to the court proceedings to pursue wages and other entitlements under the employment contract. Moreover, without legal representation and access to legal aid for arbitration, employees would be put in a disadvantaged position in cases where the employer chooses to be legally represented which is allowed in the arbitration process. Furthermore, employees would incur additional expenses in paying fees and charges for appointing arbitrators etc…*
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> *In the light of the recent ruling by CFA and having considered the concerns highlighted in previous paragraphs, we would like to propose a revisit of Clause 20(2) of the draft Bill, with a view to preserving the exclusive jurisdiction of LT, MECAB and District Court on various employment claims ...*
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> *[W]e do not consider that the time is ripe now to legislate for the court's discretion to stay proceedings for arbitration in all matters involving claims or disputes made pursuant to or arising under any employment contracts, including employees' compensation*

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[2] Section 5 of MECAB Ordinance: The Board shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule. Save as is provided in this Ordinance, no claim within the jurisdiction of the Board shall be actionable in any court.

claims. We believe that our proposal will not detract from making Hong Kong a user-friendly regional arbitration centre as employment contracts, including employee's compensation claims, are primarily domestically-oriented and related to the grassroots segment of the community.".

Decision

11. The Working Group, with the help of its Sub-committee, has carefully reviewed and considered the submissions received. The Working Group suggested that clause 20(2) of the draft Bill attached to the Consultation Paper should be amended to retain the provision in section 6(2) of the current Arbitration Ordinance.

12. Having taken into account the recommendation and deliberation of the Working Group, the Court of Final Appeal's decision in the *Paquito* case and the submissions received including the views of the Labour Department which has policy responsibility over labour matters, the Department of Justice considers that there should be no change to the existing position provided for in section 6(2) of the current Arbitration Ordinance which only refers to matters falling within the jurisdiction of the Labour Tribunal.

13. The Department of Justice considers that the expansion of the courts' discretion beyond matters covered by section 6(2) of the current Arbitration Ordinance would require a more detailed examination of the public policy justifications which is beyond the ambits of the Working Group to implement the Report of the Committee on Hong Kong Arbitration Law and the Arbitration Bill.

Department of Justice
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