

**For discussion
on 22 February 2010**

LegCo Panel on Administration of Justice and Legal Services

Arbitration in Hong Kong of Mainland-Related Disputes

Background

At the meeting of the Bills Committee on the Arbitration Bill held on 5 November 2009, Members raised questions on arbitration of Mainland-related disputes in Hong Kong. This paper discusses the issues relating to arbitration involving “foreign investment enterprises”.

Foreign-related Contract and Foreign-related Elements

2. Article 128(2) of the *Contract Law of the People's Republic of China* (“*Contract Law*”) provides that parties to a foreign-related contract may, according to the arbitration agreement, apply to a Chinese arbitration institution or any other arbitration institution for arbitration. However, the *Contract Law* has not provided for the meaning of “foreign-related contract”.

3. Reference has been made to the *Opinion of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)* (“*1988 Opinion*”) promulgated in 1988, of which Article 178 provides that the following civil legal relationships would be regarded as “foreign-related civil relations”:

- i. where either party or both parties in a civil legal relationship is a foreigner, a stateless person or a foreign legal person;
- ii. the subject matter of the civil legal relationship is within the territory of a foreign country; or
- iii. any other legal fact which gives rise to, modifies or extinguishes civil rights or obligations taking place in a foreign country.

4. In 1992, the Supreme People’s Court also promulgated the *Opinion on Several Questions Concerning the Application of the Civil Procedure Law of the People’s Republic of China* (“1992 Opinion”). The discussion of civil cases involving foreign elements as set out in Article 304 of the *1992 Opinion* is broadly similar to that in the *1988 Opinion*.

5. Having referred to the above Mainland provisions, it appears that for a contract with any foreign-related element, the parties concerned may by agreement choose a place other than the Mainland (including Hong Kong) as the venue for arbitration. However, the relevant provisions do not expressly prohibit a Mainland legal person from conducting arbitration in a place other than the Mainland where a contract does not contain any foreign-related element.

Arbitration involving “foreign investment enterprises”

6. At present, “foreign investment enterprises” set up in the Mainland may operate in the forms of Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or wholly foreign-owned enterprises. These foreign-invested enterprises (including Hong Kong invested enterprises) are generally set up according to the *Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures*, the *Law of the People’s Republic of China on Chinese-Foreign Contractual Joint Ventures* and the *Law of the People’s Republic of China on Wholly Foreign-Owned Enterprises* as well as other relevant laws and regulations. A “foreign investment enterprise” set up in the form of a company is regarded as a Mainland legal person.

7. Against this background and since foreign investment enterprises have the status of Chinese legal persons, some members of the legal and arbitration community in Hong Kong and the Mainland take the view, with reference to the relevant opinions promulgated by the Supreme People’s Court, that the contract to which such an enterprise is a party must involve a foreign-related element if it is to choose Hong Kong as the venue of arbitration to resolve a contractual dispute.

Follow-up action of the Department of Justice

8. The Department of Justice is very concerned about the issue of arbitration involving foreign investment enterprises raised by the legal and

arbitration communities. We have exchanged views with them on the issue and reflected those views to the Mainland authorities.

9. At present, the issue is still under discussion. We believe that it would help promote Hong Kong as a regional centre for commercial dispute resolution as well as enhance cooperation between the arbitration communities of the Mainland and Hong Kong, if the Mainland authorities could clarify the issue of foreign investment enterprises choosing Hong Kong as the venue for arbitration of disputes arising from contracts to which they are parties. We will continue our dialogue with the stakeholders and the Mainland authorities with a view to seeking clarification on the issue as soon as possible.

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Department of Justice
February 2010