For information

LegCo Panel on Administration of Justice and Legal Services

Arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao

Result of the Consultation Exercise

Purpose

This paper informs Members of the outcome of the Administration's consultation exercise on the proposed arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao ("the Arrangement").

The Consultation Exercise

2. The Administration conducted a consultation exercise with the legal profession, chambers of commerce, trade associations, arbitration bodies and other professional bodies on the desirability to enter into the Arrangement and the broad framework of the Arrangement during the period 17 March 2011 to 15 April 2011. A copy of the consultation paper is attached at **Annex 1**. Two respondents asked for an extension of the consultation period to 29 April 2011.We have received altogether 12 written responses.

3. Out of the 12 respondents, 10 expressed support to the Arrangement and 2 indicated that they had no comments on the Arrangement. The 12 respondents include chambers of commerce, trade association, professional bodies (including legal and other professional bodies), arbitral bodies and trade-related government organ.

General Comments

4. In the responses which supported the establishment of the Arrangement, the following grounds of support were mentioned:

(a) the Arrangement is a good initiative as the position of enforcement in Macao of a Hong Kong arbitral award is somewhat uncertain;

(b) given the increase in economic interflow between Hong Kong and Macao as well as the rest of the Pearl Delta Region, it is timely for making the Arrangement;

(c) the Arrangement will foster further legal co-operation between Hong Kong and Macao in civil and commercial matters;

(d) the Arrangement would be mutually beneficial to both jurisdictions;

(e) supports bringing in enhanced certainty with a simple mechanism under the Arrangement, which will further build up Hong Kong's role as the regional arbitration centre for resolution of all disputes;

(f) the Arrangement will set up a clear and certain mechanism for mutual enforcement (between Hong Kong and Macao) and in the long run will enhance Hong Kong's role as a regional arbitration centre;

(g) the Arrangement will help to provide a more comprehensive arbitration mechanism for Hong Kong/Macao and the whole Region;

(h) the Arrangement will streamline the enforcement of arbitral awards in Macao and Hong Kong and help to reinforce Hong Kong's position as an international arbitration centre;

(i) given the increasing economic interflow between the two SARs and with the rest of the Pearl Delta Region, the Arrangement is likely to be welcome by Hong Kong's business community in general and its legal profession in particular;

(j) fostering regional co-operation between Guangdong, Hong Kong and Macao is a key focus in the National 12th Five-Year Plan;

(k) the Arrangement will help to protect commercial activities conducted within Hong Kong/Macao and the Pearl Delta Region and it will strengthen the investors' confidence and enhance business activities in the Region; and

(l) the Arrangement will prove highly beneficial to the members (of one of the respondents) who increasingly are becoming engaged in works located outside Hong Kong's borders.

5. Among the respondents which were supportive of the Arrangement, many of them considered that it would be beneficial to establish the Arrangement, and that it would enhance Hong Kong's role as a regional/international arbitration centre. No respondent expressed any concern or comment over the arbitral awards obtained in Macao and in fact, some of them commented that the Arrangement would help to set up a clear, certain and comprehensive arbitration mechanism between the two SARs and even in the Pearl Delta Region.

Specific comments

6. In the ensuing paragraphs, the respondents' major specific comments on different elements of the Arrangement are briefly set out.

Whether the Arrangement be developed in the light of the Mainland/Hong Kong and Mainland/Macao Arrangement

7. Four of the respondents commented that the Arrangement should be developed in the light of the arrangement on reciprocal enforcement of arbitral awards between the Mainland and Hong Kong ("Mainland/Hong Kong Arrangement"). One of the respondents further remarked that it would be easier for the business and legal sectors to adapt to the Mainland/Hong Kong Arrangement.

8. The Hong Kong Bar Association commented that for certainty, as regards the grounds for refusal of enforcement, levels of courts and evidence to be provided in the application, the Arrangement should be developed in the light of the Mainland/Hong Kong Arrangement.

9. Two respondents commented that it would be good to use the Mainland/Hong Kong Arrangement and the arrangement on reciprocal enforcement of arbitral awards between the Mainland and Macao

("Mainland/Macao Arrangement") as a basis or starting point for the Arrangement.

10. Two of the respondents suggested that the Arrangement should be based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), as it would provide a tried and tested regime for the recognition and enforcement of arbitral awards between different jurisdictions.

Scope of Application

11. The Hong Kong Bar Association commented that in line with the Mainland/Hong Kong Arrangement, the Arrangement should cover all arbitrations.

12. Two other respondents suggested that the Arrangement should follow the New York Convention with the commercial reservation. Under the commercial reservation of the New York Convention, the convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law of the contracting party making the reservation.

13. One respondent observed that approximately one-third of all contracting parties to the New York Convention have adopted the commercial reservation, which is often found in jurisdictions with a civil law background. However another respondent observed that neither Portugal nor Brazil (two jurisdictions with legal systems similar to Macao) has adopted the commercial reservation.

14. Another respondent commented that the Arrangement should not conflict with the Mainland/Hong Kong Arrangement or the Mainland/Macao Arrangement, yet it should ideally adopt a scope that allows flexibility under either jurisdiction.

Application Procedure

General Procedure

15 One respondent commented that the application procedure should seek to work within the new Hong Kong Arbitration Ordinance as much as possible and at the same time stay within the constraints of each jurisdiction.

Level of courts for application

16. One respondent suggested that the Hong Kong Court of First Instance shall assume the role of enforcing court in Hong Kong and that a similar level of court in Macao be designated as the enforcing court.

17. Another respondent considered that application under the Arrangement should be made to those courts where judges have experience or at least training in the principles of international arbitration.

Parallel application

18. As stated in para 13(a) of the Consultation Paper, under the Mainland/Macao Arrangement, a party seeking enforcement of an arbitral award may make applications to the courts of both places for enforcement but the court of the place where the award was made should first order execution, subsequent to which the court of the other place could order the enforcement of the liabilities outstanding from the execution ordered by the court of the place where the award was made.

19. One respondent commented that unless there is a good reason, it may be preferable to avoid the provision set out in para 13(a) of the Consultation Paper as this may cause unnecessary delay in the enforcement process.

Evidence to be provided in application

20. One respondent commented that the levels of evidence to be provided are slightly different between the UNCITRAL based rules in Hong Kong and the Civil Code rules of Macao. However the arrangements within the two frameworks are very similar and it is suggested that they may only require additional definitions to aid compliance and enforcement in either jurisdiction. The respondent further suggested that the aim should be to obtain enforcement without court intervention which may require streamlining the present rules with tighter definitions rather than adding many complex ones.

Grounds for refusal of enforcement

21. As mentioned in para 13(b) of the Consultation Paper, under the Mainland/Macao Arrangement, a Mainland court may refuse to recognize and enforce a Macao award if it is satisfied that its recognition

and enforcement would violate the basic principles of Mainland law or social public interest.

22. One respondent commented that if the concept of "social public interest" and "the basic principles of Mainland law" do not apply in Hong Kong and/or Macao, it may be preferable not to include them in the Arrangement.

23. Another respondent commented that the grounds of refusal under the New York Convention have the added benefit of being well understood by the international business community.

Exploratory discussion with the Macao authorities

24. In parallel with the consultation on the Arrangement, the Administration has conducted exploratory discussion with the Macao authorities on the direction of the Arrangement. A meeting was held in the latter half of April 2011 between representatives of the Administration and the Macao authorities to explore the desirability of the conclusion of the Arrangement. The two sides also exchanged preliminary views and comments on the content of the Arrangement.

25. In early June, the Macao authorities informed the Administration that the Macao SAR formally agreed to commence discussion with the Hong Kong SAR on the Arrangement.

Way forward

26. As reported in this paper, given the positive response of the respondents in the consultation exercise, the Administration considers that it is timely to commence discussion with the Macao SAR on the Arrangement.

27. The New York Convention is applicable to both the Hong Kong and Macao SARs. The new Arbitration Ordinance (Cap 609) of Hong Kong commenced operation on 1 June 2011. It unifies the domestic and international arbitration regimes on the basis of the UNCITRAL Model Law on International Commercial Arbitration.

28. Given that the Macao SAR has formally agreed to commence discussion with the HK SAR on the Arrangement, the Administration will proceed first with the discussion of the Arrangement with the Macao SAR.

The specific comments of the respondents set out in this paper will be taken into account in the course of discussion.

29. To foster the establishment of a mechanism for reciprocal recognition and enforcement of arbitral awards within the region, the Administration will also liaise with relevant Taiwanese authorities through the platform of the Hong Kong-Taiwan Economic and Cultural Co-operation and Promotion Council and the Taiwan-Hong Kong Economic and Cultural Co-operation Council.

Department of Justice
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Annex 1

Consultation Paper on the proposal to enter into an arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao

Purpose

The Department of Justice would like to seek the views of the commercial sector, legal professional bodies and other interested parties on the following :

(1) whether it is desirable to enter into an arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao; and if so,

(2) whether the arrangement should be developed in the light of (a) the Arrangement on reciprocal enforcement of arbitral awards between the Mainland and Hong Kong (1999)[1] and (b) the Arrangement between the Mainland and Macao (2007)[2];

We would also welcome any comments on the following aspects of the arrangement :

(1) scope of application of the arrangement;

(2) application procedure (including the level of courts for application and evidence to be provided in application); and

(3) grounds for refusal of enforcement.

[1] Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (see paragraph 13 and Annex 2 of this paper).

[2] Arrangement on Mutual Recognition and Enforcement of Arbitral Awards Made in the Mainland and Macao SAR (see paragraph 13 and Annex 1 of this paper).

Reciprocal Enforcement of Arbitral Awards between Hong Kong and Macao

2. At present, there exists no arrangement between Hong Kong and Macao on mutual enforcement of arbitral awards.

Enforcement of Macao Arbitral Awards in Hong Kong

3. Arbitral awards made in Macao may be summarily enforced in Hong Kong under section 2GG of the *Arbitration Ordinance* (Cap. 341). Section 2GG(1) provides that an award given in arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the court that has the same effect, but only with the leave of the court. If leave is granted, the court may enter judgment in the terms of the award, order or direction. Section 2GG(2) states that notwithstanding anything in the *Arbitration Ordinance*, this section applies to an award, order and direction made or given whether in or outside Hong Kong. It follows that an arbitral award from Macao could be enforced under section 2GG. It appears that, however, there have not been any decided cases on the enforcement of Macao awards in Hong Kong under section 2GG.

4. Similar provisions have been provided under Division 1 of Part 10 of the new Arbitration Ordinance passed on 10 November 2010. Section 84 of the new Arbitration Ordinance provides that an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the court that has the same effect, but only with the leave of the court. An arbitral award from Macao could be enforced under section 84 of the new Arbitration Ordinance as in the case of section 2GG. The new Arbitration Ordinance will come into operation on 1 June 2011.

5. Alternatively, a party may bring an action at common law to enforce a Macao arbitral award in a Hong Kong court. The applicant may, through proceedings by writ, apply to the court for a summary judgment on the terms of the arbitral award. In Xiamen Xingjingdi Group Ltd. v Eton Properties Ltd,[3], the Court of First Instance held that the court's approach towards either means of enforcement, namely, enforcement by action and application for summary enforcement pursuant to section 2GG of the Arbitration Ordinance, should not be radically different. In either case, the court's role should be as "mechanistic as possible" and unless the award was plainly and obviously incapable of performance, the court should allow the

[3] [2008] 4 HKLRD 972 (at para. 47 and 63)

application for its enforcement.

Enforcement of Hong Kong Arbitral Awards in Macao

Decree Law 55/98M

6. As far as the Administration understands, Hong Kong arbitral awards may be enforced in Macao under the Decree Law 55/98M of Macao. The Decree Law 55/98M governs international commercial arbitration (涉外商事仲裁). Under Article 1(4), an arbitration is considered "international" if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, places of business in different states or territories; or

(b) one of the following places is situated outside the state or territory in which the parties have their places of business:

(i) the place of arbitration as determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed the subject matter of the arbitration agreement relates to more than one state or territory.

7. Article 1(2) states that the term "commercial" covers matters arising from all relationships of a commercial nature, whether contractual or not. Article 1(2) sets out a non-exhaustive list of transactions which are regarded as "commercial" in nature and such include: supply of goods or services, distribution agreement, joint venture, construction and carriage of passengers by air or sea, etc.

8. If an arbitral award of Hong Kong is made in "international commercial" arbitration, according to Article 1 of the Decree Law 55/98M, it

may be recognised and enforced under Articles 35 and 36 of the Decree Law.

Code of Civil Procedure

9. The Administration further understands that if an arbitral award of Hong Kong is not an award of an international commercial arbitration for the purposes of Article 1(4) of the Decree Law 55/98M, it may still be possible to enforce in Macao pursuant to Chapter 14 of the Code of Civil Procedure of Macao (民事訴訟法典).

10. Any arbitral award made outside Macao may be recognised as binding and enforceable upon confirmation by a competent court of Macao under Article 1199 of the Code of Civil Procedure. Article 1200 stipulates the conditions upon which a foreign award must satisfy before it will be confirmed by the Macao court:

(a) there is no doubt as to the authenticity and interpretation of the award;

(b) the award is "final" (確定) according to the law of the place where it was rendered;

(c) the jurisdiction of the tribunal which made the award has not been acquired by fraud of law and the award does not involve matters which are in the exclusive jurisdiction of Macao courts;

(d) there is no possibility of invoking *res judicata* by reason that the case has been submitted to the Macao courts, except if, before the case has been initiated in the Macao courts, it has been submitted to the court in which the award was made;

(e) the party against whom the award is enforced has been given notice of the arbitral proceedings according to the law of the place where the award was made, the adversarial principle has been observed and the parties' rights have been equally respected;

(f) the confirmation of the award would not be contrary to the public policy of Macao.

Application of the New York Convention in Macao

11. On 19 July 2005, the Central People's Government of the PRC declared that the New York Convention shall apply to Macao, subject to the reciprocity reservation made by the PRC upon her own accession to the Convention. However, the New York Convention does not apply to the recognition and enforcement of arbitral awards between Hong Kong and Macao as both are territories of the same Contracting State, i.e. the PRC.

Enforcement of Arbitral Awards between the Mainland and Macao

12. Before the conclusion of the "*Arrangement on Mutual Recognition and Enforcement of Arbitral Awards Made in the Mainland and Macao SAR*" (內地與澳門特別行政區相互認可和執行仲裁裁決的安排) in October 2007, recognition and enforcement of Mainland arbitral awards in Macao was subject to a mechanism similarly applicable to Hong Kong awards as discussed in the above paragraphs.

13. Under the Macao/Mainland Arrangement[4] (Annex 1) which took effect since 1 January 2008, arbitral awards rendered in Macao and the Mainland are reciprocally enforceable. The content of the Arrangement is broadly similar to the arrangement on the same matter entered between the Mainland and Hong Kong in 1999 (at Annex 2) with the following differences:

(a) Under the Macao/Mainland Arrangement, a party seeking enforcement of an arbitral award may make applications to the courts of both places for enforcement but the court of the place where the award was made should first order execution, subsequent to which the court of the other place could order the enforcement of the liabilities outstanding from the execution ordered by the court of the place where the award was made.

Under the HK/Mainland Arrangement, an applicant is prohibited from filing applications to the courts of the Mainland and Hong Kong at the same time. However, if the result of enforcement of the award by the court of one place is proved insufficient to satisfy the liabilities, the

[4] The *Macao/Mainland Arrangement* is the third arrangement on mutual legal co-operation between Macao and the Mainland, with the first arrangement being entered into in 2001 on mutual service of judicial documents and facilitation of the taking of evidence; and the second signed in 2006 on reciprocal enforcement of court judgments in civil cases.

applicant may then apply to the court of another place for enforcement of the outstanding liabilities.

(b) Under the Macao/Mainland Arrangement, a Mainland court may refuse to recognize and enforce a Macao award if it is satisfied that its recognition and enforcement would violate the basic principles of Mainland law (內地法律的基本原則) or social public interest.

According to the HK/Mainland Arrangement, "Social public interest (社會公共利益)" of the Mainland is one of the grounds for refusal of enforcement but not violation of the "basic principles of the Mainland law" .

Economic Development in Macao

14. It is noted that the development of arbitration in Macao has received strong governmental support in recent years. The World Trade Center Macao Arbitration Center (formerly known as "World Trade Center Macao Voluntary Arbitration Center") was established in June 1998 and has been actively promoting the use of arbitration among the business entities of Macao. In September 2001, the Monetary Authority of Macao has set up an arbitration centre for resolving civil and commercial disputes not exceeding the amount of MOP 50,000 on matters relating to insurance and provident fund.

15. Macao has been witnessing double-digit growth in its GDP in recent years and in 2008, Macao enjoyed a 21.6% increase in foreign direct investment while the majority of the foreign investors had usual place of residence in Hong Kong, followed by the United States and the Mainland[5]. It is expected that with growing economic activities in Macao in a wide range of areas, including construction, banking and finance as well as gaming and tourism, commercial disputes will increase in the long run and so will the need for arbitration services.

16. With increasing economic interflow between Hong Kong and Macao as well as the rest of PRD Region, the Administration considers that fostering mutual legal co-operation, particularly in reciprocal enforcement of arbitral awards, between Hong Kong and Macao will be welcome by the legal profession as well as the business sectors of both places. This will also enhance Hong Kong's role as a regional arbitration centre for commercial

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[5] Information provided by the Statistics and Census Service (統計暨普查局) of the Macao SAR Government, available on its webpage: http://www.dsec.gov.mo

disputes.

17. The administration considers that such an arrangement would be beneficial to Hong Kong as a whole by:

(a) adding certainty to the enforceability of Macao arbitral awards in Hong Kong and vice versa;

(b) establishing a simple mechanism in both jurisdictions on reciprocal enforcement of arbitral awards;

(c) fostering legal co-operation between Hong Kong and Macao in civil and commercial matters; and

(d) enhancing Hong Kong's role as a regional arbitration centre for commercial disputes.

18. The Administration proposes that an arrangement between Hong Kong and Macao on the enforcement of arbitral awards similar to the existing arrangement between Hong Kong and the Mainland should be established, which was made in accordance with the spirit of the New York Convention. When the arrangement is concluded, it would be implemented in Hong Kong by way of introducing amendments to the new Arbitration Ordinance. Similar to the existing arrangement between Hong Kong and the Mainland, the framework of the proposed arrangement with Macao will cover mainly the following aspects:

(a) scope of application of the arrangement;

(b) application procedure (including the level of courts for application and evidence to be produced on application); and

(c) grounds for refusal of enforcement.

Consultation

19. The relevant parties including the Judiciary and relevant policy bureaux have been consulted on the proposal to enter into an arrangement with Macao on reciprocal enforcement of arbitral awards in the last quarter of 2010. They have indicated support for the proposal. The LegCo Panel on Administration of Justice and Legal Services has been briefed on the proposal in late February 2011. Before the proposal is taken forward, the

Administration would like to consult interested parties on the issues set out in paragraph 1 of this paper. Any views or comments may be sent to the following officer on or before 15 April 2011:

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