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Bills Committee on Arbitration (Amendment) Bill 2013

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 10 May 2013**

Purpose

This paper provides background information on issues relating to the reciprocal recognition and enforcement of arbitral awards with the Mainland and Macao, and past deliberations of the Panel on Administration of Justice and Legal Services ("the Panel") on the proposed arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao ("the Macao/Hong Kong Arrangement").

Legal framework

2. Arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap. 609) ("the Ordinance"). The Ordinance¹, which commenced operation on 1 June 2011, unifies the domestic and international arbitration regimes on the basis of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law.

Reciprocal enforcement of arbitral awards with the Mainland

3. Arbitral awards made in Hong Kong can be enforced in more than 140 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). The Hong Kong Special Administrative Region ("HKSAR")'s membership of the New York Convention has, since 1 July 1997, been by virtue

¹ The former Arbitration Ordinance (Cap. 341), enacted in July 1963, was based on a split regime - an international regime based on the UNCITRAL Model Law (i.e. the model law drafted by the United Nations Commission on International Trade Law), and a domestic regime.

of the fact that China is a signatory to that Convention and has applied it to Hong Kong. Being an international treaty, the New York Convention is not applicable to mutual enforcement of arbitral awards between HKSAR and the Mainland. Pursuant to Article 95 of the Basic Law (which provides for juridical assistance between HKSAR and other parts of China), an arrangement for reciprocal enforcement of arbitral awards between Hong Kong and the Mainland, based on the spirit of the New York Convention, was entered into in June 1999 and came into effect on 1 February 2000 ("the 1999 Arrangement").

Reciprocal enforcement of arbitral awards between Hong Kong and Macao

4. 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

5. Enforcement in Hong Kong of an arbitral award which is neither a Mainland award or a convention award (including Taiwan and Macao awards) may be summarily enforced under section 84 of the Ordinance. Section 84 provides that an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same way as a judgment of the court that has the same effect, but only with the leave of the court. 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.

Enforcement of Hong Kong arbitral awards in Macao

6. Hong Kong arbitral awards may be enforced in Macao under the Decree Law 55/98M of Macao ("the Decree Law") which governs international commercial arbitration ("涉外商事仲裁"). Under Article 1(4) of the Decree Law, 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) of the Decree Law states that the term "commercial" covers matters arising from all relationships of a commercial nature, whether contractual or not. Article 1(2) further 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, it may be recognised and enforced under Articles 35 and 36 of the Decree Law. However, 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, 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").

9. 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

10. On 19 July 2005, the Central People's Government of the People's Republic of China ("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

11. 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") ("the Macao/Mainland Arrangement") 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.

12. Under the Macao/Mainland Arrangement which took effect since 1 January 2008, arbitral awards rendered in Macao and the Mainland are reciprocally enforceable. The content of the Macao/Mainland Arrangement is broadly similar to the arrangement on the same matter entered between Hong Kong and the Mainland in 1999 (paragraph 3 above refers).

Past deliberations

13. At the Panel meeting on 28 February 2011, the Administration briefed members on its plan to establish an arrangement between Hong Kong and Macao on the enforcement of arbitral awards, similar to the existing arrangement between Hong Kong and the Mainland, by way of introducing amendments to the Ordinance.

14. The Administration advised that with increasing economic interflow between Hong Kong and Macao as well as the rest of the Pearl River Delta Region, such an arrangement would be beneficial to Hong Kong 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.

The Administration further advised that the arbitration profession was generally in support of the proposed arrangement.

15. Question was raised as to whether there was any arrangement on reciprocal recognition and enforcement of arbitral awards between Hong Kong and Taiwan, having regard to the fact that there was more economic interflow between Hong Kong and Taiwan than between Hong Kong and Macao.

16. The Administration advised that it was the Administration's plan to establish a mechanism for reciprocal recognition and enforcement of arbitral awards with Taiwan. If a mechanism for reciprocal recognition and enforcement of arbitral awards was established between Hong Kong and Macao, the Administration hoped to take forward, as part of the Greater China concept, the establishment of a similar mechanism between Hong Kong and Taiwan in the next step. Unlike Hong Kong and Macao, the New York Convention was not applicable to Taiwan. Thus, it was envisaged that the implementation details for any arrangement on reciprocal recognition and enforcement of arbitral awards with Taiwan would be more complex than that with Macao. Since the relevant Macao authorities had indicated their willingness to further

discuss the establishment of such a mechanism with Hong Kong, the Administration therefore actively sought to take forward the matter with Macao first.

17. Whilst noting that having a separate arrangement for reciprocal enforcement of arbitral awards would add certainty to the enforceability of Macao arbitral awards in Hong Kong and vice versa, members considered that there must also be clear societal needs for the proposed arrangement.

18. The Administration agreed on the need for sufficient consultation before taking the matter forward. In March 2011, the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties were consulted on the proposal to conclude the Macao/Hong Kong Arrangement, including the broad framework of the Macao/Hong Kong Arrangement. According to the Administration, the consultees were supportive of the proposal.

19. The Panel was briefed by the Administration at its meeting held on 14 December 2012 on the legislative proposals to amend the Ordinance to (i) implement the Macao/Hong Kong Arrangement² and to (ii) make miscellaneous amendments to the Ordinance. Members were generally supportive of the legislative proposals. A member urged that legislative underpinning be provided for the emergency arbitrator appointed pursuant to the arbitration rules administered by the Hong Kong International Arbitration Centre ("HKIAC"). The Administration advised that it was in discussion with HKIAC with regard to the definition of "emergency arbitrator" and the enforcement of emergency relief granted by an emergency arbitrator in the Ordinance.

Relevant papers

20. A list of the relevant papers available on the website of the Legislative Council (<http://www.legco.gov.hk>) is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
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² The Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region was concluded on 7 January 2013.

Appendix

Relevant papers on Arbitration (Amendment) Bill 2013

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	28 February 2011 (Item V)	Agenda Minutes
	14 December 2012 (Item V)	Agenda Minutes

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