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Report of the Bills Committee on Arbitration (Amendment) Bill 2013

Purpose

This paper reports on the deliberations of the Bills Committee on Arbitration (Amendment) Bill 2013.

Background

2. Arbitration in Hong Kong is currently governed by the Arbitration Ordinance (Cap. 609) ("the Ordinance") which contains provisions regulating various aspects of arbitration such as the composition and jurisdiction of the arbitral tribunal, the conduct of arbitral proceedings, and the recognition and enforcement of arbitral awards.

3. China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 ("the New York Convention") which has applied to the Hong Kong Special Administrative Region since reunification. Accordingly, an arbitral award obtained in Hong Kong is enforceable in other states that are parties to the New York Convention and vice versa. The framework of enforcement in Hong Kong of an arbitral award made in a state (other than China or any part of China) which is a party to the New York Convention is specified in Division 2 of Part 10 of the Ordinance.

4. The mutual enforcement of arbitral awards between Hong Kong and the Mainland is governed by the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region as concluded in 1999. The mechanism for enforcement in Hong Kong of an arbitral award made in the Mainland is set out in Division 3 of Part 10 of the Ordinance.

5. Before the conclusion of the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region ("the Arrangement") in January 2013, there was no arrangement between Hong Kong and Macao on the reciprocal recognition and enforcement of arbitral awards. According to the Administration, the conclusion of the Arrangement is beneficial to Hong Kong in terms of enhancing our role as a regional arbitration centre as it facilitates the efficient enforcement in Hong Kong of an arbitral award made in Macao and vice versa.

6. In March 2011, the Administration conducted a consultation with the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties in respect of the Arrangement. According to the Administration, the consultees were supportive of the Arrangement.

The Bill

7. The Bill seeks to:

- (a) amend the Ordinance to implement the Arrangement;
- (b) provide for the enforcement of emergency relief and make other miscellaneous amendments to the Ordinance;
- (c) add to the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) four new parties to the New York Convention; and
- (d) make consequential amendments to rule 10 of Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A).

The Bills Committee

8. At the House Committee meeting on 26 April 2013, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Dr Hon Priscilla LEUNG, the Bills Committee has held one meeting with the Administration. The membership of the Bills Committee is in the **Appendix**.

Deliberations of the Bills Committee

Implementation of the Arrangement

9. Concern was raised as to why the Arrangement was concluded in January 2013, which was years after the conclusion of a similar arrangement between Hong Kong and the Mainland in 1999.

10. The Administration has explained that due to the increasing economic interflow between Hong Kong and the Mainland, priority was accorded to establishing an arrangement on reciprocal recognition and enforcement of arbitral awards between Hong Kong and the Mainland after reunification. Pending the implementation of reciprocal enforcement of arbitral awards between Hong Kong and Macao, a party may bring an action at common law to enforce a Macao arbitral award in a Hong Kong court. Alternatively, a Macao award may be summarily enforced in Hong Kong under section 84 of the Ordinance.

11. On the question of whether consideration would be given to implementing a similar arrangement on reciprocal recognition and enforcement of arbitral awards between Hong Kong and Taiwan, the Administration has advised that it is the aim of the Administration to forge closer co-operation on arbitration in the Greater China Region. After the enactment of the Bill to implement the Arrangement, the Administration would next explore actively the possibility of establishing an arrangement similar to the Arrangement between Hong Kong and Taiwan.

Development of Hong Kong as a regional arbitration centre

12. Apart from enacting the Bill, a question was raised on whether, and if so, what other measures would be taken by the Administration to promote Hong Kong as a regional arbitration centre.

13. The Administration has advised that it would facilitate the establishment and growth of world class arbitration organizations in Hong Kong, and promote Hong Kong's arbitration service in the Mainland and other countries.

Drafting aspects of the Bill

14. Dr Hon Priscilla LEUNG has requested the Administration to consider replacing "倚據" referred to in the Chinese text of the proposed section 87(2) of the Ordinance with a more commonly used expression.

15. The Administration has advised that "倚據" is used in the current provisions of the Ordinance, such as sections 53(4)(a), 87(3) and 91. "倚據" has also been used as the equivalent to "relied on" in (i) the Rules of the High Court (Cap. 4 sub. leg. A) (for example, Order 82, rule 3(1) and Order 118, rule 3(2)); (ii) Order 12, rule 8(2A)(b) of the Rules of the District Court (Cap. 336 sub. leg. H); (iii) rule 11(1) of the Pneumoconiosis and Mesothelioma (Compensation) Appeal Rules (Cap. 360 sub. leg. C); and (iv) section 33(3)(b) of the Building Energy Efficiency Ordinance (Cap. 610). In all these examples, "倚據" (and "relied on" in the corresponding English text) was used in relation to court or hearing matters (such as evidence relied on in an affidavit, facts and matters in support of a legal action, and documents relied on in an appeal). Furthermore, "倚據" has been used in a variety of publications of the Hong Kong government, as well as newspapers and journals in the Mainland. As "倚據" is quite commonly used in both legislative and non-legislative writings and in order to achieve consistency with the Ordinance, the Administration considers that it is appropriate to use "倚據" to reflect the meaning of "relied on" in clauses 11(2) and 14(2) of the Bill.

16. Members note that the Administration has agreed to move Committee Stage amendments ("CSAs") to:

- (a) amend section 5(2) of the Ordinance to make it clear that the proposed new Part 3A of the Ordinance on enforcement of emergency relief would also apply to an arbitration, if the place of arbitration is outside Hong Kong;
- (b) amend the word "現" in "恢復現狀" of the Chinese text of the proposed new section 22B(2)(a) of the Ordinance to "原"; and
- (c) amend the Chinese rendition of "Sao Tome and Principe" in clause 20 of the Bill by replacing the "及" in "聖多美及普林西比島" with "和" and deleting the word "島".

Amendment to clause 20 of the Bill

17. Members note that the Administration will move CSA to add "Myanmar" to the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A), having regard to the fact that Myanmar recently acceded to the New York Convention on 16 April 2013.

Commencement of the Bill

18. The Administration has advised that the Bill, if enacted, would come into operation by two phases. The first phase would comprise the coming into operation of (i) the clauses on the emergency arbitrator procedure to tie in with that of the arbitration rules of the Hong Kong International Arbitration Centre; (ii) clause 7 to amend section 75 of the Ordinance to provide that if the parties to arbitration have agreed that the costs of the arbitral proceedings are to be taxed by the court, the costs are to be taxed on a "party and party" basis under rule 28(2) of Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A); (iii) clauses 19 and 20 to amend the Schedule to Cap. 609 sub. leg. A; and (iv) clauses containing amendments to enhance the readability of the relevant provisions of the Ordinance. These provisions will commence on the day on which the Amendment Ordinance is published in the Gazette. The second phase would comprise the coming into operation of the remaining clauses to implement the Arrangement, after discussion with the Macao authorities on the timing to implement the Arrangement. They will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette. Clause 1(2) is proposed to be amended to provide for phased commencement.

Committee Stage amendments

19. The Bills Committee agreed to the CSAs to be moved by the Administration.

Consultation with the House Committee

20. The Bills Committee consulted the House Committee on 21 June 2013 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting of 10 July 2013.

Council Business Division 4
Legislative Council Secretariat
2 July 2013

Bills Committee on Arbitration (Amendment) Bill 2013

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Dennis KWOK

(Total : 4 Members)

Clerk Mary SO

Legal Adviser Wendy KAN