

# Arbitration (Amendment) Bill 2013

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# A BILL

## To

Amend the Arbitration Ordinance to implement an arrangement between Hong Kong and Macao for the reciprocal recognition and enforcement of arbitral awards; to make miscellaneous amendments to that Ordinance and the Arbitration (Parties to New York Convention) Order; and to make consequential amendments.

Enacted by the Legislative Council.

### **Part 1**

#### **Preliminary**

##### **1. Short title and commencement**

- (1) This Ordinance may be cited as the Arbitration (Amendment) Ordinance 2013.
  - (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.
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## Part 2

### Amendments to Arbitration Ordinance

**2. Arbitration Ordinance amended**

The Arbitration Ordinance (Cap. 609) is amended as set out in sections 3 to 18.

**3. Section 2 amended (interpretation)**

Section 2(1)—

**Add in alphabetical order**

“*Macao* (澳門) means the Macao Special Administrative Region;

*Macao award* (澳門裁決) means an arbitral award made in Macao in accordance with the arbitration law of Macao;”.

**4. Section 5 amended (arbitrations to which this Ordinance applies)**

Section 5(2), after “only”—

**Add**

“this Part;”.

**5. Part 3A added**

After Part 3—

**Add**

## “Part 3A

### Enforcement of Emergency Relief

#### 22A. Interpretation

In this Part—

*emergency arbitrator* (緊急仲裁員) means an emergency arbitrator appointed under the arbitration rules (including the arbitration rules of a permanent arbitral institution) agreed to or adopted by the parties to deal with the parties’ applications for emergency relief before an arbitral tribunal is constituted.

#### 22B. Enforcement of emergency relief granted by emergency arbitrator

- (1) Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.
- (2) The Court may not grant leave to enforce any emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that it consists only of one or more temporary measures (including an injunction) by which the emergency arbitrator orders a party to do one or more of the following—
  - (a) maintain or restore the status quo pending the determination of the dispute concerned;
  - (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

- (c) provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
  - (d) preserve evidence that may be relevant and material to resolving the dispute;
  - (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d);
  - (f) give security for the costs of the arbitration.
- (3) If leave is granted under subsection (1), the Court may enter judgment in terms of the emergency relief.
- (4) A decision of the Court to grant or refuse to grant leave under subsection (1) is not subject to appeal.”.

**6. Section 61 amended (enforcement of orders and directions of arbitral tribunal)**

Section 61(4), Chinese text—

**Repeal**

“根據第(1)款決定批予許可或拒絕”

**Substitute**

“決定根據第 (1) 款批予許可，或決定拒絕根據第 (1) 款”。

**7. Section 75 amended (taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal))**

Section 75(1)—

**Repeal**

everything after “the tribunal) are”

**Substitute**

“to be taxed by the court on the party and party basis in accordance with rule 28(2) of Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A).”.

**8. Section 84 amended (enforcement of arbitral awards)**

Section 84(3), Chinese text—

**Repeal**

“根據第 (1) 款決定批予或拒絕批予強制執行裁決的”

**Substitute**

“決定根據第 (1) 款批予強制執行裁決的許可，或決定拒絕根據第 (1) 款批予該”。

**9. Section 85 amended (evidence to be produced for enforcement of arbitral awards)**

(1) Section 85—

**Repeal**

“neither a Convention award nor a Mainland award”

**Substitute**

“not a Convention award, Mainland award or Macao award”。

(2) Section 85—

**Repeal paragraph (c)**

**Substitute**

“(c) if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.”。

**10. Section 86 amended (refusal of enforcement of arbitral awards)**

(1) Section 86(1), English text—



**Repeal paragraph (a)**

**Substitute**

“(a) that a party to the arbitration agreement was under some incapacity (under the law applicable to that party);”.

(2) Section 86—

**Repeal subsection (3)**

**Substitute**

“(3) If an award referred to in section 85 contains, apart from decisions on matters submitted to arbitration (*arbitral decisions*), decisions on matters not submitted to arbitration (*unrelated decisions*), the award may be enforced only in so far as it relates to the arbitral decisions that can be separated from the unrelated decisions.”.

(3) Section 86(4), English text—

**Repeal**

“the setting aside or suspension of”

**Substitute**

“setting aside or suspending”.

**11. Section 87 amended (enforcement of Convention awards)**

(1) Section 87(1)(b)—

**Repeal**

“arbitral award, and section 84 applies”

**Substitute**

“award to which section 84 applies, and that section applies to a Convention award”.

(2) Section 87—

**Repeal subsection (2)**

**Substitute**

“(2) A Convention award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the parties, and may accordingly be relied on by any of them by way of defence, set off or otherwise in any legal proceedings in Hong Kong.”.

**12. Section 88 amended (evidence to be produced for enforcement of Convention awards)**

Section 88—

**Repeal paragraph (c)**

**Substitute**

“(c) if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.”.

**13. Section 89 amended (refusal of enforcement of Convention awards)**

(1) Section 89(1)—

**Repeal**

“in the cases”

**Substitute**

“as”.

(2) Section 89(2), English text—

**Repeal paragraph (a)**

**Substitute**

“(a) that a party to the arbitration agreement was under some incapacity (under the law applicable to that party);”.

- (3) Section 89—

**Repeal subsection (4)**

**Substitute**

“(4) If a Convention award contains, apart from decisions on matters submitted to arbitration (*arbitral decisions*), decisions on matters not submitted to arbitration (*unrelated decisions*), the award may be enforced only in so far as it relates to the arbitral decisions that can be separated from the unrelated decisions.”.

- (4) Section 89(5), English text—

**Repeal**

“the setting aside or suspension of”

**Substitute**

“setting aside or suspending”.

**14. Section 92 amended (enforcement of Mainland awards)**

- (1) Section 92(1)(b)—

**Repeal**

“arbitral award, and section 84 applies”

**Substitute**

“award to which section 84 applies, and that section applies to a Mainland award”.

- (2) Section 92—

**Repeal subsection (2)**

**Substitute**

“(2) A Mainland award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the parties, and may accordingly be relied on by any of them by way of defence, set off or otherwise in any legal proceedings in Hong Kong.”.

**15. Section 93 amended (restrictions on enforcement of Mainland awards)**

Section 93—

**Repeal subsection (2)**

**Substitute**

“(2) If a Mainland award is not fully satisfied by way of enforcement proceedings taken in the Mainland, or in any other place other than Hong Kong, that part of the award which is not satisfied in those proceedings is enforceable under this Division.”.

**16. Section 94 amended (evidence to be produced for enforcement of Mainland awards)**

Section 94—

**Repeal paragraph (c)**

**Substitute**

“(c) if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.”.

**17. Section 95 amended (refusal of enforcement of Mainland awards)**

(1) Section 95(1)—

**Repeal**

“in the cases”

**Substitute**

“as”.

(2) Section 95(2), English text—

**Repeal paragraph (a)**

**Substitute**

“(a) that a party to the arbitration agreement was under some incapacity (under the law applicable to that party);”.

(3) Section 95—

**Repeal subsection (4)**

**Substitute**

“(4) If a Mainland award contains, apart from decisions on matters submitted to arbitration (*arbitral decisions*), decisions on matters not submitted to arbitration (*unrelated decisions*), the award may be enforced only in so far as it relates to the arbitral decisions that can be separated from the unrelated decisions.”.

**18. Part 10, Division 4 added**

Part 10, after Division 3—

**Add**

**“Division 4—Enforcement of Macao Awards**

**98A. Enforcement of Macao awards**

(1) A Macao award is, subject to this Division, enforceable in Hong Kong either—

(a) by action in the Court; or

(b) in the same manner as an award to which section 84 applies, and that section applies to a Macao award accordingly as if a reference in that section to an award were a Macao award.

(2) A Macao award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the parties, and may accordingly be relied on by any of them by way of defence, set off or otherwise in any legal proceedings in Hong Kong.

- (3) A reference in this Division to enforcement of a Macao award is to be construed as including reliance on a Macao award.

**98B. Enforcement of Macao awards partially satisfied**

If a Macao award is not fully satisfied by way of enforcement proceedings taken in Macao, or in any other place other than Hong Kong, that part of the award which is not satisfied in those proceedings is enforceable under this Division.

**98C. Evidence to be produced for enforcement of Macao awards**

The party seeking to enforce a Macao award must produce—

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.

**98D. Refusal of enforcement of Macao awards**

- (1) Enforcement of a Macao award may not be refused except as mentioned in this section.
- (2) Enforcement of a Macao award may be refused if the person against whom it is invoked proves—
  - (a) that a party to the arbitration agreement was under some incapacity (under the law applicable to that party);
  - (b) that the arbitration agreement was not valid—

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- (i) under the law to which the parties subjected it; or
    - (ii) (if there was no indication of the law to which the arbitration agreement was subjected) under the law of Macao;
  - (c) that the person—
    - (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or
    - (ii) was otherwise unable to present the person's case;
  - (d) subject to subsection (4), that the award—
    - (i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or
    - (ii) contains decisions on matters beyond the scope of the submission to arbitration;
  - (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with—
    - (i) the agreement of the parties; or
    - (ii) (if there was no agreement) the law of Macao; or
  - (f) that the award—
    - (i) has not yet become binding on the parties; or
    - (ii) has been set aside or suspended by a competent authority of Macao or under the law of Macao.
- (3) Enforcement of a Macao award may also be refused if—

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- (a) the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong; or
  - (b) it would be contrary to public policy to enforce the award.
- (4) If a Macao award contains, apart from decisions on matters submitted to arbitration (*arbitral decisions*), decisions on matters not submitted to arbitration (*unrelated decisions*), the award may be enforced only in so far as it relates to the arbitral decisions that can be separated from the unrelated decisions.
- (5) If an application for setting aside or suspending a Macao award has been made to a competent authority as mentioned in subsection (2)(f), the court before which enforcement of the award is sought—
- (a) may, if it thinks fit, adjourn the proceedings for the enforcement of the award; and
  - (b) may, on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.
- (6) A decision or order of the court under subsection (5) is not subject to appeal.”
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## Part 3

### **Amendment to Arbitration (Parties to New York Convention) Order**

**19. Arbitration (Parties to New York Convention) Order amended**

The Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) is amended as set out in section 20.

**20. Schedule amended**

The Schedule—

**Add in alphabetical order**

“Fiji

Liechtenstein

Sao Tome and Principe

Tajikistan”.

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## Part 4

### Consequential Amendments to Rules of the High Court

#### 21. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in section 22.

#### 22. Order 73, rule 10 amended (enforcement of settlement agreement, award, order or direction under Arbitration Ordinance)

(1) Order 73, rule 10, heading—

**Repeal**

“or direction”

**Substitute**

“, direction or emergency relief”.

(2) Order 73, after rule 10(1)(b)—

**Add**

“(ba) under section 22B(1) of the Arbitration Ordinance to enforce any emergency relief;”.

(3) Order 73, rule 10(1)(d)—

**Repeal**

everything after “84(1)”

**Substitute**

“of the Arbitration Ordinance, or in accordance with section 84 of the Arbitration Ordinance as provided by section 87(1)(b), 92(1)(b) or 98A(1)(b) of that Ordinance, to enforce an arbitral award;”.

(4) Order 73, rule 10(1)—

**Repeal**

“judgment or order”

**Substitute**

“judgment, order or direction”.

- (5) Order 73, after rule 10(3)(a)(ii)—

**Add**

“(iiaa) if the application is under section 22B(1) of the Arbitration Ordinance, the arbitration agreement (or a copy of it) and the original instrument of grant of emergency relief (or a copy of it);”.

- (6) Order 73, rule 10(3)(a)(iii)—

**Repeal**

“(iv) and (v)”

**Substitute**

“(iv), (v) and (vi)”.

- (7) Order 73, rule 10(3)(a)(iv)—

**Repeal**

“under section 87(1)(a) of the Arbitration Ordinance, or”.

- (8) Order 73, rule 10(3)(a)(v)—

**Repeal**

“under section 92(1)(a) of the Arbitration Ordinance, or”.

- (9) Order 73, after rule 10(3)(a)(v)—

**Add**

“(vi) if the application is in accordance with section 84 of the Arbitration Ordinance as provided by section 98A(1)(b) of that Ordinance, the documents required to be produced under section 98C of that Ordinance;”.

- (10) Order 73, rule 10(3)(b)—

**Repeal**

“or direction”

**Substitute**

“, direction or emergency relief”.

- (11) Order 73, rule 10(3)(c)—

**Repeal**

“or direction”

**Substitute**

“, direction or emergency relief”.

- (12) Order 73, rule 10(6)—

**Repeal**

“or direction”

**Substitute**

“, direction or emergency relief”.

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### **Explanatory Memorandum**

The main object of this Bill is to amend the Arbitration Ordinance (Cap. 609) (*principal Ordinance*) to implement the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region concluded in January 2013.

2. The Bill also makes miscellaneous amendments to the principal Ordinance.
3. Clause 5 adds a new Part 3A to the principal Ordinance, which provides for the enforcement of emergency relief granted by an emergency arbitrator appointed by the parties to arbitration before an arbitral tribunal is constituted.
4. Clause 7 amends section 75 of the principal 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.
5. Clause 18 adds a new Division 4 to Part 10 of the principal Ordinance. The new Division provides for the requirements relating to the enforcement in Hong Kong of an arbitral award made in Macao.
6. Clause 20 adds to the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) 4 new parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
7. Clause 22 makes consequential amendments to the Rules of the High Court (Cap. 4 sub. leg. A) as regards the enforcement of arbitral awards under those Rules.