

立法會
Legislative Council

LC Paper No. LS45/12-13

**Paper for the House Committee Meeting
on 26 April 2013**

**Legal Service Division Report on
Arbitration (Amendment) Bill 2013**

I. SUMMARY

1. The Bill

The Bill seeks to -

- (a) amend the Arbitration Ordinance (Cap. 609) to implement an arrangement between Hong Kong and Macao for the reciprocal recognition and enforcement of arbitral awards (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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958; and
- (d) make consequential amendments to rule 10 of Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A).

2. Public Consultation The Administration has consulted the relevant parties on the proposal in relation to the Arrangement and a draft of the Bill. They were generally supportive of the proposal and the draft Bill.

3. Consultation with LegCo Panel The Panel on Administration of Justice and Legal Services was consulted on the legislative proposals on 14 December 2012. Members were generally supportive.

4. Conclusion Members may wish to consider setting up a Bills Committee to study the Bill in detail. The Legal Service Division will seek clarification from the Administration regarding the legal and drafting aspects of the Bill and will make a further report if necessary.

II. REPORT

The date of First Reading of the Bill is 24 April 2013. Members may refer to the LegCo Brief (File Ref.: LP CLU 5037/35/1C) issued by the Department of Justice on 26 March 2013 for further details.

Object of the Bill

2. The Bill seeks to -

- (a) amend the Arbitration Ordinance (Cap. 609) (the 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 (the Arrangement);
- (b) make miscellaneous amendments to the Ordinance;
- (c) update the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) (the Order); and
- (d) make consequential amendments to rule 10 of Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A) (RHC).

Background

3. Arbitration in Hong Kong is currently governed by 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.

4. Hong Kong 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) by virtue of China's accession to the New York Convention. Accordingly, an arbitral award obtained in Hong Kong is enforceable in other states that are signatories 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.

5. 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 Mainland¹ (Mainland award) is set out in Division 3 of Part 10 of the Ordinance.

6. Before the conclusion of the Arrangement in January 2013, there was no arrangement between Hong Kong and Macao on the reciprocal recognition and enforcement of arbitral awards². According to paragraph 2 of the LegCo Brief, 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 (Macao award) and vice versa. In order to implement the Arrangement, it is necessary to amend the Ordinance.

Provisions of the Bill

Implementation of the Arrangement

7. Clauses 3, 9(1) and 18 of the Bill seek to amend the Ordinance to provide for a framework for enforcing Macao awards in Hong Kong pursuant to the Arrangement.

8. Clause 18 of the Bill proposes to add a new Division 4 (comprising new sections 98A to 98D) to Part 10 of the Ordinance as follows -

- (a) new section 98A provides that a Macao award is enforceable in Hong Kong either by action in the Court of First Instance of the High Court (the Court) or in the same manner as an arbitral award to which section 84 of the Ordinance applies with the leave of the Court;
- (b) new section 98B specifies that 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 new Division 4;
- (c) new section 98C sets out the evidence required to be produced for enforcement of a Macao award; and
- (d) new section 98D states the grounds for refusal of enforcement of a Macao award.

¹ The "Mainland" is defined in the Ordinance to mean any part of China other than Hong Kong, Macao and Taiwan.

² Nevertheless, an arbitral award made in Macao may still be enforceable in Hong Kong under section 84 of the Ordinance or alternatively, a party may bring an action at common law in a Hong Kong court to enforce the award. An arbitral award made in Hong Kong may also be enforced in Macao under the relevant law of Macao.

9. The proposed enforcement mechanism of Macao awards provided in new Division 4 is broadly similar to that of Mainland awards as currently contained in Division 3 of Part 10 of the Ordinance.

10. Clause 3 of the Bill proposes to add new definitions of "Macao" and "Macao award" to section 2 of the Ordinance. Clause 9(1) of the Bill seeks to clarify that section 85 of the Ordinance does not apply to enforcement of a Macao award.

Miscellaneous amendments to the Ordinance

Enforcement of emergency relief

11. According to paragraphs 4 and 5 of the LegCo Brief, an emergency arbitrator procedure has increasingly been adopted by arbitral institutions around the world. Basically, the procedure would enable parties to arbitration to obtain emergency relief from an emergency arbitrator before the arbitral tribunal is constituted. The Hong Kong International Arbitration Centre (HKIAC) is also finalizing amendments to its Arbitration Rules to include a procedure for the appointment of an emergency arbitrator to deal with applications for emergency relief before the constitution of an arbitral tribunal.

12. To complement these developments, clause 5 of the Bill seeks to add new Part 3A (comprising new sections 22A and 22B) to the Ordinance to provide for the enforcement of an emergency relief. Under new Part 3A, an 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. It also specifies the circumstances under which the Court may not grant leave to enforce an emergency relief granted outside Hong Kong.

Taxation of costs of arbitral proceedings

13. Clause 7 of the Bill proposes 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" basis³ in accordance with rule 28(2) of Order 62 of RHC. Section 75 of the Ordinance currently does not specify the basis on which the court can award the costs.

³ On a taxation on that basis, there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

Other amendments

14. Clause 15 of the Bill seeks to amend section 93 of the Ordinance to provide that 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 Division 3 of Part 10 of the Ordinance.

15. Clauses 4, 6, 8, 9(2), 10-14 and 16-17 of the Bill propose various textual amendments to sections 5(2), 61(4), 84(3), 85-89, 92, 94 and 95 of the Ordinance for the sake of consistency and refinement.

Updating the Schedule to the Order

16. The Schedule to the Order contains the list of parties to the New York Convention. As mentioned in paragraph 7 of the LegCo Brief, there are four new parties to the New York Convention, namely, Fiji, Liechtenstein, Sao Tome and Principe, and Tajikistan. Clause 20 of the Bill proposes to update the list by adding them to the Schedule to the Order.

Consequential amendments to rule 10 of Order 73 of RHC

17. Rule 10 of Order 73 of RHC specifies the procedural requirements in relation to the enforcement of settlement agreement, award, order or direction under the Ordinance. In view of the amendments proposed to be made to the Ordinance, clause 22 of the Bill seeks to make consequential amendments to rule 10 of Order 73 of RHC.

Commencement

18. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public Consultation

19. According to paragraph 18 of the LegCo Brief, the Administration consulted the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties in March 2011 on the proposal to conclude the Arrangement and the broad framework of the Arrangement. The Administration confirmed that they were supportive of the proposal.

20. As stated in paragraph 19 of the LegCo Brief, the Administration sent a draft of the Bill to Law Society of Hong Kong, Hong Kong Bar Association, HKIAC, International Chamber of Commerce, International Court of Arbitration (Asia Office), Chinese International Economic and Trade Arbitration Commission (Hong Kong Arbitration Centre) and Judiciary in January 2013 for consultation. The Administration reported that they were generally supportive and that their comments and responses had been taken into account where appropriate.

Consultation with LegCo Panel

21. The Clerk to the Panel on Administration of Justice and Legal Services has advised that the Panel was consulted on the legislative proposals on 14 December 2012. 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 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.

Conclusion

22. Members may wish to consider setting up a Bills Committee to study the Bill in detail. The Legal Service Division will seek clarification from the Administration regarding the legal and drafting aspects of the Bill and will make a further report if necessary.

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22 April 2013