

立法會

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Bills Committee on Arbitration (Amendment) Bill 2015

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper gives an account of the deliberations of the Panel on Administration of Justice and Legal Services ("the Panel") on the Administration's proposals to amend the Arbitration Ordinance (Cap. 609) ("the Ordinance").

Background

2. The Ordinance, which came into operation on 1 June 2011, has unified the arbitration regimes for domestic and international arbitration under the now repealed Arbitration Ordinance (Cap. 341)¹. However, in response to the request of some users of arbitration², a limited exception to this unified regime is provided in Part 11 of and Schedule 2 to the Ordinance. It retains the rights formerly granted to parties under the domestic regime for seeking the Court's assistance on certain matters by way of opt-in provisions in sections 2 to 7 of Schedule 2 to the Ordinance. In addition, section 1 of Schedule 2 provides that "[d]espite section 23 [of the Ordinance], any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration."³

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.

2 For example, parties from the construction industry in Hong Kong have been using the standard forms of contracts with an arbitration agreement specifying that an arbitration under the agreement is a "domestic" arbitration.

3 Section 2 of Schedule 2 provides that the Court may order two or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another. Section 3 of Schedule 2 empowers the Court to decide any question of law arising in the course of arbitral proceedings. Sections 4 and 7 of Schedule 2 allow an arbitral award to be challenged at the Court on the ground of serious irregularity affecting the arbitral tribunal, the arbitral proceedings or the award. Sections 5, 6 and 7 of Schedule 2 enable a party to appeal to the Court against an arbitral award on a question of law.

3. Under section 100 of the Ordinance, all of the provisions (sections 1 to 7) in Schedule 2 to the Ordinance automatically apply to parties to two types of domestic arbitration agreements⁴. This is subject to section 102. In particular, section 102(b)(ii) provides that section 100 does not apply if the arbitration agreement concerned has provided expressly that "any of the provisions in Schedule 2 applies or does not apply".

4. According to the Administration, the arbitration sector has expressed, through the Hong Kong International Arbitration Centre ("HKIAC"), the concern over whether parties opting for domestic arbitration and specifying the number of arbitrators in the arbitration agreement may still retain their rights to seek the Court's assistance for matters set out in sections 2 to 7 of Schedule 2. Arguably, if parties specify the number of arbitrators in a domestic arbitration agreement, be it one or any number other than one, it would have the effect of expressing providing that section 1 of Schedule 2 applies or does not apply. This would arguably be caught by section 102(b)(ii) and would in turn result in the disapplication of section 100. Such legal uncertainties would give rise to doubts (and litigation) as to whether parties to a domestic arbitration agreement which specifies the number of arbitrators would be able to seek the Court's assistance on matters set out in sections 2 to 7 of Schedule 2.

5. The arbitration section has therefore requested that legislative amendments be introduced to the Ordinance to put the matter beyond doubt, so that parties opting for domestic arbitration should be free to decide on the number of arbitrators, whilst retaining their right to seek the Court's assistance on the matters set out in sections 2 to 7 of Schedule 2.

6. In June 2014, the Administration consulted the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties on the proposed amendments to (a) remove some legal uncertainties relating to the opt-in mechanism provided for domestic arbitration under Part 11 of the Ordinance; and (b) update, for the purpose of the Ordinance, the list of parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") by (a) adding the new parties (namely, Bhutan, Burundi and Guyana); (b) adding British Virgin Islands to the entry for the United Kingdom; and (c) amending "Bolivia" to "Bolivia (Plurinational State of)" in the Schedule to the Arbitration (Parties to New York Convention Order) (Cap. 609 sub. leg. A).

⁴ The agreement must be either: (a) an arbitration agreement entered into before the commencement of the Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or (b) an arbitration agreement entered into at any time within a period of six years after the commencement of the Ordinance which provides that arbitration under the agreement is a domestic arbitration.

7. According to the Administration, responses from 14 consultees were received at the end of the consultation period. None of these consultees had raised any in-principle objection to the proposed amendments.

Deliberations of the Panel

8. The Administration consulted the views of the Panel at its meeting held on 24 November 2014 on the aforesaid proposals to amend the Ordinance.

9. Members noted that apart from section 100 of Cap. 609 whereby all of the provisions of Schedule 2 to Cap. 609 were automatically applied to parties to a domestic arbitration agreement, parties to an arbitration agreement might also expressly opt in any or all of the provisions in Schedule 2 to Cap. 609 under section 99 of Cap. 609. To align with the spirit of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL Model Law") which encouraged the use of arbitration to facilitate the fair and speedy resolution of disputes without unnecessary expense and on which Cap. 609 was based, the Administration was urged to step up efforts to encourage parties who wished to use arbitration to settle their disputes not to opt for inclusion in their arbitration agreements the rights to seek the Court's assistance for matters set out in sections 2 to 7 of Schedule 2 to Cap. 609.

10. The Administration advised that the limited exception provided in section 100 of Cap. 609 was made in response to some users of arbitration to retain the rights formerly granted to parties to a domestic arbitration agreement under the now repealed Arbitration Ordinance (Cap. 341) for seeking the Court's assistance on certain matters by way of an opt-in mechanism. The automatic opt-in mechanism provided under section 100 of Cap. 609 was mainly used for arbitral proceedings involving construction disputes. This automatic opt-in mechanism would no longer apply to arbitration agreements entered into after the transitional period of six years from the commencement of Cap. 609. To align with the spirit of the UNCITRAL Model Law, the Administration had encouraged and would continue to encourage overseas and local users of arbitration not to opt in any of the provisions in Schedule 2 to Cap. 609 to retain their rights to seek the Court's assistance for settling their disputes in their agreements.

11. Members further noted from the submission of the Hong Kong Bar Association to the Panel that whilst it was supportive of the proposed amendments to Cap. 609, suggestion was made to add the words "by the parties" after the word "determination" in the proposed amendment to section 1 of Schedule 2 to Cap. 609, so as to expressly differentiate the situation from that where the number of arbitrators would be decided by the HKIAC under section 23(3) of Cap. 609.

12. Panel members generally did not object to the Administration introducing the amendment bill into the Council in the first quarter of 2015.

Relevant papers

13. A list of the relevant papers available on the website of the Legislative Council is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
10 March 2015

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List of relevant papers

Meeting	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	24.11.2014 (Item III)	CB(4)172/14-15(03) CB(4)177/14-15(01) CB(4)355/14-15 (Minutes of meeting)

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