

LEGISLATIVE COUNCIL BRIEF

Arbitration (Amendment) Bill 2015

INTRODUCTION

 A At the meeting of the Executive Council on 20 January 2015, the Council ADVISED and the Chief Executive ORDERED that the Arbitration (Amendment) Bill 2015, at Annex A, should be introduced into the Legislative Council. The Bill seeks to –

- (a) remove some legal uncertainties relating to the opt-in mechanism provided for domestic arbitration under Part 11 of the Arbitration Ordinance (Cap. 609) (“the Ordinance”); and
- (b) update, for the purposes of the Ordinance, the list of parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”).

JUSTIFICATIONS

The opt-in mechanism for domestic arbitration

2. The Ordinance, which came into operation on 1 June 2011, has unified the separate arbitration regimes for domestic and international arbitration under the now repealed Arbitration Ordinance (Cap. 341).

3. However, in response to the request of some users of arbitration¹, 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.² 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

4. According to section 100 of the Ordinance, all of the provisions (sections 1 to 7) in Schedule 2 automatically apply to parties to two types of domestic arbitration agreements.⁴ This is subject to section 102. In particular, section 102(b)(ii) provides, among others, 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”.

5. 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

¹ 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.

² Section 2 of Schedule 2 provides that the Court may order 2 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 Section 23(1) of the Ordinance provides that parties are free to determine the number of arbitrators. Section 23(2) provides that parties are free to authorize a third party to make the determination. Section 23(3) provides that the Hong Kong International Arbitration Centre is the default authority to decide on the number of arbitrators if parties fail to agree on this matter. Currently the effect of section 1 of Schedule 2 of the Ordinance is to dis-apply section 23 of the Ordinance.

⁴ The agreement must be either: (a) an arbitration agreement entered into before the commencement of the Ordinance which has provided that an arbitration under the agreement is a domestic arbitration; or (b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of the Ordinance which provides that an arbitration under the agreement is a domestic arbitration.

the Court's assistance for matters set out in sections 2 to 7 of Schedule 2.⁵ Arguably, if parties specify the number of arbitrators in a domestic arbitration agreement, be it 1 or any number other than 1, it would have the effect of expressly 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.

6. The arbitration sector 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.

Amendments to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A)

7. There are some new state parties to the New York Convention, including Bhutan, Burundi, Democratic Republic of the Congo and Guyana, since the enactment of the Arbitration (Amendment) Ordinance 2013. The United Kingdom has also submitted a notification to extend the territorial application of the New York Convention to the British Virgin Islands. In addition, it is noted that the name for "Bolivia" has been changed to "Bolivia (the Plurinational State of)". In order to comply with obligations under the New York Convention to recognize and enforce arbitral awards made in these jurisdictions, it is necessary to amend the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) to reflect the above changes.

THE BILL

8. The main provisions of the Bill are summarised below.

⁵ See John Choong & J. Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (2011), paras 102.10 to 102.15.

9. Clause 3 amends section 23(3) of the Ordinance to clarify that if the parties fail to agree on the number of arbitrators in an arbitration and section 1 of Schedule 2 to the Ordinance does not apply, such number is to be either 1 or 3 as decided by the HKIAC in the particular case.

10. Section 102 of the Ordinance deals with the circumstances under which sections 100 and 101 of the Ordinance (“those 2 sections”) do not apply. Clause 4 amends section 102 so that an express provision in an arbitration agreement having the effect that section 1 of Schedule 2 to the Ordinance applies, or does not apply would not trigger the disapplication of those 2 sections. Those 2 sections provide for the provisions of that Schedule (“opt-in provisions”) to apply automatically to certain arbitration agreements. Hence, the effect of not triggering the disapplication of those 2 sections would be that the opt-in provisions still apply whether or not section 1 of that Schedule applies to the arbitration agreement concerned.

11. Clause 4 further adds a new subsection to section 102 to spell out that section 102(1)(b)(ii) does not derogate from the operation of section 99 of the Ordinance.

12. Clause 5 adds a new subsection to section 111 of the Ordinance to provide that the savings and transitional provisions contained in Part 2 of Schedule 3 to the Ordinance (added by clause 7) apply in relation to the Arbitration (Amendment) Ordinance 2015 (“the Amendment Ordinance”).

13. Clause 6 amends section 1 of Schedule 2 to the Ordinance so that for an arbitration to which section 1 of Schedule 2 applies, any dispute arising between the parties to the arbitration agreement concerned is to be submitted to a sole arbitrator for arbitration if the parties fail to agree on the number of arbitrators.

14. Clause 7 adds a new Part 2 to Schedule 3 to the Ordinance to provide for the savings and transitional provisions so that the Amendment Ordinance does not apply to certain arbitrations.

15. Clause 9 contains amendments to the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) to update the list of parties to the New York Convention in respect of the matters in paragraph 7 above.

LEGISLATIVE TIMETABLE

16. The legislative timetable will be as follows –

Publication in the Gazette	23 January 2015
First Reading and commencement of Second Reading debate	4 February 2015
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

17. The proposal has no economic and financial and civil service implications. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no productivity, environmental, sustainability and family implications.

18. The Bill will not affect the current binding effect of the Ordinance.

CONSULTATION

19. In June 2014, the Administration conducted consultation with the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties on the proposed amendments. It is proposed in the consultation paper that section 1 of Schedule 2 and section 102(b)(ii) of the Ordinance should be amended to remove the legal uncertainties mentioned above. At the end of the

consultation period, responses from 14 consultees were received. None of the consultees has raised any in-principle objection to the proposed amendments.

20. In October 2014, an English draft Bill was circulated to further consult the Legal Advisory Division (Works) of the Development Bureau as well as a number of legal and arbitration professional bodies, including the Law Society of Hong Kong, the Hong Kong Bar Association, the HKIAC, the International Court of Arbitration of the International Chamber of Commerce (Asia Office), the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, Hong Kong Institute of Arbitrators and Chartered Institute of Arbitrators (East Asia Branch). Based on the responses received, the Bill at Annex A was prepared.

21. On 24 November 2014, the Administration briefed the Legislative Council's Panel on Administration of Justice and Legal Services on the above proposals. Members of the Panel expressed support to the introduction of the Bill into the Legislative Council.

PUBLICITY

22. A press release is to be issued on 21 January 2015. A spokesperson will be available for media enquiries.

ENQUIRY

23. Any enquiry on this brief can be addressed to Mr Bernard Yue, Senior Government Counsel (Ag.), Legal Policy Division, Department of Justice at Tel. No. 2563 4066.

Department of Justice
21 January 2015

A BILL

To

Amend the Arbitration Ordinance to adjust the circumstances under which the opt-in provisions in Schedule 2 to the Ordinance do not automatically apply; to update the Arbitration (Parties to New York Convention) Order; and to make related amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title

This Ordinance may be cited as the Arbitration (Amendment) Ordinance 2015.

Part 2

Amendments to Arbitration Ordinance

2. Arbitration Ordinance amended

The Arbitration Ordinance (Cap. 609) is amended as set out in sections 3 to 7.

3. Section 23 amended (article 10 of UNCITRAL Model Law (number of arbitrators))

Section 23—

Repeal subsection (3)

Substitute

“(3) The number of arbitrators in an arbitration is to be either 1 or 3 as decided by the HKIAC in the particular case if—

- (a) the parties fail to agree on the number of arbitrators; and
- (b) section 1 of Schedule 2 does not apply.”.

4. Section 102 amended (circumstances under which opt-in provisions not automatically apply)

(1) Section 102—

Renumber the section as section 102(1).

(2) Section 102(1)(b)(ii)—

Repeal

“any of the provisions in”

Substitute

“section 2, 3, 4, 5, 6 or 7 of”.

- (3) After section 102(1)—

Add

“(2) Subsection (1)(b)(ii) does not derogate from the operation of section 99.”.

5. Section 111 amended (savings and transitional provisions)

- (1) Section 111—

Renumber the section as section 111(1).

- (2) Section 111(1), before “Schedule”—

Add

“Part 1 of”.

- (3) After section 111(1)—

Add

“(2) Part 2 of Schedule 3 provides for the savings and transitional arrangements that apply on, or relate to, the commencement of the Arbitration (Amendment) Ordinance 2015 (of 2015).”.

6. Schedule 2 amended (provisions that may be expressly opted for or automatically apply)

Schedule 2, section 1—

Repeal

“Despite section 23, any dispute arising between the parties to an arbitration agreement”

Substitute

“If the parties to an arbitration agreement fail to agree on the number of arbitrators, any dispute arising between the parties”.

7. Schedule 3 amended (savings and transitional provisions)

- (1) Schedule 3, before section 1—

Add**“Part 1****Savings and Transitional Provisions Relating to Commencement of this Ordinance”.**

- (2) Schedule 3, after Part 1—

Add**“Part 2****Savings and Transitional Provisions Relating to Commencement of Arbitration (Amendment) Ordinance 2015****1. Conduct of arbitral and related proceedings**

- (1) If an arbitration has commenced under article 21 of the UNCITRAL Model Law before the commencement date, that arbitration and all related proceedings are to be governed by the pre-amended Ordinance as if the Arbitration (Amendment) Ordinance 2015 (of 2015) had not been enacted.

- (2) In subsection (1)—

all related proceedings (所有相關程序) includes arbitral proceedings resumed after the setting aside of the award made in the arbitration;

article 21 of the UNCITRAL Model Law (《貿法委示範法》第 21 條) means article 21 of the UNCITRAL Model Law as given effect to by section 49(1);

commencement date (生效日期) means the day on which the Arbitration (Amendment) Ordinance 2015 (of 2015) comes into operation;

pre-amended Ordinance (《原本條例》) means this Ordinance as in force immediately before the commencement date.”.

Part 3

Amendments to Arbitration (Parties to New York Convention) Order

8. **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 9.
9. **Schedule amended**
- (1) The Schedule—
 - Repeal**
“Bolivia”
 - Substitute**
“Bolivia (Plurinational State of)”.
 - (2) The Schedule, entry relating to United Kingdom of Great Britain and Northern Ireland, after “Bermuda,”—
 - Add**
“British Virgin Islands,”.
 - (3) The Schedule—
 - Add in alphabetical order**
“Bhutan
Burundi
Democratic Republic of the Congo
Guyana”.
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Explanatory Memorandum

This Bill seeks to amend the Arbitration Ordinance (Cap. 609) (*the Ordinance*) and the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) (*the Order*).

Amendments to the Ordinance

2. Clause 3 amends section 23(3) of the Ordinance to clarify that if the parties fail to agree on the number of arbitrators in an arbitration and section 1 of Schedule 2 to the Ordinance does not apply, such number is to be either 1 or 3 as decided by the Hong Kong International Arbitration Centre in the particular case.
3. Section 102 of the Ordinance deals with the circumstances under which sections 100 and 101 of the Ordinance (*those 2 sections*) do not apply. Clause 4 amends section 102 so that an express provision in an arbitration agreement that section 1 of Schedule 2 to the Ordinance applies, or does not apply, would not trigger the disapplication of those 2 sections. Those 2 sections provide for the provisions of that Schedule (*opt-in provisions*) to apply automatically to certain arbitration agreements. Hence, the effect of not triggering the disapplication of those 2 sections would be that the opt-in provisions still apply whether or not section 1 of that Schedule applies to the arbitration agreement concerned.
4. Clause 4 further adds a new subsection to section 102 of the Ordinance to spell out that section 102(1)(b)(ii) does not derogate from the operation of section 99 of the Ordinance.
5. Clause 5 adds a new subsection to section 111 of the Ordinance to provide that the savings and transitional provisions contained in Part 2 of Schedule 3 to the Ordinance (added by clause 7) apply in relation to the Arbitration (Amendment) Ordinance 2015 (*the Amendment Ordinance*).

6. Clause 6 amends section 1 of Schedule 2 to the Ordinance so that for an arbitration to which section 1 of that Schedule applies, any dispute arising between the parties to the arbitration agreement concerned is to be submitted to a sole arbitrator for arbitration if the parties fail to agree on the number of arbitrators.
7. Clause 7 adds a new Part 2 to Schedule 3 to the Ordinance to provide for the savings and transitional provisions so that the Amendment Ordinance does not apply to certain arbitrations.

Amendments to the Order

8. The Schedule to the Order specifies the States or territories declared to be parties to the New York Convention. Clause 9 amends that Schedule to update the list of parties to the Convention.