

II. REPORT

The date of First Reading of the Bill is 4 February 2015. Members may refer to the LegCo Brief (File Ref.: LP 19/00/3C) issued by the Department of Justice on 21 January 2015 for further details.

Object of the Bill

2. The Bill seeks to –
 - (a) make it clear that parties opting for domestic arbitration and specifying the number of arbitrators in an arbitration agreement may still retain their rights by virtue of section 100 of the Arbitration Ordinance (Cap. 609) to seek assistance from courts for matters set out in sections 2 to 7 of Schedule 2 of Cap. 609; and
 - (b) update, for the purposes of Cap. 609, the list of parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which is given effect by the Arbitration (Parties to New York Convention) Order (Cap. 609A).

Background

3. Section 100 of Cap. 609 provides that subject to section 102, all the provisions in Schedule 2 to Cap. 609 apply to certain domestic arbitration. Section 102(b)(ii) provides that section 100 does not apply if the arbitration agreement concerned has provided that any of the provisions in Schedule 2 applies or does not apply.

4. Section 1 of Schedule 2 to Cap. 609 provides that despite section 23 of Cap. 609¹, any dispute arising between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration. Sections 2 to 7 of Schedule 2 further provide that the parties may seek certain assistance from the Court of First Instance (CFI).

¹ Section 23(1) of Cap. 609 gives legal effect to Article 10(1) of the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985 and as amended by the Commission on 7 July 2006. Article 10(1) provides that parties to an arbitration are free to determine the number of arbitrators. Section 23(3) provides that subject to section 1 of Schedule 2 (if applicable), if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by the Hong Kong International Arbitration Centre in the particular case.

5. According to paragraphs 5 and 6 of the LegCo Brief, the arbitration sector has expressed concern that if the parties to a domestic arbitration agreement specified the number of arbitrator (whether one or more than one) in the arbitration agreement, it would have the effect of expressly providing that section 1 of Schedule 2 applies or does not apply, hence triggering the application of section 102(b)(ii), in which case the provisions in Schedule 2 may not apply. In the circumstances, it gives rise to doubts as to whether the parties would be able to seek assistance from CFI on matters set out in sections 2 to 7 of Schedule 2.²

Provisions of the Bill

6. In order to enable the parties to a domestic arbitration referred to in paragraph 5 above to retain their right to seek assistance from CFI, the Bill seeks to –

- (a) amend section 23 of Cap. 609, among other things, to the effect that if section 1 of Schedule 2 does not apply, the number of arbitrators is to be either 1 or 3 as decided by the Hong Kong International Arbitration Centre (clause 3 of the Bill);
- (b) amend section 102(b)(ii) to remove the reference to section 1 of Schedule 2 so that section 100 does not apply only if the arbitration agreement has provided expressly that any of the provisions of Schedule 2, other than section 1, applies or does not apply (clause 4 of the Bill); and
- (c) to remove the reference to section 23 of Cap. 609 in section 1 of Schedule 2 (clause 6 of the Bill).

7. Clause 7 of the Bill also seeks to amend Schedule 3 to Cap. 609 to provide for savings and transitional provisions so that the Bill, upon coming into operation as an ordinance, does not apply to certain arbitrations.

8. Clause 9 of the Bill seeks to amend the Schedule to Cap. 609A to update the list of parties to the New York Convention by replacing "Bolivia" with "Bolivia (Plurinational State of)" and by adding to the list "British Virgin Islands" and "Bhutan". Under section 90(2) of Cap. 609, inclusion in the list is conclusive evidence that the State or territory specified in it is a party to the New York Convention. An arbitral award made in a State or the territory of a State to the

² Members may also refer to paragraphs 3 to 7 of a discussion paper prepared by the Administration for the meeting of the Panel on Administration of Justice and Legal Services on 24 November 2014 (LC Paper No. CB(4)172/14-15(03)) for further information on the concern of the arbitration sector.

New York Convention, other than China or any part of China, is recognized and enforceable under Cap. 609.

9. The Bill, if passed, would come into operation upon publication in the Gazette.

Public Consultation

10. According to paragraphs 19 and 20 of the LegCo Brief, 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. No in-principle objection has been raised. In October 2014, a draft bill in English language was circulated to further consult the Legal Advisory Division (Works) of the Development Bureau and a number of legal and arbitration professional bodies, including The Law Society of Hong Kong and the Hong Kong Bar Association (the Bar Association). The Bill was prepared based on the responses received.

Consultation with LegCo Panel

11. As advised by the Clerk to the Panel on Administration of Justice and Legal Services (the Panel), the Panel was briefed by the Administration on the proposed Arbitration (Amendment) Bill 2015 at its meeting held on 24 November 2014. To align with the spirit of the "Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law" which encouraged the use of arbitration to facilitate the fair and speedy resolution of disputes without unnecessary expense and on which the Arbitration Ordinance (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 CFI's assistance for matters set out in sections 2 to 7 of Schedule 2 to Cap. 609. In its submission to the Panel, the Bar Association indicated its support for the proposed amendments to Cap. 609. However, the Bar Association suggested adding the words "by the parties" after "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 Hong Kong International Arbitration Centre under section 23(3) of Cap. 609.³

³ The draft provision on which the Bar Association has given comments is set out in paragraph 16 of Annex A of the discussion paper identified in footnote 2. Clause 6 of the Bill, which seeks to amend section 1 of Schedule 2, has adopted a different drafting to make it clear that section 1 of Schedule 2 only applies if parties to an arbitration agreement fail to agree on the number of arbitrators.

12. Panel members generally did not object to the Administration introducing the Bill into LegCo in the first quarter of 2015.

Conclusion

13. No difficulties in the legal and drafting aspect of the Bill have been identified.

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