

**立法會**  
*Legislative Council*

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**Paper for the House Committee meeting on 10 April 2015**

**Report of the Bills Committee on the Arbitration (Amendment) Bill 2015**

**Purpose**

This paper reports on the deliberations of the Bills Committee on the Arbitration (Amendment) Bill 2015.

**Background**

2. The Arbitration Ordinance (Cap. 609) ("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operation on 1 June 2011, has unified the arbitration regimes for domestic and international arbitration under the now repealed Arbitration Ordinance (Cap. 341). However, in response to the request of some users of arbitration<sup>1</sup>, 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.<sup>2</sup> 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."<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

3. According to 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 agreements<sup>4</sup>. This is subject to section 102. In particular, section 102(b)(ii) provides, amongst 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".

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 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.

5. 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.

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 above proposed amendments. 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.

## **The Bill**

7. 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 Ordinance to seek assistance

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<sup>4</sup> 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.

from courts for matters set out in sections 2 to 7 of Schedule 2 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 1958 ("New York Convention") by (i) adding the new parties (namely, Bhutan, Burundi and Guyana); (ii) adding British Virgin Islands to the entry for the United Kingdom; and (iii) amending "Bolivia" to "Bolivia (Plurinational State of)" in the Schedule to the Arbitration (Parties To New York Convention) Order (Cap. 609 sub. leg. A).

## **The Bills Committee**

8. At the House Committee meeting on 6 February 2015, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Kenneth LEUNG, the Bills Committee has held two meetings, including one meeting with deputations and the Administration. The membership of the Bills Committee is in **Appendix I**. A list of organizations which have given views on the Bill is in **Appendix II**.

## **Deliberations of the Bills Committee**

9. Members note that, in order to remove the above legal uncertainties relating to the opt-in mechanism provided for domestic arbitration under Part 11 of the Ordinance, it is necessary to, amongst other things,

- (a) amend 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 (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 amend section 1 of Schedule 2 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 (clause 6 of the Bill).

10. Members also note that clause 7 of the Bill seeks to add a new Part 2 to Schedule 3 to the Ordinance to provide for savings and transitional provisions so that the Bill, upon coming into operation as an Amendment Ordinance, does not apply to an arbitration which has commenced before the commencement date of the Amendment Ordinance.

11. On the justification to update the list of state parties to the New York Convention by amending Cap. 609 sub. leg. A, the Administration has explained that it is to comply with obligations under the New York Convention to recognize and enforce arbitral awards made in contracting parties so that arbitral awards made in new contracting states to the New York Convention, such as Bhutan, could be enforced by Hong Kong courts and vice versa.

12. Dr Hon Priscilla LEUNG has asked whether the territory of "British Virgin Islands" also appears in other local legislation. The Administration replied in the positive. The reason for adding British Virgin Islands to the entry for the United Kingdom is that the United Kingdom has submitted a notification to extend territorial application of the New York Convention to the British Virgin Islands.

13. Members note that the Secretary for Justice will move a Committee Stage amendment ("CSA") to add "State of Palestine" in the Schedule to Cap. 609 sub. leg. A, as the State of Palestine acceded to the New York Convention on 2 January 2015 and will become a new contracting party to the Convention on 2 April 2015. The proposed CSA is in **Appendix III**.

14. On the question as to whether amending Cap. 609 sub. leg. A is the only way to update, for the purpose of the Ordinance, the list of parties to the New York Convention, the Administration has advised that, in addition to amending Cap. 609 sub. leg. A by a bill, another way is for the Chief Executive in Council to declare by order in the Gazette that any State or territory is a party to the New York Convention under section 90(1) of the Ordinance.

15. The Administration has advised that as the Bill was introduced to address the concern of some users of arbitration, the Bill, if passed by the Legislative Council, would come into operation upon publication in the Gazette as soon as practicable.

### **Advice sought**

16. Members are invited to note the deliberations of the Bills Committee.

**Bills Committee on the Arbitration (Amendment) Bill 2015**

**Membership List**

**Chairman** Hon Kenneth LEUNG

**Members** Hon James TO Kun-sun  
Hon TAM Yiu-chung, GBS, JP  
Hon Abraham SHEK Lai-him, GBS, JP  
Hon Cyd HO Sau-lan, JP  
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP  
Hon Paul TSE Wai-chun, JP  
Hon Dennis KWOK  
Hon Tony TSE Wai-chuen, BBS

(Total : 9 Members)

**Clerk** Miss Mary SO

**Legal adviser** Mr Kelvin LEE

## **Appendix II**

### **Bills Committee on the Arbitration (Amendment) Bill 2015**

#### **List of organizations that have given views to the Bills Committee**

1. The Hong Kong Bar Association
2. The Law Society of Hong Kong
3. Hong Kong Institute of Surveyors
4. Hong Kong International Arbitration Centre

Draft CSAs (subject to fine-tuning and format checking)

Arbitration (Amendment) Bill 2015

Committee Stage

Amendment to be moved by the Secretary for Justice

Clause

Amendment Proposed

9(3)

By adding in alphabetical order to the proposed entries—  
“State of Palestine”.