

立法會
Legislative Council

LC Paper No. LS38/20-21

**Paper for the House Committee Meeting
on 26 February 2021**

**Legal Service Division Report on
Arbitration (Amendment) Bill 2021**

I. SUMMARY

1. The Bill

The Bill seeks to:

- (a) amend the Arbitration Ordinance (Cap. 609) to give effect to the supplemental arrangement between the Mainland and Hong Kong for mutual enforcement of arbitral awards signed on 27 November 2020 ("Supplemental Arrangement"); and
- (b) amend the Arbitration (Parties to New York Convention) Order (Cap. 609A) to update the list of contracting parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

**2. Public
consultation**

According to the Administration, the Advisory Committee on Promotion of Arbitration supported the signing of the Supplemental Arrangement and the related proposed amendments to Cap. 609. The signing of the Supplemental Arrangement is also welcomed by legal practitioners and arbitration community in Hong Kong.

**3. Consultation with
LegCo Panel**

The Panel on Administration of Justice and Legal Services was briefed at its meeting on 27 January 2021 on the Supplemental Arrangement and the proposal to amend Cap. 609 to implement the Supplemental Arrangement. Members raised no objection to the legislative amendment proposal but have enquired on the rationale and effects of certain proposed amendments.

4. Conclusion

The Legal Service Division is seeking clarification from the Administration regarding certain legal and drafting aspects of the Bill. In view of the possible legal effect of the Bill and the queries raised by the Members at the Panel meeting, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 24 February 2021. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: ARB 5042/20C) issued by the Department of Justice on 10 February 2021 for further details.

Object of the Bill

2. The Bill seeks to:
 - (a) amend the Arbitration Ordinance (Cap. 609) to give effect to the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("HKSAR") ("Supplemental Arrangement") and make certain textual amendments to Cap. 609; and
 - (b) amend the Arbitration (Parties to New York Convention) Order (Cap. 609A) to update the list of contracting parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention").

Background

3. 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 HKSAR ("Arrangement") signed in 1999. To implement the Arrangement, the mechanism for enforcement in Hong Kong of an arbitral award made in the Mainland ("Mainland award") is set out in Division 3 of Part 10 of Cap. 609. Under the preamble of the Arrangement (as reflected in sections 2 and 92 of Cap. 609), only a Mainland award made by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China ("PRC") is enforceable in Hong Kong. Section 97 of Cap. 609 provides that the Secretary for Justice must publish a list of recognized Mainland arbitral authorities from time to time. Also, under Article 2(3) of the Arrangement (as reflected in section 93 of Cap. 609), a Mainland award is not enforceable in Hong Kong under Cap. 609 if an application has been made on the Mainland for enforcement of the award.

4. According to paragraphs 1 and 2 of the LegCo Brief, the Supplemental Arrangement was signed between the Government of HKSAR and the Supreme People's Court ("SPC") of the PRC on 27 November 2020 after a review of the Arrangement, in consultation with SPC. According to

paragraphs 11 to 13 of the LegCo Brief, Article 2 of the Supplemental Arrangement removes the dependence of the enforceability of the Mainland award on choices of arbitral authorities under the Arrangement to align with the current practice of international arbitration under the New York Convention. Article 3 of the Supplemental Arrangement removes the restriction on concurrent applications for enforcement of the same arbitral award in both the Mainland and Hong Kong in order to address the lacuna in the scheme under the Arrangement as illustrated in the case of *CL v SCG* [2019] 2 HKLRD 144 and to better protect the arbitral award creditor.¹ To implement Articles 2 and 3 of the Supplemental Arrangement, the Administration considers it necessary to amend Cap. 609.

Provisions of the Bill

Implementation of the Supplemental Arrangement

5. Clauses 3, 4 and 5 of the Bill seek to amend Cap. 609 to give effect to Articles 2 and 3 of the Supplemental Arrangement.

6. Section 92 of Cap. 609 provides for the enforcement of Mainland award which is defined in section 2 of Cap. 609 as "an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China". To implement Article 2 of the Supplemental Arrangement, clause 3 of the Bill proposes to amend the definition of "Mainland award" by repealing the reference "in the Mainland by a recognized Mainland arbitral authority". The effect of the proposed amendment is that a Mainland award rendered pursuant to the Arbitration Law of PRC would be enforceable in Hong Kong regardless of whether it is made by a recognized Mainland arbitral authority as specified in a list published under section 97 of Cap. 609. Consequently, the Bill proposes to repeal the definition of "recognized Mainland arbitral authority" in section 2 and section 97.

7. Section 93 of Cap. 609 prohibits concurrent applications for enforcement of the same arbitral award in both the Mainland and Hong Kong. In order to remove this restriction as provided in Article 3 of the Supplemental Arrangement, clause 4 of the Bill proposes to repeal section 93 of Cap. 609.

8. It is noted that Article 3 of the Supplemental Arrangement also includes a restriction that the total amount to be recovered from enforcing the

¹ The court in *CL v SCG* (supra) held that the enforcement action in Hong Kong by an award creditor was time-barred because the award creditor was not allowed under the Arrangement and Cap. 609 to apply for enforcement of the award in Hong Kong until the Mainland enforcement proceedings were finally determined.

arbitral award in the courts of the two places (i.e. the Mainland and Hong Kong) must not exceed the amount determined in the arbitral award. As such restriction is not proposed in the Bill, the Legal Service Division ("LSD") is seeking clarification from the Administration on the safeguards for the interests of the parties in the enforcement application.

9. Clause 3 of the Bill also proposes to make textual amendments to the definition of "Mainland" in section 2 of Cap. 609.

Updating the list of contracting parties

10. The Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609A) provides for a list of contracting parties to the New York Convention. Under section 90(2) of Cap. 609, inclusion in the list is conclusive evidence that the State or territory specified in the Schedule to Cap. 609A is a party to the New York Convention. An arbitral award made in such a State or territory, other than China or any part of China, is recognized and enforceable under section 87 (Enforcement of Convention awards) of Cap. 609.

11. Clauses 6 and 7 of the Bill seek to amend the Schedule to Cap. 609A to update the list of contracting parties to the New York Convention by adding "Ethiopia", "Palau", "Sierra Leone" and "Tonga".

Commencement

12. The Bill, if passed, would come into operation in two phases. The provision in relation to the short title and commencement (i.e. clause 1) and the provisions concerning the amendments to the Schedule to Cap. 609A (i.e. clauses 6 and 7) would come into operation on the day on which the enacted Ordinance is published in the Gazette. The remaining provisions concerning the amendments to Cap. 609 would come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public consultation

13. According to paragraph 29 of the LegCo Brief, the Advisory Committee on Promotion of Arbitration² supported the signing of the

² According to footnote 8 of the LegCo Brief and webpage of the Department of Justice ("DoJ") (https://www.doj.gov.hk/en/legal_dispute/arbitration.html), the Advisory Committee on Promotion of Arbitration, chaired by the Secretary for Justice, includes representatives from the DoJ and members of the legal, arbitration and relevant sectors in Hong Kong. It was set up in December 2014 to advise and assist the DoJ in respect of the promotion of arbitration in Hong Kong.

Supplemental Arrangement and the related proposed amendments to Cap. 609. The signing of the Supplemental Arrangement is also welcomed by legal practitioners and arbitration community in Hong Kong (e.g. The Hong Kong International Arbitration Centre).

Consultation with LegCo Panel

14. According to the Clerk to the Panel on Administration of Justice and Legal Services, the Panel was briefed at its meeting on 27 January 2021 on the Supplemental Arrangement and the proposal to amend Cap. 609 to implement the Supplemental Arrangement. While members of the Panel generally had no objection to the legislative proposal, questions were raised as to the reasons for removal of the restriction set in the Arrangement which prohibited parties from making simultaneous applications in both courts of the Mainland and Hong Kong for enforcement of an arbitral award, and the measures to protect the interests of parties so that they would not be unduly disadvantaged after removal of the restriction. In response, the Administration advised that such restriction was not mandated by the New York Convention and simultaneous applications made to courts in multiple jurisdictions for the enforcement of an arbitral award were a common practice internationally. To prevent double benefits gained through making applications for enforcement of an arbitral award in both jurisdictions, Article 3 of the Supplemental Arrangement provided that the total amount recovered by an applicant from both applications would not exceed the amount determined in the arbitral award.

Conclusion

15. LSD is seeking clarification from the Administration regarding certain legal and drafting aspects of the Bill. In view of the possible legal effect of the Bill and the queries raised by the Members at the Panel meeting, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

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