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Panel on Administration of Justice and Legal Services

Meeting on 31 May 2021

**Background brief on latest developments in international arbitration for
Hong Kong**

Purpose

This paper provides background information on the developments in international arbitration for Hong Kong. It also provides a brief account of the past discussions of Legislative Council ("LegCo") Members and the Panel on Administration of Justice and Legal Services ("the Panel") on the above and related matters.

Background

2. In the Department of Justice ("DoJ")'s 2020 policy initiatives, the Administration stated that it would continue to promote the Hong Kong's distinctive advantage of "one country, two systems" while actively consolidating Hong Kong's status as an international legal and dispute resolution services centre in the region, harness the opportunities offered by Belt and Road Initiative and the development of the Guangdong-Hong Kong-Macao Greater Bay Area ("GBA"), and to enhance the standing of Hong Kong's international legal services through closer collaboration with various international and governmental organisations and institutions. Furthermore, through enhanced efforts in promotion and explanation to clarify misconceptions and misunderstanding, the Administration would continue to showcase that Hong Kong remained a neutral and effective international legal hub for deal-making and dispute resolution services.

Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region

3. The Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("HKSAR")("the Arrangement") was signed between DoJ and the Supreme People's Court of the People's Republic of China ("SPC") on 21 June 1999 which came into effect on 1 February 2000¹. Having accrued years of implementation experience, and taking into account the comments from the arbitration sector, the Administration conducted a review of the Arrangement in consultation with SPC.

4. At its meeting on 27 January 2021, the Panel was briefed on the signing of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR ("the Supplemental Arrangement") and the proposal to amend the Arbitration Ordinance (Cap. 609) to implement the Supplemental Arrangement. According to the Administration, the purpose of signing the Supplemental Arrangement was to amend the Arrangement and bring it more fully in line with the current practice of international arbitration. Subsequently, the Arbitration (Amendment) Bill 2021 was given Third Reading at the Council meeting of 17 March 2021.

Arrangement on Interim Measures in Aid of Arbitral Proceedings

5. At its meeting on 29 April 2019, the Panel was briefed by the Administration on the latest development of cooperation between HKSAR and the Mainland on arbitration-related matters, in particular on the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR ("the Arrangement Concerning Interim Measures") which was signed between DoJ and SPC on 2 April 2019.

6. The Administration stressed that under the Arrangement Concerning Interim Measures, HKSAR was the first jurisdiction outside the Mainland where parties to arbitral proceedings seated in Hong Kong might apply to Mainland courts for interim measures. The Panel was also briefed about DoJ's plans to explore the possibility of introducing an initiative to enable two Mainland parties

¹ Before 1 July 1997, reciprocal enforcement of arbitration awards between the Mainland and Hong Kong was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the "New York Convention"). However, being an international agreement, the New York Convention is not applicable to the enforcement of arbitral awards between the Mainland and HKSAR. In the absence of reciprocal arrangement between the two jurisdictions, Hong Kong arbitral awards are not enforceable in the Mainland, and vice versa. The Arrangement was thus signed to rectify the situation. The Arrangement follows as closely as practicable the practice prior to 1 July 1997 and the spirit of the New York Convention and, on the other hand, reflects Hong Kong's status as a Special Administrative Region of the People's Republic of China.

in GBA to freely choose Hong Kong as the seat of arbitration and the law of Hong Kong as the governing law of a contract, and to promote Hong Kong as a regional capacity building centre for international law and dispute resolution.

Major views and concerns of Members

7. The major views and concerns previously expressed by LegCo Members on matters relating to the developments in international arbitration for Hong Kong are set out in the ensuing paragraphs.

Opportunities for Hong Kong legal and dispute resolution sector under the cooperation with the Mainland

8. The Panel expressed concerns about the progress of the Administration in exploring with the relevant Mainland authorities the viability of allowing Hong Kong arbitral institutions to administer arbitration cases domestically in the Mainland. In reply, the Administration advised that the relevant work was in progress. It added that the form of conducting arbitration on the Mainland was governed by Mainland law relating to arbitration, and there were special requirements of handling arbitration cases involving parties outside the Mainland.

9. The Panel noted the feedback given by the legal and dispute resolution sector to the Administration that the HKSAR Government could further explore with the Mainland on the sector's two suggestions. First, to allow parties in GBA to freely choose the law which was familiar to the parties as the governing law of a contract, e.g. allowing wholly owned Hong Kong enterprises ("WOKES") to choose Hong Kong law as the governing law of a contract. Second, to allow Hong Kong solicitors and barristers to participate in appropriate cases concerning Hong Kong (e.g. cases where Hong Kong law is applicable) as advocates in the courts of GBA (e.g. Qianhai Court). The Panel shared and agreed to the suggestions made by the legal and dispute resolution sector.

Submitting a dispute involving parties in the Mainland to an arbitral institution outside the Mainland

10. At its meeting on 29 April 2019, the Panel noted from the information provided by the Administration that WOKES and joint ventures set up by Hong Kong investors in the Mainland were treated as Mainland legal persons under Mainland laws and, in the absence of any foreign-related elements, Mainland parties were not allowed to submit a dispute to an arbitral institution outside the Mainland for arbitration.

11. It was some members' understanding that WOKEs were all along regarded as wholly foreign owned enterprises having foreign-related elements under the civil law of the Mainland, and the parties to a contract involving WOKEs had a right to submit a dispute to an arbitral institution outside the Mainland. In response to members' enquiries, the Administration explained that wholly foreign-owned enterprises, Sino-foreign equity joint ventures and Sino-foreign cooperative joint ventures set up by Hong Kong investors in the Mainland were treated as Mainland legal persons without any foreign-related elements.

12. Upon members' request, the Administration provided supplementary information on the issue in its letter dated 4 October 2019. In gist, against the different views within the sector and the uncertainties, DoJ stressed that it would continue to consult the Mainland authorities on the possibility of introducing an initiative to enable Mainland parties (including WOKEs set up by Hong Kong investors in the Mainland) in GBA to choose Hong Kong as the seat of arbitration regardless of the presence or absence of any foreign-related elements in the civil and commercial disputes concerned. DoJ believed that this would give foreign-invested enterprises more definite options for the venue of commercial dispute resolution.

13. At the Panel meeting on 22 March 2021, the Administration updated members that the adoption of Hong Kong law by WOKEs had achieved a breakthrough in Qianhai as over 11 000 WOKEs registered there were allowed to agree on the choice of applicable law, including Hong Kong law, when they enter into civil and commercial contracts despite the absence of "foreign-related elements". The Administration would actively strive for the wider use in GBA of Hong Kong as a place of arbitration outside the Mainland and the relaxation of the "foreign-related elements" requirement under Mainland law.

Interim measures from Mainland Courts available to parties to institutional arbitrations seated in Hong Kong

14. At the Panel meeting on 29 April 2019, members noted that pursuant to the Arrangement Concerning Interim Measures, parties to arbitral proceedings seated in Hong Kong and administered by eligible arbitral institutions which had been designated would be able to apply to the relevant Mainland court for interim measures including property preservation and conduct preservation in aid of such arbitral proceedings. Members considered that it would greatly enhance the competitiveness of Hong Kong arbitrators against their Mainland counterparts.

15. Hong Kong Bar Association ("the Bar Association") also said that the Arbitration Committee of the Bar Association as well as the legal sector in general warmly welcomed the Arrangement Concerning Interim Measures as it would enhance Hong Kong's competitiveness in providing international

arbitration services. However, it was concerned whether the interim measures could be granted after an arbitral award had been made but was not yet enforced.

Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region

16. At the meeting on 27 January 2021, the Panel enquired about the reason for the Supplemental Arrangement's removal of a previous restriction set, which disallowed parties from making simultaneous applications to both courts in the Mainland and Hong Kong for enforcement of an arbitral award, and whether there were measures to fairly protect the interests of parties to an arbitration so that they would not be unduly disadvantaged by arbitration procedures proceeding simultaneously in both jurisdictions.

17. In response, the Administration advised that the existing restriction in the Arrangement, which was promulgated in 1999, was not mandated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As simultaneous applications made to courts in multiple jurisdictions were a common practice internationally, the Supplemental Arrangement sought to remove the restriction for enforcement of arbitral awards in the Mainland and Hong Kong. To prevent double benefits, safeguards were put in place to ensure that the total amount recovered by the applicant would not exceed the amount determined in the arbitral award.

Maritime arbitration

18. At the Panel meeting on 30 April 2018, members commented that apart from commercial arbitration, there was a great demand for maritime arbitration services. However, specialized arbitrators in that area had been in short supply in Hong Kong.

19. The Bar Association also agreed at the meeting that maritime arbitration was a developing area of arbitration services in Hong Kong and noted that there were a number of maritime arbitral institutions which had set up their branch offices in Hong Kong. As London was traditionally the best international maritime arbitration centre owing to the wide range of relevant specialist's services available there, Hong Kong could make reference to London's experience if it aimed to develop its maritime arbitration services centre.

20. In reply to the Panel's enquiry on the Administration's plan to expand the market for such services, the Administration said that it took heed of the demand for maritime arbitration services and was studying measures to develop such services in Hong Kong.

Council question

21. A written question was raised at the Council meeting of 18 December 2019 regarding Hong Kong as an international arbitration hub. In its reply, the Administration advised that it had in recent years adopted various initiatives, fine-tuning the arbitration-related legal framework, attracting international dispute resolution institutions to set up offices in Hong Kong, and hosting large-scale international conferences relating to legal and dispute resolution services in Hong Kong. It would continue to actively put forward new policy initiatives and focus its efforts on promoting Hong Kong's international legal and arbitration services.

Latest position

22. The Administration will brief the Panel on the latest developments in international arbitration for Hong Kong at the Panel meeting to be held on 31 May 2021. It will update members about the implementation of the Arrangement Concerning Interim Measures; the challenges faced by and opportunities available to international arbitral institutions in Hong Kong as well as other relevant developments.

Relevant papers

23. A list of relevant papers is in **Appendix**.

Council Business Division 4
Legislative Council Secretariat
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Latest developments in international arbitration for Hong Kong

List of relevant papers

Meeting	Date	Item	Paper No.
Panel on Administration of Justice and Legal Services	30.4.2018 (Item III)	<u>Administration's paper</u>	CB(4)965/17-18(03)
		<u>Minutes of meeting</u>	CB(4)510/18-19
	25.3.2019 (Item IV)	<u>Administration's paper</u>	CB(4)665/18-19(04)
		<u>Minutes of meeting</u>	CB(4)1176/18-19
	29.4.2019 (Item III)	<u>Administration's paper</u>	CB(4)782/18-19(02)
		<u>Background brief</u>	CB(4)782/18-19(03)
		<u>Minutes of meeting</u>	CB(4)1177/18-19
		<u>Supplementary information provided by Administration</u>	CB(4)1249/18-19(01)
	4.1.2021	<u>Administration's paper</u>	CB(4)314/20-21(03)
	27.1.2021 (Item IV)	<u>Administration's paper</u>	CB(4)403/20-21(04)
	22.3.2021 (Item IV)	<u>Administration's paper</u>	CB(4)648/20-21(05)
		<u>Background brief</u>	CB(4)648/20-21(06)
	-	<u>Information paper on arrangement concerning mutual assistance in court-ordered interim measures in aid of arbitral proceedings by the courts of the Mainland and of the Hong Kong Special Administrative Region</u>	CB(4)725/18-19(01)

Meeting	Date	Item	Paper No.
Council	18.12.2019	<u>A Council question on Hong Kong as an international arbitration hub</u>	-
	10.2.2021	<u>Legislative Council Brief Arbitration (Amendment) Bill 2021</u>	ARB 5042/20C

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