

LC: Speech by Secretary for Justice on resumption of Second Reading debate on Arbitration (Amendment) Bill 2016

Following is the speech by the Secretary for Justice, Mr Rimsky Yuen, SC, on the resumption of the Second Reading debate on the Arbitration (Amendment) Bill 2016 in the Legislative Council meeting today (June 14):

President,

The Arbitration (Amendment) Bill 2016 has been examined in detail by the Bills Committee chaired by the Hon Martin Liao. I would like to take this opportunity to express our gratitude to the Hon Martin Liao and all other members of the Bills Committee for their hard work in scrutinising the Bill. I would also like to express my gratitude to the relevant bodies for their valuable opinions and support.

The main objective of the Bill is to amend the Arbitration Ordinance (Cap. 609) (the Ordinance) so as to clarify that disputes over intellectual property rights (IPR disputes) can be resolved through arbitration and that it is not contrary to the public policy of Hong Kong to enforce arbitral awards involving IPRs. The Bill also proposes to amend the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609A) to update the list of parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

As I pointed out when introducing the Bill into this Council last December, the Ordinance presently does not have any specific provision dealing with the arbitrability of IPR disputes and there is no authoritative judgment in Hong Kong on the subject. We believe that the amendments on arbitrability of IPR disputes will help attract more parties to resolve their IPR disputes through arbitration in Hong Kong and facilitate the enforcement of related arbitral awards in

Hong Kong.

Confidentiality of arbitration process and of arbitral awards

During discussion of the Bills Committee, some members raised the question of whether confidentiality of arbitration process and of arbitral awards would give rise to competition concerns. The Government has since explained in detail the relevant issues to the Bills Committee, taking into full account the views of members of the Bills Committee, stakeholders and the Competition Commission of Hong Kong.

In short, the Competition Commission agrees that the Bill and its implications on the arbitration process are "competition neutral", and that confidentiality of arbitration is unlikely by itself to be inconsistent with the Competition Ordinance (Cap. 619). Moreover, it also considers that the Bill is consistent with the Competition Ordinance from an enforcement perspective. I wish to take this opportunity to reiterate that the Bill seeks to amend the Ordinance so as to clarify that IPR disputes can be resolved through arbitration for the purposes of facilitating the conduct of intellectual property (IP) arbitration and the enforcement of related arbitral awards in Hong Kong. The Bill does not seek to alter the substantive legal rights of the parties to any arbitration or any third parties, the position of competition law in Hong Kong, or the power of the courts or competition authorities in relation to competition issues under the laws of Hong Kong.

Since confidentiality of arbitration is not by itself anti-competitive, whether disclosure or recordal of IPR arbitral awards should be required must be considered carefully in light of relevant wider public policy considerations. These include: first, the importance of confidentiality in Hong Kong's arbitration regime. Confidentiality is, whether locally or internationally, often

one of the key reasons why parties prefer to use arbitration (as opposed to court litigation) to resolve disputes. In the case of Hong Kong, such confidentiality is expressly provided for in section 18 of the Ordinance. Any erosion of confidentiality may prejudice Hong Kong's position as a leading international arbitration centre.

Second, arbitral awards, in general, only have inter partes effect, which means that the legal rights of third parties will not be affected. There are safeguards for third party interests under the existing arbitration and legal regimes. Third parties may also seek to protect their interests by conducting investigation or due diligence or by negotiating suitable contractual provisions. Further, we have considered the practice of 30 jurisdictions. Based on our survey, we note that the general practice in these jurisdictions is that mandatory disclosure or recordal of IPR arbitral awards with inter partes effect is not required. Having taken into account all relevant factors, the Government considers it not necessary or appropriate to require mandatory disclosure of IPR arbitral awards or their recordal with IPR registries in Hong Kong.

Committee Stage Amendments

President, I shall be moving a number of Committee Stage Amendments (CSAs) later. The Bills Committee has examined the proposed CSAs and did not raise any objections. I shall briefly explain the proposed CSAs as follows.

Clauses 1(3) and 7 of the Bill

According to clause 1(3) of the Bill, the amendments concerning IP arbitration (i.e. Part 2 of the Bill (except the new section 103J)) are to come into operation on October 1, 2017, rather than on the day of publication of the Amendment Ordinance in the Gazette (Note). The

underlying policy intent of this deferred commencement provision as originally drafted is to allow the IP arbitration community a period of around six months after the passage of the Bill to prepare for commencement of the relevant amendments. To give effect to this policy intent, I will move CSAs to clause 1(3) and related CSAs to clause 7 of the Bill to the effect that the relevant amendments will commence on the first day of the seventh month immediately following the month in which the Amendment Ordinance is published in the Gazette. In other words, if the Amendment Ordinance is passed by the Council and gazetted within this month (i.e. June 2017), the above-mentioned legislative amendments relating to IP arbitration will come into operation on January 1, 2018.

Clause 9(2) of the Bill

Separately, since the Government introduced the Bill, Angola has recently acceded to the New York Convention with effect from June 4, 2017. Therefore, I will move another CSA to amend clause 9(2) of the Bill in order to add Angola to the Schedule to the Arbitration (Parties to New York Convention) Order. By virtue of clause 1(2) of the Bill, the relevant amendment will come into operation on the day of gazettal.

Conclusion

The established policy of the Department of Justice is to encourage the use of arbitration to resolve civil and commercial disputes. To further consolidate Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific region, the Department of Justice has been reviewing the arbitration regime of Hong Kong from time to time and will also consider improvement to the Ordinance. The Government believes that the relevant amendments to the Bill will further consolidate Hong Kong's competitiveness as a

leading international arbitration centre and reinforce Hong Kong's edge over other jurisdictions in the region in resolving IP disputes.

Mr President, with these remarks, I urge Members to support the Second Reading of the Bill and the amendments that I will move at the subsequent Committee Stage.

Thank you, President.

Note: Clause 1(2) of the Bill.

Ends/Wednesday, June 14, 2017