

**For Discussion
On 14 December 2012**

LegCo Panel on Administration of Justice and Legal Services

Proposed Amendments to the Arbitration Ordinance (Cap 609)

Purpose

This paper briefs Members of the Panel of the Administration's proposal to amend the Arbitration Ordinance (Cap 609) and the background to the proposal.

Reciprocal Recognition and Enforcement of Arbitral Awards between Hong Kong and Macao

2. At the meeting of the Panel held on 28 February 2011, the Administration consulted the Panel on the proposed arrangement for reciprocal enforcement of arbitral awards between the HKSAR and the Macao SAR (the "Arrangement"). The details of the background to the proposal were set out in the Administration's paper (CB(2) 1129/10-11(01)).

3. The Administration proposed that the terms of the Arrangement would be similar to the existing arrangement between Hong Kong and the Mainland on mutual enforcement of arbitral awards concluded in 1999 ("Mainland/Hong Kong Arrangement"), which was made in accordance with the principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). Members of the Panel noted in the meeting of February 2011 that it was the Administration's plan to conduct wider consultation with relevant stakeholders on the direction of the Arrangement.

Consultation in respect of the Arrangement

4. In March 2011, the Administration conducted a consultation with the legal profession, chambers of commerce, trade associations, arbitration bodies, other professional bodies and interested parties.

5. By an information note in July 2011 (CB (2) 2412/10-11(01)), the Administration informed the Panel of the result of the consultation on the Arrangement ("the Information Note"). As stated in the Information Note,

the respondents were generally supportive of the Arrangement. Most of them considered that it would be beneficial to establish the Arrangement and that it would enhance Hong Kong's role as a regional/international arbitration centre.

6. Many of the respondents agreed that the Arrangement should be developed in the light of the Mainland/Hong Kong Arrangement.

Discussion with the Macao authorities on the Arrangement

7. In the Information Note, the Administration stated that in parallel with the consultation on the Arrangement, the Administration had conducted exploratory discussion with the Macao authorities on the direction of the Arrangement. At a meeting held in April 2011, representatives of the Administration and the Macao authorities explored the desirability of the conclusion of the Arrangement and exchanged preliminary views and comments on the content of the Arrangement. In early June 2011, the Macao authorities informed the Administration that the Macao SAR formally agreed to commence discussion with the Hong Kong SAR on the Arrangement.

8. Given the positive response of the respondents in the consultation exercise, the Administration considered in the Information Note that it was timely to commence discussion with the Macao SAR on the Arrangement. The Administration further remarked that the specific comments of the respondents expressed in the consultation exercise would be taken into account in the course of discussion.

9. Since June 2011, the Administration has been engaging in discussions with the Macao authorities on the content of the Arrangement. After formal discussions and exchanges, the two sides reached consensus on the final version of the Arrangement in early November 2012. It was agreed that the signing ceremony of the Arrangement would be held soon in early 2013.

Proposed Amendments to Arbitration Ordinance (Cap 609)

10. At the meeting of the Panel held on 28 February 2011, the Administration advised the Panel that when the Arrangement was concluded, it would be implemented in Hong Kong by way of amendments to the Arbitration Ordinance. The Administration proposes to amend the Arbitration Ordinance (Cap 609) to implement the Arrangement.

11. As the content of the Arrangement is similar to the Mainland/Hong Kong Arrangement, the proposed amendments are broadly similar to Part 10 Division 3 of Cap 609 under which the mechanism for enforcement of arbitral awards under the Mainland/Hong Kong Arrangement is set out following the New York Convention principles.

Amendments to implement the Arrangement

12. The proposed amendments will include the addition of a new Division 4 under Part 10 of Cap 609 to set out matters relating to the enforcement of Macao arbitral awards (“Macao awards”) under the Arrangement. The main provisions of the proposed new Division 4 are summarized below :

(i) Enforcement of Macao awards

13. Similar to a Mainland award under the Mainland/Hong Kong Arrangement, it is proposed that a Macao award is enforceable in Hong Kong either by action in the Court of First Instance of the High Court (“Court”), or in the same manner as an arbitral award to which s. 84 of Cap 609 applies with the leave of Court.

14. Under s. 84 of Cap 609, an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.

(ii) Enforcement of Macao awards partially satisfied

15. It is proposed that a provision be included to provide that if a Macao award is not fully satisfied by way of enforcement proceedings taken in Macao (or in any other place other than Hong Kong), that part of the award which is not satisfied in those proceedings is enforceable under the proposed new Division 4. This proposed provision is different from the relevant provision under the Mainland/Macao Arrangement.

16. Under the Mainland/Macao Arrangement, a party seeking enforcement of an arbitral award may make applications to the courts of both places for enforcement but the court of the place where the award was made should first order execution, subsequent to which the court of the other place could order the enforcement of the liabilities outstanding from the execution ordered by the court of the place where the award was made. In gist, the parties are allowed to make parallel application to enforce the arbitral awards

in the Mainland and Macao simultaneously, subject to the provision on the order of execution.

17. In the discussion of the Arrangement, the Administration and the Macao authorities reached consensus that there would not be any express prohibition against parallel application to enforce the arbitral awards in the Mainland and Hong Kong, provided that the total amount recovered from enforcing the award in courts of the two places shall not exceed the amount awarded.

(iii) Evidence to be produced for enforcement of Macao awards

18. Similar to s. 94 of Cap 609 in respect of the enforcement of Mainland awards under the Mainland/Hong Kong Arrangement, it is proposed that provisions on the evidence required be included in the proposed new Division 4.

(iv) Refusal of enforcement of Macao awards

19. The grounds of refusal of enforcement of Macao awards under the Arrangement are in line with the grounds under the New York Convention which are set out in s. 89 of Cap 609. It is proposed that similar provisions be included in the proposed new Division 4. Further, it is proposed that provisions be made regarding the provision of security upon an application for setting aside or suspension of a Macao award.

Other miscellaneous amendments to Cap 609

20. The new Arbitration Ordinance (Cap 609) came into effect in June 2011. Since then, the Hong Kong International Arbitration Centre has proposed some miscellaneous amendments to Cap 609. The Administration considered the proposals and suggested that the following miscellaneous amendments be made to Cap 609 :

(i) Provision confirming the enforceability of orders made by an "emergency arbitrator"

21. The Hong Kong International Arbitration Centre proposed, in their consultation paper in October 2012, to amend its Arbitration Rules to include a procedure for the appointment of an "emergency arbitrator" to deal with applications for urgent relief before the constitution of an arbitral tribunal.

22. The Administration proposes to amend Cap 609 to clarify that

interim measures made by an emergency arbitrator appointed pursuant to the arbitration rules agreed to or adopted by the parties, including the arbitration rules of a permanent arbitral institution, prior to the constitution of the arbitral tribunal are enforceable under Cap 609.

(ii) Taxation of costs of arbitral proceedings

23. It is proposed that provisions be included to clarify that if the parties to arbitration have agreed that the costs of the arbitral proceedings are to be taxed by the court, the costs shall be taxed by the court on a “party and party” basis under Order 62 Rule 28(2) of the Rules of the High Court (Cap 4A).

Amendment to the Arbitration (Parties to New York Convention) Order (Cap 609A)

24. The Administration also proposes to update the list of the parties to the New York Convention by adding the new parties (namely, Fiji, Liechtenstein and Tajikistan) to the Schedule of the Arbitration (Parties to New York Convention) Order (Cap 609A).

Consequential Amendment

25. Consequential amendment would also be made to the Rules of High Court (Cap 4A) to provide for the enforcement of Macao awards as a result of the addition of the proposed new Division 4 under Part 10 of Cap 609 in relation to the enforcement of Macao awards.

Conclusion

26. Subject to any comments from Members and further views from the stakeholders, we will finalize the draft bill with a view to introducing the Arbitration (Amendment) Bill into the Legislative Council in the first quarter of 2013.

**Department of Justice
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