For discussion
on 25 January 2016

Legislative Council Panel
on Administration of Justice and Legal Services

Proposed Amendments to the Arbitration Ordinance (Cap. 609)

This paper seeks Members' views on the Government's proposal to amend the Arbitration Ordinance (Cap. 609).

PROPOSALS

2. The Government proposes to introduce legislative amendments to make it clear that disputes over intellectual property rights ("IPRs") are capable of resolution by arbitration and it would not be contrary to public policy to enforce an arbitral award solely because the award is in respect of a dispute or matter which concerns IPRs.

BACKGROUND

3. It has been the steadfast policy of the HKSAR Government to enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. Arbitrability of the subject matter of a dispute is an important issue which ought to be clear right from the commencement of arbitration (or even before). At present, the Arbitration Ordinance applies to an arbitration under an arbitration agreement (i.e. an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[1]), if Hong Kong is the place of arbitration[2]. However, the Arbitration Ordinance does not have any specific provision dealing with the question of arbitrability of disputes over IPRs. Besides, as far as we know, there is no authoritative judgment in Hong Kong concerning arbitrability of IPRs either.

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1 Section 19 of the Arbitration Ordinance (incorporating Option 1 of Article 7 of the UNCITRAL Model Law)
2 Section 5 of the Arbitration Ordinance

4. As part of the efforts to promote arbitration as well as to enable Hong Kong to have an edge over other jurisdictions in the Asia-Pacific region as a venue for resolving IP disputes, we believe specific guidance on the issue of arbitrability of IPRs would serve to clarify the legal position and thereby facilitate and attract more parties (including parties from other jurisdictions) to resolve their IP disputes by arbitration in Hong Kong.

RECOMMENDATIONS OF THE TWO RELEVANT WORKING GROUPS

5. In March 2015, the Working Group on Intellectual Property Trading ("IP Trading Working Group") published a report ("the Report") setting out, among others, its recommendations on promoting Hong Kong as an intellectual property ("IP") trading hub and an international IP arbitration and mediation centre. The Report noted that there have been doubts among the arbitration and IP communities on the arbitrability of IP disputes, especially on issues relating to the validity of registered IPRs (i.e. patents, trade marks and registered designs) granted by state agencies or government authorities. Different approaches have been adopted by different jurisdictions on this issue. In some jurisdictions, there are express statutory provisions or rulings that allow arbitration of disputes relating to the validity of IPRs. To promote the development of Hong Kong as an IP arbitration centre, the IP Trading Working Group recommended that the Government should "study the need for legislative amendments to clarify the arbitrability of IP disputes".

6. In light of the above recommendation, a Working Group on Arbitrability of Intellectual Property Rights ("Arbitrability Working Group") was set up by the Department of Justice to, among others, consider and advise the Government on the need (if any) and extent of legislative amendments that are necessary to address the issue of arbitrability of IPRs.[3] The Arbitrability Working Group gives general support to the proposal to amend the Arbitration Ordinance to clarify that IP disputes are capable of settlement by arbitration.

[3] The Arbitrability Working Group comprised representatives from the Department of Justice, Intellectual Property Department, Hong Kong International Arbitration Centre and legal practitioners with expertise in the area.

DETAILS OF THE PROPOSED AMENDMENTS TO THE ARBITRATION ORDINANCE

7. Currently, section 86(2) (in Division 1, Part 10) of the Arbitration Ordinance provides, among others, that enforcement of an award may be refused if (a) the award is in respect of a matter which is not capable of resolution by arbitration under the law of Hong Kong ("the arbitrability ground"), or (b) it would be contrary to public policy to enforce the award ("the public policy ground"). Both grounds are also found in Divisions 2 - 4 of Part 10[4]. There is concern as to whether enforcement of an arbitral award involving IPRs (particularly on issues of validity of IPRs) would be refused in Hong Kong under either (or both) of the above grounds in section 86(2) of the Arbitration Ordinance. To put the matter beyond doubt, we propose to make it clear that disputes over IPRs, whether they arise as the main issue or an incidental issue, are capable of resolution by arbitration and it would not be contrary to public policy to enforce the ensuing award. The effect is that enforcement of an arbitral award under Part 10 of the Arbitration Ordinance would not be refused in Hong Kong under either the arbitrability ground or the public policy ground merely because the award involves IPRs.

8. Article 34 of the UNCITRAL Model law adopted in section 81(1) of the Arbitration Ordinance states, among others, that an arbitral award may be set aside if the court finds that the subject matter of the dispute is not capable of resolution by arbitration under the law of Hong Kong or the award is in conflict with the public policy of Hong Kong. Also with a view to putting the matter beyond doubt in relation to IPRs, we propose to similarly clarify the position in relation to an application for setting aside an arbitral award.

9. In accordance with the spirit of section 73 of the Arbitration Ordinance, we propose that the effect of an arbitral award in respect of a dispute or matter relating to an IPR should only bind the actual parties who participate in the arbitral proceedings and not beyond.

10. The proposed amendments to the Arbitration Ordinance would help (i) clarify the ambiguity (whether perceived or otherwise) in

[4] See Sections 89(3), 95(3) and 98D(3) of the Arbitration Ordinance.

relation to the "arbitrability of intellectual property disputes" in a case where Hong Kong has been chosen as the seat of arbitration, or Hong Kong law has been chosen as the governing law of the arbitration; (ii) make Hong Kong more appealing than other jurisdictions for conducting arbitration involving IP disputes; and (iii) demonstrate to the international community that Hong Kong is committed to developing itself as an international centre for dispute resolution involving IP matters as well as an IP trading hub in the region.[5]

CONSULTATION

11. In December 2015, the Department of Justice issued a consultation paper to seek the views of the legal professional bodies, business associations, transactional lawyers, IP practitioners, chambers of commerce and other interested parties on the proposal to amend the Arbitration Ordinance as set out in the draft Bill attached to the consultation paper. At the **Annex** is a copy of the consultation paper which invites responses by 18 January 2016.

WAY FORWARD

12. Subject to Members' comments and the result of the consultation mentioned in paragraph 11 above, the Government will finalise the draft Bill with a view to introducing it into the Legislative Council in the second quarter of 2016.

Department of Justice
January 2016

[5] Page 54 of the Report.

Annex

Consultation Paper on Arbitration (Amendment) Bill 2016

Introduction

This consultation paper proposes that the Arbitration Ordinance (Cap. 609) be amended so as to make it clear that disputes over intellectual property rights ("IPRs") are capable of resolution by arbitration and it would not be contrary to public policy to enforce an award solely because the award is in respect of a dispute or matter which relates to IPRs.

Background

2. Whether a dispute is arbitrable (i.e. can be subject to arbitration) depends on the law of the seat of arbitration or the governing law of the arbitration. Different approaches have been adopted by different jurisdictions as to the arbitrability of intellectual property disputes, especially on issues relating to validity of registered IPRs (patents, trade marks and registered designs) granted by state agencies or government authorities.[1]

3. At present, there is no specific legislative provision addressing the arbitrability of IPRs in Hong Kong. Nor does the Arbitration Ordinance contain any definition or reference as to what types of subject matter are incapable of resolution by arbitration. In March 2015, the Working Group on Intellectual Property Trading[2] published a

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[1] In the United States and Belgium, there are statutory provisions which expressly allow the arbitration of disputes relating to the validity or infringement of patents. In Switzerland, pursuant to a ruling by the Swiss Federal Office of Intellectual Property in 1975, arbitral tribunals are empowered to decide all issues of IPRs, including the validity of patents, trade marks and designs. By contrast, the law in some jurisdictions appears to prohibit arbitration of the validity of IPRs. For example, in Romania, patent claims are generally not arbitrable. Under the patent law in Mainland China, the issue of patent validity constitutes an administrative matter that cannot be submitted to arbitration. In many jurisdictions, the legal position is unclear as there is no legislative provision or court decision addressing this issue.

[2] This Working Group was chaired by Mr Gregory So, GBS, JP, Secretary for Commerce and Economic Development and comprises Government representatives, IP practitioners, industry stakeholders and experts from the academic and other fields. A Sub-group on IP Arbitration and Mediation was formed under the Working Group to facilitate dedicated discussion on the specialised subject of IP arbitration and mediation.

report ("the Report") setting out, *inter alia*, its recommendations on promoting Hong Kong as an intellectual property trading hub and an international intellectual property arbitration and mediation centre. One important recommendation of the Report is to "study the need for legislative amendments to clarify the arbitrability of IP disputes".

4. In the light of the above recommendation, a Working Group on Arbitrability of Intellectual Property Rights ("the Arbitrability Working Group") was set up by the Department of Justice to, *inter alia*, consider and advise the Government on the need (if any) and extent of legislative amendments that are necessary to address the issue of arbitrability of IPRs. The Arbitrability Working Group comprises representatives from the Department of Justice, Intellectual Property Department, Hong Kong International Arbitration Centre and legal practitioners with expertise in this area. The proposal to amend the Arbitration Ordinance is generally supported by the Arbitrability Working Group so as to clarify that disputes relating to IPRs are capable of resolution by arbitration and it would not be contrary to public policy to enforce the ensuing award solely because the award is in respect of a dispute or matter which relates to IPRs.

Justifications

5. It has been the steadfast policy of the Hong Kong Government to enhance Hong Kong's status as a leading centre for legal and dispute resolution services in the Asia-Pacific region. Arbitrability of the subject matter of a dispute is an important issue which ought to be clear right from the commencement of arbitration. At present, the Arbitration Ordinance applies to an arbitration under an arbitration agreement (i.e. an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[3]), if the place of arbitration is in Hong Kong.[4] However, the Arbitration

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[3] Section 19 of the Arbitration Ordinance (incorporating Option 1 of Article 7 of the UNCITRAL Model Law)

[4] Section 5 of the Arbitration Ordinance provides that the Ordinance applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, if the place of arbitration is in Hong Kong.

Ordinance does not have any specific provision addressing the arbitrability of disputes involving IPRs. It appears that there is no authoritative judgment in Hong Kong concerning arbitrability of IPRs either.

6. To enable Hong Kong to stand above other jurisdictions in the Asia-Pacific region as a venue for resolving IP disputes, specific guidance on the issue of arbitrability of IPRs would serve to clarify the legal position and attract more parties from other jurisdictions to come to Hong Kong to resolve their IP disputes by arbitration.

7. Currently, section 86(2) (in Division 1, Part 10) of the Arbitration Ordinance provides that enforcement of an award may be refused if (a) the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong ("the arbitrability ground"), or (b) it would be contrary to public policy to enforce the award ("the public policy ground"). Both grounds are also found in Divisions 2 - 4 of Part 10[5]. There is concern as to whether enforcement of an award involving IPRs (particularly on issues of validity) would be refused in Hong Kong under either (or both) of the above grounds in section 86(2) of the Arbitration Ordinance. To put the matter beyond doubt, we propose to make it clear that disputes involving IPRs, whether they arise as the main issue or an incidental issue, are capable of resolution by arbitration and it would not be contrary to public policy to enforce the ensuing award. The effect is that enforcement of an award under Part 10 of the Arbitration Ordinance would not be refused in Hong Kong under either the arbitrability ground or the public policy ground merely because the award involves IPRs.

8. Article 34 of the UNCITRAL Model law adopted in section 81(1) of the Arbitration Ordinance states, *inter alia*, that an arbitral award may be set aside if the court finds that the subject matter of the dispute is not capable of resolution by arbitration under the law of Hong Kong or the award is in conflict with the public policy of Hong Kong. To put the matter beyond doubt in relation to IPRs, we also propose to similarly clarify the position in relation to an application for setting aside an award.

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[5] See Sections 89(3), 95(3) and 98D(3) of the Arbitration Ordinance.

9. As pointed out by the Report, the proposed amendments to the Arbitration Ordinance would help (i) clarify the ambiguity in relation to the "arbitrability of intellectual property disputes" in a case where Hong Kong has been chosen as the seat of arbitration, or Hong Kong law has been chosen as the governing law of the arbitration; (ii) make Hong Kong more appealing than other jurisdictions for conducting arbitration involving IP disputes; and (iii) demonstrate to the international community that Hong Kong is committed to developing itself as an international centre for alternative dispute resolution involving IP matters as well as an IP trading hub in the region.[6]

The Arbitration (Amendment) Bill 2016 ("the Bill")

10. A working draft of the Bill is attached at Annex A which may be subject to change after public consultation. The key provisions to implement the proposals referred to in paragraphs 7 and 8 above are set out in the proposed sections 103B, 103D and 103E. The rationale behind other provisions is set out in the ensuing paragraphs.

Proposed definition of "intellectual property rights"

11. The proposed section 103A(1)(a) provides that a reference to an intellectual property right is a reference to such a right (i) whether or not the right is protectable by registration[7]; and (ii) whether or not the right is registered, or subsists, in Hong Kong. The proposed section 103A(1)(b) further provides that a reference to an intellectual property right includes an application for the registration of the right if the right is protectable by registration. Applications for the registration of IPRs should be specifically included in the proposed definition because they constitute personal property which may be assigned or mortgaged/charged in the same manner as registered IPRs (e.g. section 50 of the Patents Ordinance (Cap. 514) and section 31 of the Trade Marks Ordinance (Cap. 559).

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[6] See the Report at page 54.

[7] The term "registration" is to be defined in the Bill to include the grant of the IPR concerned.

Awards not binding on licensees of intellectual property rights

12. The proposed section 103C provides that a person acting in the capacity of a licensee, whether or not exclusively so, of an IPR will not be regarded as a person claiming through or under the owner or a person having an interest in the IPR for the purposes of section 73(1)(b) of the Arbitration Ordinance. Currently, section 73(1) of the Arbitration Ordinance provides, *inter alia*, that an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and any person claiming through or under any of the parties[8]. Since licensing arrangements are common in the case of IPRs and exclusive licensees, who are given rights that are concurrent with those of the owners of IPRs by virtue of IP legislation[9], have the same rights as the owners of IPRs to bring proceedings in respect of any infringement of the IPR, it is desirable to clarify whether licensees of a party to an arbitration agreement would be regarded as "persons claiming through or under" that party within section 73(1)(b) of the Arbitration Ordinance.

13. As recommended by the Arbitrability Working Group, licensees of an IPR should not be entitled to the benefits, or be subject to the liabilities, of an arbitral award obtained by the owner of the IPR unless they are joined as parties to the arbitration. The effect of the proposed section 103C is to clarify that an award relating to IPRs is not binding on licensees, whether exclusive or not, unless these licensees are joined as parties to the arbitration. By so restricting the effect of an arbitral award between actual parties who have joined *inter se*, this proposed section would help avoid uncertainties such as those which may otherwise arise from the risk of exposure to potential claims by an

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[8] English case law indicates that the following claimants fall within the phrase "any persons claiming through or under any of the parties":

(a) A claimant who is the assignee of the benefit of the contract.

(b) A claimant has succeeded by operation of law to the rights of the named party. Death, bankruptcy and liquidation operate to transfer rights to the personal representative, trustee in bankruptcy, administrator or liquidator, as the case may be.

(c) A claimant has replaced the person originally named as a party by a novation.

See Robert Merkin, *Arbitration Law* (2014, Informa Law), at 1.42; and Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1989, Butterworths), at 137.

[9] See for example section 112 of the Copyright Ordinance (Cap. 528) and section 36 of the Trade Marks Ordinance (Cap. 559).

unascertainable number of licensees, or exposing such licensees to the liabilities of an arbitral award obtained by a third party against the owner of the IPR.

Effect of an arbitral award

14. The Arbitrability Working Group agreed that in accordance with the spirit of section 73 of the Arbitration Ordinance, the effect of an arbitral award in respect of a dispute or matter relating to an IPR should only bind the actual parties who participate in the arbitral proceedings and not beyond. For example, if a dispute concerning infringement and validity of a registered trade mark is to be resolved by arbitration, and the arbitrator decides that the trade mark is invalid and the infringement claim fails, the effect of the arbitral award under the proposed Arbitration (Amendment) Bill 2016 is that the mark would be considered invalid as between the parties to that arbitration only. However, it remains validly registered insofar as third parties are concerned. It is anticipated that a party to the arbitration seeking to challenge the validity of the registered trade mark in question would frame the relief sought in an appropriate manner, including an order from the arbitral tribunal against the owner of the registered trade mark to surrender the mark or to assign it to the successful party. If the losing party in the arbitration files a notice to the Registrar of Trade Marks to surrender or assign the trade mark pursuant to the award, the Registrar of Trade Marks will make the appropriate entry in the register. If the losing party however refuses or fails to file a notice of surrender or assignment, the other party may apply to the court for leave to enforce the arbitral award under Part 10 of the Arbitration Ordinance, and upon leave being granted, the Registrar of Trade Marks will alter the register or enter the particulars of the court order as a registrable transaction accordingly.

Savings Provision

15. Following the approach of the savings provision in section 1 of Schedule 3 to the Arbitration Ordinance, the amendments would not apply to an arbitration that has commenced prior to the commencement of the Amendment Ordinance.[10]

[10] Under Art 21 of the UNCITRAL Model Law as implemented by section 49 of Cap. 609, "unless

Consultation

16. Before taking the matter forward, the Department of Justice would like to seek the views of the legal professional bodies, business associations, transactional lawyers, trade mark practitioners, patent agents, chambers of commerce and other interested parties on the proposed Bill outlined above.

17. Please address your views or comments on the proposed Bill to the following officer by 18 January 2016:

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General Legal Policy Unit 2
Legal Policy Division,
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otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

directly related to the consultation.

Department of Justice
December 2015
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A BILL

To

Amend the Arbitration Ordinance to clarify the arbitrability of disputes over intellectual property rights and the effect and enforceability of arbitral awards involving intellectual property rights; and to make related amendments.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Arbitration (Amendment) Ordinance 2016.

2. Arbitration Ordinance amended

The Arbitration Ordinance (Cap. 609) is amended as set out in sections 3 to 6.

3. Section 5 amended (arbitrations to which this Ordinance applies)

Section 5(2)—

Repeal

"and Part 10"

Substitute

", Part 10 and sections 103A, 103B and 103E".

4. Part 11A added

After Part 11—

Add

"Part 11A

Arbitrations Relating to Intellectual Property Rights

103A. Interpretation

(1) In this Part—

(a) a reference to an intellectual property right is a reference to such a right—

(i) whether or not the right is protectable by registration; and

(ii) whether or not the right is registered, or subsists, in Hong Kong;

(b) a reference to an intellectual property right includes an application for the registration of the right if the right is protectable by registration;

(c) a reference to a dispute over an intellectual property right is a reference to a dispute over the subsistence, scope, validity, ownership, infringement or any other aspect of an intellectual property right; and

(d) a reference to a subject-matter of a dispute, or a matter, relating to an intellectual property right is a reference to a subject-matter of a dispute, or a matter, relating to the subsistence, scope, validity, ownership, infringement or any other aspect of an intellectual property right.

(2) In this section—

registration ( ), in relation to an intellectual property right, includes the grant of the right.

103B. Arbitrability of disputes over intellectual property rights

(1) A dispute over an intellectual property right is capable of settlement by arbitration.

(2) Subsection (1) applies whether the dispute arises as the main issue or an incidental issue in the arbitration for the settlement of the dispute.

(3) For the purposes of subsection (1), the fact that the law of Hong Kong or a place outside Hong Kong confers jurisdiction on a specified entity to determine a dispute over an intellectual property right but does not refer to the determination of the dispute by arbitration does not, by itself, indicate that the dispute is not capable of settlement by arbitration.

(4) In ascertaining whether there is an arbitration agreement for the purposes of subsection (1), an agreement by the parties to submit to arbitration a dispute over an intellectual property right is to be regarded as an agreement by the parties to submit to arbitration a dispute which has arisen or which may arise between them in respect of a defined legal relationship.

(5) In subsection (3)—

specified entity ( ) means a court, tribunal, person holding an administrative or executive office, or any other entity, having power under the law of Hong Kong or a place outside Hong Kong to determine a dispute over an intellectual property right.

103C. Awards not binding on licensees of intellectual property rights

(1) This section applies if an award is made in arbitral proceedings to which any of the following is one of the parties—

(a) an owner of an intellectual property right;

(b) a person having an interest in an intellectual property right (***interested person***).

(2) To avoid doubt, a person acting in the capacity of a licensee (whether an exclusive licensee or not) of the intellectual property right under a licence agreement with the owner or interested person is not a person claiming through or under the owner or interested person for the purposes of section 73(1)(b).

103D. Recourse against awards involving intellectual property rights

For the purposes of Part 9—

(a) the subject-matter of a dispute is not incapable of settlement by arbitration under the law of Hong Kong only because the subject-matter of the dispute relates to an intellectual property right; and

(b) an award is not in conflict with the public policy of Hong Kong only because the subject-matter of the dispute in respect of which the award is made relates to an intellectual property right.

103E. Recognition and enforcement of awards involving intellectual property rights

For the purposes of Part 10—

(a) a matter is not incapable of settlement by arbitration under the law of Hong Kong only because the matter relates to an intellectual property right; and

(b) it is not contrary to public policy to enforce an award only because the award is in respect of a matter relating to an intellectual property right.".

5. Section 111 amended (savings and transitional provisions)

After section 111(2)—

Add

"(3) Part 3 of Schedule 3 provides for the savings and transitional arrangements that apply on, or relate to, the commencement of the Arbitration (Amendment) Ordinance 2016 (of 2016).".

6. Schedule 3 amended (savings and transitional provisions)

Schedule 3, after Part 2—

Add

"Part 3

Savings and Transitional Provisions Relating to Commencement of Arbitration (Amendment) Ordinance 2016

1. Conduct of arbitral and related proceedings

(1) If an arbitration has commenced under article 21 of the UNCITRAL Model Law before the commencement date, that arbitration and all related proceedings are to be governed by the pre-amended Ordinance as if the

Arbitration (Amendment) Ordinance 2016 (of 2016) had not been enacted.

(2) In subsection (1)—

all related proceedings ( ) includes arbitral proceedings resumed after the setting aside of the award made in the arbitration;

article 21 of the UNCITRAL Model Law ( ) means article 21 of the UNCITRAL Model Law as given effect to by section 49(1);

commencement date ( ) means the day on which the Arbitration (Amendment) Ordinance 2016 (of 2016) comes into operation;

pre-amended Ordinance ( ) means this Ordinance as in force immediately before the commencement date.".

Explanatory Memorandum

This Bill seeks to amend the Arbitration Ordinance (Cap. 609) (***Ordinance***).

2. Clause 1 sets out the short title.

3. Clause 3 amends section 5 of the Ordinance to provide that the new sections 103A, 103B and 103E of the Ordinance (added by clause 4) apply to an arbitration the place of which is outside Hong Kong.

4. Clause 4 adds a new Part 11A to the Ordinance which provides for arbitrations relating to intellectual property rights. The new Part 11A contains the new sections 103A, 103B, 103C, 103D and 103E of the Ordinance.

5. The new section 103A of the Ordinance deals with the interpretation of terms and expressions referred to in the new Part 11A. In particular, a reference to an intellectual property right is a reference to such a right whether the right is registrable or non-registrable and whether the right is registered or subsists in or outside Hong Kong. A reference to a dispute over an intellectual property right includes a dispute over the subsistence, scope, validity, ownership or infringement of an intellectual property right.

6. The new section 103B of the Ordinance clarifies the arbitrability of disputes over intellectual property rights.

7. The new section 103C of the Ordinance clarifies that a person acting in the capacity of a licensee (whether an exclusive licensee or not) of an intellectual property right under a licence agreement with an owner of the right or a person having an interest in the right (***interested person***) is not a person claiming through or under the owner or interested person for the purposes of section 73(1)(b) of the Ordinance.

8. The new sections 103D and 103E of the Ordinance clarify the enforceability of arbitral awards involving intellectual property rights.

9. Clause 5 adds a new subsection (3) to section 111 of the Ordinance. The new subsection and the new Part 3 of Schedule 3 to the Ordinance (added by clause 6) provide for the necessary savings and transitional arrangements.