

LCQ3: The enforcement of arbitral awards and judgments in commercial matters

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Following is a question by the Hon Margaret Ng and an oral reply by the Secretary for Justice, Ms Elsie Leung, in the Legislative Council today (January 26):

Question:

Regarding the enforcement of arbitral awards and judgments in commercial matters, will the Government inform this Council:

(a) given that in response to the request made by the Panel on Administration of Justice and Legal Services in March last year for statistics on the number of applications for enforcement of Hong Kong arbitral awards in the Mainland, the Acting Deputy Solicitor General informed the Panel in July that a reply from the Mainland authorities was still awaited, what statistics and information have been obtained so far, particularly in the up-to-date numbers of applications made, awards enforced as well as unsuccessful applications and the reasons for their being unsuccessful; and

(b) how the enforcement situation as reflected in the statistics and information in (a) above will affect the Government's position on the current negotiation on the reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland?

Reply :

Madam President,

(a) After the AJLS Panel meeting held on 22 March 2004, my Department approached the Supreme People's Court (SPC) for information on enforcement of HKSAR arbitral awards in the Mainland. The SPC advised us that, according to its records, the Mainland courts have not received any application for enforcing arbitral awards made in the Hong Kong Special Administrative Region.

This was not satisfactory. I therefore followed up with the Supreme People's Court during my visit to Beijing in summer 2004, and again when the President of the Supreme People's Court, Mr Xiao Yang visited Hong Kong in November, 2004. I

was informed on the 19 January, 2005 by a delegation headed by officials from the Supreme People's Court visiting Hong Kong that they will be organizing a 'field study' by visiting the courts in Guangdong province responsible for the enforcement of Hong Kong awards to study the reason why there is no record of any application for enforcement of Hong Kong arbitral awards.

In early 2002, my department had, jointly with the Law Society, the Hong Kong International Arbitration Centre, the Hong Kong Institute of Arbitrators and the Chartered Institute of Arbitrators - East Asia Branch, conducted a survey on the enforcement in the Mainland of arbitral awards made in Hong Kong. There were only a few responses but none of them complained about any application for enforcement of a Hong Kong arbitral award having been refused by a Mainland court after the implementation of the arrangement.

Since the record of enforcement is not yet available from the Mainland, on 24 November, 2004, the Department of Justice wrote to the local legal and arbitration professional bodies, as well as major Chambers of Commerce, for updated information on any non-enforcement of Hong Kong arbitral awards. To date, there has been no response indicating any case of non-enforcement.

We hope that the field study by the Supreme People's Court will produce useful results and will assist us in understanding the situation concerning enforcement. We will also consider exploring with the Law Society and the local arbitration bodies the feasibility of a notification system whereby their members will inform us of any application for enforcement and the result of it, as well as the time taken for enforcement, and in the case of non-enforcement, the reason given for this. Another possibility would be to require all applications to be submitted to the Supreme People's Court for registration before dispatching them to the local court where the award is to be enforced. These possibilities will be explored further after the results of the Mainland and local investigations are known, and with the agreement of relevant parties.

(b) Under the principle of "one country, two systems", we have no right to interfere with the administration of justice in the Mainland. Since an agreement on arbitral awards is in place, if a Hong Kong arbitral award is not enforced in the Mainland, we are entitled to take the matter up with our counterpart and find out why. The lack of a record of enforcement or non-enforcement is discouraging, but we are in the course of finding out the reason for this. If there is evidence of non-enforcement, we shall

take the matter up with the Supreme People's Court.

The reason we pursue an agreement under which certain Hong Kong judgments in commercial cases could be enforced in the Mainland is because (1) this would save the time and expense of bringing an action again in the Mainland; (2) the Hong Kong party might not be able to comply with the rules of procedure concerning jurisdiction or proof of claim under the Mainland law; and (3) the other party to the proceedings may not have assets in Hong Kong but have assets in the Mainland. An agreement for reciprocal enforcement is certainly beneficial to a Hong Kong company or individual and is a proposal supported by many in the business sector when we carried out the consultation in the spring 2002. The proposal was also supported by the AJLS Panel before we started discussions with the Mainland.

The Administration informed the AJLS Panel of the latest developments concerning the ongoing discussions at its meeting on 22 November 2004. The Administration reported at that meeting that, since mid 2002, we had conducted three rounds of informal meetings with the Mainland authorities to exchange views on the scope of the proposed arrangement, on the issue of finality, and on the technicalities involved in the recognition and enforcement of judgments in both jurisdictions. These meetings have served to enhance our mutual understanding of each other's legal and judicial systems, and the rationale underlying the proposed arrangement.

Discussions are still continuing, and indeed another meeting was held on the 19 and 20 January 2005, and some progress has been made. It would be premature at this stage to predict when we may reach a mutually satisfactory and acceptable arrangement. Both the HKSAR and the Mainland authorities recognize that the arrangement would need to be underpinned by local legislation in the HKSAR before it may take effect in Hong Kong. We will report to the AJLS Panel when there is any major development.

Ends/Wednesday, January 26, 2005

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