

26 April 2011

Ms Alice Choy  
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Legal Policy Division  
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Dear Ms Choy

**Consultation Paper on the proposal to enter into an arrangement with Macao SAR  
on Mutual Enforcement of Arbitral Awards**

The Chamber's views on issues raised in the subject consultation paper are as under.

- (1) The Chamber supports the initiative to enter into an arrangement on mutual enforcement of arbitral awards between Hong Kong and Macao.
- (2) No, the arrangement should not be developed in the light of either:
  - (a) the Arrangement on reciprocal enforcement of arbitral awards between the Mainland and Hong Kong (1999); or
  - (b) the Arrangement between the Mainland and Macao (2007);

but should be based instead on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

We note that China is a signatory to the New York Convention and has notified the United Nations that the convention also applies to both Hong Kong and Macao. Although it is understood that the convention is only applicable between separate signatories and, as such, does not apply between Hong Kong and the Mainland or Hong Kong and Macao, the New York convention does, however, provide a tried and tested regime for the recognition and enforcement of awards between different jurisdictions.

The 1999 agreement for the enforcement of awards between the Mainland and Hong Kong is rather complex by comparison with the New York Convention and does not appear to offer any advantages over the latter of which the scope of application and grounds for refusal of enforcement have the added benefit of being well understood by the international business community. We therefore feel that the New York Convention would be better suited to an arrangement between Macao and Hong Kong.

If the New York Convention were to be used as a model it should be noted that there are two common reservations to the New York convention both of which have been taken into account by China. These are:

- (1) The reciprocity reservation: The Convention only applies to recognition and enforcement of awards made in the territory of another contracting State; and
- (2) The commercial reservation: The Convention only applies to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

If a specific arrangement was made between Hong Kong and Macao, there should be no need for any reservation of reciprocity. The agreement should instead require the courts in each jurisdiction to enforce, subject to the New York Convention grounds.

It may be necessary for the arrangement between Hong Kong and Macao to include provisions similar to the commercial reservation, which is typical to jurisdictions with a civil law background. However, it may be noted that neither Portugal nor Brazil (two jurisdictions with legal systems similar to Macao) has adopted the commercial reservation.

We would suggest that the Court of First Instance assume the role of enforcement court in Hong Kong and would also recommend that a similar level of court in Macao be designated as the enforcing court.

We thank you for the opportunity of providing input and hope that these are useful to you in your deliberations.

Sincerely

Alex Fong  
CEO