

立法會
Legislative Council

LC Paper No. CB(2)444/09-10
(These minutes have been
seen by the Administration)

Ref : CB2/BC/9/08

Bills Committee on Arbitration Bill

**Minutes of the third meeting
held on Monday, 5 October 2009, at 2:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Ronny TONG Ka-wah, SC
Prof Hon Patrick LAU Sau-shing, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun

Member absent : Hon CHIM Pui-chung

Public Officers attending : Item I
Mr Frank POON
Deputy Solicitor General (General)

Ms Phyllis KO
Senior Assistant Law Draftsman

Mr Allen LAI
Senior Government Counsel

Mr LEE Tin-yan
Senior Government Counsel

Mr Christopher NG
Senior Government Counsel

Ms Angie LI
Government Counsel

**Deputations
by invitation** : Item I

Mr Samuel C C WONG
Barrister-at-Law

The Hong Kong Institute of Architects

Prof. Edwin CHAN
Vice-Chairman of Contract and Dispute Resolution Committee

Mr Simon CHEE
Member of Contract and Dispute Resolution Committee

International Chamber of Commerce - Hong Kong, China

Miss Kim Rooney
Arbitration Committee Member

Mr Andrew Aglionby
Arbitration Committee Member

The Hong Kong Institute of Surveyors

Mr Gilbert KWOK
Quantity Surveying Division Council Member

Mr Bernard WU
Quantity Surveying Division Council Member

Hong Kong Construction Association

Mr Thomas TSE
Secretary General

Mr Dean Lewis
Legal Advisor

The Hong Kong Federation of Electrical and Mechanical
Contractors Limited

Mr Paul CHONG
Chairman

Mr Peter Scott Caldwell
Arbitrator and Mediator

Hong Kong International Arbitration Centre

Mr Robin Peard
Council Member

Clerk in attendance : Miss Betty MA
Chief Council Secretary (2) 4

Staff in attendance : Mr Kelvin LEE
Assistant Legal Adviser 1

Miss Florence WONG
Senior Council Secretary (2)5

Miss Maggie CHIU
Legislative Assistant (2)4

Action

I. Meeting with deputations and the Administration

[The Bill, Legislative Council Brief, LC Paper Nos. CB(2)2261/08-09(01) to (02), CB(2)2469/08-09(03), CB(2)2494/08-09(01), CB(2)2497/08-09(01) to (02), CB(2)2508/08-09(01) to (04) and CB(2)2546/08-09(01) to (05)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

2. The Bills Committee received oral presentations from six organizations and two individuals attending the meeting, and three written submissions from organizations not attending the meeting.

Admin

3. The Administration was requested to –

- (a) further discuss with the arbitration users, in particular the construction industry which was the major arbitration users, and consider ways to address their concerns;

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- (b) critically review the drafting approach of the Bill as to whether it would be more user-friendly from the perspective of arbitration users; and
- (c) consider the suggestion of reinstating clause 102 of the draft Arbitration Bill regarding the automatic opt-in provisions for subcontracting cases.

II. Any other business

- 4. Members agreed that the next meeting would be held on 5 November 2009 at 8:30am.
- 5. There being no other business, the meeting ended at 4:29 pm.

Council Business Division 2
Legislative Council Secretariat
3 December 2009

**Proceedings of the third meeting of the
Bills Committee on Arbitration Bill
on Monday, 5 October 2009, at 2:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker(s)	Subject(s)	Action required
<i>Agenda item I – Meeting with deputations and the Administration</i>			
000000 - 000441	Chairman	Opening remarks	
000442 - 001038	Mr Samuel C C WONG Chairman	<p>Presentation of views as detailed in LC Paper No. CB(2)2497/08-09(01)</p> <p>View that it was not easy to go through and understand the Bill, although the primary objective of the Bill was to be "more user-friendly" in the context of attracting more international arbitration to Hong Kong</p> <p>The provisions of schedule 2 to the Bill should be made to be opt-out provisions instead of opt-in provisions</p>	
001039 - 001357	The Hong Kong Institute of Architects (HKIA) Chairman	<p>Presentation of HKIA's views as detailed in LC Paper No. CB(2)2508/08-09(02)</p> <p>Supplementary view that the word "or" between subparagraphs (b) and (c) of article 11(4) of the UNCITRAL Model Law (Model Law) in clause 24(1) should be replaced by "and" so as to better reflect the existing practice</p>	
001358 - 001614	The Hong Kong Federation of Electrical and Mechanical Contractors Limited (HKFEMC) Chairman	<p>Presentation of HKFEMC's views as detailed in LC Paper No. CB(2)2546/08-09(01)</p> <p>View that electrical and mechanical contractors were major users of arbitration, the President of HKFEMC should be added to the list of persons and organisation to be invited as members of the Appointment Advisory Board, amended by section 36(2) of schedule 4 to the Bill</p>	
001615 - 001931	Chairman International Chamber of Commerce - Hong Kong, China (ICC)	<p>Views of ICC that –</p> <p>(a) the meaning of "place of arbitration" in clause 48 of the Bill (i.e. article 20 of the Model Law) was unclear, given that the term could mean the juridical place where an arbitral award was made, or the geographic location where the arbitral hearing was held; and</p> <p>(b) a decision by an arbitral tribunal to the effect that it did not have jurisdiction should be capable of an appeal. A party who wished to arbitrate in circumstances where an arbitral tribunal had erroneously decided that there was no jurisdiction would be left without redress</p>	

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001932 - 002354	The Hong Kong Institute of Surveyors (HKIS)	<p>Presentation of HKIS's views as detailed in LC Paper No. CB(2)2508/08-09(03)</p> <p>While welcoming the proposal to simplify the current Arbitration Ordinance and make it more user-friendly, it objected to the proposal of adopting a unitary regime for arbitration.</p> <p>Proposed amendments as detailed in paragraph 9 of its submission, if the Bill was to be passed by the Legislative Council despite the objection by HKIS</p>	
002355 - 002936	Hong Kong Construction Association (HKCA)	<p>Presentation of HKCA's views as detailed in LC Paper No. CB(2)2508/08-09(01)</p> <p>Request that the automatic opt-in provisions for subcontracting cases in clause 102 of the draft Bill should be reinstated. Under the existing regime, a domestic subcontract would not need to expressly refer to the domestic regime as this would automatically apply. As there was no automatic opt-in for subcontracts under the Bill, the status quo of local subcontractors would immediately change when the Bill came into force, unless the subcontractors were aware that they needed to change their subcontracts to state expressly that they would be subject to the domestic regime</p>	
002937 - 003214	Mr Peter Scott Caldwell Chairman	<p>In response to HKCA's suggestion of reinstating clause 102 of the draft Bill, Mr Peter Caldwell advised that the automatic opt-in provisions for subcontracting cases was not necessarily a protection for small subcontractors as they might be dragged into lengthy proceedings in the court and incur high expenditure</p>	
003215 - 003747	Hong Kong International Arbitration Centre (HKIAC)	<p>Views of Mr Robin Peard that –</p> <ul style="list-style-type: none"> (a) the reproduction of the main text of Model Law in schedule 1 to the Bill would enhance the perception that Hong Kong was a Model Law jurisdiction; (b) when the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (Working Group) deliberated on clause 16 of the Bill, it had balanced the needs to preserve confidentiality as a key aspect of arbitration and to adhere to the principle of openness of court proceedings; and (c) the right of appeal to the decision of the court had been set out in the Bill after considering the fact that appeals might sometimes delay disputes resolution 	
003748 - 005031	Administration Chairman	<p>The Administration's response to the concerns raised by deputations that –</p> <ul style="list-style-type: none"> (a) the proposal to create a unitary system of arbitration law and the consultation on the reform of arbitration law started since 1990s. The Hong Kong Institute of Arbitrators in cooperation with 	

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		<p>HKIAC issued a report in 2003 recommending that the existing Arbitration Ordinance should be redrawn and a unitary regime should be created. The Department of Justice published a Consultation Paper on the Reform of Arbitration in Hong Kong and draft Arbitration Bill (Consultation Paper) in 2007 to seek views on reform of the law of arbitration in Hong Kong</p> <p>(b) over 40 submissions were received on the Consultation Paper, and the Working Group had carefully reviewed and considered all the submissions and made recommendations with regard to most of the issues;</p> <p>(c) it was proposed under clause 102 of the draft Bill that the opt-in provisions that automatically applied under clause 101 of the draft Bill deemed to apply in subcontracting cases. The submissions on the Consultation Paper were overwhelmingly against the proposal, although HKCA was in support of the retention of clause 102. It was agreed by an overwhelming majority of members of the Working Group that clause 102 of the draft Bill should be deleted, and the Administration agreed to this suggestion. Notwithstanding this, the opt-in provisions would apply to subcontracts if they wished to do so by using clauses 99 and 100 of the Bill. The Administration would enhance the public awareness on the opt-in provisions; and</p> <p>(d) the policy intent was clearly spelt out in article 11(4)(c) of the Model Law in clause 24(1), i.e. an institution might perform the function of appointing arbitrators if it was authorised by the appointment procedure agreed by the parties. The HKIAC, as the default appointment authority, might only appoint an arbitrator if a party or an institution failed to act under the agreed appointment procedure</p>	
005032 - 005504	Prof Patrick LAU Administration	<p>Views of Prof Patrick LAU that –</p> <p>(a) diverse views from deputations showed that the Working Group lacked representatives from major arbitration users; and</p> <p>(b) in the absence of contracts in most subcontracting cases in the construction industry, it was envisaged that subcontractors would not state expressly that they would be subject to the domestic regime. Consideration should be given to exempting the construction industry from the applicability of the Bill until the Construction Industry Council (CIC) was able to draw up a standard contract for subcontracting cases</p>	

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005505 - 010526	Ir Dr Raymond HO Chairman HKFEMC Administration	<p>Views of Ir Dr Raymond HO that the Administration should further gauge views from the construction industry, including CIC. The concerns about automatic application of opt-in provisions to subcontracts should be resolved right away having regard to the proliferation of subcontracts in the construction industry</p> <p>Views of HKFEMC that it supported in principle the direction of the reform of the arbitration law. However, it urged the Administration to take full account of the concerns expressed by the industry and improve the arbitration regime having regard to the number of disputes arising from subcontracting arrangement in the construction industry</p> <p>The Administration's response that –</p> <p>(a) clauses 99 and 100 of the Bill allowed provisions set out in schedule 2 to be opted for inclusion in arbitration agreements and provided for the circumstances under which those provisions would automatically apply. Clause 100 provided that all the opt-in provisions in schedule 2 would automatically apply to an arbitration agreement which referred to domestic arbitration. In addition, the industry might consider introducing a standard form contract. Nonetheless, it would consider the suggestion of reinstating clause 102 of the draft Bill; and</p> <p>(b) the Ordinance would come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette. The Administration would take into account the readiness of parties concerned in appointing the commencement date of the Ordinance</p> <p>Responding to Ir Dr Raymond HO, the Administration advised that it had received submission from CIC, and would consider its views and provide a written response</p>	<p>Admin</p> <p>Admin</p>
010527 - 010919	Mr Abraham SHEK	Concerns expressed by the construction industry, which represented the largest users of domestic arbitrations, should be addressed although he did not object to the direction of the reform of the law of arbitration	
010920 - 012252	Mr Ronny TONG Chairman Administration	<p>Rationale for deleting clause 102 of the draft Bill regarding the automatic opt-in provisions for subcontracting cases, and giving effect to article 16 of the Model Law which enabled an arbitral tribunal to rule on its own jurisdiction</p> <p>The Administration's response –</p> <p>(a) clause 102 of the draft Bill was deleted having regard to an overwhelming majority views received that the clause was against party autonomy and there was an arbitrary distinction between the application of the provision to local and overseas subcontractors. This apart, clauses 99 and 100 of the Bill allowed the parties to choose domestic arbitration if they wished to do so; and</p>	

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		(b) the Working Group considered that the competence of arbitral tribunal to rule on its own jurisdiction should not depart from the Model Law and it would not be appropriate to force an arbitral tribunal to conduct an arbitration when it ruled that it had no jurisdiction	
012253 - 013624	Ms Miriam LAU Chairman Mr Samuel C C WONG HKIS ICC Administration	Further views from deputations on the drafting approach of the Bill The Administration's response that respondents to the consultation on the direction of having a unitary regime for arbitration on the basis of the Model Law and the drafting approach of the draft Bill had expressed general support for the approach although there were a few diverse comments on the automatic opt-in provisions for subcontracts	
013625 - 013803	Dr Priscilla LEUNG	Views of Dr Priscilla LEUNG that the Administration should critically review and improve the drafting approach of the Bill	Admin
013804 - 014013	Prof Patrick LAU	While he supported the policy direction of the Bill, Prof Patrick LAU considered that the Administration should consider views expressed by the deputations	
014014 - 014559	HKIAC Chairman HKCA	Further discussion on the drafting approach of the Bill and the automatic opt-in provisions for subcontracts	
014600 - 014810	Mr Abraham SHEK Chairman	Concern about the enforceability of the Bill having regard to the concerns expressed by HKCA and HKFEMC, which represented the major arbitration users. The Administration was requested to further discuss with the industry on the legislative proposal	Admin
014811 - 014915	HKFEMC Chairman	Suggestion that the automatic opt-in provisions as set out in clause 102 of the draft Bill be reinstated and applicable to subcontracts of small contract sum	
014916 - 014947	Mr Samuel C C WONG	Support of the objectives of and general approach to the reform of the arbitration law	
014948 - 015230	Chairman	The Administration was requested to consider the concerns expressed by the deputations and the construction industry and discuss with parties concerned on the viability of improving the opt-in provisions for subcontracting cases	Admin
015231 - 015749	Administration Chairman Mr Ronny TONG	The Administration's elaborations on the drafting approach of the Bill [LC Paper No. CB(2)2546/08-09(02)]. In gist, the drafting approach taken in the Bill reflected the Working Group's general consensus and achieved the policy objective of the Administration	

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<i>Agenda item II – Any other business</i>			
015750 – 015912	Chairman Mr Ronny TONG	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
3 December 2009