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The Hong Kong Construction Association Ltd

Our Ref: 0200003850

I would summarise HKCA's position on the major recommendations in the HKIA Report as follows:-

1. HKCA firmly agree that the Arbitration Ordinance is in need of redrawing. It is an Ordinance which is difficult to understand, especially for the lay person.

2. HKCA believe that there is a difference in how a domestic and an international arbitration should be conducted. Nearly all arbitrations involved in the construction industry in Hong Kong are domestic arbitrations. The industry is used to conducting arbitrations as domestic ones, which currently carries with it certain fundamental and important rights. These include the right of appeal to the Court, the right for the Court to determine a preliminary point of law, the right for the Court to order that more than one arbitration (which are related to each other) can be consolidated or heard together and, finally, the right for an arbitration to be conducted by a single arbitrator in default of agreement on the number of arbitrators.

3. The final Report of HKIA recognises HKCA's concerns and proposes that it be possible for parties to enter into contracts which "opt-in" to these fundamental rights as a package. The contract would simply need to provide that an arbitration would be a "domestic arbitration". This is of course the opposite of the current position whereby parties have to "opt-out" of the domestic regime if their contract is a domestic contract but they want it governed as if an international one.

4. HKIA were unwilling to consider maintaining the status quo with regard to domestic arbitrations and so HKCA, not wishing to hold back the development of arbitration in Hong Kong, accepted that if a separate part of the new Ordinance contained the fundamental rights referred to above, with a simple method of opting in to these rights, then subject to the drafting of the Ordinance this would be considered satisfactory from HKCA's point of view.

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5. In the subsequent post Report consultation with the Department of Justice, HKCA have identified a further two requirements, for the better and necessary protection of the construction industry:-

(a) although it can be expected that Hong Kong employers such as the Government, MTRC, KCRC, Housing Authority etc as well as developers, will be alive to the changes and ensure that their standard forms of contract provide a proper "opt-in" provision, HKCA has concerns about whether such provisions will be incorporated in sub-contracts. HKCA therefore proposed, (and subject to drafting, it was accepted by all relevant parties) that if a head contract contains an opt-in to the domestic regime, all sub-contracts and associated contracts would be deemed to have also done so. This is considered as extremely important by HKCA.

(b) The drafting of the new Ordinance will be important and HKCA should be an active party in its drafting to ensure that the industry's interests are adequately protected. HKCA are therefore very pleased that the Department of Justice has agreed to set up a draft working group to assist in the drafting of the new Ordinance and that HKCA will have a representative on that group.

I look forward to meeting you on 27 June 2005.

Yours faithfully,

David Suff
Vice President of HKCA and Chairman of Civil Engineering Committee

Encl

cc Mr. Dean Lewis

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The Hong Kong Construction Association Ltd
A member of International Federation Of Asian And Western Pacific Contractors' Associations

App.9

ORIGINAL

29 October 2002

Ref: BW/DL/WS/mn:690:02:IA9

Mr. Robin S PEARD
Chairman
Hong Kong Institute of Arbitrators Committee
The Hong Kong International Arbitration Centre
38th Floor
Two Exchange Square
Central
Hong Kong

Dear Mr. Peard,

HONG KONG ARBITRATION LAW

We refer to your draft report and your invitation for comments. We also refer to the seminar held on 9 October 2002 ("the Seminar").

1. This submission is made on behalf of the Hong Kong Construction Association ("HKCA"). HKCA has about 400 members comprising local and international contractors carrying out foundations, civil engineering and building contracting.

2. According to statistics on the website of the Hong Kong International Arbitration Centre ("HKIAC") the construction industry is by far the largest user of arbitration in Hong Kong. In the year 2001, out of 307 disputes referred to HKIAC, 195 of them were construction disputes, almost two thirds and we therefore believe that contractors are the largest users of arbitration in Hong Kong.

3. HKCA were allowed a single representative on your Committee but there was no other representatives from the contracting industry on a committee of 22 persons.

4. HKCA agrees that the Arbitration Ordinance needs to be rewritten. It is currently very difficult for our members to understand it. Indeed, it is so complex that it is possible only for lawyers to understand it.

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5. We also see the advantages of basing the new Ordinance on a tried and tested regime such as the Model Law and we understand the stated purpose of the proposal for a unitary regime, that this will enhance Hong Kong's reputation in the international business community as a place to arbitrate. However we feel strongly that the needs of the domestic contracting industry have not been fully taken into account in pursuing this international enhancement objective.

6. We consider that it is necessary for the Arbitration Ordinance to retain a number of provisions which would be applicable only to domestic arbitrations, without the need for a party to "opt in" or "opt out". The fact that the Report recommends retaining these provisions, albeit on an "opt in" or "opt out" basis, suggests strongly that they are potentially important matters.

7. We are extremely concerned that to leave the position on these provisions to be decided at the time of entering into an arbitration agreement, when there are so many choices to make, has the potential to throw the domestic construction industry into great confusion. We hope we do not state this too highly but let us first identify the "opt in" and "opt out" provisions :

Opt-In

(i) the court's power to order arbitrations to be consolidated or heard concurrently (paragraph 20.5);

(ii) the court's power to decide, on request, a preliminary issue of law that arises in the arbitration (paragraph 32.9);

(iii) the right to apply for leave to appeal an Arbitration Award (paragraph 41.10);

(iv) the right for the court to tax / assess costs payable in an arbitration (paragraph 40.10);

(v) the ability of an arbitrator to give a decision "ex aequo et bono" (in other words a decision that is made on the basis of what the arbitrator thinks is fair – and disregarding the strict application of the law / the contract) (paragraph 33.3);

(vi) the power of the arbitrator to act both as a conciliator and an arbitrator (paragraph 33.13).

Of these, we consider that (i) and (iii) are the most significant issues.

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Opt-Out

(xv) the number of arbitrators to be appointed – HKIAC to decide whether one or three unless parties agree how many there should be ((paragraph 14.4);

(xv) the power of the tribunal to order security for costs (paragraph 22.16);

(xv) the powers of the tribunal to appoint its own expert (paragraph 31.2);

(xv) the power of the tribunal to limit recoverable costs (paragraph 40.21);

(xv) the power of the tribunal to order interim measures of protection (paragraph 22.10);

(xv) the powers of the tribunal to make peremptory orders where a party has failed to comply with an order and direction – and also to deal with breaches of such a peremptory order (paragraph 22.27);

(xv) the confidentiality of arbitration proceedings and decisions (paragraph 5.18);

(xv) the power of the tribunal to give different awards at different times on different issues (paragraph 36.11);

(xv) deeming provisions as to when notices are served (paragraph 7.1);

(xv) the procedure for challenging arbitrators for impartiality / bias (paragraph 17.1);

(xv) the method of commencing validly an arbitration (paragraph 26.4);

(xv) the ability to amend pleadings subject to the right for the tribunal to refuse permission (paragraph 28.2);

(xv) The right to have an oral hearing at the request of a party – and the tribunal's general power to decide when to hold hearings (paragraph 29.3);

(xv) the tribunal's powers as to how to proceed if a party fails to serve its pleadings (paragraph 30.3);

(xv) the provision that substantive decisions on a 3 member tribunal shall be made by majority vote (paragraph 34.3).

Of these we consider that (i) is the most significant issue.

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8. It is already apparent that there are over 20 opt-in and opt-out provisions to consider when drafting a domestic arbitration agreement. When we also then consider that a large number of public sector construction contracts are procured on various standard forms of contract; the Government, MTRC, KCRC, the Airport Authority, Housing Society, Housing Authority, Hospital Authority all have their own standard forms, as well as there being a large number of contracts let by developers, it is obvious that it will not be possible to obtain a unified approach to arbitration agreements. The Industry could therefore find itself operating under a number of significantly different arbitration agreements each with effectively a different set of laws being applicable.

9. We therefore consider strongly that the Ordinance should retain a separate section, including provisions applicable only to domestic arbitrations. Some of the opt-in and opt-out provisions could perhaps be retained as optional but there should be a core set of provisions applicable to domestic arbitrations, including the following :

(i) the court's power to order arbitrations to be consolidated or heard concurrently should be retained for domestic arbitrations. In our industry, where sub-contracts are so important, it is vital that this power is retained to ensure that in appropriate cases the risk of inconsistent findings by different arbitrators is avoided. You suggested at the Seminar that the Committee might reconsider this if it could be shown that there have a large number of applications to the Court under Section 6B. With respect this is not the point. There may have been few applications because consolidation has occurred by agreement, there being little point in contesting an application. Our members and advisers know of such cases;

(ii) the right to apply to the court for leave to appeal an arbitrator's award should be retained for domestic arbitrations. This power has been exercised by the Hong Kong Courts a number of times and is considered to be an important safeguard for those occasions when an arbitrator gets the law very wrong. It is we consider particularly important in Hong Kong where there are question marks over the abilities of some practising arbitrators. You suggested at the Seminar that successful applications for leave are rare. We would not agree that this is necessarily true or indeed that this is relevant. The right of applying for leave to appeal is an emergency power or safety valve. Merely because it is not often successfully used does not provide good logic for not retaining the right. In any event our members and advisers know of a number of successful applications over the years and in each of these cases there would have been a miscarriage of

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justice had there had been no right of appeal. The absence of the right may well be appropriate in the case of an international arbitration but it would be a significant and grave step to remove this jurisdiction of the Court for domestic arbitrations ;

(iii) the default number of arbitrators should be retained as one for domestic arbitrations and not left to the discretion of HKIAC. Arbitrators and legal costs in Hong Kong are already enormous and there is little if any scope for negotiating fees of arbitrators when they are appointed by HKIAC. It is thus important to retain certainty that a single arbitrator will be appointed in domestic arbitrations, unless the parties agree otherwise. You suggested at the Seminar that a guideline should be given to HKIAC to the effect that a single arbitrator should be appointed for a domestic arbitration. This begs the question of what HKIAC will interpret a domestic arbitration to be if it is not defined in the new Ordinance. Our view is that this should be spelt out in the new Ordinance.

10. Another proposed change that we feel strongly about is the proposal to abolish the right of a party to apply to the Court to remove an arbitrator for "misconduct" or "serious irregularity". Although successful applications to remove arbitrators for misconduct are rare (although there have been some), the current powers of the Court at least provide a degree of protection for these extreme cases. Indeed it may be that the existence of the power itself has deterred some arbitrators from misconducting themselves. Again this is an important power given the question-mark over the quality of some arbitrators in Hong Kong and should be retained at least for domestic arbitrations.

11. A proposed change which we believe would lead to the potential for additional costs being incurred in arbitrations is the proposal to replace a party's right to a "reasonable opportunity" to present its case, with a right to a "full opportunity". This would have potential significance where an arbitrator is endeavouring to adopt fast track or cost saving procedures but one of the parties objects and instead requires that the arbitration all but replicate High Court procedures. This removes one of the benefits of arbitration, its flexibility and we would therefore suggest that the existing wording is more appropriate.

12. The above four matters are those our members feel most strongly about. They are also of course matters which the international business community also may feel strongly about from the point of view of international

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arbitration. In saying this however we note that in England and Wales the Arbitration Act of 1996, which has a unitary regime, retains a default single arbitrator and the right of appeal to the courts even for international arbitrations.

13. It seems to us, in conclusion, that the distinction between international and domestic arbitrations should be retained although the section of the Ordinance dealing with domestic arbitrations could be fairly limited. We note that at the Seminar you stated that one of the objectives in having a unitary regime was so that the new Ordinance could be clear and user friendly. The existing Ordinance is unclear because of the way it is drafted and because of the way it has been revised over the years. It is not unclear because it contains a separate regime for domestic disputes, and it should not be difficult to draft a clear Ordinance which includes some separate provisions applicable only to domestic arbitrations.

I hope that our comments are helpful and would be pleased to elaborate.

Yours sincerely,

Billy Wong
President

c.c. Secretary for Justice
Works Bureau Legal Advisory Division, Ms May Tam.

Masons - Mr. Dean Lewis