Arbitration Bill gazetted in June 2009 ("Arbitration Bill")
Automatic Opt-in for Subcontracts

Preliminary

For the purposes of this paper, unless indicated otherwise[1], references to a Clause or Schedule are to the clause or schedule of the draft arbitration bill ("**Draft Bill**") attached to the Consultation Paper on Reform of the Law of Arbitration in Hong Kong published by the Department of Justice ("**DOJ**") in December 2007 (the "**Consultation Paper**").

Purpose

2. This paper sets out the background on the differences among the stakeholders on whether Clause 102 should be reinstated to the Arbitration Bill, DoJ's proposal to address their differences, and the stakeholders' comments on the proposal. An extract of Clause 102 (together with Clause 100 and Clause 101) is attached as **Annex 1** for ease of reference.

Background

3. When DOJ published the Draft Bill for consultation in December 2007, it was proposed, among other things, that:

(a) where an arbitration agreement (entered into before, or at any time within a period of 6 years after, the commencement of the new Arbitration Ordinance) stipulates that arbitration under that agreement is a "domestic arbitration", all the opt-in provisions under Schedule 3[2] shall, subject to any express agreement to the contrary, automatically apply (see Clause 101); and

(b) where i) all the provisions relating to domestic arbitration in Schedule 3 automatically apply to an arbitration agreement under Clause 101, and ii) the whole or any part of the subject matter of the contract which includes that arbitration agreement is subcontracted to any person under a subcontract which also includes an arbitration agreement, all

[1] for example, in Annex 3, references to a Clause or Schedule are references to the clause or schedule of the Arbitration Bill.
[2] renumbered as Schedule 2 in the Arbitration Bill.

the provisions in Schedule 3 would also apply to the arbitration agreement in the subcontract (see Clause 102).

4. While certain stakeholders, particularly those from the construction industry, expressed their support for Clause 102, a clear majority of the respondents to the Consultation Paper was against Clause 102 and requested it be removed from the Draft Bill. DOJ's Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law ("the **Working Group**") discussed the response and decided in favour of taking out Clause 102.

5. To reflect the majority view and the deliberations of the Working Group, DOJ had not included Clause 102 in the Arbitration Bill.

6. The issue regarding Clause 102 was raised again at the LegCo Bills Committee meeting with the deputations on 5 October 2009. While certain deputations of the construction industry, such as the Hong Kong Construction Association, proposed to reinstate Clause 102, there were a number of others who did not agree to the proposal and it became evident that further discussions among the stakeholders on Clause 102 would be necessary. Accordingly, DOJ organised a meeting with stakeholders (see the attendance list at **Annex 2**) on 29 October 2009 to facilitate further discussions on Clause 102 (the "**Meeting**").

7. Various views were expressed at the Meeting with stakeholders from the construction industry generally in favour of Clause 102 while representatives of the other sectors were generally against Clause 102.

8. A major concern, which was acknowledged by many people who attended the Meeting, is that the automatic opt-in mechanism for subcontracts under Clause 102 may have implications on other industries such as insurance and shipping where contracts for sub-underwriting and sub-charter are not uncommon. Confining the effect of the automatic opt-in mechanism to construction contracts would limit the scope of the problem.

The Revised Clause 102

9. Accordingly, after due consideration of the views of the stakeholders at the Meeting, DOJ proposed to the stakeholders in January 2010 that Clause 102 could be revised by limiting its application to construction subcontracts only ("**Revised Clause 102**") and reinstated to

the Arbitration Bill (please see **Annex 3**). For ease of comparison, a marked-up copy of the Revised Clause 102[3] is attached at **Annex 3A**.

10. A key feature of the Revised Clause 102 is to define "construction contract" as having the meaning given to it in the Construction Industry Council Ordinance, Cap. 587 ("**CIC Ordinance**") which is "a contract between an employer and a contractor under which the contractor carries out construction operations but does not include a contract of employment", and accordingly to define "construction operations" as having the meaning given to it in Schedule 1 to the CIC Ordinance (please see **Annex 4** attached). These two definitions ("**Definitions**") are also adopted in section 19(1)[4] of the Construction Workers Registration Ordinance, Cap. 583 ("**CWR Ordinance**").

11. In DoJ's view, the Definitions suit the Revised Clause 102. To adopt the Definitions for the Revised Clause 102 would ensure consistency on the meaning of the terms among the CIC Ordinance, the CWR Ordinance and the Arbitration Bill. The Definitions have also appropriately covered most contracts and activities that are ordinarily perceived as construction contracts and operations respectively. The fact that the Definitions are adopted in the CIC Ordinance and the CWR Ordinance supports this proposition. Any dispute on whether certain activities are construction operations within the meaning of the Definitions can be decided in arbitration based on the facts of the case.

To exclude Non-Local Subcontractors/Subcontracts from the Revised Clause 102

12. Another key feature of the Revised Clause 102 is to exclude subcontractors with residence, place of incorporation, management and control, or place of business outside Hong Kong, as well as subcontracts the performance of which is outside Hong Kong, from its application ("**International Exception**"). At the Meeting, certain stakeholders raised objection against the International Exception. In gist, they would like equal treatment between local and non-local subcontractors/subcontracts. On the other hand, there were other stakeholders who were in favour of retaining the International Exception pointing out that it would undermine Hong Kong's reputation as an international arbitration centre if domestic arbitration provisions were inadvertently imposed by Clause 102 on the unwary non-local subcontractors.

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[3] as new Clause 100A of the Arbitration Bill.

[4] minor modifications to the meaning of "construction operations" are made in the CWR Ordinance.

13. As the key objective of the Arbitration Bill is to enhance Hong Kong's standing as an international arbitration centre, we have decided to keep the International Exception in the Revised Clause 102.

Other Options

14. When formulating the Revised Clause 102, DoJ had also considered some other options briefly raised at the Meeting. For reasons mentioned below, we considered them less feasible than the proposal in the Revised Clause 102:

(a) *Not to reinstate Clause 102*

Given the concerns hitherto expressed by deputations of the construction industry, we considered it appropriate to reinstate Clause 102 while limiting it to the construction industry only.

(b) *To reinstate Clause 102 without limiting it to construction subcontracts*

While this option may satisfy the construction industry, it is against the majority view of the stakeholders. As such, DoJ considered it a non-viable option.

(c) *To reinstate Clause 102 without providing for the International Exception*

As mentioned above, given that the key objective of the Arbitration Bill is to enhance Hong Kong's standing as an international arbitration centre, we considered it essential to provide for the International Exception to avoid inadvertent imposition of domestic arbitration provisions on unwary non-local subcontractors.

Responses from the stakeholders

15. Eleven stakeholders have commented on the Revised Clause 102 (see the list of respondents at **Annex 5**). The responses are mixed. One respondent has reiterated its opposition to the Arbitration Bill. Two respondents have maintained that Clause 102 should not be included in the Arbitration Bill. Three respondents are prepared to accept the Revised Clause 102 as a compromise. Five respondents have indicated their

support for the Revised Clause 102 subject to additional amendments. Please refer to **Annex 6** for a summary of the responses and our comments on them.

Conclusion

16. The majority of the respondents are supportive of the Revised Clause 102. Certain respondents would like to make further amendments to the Revised Clause 102. However, as explained in Annex 6, it may not be practicable to implement a majority of the amendments which in certain cases are likely to sharpen the differences among the stakeholders on the subject and contrary to the overall goal of reaching an acceptable compromise for all. In the circumstances, we have concluded that the Revised Clause 102 should (subject to the further amendments as mentioned in paragraphs 7 and 24 of Annex 6) be adopted to resolve the differences of the stakeholders on the subject.

Department of Justice
Legal Policy Division
May 2010

Ref.: LP 19/00/3C
353775 v7

Annex 1

Clauses 100 to 102 in the Draft Bill

100. Arbitration agreements may provide expressly for opt-in provisions

An arbitration agreement may provide expressly that any or all of the following shall apply –

(a) section 1 of Schedule 3;

(b) section 2 of Schedule 3;

(c) section 3 of Schedule 3;

(d) sections 4 and 7 of Schedule 3;

(e) sections 5, 6 and 7 of Schedule 3.

101. Opt-in provisions automatically apply in certain cases

All the provisions in Schedule 3 apply, subject to section 103, to –

(a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement shall be a domestic arbitration; or

(b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement shall be a domestic arbitration.

102. Opt-in provisions that automatically apply under section 101 deemed to apply in subcontracting cases

(1) Where all the provisions in Schedule 3 apply to an arbitration agreement under section 101(a) or (b), if –

(a) the whole or any part of the subject matter of the contract that includes the arbitration agreement in any form referred to in section 19 ("relevant subject matter") is subcontracted to any person under a contract ("subcontract"); and

(b) that subcontract also includes an arbitration agreement ("subcontracting parties' arbitration agreement") in any form referred to in section 19,

then all the provisions in Schedule 3 also apply to the subcontracting parties' arbitration agreement.

(2) Unless the subcontracting parties' arbitration agreement is an arbitration agreement referred to in section 101(a) or (b), subsection (1) does not apply if –

(a) the person to whom the whole or any part of the relevant subject matter is subcontracted under the subcontract is –

(i) a natural person who is ordinarily resident outside Hong Kong;

(ii) a body corporate –

(A) incorporated under the law of a place outside Hong Kong; or
(B) the central management and control of which is exercised outside Hong Kong; or

(iii) an association –

(A) formed under the law of a place outside Hong Kong; or
(B) the central management and control of which is exercised outside Hong Kong;

(b) the person to whom the whole or any part of the relevant subject matter is subcontracted under the subcontract has no place of business in Hong Kong; or

(c) a substantial part of the relevant subject matter which is subcontracted under the subcontract is to be performed outside Hong Kong.

(3) Where all the provisions in Schedule 3 apply to a subcontracting parties' arbitration agreement under subsection (1), if –

(a) the whole or any part of the relevant subject matter that is subcontracted under the subcontract is further subcontracted to another person under another contract ("other subcontract"); and

(b) that other subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule 3 apply to the arbitration agreement so included in that other subcontract as if that other subcontract were a subcontract under subsection (1).

Annex 2

List of Stakeholders

Invited and Attended the Meeting

Mr Samuel Wong	(Andrew Liao SC's Chambers)
Mr Robin Peard	(Hong Kong International Arbitration Centre)
Mr Bernard Wu	(Hong Kong Institute of Surveyors)
Mr Gilbert Kwok	(Hong Kong Institute of Surveyors)
Mr Peter Caldwell	(Caldwell Ltd)
Mr Dean Lewis	(Hong Kong Construction Association)
Mr Christopher To	(Construction Industry Council)
Mr Anthony Houghton	(Hong Kong Bar Association)
Mr Simon Chee	(Hong Kong Institute of Architects)
Mr Fung Kwai-kin	(Hong Kong Federation of E&M Contractors, FEMC)
Ms Kim Rooney	(International Chamber of Commerce-Hong Kong, China)
Mr Paulo Fohlin	(International Chamber of Commerce - Hong Kong, China)

Invited but absent with apology

Mr Andrew Brandler	(Hong Kong General Chamber of Commerce)
Mr Huen Wong	(The Law Society of Hong Kong)

Annex3[5]

Revised Clause 102 (to be renumbered as Clause 100A)

100A. Opt-in provisions that automatically apply under section 100 deemed to apply in construction operations subcontracting cases

(1) Where all the provisions in Schedule 2 apply under section 100 (a) or (b) to an arbitration agreement included in any form referred to in section 19 in a construction contract, if -

(a) the whole or any part of the construction operations to be carried out under the construction contract ("relevant operation") is subcontracted to any person under another construction contract ("subcontract"); and

(b) that subcontract also includes an arbitration agreement ("subcontracting parties' arbitration agreement") in any form referred to in section 19,

then all the provisions in Schedule 2 also apply to the subcontracting parties' arbitration agreement.

(2) Unless the subcontracting parties' arbitration agreement is an arbitration agreement referred to in section 100 (a) or (b), subsection (1) does not apply if –

[5] for the purposes of this Annex 3, unless indicated otherwise, references to a Clause or Schedule are references to the clause or schedule of the Arbitration Bill.

(a) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract is –

(i) a natural person who is ordinarily resident outside Hong Kong;

(ii) a body corporate –

(A) incorporated under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong; or

(iii) an association –

(A) formed under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong;

(b) the person to whom the whole or any part of the relevant operation is subcontracted under the subcontract has no place of business in Hong Kong; or

(c) a substantial part of the relevant operation which is subcontracted under the subcontract is to be

performed outside Hong Kong.

(3) Where all the provisions in Schedule 2 apply to a subcontracting parties' arbitration agreement under subsection (1), if –

(a) the whole or any part of the relevant operation that is subcontracted under the subcontract is further subcontracted to another person under a further construction contract ("further subcontract"); and

(b) that further subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule 2 apply to the arbitration agreement so included in that further subcontract as if that further subcontract were a subcontract under subsection (1).

(4) In this section –

(a) "construction contract" (建造合約) has the meaning given to it in section 2(1) of the Construction Industry Council Ordinance (Cap. 587); and

(b) "construction operations" (建造工程) has the meaning given to it in Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).

Annex3A[6]

Revised Clause 102 (to be renumbered as Clause 100A) – Marked up to show the differences with Clause 102 of the Draft Bill

~~102~~100A. Opt-in provisions that automatically apply under section ~~101~~100 deemed to apply in construction operations subcontracting cases

(1) Where all the provisions in Schedule ~~3~~2 apply ~~to an arbitration agreement~~ under section ~~101~~100 (a) or (b) to an arbitration agreement included in any form referred to in section 19 in a construction contract, if -

(a) the whole or any part of the ~~subject matter of~~construction operations to be carried out under the construction contract ~~that includes the arbitration agreement in any form referred to in section 19~~ ("relevant ~~subject matter~~ operation") is subcontracted to any person under ~~a~~another construction contract ("subcontract"); and

(b) that subcontract also includes an arbitration agreement ("subcontracting parties' arbitration agreement") in any form referred to in section 19,

then all the provisions in Schedule ~~3~~2 also apply to the subcontracting parties' arbitration agreement.

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[6] for the purposes of this Annex 3A, unless indicated otherwise, references to a Clause or Schedule are references to the clause or schedule of the Arbitration Bill.

(2) Unless the subcontracting parties' arbitration agreement is an arbitration agreement referred to in section ~~101~~100 (a) or (b), subsection (1) does not apply if –

(a) the person to whom the whole or any part of the relevant ~~subject matter~~operation is subcontracted under the subcontract is –

(i) a natural person who is ordinarily resident outside Hong Kong;

(ii) a body corporate –

(A) incorporated under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong; or

(iii) an association –

(A) formed under the law of a place outside Hong Kong; or

(B) the central management and control of which is exercised outside Hong Kong;

(b) the person to whom the whole or any part of the relevant ~~subject matter~~operation is subcontracted

under the subcontract has no place of business in Hong Kong; or

(c) a substantial part of the relevant ~~subject matter~~ operation which is subcontracted under the subcontract is to be performed outside Hong Kong.

(3) Where all the provisions in Schedule ~~3~~2 apply to a subcontracting parties' arbitration agreement under subsection (1), if –

(a) the whole or any part of the relevant ~~subject matter~~operation that is subcontracted under the subcontract is further subcontracted to another person under ~~another~~a further construction contract ("~~other~~further subcontract"); and

(b) that ~~other~~further subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule ~~3~~2 apply to the arbitration agreement so included in that ~~other~~further subcontract as if that ~~other~~further subcontract were a subcontract under subsection (1).

(4) In this section –

(a) "construction contract" (建造合約) has the meaning

given to it in section 2(1) of the Construction Industry Council Ordinance (Cap. 587); and

(b) "construction operations" (建造工程) has the meaning given to it in Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).

Annex 4

The following are extracts of the definitions of "construction contract" and "construction operations" in the CIC Ordinance:

"construction contract" means a contract between an employer and a contractor under which the contractor carries out construction operations but does not include a contract of employment;

"construction operations" has the meaning assigned to it in Schedule 1.

SCHEDULE 1

CONSTRUCTION OPERATIONS

1. In this Ordinance, "construction operations" (建造工程) means operations of any of the following descriptions—

(a) building works as defined in section 2(1) of the Buildings Ordinance (Cap. 123);

(b) street works as defined in section 2(1) of the Buildings Ordinance (Cap. 123);

(c) construction, alteration, repair, maintenance, extension, demolition or dismantling of—

(i) any buildings, or other temporary or permanent structures forming, or to form, part of land;

(ii) any works forming, or to form, part of land;

(iii) any industrial plant or any industrial installations for the purposes of land drainage, coast protection, water supply or defence; or

(iv) any power-lines, telecommunications apparatus or pipelines, including walls, pylons, aircraft runways, docks and harbours, railways, inland waterways, reservoirs, water-mains, wells and sewers;

(d) supply and installation of fittings or equipment in any buildings, or other structures forming part of land, including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, refuse collection, water supply, fire protection, security or communications, lift or escalator and other extra low voltage works;

(e) external or internal cleaning of any buildings, or other temporary or permanent structures forming part of land, to the extent that it is carried out in the course of construction, alteration, repair, maintenance, extension or restoration of such buildings or structures;

(f) painting or decorating any external or internal surfaces or parts of any buildings, or other temporary or permanent structures forming part of land;

(g) operations which form an integral part of, or are preparatory to, or are for rendering complete, any of the operations described in paragraphs (a), (b), (c), (d), (e) and (f), including site clearance and investigation, earthmoving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works.

2. Notwithstanding section 1, "construction operations" (建造工程) does not include operations of any of the following descriptions—

(a) design, advice or consultation work, unless such design, advice or consultation work is incidental to any operations described in section 1;

(b) manufacture of plant or machinery at a site for delivery of such plant or machinery to another site where the sole or principal activity at that other site is—

(i) power generation; or

(ii) the production, transmission, processing or bulk storage of any materials or manufactured products, including chemicals, pharmaceuticals, oil, gas, steel,

food or drink or vehicles, which are intended for sale.

3. In this Schedule—

"extra low voltage" (特低壓) means voltage normally not exceeding—

(a) 50V root mean square alternating current between conductors or between a conductor and earth; or

(b) 120V direct current between conductors or between a conductor and earth;

"land" (土地) includes land under the sea.

Annex 5

List of Respondents to the Revised Clause 102

Mr Samuel Wong	(Andrew Liao SC's Chambers)
Mr Robin Peard	(Hong Kong International Arbitration Centre)
Mr K W Chau	(Hong Kong Institute of Surveyors)
Mr Dean Lewis	(Hong Kong Construction Association)
Mr Christopher To	(Construction Industry Council)
Mr Edward Shen	(The Hong Kong Institute of Architects)
Mr Otto Poon	(Hong Kong Federation of E&M Contractors, FEMC)
Ms Kim Rooney	(International Chamber of Commerce-Hong Kong, China)
Mr Paulo Fohlin	Vinge
Ms Joyce Wong	(The Law Society of Hong Kong)
Mr. WW Chui	(The Works Branch of the Development Bureau)

Annex 6

The following is a summary of the key comments received from eleven respondents on the Revised Clause 102:

Against the Arbitration Bill

Respondent's comments

One respondent has reiterated its position against the Arbitration Bill. At the same time, it proposes to further amend the Revised Clause 102(1)(a) (see parts underlined and in italics) to expressly include designs, advice or consultation works as follows[7]:

> "(a) the whole or any part of construction operations to be carried out under the construction contract *(such operations and contracts may include designs, advice or consultation works)*("relevant operation") is subcontracted to any person under another construction contract *(which may in part or in whole be with designs, advice or construction works)* ("subcontract")"

DoJ's Comments

2. After due consideration, we consider it not appropriate to add the suggested amendments for the following reasons:

(a) the definition of "construction operations" has already stated that any design, advice or consultation work that is incidental to a construction operation is itself a construction operation. It is not appropriate to further include the suggested amendments to the Revised Clause 102(1)(a), otherwise it might cover a variety of activities not incidental to construction operations. Indeed, the Housing Grants, Construction and Regeneration Act 1996 in the UK (**"the Act"**) adopts a similar approach. Under the Act, an agreement "(a) to do architectural, design, or surveying work, or (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape"

[7] The proposed further amendments are highlighted in italics and underlined. Another respondent has also made a similar proposal to broaden references of design, advice or consultation work in the Revised Clause 102 (see paragraph 12 of this Annex 6 below).

in relation to construction operations is a construction contract; and

(b) at least one respondent has expressed his objection to include design, surveying work, or advice incidental to construction operations as construction operations on the basis that they are "too wide" and "may not be welcomed." Further expanding their scope as sought would only sharpen the differences among the stakeholders on the Revised Clause 102.

Against the Revised Clause 102

Respondents' comments

3. Two respondents have maintained that Clause 102 should not be included in the Arbitration Bill.

DoJ's Comments

4. We respect their position on this matter. On the other hand, we note that the majority of the respondents are prepared to consider the Revised Clause 102 as a compromise.

Supports the Revised Clause 102

Respondents' comments

5. Three respondents have reiterated their stance against Clause 102 but have accepted the Revised Clause 102 as a compromise. One of the three respondents has also suggested that the heading of the Revised Clause 102 be altered as "*Opt-in provisions that automatically apply under section 100 deemed to apply in Hong Kong domestic subcontracting cases*" to highlight the International Exception.

6. All three respondents have expressed their strong support for the International Exception.

DoJ's comments

7. We welcome and are encouraged by their responses. On the proposed new heading for the Revised Clause 102, we agree to highlight the International Exception. However, we are concerned that the

reference to "Hong Kong domestic subcontracting cases" as proposed may create the wrong impression that the International Exception would cover non-construction subcontracting cases in Hong Kong. As such, we propose that the heading of the Revised Clause 102 be amended as *"Opt-in provisions that automatically apply under section 100 deemed to apply to Hong Kong construction subcontracting cases"* instead.

Supports the Revised Clause 102 subject to further amendments

8. Five respondents have indicated their support for the Revised Clause 102 subject to further amendments: –

To remove or modify the International Exception

Respondents' comments

9. Three respondents have expressed their disagreement to the International Exception in the Revised Clause 102 altogether. One of them has also requested (i.e. if it is decided to retain the International Exception) that the following additional requirements be added to the International Exception:

(a) the International Exception should not apply to Mainland and Macao subcontractors and they should be subject to the Revised Clause 102;

(b) both the place of incorporation and management of the subcontractors must be outside Hong Kong to qualify for the International Exception; and

(c) "foreign" subcontractors must not have carried out any construction contract in Hong Kong for the last 5 years to qualify for the International Exception.

DoJ's comments

10. In fact, one of the five respondents has acknowledged that the International Exception is necessary for the unitary regime proposed by the Arbitration Bill. Furthermore, the three respondents which have accepted the Revised Clause 102 as a compromise have expressed their strong support for the International Exception. Furthermore, we are of the view that the International Exception is necessary to enhance Hong Kong's standing as an international arbitration centre.

11. In view of the above, we do not consider it appropriate to remove the International Exception or to impose more stringent conditions. It is contrary to our policy intent and would further sharpen the differences among the stakeholders as a whole over the Revised Clause 102.

To provide a broader reference of design, advice or consultation work in the Definitions

Respondent's comments

12. One respondent has proposed to include architectural consultancy services in the Definitions. Another respondent has proposed the following additional words (as underlined and in italics) to the exception of the definition of "construction operations" in section 2(a) of Schedule 1 to the CIC Ordinance:

> " design, advice or consultation work, unless such design, advice or consultation work is *related or in any way connected or* incidental to any operations described in section 1".

DoJ's comments

13. Please refer to our related comments in paragraph 2 of this Annex. In addition, it is not appropriate to specify individual professional services in the Definitions. Instead, the approach adopted in the Definitions of providing a conceptual framework to include design, advice or consultation work incidental to any operations described in section 1 of the CIC Ordinance as construction operations is preferred. In any event, a subcontracting party who would like to adopt the provisions in Schedule 2 of the Arbitration Bill for his particular subcontract may consider providing an express provision to such effect in the subcontract. As to the other proposed changes to the definition of "construction operations" as referred above, it is not clear whether the proposed changes would make a difference to the existing provision. It seems that "related or in any way connected" is similar to "incidental to" in meaning. However, the proposed amendments would create inconsistency on the definition of "construction operations" among the new Arbitration Ordinance, the CIC Ordinance and the CWR Ordinance.

The Revised Clause 102 be made mandatory, rather than optional, for all subcontracts

Respondent's comments

14. One respondent has requested that the Revised Clause 102 be made mandatory for all subcontracts. It argues that different subcontractors along the entire subcontracting chain may opt differently if the Revised Clause 102 is optional. As a consequence, subcontracts may have different arbitration terms along the entire subcontracting chain. The respondent is concerned that it may create confusion and uncertainty, particularly for the smaller subcontractors who would not have the bargaining power or resources to ascertain the arbitration terms of the principal contract and/or subcontracts up the subcontracting chain.

DoJ's comments

15. Only one respondent has requested that the Revised Clause 102 be made mandatory for subcontracts. It is not the majority view. In addition, a key principle of the Arbitration Bill is to facilitate party autonomy (see clause 3 of the Arbitration Bill). It is against the principle to impose the opt-in provisions in Schedule 2 of the Arbitration Bill on subcontractors on a mandatory basis.

To continue to apply the Revised Clause 102 after the 6 years' period from the commencement of the new Arbitration Ordinance

Respondent's comments

16. Two respondents have requested to continue to apply the Revised Clause 102 to subcontracts after the initial 6 years from the commencement of the new Arbitration Ordinance.

DoJ's comments

17. The purpose of the automatic opt-in mechanism is to allow contractors of the construction industry who are familiar with the existing domestic arbitration regime to continue to use domestic arbitrations for a further 6 years after the commencement of the new Arbitration Ordinance. It is aimed at facilitating a smooth transition to the unified arbitration regime under the new Arbitration Ordinance. However, it is against the key purpose of the Arbitration Bill of providing a unified arbitration regime based on the UNCITRAL Model Law to enhance Hong Kong's

competitiveness. Thus, we cannot agree to this proposal to extend its application further. In fact, it was proposed in the Draft Bill that Clause 102 is subject to Clause 101. Given that Clause 101 only applies to an arbitration agreement entered before or within 6 years after the commencement of the new Arbitration Ordinance, it is intended that Clause 102 shall cease to apply to arbitration agreements the principal arbitration agreements of which are concluded 6 years after commencement of the new Arbitration Ordinance. We did not receive any request during consultation of the Draft Bill to apply Clause 102 beyond that period.

Parties' consent for consolidation of arbitral proceedings

Respondent's comments

18. One respondent has requested that arbitral proceedings should only be consolidated with the parties' consent under section 2(1) of Schedule 2 of the Arbitration Bill. It raised an example that a subcontractor having a small claim against its main contractor might unwillingly be dragged into other arbitral proceedings as a result of consolidation of arbitral proceedings by the court under section 2(1) of Schedule 2 of the Arbitration Bill.

DoJ's comments

19. An arbitral tribunal may (unless otherwise agreed by the parties) make more than one award at different times on different aspects of the matters to be determined under clause 71 of the Arbitration Bill. Hence, for the sub-contractor whose arbitral claims against its main contractor are consolidated with other arbitral proceedings by the court, he may consider requesting the arbitral tribunal to exercise such power and make a separate award for its claim. Besides, the power of the court to consolidate arbitral proceedings is based on the existing domestic arbitration regime in section 6B(1)in Part II (Domestic Arbitration) of the current Arbitration Ordinance (which power is not subject to parties' consent) and that an additional requirement of "upon application of any party to the arbitral proceedings" is added for the consolidation of arbitral proceedings in section 2(1) of Schedule 2 of the Arbitration Bill. Accordingly, we do not consider it justified to further restrict the court's power of consolidation of arbitral proceedings in section 2(1) of Schedule 2 of the Arbitration Bill.

To impose a legal requirement for the disclosure in a subcontract the arbitration clauses adopted in the immediately preceding subcontract

Respondent's comments

20. One respondent has requested that a legal requirement be imposed in the new Arbitration Ordinance for the disclosure, in a subcontract, the arbitration clauses adopted in the immediately preceding subcontract.

DoJ's comments

21. It is not appropriate to impose such requirement by means of legislation. In particular, it is questionable whether, and if so what, appropriate remedies against breach of the requirement can be imposed by legislation. Clearly, it is not suitable to impose criminal sanction on breach of the requirement. It is also not practicable to prescribe a suitable civil remedy against breach of the requirement by legislation. In this respect, a suggestion was made to deem opting in, or as the case may be, opting out of Schedule 2 of the Arbitration Bill for failure to make the required disclosures. However, it is against the principle of party autonomy of the Arbitration Bill to impose such a remedy by legislation. In our view, it is more appropriate to leave the parties to decide for themselves whether, and if so what, civil remedy against such breach should be provided in their arbitral agreement. In sum, we do not consider it appropriate for the Arbitration Bill to impose the proposed disclosure requirement.

To add express reference to public works, such as road, bridge, tunnel, viaduct, and slope works

Respondent's comments

22. One respondent has requested that particular references of public works, such as road, bridge, tunnels, viaduct, and slope works be included in the definition of "construction operations".

DoJ's comments

23. We are of the view that the examples of public works as referred to by the respondent are covered by the definition of "construction operations". In particular, we note that the definition has included "construction, alteration, repair, maintenance, extension,

demolition or dismantling of... any works forming, or to form, part of land" as construction operations.

To provide opting out of Revised Clause 102

Respondent's comments

24. One respondent has raised the concern that there seems to be no opting-out of Revised Clause 102.

DoJ's comments

25. We confirm it is our intention to revise clause 101 of the Arbitration Bill to allow for opting out of the Revised Clause 102 (please see **Annex 7** attached).

Annex 7

101. Circumstances under which opt-in provisions not automatically apply

Sections 100 and 100A do ~~does~~ not apply if—

(*a*) the parties to the arbitration agreement concerned so agree in writing; or

(*b*) the arbitration agreement concerned has provided expressly that—

(i) section 100 or 100A do ~~does~~ not apply; or

(ii) any of the provisions in Schedule 2 applies or does not apply.

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