香 港 建 造 商 會
Hong Kong Construction Association

HKCA Paper on

Deeming Provision of Arbitration Bill for Legislative Council Bills Committee Meeting on 5 October, 2009

1. The issue which this paper deals with is the omission of an automatic Opt-in Provision for Domestic Sub-contractors of any tier, to the scheduled "*domestic*" Provisions of the Bill. A provision was included in all drafts of the Bill (Clause 102 in the Consultation Draft) until after the completion of the consultation.

2. The new arbitration law will be a unitary one based on the UNCITRAL Model Law removing the legal distinction between international and domestic arbitration. The Model Law does not contain important domestic provisions currently contained in the existing Arbitration Ordinance and thus it was felt by the industry, and in particular HKCA, that the current domestic provisions should continue to apply to "*domestic*" arbitration.

3. Under the Arbitration Bill, a number of "domestic" provisions of the existing Arbitration Ordinance have been included in Schedule 3. These include the court's power of consolidation of two arbitrations or ordering that they be heard at the same time, appointment of a sole arbitrator in default of the arbitration agreement specifying the number of arbitrators and the powers of the court to decide a question of law and to hear an appeal on a point of law. Parties to an arbitration agreement can expressly opt in to the scheduled provisions such that they will apply to any arbitration pursuant to that agreement.

4. The consultation Draft of the Arbitration Bill therefore included two relevant provisions.

   (a) First, a provision whereby any existing contract containing an arbitration agreement specifying that the Arbitration was to be "*domestic*" would, for a transitional period of 6 years after the new law comes into effect, automatically incorporate the scheduled domestic provisions.[1]

   (b) Secondly, Where there was either an express or automatic opt-in to the schedule, all sub-contractors of any tier would be deemed to have also opted-in to the schedule unless the arbitration agreement in the Sub-contract expressly provided otherwise.[2]

[1] Clause 101.
[2] Clause 102.

5. The responses to the Consultation process were against the deeming provision referred to in (b) above. HKCA specifically and strongly supported this provision. Hong Kong Institute of Surveyors, the Urban Renewal Authority, Messrs. Herbert Smith, Messrs Pinsent Masons and Hong Kong Institute of Architects and Mr. Chan Che Bun Anderson also supported it.[3] The Judiciary expressed no views on it. Against it were Mr. Peter Caldwell, Messrs Lovells, Bar Association, Hong Kong General Chamber of Commerce, Hong Kong Institute of Arbitrators, Mr. Robin Peard, Mr. Samuel Wong and the Hong Kong Federation of Electrical and Mechanical Contractors Ltd[4]. The Government decided to remove the provision.

6. This Paper explores the history of the draft Bill's progress and the arguments for and against the incorporation of the deeming provision.

Bill History

7. The Committee on Hong Kong Arbitration Law established by the Hong Kong Institute of Arbitrators in cooperation with the Hong Kong International Arbitration Centre produced its' draft report in July 2002. It sought comments on its' draft report and HKCA duly made a submission on 29 October 2002 (***Appendix 1***). In that submission, HKCA stated :

> "*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. ... We therefore consider strongly that the Ordinance should retain a separate section, including provisions applicable only to Domestic Arbitrations.*"

8. At this time therefore, HKCA were proposing to retain a separate domestic section for the new arbitration law and thus to retain the legal distinction between international and domestic arbitration. The Joint Committee considered HKCA's submission and proposed to retain a small domestic section "*so that if the parties to an arbitration agreement refer to arbitration being domestic then these provisions will automatically apply.*"[5]

9. There was then an exchange of letters between HKCA and the Joint Committee confirming this position (***Appendix 3***).

[3] By suggesting that the starting point for arbitrations should be under the domestic regime.
[4] The HKFEMC was against it however because they wished the automatic opt in to be applicable to sub-contractors irrespective of the position pertaining at main contract level. In effect therefore they were in favour of the principle but not the mechanism.
[5] As referred to in Mr. Colin Wall's letter to HKCA of 5 March 2003 (***Appendix 2***).

10. It is noteworthy that, at this point, there had been no discussion concerning any deemed opt-in for domestic sub-contractors.

11. The final Joint Committee Report was issued on 30 April 2003. That included the following passage:

> "*As a result of discussion of the HKCA submission the Committee decided it was appropriate to accommodate the need expressed by HKCA to allow users of standard form contracts to "opt in" to certain provisions of the former domestic regime which they have enjoyed through such contracts."*

12. The first mention of a deemed opt-in for sub-contracts was in HKCA's legal advisor's email of 18 April 2005 to HKCA :

> "*The concern I was left with in 2003 when HKCA came to its compromised solution*[6] *with the Report Committee was the risk of different arbitration regimes applying to different contracts on one project. For example, the Main Contract could opt-in to the Domestic regime but a Sub-contract down the line omits to do so and is therefore treated as an international arbitration. I think this can be overcome in the detailed drafting by stating that all Sub-contracts down the line have the same regime as a contract above. In my example, therefore, all the sub-contracts would be Domestic Arbitrations (unless of course they opt-in to the international regime). I have suggested this to Peard and he has no objection to this although cannot speak for everyone of course.*"

13. This proposal was then made by HKCA (through its legal advisor) at the meeting held at Government on 19 April 2005 and *"All participants agreed that the deeming provision proposed by Mr. Lewis could address the construction industry's concerns and should be mentioned in the LegCo paper as a proposal acceptable to the profession."* (***Appendix 4***).

14. HKCA representatives attended the Legco Panel on Administration of Justice and Legal Services on 27 June 2005. Prior to that meeting, HKCA wrote to the Panel by letter of 15 June 2005 (***Appendix 5***) and expressly stated :

> "*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 the 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*

[6] The reference to a compromise is a reference to the offer by the HKIArb Committee, through Mr. Robin Peard, to support the HKCA submission in its final Report provided HKCA dropped its requirement for the retention of a full domestic section in the new law and therefore the retention of a dual regime.

contracts would be deemed to have also done so. This is considered as extremely important by HKCA."

15. During the drafting of the Bill various concerns were expressed about the automatic opt in provisions and there were a number of changes to the drafting such that in the final provision sub-contractors outside of Hong Kong were excluded from the automatic opt in. The final draft provision therefore provided an automatic opt in for sub-contracts down the line which themselves contained arbitration agreements, unless the sub-contract was an *"international"* one ***and*** provided there was no break in the chain. For example if a sub-contract contained an express opt in of part only of the scheduled provisions or if it contained an express opt out of the schedule the automatic opt in down the line would not apply and the chain of automatic opt in would be broken. A concern was also expressed about the indefinite continuance of the automatic opt in provisions *in toto* and it was agreed instead that there should be a transitional period of 6 years.

16. The Consultation Document, after describing the opt in provisions stated: *"Comments are invited on the "opting-in" system."*

Consultation Responses

17. By letter dated 24 April, 2008 (**Appendix 6**) HKCA submitted as follows:

> *"We fully support the idea of the Opt-in provisions for the matters set out in Schedule 3. We consider that these provisions are very important for stability and continuity of Domestic Arbitration in Hong Kong.*
>
> *We also support the automatic Opt-in provisions in Clause 102 with one exception. We originally put forward the proposal that there should be an automatic opt-in so that contractors and sub-contractors would not be taken by surprise by the changes in the law. During the drafting, we were consulted as to whether the automatic opt-in could apply for a transitional period of 6 years and we agree with this. This period should give all users of arbitration sufficient time to revise their standard forms of contract and also to make them aware of the need to include express opt-in provisions in their bespoke contracts.*
>
> *The exception we refer to is the exclusion from the automatic opt-in system of arbitration agreements which have international aspects to them as set out in Clause 102(2). We firmly believe that there should be no exception from the law for suppliers and sub-contractors who may be from overseas but nevertheless do business with Hong Kong companies. It must be assumed that those doing business in Hong Kong or supplying goods for incorporation in projects in Hong Kong will make themselves knowledgeable of Hong Kong law. If they do this they will be free to expressly exclude the automatic opt-in provisions and this we believe is sufficient protection for them."*

Arguments against the Automatic Opt-in for Sub-contracts (and HKCA's Response)

18. The provisions are too complex (Mr Samuel Wong). Only one response made this comment and HKCA submit it should be disregarded.

19. There should be no automatic opt in (generally) for "domestic arbitrations" (Messrs Lovells). Lovells suggest that there should be automatic opt in only for the construction industry but do not criticise specifically the automatic sub-contract opt in. Lovells' argument is therefore about the applicability of Schedule 3 and not its content. This is therefore not relevant to the issue.

20. The scope of application is not clear (Bar Association, Hong Kong Institute of Arbitrators). This is a comment about the drafting and should not be taken into account in deciding the issue.

21. The provision impinges on party autonomy as sub-contractors not specifically opting for domestic arbitration will find themselves subject to Schedule 3 (Hong Kong General Chamber of Commerce, International Chamber of Commerce-Hong Kong, Mr. Peter Caldwell, Mr. Robin Peard, and Mr. Samuel Wong). This seems to be the only argument going to the principle of automatic opt in. The argument is that a sub-contractor has not agreed to the domestic schedule and it is wrong for it to be deemed to have submitted to the domestic schedule. HKCA believe this argument to be misconceived for the reasons set out below. The automatic opt in for Hong Kong sub-contractors does no more than retain the status quo under the current Arbitration Ordinance and this is the intention of the deemed opt in provisions.

The Argument in favour of the Automatic opt-in for Sub-contracts

22. The philosophy of the proposed automatic opt-in for contracts is the retention of the *status quo* for those contracts which are drafted on the basis of an express opt-in to the domestic regime under the current Arbitration Ordinance. Under the existing structure of a project, if the main contract contains a reference to domestic arbitration that contract will be governed by the domestic regime whether or not the arbitration agreement would otherwise be governed by the international regime. So far as sub-contracts are concerned if they are domestic sub-contracts they would also be governed by the domestic regime and if international sub-contracts they would be governed by the international regime unless the sub-contract arbitration agreement contains express contrary requirements. **Importantly, under the existing regime a domestic sub-contract would not need to expressly refer to the domestic regime as this will automatically apply**.

23. If there is no automatic opt-in for sub-contracts under the new law this position will change. Without an express opt-in all sub-contracts, whether or not they would have qualified for a domestic arbitration under the existing regime, will be governed by the international unitary regime under the new law. This could significantly prejudice local Hong Kong sub-contractors as they will be required to be sufficiently sophisticated to know how to deal with the new law in order to preserve the status quo of being under the domestic regime under the new law. This is to be contrasted with main contracts, almost all standard forms of which in Hong Kong, include a reference to domestic arbitration, thereby attracting the domestic schedule under the new law for the transitional period of 6 years.

24. Therefore the status quo of local sub-contractors will immediately alter when the new law comes into force, unless those sub-contractors are aware that they need to change their sub-contracts and do so effectively. The objective of *status quo* retention of the new law is therefore unlikely to be achieved in all cases. In HKCA's submission if a sub-contractor under a main contract which is subject to the domestic Schedule of the new law would have been subject to the domestic regime under the existing law, that sub-contractor should also be subject to and enjoy the benefits of the domestic schedule of the new law, for the transitional period, being the period which it is recognised (by the new law) as being necessary for the probably more sophisticated Employers and main Contractors to arrange amendments to their standard form contracts. Those in the position of being least able to protect themselves will therefore be let down and prejudiced by the new law as currently drafted.

25. HKCA strongly believes therefore that the automatic deemed opt in to the domestic schedule for local sub-contractors which was included in the Consultation draft, should be reinstated to the Bill.

The Secretariat

The Hong Kong Construction Association, Ltd

9 September, 2009

Appendix 1

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

App.9

29 October 2002

ORIGINAL

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

To Mr Dean Lewis

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

Appendix 2

COMMERCIAL, MEDIATION & ARBITRATION SERVICES LTD.
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5th March 2003

Mr Patrick Chan
The Hong Kong Construction Association Ltd
3/F, 180-182 Hennessy Road
Wanchai
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Dear Patrick

Proposed Changes to Hong Kong Arbitration Law

Yesterday evening there was a full meeting of the above committee. The object of the meeting was to consider the various submissions that were received as a result of the consultation on the draft report on the proposed changes to the Arbitration Ordinance. The comments from HKCA formed the major item to be discussed.

As you are aware HKCA wrote to Mr Robin Peard in a letter dated 29th October 2002 setting out its views on the draft report. Subsequent to that letter HKCA had a meeting on 5th December 2002 where various views were exchanged.

Basically HKCA wished to retain a separate section of the Ordinance, which would be applicable to Domestic Arbitrations. There were four core provisions which HKCA wished to retain. These were:

1. The Court's power to order consolidation or concurrent arbitrations (the current Section 6B);

2. The right to apply to the Court to appeal an arbitrator's award;

3. That the default number of arbitrators should be retained as one;

4. The retention of the "misconduct" provisions.

Another concern was the proposed change to replace a party's right to a "reasonable opportunity" to present its case, with a right to a "full opportunity". Robin Peard and others supported this latter point and I am pleased to be able to tell you that the committee has agreed that the "reasonable opportunity" provisions will be retained.

With regard to the other four numbered points, I believe that we have reached a satisfactory compromise, which will leave domestic construction arbitrations largely untouched should the Arbitration Ordinance be amended in accordance with the recommendations of the Arbitration Reform Committee.

The Commiittee agreed that there should be a small "Domestic Arbitration Section" in the Ordinance so that if the parties to an arbitration agreement refer to arbitration being domestic then these provisions will automatically apply. The Committee agreed that items 1, 2 & 3 should all be referred to in this small section. It was only Item 4, the misconduct provision, which was not supported and the recommendation of the Committee will remain that it should be removed.

This does not leave the arbitrating parties in a totally unprotected position if the arbitrator "goes off the rails" as Article 12 of the Model Law provides that arbitrators can be removed during the arbitration if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Furthermore, I was informed that the HKIAC Panel Selection Committee, which is the body that considers arbitration appointments are informed by the Court if there are justified complaints made about an arbitrator's conduct and that the Panel Selection Committee then takes the necessary action. I should add for completeness that the HKIAC is the default appointing body if the parties cannot agree their own arbitrator.

My firm recommendation is that HKCA should accept this compromise. The compromise also has the advantage that the transitional arrangements should be easy to implement, as it is my understanding that the standard forms of contract used for construction in Hong Kong all contain references to domestic arbitrations, with the exception of the HKIA Standard Form of Building Contract, which is soon to be replaced.

The way forward is as follows:

a) I will need to receive formal approval from HKCA to these compromise proposals as soon as possible, so that a final version of the report can be prepared and submitted to Government.

b) I will need to provide evidence that the existing construction standard forms of contract do currently refer to Domestic Arbitration.

c) We have been asked to come up with some recommended wording for what this Domestic Arbitration Section might contain.

In respect of item a) I am happy to meet with David Suff's Committee to explain first hand what these matters mean, although I feel that this could probably be done by merely circulating this letter and giving the members of the Committee a specific deadline for comment.

In respect of item b) I believe that Peter Berry would be in the best position to provide copies of the current arbitration clauses used in the standard form of construction

contracts in use in Hong Kong and the latest version of the replacement Standard Form of Building Contract.

In respect of item c) then all that is needed is some fairly simple wording which will say that if the parties have agreed that the arbitration is to be a "Domestic Arbitration" then notwithstanding anything to the contrary, the following provisions are deemed to apply. [this would require a cross reference to the provisions relating to the right of appeal, a sole arbitrator and consolidation]. These three provisions together with a number of other additions to UNCITRAL Model Law will be contained in a separate section of the revised Arbitration Ordinance.

To speed matters up I have taken the liberty of circulating this letter to David Suff, Peter Berry, Martin Hadaway and Dean Lewis.

I look forward to hearing from you shortly.

Yours sincerely
For and on behalf of
Commercial, Mediation & Arbitration Services Ltd

Colin

Colin J Wall
Managing Director

CC:	David Suff – Balfour Beatty	2736 – 0611
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Appendix 3

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The Hong Kong Construction Association Ltd

A member of International Federation Of Asian And Western Pacific Contractors' Associations

26 March 2003

Ref: BW/WS/DL/mn:239:03:1A9

ORIGINAL

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

By Fax and Post

To Mr Dean Lewis
Total - 3 pages

Dear

Reform of Hong Kong Arbitration Law

I understand from Colin Wall, HKCA's representative on your Arbitration Reform Committee, that HKCA's Submission was discussed at a Committee Meeting on 4 March 2003. Colin has reported that the Committee is minded to recommend that a small "domestic" section of the Ordinance be retained which would include :

1. The Court's power to order consolidation (currently Section 6B).

2. The right of appeal to the Court.

3. That the default number of arbitrators should be one.

This "domestic" section will apply to arbitrations where the arbitration agreement has expressly stated that the arbitration is to be treated as a "domestic" arbitration.

I am pleased to confirm that the proposal described above is considered to be satisfactory from HKCA's point of view.

As most of the standard form construction contracts in Hong Kong already contain wording which requires that arbitrations are treated as domestic ones, I expect that changes to the standard forms may either be unnecessary or will be minimal, following the promulgation of the new Ordinance although, of course, this will be a matter for the procuring bodies concerned. For your information, I enclose copies of the relevant pages for the following standard form construction contracts which include the reference to domestic :

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1. Government GCC.
2. KCRC GCC.
3. MTRC GCC.
4. Airport Authority GCC.
5. Current Draft of the New Building Standard Form of Contract for Hong Kong.
6. The HKCA Standard Form of Domestic Sub-Contract.

Precisely how the drafting of this section of the new Ordinance should be set out will of course depend on how the Ordinance is re-drafted but of course we would be very pleased to provide input at the appropriate time.

I would like to express my appreciation of your Committee's serious consideration of HKCA's Submission.

Yours sincerely,

Martin Hadaway
Vice President of HKCA and
Chairman of Civil Engineering Committee

cc Masons (Mr. Dean Lewis) (w/e)
Mr. Colin Wall (w/e)

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Our Ref. : RSP/419
Your Ref. : BW/WS/DL/mn:239:03:IA9

31st March 2003

Mr. Martin Hadaway,
Vice President,
The Hong Kong Construction
Association Limited,
3/F, 180-182 Hennessy Road,
Wanchai,
Hong Kong.

By fax no. 25727104

Dear Martin,

Re: Reform of Hong Kong Arbitration Law

Thank you for your letter of 26th March.

I believe that the Full Committee will be making a recommendation along the lines set out in your letter. In fact I am at present incorporating the recommendation in the Committee's Final Report which will then be presented to the Full Committee for approval and thereafter sent to the Secretary for Justice.

Once it is decided that the Committee's recommendations will be implemented, the Department of Justice will start drafting a new Ordinance.

Please thank the various Members of The Hong Kong Construction Association Limited for their input.

With best regards.

Yours sincerely,

R. S. Peard

Appendix 4

Minutes of meeting
at 2:30 pm on Tuesday 19 April 2005
at the conference room, 4/F, High Block, QGO
to discuss the Report of the HK Institute of Arbitrators' Committee on Hong Kong Arbitration Law

Present

Mr Robert Allcock, Solicitor General (Chairman)
Mr Robin Peard, JP (HKIAC/HKIArb)
Mr Philip Yang (HKIAC)
Mr Peter Caldwell (HKIAC)
Mr Christopher To (HKIAC)
Mr David Bateson (HKIArb)
Mr Paul Barrett (CIArb East Asia Branch)
Mr Dean Lewis (HK Construction Association)
Mr Patrick Chan (HK Construction Association)
Mr Ken Somerville (Legal Advisory Division (Works), ETWB)
Mr Godfrey Kan, SGC/LPD/Department of Justice (Secretary)

Absent with apologies

Mr Glenn Haley (CIArb East Asia Branch)
Mr Douglas Wardale (CIArb East Asia Branch)

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The Chairman welcomed the representatives of the HK International Arbitration Centre ("HKIAC"), the HK Institute of Arbitrators ("HKIArb"), the Chartered Institute of Arbitrators ("CIArb") East Asia Branch, the HK Construction Association ("HKCA") and the Legal Advisory Division (Works) of the Environment, Transport and Works Bureau. He said it would be easier to convince the Legislative Council and the Executive Council of the need to implement the

proposals of the HKIArb Committee on Hong Kong Arbitration Law ("the HKIArb Committee") if the profession and major users of arbitration could reach consensus as to how to carry forward the report of the HKIArb Committee published in 2003.

2. The participants of that meeting noted that the Department of Justice had circulated to them the fifth draft (dated 6 April 2005) of the Information Paper for the LegCo Panel on Administration of Justice and Legal Services concerning the 2003 Report for comments. All the participants agreed that it was common ground that the Arbitration Ordinance was not user-friendly and should be simplified.

3. In relation to the proposal of the HKIArb Committee that Hong Kong should have a unitary arbitral regime using the Model Law as the basis with a small section containing provisions for parties to a domestic arbitration to opt-in, Mr Lewis said that HKCA had requested that certain provisions in the existing domestic regime be retained in the new Ordinance but did not want to hold back law reform because of that issue. The objectives of HKCA had been to assist the development of arbitration law in Hong Kong whilst ensuring that the interests of domestic arbitration users would be protected under the new law.

4. Mr Lewis referred to paragraph 19(m) of the draft LegCo paper and said that one of the major concerns of HKCA had been the risk of sub-contractors not being sophisticated enough to draft their sub-contracts mirroring the principal contracts. He pointed out that most Government and quasi-Government bodies specified in their construction contracts that the arbitration agreements were, or should be treated as, domestic arbitration agreements. He believed that that would remain the case after the proposals had been implemented. HKCA members would also be diligent enough to include such a provision in their sub-contracts at the first sub-contract level. However, the Association had less control over sub-contractors further down the contract chain. It was parties to these sub-sub-contracts that required protection under the new statutory framework.

5. Mr Lewis said that the above concern could be addressed by including a deeming provision in the draft legislation to the effect that where a contract (in the construction field) opted-in to the provisions in the "domestic section", then all sub-contracts below the principal contract as well as all contracts associated with the principal contract would be treated as domestic unless the parties to the sub-contract or associated contract concerned had opted out of the "domestic section" or opted-in to the provisions of the main body of the new Ordinance, depending on how the new legislation would be drafted. Mr Lewis emphasised that HKCA's position on the Committee's proposals was predicated on the inclusion of such a deeming provision in the new Ordinance.

6. Mr Lewis added that HKCA would support the setting up of a working group to assist the drafting of the new Ordinance if it was decided that the HKIArb Committee's proposals should be implemented. He said HKCA would like to be represented on such a working group so that the interests of the construction industry could be protected.

7. Mr Peard said that Mr Lewis' proposal was worth considering but would require careful drafting to deal with matters such as the nature of sub-contracts that would be caught by the deeming provision and whether it would apply to contracts in the construction industry only.

8. Mr Bateson considered that these matters could be accommodated at the drafting stage.

9. Mr Barrett raised the possibility of providing for a right of appeal unless the parties had opted out. He was concerned that Mr Lewis' proposal might have problems over time.

10. The Chairman asked whether, since there would be only one regime with a schedule for opting in, it would be preferable to provide for an opting in without using the word "domestic".

11. Mr Peard said that the standard form of building contract used the word "domestic". He believed that the Committee's proposals

(with or without modifications) could address the concerns of the construction industry without the need to revise the standard forms being used by the Government and public bodies.

12. The Chairman suggested that the new law should be prospective and should not have any retrospective effect on previously agreed contracts, which might continue to have effect for a long time. Mr Yang referred to the Arbitration Act 1996 in the UK and said that the provisions of the Act applied to arbitral proceedings commenced on or after the date on which the provisions came into force irrespective of the dates of the contracts. The Chairman said that transitional provisions was an important point which could be addressed at the drafting stage.

13. Mr Caldwell remarked that including a provision deeming a sub-contract to be domestic if the principal contract was domestic might not necessarily be in the interests of members of the construction industry because a party might apply to the court for leave to appeal merely to exert pressure on the other party, thus making weaker parties vulnerable instead of protecting them.

14. All participants agreed that the deeming provision proposed by Mr Lewis could address the construction industry's concerns and should be mentioned in the LegCo paper as a proposal acceptable to the profession. They also agreed that a small working group should be set up to assist the Department of Justice in drafting the new legislation instead of conducting another consultation exercise.

15. Mr Bateson said that HKIArb supported the formation of the working group. Mr Peard, Mr Lewis, Mr Somerville and Mr Caldwell also agreed to become members of that working group. Mr Barrett said that the CIArb (East Asia Branch) could nominate someone to represent the Institute. Mr Yang said that since the Hong Kong Shipowners Association had expertise in this area, the Department might consider inviting them to send a representative. The Chairman advised that an experienced law draftsman and a government counsel from the Legal Policy Division of the Department of Justice would be nominated to the working group.

16. The Chairman said that the LegCo paper would be revised in the light of their deliberations. He said the paper would state that adopting the HKIArb Committee's proposals could meet many objections to a unitary regime.

17. Mr Lewis suggested, and the Chairman agreed, that the last sentence in paragraph 23 of the draft paper should be deleted.

18. Mr Peard suggested, and the Chairman agreed, that the comments in section 2 of Mr Peard's fax to Mr Kan dated 18 April 2005 concerning the need to achieve an Ordinance which was as user-friendly as possible should be reflected in the paper.

19. In response to a question raised by Mr Somerville, the Chairman said that paragraph 29 of the draft paper would be revised and simply state that the Department of Justice proposed that a working group should be formed to assist the Department in preparing drafting instructions and the draft legislation, and the purpose of the paper was to seek Panel members' preliminary views on the HKIArb Committee's proposals.

20. The Chairman said that the paper would be presented to the Panel for discussion in June and the Department would suggest the Panel invite the professional bodies and HKCA to attend. He pointed out that the Bar Association and the Law Society might also be invited as a matter of course.

21. All participants agreed to send representatives to the Panel to give their moral support. They also agreed that it was unnecessary to circulate the revised draft to them before distributing it to the Panel.

22. The Chairman said that the profession might wish to explain the Committee's proposals to the Hon Margaret Ng before the Panel met in June. Mr Lewis said he would give advance notice of the Panel discussion to the Law Society's Alternative Dispute Resolution Committee. Mr Peard kindly advised the Chairman that he would speak to Hon Margaret Ng before the LegCo Panel meeting to explain the purpose of the amendment proposals.

23. The Chairman was pleased that the profession and major arbitration users could reach consensus as to the way forward and thanked all participants for their contributions.

24. The meeting ended at 3:30 pm.

(Mr Robert Allcock)
Solicitor General
Chairman
31 May 2005

Our ref: LP 19/00/3C II

(DM#316258 v3)

Appendix 5

香 港 建 造 商 會
The Hong Kong Construction Association Ltd
A member of International Federation Of Asian And Western Pacific Contractors' Associations

15 June 2005

ORIGINAL

Our Ref: 0200003850

Mrs Percy MA
Clerk to Panel
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax and Post
2509 9055

Dear Mrs Ma

Panel on Administration of Justice and legal Services
Meeting on Monday, 27 June 2005 at 4:30pm
Reform of the law of arbitration

Thank you for your letter dated 27 May 2005.

We will be pleased to attend the Panel on 27 June 2005 to answer any questions the Panel may have for us. Our representatives who will attend are:-

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

[沙傅達偉, 香港建造商會副會長及土木工程小組主席]

Dean Lewis, Partner of Masons and legal adviser to HKCA

[盧宏正,梅森律師事務所合伙人及香港建造商會法律顧問]

Since the Hong Kong Institute of Arbitrators ("HKIA") produced its draft Report in July 2002, HKCA has been very actively involved in the consultation process leading up to the publication of the final Report in April 2003. Since its publication, HKCA has been actively involved in the post publication process. This is perhaps understandable given that HKCA members and other parties in the construction industry are the largest users of arbitration in Hong Kong.

A copy of HKCA's first submission to HKIA is annexed hereto.

3/F, 180-182 Hennessy Road, Wanchai, Hong Kong Tel: 2572 4414 Fax: 2572 7104 E-mail: admin@hkca.com.hk www.hkca.com.hk

香港建造商會

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.

香港建造商會
The Hong Kong Construction Association Ltd

Our Ref: 0200003850

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,

D. Suff

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

Encl

cc Mr. Dean Lewis

香 港 建 造 商 會
Hong Kong Construction Association

24 April 2008

Our Ref: 0200009226

Legal Policy Division
Department of Justice
1st Floor
High Block
Queensway Government Offices
66 Queensway,
Hong Kong

By Fax & Post
2877 2353

Dear Sir

ARBITRATION LAW REFORM

We have the following comments on the Consultation Paper for Reform of the Law of Arbitration in Hong Kong and Arbitration Bill:

1. Paragraph 2.21

   We agree that a decision of the Court that time should not run for limitation purposes after an award has been set aside should be subject to no appeal.

2. Paragraph 2.26

   We believe that if a mandatory stay to arbitration under Article 8 of the Model Law can be subject to appeal then a stay to arbitration for interpleader proceedings should also have a right of appeal.

3. Paragraph 3.13

   We believe that a decision of the Court under Clauses 20(1) and (2) should be subject to appeal with leave.

4. Paragraph 3.9

   We support the proposal as in many cases the court is much better placed to do justice between parties too an employment contract.

5. Paragraph 4.22

   We consider that there should be no appeal from a decision of the Court under Clause 31(11).

.../P.2

6. Paragraph 4.27

We agree that it is unnecessary for the Ordinance to include provision for the appointment of judicial officers as arbitrators for the reasons set out in paragraph 4.25. However, we would also agree that the exceptions referred to in paragraph 4.26 should apply.

7. Paragraph 6.16

We agree that reciprocity should not be required for the enforcement of an interim measure arising out of arbitral proceedings outside Hong Kong and agree with the recommendation in paragraph 6.16.

8. Paragraph 6.17

The grant of an interim measure is potentially very serious and damaging and therefore we believe that a decision of the Court in this regard should be subject to appeal with leave of the Court.

9. Paragraph 7.32

We agree with the view expressed in this paragraph.

10. Paragraph 8.6

We agree with the view expressed in this paragraph. The enforcement of awards and arbitration settlement agreements are fundamental rights of a party which should be subject to appeal with leave.

11. Paragraph 8.19

We agree with Clause 75(3) and (4). We do not consider that enforcement of costs orders during the course of an arbitration would unduly delay proceedings or incur wasteful costs. This is particularly the case given the summary right of the arbitrator to assess costs now included in the Ordinance.

12. Paragraph 8.45

We agree with the proposal made in paragraph 8.44.

.../P.3

13. Paragraph 9.3

A decision of the Court to set aside an arbitral award relates to a fundamental jurisdiction which we believe should be subject to appeal with leave.

14. Paragraph 10.8

The decision of the Court to grant or refuse leave to enforce an award goes to a fundamental right of a party and should be subject to appeal with leave.

15. Paragraph 10.12

We believe that the position is the same as under paragraph 10.8. A decision of the Court to grant or refuse leave to enforce a Convention award should be subject to appeal with leave.

16. Paragraph 10.18

We believe that the position is the same as under paragraph 10.8. A decision of the Court to grant or refuse leave to enforce a Mainland award should be subject to appeal with leave.

17. Paragraph 11.10

We fully support the idea of the Opt-in provisions for the matters set out in Schedule 3. We consider that these provisions are very important for stability and continuity of Domestic Arbitration in Hong Kong.

We also support the automatic Opt-in provisions in Clause 102 with one exception. We originally put forward the proposal that there should be an automatic opt-in so that contractors and sub-contractors would not be taken by surprise by the changes in the law. During the drafting, we were consulted as to whether the automatic opt-in could apply for a transitional period of 6 years and we agree with this. This period should give all users of arbitration sufficient time to revise their standard forms of contract and also to make them aware of the need to include express opt-in provisions in their bespoke contracts.

...P.4

The exception we refer to is the exclusion from the automatic opt-in system of arbitration agreements which have international aspects to them as set out in Clause 102(2). We firmly believe that there should be no exception from the law for suppliers and sub-contractors who may be from overseas but nevertheless do business with Hong Kong companies. It must be assumed that those doing business in Hong Kong or supplying goods for incorporation in projects in Hong Kong will make themselves knowledgeable of Hong Kong law. If they do this then they will be free to expressly exclude the automatic opt-in provisions and this we believe is sufficient protection for them.

18. Paragraph 12.3

We support the inclusion of references to mediators in Clauses 105 and 106. We consider that this would help to further promote mediation and help mediators in fulfillment of their duties.

19. Schedule 3 Paragraph 7

We consider that the alternative proposal referred to in paragraph 7(b) should be included. In Court proceedings where there are related proceedings being heard at the same time, the Court is empowered to make costs orders which do justice to the parties and the situation. There seems to be no good reason why an arbitrator who is also hearing an arbitration should not do likewise.

20. Schedule 3 Paragraph 9

We would support the Court being given power to appoint the same arbitrator to hear proceedings that had been ordered by the Court to be heard at the same time or one immediately after another, subject to any agreement otherwise between the parties, whether in the original arbitration agreement or during the course of the Court proceedings.

We hope that our comments are useful.

Yours sincerely,

Conrad Wong
President