Submissions by the Hong Kong Institute of Surveyors ("HKIS")

on Arbitration Bill

to Bills Committee of the Legislative Council

for meeting on 5 October 2009

Should the Arbitration Bill be passed?

1. The purpose of the Bill is clearly stated in Legislative Council Brief (File Ref: LP 19/00/3C Pt.38) paragraph 3 stating *'The purpose of the Bill is to implement the proposed reform...user-friendly...operate an arbitration regime which accords with widely accepted international arbitration practices and development. The Bill, when enacted, may attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings. It will also help promote Hong Kong as a regional centre for dispute resolution.'*

2. In brief, the purposes are (1) user-friendly; (2) accords with international arbitration practices; (3) may attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings; (4) promote Hong Kong as a regional centre for dispute resolution.

3. These purposes may have stemmed from the Report of the Committee on Hong Kong Arbitration Law dated 30 April 2003 ("the Report") stating *'5.4 The Model Law is designed to establish a special uniform regime for international cases where disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. It has, however, been noted that*

the Model Law can be taken as a model for legislation on domestic arbitration. Indeed, there are quite a number of jurisdictions that have recently enacted their arbitration laws adopting the Model Law for both domestic and international arbitrations.

5.5 There are other advantages for adopting one law for both domestic and international arbitration. One of them is that the issue of whether one or the other regime should apply is avoided. It is also in accord with the recognized international trend in reducing the extent of judicial supervision and intervention in arbitral proceedings, whether domestic or international.

5.6 We note that a significant portion of Hong Kong business community is international in character and that business activities conducted in Hong Kong are likely to continue to become increasingly international in the future. Thus, a unified arbitration regime would have the added beneficial effect of further enabling the Hong Kong business community and the local legal profession to operate an arbitration regime which accords with international arbitration practices and development. In addition, the Model Law is likely to attract disputes which have little connection with Hong Kong since it is familiar to lawyers from civil law as well as common law jurisdictions.

5.7 Therefore, we endorse the concept of a unitary system of arbitration law, with the Model Law governing both domestic and international cases. As such, we agree with the proposal of the previous Committee to completely redraw the Arbitration Ordinance (Cap.341) in order to apply the Model Law equally to both domestic and international arbitrations. We thus ***recommend*** *a unitary*

regime adopting the Model Law for both domestic and international arbitrations.'

4. If the purposes of the Arbitration Bill are stemming from paragraphs 5.4 to 5.7 of the Report, the purposes of the Arbitration Bill are unsuitable for the construction industry in Hong Kong. Firstly, whilst it is noted in paragraph 5.6 of the Report that *'a significant portion of Hong Kong business community is international in character'* and that underlines the adoption of the Model Law for both international and domestic arbitrations, is this the correct way of thinking?

5. As far as the construction industry is concerned, very often disputes are elevated to arbitrations. Constructions arbitrations have special characteristics which distinguish them from other arbitrations. Most construction arbitrations do not involve foreign elements. They involve complicated and substantial legal arguments, evidence and documents akin to High Court proceedings. Amounts in dispute and costs in most construction arbitrations are usually substantial such that arbitration awards have significant impact on the parties' rights (in this respect, the Court's assistance and supervision, for example appeal and removal of arbitrators, are necessary). HKIS believes that the majority, if not all, of the construction arbitrations in Hong Kong are domestic arbitrations and have been held under the domestic regime. The reason behind is that the domestic regime suits the construction industry with certain characteristics/advantages of domestic arbitration such as single arbitrator, consolidation of arbitrations, multi-party arbitration, with appropriate assistance and supervision from the Courts etc. The practice which has been familiarly adopted by the construction

industry should not be sacrificed by a mere hope of increasing business opportunity for arbitral proceedings to be held in Hong Kong or promoting Hong Kong as a dispute resolution centre. Such purposes should be enhanced by other means such as (1) the HKSAR Government may provide better facilities to HKIAC, for example allocating more resources such as an independent building, similar to, if not better than, the Maxwell Chambers in Singapore rather than just half a floor in Exchange Square, for HKIAC's use so as to improve its image; (2) universities may strengthen subjects on international trades, shipping law, and/or legal studies of other jurisdictions such as PRC, US and European countries.

6. It is submitted that the proposed reform, based on the UNCITRAL Model Law, may not bring any substantial benefits (at least not to the construction industry) but rather a mere hope for more business parties to choose Hong Kong as the place to conduct arbitral proceedings. The commercial decision of whether choosing Hong Kong to conduct arbitrations does not depend solely on having any reform in legislation or at all. The decision depends more on geographical location, language, availability of good arbitration facilities such as conference rooms, their costs, availability of good quality arbitrators, their commands in different languages and fee structures, costs effectiveness, reasonable hotels located close to the arbitration venue, simplicity in satisfying immigration clearance and in obtaining working permits, ease of enforcing awards published in Hong Kong in other countries and the costs thereof etc. It would be better for the HKSAR Government to improve arbitration facilities from those in the existing HKIAC, simplifying immigration clearance and procedures in

obtaining working permits for those come from overseas to Hong Kong for arbitrations, rather than to reform the existing Arbitration Ordinance. Further, it is submitted that the business opportunity of arbitral proceedings will not be increased merely by reforming the existing Arbitration Ordinance which already provides the international regime and supports any international arbitration held in Hong Kong. In the past, there are very few, if not nil, complaints from parties involved in international arbitration proceedings in Hong Kong. Hence, the Arbitration Ordinance should not be reformed just to promote arbitral business in Hong Kong. The advantages of domestic arbitration should not be taken away from the construction industry for a mere hope, ie a hope for increasing arbitral business and perhaps international fame. It is HKIS's view that the existing legislation for arbitration works well for the construction industry and that it is not apparent that the proposed reform will bring any real benefit to the construction industry. HKIS therefore cannot support the Arbitration Bill and objects to any change for the sake of change. Whilst there may be reasons which do not concern the construction industry motivate the proposed reform of the arbitration legislation, HKIS considers that the construction industry should not be dragged into such reform and thereby being prejudiced and sacrificed.

7. HKIS has considered the points 'user-friendly' and 'accords with international arbitration practices'. First, the point 'user-friendly' is non-consequence because whether the Bill is 'user friendly' can only be revealed after the Bill is in use for a few years. Even though the Bill may be user-friendly as proposed, the reformed Bill must fulfill its purpose of laying a set of suitable ground rules for the parties in dispute and/or their advisors to follow. It is submitted that the

proposed Bill, based on the UNCITRAL Model Law, does not suit domestic arbitration at all, albeit it may serve international arbitrations (though one must bear in mind that the existing Arbitration Ordinance has already served international arbitrations). That is the reason why there are so many countries still adopting two regimes such as PRC, Australia, and Singapore. A brief summary of the legislations of these countries are as listed hereinafter for easy reference.

a. China

- Arbitration Law 1995 for both domestic and international arbitration
- The provisions of Chapter 7 (Articles 65 to 73) specifically apply to international arbitrations
- The other provisions apply to both domestic and foreign-related arbitrations.

Source: http://www.ccibc.com.br/download/internacional.pdf

b. Australia

Separate legislations:

(1) *International Arbitration Act 1974* (Commonwealth)
s16 – the Model Law has the force of law in Australia
Source: http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/

(2) Different States (NSW, Victoria, Queensland, South Australia, Western Australia and etc) have their own legislation on commercial arbitration (domestic).

(i) *Commercial Arbitration Act 1985* (WA)
Source: http://www.austlii.edu.au/au/legis/wa/consol_act/caa1985219/

(ii) *Commercial Arbitration Act 1984* (NSW)
Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/caa1984219/

c. Singapore

(1) *Arbitration Act 2001* (Cap10)
s3 - 'This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap 143A) does not apply to that arbitration.'

Source: http://www.jus.uio.no/lm/singapore.arbitration.act.2001/03.html

(2) *International Arbitration Act* (Cap 143A)

s.5- '(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.'

Source: http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-143A&doctitle=INTERNATIONAL%20ARBITRATION%20ACT%0A&date=latest&method=part

d. Macau

(1) *Decreto-Lei n.º 29/96/M*

- governs domestic arbitrations.

(2) *Decreto-Lei n.º 55/98/M*

- governs international arbitrations.

Source: http://www.imprensa.macau.gov.mo (Portuguese and Chinese versions in full, English version in part).

8. HKIS submits that the Bill is not user friendly for construction professionals. The main reasons are:

a. It is the existing trade practice in Hong Kong for main contractors to sublet parcels of their works to subcontractors who in turn sub-sublet mini-parcels

of the subcontracted works to sub-subcontractors, and the sub-contracting chain can go down many tiers. The main contracts may be drafted in a sophisticated way with domestic arbitration clauses, or opt-in clauses. For subcontracts (and those further down the sub-contracting chain), it is expected that they will be drafted in a much simple way and most of them will be in Chinese. Traditionally, the disputes in construction industry in Hong Kong are best resolved following the domestic regime carrying with certain characteristics/advantages such as consolidation of arbitrations, multi-party arbitration, single arbitrator, with appropriate assistance and supervision from the Courts etc. The construction professionals in Hong Kong are acquainted with the domestic regime and in particular, the members of HKIS are satisfied with the existing Arbitration Ordinance CAP341.

b. The Bill is based on Model Law which was drafted for international arbitrations. In order to cater for domestic arbitration requirements, the Bill introduces s100 with opt-in clauses in Schedule 2. However, this would create a lot of ambiguities by itself. For example, a subcontractor may not put the opt-in clauses into their subcontracts. Under such circumstances, the subcontract dispute may have to follow the Model Law whereas the main contract dispute may have the domestic arbitration advantages with the opt-in clauses. On the other hand, different subcontractors may propose different opt-in clauses with the same main contractor and that would be problematic in consolidation of arbitrations if there is a dispute involving 2 to 3 subcontractors.

Proposed amendments to the Arbitration Bill

9. If the Arbitration Bill is to be passed in the Legislative Council, despite the objection by the HKIS, it is submitted that the following amendments should be considered in passing the Bill.

a. Title of s24 should read *'Article 11 of UNCITRAL Model Law Revised'* ie with the word *'Revised'* added so as to allow HKIS retain its appointing authority with HKIA. Then s24(1) should read *' Article 11 of the UNCITRAL Model Law, as per the revised text set out below, has effect ...(1)...(2)...(3)...(4)...(a) a party fails to act as required under such procedure, or (b) the parties, ...such procedure* ***and*** *(c) which applies to both conditions (a) and (b), a third party, including an institution, fails to ..., any party may request the court...';* and s24(4) should read *'In any other case...of the UNCITRAL Model Law as revised above,...'*. A copy of the proposed amendments hand written is attached in Annex 1 for easy reference.

b. s100 should have the words *'within a period of 6 years'* **deleted.** HKIS considers it undesirable to fix a time limit because it simply defers (rather than resolves) the aforesaid problems;

c. Redrafting of Schedule 2 to cater for subcontracts disputes as mentioned in paragraph 8 b above;

d. s10(2) should exclude emails;

e. s33 should be replaced by *'Arbitrators should not act as mediator'*. – Whilst the concept of having the same person acting as both the mediator and arbitrator is nothing new, HKIS has reservation on the proposal that mediators may also act as arbitrators. As they have heard some confidential information in caucus, it is unrealistic to assume that they could completely ignore such information in the subsequent arbitration and this casts doubt as to whether they would be influenced by such information in the arbitration proceedings. Moreover, given that the parties realize the same person who mediates their case may end up arbitrate the same cases, the parties are likely to be very cautious in communicating with the person in the mediation stage and thereby undermining the effectiveness of such mediation;

f. s72(1) should read *'Unless otherwise agreed by the parties, an arbitral tribunal has the power to make an award within 3 months for domestic arbitration and 6 months for international arbitration';*.

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institution, to make that determination.

(3) Subject to section 1 of Schedule 2 (if applicable), if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by the HKIAC in the particular case.

24. Article 11 of UNCITRAL Model Law (Appointment of arbitrators) Revised

(1) Article 11 of the UNCITRAL Model Law, as per the revised text ~~the text of which is~~ set out below, has effect subject to section 13(2) and (3) -

"*Article 11. Appointment of arbitrators*

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment,

the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, ~~or~~ and

(c) a third party, including an institution, which applies to both conditions (a) and (b) fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in

appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1) -

(i) each party is to appoint the same number of arbitrators; and

(ii) unless otherwise agreed by the parties, the HKIAC must appoint the remaining arbitrator or arbitrators; or

(b) if -

(i) a party fails to act as required under an appointment procedure agreed upon by the parties; or

(ii) in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,

the HKIAC must make the necessary appointment upon a request to do so from any party.

(4) In any other case (in particular, if there are more than 2 parties) article 11(4) of the UNCITRAL Model Law, as revised above, given effect to by subsection (1), applies as in the case of a failure to agree on an appointment procedure.

(5) If any appointment of an arbitrator is made by the HKIAC by virtue of this Ordinance, the appointment -

(a) has effect as if it were made with the agreement of all parties; and

(b) is subject to article 11(5) of the UNCITRAL Model Law, given effect to by subsection (1).