Construction Industry Council
建造業議會

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9 September 2009

Miss Florence Wong
for Clerk to Bills Committee on Arbitration Bill
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Miss Wong,

Bills Committee on Arbitration Bill

The Draft Arbitration Bill (the "draft Bill") proposes the creation of a unitary regime of arbitration on the basis of the Model Law on International Commercial Arbitration (the "Model Law") as adopted by the United Nations Commission on International Trade Law ("UNCITRAL") for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Arbitration Ordinance (Cap. 341). The Articles of the Model Law are set out in the draft Bill and given the force of law where appropriate, whereas some of the Articles of the Model Law have been modified and adapted.

The Construction Industry Council ("CIC") in principle supports the objectives of the draft Bill in streamlining the current law by creating a unitary arbitration regime. However the CIC would like to raise a few matters for the Bills Committee to consider which are of particular concern to the construction industry.

It may be suggested that adopting and amending parts of the Model Law to cater for Hong Kong's unique environment may create a misconception that Hong Kong is not really a Model Law jurisdiction in the eyes of the international community. We think the incorporation of the unamended Model Law into the Ordinance substantially negates this concern and makes the international source of the Ordinance clear. It may also be said that by inserting many non-Model Law clauses into the draft Bill, the structure is more complicated which may cause difficulties in understanding the regime. However in the interests of retaining the international root of the Ordinance we consider it important that the changes to the Model Law can be clearly identified.

The majority of significant arbitrations taking place in Hong Kong arise from construction contracts which are very often conducted under the domestic regime. This is likely to continue to be the case for some years, because the contracts are often of

several years duration and the standard forms in use in Hong Kong invariably opt into the domestic regime. As a result of this preference for the domestic regime practitioners have over the years become familiar with the domestic provisions of the Arbitration Ordinance (Cap 341) in particular the provisions relating to a reference to a single arbitrator, consolidations of proceedings, challenge to an arbitration award on the ground of serious irregularity and the appeal on points of law, nevertheless the Model Law has no such provisions within its legal context. The draft Bill overcomes this by including a Schedule (Schedule 2) under Part 11 which caters for opt-in provisions allowing parties to choose to depart from the Model Law approach in certain circumstances.

Some of the provisions in Schedule 2 have proved very useful to parties to arbitration, particularly in respect of construction disputes. There are frequently related disputes as between employers and main contractors and as between main contractors and sub-contractors and further down the line. The Court's power to consolidate related proceedings is a useful tool to bring all related disputes together before one arbitral tribunal to ensure consistent findings and to save time and costs. As a result use of standard forms and the fact that common issues arise, it is desirable to maintain some limited power of appeal in the interests of certainty and the development of resolution of common issues. Whilst there is a modern trend to encourage appeals in arbitrations, given the well established principles for applying for leave to appeal against an award under the existing provisions, it is valuable and worthy of keeping as part of the system.

Sections 3 to 7 of Schedule 3 of the draft Bill allow jurisprudence on laws for the commercial sector to be developed thus providing a sense of predictability and stability from a commercial context.

Whereas the six (6) year period for transition under Section 100 seems logical provided sufficient promotion of this aspect is given to the community in particular the construction community to ensure that users of arbitration services are fully aware of this timeline.

Under Section 25(1) of the Arbitration Ordinance (Cap. 341) an arbitrator can be removed if he "has misconducted himself or the proceedings". This provision is wide and all encompassing to cater for all scenarios of an arbitrators' misdoing. The draft Bill eliminates this standard, applying the Model Law rule of removal only in the more specific circumstance that either the arbitrator does not have the qualifications agreed by the parties or there exist "justifiable doubts as to his impartiality or independence" a much lower standard. Some might argue that an open-ended provision might attract abuse whereby one party can use such a provision to delay the arbitration proceedings. On the other hand a narrow provision does not afford much protection to users who are faced with an incompetent arbitral tribunal.

Section 20(2) of the draft Bill touches on claims within the jurisdiction of the Labour Tribunal. From an international perspective resolving employment disputes by arbitration is a common occurrence and should be encouraged. The Hong Kong Bar Association's comments of 11 July 2008 on this matter should be further reviewed and considered.

Section 31(8) allows an umpire to be appointed by the Court if the arbitrator fails to adhere to procedural matters. This provision has merits provided the necessary procedural safeguards relating to an appeal are introduced.

Section 34(1) of the draft Bill gives effect to Article 16 of the Model Law which enables an arbitral tribunal to rule on its own jurisdiction. It provides that a ruling of an arbitral tribunal that has jurisdiction may be appealed to the Court but not a ruling that it does not have jurisdiction as per Article 16(4) of the Model Law. We are of the view that a ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute should also be subjected to an appeal of the Court. Thus ensuring that the arbitral tribunal fulfills its obligations in relation to the reference.

The interim measures under Section 36 are rather limited. Some consideration may be given to allowing an arbitral tribunal to make an order for interim payment. The preliminary orders made by an arbitral tribunal in respect of interim measures should also be enforceable by the Court to give them "teeth". The provision for interim payment is particularly important when there is economic downturn as cashflow can be particularly important.

Although the draft Bill is written in a user friendly context compared to the current Arbitration Ordinance (Cap 341) practitioners nevertheless will need some time to adapt to the new regime and on this basis it would be helpful if the administration could conduct some seminars for those in the construction industry to explain the essence of the draft Bill and what precautions should one adopt in relation to drafting arbitration clauses into contracts, conducting arbitration proceedings and the dividing line between the powers of a mediator and an arbitrator in connection with the same arbitral reference.

The above summaries our views and suggestions, and should you require any further input from us on the same, please feel free to let us know.

Yours faithfully,

Keith Kerr
Chairman
Construction Industry Council

cc. Dr Hon Margaret Ng, Chairman of Bills Committee on Arbitration Bill