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Report of the Bills Committee on Arbitration Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Arbitration Bill.

Background

2. The current Arbitration Ordinance (Cap. 341) ("the current Ordinance") provides separate regimes for the conduct of domestic and international arbitrations in Hong Kong. The regime for domestic arbitration is largely based on the United Kingdom ("UK") arbitration legislation, while the regime for international arbitration is based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law") as adopted by UNCITRAL on 21 June 1985 and as amended by that Commission on 7 July 2006.

3. In 1998, the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Centre ("HKIAC") established a Committee on Hong Kong Arbitration Law on the reform of the arbitration law. The Committee issued a report in 2003 recommending that the current Ordinance be redrawn and a unitary regime with the Model Law governing both domestic and international arbitrations be created. The Department of Justice ("DoJ") set up in September 2005 the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law ("Working Group"), chaired by the Solicitor General and comprising representatives of the legal profession, arbitration experts and relevant government officials, to formulate legislative proposals to implement the recommendations in the report of the Committee.

4. DoJ published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and draft Arbitration Bill ("Consultation Paper") on 31 December 2007 to seek views on reform of the law of arbitration in Hong Kong. The consultation period ended on 30 June 2008. The draft Bill adopts the structure of the Model Law as its framework. The purposes of the reform are –

- (a) to make the law of arbitration more user-friendly to arbitration users both in and outside Hong Kong;
- (b) to enable the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development as the Model Law is familiar to practitioners from both civil law and common law jurisdictions;
- (c) to attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings, as Hong Kong will be seen as a Model Law jurisdiction; and
- (d) to promote Hong Kong as a regional centre for dispute resolution.

The Bill

5. The Arbitration Bill ("the Bill") seeks to reform the law relating to arbitration and to provide for related and consequential matters. The Bill is divided into 14 Parts. Part 1 of the Bill sets out the object and principles of the Bill. It also provides that –

- (a) certain provisions of the Model Law have the force of law in Hong Kong subject to modifications and supplements as expressly provided for in the Bill; and
- (b) the Bill applies to the Government and the Offices set up by the Central People's Government in Hong Kong.

6. Parts 2 to 9 of the Bill follow the structure of the Model Law with modifications. In summary –

- (a) Part 2 contains general provisions which sets out, among other things, the principles for the interpretation of the Model Law, the procedural rules in respect of the delivery of written communications and the application of the Limitation Ordinance (Cap. 347) to arbitrations. Further, court proceedings under the Bill are, in general, to be heard otherwise than in open court;
- (b) Part 3 contains provisions relating to arbitration agreements, including the definition and form of arbitration agreements, and the circumstances under which an action in court, the dispute of which is the subject of an arbitration agreement, should be referred to arbitration;

- (c) Division 1 of Part 4 contains provisions relating to the composition of arbitral tribunal, including the appointment of arbitrators and grounds and procedures for challenging the appointment of arbitrators. Division 2 of Part 4 contains provisions relating to the appointment of mediator;
- (d) Part 5 empowers an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement;
- (e) Part 6 concerns the power of an arbitral tribunal to grant interim measures and preliminary orders;
- (f) Part 7 contains provisions relating to the conduct of arbitral proceedings and sets out the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings;
- (g) Part 8 contains provisions relating to the making of arbitral awards, including the award on costs and interest on awards of costs of the arbitral proceedings. It also provides for the circumstances under which arbitral proceedings are to be terminated; and
- (h) Part 9 provides for recourse to the court against an arbitral award by an application for setting aside the award on specified grounds.

7. Part 10 of the Bill concerns the recognition and enforcement of awards, including Mainland awards. It retains the scheme under the current Ordinance for the enforcement of arbitral awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal.

8. Part 11 provides that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the "opt-in" provisions in Schedule 2 to the Bill is to apply. The opt-in provisions enable users of arbitration to continue to use certain provisions that only apply to domestic arbitration under the current Ordinance. Subject to any express agreement to the contrary, those provisions will be automatically applied if the arbitration agreement is a domestic arbitration agreement –

- (a) entered into before the commencement of the Bill; or
- (b) entered into at any time within a period of six years after the commencement of the Bill.

9. Part 12 of the Bill contains miscellaneous provisions, including provisions relating to the liability of an arbitral tribunal, a mediator and any other relevant person.

10. Part 13 of the Bill contains provisions relating to the repeal of the current Ordinance and provisions on the relevant savings and transitional arrangements. Clause 110 in this Part provides that the savings and transitional arrangements set out in Schedule 3 are to apply.

11. Part 14 of the Bill provides for consequential and related amendments. Clause 111 in this Part specifies that the consequential and related amendments are set out in Schedule 4.

12. The Bill upon enactment ("new Ordinance") will come into operation on a day to be appointed by the Secretary for Justice ("S for J") by notice published in the Gazette. Section 108 of the new Ordinance will repeal the current Ordinance.

The Bills Committee

13. At the House Committee meeting on 10 July 2009, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Dr Hon Margaret NG, the Bills Committee held 15 meetings with the Administration and received views from eight deputations at one of these meetings. The membership of the Bills Committee is in **Appendix I**. The list of deputations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Object of the Bill

Establishment of a unitary regime for arbitration

14. According to the Administration, the Bill seeks to establish a unitary regime of arbitration on the basis of UNCITRAL Model Law for all types of arbitration, thereby abolishing the distinction between the existing two regimes (i.e. domestic and international arbitrations) under the current Ordinance. The definitions for "domestic arbitration agreement" and "international arbitration agreement", as defined in the current Ordinance, are omitted. Moreover, definitions in Article 2 of the Model Law (Definitions and rules of interpretation) have been incorporated into the Bill so far as applicable.

15. The Bills Committee notes that in terms of number of international arbitration cases handled, Hong Kong ranked third among its major competitors (namely USA, the Mainland, England and Wales, Sweden, Singapore, Malaysia and New Zealand) in each of 2006, 2007 and 2008, having handled 234, 274 and 449 international arbitration cases respectively. Except for USA and Singapore, all the competitors have adopted a unitary regime for domestic and international arbitrations. A unitary

regime for domestic and international arbitrations on the basis of the Model Law would enable Hong Kong to operate an arbitration regime which accords with international arbitration practices and enhance Hong Kong's competitiveness. Parties to an arbitration will be saved from the trouble of having to identify whether any particular arbitral proceeding is "domestic" or "international" and which set of law is applicable.

16. Members support the guiding objective of establishing a unitary regime for arbitration in Hong Kong. Deputations which have given views to the Bills Committee also express support for the spirit of the Bill.

Speedy resolution of disputes

17. The Administration has stressed that the object and principles of the Bill are to, among other things, encourage the business community and arbitration practitioners to choose Hong Kong as a place to conduct arbitral proceedings and facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses. Moreover, the cutting down of the opportunities for appeal in relatively minor procedural matters to the court should also mean that arbitration should be less costly and more speedy with the enactment of the Bill. Members have deliberated on the need to set out simplified procedures for arbitral proceedings and members have suggested the Administration to consider similar procedures offered by arbitration institutions, such as HKIAC.

18. The Administration has explained that the Model Law does not provide for simplified or fast track procedures. Article 19(1) of the Model Law provides that the parties are free to agree on the procedures to be followed by the arbitral tribunal in conducting the proceedings. Clause 47 of the Bill provides that Article 19(1) of the Model Law has effect in Hong Kong. While Article 19 is considered to be sufficient in itself to vest the necessary procedural authority upon the arbitral tribunal, arbitration institutions may, depending on the perceived needs of the parties engaging their services, develop simplified procedures which may be invoked with the agreement of the parties to a dispute. For instance, the Arbitration Rules of HKIAC provide for the possibility that arbitrations can be conducted on a document-only basis. In the light of the above, the Administration considers that instead of including specific simplified or fast track procedures in the Bill, the parties should be free to enter into an agreement at suitable time to adopt such procedures for the arbitral proceedings as they think appropriate.

Drafting aspects of the Bill

Drafting approach

19. The Bills Committee notes that those articles of the Model Law that are intended to have the force of law are reproduced in the main body of the Bill under different clauses and are given effect accordingly. The full text of the Model Law is

also reproduced in Schedule 1 to the Bill for information only. Provisions in the Model Law which are not applicable under the Bill are underlined in Schedule 1. A note is added after each article of the Model Law to indicate the provision in the Bill which makes direct reference to that article. The Bills Committee also notes that this drafting approach is new and is unprecedented, even among legislation made to implement international obligations.

20. Members have deliberated on the drafting approach having regard to the objective of the Bill in making the law of arbitration more user-friendly to arbitration users both in and outside Hong Kong. Noting that substituting provisions and other supplemental provisions to which the Model Law are subject have not been shown in Schedule 1, some members have expressed concern that readers of the Bill have to make reference to the main body of the Bill to determine the extent to which the Model Law applies. Some members have questioned the necessity for reproducing the full text of the Model Law in a Schedule as certain provisions are merely reference materials which should not be part of the law. They consider that the drafting of the Bill is not as user-friendly as intended. Some other members have expressed support for the current drafting approach as it enables the international users to make cross reference between the domestic legislation and the Model Law.

21. The Administration has pointed out to the Bills Committee that the Model Law has no binding effect on the member states of the United Nations. Each state may adopt the text as such, or may modify the text of some articles, or add other provisions to the text in its own exercise to modernize the arbitration law.

22. The Administration has advised that members of the Working Group had given detailed consideration to the appropriate structure for the application of specific articles of the Model Law and how useful information on the text of the Model Law can be provided to the users of the new Ordinance. There was a general consensus in the Working Group that it was necessary to map out a more user-friendly ordinance. It was pointed out that the current Ordinance is not user-friendly and users have to turn to its Fifth Schedule to find out the provisions of the Model Law. In the course of consultation, users of arbitration suggested that the Bill should be self-contained and user-friendly such that they would not have to make cross reference to the Model Law. In order to make the new Ordinance more user-friendly, the Working Group considered that the framework of the Bill should follow the structure and wording of the Model Law by reproducing the Model Law provisions that are intended to have force of law in Hong Kong in the main body of the Bill, with appropriate add-ons and/or modifications. To annex a copy of the Model Law, which shows clearly the parts of the Model Law adopted and not adopted, would help to enhance the perception that Hong Kong is a Model Law jurisdiction.

23. The Administration is of the view that the drafting approach taken in the Bill reflects the general consensus of the Working Group and also achieves the policy objective that Hong Kong is to be seen as conforming to the Model Law.

Long title of the Bill

24. Some members have examined whether reference to the Model Law should be made in the long title of the Bill given that the objective of the Bill is to make Hong Kong to be perceived as a Model Law jurisdiction.

25. The Administration has advised that as modifications are made to the Model Law in the Bill, it is not appropriate to make reference to the Model Law in the long title without explaining the modifications. Since clause 4 of the Bill has expressly stated that the Model Law has the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in the new Ordinance and the purpose for the reform of the arbitration law has been clearly stated in the Explanatory Memorandum of the Bill, the Administration considers that the current drafting of the long title is appropriate.

Chinese renditions of English expressions in the Model Law and the Bill

26. The Administration has drawn the attention of the Bills Committee to the fact that the Chinese renditions adopted by the Model Law of a number of English expressions are different from the Chinese renditions of the same English expressions that are commonly used in the local legislation. Clause 2(5) is introduced as an interpretation provision to reconcile the difference between the Chinese rendition of an English expression in the applicable Model Law provision set out in the Bill and the Chinese equivalent of the same English expression in the other provision of the Bill by providing that both of them are to be treated as being identical in effect.

Amendments to the new Ordinance upon amendments made to the Model Law

27. Members have questioned the need to make consequential amendments to the new Ordinance in the event that the Model Law is amended.

28. The Administration has advised that if the Model Law is amended in future and it is thought that the amendments should apply to Hong Kong, legislative amendments to the new Ordinance would be made. However, it does not expect that amendments to the Model Law will be made frequently. The Administration has advised that following the promulgation of the Model Law in 1985, more substantive amendments were only made in 2006. In the circumstances, the Administration considers it not necessary to include a general reference clause on the Model Law requirements, including any subsequent amendments. The future amendments of the Model Law may go beyond matters of technical nature and require consideration from a legal point of view, bearing in mind the need to adhere to uniform international practice.

Applicability of the Bill

29. Part 2 of the Bill corresponds to Chapter I of the Model Law and contains general provisions. It sets out the principles for the interpretation of the Model Law,

the procedural rules in respect of the delivery of written communications and the application of the limitation provisions.

30. The Bills Committee has noted that the Bill is applicable to arbitrations in Hong Kong, whether or not the arbitration agreements are entered into in Hong Kong. However, only certain provisions of the Bill apply if the place of arbitration is outside Hong Kong. The Bill also applies to arbitrations under other Ordinances, and all the provisions set out in Schedule 2 are, subject to a few modifications, deemed to apply to those statutory arbitrations.

31. The Administration has pointed out that the Bill is based on the principles that the parties to a dispute should be free to agree on how the dispute should be resolved and that the court should intervene in the arbitration of a dispute only as expressly provided for in the Bill. The major principles of the Bill are set out under clause 3. However, as it is difficult to provide exhaustive principles, the court and arbitral tribunal can also make reference to the relevant case law. The Court of First Instance of the High Court ("the Court") is, by virtue of clause 13, designated to perform the various functions of the court referred to in the Model Law.

Court proceedings relating to arbitration (clauses 16 to 18)

Confidentiality in arbitral proceedings

32. Under the current Ordinance, court proceedings relating to arbitration shall, on the application of any party to the proceedings, be heard otherwise than in open court. The Administration has explained to the Bills Committee that having considered the need to preserve the requirement for confidentiality as a key aspect of arbitration and the need to protect the public interest in having transparency of process and the public accountability of the judicial system, it is stipulated in clause 16 of the Bill that as a starting point, court proceedings relating to arbitration are to be heard otherwise in open court, unless on the application of any party or on the court's initiative in any particular case, the court is satisfied that the proceedings ought to be heard in open court.

33. Some members have pointed out that the fundamental principle of open justice shall not be discarded lightly for the sake of attracting more arbitration business. While arbitration is a private consensual method of dispute resolution, the court is a public institution for the administration of justice. When the court is asked to intervene to determine the question of whether an arbitral award should be set aside, the court is not merely resolving a private dispute but also adjudicating on issues involving legal principles. Having said that, members generally consider that as a starting point, the arrangement under clause 16 is acceptable as it allows the court to take into account all circumstances of the case and decide whether the relevant court proceedings should be heard in open court.

34. The Bills Committee notes that restrictions on the reporting of court proceedings that are heard otherwise than in open court are stipulated under clause 17.

Disclosure of information relating to arbitral proceedings and award made in those proceedings

35. Under clause 18, the parties are deemed to have agreed not to publish, disclose or communicate any information relating to arbitral proceedings under the arbitration agreement or to an award made in those proceedings, subject to certain exceptions stated in that clause. The first exception is where the parties otherwise agree. The second exception is that the publication, disclosure or communication is contemplated by the Bill; or if a party is obliged by law to make such publication, disclosure or communication to any government body, regulatory body, court or tribunal; or if the publication, disclosure or communication is made to a professional or other adviser of any party.

36. Some members consider that with the increasing use of arbitration for resolution of disputes, it will be beneficial to have the guiding principles in important arbitral awards made available for reference of the arbitration profession and research purpose. Such information will provide valuable reference on procedural and substantive issues that arose during arbitral proceedings. These members have enquired about the viability of making available to the public the arbitration decisions in some form after obliterating personal and sensitive data therein.

37. The Administration has explained that it is important to adhere to the international practice that arbitral awards should only be made public with the consent of the parties concerned, having regard to the private and confidential nature of arbitration. The Administration is of the view that clause 18 of the Bill strikes the right balance in safeguarding the confidentiality in arbitration and the need to disclose information relating to arbitral proceedings and awards under exceptional circumstances. Clause 18(2) serves to provide guidance for disclosure of information relating to arbitral proceedings and awards.

38. Some members have raised concern about the scope of the exception and the meaning of the expression "contemplated by this Ordinance" in clause 18(2)(a). The Administration has advised that it will not be advisable to provide an exhaustive list of the situations to be "contemplated by this Ordinance" on the one hand, and the "contemplated by this Ordinance" exception, on the other hand, appears to be narrow and it is arguable that it may not permit disclosure for other legitimate reasons, such as those needed to protect or pursue a legal right or interest or to enforce or challenge an award in legal proceedings outside Hong Kong.

39. In the light of members' concern, the Administration proposes to amend clause 18(2)(a) of the Bill to the effect that a party may publish, disclose or communicate any information relating to the arbitral proceedings or award for the purposes of protecting or pursuing a legal right or interest of the party, or of enforcing or challenging the

award, in legal proceedings before a court or other judicial authority in or outside Hong Kong.

Whether an order of the court under the Bill should be subject to appeal

40. The Administration has advised that the guiding principle adopted by the Bill is that general minor procedural proceedings in the court should not be subject to appeal, whereas proceedings which determine substantive rights or might do so may be subject to appeal. For instance, having taken into account the views received during the consultation that arbitration should be encouraged, the Administration considers it unnecessary to provide for appeal against a direction of the court under clause 15(1) referring the parties to arbitration on interpleader issue in accordance with an arbitration agreement between the claimants in interpleader proceedings. On the other hand, a party may appeal with the leave of the court if the court refuses to refer the parties to arbitration on interpleader issue under clause 15(2). This is in line with the objective of the Bill to facilitate speedy resolution of disputes by arbitration.

Arbitration agreement (Part 3, clauses 19 to 22)

41. Part 3 of the Bill corresponds to Chapter II of the Model Law and contains provisions related to an arbitration agreement. In particular, clauses 19 to 21 deal with the application of Articles 7 to 9 of the Model Law respectively.

42. The Administration has drawn members' attention to the fact that Option I of Article 7 of the Model Law (Definition and form of arbitration agreement) is adopted, which is given effect by clause 19. Moreover, the requirement that an arbitration agreement in writing is extended to include electronic communications, provided that information contained therein is accessible so as to be useable for subsequent reference.

43. Noting that clause 21 stipulates that it is not incompatible with an arbitration agreement for a court to grant an interim measure of protection, some members have raised concern about the factors taken into account by the court and the enforceability of such interim measures in Hong Kong. The Administration has advised that clause 21 gives effect to Article 9 of the Model Law which provides that it is compatible with an arbitration agreement for any interim measure to be obtained from the court. The grant, recognition and enforcement of interim measures are dealt with under Part 6 of the Bill.

44. The Administration has further advised that an arbitration agreement is not discharged by the death of a party, but the operation of any law which provides for the extinguishment of any right or obligation by death is not affected. There is a similar provision in section 4 of the current Ordinance.

Arbitration for employment matters

45. The Bills Committee notes that the Consultation Paper proposed to expand the types of employment-related cases in which the court may decide whether or not to refer the parties to arbitration where there is an arbitration agreement in order to give effect to arbitration agreement in employment contracts. The proposal is to include not only matters falling within the jurisdiction of the Labour Tribunal but also matters involving claims or disputes made pursuant to or arising under an employment contract. Under this proposal, claims under the Employees' Compensation Ordinance (Cap. 282) ("ECO") would also fall within the category of claims made pursuant to or arising under an employment contract as referred to in clause 20(2). Members have enquired about the considerations for taking the proposal out in the Bill.

46. The Administration has pointed out to the Bills Committee that in April 2008, the Court of Final Appeal, in *Paquito Lima Buton v Rainbow Joy Shipping Ltd. Inc.*, considered the question of whether or not the District Court had exclusive jurisdiction to deal with all ECO claims under section 18A of ECO despite the presence of an arbitration agreement. The Court of Final Appeal held that on its true construction, section 18A(1) of ECO conferred exclusive jurisdiction on the District Court to deal with all ECO claims save in the cases expressly excepted. There was no overriding right to insist on arbitration.

47. The Administration has advised that the Working Group has carefully reviewed and considered the proposal, and suggested that clause 20(2) of the draft Bill attached to the Consultation Paper should be amended to retain the provision in section 6(2) of the current Ordinance. The Administration has further advised that having taken into account the recommendation and deliberation of the Working Group, the Court of Final Appeal's decision in the *Paquito* case and the views of the Labour Department which has policy responsibility over labour matters as well as other submissions received, DoJ considers that there should be no change to the existing position provided for in section 6(2) of the current Ordinance which is confined to claims or other matters falling within the jurisdiction of the Labour Tribunal.

Composition of the arbitral tribunal (Part 4, clauses 23 to 33)

48. Part 4 of the Bill corresponds to Chapter III of the Model Law and relates to the composition of an arbitral tribunal. In particular, Division 1 of Part 4 is about arbitrators, and Division 2 of Part 4 is about mediators.

Appointment of arbitrators

49. Under the current Ordinance, in the absence of a contrary intention, the default number of arbitrator shall be one in domestic arbitration, whereas in international arbitration, if the parties fail to agree on the number of arbitrators, it is to be either one

or three, as decided by HKIAC. It is proposed under the Bill that the parties are free to determine the number of arbitrators in all types of arbitration. Specifically, clause 23 gives effect to Article 10 of the Model Law, which enables the parties to determine the number of arbitrators. In all types of arbitration, where the parties fail to agree on the number of arbitrators, the number of arbitrators shall be either one or three as decided by HKIAC.

50. The Administration has pointed out that appointment procedures for arbitrations with an even number of arbitrators and arbitrations with an uneven number of arbitrators greater than three are set out in clause 24(2) and (3) respectively. Under clause 24(5), any appointment of an arbitrator made by HKIAC is deemed to have been made with the agreement of all parties.

51. The Hong Kong Institute of Architects and the Hong Kong Institute of Surveyors have suggested that the word "or" between subparagraphs (b) and (c) of Article 11(4) of the Model Law in clause 24(1) should be replaced by "and" to better reflect the existing two-step appointment procedure, i.e. HKIAC will decide the number of arbitrators if the parties fail to agree on the number of arbitrators.

52. The Administration considers the current drafting appropriate as the policy intent is clearly spelt out in Article 11 of the Model Law in clause 24(1), i.e. the parties are free to agree on the procedure for the appointment of an arbitrator. The default appointment authority (i.e. HKIAC) will exercise its power of appointment for a party or an institution only if the party or the institution fails to make an appointment pursuant to the agreed appointment procedure. The default appointment authority will not exercise its power of appointment for an institution where the default only relates to a party. As the arrangement is commonly adopted in the international arbitration regime and the Administration is not aware of any problems arising from the operation of Article 11, the Administration is of the view that no change to the drafting is necessary.

53. The Administration has drawn the attention of the Bills Committee to the fact that, it had received representation from HKIAC on clause 13 of the Bill. Clause 13(3) provides that "The HKIAC may, with the approval of the Chief Justice, make rules to facilitate the performance of its functions under section 24 or 32(1)." HKIAC has pointed out that clause 13(3) of the Bill does not expressly include the power of HKIAC to make rules to govern its procedures in deciding the number of arbitrators under clause 23(3) of the Bill. The Administration has advised that having considered the views of HKIAC, it is of the view that it is appropriate to amend clause 13(3) of the Bill to provide expressly that HKIAC does have the power to make rules, with the approval of the Chief Justice, dealing with the decision on the number of arbitrators under clause 23(3). A Committee Stage Amendment ("CSA") to clause 13(3) will be proposed to this effect.

Appointment of umpires

54. The current Ordinance provides for the appointment of an umpire in cases of domestic arbitration agreements which have a reference to two arbitrators. Clause 30 seeks to extend the application to all types of arbitration involving an even number of arbitrators. The functions of an umpire in arbitral proceedings and circumstances under which a party may apply to the Court for replacement of the arbitrators by the umpire are stipulated in clause 31.

Appointment of mediators

55. Division 2 of Part 4 contains provisions which deal with the appointment of a mediator. Under clause 32(1) of the Bill, in case of default by a third party which has been specified in an arbitration agreement to appoint mediator in doing so, HKIAC, may on the application of any party, appoint a mediator.

56. The Bills Committee has asked for explanations as to why the appointment of a mediator under clause 32(1) of the Bill is to be made by HKIAC. It has questioned whether the Hong Kong Mediation Centre should also be authorized to appoint a mediator for the purpose of the Bill.

57. The Administration has advised that it will not be desirable to authorize more than one authority to appoint mediators under clause 32(1). The power of appointing mediators in clause 32(1) will be used as a last resort and only where there is a written arbitration agreement between the parties. The power can only be exercised if a third party has been authorized by the arbitration agreement to appoint a mediator and such appointment has not been duly made. As the power of appointment of mediator under this clause is derived from an arbitration agreement, the Administration considers that the default appointment power should be exercised by HKIAC which is consistent with similar power given to it by clause 24(2) of the Bill for appointing arbitrators where a party has failed to make the necessary appointment under the terms of an arbitration agreement. The Administration has further advised that the default appointment authority under a standalone mediation agreement may be addressed by the Working Group on Mediation in the context of the general framework for development of mediation in Hong Kong.

58. Members have expressed concern whether it is appropriate for an arbitrator to act as a mediator, as provided for under clause 33, having regard to the fact that an arbitrator may have obtained confidential information from a party during the mediation proceedings conducted by the arbitrator as a mediator.

59. The Administration has explained that under clause 33(1), an arbitrator may act as a mediator only under the condition that all parties consent in writing and for so long as no party withdraws the party's consent in writing. It is also stipulated under clause 33(4) that an arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to

the arbitral proceedings if confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator and those mediation proceedings terminated without reaching a settlement acceptable to the parties.

Mediator immunity

60. The Administration has subsequently informed the Bills Committee that the Working Group on Mediation has published its report in February 2010 for a three-month consultation. Members note that the issue of mediator immunity has been raised in the Report. The Working Group considers that the most common type of mediation conducted in Hong Kong is facilitative and the mediators do not perform any judicial function. Therefore the rationale underlying immunity for judges and arbitrators does not apply. The Working Group has referred to clause 103 (i.e. arbitral tribunal or mediator to be liable only for dishonest acts or omissions) of the Bill and posed the questions of whether the immunity conferred by clause 103 only applies when an arbitrator acts as a mediator pursuant to clause 33, or whether the immunity is enjoyed by all mediators (irrespective of whether the mediator also acts as an arbitrator). If the immunity conferred under clause 103 only applies to an arbitrator acting as mediator, the Working Group queries whether the wording of clause 103 should be appropriately revised.

61. The Administration considers that it should be made clear that, in relation to mediation, clauses 103 and 104 only apply to the situations as provided for in clauses 32 and 33, thus confining, under clauses 103 and 104, the availability of the immunity to mediators only in respect of mediation conducted within the framework of arbitration. To put beyond doubts and not to prejudice the consultation process of the Working Group on the issue of mediator immunity, the Administration will propose amendments to clauses 103 and 104 to the effect that these two clauses will only apply to mediators acting under clauses 32 and 33.

Jurisdiction of arbitral tribunal (Part 5, clause 34)

62. Part 5 of the Bill corresponds to Chapter IV of the Model Law and relates to the jurisdiction of an arbitral tribunal. The Bills Committee notes that clause 34 gives effect to Article 16 of the Model Law which enables an arbitral tribunal to rule on its own jurisdiction. The Court may, by virtue of clause 13, decide on the matter, upon any party's request, if the arbitral tribunal rules as a preliminary issue that it has jurisdiction. If the arbitral tribunal rules as a preliminary question that it has jurisdiction over a matter referred to arbitration, there is a right for any party to request the Court of First Instance to decide the matter. On the other hand, clause 34(4) provides that "a ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal".

Interim measures and preliminary orders (Part 6, clauses 35 to 45)

63. Part 6 of the Bill corresponds to Chapter IVA of the Model Law and relates to interim measures and preliminary orders that may be ordered by an arbitral tribunal. An interim measure is any temporary measure ordered prior to the issuance of the award by which the dispute is finally decided. An arbitral tribunal may, upon application, grant a preliminary order directing a party not to frustrate the purpose of any requested interim measure. The Bills Committee also notes that the Court is empowered under clause 45(3) to grant an interim measure in relation to arbitral proceedings irrespective of whether or not similar powers may be exercised by an arbitral tribunal.

64. Some members have enquired whether the notice given by the arbitral tribunal to all parties of the preliminary order should be in written form; if so, whether the preliminary order is binding on the parties concerned pending the issue of the written notification. A concern about the enforceability of the preliminary order has also been raised.

65. The Administration has advised that the arbitral tribunal is required to give notice immediately after determining an application for a preliminary order. The preliminary order is binding on the parties upon their receipt of the notice but is not enforceable by the court. A preliminary order will expire 20 days after its issuance. Notwithstanding this, clause 45 allows parties to apply to the Court for granting an interim measure and clause 61 stipulates that an order or direction, including an interim measure, made in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.

66. The Bills Committee has noted that Article 17D of the Model Law, which is given effect by clause 39 of the Bill, provides that the arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative. Members have raised a query on whether the party may object to or appeal against such modification after the arbitral tribunal has modified an interim measure on its own initiative and whether there is a need to expressly provide for a mechanism to appeal against the tribunal's decision to modify an interim measure that it has granted.

67. The Administration has pointed out that an application for modification, suspension or termination of an interim measure or a preliminary order can also be made by any party in accordance with the procedures laid down in an arbitration agreement. In the absence of such procedures and in the event that any party is dissatisfied with the arbitral tribunal's decision, it can make an application to the tribunal for modification, suspension or termination of an interim measure or a preliminary order it has granted. On the concern about the need for an appeal mechanism, the Administration considers that Article 17D has struck the right balance

to achieve flexibility of the interim measure and to protect the interests of the parties. Given the object of the Bill to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses, it does not consider it appropriate for the Bill to provide for appeal against interim measures ordered by an arbitral tribunal, including modification of such measures by the same tribunal, as to do so would have the effect of substantially delaying the arbitral proceedings.

Conduct of arbitral proceedings (Part 7, clauses 46 to 63)

68. Part 7 of the Bill corresponds to Chapter V of the Model Law and relates to the conduct of arbitral proceedings. The parties are allowed to agree on the procedures to be followed and the language to be used in conducting arbitral proceedings, and the place of arbitration. Part 7 also provides that if there is no agreement, the arbitral tribunal may conduct the arbitration and receive any evidence which it considers appropriate.

69. The Administration has drawn the attention of the Bills Committee to the fact that clause 46 replaces Article 18 of the Model Law (Equal treatment of parties). Apart from being applicable to international arbitration under the current Ordinance, clause 46(2) has effect in substitution for Article 18 for all types of arbitration under the Bill. This clause further provides that an arbitral tribunal has to be independent.

70. The Bills Committee notes that clause 53 seeks to give effect to Article 25 of the Model Law which allows the arbitral tribunal to continue the proceedings if a party fails to appear at a hearing or produce documentary evidence, and make the award on the evidence before it. Clause 53 further provides that if a party fails to comply with any order or direction of the arbitral tribunal, the tribunal can make a peremptory order requiring compliance within the time that the tribunal considers appropriate. Under clause 51, either party may amend any statement of claim or defence during the course of the arbitral proceedings.

71. In response to members' concern that the Chinese equivalent to the English expression "peremptory order" ("最終命令") in clause 53(3) and (4) may not convey the time limit set for compliance with the order or direction of the arbitral tribunal, the Administration suggests to render "peremptory order" as "最後敦促令". The Administration believes that the words "最後" are a clearer indication of the temporal limit within which the order or direction of the arbitral tribunal has to be complied with. Members consider the proposed amendments acceptable, and the Administration will move a CSA to clause 53(3) and (4) of the Bill accordingly.

Appointment of experts

72. Clause 54 empowers an arbitral tribunal to appoint experts to report on specific issues and allow those experts to participate in a hearing. This clause further provides that the arbitral tribunal may appoint experts, legal advisers or assessors to assist in assessing the costs of arbitral proceedings. Members have questioned the

need to empower the arbitral tribunal to appoint experts, including legal experts and assessors, to assist in the assessment of the costs of the arbitral proceedings under clause 54(2). Some members also express concern that clause 54 empowers the arbitral tribunal to appoint experts or legal advisers without the need to consult parties of the arbitration.

73. The Administration has advised that clause 54(2), which is modelled on the UK Arbitration Act, empowers the arbitral tribunal to appoint experts when necessary. Although the provision does not require the arbitral tribunal to consult parties on the appointment of experts, the arbitral tribunal will in practice consult parties before appointing experts so as to avoid disputes. If an objection is raised by any party on the decision regarding the appointment of experts, the arbitral tribunal will hear the views expressed by the party and it still has the discretion to make the final decision on the appointment of experts. The Administration has further advised that many arbitrators, especially those who are not lawyers, may have problems in assessing costs themselves. Hence, clause 54(2) has been inserted to provide beyond doubt that the arbitral tribunal may appoint assessors to assist it on costs. In any event, according to experienced arbitrators, this power would only be used in complex cases.

74. After taking into account members' views, the Administration has expressed agreement with the view that, in practice, it is only necessary to allow the arbitral tribunal to appoint assessors (who will normally be law costs draftsman) to advise on questions of costs. The Administration will propose an amendment to clause 54(2) to this effect. A similar amendment will also be proposed to clause 77(3)(b)(ii).

75. Members have also raised the question of whether there is a need to provide in clause 54(2) for procedures for the parties concerned to raise objections before an arbitral tribunal appointed experts on specific issues.

76. The Administration has pointed out that according to experienced arbitrators, the arbitral tribunal will always consult the parties on the appointment of experts as the tribunal will wish the parties to be responsible for the fees of the tribunal-appointed expert. In view of the prevalent practice of consulting the parties before experts are appointed by the arbitral tribunal and the desirability to preserve the autonomy of the parties to deal with the procedural matters in arbitration, the Administration does not consider that an express provision in the Bill is necessary.

Writ of habeas corpus ad testificandum in clause 55(3)

77. Clause 55(3) provides that the Court may order a writ of *habeas corpus ad testificandum* to be issued requiring a prisoner to be taken before an arbitral tribunal for examination. Some members have asked whether "person in custody" is within the meaning of "prisoner" for the purposes of clause 55(3).

78. The Administration has explained that the writ of *habeas corpus ad testificandum*, together with the form of writ of *habeas corpus ad respondendum*,

were found to be obsolete and were removed from the Schedule to the Supreme Court Ordinance (now the High Court Ordinance) (Cap. 4) by the Supreme Court (Amendment) Ordinance (95 of 1997). It is noted that the warrant or order to be issued by a judge of the Court under section 81 of the Evidence Ordinance (Cap. 8) is for bringing up "any person in lawful custody before any court". The Administration is of the view that it is no longer necessary to rely on the obsolete writ of *habeas corpus ad testificandum* since the Court can now invoke the power given to it by section 81 of the Evidence Ordinance. The Administration therefore proposes to add a new subclause in place of clause 55(3) to make suitable reference to section 81 of the Evidence Ordinance.

79. The Administration has also pointed out that Order 54, rule 9 of the High Court Rules (Cap. 4 sub. leg. A) refers to the writs of *habeas corpus ad testificandum* and *habeas corpus ad respondendum*. An additional provision in the Bill was proposed to repeal this obsolete provision. A concern has been raised as to whether the scope of section 81 of the Evidence Ordinance is narrower than that provided under clause 55(3) of the Bill and whether it is appropriate for the Administration to amend the High Court Rules in this context. In the light of members' concern, the Administration subsequently proposes no amendment to the High Court Rules, but only to delete clause 55(3).

Evidence to be given by affidavit

80. Members have enquired whether an affidavit by a witness overseas will be acceptable for the purposes of clause 56(1)(c). The Administration has advised that according to experienced arbitrators, it is fairly common in shipping arbitrations for written statements by witnesses overseas to be accepted in evidence and arbitral tribunals will sometimes request that such evidence be given on affidavit. The arbitral tribunal has discretion to accept written statements made by an overseas witness under clause 47(3) of the Bill which provides that an arbitral tribunal may receive any evidence that it considers relevant to the arbitral proceedings.

Meaning of "relevant property"

81. Members have enquired whether "relevant property" referred to in clause 56(6) will include intangible property such as intellectual property rights. The Administration has advised that the term "relevant property" includes movable and immovable property and would include intellectual property rights.

Special powers of the Court in relation to arbitral proceedings

82. Clause 60 deals with the special powers of the Court to order the inspection of relevant property etc. in relation to arbitral proceedings and provides that, if the arbitral proceedings have been or are to be commenced outside Hong Kong, those powers may be exercised only if the arbitral proceedings are capable of giving rise to an arbitral award that may be enforced in Hong Kong.

83. Members have questioned the proper interpretation of clause 60(5) and are concerned that the current drafting may be interpreted as providing an arbitral tribunal with the power to override an order made by the Court under clause 60.

84. The Administration has explained that the arbitral tribunal can order that an order made by the court ceases to have effect only if that court has allowed the arbitral tribunal to do so in the original order made by the court. It may also be necessary, for example, to invoke this power in case the court has to hear an emergency application and refers the issue to the arbitrator for full hearing. Therefore, it is clear that this power can only be invoked if the court order has empowered or authorized the tribunal to make such an order. The rationale for so providing is to save time and costs because otherwise an application may have to be made to the court again to vary or terminate its own order.

85. Members have made some suggestions to improve the drafting of both the English and Chinese versions of the clause to avoid the above undesired interpretation. To address members' concern, the Administration agrees to incorporate members' suggestions made in the discussion and recast both versions of clause 60(5) by defining clearly the roles of the Court and the arbitral tribunal in relation to the orders concerned. While members consider the proposed CSAs to the clause acceptable, the Chairman has requested S for J to, to put beyond doubts, state explicitly the policy intention of the provisions in his speech to be delivered during the resumption of the Second Reading debate on the Bill.

Power of Court to order recovery of arbitrator's fees

86. Members have examined the need for spelling out the considerations to be taken into account by the Court in exercising discretion under clause 62 to order recovery of an arbitrator's fee if the arbitrator's mandate has terminated upon challenge or failure to act.

87. The Administration has advised that in exercising its discretion under clause 62 of the Bill, the Court may have regard to the conduct of the arbitrator and any other relevant circumstances. In view of the broad scope of circumstances, the Administration considers it neither practicable nor desirable to enumerate all the factors of considerations under clause 62 of the Bill. A statutory list of matters that should be taken into consideration may unduly fetter the wide discretion of the court and may be counter-productive.

88. Members have also enquired whether clause 62 may be disappplied if there is an agreement between the parties and an arbitrator on payment (including repayment) of arbitrator's fees that may cover the situations envisaged by clause 26 (challenge of arbitrators) and clause 27 (failing to act etc.).

89. The Administration has pointed out that the power of the Court under clause 62 may only be exercised if there is an application by a party under this clause. Whilst many disputes concerning arbitrator's fees are settled between the parties and an arbitrator without the need to resort to court proceedings, clause 62 provides a formal channel for resolving such disputes if the parties (including the arbitrator) cannot reach an agreement or if the parties have reached agreement but one or more parties fail to honour the agreement. The Administration does not consider that clause 62 may be substituted by parties' own agreement although the clause itself would not be invoked if the parties have concluded an agreement on fees and have honoured the agreement.

Making of award and termination of proceedings (Part 8, clauses 64 to 80)

90. Part 8 of the Bill corresponds to Chapter VI of the Model Law and relates to the making of awards and termination of proceedings. In particular, clauses 64 to 69 deal with the application of Articles 28 to 33 of the Model Law respectively. Clauses 70 to 80 are supplementary provisions for Part 8.

91. Noting that clause 68 stipulates that arbitral proceedings are terminated if a final award is made or if the arbitral tribunal issues an order for the termination of those arbitral proceedings, some members have sought clarification on whether any parties can request the arbitral tribunal to be reconvened to review an award after the termination of the arbitral proceedings.

92. The Administration has pointed out that finality of an arbitral award will contribute to the speedy resolution of disputes, which is one of the objectives of the reform of the arbitration law. Notwithstanding this, clause 81(1) gives effect to Article 34 of the Model Law which provides for applications to the court for setting aside as exclusive recourse against an arbitral award due to reasons as stated in paragraph (2) of Article 34 in clause 81(1).

Taxation of costs by the court

93. Clause 75 provides for the taxation of costs of arbitral proceedings by the court if so agreed by the parties. Members have expressed concern as to whether the drafting of clause 75(1) of the Bill is able to deal with a situation where an arbitral tribunal has inadvertently omitted to make an order for taxation by the court. Having considered members' views, the Administration agrees to amend clause 75(1) of the Bill to provide for taxation of costs by the court if the parties have so agreed, unless the arbitral tribunal otherwise directs in the arbitral award.

Determination of an arbitral tribunal's fees and expenses

94. Members have enquired whether clause 77 would be effective in ensuring that arbitration fees and expenses would be duly settled where, even when the arbitral tribunal has invoked its power to refuse to deliver award under clause 77(1), no party

(in particular, the losing party responsible for fees and expenses may not want to apply and make payment for fees and expenses) applies for court intervention under clause 77(2).

95. The Administration has advised that the existing law of Hong Kong provides for the assessment of fees demanded by arbitrator and umpire by the Court in a case when a party disputes the fees of the arbitral tribunal. Clause 77 is modelled on section 56 of the UK Arbitration Act 1996 which seeks to provide for a further and alternative means of dispute resolution over the arbitral tribunal's fees and expenses. In other words, where an arbitral tribunal refuses to deliver an award to the parties unless an extortionate amount of its fees and expense are paid under clause 77(1), clause 77(2) gives the party a chance to seek assistance from the court. In this context, the Administration considers that the situation where no party would apply under clause 77(2) to take the matter further is rare, but even if so, the parties to the arbitral proceedings would be jointly and severally liable to pay the arbitration fees and expenses under clause 78(1) of the Bill.

Recourse against award (Part 9, clause 81)

96. The Bills Committee notes that clause 81 gives effect to Article 34 of the Model Law which provides that an arbitral award may be set aside by the Court (as designated by clause 13) on the ground that a party is under incapacity or the arbitration agreement is not valid, that proper notice of appointment of an arbitrator or of the arbitral proceedings has not been given or the party concerned is unable to present the party's case, that the award deals with a dispute not covered by the terms of submission to arbitration, that the composition of the arbitral tribunal or the conduct of arbitral proceedings is contrary to the effective agreement of the parties or to the Model Law, that the subject matter of the dispute is not capable of settlement by arbitration, or that the award is in conflict with the public policy.

Recognition and enforcement of arbitral awards (Part 10, clauses 82 to 98)

97. Part 10 of the Bill corresponds to Chapter VIII of the Model Law and relates to the recognition and enforcement of arbitral awards. Under the current Ordinance, an award made in the Mainland by a recognized Mainland arbitral authority ("the Mainland award"), and an award made in a State or territory (other than China or any part of China) which is a party to the New York Convention ("Convention award"), can be enforced as provided for in Part IIIA and Part IV respectively of the current Ordinance. An arbitral award which is neither a Mainland award nor a Convention award is enforceable at the discretion of the Court pursuant to section 2GG of the current Ordinance. According to the Administration, the procedures for the enforcement of Mainland awards and Convention awards under the Bill remain the same as those found in the current Ordinance.

Reciprocal enforcement of arbitral awards between Hong Kong and the Mainland

98. Members have expressed concern about the enforceability of Hong Kong awards on the Mainland and asked for an update of the reciprocal enforcement of arbitral awards between Hong Kong and the Mainland including the number of applications made on both places, their enforceability as well as the reasons for the awards not being enforced.

99. The Administration has advised that the "Arrangement Concerning Mutual Enforcement of Arbitral Awards" ("the Arrangement") between Hong Kong and the Mainland was concluded in June 1999 and came into effect on 1 February 2000. The Supreme People's Court of the People's Republic of China ("SPC") issued a confirmation in October 2007 that awards made in "*ad hoc*" arbitral proceedings (i.e. proceedings not managed or overseen by an arbitration institution like HKIAC) in Hong Kong are enforceable in the Mainland. In December 2009, SPC has issued a notification confirming that arbitral awards made in Hong Kong, whether by the International Court of Arbitration of the International Chamber of Commerce or other foreign arbitration institutions, are enforceable in the Mainland in accordance with the provisions of the Arrangement.

100. The Administration has further advised that according to the information provided by the Judiciary, during the period from 2000 to 2009, the High Court of Hong Kong has processed 84 applications to enforce Mainland awards in Hong Kong. All applications were granted. There were 18 applications to set aside the orders given for the enforcement of the awards. The court allowed five applications to set aside the original orders. It is understood that the parties in a majority of such cases set aside the original orders by consent. The Administration has made enquiries with SPC on the figures relating to the enforcement of awards made in Hong Kong on the Mainland. SPC has explained that it does not keep such statistics as the applications are handled by lower courts on the Mainland. However, according to the information available to SPC, during the period from 2000 to April 2008, 33 applications have been processed by the People's Courts in different provinces and municipalities in the Mainland for the recognition and enforcement of Hong Kong arbitral awards. Twenty-four applications were allowed and nine cases were refused.

Convention awards

101. The Bills Committee notes that the Administration has taken the opportunity to update the list of parties to the New York Convention as specified in the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 341 sub. leg. A).

Automatic opt-in mechanism (Part 11, clauses 99 to 102 and Schedule 2)

102. An "opting-in" system is provided under Part 11 of the Bill to enable users of arbitration to continue to adopt domestic arbitration provisions based on the current Ordinance and as set out in Schedule 2 to the Bill. All the opt-in provisions under

Schedule 2 to the Bill will automatically apply to an arbitration agreement entered into before, or at any time within a period of six years after, the commencement of the Bill and which has provided that arbitration under the agreement is a domestic arbitration.

103. The Bills Committee notes that when DoJ published the draft Bill for consultation in December 2007, it was proposed, among other things, that all the provisions relating to domestic arbitration would apply automatically to an arbitration agreement in a subcontract if the main contract has provided for domestic arbitration (clause 102 of the draft Bill). According to the Administration, the Working Group received diverse views from respondents to the proposal. While certain respondents, particularly those from the construction industry, expressed their support for the proposal, a majority of the respondents to the Consultation Paper were against it. After considering the views received, the Working Group had decided to drop the proposal and take out clause 102 of the draft Bill. To reflect the majority view and the deliberation of the Working Group, DoJ had not included clause 102 of the draft Bill in the Bill.

104. The Bills Committee also notes that depositions from the construction industry, such as the Hong Kong Construction Association, have strongly requested for re-instatement of the automatic opt-in provisions for subcontractors, as originally proposed under clause 102 of the draft Bill. They have pointed out that under the existing regime, a domestic subcontract does not need to expressly refer to the domestic regime as it will automatically apply. Without an express opt-in, all subcontracts, irrespective of whether they would have qualified for a domestic arbitration under the existing regime, will be governed by the international unitary regime under the Bill. Such arrangement is in contrast to main construction contracts in Hong Kong where almost all standard form contracts include a reference to domestic arbitration. As there is no automatic opt-in for subcontracts under the Bill, the status quo of local construction subcontractors will immediately change when the Bill comes into force, unless the subcontractors are aware that they need to change their subcontracts to state expressly that they will be subject to the domestic regime.

105. The Administration has explained that the submissions on the Consultation Paper were overwhelmingly against the proposed automatic opt-in mechanism, although the Hong Kong Construction Association was in support of the retention of clause 102 of the draft Bill. It was agreed by an overwhelming majority of members of the Working Group that clause 102 of the draft Bill should be deleted, and the Administration agreed to this suggestion. Notwithstanding this, the opt-in provisions will apply to subcontracts if the subcontractors wish to do so as provided for under clauses 99 and 100 of the Bill. The Administration has further explained that the automatic opt-in mechanism for subcontracts may have implications on other industries such as insurance and shipping where contracts for sub-underwriting and sub-charter are not uncommon.

106. Some members share the views of the construction industry. They have pointed out that in the absence of contracts in most subcontracting cases in the

construction industry, it is envisaged that subcontractors will not state expressly that they will be subject to the domestic regime. A suggestion was made to exempt the construction industry from the applicability of the Bill until the Construction Industry Council is able to draw up a standard contract for subcontracting cases.

107. While acknowledging the concerns raised by the construction industry, some members have expressed reservation with the proposal to amend the Bill to suit the specific needs of an industry. At the request of members, the Administration has made enquiries with HKIAC for a the breakdown of arbitration cases opting for domestic arbitration by industries. HKIAC has advised that while it does not keep any statistics for domestic arbitration, such cases are mainly from sectors including building management, construction, insurance, and general commercial transactions. To the knowledge of HKIAC, as far as construction cases are concerned, the percentage of construction disputes opted for domestic arbitration should not be substantially higher than one-third, i.e. some 60 such cases in 2008. This apart, quite a number of cases involving disputes in other sectors are conducted under the domestic arbitration regime.

108. The Administration has subsequently advised that after further discussions with the stakeholders and consideration of their views, it is of the view that confining the automatic opt-in mechanism to construction contracts is an appropriate way to address stakeholders' differences on the subject. Accordingly, the Administration proposes to amend the Bill by introducing an opting-in mechanism for sub-contracts but to limit its application to construction subcontracts only. A key feature of the revision 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 CIC Ordinance. These two definitions are, subject to minor modifications, also adopted in section 19(1) of the Construction Workers Registration Ordinance (Cap. 583) ("CWR Ordinance").

109. The Administration has pointed out that there are divided views among the stakeholders on the above proposal, such as whether "design, advice or consultation work" per se should be included as construction operations. In that regard, the Administration is of the view that the proposed definitions of "construction contract" and "construction operations" would ensure consistency in the meaning of the terms among CIC Ordinance, CWR Ordinance and the Bill. The proposed definitions have also appropriately covered most contracts and activities that are ordinarily perceived as construction contracts and operations respectively. Any dispute on whether certain activities are construction operations within the meaning of the proposed definitions can be decided in arbitration based on the facts of the case.

110. The Administration has further pointed out that another key feature of the proposed amendments 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"). Those who are in favour of retaining the International Exception consider that it will undermine Hong Kong's reputation as an international arbitration centre if domestic arbitration provisions are inadvertently imposed by clause 102 on the unwary non-local subcontractors. On the other hand, some stakeholders have raised objection to the exception as they prefer equal treatment between local and non-local subcontractors/subcontracts. Notwithstanding this, the Administration has explained that the proposed amendments seek to resolve the differences of the stakeholders on the subject and the majority of the respondents to the proposed amendments are supportive of the proposal.

111. To give effect to the above, the Administration will reinstate the deemed application of the opt-in provisions that automatically apply under clause 100 of the Bill for Hong Kong construction subcontracting cases by inserting a new clause 100A into the Bill, and amend clause 101 of the Bill so that the circumstances in which those opt-in provisions are not applicable would also apply to the new clause 100A. Members consider the Administration's proposed amendments acceptable.

112. Members also appeal to the Administration to launch adequate publicity so that the stakeholders, in particular the construction industry, would be aware that the automatic opt-in mechanism would cease after a transitional period of six years, and make necessary preparation for the unitary arbitration regime. The Administration has assured members that it will issue press releases and arrange briefings on the Bill so as to enhance the public awareness on the Bill, including the opt-in provisions. This apart, HKIAC and the International Chamber of Commerce have advised that they will take appropriate measures to prepare arbitrators and other professionals for the implementation of the Bill.

Review of the subsidiary legislation made under the current Ordinance

113. Clause 109 of the Bill provides that any subsidiary legislation made under the current Ordinance and in force at the commencement of the new Ordinance, so far as it is not inconsistent with the new Ordinance, continues in force and has the like effect for all purposes as if made under the new Ordinance.

114. In response to members' enquiry, the Administration has reviewed the provisions in the relevant subsidiary legislation and affirmed that subject to those consequential and related amendments made to the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B) which have already been set out in sections 35 to 39 of Schedule 4 to the Bill, there are no inconsistencies between the subsidiary legislation and the Bill.

Membership of the Appointment Advisory Board

115. Section 36 of Schedule 4 to the Bill aims to add the President of the Hong

Kong Construction Association to the Appointment Advisory Board in rule 3(2) of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B). The Bills Committee notes that although the Administration has not received any objection to the proposal, the Hong Kong Federation of Electrical and Mechanical Contractors Limited has suggested that its President should also be added to the Board as electrical and mechanical contractors are major arbitration users.

116. The Administration has explained that given that about one-third arbitration cases are from the construction sector and further expanding the Appointment Advisory Board would affect its operation, the Administration considers that the current proposal of including only Hong Kong Construction Association is appropriate.

Committee Stage amendments

117. Apart from the major CSAs highlighted above, the Administration will also move minor and consequential amendments. A full set of CSAs to be moved by the Administration and agreed by the Bills Committee is in **Appendix III**.

Resumption of the Second Reading debate

118. Subject to the moving of the proposed CSAs by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 10 November 2010.

Advice sought

119. Members are invited to note the deliberations of the Bills Committee.

Bills Committee on Arbitration Bill

Membership List

Chairman

Dr Hon Margaret NG

Members

Hon Albert HO Chun-yan

Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP

Hon LAU Kong-wah, JP

Hon Miriam LAU Kin-yee, GBS, JP

Hon Abraham SHEK Lai-him, SBS, JP

Hon Ronny TONG Ka-wah, SC

Hon CHIM Pui-chung

Prof Hon Patrick LAU Sau-shing, SBS, JP

Dr Hon Priscilla LEUNG Mei-fun

Hon Paul TSE Wai-chun

(Total : 11 Members)

Clerk

Miss Betty MA

Legal adviser

Mr Kelvin LEE

Date

28 July 2009

Bills Committee on Arbitration Bill

List of organisations/individuals which/who have given views to the Bills Committee

Hong Kong Construction Association

Hong Kong International Arbitration Centre

International Chamber of Commerce - Hong Kong, China

The Hong Kong Federation of Electrical and Mechanical Contractors Limited

The Hong Kong Institute of Architects

The Hong Kong Institute of Surveyors

Mr Peter Scott Caldwell

Mr Samuel C C WONG

Written submissions only

Construction Industry Council

Hong Kong Mediation Centre

The Law Society of Hong Kong

The Real Estate Developers Association of Hong Kong

ARBITRATION BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	(a) In the definition of “interim measure”, by deleting “保護” and substituting “保全”. (b) In the definition of “respondent”, by deleting “應訴” and substituting “被申請”.
8(2)	By adding “(other than section 2(5))” after “section 2”.
13(3)	By adding “23(3),” after “section”.
18(2)	By deleting paragraph (a) and substituting – “(a) if the publication, disclosure or communication is made – (i) to protect or pursue a legal right or interest of the party; or (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial

authority in or outside Hong Kong;”.

- 20(3) By deleting “Subsections (1) and (2) have” and substituting “Subsection (1) has”.
- 24(1) In the Chinese text –
- (a) by deleting “委托” and substituting “委託”;
 - (b) by deleting “交托” and substituting “交託”.
- 32(1)(a) By deleting “written agreement” and substituting “arbitration agreement”.
- 32(3) By deleting “written agreement” where it twice appears and substituting “arbitration agreement”.
- 53(3) In the Chinese text, by deleting “最終命令” and substituting “最後敦促令”.
- 53(4) In the Chinese text, by deleting “最終命令” where it twice appears and substituting “最後敦促令”.
- 54(2) By deleting paragraph (a) and substituting –
- “(a) the arbitral tribunal may appoint assessors to assist it on technical matters, and may allow any of those assessors to attend the proceedings; and”.
- 54(2)(b) By deleting “experts, legal advisers or”.

- 55 (a) By deleting subclause (3).
- (b) By adding –
- “(6) Section 81 (Warrant or order to bring up prisoner to give evidence) of the Evidence Ordinance (Cap. 8) applies as if a reference to any proceedings, either criminal or civil, in that section were any arbitral proceedings.”.
- 60 By deleting subclause (5) and substituting –
- “(5) An order made by the Court under this section may provide for the cessation of that order, in whole or in part, when the arbitral tribunal makes an order for the cessation.”.
- 75 By deleting subclause (1) and substituting –
- “(1) Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are to be taxed by the court, then unless the arbitral tribunal otherwise directs in an award, the award is deemed to have included the tribunal’s directions that the costs (other than the fees and expenses of the tribunal) are –
- (a) to be taxed by the court; and
- (b) to be paid on any basis on which the court can award costs in civil proceedings before the court.”.
- 77(3)(b)(ii) By deleting “expert, legal adviser or”.
- 86(2)(a) By adding “under the law of Hong Kong” after “arbitration”.

- 90(1) By adding “in Council” before “may, by order”.
- 98 By adding “under the repealed Ordinance as then in force” after “(2 of 2000)”.
- New By adding –
- “100A. Opt-in provisions that automatically apply under section 100 deemed to apply to Hong Kong construction subcontracting cases**
- (1) If –
- (a) all the provisions in Schedule 2 apply under section 100(a) or (b) to an arbitration agreement, in any form referred to in section 19, included in a construction contract;
- (b) 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
- (c) 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, subject to section 101, 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 –

- (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) If –

- (a) all the provisions in Schedule 2 apply to a subcontracting parties' arbitration agreement under subsection (1);
- (b) 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
- (c) 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, subject to section 101, 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 –

“construction contract” (建造合約) has the meaning given to it by section 2(1) of the Construction Industry Council Ordinance (Cap. 587);

“construction operations” (建造工程) has the meaning given to it by Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).”.

- 100A do”.
- 101(b)(i) By adding “or 100A” after “section 100”.
- 103 By adding –
- “(3) In this section, “mediator” (調解員) means a mediator appointed under section 32 or referred to in section 33.”.
- 104 By deleting subclause (5) and substituting –
- “(5) In this section –
- “appoint” (委任) includes nominate and designate;
- “mediator” (調解員) has the same meaning as in section 103,
- and “mediation proceedings” (調解程序) is to be construed accordingly.”.
- Schedule 1,
Article 1(4)(b) In the Chinese text, by deleting “爲准” and substituting “爲準”.
- Schedule 1,
Article 11(4)(c) In the Chinese text, by deleting “委托” and substituting “委託”.
- Schedule 1,
Article 11(5) In the Chinese text, by deleting “交托” and substituting “交託”.
- Schedule 2 By adding “, 100A” before “& 101”.
- Schedule 2,
section 7(9) By adding “, direction” after “An order”.
- Schedule 4 By adding –

“Arbitration (Parties to New York Convention) Order

34A. Schedule amended

(1) The Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 341 sub. leg. A) is amended by repealing “Bosnia-Herzegovina” and substituting “Bosnia and Herzegovina”.

(2) The Schedule is amended by repealing “Kazakstan” and substituting “Kazakhstan”.

(3) The Schedule is amended by repealing “Korea, Republic of” and substituting “Republic of Korea”.

(4) The Schedule is amended by repealing “Macedonia, the former Yugoslav Republic of” and substituting “The former Yugoslav Republic of Macedonia”.

(5) The Schedule is amended by repealing “Netherlands (including Netherlands Antilles and Surinam)” and substituting “Netherlands (including Netherlands Antilles)”.

(6) The Schedule is amended by repealing “Slovak Republic” and substituting “Slovakia”.

(7) The Schedule is amended, in the English text, by repealing “Tanzania, United Republic of” and substituting “United Republic of Tanzania”.

(8) The Schedule is amended by repealing “United Kingdom (including Belize, Bermuda, Cayman Islands, Gibraltar, Guernsey and Isle of Man)” and substituting “United Kingdom of Great Britain and Northern Ireland (including Bailiwick of Jersey, Cayman Islands, Bermuda, Gibraltar, Guernsey and Isle of Man)”.

(9) The Schedule is amended by repealing “Venezuela” and substituting “Venezuela (Bolivarian Republic of)”.

(10) The Schedule is amended, in the English text, by repealing “Vietnam” and substituting “Viet Nam”.

(11) The Schedule is amended by repealing “Yugoslavia”.

(12) The Schedule is amended, in the Chinese text, by repealing “丹麥(包括法羅群島及格陵蘭)” and substituting “丹麥(包括法羅群島及格陵蘭島)”.

(13) The Schedule is amended, in the Chinese text, by repealing “文萊” and substituting “文萊達魯薩蘭國”.

(14) The Schedule is amended, in the Chinese text, by repealing “尼日尼亞” and substituting “尼日利亞”.

(15) The Schedule is amended, in the Chinese text, by repealing “吉爾吉斯” and substituting “吉爾吉斯斯坦”.

(16) The Schedule is amended, in the Chinese text, by repealing “多米尼加” and substituting “多米尼克”.

(17) The Schedule is amended, in the Chinese text, by repealing “安提瓜及巴布達” and substituting “安提瓜和巴布達”.

(18) The Schedule is amended, in the Chinese text, by repealing “沙地阿拉伯” and substituting “沙特阿拉伯”.

(19) The Schedule is amended, in the Chinese text, by repealing “孟加拉” and substituting “孟加拉國”.

(20) The Schedule is amended, in the Chinese text, in the entry relating to “法國”, by adding “所有” before “領土”.

(21) The Schedule is amended, in the Chinese text, in

the entry relating to “美利堅合眾國”, by adding “所有” before “領土”.

(22) The Schedule is amended, in the Chinese text, by repealing “特立尼達及多巴哥” and substituting “特立尼達和多巴哥”.

(23) The Schedule is amended, in the Chinese text, in the entry relating to “澳大利亞”, by adding “，巴布亞新畿內亞除外” after “領土”.

(24) The Schedule is amended by adding –

“Afghanistan

Albania

Azerbaijan

Bahamas

Brazil

Cook Islands

Dominican Republic

Gabon

Honduras

Iceland

Iran (Islamic Republic of)

Jamaica

Lao People’s Democratic Republic

Lebanon

Liberia

Malta

Marshall Islands

Republic of Moldova

Montenegro

Mozambique
Nepal
Nicaragua
Oman
Qatar
Rwanda
Saint Vincent and the Grenadines
Serbia
United Arab Emirates
Zambia”.”.

Schedule 4

By adding –

“38A. **Decision by HKIAC**

Rule 10(1) is amended by repealing “6(2)” and
substituting “8(2)”.”.

Schedule 4,
section 39

By adding before subsection (1) –

“(1A) The Schedule is amended, in the English text, by
repealing “[ss. 6 & 8]” and substituting “[rules 6 & 8]”.”.

Schedule 4,
section 56(a)

By deleting “55(2) and (3)” and substituting “55(2) and (6)”.