THE HONG KONG INSTITUTE OF
SURVEYORS

Your Ref: LP 19/00/3C Pt.24

27 June 2008

Office of the Solicitor-General
Legal Policy Division
Department of Justice
1st Floor, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Sir

Arbitration Law Reform

We refer to the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill ("the Bill").

Surveyors have been historically having substantial involvement in arbitration business, in particular in construction disputes, rent reviews and boundary disputes. As you may know, the Royal Institution of Chartered Surveyors and subsequently the Hong Kong Institute of Surveyors have been acting as one of the appointing authorities of arbitrators in Hong Kong since the middle of last century. We, the Hong Kong Institute of Surveyors, hope our views as set out below on the Bill would be useful.

We note that the Bill is intended to unify the different regimes that apply for 'international' and 'domestic' arbitration in Hong Kong. The Bill is based on the UNCITRAL Model Law and will effectively replicate the regime in place for 'international' arbitration.

It is our understanding that majority of arbitrations in Hong Kong, in particular those in relation to development and construction, rent and boundary disputes, are domestic arbitrations which are operated under a regime different from the Model Law. Parties welcome advantages in domestic arbitrations which advantages are absent under the Model Law, for example, disputes being referred to a sole arbitrator, consolidation of sets of proceedings (no such power under the Model Law), challenge to an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award, wider provisions than the Model Law relating to removal of arbitrators for misconduct; and limited rights of appeal against an award on questions of law (the Model Law has no appeal mechanism).

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We therefore see neither any desirability nor necessity to unify the different regimes that apply for international and domestic arbitrations in Hong Kong.

We have also considered the usefulness of Part 11 of the Bill which provides the so-called "opt-in" provisions allowing the parties to choose to depart from the Model Law approach in certain circumstances. Whilst there will be a compulsory opting-in because Section 101 provides for the opt-in provisions to apply automatically to an arbitration agreement if that agreement is entered into before, or at any time within 6 years following the Bill coming into effect and if the arbitration agreement refers to "domestic arbitration", it means that after this 6 years period, if the Bill is adopted, the starting point for arbitrations will be under the regime of international arbitration unless the parties agree to apply the "opt-in" provisions.

Similarly, for those arbitration agreements which are silent as to whether they are domestic arbitrations, the starting point for arbitrations will be under the regime of international arbitration unless the parties agree to apply the "opt-in" provisions. We see neither any desirability nor necessity to have the starting point for arbitrations to be under the regime of international arbitration.

On the contrary, due to those advantages in domestic arbitrations which are absent under the Model Law, we submit that the starting point for arbitrations should be under the regime of domestic arbitration unless the parties agree otherwise.

Having set out above our comments in general, we would like to specifically submit as follows:-

Part 1

(a) The Model Law is prepared by UN Commission on International Trade Law. Its purpose is to provide a guideline to 'International Commercial Arbitration'. There is no good reason to adopt the Model Law to both domestic and international arbitrations.

(b) We have reservation to delete 'commercial'. The application of the Bill should remain limiting to International Commercial Arbitration. For example, labour arbitration should not be controlled under the Bill as the procedures of labour arbitration should be much simpler than those of commercial arbitration.

Part 2

(a) The distinction between "domestic" and "international" should not be abolished.

(b) List of non-arbitrable subjects should be prepared even though the list may not be exhaustive. Some subjects are clearly not suitable for arbitration, for example, family disputes.

(c) Whilst we support the recognition of the development of electronic transaction, we have reservation on the acceptance of the service of Notice of Arbitration by e-mail. We understand that this practice has not been adopted in the UK. Certain communications by e-mail should not be allowed.

(d) We have reservation to designate HKIAC as the competent authority. Whilst it may be a competent appointing authority for International Arbitration, other professional institutions (for example, the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors, the Hong Kong Institute of Engineers, the Chartered Institute of Arbitrators, the Hong Kong Institute of Arbitrators, the Law Society of Hong Kong, the Hong Kong Bar Association, i.e. HKIA, HKIS and HKIE) are very experienced in handling domestic arbitrations and their names should be included.

Part 4

(a) For the same reasons said above, we have reservation on the designation of HKIAC as the authority.

(b) We support the alternative proposal that judges, magistrates and public officers should not be appointed as arbitrators. As arbitration is private in nature and there are many competent arbitrators available, the involvement of judges and public officers should be avoided.

(c) We have reservation on the proposal that mediators may also act as arbitrators. As they have heard some confidential information in conducting the mediation, it is unrealistic to assume that they could completely ignored such information in the subsequent arbitration and this casts doubt as to whether they would be influenced by such information in the arbitration proceedings. Besides, Ms. Teresa Cheng, QC, SC, when she was delivering a lecture at HKU SPACE, informed that it would be very difficult, if not impossible, to reset the mind set from a mediator back to an arbitrator since for arbitrator he has to be fair and impartial while as an mediator, his aim is to settle the dispute, not fair or impartial.

(d) We would suggest the adoption of the two separate system approach: first mediation, failing which arbitration will commence. It is that mechanism we are adopting in our Standard Form of Building Contract.

Part 8

It may not be helpful to allow an arbitral tribunal may make an award at any time. A time limit should be laid down (for example, 1 month for domestic arbitration or 3 months for international arbitration).

Part 9

It is understandable that we should not encourage any appeals which are frivolous, vexatious or abuse of the process, however it does not necessarily mean to abolish the power or function of the court to overlook arbitrators completely. In fact, the existing system of obtaining **leave** from the court will act as a screening process to carve out any unmeritorious appeals. We think it is undesirable if the Court of First Instance may not set aside an arbitral award on ground of errors of fact or law on the face of the award. It is manifestly unfair and unjust to the losing party.

Part 11

See comments given above.

Part 12

We suggest arbitrator and mediator should have be immunity from liability under the concept of quasi-judicial officer but we support the proposal that their employee and agent should be liable in certain circumstances.

We hope that the above views are useful to you. Should you require further elaboration, please feel free to contact our Institute at 2526 3679.

Yours faithfully

Yu Kam-hung
President