¶1-010 Arbitration in Hong Kong generally

The seeds of arbitration in Hong Kong go back to the early days of the establishment of Hong Kong as a British colony. However, it is only in the past twenty five to thirty years that arbitration has grown exponentially and has become an important and mainstream method of dispute resolution.

The first *Arbitration Ordinance*[1] was introduced in 1844 as a temporary measure to enable civil disputes in the colony to be determined prior to the establishment of a British style court system. Under this first *Arbitration Ordinance*, the Governor of Hong Kong could refer civil disputes to arbitration. Arbitration under this scheme was therefore something that was imposed on the parties by the Governor and not something that the parties chose for themselves. It was therefore radically different in nature to modern commercial arbitration in Hong Kong, which depends entirely on the parties having agreed to refer their disputes to arbitration. This first arbitration scheme was short lived. A British style common law court system was established in Hong Kong later the same year,[2] so that civil disputes could be heard and determined in that forum.[3] The 1844 law on arbitration did not survive the year.

Following this first, and rather unusual, foray into arbitration, Hong Kong started to adopt a more conventional (and English) legal framework for arbitrations. In 1855, for example, legislation was passed that provided, inter alia, for the legal recognition and enforcement of arbitration agreements entered into between contracting parties, and the enforcement (and setting aside) of arbitration awards.[4] This 1855 legislation was the start of the tradition of commercial arbitration that exists today in Hong Kong.

Hong Kong has, of course, periodically revised and updated its arbitration laws in order to reflect developments in arbitral and legal thinking. However, until the 1980s, most of the impetus in revising the arbitration legislation was simply to keep pace with changes in the equivalent English legislation. There was relatively little use made of arbitration in Hong Kong. For example, a survey by the Law Reform Commission of Hong Kong in 1980 indicated that there were only in the region of 14 to 20 new arbitrations per annum for the three years 1978–1980.

The Law Reform Commission concluded that one of the reasons for this low number was the lack of good arbitral facilities and arbitrators. It made a number of recommendations in order to help develop arbitration in Hong Kong, and to assist in turning Hong Kong into a leading centre for arbitration in Asia. These included the formation of the Hong Kong International Arbitration Centre ("HKIAC") and a number of other significant measures and investments.

The investment and steps taken since the early 1980s have had a radical impact. Hong Kong is now widely recognised internationally as a mature and leading centre for arbitration within

[1] Ordinance 6 of 1844.

[2] The Hong Kong Supreme Court was established in October 1844.

[3] See Derek Roebuck and Christopher Munn, *"Something So Un-English": Mediation and Arbitration in Hong Kong, 1841–1865*, (2010) (26(1) Arbitration Int. 87, pp93–95; and John Choong and J. Romesh Weeramantry, *The Hong Kong Arbitration Ordinance Commentary and Annotations*, Hong Kong: Sweet & Maxwell (2010), p3.

[4] This legislative framework was incorporated within the *Civil Administration of Justice (Amendment) Ordinance 1855* (Cap 6 of 1885).

the Asia Pacific Region, and worldwide. There are now regularly several hundred arbitrations each year conducted under HKIAC's auspices alone. For example, in the three year period 2010 to 2012, HKIAC handled in excess of 270 new arbitrations per annum.[5] This does not include arbitrations conducted in Hong Kong under the auspices of other arbitral institutions.

¶1-020 Construction Arbitration in Hong Kong in the period 1980s to 2008

The construction industry has been a major driving force in, and at the forefront of, the development and growth of arbitration in Hong Kong since the early 1980s. Most recently, during the consultation and drafting processes for the latest *Arbitration Ordinance*, the industry was accepted as being one of the major stakeholders for the purposes of arbitration reform. This was reflected in the decision to include provisions in the *Arbitration Ordinance 2010* ("the *Arbitration Ordinance*") unique – and only applicable – to the Hong Kong construction industry.[6]

The construction industry has generally been by far the single biggest user of arbitration services in Hong Kong for the three decades from the 1980s to 2008. For example, according to figures of the HKIAC, construction arbitrations accounted for 60% of all new arbitrations in 2006, 58% in 2007, and 56% in 2008.

There can be little doubt that arbitration was adopted as the primary method of dispute resolution for the construction and engineering industries in Hong Kong. This is the case for both public sector procurement as well as private sector projects.

Arbitration clauses are found in most, if not all, of the Hong Kong standard form contracts commonly in use as well as in the major international standard forms of contracts (such as the FIDIC Rainbow suite) commonly encountered.

This predominance of arbitration as the dispute resolution method of choice was also reflected by the experience of those lawyers who specialise in resolving construction disputes. The very great majority of disputes that escalate to formal legal proceedings are dealt with in arbitration and not by the Hong Kong courts. Where construction disputes are resolved by the Hong Kong courts they tend to involve disputes at the lower tiers of the construction process (sub contractors and sub-sub contractors) where contracts are often less well developed and less sophisticated.

¶1-030 Construction Arbitration in Hong Kong in the period since 2008

HKIAC statistics indicate that a change has taken place in the mix of Hong Kong arbitrations in the past few years. In 2009, the number of new construction arbitrations suddenly and noticeably dropped. There were 181 new construction arbitrations in 2006, 183 in 2007 and 208 in 2008. In 2009, however, the HKIAC figures show only 93 new construction arbitrations. This was not a one off fall. There were only 81 new construction arbitrations in 2010, 39 in 2011, and 70 in 2012.

The "market share" of construction arbitrations has also dropped since 2009. As discussed above, HKIAC figures show that construction arbitrations accounted for in the region of 60%

[5] HKIAC handled 291 new arbitrations in 2010, 275 in 2011 and 271 in 2012 (source HKIAC).

[6] See Section 101 of the *Arbitration Ordinance* and the discussion below.

http://www.pbookshop.com

of new arbitrations in the period 2006 to 2008. However, in 2009 and 2010, construction arbitrations accounted for only 28% of new arbitrations. This figure was down to 14% in 2011 and was 24% in 2012.

This noticeable shift in the annual figures for HKIAC construction arbitrations clearly invites speculation as to whether there has been a sea-change in dispute resolution methods for the local construction industry or whether other factors have caused or contributed to the numerical change. There is insufficient data and research available in order to provide a clear analysis and set of evidentially based conclusions to these questions. However, some general trends and observations can still usefully be discussed.

HKIAC's own conclusions are that the decline in the number of construction arbitrations can probably be accounted for a combination of factors including:

- a reduction and slow down in the number of major construction projects being undertaken in Hong Kong, with a consequential reduction in the number of construction disputes and arbitrations;
- an increased awareness of Alternative Dispute Resolution ("ADR") methods such as mediation;
- an increase in the number of international arbitrations handled by HKIAC, which tend to be less construction orientated, and which thus impacts on the 'market share' percentages.

¶1-040 The *Arbitration Ordinance 2010*: a major over-haul of Hong Kong Arbitration law

As was discussed briefly above, Hong Kong enacted an entirely new *Arbitration Ordinance (Cap 609)* in 2010, which came into force on 1 June 2012. This repealed and entirely replaced the previous ordinance.

Under the *Arbitration Ordinance 2010*, there is now one single arbitral regime that applies to all arbitrations (subject to various opt-in and opt-out provisions). There is no longer one regime for domestic arbitrations and a separate regime for international arbitrations. The unitary regime applies to all arbitrations. The new ordinance is based extensively on the UNCITRAL Model Law, although there are a number of carefully thought out modifications.

¶1-050 The *Arbitration (Amendment) Ordinance 2013*

In July 2013, amendments to the *Arbitration Ordinance 2010* were made. The most significant of which was the introduction of new provisions relating to the enforcement of arbitral awards made in the Macao Special Administrative Region of China ("Macau") Under the *Arbitration (Amendment) Ordinance 2013*, the courts of Hong Kong shall recognise and enforce arbitral awards made in Macau pursuant to the laws of arbitration of Macau and the courts of Macau shall recognise and enforce arbitral awards made in Hong Kong pursuant to the *Arbitration Ordinance* of Hong Kong.

Other amendments of significance to construction arbitrations included (i) the introduction of new provisions allowing the Hong Kong courts to enforce emergency relief granted by an

© 2015 Wolters Kluwer Hong Kong Limited

emergency arbitrator, whether made in or outside Hong Kong, in the same way as an order or direction of the court; and (ii) amendments to the provisions relating to taxation of arbitration costs, which provide for the costs of the arbitral proceedings to be taxed on a "party to party" basis if the parties to arbitration have agreed that such costs are to be taxed by the court.

¶1-060 The Arbitration (Amendment) Bill 2014

The Department of Justice is, at the time of writing, seeking views from the construction industry in relation to a Consultation Paper on the Arbitration (Amendment) Bill 2014 to address concerns over the legal uncertainties relating to the application of the provisions of Sch 2 of the *Arbitration Ordinance 2010* to parties to a domestic arbitration agreement. To address the concern, it is proposed that s1 of Sch 2 and s102(b)(ii) of the ordinance be amended. Reference can be made to the Department of Justice "Consultation Paper on the Arbitration (Amendment) Bill 2014" dated June 2014 for further details. At the same time an update to the list of state parties to the New York Convention as set out in the Arbitration (Parties to New York Convention) Order (Cap 609A) is included in the proposed amendments to the *Arbitration Ordinance*. It is anticipated that the amendments will take effect sometime in 2015.

¶1-070 Updating your arbitration agreements: sole arbitrators, consolidation, appeals

As is more fully discussed in Chapter 4, there are certain provisions in the *Arbitration Ordinance* that only apply if the parties have opted in to them. If the arbitration agreement is silent on these, then they do not apply to the arbitration.

These powers can be found in Sch 2 of the *Arbitration Ordinance* and include:

- disputes to be submitted to a sole arbitrator (Sch 2, s1);
- court powers to order consolidation of arbitrations (Sch 2, s2);
- court powers to decide preliminary questions of law (Sch 2, s3);
- court powers to deal with challenges to an award for serious irregularity (Sch 2, s4);
- court powers to deal with an appeal against an arbitration award on a question of law (Sch 2, s5).

The *Arbitration Ordinance* currently contains a series of transitional arrangements, meaning that:

- the parties to an arbitration agreement are deemed to have opted into these powers if they have entered into an arbitration agreement prior to June 2017 that provides that arbitration under the agreement is a domestic arbitration unless they expressly state to the contrary;[7]
- where a construction main contract contains an arbitration agreement entered into prior to June 2017 that provides that arbitration under the agreement is a domestic arbitration then these deemed opt-ins will also apply to any sub-contractor

[7] *Arbitration Ordinance* ss100 and 102.

http://www.pbookshop.com

arbitration agreements in exclusively Hong Kong construction sub-contracts unless they expressly state to the contrary.[8]

These transitional arrangements mean that prior to June 2017, there is no need to re-draft arbitration agreements so as to opt into the Sch 2 powers given that the arbitration agreement states that an arbitration is a domestic arbitration under the agreement. Importantly, however, adoption of the HKIAC Domestic Arbitration Rules is not sufficient to achieve this. The arbitration agreement must provide that the arbitration is a domestic arbitration.

This temporary arrangement will, however, cease to apply to any arbitration agreements (whether in main contracts or sub — contracts or any other type of contract) entered into after the 1 June 2017. From that date, the Sch 2 opt-in powers will only apply if the relevant arbitration agreement expressly opts-in to them – as is currently the case if the main contract arbitration clause does not expressly provide for the arbitration to be a domestic arbitration.

This is a potentially significant matters as, for example, all rights to appeal an arbitration award will effectively cease to exist for arbitration agreements entered into after 1 June 2017 unless arbitration agreements are re-drafted expressly to provide in an opt-in under Sch 2. While June 2017 is, at the time of writing, sometime off, the review and re-drafting exercise will take some time.

¶1-080 The current impact of ADR on dispute resolution for the construction industry

There has been some growth in the use of ADR methods for construction disputes including mediation, dispute resolution adviser ("DRA") and dispute resolution board ("DRB"). However, there is little evidence that ADR methods are being used in construction disputes on a regular basis or have transformed the approach to dispute resolution.

These ADR methods, if deployed sensibly and conducted well, should reduce the number and or scope of construction disputes that are ultimately determined by arbitration. ADR is not, however, strictly a replacement for arbitration but instead a set of methods or techniques that can prevent arbitration becoming necessary.

The fundamental nature and objectives of ADR techniques (such as mediation) on the one hand and arbitration on the other, are radically different:

- arbitration (in common with court litigation) involves a third party (the arbitral tribunal) resolving the parties' disputes by imposing on the parties a final and permanent impartial determination. The arbitral tribunal listens to the arguments and evidence and then gives a final and binding independent decision in relation to the parties' disputes;
- ADR (such as mediation), however, does not generally involve the parties' disputes being resolved by a third party imposing a final and binding decision or solution on the parties. Instead the objective of ADR is generally to help the parties themselves find solutions to problems and disputes so as to avoid the necessity of a third party imposing a final and binding independent decision.

[8] *Arbitration Ordinance* s101.

 © 2015 Wolters Kluwer Hong Kong Limited

http://www.pbookshop.com

ADR techniques can, in this sense, be loosely divided into two main types:

- some forms of ADR (such as mediation and some DRA schemes) are designed to help the parties identify and agree solutions for themselves.

  Mediators, for example, generally cannot impose any solution or decision on the parties. A mediator's role is to try help the parties find a negotiated solution that they can both agree to;
- other forms of ADR (such as expert determination, adjudication or some DRB schemes) do involve an independent third party imposing some sort of decision on the parties about the dispute. However, this usually involves a fairly quick, and rough and ready process, and the decision is usually only binding on an interim basis unless both parties decide to accept it.

  So for example, DRB schemes frequently require the DRB itself to give a decision on disputes referred to it during the construction project. The DRB gives a fairly quick, and rough and ready decision. That decision is generally binding on the parties until completion of the project has been achieved, and the parties must implement and respect the decision. Either party can, however, generally challenge that decision within a specified time limit, and refer the dispute to arbitration (for a final determination of the dispute to be made after the completion of the project). If neither party refers the dispute to arbitration, the DRB decision effectively becomes final and binding.

  This sort of ADR can assist the parties in two different ways. First, it enables quick and independent decisions about disputes to be made during the lifetime of the project. This can help keep the project moving by finding interim solutions to problems without waiting for long and expensive arbitral proceedings (which generally take place after completion). Secondly, it can often help avoid or limit full scale disputes and arbitrations. Experience shows that parties sometimes accept the DRB decision (even if is not favourable to them) and do not always refer the dispute to a full scale arbitration.

Whilst some progress has been made in the last decade to bring ADR methods in to the main stream of the construction industry, this has probably only made a fairly limited impact to date on the number of arbitrations and on construction dispute resolution in general. However, there is a prospect that progress may now accelerate in this regard as the Hong Kong Government encourages greater use to be made of the DRA system; the Construction Industry Council ("CIC") advocates dispute avoidance and ADR through the use a five-option multi-tier dispute resolution mechanism[9] and partnering;[10] and New Engineering Contract ("NEC") is piloted. These new initiatives in bringing ADR in to the main stream of the construction industry are outlined below.

- *Use of DRA in Government Contracts*

  A DRA is a neutral person jointly selected and paid for by the employer and the contractor in a construction contract. The DRA works with them as well as

[9] *Guidelines on Dispute Resolution*, CIC, September 2010 and *Reference Materials for Application of Dispute Resolution in Construction Contracts*, CIC, January 2013.

[10] *Guidelines on Partnering*, CIC, August 2010.

the architect/engineer to encourage cooperation and joint problem solving and to encourage the resolution of disagreements at the site level and if not successful, at the senior level, to ensure that disagreements are resolved expeditiously and cost-effectively before they turn into formal disputes.

The DRA system was first adopted by the Architectural Services Department in the Queen Elizabeth Hospital extension and renovation project in 1991. Since then, the DRA system has been adopted in over 70 building works contracts of the Architectural Services Department.[11] The Housing Department has also adopted the DRA system in all of its building and foundation contracts since 2004.

In 2005, the then Environment, Transport and Works Bureau developed and launched a pilot scheme for the trial use of the DRA system for civil engineering contracts in public works projects. Based on the results of the trial projects, the Government agreed in February 2011 that the DRA system should be generally adopted in all capital engineering works contracts with a value in excess of $200 million except for contracts of a routine nature, and contracts with a value below $200 million if this is justified by the complexity of the works. In January 2014, there are a total of 54 ongoing civil engineering contracts and 17 ongoing building contracts in which the DRA system has been adopted.[12]

- *CIC's Five-option Multi-tier Dispute Resolution Mechanism*

The courts have long realised a fundamental principle that justice delayed is justice denied. Recognising such principle and the long duration of a construction project, the CIC advocates that parties to a construction contract should have the right to have their disputes resolved as and when they arise during the currency of the works, and, that post-construction arbitration or litigation should only be used as a last resort.

The CIC also recognises the importance of disputes avoidance and advocates the use of measures, such as partnering and DRA, to resolve disagreements before they escalate into disputes. Where dispute is unavoidable, however, the CIC contends that they should be managed proactively and positively to encourage early and effective settlement. Five immediate dispute resolution options are put forward by the CIC for use by the parties in a construction contract; and, they are mediation, adjudication, independent expert certifier, expert determination and arbitration.

The CIC's five-option multi-tier dispute resolution mechanism is illustrated in Figures 1.1 and 1.2 below. Reference can be made to the CIC Guidelines on Dispute Resolution[13] and the CIC Reference Materials for Application of Dispute Resolution in Construction Contracts[14] for further details.

[11] Speech by Secretary for Development at the International Construction Law Conference, 6 December 2010.

[12] Speech by the Hon Rimsky Yuen, SC, JP Secretary for Justice at the IPBA-CIC Construction Conference 2014, *Dispute Avoidance and Resolution within the Construction Industry – An Asia-Pacific Perspective*, on 24 January 2014.

[13] *Guidelines on Dispute Resolution*, CIC, September 2010.

[14] *Reference Materials for Application of Dispute Resolution in Construction Contracts*, CIC, January 2013.

 © 2015 Wolters Kluwer Hong Kong Limited

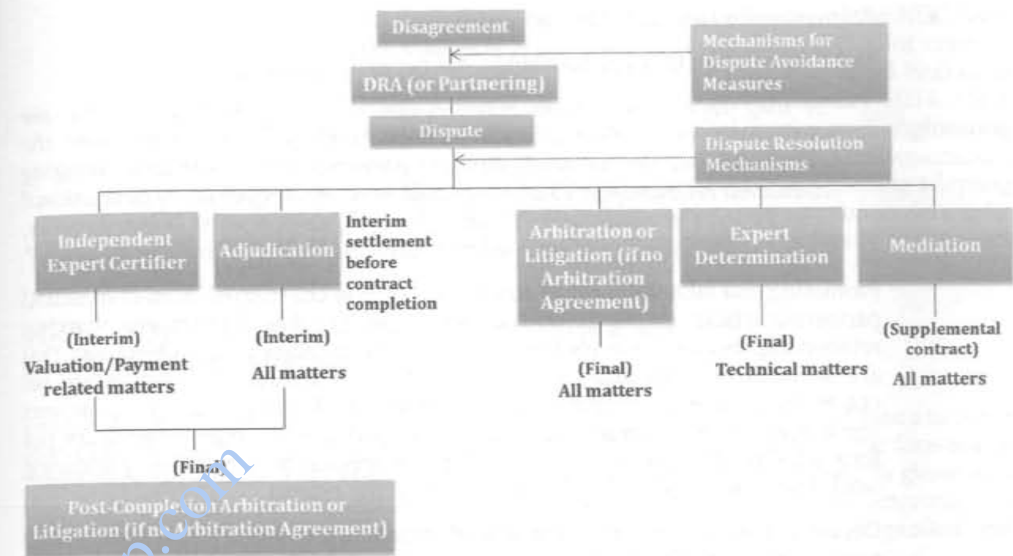

Figure 1.1 – Overview of CIC's Dispute Resolution Mechanism

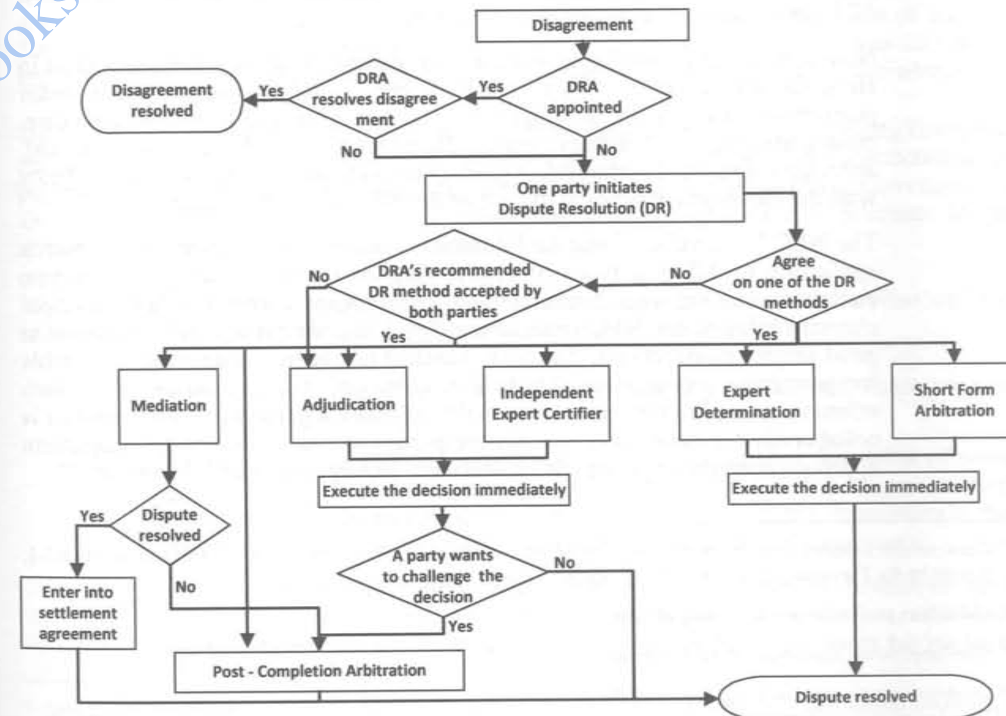

Figure 1.2 – Flowchart for CIC's Dispute Resolution Mechanism

http://www.pbookshop.com

¶4-010 Overview of the Arbitration Framework in Hong Kong

¶4-011 (a) Arbitration Ordinance (Cap 609)

The primary legislation governing arbitrations in Hong Kong is the *Arbitration Ordinance (Cap 609)*. This legislation was enacted on 11 November 2010 and came into effect on 1 June 2011, replacing the previous *Arbitration Ordinance (Cap 341)* (the old ordinance). The enactment of the current legislation was seen at the time as a major step in mordernising the arbitration system in Hong Kong and celebrated by most practitioners and parties alike. The major change brought by the current ordinance was the abolishment of the dual regime for "domestic" and "international" arbitrations under the old ordinance, and bring the legislation in line with the UNCITRAL Model Law. As reported by the Bills Committee on the Arbitration Bill,[1] 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 as parties to an arbitration will be saved from the trouble of having to identify whether any particular arbitral proceedings are "domestic" or "international" and which set of law is applicable.

While the current legislation has been in place since 1 June 2011, the old ordinance will continue to apply to arbitrations that were commenced before the coming into effect of the new legislation.

Further and of particular relevance to construction arbitrations in Hong Kong, the spirit of the old legislation lives on in the form of the "opt-in" mechanism under Sch 2 of the current legislation. Schedule 2 of the current ordinance is the schedule containing the key features of the "domestic" regime under the old ordinance. The applicability of Sch 2 to an arbitration in Hong Kong could be by way of an express opt-in or an automatic opt-in. This will be discussed in more detail later in this chapter. The availability of the Sch 2 opt-in under the current ordinance means that users of the arbitration process in Hong Kong will have the benefit of domestic arbitrations under the old ordinance, as well as the benefits brought about by the legislation having been updated in general.

¶4-012 (b) The Rules of the High Court (Cap 4A)

Order 73 of the *Rules of the High Court*, which came into effect on the same date as the current ordinance, sets out the procedures for various applications to the court under the current ordinance, which include:

- applications for interim measures under s45 of the current ordinance;
- applications to challenge an arbitral award on the ground of serious irregularity under s4 of Sch 2 to the current ordinance;
- applications for leave to appeal on a question of law arising out of an arbitral award under s6 of Sch 2 to the current ordinance;

[1] See para 15 of the Report of the Bills Committee on Arbitration Bill. The Bills Committee was formed in July 2009 to study the Arbitration Bill. After holding fifteen meetings and considering views from various organisations and individuals including the Hong Kong International Arbitration Centre, the Hong Kong Construction Association and International Chamber of Commerce, the Bills Committee published a report on 22 October 2010.

© 2015 Wolters Kluwer Hong Kong Limited

- applications to decide any preliminary question of law under s3 of Sch 2 to the current ordinance;
- applications to set aside an arbitral award under s81 of the current ordinance;
- applications for leave to enforce an order or direction of an arbitral tribunal under s61 of the current ordinance; and
- applications for leave to enforce an award made by an arbitral tribunal.

Order 73 also sets out the time limits for making certain applications under the current ordinance and it is worth noting that an application to challenge an arbitral award on the ground of serious irregularity or for leave to appeal on a question of law arising out of an arbitral award must be made within 30 days after the award is delivered, whereas an application to set aside an arbitral award can be made within 3 months from receipt of the award. Extensions of time may be allowed by the court under O3 r5 of the Rules of the High Court if the court considers appropriate. In exercising its discretion, the court will usually consider factors such as (1) the length of the delay; (2) the reasons for the delay; (3) the merits of the intended application; and (4) the degree of prejudice to the other party if an extension is granted.[2]

It is to be noted that following the Civil Justice Reform in 2008, the Rules of the High Court have been significantly revised. Of particular relevance to bringing challenges to arbitral awards in the court is that leave to appeal to the Court of Appeal will now have to be sought first from the judge or master against whose judgment or order an appeal is to be lodged,[3] and it is only if the first instance judge or master refuses to grant leave that an application for leave may be made to the Court of Appeal.[4] In respect of an application to the first instance court for leave to appeal, the court of first instance has no jurisdiction to grant any extension of time, and the power to extend time under O3 r5 has no application.[5] It is therefore imperative that any application for leave to appeal is made within time.

It is further to be noted that similar to the situation with the old ordinance, the old Order 73 will continue to apply to arbitrations governed by the old ordinance.

¶4-013 (c) The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL and adopted by the United Nations Commission on International Trade Law on 21 June 1985. The Model Law was developed to address considerable disparities in national laws on arbitration and to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs to international commercial arbitration.

[2] *Chiu Sin Chung v Yu Yan Yan, Angela* [1993] 1 HKLR 225.

[3] Order 59, rule 2B (4) of the Rules of the High Court permits the Court of Appeal to entertain an application for leave to the Court of Appeal in the first instance but justification as to why leave is sought directly from the Court of Appeal has to be provided by the applicant.

[4] Order 59, rule 2B of the Rules of the High Court.

[5] *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515.

http://www.pbookshop.com

A few amendments were made to the original 1985 version of the Model Law in 2006. The amendments made in 2006 include the expansion of the definition of "arbitration agreement"[6] and the granting of more comprehensive powers to arbitral tribunal to order interim measures and to grant preliminary orders including *ex parte* orders.[7]

Save for a few modifications,[8] the Model Law including the amendments made to it in 2006 have now been adopted as part of the arbitration legislation in Hong Kong by the current ordinance.

¶4-014 (d) The New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 and came into force on 7 June 1959. Considered as the cornerstone of international arbitration, the New York Convention serves two principal purposes. One is to require courts of contracting states to refuse to exercise jurisdiction over the parties' dispute if the parties have a valid arbitration agreement in place and to compel the parties to refer their dispute to arbitration. The other is for contracting states to recognise and enforce arbitral awards made in other contracting states, subject to the declarations and reservations of certain contracting states.[9] Hong Kong has been a party to the New York Convention since 1975.[10] This offers much incentive for parties especially those involving in international transactions to choose arbitration over court litigation because enforcement of foreign court judgments in Hong Kong and enforcement of judgments obtained from Hong Kong court in foreign jurisdictions are not straightforward if the judgments are obtained from or to be enforced in foreign jurisdictions with which Hong Kong has no reciprocal agreements. In contrast with the only handful of jurisdictions with which Hong Kong has reciprocal agreements for the enforcement of judgments, the number of signatory states to the New York Convention is much higher (150 as at the date of writing).

¶4-020 The Arbitration Ordinance

¶4-021 (a) Background

The old ordinance (Cap 341), which was based largely on the *UK Arbitration Act 1950*, was enacted in 1963. It had undergone various amendments to accommodate and adopt the New York Convention, the Model Law and other developments in the arbitration system in Hong Kong throughout the years. In 1998, the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Centre established a Committee on Hong Kong

http://www.pbookshop.com

[6] Article 7 of the Model Law.

[7] Chapter IV A of the Model Law.

[8] See the next section on the *Arbitration Ordinance*.

[9] The *Indian Arbitration and Conciliation Act 1996* which governs the enforcement of foreign awards by Indian courts, for example, requires the Indian Government to gazette a state before an arbitral award made in that state will be recognised and enforced by Indian courts. China was not one of the gazetted states until 19 March 2012. The addition of China, hence Hong Kong, should increase the appeal of Hong Kong as an international arbitration centre.

[10] The New York Convention was adopted by Hong Kong in 1977 by reason of it being a British colony and the United Kingdom's accession to the New York Convention on its behalf. Since the transfer of sovereignty to China in 1997, Hong Kong remains as a party by virtue of China's accession to the New York Convention.

© 2015 Wolters Kluwer Hong Kong Limited

Arbitration Law to recommend reforms to the arbitration law. The Committee issued a report in 2003, recommending that the original ordinance (Cap 341) be redrawn and a unitary regime with the Model Law governing all arbitrations be created. To implement the recommendations of the Committee, the Department of Justice published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill in December 2007. A revised Arbitration Bill, taking into account all the comments and recommendations made during the consultation process, was introduced into the Legislative Council in June 2009. The final text of the Bill was enacted by the Legislative Council on 10 November 2010 and the *Arbitration Ordinance (Cap 609)* came into effect on 1 June 2011.

¶4-022 (b) Aspects of the current ordinance relevant to construction arbitration

As discussed above, the current ordinance has modernised the arbitration system in Hong Kong. It has done so by largely following the Model Law, adopting its headings and chapters and containing number references to corresponding provisions in the Model Law, with the intention of making Hong Kong a Model Law jurisdiction.[11] A majority of the articles in the Model Law are incorporated into the current ordinance verbatim and in their entirety, hence making the current ordinance more user-friendly to international practitioners. Yet, certain articles of the Model Law have been modified to suit the special features of and to give some elements of uniqueness to the jurisdiction. For example, s46 of the current ordinance, which is based on Art 18 of the Model Law, provides that the arbitral tribunal is required to give the parties a "reasonable" opportunity to present their cases in arbitral proceedings whereas the original wording of Art 18 of the Model Law provides that each party shall be given a "full" opportunity of presenting his case. The modified wording in the current ordinance is considered to be more appropriate than the original text of the Model Law.

Aspects of the current ordinance that are likely to be relevant to construction arbitrations are highlighted below.

Form of arbitration agreement

Art 7 of the Model Law, which provides for the definition of arbitration agreement, sets out two options for enacting states to consider. The two options differ in that Option I requires the agreement to be in writing, although a written record of the contents of an agreement made orally or in any other form will also suffice, whereas Option II allows an arbitration agreement to be in any form. The current ordinance has adopted Option I.[12] In the circumstances, for an arbitration agreement to be recognised as such under the current ordinance, the same must be recorded in writing.

It should be noted that a mere reference in a contract to a document containing an arbitration clause can also constitute a written arbitration agreement, provided that that contract is in writing and the reference is such as to make that clause part of the agreement. Incorporation by reference to an arbitration clause contained in other written document is commonly found in back-to-back agreements which are often used by contractors and subcontractors. In considering whether there has been incorporation of arbitration clause by reference, the court has to determine the parties' intentions when they entered into the contract by reference to the words used. In *Astel-Peiniger Joint Venture v Argos Engineering*

[11] See para 4 of the Report of the Bills Committee on Arbitration Bill.

[12] Section 19 of the *Arbitration Ordinance (Cap 609)*.

and Heavy Industries Co Ltd [1994] 3 HKC 328, the plaintiff was a sub-subcontractor entrusted with paint works pursuant to a subcontract concluded between the main contractor and the defendant as a subcontractor. The sub-subcontract was on a back-to-back basis and proportional to the upper tier subcontract. The plaintiff was provided with a copy of the subcontract prior to the conclusion of the sub-subcontract without raising any objections. The defendant made an application to stay the proceedings and refer the dispute to arbitration on the grounds that the sub-subcontract incorporated by references the terms and conditions of the subcontract, including an arbitration clause therein. The court ordered that the action be stayed and held that the provision in the sub-subcontract that it would be "back to back" with the subcontract sufficiently illustrated the intention of the parties to incorporate the arbitration clause into the sub-subcontract; and that the provision that the sub-subcontract should be "proportional" to the subcontract indicated that some modifications would have to be made to the arbitration clause so that it would be capable of being performed in the context of the sub-subcontract.

Stay of proceedings in favour of arbitration

It is often an issue in construction disputes as to whether there is a valid arbitration agreement, or the circumstances under which the court will hear the parties' dispute or will stay proceedings in favour of arbitration. Since the adoption of Art 8 of the Model Law into the old ordinance in 1997, a wealth of case law has developed concerning the application and interpretation of this provision. According to Ma J (as he then was) in *Tommy C.P. Sze v Li & Fung (Trading) Ltd* [2003] 1 HKC 418 the four questions which the court needs to address are: (i) is the clause in question an arbitration agreement?[13] (ii) is the arbitration agreement null and void, inoperative or incapable of being performed? (iii) is there in reality a dispute or difference between the parties? (iv) is the dispute or difference between the parties within the ambit of the arbitration agreement?

The above position remains the same under the current ordinance. Under s20, where the arbitration agreement complies with the requirements set out in s19, the court is obliged to grant a stay of proceedings upon request made by a party to the action not later than submitting his first statement on the substance of the dispute unless the arbitration agreement is "null and void, inoperative or incapable of being performed".

Once it is shown to the satisfaction of the court that there is a *prima facie* case of the existence of a valid arbitration agreement covering the subject matter of the dispute, the court must order a stay and there is no residual discretion to do otherwise. Even where liability is not contested but the amount of damages remains in issue, the court must order a stay.[14] The court's power to refuse a stay is available only if the arbitration agreement is "null and void, inoperative or incapable of being performed".

[13] Ma J (as he then was) stated in his judgment in *Tommy C.P. Sze & Co* that *"An agreement which does not compel parties to have disputes or differences resolved by arbitration is not an arbitration agreement for the present purposes* (a stay application). *Where, for example, an option is given to the parties to go to arbitration if they so choose but with litigation in the courts being an available option as well, this is not truly an arbitration agreement".*

[14] *Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru* [1978] 2 All ER 254.

© 2015 Wolters Kluwer Hong Kong Limited

Null and void

An arbitration agreement will become null and void if circumstances which it is under have the effect of making it invalid. An arbitration agreement will be void if the subject matter of the arbitration agreement is not arbitrable as a matter of law and public policy in Hong Kong. For instance, disputes relating to criminal charge and relations between parents and children are not arbitrable. In *Fiona Trust & Holding Corp & Others v Yuri Privalouv & Others* [2007] EWCA Civ 20, the court held that if the fraudulent event has impeached the arbitration agreement directly, then the agreement shall be regarded as null and void.

Inoperative

An arbitration agreeemnt is inoperative if there is a condition precedent to the arbitration agreement taking effect and it has not been fulfilled. In the obiter views of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, Lord Mustill stated that it would make no sense for a court to refer the dispute to arbitration when a preliminary step was required to be taken first. However, failure to comply with a contractual requirement to refer the dispute to an expert or to mediation before it is submitted to arbitration may not render an arbitration agreement inoperative. In *Westco Air Conditioning Ltd v Sui Chong Construction Engineering Co Ltd* [1998] HKEC32, where the arbitration clause in the contract provided that any dispute would first be referred to an architect before having the dispute referred to arbitration, Westco argued that the requirement that the court proceeding be stayed in favour of arbitration was inapplicable because the arbitration clause was inoperative as the dispute was yet to be referred to an architect. Rejecting Westco's argument, the court ordered that the action be stayed in favour of the arbitration and held that when it was shown that the matter fell within the scope of the arbitration agreement, a court had no option but to stay the proceeding before it. In *T v TS* [2014] HKCFI 1427, a party sought to resist an application to stay the court proceedings in favour of arbitration on the basis that the arbitration agreement had become inoperative. The argument was that the arbitration agreement was discharged by performance after the parties had referred certain disputes to arbitration. The court, in rejecting the argument, adopted the sensible and rational business persons approach and held that the parties, given their agreement to arbitrate, could not sensibly have intended for further or remaining disputes (after an award had been rendered) to be subjected to litigation in courts.

Incapable of being performed

Where the terms of the arbitration agreement are too vague or contradictory to the terms of the contract, an arbitration agreement is incapable of being performed. In *Lucky-Goldstar International (H.K.) Limited v Ng Moo Kee Engineering Limited* [1993] 1 HKC 404, where the arbitration agreement referred by mistake to a non-existent organisation and non-existent rules, the court held that the parties' intention to arbitrate were shown in the arbitration clause and the reference to a non-existent organisation and non-existent rules did not render the arbitration agreement null and void, inoperative or incapable of being performed.

The reluctance of the Hong Kong courts to interfere with arbitral proceedings is further demonstrated in *Lin Ming and another v Chen Shu Quan and others* [2012] HKCFI 627. In that case, the Court of First Instance allowed an application to stay court proceedings in favour of an arbitration under s20 of the current ordinance and despite accepting that the Hong Kong courts have jurisdiction under s21L of the *High Court Ordinance* to restrain arbitration cases, made clear that *"such jurisdiction must be exercised very sparingly and with great caution"* and accordingly declined to grant an anti-arbitration injunction.

http://www.pbookshop.com

Opt-in mechanism

The construction industry, being one of the prime users of the domestic regime of arbitration under the old ordinance, was a main driver in ensuring that certain important features of the old domestic regime are maintained in the current ordinance. With a high quality and highly dependable judiciary in Hong Kong, it can be seen that a certain amount of judicial intervention under limited circumstances can be useful and healthy towards maintaining consistency and the development of a body of case law on important construction law issues. The current ordinance provides parties with the liberty to adopt the old domestic regime by way of the opt-in mechanism under Sch 2. The opt-in mechanism is provided under ss99 to 101 of the current ordinance.

Section 99 provides that parties may elect one or more of the "opt-in" provisions set out in Sch 2 to apply to their arbitration, hence creating a bespoke regime for their arbitration. These "opt-in" provisions are:

- determination of dispute by a sole arbitrator (para 1 of Sch 2);
- giving the court power to consolidate arbitrations (para 2 of Sch 2);
- giving the court power to determine preliminary question of law (para 3 of Sch 2);
- challenge to an arbitral award allowed on the grounds of serious irregularity (paras 4 and 7 of Sch 2); and
- appeal against an arbitral award allowed on a question of law (paras 5, 6 and 7 of Sch 2).

The court's power to consolidate arbitration is of particular relevance to the construction industry. This will be discussed in more detail in the section on multi-party disputes below.

Under s100, the "opt-in" provisions in Sch 2 will automatically apply to an arbitration agreement entered into before, or within six years after the commencement of the current ordinance, i.e. until 1 June 2017, which provides that arbitration is domestic. Domestic arbitration is specified in most government and private standard forms of construction contracts.

Section 101 specifically caters for the needs of the construction industry by providing that if all the "opt-in" provisions in Sch 2 apply to an arbitration under a construction contract pursuant to s100, then all sub-contracts containing an arbitration agreement shall be deemed to have adopted all of the "opt-in" provisions in Sch 2 as well.

One aspect of the opt-in mechanism which should be noted is that the automatic opt-in at the sub-contract level is only applicable to an automatic opt-in at the main contract level under s100. Should the main contract provide for an express opt-in, as opposed to allowing the automatic opt-in to operate during the six-year period after the commencement of the current ordinance, the automatic opt-in under s101 has no application.

Despite the aforesaid and to reinforce party autonomy, s102 allows the parties to opt-out of the automatic opt-in provisions if they choose to do so. There are some uncertainties regarding the

application of s102(b)(ii) in the event of the parties agreeing on the number of arbitrators in a domestic arbitration. As a result, s1 of Sch 2 and s102(b)(ii) of the ordinance may be amended.[15]

Multi-party disputes

Disputes in relation to constructions projects involving more than two parties such as the employer, contractor and sub-contractor are often based on the same or a similar set of facts. If these parties pursue separate arbitration proceedings, problems arise as to possible inconsistent findings being made by different arbitral tribunals. In addition, running separate arbitrations is likely more time consuming and less cost effective.

Consolidation

To tackle this problem, the different arbitration proceedings can be consolidated into a single case, which is to be dealt with in one set of proceedings or in different sets of proceedings before the same tribunal one being heard following the other.

The opt-in provision under s2 in Sch 2 of the current *Arbitration Ordinance* allows consolidation where there are two or more arbitration proceedings, if the court is satisfied that a common question of law or fact arises in the different proceedings; that the rights to relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or that for any other reason it is desirable to make an order under this section.

Alternatively, consolidation clause can be included in the arbitration agreement providing a mechanism for the consolidation of related dispute between the employer, contractor, sub-contractor before a single tribunal.

Name borrowing

A different type of multi-party problem arises in construction projects which involve multiple levels of contracts between the employer and the sub-contractors with no direct contractual relationship between the employer and the sub-contractors. Under the doctrine of privity of contract, a person cannot enforce rights under a contract to which he is not a party. Accordingly, in the absence of a direct contractual connection between an employer and a sub-contractor, neither of them will be able to bring arbitration proceedings against each other with respect to the works carried out by the sub-contractor in a project.

A solution to such a problem is to include a name borrowing clause in the sub-contract entered between a main contractor and a sub-contractor, allowing the sub-contractor to bring arbitration proceedings in the name of the main contractor or allowing the sub-contractor to be joined as a party to an arbitration between the main contractor and the employer. Under the name borrowing arrangement, the right to enforce the award remains on the main contractor but not the sub-contractor. The contractor's obligation may be limited to assistance and co-operation only as held in *Belgravia Property Co Ltd v S&R (London) Ltd* [2001] BLR 424, where Belgravia entered into a contract with the contractor for renovation works. The contractor and S&R then entered a sub-contract for plastering work which contained a name borrowing clause allowing S&R to use the contractor's name or join in arbitration proceedings at its instigation. It was held that although the sub-contractor was entitled to commence arbitration

[15] See part (c) in ¶4-039 of this chapter.

http://www.pbookshop.com

¶8-048 Arrangements for the hearing 182
¶8-049 Rules of evidence 182
¶8-051 Adversarial or inquisitorial procedure 182
¶8-052 Admissibility and weight of evidence 183
¶8-053 Burden of proof 183
¶8-054 Expert evidence 184
¶8-055 Form of expert evidence 184
¶8-056 Limit on number of expert witnesses 184
¶8-057 Appointment of expert witnesses 184
¶8-058 Meetings of experts 185
¶8-059 Witness evidence (non-expert) 185
¶8-061 Examination on oath 186
¶8-062 Court Assistance on taking evidence 186
¶8-063 Discovery 186
¶8-064 Privilege 186
¶8-065 Categories of privileged documents 187
¶8-066 Extensions of time 187
¶8-067 Security for costs 187
¶8-068 Exclusion agreement 188
¶8-069 Order for directions 188
¶8-070 Other matters to consider prior to preliminary conference 188
¶8-071 Challenge to the composition of the tribunal 188
¶8-072 Proceedings involving two or more languages 188
¶8-073 Duty on claimant to proceed expeditiously 189
¶8-074 Mediation-Arbitration 189

© 2015 Wolters Kluwer Hong Kong Limited

¶8-010 Introduction

The preliminary conference is the first meeting the arbitrator will hold with the parties after his appointment in order to, amongst other things, give directions for the procedural timetable of the arbitration. While the meeting will therefore usually take place early on in the arbitration process, the parties should have already prepared themselves as fully as possible ahead of participating in the conference so as to ensure as far as possible that appropriate directions are given (and incidentally to convey a positive impression to the arbitrator, as this will be the first time they meet the arbitrator regarding the dispute). Prior to the preliminary conference, the arbitrator will usually prepare an agenda for the meeting. Both parties are advised to consider the items on the agenda and a wide range of matters in order to establish the key building blocks of their case, including ascertaining the length of time they believe is required to prepare themselves for the various stages of the arbitration. For example, the parties will consider issues such as: the time required for the preparation of pleadings, the discovery stage; the possible need for experts and if so their disciplines; the time required in relation to the preparation of experts' reports and how many witnesses (non-expert and expert) will be called. Such matters need to be considered ahead of the preliminary conference so that when the conference takes place, the parties are able to make their effective submissions to the arbitrator as to the procedural timetable and the arbitrator will have been fully briefed by both parties by the end of the conference and is then able to strike a balance regarding the parties' needs.

The purpose of this chapter is to provide a general practical guide to the matters likely to be addressed at the preliminary conference and the preparatory work which the parties should undertake beforehand. There are also a host of interlocutory or interim applications that can be made by both parties either at the preliminary conference or at a later date but these will not be considered in detail in this chapter.

¶8-020 The preliminary conference

¶8-021 Purpose of preliminary conference. The primary purpose of a preliminary conference is for the arbitrator to fix procedural directions and the timeframe for the parties to adhere to in order to facilitate the arbitration. During the preliminary conference, the arbitrator can consider submissions from the parties as to the procedures required to be completed before setting the timetable. Following the conference, the arbitrator will issue an order for directions that will reflect what the parties have discussed and which the parties must then comply with. Although the parties may be eager to explain their side of the story to the arbitrator, it is important to remember that the preliminary conference is neither the time nor the forum in which the parties are permitted to voice their versions of events. The purpose of the conference is purely to allow the parties to discuss the subject matter of the dispute and the procedural steps required. At this stage the arbitrator will not usually request any evidence or oral submissions by the parties or their legal representatives in respect of the dispute.

¶8-022 Timing of preliminary conference. The arbitrator will usually convene a preliminary conference with the parties and their representatives as soon as possible after the parties have agreed to his appointment and the arbitrator has duly accepted the appointment. Sometimes, for smaller disputes where the parties are able to agree the rules and procedures of the arbitration, a preliminary conference may be dispensed with and the matter can be dealt with by correspondence. However, in most cases the arbitrator will want to hold a

http://www.pbookshop.com

preliminary conference in order to meet the parties and to get a feel of the dispute as well as to give directions. It is sometimes possible at this stage for the arbitrator to suggest a means of resolving the dispute without the need to progress to a full arbitration hearing, such as by conducting the arbitration by way of a documents-only procedure, or a determination of liability issues before quantum. Construction arbitrations normally involve detailed analysis of facts and law, and summary procedures are usually not appropriate. However, interlocutory applications or preliminary issues should most certainly be explored, as early determination on specific issues may lead to a speedier resolution of complex construction disputes.

¶8-023 **Party autonomy**. One of the key advantages of arbitration is that the parties to a dispute are able in principle to decide in their own terms how they would like their dispute to be resolved. Section 3 of the *Arbitration Ordinance* states:

> *"(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.*
>
> *(2) This Ordinance is based on the principles:*
>
> *(a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and*
>
> *(b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."*

In addition, s47 of the *Arbitration Ordinance* provides that:

> *"(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) [Not applicable].*
>
> *(2) If or to the extent that there is no such agreement of the parties, the arbitral tribunal may, subject to the provisions of this Ordinance, conduct the arbitration in the manner that it considers appropriate."*

Under s47 of the *Arbitration Ordinance*, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In that spirit of independence, the more the parties can agree without the involvement of the arbitrator, the more beneficial it is likely to be for the orderly conduct of the reference. If in the event the parties are unable to reach agreement, the arbitrator may step in to offer suggestions so as to encourage a compromise or failing that the arbitrator will then decide the issue.

¶8-024 **Agenda**. At the same time as when he notifies the parties of the time and the venue of the preliminary conference, the arbitrator will usually send the parties an agenda for the preliminary conference. The matters set out in the agenda will be considered at the preliminary conference insofar as they have not already been clarified by the arbitration agreement or by some other prior agreement between the parties. The arbitrator will generally work through

© 2015 Wolters Kluwer Hong Kong Limited

the agenda item-by-item, asking both parties to address him on each matter and noting whether the parties have reached agreement on each item. In respect of the procedural items, the parties should aim to agree to as many of these as possible in order to assist the arbitrator and avoid being considered obstructive or unreasonable by the arbitrator. See "**Matters to be considered**" below, which set out the common matters in a typical agenda.

¶8-025 **Agreeing directions in advance**. It is quite common for the parties' legal representatives to have been in communication prior to the conference and to have reached agreement in relation to many points of the agenda and further to have also agreed on the timetable and directions for the arbitration. The main benefit of this is that the parties will save time and costs at the preliminary conference itself and may even dispose of the need to have one. The agreement of directions in advance will also assist the parties in understanding what their respective desired timetables are. Upon reaching any agreement as to directions, the parties should then inform the arbitrator as soon as possible of the agreement so that he may opine on the agreed approach and offer any views that he may have on the feasibility of the approach as well as his own suggestion (if any). In addition, the arbitrator will wish to be satisfied that the timetable is appropriate and the hearing dates will of course depend partly on his availability.

http://www.pbookshop.com

¶8-026 **Matters to be considered.** Unlike the *English Arbitration Act1996*, the *Arbitration Ordinance* does not contain examples of procedural and evidential matters for the tribunal to consider. Nevertheless, the range of matters which may be addressed at the conference is wide-reaching. A non-exhaustive list of typical issues for consideration is set out below:

- the arbitrator's appointment (such as the nationality, qualifications and/or experience of arbitrators, and the selection method of arbitrators);
- arbitrator's schedule of charges and deposits;
- cap on recoverable costs;
- any objections as to jurisdiction of the arbitrator;
- procedural rules and governing law to be applied;
- the application of evidential rules in the arbitration which the parties or the tribunal otherwise wish to adopt (such as the IBA Rules on the Taking of Evidence in International Arbitration);
- the seat of the arbitration;
- communications with the arbitrator;
- language of the arbitration and translation of documents;
- security for costs;
- timetable for pleadings and pre-hearing review;
- discovery;
- how the issues in dispute are to be identified;
- bifurcation and determination of preliminary issues;
- any exclusion agreement;

- arrangement for the hearing(s); venue, transcript and timing;
- whether opening addresses to be reduced to writing;
- whether factual evidence is to be adduced and the number of witnesses;
- whether expert evidence is to be adduced by the parties and their disciplines;
- whether final addresses are to be reduced to writing;
- the need (or otherwise) for a reasoned award; and
- taxation of costs.

The matters listed above represent typical areas which an arbitrator will discuss with the parties during the preliminary conference. Usually, not all of them will arise. Further, the arbitrator may not necessarily deal with all the matters during the preliminary conference and he may choose to give directions at some later stage during the course of the arbitration. Some of the above listed items are discussed in detail in previous chapters but it is convenient to consider certain items in further detail below.

¶8-030 Matters to be considered during the preparation for preliminary conference.

¶8-031 Identification of the written arbitration agreement and appointment of the arbitrator. Under s19 of the *Arbitration Ordinance (Cap 609)*, the Ordinance only applies to written arbitration agreements. The writing requirement is broadly defined to include "*if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*." Further, it is provided that the requirement of a written arbitration agreement can be satisfied by an electronic communication (including, for example, communications by electronic data exchange, electronic mail or telegram) if the information is accessible so that it may be used for subsequent reference. These amendments to the *Arbitration Ordinance* have been made to reflect the requirements of current contract practice and modern means of communications. For example, in the construction practice, an arbitration agreement can be referred to in exchanges of letters or by e-mail correspondence or even orally, if that oral agreement is recorded in writing. The implementation of s19 means that there is no longer a strict requirement for the agreement to be written provided that the parties can demonstrate that there is an arbitration agreement recorded in some form.

¶8-032 Cap on recoverable costs. If during the period of preparation for the preliminary conference, either party considers that the costs of the reference may become disproportionate to the actual amount in dispute, that party is free to apply to the arbitrator requesting him to place a cap on the amount of costs recoverable.

Section 57 of the *Arbitration Ordinance*, empowers an arbitral tribunal to give directions to limit the recoverable costs of the whole or any part of the arbitration proceedings to a specified amount. Recoverable costs refer to the party's own costs (i.e. excluding the fees and expenses of the arbitral tribunal). This places a cap on the amount of recoverable costs, but the actual amount of costs that is recoverable will be determined through the process of assessment or taxation of costs. Any direction given may also be varied at any subsequent stages, as long as the direction is made sufficiently in advance (which is a question of fact depending on the circumstances of the case).

© 2015 Wolters Kluwer Hong Kong Limited

While each party is free to make such an application to limit recoverable costs at any stage of the arbitral proceedings, it is advisable to make the application sufficiently in advance of incurring the relevant costs or taking the steps which may be affected by the direction.

Section 57 (and its predecessor s2GJ in the 1996 *Arbitration Ordinance*) has been sparingly used.

¶8-033 Substantive law to be applied. The issue of the substantive law and rules of law to be applied are usually considered at the preliminary stage of the arbitration. The parties must consider what law or rules of law are to be applied to the substance of the dispute. Section 64 of the *Arbitration Ordinance* states:

> *"(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*
>
> *(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."*

It is not uncommon for parties to have referred a dispute to arbitration without due consideration of the applicable law. There are three categories of applicable law that the parties should consider applying to a dispute referred to arbitration as follows:

(a) the governing law of the contract — this is the law governing the substance of the dispute which is usually stipulated under a contract;

(b) the law of the arbitration agreement — this relates to the law governing the validity of the arbitration agreement; and

(c) the procedural law of the arbitration or *lex arbitri* — this is the law governing the conduct of the arbitration.

The parties should review the terms of the contract in dispute to establish what the governing law of the contract is as early as possible.

¶8-034 Communications with the arbitrator. Any communications with the arbitrator must be copied to the other side to ensure procedural fairness. This will usually be made clear during the preliminary conference.

¶8-035 Language. Parties should consider which language they would prefer the arbitration to be conducted in. Construction arbitrations in Hong Kong are usually conducted in English. For example, it is worth noting that the HKIAC Domestic Rules provide that the language of the arbitration conducted in accordance with the HKIAC Domestic Rules shall be in English unless the parties and the arbitrator agree otherwise. As may be expected, many construction agreements are in Chinese and therefore require translation for the purpose of arbitration. In such instance, the parties may consider that the arbitration should be conducted instead in Chinese. Under s50 the *Arbitration Ordinance*, the parties are permitted to agree upon the language to be used in the arbitral proceedings:

http://www.pbookshop.com

"(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal."

The language of the arbitration is usually discussed at the preliminary conference and then recorded in the tribunal's first procedural order.

Under s50 of the *Arbitration Ordinance*, a distinction is drawn between written statements, hearings and awards or other communications for the tribunal, which must be in the language of the arbitration and documentary evidence produced in the arbitration, where translation into the language of the arbitration is at the tribunal's discretion. This distinction highlights the potential burden of translations in cases involving voluminous documents.

¶8-036 Arbitrator's schedule of charges and deposits. The arbitrator will usually provide his schedule of charges well in advance of the preliminary conference. The most important matters for the parties to settle are:

a) daily and hourly rates for the time spent;
b) cancellation and postponement charges;
c) reimbursement of expenses;
d) security for the arbitrator's fees; and
e) whether to tax the arbitrator's costs.

In relation to item (d), the arbitrator will usually request that each party deposits a certain amount of money on account from time to time as security for the arbitrator's fees.

The arbitrator may also wish to appoint a tribunal secretary for administration of the arbitration, such as organising hearings.

¶8-037 Identification of issues. It is essential that, beginning with the claimant, each party must identify the issues in dispute as early on in the arbitral process as possible. One reason for the early identification of issues is that if both parties are aware of the issues between them, they may be able to discover a way to reach a compromise on certain issues; thereby facilitating a more streamlined and accelerated procedure to be adopted. The procedure for resolving issues cannot be chosen until the issues are identified. For example, if the parties are in agreement over the facts and the issues in dispute solely pertaining to law, the appropriate procedure may be for the arbitration to be conducted by documents alone. The claimant should provide the initial outline of the issues and the arbitrator will usually invite the respondent to comment on the outline as well to indicate whether it has any intention of filing a counterclaim and the particulars of any such counterclaim.

 © 2015 Wolters Kluwer Hong Kong Limited

¶8-038 Determination of preliminary issues. In some cases, the parties may need or find it useful to deal with preliminary issues which are dispositive of the main dispute. A preliminary issue can involve a decision to be made on a point of law or jurisdiction of the arbitrator for example. It is often the case that, during the early stages of the reference, a party discovers that a key to the potential success of its claim depends upon the determination of a preliminary question of law. From a practical point of view, if this preliminary issue is determined at an early stage of the proceedings, the result will be to save unnecessary delay and costs. For example, the claimant, in seeking to maximise its chances of success in the arbitration, may seek to join the respondent's parent and subsidiary companies as joint respondents to the arbitration but it is the respondent's view that the arbitral tribunal does not have jurisdiction over the subsidiary company. Other examples of preliminary issues that the parties usually refer to the arbitrator for his determination include the governing law of the agreement, whether the exchange of letters constitute a binding agreement, or whether a claim should be time barred due to the expiry of the limitation period. In this instance, it may be necessary to seek an immediate determination from the arbitrator on the preliminary issue of jurisdiction before proceeding with the main hearing in order to save time and money. Where both parties are represented by counsel, the arbitral tribunal will request that each party will by way of written submissions explain its case in respect of the preliminary issue and the legal basis supporting its assertions and allegations. The arbitrator must then decide which of the parties' positions he considers to be correct. He cannot delegate this or any other decision to anybody else.

¶8-039 Preparation of statements of case. In construction arbitrations, the Claimant and the Respondent usually prepare statements of case in which they set out the case that they each want to put forward. Each case must be set out in full so as to allow the other party the opportunity of dealing with it. Section 51 of the *Arbitration Ordinance* provides that:

"Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit."

Statements of case comprise a statement of claim and a statement of defence and are normally drafted in a narrative style setting out both matters of fact and of law. The statements include any evidence to be called in support of each allegation and witness statements may be annexed, but this is rare[1]. The statements of case will help the other party to fully understand the dispute and may also serve to facilitate settlement of the dispute before the hearing. The parties can include points of law and summaries of evidence in their pleadings. Subject to the arbitrator's discussions with the parties during the preliminary conference, the following represents a typical list of statements of case to be drafted in an arbitration relating to a construction dispute:

[1] The Hong Kong International Arbitration Centre Domestic Arbitration Rules (Art 7.2) provides that a statement of claim must set out *"a full description in narrative form of the nature and circumstances of the dispute specifying all factual matters and, if necessary for the proper understanding of the claim, a summary of any contentions of law relied upon and the relief claimed"*.

http://www.pbookshop.com

¶12-010 Introduction

Disputes in the Hong Kong construction industry, as with many other developed economies, have been the focus of detailed consideration and debate in the last two decades. During this period, the construction industry in Hong Kong has developed distinct patterns and preferred strategies for resolving disputes, most notably through the use of post-completion arbitration. However, post-completion arbitration has not successfully addressed construction dispute resolution's primary concern – how to deal expeditiously with claims for extension of time and reimbursement of cost – in a satisfactory manner.

This chapter outlines the current debate within the construction industry on dispute resolution in Hong Kong, starting with the Tang Report in 2001 and looking in tandem at the more recent Guidelines on Dispute Resolution issued by the CIC in 2010, which show that even after a decade of discussion, many of the key concerns identified by the Tang Report remain unaddressed. It is understood that in 2014, the CIC will progress a fresh review of the industry's needs in dispute resolution and other areas, picking up on some of the themes of the Tang Report.

We will then look at common multi-tier dispute resolution clauses which are currently in use in Hong Kong, which represent the "near future" for construction dispute resolution in Hong Kong. The prevalence of multi-tiered dispute resolution in more recently drafted contracts illustrates the gradual progress towards an understanding that not all disputes can be resolved in the same way. However, this understanding has had limited traction, with post-completion arbitration remaining entrenched as the final form of dispute resolution in all contracts. Recent contracts proffered by the Hong Kong Government and the MTRC, the new HKIA Standard Form Contract as well as a bespoke form of contract used by a prominent Hong Kong private developer, illustrate how dispute resolution still perpetuates many of the concerns over wasted time and heavy costs. These contracts are also examples of how multi-tier dispute resolution is used in Hong Kong reflecting what is considered acceptable as a template for resolving future disputes. Finally, this chapter contends that current developments are insufficient to address the concerns expressed in the Tang Report.

This chapter then looks to the medium term to identify developments that are on the horizon for construction disputes in Hong Kong. These include the adoption of the NEC forms of contract by the Government, the enactment of Security of Payment legislation, the further development and regular use of the Dispute Resolution Advisor System by the HKSAR Government and the CIC's recommendation of a flexible five-tiered dispute resolution mechanism as a better solution to the challenges of dispute resolution. The impact of these developments, if they come to pass within the next decade, will be a dramatic transformation of how disputes are resolved in the industry and will have a dramatic impact on both the role of arbitrations and the courts in construction dispute resolution. There will be a move away from the existing method of dispute resolution, since each prospective development envisages speedy, cost-effective interim dispute resolution. This will move the construction industry forward from its status quo of post-completion arbitration and change the way participants in the construction industry behave both during projects and when resolving disputes.

¶12-020 Construction Dispute Resolution in Hong Kong

As with other developed economies, dispute resolution in the construction industry in Hong Kong has been the focus of detailed consideration and debate. The Government first

reviewed the dispute resolution process used within its own contracts as part of the Grove Report in 1998.[1] The Grove Report advocated the wider adoption of dispute resolution advisors and the adoption of "no-decision" mediation. In 2001, the Construction Industry Review Committee submitted its report to the Chief Executive ("the Tang Report") which highlighted a number of concerns with the operation of the construction industry in Hong Kong.[2]

Dispute resolution was recognised to be of particular concern. Due to the inherent complexity and sophistication of the construction projects undertaken in Hong Kong, the manner in which such projects typically have been, and continue to be procured and the risks that are inherently likely to arise as a result of such projects, dispute resolution has proven to be problematic: especially when relatively simple risk allocation models have been adopted. As the Tang Report recognised:[3]

> *"While construction contracts apportion risks inherent in construction between the employer and the Contractor, it is normal and natural that the Contractor may on occasions submit claims for additional costs, time or damages associated with those risks where liability is claimed to rest with the employer."*

The Tang Report identified that the construction industry could seek to discover greater value in project delivery through review of its dispute resolution mechanisms:[4]

> *"13. The resolution of disputes can be expensive and time-consuming. We urge employers, consultants and Contractors to adopt a proactive approach to resolving claims and disputes as they arise. Where appropriate, alternative dispute resolution techniques (such as the use of a dispute resolution adviser or dispute review board) should be used instead of formal and binding adjudication means, which will remain as a last resort."*

Construction disputes in Hong Kong have exhibited an observable pattern as to the type of dispute that is likely to occur. As the Construction Industry Council ("CIC") recognised in its Guidelines on Dispute Resolution ("CIC Guidelines")[5] in 2010 and again when it released its Reference Material for Application of Dispute Resolution in Construction Contracts in 2013 ("CIC Reference Material"),[6] these disputes have tended to proliferate in relation to interim payment, final account and release of retention, payment to suppliers, challenges to the impartiality of consultants, abandonment of the works and defects and rectification.

Yet, despite the understanding that disputes proliferate along fairly predictable lines, there has been little achieved so far to reduce and manage disputes. As recognised by the CIC Guidelines:[7]

---

[1] Grove, J. B. (1998). *Consultant's Report on Review of General Conditions of Contract for Construction Works*, The Government of the Hong Kong SAR.

[2] CIRC, *Construct for Excellence: Report of the Construction Industry Council*, January 2001.

[3] Tang Report, para 5.60.

[4] See ibid, 13.

[5] CIC, Guidelines on Dispute Resolution, version 1, September 2010, pp10-11.

[6] CIC, *Reference Material for Application of Dispute Resolution in Construction Contracts*, Version 1, January 2013.

[7] CIC, Guidelines, p9.

http://www.pbookshop.com

"Hong Kong promotes a harmonious society and encourages the use of contracts within the construction sector. Yet, in the provision of dispute resolution mechanisms, most contracts provide for post-contract completion arbitration. This arrangement tends to create a hostile environment and prohibits parties from resolving their differences as soon as a dispute arises, resulting in the entrenchment of views and thereby damaging the spirit of partnership. This type of dispute resolution clause has long been abandoned in various other jurisdictions as they have been seen as unfair and detrimental to the cash flow of Contractors. This arrangement is unsatisfactory for reasons elaborated below."

The reliance on arbitration in Hong Kong is evidenced by the statistics produced by the Hong Kong International Arbitration Centre ("HKIAC"). In 2012, the last year for which information is available, 24% of the disputes handled by the HKIAC concerned construction.[8] This percentage share is reproduced relatively consistently in HKIAC's statistics for previous years.[9] As an industry, the construction sector is the most significant user of arbitration services in Hong Kong.

It is fair to assume that many of these arbitrations were post-completion arbitrations. The dominance of post-completion arbitration as the preferred form of binding dispute resolution in Hong Kong is virtually all-pervasive. It is the preferred form of final dispute resolution in Hong Kong Government, and Hong Kong Housing Authority contracts and the latest contracts let by MTRC on its many ongoing rail developments. It is required by the HKIA Standard Form Building Contract 1999 which is a form of contract often used in the private sector,[10] as well as in many of the bespoke forms of contract used by private employers in Hong Kong.

The use and suitability of post-completion arbitration has been the subject of extensive discussion in Hong Kong.[11] This has focused on identifying the key features that must be possessed by a dispute resolution mechanism in the construction industry before it can be considered suitable. The Tang Report focused on two key elements: firstly, the early active management of disputes to ensure efficient and proactive resolutions and secondly, the ability to select the most appropriate form of dispute resolution given the particular requirements of the dispute between the parties.[12]

The CIC Guidelines identify two further considerations. The first is the fundamental principle that justice delayed can be justice denied, a principle long recognised by the law of Hong Kong. The CIC Guidelines emphasise how important this principle can be in the context of a construction contract, where a requirement to wait until the completion of the works can often mean a multi-year wait before arbitration can commence.[13] The second principle is the

[8] HKIAC, Statistics-2012, http://www.hkiac.org/index.php/en/hkiac/statistics.

[9] 2011 appears to have been an exception, where only 14% of cases involved construction disputes. See HKIAC, Statistics-2011, http://www.hkiac.org/index.php/en/hkiac-statistics/case-statistics/433.

[10] Although these provisions have been ameliorated to some extent by Clause 41.5 in the less used 2006 edition of the standard form which permits specific types of dispute to be submitted to arbitration at any time, with all other disputes being reserved for post-completion arbitration.

[11] CIC Guidelines, p20.

[12] Tang Report, ¶5.63.

[13] CIC Guidelines, p12.

© 2015 Wolters Kluwer Hong Kong Limited

importance of cash flow within the construction industry.[14] Disputes further up the contractual chain which remains unresolved will have an impact on all Sub-Contractors and suppliers further down the chain, causing a cascade of cash flow problems throughout the project. This is exacerbated by long delays in resolving disputes through post-completion arbitration.

By its very nature, post-completion arbitration is in essence delayed justice, since it requires that the binding dispute resolution mechanism is put on hold until the completion of the project. Furthermore, this delay can ultimately compromise the effectiveness of the arbitral proceedings as the lapse of time may cause witnesses' recollections to fade, key personnel to move on to other employment and of course for physical evidence to be lost or at least, made more difficult to obtain.[15] Similarly, the prospect of a long delay leads the parties to try and "convince" the other that they are correct. This can lead to protracted correspondence setting out the parties' positions, which in turn entrenches those positions and breaks down the mutual spirit of cooperation that is needed on any significant construction project.[16] The ultimate concern is of injustice. Where Contractors lack access to immediate justice and cash flow is controlled by the Employer, Contractors may be forced to settle or compromise their rights due to the relative weakness of their negotiating position. Ultimately, as is recognised by the CIC Guidelines, post-completion arbitration has been found wanting because it cannot be counted on to deliver against these important considerations.[17]

Three further points are worth making in relation to the use of post-completion arbitration in Hong Kong. The first is to recognise that the challenges and criticisms predominantly focus on the fact that the arbitration can only be held post-completion. Issues of delay, cash flow, access to justice, fading evidence and unwilling settlements are all issues of timing. The critics of post-completion arbitration are not critics of arbitration. They are criticisms, to use the words of the CIC, of how *"[t]he practices in Hong Kong in relation to dispute resolution mechanism in some contracts...have not kept up-to-date."*

Secondly, arbitration itself is a remarkably flexible system capable of delivering a dispute resolution procedure that can be tailored to fit the needs of the parties as well as the nature of the dispute. In the experience of the authors, construction arbitration in Hong Kong tends often to be deployed in a relatively fixed format without adequate attention paid to the flexibility and options that it may provide. This in turn leads to rigidity in how arbitrations are conducted which leads to higher costs and extends the time taken to complete an arbitration. Yet neither of these features is inherent to arbitration itself. This can be seen by the contracts used by the Hong Kong Housing Authority where short form arbitration is increasingly used as the final form of dispute resolution to combat concerns over time and cost.[18]

Finally, it is important to remember that arbitration is capable of delivering justice and, more importantly, a high quality of justice. Arbitration provides parties with an opportunity to thoroughly ventilate their respective positions, to prepare and marshal the best available

[14] Ibid, p13.

[15] Ibid, p20.

[16] Ibid.

[17] Ibid, p9.

[18] CIC Reference Material, p31.

http://www.pbookshop.com

evidence and to obtain accurate and reasoned awards that are capable of enforcement through the judicial system, both in Hong Kong and internationally.[19]

It is incontrovertible that arbitration, including post-completion arbitration, has an important role to play in the future of construction dispute resolution in Hong Kong.[20] As is recognised by both the Tang Report and the CIC Guidelines, resolving disputes in the construction industry is about striking the right balance between the nature of the dispute, the methods of dispute resolution available and the costs (in both time, effort and money) to the parties in resolving the dispute. This balancing exercise will determine the right method of resolving the dispute that has arisen between the parties. For example, a dispute between parties that deals with the extent of the defects liability period (arising at the end of a contract) might quite sensibly be reserved for post-completion arbitration since the parties would be close to the end of delivery of their principal obligations to each other. The analysis of benefit and burden in this instance may well justify the parties "parking" their dispute while they proactively close out their remaining obligations under the contract. Finally, in one area at least, post-completion arbitration remains pre-eminent: post-completion arbitration is the best way of reviewing and revising any interim decision reached through an interim dispute resolution mechanism, such as adjudication.[21]

¶12-030 The Near Future: Multi-tier Dispute Resolution in Hong Kong

The "near future" of construction disputes in Hong Kong has already been written. More precisely, the relevant provisions have already been drafted into contracts; these contracts have gone out to tender; Contractors have been awarded those contracts; Sub-Contractors have been appointed; and the projects are currently being carried out. It is inevitable that some percentage of these contracts will be the subject of dispute in the future (or indeed may have already encountered situations giving rise to disputes) that will be submitted for resolution through more formal dispute resolution mechanisms in the future.

This section looks at the various provisions for dispute resolution used by the major employers in Hong Kong. In relation to each dispute resolution provision, the path that is taken by a dispute is identified, as it rises up through the now seemingly ubiquitous multi-tier dispute resolution provision; through various structured tiers of immediate dispute resolution; and then on to the post-completion arbitration, if it is required. In addition, unique and individual features of each clause and each employer are also noted, so as to identify those aspects of disputes with those particular employers that are likely to be unique. Comparing the various provisions of these contracts, both in where they are in harmony and where they are in contrast, gives a portrait of what construction dispute resolution will look like in Hong Kong in the near future.

This section then looks briefly at the legal framework that will govern construction dispute resolution in Hong Kong for the near future. In large part, this has been recently put into place with the revised *Arbitration Ordinance (Cap 609)* and consequential review of the Domestic

[19] Part 10 *Arbitration Ordinance (Cap 609)* & the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38.

[20] CIC Guidelines, p27.

[21] Ibid, p22.

 © 2015 Wolters Kluwer Hong Kong Limited

Arbitration Rules to give effect to the new *Arbitration Ordinance (Cap 609)*. These will have significant impacts on the near future of construction arbitrations in Hong Kong.

¶12-040 The near future of construction arbitration in Hong Kong: contracts with the Hong Kong Government

The Government of the Hong Kong SAR ("Government") is one of the most regular employers in construction and engineering contracts in Hong Kong. In addition, the Government is a unique employer since it is the only employer that procures infrastructure projects such as roads and bridges (other than MTR Corporation ('MTRC')) and it also procures construction contracts associated with the provision of essential public services such as waste disposal services and medical services; as well as projects that pursue policy objectives such as district redevelopments and cultural enhancement. In other jurisdictions, the importance of government as a client has been recognised, with it having a particular onus to be a "best practice" client, providing its staff with necessary training to achieve this and establishing benchmarks to measure performance in the industry.[22]

For Government projects, the traditional contract structure — with projects having Employer, Contractor and Engineer actively working together on projects — continue to prevail. The benchmark dispute resolution clause in relation to infrastructure projects remains Clause 86 of the General Conditions of Contract for Civil Engineering Works 1999 Edition. Clause 86 is relatively complex and multi-tiered, providing for a reference to the Engineer, mediation, pre-completion arbitration for some disputes and post-completion arbitration for all others. The process is rigid, with many short timelines and key notices having to be provided within the stipulated timelines.

Clause 86 reads as follows:

> **SETTLEMENT OF DISPUTES**
>
> 86. (1) If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision, instruction, order, direction, certificate or valuation by the Engineer whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Unless the Contract shall have been already terminated or abandoned the Contractor shall in every case continue to proceed with the Works with all due diligence and he shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised in mediation or arbitration as hereinafter provided. Such decision shall be final and binding upon the Contractor and the Employer unless either of them shall require that the matter be referred to mediation or arbitration as hereinafter provided. If the Engineer shall fail to give such decision for a period of 28 days after being requested to do so or if either the Employer or the Contractor be dissatisfied with any such decision of the Engineer then either the Employer or the Contractor may within 28 days after receiving notice of such decision, or within 28 days

[22] Sir Michael Latham, *Constructing the Team*, Final Report July 1994, paras 1.13-1.19.

http://www.pbookshop.com

after the expiry of the said decision period of 28 days, as the case may be, request that the matter be referred to mediation in accordance with and subject to The Government of the Hong Kong Special Administrative Region Construction Mediation Rules (the Mediation Rules) or any modification thereof being in force at the date of such request.

(2) If the matter cannot be resolved by mediation, or if either the Employer or the Contractor do not wish the matter to be referred to mediation then either the Employer or the Contractor may within the time specified herein require that the matter shall be referred to arbitration in accordance with and subject to the provisions of the *Arbitration Ordinance (Cap 341)* or any statutory modification thereof for the time being in force and any such reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance. Any reference to arbitration shall be made within 90 days of:

(a) the receipt of a request for mediation and subsequently the recipient of such request having failed to respond, or

(b) the refusal to mediate, or

(c) the failure of the mediation proceedings to produce a settlement acceptable to the Employer and the Contractor, or

(d) the abandonment of the mediation, or

(e) the Engineer failing to make a decision for a period of 90 days after being so requested to do so and subsequently neither the Employer nor the Contractor having requested mediation, or

(f) the receipt of a notice of a decision by the Engineer and subsequently neither the Employer nor the Contractor having requested mediation.

(3) The arbitrator appointed shall have full power to open up, review and revise any decision (other than a decision under Clause 46(3) not to vary the Works), instruction, order, direction, certificate or valuation by the Engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision above referred to. Save as provided for in sub-clause (4) of this Clause no steps shall be taken in the reference to the arbitrator until after the completion or alleged completion of the Works unless with the written consent of the Employer and the Contractor.

Provided that:

(a) the giving of a certificate of completion in accordance with Clause 53 shall not be a condition precedent to the taking of any step in such reference;

(b) no decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator on any matter whatsoever relevant to the dispute or difference so referred to the arbitrator as aforesaid.

(4) In the case of any dispute or difference as to the exercise of the Engineer's powers under Clause 81(1) the reference to the arbitrator may proceed notwithstanding that the Works shall not then be or be alleged to be complete.

© 2015 Wolters Kluwer Hong Kong Limited

(5) The Hong Kong International Arbitration Centre Domestic Arbitration Rules shall apply to any arbitration instituted in accordance with this Clause unless the parties agree to the contrary.

(6) The reference to arbitration under sub-clause (2) of this Clause shall be a domestic arbitration for the purposes of Part II of the *Arbitration Ordinance (Cap 341)*.

The starting point for any dispute or difference that arises under Clause 86 is for it to be referred to the Engineer for its decision. The Engineer has 28 days to reach its decision which it must give to the parties in writing. Such a decision is final and binding on the parties unless they choose to refer the dispute to mediation or arbitration. If the Engineer fails to give a decision within the 28 days, or gives a decision that is unsatisfactory to either the Contractor or the Employer, then the matter can be referred to mediation under The Government of the Hong Kong Special Administrative Region Construction Mediation Rules, though such referral is not mandatory.[23]

If the matter cannot be resolved by mediation, or if either the Employer or the Contractor do not wish to submit the matter to mediation, they may submit it to arbitration within 90 days of any of the following events:[24]

- the receipt of a request for mediation and the failure of the recipient of the request to respond;
- the refusal to mediate;
- the failure of the mediation proceedings to produce a mutually acceptable settlement;
- the abandonment of the mediation;
- the Engineer failing to make a decision for 90 days after being requested to do so, and neither party having requested mediation; or
- the receipt of a notice of a decision by the Engineer and subsequently neither party having requested mediation.

Referral to arbitration is the final step in the dispute resolution procedure whilst the works are ongoing. No steps can be taken in relation to the reference to the arbitrator until the completion or alleged completion of the whole of the works unless the Employer and the Contractor both agree to do so.[25] The only exception to the requirement for post-completion arbitration is for disputes that arise out of the Engineer's power under Clause 81(1) of the contract. Clause 81(1) permits the Engineer to certify that the Contractor has become bankrupt, has sub-contracted the entirety of the works to another, has failed to construct the works properly or has failed to proceed with the works as required. The effect of such failure is that the Employer may avail himself of various remedies, including the power to determine the contract and re-enter the site. Understandably, disputes in relation to the Engineer's certification under this clause

[23] General Conditions of Contract for Civil Engineering Works, Clause 86(1).

[24] Ibid, Clause 86(2).

[25] Ibid, Clause 86(3).

http://www.pbookshop.com