THE HONG KONG INSTITUTE OF
SURVEYORS

Your Ref: LP 19/00/3C Pt.49

19 February 2010

Department of Justice
Legal Policy Division
4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

By Fax & Post
2869 0720

Attn: Mr Frank Poon, Deputy Solicitor General

Dear Mr Poon,

Clauses 24(1) and 102 of the Draft Arbitration Bill

Thank you for your letter dated 13 January 2010 on the captioned.

The Dispute Resolution Committee of the Hong Kong Institute of Surveyors has convened meetings among its members to discuss the issues raised in your letter, viz Clauses 24(1) and 102 of the Draft Arbitration Bill. I now enclose for your consideration a report of that Committee.

If you have any queries, please do not hesitate to contact our Ms Margaret Yung at 2526 3679.

Yours sincerely,

K W Chau
President

Enc Appendix

香港中環康樂廣場1號怡和大廈8樓801室
Suite 801, 8/F Jardine House, 1 Connaught Place, Central, Hong Kong
Telephone: 2526 3679 Facsimile: 2868 4612 E-mail: info@hkis.org.hk Web Site: www.hkis.org.hk

香港測量師學會

Appendix

Report of the Dispute Resolution Committee of the Hong Kong Institute of Surveyors

First we must reiterate that we do **NOT** support the Arbitration Bill. This is our primary position as set out in our submissions attached to our letter of 21 September 2009 (under our ref CB2/BC/9/08) to the Legislative Council. Our response to your letter of 13 January 2010 is subject to and without prejudice to such primary position.

Our comments on Clauses 24(1) and 102 (now you renumber it as 100A) of the Bill are as follows.

Revised Clause 102 (to be renumbered as Clause 100A)

Generally, we have no objection to this clause save that:

(a) the word "included" appears to be placed in a wrong position. The word *'included'* should either be deleted or repositioned such that Clause 100A(1) should either read

"Where all the provisions in Schedule 2 apply under section 100 (a) or (b) to an arbitration agreement in any form referred to in section 19 in a construction contract, if"

Or

"Where all the provisions in Schedule 2 apply under section 100(a) or (b) to an arbitration agreement in any form referred to in section 19 ***is included*** *in a construction contract, if -" (emphasis added).*

(a) changing Section 100A(1)(a) to:-

"the whole or any part of construction operations to be carried out under the construction contract ***(such operations and contracts may include designs, advice or consultation works)*** *("relevant operation") is subcontracted to any person under another construction contract* ***(which may in part or in whole be with designs, advice or consultation works)*** *("subcontract"); and" (suggested additional wording emphasised).*

The additional wording is catered for design and build contracts which are becoming more popular these days. Some of these contracts may have design and consultancy subcontracts.

(b) adding "subject to subsection (1)(a)," at the beginnings of Sections 100A(4)(a) and 100A(4)(b).

Clause 24(1) of the Bill

Our stance as explained in our submissions attached to our letter ref CB2/BC/9/08 dated 21 September 2009 to the Legislative Council still stands. We opine that Clause 24(1) should be amended according to our submissions. We would wish to explain further our submissions below.

For example, very often, arbitration clauses require arbitration to be conducted by an arbitrator to be agreed between the parties or failing agreement, within a certain period of time after a party has given its opponent a written request to concur in the appointment of an arbitrator, before an arbitrator is appointed at the request of either party through an appointing body other than HKIAC.

If neither party makes a request to their agreed appointing body upon their failure to agree an arbitrator, this may be argued by one of the parties to amount to a failure to act according to the agreed arbitration procedure.

By having "or" between Article 11(4)(a), 11(4)(b) and 11(4)(c), in the above situation, if neither party makes a request to their agreed appointing body for appointment of an arbitrator upon their failure to agree an arbitrator, and if a party apply to HKIAC instead of their agreed appointing body, it may arguably trigger HKIAC's jurisdiction to make an appointment of an arbitrator under Article 11(4)(a) (because not requesting the parties' agreed appointing body to make an appointment (and a party to apply to HKIAC instead of the agreed appointing body) are arguably failures to act according to the agreed arbitration procedure) without the need to see whether the parties' agreed appointing body has failed to make an appointment under Article 11(4)(c). This being the case, one of the parties may take the opportunity to side-step the parties' agreed appointing body for making an appointment of an arbitrator. We therefore believe what we have proposed last time in amending Article 11(4) is fully justified.

We note that you have explained to Mr Edward Shen of HKIA in paragraph 6 of your letter ref LP 19/00/3C Pt 48 dated 11 December 2009, a copy of which is attached for easy reference, that *'...In each of the situations mentioned above, the HKIAC will only exercise its power to appoint an arbitrator if there is non-compliance with an agreed appointment procedure. In other words, if the agreed appointment procedure provides for a third party (which may be a professional body) to appoint an arbitrator, the party or parties would not be allowed to bypass the third party by seeking the assistance of the HKIAC directly where the third party is not in default.'*

With respect, your explanation seems to be inconsistent with your explanation in paragraph 5 of your letter stating *'In any of these situations, the parties are allowed to seek assistance from the designated authority (ie the Hong Kong International Arbitration Centre...to take the necessary measure, thereby avoiding any deadlock or undue delay.'* In fact paragraph 5 of your letter confirms that our concern, as explained above, is valid, ie in any one of the situations under Article 11(4)(a) or 11(4)(b) or 11(4)(c), *one or both of* the parties are allowed to seek assistance from HKIAC.

Moreover, we consider your remark *"In each of the situations mentioned above, the HKIAC will only exercise its power to appoint an arbitrator if there is non-compliance with an agreed appointment procedure"* is no more than your speculation based on faith or trust. Such remark is not supported by the letters of the proposed Arbitration Bill. There is no guarantee nor certainty that when situation in Article 11(4)(a) or 11(4)(b) arises alone, and in the absence of situation said in Article 11(4)(c), HKIAC will not exercise its power to appoint an arbitrator. If you disagree, please enlighten us by citing the verbatim of the proposed Arbitration Bill which prohibits HKIAC from making any appointment of an arbitrator when the situation under Article 11(4)(c) has not arisen or which states that HKIAC will not make any appointment of an arbitrator unless the situation said in Article 11(4)(c) has arisen.

We would therefore urge you to consider adopting our suggested amendments to Clause 24(1) of the Bill.

In addition to that, we would be grateful if you could arrange a letter to be issued by HKIAC to HKIS confirming paragraph 6 of your letter dated 11 December 2009 to Mr Edward Shen of HKIA.

Conclusively, we reiterate that our submissions dated 21 September 2009 still stand. Apart from the above comments, it is our stance that the Draft Arbitration Bill should not be passed as it is not the correct way to promote Hong Kong as an international arbitration centre.

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律政司
法律政策科
香港金鐘道66號
金鐘道政府合署高座4樓
圖文傳真：852-2869 0720
網址：www.doj.gov.hk

DEPARTMENT OF JUSTICE
Legal Policy Division
4/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong
Fax : 852-2869 0720
Web Site : www.doj.gov.hk

本司檔號 Our Ref.: LP 19/00/3C Pt. 48
來函檔號 Your Ref.: BP/CDRD/SC/20112009
電話號碼 Tel. No.: 2867 4752

Fax: 2519 6011

11 December 2009

Mr. Edward Shen
Chairman, Contract and Dispute Resolution Committee
The Hong Kong Institute of Architects
19/F, One Hysan Avenue
Causeway Bay
Hong Kong

HKIA
11 DEC 2009

President	Hon Treasurer
Vice President	Council
Hon Secretary	Board Chairman
File	

Dear Mr Shen,

Arbitration Bill – Clause 24(1) Appointment Authority

Thank you for your letter dated 20 November 2009 on the Arbitration Bill ("the Bill").

Clause 24(1) of the Bill gives effect to the recommendation in the 2003 Report of the Committee on Hong Kong Arbitration Law published by the Hong Kong Institute of Arbitrators ("the 2003 Report"). Paragraph 18 of the 2003 Report reviewed the UNCITRAL Model Law provision on the appointment of arbitrators and recommended that Article 11 of the UNCITRAL Model Law should be adopted unchanged in Hong Kong and apply to all cases.

The recommendation is in keeping with the international trend to adopt the text of Article 11 of the UNCITRAL Model Law verbatim or with minor variations in their municipal legislation. Australia, India, Scotland and Singapore are some of the prime examples[1].

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[1] See the Comparison Chart on Article 11 in Dr Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd ed., 2005) pp. 382-3.

The Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law set up by the Department of Justice (the "Working Group") endorsed the above recommendation in the 2003 Report. During the consultation period, we have not received any objection to the proposal.

As pointed out in paragraph 18.5 of the 2003 Report, Article 11(4) of the UNCITRAL Model Law deals with three situations: (a) the situation where the parties fail to reach agreement on a matter covering the appointment procedure; (b) the situation where a party fails to act as required by the parties' agreed appointment procedures; and (c) the situation where a third party fails to perform the functions entrusted by the parties. In any of these situations, the parties are allowed to seek assistance from the designated authority (i.e. the Hong Kong International Arbitration Centre in Hong Kong ("the HKIAC")) to take the necessary measure, thereby avoiding any deadlock or undue delay.

I explained in the Bills Committee meetings at LegCo on 5 October 2009 and 3 December that an institution may perform the function of appointing arbitrator(s) if it is authorized by the appointment procedure agreed by the parties. In each of the situations mentioned above, the HKIAC will only exercise its power to appoint an arbitrator if there is non-compliance with an agreed appointment procedure. In other words, if the agreed appointment procedure provides for a third party (which may be a professional body) to appoint an arbitrator, the party or parties would not be allowed to bypass the third party by seeking the assistance of the HKIAC directly where the third party is not in default.

In fact, Article 11 of the UNCITRAL Model Law currently applies to international arbitration under the Arbitration Ordinance (Cap. 341). We also understand that, in many instances, HKIA-HKIS co-appointment is specified in building contracts for construction-related industries in the expectation that the dispute could be resolved by professionals. We are of the view that the existing appointment mechanism provided for in Article 11 works well in the local context for users of international arbitration and it has not prejudiced or frustrated the parties' intention to entrust the appointment functions to HKIA-HKIS.

For the above reasons and after careful consideration, we consider that it is not necessary to amend Article 11 of the UNCITRAL Model Law as set out in clause 24(1) of the Bill. I can, however, assure you that the said provision will not compromise the power of appointing

arbitrator(s) which may be conferred upon an institution under an agreed appointment procedure.

Yours sincerely,

(Frank Poon)
Deputy Solicitor General (General)

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