

22 April 2014

By Fax (2868 4707) & Post

Ms Bernadette LINN, JP
Director of Lands
Lands Department
20/F, North Point Government Offices
333 Java Road, North Point
Hong Kong

Dear Bernadette,

Re: Proposed Pilot Scheme for Arbitration on Land Premium

On behalf of the Hong Kong Institute of Surveyors (HKIS), I have much pleasure in submitting our suggestions on the Proposed Pilot Scheme for Arbitration on Land Premium (the "Pilot Scheme") as below for your consideration.

1. The time to start the arbitration mechanism and the substance of arbitration

The HKIS opines that arbitration should be performed on a case by case basis due to the unique characteristics of each real property and the Government lease. In order to strike a balance of the negotiation of terms and conditions of the land transaction in the free market and the increase of the land supply through land exchange and lease modification, arbitration should only be encouraged to consider after a lengthy period of negotiation, say after the third premium appeal.

Under the current mechanism of the Lands Department, there is no more fast track procedure after the third premium appeal and it would take at least a few more months for the Lands Department to consider the fourth premium appeal. Therefore, arbitration at this time provides a good platform for the two parties to settle the land premium, thereby increasing the land supply in Hong Kong at a faster pace.

In order to have an effective and efficient arbitration process, it is recommended that the arbitration should only proceed after both parties (the Government and the land owner) have agreed on the fundamental principles affecting the assessment of the premium such as the basis of valuation, the interpretation of the lease conditions, the policy issues and other key development parameters.

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總辦事處 Head Office

香港上環干諾道中111號永安中心12樓1205室
Room 1205, 12/F Wing On Centre,
111 Connaught Road Central, Sheung Wan, Hong Kong
Telephone: 2526 3679 Facsimile: 2868 4612
E-mail: info@hkis.org.hk Web Site: www.hkis.org.hk

北京辦事處 Beijing Office

中國北京市海澱區高樑橋斜街59號院1號樓
中坤大廈6層616室 (郵編: 100044)
Room 616, 6/F, Zhongkun Plaza, No.59 Gaoliangqiao Xiejie,
No.1 yard, Haidian District, Beijing, China, 100044
Telephone: 86 (10) 8219 1069 Facsimile: 86 (10) 8219 1050
E-mail: info-bjo@hkis.org.hk Web Site: www.hkis.org.hk



The arbitration will then focus on the key variables which would affect the before and after land value such as the selection of comparables, the opinion of Gross Development Value, the amount of construction cost, the development period, the discount rate, etc.

In other words, the scope of arbitration shall be confined only to the value and cost elements in the valuation and no other. Any other issues in dispute, e.g. interpretation of lease terms and conditions, development parameter / potential, etc shall be separately settled or agreed or cleared by a court decision prior to arbitration.

2. Terms and conditions of the agreement to arbitration

The scheme is a pilot scheme in nature and it is necessary to make sure that the Government and land owners are prepared to enter into arbitration. The key words would seem to be "willing" and "practicable". After a trial period, say a few cases, then the Pilot Scheme can be reviewed in the light of the results and feedbacks gathered.

- 2.1 There could be a template agreement, which would allow amendments to be made thereof, if so requested by the land owner and accepted by the Government. An example of amendment could relate to the timing of the arbitration including the selection and appointment of arbitrators, submissions of expert reports and supporting documents, rebuttals and hearings if appropriate, and then the timing for the preparation of the arbitration award. There have been suggestions of a time period of 3 months to complete the process and this seems to be possible.
- 2.2 Before the making of the arbitration agreement, there should be a known process to initiate the creation of the agreement including such pre-requisites for premium negotiation between the two parties.
- 2.3 The panel of arbitrators and the selection process and/or criteria of the relevant arbitrator(s) and the related fees, would also need to be known. The standard arbitration agreement shall set out how the arbitration panel is formed; how the arbitrators are selected and where do the arbitrators come from. Once the arbitration agreement is signed, then the appointment of arbitrator can be made within a specified time.
- 2.4 The basis of valuation should be the market value as defined by the HKIS. The definitions and assumptions of "Before Value" and "After Value" shall be clearly set out in the agreement including vacant possession, redevelopment values with or without buildings.



- 2.5. The date of valuation would be a critical consideration. One suggestion could be for the date of the arbitration agreement to be the valuation date. This will facilitate the preparation of the valuation submissions and the subsequent value determination – this is also an established practice in rent review cases and capital value determinations under joint venture agreements, etc. If the valuation date is a “current date” valuation – as in the current premium negotiation process, then there will be volatility of values according to the changes in the market conditions and thus would not be practicable.
- 2.6. The high end and low end of values could be set out in the agreement and the arbitration award would need to be within the limits. The award will thus be within the expectations of the parties instead of a possible surprise. The arbitration award shall be with reasons so that the process can be seen as transparent and fair.
- 2.7. The costs of the arbitrator(s) and the proceedings are to be shared equally between the two parties. Each party will bear its own professional costs.
- 2.8. The arbitration award is final and binding on both parties.

3. The basis of arbitration and the time to complete the arbitration

3.1 Basis of arbitration

Land premium arbitration shall generally be under the preview of the Arbitration Ordinance (Cap 609) and the current Hong Kong and international practices.

A pre-defined “standard arbitration agreement” shall be signed between the Government and land owner. For the sake of transparency and equity, the Government shall prepare and pre-announce a pre-defined “standard arbitration agreement”, which shall form the blanket agreement for all arbitration of land premium. All land owners will know the arbitration contents and basis of arbitration clearly before decision on using arbitration can be made.

With regard to the basis of valuation, it shall be enhancement in land value between the “before” and “after” situation, on current market value basis. This shall be clearly stated in the arbitration agreement.



3.2 Time to complete the arbitration and the resulting enforcement

The arbitration shall be completed in a short period of time as far as possible since the key reason for arbitration is to shorten the premium negotiation time and hence fast track the land supply for housing development.

Prior to arbitration, all the basic parameters, interpretation of lease terms and conditions and development potential in the “before and after” situation shall be agreed between the parties and clearly laid down in the arbitration agreement. This would simplify the arbitration process and concentrate only on the value elements.

The process of arbitration is recommended to be completed within 3 months. That is, 3 months from the signing of the arbitration agreement to the award of decision.

Premium assessments involve the submission of detailed valuation report and expert witness. It is recommended that similar to the trial hearing in the Lands Tribunal, a timetable shall be set for each and every step during the course of arbitration such that the submission of expert report or hearing etc in the arbitration process would not be delayed or extended. Each party shall prepare in advance in order to meet such pre-set time frame as laid out in the arbitration agreement.

Since land value changes with time, the premium shall reflect the value on the material date, i.e. the transaction date. Should there be any further dispute after the award of land premium; the awarded land value would lapse with time. It is recommended that the awarded land value shall be valid for 28 days. The arbitration award shall be enforceable and binding, but in the event that any party who put the award to the High Court for appeal, on the point of law etc, then the awarded premium shall become invalid and re-assessment shall be made after the decision of appeal is granted.

4. **The arbitration panel**

The arbitration panel shall consist of three arbitrators, unless the parties agree in writing otherwise:-

1. The Chairperson of the panel shall be a barrister or solicitor with arbitration qualification admitted in a recognised jurisdiction with not less than 7 years' experience, and should also be familiar with property development and land matters.



2. One expert member shall be a General Practice Surveyor who is a corporate member of the HKIS with a minimum post-qualification experience of not less than 7 years who can afford the necessary expertise in understanding the standards of valuation and complex problems in the development.
3. The other panel member is from the general public who is normally a member of a professional institution (i.e. the HKIS, Hong Kong Institute of Bankers, Hong Kong Institute of Certified Public Accountants, Hong Kong Institute of Architects (HKIA), Law Society of Hong Kong, etc) or people with high standing.

This composition with a diverse background can give the balance of legal proceedings, expertise in valuation and one person with common sense which may enhance the breadth of the decision-making process.

Regarding the selection of panel members, the Government and the Real Estate Developers Association (REDA) should agree on a list of arbitrators and on an appointing body. The selection of the arbitrators will be done by the appointing body by following the list of arbitrators. The appointing body will comprise representatives from the Government (i.e. Department of Justice, Lands Department, etc) and the REDA.

Though the HKIS is maintaining a list of HKIS Arbitrators and Mediators, such members have been admitted only onto the HKIA & HKIS Joint Panel of Arbitrators or Joint Panel of Mediators. When there is a request for an appointment of an Arbitrator or Mediator in accordance with the contractual requirements under the Standard Forms of Building Contracts, the Presidents of the HKIA and HKIS will jointly make an appointment of Arbitrator or Mediator from the Panels. To serve the purpose of the Pilot Scheme, a separate list would be formed by the HKIS in due course. A list of the HKIS Arbitrators and Mediators is attached as **Appendix I** in this submission for reference purpose.

5. Conclusion

The HKIS welcomes this new initiative as it would facilitate the negotiation process between private land owners and the Government. The HKIS considers that the implementation of the Pilot Scheme should be given cautious consideration as it might on one hand, affect the land development process, and on the other hand, the public revenue.



The above suggestions shall only provide you with a broad outline of those issues that we, as property and construction professionals consider as important and urgent for a better scheme, and that we surveyors are in a best position to offer assistance. We sincerely hope that these ideas and proposals will be further explored with your department and we will be more than pleased to share our views with you. If you should require more information or would like to set up a brief discussion meeting on the above proposals, please contact Sr Joseph C. Ho at 2586 1737 or the HKIS Secretariat at 2526 3679.

Thank you for your attention.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Simon Kwok', is positioned below the text 'Yours sincerely,'.

Sr Simon Kwok
President
The Hong Kong Institute of Surveyors

Enc Appendix I

cc Secretary for Development (Fax: 2845 3489)
The Hon Sr Tony Tse, Legislative Councillor (Fax: 2880 5128)
Sr Joseph C. Ho, Convenor of the Task Force on Land Premium Arbitration