Construction Arbitration in Hong Kong

A Changing Landscape

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With the recent changes in the local economies, construction arbitration in Hong Kong gains momentum again to bloom. This article seeks to review the landscape of construction arbitration in Hong Kong, with a view to providing some insights for users in the light of the forthcoming new Arbitration Ordinance[1].

Domestic Construction Arbitration

Arbitration has been defined as the reference of dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The award is final and binding and can be enforced in similar manner as a judgment of the court.

Arbitration is not a new concept to the Hong Kong construction industry. Recourse to arbitration has been common practice in most standard forms of contracts in use in the private and public sectors since 1970s, if not earlier. Hong Kong contractors and developers operating outside Hong Kong, in places like Mainland China, Macau, India and Middle East, have also been using Hong Kong arbitration for resolving construction disputes. From statistics kept by the Hong Kong International Arbitration Centre (HKIAC), a total of 332 cases was handled by the HKIAC in 2009, 212 cases were international in nature and 120 were domestic. This reflects Hong Kong as a key hub for arbitration. Among the cases, some 100 arbitrations were involving construction disputes. The number of cases has indeed been increasing over the years. This is partly due to the readily available pool of construction arbitrators, lawyers and expert witnesses practising in Hong Kong and partly due to the escalating construction activities in the region. The Construction and Arbitration List has further been created in the High Court to have

a judge to specially hear construction or arbitration related cases for quite some time now.

The existing Arbitration Ordinance (Cap 341) applies the UNCITRAL Model Law as the statutory regime for international arbitration[2] and the New York Convention model for enforcement of arbitral awards made overseas in places of signatories to the Convention, and also of arbitral awards from various arbitration commissions in Mainland China[3].

For domestic projects, construction arbitrations in Hong Kong are mostly conducted as domestic arbitrations, utilising the HKIAC Domestic Arbitration Rules. These come with several features. Firstly, unless otherwise agreed, there shall be a single arbitrator (instead of 3 arbitrators in some international arbitrations)[4]. This has the benefits of saving some costs and time, particularly in relatively straightforward cases. Secondly, there is the power of the court to order consolidation of domestic arbitrations in cases, for example, where common questions of law or fact are involved or where the remedies claimed are in respect of the same transaction or series of transactions[5]. With the chains of contracts involving sub-contractors or suppliers in the construction industry, consolidation is again a time and cost saving device that can turn out to be highly useful. Thirdly, there is the right of appeal or challenge of the arbitral awards on points of law. Though such a right is limited to cases which are obviously wrong or with substantial injustice[6], it is yet considered an important safeguard by the construction industry in Hong Kong.

All of these will be changed with the forthcoming amendments to the Arbitration Ordinance (Cap.341).

The New Ordinance

Following the consultation paper on the reform of the law of arbitration in Hong Kong, which was published by the Department of Justice of Hong Kong in 2007, the new Ordinance is now at the very final stage of being implemented for operation. The new Ordinance adopts with modifications the proposals as set out in the report of Committee on Hong Kong Arbitration Law, recommending a unitary regime that applied the UNCITRAL Model Law to govern both domestic and international arbitrations. The new Ordinance is a rewritten one to replace the existing Arbitration Ordinance (Cap 341). During the process, arbitration laws around the world were examined with a view to incorporating international best practices. The amendments to the UNCITRAL Model Law in 2006 had also been taken into account in the draft bill.

In the new Ordinance, the existing enforcement mechanisms for arbitral awards are retained. The framework and content of UNCITRAL Model Law is also adopted. Those familiar headings used in the UNCITRAL Model Law are used as well for the benefits of the users. In particular, those 2006 amendments to the UNCITRAL Model Law concerning the interim measures are mostly adopted, save as to the mechanism for enforcement of such measures. Thus, under the new Ordinance, the existing approach under section 2GG of the Arbitration Ordinance (cap 341) for enforcement of

orders and directions is preserved, while views were sought as regards whether to introduce conditions such as reciprocity or types of measures in respect of interim measures made outside Hong Kong.

The purpose of the reform is to make the law on arbitration in Hong Kong more user friendly. As the UNCITRAL Model Law will be familiar to practitioners from civil law as well as common law jurisdictions, this will have the benefits of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which will accord with widely accepted international arbitration practices and development, thereby attracting more businesses to choose Hong Kong as the place to conduct arbitral proceedings.

All of these are developments that are indeed welcome by the users of international arbitrations in Hong Kong. On the other hand, for uses of domestic arbitrations, such as the construction industry, it is believed that a transition period should be allowed and an easy mechanism to allow users to retain the benefits afforded by those existing provisions applicable to domestic arbitrations should be helpful. This is achieved via Part 11 of the new Arbitration Ordinance. Part 11 of the new Arbitration Ordinance aims to give effects that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the "opt-in" provisions in Schedule 2 of the new Ordinance is to apply. While the Ordinance establishes a unitary regime for arbitration in Hong Kong, abolishing the distinction between the two regimes (i.e. domestic arbitrations and international arbitrations) existed under the Arbitration Ordinance (Cap.341), the opt-in provisions enable parties to arbitration to continue to use certain provisions that only apply to domestic arbitration under the Arbitration Ordinance 1997. These sections are set out, for ease of incorporation, in Schedule 2 of the new Ordinance. The new Ordinance enables parties generally to opt-in any or all of the sections in Schedule 2 by express agreement[7]. This is to be read together with sections 100 and 101 of the new Ordinance. Section 100 provides that these provisions are to be automatically applied if the arbitration agreement is a domestic arbitration agreement entered into before or within 6 years of its commencement; section 101 applies these provisions automatically to arbitration agreements in subcontracts regarding construction operations[8]. Thus, for these arbitration agreements, no express opting-in of these provisions is necessary.

In the new Ordinance, section 1 of Schedule 2 requires a dispute to be referred to a sole arbitrator for arbitration; section 2 of Schedule 2 allows 2 or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another; section 3 of Schedule 2 empowers the Court of First Instance to decide any question of law arising in the course of arbitral proceedings; section 4 and 7 of Schedule 2 allow an arbitral award to be challenged on the grounds of serious irregularity affecting the arbitral tribunal, the arbitral proceedings or the award; sections 5, 6 and 7 of Schedule 2 provide for an appeal against an arbitral award on a question of law.

Concluding Insights

With these changes, users of construction arbitrations need to familiar themselves with and alert themselves to the implications that will be brought into operation in using the standard form of contracts that they are familiar with. To avoid uncertainty and subsequent surprises, it is indeed prudent to undertake a comprehensive review and update of the arbitration clauses in such agreements so as to spell out clearly in relation to matters like number of arbitrators, right of appeal on a question of law, power of court in ordering consolidation and in deciding a point of law preliminarily.

1 At the time of writing, it is anticipated that the new Arbitration Ordinance will become law in the 1st quarter of 2011.
2 Arbitration Ordinance (Cap 341), Part IIA.
3 Arbitration Ordinance (Cap 341), Part IIIA and Part IV.
4 Section 8, Arbitration Ordinance (Cap.341).
5 Section 6B of the Arbitration Ordinance (Cap.341) and Alpha Building Construction Ltd v Best Partner Ltd [2008] 2 HKLRD D4.
6 Swire Properties Ltd & Others v Secretary for Justice (2003) 6 HKCFAR 236.
7 Section 99 of the new Arbitration Ordinance.
8 'Construction operations' has the meaning given to it by Schedule 1 to the Construction Industry Council Ordinance (Cap.587).