

**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 (Friday)**

Mr (Huen) Wong, Mr (Christopher) To, Distinguished Guests, Ladies and Gentlemen,

First of all, thank you for inviting me to this conference. The construction industry is one of the pioneers in the field of dispute avoidance and resolution. Given the economic development in the Asia Pacific region, there are a significant number of infrastructure and construction projects already going on or scheduled to commence in the near future. The theme of this conference, “Dispute Avoidance and Resolution within the Construction Industry – An Asia-Pacific Perspective”, is therefore both apposite and timely. I am sure that this conference will provide a useful platform for participants to exchange views on the latest trends and issues concerning dispute avoidance and resolution in the construction context.

2. As the Government has a role to play in the context of dispute avoidance and resolution, I would like to take this opportunity to briefly touch on two areas. The first area concerns the Dispute Resolution Advisor system and the use of the New Engineering Contract for public works projects. The second area concerns the proposed Security of Payment legislation.

## **Dispute Avoidance**

### Dispute Resolution Advisor

3. The Dispute Resolution Advisor (DRA) is a neutral person jointly selected and employed by the Employer and the Contractor to provide early independent views to facilitate settlement of potential disputes throughout the contract period until expiry of the maintenance period. Upon appointment the DRA holds familiarization meetings with the aim of developing the relationships between the personnel on site as well as building their support for the system. Regular site visits are made to facilitate the settlement of any potential disputes, and the DRA employs pro-active techniques to encourage co-operation and joint problem solving at site level.

4. The role of the DRA is to foster co-operation amongst the Employer, the Contractor, their consultants as well as sub-contractors, so as to minimise the number of claims, to avoid conflicts in the first instance and to settle differences or disagreements as they emerge and before they become disputes which will need to be dealt with under the dispute resolution provisions in the contract.

5. The DRA system was first adopted for building contracts by the Architectural Services Department in the early 1990s, and its use was extended by the Housing Department in 2004 to capital works building and piling contracts. 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. By early 2011, a total of 46 contracts let by four works departments had been selected for the trial use of the DRA system.

6. Based on the results of the reviews and statistics, the DRA system was proven to be effective. As a result, in February 2011 the Government agreed 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. There are currently a total of 54 ongoing civil engineering contracts and 17 ongoing building contracts in which the DRA system has been adopted. The Government will continue to collect statistics and feedback on the DRA system, and will also promote the enlisting of DRAs as and when it is appropriate to ensure that there are sufficient numbers to meet the requirements of the system.

### NEC

7. Apart from the DRA system, the Government has taken active steps to introduce into public works projects the beneficial dispute avoidance mechanisms and partnering approach that are found in the New Engineering Contract (NEC).

8. The current version is NEC 3, which comprises a family of contract forms which can be selected to suit the particular circumstances and requirements of a project. It is collaborative in nature and requires the relevant parties to take a proactive management approach encouraging

co-operation and early joint resolution of problems. For instance, NEC3 specifies time limits for the contracting parties to reply to contract communications and also provides a system whereby the parties are required to give early warnings when either becomes aware of a possible risk of any matter which could cause problems to time, cost or quality of the project, so that they can respond in a collaborative way to avoid or reduce the likelihood of the risk occurring as well as the adverse consequences when the risk arises.

9. The first pilot NEC contract was let by the Government in 2009. As at 1 January this year, there are over 40 selected pilot contracts including capital works civil engineering contracts, maintenance contracts and consultancy agreements. The Government has also set up a Steering Committee to monitor the delivery of the pilot projects and a monitoring mechanism to collect statistics on the key performance indicators including claims management and dispute avoidance. In view of the general positive results in the on-going pilot construction contracts, the Government proposed in August last year to extend the scope of the trial including adopting the NEC form as far as possible in all public works contracts for tenders to be first gazetted in 2015 and 2016, and selecting more consultancy agreements using the NEC.

## **Dispute Resolution**

### Mediations

10. Mediation is not new to Hong Kong. In the past decade or so, through the joint efforts of the Government, the Judiciary, the legal

profession and the relevant stakeholders, mediation is now very much a part of the legal landscape in Hong Kong.

11. In terms of legal framework, the Mediation Ordinance was enacted in June 2012 and came into effect on 1 January this year. The Ordinance aims to provide a legal framework for the conduct of mediation without hampering the flexibility of the mediation process, and to address some of the issues in which the existing law is uncertain, such as confidentiality and admissibility of mediation communications.

12. As regards accreditation standards, the Hong Kong Mediation Accreditation Association Limited (“HKMAAL”), an industry-led accreditation body for mediators was incorporated in August 2012. This non-profit making body can assist to ensure the quality of mediators and consistency of accreditation standards, which are crucial in maintaining public confidence in the mediation process.

13. As a long term commitment, a Steering Committee on Mediation was established in November 2012. This Steering Committee will work closely with the stakeholders in the promotion and development of the use of mediation to resolve disputes including the use of mediation in construction disputes in Hong Kong.

14. Mediation, of course, is no stranger to the construction industry and the Hong Kong Government has been active in promoting the use of mediation in resolving construction disputes.

15. Where a dispute arises between the Contractor and the

Government under a public works contract, the Government adopts a proactive 3-tier process with a view to bringing the dispute to a timely and cost-effective conclusion. Hence, under the public works contracts, a party will in the first instance refer a dispute to the Engineer under the contract, and the Engineer will give a decision which is binding on the parties unless it is referred to a mediation or arbitration. Any such mediation is to be conducted in accordance with the Government's Construction Mediation Rules.

16. The mediation procedure under the Construction Mediation Rules is designed to be flexible to enable the parties to tailor the proceedings to the requirements of the case, and for the mediation to be an expedited means of dispute resolution. The Rules provide for the mediator to be appointed with the agreement of the parties, and that the mediator must endeavour to conclude the mediation within 42 days.

17. Overall, our experience of construction mediations has been very positive and in the period from 2005 to the end of 2013 about 75% of our construction mediations have had a successful outcome.

### Construction Arbitrations

18. If either party to the public works contract does not wish the dispute to be referred to mediation or if the dispute cannot be resolved through mediation, the dispute will be referred to arbitration conducted in accordance with the new Arbitration Ordinance and the Hong Kong International Arbitration Centre Domestic Arbitration Rules.

19. The new Arbitration Ordinance and the HKIAC Domestic Arbitration Rules provide a comprehensive set of procedures for the conduct of the arbitration. They enable the parties to maintain control of the procedures and for the arbitrator to manage the process and make orders for the required procedural steps if no agreement can be reached. The objective is to achieve a fair and binding decision while the costs incurred and the time involved are kept within reasonable limits.

20. The Department of Justice also takes an ongoing, active role in the development of the law on arbitration and the conduct of the arbitration process.

21. The current version of the Arbitration Ordinance has been in effect since June 2011 and has unified our previous domestic and international arbitration regimes so that both are now regulated on the basis of the UNCITRAL Model Law on International Commercial Arbitration. The Arbitration Ordinance was amended in July 2013, principally to implement an arrangement between Hong Kong and Macau for the reciprocal recognition and enforcement of arbitral awards, and to make provisions for the enforcement of emergency relief granted by an emergency arbitrator in or outside Hong Kong. Further amendments to the Arbitration Ordinance are currently being considered by the Department of Justice with the support of HKIAC and other concerned parties, and this process will continue to ensure that Hong Kong remains at the forefront as a regional arbitration centre.

22. As recently announced, the Department of Justice is in the process of establishing an advisory committee on the development and

promotion of arbitration services. By this advisory committee and the joint efforts of all the stakeholders, it is hoped that the development of arbitration in Hong Kong can be taken to a new height.

#### Proposed Security of Payment Legislation - Mandatory Adjudication

23. Concern has been expressed in the local construction industry over delays in payments being made down the contract chain and over the lengthy period of time for disputes to be resolved. Other jurisdictions including the UK, a number of states in Australia, New Zealand, Singapore, Malaysia and Ireland have enacted Security of Payment legislation to facilitate timely payment for work done and services provided by contractors, sub-contractors, consultants and suppliers.

24. The Hong Kong Government together with the Construction Industry Council conducted a survey in 2011 to ascertain the situation in Hong Kong. In October 2012 a Working Group was established comprising representatives from the main bodies in the industry to obtain their views on the legislative provisions that would be most appropriate to suit the conditions in Hong Kong.

25. The Working Group has considered a number of issues including the scope of the proposed legislation, the prohibitions on pay-when-paid and conditional payment clauses and the right to suspend work for non-payment. Of particular importance is the introduction of mandatory adjudication as an expedited method of dispute resolution. It is proposed that the award of the adjudicator will be binding unless the dispute is referred to arbitration or litigation, and subject to limited rights of



challenge the sum awarded by the adjudicator will be payable pending the outcome of the arbitration or litigation. I understand there will be a presentation on this topic in the afternoon session.

### **Concluding Remarks**

26. Ladies and gentlemen, the Government fully appreciates the importance of dispute avoidance and dispute resolution in shaping the future of the construction industry in Hong Kong. We will spare no effort in taking measures to meet the needs of the local and the international business communities and to ensure that Hong Kong continues to be a leading centre for international legal and dispute resolution services in the Asia-Pacific region.

27. On this note, may I conclude by wishing the conference every success. Thank you.