

**Speech by the Hon Rimsy Yuen, SC, JP,
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Hong Kong Construction Arbitration Centre &
University of Hong Kong
Joint Conference on Construction Dispute Resolution 2015
“Resolution of Construction Disputes”
on 19 March 2015 (Thursday)**

Dr. Simon Chee, Professor Michael Hor, Distinguished Guests, Ladies and Gentlemen,

First of all, may I express my gratitude for inviting me to attend this Joint Conference on Construction Dispute Resolution, and for giving me the chance to address this distinguished audience.

2. Hong Kong has never been short of infrastructure and construction projects that are either ongoing or are scheduled to commence in the near future. Although people generally do not like to face disputes, it is a fact of life that disputes do from time to time arise in the course of human activities, including construction activities. The best approach, in my view, is to plan ahead, so that disputes can be avoided as much as possible, and to ensure that there are in place robust dispute resolution mechanism to resolve disputes when they do arise. With the theme “*A Macro View: the Market Perspective*”, I believe this conference will provide all participants a good opportunity to take a macro but in-depth look at issues relevant to construction dispute resolution, as well as to exchange views on the latest trends.

3. Court litigation is the traditional means of dispute resolution, but we all know that litigation has its limitations. Over the years, the Hong Kong Government has been actively promoting other means of dispute resolution including arbitration and mediation. In this regard, the construction industry is one of the pioneers in the field of dispute resolution in Hong Kong. I would like to take this opportunity to briefly deal with three aspects. The first aspect concerns dispute avoidance, the second aspect concerns dispute resolution, and the third aspect concerns the proposed security of payment legislation.

Dispute Avoidance

4. As regards dispute avoidance, dispute resolution adviser and the relevant features in the New Engineering Contract merit discussion.

Dispute Resolution Adviser

5. 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. The DRA’s primary role is to foster co-operation amongst the employer, the contractor, their consultants as well as sub-contractors, so as to minimize 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.

6. 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. Based on the results of the reviews and statistics, the DRA system has been 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.

7. Disputes should not be dealt with only after they have arisen, and DRA is but one example which illustrates how pre-dispute mechanism can be put to good use.

NEC

8. Apart from the DRA system, the Government has introduced into public works projects the beneficial dispute avoidance mechanisms and partnering approach that are found in the New Engineering Contract (“NEC”). The current version is NEC 3, which comprises a family of contract forms which can be selected to suit the particular circumstances

and nature of a project. It is collaborative in nature and requires the parties to take a proactive management approach encouraging co-operation and early joint resolution of problems. For instance, NEC 3 provides a system whereby the parties are required to give early warnings when they become 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.

Dispute Resolution

Construction Mediations

9. Turning to dispute resolution under Government contracts, mediation plays an important role. In the past decade, through the joint efforts of the Government, the Judiciary, the legal profession and the other relevant stakeholders, mediation is now very much a part of the dispute resolution landscape in Hong Kong. In fact, as far back as in 1992, the Government has been using mediation successfully as a dispute resolution mechanism in the construction field, when mediation was included in the contracts for the construction of the Chek Lap Kok International Airport.

10. 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 an early conclusion incurring

the minimum level of costs necessary to arrive at a fair and reasonable outcome. Put shortly, a party will in the first instance refer a dispute to the engineer, and the engineer will give a decision which is binding on the parties unless it is referred to mediation or arbitration. All such mediations are to be conducted in accordance with the Government's Construction Mediation Rules, which are designed to be flexible so as 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.

11. In this connection, the Mediation Ordinance (Cap. 620) provides a legal framework for the conduct of mediation without hampering the flexibility of the mediation process, and addresses important issues such as confidentiality and admissibility of mediation communications.

12. Rules and legal framework aside, we also need mediators of good quality and consistent accreditation standards to maintain public confidence in the mediation process. Accordingly, the Hong Kong Mediation Accreditation Association Limited, an industry-led accreditation body for mediators, was incorporated in August 2012. This body discharges accreditation and disciplinary functions, and mediators with specialist knowledge of works and construction are available on the panel of general mediators which it maintains.

13. On the whole, our experience of construction mediations has been

encouraging. In the period from 2005 to 2014, about 77% of our construction mediations have had a successful outcome.

14. As a long-term commitment of the Government, a Steering Committee on Mediation was established in November 2012. This Steering Committee works closely with the stakeholders in the promotion and development of the use of mediation to resolve disputes including construction disputes.

Construction Arbitrations

15. Another important dispute resolution mechanism is arbitration. If either party to the Government's 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 Arbitration Ordinance (Cap. 609) and the arbitration rules as stipulated in the contract.

16. The Arbitration Ordinance and the arbitration rules as chosen by the parties to the contract provide a comprehensive set of procedures for the conduct of the arbitration. They enable the parties to maintain control of the procedures and the arbitrator to manage the process and make orders for the required procedural steps. The objective is to achieve a fair and binding decision while the costs incurred and the time involved are kept

within reasonable limits.

17. The Department of Justice (“DoJ”) takes an ongoing and active role in the development of the law on arbitration and the conduct of the arbitration process. The current Arbitration Ordinance has been in effect since June 2011 and has unified the previous domestic and international arbitration regimes so that both are now regulated on the basis of the UNCITRAL Model Law on International Commercial Arbitration. Last month, we introduced the Arbitration (Amendment) Bill 2015 into the Legislative Council to make it clear that parties opting for domestic arbitration (as in the Government’s public works contracts) would be allowed to decide on the number of arbitrators, whilst retaining their right to seek the Court’s assistance on consolidation of arbitrations, challenges to an arbitrator’s award and other matters set out in Schedule 2 to the Ordinance. Going forward, we will continue to keep the Hong Kong arbitration regime under constant reviews, in consultation with relevant stakeholders, including of course the construction sector.

18. In December last year, the DoJ established the Advisory Committee on Promotion of Arbitration to further promote Hong Kong as a leading centre for international arbitration services in the Asia-Pacific region. The Advisory Committee is responsible for overall co-ordination and strategic planning for the future development and promotion of arbitration services. We believe the efforts made by this Advisory

Committee will take the promotion of Hong Kong's arbitration services to a new height.

Proposed Security of Payment Legislation – Mandatory Adjudication

19. Let me now turn to another aspect in construction dispute resolution - the proposed Security of Payment legislation. Over the years, the local construction industry has expressed concerns over delays in payments being made down the contract chain and over the lengthy period of time for disputes to be resolved. Some other jurisdictions such as the UK, a number of states in Australia, New Zealand, Singapore and Malaysia have enacted Security of Payment legislation to facilitate timely payment for work done and services provided by contractors, sub-contractors, consultants and suppliers.

20. To gauge the views of the industry, the Government and the Construction Industry Council jointly conducted a survey in 2011 to ascertain the situation in Hong Kong. The results of the survey show that there are wide spread payment issues in the local construction industry. Subsequently, the Government appointed a consultant to study the model of security of payment legislation adopted in overseas jurisdictions. In October 2012, a Working Group, comprising representatives from the main bodies in the industry, was established to map out the way forward in putting up the legislative provisions that would be most appropriate to suit the

circumstances in Hong Kong.

21. 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, have been considered by the Working Group so far. Amongst all, the introduction of mandatory adjudication as an expedited method of dispute resolution is of particular importance. It is currently 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. The latest plan of the Government is to launch a public consultation on the proposed legislation in the second quarter of 2015.

Concluding Remarks

22. Ladies and gentlemen, as illustrated by the latest Policy Address and the Budget Speech, the Government places great importance on effective dispute resolution, whether in the context of the construction industry in Hong Kong and beyond. We will continue to take robust measures to meet the needs of the local and the international communities, with a view to maintaining and enhancing Hong Kong's status as the leading centre for international legal and dispute resolution services in the Asia-Pacific region. As the Chairman of the Steering Committee on

Mediation and also the Advisory Committee on Promotion of Arbitration, I would urge you to give us your views as to how dispute resolution can be further and better developed in Hong Kong.

23. On this note, may I wish the conference every success.

Thank you.