The Changing Landscape of Construction Dispute Resolution in Hong Kong: Opportunities for QS?

Christopher To
Executive Director, Construction Industry Council

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Hong Kong’s Construction Landscape

- Wide range of construction activities - from new construction to alteration, repair, maintenance or demolition of buildings and civil engineering works

Massive Infrastructure Projects

Repair & Maintenance Works

Hong Kong’s Construction Landscape

1920s-30s
1950s
1975
1990s
2010s

sources of photos: http://hongwrong.com/
CONSTRUCTION EXPENDITURE FORECAST FOR PUBLIC AND PRIVATE SECTORS (2014/15 TO 2023/24)

Actual Expenditure (2004/05 to 2013/14) & Mid-term

- Public Sector
- Private Sector

- E&M Works*
- RMAA Works*
- Civil Works
- Building Works

*E&M Works - Electrical and Mechanical Works
*RMAA Works - Repair, Maintenance, Alteration and Additional Works

Long-Term

- Public Sector
- Private Sector

Graph showing Actual Expenditure, Mid-Term Forecast, and Long-Term Forecast in billions of HK dollars.
Number of Arbitration Handled by the HKIAC (1985-2012)

Disputes Involving the HKIAC (since the HKIAC opened in September 1985)

Total no. of arbitration handled by the HKIAC (1985-2012) = 5863

Source: HKIAC statistics
Number of Construction Arbitration and Court Cases in Hong Kong

**Number of construction arbitration cases handled by Hong Kong International Arbitration Centre**

- 2003: 137
- 2004: 127
- 2005: 104
- 2006: 181
- 2007: 183
- 2008: 208
- 2009: 93
- 2010: 81
- 2011: 39
- 2012: 70

**Number of construction court cases registered at High Court Registry**

- 2003: 111
- 2004: 95
- 2005: 85
- 2006: 84
- 2007: 75
- 2008: 58
- 2009: 57
- 2010: 73
- 2011: 61
- 2012: 54
The Changing Landscape of Construction Dispute Resolution in Hong Kong

In the Past Decades...

• Post-completion arbitration (or litigation) was the dominant form of dispute resolution in the industry

More Recently ...

• Rise in the use of dispute avoidance (e.g. Partnering and DRA/DRBs) and other alternative dispute resolution methods

• CIC’s Multi-tier Dispute Resolution Mechanism – introducing new dispute resolution solutions (e.g. Independent Expert Certifier Review and Expert Determination)

• Legislative Intervention - preparatory work for Security of Payment Legislation underway. Creation of a statutory right to adjudicate will provide an interim and enforceable dispute resolution mechanism during the lifetime of the project

• Arbitration will remain the pre-dominant method of dispute resolution when disputes are escalated to the stage of formal legal proceedings
Prevention is better than cure. The use of dispute avoidance measures, such as Partnering, Dispute Resolution Advisor (DRA) and Dispute Resolution Board (DRB), to resolve disagreements before they escalate into disputes should be encouraged.

- **Partnering**
  - places emphasis on the process of building harmonious working relationship between stakeholders
  - has been used by various public and private sector clients in Hong Kong

- **Contractual Partnering**
  - regulates the parties’ behaviour through a *contractual framework* which is legally enforceable
  - contractual partnering using the NEC3 form of contracts is currently under trial use in Hong Kong

- **Alliancing**
  - focuses on *relationship management* and is another contractual arrangement that encapsulates collaborative working
  - an alliance, in its purest form, creates a *virtual organisation*, in which no real distinction exists between the design team, construction team and contract administrators
  - not very commonly used in Hong Kong
Dispute Avoidance (Cont’d)

The NEC3 Form of Contract

NEC is a suite of standard contracts currently at its third edition that is applicable to different types of engineering contracts, including construction contracts, maintenance contracts and consultancy contracts.

The principal characteristics of the NEC contract are flexibility, simplicity and a stimulus to good project management.

The NEC contract has been championed as suitable for partnering arrangement due to the operation of core clause 10.1 which refers to acting “in the spirit of mutual trust and cooperation”.

Dispute Avoidance (Cont’d)

Key Features of NEC3

- **Cooperation**: "The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and cooperation."
- **Better Risk Allocation**: "Risks belong with those who are best able to evaluate, control, bear the cost and benefit from their assumption." Risk to be shared via e.g. target cost, risk register, ‘compensation events’, etc.
- **Flexibility**: Modular ease to use contract form with different pricing options (priced, reimbursable, target cost, etc.)
- **Strong Programme Provision**: Programme being the cornerstone of the contract e.g. key dates, compensation events
- **Early Warning System**: To ensure that the parties are made aware asap of any event which may increase price, delay completion, delay meeting a key date, or impair performance of the works in use.
Dispute Avoidance (Cont’d)

**Dispute Resolution Advisor (DRA)**

- A DRA is a third-party neutral jointly appointed by the Employer and Contractor at the beginning of the project to familiarise him/herself with the project and follow through the project pro-actively to prevent dispute and to assist settlement of disagreements before they get crystallised to become disputes.

**Dispute Resolution Board (DRB)**

- A DRB is a committee established at the outset of a project to deal with disagreements and disputes that arise during the course of a project. It usually consists of three impartial professionals selected based on their experience in construction and project administration and management.
Recognising the fundamental principle of “justice delayed is justice denied” and the long duration of a construction project, the CIC advocates that parties to a construction contract should have the right to have their disputes resolved as and when they arise during the currency of the works.

Where disputes are unavoidable, they should be managed proactively and positively to encourage early and effective settlement.

A five-option multi-tier dispute resolution mechanism has been put forward by the CIC.
CIC’s Multi-tier Dispute Resolution Mechanisms (Cont’d)

Disagreement

DRA/DRB/Partnering

Dispute Resolution Mechanisms

Mechanisms for Dispute Avoidance Measures

Dispute

Independent Expert Certifier

Interim settlement before contract completion

(Interim) Valuation/Payment related matters

(Interim) All matters

(Interim)

Adjudication

Arbitration or Litigation (if no Arbitration Agreement)

Expert Determination

Mediation

(Cont’d)

(Interim) All matters

(Final) Technical matters

(Supplemental contract) All matters

Post-Completion Arbitration or Litigation (if no Arbitration Agreement)
Disagreement resolved

Disagreement

DRA resolves disagreement

Disagreement

DRA appointed

One party initiates Dispute Resolution (DR)

DRA’s recommended DR method accepted by both parties

Agree on one of the DR methods

Mediation

Yes

Dispute resolved

Enter into settlement agreement

Dispute resolved

Adjudication

Execute the decision immediately

A party wants to challenge the decision

Yes

Post-Completion Arbitration

No

Independent Expert Certifier

Expert Determination

Yes

Execute the decision immediately

No

No

Yes

No

Yes

Yes

No

No

Yes

Short Form Arbitration

Dispute resolved
Independent Expert Certifier Review

- Independent Expert Certifier (IEC) Review is a relatively new ADR method introduced in CIC’s Guidelines on Dispute Resolution (September 2010). A set of rules has been developed by the CIC with a view to providing a simple, user-friendly and efficient IEC Review process and this is set out in CIC’s Reference Materials for Application of Dispute Resolution in Construction Contracts (“the CIC Reference Materials”).

- Key Features of Independent Expert Certifier Review under the CIC Reference Materials (August 2015)

  **Independent Expert Certifier**

  - IEC is an independent third party neutral with experience or expertise relevant to the area of the dispute
  - IEC conducts an independent and impartial review of the decision or certification made by the Architect/Engineer/Surveyor (the Certifier) and provides a second opinion based on the same documents and information that were initially provided to the Certifier

  **Decision of the IEC**

  - the decision of the IEC on the dispute is binding in the interim, i.e. during the currency of the Works
  - the decision of the IEC is not final and can be challenged by post-completion arbitration
## Timeline for Independent Expert Certifier Review under the CIC Reference Materials (August 2015)

<table>
<thead>
<tr>
<th>Day</th>
<th>Duration (No of Working Days)</th>
<th>Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day 0</td>
<td>0</td>
<td>The Claimant requests IEC review.</td>
</tr>
<tr>
<td>Day 1 – 5</td>
<td>5</td>
<td>The Respondent rejects and counter-proposes the nominations.</td>
</tr>
<tr>
<td>Day 6 - 8</td>
<td>3</td>
<td>The Claimant objects to counter-proposal</td>
</tr>
<tr>
<td>Day 9 - 11</td>
<td>3</td>
<td>• Both parties agree on an appointing body; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Both parties fail to agree on an appointing organisation and one party writes to HKIAC for nomination</td>
</tr>
<tr>
<td>Day 12 - 21</td>
<td>10</td>
<td>The agreed appointing body / HKIAC nominates an IEC</td>
</tr>
<tr>
<td>Day 22 – 26</td>
<td>5</td>
<td>Parties do not raise objection to the proposed IEC</td>
</tr>
<tr>
<td>Day 27 – 31</td>
<td>5</td>
<td>Submission of same documents to IEC.</td>
</tr>
<tr>
<td>Day 32 – 41</td>
<td>10</td>
<td>The IEC provides both parties with the Decision</td>
</tr>
<tr>
<td>Day 42 - 46</td>
<td>5</td>
<td>The IEC makes written reasons in support of the Decision.</td>
</tr>
</tbody>
</table>

**Engagement of IEC**
Expert Determination

- Expert Determination is commonly used to resolve disputes on a narrow technical issue, such as valuation disputes and those relating to defects or compliance with technical specifications in construction contracts.

- Key Features of Expert Determination under the CIC Reference Materials (August 2015)
  - A **final** and **binding** dispute resolution process
  - The Expert has the right to **use his own expertise** to make a determination
  - The Expert Determination **can only be challenged in limited circumstances**
Expert Determination (Cont’d)

Timeline for Expert Determination under the CIC Reference Materials (August 2015)

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<tr>
<td>Day 0</td>
<td>0</td>
<td>Parties agree to adopt Expert Determination</td>
</tr>
<tr>
<td>Day 1 - 3</td>
<td>3</td>
<td>The parties cannot agree on an Expert</td>
</tr>
<tr>
<td>Day 4 - 6</td>
<td>3</td>
<td>- Both parties agree on an appointing body; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Both parties fail to agree on an appointing organisation and one party writes to HKIAC for nomination</td>
</tr>
<tr>
<td>Day 7 - 9</td>
<td>3</td>
<td>The appointing body nominates an Expert</td>
</tr>
<tr>
<td>Day 10</td>
<td>1</td>
<td>Either party sends the reasons for objecting to the nomination of the appointing body</td>
</tr>
<tr>
<td>Day 11 - 14</td>
<td>4</td>
<td>The appointing body to consider reasons for the objection and re-nominate another expert as appropriate</td>
</tr>
<tr>
<td>Day 15- 19</td>
<td>5</td>
<td>Parties do not raise objection to the proposed Expert after declaring interest, if any</td>
</tr>
<tr>
<td>Day 20 - 22</td>
<td>3</td>
<td>The parties provide necessary information to the Expert</td>
</tr>
<tr>
<td>Day 23 – 32</td>
<td>10</td>
<td>The Expert concludes the determination (the determination shall not extend beyond 3 months)</td>
</tr>
</tbody>
</table>

Engagement of Expert
Adjudication

- Adjudication has not been commonly used in Hong Kong. It was provided for as a mandatory process in the Airport Core Programme (ACP) in 1990s, in which four construction disputes were resolved in two adjudications with no further steps taken to challenge the adjudicator’s decisions.

- **Key Features of Adjudication under the CIC Reference Materials (August 2015)**
  - an adjudicator is a third party neutral.
  - the adjudicator produces a decision after receiving evidence and written and/or oral submissions from the parties.
  - The decision is binding in the interim. It is not final and can be challenged in post-completion arbitration.
  - A statutory process in overseas security of payment (SOP) legislation and is proposed in the coming SOP Legislation.
Proposed Security of Payment Legislation

Timeline of the Proposed Security of Payment Legislation in Hong Kong

2008  • HKCA – Survey on “General Building Contractors’ and Specialist Contractors’ Status on Cash Flow and Other Related Issues”

2009  • CIC – Survey on “Problems of Outstanding Payment in Construction Supply Chain”

2010  • CIC – Task Force on Security of Payment Legislation

2011  • CIC & DEVB – Survey on “Payment Practice in the Construction Industry”


2012  • DEVB – Working Group on Security of Payment Legislation for the Construction Industry

2015  • DEVB – Public Consultation on “Proposed Security of Payment Legislation for the Construction Industry” (1 June to 31 August 2015)
Proposed Security of Payment Legislation (Cont’d)

Security of Payment Legislation in Overseas Common Law Jurisdictions

- Housing Grants, Construction and Regeneration Act 1996
- Building and Construction Industry Security of Payment Act 2004
- Construction Contracts Act 2013
- Construction Industry Payment and Adjudication Act 2012
- Building and Construction Industry Security of Payment Act 1999 (NSW)
- Construction Contracts Act 2002
Hong Kong’s Proposed Approach to Security of Payment Legislation

• Broad coverage with exceptions
• Offer payment protection via the statutory provisions but also maintain flexibility in the parties’ freedom to contract
• Banning of “pay when paid” and other conditional payment clauses
• Right to suspend work for non-payment
• Introduction of mandatory adjudication for disputes
Opportunities for QS?

- Arbitrator
- Expert Witness
- Mediator
- Adjudicator
- Independent Expert Certifier
- Expert (for Expert Determination)
- Dispute Resolution Advisor
- Contract Administrator or NEC Project Manager
CIC Website <www.hkcic.org>