



CONSTRUCTION
INDUSTRY COUNCIL
建造業議會



REFERENCE MATERIALS

FOR APPLICATION OF DISPUTE RESOLUTION IN CONSTRUCTION CONTRACTS

Disclaimer

Whilst reasonable efforts have been made to ensure the accuracy of the information contained in this publication, the CIC nevertheless would encourage readers to seek appropriate independent advice from their professional advisers where possible and readers should not treat or rely on this publication as a substitute for such professional advice for taking any relevant actions.

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Preface

The Construction Industry Council (CIC) is committed to seeking continuous improvement in all aspects of the construction industry in Hong Kong. To achieve this aim, the CIC forms Committees, Task Forces and other forums to review specific areas of work with the intention of producing Alerts, Reference Materials, Guidelines and Codes of Conduct to assist participants in the industry to strive for excellence.

The CIC appreciates that some improvements and practices can be implemented immediately whilst others may take more time to adjust. It is for this reason that four separate categories of publication have been adopted, the purposes of which are as follows:

Alerts	Reminders in the form of brief leaflets produced quickly to draw the immediate attention of relevant stakeholders the need to follow some good practices or to implement some preventative measures in relation to construction site safety.
Reference Materials	Reference Materials for adopting standards or methodologies in such ways that are generally regarded by the industry as good practices. The CIC recommends the adoption of these Reference Materials by industry stakeholders where appropriate.
Guidelines	The CIC expects all industry participants to adopt the recommendations set out in such Guidelines and to adhere to such standards or procedures therein at all times. Industry participants are expected to be able to justify any course of action that deviates from those recommendations.
Codes of Conduct	Under the Construction Industry Council Ordinance (Cap 587), the CIC is tasked to formulate codes of conduct and enforce such codes. The Codes of Conduct issued by the CIC set out the principles that all relevant industry participants should follow. The CIC may take necessary actions to ensure the compliance with the Codes.

If you have attempted to follow this publication, we do encourage you to share your feedback with us. Please take a moment to fill out the Feedback Form attached to this publication in order that we can further enhance it for the benefit of all concerned. With our joint efforts, we believe our construction industry will develop further and will continue to prosper for years to come.

Executive Summary

The discussions relating to various modes and timing of dispute resolution mechanisms have been covered in the September 2010 Guidelines. Disputes should be avoided if possible and where avoidance fails, they should be resolved as soon as practicable.

The Dispute Avoidance Measures should be introduced through the use of a Dispute Resolution Advisor (DRA), jointly appointed by the Employer and Contractor, who will help the parties to avoid differences crystallising into dispute.

Where disputes do arise notwithstanding the Dispute Avoidance Measures, under the current forms of contracts, they would be referred to the Architect/Engineer/Surveyor for decision/certification. A party wishing to challenge any Decision or Certification of the Architect/Engineer/Surveyor can do so only by way of arbitration to be commenced after completion of the Works.

The undesirability of delay in resolving such disputes at the post-completion stage has been discussed in detail in the September 2010 Guidelines. The introduction of some immediate dispute resolution mechanisms made available for the use of the parties during the currency of the works was therefore recommended. The Task Force reviewed the application of the immediate dispute resolution mechanisms proposed in the September 2010 Guidelines and considered if and how they could be adapted into the structure of contractual dispute resolution clauses currently in use in Hong Kong.

The post-contract completion arbitration provision should be kept in place for the following reasons. Some of the proposed immediate dispute resolution mechanisms produce results that are binding in the interim during the currency of the works, but they can be challenged and revised by arbitrators in arbitration commenced after completion of the works. Parties may also wish to have certain disputes resolved at the end of the contract.

Having laid out the overall scheme of arrangement which commences with the DRA and ends with post-completion arbitration, the intermediate dispute resolution mechanisms proposed in the September 2010 Guidelines were reviewed and considered.

The five dispute resolution mechanisms proposed together with the corresponding sets of rules proposed can be made available to the parties to choose from during the currency of the works. How each of these mechanisms can be applied to resolve different types of disputes has been discussed in the September 2010 Guidelines.

These immediate dispute resolution mechanisms available for use during the currency of the works should be inexpensive, simple, user-friendly, effective and speedy. The construction professionals should be the prime service providers for these mechanisms thereby allowing the experts in the relevant areas to efficiently resolve disputes with the lowest possible costs and within minimal time.

The Rules (Annexes C to G) proposed for each set of mechanisms have all been developed with these guiding principles in mind. References have been made to existing rules and considerations given to the real and apparent concerns regarding the use of some of these mechanisms in the industry in Hong Kong and elsewhere.

To ensure efficiency, impartiality and maintenance of standards, the Hong Kong International Arbitration Centre has been proposed to be the nominating body in each of these mechanisms should the third party neutral not be agreed by the parties.

If the parties can agree on the choice of one of the immediate dispute resolution mechanisms, the Rules would be used to guide the conduct of the relevant proceedings. Party autonomy is respected, allowing the parties to vary the relevant Rules on a case by case basis.

The situation where the parties cannot agree on which dispute resolution mechanisms to be used has to be addressed if the underlying objectives of considering and introducing these measures are to be met. The Task Force has proposed that the default mechanism to be adopted should be adjudication. The pros and cons, practical difficulties and other concerns have been debated and considered and the relevant factors balanced against one and another when coming to this Reference Material.

The self-explanatory flow chart (Figure 6.1) sets out the overall scheme of the mechanisms. The starting point is the DRA. If the differences/disputes cannot be resolved, the parties can agree to choose one of the five mechanisms to resolve the dispute. If no agreement is reached, then by default, adjudication will be adopted. Depending on the mechanisms to be adopted, some will render a final and binding result thereby resolving the dispute conclusively, whilst other methods will provide a binding but interim decision which can be challenged and revised by post-completion arbitration.

The overall scheme proposed is aimed at ensuring that disputes are resolved as soon as practicable so that the concerns leading to the preparation and consideration of the underlying objectives in the September 2010 Guidelines are addressed.

1. Purpose

The purposes of this “Reference Material for Application of Dispute Resolution in Construction Contracts” (Reference Material) are to summarise the discussions and recommendations of the Task Force on Dispute Resolution Documentation on the sample contract clauses and to facilitate the incorporation into construction contracts of the relevant alternative dispute resolution methods recommended in the “Guidelines on Dispute Resolution” published by the Construction Industry Council in 2010.

2. Terminology

In this document, unless the context otherwise requires, the following terms shall have the following meanings:

- a. “Arbitration” It is a legal process conducted in accordance with the Arbitration Ordinance (Cap. 609) which results in an award being issued by an arbitrator. Arbitration awards are final and binding on the parties and can only be challenged in very exceptional circumstances.
- b. “Consultant” The person named as the Architect/Engineer/Surveyor in the Contract, or any successor appointed.
- c. “Contract” The Articles of Agreement, the Appendix, the Form of Tender submitted by the Contractor, the Employer’s letter of acceptance of the Contractor’s tender and any correspondence between the parties expressed to form part of the Contract, the Special Conditions, if any, the Conditions, the Contract Drawings, the Specification and the Contract Bills.
- d. “Contractor” The person named as the Contractor in the Contract.
- e. “Contract Completion” The date by which the Works or a Section is to be completed or such later date as may be fixed by the Consultant.
- f. “Disagreement” A conflict between contracting parties which may become a dispute if it cannot be settled with the assistance of Dispute Resolution Advisor before one of the contracting initiates a request for dispute resolution.
- g. “Dispute” A dispute means any Disagreement which cannot be resolved through any dispute avoidance measures.
- h. “Final Account” A statement of account showing in detail the value of the work done in accordance with the Contract together with

Terminology

- all further sums which the Contractor considers to be due to him up to the date of the maintenance certificate.
- i. "Reference Material" This Reference Material for Application of Dispute Resolution in Construction Contracts.
 - j. "HKIAC" Hong Kong International Arbitration Centre.
 - k. "Section" A part of the Works for which a separate Completion Date is stated in the Appendix where the Contract provides for sectional completion of the Works.
 - l. "September 2010 Guidelines" Guidelines on Dispute Resolution published by the CIC in September 2010.
 - m. "Task Force" The Task Force on Dispute Resolution Documentation set up under the Committee on Subcontracting of the Construction Industry Council which takes charge of the preparation of this Reference Material.
 - n. "Works" The works briefly described in the Articles of Agreement and shown upon, described by or referred to in the Contract including any change made to the works in accordance with the Contract.

3. Background

- a. It is preferable to settle disputes as early as possible as resolution of disputes can be expensive and time-consuming and sometimes causing significant negative impact on a company. When disputes have arisen, they should firstly be handled in a constructive and collaborative way in order to reach early and effective settlements. The traditional post-completion arbitration and litigation approaches should remain as last resort solutions.
- b. To encourage early settlement of disputes, the CIC published the “Guidelines on Dispute Resolution” in September 2010 in which a new mechanism for handling disputes and some new alternative dispute resolution methods were introduced to speed up the settlement of construction disputes.
- c. As the mechanism and some of the methods for resolving disputes recommended in the “September 2010 Guidelines” were new to the local construction industry and to facilitate the adoption of the recommendations, the Task Force on Dispute Resolution Documentation was established under the Committee of Subcontracting of Construction Industry Council with the terms of reference in **Annex A** and membership listed in **Annex B** to prepare a set of streamlined, user-friendly and efficient model rules and procedures for the proposed dispute resolution methods for incorporation into commonly used forms of construction contracts .
- d. This Reference Material summarises the discussions of the Task Force on Dispute Resolution Documentation and set out the rules and procedures recommended to facilitate the adoption of the “September 2010 Guidelines”.

4. Introduction

- a.** In the “September 2010 Guidelines”, the following principles of dispute resolution are recommended for contracts adopting the recommendations in the Guidelines:
- i. avoid a dispute in the first place;
 - ii. dispute resolution should be available immediately as and when the dispute arises;
 - iii. dispute resolution should be contractually obliged as opposed to optional such that both parties would be obliged to participate when the process is invoked;
 - iv. the process itself must be short in time and inexpensive;
 - v. sequential procedure is not preferred as that tends to proliferate the disputes between the parties as opposed to quickly resolving them;
 - vi. there should be a right to review and revise any interim decisions by way of arbitration after completion of the works (unless a short form arbitration has taken place beforehand).
- b.** In accordance with the above principles, in the "September 2010 Guidelines", the use of Dispute Resolution Advisor is recommended to resolve arguments at first instance and a new mechanism for dispute resolution is proposed to resolve arguments which have turned into disputes.
- c.** Under the new mechanism for dispute resolution, parties to construction contracts should be free to choose any one of the following five dispute resolution methods to resolve their dispute as and when it arises:
- Mediation
 - Adjudication
 - Independent Expert Certifier Review
 - Expert Determination
 - Short Form Arbitration
- d.** The current dispute resolution clauses in standard form of contracts should be amended in order to incorporate the immediate dispute resolution process.
- e.** Appropriate rules to govern the new dispute resolution mechanism are required to ensure that the dispute resolution process can be properly carried out.
- f.** In preparing the model dispute resolution clauses, consideration is given to:

Introduction

- The types of dispute resolution mechanisms to be covered by the model dispute resolution clauses, and whether such clauses should include dispute avoidance provisions such as dispute resolution advisor;
 - The desirability to incorporate any institutional dispute resolution rules and procedures into the model dispute resolution clauses, and if that is desirable, whether modification should be made to any of those rules and procedures; if incorporation is not desirable, whether any procedures and rules should be drafted for the model dispute resolution clauses;
 - Whether any reference material on the use of the model dispute resolution clauses should be prepared; and
 - How the model dispute resolution clauses can be integrated with or incorporated into commonly used forms of construction contracts.
- g.** In this Reference Material, relevant special conditions of contract and rules for respective dispute resolution methods are proposed.

5. Dispute Avoidance Measure

a. Dispute Resolution Advisor (DRA)

The basic concept of a Dispute Resolution Advisor (DRA) involves the use of a neutral third person who advises the parties to a potential dispute and suggests possible options to avoid the dispute.

The DRA is jointly appointed by the employer and the contractor from contract commencement to contract completion. The DRA's main role is to assist the parties to identify potential disputes and assist in the resolution of disagreements, which if unresolved, may turn into formal disputes.

The DRA has no power to make any decision and his function is to be facilitative, encouraging parties to jointly work towards a common goal of completing the works in accordance with the contract.

If disputes do arise, and where necessary, the DRA can advise on the choice of one of the five means of resolving disputes.

Currently, DRA is engaged in projects involving Development Bureau and Housing Authority in Hong Kong.

The DRA is appointed by the employer and the main contractor but is involved in avoiding disputes at main contract and nominated subcontract levels.

b. Scope of Application

DRA is used in main contract and nominated subcontract only. A DRA should be brought in at the beginning of a contract, continue to participate regularly for the duration of the contract and preferably till the completion of the final account of the contract.

The DRA who meets at regular intervals with representatives of the Employer, Consultant, Main Contractor, Nominated Subcontractors and major Domestic Subcontractors, takes note of potential disagreements between the Employer/Consultant and the Main Contractor as they arise. The DRA will help settle disagreements before they finally turn into disputes which require more formal and timely method to resolve.

The Task Force recommends the use of DRA in subcontracts be further considered. At the moment, the Task Force considers that it is not yet appropriate to definitively make any recommendation on whether it is to be adopted in subcontracts due to the following reasons:

- i. There is practical difficulty in adopting DRA system at all subcontract levels. A DRA has to be appointed in early stages and attend all meetings among the

Dispute Avoidance Measure

Employer, Consultant, Contractor and Nominated Subcontractor (if any) to keep abreast of the project developments. Since a construction project is often executed by many domestic subcontractors, a DRA if engaged will be required to attend many meetings to keep himself updated with the work progress. The DRA may easily be overwhelmed by the heavy workload, frequent meetings and day-to-day details. Also, there might be a concern of the Employer to pay the DRA fee for subcontracts.

- ii. DRA does not have the power to make binding (or at least interim binding) decision. A speedy resolution of disputes for domestic subcontractors, which can accelerate payment issues, may be more useful and practical than the use of DRA in subcontracts.

c. Form of DRA System

A comparison has been made amongst the three DRA systems adopted respectively by Housing Authority (HA), Architectural Services Department (ArchSD) for building contracts and Development Bureau (DevB) for civil engineering contracts.

The Task Force recommends following the DRA system adopted by Development Bureau. This is on the basis that it is easier to follow and having taken account of the character of the Development Bureau's DRA system, which is more linked with the various dispute resolution methods to be elaborated in the later part of this publication. However, such recommendation is non-binding. It should not dictate the choice of the parties on the adoption of dispute resolution method(s).

The DRA should not be allowed to be the person to make binding decisions as adjudicator, arbitrator, etc in the subsequent dispute resolution except for acting as mediator.

d. Special Conditions of Contract for DRA

Special Conditions of Contract for the use of Dispute Resolution Advisor adopted by Development Bureau of the Government in its construction contracts are set out in **Annex H** for reference. It is extracted from the Guideline for the Use of the Dispute Resolution Advisor System issued by Development Bureau in July 2010.

e. Training of DRA

To encourage enlisting and to ensure a sufficient supply of qualified and experienced DRAs to meet the industry demand, the HKIAC has organised training courses for DRAs. The courses enable participants to:

- i. gain the knowledge and understanding of the DRA and other dispute resolution processes;

Dispute Avoidance Measure

- ii. apply the DRA concepts and dispute avoidance and resolution skills, via role plays; and
- iii. have a better understanding of the DRA process being used in public works projects.

According to the statistics provided by the Development Bureau, there were on average about 40 DRAs on the list before 2010. With the concerted efforts of the Government, HKCA and HKIAC, the number of DRAs for public works contracts had significantly increased to 63 in early 2012, majority of them are surveyors, followed by engineers and the rest are architects and construction practitioners.

f. Admission Criteria of DRA

Currently, a list of DRA maintained by the Joint Managing Committee (JMC) comprising representatives of Government's Works Departments and Hong Kong Construction Association for use in public works contracts is available. Whether another list of DRA is required for private sector to be maintained by an independent body such as HKIAC would be further discussed before a recommendation can be made in the Reference Material.

- i. Salient points of consideration in the admission criteria
 - A good DRA might not be necessarily an experienced mediator/arbitrator.
 - Project administration (including site working) experience is believed to be one of the important factors in being a good DRA.

6. Dispute Resolution Mechanism

a. Choice of Dispute Resolution Methods

If the disagreements cannot be resolved and ultimately turn into disputes, the Contract should allow for the provision of different choices of dispute resolution methods to facilitate the resolution of disputes under different situations.

b. Current Arrangement in Construction Contracts

Majority of construction contracts in Hong Kong allow for post-completion arbitration as an alternate dispute resolution method in lieu of litigation. In public works contracts, voluntary mediation is also provided before going for arbitration, as well as the voluntary adjudication, both of which are subject to the mutual consent of both contracting parties.

As stated in the Guidelines on Dispute Resolution, limited alternate dispute resolution methods allowed in the construction contract may not be sufficient to cater for different types of disputes arising throughout the contract period. Besides, contracting parties should be obliged to go for alternate dispute resolution if one of the contracting parties triggers the event instead of relying on the need of mutual consent in order to achieve a speedy resolution of the dispute.

c. Choice of Dispute Resolution Methods

It is recommended that all the following dispute resolution methods should be provided in the Contract for the contracting parties to choose:

- i. Mediation
- ii. Adjudication
- iii. Independent Expert Certifier Review
- iv. Expert Determination
- v. Short Form Arbitration

Subject to mutual agreement, the contracting parties can agree to adopt the traditional post-completion Arbitration as the dispute resolution method.

The following sub-sections set out the overall workflow and procedure for the Dispute Resolution Mechanism.

d. Preparation for Dispute Resolution

The party who triggers the Dispute Resolution Mechanism (the Claimant) shall prepare the following information for onward provision to each responding party

Dispute Resolution Mechanism

(the Respondent) and the third party neutral person to be appointed under the Dispute Resolution Mechanism:

- a concise summary of the nature and background of the Dispute and the issues arising;
- a statement of the relief claimed;
- a statement of any matters which the parties have already agreed in relation to the procedure for determination of the Dispute;
- copies of all documents which have an important and direct bearing on the issues (or a list of such documents if they are already in the possession of the recipient).
- any other information or documents (e.g. expert reports, witness statements, photographs, correspondence and submissions) as the Claimant may consider relevant.

e. Declaration of Interests

i. General Principles

When a Third-Party Neutral has a potential conflict of interest in a matter placed before the dispute resolution, he should make full disclosure of his interest.

The basic principle to be observed is that the Third-Party Neutral's advice, decision, ruling or award should be disinterested and impartial and it is the responsibility of the Third-Party Neutral to judge and decide if the situation warrants a declaration.

It is impossible to define or describe all the situations that would call for such a declaration, because each individual case differs, and because of the difficulty of catering for unusual and unforeseen circumstances. The Third-Party Neutral should have a continuing duty of disclosure once he comes to the knowledge.

ii. Potential Conflict of Interest Situations

The following are potential conflict of interest situations:

- Pecuniary interests in a matter under the Contract, held either by the Third-Party Neutral or by any close relative of his. The Third-Party Neutral himself is the best judge of who, in the particular circumstances, is a "close relative".
- A directorship, partnership, shareholder, advisory or client relationship, employment or other significant connection with a company, firm, club, association, union or other organization which is connected with, or the subject of, a matter under the Contract.

Dispute Resolution Mechanism

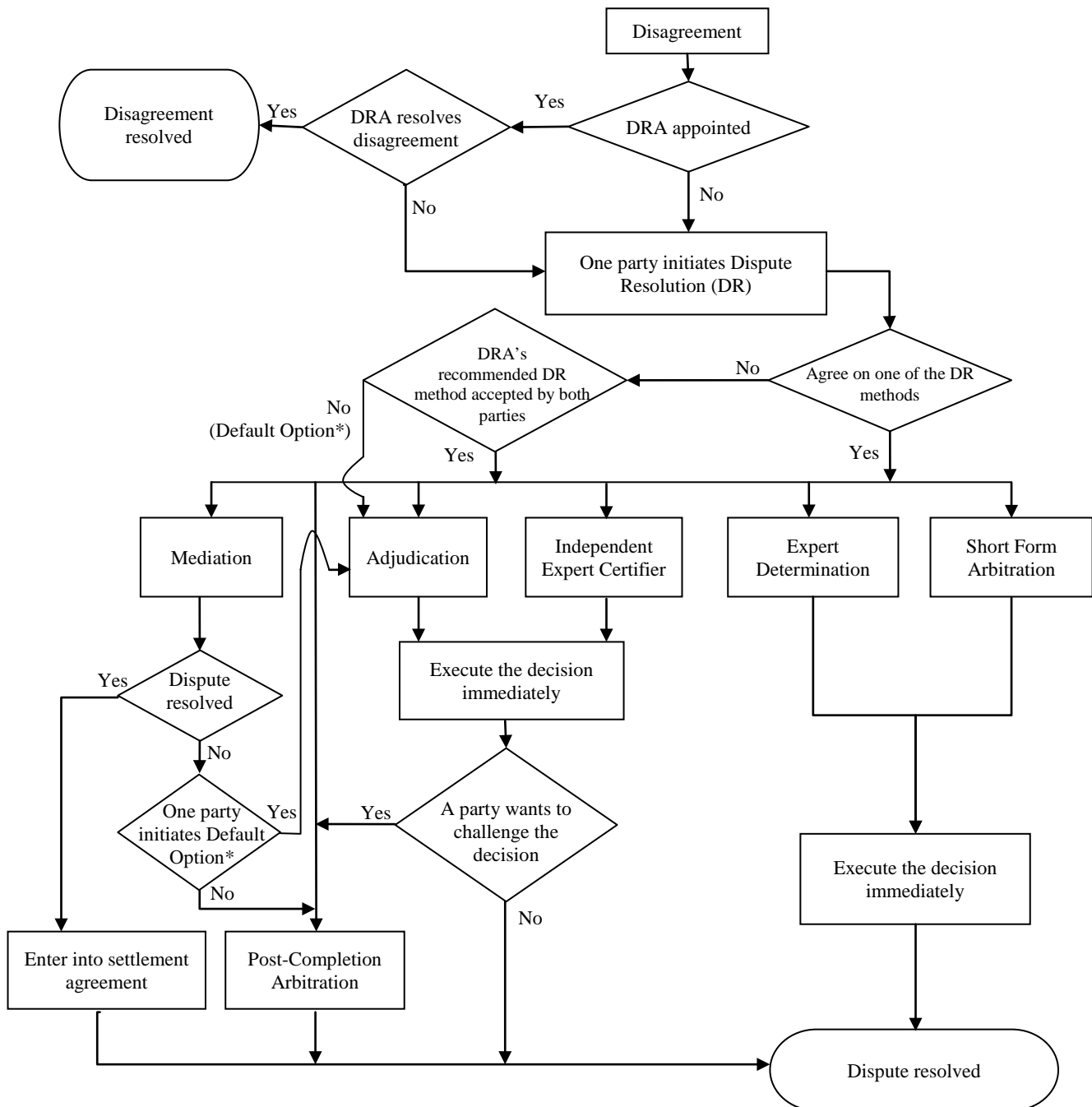
- Some personal relationship which might be so close as to warrant declaration in order to avoid the situations where an objective observer may believe that the Third-Party Neutral's advice has been influenced by the closeness of the association.
- The Third-Party Neutral who, as a barrister, solicitor, accountant or other professional adviser, has personally or as a member of a company, advised or represented or had any dealings with any person or body connected with any matter under the Contract.
- Any circumstances likely to lead an objective observer to believe that the Third-Party Neutral's advice may have been motivated by personal interest rather than a duty to give impartial advice.

iii. Declaration of Interests After Dispute Resolution Commenced

- If the Third-Party Neutral has any direct personal or pecuniary interest in any matter in relation to the Contract, he must, as soon as practicable after he has become aware of it, disclose to the parties of the Contract prior to the discussion of the item.
- Both parties of the Contract shall decide whether the Third-Party Neutral disclosing an interest may continue in the dispute resolution or be dismissed.
- All cases of declaration of interests shall be recorded in writing.

Dispute Resolution Mechanism

f. Flow chart for Dispute Resolution Mechanism with or without DRA



* For Default Option (refer to Chapter 12)

Figure 6.1

Dispute Resolution Mechanism

Notes:

- i. This flow chart summarises the logistics relating to the use of the DRA, the five dispute resolution mechanisms and the post-completion arbitration.
- ii. The parties can agree on which of the five dispute resolution mechanisms to be adopted. Where no agreement can be reached, a default procedure has to be adopted.
- iii. Considerations on the choice of default mechanism to be specified in the dispute resolution clause include:
 - o the need and desirability for a decision during the currency of the Works,
 - o the need for a fair, simple and short procedures,
 - o the pros and cons of such decision being a final decision in the context of consideration between short form arbitration and adjudication,
 - o should adjudication be adopted as the default mechanism, the risks of a party being ambushed by claims and the acceptance of such procedures in the context of the use of public funding.
- iv. Upon consideration of the factors, the Task Force takes the view that the default mechanism should be adjudication.

7. Mediation

a. About Mediation

Mediation is a consensual process where an independent third party attempts to resolve the differences between two or more parties.

It is dispute specific and any settlement achieved does not establish any precedents of similar situations in subsequent cases.

Under the facilitative model of mediation, a third party neutral, the mediator facilitates the disputing parties to reach a negotiated settlement without rendering any decision on the substantive issues. Below are some special features of this dispute resolution method:

- the rules of natural justice do not apply
- the mediator can see a party in private
- parties may stop the process by terminating the mediation
- no decision or opinion is rendered by the mediator
- if successful it will result in a settlement agreement which is a contract supplemental to the construction contract
- if the mediation is unsuccessful another process will have to be used

Hong Kong has quite substantial mediation experience in the construction industry for the last 20 years. Despite the fact that post-completion arbitration is still prevalent in private works projects as the alternative dispute resolution method, disputes arising between public sector employers and contractors are generally referred to mediation during the currency of the works.

b. Concerns over the Current Application of Mediation

Mediation may not definitively end a dispute. If a definitive result is needed within a short time frame, it may not satisfy that requirement.

Some mediations can go on for a very long time before completion. It is inappropriate to resolve highly volatile disputes and in situations where there is a serious lack of trust and respect between disputants.

Mediation is not recommended for cases where one of the disputants wants to establish a legal rule or precedent because mediation settlements has no legal rule or precedent value.

Mediation

c. Considerations Taken into Account in Formulating a New Set of Mediation Rules

Following consideration by the Task Force on the Hong Kong International Arbitration Centre Mediation Rules and Development Bureau Mediation Rules, a set of modified Mediation Rules tailored for the construction industry is proposed by fine tuning the existing sets of rules.

d. Mediation Rules Proposed by the Task Force

With reference to the rules stated in paragraph (c) above, the Task Force proposes a set of model Mediation Rules for the construction industry as set out in **Annex C**.

e. Appointment and Panel of Mediators

The Task Force recommends the use of the panel of mediators established and maintained by the HKIAC and the involvement of the HKIAC in appointing to appoint a mediator for parties not being able to agree on a mutually acceptable mediator.

f. Default Mechanism

If both parties fail to reach an agreement through mediation, either party is able to resort to the default mechanism, instead of waiting till the completion of the project for post-completion arbitration to resolve the dispute. Refer to Chapter 12 – Default Option for details about this arrangement.

8. Adjudication

a. About Adjudication

The specific issue to be resolved will be referred to decision by a third party neutral, the Adjudicator. The Adjudicator produces a decision after the parties present their evidence and made their written and/or oral submissions. The decision is binding in the interim, that is, during the currency of the works. But the Adjudicator's decision is not final and can be challenged in post-completion arbitration.

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. One other adjudication was conducted in 2009 in another context.

DRA system coupled with voluntary adjudication has been adopted in capital engineering works contracts of the Government with contract value exceeding HK\$200 million.

b. Concerns over the Current Application of Adjudication

In practice, the process of adjudication has been too lengthy, time consuming and resource demanding. The procedures that were adopted resemble those of arbitration.

c. Considerations Taken into Account in Formulating a New Set of Adjudication Rules

References had been made to the HKIAC Adjudication Rules and the Construction Adjudication Rules of the Hong Kong Government.

The rules are proposed with a view to addressing concerns over the complicated procedures used in practice which have led to increased cost and more time. The adoption of procedures akin to formalized dispute resolution process such as arbitration and court procedures is discouraged, and the proposed rules aim to provide a streamlined, user-friendly and efficient process.

d. Adjudication Rules Proposed by the Task Force

The Task Force puts forward a significant change to the adjudication rules currently adopted in Hong Kong. The proposed set of adjudication rules are set

Adjudication

out in **Annex D**.

e. Salient Points in the New Set of Rules

- i. Language – The specification of language requirement being English should be removed as it was not favourable to smaller-sized contractors or subcontractors.
- ii. Place of adjudication – It is not necessary to specify the place so as to make the adjudication process less formal than short form arbitration.
- iii. Initiation of adjudication process - This will comprise a submission and the names of three possible adjudicators.
- iv. Appointment of adjudicator – The time taken for adjudication under the existing rules is too lengthy and needs to trim down. HKIAC will perform the appointment if both parties cannot agree on the appointment of adjudicator.
- v. To make adjudication more user-friendly and responsive to industry needs, the proposed framework should be simple and straightforward as follows:
 - The party which initiates the adjudication (the Claimant) should provide a list of adjudicators to the responding party (the Respondent) for the agreement on the adjudicator.
 - In addition, an adjudication claim submission should also be provided to the Respondent and accompanied by such other information or documents (e.g. expert reports, witness statements, photographs, correspondence and submissions) as the Claimant may consider relevant.
 - 5 days to choose an adjudicator - After receiving the adjudication claim submission, Respondent shall within 5 days to choose an adjudicator from the list provided by the Claimant or make a counter-proposed list of adjudicators as well as provide a response submission in reply to the Claimant's adjudication claim submission.
 - 3 days to respond to counter-proposal - Claimant should give response to the adjudicator counter-proposed by the Respondent in 3 working days; or
 - 3 days, or such other period as the HKIAC may require, for HKIAC to appoint adjudicator – Claimant to write to HKIAC (copied to the Respondent) requesting the appointment of an adjudicator if the Claimant cannot agree to any of the counter-proposed adjudicators, the appointment should be carried out by HKIAC within a further 3 working days or such other period as the HKIAC may require.
 - Adjudication is deemed to be commenced on
 - the date of the appointment of the adjudicator; or

Adjudication

- the date of the provision of the response submission by the Respondent; or
- if no response submission is filed by the Respondent, the expiration of the response submission period which is 20 days after receiving the Claimant's submission by the Respondent,

whichever is later ("Adjudication Commencement Date").

- Within 2 days of the Adjudication Commencement Date, the Claimant and the Respondent shall submit respectively the adjudication claim submission and the response submission to the appointed adjudicator.
- The adjudicator shall provide both parties with the decision on the adjudication within 20 days after the Adjudication Commencement Date. In order not to lengthen the duration for coming up with a decision, the adjudicator will have the discretion to extend 20 days (Rule 24).
- Written confirmatory decision with reasons has to be made within another 5 days after the decision is given.

Witness

- vi. In the current adjudication rules of HKIAC and Development Bureau, an adjudicator can be called as a witness of fact in respect of the adjudication proceedings in any subsequent arbitration or litigation and can only speak to matters within his knowledge relating to the conduct of the adjudication.
- vii. However, following the principle that judges in lower courts would not be asked to be witnesses in higher courts, the Task Force considered that the neutral party (i.e. adjudicator) should not be called as a witness in any subsequent arbitration or litigation arising out of the contract.

Costs Allocation

- viii. There are basically two types of arrangements for the costs of adjudication proceedings in overseas jurisdictions. According to the state of Victoria, Australia, the Claimant and Respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator might determine. In Singapore, an adjudicator shall, in making his determination in relation to any adjudication application, decide which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party.
- ix. To encourage a greater use of adjudication and to give both parties a fair and equal opportunity, the adjudicator should be given an absolute discretion and express power to determine which party shall pay the costs of the adjudication. In determining the costs, the adjudicator may proceed on a basis that the parties shall bear their own costs equally (i.e. legal cost and adjudicator's fee), but shall take into account the strength of the claims and defences.

Adjudication

- x. The deposit to HKIAC is intended to serve as an advance on costs for the adjudicator's fee and the administration fee which covers the general administration of the adjudication by the HKIAC including payment on account, appointment of adjudicator, revoking the appointment, replacement of an adjudicator and dispute as to adjudicator's fees and expenses.

f. Appointment and Panel of Adjudicators

The parties are free to agree on the adjudicator to be appointed. If no agreement can be reached, the appointment will be made by the HKIAC. The HKIAC will make appointment from the panel of adjudicators established and maintained by the HKIAC.

9. Independent Expert Certifier Review

a. About Independent Expert Certifier Review

A new type of neutral third party participating in the alternative dispute resolution is introduced in the Guidelines on Dispute Resolution which is known as Independent Expert Certifier (IEC).

IEC is an independent third party neutral who should have experience or expertise relevant to the area of the dispute.

The IEC conducts an independent and impartial review of the decision or certification made by the Architect/Engineer/Surveyor (the Certifier) and effectively provides a second opinion based on the same documents and information that were initially provided to the Certifier.

The decision of the IEC on the dispute is not final but binding in the interim, that is during the currency of the Works, which can be challenged by post-completion arbitration. The role of IEC will not replace or alter the Authorised Person's statutory duties, functions and power.

b. Considerations Taken into Account in Formulating a New Set of IEC Review Rules

The prime objective is to ensure that the IEC will come to a decision based on the same set of information as considered by the Certifier. Therefore, a set of simple and user-friendly rules is proposed by the Task Force.

c. Independent Expert Certifier Review Rules Proposed by the Task Force

The proposed set of IEC review rules are specified in **Annex E**.

d. Appointment and Panel of IEC

In the event that the parties cannot agree on the IEC to be appointed, the parties shall agree one of the following organisations to appoint an IEC: the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers or the Hong Kong Institute of Surveyors.

If the parties cannot agree on the appointing organisation, either party can write to the Hong Kong International Arbitration Centre ("HKIAC") requesting for the appointment of an IEC.

With extensive and diverse experience in establishing accreditation systems and managing panels of mediators, adjudicators and arbitrators, HKIAC is recognised

IEC Review

as a reputable organisation in establishing and maintaining the panel of IECs comprising of nominations from the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers and the Hong Kong Institute of Surveyors.

10. Expert Determination

a. About Expert Determination

Expert Determination is a final and binding dispute resolution process. The Expert has to make a determination on the issue before him and is allowed to use his own expertise in coming to his conclusion. Expert Determination can only be challenged in limited circumstances.

The Expert may conduct the determination in such manner, as he considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy resolution of the dispute. Expert Determination will be involved if a final decision on the dispute is expected.

b. Considerations Taken into Account in Formulating a New Set of Expert Determination Rules

The new set of rules is proposed with a view to providing a simple, user-friendly and efficient process.

c. Expert Determination Rules Proposed by the Task Force

The proposed set of rules for Expert Determination is set out in **Annex F**.

d. Appointment and Panel of Experts

If the parties cannot mutually agree to the appointment of an expert, the parties shall agree one of the following organisations to appoint an expert: the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers or the Hong Kong Institute of Surveyors.

If the parties cannot agree on the appointing organisation, either party can write to the Hong Kong International Arbitration Centre (“HKIAC”) requesting for the appointment of an Expert.

With extensive and diverse experience in establishing accreditation systems and managing panels of mediators, adjudicators and arbitrators, HKIAC is recognised as a reputable organisation in establishing and managing the panel of experts comprising nominations from the Hong Kong Institute of Architects, the Hong Kong Institution of Engineers and the Hong Kong Institute of Surveyors.

Candidates for inclusion in the list of experts to be maintained by the HKIAC must

Expert Determination

- i. be a registered professional;
- ii. be qualified by the board of the professional institute to attain the “fellow” membership status or have such qualifications as may be deemed appropriate by the professional institute; and
- iii. complete a compulsory training course on expert determination; plus fulfill other criteria as determined appropriate by respective professional institutes prior to the nomination for inclusion in the expert list.

11. Short Form Arbitration

a. About Short Form Arbitration

The arbitration will deal with a discrete dispute during the currency of the works. It will proceed on a documents-only basis and if necessary, with a short oral hearing. The award is final and binding.

The Housing Authority has adopted the use of a DRA and short form arbitration during the currency of the works as the dispute resolution mechanism for public housing works contracts.

DRA system coupled with short form arbitration has also been adopted in contracts of the Architectural Services Department with contract value exceeding HK\$200 million and complicated nature of work that disputes are likely to arise.

b. Considerations Taken into Account in Formulating a New Set of Short Form Arbitration Rules

The rules proposed by the Task Force have been developed in consideration of the rules currently adopted by the HKIAC and Architectural Services Department.

c. Short Form Arbitration Rules Proposed by the Task Force

A proposed set of Short Form Arbitration Rules for construction contracts which essentially follows the short form arbitration rules of Architectural Services Department is set out in **Annex H**.

d. Appointment and Panel of Arbitrators

If the parties cannot agree on the appointment of the arbitrator, the arbitrator will be appointed by the HKIAC.

The HKIAC will make appointment from the panel of arbitrators established and maintained by the HKIAC.

12. Default Option

If the parties are not able to reach agreement for whatever reason, a default mechanism has to be in place so that the disputes will be resolved as soon as possible.

Having considered the concerns of the various mechanisms, the familiarity with the procedures proposed as well as the desirability of having a decision, the Task Force proposed that adjudication should be the default mechanism to be adopted. There were concerns about the adjudication procedures raised by some in the Task Force and as a result the views of the stakeholders were sought. During the consultation meeting with the stakeholders this was specifically discussed and the views expressed manifest a strong preference for a process that would give rise to a decision, namely short form arbitration or adjudication and there is a strong tendency towards adopting adjudication.

The Task Force notes that since the consultation with the stakeholders, the Report on Security of Payment Legislation to Improve Payment Practices in the Construction Industry prepared by the Task Force on Security of Payment Legislation, in which enactment of security of payment legislation is recommended, has been adopted by the Committee on Subcontracting and the Construction Industry Council. This reinforces the Task Force's initial view on the need for a default mechanism that will result in a decision being rendered, i.e. Adjudication or Short Form Arbitration.

In the premises, the Task Force concludes that the default mechanism should be Adjudication for the following reasons:

- The desirability of having a decision from the default mechanism to ensure cash-flow is maintained.
- The Adjudication Rules proposed provide for a much simpler and shorter process removing the concerns of the industry with respect to the cost and time involved in adjudication conducted in Hong Kong thus far.
- Because of the nature of an interim binding outcome of adjudication which can be challenged through post-project completion arbitration, less formal processes are anticipated. Hence, while a quick decision can be arrived during the construction period, less resources would be required for preparing for the argument at the adjudication process. The losing party could still go for post-project completion arbitration with full legal support to challenge the adjudication decision if necessary.
- Adjudication as the default option would be in line with the overseas statutory adjudication under the security of payment legislation, which has been adopted in other jurisdictions, for instance Singapore, UK and Australia. Hence, the proposed mechanism may be reflective of the future security of payment legislation, should it be enacted.

Default Option

Mediation

There was a suggestion raised at the consultation meeting that after a failed mediation, the parties should be able to resort to the default mechanism, i.e. Adjudication as afore-mentioned, as opposed to post-contract arbitration. The Task Force considers that whilst the “stepped” approach is generally undesirable as noted in the Guidelines on Dispute Resolution, nonetheless there is much merit in the suggestion when adopted in the context as here and therefore the Task Force recommends it be adopted. The parties will not have had to wait for post-contract completion after having in good faith attempted mediation but failed to reach agreement. It will also avoid a party from abusing the use of mediation to stall the resolution of the dispute.

The flow chart in Chapter 6 (Figure 6.1) illustrates how this is to be implemented.

13. Special Conditions of Contract for Dispute Resolution Mechanism

In order to implement the new dispute resolution mechanism recommended in this Reference Material, a new set of Special Conditions of Contract for incorporating into construction contracts to supplement the General Conditions of Contract are required.

The Special Conditions of Contract proposed are set out in Annex I which are made reference to the Special Conditions of Contract for Adjudication prepared by Development Bureau for the use in public works contract.

14. Consultation with Stakeholders

a. Objectives of the Consultation Meeting

A consultation meeting was organised on 5 July 2012 to:

- offer major stakeholder groups the opportunity to hear the new mechanisms for handling construction disputes and the corresponding new sets of rules proposed by the Task Force on Dispute Resolution Documentation to speed up the resolution of construction disputes; and
- provide a platform for key stakeholder groups to share views, voice concerns or ask questions about the implications of the proposed new dispute resolution mechanisms before the Reference Material was finalised.

b. Programme Rundown

The following documents were distributed to participants in advance of the consultation meeting:

- i. a brief report of the Task Force on its proposal relating to the dispute resolution in construction industry;
- ii. a flow chart of the proposed dispute resolution mechanism; and
- iii. a set of draft rules and procedures for the five dispute resolution methods.

The consultation meeting was kicked off by Ir Teresa Cheng, Chairperson of the Task Force. Ms. Cheng gave an overview of dispute resolution in construction contracts – background, objectives and future. In addition, Ms. Cheng also introduced the proposed models rules and procedures of adjudication and independent expert certifier review, followed by the introduction on mediation, expert determination and short form arbitration respectively by two Task Force Members, namely, Ms. Catherine Mun and Mr. Yeung Ka-man.

c. Enrolment

Invitations were sent to 30 organisations including relevant government departments. The Secretariat received nomination of representatives from 27 organisations and government departments.

d. Number of Participants

The consultation meeting attracted around 90 representatives, including those from Development Bureau and respective government departments.

Consultation with Stakeholders

e. Feedback of Stakeholders

Major views and comments of stakeholders collected at the consultation meeting are summarised in Annex J.

Annex A - Terms of Reference

Task Force on Dispute Resolution Documentation

1. To prepare model dispute resolution clauses for incorporation into commonly used forms of construction contracts, which shall have regard to the dispute resolution practices recommended in the September 2010 Guidelines endorsed by the CIC on 9 December 2009;
2. In preparing for the model dispute resolution clauses, consideration should be given to
 - i. the types of dispute resolution mechanisms (eg, expert determination, mediation, adjudication, arbitration) to be covered by the model dispute resolution clauses, and whether such clauses should include dispute avoidance provisions such as dispute resolution adviser;
 - ii. the desirability to incorporate any institutional dispute resolution rules and procedures into the model dispute resolution clauses, and if that is desirable, whether modification should be made to any of those rules and procedures; if incorporation is not desirable, whether any procedures and rules should be drafted for the model dispute resolution clauses;
 - iii. whether any guideline on the use of the model dispute resolution clauses should be prepared; and
 - iv. how the model dispute resolution clauses can be integrated with or incorporated into commonly used forms of construction contracts;
3. To consult relevant stakeholders on the draft model dispute resolution clauses and associated reference materials (“final model documents”) and finalise the same; and
4. To make recommendations on the promulgation of the final model documents.

Working Group on the Review of the Implementation of the Dispute Resolution Mechanism

1. To review the “Reference Materials for Application of Dispute Resolution in Construction Contracts” (the Reference Materials) issued by the CIC with the view of having a smooth implementation of the dispute resolution mechanism;
2. To revise or fine-tune the rules and procedures of the dispute resolution mechanisms where appropriate and necessary; and
3. To update the Reference Materials, if deemed necessary.

Annex B - Membership List

Task Force on Dispute Resolution Documentation

Chairman	Ir Teresa CHENG Member of Committee on Subcontracting
Vice-Chairman	Mr. Eugene FONG The Hong Kong Federation of Electrical & Mechanical Contractors Limited
Members	Mr. Conrad WONG Member of Committee on Subcontracting
	Mr. Bernard HUI Co-opted Member of Committee on Subcontracting
	Mr. Geoffrey CHAN Solicitor
	Mr. Peter HO Accredited Mediator
	Mr. Gilbert KWOK The Hong Kong Institute of Surveyors
	Mr. Dean LEWIS Hong Kong Construction Association
	Mr. Stanley LO Solicitor
	Ms. Catherine MUN Solicitor
	Mr. NG Kwok-ming Hong Kong Construction Sub-Contractors Association
	Mr. NG Kwok-kwan Hong Kong Construction Industry Employees General Union
	Mr. YUEN Hung-wai Hong Kong General Building Contractors Association
Mr. Ringo MOK Development Bureau	
Mr. YEUNG Ka-man Hong Kong Housing Authority	

Working Group on the Review of the Implementation of the Dispute Resolution Mechanism

Chairman	Sr CHEUNG Tat-tong Co-opted Member of Committee on Procurement and Subcontracting
Members	Mr. Elvin CHIU The Real Estate Developers Association of Hong Kong
	Prof. Edwin CHAN Hong Kong Polytechnic University
	Prof. LEUNG Hing-fung The University of Hong Kong
	Mr. Dennis CAI Hong Kong International Arbitration Centre
	Dr. Simon CHEE Hong Kong Construction Arbitration Centre
	Mr. Derek ZEN Hong Kong Construction Association
	Mr. HO Wai-wah/ Mr. Ivan CHAN (from 18 May 2015) Hong Kong General Building Contractors Association
	Mr. LAU Chun-kay The Hong Kong Federation of Electrical and Mechanical Contractors Limited
	Mr. Lawrence NG Hong Kong Construction Sub-Contractors Association
	Mr. Edward SHEN/ Mr. YUEN Kwok-cheung (from 28 Feb 2014) The Hong Kong Institute of Architects
	Ir Henry LIU The Hong Kong Institution of Engineers
	Mr. Bernard WU The Hong Kong Institute of Surveyors
Mr. Honson CHIU Hong Kong Housing Authority	

	Mr. Stanley CHAN Development Bureau
	Mr. Ian PENNICOTT Hong Kong Bar Association
	Mr. Mark LIN The Law Society of Hong Kong

Annex C - Mediation Rules

	Mediation Rules Proposed by Task Force
Definition and Interpretation	<p>1. Unless the context otherwise requires,</p> <p>words in the singular shall include the plural and vice versa;</p> <p>reference to one gender shall include a reference to the other genders; and</p> <p>"day" shall mean a day other than a Saturday, Sunday or general holiday for the purposes of the General Holidays Ordinance (Cap. 149).</p>
General	<p>2. Mediation under these Rules is a confidential, voluntary, non-binding and private dispute resolution process in which a neutral person (the mediator) helps the parties to reach a negotiated settlement.</p>
General	<p>3. These Rules apply to the mediation of present or future disputes where the parties seek amicable settlement of such disputes and where, either by stipulation in their contract or by agreement, they have agreed that these Rules shall apply.</p> <p>4. The parties may agree to vary these Rules at any time.</p>
Initiation of the mediation process	<p>5. If a dispute arises, a party may initiate mediation by delivering a written request to mediate ("the Request") to the other party with copies to the Hong Kong International Arbitration centre ("HKIAC"). The Request shall identify the dispute and nominate a mediator to be appointed.</p>
Response to request for mediation	<p>6. Within 5 days of receiving the Request, the responding party shall notify the party requesting mediation whether the nominated mediator is acceptable and in the event that the nominated mediator is not acceptable, the parties shall attempt to agree a mediator within 10 days of receiving the Request.</p>
Appointment of the mediator	<p>7. Where the parties agree on a mediator and that person agrees to act as mediator, the mediation shall then proceed in accordance with these Rules.</p> <p>8. If the parties fail to agree on a mediator within the time stipulated in Rule 6, either party may request the HKIAC to appoint a mediator. The HKIAC shall appoint a mediator within three working days of</p>

	Mediation Rules Proposed by Task Force
	receiving the request or such other period as the HKIAC may require.
Disqualification of the mediator	<p>9. No person shall act as mediator in any dispute in which that person has any financial or personal interest in the result of the mediation except by consent of the parties.</p> <p>10. Before accepting an appointment, the proposed mediator shall disclose to the parties and to the HKIAC, if the HKIAC has to make the appointment under Rule 8, any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute.</p> <p>11. Upon receiving the information the HKIAC shall immediately communicate the information to the parties for their comments.</p> <p>12. If any party takes objection to the proposed mediator within 5 days of the disclosure made, the HKIAC shall decide if he is to be appointed and may in its absolute discretion appoint the same or another mediator.</p>
The mediation process	<p>13. The mediator shall commence the mediation as soon as possible after his appointment and shall use his best endeavours to conclude the mediation within 30 days of his appointment.</p> <p>14. The mediation process shall not extend beyond a period of three months from the date of the appointment of the mediator without the written consent of all parties.</p>
Role of the mediator	<p>15. The mediator may conduct the mediation in such manner as he considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement of the dispute.</p> <p>16. The mediator may communicate with the parties together or with each party separately.</p>
Role of the parties	<p>17. Each party shall co-operate in good faith with the mediator.</p> <p>18. Either party may request a private meeting with the mediator at any time.</p> <p>19. The parties shall give full assistance to enable the mediation to proceed and be concluded within the time stipulated.</p>

	Mediation Rules Proposed by Task Force
Representation	<p>20. The parties may be represented or assisted by persons of their choice.</p> <p>21. Each party shall notify in advance the names and the role of such persons to the mediator and the other party.</p> <p>22. Each party shall have full authority to settle or be accompanied by a person with such authority.</p>
Termination of the mediation	<p>23. The mediation process shall conclude:</p> <ul style="list-style-type: none"> a) Upon the signing of a settlement agreement by the parties or; b) Upon the written advice of the mediator after consultation with the parties that in his opinion further attempts at mediation are no longer justified or; c) Upon written notification by any party at any time to the mediator and the other parties that the mediation is terminated.
Confidentiality	<p>24. Mediation is a private and confidential process. Every document, communication or information disclosed, made or produced by any party for the purpose of or related to the mediation process shall be disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure. Confidentiality also extends to the settlement agreement except where its disclosure is necessary for implementation or enforcement.</p> <p>25. Nothing that transpires during the course of the mediation is intended to or shall in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent arbitration, adjudication or litigation.</p>
Costs	<p>26. Each party shall bear its own costs regardless of the outcome of the mediation or of any subsequent arbitral or judicial proceedings.</p> <p>27. All other costs and expenses shall be borne equally by the parties and the parties shall be jointly and severally liable to pay to the mediator such costs, including:</p> <ul style="list-style-type: none"> a) the mediator's fees and expenses; b) expenses for any witnesses or expert advice or opinion requested by the mediator with the

	Mediation Rules Proposed by Task Force
	<p>consent of the parties; and</p> <p>c) any administrative costs in support of the mediation.</p> <p>28. Before the commencement of the mediation, the mediator may require the parties to deposit such portion of the anticipated costs and expenses as he thinks appropriate. He may at any time during the mediation require the parties to make further deposits to cover any additional anticipated fees and expenses. Any surplus funds deposited shall be returned to the parties at the conclusion of the mediation.</p>
Mediator's role in subsequent proceedings	<p>29. The parties undertake that the mediator shall not be appointed, unless the parties agree otherwise, as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.</p>
Exclusion of liability	<p>30. The parties jointly and severally release, discharge and indemnify the mediator and the HKIAC in respect of all liability whatsoever, whether involving negligence or not, from any act or omission in connection with or arising out of or relating in any way to any mediation conducted under these Rules, save for the consequences of fraud or dishonesty.</p>

Explanatory Notes:

<u>Rule</u>	<u>Remarks</u>
2.	<u>General</u> HKIAC's version is used.
3 & 4.	<u>Application of the rules</u> HKIAC's version is used.
7 & 8	<u>Appointment of Mediator</u> DevB's rule has been chosen
20-22.	<u>Representation</u> HKIAC's rule is used.
23.	<u>Termination of the mediation</u> HKIAC/DevB's rules are essentially the same.
24 & 25.	<u>Confidentiality</u> HKIAC's rule is preferred as a broader provision would allow greater flexibility.
26 - 28.	<u>Costs</u> DevB's rule is preferred as it offers the party flexibility to determine whether the deposit should be kept by an independent body or the mediator.
29.	<u>Mediator's role in subsequent proceedings</u> <i>The parties undertake that the mediator shall not be appointed, <u>unless the parties agree otherwise</u>, as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.</i> HKIAC's rule is used with addition of an expression which is underlined above.
30.	<u>Exclusion of liability</u> HKIAC/DevB's rules are essentially the same.

Annex D - Adjudication Rules

	Adjudication Rules Proposed by Task Force
Definition and Interpretation	<p>1. Unless the context otherwise requires, words in the singular shall include the plural and vice versa.</p> <p>reference to one gender shall include a reference to the other genders; and</p> <p>"day" shall mean a day other than a Saturday, Sunday or general holiday for the purposes of the General Holidays Ordinance (Cap. 149).</p>
General	<p>2. Adjudication is a dispute resolution process where a third party neutral (the adjudicator) renders a Decision which is binding on the parties unless and until it is challenged in subsequent arbitration.</p> <p>3. The adjudication will be conducted under these rules and administered by Hong Kong International Arbitration Centre ("HKIAC").</p> <p>4. These Rules apply to the adjudication process to be adopted for the resolution of disputes pursuant to the agreement of the parties or where no agreement on the adoption of any other form of dispute resolution mechanism is reached, adjudication will, by default, be the applicable mechanism and these Rules will apply.</p> <p>5. The parties may agree to vary these Rules at any time.</p>
Appointment of adjudicator	<p>6. The party which initiates the adjudication (the Claimant) shall provide a list of at least 3 names of nominees for appointment of adjudicator with their current fee rates and any other conditions of appointment to the responding party (the Respondent) for the agreement on the adjudicator.</p> <p>7. In addition, an adjudication claim submission shall at the same time be provided to the Respondent and accompanied by such other information or documents (e.g. expert reports, witness statements, photographs, correspondence and submissions) as the Claimant may consider relevant.</p> <p>8. Within 20 days of receiving the Claimant's submission, the Respondent shall provide a response submission in reply to the Claimant's adjudication claim submission, copying the same to the appointed adjudicator.</p> <p>9. After receiving the adjudication claim submission, the Respondent shall within 5 days inform the Claimant and HKIAC whether the Respondent (i) agrees to appoint an</p>

	Adjudication Rules Proposed by Task Force
	<p>adjudicator from the list provided by the Claimant or (ii) make a counter-proposed list of at least 3 names of nominees for appointment of adjudicator and shall inform the HKIAC at the same time. If agreement is reached, HKIAC shall appoint the adjudicator within 3 days of receiving such agreement or such other period as the HKIAC may require.</p> <p>10. If the Respondent makes a counter-proposal, the Claimant shall within 3 days inform the Respondent and HKIAC whether the Claimant agrees to appoint an adjudicator from the list counter-proposed by the Respondent. If agreement is reached, HKIAC shall appoint the adjudicator within 3 days of receiving such agreement or such other period as the HKIAC may require.</p> <p>11. If no agreement is reached, the appointment shall be made by HKIAC within a further 3 days or such other period as the HKIAC may require.</p> <p>12. The adjudication is deemed to be commenced on the date of the appointment of the adjudicator, or the date of the provision of the response submission by the Respondent, or if no response submission is filed, the expiration of the period set out in Rule 8, whichever is later (“Adjudication Commencement Date”).</p> <p>13. Within 2 days of the Adjudication Commencement Date, the Claimant and the Respondent shall submit their respective claim submission and response submission previously provided to each other to the appointed adjudicator.</p>
Payment on account	<p>14. Each party shall within 5 days of the Adjudication Commencement Date deposit the sum of HK\$50,000 with HKIAC as a payment on account of the costs and proper expenses of the adjudication. The sum of HK\$50,000 is subject to annual review and adjustment by HKIAC.</p> <p>15. The adjudicator may at any time during the course of the adjudication require the parties to make a further deposit or deposits with HKIAC to cover anticipated additional fees and expenses.</p> <p>16. In the event of default by a party in making a deposit required under [Rule 14 or 15], the other party may serve notice on the party in default requiring payment within 5 days failing which the other party may make such payment itself or deem the adjudication to be abandoned.</p>
Procedure	<p>17. The power of the adjudicator shall be confined to what is provided in these Rules.</p>

	Adjudication Rules Proposed by Task Force
	<p>18. The adjudicator may decide whether or not to convene a hearing for the adjudication.</p> <p>19. If any party wishes to reply upon any factual or expert witness, their witness statement shall be included in the Claimant's adjudication claim submission or the Respondent's response submission. The adjudicator shall determine the period allowed for a party to question a witness called by the other party.</p>
Power of the Adjudicator	<p>20. The adjudicator shall have power:</p> <ul style="list-style-type: none"> • to examine any witness or conduct an inspection of any property or thing relevant to the Dispute; • to continue with the adjudication when a party fails to observe its obligation or comply with the requirements of the Rules; • to rule on his own jurisdiction. <p>21. The adjudicator does not have the power to compel any parties to give evidence. If a witness does not attend to answer questions the adjudicator may attach such weight to any witness statement as he thinks fit or exclude it altogether.</p>
Termination of adjudication	<p>22. By agreement between the parties, the adjudication may be terminated at any time on giving written notice to the adjudicator and to HKIAC.</p>
Decision	<p>23. The adjudicator shall provide both parties with the Decision on the adjudication within 20 days after the Adjudication Commencement Date.</p> <p>24. The adjudicator has the right to request an extension of time of up to a maximum period of 20 days in the event that the adjudicator considers it necessary.</p> <p>25. The adjudicator may render a Decision followed by the written reasons to be provided within 5 days of the Decision.</p>
Costs	<p>26. The adjudicator has an absolute discretion and express power to determine which party shall pay the costs of the adjudication. The adjudicator might proceed on a basis that the parties shall bear their own costs equally (i.e. legal cost and adjudicator's fee) but shall take into account the strength of the claim and defense in finally deciding on the issue of costs.</p> <p>27. If the adjudication is abandoned, suspended or concluded, by agreement or otherwise, before his Decision is made, the parties shall be jointly and severally liable to pay to the adjudicator his fees and other expenses, including the charges of HKIAC, as determined by him.</p>

	Adjudication Rules Proposed by Task Force
	<p>28. At the conclusion of the adjudication, HKIAC shall deduct the costs and expenses of the adjudication from the monies deposited under Rule [14 or 15] and shall return any surplus to the party/parties in proportion to their of making such deposit payments;</p> <p>29. In the event that at the conclusion of the adjudication the costs and expenses of the adjudication exceed the monies deposited under [Rules 14 or 15], the adjudicator may order the shortfall to be paid in accordance with this rule.</p>
Confidentiality	<p>30. The adjudication proceedings are private and confidential between the parties and the adjudicator. No information relating to the adjudication shall be disclosed by any person without the written consent of each and every party to the adjudication. Disclosures are permissible where disclosures:</p> <ul style="list-style-type: none"> (a) are necessary for implementation or enforcement; (b) are required by the parties' auditors or for some other legitimate business reason; (c) are required by any order of the courts of Hong Kong or other judicial tribunal; (d) are necessary for the making of claims against any third party or to defend a claim brought by any third party; or (e) otherwise agreed by the parties.
Adjudicator not Subsequently to Act as Arbitrator	<p>31. The adjudicator shall not be appointed as arbitrator in any subsequent arbitration between the parties, whether arising out of the dispute or otherwise arising out of the contract unless the parties agree otherwise in writing. The adjudicator cannot be called as a witness in any subsequent arbitration or litigation arising out of the Contract.</p>
Subsequent Arbitration	<p>32. In the event of any subsequent arbitration concerning any Dispute which has been the subject of adjudication all written submissions of and documents submitted by the parties and the Decision of the adjudicator shall be admissible in such arbitration.</p>
Exclusion of liability	<p>33. None of HKIAC, HKIAC Council, HKIAC Secretariat or their staff, adjudicators nor experts appointed by adjudicators shall be liable for any act or omission in connection with an adjudication conducted under these Rules, save where the act was done or omitted to be done dishonestly.</p>

Explanatory Notes:

<u>Rule</u>	<u>Remarks</u>
4	Adjudication can be chosen as a method of dispute resolution by agreement or as a default option if Claimant and Respondent cannot agree on one of the dispute resolution methods.
14	<ul style="list-style-type: none"> • The deposit is intended to serve as an advance on costs for the adjudicator's fee and administration fee of HKIAC. • The administration fee covers the general administration of the adjudication by the HKIAC including payment on account, appointment of adjudicator, revoking the appointment, replacement of an adjudicator and dispute as to adjudicator's fees and expenses.
20	<ul style="list-style-type: none"> • Adjudicator's powers are limited to those expressly set out in these rules. • In the consideration of the power of an adjudicator, the relevant clauses of the adjudication rules adopted by Development Bureau have been considered.
24	Adjudicator should be given the right to request for an extension of time to maximum 20 days in an event that the adjudicator considers necessary.
26	To encourage a greater use of adjudication and to give both parties a fair and equal opportunity, the adjudicator should be given an absolute discretion and express power to determine which party shall pay the costs of the adjudication.
30	<ul style="list-style-type: none"> • Reference is made to Rule 12.1 of Development Bureau's adjudication rules with an extra provision "(e) or otherwise agreed by the parties." added. • The following Rule 12.2 of Development Bureau's adjudication rules is not necessary as such provisions are included in Special Conditions of Contract.

"Notwithstanding Rule 12.1 and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose the outline of any dispute with the other party and the outcome of the adjudication to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the outcome of the adjudication without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the outcome of the adjudication. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified

<u>Rule</u>	<u>Remarks</u>
	<i>information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party's request, the Government party shall convey the request to the said Committee for its consideration."</i>
31	<ul style="list-style-type: none">• In the current rules of HKIAC and Development Bureau, an adjudicator can be called as a witness of fact in respect of the adjudication proceedings in any subsequent arbitration or litigation can only speak to matters within his knowledge relating to the conduct of the adjudication.• However, following the principle that judges in lower courts would not be asked to be witnesses in higher courts, the Task Force considered that the neutral party (i.e. adjudicator) should not be called as a witness in any subsequent arbitration or litigation arising out of the contract.

Annex E - Independent Expert Certifier Review Rules

	Independent Expert Certifier Review Rules Proposed by Task Force
Definition and Interpretation	<p>1. Unless the context otherwise requires, words in the singular shall include the plural and vice versa.</p> <p>reference to one gender shall include a reference to the other genders; and</p> <p>"day" shall mean a day other than a Saturday, Sunday or general holiday for the purposes of the General Holidays Ordinance (Cap. 149).</p>
Definition of IEC	<p>2. The Independent Expert Certifier ("IEC") is a neutral third party in the construction industry profession with the relevant expertise appointed to review any disputed decision or certification made by the Certifier designated in the contract. The IEC will render a Decision based on the same documentation that has been provided to the Certifier. The IEC Decision will be binding upon the parties unless and until it is challenged in subsequent arbitration.</p>
Application of IEC Rules	<p>3. These Rules apply to the process of IEC review of any disputed decision or certification of the Certifier where parties have by agreement chosen this dispute resolution mechanism.</p> <p>4. The parties may agree to vary these Rules at any time.</p>
Role of IEC	<p>5. The IEC shall review the documents already submitted by the parties to the Certifier designated in the contract. He shall not ask for and the parties shall not be allowed to provide additional or supplementary information during the process. The Decision of the IEC shall be based solely on such documents.</p>
Appointment of IEC	<p>6. The party requesting for an IEC review shall identify the decision/certification that is being challenged and the documents submitted previously to the Certifier on the basis of which the Decision/certification was made, and provide a list of 3 candidates for appointment as the IEC in its request for IEC review.</p> <p>7. The responding party shall within 5 days inform the other party whether any one of the 3 candidates provided is acceptable and if not, to make a counter-proposal with a list of 3 names for appointment as IEC.</p>

	Independent Expert Certifier Review Rules Proposed by Task Force
	<p>8. If the parties cannot agree on the IEC to be appointed within 3 days of receiving the counter-proposed list, the parties shall within another 3 days agree one of the following organisations to appoint an IEC:</p> <ul style="list-style-type: none"> • The Hong Kong Institute of Architects • The Hong Kong Institute of Surveyors • The Hong Kong Institution of Engineers <p>9. If the parties cannot agree on the appointing organisation within the 3 day period, either party can write to the Hong Kong International Arbitration Centre (“HKIAC”)* requesting for the appointment of an IEC.</p> <p style="padding-left: 40px;">Remarks *: HKIAC should establish and maintain the panel of IECs comprising of nominations from The Hong Kong Institute of Architects, The Hong Kong Institute of Surveyors and The Hong Kong Institution of Engineers.</p> <p>10. The appointing organisation shall in its absolute discretion appoint an IEC within 10 days of receiving the request to appoint.</p> <p>11. If any party takes objection to the IEC proposed by the appointing organisation within 5 days of the disclosure, the appointing organisation shall decide if he is to be appointed and may in its absolute discretion appoint the same or another IEC.</p>
Disqualification of the IEC	<p>12. No person shall act as the IEC in any dispute in which that person has any financial or personal interest in the disputed Decision or certification except by consent of the parties.</p> <p>13. Before accepting an appointment, the proposed IEC shall disclose to the parties and to the HKIAC, if the HKIAC has to make the appointment under Rule 9, any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute.</p> <p>14. Upon receiving the information HKIAC shall immediately communicate the information to the parties for their comments.</p> <p>15. If any party takes objection to the IEC proposed by the appointing organisation within 5 days of the disclosure, the appointing organisation shall decide if he is to be appointed and may in its absolute discretion appoint the same or another IEC.</p>

	Independent Expert Certifier Review Rules Proposed by Task Force
The Review Process	<p>16. Within 5 days of the appointment of the IEC, the parties shall respectively submit to the IEC the documents already submitted to the Certifier.</p> <p>17. Upon receiving the documents by the IEC, the IEC review process is deemed to have commenced (“the commencement of the IEC Review”).</p> <p>18. The IEC shall not require additional or supplementary information from either party.</p> <p>19. The IEC shall provide both parties with the Decision within 10 days after the commencement of the IEC Review.</p> <p>20. The IEC may render its Decision without providing reasons at the same time. In such eventuality, written reasons in support of the Decision already rendered have to be made no later than 5 days of the date of the IEC Decision.</p> <p>21. The time period within which the IEC has to render his Decision shall only be extended by agreement of the parties and in any event such period shall not extend beyond a period of three months.</p>
Duties of Parties to Facilitate the IEC Review procedure	<p>22. The parties shall give full assistance to enable the IEC review to proceed and be concluded within the time stipulated.</p>
The IEC Decision	<p>23. The Decision of the IEC shall be binding on the parties unless and until it is challenged in subsequent arbitration.</p> <p>24. The parties agree to comply with the Decision of the IEC.</p>
Termination of the IEC	<p>25. The appointment of the IEC may be terminated at any time by agreement of the parties upon giving written notice to the IEC.</p>
Costs	<p>26. The IEC has an absolute discretion and express power to determine which party shall bear and pay the costs of the IEC review process. The IEC may proceed initially on the basis that the parties shall each bear their own costs and the costs of the IEC in equal share. However, he is entitled to take into account other circumstances he thinks appropriate such as the strength of the claim and response.</p> <p>27. If the IEC process is abandoned, suspended or concluded, by agreement or otherwise, before the Decision is made, the parties shall be jointly and severally</p>

	Independent Expert Certifier Review Rules Proposed by Task Force
	liable to pay to the IEC his fees and other expenses including the charges of HKIAC.
Exclusion of Liability	28. The parties jointly and severally release, discharge and indemnify the IEC in respect of all liability whatsoever, whether involving negligence or not, from any act or omission in connection with or arising out of or relating in any way to any review conducted under these IEC Rules, save for the consequences of fraud or dishonesty.

Explanatory Notes:

<u>Rule</u>	<u>Remarks</u>
	Definition of IEC
2, 5, 20 & 23	In addition to certification, IEC will also make Decision and should therefore be included in the rules wherever appropriate.
	Role of IEC
5	The role of IEC is not resolving a dispute or reviewing the decision or certification made by the original certifier under the contract, (i.e. architect/engineer/surveyor. The IEC will conduct an independent certification to make an interim binding decision based solely on the same documents presented initially to the certifier designated in the contract.
	Appointment of IEC
10	The appointing organisation is recommended to establish and maintain the panel of IECs.
	Costs
26 & 27	Follow the same arrangement as provided in adjudication.

Timeline for Appointing Independent Expert Certifier Review

<u>Day</u>	<u>Duration (No of Working Days)</u>	<u>Procedure</u>
Day 0	0	The Claimant requests IEC review.
Day 1 – 5	5	The Respondent rejects and counter-proposes the nominations.
Day 6 - 8	3	The Claimant objects to counter-proposal
Day 9 - 11	3	<ul style="list-style-type: none"> • Both parties agree on an appointing body; or • Both parties fail to agree on an appointing organisation and one party writes to HKIAC for nomination
Day 12 - 21	10	The agreed appointing body / HKIAC nominates an IEC
Day 22 – 26	5	Parties do not raise objection to the proposed IEC
Day 27 – 31	5	Submission of same documents to IEC.
Day 32 – 41	10	The IEC provides both parties with the Decision
Day 42 - 46	5	The IEC makes written reasons in support of the Decision.



Engagement of IEC

Annex F - Expert Determination Rules

	Expert Determination Rules Proposed by Task Force
Definition and Interpretation	<p>1. Unless the context otherwise requires,</p> <p>“the Dispute” means the issue in dispute for expert determination in accordance with these Rules;</p> <p>“Expert” means a person who has accepted appointment to determine the Dispute in accordance with these Rules;</p> <p>words in the singular shall include the plural and vice versa;</p> <p>reference to one gender shall include a reference to the other genders; and</p> <p>"day" shall mean a day other than a Saturday, Sunday or general holiday for the purposes of the General Holidays Ordinance (Cap. 149).</p>
Scope	<p>2. Unless otherwise agreed in writing by the parties, the determination of the Dispute by the Expert (“Expert Determination”) shall be final and binding on the parties.</p>
Application of Expert Determination Rules	<p>3. These Rules apply where the parties have agreed to choose Expert Determination as the method to resolve the particular dispute and the description of the issues to be resolved by the expert to be appointed.</p> <p>4. The parties may agree to vary these Rules at any time.</p>
Appointment of the Expert	<p>5. The parties shall mutually agree on the person to be appointed as the Expert within 3 days after they have agreed to adopt these Rules.</p> <p>6. If the parties are unable to agree on the Expert, the parties shall within another 3 days agree one of the following organisations to appoint an Expert:</p> <ul style="list-style-type: none"> • The Hong Kong Institute of Architects • The Hong Kong Institute of Surveyors • The Hong Kong Institution of Engineers <p>7. If the parties cannot agree on the appointing organisation within the 3-day period, either party can write to the Hong Kong International Arbitration Centre</p>

	Expert Determination Rules Proposed by Task Force
	<p data-bbox="624 293 1353 327">("HKIAC")* requesting for the appointment of an Expert.</p> <p data-bbox="655 409 804 443">Remarks *:</p> <p data-bbox="655 450 1362 629">HKIAC should establish and maintain the panel of Experts comprising of nominations from the Hong Kong Institute of Architects, The Hong Kong Institute of Surveyors and The Hong Kong Institution of Engineers.</p> <p data-bbox="576 667 1362 797">8. The appointing organisation shall nominate an Expert within 3 working days of receiving the request or such other period as the appointing organisation may require, and notify both parties of the same.</p> <p data-bbox="576 835 1362 1032">9. The request for nomination shall include a description of the field of activity of the expert to be nominated together with any desired qualifications of the expert such as education, language skills and professional experience and a description of the issues to be determined by the expert to be appointed.</p> <p data-bbox="576 1070 1362 1200">10. If any party objects to the nomination, the party shall send the reasons for his objection to the appointing organisation in writing within 1 day of receiving the notice of nomination.</p> <p data-bbox="576 1238 1362 1503">11. The appointing organisation shall consider the reasons for the objection within 1 day of receiving the objection or such other period as it may require and may in its absolute discretion nominate another expert within 3 days of receiving the objection or such other period as it may require. The parties shall accept the decision of the appointing organisation that the objection cannot be substantiated or its second nomination as final.</p> <p data-bbox="576 1541 1362 1637">12. The Expert Determination is deemed to be commenced on the date when the Expert confirms his appointment to the parties.</p>
Role of the Expert	<p data-bbox="576 1682 1362 1812">13. The Expert shall act as an expert to determine the Dispute in accordance with these Rules. The Expert is not a mediator, arbitrator, adjudicator or expert witness and shall not act as such.</p> <p data-bbox="576 1850 1362 2013">14. The Expert may conduct the determination in such manner, as he considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement of the dispute.</p>

	Expert Determination Rules Proposed by Task Force
Exclusion of Liability	15. The Expert shall not be liable for any act or omission arising from Expert Determination under these Rules unless such act or omission is shown to have been fraudulent or deceitful.
Disqualification of the Expert	16. No person shall act as the Expert in any dispute in which that person has any financial or personal interest in the outcome of the determination except by consent of the parties. 17. Before accepting an appointment, the proposed or nominated expert shall disclose to the parties and the HKIAC, if the HKIAC has to make the appointment under Rule 7, any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute. Upon receiving the disclosed information the HKIAC shall immediately communicate the information to the parties for their comments. If any party objects to the appointment of the proposed expert within 5 days of receiving the disclosed information from the proposed or nominated expert or the HKIAC (as the case may be), the proposed or nominated expert shall not be appointed. In such case the appointing organisation shall in its absolute discretion nominate the same or another suitable expert.
Termination of the Expert Determination	18. The process of the Expert Determination may be terminated jointly by the parties at any time on giving written notice to the Expert.
The Expert Determination Process	19. Unless otherwise agreed by the parties, the Expert shall commence the determination as soon as possible after his appointment and shall use his best endeavours to conclude the determination within 10 days of his appointment. His determination shall not extend beyond a period of three months from the date of his appointment without the written consent of all parties.
Expert Determination Procedure	20. The parties each shall provide the Expert with all necessary information within 3 days after the appointment of the Expert with copies to the other party or parties. 21. The Expert may decide whether or not to convene meetings with both parties. He may communicate or meet with the parties together or may, upon request and having obtained consent from the parties, with any party separately. The Expert shall record in writing his discussions in private communications or meetings with any party.

	Expert Determination Rules Proposed by Task Force
	<p>22. The Expert may require further information to be provided by any party at any time during the determination.</p> <p>23. The Expert shall have the discretion to decide on the procedure to be followed in the determination such as to conduct site visit/inspection.</p> <p>24. The Expert may carry out his own investigation to ascertain any issues he considers necessary.</p> <p>25. With prior notification to both parties, the Expert may conduct such independent tests as he considers appropriate and may arrange for such tests to be carried out by others under his instruction.</p>
Parties to Facilitate the Expert Determination	26. The parties shall give full assistance to enable the Expert Determination to proceed and be concluded within the time limits stipulated in these Rules.
The Determination	<p>27. The Expert shall give his determination on the Dispute within the time frame as specified in these Rules in writing which should state:</p> <ol style="list-style-type: none"> a) the issues in dispute; b) the determination; and c) the reasons for reaching the determination. <p>28. The Expert Determination is binding on the parties from the date upon which it is made, unless and until the determination is overruled through legal proceedings.</p> <p>29. The parties agree to comply with the binding determination of the Expert without delay, regardless of any legal proceedings contemplated or being taken by any party.</p>
Costs	<p>30. The Expert has an absolute discretion and express power to determine which party shall pay the costs of the Expert Determination. The Expert might proceed on a basis that the parties shall bear the costs of the Expert Determination (i.e. the Expert's fees and expenses, but excluding legal costs) equally but shall take into account the strength of the claim and defence. The parties should bear their own legal costs, if any.</p> <p>31. The parties shall be jointly and severally liable to pay the Expert his fees and expenses including the charges of the HKIAC.</p> <p>32. If the Expert Determination is abandoned, suspended, terminated or concluded, by agreement or otherwise,</p>

	Expert Determination Rules Proposed by Task Force
	before the Expert Determination is made, the Expert shall determine which party shall pay the costs of the Expert Determination following the principles in Rule 30 unless the parties agree otherwise.

Explanatory Notes:

<u>Rule</u>	<u>Comments</u>
The Expert Determination Process	<u>Unless otherwise agreed by the parties</u> , the Expert shall commence the determination as soon as possible after his appointment and shall use his best endeavours to conclude the determination within <u>10</u> days of his appointment. His appointment shall not extend beyond a period of three months from the date of his appointment without the written consent of all parties.
Expert Determination Procedure	<p>Rule 20 - The parties shall provide the Expert with all necessary information within <u>3</u> days after the appointment of the Expert and copies to the other party or parties.</p> <p>Rule 21 - The Expert may decide whether or not to convene meetings with both parties. He may communicate or meet with the parties together or upon request and having obtained consent from the parties, with any party separately. <u>The Expert shall record in writing his discussions in private communications or meeting with any party.</u></p> <p>Rule 23 - The Expert shall have the discretion to decide on the procedure to be followed in the determination <u>such as to conduct site visit/inspection.</u></p>
Costs	The principle of cost allocation basically follows the adjudication rules.

Timeline for Appointing Expert

<u>Day</u>	<u>Duration (No of Working Days)</u>	<u>Procedure</u>
Day 0	0	Parties agree to adopt Expert Determination
Day 1 - 3	3	The parties cannot agree on an Expert
Day 4 - 6	3	<ul style="list-style-type: none"> Both parties agree on an appointing body; or Both parties fail to agree on an appointing organisation and one party writes to HKIAC for nomination
Day 7 - 9	3	The appointing body nominates an Expert
Day 10	1	Either party sends the reasons for objecting to the nomination of the appointing body
Day 11 – 14	4	The appointing body to consider reasons for the objection and re-nominate another expert as appropriate
Day 15– 19	5	Parties do not raise objection to the proposed Expert after declaring interest, if any
Day 20 - 22	3	The parties provide necessary information to the Expert
Day 23 – 32	10	The Expert concludes the determination (the determination shall not extend beyond 3 months)

 Engagement of Expert

Annex G - Short Form Arbitration Rules

	Short Form Arbitration Rules Proposed by Task Force
Definition and Interpretation	<p>1. Unless the context otherwise requires, words in the singular shall include the plural and vice versa.</p> <p>Reference to one gender shall include a reference to the other genders.</p> <p>"day" shall mean a day other than a Saturday, Sunday or general holiday for the purposes of the General Holidays Ordinance (Cap. 149).</p>
Application of the Rules	<p>2. These Rules apply where the parties have agreed to choose Short Form Arbitration as the method to resolve the particular dispute.</p> <p>3. The parties may agree to vary these Rules at any time.</p>
Preliminary	<p>4. In these Rules all words and expressions shall have the same meaning as in the Contract unless otherwise provided or where the context otherwise requires. Any interpretation and application of these Rules shall be consistent with Special Conditions of Contract Clause [SCC#]. In the event of conflict, Special Conditions of Contract Clause [SCC#] shall govern.</p> <p>5. The place of the arbitration shall be the Hong Kong Special Administrative Region</p> <p>6. (a) For the purposes of these Rules the Employer and the Contractor shall be called the "parties to the dispute".</p> <p>(b) For the purposes of these Rules whichever of the Employer or the Contractor, served the "Notice of Dispute", pursuant to Special Conditions of Contract Clause [SCC#] shall unless otherwise agreed, be termed the "Claimant".</p>
Commencement of Arbitration and Appointment of Arbitrator	<p>7. (a) The Commencement Date of the arbitration shall be deemed to be the date immediately following agreement by the Parties to arbitrate their dispute under these Rules.</p> <p>(b) The Employer and the Contractor shall attempt to select and agree upon the appointment of an Arbitrator.</p>

	Short Form Arbitration Rules Proposed by Task Force
	(c) If the parties to the dispute are unable to agree upon an Arbitrator within 5 days of the Commencement Date, then the Arbitrator shall be appointed, upon the written application of either the Employer or the Contractor, by the Hong Kong International Arbitration Centre (HKIAC) or, alternatively, where a party proposes and the other party concurs then the Arbitrator shall be appointed in accordance with the HKIAC list system for the appointment of arbitrators within 5 days.
Procedure Generally	8. The Arbitrator shall be provided with a copy of these Rules by the Claimant and unless the Arbitrator is of the opinion that a preliminary meeting is necessary, all procedural matters not dealt with in these Rules shall, failing agreement between the parties, be settled by directions of the Arbitrator set out in correspondence.
Site Visit	9. The Arbitrator may at any time during the course of the arbitration conduct a site visit, if he considers that such a visit may assist him in understanding the dispute.
Interlocutory Matters	<p>10. Within 15 days of the Arbitrator's acceptance of his appointment, the Claimant shall submit to the Arbitrator and to the Respondent a Statement of Claim case file containing :</p> <p>(a) a brief statement of that party's principal arguments of fact and law and of the remedies sought; and</p> <p>(b) copies of all relevant documents on which that party will rely.</p> <p>11. Within 15 days of receiving the Claimant's Statement of Claim case file, the Respondent shall submit to the Arbitrator and to the Claimant a Statement of Defence case file containing :</p> <p>(a) a brief statement of his principal arguments of fact and law; and</p> <p>(b) copies of all relevant documents on which that party will rely.</p> <p>12. Within 10 days of receiving the Respondent's Statement of Defence case file the Claimant shall submit :</p> <p>(a) any Reply that the party wishes to make; and</p> <p>(b) any other relevant documents on which that party will rely for this purpose.</p> <p>13. The Arbitrator may, at his discretion, permit the parties to make further replies to each other's cases, but shall</p>

	Short Form Arbitration Rules Proposed by Task Force
	<p>in exercising this power have regard to the intention of these Rules that the hearing shall take place within 50 days from the Commencement Date.</p> <p>14. The Arbitrator may require the parties to submit to him and to each other such further documents or information as he considers to be necessary to his Decision.</p>
Election of Oral Hearing or Documents-Only Procedure	15. The parties to the dispute may elect to present their case to the Arbitrator either by way of an oral hearing or by way of documents-only. The election of the parties to the dispute is binding subject to the provisions of Rule 22. In the event the parties to the dispute are unable to agree as to which procedure to elect the Arbitrator shall determine the procedure.
Oral Hearing	16. Where the parties elect a procedure by way of an oral hearing, the Arbitrator shall fix a date for the hearing at the earliest opportunity, which hearing date shall not be more than 55 days from the Commencement Date or 5 days from the Claimant's Reply, whichever is the later.
Documents-Only	17. Where the procedure is to be by way of documents-only, the Arbitrator may call the parties to an informal hearing for the purpose of seeking further clarification of statements made in the case files. Such informal hearing shall not be more than 55 days from the Commencement Date.
The Arbitration Hearing	<p>18. The arbitration hearing shall, subject to provisions of Rule 22, be conducted and concluded in one day.</p> <p>(a) On the morning of the arbitration hearing, the Claimant or his representatives shall have 2 hours to make a presentation of his claim to the Arbitrator. During his presentation, the Claimant shall not be permitted to produce any documents or cost records which have not already been provided to the Respondent. The Claimant shall be permitted to produce any analysis or description of his claim which has been prepared for the purpose of his presentation.</p> <p>(b) The Respondent and his representatives shall have 1 hour to ask the Claimant questions about his claim and his presentation. Thereafter the Arbitrator shall have ½ hour to ask the Claimant questions about his claim and his presentation.</p> <p>(c) After lunch the Respondent or his representatives</p>

	<p align="center">Short Form Arbitration Rules Proposed by Task Force</p>
	<p>shall have 2 hours to make a presentation of his claim to the Arbitrator. During his presentation, the Respondent shall not be permitted to produce any documents or cost records which have not already been provided to the Claimant. The Respondent shall be permitted to produce any analysis or description of his claim which has been prepared for the purpose of his presentation.</p> <p>(d) The Claimant and his representatives shall have 1 hour to ask the Respondent questions about his claim and his presentation. Thereafter the Arbitrator shall have ½ hour to ask the Respondent questions about his claim and his presentation.</p> <p>(e) If either party wishes to call evidence he may do so, but must not exceed the time limits set out above. Any questioning of witnesses by other parties or the Arbitrator shall be counted as part of the time allowed under Rules 18(b) and 18(d), and the time allowed to them to ask questions at the end of the presentation shall be reduced accordingly.</p> <p>19. Subject to the above time limitation, the Arbitrator may conduct the arbitration in such manner as the Arbitrator deems reasonable and in accordance with the rules of natural justice.</p>
<p>An Award arising out of an Oral Hearing or Documents-Only Arbitration</p>	<p>20. The Arbitrator shall within 10 days of the hearing or, in the case of a documents-only arbitration, within 10 days of the last submission of documents or the holding of an informal hearing whichever is later, make an award. The award shall be in writing and unless the parties to the dispute otherwise agree shall contain a concise reasoned decision with sufficient detail so that the parties may appreciate the reasons for the award. The award need not contain sufficient details to enable one or other of the parties to the dispute to submit an appeal pursuant to Schedule 2, Section 5 of the Arbitration Ordinance (Cap. 609).</p>
<p>Costs</p>	<p>21. Subject to Rule 22(a) the Arbitrator shall, unless the parties to the dispute otherwise agree, determine the costs of the award and the costs of the reference and who shall pay them.</p>
<p>Transfer of the Arbitration Costs and the Cost of the DRA Report</p>	<p>22. (a) After the conclusion of the arbitration hearing or, in the case of a documents-only arbitration within 3 days of the last submission of documents or after the holding of an informal hearing, whichever is later but prior to the publication of the award pursuant to</p>

	Short Form Arbitration Rules Proposed by Task Force
	<p>Rule 20 either of the parties to the dispute may apply, in writing to the Arbitrator for the Arbitrator to render an award save as to costs. Such application shall be copied to the other party. The Arbitrator shall consider the request and afford the party not making the request an opportunity for comment. If the Arbitrator considers the request reasonable he shall make and publish an award on the dispute but shall not make an award as to costs. He shall then convene a separate meeting to hear evidence on the transfer of costs. Such meeting should normally be held within 10 days of the date of publication of the award.</p> <p>(b) At the meeting the parties to the dispute shall be entitled to present evidence to demonstrate that the award of costs should not follow the event and that some or all costs should be transferred. The Arbitrator may also transfer all or part of the costs of the award and costs of the reference.</p>
General	<p>23. If, during the course of the arbitration, the Arbitrator concludes that the dispute is incapable of proper resolution in accordance with these Rules, he shall advise the parties of his alternative proposals for the conduct of the arbitration. The arbitration shall, unless otherwise directed by the Arbitrator, continue from the point already reached.</p> <p>24. The Arbitrator shall have the power to extend any of the time limits stipulated in these Rules or time limits agreed upon by the parties to the dispute pursuant to these Rules.</p>
Confidentiality	<p>25. The arbitration proceedings are private and confidential between the parties and the Arbitrator. No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration. Disclosures are permissible where disclosures –</p> <p>(a) are necessary for implementation or enforcement;</p> <p>(b) are required by the parties’ auditors or for some other legitimate business reason;</p> <p>(c) are required by any order of the courts of Hong Kong or other judicial tribunal;</p> <p>(d) are necessary for the making of claims against any third party or to defend a claim brought by any third party.</p>

	Short Form Arbitration Rules Proposed by Task Force
	<p>26. Notwithstanding Rule 25 and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose an outline of any dispute with the other party and the outcome of the arbitration to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the outcome of the arbitration without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the outcome of the arbitration. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party's request, the Government party shall convey the request to the said Committee for its consideration.*</p> <p>(*This provision can be omitted for private sector contracts.)</p>

Insert the relevant Clause SCC No. with title "Dispute Resolution".

Annex H - Special Conditions of Contract for Dispute Resolution Advisor System (Development Bureau)

Dispute Resolution Advisor System

1. The operation of the Dispute Resolution Advisor (DRA) System is set out in Annexes A and B to this Special Condition of Contract.
2. General Conditions of Contract Clauses 48, 50, 61 and 63 are amended in accordance with the DRA System.
3. For the avoidance of doubt this Special Condition shall include Annexes A and B to this Special Condition of Contract.

Annex A - Procedures for Dispute Resolution Advisor (DRA) System

1. DRA Services

1.1. Definition of Services

The services to be performed by the DRA under the Contract shall comprise the duties and powers set out or necessarily implied from the Contract and the DRA Agreement (“Services”).

1.2. Generally

The role of the DRA is to foster co-operation between the Contractor and the Employer and their consultants and sub-contractors, minimise the number of claims, avoid conflicts in the first instance and settle disagreements or disputes as they emerge and before they become Disputes which shall be dealt with in accordance with Special Conditions of Contract Clauses [X] and [Y].

1.3. Particular Services

Without limitation the DRA Services include:

- a) To study and understand the documents forming the Contract.
- b) To spend a sufficient amount of time on the Site to become familiar with the relevant personnel, including the Engineer, the Engineer’s Representative, the liaison with the end-user’s administration (where appropriate), and the representatives of the Contractor and some or all of the sub-contractors.

- c) To attend an initial briefing meeting between the Contractor and the Employer or his representatives (all Nominated and Specialist Sub-contractors shall attend this meeting).
- d) To attend selectively at progress meetings, co-ordination meetings and any other ad hoc meetings.
- e) To meet on a monthly basis with the Employer and the Contractor either separately or together to attempt to resolve problems that arise before they become disputes and to anticipate problems that may arise in the future. The DRA shall meet more frequently with the Employer and the Contractor if either requests such a meeting. Such request shall be in writing.
- f) To conduct Site walks.
- g) To study and review the programme including short term and rolling programmes.
- h) To prepare reports to the Contractor and the Employer.
- i) To study and review selective correspondence generated by the Contractor and the Employer.
- j) To use all practicable and proactive measures to prevent dispute from occurring.
- k) To hold meetings as and when the DRA considers necessary for the purpose of avoiding conflicts or settling disagreements. The Contractor, the Employer, the Engineer or their representatives shall attend the meeting if so invited by the DRA. Such invitation shall be in writing.
- l) To provide independent views to the Employer's Report Review Committee on the Contractor's performance under the Contract in respect of "Progress" and "Claims Attitude", upon receiving Contractor's appeal on the Engineer's assessment.
- m) Other Services more particularly set out in Schedule 1 of the DRA Agreement.
- n) Other Services to be reasonably inferred from the Contract and the DRA Agreement.

2. Selection and Appointment of DRA

- 2.1. A DRA shall be appointed within [] days of the award of the Contract or within such additional time as may be agreed by the Contractor and the Employer. The DRA shall have experience in the construction industry and possess dispute resolution skills. He shall be neutral and independent of both parties. He cannot be an employee of either the Employer or Contractor or of any

Sub-contractor or Nominated Sub-contractor who will be engaged to execute any part of the Works and shall not have any actual or perceived conflict of interest.

- 2.2. The Employer shall on the same day as issuing the letter of acceptance of the Tender provide the Contractor with a list of ten possible DRA candidates. The Contractor shall within seven days select five candidates from the Employer's list and advise the Employer in writing using the prescribed form set out in Appendix [] together with a confirmation letter from the selected candidates indicating their agreement to submit a proposal for the position of DRA on being invited by the Employer and has subject to consideration of the invitation to be provided by the Employer no conflict of interest.
- 2.3. The Employer shall invite each of the DRA candidates nominated by the Contractor to submit a proposal for the position of DRA.
- 2.4. Technical and fee proposals from each DRA candidate should include an appreciation of potential areas of dispute that might arise under the Contract as well as their level of remuneration. Two copies of the technical and fee proposals shall be submitted simultaneously, one for each party to the Contract.
- 2.5. The Employer and the Contractor shall jointly select a DRA by agreement through a ranking system as described herein. The Employer and the Contractor shall each rank the candidates who have made proposals in order of preference with the most preferred candidate receiving the lowest number.
- 2.6. The Employer and the Contractor shall be at liberty to adopt different marking schemes for the assessment of the DRA. Where the Employer has rejected a DRA candidate on the basis of his technical proposal, the Contractor agrees that such DRA candidate will not be selected and appointed and the Contractor shall also disregard that candidate when ranking the DRA candidates.
- 2.7. The Contractor shall meet with the Employer within seven days after the closing date for receiving proposals from DRA candidates. At the meeting the Employer and the Contractor shall reveal their respective rankings of the DRA candidates. The DRA candidate with the lowest combined score shall be

appointed. The successful candidate shall be advised by the Employer on the appointment.

- 2.8. If there is more than one DRA candidate with the lowest combined number, the Employer and the Contractor shall attempt to agree who shall be appointed. Failing agreement either the Employer or the Contractor may write to the Secretary General of the Hong Kong International Arbitration Centre (HKIAC) who shall select the DRA from those candidates with the lowest combined number. The HKIAC may charge a fee, which can be reviewed from time to time, for making such selection. Any fee so charged shall be paid jointly by the Employer and the Contractor.
- 2.9. Where the successful DRA candidate for any reason cannot or will not take up the DRA position, the DRA candidate with the next lowest combined number in order of preference shall be invited to take up the DRA position. Should that person for any reason be unable to accept the appointment, the candidate with the next lowest combined number in order of preference shall be approached and so on until a DRA is appointed.

3. Parties to enter into a DRA Agreement

The Employer and the Contractor shall enter into a Dispute Resolution Advisor Agreement (“the DRA Agreement”) in the form set out in Annex B to this Special Condition of Contract modified as may be agreed between the Employer, Contractor on the one hand and the DRA candidate on the other. Should agreement cannot be reached on the modifications, the final DRA Agreement shall be determined by the Employer.

4. Payment of DRA Fees

The Employer and the Contractor shall each pay 50% of the DRA costs, fees and expenses in respect of the Services provided to them as described in the DRA Agreement. If either the Employer or the Contractor fails to pay any amount due to the DRA within 7 days after the due date, then whichever of them is not in default shall pay the amount owing to the DRA. This amount shall then be a debt due from whichever has not paid the debt to the other. Should the Employer make such a payment as a result of the Contractor’s default, he shall, in addition to any other rights he may have, be entitled to

deduct the amount paid from any monies due from the Employer to the Contractor under General Conditions of Contract Clause 79 or otherwise.

5. Tenure of DRA

5.1. The tenure of the DRA shall, unless the Employer and the Contractor otherwise agree in writing, cease upon the date of issue of the maintenance certificate pursuant to Clause 80 of the General Conditions of Contract. Irrespective of the above, the DRA may be discharged at any time by a joint written notice from the Employer and the Contractor. The Employer or the Contractor may discharge the DRA unilaterally at any time after the first six months of his tenure as DRA. As a precondition to such discharge, however, the party wishing to discharge the DRA shall first meet with the other party to the Contract to advise of the intention to discharge and the reasons for the proposed discharge. After the meeting, should the party still wish to discharge the DRA the party may do so by giving the DRA notice in writing specifying the effective date of the discharge, such notice to be copied to the other party to the Contract.

5.2. If the DRA is discharged pursuant to Clause 5.1 of these Procedures, or resigns from the position, or is otherwise unable to fulfill his obligations, the Employer and the Contractor shall choose another DRA pursuant to Clause 2 of these Procedures, or they may so agree to appoint the DRA candidate who has made submission in the earlier DRA selection exercise in order of preference as defined in Clause 2.5. The replacement DRA shall be appointed within 30 days of the date of discharge or resignation or incapacity of the incumbent DRA.

6. Dispute Resolution Process

6.1. Amendment to General Conditions of Contract

- a) General Conditions of Contract Clause 1(1) shall be amended by Special Condition of Contract Clause [X].
- b) General Conditions of Contract Clause 86 shall be amended by Special Condition of Contract Clause [Y].

6.2. Dispute Avoidance and Settlement

- a) The contracting parties shall endeavour to settle any differences or

disputes between them through mutual understanding and the promotion of good working relationship. This could be done with or without the assistance of the DRA throughout the contract period. However in the event that, despite of the proactive effort of the DRA, any Dispute has arisen, it shall be referred to the Engineer in accordance with the provisions set out in Special Conditions of Contract Clause [Y].

- b) If the Engineer shall fail to give such decision for a period of 28 days after being requested to do so or if either the Employer or the Contractor be dissatisfied with any such decision of the Engineer then the contracting parties may choose the most suitable form of dispute resolution measures which may include mediation, adjudication or arbitration all in accordance with the procedures set out in the Special Conditions of Contract Clause [Y].

7. Amendment of General Conditions of Contract Clauses 48, 50, 61 and 63

7.1. Introduction of time limits for Engineer to make decision or valuation

Further to General Conditions of Contract Clauses 48, 50, 61 and 63, the following time limits shall apply in respect of the following types of claims evaluation, ascertainment and determinations that may arise under the Contract.

7.2. General Conditions of Contract Clause 61

- a) With respect to any Engineer's determination, arising under General Conditions of Contract Clause 61 relating to any valuation by the Engineer of a variation, the Engineer's duty to determine the sum which in his opinion shall be added to or deducted from the Contract Sum shall commence with the issuance of the variation by the Engineer and such determination shall be provided to the Contractor within 56 days thereafter.
- b) If the Engineer considers that he reasonably requires information from the Contractor to assist in the determination, the Engineer shall request such information in writing within 7 days of the issuance of the variation by the Engineer.
- c) The Contractor shall provide within 7 days of receiving the request any information that the Engineer may reasonably require to assist in this determination.
- d) In the absence of the requested information, the Engineer may make his determination based on the information otherwise available.

7.3. General Conditions of Contract Clause 63

- a) With respect to any Engineer's ascertainment, pursuant to General Conditions of Contract Clause 63 relating to an evaluation by the Engineer of a claim by the Contractor arising out of a grant by the Engineer of an extension of time pursuant to General Conditions of Contract Clause 50, the Contractor shall submit his claim, to the Engineer within 28 days after the Engineer's notice and the Engineer's evaluation of the claim shall be provided to the Contractor within 56 days of receiving the Contractor's claim.
- b) If the Engineer considers that he reasonably requires further information from the Contractor to assist in the evaluation, the Engineer shall request such information in writing within 7 days of the date of receiving the Contractor's claim.
- c) The Contractor shall provide within 7 days of receiving the request any information the Engineer may reasonably require to assist in the evaluation.
- d) In the absence of the requested information, the Engineer may make his evaluation based upon the information otherwise available.

7.4. General Conditions of Contract Clause 48(2)

- a) With respect to any other Engineer's determination or ascertainment, including any requirement to ascertain Cost pursuant to General Conditions of Contract Clause 48(2), the Contractor shall serve notice to the Engineer within 28 days after happening of the events giving rise to a claim, and the Engineer's determination of the sum which in his opinion shall be added to or deducted from the Contract Sum or ascertainment of the Cost incurred, as the case may be, shall be provided to the Contractor within 56 days thereafter, if not already so provided.
- b) If the Engineer considers that he reasonably requires further information from the Contractor to assist in the determination the Engineer shall request such information within 7 days of the date of receiving the Contractor's notice.
- c) The Contractor shall provide within 7 days of receiving the request any information the Engineer may reasonably require to assist in the determination.
- d) In the event that it is necessary to keep contemporary records pursuant to General Conditions of Contract Clause 64(3) to support the claim and the Engineer would, in the absence of such records, be unable to determine the sum which in his opinion shall be added to or deducted from the

Contract Sum or ascertain the Cost incurred, as the case may be, the Employer and the Contractor may, pursuant to Clause 7.7 extend the time limit for the Engineer's determination or ascertainment.

7.5. Failure of Engineer to provide determination or ascertainment

If the Engineer does not provide a determination or ascertainment within the time period prescribed in this Clause 7, the Contractor may request for the assistance of the DRA whose main duty is to avoid conflicts or differences from turning into Disputes, or he may wait until the determination or ascertainment is provided.

7.6. General Conditions of Contract Clause 50

- a) Should the Contractor apply for an extension of time for completion pursuant to General Conditions of Contract Clause 50, the Engineer shall provide his decision on the extension of time for completion to the Contractor within 56 days of the Contractor's notice.
- b) If the Engineer considers that he reasonably requires further information from the Contractor to assist in the determination of the extension of time the Engineer shall request such information within 7 days of the date of receiving the Contractor's notice.
- c) The Contractor shall provide within 7 days of receiving the request any information the Engineer may reasonably require to assist in the determination.
- d) In the absence of the information requested, the Engineer may make his determination based upon the information otherwise available.
- e) In the event that:
 - i. the delay has a continuing effect and the Engineer is unable to determine the full extent of the extension of time, the Engineer may first grant an interim extension of time; or
 - ii. the circumstances are such that it is unclear if an extension of time will be required then the Employer and the Contractor may pursuant to Clause 7.7 extend the time limit for the Engineer's grant.

7.7. Extension of time limit

- a) The Employer and the Contractor may agree to extend any of the time limits set out in this Clause 7. Such agreement shall be in writing and copied to the DRA.
- b) If the Employer and the Contractor are unable to agree such extension

then either the Employer or the Contractor, as the case may be, shall inform the DRA in writing prior to the expiry of the time limit in issue, that there is a disagreement and the DRA shall be empowered to determine whether an extension to the time limit is in all the circumstances reasonable and if so, the amount of such extension.

- c) The Employer and the Contractor shall be bound by the DRA's determination and both parties agree that neither shall refer such a decision to the Engineer pursuant to the Special Condition of Contract Clause [Y].

8. Sub-contractors and Nominated Sub-contractors

8.1. Where the Contractor sub-contracts any part of the Works in accordance with Clause 4 of the General Condition of Contract the Contractor shall include the following clause (with only such modifications as may be agreed by the Employer) in any and all such sub-contracts and shall use his best endeavours to ensure that the terms and conditions of the clause are observed:

- (1) The sub-contractor acknowledges that a Dispute Resolution Advisor (DRA) has been appointed in the Contract between the Employer and the Contractor. The role of the DRA is to foster co-operation between the Contractor and the Employer and their consultants and sub-contractors in order to prevent or at least minimise disputes that may arise in the course of the Contract.
- (2) The sub-contractor shall where requested by the Contractor or the DRA:
 - (a) attend and participate in meetings with the DRA alone or with the DRA, the Contractor, the Employer and such other parties as the DRA directs,
 - (b) provide documents or copies of documents to the DRA on the DRA's request, and
 - (c) negotiate in and deal in good faith using its best endeavours with respect to any issue or dispute which arises between the Contractor and it where such issue or dispute affects or may affect any issue or dispute between the Contractor and the Employer.
- (3) The sub-contractor acknowledges that the DRA will not and shall not assist in the resolution of issues or disputes between the

Contractor and the sub-contractor which do not and will not affect any issue or dispute between the Contractor and the Employer.

- (4) The Sub-contractor undertakes to the Contractor that he will maintain in strict confidence any information provided to him by the DRA or by the Contractor or Employer in the course of meetings held with the DRA.

9. Engineer to co-operate with DRA

It shall be part of the Engineer's (and of the Engineer's Representatives) duties and powers to co-operate with the DRA.

SPECIAL CONDITION OF CONTRACT

Annex B - Dispute Resolution Advisor (DRA) Agreement

THIS AGREEMENT is made the ____ day of _____

BETWEEN:

THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (“the Employer”); and

_____ of _____ (“the Contractor”);
and

_____ [Name of DRA] _____

and where referred to collectively called “the parties”.

WHEREAS:

- A. The Employer has awarded to the Contractor Contract No. _____ (“the Contract”) and _____ [Name of DRA] _____ has been provided with an extract of the contract document showing the extent of the Contract and programme details.
- B. The Contract requires the Employer and the Contractor to enter into a written agreement with a Dispute Resolution Advisor (“DRA”) to give effect to the obligations of the DRA as provided for in the Contract.
- C. The Employer and the Contractor wish to jointly appoint _____ [Name of DRA] _____ as DRA and _____ [Name of DRA] _____ has agreed to accept such appointment on the following terms and conditions now set out.

NOW IT IS AGREED AS FOLLOWS:

1. Definitions and Interpretation

- 1.1. Unless the context otherwise requires, in construing this Agreement words and expressions

- 1.2. Should there be any ambiguity or issue of precedence in the interpretation of this Agreement between the Contract and this Agreement, this Agreement shall prevail.
- 1.3. This Agreement shall be governed by and construed according to the laws for the time being in force in Hong Kong.
- 1.4. Words importing the singular only also include the plural and vice versa where the context requires.
- 1.5. Unless otherwise provided, all payments shall be made in Hong Kong dollars.
- 1.6. Except where the context otherwise requires reference to "Clause" in this Agreement shall mean a reference to a "Clause" in this Agreement.
- 1.7. Except where the context otherwise requires a reference to "Schedule" in this Agreement shall mean a Schedule annexed to this Agreement and for the avoidance of doubt Schedules 1 and 2 annexed to this Agreement form part of this Agreement and shall be interpreted as such.

2. Entire Agreement

This Agreement comprises the entire agreement of the parties and replaces and supersedes all prior negotiations, representations and agreements (whether oral or in writing).

3. Appointment of the Dispute Resolution Advisor

The Employer and the Contractor jointly appoint [Name of DRA] as DRA and [Name of DRA] accepts such appointment in consideration for the fees set out in Clause 11 and the Schedule of Fees at Schedule 2 ("Schedule of Fees") and on the terms and conditions set out in this Agreement.

4. Services

The services to be performed by the DRA under this Agreement shall comprise the duties and powers set out or necessarily implied from this Agreement and as particularly set out in Schedule 1 and the Contract ("Services").

5. DRA to carry out Services fairly and impartially

The DRA shall carry out the Services fairly and impartially as between the Employer and the Contractor.

6. Tenure

- 6.1. Subject to Clause 7 the tenure of the DRA shall commence from the date

upon which the Agreement is executed and cease upon the date of issue of the maintenance certificate pursuant to Clause 80 of the General Conditions of Contract ("GCC").

7. Discharge of DRA

7.1. The DRA may be discharged:

- a) at any time by a joint written notice from the Employer and the Contractor to the DRA, and
- b) the Employer or the Contractor may discharge the DRA unilaterally at any time commencing from the first day after six months from the date of the execution of this Agreement. As a precondition to such discharge, however, the party wishing to discharge the DRA shall first meet with the other party to the Contract to advise of the intention to discharge and the reasons for the proposed discharge. After the meeting should the party still wish to discharge the DRA the party may do so by giving the DRA notice in writing specifying the effective date of the discharge, such notice to be copied to the other party to the Contract.

7.2. The DRA may at any time upon giving a one month written notice to the Employer and the Contractor resign from his position as DRA.

8. Confidentiality

8.1. The DRA shall not divulge any information about this Agreement or the Contract to any third party except where the Employer and the Contractor both give their written consent or where it is necessary for the performance of the Services.

8.2. Nothing done by the DRA in the performance of the Services or by the Contractor or the Employer in relation to the DRA's Services is intended to or shall in any way affect the rights of or prejudice the position of the Employer and the Contractor in any subsequent litigation or arbitration including without limitation that the parties acknowledge and agree that:

- a) legal professional privilege is not waived by the act of providing any documentation to the DRA if that documentation would in the ordinary course of any arbitration or Court proceedings be protected by legal

professional privilege from discovery and inspection,

- 8.3. The fact that the accuracy of information or the validity or meaning of documents is not challenged during the performance of the DRA's Services does not preclude challenge in subsequent litigation or arbitration. Notwithstanding the provisions of Clause 8.2, if from information provided or made available to him in the performance of the Services the DRA considers that the safety of any person is or may be at risk as a result of actual or alleged action or omission in the Works, or that any person who is involved directly or indirectly with the Contract or this Agreement may have committed crimes in particular corruption or bribery as defined in the Prevention of Bribery Ordinance, the duty of confidentiality shall not apply.

9. **DRA not subsequently to act as adjudicator, arbitrator, consultant or advocate**

The Contractor and the Employer agree that they shall not appoint the DRA as adjudicator, arbitrator, consultant or advocate in any adjudication, arbitration or Court proceedings in relation to the Contract unless the Employer and the Contractor first agree in writing.

10. **Obligations of the Employer and the Contractor**

- 10.1. The **Employer** and the Contractor shall co-operate with the DRA and use their best endeavours to ensure that their consultants and sub-contractors co-operate with the DRA.
- 10.2. The Employer and the Contractor shall use their best endeavours to ensure the timely supply to the DRA of all information and documentation as the DRA may reasonably require for the purpose of the Services and shall keep the DRA informed on all matters and information relating to the Services which they are aware of in order for the DRA to properly undertake the Services.
- 10.3. The Contractor shall procure that all contracts between him and any sub-contractor (including for the avoidance of doubt any Nominated Sub-contractor) engaged for the execution of any part of the Works shall insert the clauses so stated in Clause 8 of Annex A of the Special Conditions of Contract on the DRA System.
- 10.4. The Employer and the Contractor shall comply with all requests and decisions reasonably made or given by the DRA so far as they relate to procedural matters arising from the Services to be provided by the DRA but shall not be obliged to accept any opinion expressed by the DRA as to the substance of the problems or dispute in question nor are they bound to agree to any

settlement proposed by the DRA.

11. Payment

- 11.1. Payments under this Agreement shall be made in accordance with and at the times set out in the Schedule of Fees.
- 11.2. The DRA shall maintain full and accurate records of the time spent by him in connection with the provision of the Services and shall produce such records to the Employer and the Contractor for inspection at all reasonable times on request.
- 11.3. The Employer and the Contractor shall each pay fifty percent (50%) of the DRA's costs, fees and expenses in respect of the Services.
- 11.4. If either the Employer or the Contractor fail to pay any amount due to the DRA within seven (7) days after the due date then whichever of them is not in default shall pay the amount owing to the DRA. This amount shall then be a debt due from whichever has not paid the debt to the other. Should the Employer make such a payment as a result of the Contractor's default, it shall, in addition to any other rights it may have, be entitled to deduct the amount paid from any monies due from the Employer to the Contractor under General Conditions of Contract Clause 79 of the Contract or otherwise.
- 11.5. For the avoidance of doubt, it is hereby declared and agreed that except for payment specified in the foregoing provisions of this Clause, no additional payments shall be made in respect of any costs, fees or expenses incurred by the DRA in carrying out the Services.
- 11.6. If the DRA is discharged in accordance with sub-clause 7.1, or if the DRA resigns in accordance with sub-clause 7.2, the DRA shall be paid at the rate and in the manner set forth in this Clause 11 for the carrying out of the DRA Services or any part thereof up to the date of discharge or date of resignation as the case may be.

12. Exclusion of Liability

It is agreed that the DRA shall not be liable to the Employer or the Contractor for any act or omission in connection with the performance of his Services except for the consequences of any fraud or dishonesty.

13. Declaration of Interest

On appointment and during the currency of this Agreement, the DRA must declare any interest if it is considered to be in actual, potential or perceived conflict with the DRA Services. Apart from the services to be provided under

this Agreement, the DRA shall not also act as a consultant/adviser/ service provider of the Employer, the Contractor or any sub-contractors for any matters arising out of or in relation to the Contract during the currency of this Agreement. Provided that if a material conflict is considered by the Employer and/or the Contractor to be in existence, the Employer and/or the Contractor can require the DRA to take steps to remove such a conflict.

14. Prevention of Bribery

The DRA is not allowed to solicit or accept advantage as defined in the Prevention of Bribery Ordinance and he should avoid soliciting or accepting any excessive hospitality, entertainment or inducements which could impair his impartiality in relation to Government projects. The DRA shall inform his employees who are engaged directly or indirectly on the formulation and implementation of Government projects that the soliciting or accepting of advantage as defined in the Prevention of Bribery Ordinance is not permitted. The DRA shall also caution his employees against soliciting or accepting any excessive hospitality, entertainment or inducements which could impair his impartiality in relation to Government projects.

SIGNED, SEALED and DELIVERED)

by the Employer by [*Name and Position*])

In the presence of:)

[*Name of witness*])

witness : _____)

SEALED with the COMMON SEAL of)

[*name of Contractor*])

and **SIGNED** by)

[_____]its[*director(s) or*])

director and secretary or person(s) authorized to)

sign the contract by its board of directors])

In the presence of:)

SIGNED by [*Name of DRA*])

In the presence of:)

)

SCHEDULE 1

**FUNCTIONS, DUTIES AND OBLIGATIONS OF
THE DISPUTE RESOLUTION ADVISOR (DRA)**

1. (1) The DRA shall carry out the functions, duties and obligations strictly in accordance with the terms of this Agreement and the Contract.
- (2) The DRA does not have the authority to impose on the Employer and the Contractor his opinion as to the substance of any problem or dispute in question;

2. Details of the services offered In so far as it does not contradict with the terms of this Agreement and the Contract provisions the DRA is expressly required to perform functions, duties and obligations in accordance with the following proposals :-

(all as set out in DRA's proposal plus any special conditions that are subsequently agreed by Employer/Contractor)

SCHEDULE 2

SCHEDULE OF FEES

(all as set out in DRA's proposal and subsequently agreed by the Employer and the Contractor)

Annex I - Special Conditions of Contract for Dispute Resolution Mechanism

SCC 1 Definitions

"Dispute" means any dispute or difference of any kind whatsoever between the Employer and the Contractor arising out of or in connection with the Contract or the carrying out of the Works including without limitation any dispute as to any decision, instruction, order, direction, certificate or valuation by the Engineer¹ whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract by either the Employer or the Contractor.

"Mediation Rules" means the rules for mediation in Annex C hereto.

"Adjudication Rules" means the rules for adjudication in Annex D hereto.

"Independent Expert Certifier Review Rules" means the rules for independent expert certification in Annex E hereto.

"Expert Determination Rules" means the rules for Expert Determination in Annex F hereto.

"Short Form Arbitration Rules" means the rules for short form arbitration in Annex G hereto.

"Arbitration Rules" means Hong Kong International Arbitration Centre Domestic Arbitration Rules.

SCC 2 Settlement of Disputes

1. Any and all Disputes shall be settled in accordance with the provisions of this Clause SCC2 and for the purpose of this clause a Dispute shall be deemed to arise when one party serves on the Engineer and the other party a notice in writing (hereinafter called a "Notice of Dispute") stating the nature of the Dispute.
2. Within 28 days of receiving a Notice of Dispute, either
 - (a) the Engineer shall decide the Dispute and notify the Employer and the Contractor in writing of his decision; or
 - (b) in the case of a Dispute arising from a decision of the Engineer in accordance with a direction of the Employer under any requirements particularised pursuant to [GCC Clause 2(1)(b)], the Engineer shall notify the Contractor in writing of that fact.

¹ For a Building Contract replace with "Architect" throughout these Special Conditions.

3. Unless the Contract or the Contractor's employment thereunder has already been terminated, the Contractor shall in every case continue to proceed with the Works with all due diligence regardless of the nature of the Dispute and the Employer and the Contractor shall give effect forthwith to every decision of the Engineer (whether pursuant to this Clause SCC2 or otherwise) except and to the extent that the same shall have been revised by:
 - (a) settlement agreement; or
 - (b) a decision of an adjudicator; or
 - (c) a decision of an independent expert certifier; or
 - (d) a determination of an expert; or
 - (e) an arbitral award.
4. In relation to any Dispute in respect of which:
 - (a) the Engineer has given his decision in accordance with SCC2(2)(a); or
 - (b) the Engineer has given the Contractor notice in accordance with SCC2(2)(b); or
 - (c) the time for giving such decision or notice under SCC2(2) has expired,either party may, within 28 days of the date of such decision or notice or the expiration of such time limit, give notice in writing to the other party (hereinafter called a "Request for Dispute Resolution") requesting that the Dispute be referred to Dispute Resolution Procedures in accordance with the following provisions of this clause.
5. Within 28 days² of the service of a Request for Dispute Resolution the parties shall attempt to agree to dispute resolution by:
 - (a) Mediation in accordance with the Mediation Rules, or
 - (b) Adjudication in accordance with the Adjudication Rules, or
 - (c) Independent Expert Certifier in accordance with the Independent Expert Certification Rules, or
 - (d) Expert Determination in accordance with the Expert Determination Rules, or
 - (e) Short Form Arbitration in accordance with the Short Form Arbitration Rules.
6. The parties agree to comply with the requirements of the rules applicable to the particular Dispute resolution procedure they have agreed or is applicable

² To be amended to 14 days for private sector contracts.

pursuant to this clause.

7. If the parties are not able to agree a Dispute resolution procedure within the said 28 days, the Dispute shall be resolved by Adjudication in accordance with the Adjudication Rules.
8. (a) A determination of an expert or an award of an arbitrator shall be final and binding on the parties.

(b) A decision of an adjudicator or an independent expert certifier shall be binding upon the parties and enforceable as such unless and until either the Dispute:
 - i. has been settled; or
 - ii. has been referred to arbitration as provided in this Clause SCC2 and an arbitral award has been made or a settlement reached.
9. In relation to any Dispute in respect of which a mediation has ended without settlement as defined in the Mediation Rules, either party may within 90 days of the date of the end of the mediation refer such Dispute to adjudication in accordance with the Adjudication Rules or to arbitration subject to the following provisions of this Clause SCC2.
10. In relation to any Dispute in respect of which:
 - (a) an adjudicator has given his decision in accordance with Clause SCC2(5)(b); or
 - (b) an independent expert certifier has given his decision in accordance with Clause SCC2(5)(c); or
 - (c) the time for an adjudicator or an independent expert certifier for giving a decision in accordance with the Adjudication Rules or Independent Expert Certification Rules, respectively, has expired,

either party may within 90 days of the date of such decision or the expiration of such time limit refer such Dispute to arbitration subject to the following provisions of this Clause SCC2.
11. (a) Save as provided for in Clause SCC2(5)(e) and SCC2(10)(b) no steps shall be taken in any reference of a Dispute to arbitration until after the completion or alleged completion of the Works unless with the written consent of the Employer and the Contractor

Provided that:

- i. the giving of a certificate of completion in accordance with Clause 53 shall not be a condition precedent to the taking of any step in such reference;
- ii. no decision given by the Engineer in accordance with the foregoing

provisions shall disqualify him from being called as a witness and giving evidence before an arbitrator on any matter whatsoever relevant to a Dispute so referred to arbitration as aforesaid.

- (b) in the case of a Dispute as to the exercise of the Engineer's powers under Clause 81(1) the reference to the arbitrator may proceed notwithstanding that the Works shall not then be or be alleged to be complete.
12. The reference of a Dispute to arbitration (other than a reference in accordance with SCC2(5)(e)) shall be conducted in accordance with the Arbitration Rules and such reference and any reference in accordance with SCC2(5)(e) shall be a domestic arbitration for the purposes of Section 100 of the Arbitration Ordinance, Cap. 609.
13. Save as expressly otherwise provided, the adjudicator, the independent expert certifier, the expert and the arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, notice, order, direction, withholding of approval or consent, determination, certificate, statement of objection, assessment or valuation of the Engineer relating to the Dispute and the arbitrator shall have full power to order the rectification of the Contract subject to any rule of law which would restrict this power.

Annex J - Feedback of Stakeholders on the Proposed Dispute Resolution Mechanism

1. Despite some practical difficulties, do you recommend to extend the dispute avoidance measure through the use of a Dispute Resolution Advisor (DRA) to subcontract level (i.e. between main contractor and domestic subcontractor) in an attempt to assist the parties in identifying potential disputes and resolving disagreements, which, if unresolved, would turn into formal disputes?

Enquirer Organisation/ Association	Questions/Views	Feedback from the Task Force On Spot
Lawrence NG Hong Kong Construction Sub-Contractors Association	<p>Following comments and recommendations were given from subcontractors' perspective:</p> <ul style="list-style-type: none"> • It was generally believed that the DRA system would not work at domestic subcontract level due to lack of written contract between subcontractors and their upper-tier parties. • However, it was suggested that the dispute avoidance measure (i.e. DRA) should be extended to domestic subcontract level to resolve disputes particularly in the area of payment. • Unlike nominated subcontractors who would receive certificates issued by the certifier, domestic subcontractors have no reliable source to know when the main contractor got paid by the clients. Under the circumstances, the DRA, who knows the time and scope of certification, can facilitate the communication between the main contractor and subcontractors. The DRA has the power and responsibility to review the contracts (both main contracts and subcontracts) and the payment schedule so as to provide a fair and neutral opinion. • Since the DRA has already been adopted in the main contract level, DRA services can be provided on an ad hoc basis to give advice to subcontractors on specific issues. Subcontractors will be charged upon request for DRA services throughout the construction period. 	<p>Concerns of the Task Force over the use of DRA at domestic subcontract level:</p> <ul style="list-style-type: none"> • The DRA will easily be overwhelmed by the heavy workload as there are a large number of domestic subcontractors in each project. • The concern on the potential conflict of interest of the same person playing the role of a DRA between the employer and the main contractor, and between the main contractor and a large number of subcontractors. • Since the DRA has no binding decision-making power, the dispute avoidance measure might not be useful and practical to resolve payment problems between main

Enquirer Organisation/ Association	Questions/Views	Feedback from the Task Force On Spot
Lawrence NG Hong Kong Construction Sub-Contractors Association (continued)	<ul style="list-style-type: none"> • The task force was urged to give further consideration on how the proposed dispute avoidance measure and dispute resolution mechanism can be extended effectively to domestic subcontract level as well. • The subcontractors strongly disagreed with the view that the payment problem between main contractors and subcontractors can only be resolved through security of payment legislation. Some interim solutions are necessary before the enactment of the new legislation. • Russell Jones expressed different view that though it might work in principle, there were in effect practical problems of the resources of the DRA if the services are to be extended to the downstream of the supply chain. 	<p>contractor and subcontractors. The payment problem can effectively be resolved through security of payment legislation and mandatory adjudication.</p> <ul style="list-style-type: none"> • In response, Conrad Wong suggested that HKCA, HKCSA and CIC should sit together to deliberate how the proposed dispute resolution mechanism can be effectively carried out at domestic subcontract level.
Thomas TSE Hong Kong Construction Association	HKCA proposed a different role in addition to DRA, namely independent professional advisor to give advice to main contractor and subcontractors on payment or quality issues. With insufficient supply of qualified and experienced DRAs in the market (61 DRAs), the implementation of DRA services at the lower tier would likely be impossible.	
James BLAKE The Hong Kong Institution of Engineers	With regard to dispute resolution, any disputes arise at subcontract level should be considered as equally important as the problems occur in main contract level. If a DRA is appointed, he should be able to give advice to avoid any problems that might arise at any levels during the construction period. There should not be any difference between main contractor and subcontractors.	

Enquirer Organisation/ Association	Questions/Views	Feedback from the Task Force On Spot
HKFEMC (Written comment by mail on 20 August 2012)	<p>HKFEMC agrees to recommend extending the dispute avoidance measure through the use of a Dispute Resolution Advisor (DRA) to subcontract level. The subcontract level should cover both domestic subcontractors and nominated subcontractors.</p> <p>HKFEMC believes that the practical difficulties should not be underestimated and it would be useful to address the major difficulties and see how they can be overcome. Such an exercise would help to increase the effectiveness of the DRA and improve the chances of avoidance of dispute.</p>	
HKIS (Written comment by mail on 27 August 2012)	HKIS agrees to extend the dispute avoidance measure through the use of a dispute resolution advisor (DRA) to subcontract level to assist the parties in identifying potential disputes and resolve disagreement before they turn into formal disputes.	

2. What are your views on the feasibility, practicality and effectiveness of the proposed rules and procedures of the five dispute resolution mechanisms, namely Mediation, Adjudication, Independent Expert Certifier Review, Expert Determination and Short Form Arbitration?

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Russell JONES Hong Kong Construction Association	Is there a time period between the decision made by the IEC or the adjudicator between his decision and the time the party can register his challenge to the decision?	The task force has not yet formulated the time period, it will however be specified in the Special Conditions of Contract. There should be a timeline provided for a

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Russell JONES Hong Kong Construction Association (continued)	The task force was urged to look into the period to avoid any potential risk for ambushing (e.g. around Christmas time, New Year time).	party to challenge the decision.
HKFEMC (Written comment by mail on 20 August 2012)	In principle any mechanism that is accepted and respected by all parties concerned is a good mechanism. In practice HKFEMC has little or no experience in most of the mechanisms. HKFEMC's opinion is that adjudication would be the most acceptable of the five. There are various degrees of skepticism in the practicality of the other four mechanisms.	
HKIS (Written comment by mail on 27 August 2012)	<p>HKIS notes that the appointing authority for all of the 5 mechanisms is stated to be the Hong Kong International Arbitration Centre ("HKIAC"). HKIS does not think this is appropriate especially in connection with the appointment of experts and independent expert certifiers.</p> <p>Firstly, as there are many appointing authorities in the construction industry, and in the spirit of the competition law, HKIS believes it is wrong to be in favour of one appointing authority for all 5 mechanisms. HKIS believes the default appointing authority should be left blank in the special conditions for the parties to fill in before they enter into a contract.</p> <p>Secondly, in the spirit of freedom of contract, HKIS believes the contracting parties should not be forced to accept HKIAC to be the appointing authority. They should be able to choose the appointing</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
<p>HKIS (Written comment by mail on 27 August 2012) (continued)</p>	<p>authority they want.</p> <p>Thirdly, for the appointment of experts or independent expert certifiers, HKIS does not think this should be left to HKIAC. If a QS has to be appointed as an expert or an independent expert certifier, HKIS believes HKIS should be the appointing authority. For the same reason, if an architect has to be appointed, HKIA should be the appointing authority. HKIS believes the present mechanism of having HKIAC to be the appointing authority in consultation with HKIS, HKIA and HKIE is not satisfactory.</p>	
<p>HKIA (Written comment by mail on 26 September 2012)</p>	<p>HKIA notes that the HKIAC is nominated as the single default appointing authority under all the five dispute resolution methods.</p> <p>For Independent Expert Certifier and Expert Determination, a construction professional with expertise relevant to the dispute has to be appointed. The appointing authority is therefore required to fully appreciate the nature of dispute before making suitable appointment. In such case, HKIAC may not be a suitable default appointing authority.</p> <p>For adjudication, in the UK the Scheme for Construction Contracts (England and Wales) Regulations (1998 and 2011) does not specify one single appointing authority in case of default. Parties are allowed to choose their preferred adjudicator nominating body. This model better reflects the basic principle of party autonomy.</p> <p>In the premises, HKIA believes that it is not appropriate to specify one single default appointing authority in the rules.</p>	

3. Proposed by the Task Force on Dispute Resolution Documentation, Adjudication is recommended to be stipulated as the default mechanism for dispute resolution if the parties cannot agree on any one of the proposed dispute resolution methods to be used. What are your views on this proposition?

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Martin DUNN MTR Corporation Limited	Regarding the choice of default mechanism, MTR might consider putting in Expert Determination or Short Form Arbitration in the contracts which give rise to a final decision.	
TANG Ki-cheung The Hong Kong Institute of Surveyors	<p>In order to provide specific reference or guideline for the users to follow, KC shared his view that Expert Determination and Short Form Arbitration can be proposed as default mechanism for contracts with small sum of money (i.e. the contract sum less than a certain amount) whereas Adjudication can be proposed as default option for contract sum bigger than a certain amount.</p> <p>If only one default mechanism can be chosen, adjudication would be recommended.</p>	
Lawrence NG Hong Kong Construction Sub-Contractors Association	Lawrence Ng shared his personal view that subcontractors in general prefer to choose a procedure, which can offer a final and binding decision in order to save time and costs to pursue further legal action after interim binding decision.	
James BLAKE The Hong Kong Institution of Engineers	From the experience of Airport Core Programme, it must be the employer to determine the default mechanism and write in the tender documents before the documents go out. The tenderers are invited to bid for the project on a fair and equal basis. Once the default mechanism is chosen, the parties would have the opportunity to proceed if mediation does not work for whatever	In response, Conrad Wong expressed that the reference material with recommendations of the Task Force would be published to promote good practices. The question is should the task force

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
James BLAKE The Hong Kong Institution of Engineers (continued)	reasons. This could ensure the cash flow and any other issues could be resolved reasonably within the construction period.	make a recommendation for default mechanism to the employers/clients. If a default mechanism is recommended, it is up to the employers/clients to determine whether such mechanism would be adopted.
Vincent CONNOR Pinsent Masons	A default mechanism is necessary if the dispute cannot be resolved through mediation. The question is should it be adjudication or short form arbitration. If the parties are striving to get to a solution to a cash flow problem during the project, the use of short form arbitration would seem be suitable. However, the concern is if the disagreement of complex nature has gone through mediation but having it failed, it would seem quite unfair if the only way is to proceed to short form arbitration. The choice of adjudication as a default mechanism might be a safer one due to its interim-binding nature.	
K H TAO Highways Department	<p>The industry is familiar with mediation and it has been widely adopted. Other methods are too new to be considered as default option. If Adjudication is proposed, it is suggested to try out first on a trial basis before choosing it as default mechanism.</p> <p>It was suggested that the parties should be given sufficient flexibility to determine which dispute resolution method should be chosen as the default mechanism. However, if a default mechanism must be chosen, mediation, which is well established and widely adopted in Hong Kong would be preferred.</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
<p>Albert LEUNG The Association of Consulting Engineers of Hong Kong</p>	<p>The parties always want the final decision to be made as soon as possible. Adjudication, as proposed does not provide a final and binding decision. Arbitration, which can be simple, straightforward, document-only and deliver final and binding decision, was suggested as the default option if parties are unable to select any one of the proposed dispute resolution methods.</p> <p>As compared with full-blown Arbitration, some people commented that the procedure of Short Form Arbitration is too short.</p>	
<p>Francis LEUNG Architectural Services Department</p>	<p>From technical perspective, there might be a need to consider more than one type of default arrangements to deal with different situations. From ArchSD's point of view, Short Form Arbitration is preferred.</p>	
<p>FOK Cheuk-leung Housing Department</p>	<p>It is not recommended to propose just one type of default mechanism to resolve different kinds of disputes arising from a variety of contracts. Therefore, it was suggested that the default arrangement should be determined by the contracting parties depending on the type of contract.</p>	
<p>Sam CHAN Hong Kong institution of Engineers</p>	<p>It was proposed that the default mechanism should be chosen by the employer during the preparation of the contract. Hence, the default mechanism is already been determined when the parties enter into a contract. If the contractor disagrees with the default mechanism, he can request to change it in the next contract, not during the existing contract period.</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Written comment from a evaluation questionnaire	It is not recommended to propose Adjudication as a default mechanism since it does not render final and binding decision. Short Form Arbitration is more preferable since it gives rise to the certainty that a final decision will be made.	
HKFEMC (Written comment by mail on 20 August 2012)	HKFEMC supports the proposition to stipulate adjudication to be used as the default mechanism for dispute resolution.	
HKIS (Written comment by mail on 27 August 2012)	<p>HKIS does not think there should be a default mechanism for dispute resolution to be stated in the contract.</p> <p>Firstly, if the parties to a contract cannot agree to adopt one of the dispute resolution mechanisms stated in the contract, HKIS believes it is wrong to push them to adopt a mechanism which they have discussed and rejected.</p> <p>Secondly, if the default mechanism is to become a standard practice, HKIS is not sure whether this is in fact in the interest of both parties to a construction contract. In practice, as the Employer will decide the default mechanism to be stated in the contract to be included in tender documents, it is human nature that the Employer will choose a default mechanism which he would believe should be in his interest and not in the interest of tenderers/contractors.</p>	

4. Should any disputes which arise between the parties under the construction contract be referred to Adjudication if that disputes cannot be resolved through Mediation?

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Russell JONES Hong Kong Construction Association	Mediation might be used as a tactic to delay the resolution of dispute. If mediation is pursued but ended up fruitless, can the parties reverse back to the flow chart to choose one of the other four dispute resolution methods (i.e. adjudication, IEC Review, expert determination or short form arbitration) as a safety net?	
Martin DUNN MTR Corporation Limited	From MTR perspective, mediation is used which can be challenged ultimately by post-completion arbitration. If issues related to quantum cannot be resolved, then it could be reversed back to a mechanism that is fixed and final, not those methods that can be challenged.	
HKFEMC (Written comment by mail on 20 August 2012)	Bearing in mind that adjudication is the preferred mechanism, HKFEMC agrees that should mediation be chosen and if the dispute(s) cannot be resolved in that instance, the dispute(s) be referred to adjudication.	
HKIS (Written comment by mail on 27 August 2012)	<p>Without prejudice to HKIS's views stated for question 3, HKIS agrees that adjudication should be adopted if mediation fails to achieve settlement of the disputes between the contracting parties.</p> <p>While HKIS noted at the consultation meeting that most of the contractors there indicated their preference to have arbitration instead of adjudication because they would want to have a binding decision which would not be subject to appeal to the court easily after the mediation process in order not to waste further time in resolving disputes, HKIS agrees that adjudication should be</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
HKIS (Written comment by mail on 27 August 2012) (continued)	adopted as it provides a quick interim result notwithstanding the fact that the decision of adjudication can be challenged in post-completion arbitration and further time would need to be spent to resolve such disputes.	

5. Is it worth proposing the Independent Expert Certifier Review as one of the suitable methods to facilitate the resolution of disputes?

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force on Spot
TANG Ki-cheung The Hong Kong Institute of Surveyors	Disputes on certification to be handled by the IEC should not be limited to cost but also other matters such as quality arising from the certification.	It was clarified that the IEC Review is not limited to resolving disputes on costs only. The IEC can review any issues such as quality reviewed and certified by the architect/engineer/ surveyor.
	Is IEC Review applicable to domestic subcontracts with no participation of certifiers?	The task force has not specifically addressed how IEC Review is to be implemented at domestic subcontract level. The task force has been focusing mainly on the main contract level so far. Indeed, IEC may not be applicable to subcontract as there is no original Certifier in some subcontracts.

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force on Spot
TANG Ki-cheung (continued)		
	<p>Though HKIS has no clear stance on the matter, KC Tang expressed strong opposition in personal view to use IEC Review at main contract level since the IEC would undermine the position of the certifier under the contract. The main contractor might use the opinions given by the IEC to challenge the decision made by the original Certifier. The IEC Review was recommended to be used only at domestic subcontract level with no participation of Certifier.</p>	
HKFEMC (Written comment by mail on 20 August 2012)	<p>“Independent Expert Certifier” is a relatively new concept in Hong Kong. It is doubtful that disputing parties sufficiently confident to let the outcome of their dispute to depend on the judgment of someone they do not fully trust. There will be the usual questions on the independent expert’s expertise, experience, credibility and impartiality.</p> <p>HKFEMC supports the idea of “Independent Expert Certifier”, although HKFEMC believes that it would take considerable time and effort to be accepted and put into practice.</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force on Spot
<p>HKIS (Written comment by mail on 27 August 2012)</p> <p>HKIS (Written comment by mail on 27 August 2012) (continued)</p>	<p>HKIS objects to the independent expert certifier mechanism for contracts where architects/engineers/surveyors have been appointed.</p> <p>The basis of HKIS's objection is that if there is such a system, HKIS does not believe a contractor would not want to appoint for instance another QS to reassess at least some if not all of the payment certificates under the contract as the cost involved is small. HKIS does not believe HKIS needs to explain why such a system is going to be problematic as effectively there will be 2 QS for every contract. Similar to a company being run by 2 CEOs or 2 Managing Directors, HKIS believes with such a system, there will be more disputes. Although more disputes will mean more jobs for HKIS's QS members, HKIS is not sure such a mechanism is in the interest of the industry.</p>	
<p>HKIA (Written comment by mail on 26 September 2012)</p>	<p>The proposed IEC system has an extremely wide coverage including all decisions and certifications made by the contract certifier. The parties can challenge any decisions and certification easily and at extremely low costs. This creates a danger of abuse by one or both of the parties.</p> <p>The contract certifier's power and the finality of his decision are essential for proper administrator of construction contract. Abuse of the IEC system would cause grave difficulties to contract administration. It is likely to cause more disputes rather than resolving them.</p>	

6. Should Expert Determination, which provides a final and binding decision, be included as one of the dispute resolution methods in the overall dispute resolution mechanism?

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
Russell JONES Hong Kong Construction Association	IEC Review deals with money whereas Expert Determination is used to resolve technical issues. It seems that the two methods are complementary to each other. Why Expert Determination is proposed to be final and binding rather than it be challenged in the same way as IEC Review?	The task force has not specifically addressed this particular consideration. However, Expert Determination is an established principle in law that gives rise to a final and binding decision. If it is intended to seek for a decision to be binding in the interim, parties can probably go for IEC Review or Adjudication instead of Expert Determination.
	Contractors prefer to have both decisions on the technical and quantitative arguments being final and binding.	
HKFEMC (Written comment by mail on 20 August 2012)	<p>Like “Independent Expert Certifier”, “Expert Determination” is a relatively new concept in Hong Kong. The same questions on the expert’s expertise, experience, credibility and impartiality will arise. However, the decision of the expert in this case is much more crucial as the decision will be binding and final. It would thus be more difficult to see that disputing parties be confident enough to allow the outcome of the dispute, and thus their fortune, to depend on the judgment of an “expert”.</p> <p>HKFEMC would prefer to see that the expert gives his opinion and that the opinion be used by someone with a better overall picture of</p>	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
HKFEMC (Written comment by mail on 20 August 2012) (continued)	the contract and the dispute, and of commonly recognized authority, to give the judgment. HKFEMC therefore has reservations on including Expert Determination as one of the dispute resolution methods in the overall dispute resolution mechanism.	
HKIS (Written comment by mail on 27 August 2012)	HKIS agrees that Expert Determination, which provides a final and binding decision, should be included as one of the dispute resolution methods in the overall dispute resolution mechanism.	

7. Other Questions

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
TANG Ki-cheung Hong Kong Institute of Surveyors	Any guidelines would be published to introduce various new dispute resolution methods proposed by the task force?	The September 2010 Guidelines covered the recommendations of new alternative dispute resolution methods.
CHOW Ping-wai Resident Site Staff Association (Written comment by email on 6 July 2012)	In view of the flow chart specified in the consultation document, it is suggested to add a mechanism to advance the arbitration to be carried out during construction stage, instead of post-completion arbitration when the dispute could not be settled by various options proposed. Such mechanism should be launched when the dispute affecting the normal operation of the contract works. For example,	

Enquirer Organisation/Association	Questions/Views	Feedback from the Task Force On Spot
<p>CHOW Ping-wai Resident Site Staff Association (Written comment by email on 6 July 2012) (continued)</p>	<p>the Engineer issues a VO to delete a large amount of contract works due to the change of design. But, the contractor has priced high rate for those deleted works and the remaining works are of very low rate, some of them even zero rate. According to the original contract, the deleted works should also be constructed at the early stage of the contract. In this regards, only low rate contract works will be carried out by the contractor. Such deletion will certainly affect the cash flow planning of the contractor. Contractor expressed that such change should not be in SA form instead of VO. Unfortunately, the client still maintains his view and does not agree to settle the dispute by mediation and insist to settle it by arbitration. Such arrangement seriously affects the cash flow of the contract works. Advance arbitration will certainly help to resolve the dispute and allow the contract to continue carrying out the remaining works from both financial and works programme perspectives. Please review whether such arrangement could be added to the new dispute resolution mechanism.</p>	
<p>HKFEMC (Written comment by mail on 20 August 2012)</p>	<p>HKFEMC supports the proposal to provide the opt-in provision relating to the Arbitration Ordinance (Cap 609) in the Special Conditions of Contract. For the sake of consistency and of reducing at least one element of uncertainty, HKFEMC believes that this provision should not be left as an option.</p>	
<p>HKIS (Written comment by mail on 27 August 2012)</p>	<p>HKIS agrees that the opt-in provision relating to the Arbitration Ordinance (Cap 609) should be provided in the Special Conditions of Contract.</p>	

Feedback Form

Reference Material for Application of Dispute Resolution in Construction Contracts

Thank you for reading this publication. To improve our future editions, we would be grateful to have your comments.

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2. Does the publication enable you to understand more about the application of dispute resolution in construction contracts?	Yes	No	No Comment		
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