

# Does Hong Kong Need a New Construction Law?



*A recent provocative article by Arthur Marriott QC (1998, 14 Const LJ94), has raised the question of whether Hong Kong needs a new construction law. Arthur Marriott will be well known to long-term players in local industry having served for a time as one of the name partners at a well-established international law firm here. Although no longer associated with that firm (he has joined another in London) his views command considerable respect. JA McInnis looks at those views.*

## Hong Kong

Marriott first of all makes the case that Hong Kong is unique. It is international. It has completed construction works on the largest possible scales. Yet Hong Kong is also heavily influenced by UK forms of contract and their administration. So too are the professions heavily influenced by UK standards and practices in the same way. While this is less so today than previously, Hong Kong is still, ironically, ahead of the UK in some ways, eg quality assurance and dispute resolution, particularly through public forms of contract. However, Hong Kong lags behind in terms of introducing new forms of contract or means of procurement both in the public and private sectors. It should be noted that efforts are being made in both sectors to speed the process of reform further. But one may ask — is it enough and is it the best way forward?

## A Way Ahead?

Marriott broaches the delicate question of the possible ways ahead for Hong Kong. The first way ahead he frames in the most progressive and open-ended terms. He states:

“There is a clear need to find alternative forms of contract which encourage co-operation and are founded on concepts of reasonableness and good faith.”

He then cites a series of possible means of moving ahead in this sense, including:

- \* mechanisms to control and prevent abuse
- \* greater transparency in costing
- \* better access to documentation
- \* further means of ADR
- \* redefinition of the role of the engineer, and
- \* new conceptual work on forms of contract

However, once these means have been outlined, a further question presents itself.

## The Key Question

The key question which arises is whether reforms through such means serve the way ahead? And a number of instances where law itself has arguably let industry down, are set out, including:

- \* the design/build interface
- \* dealing with impossibility of performance, and
- \* negligence claims

Marriott points out interestingly that while many of those who

draft and administer contracts in Hong Kong are not legally trained, it is still “the law” which gets the blame for not providing clear answers in these areas.

## So — Codify or Restate the Law?

Two further alternatives or ways ahead are suggested apart from simply trying to draft new immutable forms of contract. That is, 1) to consider a codification of Hong Kong construction law, or 2) a restatement of Hong Kong construction law. Codification is a legislative attempt to lay down in a more systematic way the common law principles which come from case law or court decisions. It has been done in other areas; for instance the Sale of Goods Ordinance, based on the Sale of Goods Act codifying part of sales law. The provisions in the Ordinance and the Act derive from earlier cases in the subject area. A restatement of the law, on the other hand, while it also draws heavily on past case law or decided cases, is also ostensibly an update of the law. To summarise, a code states the law “as it is” while a restatement would also state the law somewhat as it should be. Hence a restatement can be said to be progressive in this one respect. A re-statement is also non-binding and fetters the courts less than a code. There are different ways of enacting both alternatives as well. Because a code is legislative it would have to be passed by Legco. A good example of where this practice is currently taking place is in the financial and securities regulation area. The exercise is being put forward as “consolidation” rather than codification but it will almost certainly have elements of the latter part. The securities consolidation will also emphasise legislation over case law. To refer to America by comparison, both codes and restatements are in widespread use. One of the best known codes in America is the Uniform Commercial Code (UCC) which is currently undergoing its own update. It governs certain contracts and sales transactions and is enacted in individual states. The UCC is intended to set out a cohesive body of legal principles informed by business practices.

## Any Views?

Marriott suggests that, as in the case of past changes to the Arbitration Ordinance in Hong Kong, reform of construction law could be done privately. It is an interesting idea. Whether any of these suggestions: new forms of contract, or a restatement, or a codification of the law is the best way forward is the question raised here. Likewise whether a private body, industry body, or government should move any reform forward is also put in issue. If you have views on whether Hong Kong needs a new construction law or not, and if so why, or what shape such law or otherwise should take, please send us your views. A selection of comments will be published the next month, space permitting. ■AAC

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