

MinterEllison

SCL Conference: Focus on Asia

Legal avenues in securing cashflow:
The position in Hong Kong

Henry Sherman
Senior Consultant, Minter Ellison HK

2 September 2015

HK_2864503_1 1

Outline

- 1. The current position in HK**
- 2. An overview of the recent security of payment (SoP) consultation paper**
- 3. How do the proposals compare with the UK and other regimes?**

1. The current position in HK

- No SoP legislation yet
- Govt. consultation on SoP ended 31 August 2015
- Legislation: ? 2016
- Contractual avenues limited

1. The current position in HK (cont'd)

- Arbitration not litigation is the norm
- DRA system under some Govt. contracts – can help disputes arising
- May lead to binding short-form arbitration (approx 3 mth time span) or traditional arbitration
- Govt. committed to extensive use of NEC3 2015/17; DRA is likely to replace NEC form of contractual adjudication

1. The current position in HK (cont'd)

- No private sector equivalent to DRA
- Where DRA not used, mediation is a common 1st step in private & public sector contracts
- If it fails, arbitration is usually deferred to the end of the contract / project
- Generally, no other interim remedy
- Widespread use of pay when paid clauses
- Govt. research indicates high level of payment problems under all types of contract though “more severe in the private sector” (consultation paper)

1. The current position in HK (cont'd)

Extracts from a typical DR clause:

- [w] If the matter cannot be resolved by mediation, then either the Employer or the Contractor may within the time specified herein require in writing that the matter be referred to arbitration in accordance with and subject to the provisions of the arbitration Ordinance...
- [x] Save as provided for in Clauses [y] and [z] of the Conditions of Contract, no steps shall be taken in the reference to the arbitrator under Clause [w] of the Conditions of Contract until after the completion or alleged completion of the Works unless with the written consent of the Employer and the Contractor.'

1. The current position in HK (cont'd)

- [y] In the case of any dispute or difference as to the exercise of the employer's power under [the termination clause] of the Conditions of Contract the reference to the arbitrator may proceed notwithstanding that the Works shall not then be or alleged to be complete.
- [z] In the case where the Contract has been terminated or abandoned, the reference to the arbitrator may proceed notwithstanding that the Works shall not then be or be alleged to be complete.'

2. Overview of HK SoP proposals

- Will apply to only some construction contracts [CCs] as defined – includes e.g. consultants' appointments & sub-contracts of every tier if main contract qualifies
- Will apply to all CC's entered into by Govt & specified bodies e.g. Airport, Hospital & Housing Authorities, MTR & private sector utilities
- Will only apply to private sector CCs relating to new building(s) where the main contract value exceeds HK\$5 million (c. SGD900,000) / HK\$0.5 m for professional services & supply only contracts
- Will not be retrospective

2. Overview of HK SoP proposals (cont'd)

- Parties remain free to agree payment terms except for 60 days max. from claim for interim & 120 days for final payment
- SoP applies to loss & expense as well as value of works
- Default provisions re process if contract unclear / incomplete
- Process triggered by a Payment Claim (PC) with specified content

2. Overview of HK SoP proposals (cont'd)

- Payer then serves Payment Response (PR) up to 30 days later, again with specified content
- If PR is late / defective payee has no automatic right to payment in full but payer cannot set off / deduct against sums due
- Pay when paid & conditional payment clauses outlawed even where higher-tier insolvency

2. Overview of HK SoP proposals (cont'd)

- Right to suspend on notice (with right to time & \$) but only after non-payment of adjudicator's award or of amount admitted as due in PR
- Both parties can adjudicate but only re disputes about
 - money claims under contract claimed on PC (including LDs)
 - set off / deductions against sums due under PCs
 - time for performance / entitlement to E.O.T. for work / services / supply

2. Overview of HK SoP proposals (cont'd)

- Deadline of 28 days to start adjudication (A)
- Procedure:
 - Notice of A
 - agreement / appointment of adjudicator (Ar.) in 5 working days (w.d.)
 - submissions to be served by date of agreement / appointment of Ar.
 - other side has 20 w.d. to respond
 - Ar. to decide with reasons in 20 w.d. or up to 55 w.d. from appointment / longer if agreed
 - Ar. can vary time periods & conduct A as sees fit as long as A is concluded within above time frame

2. Overview of HK SoP proposals (cont'd)

- Provisions to combat ambush:
 - 28 day deadline & time frame for PR (see above) + exclusions?
 - Ar. can disregard claimant material which is new & should reasonably have been provided earlier
 - Ar. can resign if he/she decides A cannot be decided fairly in the time available
- Each side bears own costs; Ar. allocates his

2. Overview of HK SoP proposals (cont'd)

- Ar's decisions to be capable of enforcement like court judgments
- No set off / deduction
- Limited period for challenge; not indication of challenge requirements
- No details yet of how courts are to implement enforcement / challenge process

3. Comparison with HK & elsewhere

- Exclusions very wide and unique to HK
- Rationale for some (e.g. major refurbishments) is unclear
- Will result in incomplete cover for private sector projects (though they suffer most from cashflow problems) and for small contractor who is focus of most SoP regimes
- Will create uncertainty as to right to adjudicate (e.g. through uncertain value of head contract, hybrid projects – new & refurb.)

3. Comparison with HK & elsewhere (cont'd)

- Risk of abuse e.g. by subdividing private-sector contracts
- Failure to serve compliant PR triggers right to full payment in e.g. UK – HK proposals likely to encourage late payment
- Right to suspend more limited than in some other jurisdictions
- Range of disputes which can be adjudicated is
“somewhere between the approach taken by the UK and Singapore / New South Wales” (consultation paper)

3. Comparison with HK & elsewhere (cont'd)

- “In practice ... the vast majority of disputes can be considered by adjudicators” (consultation paper)
- Agreement of Ar. only possible after A. triggered – sensible & unlike e.g. UK
- Timetable for A. longer than most (up to 11 weeks from Ar’s appointment or more)
- Ambush provisions more extensive than elsewhere & somewhat unbalanced
- Costs regime follows majority approach so overall cost will be higher than in most jurisdictions
- Enforcement: can HK courts deliver the fast-track support in place elsewhere?