



An Overview of Hong Kong's Unique Construction Payments Adjudication Scheme

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Introduction

In construction disputes, time is of the essence. Stable and clear legal frameworks are essential for complex construction projects to be undertaken smoothly, and for any disputes that arise to be properly and timeously resolved, to minimise the impact on the overall completion of the construction works involved.

One crucial aspect of any construction dispute is when, under what conditions, and how, payments before project completion will be due and made. Following industry concerns about payment problems experienced by contractors, the Development Bureau of the HKSAR Government explored creating

the Security of Payment (“**SOP**”) scheme to clarify the legal framework involved in resolving these key questions.

The objective of the SOP scheme is to enhance the cash flow of contractors whilst resolving disputes that arise by providing a simple process for claiming payments, responding to claims, and resolving payment disputes by adjudication when a construction project is ongoing.

This is the first of two consecutive articles which will highlight the overall framework and important implications of the SOP scheme in Hong Kong. In this first introductory article, the authors aim to explain the overall structure of the adjudication process envisaged under the contractual SOP scheme.

In summary:

- a. Hong Kong’s SOP scheme is currently contractual in nature and applies to all public works construction projects.
- b. It aims to achieve rough and ready justice by quickly adjudicating payment disputes in the interim to maintain cash flow, leaving the final resolution of such disputes to subsequent litigation or arbitration proceedings.
- c. In the meantime, the adjudication decision cannot be overturned (with probable exception on narrow grounds).
- d. It can be enforced by a direct application for payment, failing which a contractor can choose to slow down work under the construction contract, or apply for summary judgment of the adjudicated sum.

History of the SOP Scheme in Hong Kong

At present, SOP legislation has yet to be passed by the Hong Kong Legislative Council. Instead, the main source of binding SOP provisions in Hong Kong is the Development Bureau Technical Circular (Works) No. 6/2021 (the “**Circular**”). The Circular seeks to apply

the SOP scheme to construction works for public contracts in Hong Kong. It is dated 5 October 2021 and has immediate effect.

Thus, Hong Kong’s SOP system, as currently formulated, is uniquely different from that of other jurisdictions. Countries such as the United Kingdom, Australia (in 6 different states and 2 territories) and Canada (in the province of Ontario) have all promulgated SOP legislation that mandatorily imposes SOP schemes as a matter of law. By contrast, Hong Kong’s SOP scheme contained in the Circular is purely contractual and does not have legislative force.

As stated in §7 of the Circular, the SOP scheme in the Circular will be incorporated into public works contracts as Additional Conditions of Contract (“**ACC**”) and Special Conditions of Contract (“**SCC**”) from the date of the Circular. This will be commenced on two separate dates, namely 31 December 2021 and 1 April 2022.

After the Circular comes into effect, it will apply to all main contracts for public works as well as relevant subcontracts at all tiers. As stated in §14 of the Circular, the scope of relevant subcontracts encompasses construction subcontracts for the carrying out of construction work and related goods and services, such as the provision of plant, equipment, materials, labour and other advisory

services or testing services.

Further, although the Circular will not apply to private development projects, it will still play a significant role in the construction industry by providing a role model for how adjudication can help ease cash flow issues and improve payments in public works contracts. It is therefore of particular importance to the industry to understand the new adjudication system that the Circular introduces to public works contracts and subcontracts.

The Payment & Adjudication Scheme

The Circular imports a new payment timetable and an adjudication scheme to resolve disputes that arise over progress payments. In terms of scope, Hong Kong’s SOP scheme under the Circular, like that of New South Wales, only applies to disputes over progress payments. The United Kingdom’s Housing Grants, Construction and Regeneration Act 1996, by contrast, allows the adjudication of “*any difference*” concerning a construction contract (see section 108(1)).

In summary, under the Circular’s SOP scheme, a contractor’s payment claim for a progress payment must be met with an employer’s timely payment response. If a dispute arises as to the progress payment claim, the matter may proceed to adjudication.

In this regard, a contractor may serve a





payment claim for a progress payment on an employer on or after the reference date for the payment (Circular Annex C Clause 5). A payment claim must be in writing and must identify the construction work or related goods or services to which the payment is made and must state the amount payable.

Once a payment claim is received, the employer may then serve a payment response on the contractor (Circular Annex C Clause 6(1)). If an employer chooses not to serve a payment response, he will be regarded as disputing the claimed amount in full. However, an employer who does not serve a payment response will not be able to raise any set-off in any adjudication in relation to the payment claim concerned (Circular Annex C Clause 8(1)).

In line with the summary nature of the SOP scheme, which is aimed at speedy resolution of disputes through rough and ready justice, where the employer elects to serve a payment response, it must be served on the contractor no later than 30 days after the payment claim was served on the employer (Circular Annex C Clause 7(2)(b)).

A progress payment becomes due and payable on the date falling 60 days after the service of a payment claim on the employer (Circular Annex C Clause 4(1)(b)). Following the service of a payment claim, a payment dispute will arise in the following three possible scenarios– (i) if an employer does not serve a payment response at all; (ii) if the payment response disputes the whole or part of

the payment claim; or (iii) if the payment response sets off or withholds all or any part of the payment claim (Circular Annex C Clause 9(1)).

If a payment dispute arises, a contractor may, within 28 days of the date on which the payment dispute arises, initiate an adjudication of the payment dispute (Circular Annex C Clause 10). To initiate an adjudication, a notice must also be served on an adjudicator nominating body specified in the contract (Circular Annex C Clauses 12-13). The body will then appoint an adjudicator who has jurisdiction to resolve the dispute (Circular Annex C Clause 17).

The adjudicator must determine the payment dispute and issue a decision to the parties within 55 working days of the date on which he was appointed (Circular Annex C Clause 26). This is to ensure the speedy resolution of disputes and minimise cash flow interruptions.

The decision issued by the adjudicator is binding on the parties to the adjudication and enforceable as a matter of contractual obligation unless the dispute is otherwise settled or submitted to arbitration by the parties (Circular Annex C Clause 27(1)). A party will therefore be required to pay the adjudicated amount on the date specified in the decision or, if no date is provided, within 30 days of the date on which the adjudication decision was delivered (Circular Annex C Clause 30).

The Nature of Adjudication of Payment Claims

Hong Kong's SOP scheme will likely follow

that of other jurisdictions with respect to how adjudicators' decisions are viewed by the courts. Of particular relevance is the approach in the United Kingdom, where it has been acknowledged by the courts that the adjudication process is to ensure quick though somewhat rough justice. The decision of an adjudicator is binding in the interim to preserve cash flow and the contractual relationship, while disputes can be finally determined by a court or arbitral tribunal at a later date.

The general principles were laid down by the English Court of Appeal in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 at §§52-53, 87. The decision of an adjudicator does not involve the final determination of the parties' rights and must be enforced even if it results from errors of procedure, fact, or law. The court explained that in the overwhelming majority of cases, even if a losing party does not accept the adjudicator's decision as correct in fact or law, the proper course is to pay the adjudicated amount. The true position can be established at later legal or arbitral proceedings.

Bearing in mind the objectives of Hong Kong's SOP scheme, the English approach will likely appear attractive to a Hong Kong court. In this regard, it should also be kept in mind that the decision in *Carillion Construction* does not give adjudicators free reign over payment disputes. One area that the courts will police is where an adjudicator has exceeded his jurisdiction. As the court clarified in *Carillion Construction*,

adjudicators' decisions will be respected unless the question decided was not the question referred to them or the manner in which the adjudicator decided the payment claim was obviously unfair or a serious breach of the rules of natural justice.

If the adjudicator decides a dispute which was not referred to him then he has acted outside his jurisdiction and the court will set aside his decision. This is to be distinguished from the situation above where the decision is valid but mistaken, even if the mistake is one of fundamental importance (see *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49 at §25). Accordingly, to ensure that adjudicators' decisions are not wantonly challenged, the courts impose a high standard for overturning adjudicators' decisions, and will critically examine alleged errors of law or procedure before accepting that they constituted excess of jurisdiction or a breach of the rules of natural justice.

Thus, the proper venue for the true picture to emerge is subsequent legal proceedings or arbitration. The Circular at §12 confirms that the rights of the parties to pursue these avenues is not

affected by adjudication.

Enforcement of Adjudication Decisions

As Hong Kong has not yet enacted a statutory SOP scheme, adjudicator decisions on payment claims are only enforceable as a matter of contractual obligation between the parties.

In light of the Circular, the most straightforward course for a successful contractor following adjudication is to apply directly to the employer for payment.

However, as a successful claimant in adjudication possesses a contractual right to payment, if there are any delays with a direct application for payment, a claimant can also proceed to seek summary judgment under O. 14 Rules of the High Court (Cap. 4A). Although the adjudication process aims to achieve a quick resolution of a payment dispute notwithstanding factual or legal errors, summary judgment of an adjudicated sum is still appropriate.

In this regard, guidance can be found in the English case law. In *Bouygues UK*

Ltd v Dalh-Jensen UK Ltd [2000] BLR 522 at §29, the English Court of Appeal confirmed that summary judgment was the proper means of enforcing an adjudicator's decision.

Finally, the Circular provides that a contractor who is successful in adjudication but who has not yet been fully paid by an employer can suspend or slow down work under the contract (Annex C Clause 37). This gives another alternative and potentially powerful means for a claimant to ensure the enforcement of an adjudication decision.

Conclusion

Hong Kong's new SOP scheme contained in the Circular is a welcome step forward for industry participants engaged in public works contracts. It is hoped that this new framework will form the bedrock of eventual legislation for the continued growth of Hong Kong's construction industry. In their second article, the authors will discuss more specific cases concerning the nature of adjudication. ■

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香港獨特的建造付款 審裁計劃概述

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引言

在建造爭議中，時間是一項關鍵要素。為得使複雜的建造項目能夠順利進行，項目期間所產生的爭議得到及時和妥善解決，則必須有一個穩定而清晰的法律框架，從而盡量減少對相關建造工程之整體竣工帶來任何影響。

建造爭議中一個備受關注的問題，是

在項目竣工之前，付款何時到期、如何支付，以及應該在什麼時候、在什麼情況下安排付款。隨著業界對承建商遇到有關付款的問題表示關注，香港特區政府轄下的發展局擬研究制定付款保障計劃，以釐清解決該等關鍵問題所涉及的法律框架。

付款保障計劃之目的是要在建造項目進行之際，藉著提供一個提出付款

申索、回應申索、及透過審裁解決付款爭議的簡單流程，一方面維持承建商的現金周轉，另一方面解決當中所涉及的爭議。

本篇文章為連續刊發的兩篇文章的第一篇，闡述香港付款保障計劃的整體框架及其重要含義。作者在這第一篇的導論文章中，主要闡述在合約性付款保障計劃下所訂立的審裁程序的總體架構。

總括而言：

- a. 香港目前的付款保障計劃乃屬合約性質，適用於所有公共工程建設項目。
- b. 其目的是透過在中期迅速審理付款爭議以維持現金周轉，從而達至較為粗略的公義，並藉後續的訴訟或仲裁程序來最終解決有關爭議。
- c. 同時，後續的訴訟或仲裁程之前，在審裁程序中所作的裁決不能被推翻（在狹窄的理由下存在可能的例外情況）。
- d. 審裁程序的裁決可以透過直接的付款申請來強制執行，否則承建商可以選擇放慢建造合約的工程，或是就所裁定的金額申請簡易判決。



香港付款保障計劃的歷史

香港有關付款保障的法例，現時仍在等待立法會通過，目前本地具約束力的付款保障規定，主要基於《發展局 6/2021 號工務技術通告》（《通告》），其目的是將付款保障計劃應用於與香港公共合約有關的建造工程。該通告的發出日期為 2021 年 10 月 5 日，並即時生效。

因此，香港現時實施的付款保障制度，與其他司法管轄區的有著顯著不同。例如，英國、澳洲（在 6 個不同州份和兩個領地）及加拿大（在安大略省）等國家均頒布了付款保障法規，並強制性地實施了付款保障計劃，作為一項必須予以執行的法律。相反，《通告》所載的香港付款保障計劃純屬合約性質，並不具備法律效力。

如《通告》第 7 項所述的，自《通告》公布日期起，《通告》所載的付款保障計劃將會納入公共工程合約中，作為合約附加條件與合約特殊條件，並分別於兩個不同日期（即 2021 年 12 月 31 日和 2022 年 4 月 1 日）開始實施。

《通告》生效後，將會適用於所有的公共工程主合約及所有層級的相關分包合約。如《通告》第 14 項所述的，相關分包合約的範圍包含進行建造工程及相關商品和服務的建造分包合約，例如提供廠房、設備、材料、勞務及其他諮詢服務或測試服務。

此外，儘管《通告》不會適用於私人發展項目，但它仍將在建造行業中發揮顯著作用，為審裁如何協助緩解現金週轉問題及改善公共工程合約的付款發揮作用。因此，理解《通告》為公共工程合約和分包合約引入新審裁制度對業界而言尤其重要。

付款與審裁計劃

《通告》引入了一個新的付款時間表和審裁計劃，以解決因進度付款而產生的爭議。在範圍上，香港在《通



告》下的付款保障計劃與新南威爾士的相若，僅適用於與進度付款有關的爭議。與此相比，英國的 Housing Grants, Construction and Regeneration Act 1996 則容許對與建造合約有關的“任何差異”進行審裁（見第 108(1) 條）。

總而言之，在《通告》下的付款保障計劃，僱主必須就承建商的進度付款申索作出適時的付款。若有任何關於進度付款申索方面的爭議，可交付審裁程序來處理。

就此而言，承建商可以在付款參考日期或之後向僱主送達進度付款的付款申索（《通告》附錄 C 第 5 條）。該付款申索必須採用書面形式，並須指明與該付款相關的建造工程或相關商品或服務，以及須述明應付金額。

僱主一旦收到付款申索後，可向有關承建商送達付款回應（《通告》附錄 C 第 6(1) 條）。僱主若選擇不送達付款回應，其將被視作就所申索的全數金額提出爭議。但是，不送達付款回應的僱主將不可在任何審裁中，就有關的付款申索提出任何抵銷要求（《通告》附錄 C 第 8(1) 條）。

與付款保障計劃的簡易性質一致（其目的是基於達到較為粗略的公義的基礎上迅速解決爭議），僱主若選擇

送達付款回應，便必須在付款申索送達僱主後 30 日內將其送達承建商（《通告》附錄 C 第 7(2)(b) 條）。

進度付款在向僱主送達付款申索後 60 日到期應付（《通告》附錄 C 第 4(1)(b) 條）。在送達付款申索後，付款爭議將於以下三種可能的情況產生—(i) 僱主完全沒有送達付款回應；(ii) 付款回應中就全部或部分付款申索提出爭議；或 (iii) 付款回應抵銷或拖欠全部或任何部分付款申索（《通告》附錄 C 第 9(1) 條）。

如發生付款爭議，承建商可由付款爭議發生之日期起 28 日內提起付款爭議審裁（《通告》附錄 C 第 10 條）。如要啟動審裁程序，必須向合約中指定的審裁員提名團體送達通知（《通告》附錄 C 第 12-13 條），該團體其後會委任一名具有管轄權解決爭議的審裁員（《通告》附錄 C 第 17 條）。

該審裁員必須在其被委任之日期起 55 個工作天內，對支付爭議作出裁定並向各當事人頒發裁決（《通告》附錄 C 第 26 條），目的是要確保爭議得到迅速解決，並盡量減少對現金週轉造成干擾。

審裁員頒發的裁決對審裁的各個當事方均具有約束力，並且作為一項合約責任而具有強制執行力，除非該爭議以其他方式得到和解或由各當

事人提交仲裁（《通告》附錄 C 第 27(1) 條）。因此，當事人須根據裁決所指明的日期支付裁定的金額，倘無指明日期，則在裁決送達之日起 30 日內支付（《通告》附錄 C 第 30 條）。

付款申索審裁的性質

就法院將如何看待審裁員所作的裁決，香港的付款保障計劃將很有可能遵循其他司法管轄區的做法。尤其相關的是英國的做法，因當地法院已確認審裁程序是為了確保迅速但較為粗略的司法公義。審裁員所作的裁定具有中期約束力，以維持現金週轉和合約關係，而爭議最終可於較後的日期由法院或仲裁庭來裁定。

英國上訴法院在 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 一案中訂立了一般原則（見第 52-53, 87 段）。審裁員的裁決並不涉及對當事方之權利的最終認定。就算審裁員的裁決是基於在程序、事實或法律上犯錯所導致，必須予以強制執行。法院解釋，在絕大多數案件中，敗訴的一方即使不承認審裁員所作的裁定是在事實或法律上正確，正確做法，便是支付所裁定的金額，而真正情況如何，可在較後的法律或仲裁程序中裁定。

基於香港的付款保障計劃所訂立的目標，英國的做法對香港法院而言，看來相當可能具吸引力。在這方面，亦必須謹記，根據 *Carillion Construction* 一案的法律原則，法院並沒有賦予審裁員權力可完全自由裁量付款爭議。法院要監控的，是審裁員是否超出了其司法管轄範圍。正如法院在 *Carillion Construction* 一案

中所闡明的，審裁員的裁決會被尊重，除非他所裁定的問題，並非案件雙方原來向他提交的問題，又或是，他所裁定付款申索的方式明顯屬於不公平或嚴重違反自然公義法則。

審裁員倘若就某項未提交予他的爭議作出裁定，其行事便是超出了自身的司法管轄範圍，而法院將會撤銷他所作的裁決，而這有別於上述的審裁員所作裁定雖錯誤但有效（即使該錯誤是一項根本性的錯誤）的情況（參見 *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49 at § 25）。因此，為確保審裁員所作

如《通告》所顯示的，經審裁而勝訴的承建商最直截了當做法，便是直接向僱主申請付款。

然而，由於在審裁中勝訴的申索人擁有合約上的付款權利，故倘若在直接申請付款方面有任何耽延，申索人亦可根據《高等法院規則》（第 4A 章）第 14 號命令尋求簡易判決。儘管審裁程序之目的，是在儘管存在事實或法律錯誤的情況下，尋求迅速解決付款爭議，但藉簡易判決來追索已裁定的金額依然合適。

在這方面，我們可從英國的判例法中找到相關指引。在 *Bouygues UK Ltd v Dalh-Jensen UK Ltd* [2000] BLR 522 § 29 一案中，英國上訴法院確認，簡易判決是強制執行審裁員所作的裁決的適當途徑。

最後，《通告》規定，承建商倘若在審裁中勝訴，但卻仍未獲僱主全額付款，他可以

暫停或放慢在相關合約下的工程（附錄 C 第 37 條）。此舉為申索人提供了另一有力手段，確保審裁裁決得到強制執行。

結論

《通告》所載的香港的新付款保障計劃，對訂立了公共工程合約的業界人士來說是可喜的一步。作者期望這新框架能成為付款保障最終立法之基石，促進香港建造業持續發展。作者將會在其第二篇文章中，討論更多與審裁性質有關的具體案例。■

謹此鳴謝梁啟航大律師聯合共同參與撰寫本文。




的裁決不被肆意質疑，法院就推翻審裁員之裁決設下了一個高標準，並會在確認其是否超越司法權限或違反自然公義法則之前，先行嚴格審視所指稱審裁員在法律或程序上犯的錯誤。

因此，其後的法律或仲裁程序才是案件中要彰顯真實境況的適當途徑。《通告》第 12 項確認，當事方尋求該等途徑的權利不受審裁的影響。

審裁裁決的強制執行

由於香港尚未制定法定的付款保障計劃，因此審裁員就付款申索所作的裁決，只能作為各當事方之間的合約義務來強制執行。



Nature of Adjudication: Impact of Interim Account Adjudication Decisions on Final Account Assessments

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Introduction

Statutory Security of Payment (“SOP”) regimes have been implemented in a number of jurisdictions, which promote fair payment and help contractors, consultants and suppliers receive payment on time for work done and services provided.

In Hong Kong, however, there is no statutory SOP regime. The spirit of the SOP legislation in the form of SOP Provisions has been introduced under the Technical Circular (Works) No. 6/2021 (the “Circular”) in stages since 31 December 2021 in public works contracts through the incorporation of the Additional Conditions of Contract/ Special Conditions of Contract and their appendices.

The precise operation of the SOP scheme in Hong Kong is therefore ultimately a matter of contractual interpretation.



Nevertheless, experiences in other jurisdictions which have implemented statutory SOP regimes may shed light on the nature of adjudication envisaged under the Hong Kong SOP scheme.

In the United Kingdom, the adjudication regime has been described as being “*designed in part to address the cash flow difficulties in the construction industry and the approach to be taken can be summarised... by the mantra ‘pay now argue later’*”. (See *Davis Construction (South East) Ltd v Sanzen Investments Ltd* [2021] EWHC 2216 (TCC) at §22.)

This is consistent with the express purpose of the Circular, namely to “[*facilitate*] timely processing of contract payments and [*provide*] an interim mechanism for speedy resolution of payment disputes

before the enactment of the Security of Payment Legislation...”

An adjudication decision is binding on the parties to the adjudication and enforceable as a matter of contractual obligation unless and until (a) the payment dispute to which the decision relates is settled by agreement in writing between the parties to the adjudication or (b) the payment dispute is determined by arbitration or court proceedings. (see Clause 27 of SOP Provisions)

Adjudication decisions will be enforced, even if they result from errors of procedure, fact or law. Such errors must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice, which would render an adjudication decision unenforceable. (See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*

[2006] BLR 15 at §§52, 53 and 87.)

An important issue that arises is to what extent does an adjudicator’s decision on the value of *interim* accounts bind the parties for the purposes of the *final* account assessments?

This issue under the United Kingdom SOP regime was addressed in the recent English decision of *Essential Living (Greenwich) v Elements (Europe) Ltd* [2022] EWHC 1400 (TCC).

Background

The dispute arose out of a contract entered into on 1 December 2016 (“Contract”). Essential Living engaged Elements to carry out the design and construction of modular units for a project. By Article 7 of the Contract, it was provided that, if a dispute or difference arises under the Contract which either party wishes to refer to adjudication, Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“Scheme”) should apply.

The Contract also contained the following terms: -

After the expiry of the Completion Period for the Works...if this occurs before the date of practical completion, the Construction Manager may, and not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Trade Contractor...

- .1 *fix a Completion Period for the works...later than that previously fixed if in his opinion that is fair and reasonable having regard to any Relevant Events, whether on reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Trade Contractor under clause 2.26.1; or*
- .2 *...fix a Completion Period shorter than that previously fixed if in his opinion that is fair and reasonable having regard to any instructions for Relevant Omissions issued after the*

last occasion on which a new Completion Period was fixed for the Works...; or

.3 *confirm the Completion Period previously fixed.” (Clause 2.27.5); and*

4.6.1 *Not later than 3 months after the issue by the Construction Manager of the certificate of practical completion of the Works, the Trade Contractor shall provide the Construction Manager with all documents necessary for calculating the Final Trade Contract Sum.*

4.6.2 *Not later than 3 months after receipt by the Construction Manager of the documents referred to in clause 4.6.1 the Construction Manager shall prepare and send to the Trade Contractor a provisional calculation in accordance with clause 4.3 or 4.4, as applicable...” (Clauses 4.6.1 and 4.6.2)*

The works were certified as practically complete on 31 May 2019. Prior to practical completion, by notice of adjudication dated 9 April 2019 (“Adjudication”), Essential Living commenced an adjudication for the correct valuation of Elements’ account, as set out in Elements’ latest application for payment on 11 March 2019 and the Construction Manager’s valuation of 20 March 2019.

In his decision issued on 22 July 2019 (“Adjudication Decision”), the Adjudicator determined Elements’ variation and extension of time (“EOT”) claims (as well as liquidated damages for delay).

In the final accounting process conducted by the Construction Manager, Elements issued submissions on the adjustment to the Completion Period for the purpose of the review following practical completion under clause 2.27.5 of the Contract and a provisional calculation of the Final Trade Contract Sum pursuant to clause 4.6.2 of the Contract. The submissions included *increased* claims for variations, *full* EOT, *no* deduction for liquidated damages, and

additional prolongation and disruption costs.

On 7 October 2021, Essential Living commenced court proceedings for declarations to the effect that Elements remained bound by the Adjudication Decision.

The issues before the Court concerned the binding effect of the Adjudication Decision and its impact on subsequent contractual processes, including:-

1. The impact of the Adjudication Decision on claims for EOT, liquidated damages and delay damages; and
2. The impact of the Adjudication Decision on evaluation of the Final Trade Contract Sum, including various and loss and/or expense.

Decision in *Essential Living*

While noting that the Adjudication Decision only determined the interim valuation of Elements’ account and did not determine the Final Trade Contract Sum, O’Farrell J held that it did not necessarily follow that the Adjudication Decision could not bind the Construction Manager *in respect of specific matters* determined by the Adjudicator for the purpose of ascertaining the Final Trade Contract Sum. Under the Contract, the Final Trade Contract Sum on adjustment

basis did not require the Construction Manager to remeasure the works.

The Construction Manager was not required, or permitted, to reconsider or revalue variations that have been accepted and valued in accordance with the contractual procedure. Clause 5.5 provides that effect shall be given, in the calculation of the Final Trade Contract Sum, to agreed variations and valuation of such variations, including direct loss and/or expense incurred thereby. The Contract did not provide for those matters to be re-opened at the final account stage.

Therefore, it was held that to the extent the Adjudication Decision has determined on discrete issues, such as entitlement to a variation or its value, such determinations were binding on the parties for the purpose of the Final Trade Contract Sum, pending any final resolution by litigation or settlement.

The position regarding the post-completion review process under clause 2.27.5, however, was different. Unlike the contractual mechanism for the determination of the Final Trade Contract Sum, clause 2.27.5 mandated the Construction Manager, not later than 12 weeks *after* the date of practical completion, to determine the Completion Period for the works that is fair and reasonable, which is a separate exercise



and expressly permitted the Construction Manager to *review any previous decision*.

Clause 2.27.5 contemplated that this post-completion exercise could produce a Completion Period for the works that differed from earlier assessments under clause 2.27.1. Nothing in the Contract or the Scheme suggested that resolution of a dispute as to the Completion Period under clause 2.27.1 would displace the Construction Manager's obligation to assess the Completion Period under clause 2.27.5.

O'Farrell J, therefore, held that the Adjudication Decision could not determine any dispute arising out of any fixing of the Completion Period under clause 2.27.5.

Implications on SOP Scheme in Hong Kong

While *Essential Living* is a decision based on the SOP regime in the United Kingdom, it provides insight on how the issue concerning the binding effect of interim account adjudication decisions on final account assessments may be approached under the Hong Kong contractual SOP scheme. The key issue is whether the contract in question permits or mandates the contract administrator to reopen or reconsider the various claims in the final accounting process.

Absent any express provision conferring powers on the contract administrator to reopen or reconsider claims after practical completion, the general position appears to be that adjudication decisions in respect of specific matters would remain binding in the final accounting process.

This general position appears to be consistent with the Hong Kong contractual SOP scheme.

Clause 29 of the SOP Provisions expressly provides that where an adjudicator has determined in an adjudication the value of any construction work carried out, the value of any related goods and services

supplied or the value of any other entitlements, the adjudicator in any later adjudication that involves the working out of the value of that work or of those goods and services or any entitlements *must* give the work, or the goods and services or such entitlements the *same* value as that previously decided. This is consistent with O'Farrell J's decision that the specific matters determined in the Adjudication Decision remained binding on the Construction Manager for the purpose of ascertaining the Final Trade Contract Sum.

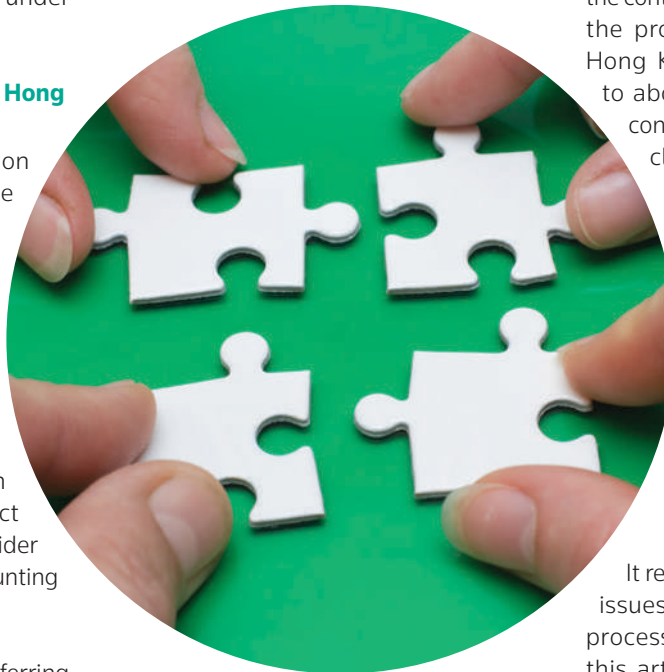
Insofar as time-related claims are concerned, it is noted at §9 of the Circular that the majority of the industry

contract administrator's assessment, the adjudicator's determination *should prevail* and the date for completion of the contract is taken as revised accordingly in order to be consistent with the payment of the associated adjudicated amount as decided by the adjudicator. The practical effect of this policy appears to confer a binding status upon the EOT determined by the adjudicator under the contractual SOP scheme.

Having said that, as mentioned above, the answer to the question concerning the binding effect of interim account adjudication decisions on the final account assessments is ultimately a question of interpretation of the terms of the contract in question. Notwithstanding the provisions and policy under the Hong Kong SOP scheme as referred to above, if the contract in question contains an express and unequivocal clause empowering the contract administrator to reopen valuation of works or EOT assessments after practical completion similar to clause 2.27.5 of the Contract in *Essential Living*, it may well be the case that the contract administrator in the post-completion revaluation or reassessment exercise is not bound by the relevant interim account adjudication decisions.


It remains to be seen how the various issues arising from the adjudication process such as those considered in this article will be tackled under the Hong Kong contractual SOP scheme. The introduction of the contractual SOP scheme in public works contracts is certainly a positive step towards the long-anticipated enactment of the SOP legislation in Hong Kong. Stakeholders of the Hong Kong construction community should make use of this opportunity to familiarize themselves with the spirit of the SOP legislation before its eventual enactment, which is expected to have a long-term impact on the landscape of the Hong Kong construction industry. ■

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stakeholders supported a refined proposal for the inclusion in the scope of adjudication of payment disputes which involved EOT. Under the refined proposal, the adjudication decision on the time-related costs forming part of the payment disputes is binding and enforceable on an interim basis, but the EOT so decided by the adjudicator is not binding.

However, as a matter of policy, it is expressly stipulated at §11 of the Circular that for practical implementation of the refined proposal in public works contracts, where the adjudicator's determination of an EOT claim is different from the



審裁的性質 — 中期賬目審裁決定對最終賬目評估的影響

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引言

法定付款保障 (SOP) 制度已在多個司法管轄區實施。該制度為促進公平付款，並協助承建商、顧問和供應商按時收到已完成的工作及已提供的服務的付款。

然而，香港現時並沒有法定的 SOP 制度。自 2021 年 12 月 31 日起，通過納入合同附加條件 / 合同特別條件及其附錄，香港政府在《技術通告（工務）第 6/2021 號》（“通告”）中在公共工程合同中以 SOP 條款的形式，分階段引入 SOP 的立法精神。

因此，SOP 計劃在香港的具體運作歸根究底是一個合約解讀的問題。不過，通過參考其他已經實施法定 SOP 制度的司法管轄區的經驗，或許能夠幫助我們瞭解香港 SOP 計劃中所設想的審裁性質。

在英國，審裁制度被視為「部分旨在解決建築業的現金流困難，其採取的方法可以總結為……先付款後爭論」。 (見 *Davis Construction (South East) Ltd v Sanzen Investments Ltd* [2021] EWHC 2216 (TCC) § 22)

這一點與通告中提到的目的一致，即「[促進] 及時處理合同付款，並在付款保障立法之前，[提供] 快速解決付款爭議的臨時機制……」

審裁決定對於審裁各方具有約束力，亦可作為合約中的責任事項來予以執行，除非且直至 (a) 與審裁有關的

付款爭議通過審裁雙方之間的書面協議解決，或 (b) 付款爭議通過仲裁或法庭程序得到決定。(見付款保障條款第 27 條)

即使審裁決定是因為程序出錯、錯誤的事實或法律而造成，該審裁決定仍然會被執行。在法庭接受此類錯誤構成超越管轄權或嚴重違反自然正義規則、從而導致審裁決定無法執行之前，必須對此類錯誤進行嚴格審查。(見 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 § 52, 53 及 87)

其中產生的一個重要問題是，審裁員對於中期賬目價值的決定，會對各方就最終賬目的評估起到多大的約束力呢？

最近英國 *Essential Living (Greenwich) v Elements (Europe) Ltd* [2022] EWHC 1400 (TCC) 一案的判決解決了英國 SOP 制度下的相關問題。

背景

Essential Living 一案中的爭議源於一份於 2016 年 12 月 1 日簽訂的合同（“合同”）。Essential Living 聘請 Elements 為一個項目進行模塊化單元的設計和建造。該合同第 7 條規定，如果合同項下出現爭議或分歧，而任何一方希望提交審裁時，則

1998 年《建築合同計劃（英格蘭和威爾斯）規則》附表第 1 部分應當適用。

該合同還包含以下條款：-

「在工程竣工期屆滿後…如果發生在實際竣工日期之前，建築經理可以在不遲於實際竣工日期後 12 週內通知行業承造商…

.1 …如果他在考慮到任何相關事件後，不論是審視先前的決定或其他事宜，以及無論行業承造商是否已根據第 2.26.1 條具體通報相關事件，認為是公平合理的情況下，為工程定下一個晚於之前確定的竣工日期；或

.2 …如果在他考慮到上一次為工程確定新的竣工期後發出任何相關遺漏指示後，認為公平合理的情況下，可以為工程定下一個早於之前確定的竣工期；或

.3 確認之前定下的竣工期。」（第 2.27.5 條）；及

4.6.1 在建築經理發出工程實際竣工證書後的 3 個月內，行業承造商應向建築經理提供計算最終行業合同金額所需的所有文件。

4.6.2 在建築經理收到第 4.6.1 條所述的文件後 3 個月內，建築經理應根據第 4.3 或 4.4 條（如適用）準備，並向行業承造商發送臨時估算……」（第 44.6.1 及 4.6.2 條）

該案所涉及的工程於 2019 年 5 月 31 日實際竣工。在實際竣工之前，Essential Living 於 2019 年 4 月 9 日發出審裁通知，啟動審裁程序。Essential Living 按 Elements 在 2019 年 3 月 11 日發出的最新付款申請和建築經理在 2019 年 3 月 20 日的估值，對 Elements 賬目的正確估值進行審裁。

在 2019 年 7 月 22 日發出的決定（**審裁決定**）中，審裁員對 Elements 的變更和延期申索（以及延遲的違約賠償金）作出決定。

在建築經理進行的最終帳目結算的過程中，Elements 提交了關於調整竣工期的相關文件，以便根據合同第 2.27.5 條在實際竣工期後進行審查，並根據合同第 4.6.2 條臨時估算最終行業合同金額。提交文件內容包括增加變更的申索、完整的延期、不扣除違約金以及額外的延期及中斷的成本。

2021 年 10 月 7 日，Essential Living 啟動法庭程序，尋求有關 Elements 仍受審裁決定約束的聲明。

法庭審理的問題涉及審裁決定的約束力，以及其對後續合同程序的影響，包括：

1. 審裁決定對延期、違約賠償金和延誤賠償的影響；及
2. 審裁決定對最終行業合同金額估算的影響，包括各種損失及 / 或費用。

Essential Living 的裁決

儘管審裁決定僅確定了 Elements 的中期帳目的臨時估值，並沒有決定最





JUDGEMENT

終行業合同的金額，但 O'Farrell 法官認為，這並不一定代表審裁決定不能就審裁員為確定最終行業合同金額而決定的個別項目約束建築經理。根據合同，調整後的最終行業合同金額不需要建築經理重新計量工程。

建築經理沒有被要求或容許重新考慮或評估已經根據合同程序估價且已被接受的變更。第 5.5 條規定，在計算最終行業合同的金額時，應考慮已經商定的變更及此類變更的估價，包括因變更而產生的直接損失及 / 或費用。合同沒有規定這些事項要在最終決算階段重新進行討論。

因此，法庭裁定，在通過訴訟和和解達成任何最終決議之前，審裁決定中已經確定的個別問題，例如變更的權利或其價值，就最終行業合同金額而言，對雙方均具有約束力。

然而，法庭對第 2.27.5 條下竣工後審查流程的立場則有所不同。與確定最終行業合同金額的合同機制不同，第 2.27.5 條要求建築經理在實際竣工日期後 12 週內，確定公平合理的工程竣工期，這是一項獨立的程序，並明確容許建築經理審視之前的任何決定。

第 2.27.5 條是一個竣工後的程序，此程序可能會產生一個不同於先前根據第 2.27.1 條評估的工程竣工期。合同或計劃中沒有任何內容表明，根據第 2.27.1 條解決關於竣工期的爭議，

將取代建築經理根據第 2.27.5 條評估竣工期的責任。

因此，O'Farrell 法官認為，審裁決定不能視為確定根據第 2.27.5 條確定竣工期程序而引起的任何爭議。

對香港 SOP 計劃的影響

雖然 *Essential Living* 一案是基於英國 SOP 制度的裁決，但此案對於在香港合同 SOP 計劃下，中期賬目審裁決定對最終賬目評估是否有約束力這一問題上，為大家帶來啟示。其關鍵在於所涉及的合同是否容許或強制要求合同管理人在最終帳目結算過程中重新開展或重新考慮各種申索。

當合同沒有任何明確規定授予合同管理人在實際竣工後重新開展或重新考慮申索的權力時，一般情況下個別事項的審裁決定在最終帳目結算過程中仍然具有約束力。

總體來說，英國法庭在就個別事項的審裁決定之約束力的立場似乎與香港合同 SOP 計劃一致。

付款保障條款第 29 條明確規定，如果審裁員在審裁中確定了任何已經展開的建築工程之價值、任何經已提供的商品和服務之價值，或任何其他權利之價值，則審裁員在其後的任何審裁中涉及計算該工程或這些商品、服務或任何權利的價值時，必須賦予先前已經確定的相同價值。這與 O'Farrell 法官的判決相符，即在確定

最終行業合同金額時，審裁決定中確定的個別事項對建築經理仍然具有約束力。

就與時間相關的申索而言，通告的第 9 段指出，大多數行業持份者支持將涉及延期的付款爭議納入審裁範圍的修改建議。根據修改後的建議，構成付款爭議的與時間相關費用之審裁具有約束力，並可臨時執行，但審裁員對延期的決定則不具約束力。

但是，作為一項政策而言，通告的第 11 段明確規定，為了在公共工程合同中實施修改後的建議，當審裁員對延期申索的認定與合同管理人的評估不同時，應以審裁員的決定為準，而合同完成日期則應被視為相應修改，以便與審裁員決定的相關審裁金額的支付保持一致。該政策的實際效果似乎賦予了審裁員約束力，由審裁員根據合同 SOP 計劃決定延期。

儘管如此，如上所述，關於中期賬目決定對最終賬目評估的約束力問題，關乎對合同條款的解釋。儘管有上述香港 SOP 計劃的條款及政策，若有關合同包括明確清晰的條款，授權合同管理人在實際竣工後重新開展工程估價或延期評估，即類似 *Essential Living* 合同第 2.27.5 條的情況，那麼合同管理人在竣工後的重新估價或評估工作很可能不受相關中期賬目審裁的約束。

如何在香港合同 SOP 計劃下解決審裁過程中出現的各種問題（例如本文所提出的問題），仍有待觀察。在公共工程合同中引入 SOP 計劃，無疑是朝著期待已久的香港 SOP 立法邁出的積極一步。此項法例一旦實施，勢必將對香港建築業的環境產生深遠影響。香港建築界持份者應把握機會，在 SOP 立法最終頒布之前，提前熟悉其背後的立法精神，並做好萬全準備。■

在此特別鳴謝楊璟麟大律師合作撰寫本文。