



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

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Comments on the Arbitration Bill

One of the common disputes in construction cases is the question of whether the sub-contractor has failed to complete the work on time thereby causing a delay of the entire project. If the sub-contractor fails to prove that the delay of the entire project is not solely caused by itself, the sub-contractor will not only lose its claim for prolongation, but will also be liable to pay the main contractor for the prolongation cost and liquidated damages which the main contractor will have to pay the employer.

Therefore, in the discovery process, it is not inconceivable for the main contractor to withhold those documents which are not in its favour, e.g. those documents which show that the delay was not solely caused by the sub-contractor in question, but by other sub-contractors or even the main contractor itself. It is very easy for the main contractor to disclose only those documents that can prove that the sub-contractor has indeed failed to complete its work on time. On the contrary, it will be very difficult for the sub-contractor to prove that other sub-contractors have also contributed to the delay since the sub-contractor is not privy to the communication between the main contractor and other sub-contractors. In fact, each of the sub-contractors is only aware of its own part but not the complete picture if the main contractor can selectively disclose only such documents which are strictly related to a particular sub-contractor. Obviously, such selective disclosure is unfair to the sub-contractors.

Although both the current and the proposed Arbitration Ordinance provide that an arbitrator can direct discovery of documents, a discovery up to a court discovery standard may not be adhered to by the arbitrators. This phenomenon may be due to the arbitrators' endeavour to maintain the flexibility that arbitration can otherwise offer. Nevertheless, such seemingly "flexible" discovery process may result in unfairness to the sub-contractors and eventually create a negative implication on arbitration as a fair and effective means to resolve disputes.



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Therefore, we believe that the new Arbitration Ordinance should have more stringent requirement on discovery. In particular, the new Arbitration Ordinance shall provide that the party shall verify on affidavit the completeness, truthfulness and accuracy of documents that it provides. Alternatively, to strike a balance between a high standard of discovery and the flexibility offered by arbitration, the arbitrator shall, on the application of a party (a requesting party), order the party making discovery to verify the completeness, trustfulness and accuracy of documents on affidavit, subject to certain restrictions or conditions to avoid abuse of this process by the requesting party.

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