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Insights

"BATTLE OF THE FORMS" IN THE HONG KONG CONSTRUCTION INDUSTRY

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INTRODUCTION

What lawyers call a "Battle of the forms" occurs when two parties, negotiating a contract, exchange conflicting standard terms during the contract negotiation and formation. This leads to the obvious and not uncommon dilemma: which side's standard form applies to the transaction?

This is an important issue – if there are such uncertainties on a construction project, especially if such disputes relate to critical issues such as dispute resolution mechanisms, payment schedules, governing law, time bar or notification provisions, and extra payment entitlements and exclusions – this potentially could disrupt or even derail the orderly progress of the construction process and escalate costs.

Under common law, the traditional "mirror image" rule surrounding offer and acceptance requires that an acceptance must match the offer for a contract to be formed, and in disputes concerning "battle of the forms", the "last shot" rule (explained below) applies.

However, in practice, parties in a project may proceed with performance (such as supplying materials or starting work) without explicitly agreeing on whose terms the project shall apply, leading to disputes.

This article therefore will explore some of the practical implications that arise from battle of the forms and how that affects the construction industry in Hong Kong, as well as our observations and recommendations.

LEGAL POSITION CONCERNING BATTLE OF THE FORMS

On a traditional analysis of offer and acceptance, a purported acceptance of an offer that was made on the offeror's standard terms, but where the "acceptance" uses the offeree's own standard terms, will constitute a rejection of the original offer and be a counter-offer. It then remains to be seen whether the original offeror is prepared to accept the counter-offer. In this sense, the party on

whose terms the contract is concluded will be the party whose correspondence constituted the "last shot" (*Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401).

Battle of the forms disputes can lead to unexpected outcomes, where the parties have failed to agree as to which set of terms governs their relationship. A recent example that relates to construction is given by the recent UK case of *Caledonia Water Alliance v Electrosteel Castings* [2024] CSOH 87, where parties had each appended their own standard terms and conditions to each individual purchase order. The court, upon undertaking an objective consideration of what has been communicated between the parties by words and action, through a consideration of the main documents exchanged, relevant correspondence and witness evidence, determined that neither parties' own standard terms and conditions applied, and instead the overarching NEC3 Framework Contract applied. This case demonstrates that the English courts (whose decisions provide helpful guidance on contract issues in Hong Kong) are prepared to apply principles of contractual interpretation pragmatically, and may be prepared to find that references to one or both parties' standard terms and conditions can be ignored if the context indicates that the parties meant to contract on a different basis. A more in-depth analysis on this recent case can be found here: Battle of the forms: a recent example.

In Hong Kong, the courts have shown a similar tendency towards pragmaticism in assessing parties' intentions and conduct when they come across battle of the forms disputes and also relevantly, disputes concerning incorporation of terms that occur prevalently in the Hong Kong construction industry. For example in the case of *Yun Kwan Construction Engineering Ltd v Shui Tai Construction Engineering Co Ltd* [2019] HKCFI 1841, which involved a dispute between the sub-contractor and a sub-sub-contractor over whether an arbitration clause from the main contract was incorporated into the sub-sub-contract, the court held that whether the clause has been incorporated depends on the wording of the documents and the relevant commercial background as understood by a reasonable person. The dispute turned upon the construction of an incorporation clause within the sub-sub-contract. The court considered that clause under the context of the parties' dealings throughout the projects concerned, including the fact that the sub-sub-contractor (the plaintiff in the proceedings) had not even been given a copy of the main contract until disclosure during the court proceedings, and determined that the clause concerned did not purport to incorporate the arbitration clause under the main contract into the sub-sub-contract.

PRACTICAL IMPLICATIONS ON THE CONSTRUCTION INDUSTRY

Hong Kong's construction sector, with its complex supply chains and high-stakes projects, is particularly prone to battle of the forms disputes.

In private sector projects in Hong Kong, developers and main contractors often use standard forms from bodies like the Hong Kong Institute of Architects (HKIA) or Hong Kong Institute of Surveyors (HKIS). For projects in the public sector, the NEC form is now the preferred form by Development Bureau of the Hong Kong SAR ("**DEVB**") since 2016, and of note would be the NEC Engineering and

Construction Contract ("**ECC**") Hong Kong Edition published in July 2023 that was drafted by NEC with DEVB based on the NEC4 ECC. Increasingly, NEC4 is also becoming more widely used in the private sector. This reduces the risk of "battle of the forms" between developers and main contractors.

However, for the contracts with third parties for provision of goods and services in the downstream of the supply chain, and for the myriad of sub-contracts and sub-sub-contracts, it is less common for sophisticated standard form contracts to be used. Potential conflicts are created when parties introduce their own terms, such as when issuing quotations and purchase orders. This is particularly the case in Hong Kong, where multi-tiered subcontracting is common, with each tier exchanging documents like purchase orders and acknowledgments, often with differing terms on payment, warranties or dispute resolution mechanisms. More often than not we see the fact pattern where one party introduces their own set of standard terms in each purchase order, while the other party introduces their own conflicting set of terms in the "acknowledgement" slip. The further down the subcontracting chain one goes, it is less likely that adequately and clearly detailed agreed terms will have been set down in writing between the parties. Such practices give rise to textbook "battle of the forms" fact scenarios. Things may be further complicated if parties argue that terms in the upper stream contracts should also be incorporated within the lower stream supply contracts, such as in the scenario of *Yun Kwan*, as discussed above.

CONCLUDING REMARKS AND SUGGESTED BEST PRACTICES

As Hong Kong's construction law landscape evolves, particularly with the upcoming implementation of Construction Industry Security of Payment Ordinance ("**CISOP**") which will go into operation on 28 August 2025 (see our article at Hong Kong Security of Payment Ordinance Passed; Goes into Operation on 28 August 2025), staying informed and vigilant will be crucial for contractors, developers, and sub-contractors and suppliers in navigating these changes. By prioritizing clear, mutually agreed contracts and leveraging Hong Kong's robust common law framework, stakeholders can ensure that the battle of the forms does not derail or disrupt their projects or lead to costly litigation.

Based on our experience, to mitigate the risks of the battle of the forms in Hong Kong's construction industry, practitioners in the construction industry should adopt the following practices:

- Use a Single Written Contract: A single, signed contract incorporating all agreed terms is the most effective way to avoid disputes. Parties should negotiate and finalize terms before work begins, preferably using standard forms contracts like the NEC4 as a starting point (although this becomes less feasible for smaller supply contracts and sub or sub-sub or even sub-sub-sub agreements).
- Clear Communication: Ensure that all terms are clearly communicated and acknowledged. Reference terms explicitly in purchase orders, acknowledgments, or emails, and avoid relying

on fine print or vague references to other contractual documents. If necessary or appropriate, reject an “acceptance” or ”acknowledgement” that adds or encloses different terms and conditions.

- Seek Legal Advice: Engage legal counsel to review contract documents in ensuring that key terms and conditions have been incorporated, especially in complex projects involving multiple parties or cross-border elements. This is particularly important with upcoming implementation of CISOP, which may affect how disputes, not just those regarding “battle of the forms”, are resolved.

RELATED CAPABILITIES

- Construction Disputes
- Commercial Construction & Engineering

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