

Regional News for December 2011

Joint Christmas Party

Eric Tang

17 Dec 2011: Joint societies Christmas Party has become an annual event. This year, it was held at Habitat Lounge, QRE Plaza, 202 Queen's Road East. It was a great occasion for us mingling with new and old friends from members of construction and engineering bodies including IIE(HK), ICE, ASHRAE, AES, ICES, IEEE, IET, HKWTO, HKIE, YWCA, EDU and IMechE. Again, this event was over-subscribed, 150 participants were registered to attend but some 170 participants turned up for the festive function. We had the honour of the presence of our special guest Dr. Lee Ka Yan (李家仁) in the closing hour and elevated us to the new height by singing us a new song.

Tonji University Visit

Miranda Lui

2 - 4 Dec 2011: Following the visits to Beijing and Tianjin in previous months, the Hong Kong Region again visited another academia in eastern China – Tonji University in Shanghai. LC Yu and Miranda Lui, together with BK SURCO director John Battersby, had paid a courtesy visit to their School of Economic and Management. To explore cooperation opportunity with Tonji, John and Miranda had given them introduction presentations about ICES and BK SURCO. The professors of Tonji advised us some local construction associations relating to infrastructures and civil engineering construction would also be interested. We are planning to collaborate with the University along similar line to what we have already formulated with CHINCA.



From Left: Yu Lap Chu, Miranda Lui, John Battersby, Jianguo CHEN, Le YUN, Jide SUN

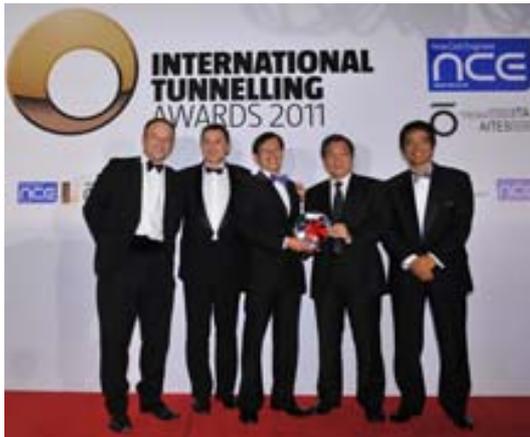
Committee Members Reaching Out

25 November 2011	Shenzhen Association of Cost Engineers – Annual Dinner and networking with their mainland members as well as professional leaders of various institutes and societies HKIS, RICS, CIOB, etc.	The Hong Kong Committee led by Mr. Honby Chan
1 December 2011	HKCPS Young Professionals Networking Party – Regional Chairman attended the function to promote ICES to a wider audience.	Mr. Honby Chan
16 December 2011	Farewell Banquet for Infrastructure Development International Conference at HKCEC invited by Works Bureau	Mr. Honby Chan

Construction News Update

Andrew Keung

2011 NCE International Tunnelling Awards were announced at a glittering awards ceremony at the Conrad Hong Kong on 1 December. This year the event was moving to Hong Kong, reflecting the fact that the Asian market is at the epicenter of tunneling innovation and expertise. Amongst the 250 submissions, only the most innovative and successful projects, companies and individuals in the tunneling industry were awarded and celebrated.



Hong Kong West Drainage Tunnel (HKWDT) won the top prize in the Tunnelling Project of the Year (US\$100m to US\$1bn) category. The judges were greatly impressed with the challenges that HKWDT had overcome and recommended that other projects should take a close look and learn from the experiences gained.

Hong Kong – Zhuhai - Macao Bridge Project



China Harbour Engineering Company has won the reclamation contract of the 150-hectare artificial island as part of the work for the 50km strategic cross border sea-bridge - Hong Kong- Zhuhai- Macao Bridge project. An inauguration ceremony was held on 14 December to mark the beginning of construction on the Hong Kong section of the project. Chief Executive Donald Tsang came out and marked the special occasion.



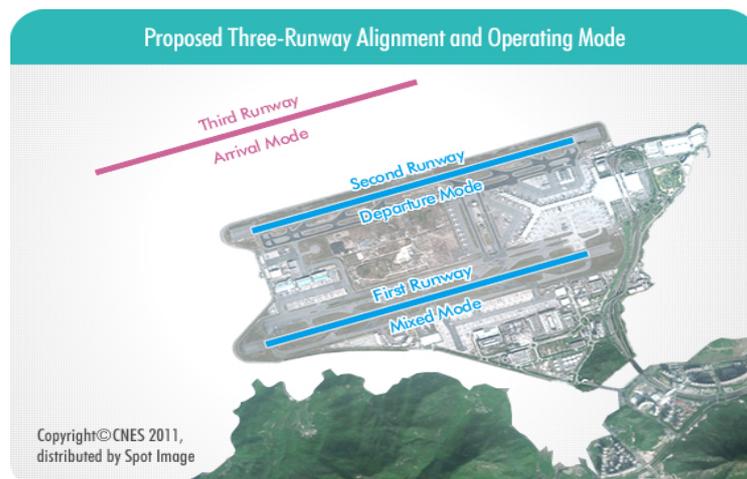
While the construction works in Hong Kong has just begun, the Macao section is now entering a new stage with the arrival of the last batch of 8 steel cylinders, weighing a total of 4,000 tonnes, from Shanghai in late November. The

installation operations are well underway and soon the construction of the perimeter wall of the eastern artificial island near Macao is coming to a close.



Airport Master Plan 2030 – Third Runway Plan Backed

Secretary for Transport & Housing Eva Cheng welcomed on 29 December the results of the Airport Authority’s public consultation on the Airport Master Plan 2030 that show a majority of respondents support the three-runway option.



With a third runway, HKIA would be able to handle 102 air traffic movements (ATMs) per hour or a practical maximum annual capacity of about 620,000 ATMs, securing the airport’s status as one of the world’s most important aviation hubs.

Other Past Events

3 Dec 2011: HKIS - Property & Facility Management Division Conference 2011 - “Corporate Real Estate - Value Enhancement or Business Support?”, ICES was the supporting organisation of this event.

Coming Events

Feb / Mar 2012: **Ian Cowling, Chief Examiner of ICES** is visiting Hong Kong and Beijing. As the membership of the Institution is expanding in this Region, we need more examiners. While he is in the Region, he will conduct training for new examiners and refresher training for existing examiners. Please give your names to Eric Tse, our Secretary, if you are able to assist the professional membership review.

21 Feb 2012: “**The Assessment of Changes under NEC**” will be presented by **Ian Heaphy**, Director of Navigant, in Room 202, Duke of Windsor Social Service Building, No. 15 Hennessey Road, Wan Chai.

Mar 2012: **Joint event would be held with HKIPM & HKIE (Building Division)** - a technical site visit to Guangzhou 廣州增城, details will be announced in due course.

27 Mar 2012: **Annual General Meeting**, details will be announced in due course.

Legal Corner

Steven Yip, Hon Legal Adviser

Contractual interpretation – Common sense prevails

In November 2011, the UK Supreme Court handed down a forceful judgment in favour of the 'purposive approach' on the interpretation of contractual terms in *Rainy Sky SA v Kookmin Bank*. The case, its progress through the courts and its wider implications are reviewed.

Led by Lord Clarke, their Lordships rejected the Court of Appeal's more literal approach to the construction of contractual terms. The Supreme Court unanimously held that where a term of a contract is open to more than one interpretation, it is generally appropriate to prefer the interpretation which is most consistent with business common sense.

The facts

This case concerned a number of refund guarantees (Bonds) issued by Kookmin Bank (Bank) to a number of parties (Buyers) who had agreed to purchase a vessel each from Korean company, Jinse Shipbuilding Co. Ltd (Builder). The price was to be paid through five equal instalments with the final instalment payable upon delivery. Under the shipbuilding contracts, the Builder was obliged to obtain the Bonds to guarantee the Buyers a full refund of their pre-delivery instalments (Instalments) should the Buyers become entitled to repayment according to the terms of the contract. Subsequently, the Builder experienced financial difficulties and entered into the Korean insolvency procedure, prompting the Buyers to seek recovery from the Bank.

The dispute

The dispute arose from the construction of two paragraphs of the Bonds which boiled down to whether or not the Bonds provided recourse to the Buyers in the event of the Builder's insolvency. The Buyers relied upon 'paragraph 3' which stated 'In consideration of your [the Buyers] agreement to make pre-delivery instalments under the Contract and for other good valuation.....we [the Bank]undertake to pay youall such sums due to you under the Contract' (emphasis added). Based on this, the Buyers argued that all pre-instalments paid were covered by the Bonds.

The Bank argued that the Bonds did not specify for the event of insolvency under 'paragraph 2' which reads: 'Pursuant to the terms of the Contract, you [the Buyers] are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract or upon a Total Loss of the Vessel, to repayment of the pre-delivery instalments of the Contract Price paid by you prior to such termination or a Total Loss of the Vessel...' (emphasis added). The Bank argued that this narrowed the scope of 'paragraph 3' as 'all such sums' covered only a refund payable 'upon... rejection of the Vessel... termination, cancellation or rescission of the Contract or upon a Total Loss', and did not cover a refund payable arising out of insolvency.

The courts were faced with determining the meaning of 'all such sums'; the question being whether the guarantee applied to the wider reference of 'pre-delivery instalments' in paragraph 3 guaranteeing all the obligations of the Builder throughout the shipbuilding contract, or confined to only those circumstances listed in paragraph 2 of the Bonds.

First Instance and Court of Appeal decisions

At first instance, the court held in favour for the Buyers, ruling that 'all such sums' was linked to all provisions of the contract as opposed to the definition in paragraph 2. It was held that the Bank's construction of the Bond would create a surprising and uncommercial result of the guarantees not being able to meet the Builder's refund obligations.

The Court of Appeal (by majority with Sir Simon Tuckey dissenting) reversed the decision and accepted the Bank's interpretation of the Bonds. It held that unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the courts have no alternative but to give effect to those terms – which was found not to be the case. Patten LJ explained '[as] to do so otherwise would be to risk imposing obligations on one or the other party which they were never willing to assume and in circumstances which amount to no more than guesswork on the part of the Court'.

Supreme Court decision

The Court of Appeal's decision was unanimously rejected by the Supreme Court which reverted to the 'purposive approach' citing previous cases where the courts aimed to ascertain the objective intentions of parties by reading the agreement in context and not

confining to reading the terms in isolation. Lord Clarke acknowledged that the Buyers' construction negated the effect of paragraph 2 in that if the guarantee of the Bonds were to refund the Buyers in all circumstances of the contract, then paragraph 2 would not have been included.

Nonetheless, the court looked at what a reasonable person, with the background knowledge reasonably available at the time, would have understood. Lord Clarke agreed with Sir Simon Tuckey that a refund arising from insolvency was a ground for immediate repayment. It made no commercial sense for the parties to have intended that an event of insolvency would not trigger a refund. Had the parties intended this surprising result, they would have included it in the contract, but they had not.

Practical implications

So does this decision mean that the courts may re-write the wording used by the parties to conform with business common sense?

Thankfully, Lord Clarke reiterated that adopting the 'purposive approach' does not mean that the courts will do this. The court would only do so if the words used were ambiguous and more than one construction was possible, in which case the court was permitted to adopt the interpretation which seems more likely to give effect to the commercial purpose of the parties' agreement.

Despite the Court of Appeal's strict, literal approach providing for more certainty, the Supreme Court confirms the '**purposive approach**' by taking the view of what a reasonable person would have intended in the relevant circumstances. Although it seems that common sense has been restored, the trade-off is that this approach may lead to unpredictability as the judges will inevitably have differences in opinion as to what the true commercial objective of the parties were.

It must be noted that for a court to take this 'purposive approach', the term in question will need to be open to more than one interpretation. The court will not assist a party that is trying to avoid a bad bargain where the term is clear and unambiguous, even if the result is uncommercial. On the facts of this case, the arguments presented appeared evenly balanced, and therefore the construction which made more business common sense prevailed.

Language is a flexible tool and this case once again illustrates the importance for clear and precise drafting. This is particularly the case for construction contracts which are usually voluminous and complicated.

Season Greeting

Warm greetings to all of you as we begin another wonderful year!