

## 專論

### • 工程保留款之爭議問題及其法律性質

劉昱劭 律師

## Focus

### • Legal Issues and Attribute of Construction Retainage

Sean Liu

#### 前言

大型工程契約通常約定在工程進行中即分期給付報酬，每期酬金之支付稱做估驗計價款，末期即尾款，契約雙方通常約定驗收通過後給付。部分合約會另約定各期估驗計價款保留一定比例，待通過驗收才與尾款一併給付，由於各期保留部分與尾款性質相當，皆可稱為工程保留款。此外，契約通常約定業主在給付工程保留款前，得先扣除瑕疵擔保請求減少價金數額及損害賠償數額，僅就餘額支付給廠商，以確保業主受償權利。

由於工程契約往往需時經年，過程中廠商的財務時有變數，以致廠商對於業主的工程保留款債權可能主動或被動地有所變動，由於相關變動多涉及業主及廠商以外之第三人，難免爭議，復因「工程保留款債權」涉及條件、期限等法學基礎概念，法律關係之釐清並不容易，最高法院近十年來有為數不少之判決在處理相關爭議。下文即以兩個常見工程保留款糾紛為例，說明最高法院曾表示的見解，以供借鑑。

#### 問題一：工程保留款之轉讓

在工程進行當中，廠商乙先將請求給付工

#### Introduction

It is usually stipulated under a large-scale project contract that payment should be made by installment in the course of construction, and the payment of each installment is referred to as an assessed payment and the last installment as the final payment. Usually, the parties to such contract agree to payment after test of completion is passed. Certain contracts would separately stipulate a certain percentage of each assessed payment to be retained until the test of completion is passed when such retained payment will be made along with the final payment. Since the nature of each retained installment is comparable to that of the final payment, they can both be referred to as construction retainage. In addition, it is usually stipulated under a project contract that before the construction retainage is paid, the employer may deduct the price reduction claimed as part of the warranty and the amount of damages and pay the balance to the contractor to protect the employer's right of claims.

Since a project contract often lasts several years with potential changes to the financial status of the contractor in the process, the contractor's right of claim over the employer's construction retainage may change voluntarily or involuntarily. Now that disputes associated with relevant changes are difficult to avoid since they often involve third parties other than the employer and contractor and that it is difficult to clarify legal relations since the "right of claim over construction retainage"

程保留款之權利讓與貸款銀行丙，遞經業主甲同意，由廠商乙與分包商丁合意契約承擔，完工後，丙與丁皆向業主甲請求支付工程保留款，業主甲應給付給誰？

上述問題之主要爭點為「債權移轉是否已立即生效？」，蓋若工程保留款請求權移轉已經移轉給銀行丙，嗣後之契約承擔標的即不能包括該權利。

就此，最高法院九十三年度台上字第一九五〇號判決認為：「嘉連公司於八十三年二月二十五日與參加人簽訂切結書讓與系爭工程合約債權時，系爭工程尚未開工，嘉連公司有無能力施作並完成全部工程，於當時仍未可知，則嘉連公司 是否有此尾款債權而得讓與參加人猶屬未定。又嘉連公司承攬系爭工程後，嗣因財務困難無法繼續工程，乃於八十五年四月十九日與上訴人達成協議，約定將承攬契約之權利、義務移轉予上訴人，其後由上訴人繼續施工，系爭工程因而於八十六年十月二十日完工，為原審認定之事實，果係如此，系爭工程款即尾款應屬上訴人完成承攬工作之報酬，依法應由上訴人取得，嘉連公司自始及嗣後始終未取得系爭工程款，參加人自無從因受讓而取得系爭工程款。」

故最高法院係以債權內容之成立已否猶屬未定，債權之移轉應不能謂已立即生效。準此，廠商乙與銀行丙之債權移轉應不生效力，分包商丁於契約承擔後取得請求給付工程保留款之權利，工程完成後，業主

involves fundamental legal concepts such as terms and duration, the Supreme Court has rendered quite a few decisions in the last decade to address relevant disputes. Below I raise two common disputes of construction as example to illustrate the stand of the Supreme Court.

- Issue 1: Assignment of Construction Retainage

In the course of project construction, Contractor B first requested to assign the right of claim over construction retainage to Lending Bank C, and Employer A subsequently agreed to the arrangement that Subcontractor D assume all the rights and obligations of Contractor B under the construction contract. To whom should Employer A pay after the project was completed when both C and D claimed payment of the construction retainage from A?

The major sticking point of the above-mentioned issue is whether the transfer of the right of claims takes effect immediately, since the object of subsequent contract assumption should not include such right if the right of claim over the construction retainage has been transferred to Bank C.

With respect to this issue, the Supreme Court rendered the 93-Tai-Shang-1950 Decision, which contains the following findings: “When Chia Lien Co. entered into a declaration on February 25, 1994 with the participant to assign the right of claim under the project contract at issue, the construction of the project at issue had not begun. Whether Chia Lien Co. was able to handle the construction and complete the entire project was still unknown at that time. Therefore, this calls into question if Chia Lien Co. enjoyed the right of claim over the final payment and could assign the same to the participant. In addition, Chia Lien Co.

甲應將工程保留款給付給丁。

該判決係將工程保留款請求權定性為附條件之債權，其理由為：「……尾款之給付，係以承攬人『工程全部完竣』及『經正式驗收合格』為要件，而工程全部完竣為系爭工程承攬人應履行之義務，於系爭工程合約簽訂時，承攬人是否能如期完成全部工程，屬將來不確定成就與否之事實，系爭工程合約以此種將來不確定成就與否之事實，作為被上訴人給付尾款之約定，應屬民法第九十九條所規定之條件。原審謂系爭工程款項為按各期完成工程價值百分之十計算之保留款累計，屬附清償期之債權，不無可議。」

上述推論，與最高法院九十七年度台上自第一五九一號判決及九十九年度台上字第一二〇八號判決關於將來債權之說明相符，這兩個判決都認為將來債權之讓與係於條件成就或始期屆至時始生效。

例如，九十七年度台上字第一五九一號同意原審法院認定：「按將來債權之讓與，僅係所讓與之債權即讓與標的，附有條件或期限，債權受讓人於原定之條件成就或期限屆至時始得行使權利，故除有民法第二百九十四條第一項所定情形外，將來債權之讓與，尚非法所不許，且於債權讓與契約生效時，發生債權移轉之效力。又將來債權之讓與，以通知將來應為債務人之人為已足，並於該讓與之將來債權，爾後因一定事實之發生而成為現實之債時，即生

subsequently suffered financial difficulties and could not continue the construction after the contract on the project at issue was awarded and thus entered into an agreement with the Appellant on April 19, 1996 to assign the rights and obligations under the project contract to the Appellant, who would continue the construction. As a result, the project at issue was completed on October 20, 1997. This is a fact found by the original trial court. If this is the case, the construction payment (i.e., the final payment) should be regarded as the remuneration to the Appellant for the completion of the contractual work and the Appellant should be legally entitled to such payment. Since Chia Lien Co. has never obtained the construction payment at issue from the beginning and at any later time, the participant could not obtain the construction payment at issue due to the assignment.”

Therefore, the Supreme Court held that since the existence of the right of claim was still uncertain, it cannot be concluded that the assignment of the right of claim took effect immediately. Therefore, Contractor B's assignment of the right of claim to Bank C should not be effective, and Subcontractor D obtained the right to request payment of the construction retainage after the assumption of the contract. Hence, Employer A should pay the construction retainage to D.

The above decision regards the right of claim over the construction retainage as a conditional right of claim on following grounds:

“...The final payment should be paid on condition that the contractor ‘has finished the project completely’ and ‘formal test of completion has been passed.’ Completion of the entire project is an obligation the contractor of the project at issue is required to assume. Whether the contractor could complete the entire project as scheduled is a fact whose future realization was not certain

移轉之效力，無待乎斯時再通知債務人。」惟針對附停止條件或始期之將來債權，九十九年度台上字第一二〇八號判決認應於停止條件成就，債權讓與實際發生效力時，另行通知債務人，始生通知效力，一併說明。

## 問題二：工程保留款之扣押

於工程進行中，廠商乙財務困難，無力繼續施作，廠商乙之債權人丙聲請法院就工程保留款發扣押命令給業主甲，業主甲則找分包商丁繼續完成工程，酬金由業主代廠商乙墊付，驗收後，業主甲可否扣除其代廠商乙墊付部分，僅給付剩餘工程保留款予債權人丙？

此問題之爭點在於扣押命令之效力範圍。如前文說明，工程合約往往約定業主在給付工程保留款前，可以扣除對於廠商之瑕疵擔保主張及損害賠償請求數額。此時業主依約所為之扣除，究竟是「業主以其對廠商的權利與廠商的工程保留款請求權進行抵銷」，抑或「工程保留款僅在遭扣除後數額範圍內生效」？是一個外觀上甚難判定，但法學概念上可以區分、且有區分實益的重要問題。

最高法院九十四年度台上字第一三〇四號判決認為：「按當事人約定承攬報酬按工作完成之程度分期給付，於每期給付時，保留其一部，待工作全部完成驗收合格後始為給付者，係對既已發生之該保留款債權

upon execution of the project contract at issue. If the project contract at issue stipulates the final to the Appellee based on the realization of the fact whose future realization is not certain, this should fall under the conditions stipulated under Article 99 of the Civil Code. It is disputable that the original trial court regarded the construction retainage, which includes the cumulative retainage calculated by ten percent of the value of each completed phase of the project, as a claim with a repayment deadline.”

The above argument is consistent with the explanation about future claims under the 97-Tai-Shang-1591 and 99-Tai-Shang-1208 Decisions of the Supreme Court, both of which held that the assignment of future claims does not take effect until the relevant conditions are satisfied or the commencing period expires.

For example, the 97-Tai-Shang Decision sustained the holding of the original trial court, which states as follows:

“For the assignment of any future claim, since only the claim so assigned, i.e., the object of assignment, entails certain terms or deadlines where the assignee of the claim cannot exercise the right until the originally stipulated terms are satisfied or the deadline expires, the assignment of such future claim is not legally prohibited except for circumstances under Article 294, Paragraph 1 of the Civil Code, and the assignment of the claim shall go into effect when the claim assignment agreement becomes effective. In addition, it is sufficient to notify the future debtor in case of the assignment of any future claim, and the assignment of such future claim will subsequently go into effect definitely because certain facts have materialized and the claim has become an actual claim, and there is no need to wait for such timing before the debtor is notified.”

約定不確定清償期限；倘其併約定工作如有瑕疵或承攬人有其他債務不履行之情形發生，定作人得逕自該保留款中扣除其因此所生之損害，則該保留款債權即屬附有解除條件之債權，於上開約定事由發生，就應扣除部分，因條件成就，其債權即當然歸於消滅，無待定作人另為抵銷之意思表示。且該債權於解除條件成就前縱已經承攬人之債權人扣押，亦不影響解除條件成就之效果，定作人仍得執以對抗執行債權人。」

最高法院在上開判決持第二種見解，亦即，業主因工程有瑕疵或承攬人有其他債務不履行之情形，依約扣除工程保留款數額，係使「工程保留款僅在遭扣除後數額範圍內生效」，設若扣除後工程保留款為零，即不受扣押命令拘束；換言之，由於業主並非以扣押命令生效後所發生之債權對工程保留款請求權主張抵銷，因此不受扣押命令拘束。

然而，最高法院八十九年度台上字第二二九〇號判決認為：「台拓公司承攬被上訴人工程，因積欠小包工程款，經被上訴人代墊支付小包工程款四千二百三十二萬七千七百九十七元，固為原審所認定，惟原審既未查明被上訴人因代墊支付小包工程款所取得之債權，是否均發生於被上訴人收受系爭扣押命令之前，遽謂被上訴人得以之與受扣押之工程保留款相互抵銷，進而認定台拓公司對被上訴人已無該工程保留款債權存在，亦非允洽」

However, it is held in the 99-Tai-Shang-1208 Decision that in case of a future claim with termination conditions or a commencing period, the debtor should be separately informed when the termination conditions have been satisfied and the assignment of the claim has actually gone into effect, and it is only then that the notification has become effective.

- Issue 2: Attachment of Construction Retainage

When Contractor B suffers financial difficulties and is unable to continue the construction in the course of project construction, if Creditor C of Contractor B applies to the court to issue a construction retainage attachment order to Employer A, who in turn approaches Subcontractor D to continue the construction with the remuneration advanced by the employer for Contractor B, can Employer A deduct the portion advanced for Contractor B and only pay the remaining construction retainage to Creditor C?

The sticking point of this issue lies in the effective scope of an attachment order. As stated in the Introduction, a project contract often stipulates that an employer may deduct the warranty claims against the contractor and the amount of damages before paying the construction retainage. At this junction, is it that the employer's deduction pursuant to the contract is "an offset between the Employer's right of claim against Contractor and Contractor's right of claim over the retainage" or that "the construction retainage takes effective only within the amount after the deduction is applied"? This is an important issue which is difficult to determine on its face but can be differentiated in terms of legal concepts with important merits.

The 94-Tai-Shang-1304 Decision of the Supreme Court indicates as follows:

準此，最高法院似區分「業主為廠商代墊款項」及「業主對廠商之瑕疵擔保或損害賠償請求」，僅認同「業主對廠商之瑕疵擔保或損害賠償請求」因影響工程保留款債權之生效數額，故不受扣押命令影響，但「業主為廠商代墊款項」則因發生在後，應受扣押命令效力所及。由於在外觀上兩者差異不大，同樣是業主依據工程合約在廠商違約時自行處理，若找原分包商，業主因代墊取得之債權受扣押命令效力所及，若找其他承商處理併主張支出相關費用屬於損害一部，即不受扣押命令影響，似有違情理。

從業主角度而言，可能的因應之道，或許只有在訂定合約時，儘量一一載明屆時可以扣除項目，例如將代墊費用也清楚續敘明為給付工程保留款前應扣除項目，甚至明確約定工程保留款具體數額是在交互計算後才生效等，以確保業主的權利可以優先於廠商的債權人。

### 工程保留款之法律定性：代結論

從結果而言，最高法院在前揭兩個法律爭議的處理結果可以促進工程竣工，符合經濟社會需要，應值贊同。蓋於問題一情形，設若業主不能將工程保留款給付給接手完成工程的分包商，而必須給付給原廠商之其他債權人，將阻礙業主覓得接替廠商完成工程；而於問題二情形，若業主不能扣除收到扣押命令後新發生之瑕疵擔保、損

“Where the parties have agreed that contractual remuneration shall be paid by installment based on the degree of work completion and shall retain a portion of each installment payment until the passing of the test of completion of the entire work, such agreement stipulates no certain repayment deadline for the right of claim over such retainage. If it is also agreed that in the event of any defective work or of other circumstances in which the contractor fails to perform, the employer may elect to deduct such damage so incurred from the retainage. In this connection, such right of claim over the retainage is a right embedded with termination conditions. When any agreed-upon reason mentioned above occurs, the right of claim over the portion that should be deducted certainly lapses when the conditions are met with no need to wait for the indication of the employer’s intent to apply the deduction. In addition, even though such right of claim has been subject to the attachment by the contractor’s creditor before the termination conditions are satisfied, this does not affect the effect of the termination conditions which have been satisfied and the employer may still prevail over the enforcing creditor on such basis.”

The Supreme Court held the second position in the above-mentioned decision. To wit, a employer may deduct a certain amount of construction retainage as agreed in the event of any project defect or any other nonperformance on the part of the contractor so that “the construction retainage is effective only within the amount obtained after the deduction.” If the construction retainage is null after the agreed-upon deduction, the retainage is not bound by any attachment order. In other words, since the employer does not assert the right of claim created after the effective date of an attachment order against the right of claim over the construction retainage, the employer is not bound by the attachment order.

害賠償暨代墊款項等，亦將嚴重影響業主儘速推動工程完工之意願。

惟自邏輯而言，最高法院的判決卻多有相互矛盾之處。最高法院對於工程保留款債權的性質，有時為附清償期之債權（例如，九十三年度台上字第四二號），有時為附解除條件之債權（例如，94年台上字第1304號判決），有時為附停止條件之債權（例如，93年度台上字第1431號判決），甚至，依據最高法院87年台上字第1205號判例推論（亦即，「查當事人預期不確定事實之發生，以該事實發生時為債務之清償期者，倘債務人以不正當行為阻止該事實之發生，類推適用民法第一百零一條第一項規定，應視為清償期已屆至。」），恐怕答案是以上皆非。

最高法院判決見解不同雖然有之，但同一爭議歧異至此仍屬罕見。無論如何，若要通案地符合上文所述促使工程順利竣工目的，本文認為，最高法院應本於論理解釋，採取工程保留款債權屬於附停止條件債權之立場。

首先，若認工程保留款屬於附清償期之債權，由於清償期之屆至與否，概念上不應影響債權範圍本身，那麼於上文問題二例子，業主恐怕無法主張以扣除對抗生效在前的扣押命令。

其次，若認工程保留款屬於附解除條件之債權，在工程進行中，該債權理論上已經

However, the Supreme Court held in the 89-Tai-Shang-2290 Decision as follows:

“Although the original trial court affirmed that in the project contracted to Tai Tuo Co. by the Appellee, the Appellee advanced the construction payment in the amount of NT\$42,327,797 to subcontractors due to the contractor’s default on construction payment to the subcontractors, nevertheless the original trial court failed to ascertain if the right of claim obtained by the Appellee due to the advanced construction payment to the subcontractors took place before the Appellee received the attachment order at issue and jumped inappropriately to the conclusion that Tai Tuo Co. no longer enjoys the right of claim over the construction retainage against the Appellee on the ground that the Appellee may set off such right of claim against the construction retainage subject to the attachment.”

Hence, the Supreme Court seems to differentiate “a employer’s advanced payment for contractors” from “a employer’s warranty or damage claim against a contractor” and only agrees that “a employer’s warranty or damage claim against the contractor is not affected by an attachment order since such claim affects the effective amount of the construction retainage claim. As for the “employer’s advanced payment for contractors,” this should be subject to the attachment order since it takes place at a later time. Since the two arguments do not differ greatly on the surface and both involve circumstances where a employer will handle such matters on its own upon a contractor’s default in accordance with the project contract, it would be unreasonable that the employer’s right of claim obtained due to advanced payment is subject to the effect of an attachment order when the original contractor is approached while the relevant costs and expenses defrayed claimed as part

生效，只不過將來有失效的風險，那麼只要讓與之廠商向受讓債權之第三人完整揭露風險，債權讓與即可以生效。若於上文問題一例子採此見解，由於業主在完工後必須把工程保留款給予債權受讓人，那麼業主恐怕無論如何找不到願意接手完成工程的承商。

由於只有將工程保留款定性為附停止條件的債權，才能同時達成問題一及問題二之判決結果，促使工程順利竣工，符合經濟社會需要，最高法院宜據此統一見解，以免判決論述的歧異造成下級法院無所適從，甚至做出錯誤的判決結果。

of the damage are not subject to the attachment order if another contractor is retained to handle such matters.

From an employer's perspective, a possible way out is perhaps to meticulously stipulate deductible items when a contract is executed. For example, it is possible to specifically stipulate advances as an item that should be deducted before construction retainage is paid. It is even possible to more specifically stipulate that the specific amount of the construction retainage is not effective until cross calculation is conducted to ensure that the employer's rights precede those of the contractor's creditors.

### **Legal Attribute of Construction Retainage: Provisional Conclusions**

As a matter of outcome, the outcome of the Supreme Court's handling of the two legal disputes mentioned above is admirable since it facilitates project completion and meets social and economic needs. Under circumstances of Issue 1, if the employer cannot pay the construction retainage to the subcontractor who takes over and completes the project and has to pay the other creditors of the original contractor, this would impede the employer from identifying a succeeding contractor to complete the project. Under circumstances of Issue 2, if the employer cannot deduct the new warranty or damages claim and advanced payment which take place after an attachment order is received, this would also seriously undermine an employer's willingness to expedite project completion.

Logically, however, there are several contradictions in the Supreme Court's decisions. The Supreme Court sometimes regards construction retainage claims as claims with repayment deadlines (e.g., the 93-Tai-Shang-42 Decision) in terms of their characteristics and sometimes regards them as claims with termination conditions (e.g.,



the 93-Tai-Shang-1431 Decision). If any inference is made pursuant to the Supreme Court's 87-Tai-shang-1205 Decision (i.e., "it is found that the parties expected that debt repayment would be preconditioned by the occurrence of a fact whose occurrence is uncertain; and if the debtor prevents the occurrence of such fact through unjustified behavior, Article 101, Paragraph 1 of the Civil Code shall apply mutatis mutandis and the repayment deadline shall expire") none of the above positions is perhaps conclusive.

In spite of the different views embedded in the Supreme Court decisions, it is still quite rare to see such discrepant views on the same dispute. Nevertheless, if the objective of ensuing smooth project completion as mentioned above is to be generally fulfilled, the author believes that the Supreme Court should preferably adopt the position that construction retainage claims are claims with termination conditions when issuing interpretation based on theories.

At the outset, if construction retainage is regarded as a claim with a repayment deadline, since whether the repayment deadline expires should not conceptually affect the scope of the claim per se, the employer under circumstances of Issue 2 mentioned above perhaps cannot assert deduction against the attachment order which takes effect earlier.

In addition, if construction retainage is regarded as a claim with termination conditions, the claim has taken effect theoretically in the course of the project construction. However, the risk that the claim may lapse in the future does exist. In that case, as long as the assigning contractor fully discloses the risk to the third party receiving the assignment of the claim, the assignment of the claim can go into effect. If this position is taken under circumstances of Issue 1 where the employer is compelled to pay the construction retainage to the

assignee of the claim after project completion, the employer probably cannot find another contractor willing to take over and complete the project.

Since only the position that construction retainage should be regarded as a claim with termination conditions can achieve the outcome of court decisions regarding Issue 1 and Issue 2 and facilitate smooth project completion and meet social and economic needs, the Supreme Court is advised to hold a unified position on such basis to avoid discrepant arguments in decisions which are difficult for lower courts to follow or even to prevent erroneous decisions.