



Proposed Security of Payment Legislation for the
Construction Industry

Consultation Document



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About this document

This document is published by the Development Bureau (DEVB) of the Hong Kong Special Administrative Region (SAR) Government to consult the public on the proposed introduction of security of payment legislation which will regulate certain aspects of payment practice in the construction industry and also provide for rapid interim dispute resolution through adjudication.

Our proposals and rationale for the legislation appear in Chapters 2 to 6. Please submit your comments to us on or before **31 August 2015** by one of the means set out below and using the response form provided in Appendix B of this document:

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This consultation document and the response form are also available on the website www.devb.gov.hk/sop

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Executive Summary

The Rationale for Security of Payment Legislation (SOPL) in Hong Kong

1. SOPL for the construction industry is to help main contractors, sub-contractors, consultants and suppliers receive payments on time for work done and services provided. It also provides a means to rapidly resolve disputes. There have been many voices in the Hong Kong construction industry advocating the introduction of SOPL to improve payment practices and dispute resolution.
2. The Hong Kong SAR Government (the “Government”) and the Construction Industry Council conducted a comprehensive and industry wide survey on payment practice in the local construction industry in 2011. The survey revealed that significant payment problems were being experienced by main contractors, sub-contractors, consultants and suppliers. Particular problems included the use of ‘pay when paid’ clauses and payments being delayed by disputes. Payment problems were more severe in the private sector. Administrative and contractual arrangements on public works contracts alone cannot help resolve the problems of the wider industry. The Hong Kong SAR Government therefore considers it necessary to adopt a legislative approach to address payment problems.

Scope and Effects of SOPL

3. The SOPL will apply to all contracts under which the Government (and specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of this document) procure construction activities or related services, materials or plant. Relevant construction activities include new build works and repair, maintenance and renovation works amongst others. Sub-contracts of all tiers will also be covered regardless of value.
4. The SOPL will also apply to private sector contracts but only where the employer is procuring construction activities or related services, materials or plant for construction of a “new building”. Also, the employer’s main contract value must exceed a specified amount (tentatively HK\$5,000,000 for construction contracts and HK\$500,000 for professional services and supply only contracts). Where the main contract is subject to SOPL then sub-contracts of all tiers will also be subject to SOPL regardless of value. Where the main contract is not subject to SOPL then sub-contracts will not be subject to SOPL.
5. The SOPL will therefore affect many construction related stakeholders, including the Government, end user procurers, developers, main contractors, sub-contractors, consultants and suppliers. However, private sector businesses and organisations and the general public will only be affected by SOPL if they engage contractors or consultants for works or services for a “new building” with contract values exceeding the specified amounts referred to above.
6. The rationale for the above approach is that most private sector businesses and organisations and the general public are unfamiliar with construction contracts and relevant legislation and generally do not have recourse to professional advice on lower value works. The SOPL should therefore avoid imposing legal and contract administration burdens upon them. Furthermore, limiting private sector coverage to “new buildings” means the SOPL will not apply to private sector repair, maintenance and renovation contracts as these are often procured by the general public on an individual basis or through Owners Corporations or by small businesses.

7. Under the proposed SOPL, parties will still retain a large degree of freedom to agree the payment terms that best suit their needs. However, the following key obligations, rights and limits will be introduced:
- a) 'Pay when paid' clauses will not be effective or enforceable.
 - b) Parties can agree payment periods between applications and payments but not exceeding 60 calendar days (interim payments) or 120 calendar days (final payments).
 - c) A right to dispute resolution by Adjudication – a rapid procedure under which an adjudicator gives an independent decision on the dispute and the amount of any payment due.
 - d) The right to adjudication arises in the event of non-payment and when there are disputes about the value of work, services, materials or plant and/or disputes about extension of time and financial claims under the contract.
 - e) The maximum period allowed for adjudications from appointment of an adjudicator to issue of the adjudicator's decision will be 55 working days¹ unless the parties both agree to a longer period. Straightforward cases should be decided quicker.
 - f) If either party is unhappy with an adjudicator's decision, they still have the right to refer the dispute to court or arbitration (if specified in the contract). Any amount the adjudicator decided as due has to be paid in the meantime.
 - g) Unpaid parties have the right to suspend or reduce the rate of progress of work after either non-payment of an adjudicator's decision or non-payment of amounts admitted as due.

This Consultation

This consultation document sets out the above proposals and their rationales in more detail to seek views from the industry and public to enable Government to develop the optimum SOPL in Hong Kong.

¹ "Working day" for the purpose of this consultation document means a day other than Saturday, Sunday or a general holiday within the meaning of the General Holidays Ordinance (Cap.149).

Chapter 1

Introduction

Background

1. Hong Kong has a large and diverse construction industry undertaking a wide spectrum of work including delivery of some of the World's largest and most complex building and infrastructure projects. A wide variety of local and overseas entities operate in Hong Kong ranging from small and medium sized enterprises to multi-disciplined international contractors and consultants.
2. Sub-contracting is a long-standing practice in the local construction industry providing flexibility in project procurement. According to survey findings², over 90% of main contractors have engaged sub-contractors, about 60% of sub-contractors have engaged sub-sub-contractors and about 68% of consultants have engaged sub-consultants. It is evident that sub-contracting is a prevalent practice in the local construction industry.
3. Some other countries, which had similar industry practices to Hong Kong, recognised the vulnerability of the construction industry (and especially the smaller sub-contractors, consultants and suppliers) to disputes and payment delays and responded through introduction of security of payment type legislation. SOPL in the construction industry is to help contractors, sub-contractors, consultants and suppliers in the supply chain to receive payments on time and in full for work done and services provided.
4. The countries which have already enacted SOPL are the United Kingdom, Australia (in 6 different states and 2 territories), New Zealand, Singapore, Malaysia and Ireland. A list of their enacted SOPL³ appears in Table 1 below.

² See paragraph 5 below.

³ Note that a number of jurisdictions have already reviewed and amended their legislation.

Table 1. List of Relevant Legislation

Jurisdiction	Title
United Kingdom	Housing Grants, Construction and Regeneration Act 1996
New South Wales, Australia	Building and Construction Industry Security of Payment Act 1999
Victoria, Australia	Building and Construction Industry Security of Payment Act 2002
New Zealand	Construction Contracts Act 2002
Western Australia	Construction Contracts Act 2004
Queensland, Australia	Building and Construction Industry Payments Act 2004
Northern Territory, Australia	Construction Contracts (Security of Payments) Act 2004
Singapore	Building and Construction Industry Security of Payment Act 2004
South Australia	Building and Construction Industry Security of Payment Act 2009
Tasmania, Australia	Building and Construction Industry Security of Payment Act 2009
Australian Capital Territory, Australia	Building and Construction Industry (Security of Payment) Act 2009
Malaysia	Construction Industry Payment and Adjudication Act 2012
Ireland	Construction Contracts Act 2013

The rationale for SOPL in Hong Kong

5. In order to ascertain the scale of payment problems in the local construction industry, the Development Bureau (DEVB) of the Hong Kong SAR Government together with the Construction Industry Council (CIC) conducted a comprehensive and industry wide survey in 2011 (DEVB Survey) on payment practices in the local construction industry. The DEVB Survey revealed that the average outstanding payments per annum (Figures 1.1 and 1.2) were:
- HK\$9.4 billion for main contractors (equivalent to 8% of total business receipts)
 - HK\$9.9 billion for sub-contractors (equivalent to 12% of total business receipts)
 - HK\$1.4 billion for consultants (equivalent to 10% of total business receipts)
 - HK\$0.4 billion for suppliers (equivalent to 5% of total business receipts).

Figure 1.1 – Average Outstanding Payments Per Annum

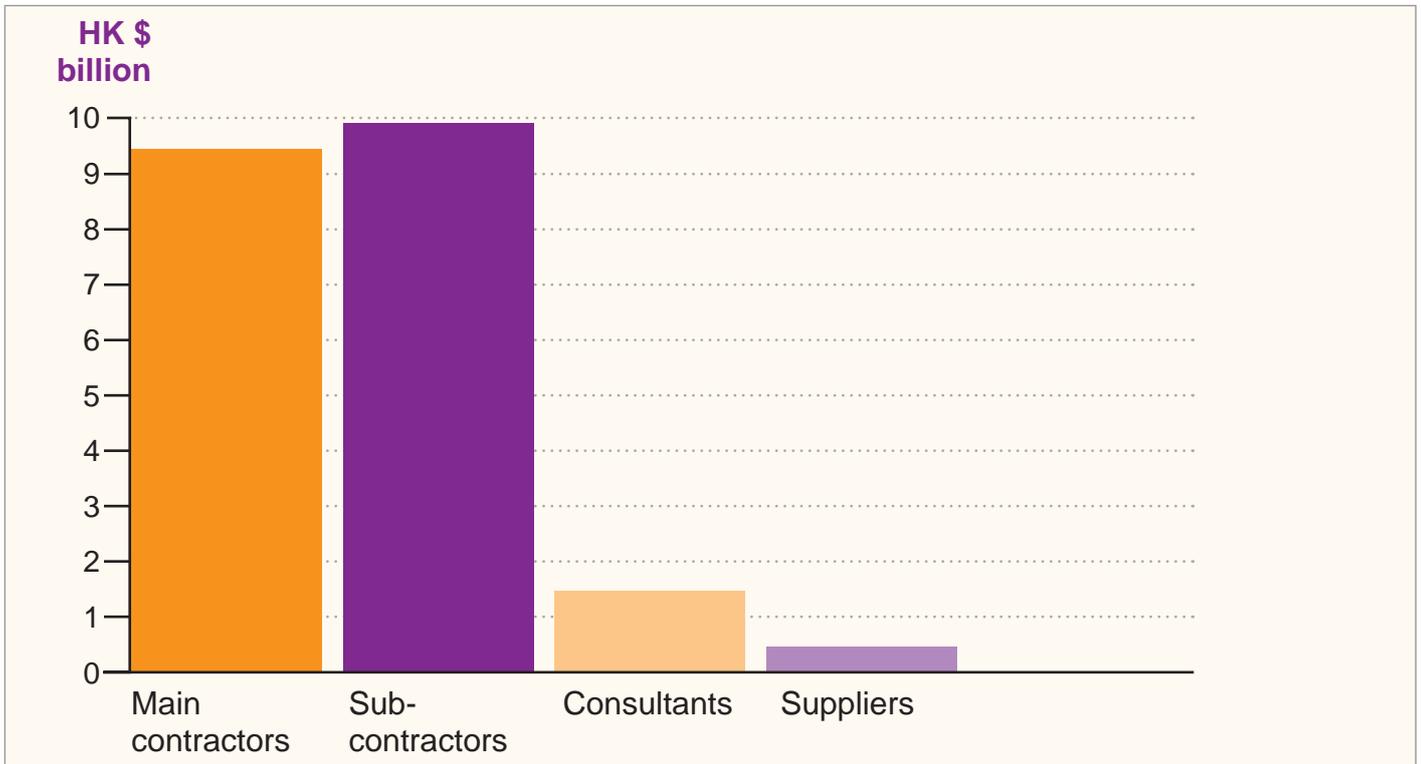
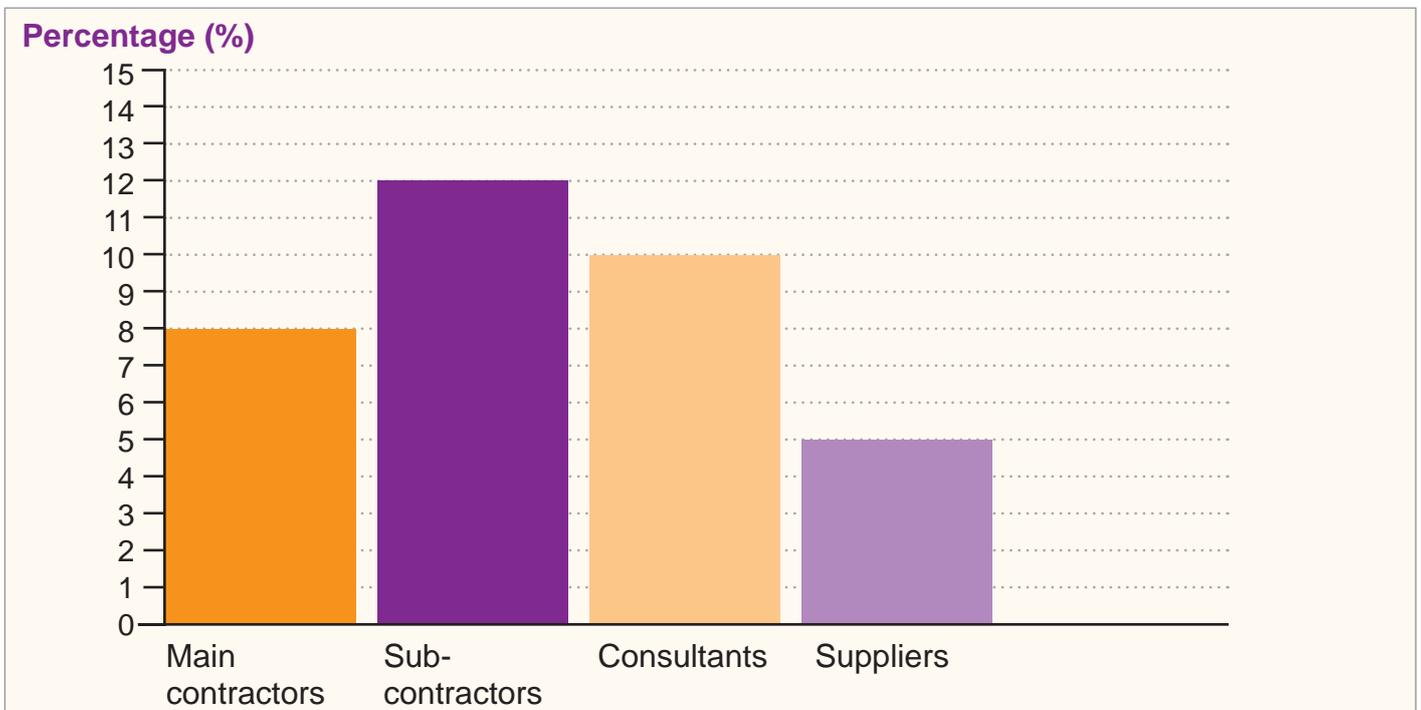
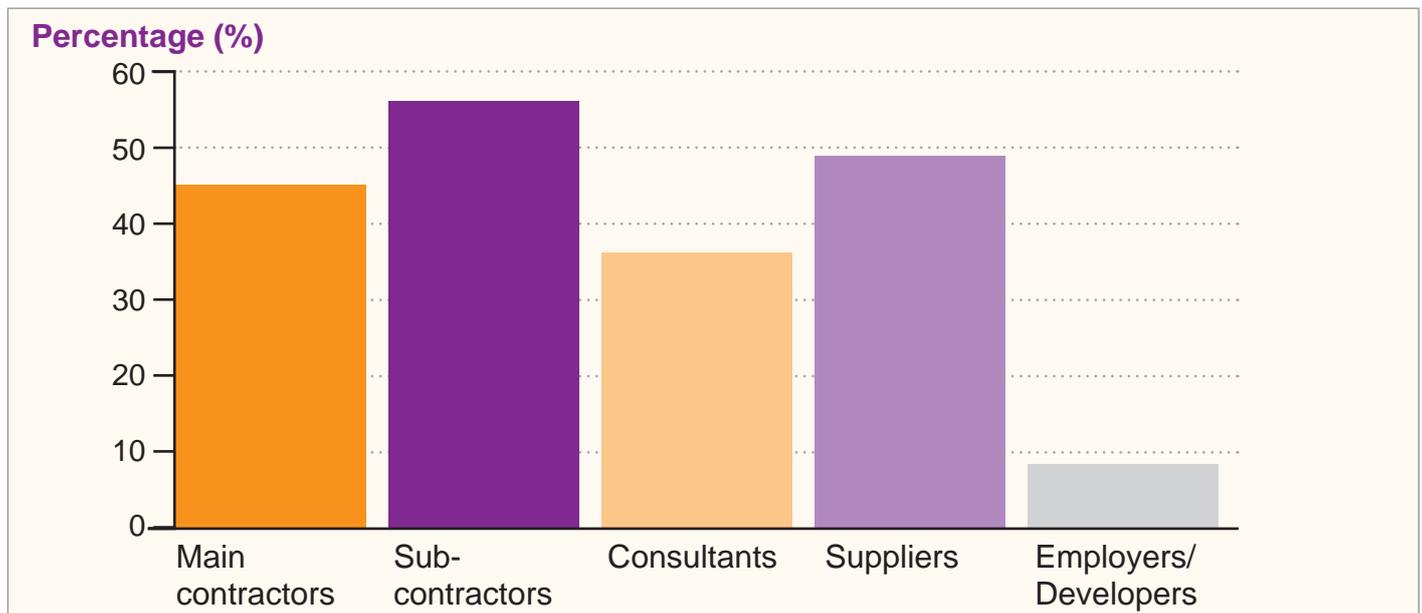


Figure 1.2 – Average Proportion of Business Receipts Outstanding



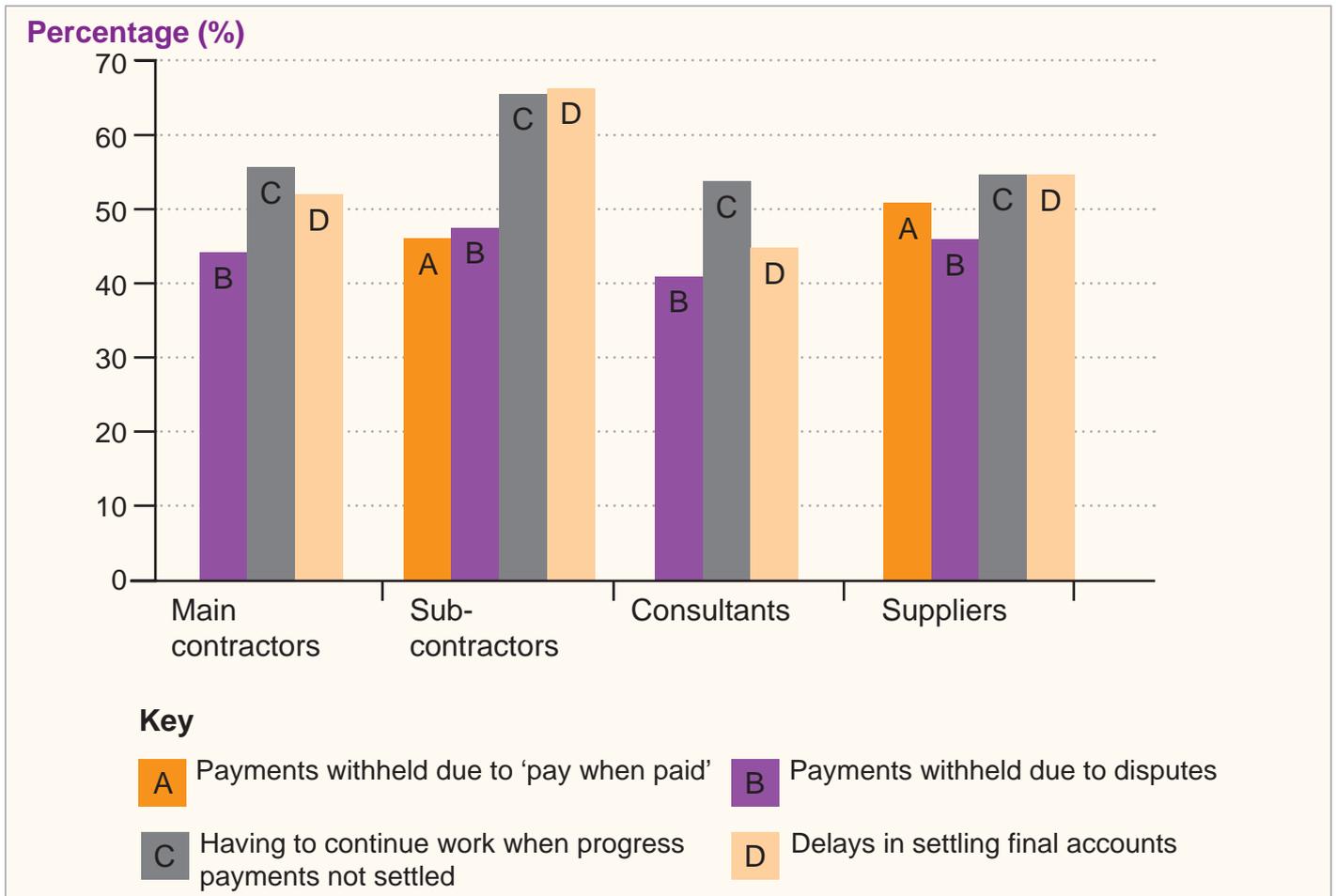
6. The DEVB Survey also gauged the overall perception of the seriousness of payment problems in the local construction industry. The DEVB Survey findings showed that the following percentages of different stakeholder groups considered payment problems in the local industry very serious or serious (Figure 1.3):
- 45% of main contractors
 - 57% of sub-contractors
 - 37% of consultants
 - 49% of suppliers
 - 8% of Developers and Employers.

Figure 1.3 – Proportion of stakeholders considering problems ‘very serious or serious’



7. Disagreements and disputes between the contracting parties were found to be the major reason for payment problems in construction contracts.
8. The DEVB Survey findings revealed that conditional payment terms such as ‘pay when paid’ and disputes in construction contracts were typically the root causes of payment problems. Key findings (Figure 1.4) of the DEVB Survey in relation to private sector contracts included:
- 47% of sub-contractors and 51% of suppliers reported having progress payments withheld due to ‘pay when paid’ clauses
 - 43% of main contractors, 47% of sub-contractors, 41% of consultants and 46% of suppliers reported progress payments being withheld due to disputes
 - 56% of main contractors, 66% of sub-contractors, 53% of consultants and 54% of suppliers reported having to continue work/supply goods even when progress payments were not settled
 - 51% of main contractors, 67% of sub-contractors, 44% of consultants and 54% of suppliers reported delays in settling final accounts.

Figure 1.4 – Proportion of private sector stakeholders reporting key problems



- Separate statistics were obtained for public works contracts which also revealed widespread payment issues although not to the same extent as in the private sector.
- The results of the DEVB Survey showed that there are widespread payment problems in Hong Kong's construction industry. Payment problems are more severe in the private sector. Administrative and contractual arrangements on public works contracts alone cannot help resolve the problems of the wider industry. DEVB therefore consider it necessary to adopt a legislative approach to address payment problems in the construction industry. This was also the view of the CIC which issued a 'Report on Security of Payment Legislation to Improve Payment Practices in the Construction Industry' dated August 2012.

Steps taken to progress Hong Kong's Security of Payment Legislation

- In September 2012, DEVB appointed a consultant to study and advise on the models of SOPL adopted in overseas jurisdictions and on options and issues for the introduction of similar legislation in Hong Kong.

12. DEVB also brought together a Working Group on Security of Payment Legislation for the Construction Industry (Working Group) comprising representatives of key industry bodies in Hong Kong and solicited, among others, their views and comments on the essential elements and framework of the legislative proposal.
13. The Working Group was set up by DEVB in October 2012. Details of the membership of the Working Group are given in Appendix C. The Working Group has discussed the options and issues for the proposed legislation identified by the consultant under the following broad headings:
 - Scope (i.e. scope of application of the legislation)
 - Payment
 - Prohibition of 'Pay when Paid' and Conditional Payment
 - Suspension for Non-Payment
 - Adjudication and Enforcement

Consultation

14. A proposed model for Hong Kong's proposed SOPL is set out in Appendix A and has been developed based on consideration of the broad headings above within the Working Group.
15. In Chapters 2 to 6 specific proposals are made in relation to the various elements of the model with the rationale behind each proposal set out. The Government is keen to receive comments on the proposals and model and will study carefully all responses received. The objective of the Government is to formulate legislation which will best serve the needs of Hong Kong.



Chapter 2

Scope

Introduction

1. This chapter is all about the scope of application of the proposed SOPL. It is important to consider very carefully the scope of application as this identifies which stakeholders within the construction industry gain the protection of SOPL and which stakeholders may face a burden as a result of SOPL.
2. Similar legislations in other jurisdictions define their scope of application from a core definition of construction activities. Whilst there are variances in wording, the definitions typically cover all mainstream permanent and temporary building and civil engineering works including the following:
 - Construction, alteration, repair, restoration, renovation, maintenance, extension, demolition or dismantling, painting or decorating of buildings or structures forming part of the land.
 - Construction, alteration, repair, restoration, renovation, maintenance, extension, demolition or dismantling of any works forming part of the land including walls, roads, power lines, telecommunications apparatus, runways, docks, harbours, railways, waterways, pipelines, reservoirs, wells, sewers, industrial plant, land drainage, coast protection or defence and land reclamation.
 - Installation in buildings or structures of fittings forming part of the land including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security or communications.
 - Operations integral to the above including site clearance, earth moving, excavation, tunnelling and boring, laying foundations, scaffolding, site restoration, landscaping, provision of roadways and access and cleaning.
3. It is proposed that Hong Kong takes a similar approach in having a wide definition of construction activities as a starting point. However, further provisions will seek to clarify which stakeholders and types of contract are covered or excluded from the scope of SOPL to achieve a suitable coverage for the local situation.

Proposal 1:

Hong Kong's SOPL will apply to:

- (1) *all contracts entered into by the Government (and the specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of this document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier; and*
- (2) *private sector contracts* where an employer is procuring construction activities or related services, materials or plant for a "new building" (or "new buildings") as defined in the Buildings Ordinance (Cap 123) and the original contract value is more than HK\$5,000,000 (or HK\$500,000 in the case of professional services and supply only contracts).*

** For the purposes of Proposal 1(2) and this Consultation Document, private sector contracts are those contracts not covered by Proposal 1(1) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A.*

4. When considering which contracts should be covered by (or excluded from) the legislation there are two broad considerations:
 - Providing rights to those who provide work, services, materials or plant who are most in need of protection. As is demonstrated by the DEVB Survey, these are often smaller contractors and sub-contractors working in the lower tiers of contract chains; and
 - Ensuring that less sophisticated and less knowledgeable procurers of work, services, materials or plant are not over burdened with the requirements of the legislation or put at risk of claims and adjudications which they are ill equipped to deal with.
5. In line with the two broad considerations mentioned above, the legislation will apply to all contracts under which the Government and specified statutory and/or public bodies and corporations procure construction activities or related services, materials or plant. The legislation will also apply to sub-contracts of all tiers.
6. For the private sector, SOPL will only apply to contracts relating to the procurement by an employer of construction of a “new building” (or “new buildings”) as defined in the Buildings Ordinance (Cap 123) and subject to the original contract values exceeding the relevant HK\$5,000,000 or HK\$500,000 thresholds. Private sector contracts for or relating to the repair, demolition, alteration, addition, maintenance, restoration, renovation, or painting and decorating of existing buildings or structures fall outside the “new building” definition and so are effectively excluded from the scope of the SOPL.
7. The rationale for the proposed approach is as follows:
 - The general public (whether acting as individuals, through Owners Corporations or small businesses) are usually not familiar with construction contracts and relevant legislation and generally do not have easy recourse to professional advice in relation to contract administration and their legal rights. For example, they may not appreciate the significance of adjudication proceedings being started against them and may not act appropriately or rapidly enough to protect their interests.
 - The general public (whether acting as individuals, through Owners Corporations or small businesses) are most likely to procure new build works and services below the HK\$5,000,000 and HK\$500,000 thresholds or works of alteration, repair, restoration, renovation, maintenance, extension, demolition or dismantling, painting or decorating of existing buildings or structures.
 - It is therefore appropriate to limit private sector coverage to higher value contracts for new buildings such as construction of new apartment blocks, retail premises, offices or industrial facilities. The result is that small businesses and the general public are rarely going to be impacted by SOPL unless they procure substantial new homes or commercial premises for themselves with contract values in excess of the relevant HK\$5,000,000 and HK\$500,000 thresholds. Where small businesses or individuals do procure higher value new build works and services above the relevant thresholds, they are more likely to employ professionals to assist and represent them.

- For the private sector, the concept of “new building” under the Buildings Ordinance (Cap 123) will have a degree of familiarity to consultants and contractors. The ordinance defines “building” as “includes the whole, or any part, of any domestic or public building or building which is constructed or adapted for use for public entertainment, arch, bridge, cavern adapted or constructed to be used for the storage of petroleum products, chimney, cook-house, cowshed, dock, factory, garage, hangar, hoarding, latrine, matshed, office, oil storage installation, out-house, pier, shelter, shop, stable, stairs, wall, warehouse, wharf, workshop or tower, sea-wall, breakwater, jetty, mole, quay, cavern or any underground space adapted or constructed for occupation or use for any purpose including its associated access tunnels and access shafts, pylon or other similar structure supporting an aerial ropeway and such other structures as the Building Authority may by notice in the Gazette declare to be a “building” and “new building” is defined as “means any building hereafter erected and also any existing building of which not less than one half measured by volume is rebuilt or which is altered to such an extent as to necessitate the reconstruction of not less than one half of the superficial area of the main walls”.

Question 1:

Do you agree that Hong Kong’s SOPL should apply to:

- (1) all contracts entered into by the Government (and the specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of this document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier; and
- (2) private sector contracts* where an employer is procuring construction activities or related services, materials or plant for a “new building” (or “new buildings”) as defined in the Buildings Ordinance (Cap 123) and the original contract value is more than HK\$5,000,000 (or HK\$500,000 in the case of professional services and supply only contracts).

* For the purposes of Question 1(2) and this Consultation Document private sector contracts are those contracts not covered by Question 1(1) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A.

Proposal 2:

Where a private sector main contract is not subject to the SOPL then all lower tier sub-contracts will not be subject to the SOPL. Where a private sector main contract is subject to the SOPL then all lower tier sub-contracts will be subject to the SOPL.

8. Proposal 2 reflects the application of Proposal 1 and is to ensure consistent and fair treatment of all parties in a private sector contract chain. If a private sector main contract (e.g. a contract between an end user employer procuring works from a main contractor) is for a “new building” and is over the HK\$5,000,000 threshold, then it will be subject to SOPL and so will all sub-contracts. If the main contract is below the HK\$5,000,000 threshold or does not relate to a “new building” then SOPL will not apply and sub-contracts will not be covered by SOPL either. If the position were otherwise, unfairness could result. It would not be fair for a main contractor to be subject to SOPL and potential adjudications on sub-contracts if they could not themselves adjudicate against their own employer.

Question 2:

Do you agree that where a private sector main contract is not subject to the SOPL then all lower tier sub-contracts will not be subject to the SOPL and that where a private sector main contract is subject to the SOPL, then all lower tier sub-contracts will be subject to the SOPL?

Proposal 3:

Hong Kong's SOPL will only apply to contracts relating to construction activities carried out in Hong Kong and will apply to such contracts even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law.

9. The rationale for this approach is that:

- SOPL is intended to respond to domestic payment and dispute resolution issues especially among lower tier contracting parties so it is logical to limit its application by reference to work carried out inside Hong Kong.
- Seeking to extend the reach of SOPL outside Hong Kong would induce risk in creating conflicts with the laws of other jurisdictions.
- Ensuring equal treatment of all parties working in or supplying to Hong Kong regardless of nationality or the applicable law of the contract.
- Preventing parties deliberately avoiding SOPL by agreeing that the law of their contract will be a foreign law and not the law of Hong Kong or by using foreign companies.
- Without this approach, contractual chains on the same project could have some contracts covered by SOPL but not others purely as a result of the involvement (as is common) of some foreign parties or foreign law being selected for some contracts.
- Other countries with SOPL adopt the same approach.

10. It is important to note that limiting the SOPL to contracts relating to construction activities in Hong Kong does not exclude all contracts involving work or services performed outside of Hong Kong. For example, a contract for design work carried out overseas but delivered to and for the use of a Hong Kong project would be covered. Similarly, so would a contract for supply of components fabricated outside Hong Kong for delivery to a contractor or sub-contractor for incorporation in a Hong Kong project.

Question 3:

Do you agree that Hong Kong's SOPL should only apply to contracts relating to construction activities carried out in Hong Kong and that it should apply even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law?

Proposal 4:

Hong Kong's SOPL will apply to oral and partly oral contracts as well as written contracts.

11. By a significant majority the consensus of the SOP Working Group is that Hong Kong's SOPL should apply to oral and partly oral contracts as well as written contracts. The rationale is as follows:

- Smaller contractors and sub-contractors who most need the protection of SOPL are the parties most likely to be working on the basis of oral or partly oral agreements.

- The requirement for contracts to be in writing can generate complex arguments over whether SOPL applies in situations where the parties do not agree that all terms are in writing. Difficulties may also arise where parties have agreed orally to vary written terms during the course of a contract. In these situations, if a dispute arises, one party might start an adjudication with the other party arguing that SOPL does not apply and that the adjudicator has no jurisdiction to make a decision.
 - Difficult issues and arguments can arise about the existence, content and terms of written contracts. For example, adjudicators often have to decide arguments over what documents are comprised in a written contract and how those documents are interpreted including considering any apparent discrepancies and ambiguities. This may involve considering contested witness evidence and a great deal of written material. Oral and partly oral contracts are of necessity generally shorter and simpler than written forms. It is not necessarily adding to the burden of adjudicators to expect them to decide disputes arising on oral or partly oral contracts.
 - The first SOPL enacted by the UK only applied to contracts which were in writing or evidenced in writing. It was considered that the nature and timescale of the adjudication process was unsuitable for determining any arguments which might arise about the existence or terms of an oral contract as such arguments would in most cases require witnesses to be heard and examined by the adjudicator. In the UK, following a consultation and review, the UK Government amended its SOPL so that oral, written and partly oral/partly written contracts are now covered⁴. The SOPL of New South Wales, Western Australia and New Zealand also cover oral and partly oral contracts.
12. Some members of the Working Group consider that Hong Kong's SOPL should only apply to written contracts or contracts evidenced in writing. The rationale is:
- If an adjudicator wrongly concluded that an oral contract existed when in fact no contract existed they would make a decision where (in the absence of a contract) SOPL would not apply at all and the decision would be made without jurisdiction and be unenforceable.
 - Both Singapore and Malaysia have taken a similar approach with their SOPL with requirements for contracts to be in writing or evidenced in writing⁵.

Question 4:

Should Hong Kong's SOPL apply to:

(A) oral and partly oral contracts as well as written contracts? OR

(B) only contracts in writing or evidenced in writing?

⁴ "There was overwhelming support for this proposal – 90% of respondents. It was felt that widening the scope of the Construction Act to include oral as well as written agreements was a vital step in improving the effectiveness of adjudication." Department for Business Enterprise and Regulatory Reform, Analysis of the 2nd Consultation on proposals to amend Part 2 of the Housing Grants, Construction and Regeneration Act 1996, Chapter 1, page 10.

⁵ In Singapore the relevant provision is section 4(1) of the Building and Construction Security of Payment Act 2004. Note that this legislation will treat a contract as being in writing even if it is not wholly in writing provided that "...the matter in dispute between the parties thereto is in writing" (Section 4(4)). In Malaysia, the relevant provision is in Section 2 of the Construction Industry Payment and Adjudication Act 2012.

Proposal 5:

Professional services contracts for the provision of services directly related to planned or actual construction activities in Hong Kong will be covered by the SOPL.

13. In the context of SOPL professional services primarily refers to design, surveying, project management, cost control and contract administration services. The scope of application is broad and will depend on the nature of the services provided rather than the qualifications of those providing the services. The main limitation will be that the services must relate directly to planned or ongoing construction activities in Hong Kong.
14. The intention is that services provided in relation to the conception and feasibility of a project or contract will be covered (even if it does not go ahead) right through to services provided to support completion and closing out.
15. Services such as accounting, financial (i.e. other than cost control and quantity surveying type services), legal and public relations will not be covered as they are very different in nature and there is no evidence that significant payment problems are encountered by providers of such services.
16. The rationale for covering professional services contracts is as follows:
 - The DEVB Survey showed that the average amount of outstanding payment for professional services consultants during 2009 and 2010 was 10% of business receipts. This indicates that professional services consultants do suffer from late payments.
 - Many professional services consultancies are small partnerships or sole traders for whom cash flow is crucial.
 - Professional services consultancies are an integral part of the construction industry and are generally responsible for the project and financial administration of the largest projects. They should be subject to the same SOPL regime as the construction contracts which they will be administering.
 - With the exception of New Zealand, other jurisdictions with SOPL include professional services contracts within the scope of their legislation. However, New Zealand is currently progressing amending legislation to include professional services contracts following a public consultation on the operation of its SOPL.

Question 5A:

Do you agree that professional services contracts which relate directly to planned or actual construction activities in Hong Kong should be covered by the SOPL?

Question 5B:

Are there any specific types of professional services contract which you feel should definitely be covered by Hong Kong's SOPL?

Question 5C:

Are there any specific types of professional services contract which you feel should definitely be excluded from Hong Kong's SOPL?

Proposal 6:

Contracts for the supply of materials or plant (even if they do not include for any installation or operation on site) will be covered by Hong Kong's SOPL.

17. Suppliers of materials and plant are key elements of the construction supply chain. It might be thought that suppliers are in a different position to contractors and sub-contractors because they are more likely to be able to negotiate or impose their own terms, to stop work, to repossess supplies and to sell or hire stock elsewhere if necessary and are less likely to have resources specifically assembled and committed to particular projects. However, the DEVB Survey showed that suppliers are also significantly affected by payment delays and payment disputes (see Chapter 1 paragraph 5). This of itself provides a rationale for covering supply contracts but other reasons include:

- Large and high value supply contracts involving considerable financial and resource commitment by suppliers are not uncommon in Hong Kong. Examples include specifically designed and pre-fabricated concrete segments for bridge and viaduct works and the large launching gantries which have to be constructed to place and support the segments during construction. Suppliers of such items will often have to commit significant design and manufacturing resources as well as finance the initial stages of their works.
- If supply contracts are not included then procurers (whether employers of contractors or contractors employing sub-contractors) could seek to avoid the operation of the SOPL in part by requiring contractors and sub-contractors to enter into separate contracts for supply of materials and supply of work or labour.
- Most other jurisdictions with SOPL cover supply contracts.

Question 6:

Do you agree that contracts for the supply of materials or plant (even if they do not include for any installation or operation on site) should be covered by Hong Kong's SOPL?

Proposal 7:

Employment, insurance, guarantee, loan and investment contracts will be excluded from the scope of Hong Kong's SOPL.

18. This proposal is intended to make clear, for the avoidance of doubt, that certain types of contract do not fall within the scope of SOPL. Most other jurisdictions adopt some or all of these exclusions.
19. SOPL is not intended to affect employer/employee relationships for individuals which are regulated by separate legislation and so all other jurisdictions make clear employment contracts are excluded. The rationale for the remaining proposed exclusions is that they relate to contracts which may be connected with construction activities but are not conventional procurer/provider contracts where one party is undertaking work for the other and being paid primarily by reference to the value of the work carried out.

20. Investment contracts in this context means contracts such as development agreements where a developer agrees to procure a building to be sold or leased to a purchaser or end user. Whilst the developer will almost certainly be obliged to procure the building to a stated specification they are not acting as nor expecting to be paid as a main contractor. Their payment (and profit) will instead be linked to the market value of the completed building. Insofar as the developer employs a main contractor to build the building in question, the building contract and all other lower tier contracts would be covered.
21. A further example of an investment contract is a quarrying contract, in which the contractor pays a sum to the site owner to have the rights to process and sell rock excavated within the quarry site. The contractor can be considered as an investor and the investment contract should be excluded.
22. Another example of an investment contract is a Build-Operate-Transfer (BOT) tunnel contract which does not involve physical payment by the client to the contractor (investor). However, other forms of BOT contracts, such as landfill contracts which involve a client paying for the construction and operation work, will not be excluded from the scope of SOPL. As with investment contracts, lower tier contracts with main contractors and sub-contractors would be covered.

Question 7:

Do you agree that contracts of employment, insurance, guarantee and loan should be excluded from the scope of the SOPL as should investment contracts and other contracts where payment is made by reference to something other than the value of the works carried out?

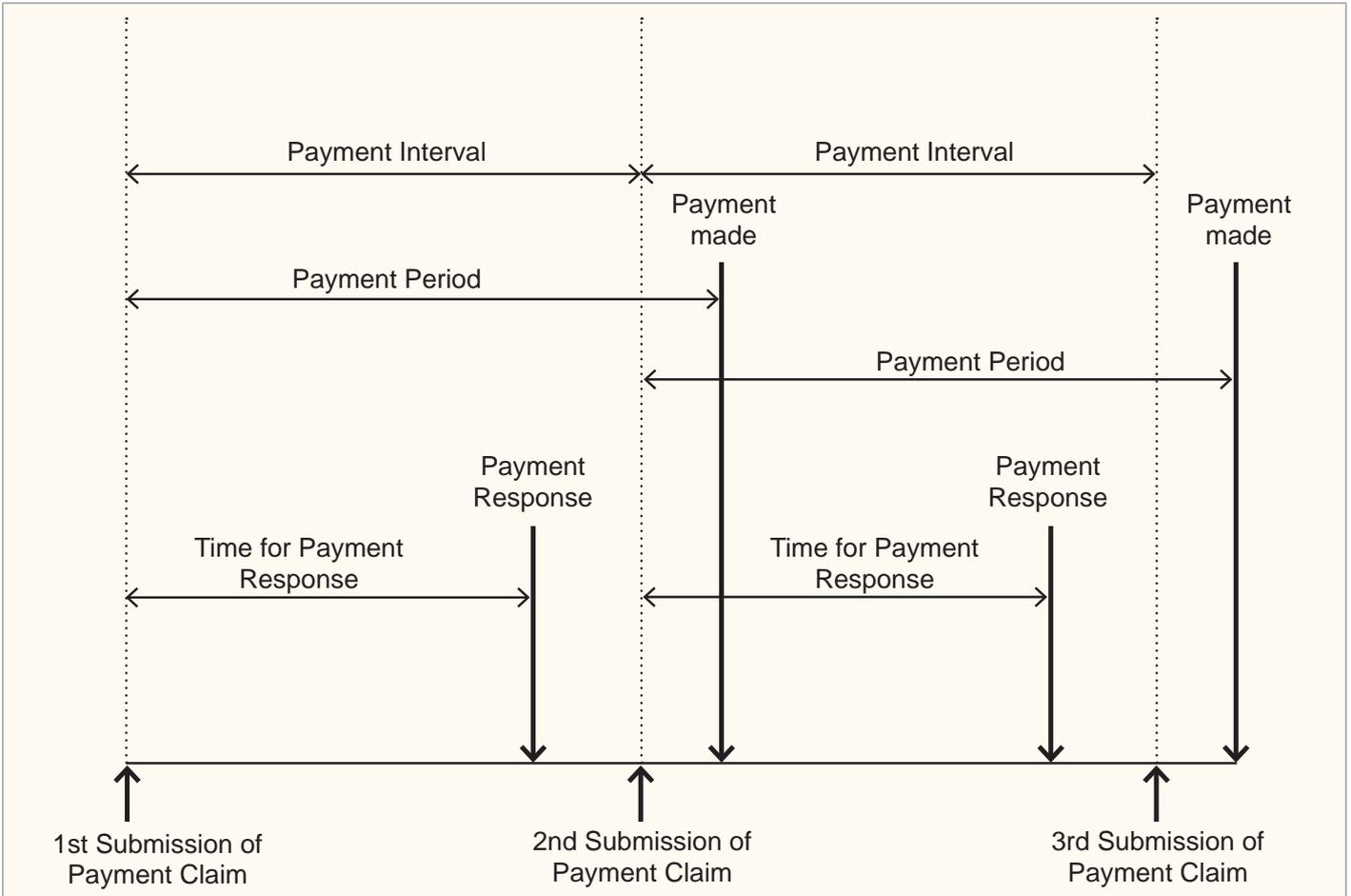
Chapter 3

Payment

Introduction

1. This chapter contains proposals for how SOPL will affect the rights of parties to reach agreements as to the timing and valuation of payments.
2. It also contains proposals to provide parties who are entitled to claim a payment under a contract with a right to claim the payment by means of a statutory 'Payment Claim' if they wish. There is an important link with the right to adjudication as it is proposed that the right to adjudicate financial claims will only arise when a Payment Claim has been made and been ignored or disputed (see Chapter 6).
3. To aid understanding, some specific terms are used below as follows:
 - **'Progress Payment'** – this refers to payments made to a party who has undertaken work or provided related services, materials or plant under a contract covered by Hong Kong's proposed SOPL. All amounts due will have to be paid under one or more Progress Payments.
 - **'Payment Interval'** – this refers to the period between the dates on which a party is entitled to claim payments under a contract covered by SOPL. For example, a contract might provide that payments can be claimed at the end of each calendar month in which case the Payment Interval would be monthly. Note that Payment Intervals may not always be set by reference to fixed periods of time. For example, entitlements to claim payments could be based on achievement of milestones.
 - **'Payment Period'** – this refers to the period between a claim for payment being made and the date when the amount due has to be paid. For example, if a contract provides that a party is entitled to claim a payment at the end of each month and receive payment within 42 calendar days of the date of the paying party receiving the claim then the Payment Period is 42 calendar days.
 - **'Payment Claim'** – this refers to a statutory claim for payment made under the proposed SOPL. Making a Payment Claim will require certain minimum criteria to be met in terms of the content of the Payment Claim. For example, details of the amount claimed, the relevant work carried out and the basis of calculation must be provided. A claiming party is not entitled to claim more than they would be entitled to under their contract in a Payment Claim. Also, they cannot claim amounts any sooner than provided for by the contract and any conditions precedent to payment and requirements in the contract as to provision of particulars and similar will still apply. Employing parties can also make Payment Claims in respect of amounts they are entitled to under their contracts such as liquidated damages for delay.
 - **'Payment Response'** – this is a response served by a paying party in response to a Payment Claim. In the Payment Response, the paying party identifies the amount of the Payment Claim accepted as due (if any), the amounts disputed (and the reasons why) and any amounts intended to be set off against amounts due (and the basis of set off).

Figure 3.1 – Relationship of the specific terms on payment



Proposal 8:

Parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong’s SOPL will be entitled to Progress Payments but the parties to the contract will be free to agree the number of Progress Payments, when they can be claimed and the basis for calculating amounts due.

4. This proposal means that parties will be free to agree Payment Intervals or that payment is only after completion. Parties will also be free to agree how work is to be valued and paid for so there is no limitation on using rates, fixed prices, target cost, cost reimbursement and other payment/risk models. The rationale for this approach is as follows:
 - It limits the interference of SOPL in freedom of contract.
 - It maintains flexibility of approach for the procurement of construction and related contracts.
 - SOPL in other jurisdictions allows parties a wide degree of freedom to agree when entitlements to payment arise and the basis on which payments are calculated⁶.

⁶ With the exception of Ireland which sets maximum Payment Intervals for sub-contracts.

Question 8:

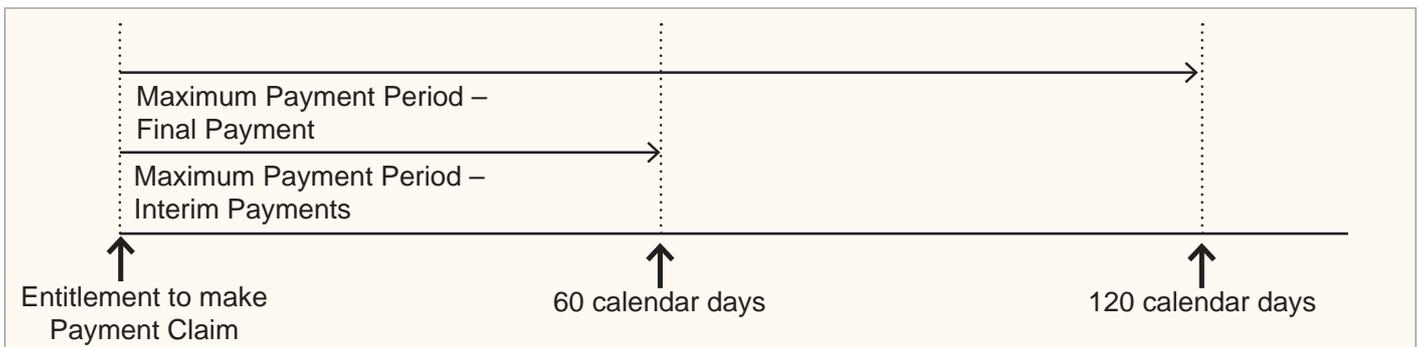
Do you agree that parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong’s SOPL should be entitled to Progress Payments but the parties to the contract should be free to agree the number of Progress Payments, when they can be claimed and the basis for calculating amounts due?

Proposal 9:

The maximum Payment Period which can be agreed for payments shall be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments.

5. While it is proposed that parties should be free to agree when payments can be claimed and how they will be valued, paying parties should be prevented from imposing unreasonably long Payment Periods. Once a claim for payment can be validly made (for example at the end of a monthly Payment Interval), the party making the claim cannot be forced to wait longer than 60 calendar days for their money on an interim basis or 120 calendar days on a final basis.
6. If a paying party included a Payment Period longer than 60 or 120 calendar days in their contract then any adjudicator, court or arbitrator deciding a dispute under the contract would disregard the longer period and treat the contract as providing the 60 or 120 calendar day period as appropriate.
7. The rationale for the approach in Hong Kong is as follows:
 - It imposes a minimum standard for payment practices in Hong Kong and the maximum periods allowed are far longer than Payment Periods typically provided for in current Hong Kong contracts.
 - It prevents paying parties from unreasonably extending Payment Periods to reduce the impact of other aspects of SOPL (such as rendering ‘pay when paid’ provisions ineffective and allowing rapid resolution of disputes through adjudication).
 - Above all, it aims to support and encourage efficient cash flow down the contractual chain which is one of the key objectives of SOPL.
 - A similar approach is taken in some other jurisdictions with SOPL, notably New South Wales, Western Australia, Singapore and Ireland (for sub-contractors only).

Figure 3.2 – The proposed Maximum Payment Periods



Question 9:

Do you agree that the maximum Payment Period which can be agreed for payments should be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments?

Proposal 10:

Parties who are entitled to Progress Payments under the terms of a contract covered by Hong Kong's SOPL will be entitled (but not obliged) to claim the Progress Payments by way of statutory Payment Claims. Paying parties will be entitled to serve Payment Responses no later than 30 calendar days after receipt of Payment Claims. Parties who are entitled to payments under statutory Payment Claims which are disputed or ignored will be entitled to pursue adjudication.

8. Parties who undertake work or provide services, materials or plant will have two options for claiming their payments. Firstly, claims can be made purely on a contractual basis under the terms of their contracts. Secondly, in addition or alternatively, payments can be claimed by way of Payment Claims under the SOPL. As set out in Proposal 8, parties will be free to agree when payments can be claimed and therefore when Payment Claims can be raised.
9. It is likely that many parties will choose to draft their contracts so that regular applications for payment are made as Payment Claims as a matter of routine with provision for Payment Responses to tie in with the familiar cycles of certification or assessment found under many forms of contract.
10. When the claiming party pursues a Payment Claim and the paying party ignores it or serves a Payment Response disputing some or all of the Payment Claim then the claiming party can take their claim (or the disputed part of it) to adjudication.
11. The 30 calendar day period proposed for service of the payer's Payment Response is the maximum period that parties can agree. It should be remembered that this will sit with the 60 calendar day (interim) and 120 calendar day (final) maximum payment periods. The longest periods which a payer can therefore try to impose are 30 calendar days for the Payment Response and 60 calendar days for payment (interim) or 120 calendar days (final) – in each case running from receipt of a valid Payment Claim.
12. It is likely that most parties will agree shorter periods for Payment Responses and payment than the proposed maximums reflecting current practices.
13. The rationale for the proposed approach is as follows:
 - It provides a distinct and relatively straightforward procedure which claiming parties can use to claim payment and invoke their rights to adjudication. Contracts cannot be drafted providing only for certificates or assessments from the payer. The claiming party will always be entitled to set out their calculation of what is due in a Payment Claim.
 - Upon receiving a Payment Claim, it should be apparent to paying parties that statutory rights are being invoked and that they need to take prompt and appropriate action. This should encourage good and timely practice in addressing payments. A paying party which fails to serve a Payment Response on time will be at risk (see Proposal 12 below) providing a further incentive to action.
 - Service of Payment Responses should ensure that amounts admitted and in dispute (and the reasons for dispute) are identified as are any amounts intended to be set off (and the grounds for set off). This should assist the parties in identifying any issues delaying payment. It should also assist the claiming party to decide whether there is a possibility of achieving a commercial resolution or whether it will be necessary to adjudicate.

- Employing parties will also be entitled to pursue Payment Claims and adjudication in respect of amounts they are entitled to under their contracts. This is considered to strike a fairer balance than only allowing that right to those who undertake construction or provide services, materials or plant.
- New South Wales and a number of other Australian states have SOPL which allows service of statutory Payment Claims. Singapore also takes this approach. However, Hong Kong's proposed SOPL will be wider than that of Singapore or New South Wales as employing parties cannot pursue Payment Claims or adjudication in those jurisdictions.

Question 10A:

Do you agree that parties who are entitled to payments under the terms of a contract covered by Hong Kong's SOPL should be entitled (but not obliged) to claim their payments by way of statutory Payment Claims?

Question 10B:

Do you agree that paying parties should be entitled to serve Payment Responses no later than 30 calendar days after receipt of Payment Claims?

Proposal 11:

Default Provisions: When parties do not make express agreements about when payments can be claimed and/or how they will be calculated and/or when and how the paying party can respond to them and/or when payment will be made the following will be implied as necessary by Hong Kong's SOPL:

- Parties undertaking work or providing services, materials or plant will be entitled to make Payment Claims at calendar month Payment Intervals.*
 - The payment due will be calculated based on the value of work, services, materials or plant provided and valuation will be based on any relevant contract price or pricing or in the absence of the same on market rates prevailing at the time the contract was entered into.*
 - Paying parties will be entitled to serve a Payment Response within 30 calendar days of receiving a Payment Claim.*
 - The Payment Period will be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payment) after receipt of a Payment Claim.*
14. The rationale for the above proposals is that they bring certainty in situations where parties have failed to make any relevant agreements themselves either in writing or orally. It is typically smaller contractors and sub-contractors which are at risk of working under agreements which do not address the detail of how and when payments are to be claimed, valued and paid. The proposed default payment interval and basis of valuation reflects common commercial practice. The proposed default period for service of Payment Responses and the making of payment reflect the maximum periods which parties can agree.

Question 11A:

Do you agree that in the absence of express agreement, parties undertaking work or providing services, materials or plant should be entitled to make Payment Claims at calendar month Payment Intervals?

Question 11B:

Do you agree that in the absence of express agreement, payments due should be calculated based on the value of work, services, materials or plant provided and with valuations based on any relevant contract price or pricing or in the absence of the same on market rates prevailing at the time the contract was entered into?

Question 11C:

Do you agree that in the absence of express agreement, paying parties should be entitled to serve a Payment Response within 30 calendar days of receiving a Payment Claim?

Question 11D:

Do you agree that in the absence of express agreement, the Payment Period for any amount due should be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payments) after receipt of a Payment Claim?

Proposal 12:

Paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of a Payment Claim will not be automatically liable to pay the full amount of the Payment Claim but they will not be able to raise any set off against amounts properly due against the Payment Claim.

15. When a paying party receives a Payment Claim, there are two main reasons why they may not want to pay the claimed amount or a part of the claimed amount. Firstly, they may not consider they are liable for some or all of the claim. For example, the payer might believe that claimed quantities are wrong or that incorrect rates have been used. Another example would be a situation where a payer considers no liability arises to pay an amount due on a milestone because in their view the milestone has not been achieved. Secondly, a payer might have claims they wish to set off against the Payment Claim. Examples would include entitlements to liquidated damages for delay but could also include common law claims for the cost of correcting defects or for delay and disruption caused to the payer or the payer's other contractors or sub-contractors.
16. The proposal is that where a payer fails to serve a Payment Response on time they will not automatically become liable to pay the full amount of the Payment Claim. Instead, assuming the claiming party pursues adjudication, it will remain open to the payer to raise liability and quantum defences in the adjudication. However, a payer will not be able to raise any set off against the Payment Claim in question and an adjudicator could not take any set off into account if the claiming party took their Payment Claim to adjudication. The paying party would not lose its rights as it could set off against a later Payment Claim (subject to serving a Payment Response on time) and it could also pursue its claim separately against the claiming party.

17. The rationale for this proposal is as follows:

- If a failure to serve a Payment Response on time led automatically to the full amount of the Payment Claim becoming due, it could lead to harsh results for paying parties including having to pay out against incorrectly calculated or inflated claims purely as a result of missing an administrative deadline. Smaller and less sophisticated employers and contractors would be especially vulnerable to this. Statistics from New South Wales, which has SOPL which does make Payment Claims due in full if not responded to, show that in a very large proportion of adjudications no Payment Response was served by the paying party.
- When claims are taken to adjudication, it will always be open to adjudicators to consider arguments as to the entitlement of the claiming party to the amounts claimed. This should reduce the risk of paying parties having to pay out sums to which there is no entitlement at all.
- The loss of rights to set off prevents paying parties from raising last minute set offs in defence of adjudication which might be completely unknown to the claiming party. The loss of the right should not, in most cases, seriously prejudice the paying party as they will often have future payments to make against which rights of set off can be exercised.
- The loss of the right to set off is also a feature of existing SOPL in the United Kingdom, Australia, Singapore and Ireland (although some of these jurisdictions go further and make the full amount of Payment Claims or their equivalents due in full absent timely response).

Question 12A:

Do you agree that paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of Payment Claims should not be automatically liable to pay the full amount of the Payment Claim?

Question 12B:

Do you agree that paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of a Payment Claim should not be able to raise any set off against amounts properly due against the Payment Claim?

Chapter 4

Prohibition of 'Pay when Paid' and Conditional Payment

Introduction

1. All existing SOPL render 'pay when paid' clauses ineffective. In other words, payers under contracts covered by SOPL cannot deny payment to a party which has undertaken work or provided services, materials or plant on the basis that the payer has not themselves received payment under their own contract.
2. 'Pay when paid' has long been regarded as an unfair block to cash flow which has the potential to harm smaller sub-contractors and traders who are generally the parties least able to fund and withstand significant delays in payment.
3. Currently in Hong Kong the courts will uphold and enforce 'pay when paid' clauses provided they are sufficiently clearly drafted. In the absence of legislation, the courts have little other option. The DEVB Survey confirms that, especially on private sector works projects, sub-contractors, consultants and suppliers all suffer from the withholding of payment due to 'pay when paid'⁷.

Proposal 13:

'Pay when paid' clauses will be rendered ineffective under Hong Kong's SOPL even where the reason for non-payment is insolvency higher in the supply chain.

4. The rationale for rendering 'pay when paid' clauses ineffective has already been set out in the introduction to Chapter 4 above.
5. 'Pay when paid' clauses should be ineffective even in the special circumstance where the reason for non-payment is insolvency higher in the supply chain. The rationale is that whilst no outcome in an insolvency will be ideal, parties in the upper tiers of supply chains are generally in a better position to take precautions against and withstand a paying party becoming insolvent.
6. The United Kingdom and Ireland have such an exception and the rationale is that in insolvency there should be no special treatment of particular parties or industries. For example, it might be considered unfair if a construction sub-contractor could force payment from a main contractor whose employer had become insolvent but sub-contractors under non construction related supply chains leading from the same employer could not avoid 'pay when paid' clauses. However, other jurisdictions with SOPL have no such an exception.

Question 13A:

Do you agree that 'pay when paid' clauses should be rendered ineffective?

Question 13B:

Do you agree that 'pay when paid' clauses should be ineffective even where the reason for non-payment is insolvency higher in the supply chain?

⁷ See Chapter 1 paragraph 8.

Proposal 14:

Clauses which have the same effect as 'pay when paid' will be rendered ineffective under Hong Kong's SOPL including in nominated sub-contracts.

7. This proposal concerns contractual provisions which are not based on receipt of payment by the paying party but on performance of obligations under a different contract. An example of this is the use of what are often called 'pay when certified' clauses. These sorts of clauses are typically used by contractors and provide that they are only obliged to make a payment to a sub-contractor when a certificate is issued under the main contract including amounts in respect of the sub-contract works. In some cases, this can be taken further so that only amounts specifically identified in the certificate as relating to the sub-contract works have to be paid.
8. The rationale for this proposal is as follows:
 - The types of clause in question can work in much the same way as 'pay when paid'. If these clauses are not rendered ineffective then those in the industry who use conventional 'pay when paid' may simply switch to 'pay when certified' or devise other contractual schemes to avoid the prohibition of 'pay when paid' provisions.
 - Sub-contractors may not even be aware what has or has not been certified to the main contractor and it may not always be clear what parts of amounts certified are actually referable to the sub-contract works. This can make the effect and operation of these clauses unfair and uncertain. SOPL in a number of other jurisdictions render ineffective these types of provisions including in the UK, New South Wales and Singapore.
9. Under nominated sub-contracting arrangements, the sub-contractors' applications are considered and certified by the employer's certifier and not by the main contractor. Although this is a relatively common arrangement in Hong Kong, it is considered that nominated sub-contracts should not be excluded from the proposed prohibition on 'pay when certified' type clauses in view of the following:
 - The contractor can independently value and pay for works undertaken by nominated sub-contractors.
 - It would be possible to set different timings of Payment Claims and Payment Responses in the main contract and nominated sub-contract so that main contractors can receive and take account of the employer's view of the nominated sub-contractor's entitlement before making their own valuation.

Question 14A:

Do you agree that clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be rendered ineffective?

Question 14B:

Do you agree that no exception should be made for nominated sub-contractors?

Chapter 5

Suspension for Non-Payment

Introduction

1. SOPL in other jurisdictions provides parties undertaking work or providing services, materials or plant with rights to suspend performance for non-payment. The right to suspend continues unless and until they are paid.
2. Without such a right, unpaid parties can be contractually obliged to continue performing and funding their work increasing the financial pressure and risks they face. It may be open to them to exercise termination provisions in their contracts (if any) or to treat the non-payment as a breach of contract which is serious enough to amount to repudiation at common law.
3. However, there are difficulties with exercising rights of termination under a contract or asserting that a contract has been repudiated for non-payment:
 - Termination and repudiation effectively brings the contract to an end but the unpaid party may prefer to continue with the balance of work as long as cash flow is restored and maintained.
 - The effects of termination or repudiation can be severe for a project. The withdrawal of any party responsible for a critical part of the works can delay all other parties on a project as well as delay the delivery of the project for an employer.
 - Ascertaining whether non-payment means a party is entitled to terminate or treat a contract as repudiated at common law can give rise to difficult legal and factual arguments. Often the 'non-payment' will result from a dispute over entitlement to payment, the merits and outcome of which may not be clear. A party which purports to terminate or stops work alleging repudiation may, if its view of its rights is found by a court or arbitrator to be incorrect, end up becoming the contract breaker and repudiator. In other words, except in very clear cases a party which decides to terminate or stop work on the basis of repudiation takes a significant legal risk.
 - It is rare for contracts to provide rights to suspend for non-payment and there is no equivalent common law doctrine providing such a right.

Proposal 15:

Hong Kong's SOPL will introduce a right for parties to suspend all or part of their works or reduce the rate of progress in the event of non-payment.

4. The rationale for introducing a statutory right to suspend is that:
 - It would incentivise paying parties to address claims for payment properly and promptly.
 - It avoids the unfairness of unpaid parties having to continue working and financing their works for prolonged periods.
 - It avoids the legal uncertainties of termination or repudiation identified in the Introduction to this Chapter.

5. It is further proposed that Hong Kong provides a right to suspend all or part of the works or reduce the rate of progress in the event of non-payment. The rationale is to allow flexibility for unpaid parties to exercise their rights in a way which best fits the needs of each contract. For example, it may be very difficult and costly to demobilise and remobilise certain sub-contractors and certain construction operations (such as tunnelling with tunnel boring machines) may need to be progressed consistently and continuously to avoid major problems. On the other hand, there may be parts of the works which can be suspended without adverse consequences but which will nonetheless put pressure on a defaulting payer.
6. The UK's SOPL provides a right to suspend part of the works as well as a right to suspend all of the works. This was introduced following review and amendment of the UK's SOPL. The amendment reflected the fact that it might not always be in the interests of parties undertaking work or providing services or of the project in question for all work to stop.
7. Malaysia's SOPL allows the rate of progress of works to be slowed as an alternative to full suspension. Similar to the approach of the UK, the Malaysian SOPL seeks to provide a less drastic option to full suspension which may benefit the unpaid party and the project.
8. The Working Group considered whether partial suspension or slowing of progress might lead to difficulties in assessing how much additional time for completion parties would be entitled to. It was concluded that considering the extent to which partial suspensions or reductions of rates of progress delayed overall completion would be no more difficult than many other delay related assessments which frequently have to be made. For example, contract administrators and arbitrators routinely have to consider delaying events affecting only part of a site or consider concurrent delays.

Question 15:

Do you agree that Hong Kong's SOPL should introduce a right for parties to suspend all or part of their works or reduce the rate of progress in the event of non-payment?

Proposal 16:

The right to suspend or reduce the rate of progress will only arise after either non-payment of an adjudicator's decision or non-payment of an amount admitted as due in a Payment Response.

9. The rationale for the proposed approach in Hong Kong is as follows:
 - Where there is a dispute as to what is due, the requirement to obtain an adjudicator's decision means there is the best chance of establishing for certain that an amount is due and unpaid prior to suspension taking place and so reduces the risk of unjustified suspensions occurring. Also, it means that a paying party has ample notice and time to consider their position prior to any suspension taking place.

- Where amounts are admitted as due, there is no need to obtain an adjudicator's decision so it makes sense to allow rights to suspend or reduce the rate of progress to be exercised sooner. In some situations there could be arguments as to whether a sum has been admitted or not (for example where a Payment Response is unclear) but such cases should be relatively rare.
10. Singapore, Malaysia and Western Australia limit rights to suspend to situations where there has been non-payment of an adjudicator's decision. This provides greatest certainty that an amount is genuinely due and outstanding. In some other jurisdictions such as the UK, New South Wales and New Zealand, rights to suspend also arise when amounts accepted as due through the payment process are unpaid.

Question 16:

Do you agree that the right to suspend or reduce the rate of progress should only arise after either non-payment of an adjudicator's decision or non-payment of an amount admitted as due in a Payment Response?

Proposal 17:

Parties which suspend or slow down work for non-payment will have rights to additional time to complete their obligations and to reasonable costs and expenses in respect of delay and disruption arising from the suspension.

11. The rationale for this proposal is as follows:
- Without a statutory right to payment for loss and expense, unpaid parties may feel it is not worth exercising the right to suspend as an unpaid party cannot be sure it will be entitled to more time to complete its works and to recover additional costs incurred as a result of the suspension.
 - Providing for these matters expressly in the SOPL will make the position clear. Without this clarity, parties may end up in dispute as to their respective rights and entitlements.
 - It is the non-paying party which has brought about the suspension or reduction in the rate of progress and the time and cost consequences are therefore allocated to them. Express statutory rights to time and money arising out of a suspension would mean paying parties could not draft contracts to allocate the risk to the party providing work, services, materials or plant.
 - The UK, Singapore and Malaysia all provide for time and cost recovery in their SOPL. Other jurisdictions with SOPL at least provide for additional time or relief from liability in respect of delay arising from the suspension.
12. It is proposed that Hong Kong's SOPL provide for these matters by stating that the period of delay arising from a suspension shall be disregarded in computing whether any contractual time periods have been complied with. Further, that the paying party shall be liable to pay reasonable costs and expenses incurred as a result of the suspension which costs and expenses can be included in a Payment Claim.

13. Identifying the period of delay arising from a suspension may not be easy. Issues may arise as to how quickly a suspending party should realistically resume work and once work is resumed it may not be possible to immediately reach the rates of production achieved before the suspension. Three options are suggested:
- Option (i) – is simply to provide that the suspending party is entitled to additional time to reflect any delay arising from the suspension meaning account could be taken of the actual delays and circumstances in each case. The advantage is that it provides greatest flexibility and fairness but at the expense of certainty. It may result in further disputes on entitlement.
 - Option (ii) – is to provide a fixed period (say 3 working days) following payment being made within which work must be resumed and which will set a limit on the additional time to which the suspending party is entitled. The advantage is that it provides greater certainty and also imposes a clear obligation on the suspending party to resume work within a set period once they have been paid. The disadvantage is that whatever period is selected it will prove either too short or unnecessarily long in many cases.
 - Option (iii) – is a hybrid of option (i) and (ii) to have an obligation for the suspending party to have resumed work within a fixed period but leaving discretion as to how the overall delay period is calculated – this means there is a clear obligation to resume work within a set time but if full production could not be achieved, it could be taken account of in considering the delay caused and the additional time to be allowed.
14. The costs and expenses which can be claimed would include delay related costs and also additional demobilisation and remobilisation costs. They could be claimed pursuant to the statutory Payment Claim process. If the entitlements give rise to their own dispute, then this could be adjudicated.

Question 17A:

Do you agree that parties which suspend or slow down work for non-payment should have rights to additional time to complete their obligations and to reasonable costs and expenses in respect of delay and disruption arising from the suspension?

Question 17B:

If your answer to Question 17A is agreed, then which is your preferred option for establishing the party's obligations to resume work and entitlement to additional time?

- (i) entitlement to additional time is to reflect all delay arising out of the suspension which will allow consideration of the periods required for resumption of work and achievement of full rates of production based on the circumstances of each case; or
- (ii) there is an express obligation for work to be resumed within a set period of time after payment is made and the entitlement to additional time is limited to the period from which suspension starts to the expiry of the set period of time for resumption of work; or
- (iii) a hybrid of (i) and (ii) above where there is a set period within which work must be resumed but account can be taken of other circumstances such as where work cannot be fully resumed or full rates of production achieved by the expiry of the set period.

If your preferred option is (ii) or (iii), what should the set period for resumption of work after payment be (in working days)?

Proposal 18:

Unpaid parties must give written notice of their intention to suspend to the non-paying party and (if known) to any party which pays the non-paying party (the “principal”) and to the site owner.

15. The rationale for giving written notice of intention to suspend to the non-paying party is as follows:
 - Suspension is a serious remedy with potentially far reaching and costly consequences for a project. Advance notice is an obvious safeguard.
 - Notice of intention to suspend will, in many cases, be enough to prompt paying parties to comply with their obligations.
 - All existing SOPL requires unpaid parties to give notice before exercising their rights to suspend. Different periods are adopted overseas ranging between 2 and 10 working days.

16. The rationale for giving written notice of intention to suspend to any party which pays the non paying party (the “principal”)⁸ and to the site owner is as follows:
 - Owners or principals may be able to take action to encourage resolution of the payment issue.
 - Even if owners and principals are unable to prevent a suspension occurring, they may be able to manage remaining works so as to minimise the adverse effects on the project in question.
 - The possibility of notices being sent to principals and owners is likely to put commercial and reputational pressure on payers to pay on time.
 - The requirement to give notice to any party paying the non paying party is a feature of Singapore’s SOPL.

17. In terms of notice periods, the Working Group considered periods of between 5 and 10 working days would be appropriate. Two options are suggested:
 - Option (i) – is to adopt a notice period of 10 working days for all circumstances. The rationale is that a longer period means there is more chance for principals and owners to intervene and avoid threatened suspensions further down the supply chain.
 - Option (ii) – is to provide for 10 working days notice of intention to suspend following non-payment of an amount admitted as due in a Payment Response and for five working days notice for non-payment of an adjudicator’s decision. The rationale is that if suspension was notified following non-payment of an adjudicator’s decision the unpaid party would already have waited many weeks from submission of their Payment Claim and it would arguably be unfair to impose a further long notice period.

⁸ An example of this in action would be a sub-contractor giving notice to the employer that it has not been paid by the main contractor.

Question 18A:

Do you agree that unpaid parties should be obliged to give written notice of their intention to suspend to the non paying party and (if known) to any party which pays the non paying party (the “principal”) and to the site owner?

Question 18B:

Option (i) – Should a single notice period be adopted for all circumstances? If so, what would an appropriate notice period be (in working days)?

Option (ii) – Should there be different notice periods for non-payment of amounts admitted as due in a Payment Response and non-payment of adjudicators’ decisions? If so, what would an appropriate notice period be (in working days) for each?



Chapter 6

Adjudication and Enforcement

Introduction

1. SOPL in other jurisdictions provides rights for disputes to be referred to and decided by an adjudicator although there are differences of approach as to what disputes can be referred, when they can be referred and who can refer them. There are also differences of approach in terms of procedure and overall timetable.
2. The key features of adjudication under SOPL are as follows:
 - Disputes are referred to an adjudicator who will independently consider and decide the dispute by issuing a written decision which will set out any amount to be paid. The timetable for adjudication is very rapid and the costs are comparatively low compared to typical court or arbitration proceedings.
 - If either party is unhappy with the decision, they can take the dispute to court (or arbitration if the contract provides for it) for a final determination in the usual way. This would not be an appeal of the adjudicator's decision but a fresh consideration of the dispute. It might be that the court proceedings or arbitration would encompass other matters in addition to the claims adjudicated.
 - The adjudicator's decision is binding and enforceable on an interim basis in the same way as a court judgment and there can be no set off against an adjudicator's decision. Even if one of the parties takes the dispute on to court or arbitration, payment of the adjudicator's decision must be made in the meantime. When court or arbitration proceedings are concluded, it may be that further amounts have to be paid or repaid.
 - Courts can enforce adjudicator's decisions even if it is apparent they are legally or factually wrong. This is because the overriding objective of adjudication is to provide a rapid independent decision. It is inevitable that decisions may at times be rough and ready but parties can still go to court or arbitration for a final considered judgment or award which will be given after completion of the full litigation or arbitration process.
 - Courts may refuse to enforce an adjudicator's decision where it was made without jurisdiction. For example, the contract was not one to which SOPL applies or the adjudicator decided a dispute which was not referred to them. Courts may also refuse to enforce a decision where there was a serious breach of natural justice. For example, a party was not allowed a fair opportunity to present its case or comment on its opponent's case.
 - The right to adjudication cannot be contracted out of and cannot be limited. For example, contractual provisions seeking to limit and define when a dispute is considered to arise for the purposes of adjudication will be ineffective. Also, provisions requiring an Engineer's/Architect's decision on the dispute or similar as a precondition to adjudication will be ineffective. Adjudicators will be able to review certified amounts relied on for the purposes of Payment Responses and decide that different amounts are due.

3. Adjudication transforms the dynamic between paying parties and those that work for them. In the absence of a right of adjudication, it can take many months or years to resolve payment disputes. An unpaid party faces the prospect of expensive and lengthy legal proceedings with the risk of paying the paying party's legal costs if unsuccessful. This can deter unpaid parties from enforcing their rights and pressure them into accepting low settlements. With adjudication, an independent third party can decide disputes and help avoid the mentioned undesirable situation for unpaid parties.
4. Adjudication encourages proper and prompt valuation of claims for payment and means that even where court or arbitration is inevitable, an independent decision can be made as to who should have the disputed money in the interim.
5. The UK's SOPL provides the widest rights of adjudication. Almost any dispute can be referred to adjudication at any time by either party to a contract.
6. At the other end of the spectrum, Singapore and New South Wales provide a more limited right. Only parties who undertake work or provide services, materials or plant can pursue adjudication and only in respect of ignored or disputed Payment Claims. Paying parties cannot adjudicate disputes arising out of their own claims such as claims for delay damages or the cost of correcting defects⁹. Furthermore, adjudication can only be commenced within a limited period after the paying party's response to a Payment Claim or after their failure to provide a response.
7. The proposed adjudication model for Hong Kong falls somewhere between the approach taken by the UK and Singapore/New South Wales.

Proposal 19:

Both parties to a contract will be entitled to refer disputes to adjudication but limited to disputes concerning the following:

- a) *the value of work, services, materials and plant supplied and claimed in a Payment Claim; and/or*
 - b) *other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or*
 - c) *set offs and deductions against amounts due under Payment Claims; and/or*
 - d) *the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract.*
8. In practice, the above proposals will mean that the vast majority of disputes can be considered by adjudicators. In the case of (a) to (c), claims must first be made as Payment Claims and have been disputed and/or set off against or ignored or the paying party must have failed to pay an amount admitted as due, before the right to adjudicate will arise. Claims under (b) could include matters such as contractor's loss and expense related to delay and disruption but also cover payers' claims such as an employer's claim for liquidated delay damages.

⁹ Although they can set off against Payment Claims and if the claiming party refers their Payment Claim to adjudication, the adjudicator can consider the set off.

9. Examples of disputes that cannot be referred to adjudication include disputes purely as to the correct interpretation of the contract and disputes about whether completion was achieved on a particular date or whether work is defective. However, whilst these disputes could not be considered in isolation, they could be considered if they are encompassed within wider disputes over valuations, money claims and time related claims made under the contract. For example, deciding correct interpretation of the contract could be key to applying valuation rules and establishing when completion was achieved may be crucial to evaluating a claim for delay damages. The question of defects may be relevant to valuation and/or consideration of a set off against a Payment Claim.
10. The rationale for the proposed approach to allow both parties to a contract the right to adjudicate disputes arising out of their contractual claims is as follows:
- Allowing both parties to a contract the right to adjudicate disputes arising out of their contractual claims is considered the fairest approach. Often, paying parties will not need to adjudicate their claims but will instead rely on setting off against amounts they owe to the party undertaking work or providing services, materials or plant. However, sometimes there will be insufficient money to set off against which could cause difficulties for paying parties if they cannot adjudicate. For example, it could be unfair if a contractor recovered significant sums through adjudication during a project but delay at the end entitled the employer to significant liquidated damages over and above the remaining amounts due to the contractor.
11. The rationale for limiting the right to adjudication as proposed is as follows:
- It ensures that the right is focused on disputes which are likely to delay payment. This is consistent with the overriding objective of introduction of SOPL in Hong Kong which is to improve payment practices and reduce payment disputes and delays.
 - Limiting the right to adjudicate financial claims to those which have been made as Payment Claims means it is possible to define and limit the circumstances and timescales for commencing adjudication. This is explained further under Proposal 20. It means that there is less scope for ambush compared to the UK model which allows any dispute to be adjudicated at (literally) any time.
 - Extension of time issues are often crucial to unlocking financial disputes on construction projects both in terms of entitlements to loss and expense and employer entitlements to liquidated damages for delay. Although they can be complex, and may be hard to resolve in the tight timeframe of adjudication, their early resolution may help prevent future disputes. It therefore makes sense to allow these disputes to be adjudicated in isolation and not just when they form part of a time related financial claim.

Question 19A:

Do you agree that both parties to a contract should be entitled to refer disputes to adjudication?

Question 19B:

Do you agree that the right to adjudicate should be limited to disputes relating to the following:

- a) the valuation of work, services, materials and plant supplied and claimed in a Payment Claim; and/or
- b) other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or
- c) set offs and deductions against amounts due under Payment Claims; and/or
- d) the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract?

Proposal 20:

There is a time limit for commencement of adjudication of 28 calendar days from either:

- a) non-payment of an amount admitted as due in a Payment Response; or*
- b) service of a Payment Response disputing all or part of a Payment Claim and/or identifying amounts to be set off against or deducted from amounts otherwise due in respect of the Payment Claim; or*
- c) the failure of the paying party to serve a Payment Response in relation to the Payment Claim within the required time; or*
- d) a dispute arising as to the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract by one of the parties to the contract.*

12. The rationale for the proposed approach is as follows:

- Adjudication is meant to provide rapid dispute resolution on an interim basis and allow parties to resolve issues at an early stage. A time limit for commencement is consistent with this objective. It is unfair to the paying party if the claiming party can indefinitely reserve their right to refer a dispute to adjudication at any time.
- The proposal is consistent with an efficient and rapid approach for regular cashflow. It reduces the opportunity for ambush as the paying party knows the period within which adjudication may be launched.
- A period of 28 calendar days is considered appropriate to give the claiming party sufficient time to consider their position before making any decision to refer a dispute to adjudication. This can also serve as a cooling-off period providing opportunity for discussion or negotiation between the parties before commencing the adjudication process.
- If the period is too short, the claiming party may feel under pressure to refer a dispute to adjudication to reserve their right.
- Other jurisdictions adopting the payment claim model impose limits of between 7 and 28 calendar days.

Question 20A:

Do you agree that there should be a time limit for commencement of adjudication of 28 calendar days from either:

- a) non-payment of an amount admitted as due in a Payment Response; or
- b) service of a Payment Response disputing all or part of a Payment Claim and/or identifying amounts to be set off against or deducted from amounts otherwise due in respect of the Payment Claim; or
- c) the failure of the paying party to serve a Payment Response in relation to the Payment Claim within the required time; or
- d) a dispute arising as to the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract by one of the parties to the contract.

Question 20B:

If not 28 calendar days then what period do you consider appropriate?

Proposal 21:

Adjudication shall have the following key features:

Timetable and Procedure

- a) *The claiming party will commence adjudication by serving on the other party a notice of adjudication, setting out brief details of the parties, the nature of the dispute and the redress sought.*
- b) *The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) by Hong Kong International Arbitration Centre (HKIAC) within 5 working days of commencement.*
- c) *The claiming party must serve their submissions together with all supporting evidence they rely on (which may include documents, photographs, witness statements and expert reports) on the responding party on or before the date of appointment of the adjudicator and on the adjudicator on the day of their appointment or the next working day.*
- d) *The responding party has 20 working days from receipt of the claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.*
- e) *The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from the date of appointment of the adjudicator and to in excess of 55 working days if both parties agree.*
- f) *The adjudicator shall have the power to vary the time for the responding party to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manner as they think fit including being able to require further submissions and evidence from either party, to call meetings with the parties, to inspect relevant matters and set deadlines and issue procedural directions provided always that the adjudication can be concluded within 55 working days from the date of appointment of the adjudicator or any agreed extended period.*

Addressing Ambush

- g) *The adjudicator shall be entitled to disregard any submission or evidence or part thereof submitted by the claiming party to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served with a Payment Claim or otherwise in advance of the notice of adjudication and which cannot fairly be considered and responded to by the responding party in the adjudication.*
- h) *The adjudicator shall be entitled to resign if they consider that it is not possible to decide the dispute fairly in the time available (being the maximum time available including any extended periods agreed by the parties).*

Costs

- i) *Each party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator's fees and expenses or the proportions in which they are to be jointly paid by the parties.*

13. The rationale for the proposed procedure is as follows:

Timetable and Procedure

- The maximum overall timescale allowed to the adjudicator of up to 55 working days for the decision (from their appointment) and the 20 working days for the responding party's submissions and supporting evidence are broadly modelled on the CIC's "Reference Material for Application of Dispute Resolution in Construction Contracts"¹⁰ which provides for 60 working days and 20 working days respectively.
- To cater for different natures and complexities of dispute, the adjudicator has flexibility to determine the overall period for the decision and the time for service of the responding party's submissions and evidence if appropriate, provided they do not exceed the overall period of 55 working days from the date of appointment of the adjudicator (or any longer period than 55 working days agreed by the parties).
- Generally the adjudicator is given flexibility as to how the adjudication is conducted. Given the nature of the process, adjudicators should take a fair but robust approach to arrive at their decision as rapidly as possible. To assist in this, adjudicators are not expected to apply strict rules of evidence, can decide matters on documents only and do not need to have formal hearings with sworn witnesses and cross examination by lawyers. Where adjudicators do wish to meet the parties, it will usually be to ask questions and to allow them to explain the issues and their respective arguments in a more informal setting. It is hoped that adjudicators and parties in Hong Kong will not seek to turn adjudications into compressed arbitration style proceedings.

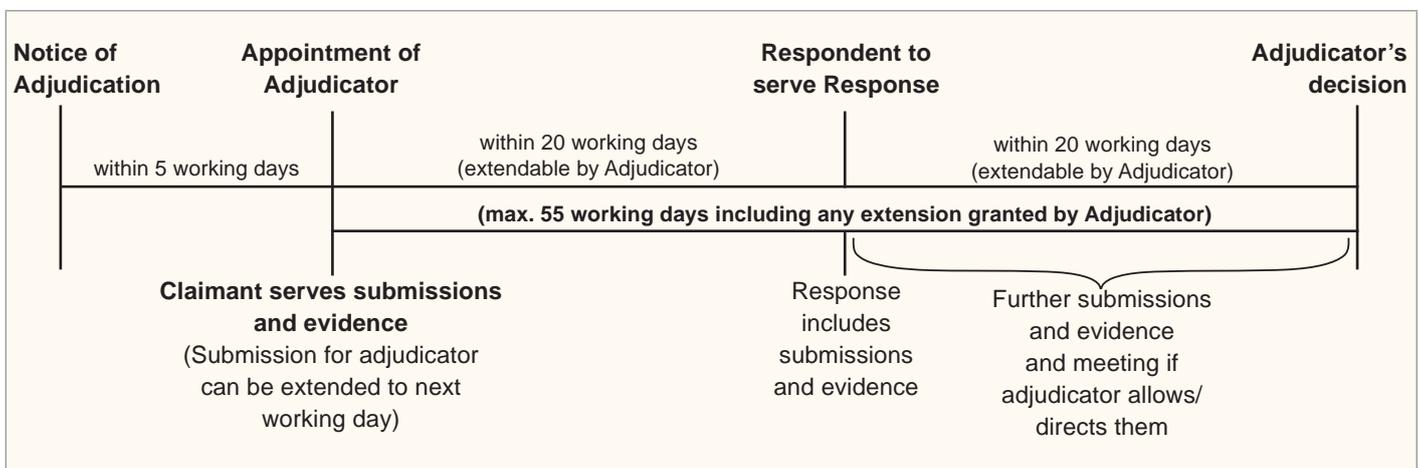
¹⁰ Document is available in CIC website, to which link is as follows: <http://www.hkcic.org/eng/info/publication.aspx?langType=1033&id=4458>.

- The timescale for adjudication means that it is not appropriate for there to be general court style discovery of documents under which all documents a party has relating to matters in dispute must be made available to the other side for inspection. Discovery can also be extremely costly on document intensive disputes. Adjudicators therefore work primarily on the basis of the documents the parties each rely on and produce. An adjudicator could ask a party to produce or provide copies of specific documents. They are only likely to do so where it was known or highly likely that the documents existed and that they would be directly relevant to matters in dispute. An adjudicator could not compel production of documents and could not strike out a claim or defence purely on the basis of a requested document not being provided but they could take non production into account in reaching their decision.

Addressing Ambush

- Proposals (g) and (h) above have been included to discourage the use of adjudication for ‘ambush’ where a claimant deliberately holds back new submissions and evidence to deploy for the first time in an adjudication in the hope of gaining a tactical advantage. Ambush is an issue in all existing jurisdictions with SOPL although it is often regarded as a relatively confined problem and as a price worth paying for the cash flow advantages which adjudication can bring.
- Hong Kong’s proposals (g) and (h) are designed to create a strong incentive on claiming parties to present all their key arguments and evidence to the responding party before adjudication is commenced and to be reasonable about timetable in the largest and most complex cases. This should provide a better opportunity for claims to be recognised and settled without adjudication where possible and also increase the fairness of adjudication where it cannot be avoided.
- Some members of the Working Group felt that in addition to being able to disregard new submissions or evidence, adjudicators should have the power to remit disputes back to the parties. This would apply where it was obvious new material was being advanced by a claimant and where the responding party (or their engineer or certifier) might well have taken a different view when responding to a Payment Claim or extension of time application had the material been available to them. Other members considered that it would be difficult to provide a workable procedure which could be relied on to produce a final decision and such a process would also cause delay.

Figure 6.1 – Timetable and procedure of adjudication



Legal Costs and Adjudicator's Fees and Expenses

- Adjudication should be a relatively low cost option, especially for smaller contractors, sub-contractors and suppliers. In many cases, parties will be capable of representing themselves in the process should they wish. Often, larger paying parties will be able to resource and fund teams of lawyers and experts to represent them at high cost. The prospect of losing and becoming liable for these costs would be a major disincentive to adjudicating. For this reason, it is proposed that each party bears their own legal costs regardless of the outcome of the adjudication or the behaviour of the parties.
- Another reason for each side bearing their own legal costs is to avoid the adjudicator having the burden of considering arguments about cost liability. Such arguments can raise complex issues about the conduct of the parties, about previous offers to settle and about the degree of success achieved by each party in the adjudication. This is inconsistent with adjudication being a rapid and low cost process.
- In line with other countries with SOPL, it is proposed that the adjudicator's own fees and expenses can be awarded by the adjudicator to one party or the other or split in proportions reflecting the outcome of the adjudication. These costs are likely to be far less than party legal costs. It should be relatively easy for an adjudicator to decide how to award their fees and expenses. It will provide an incentive against speculative pursuit of unrealistic claims and the maintaining of unrealistic defences to delay payment.

Question 21A:

Do you agree that the adjudication procedure should have the following key features:

- a) The claiming party will commence adjudication by serving on the other party a notice of adjudication setting out brief details of the parties, the nature of the dispute and the redress sought.
- b) The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) from HKIAC within 5 working days of commencement.
- c) The claiming party must serve their submissions together with all supporting evidence they rely on (which may include documents, photographs, witness statements and expert reports) on the responding party on or before the date of appointment of the adjudicator and on the adjudicator on the day of their appointment or the next working day.
- d) The responding party has 20 working days from receipt of the claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.
- e) The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from the date of appointment of the adjudicator and in excess of 55 working days if both parties agree.

Question 21A continued:

- f) The adjudicator shall have the power to vary the time for the responding party to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manner as they think fit including being able to require further submissions and evidence from either party, to call meetings with the parties, to inspect relevant matters and set deadlines and issue procedural directions provided always that the adjudication can be concluded within 55 working days from the date of appointment of adjudicator or any agreed extended period.
- g) The adjudicator shall be entitled to disregard any submission or evidence or part thereof submitted by the claiming party to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served with a Payment Claim or otherwise in advance of the notice of adjudication and which cannot fairly be considered and responded to by the responding party in the adjudication.
- h) The adjudicator shall be entitled to resign if they consider that it is not possible to decide the dispute fairly in the time available (being the maximum time available including any extended periods agreed by the parties).
- i) Each party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator's fees and expenses or the proportions in which they are to be jointly paid by the parties.

Question 21B:

Do you agree that adjudicators should have the power to remit disputes back to the parties where a claiming party introduces significant new material in an adjudication?

Proposal 22:

Parties are free to agree adjudicator nominating bodies ("ANBs") in their contract and are free to agree an adjudicator for specific disputes but only after a dispute and right to adjudicate has arisen. Where no ANB is agreed in the contract and where no adjudicator is agreed after a dispute has arisen, the Hong Kong International Arbitration Centre ("HKIAC") will be the default ANB.

- 14. ANBs are organisations which nominate adjudicators upon request. Typically ANBs in other jurisdictions are professional bodies representing surveyors, engineers or other professionals or are arbitration or mediation centres.
- 15. Obtaining a nomination is generally straightforward and involves submission of a request form with a few details of the parties and the dispute and payment of a small fee. ANBs maintain panels of adjudicators which are usually selected based on their own training and accreditation requirements. The ANB will contact a suitable panel adjudicator, check there is no conflict of interest, and nominate – normally within a few working days.

16. The proposed adjudication procedure requires appointment of an adjudicator within 5 working days of the commencement of the process. To ensure that the adjudicator can be appointed within 5 working days, claiming parties may seek a nomination from the relevant ANB at the same time that they try to agree an adjudicator with responding parties at the commencement of the process. If the parties cannot reach an agreement on the adjudicator, they have to accept the nomination from the ANB (i.e. the ANB named in the contract, or if none, the HKIAC).
17. It is expected that a number of professional bodies in Hong Kong will offer services as ANBs and the HKIAC already has a panel of adjudicators established for contractual adjudications. It is not proposed that Government will regulate ANBs.
18. The rationale for the proposal is as follows:
 - Parties are more likely to accept and respect the decision of an adjudicator they have agreed on and should be best placed to pick an individual with suitable experience and qualifications for their dispute.
 - Paying parties typically have greater bargaining power when parties are negotiating their contracts. This is why it is proposed parties cannot validly agree an adjudicator until after a dispute has arisen at which time neither party has any particular advantage.
 - There is less concern in parties agreeing an ANB at contract negotiation stage as each ANB will have a panel of adjudicators and should make an independent choice of adjudicator. Parties are more likely to respect a nomination from an agreed ANB.
 - HKIAC is the default appointing authority for arbitrators under the Arbitration Ordinance and currently has the necessary resources, infrastructure and experience of nomination in Hong Kong. They are a logical choice for the default nominating body.

Question 22A:

Do you agree that parties should be free to agree adjudicator nominating bodies (“ANBs”) in their contract?

Question 22B:

Do you agree that parties should be free to agree an adjudicator for a specific dispute but only after the dispute and right to adjudicate has arisen?

Question 22C:

Do you agree that where no ANB is agreed in the contract and where no adjudicator is agreed after a dispute has arisen the Hong Kong International Arbitration Centre (“HKIAC”) should be the default ANB?

Proposal 23:

Hong Kong's SOPL will include provision allowing adjudicator's decisions to be enforced in the same way as judgments of the court and without set off or deduction and allowing responding parties only a short period within which to lodge any challenge to validity.

19. Hong Kong's SOPL legislation will include provision allowing adjudicator's decisions to be enforced in the same way as judgments of the court and without set off or deduction. This means that whilst an adjudicator may be able to take account of any set off or deduction raised by the responding party in a timely Payment Response (which was relied on in the adjudication) there can be no new or further set off or deduction against the decision itself. It is also proposed to allow responding parties only a short period within which to lodge any challenge to validity to decisions.
20. As explained in the Introduction to this Chapter 6, the nature of adjudication is that adjudicators' decisions can be enforced immediately, and without set off, through the courts. This is the only effective way that the improvements to cash flow which adjudication brings can be ensured and enforced. This is the rationale for providing expressly in the SOPL that adjudicator's decisions can be enforced in the same way as court judgments.
21. As a safeguard, there would be a limited window within which responding parties can challenge the validity of adjudicators' decisions. This would not allow them to 'appeal' or challenge the correctness of decisions but instead to challenge validity from a procedural perspective. Grounds on which challenges may be made would include an adjudicator acting without or in excess of their jurisdiction, an adjudicator failing to act independently and impartially, an adjudicator breaching principles of natural justice and (in extreme cases) fraud or bribery has occurred.
22. The law surrounding challenges to validity of adjudicators' decisions can be complex. The experience in other jurisdictions has been that courts will generally support the intent of SOPL. This means that it is recognised that the process can be rough and ready and so only in very clear cases of an adjudicator having no jurisdiction or conducting proceedings unfairly and in breach of natural justice will a challenge succeed and a decision not be enforced. Also, courts can generally determine challenges of this nature rapidly.
23. The precise procedural aspects of this proposal will be formulated in consultation with the Hong Kong Courts.

Question 23:

Do you agree that Hong Kong's SOPL should include provision allowing adjudicator's decisions to be enforced in the same way as judgments of the court and without set off or deduction and allowing responding parties only a short period within which to lodge any challenge to validity?

Appendix A

Proposed Model:

Security of Payment Legislation for Hong Kong

(Note: This is an outline model, not draft legislation and references to “working days” are to days other than Saturday, Sunday or a general holiday for the purposes of the General Holidays Ordinance (Cap.149)). For the purposes of this model, private sector contracts are contracts which are not entered into by Government or the statutory and/or public bodies and corporations listed in Schedule 1 and are not sub-contracts relating to the same. For the avoidance of doubt, private sector contracts include contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1.

Scope

1. The legislation will apply to all construction contracts entered into by the Government of the Hong Kong Special Administrative Region (which for the avoidance of doubt includes all departments, divisions, bureau, commissions or similar of Government) and the specified statutory and/or public bodies and corporations listed in Schedule 1 to this model. The legislation will apply to sub-contractors of any tier in relation to such contracts. Subject to paragraph 5 below, the legislation will only apply to private sector construction contracts where the ultimate employer is procuring a “new building” (or “new buildings”) as defined in the Buildings Ordinance (Cap 123)¹¹. For the purposes of this model, private sector contracts are contracts which are not entered into by Government or the statutory and/or public bodies and corporations listed in Schedule 1 and are not sub-contracts relating to the same. For the avoidance of doubt, private sector contracts include contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1.

¹¹ The ordinance defines “building” as “includes the whole, or any part, of any domestic or public building or building which is constructed or adapted for use for public entertainment, arch, bridge, cavern adapted or constructed to be used for the storage of petroleum products, chimney, cook-house, cow shed, dock, factory, garage, hangar, hoarding, latrine, matshed, office, oil storage installation, out-house, pier, shelter, shop, stable, stairs, wall, warehouse, wharf, workshop or tower, sea-wall, breakwater, jetty, mole, quay, cavern or any underground space adapted or constructed for occupation or use for any purpose including its associated access tunnels and access shafts, pylon or other similar structure supporting an aerial ropeway and such other structures as the Building Authority may by notice in the Gazette declare to be a building” and “new building” is defined as “means any building hereafter erected and also any existing building of which not less than one half measured by volume is rebuilt or which is altered to such an extent as to necessitate the reconstruction of not less than one half of the superficial area of the main walls”.

2. The following types of contracts are construction contracts:
 - a) Contracts under which a party undertakes construction activities including works on site and whether involving the provision of labour only or a combination of any of labour, materials and plant;
 - b) Services contracts relating to construction activities including contracts for the provision of engineering/architectural design, surveying, quantity surveying, project management, landscaping design, interior/exterior design, planning, testing and advisory services including feasibility studies; and
 - c) Supply contracts where a party supplies (and only supplies) materials, equipment or plant to a party carrying out construction activities which will either form part of the works being completed as a result of the construction activities or which will be used in connection with the carrying out of the construction activities.
3. Relevant construction activities are the following:
 - a) Construction, alteration, repair, restoration, renovation, maintenance, extension, demolition or dismantling, painting or decorating of buildings or structures forming part of the land.
 - b) Construction, alteration, repair, restoration, renovation, maintenance, extension, demolition or dismantling of any works forming or to form part of the land including walls, roads, power lines, telecommunications apparatus, runways, docks, harbours, railways, waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant, land drainage, coast protection or defence and land reclamation.
 - c) Installation in buildings, structures or works of fittings forming part of the land including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security or communications.
 - d) Operations integral to the above including site clearance, earth moving, excavation, tunnelling and boring, laying foundations, scaffolding, site restoration, landscaping, provision of roadways and access and cleaning.
4. The legislation will apply to relevant contracts regardless of whether they are written, oral, partly written and partly oral and whether they are subject to Hong Kong law or another law and regardless of the nationality of the parties to the contract.
5. The legislation will not apply to private sector construction contracts relating to a “new building” or “new buildings” unless the original value of the main contract let by the procuring employer exceeds HK\$5,000,000 (construction works or similar) or HK\$500,000 (professional services and supply only contracts).
6. When the main contract is covered by SOPL then all sub-contracts of any tier will be covered by SOPL regardless of value. When the main contract is not covered by SOPL then sub-contracts will not be covered by SOPL regardless of tier or value.
7. The legislation will not apply retrospectively but will apply only to contracts entered into on or after a date to be set by or pursuant to the legislation.

8. The legislation will only apply where or to the extent that relevant construction activities are carried out within Hong Kong although contracts for services carried out outside Hong Kong and materials made outside Hong Kong will be covered by the legislation provided the services and materials are supplied to parties who are procuring or undertaking construction activities in Hong Kong and supplied for the purposes of such construction activities.
9. Contracts where payment is not referable to the value of work, services, materials or plant provided shall be excluded.
10. Contracts of employment of individuals, insurance, guarantees and loan agreements shall be excluded.

Payment

11. All parties that undertake construction activities or provide related services or supply related materials or plant shall be entitled to claim Progress Payments which shall include single, interim and final Progress Payments.
12. Parties shall be free to agree:
 - a) How many Progress Payments may be made.
 - b) When they may be claimed or the circumstances under which they may be claimed.
 - c) The basis on which they shall be calculated.
 - d) The period within or date on which any amount due must be paid provided that such period or date shall not exceed or be more than 60 calendar days after a claim being made in the case of interim Progress Payments or 120 calendar days after a claim being made in the case of a final Progress Payment. Any provision purporting to impose longer periods shall be ineffective.
13. All amounts to be paid under a contract as consideration for the undertaking of construction activities or for the provision of related services or the supply of related materials or plant and all amounts to be paid in relation to or arising out of delay and disruption to the same shall be paid as Progress Payments. The parties may agree that there shall only be a single Progress Payment.
14. To the extent that the parties fail to agree any of the above matters the following shall apply:
 - a) Parties undertaking construction activities or providing related services or supplying related materials or plant shall be entitled to claim a Progress Payment based on the value of their work, services or supply every calendar month.
 - b) The value of work, services or supply shall be based on any contract price or rates or other pricing agreed by the parties to the extent it can be reasonably applied or otherwise having regard to market rates or prices prevailing in the industry at the time the contract was entered into.
 - c) Payment of any amount due will be made within 60 calendar days of an interim Progress Payment claim being made or within 120 calendar days for a final Progress Payment claim.

15. Parties undertaking construction activities or providing related services or supplying related materials or plant shall be entitled (but not obliged) to make statutory Payment Claims in respect of Progress Payments on the following basis:
 - a) All amounts due in respect of Progress Payments can be the subject of Payment Claims.
 - b) Payment Claims can be made whenever Progress Payments can be claimed under agreed contract terms or absent any express agreement on the basis of the default provisions referred to above.
 - c) Progress Payments and Payment Claims can include amounts due calculated in accordance with any agreed contract terms or absent agreement calculated on the basis of the default provisions referred to above.
 - d) Payment Claims must state the amount claimed and provide a breakdown and details of the relevant work, services, materials and plant provided and the basis of valuation of the same and/or provide a breakdown and details of any other claims made under the contract and the basis of calculation of the same.
 - e) Contractual provisions which seek to prevent amounts due under express contractual provisions being claimed in Payment Claims shall be ineffective.
16. Parties who employ another party to undertake construction activities or provide related services or supply related materials shall be entitled to serve Payment Claims against the other party in respect of amounts due to them under the contract.
17. A party receiving a Payment Claim is entitled to serve a Payment Response on the following basis:
 - a) Service no later than by a date agreed by the parties (which cannot be later than 30 calendar days after receipt of a Payment Claim) or absent agreement no later than 30 calendar days after receipt of a Payment Claim.
 - b) Parties must identify in their Payment Responses:
 - The amount (if any) accepted as due under the contract ignoring any set offs or deductions and the basis of its calculation.
 - The amount (if any) disputed as due under the contract ignoring any set offs or deductions and the reasons and basis of its calculation.
 - The amount, grounds for and basis of calculation of any set offs or deductions to be made.
 - The net amount to be paid (if any) and the calculation of the same.
18. Paying parties cannot set off or deduct any amount against an amount due under a Payment Claim unless relevant details of the same are provided in a Payment Response served within the required contractual or statutory timescale.

'Pay when Paid'

19. Provisions making payment conditional on the payer receiving payment from a third party shall be ineffective.
20. Provisions making payment contingent or conditional on the operation of any other contract or agreement shall be ineffective.

Rights to Suspend for Non-Payment

21. A party which has not been paid an amount which an adjudicator has decided should be paid to them or which has been admitted as due to them in a Payment Response shall be entitled, on giving not less than 5 or 10 working days notice respectively to the paying party and (where known) to any party which pays the paying party and to the site owner, to do any or a combination of the following:
 - a) Suspend performance of their contractual obligations.
 - b) Suspend performance of part of their contractual obligations.
 - c) Reduce the rate of performance of part or all of their obligations.
22. Upon party which has not been paid an amount which an adjudicator has decided should be paid to them or which has been admitted as due to them in a Payment Response shall be entitled, on giving not less than 5 or 10 working days notice respectively to the paying party and (where known) to any party which pays the paying party and to the site owner, to do any or a combination of the following.
23. Parties which exercise rights to suspend or reduce their rate of performance shall be entitled to additional time to complete their obligations and payment of reasonable costs and expenses in respect of delay and disruption arising from the suspension or reduction in rate of performance.

Adjudication

24. Both parties to a contract shall be entitled to refer disputes to adjudication but limited to disputes concerning the following:
 - a) The valuation of work, services, materials and plant supplied and claimed in a Payment Claim; and/or
 - b) Money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or
 - c) Set offs and deductions against amounts due under Payment Claims.
 - d) The time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract.
25. There is a time limit for commencement of adjudication of 28 calendar days from either:
 - a) Non-payment of an amount admitted as due in a Payment Response.

- b) Service of a Payment Response disputing all or part of a Payment Claim and/or identifying amounts to be set off against or deducted from amounts otherwise due in respect of a Payment Claim.
- c) The paying party failing to serve a Payment Response in relation to the Payment Claim within the required time.
- d) A dispute arising as to the time for performance or entitlement to extension of the time for performance of work or provision of services, materials and plant supplied under the contract by one of the parties to the contract.

26. The adjudication procedure shall have the following key features:

Timetable and Procedure

- a) The claiming party will commence adjudication by serving on the other party a notice of adjudication setting out brief details of the parties, the nature of the dispute and the redress sought.
- b) The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) by HKIAC within 5 working days of commencement.
- c) The claiming party must serve their submissions together with all supporting evidence they rely on (which may include documents, photographs, witness statements and expert reports) on the responding party on or before the date of appointment or nomination of the adjudicator and on the adjudicator on the day of their appointment or the next working day.
- d) The responding party has 20 working days from receipt of the claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.
- e) The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from the date of appointment of the adjudicator and to in excess of 55 working days if both parties agree.
- f) The adjudicator shall have the power to vary the time for the responding party to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manner as they think fit including being able to require further submissions and evidence from either party, to call meetings with the parties, to inspect relevant matters and set deadlines and issue procedural directions provided always that the adjudication can be concluded within 55 working days from the date of appointment of the adjudicator or any agreed extended period.

Addressing Ambush

- g) The adjudicator shall be entitled to disregard any submission or evidence or part thereof submitted by the claiming party to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served with a Payment Claim or otherwise in advance of the notice of adjudication and which cannot fairly be considered and responded to by the responding party in the adjudication.
- h) The adjudicator shall be entitled to resign if they consider that it is not possible to decide the dispute fairly in the time available (being the maximum time available including any extended periods agreed by the parties).

Costs

- i) Each party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator's fees and expenses or the proportions in which they are to be jointly paid by the parties.

Default Adjudicator Nominating Bodies

- j) Parties are free to agree adjudicator nominating bodies ("ANBs") in their contract and are free to agree an adjudicator for specific disputes but only after a dispute and right to adjudicate has arisen. Where no ANB is agreed in the contract and where no adjudicator is agreed after a dispute has arisen, the Hong Kong International Arbitration Centre ("HKIAC") will be the default ANB.

Enforcement of Adjudicator's Decisions

- 27. Adjudicator's decisions can be enforced in the same way as judgments of the court and without set off or deduction.
- 28. Responding parties will have to raise any challenge to enforcement promptly and they will be determined within the enforcement procedure.

Schedule 1

Specified statutory and/or public bodies and corporations under SOPL

1. Airport Authority
2. CLP Power Hong Kong Limited
3. Chinese University of Hong Kong
4. City University of Hong Kong
5. Construction Industry Council
6. Hong Kong Academy of Medicine
7. Hong Kong Academy of Performing Arts
8. Hong Kong Baptist University
9. Hong Kong and China Gas Company Limited
10. Hong Kong Electric Company, Limited (Hong Kong Electric Investments)
11. Hong Kong Institute of Education
12. Hong Kong International Theme Parks Limited
13. Hong Kong Polytechnic University
14. Hong Kong Productivity Council
15. Hong Kong Science and Technology Parks Corporation
16. Hong Kong Sports Institute Limited
17. Hong Kong Trade Development Council
18. Hong Kong Tramways Limited
19. Hong Kong University of Science and Technology
20. Hospital Authority
21. Housing Authority
22. Housing Society
23. Kowloon-Canton Railway Corporation
24. Lingnan University
25. MTR Corporation Limited
26. Ocean Park Corporation
27. Open University of Hong Kong
28. University of Hong Kong
29. Urban Renewal Authority
30. Vocational Training Council
31. West Kowloon Cultural District Authority

Appendix B

Response Form for Consultation

(Please provide any comments on the proposals or reasons for your answers at the end of this response form or on a separate sheet.)

Part 1 (see notes at end of Appendix B)

Please send this response form to us on or before **31 August 2015** by one of these means:

mail: Works Policies 1 Section, Development Bureau , 15/F West Wing, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong

e-mail: sop_consultation@devb.gov.hk

fax: (+852) 3167 2630

This is a corporate response (representing the views of a group or an organisation) or
 individual response (representing the views of an individual)

by _____
(name of person or organisation)

at _____ and _____
(telephone) (e-mail)

Part 2 – Consultation Questions

Question 1:

Do you agree that Hong Kong's SOPL should apply to:

- (1) all contracts entered into by the Government (and the specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of this document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier; and

View: Agree Disagree (Please add \surd to as appropriate)

- (2) private sector contracts* where an employer is procuring construction activities or related services, materials or plant for a “new building” (or “new buildings”) as defined in the Buildings Ordinance (Cap 123) and the original contract value is more than HK\$5,000,000 (or HK\$500,000 in the case of professional services and supply only contracts).

View: Agree Disagree (Please add \surd to as appropriate)

* For the purposes of Question 1(2) and this Consultation Document private sector contracts are those contracts not covered by Question 1(1) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A.

Question 2:

Do you agree that where a private sector main contract is not subject to the SOPL then all lower tier sub-contracts will not be subject to the SOPL and that where a private sector main contract is subject to the SOPL then all lower tier sub-contracts will be subject to the SOPL?

View: Agree Disagree (Please add \surd to as appropriate)

Question 3:

Do you agree that Hong Kong's SOPL should only apply to contracts relating to construction activities carried out in Hong Kong and that it should apply even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law?

View: Agree Disagree (Please add \surd to as appropriate)

Question 4:

Should Hong Kong's SOPL apply to

(A) oral and partly oral contracts as well as written contracts? OR

(B) only contracts in writing or evidenced in writing?

View: A or B (Please add \surd to as appropriate)

Question 5A:

Do you agree that professional services contracts which relate directly to planned or actual construction activities in Hong Kong should be covered by the SOPL?

View: Agree Disagree (Please add \surd to as appropriate)

Question 5B:

Are there any specific types of professional services contract which you feel should definitely be covered by Hong Kong's SOPL?

Comments

If more space is required please continue in the box provided at the end of this response form.

Question 5C:

Are there any specific types of professional services contract which you feel should definitely be excluded from Hong Kong's SOPL?

Comments

If more space is required please continue in the box provided at the end of this response form.

Question 6:

Do you agree that contracts for the supply of materials or plant (even if they do not include for any installation or operation on site) should be covered by Hong Kong's SOPL?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 7:

Do you agree that contracts of employment, insurance, guarantee and loan should be excluded from the scope of Hong Kong's SOPL as should investment contracts and other contracts where payment is made by reference to something other than the value of the works carried out?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 8:

Do you agree that parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong's SOPL should be entitled to Progress Payments but the parties to the contract should be free to agree the number of Progress Payments, when they can be claimed and the basis for calculating amounts due?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 9:

Do you agree that the maximum Payment Period which can be agreed for payments should be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 10A:

Do you agree that parties who are entitled to payments under the terms of a contract covered by Hong Kong's SOPL should be entitled (but not obliged) to claim their payments by way of statutory Payment Claims?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 10B:

Do you agree that paying parties should be entitled to serve Payment Responses no later than 30 calendar days after receipt of Payment Claims?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 11A:

Do you agree that in the absence of express agreement, parties undertaking work or providing services, materials or plant should be entitled to make Payment Claims at calendar month Payment Intervals?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 11B:

Do you agree that in the absence of express agreement, payments due should be calculated based on the value of work, services, materials or plant provided and with valuations based on any relevant contract price or pricing or in the absence of the same on market rates prevailing at the time the contract was entered into?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 11C:

Do you agree that in the absence of express agreement, paying parties should be entitled to serve a Payment Response within 30 calendar days of receiving the Payment Claim?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 11D:

Do you agree that in the absence of express agreement, the Payment Period for any amount due should be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payments) after receipt of a Payment Claim?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 12A:

Do you agree that paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of Payment Claims should not be automatically liable to pay the full amount of the Payment Claim?

View: **Agree** **Disagree** (Please add √ to as appropriate)

Question 12B:

Do you agree that paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of a Payment Claim should not be able to raise any set off against amounts properly due against the Payment Claim?

View: Agree Disagree (Please add √ to as appropriate)

Question 13A:

Do you agree that 'pay when paid' clauses should be rendered ineffective?

View: Agree Disagree (Please add √ to as appropriate)

Question 13B:

Do you agree that 'pay when paid' clauses should be ineffective even where the reason for non-payment is insolvency higher in the supply chain?

View: Agree Disagree (Please add √ to as appropriate)

Question 14A:

Do you agree that clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be rendered ineffective?

View: Agree Disagree (Please add √ to as appropriate)

Question 14B:

Do you agree that no exception should be made for nominated sub-contractors?

View: Agree Disagree (Please add √ to as appropriate)

Question 15:

Do you agree that Hong Kong's SOPL should introduce a right for parties to suspend all or part of their works or reduce the rate of progress in the event of non-payment?

View: Agree Disagree (Please add √ to as appropriate)

Question 16:

Do you agree that the right to suspend or reduce the rate of progress should only arise after either non-payment of an adjudicator's decision or non-payment of an amount admitted as due in a Payment Response?

View: Agree Disagree (Please add √ to as appropriate)

Question 17A:

Do you agree that parties which suspend or slow work for non-payment should have rights to additional time to complete their obligations and to reasonable costs and expenses in respect of delay and disruption arising from the suspension?

View: Agree Disagree (Please add \surd to as appropriate)

Question 17B:

If your answer to Question 17A is agreed, then which is your preferred option for establishing the party's obligations to resume work and entitlement to additional time?

(i) entitlement to additional time is to reflect all delay arising out of the suspension which will allow consideration of the periods required for resumption of work and achievement of full rates of production based on the circumstances of each case; or

View: Agree Disagree (Please add \surd to as appropriate)

(ii) there is an express obligation for work to be resumed within a set period of time after payment is made and the entitlement to additional time is limited to the period from which suspension starts to the expiry of the set period of time for resumption of work; or

View: Agree Disagree (Please add \surd to as appropriate)

(iii) a hybrid of (i) and (ii) above where there is a set period within which work must be resumed but account can be taken of other circumstances such as where work cannot be fully resumed or full rates of production achieved by the expiry of the set period.

View: Agree Disagree (Please add \surd to as appropriate)

If your preferred option is (ii) or (iii), what should the set period for resumption of work after payment be (in working days)?

View: Period of working days

Question 18A:

Do you agree that unpaid parties should be obliged to give written notice of their intention to suspend to the non-paying party and (if known) to any party which pays the non paying party (the "principal") and to the site owner?

View: Agree Disagree (Please add \surd to as appropriate)

Question 18B:

Option (i) – Should a single notice period be adopted for all circumstances? If so, what would an appropriate notice period be (in working days)?

Option (ii) – Should there be different notice periods for non-payment of amounts admitted as due in a Payment Response and non-payment of adjudicators' decisions? If so, what would an appropriate notice period be (in working days) for each?

View: (i) single notice period (ii) different notice period (Please add \surd to as appropriate)

- (i) Single Notice Period : working days
- (ii) Different Notice Periods :
 - after non-payment of amount admitted as due in a Payment Response : working days
 - after non-payment of adjudicator's decisions : working days

Question 19A:

Do you agree that both parties to a contract should be entitled to refer disputes to adjudication?

View: Agree Disagree (Please add \surd to as appropriate)

Question 19B:

Do you agree that the right to adjudicate should be limited to disputes relating to the following:

- a) the valuation of work, services, materials and plant supplied and claimed in a Payment Claim; and/or

View: Agree Disagree (Please add \surd to as appropriate)

- b) other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or

View: Agree Disagree (Please add \surd to as appropriate)

- c) set offs and deductions against amounts due under Payment Claims; and/or

View: Agree Disagree (Please add \surd to as appropriate)

- d) the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract?

View: Agree Disagree (Please add \surd to as appropriate)

Question 20A:

Do you agree that there should be a time limit for commencement of adjudication of 28 calendar days from either:

- a) non-payment of an amount admitted as due in a Payment Response; or

View: Agree Disagree (Please add √ to as appropriate)

- b) service of a Payment Response disputing all or part of a Payment Claim and/or identifying amounts to be set off against or deducted from amounts otherwise due in respect of the Payment Claim; or

View: Agree Disagree (Please add √ to as appropriate)

- c) the failure of the paying party to serve a Payment Response in relation to the Payment Claim within the required time?

View: Agree Disagree (Please add √ to as appropriate)

- d) a dispute arising as to the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract by one of the parties to the contract.

View: Agree Disagree (Please add √ to as appropriate)

Question 20B:

If not 28 calendar days then what period do you consider appropriate?

Comments

If more space is required please continue in the box provided at the end of this response form.

Question 21A:

Do you agree that the adjudication procedure should have the following key features:

- a) The claiming party will commence adjudication by serving on the other party a notice of adjudication setting out brief details of the parties, the nature of the dispute and the redress sought.

View: Agree Disagree (Please add √ to as appropriate)

- b) The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) from HKIAC within 5 working days of commencement.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- c) The claiming party must serve their submissions together with all supporting evidence they rely on (which may include documents, photographs, witness statements and expert reports) on the responding party on or before the date of appointment of the adjudicator and on the adjudicator on the day of their appointment or the next working day.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- d) The responding party has 20 working days from receipt of the claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- e) The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from the date of appointment of the adjudicator and to in excess of 55 working days if both parties agree.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- f) The adjudicator shall have the power to vary the time for the responding party to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manner as they think fit including being able to require further submissions and evidence from either party, to call meetings with the parties, to inspect relevant matters and set deadlines and issue procedural directions provided always that the adjudication can be concluded within 55 working days from the date of appointment of the adjudicator or any agreed extended period.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- g) The adjudicator shall be entitled to disregard any submission or evidence or part thereof submitted by the claiming party to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served with a Payment Claim or otherwise in advance of the notice of adjudication and which cannot fairly be considered and responded to by the responding party in the adjudication.

View: **Agree** **Disagree** (Please add √ to as appropriate)

- h) The adjudicator shall be entitled to resign if they consider that it is not possible to decide the dispute fairly in the time available (being the maximum time available including any extended periods agreed by the parties).

View: Agree Disagree (Please add √ to as appropriate)

- i) Each party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator's fees and expenses or the proportions in which they are to be jointly paid by the parties.

View: Agree Disagree (Please add √ to as appropriate)

Question 21B:

Do you agree that adjudicators should have the power to remit disputes back to the parties where a claiming party introduces significant new material in an adjudication?

View: Agree Disagree (Please add √ to as appropriate)

Question 22A:

Do you agree that parties should be free to agree adjudicator nominating bodies ("ANBs") in their contract?

View: Agree Disagree (Please add √ to as appropriate)

Question 22B:

Do you agree that parties should be free to agree an adjudicator for a specific dispute but only after the dispute and right to adjudicate has arisen?

View: Agree Disagree (Please add √ to as appropriate)

Question 22C:

Do you agree that where no ANB is agreed in the contract and where no adjudicator is agreed after a dispute has arisen, the Hong Kong International Arbitration Centre should be the default ANB?

View: Agree Disagree (Please add √ to as appropriate)

Question 23:

Do you agree that Hong Kong's SOPL should include provision allowing adjudicator's decisions to be enforced in the same way as judgments of the court and without set off or deduction and allowing responding parties only a short period within which to lodge any challenge to validity?

View: Agree Disagree (Please add √ to as appropriate)

Comments

Notes:

1. It is optional for you to provide your personal information in Part 1 of this response form.
2. The names and views of individuals and organisations which put forth submissions in response to this Consultation Document (“senders”) may be published for public viewing after conclusion of the public consultation exercise. The Government may, either in discussion with others (whether privately or publicly), or in any subsequent report, attribute comments submitted in response to this Consultation Document.
3. We will respect the wishes of senders to remain anonymous and / or keep the views confidential in part or in whole. If the senders request anonymity in the submissions, their names will be removed when publishing their views. If the senders request confidentiality of their views, their submissions will not be published.
4. If the senders do not request anonymity or confidentiality in the submissions, it will be assumed that the senders can be named and the views can be published in their entirety.
5. To safeguard senders’ data privacy, we will remove senders’ relevant data (if provided), such as telephone numbers, email addresses, residential / return addresses, identity card numbers, facsimile numbers and signatures when publishing their submissions.
6. Provision of any personal data in this response form is voluntary. Any personal data provided may be transferred to the relevant Government bureaux and departments for purposes directly related to this consultation exercise. The Government bureaux and departments receiving the data are bound by such purposes in their subsequent use of such data. Any sender providing personal data to us in the submission will have the rights of access and correction with respect to such personal data. Requests for data access and correction should be made in writing to:

Address: Works Polices 1 Section, Development Bureau, 15/F, West Wing, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong

Fax: (+852) 3167 2630

Email: sop_consultation@devb.gov.hk

擬議建造業付款保障條例公眾諮詢

Public Consultation
on Proposed Security of Payment Legislation
for the Construction Industry

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工務政策一組

Development Bureau
Works Policies 1 Section
15/F, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Please fold and seal here 請在此對摺及封口

Appendix C

Membership of Working Group on Security of Payment Legislation for the Construction Industry

The Association of Architectural Practices

The Association of Consulting Engineers of Hong Kong

Construction Industry Council

Development Bureau

Hong Kong Construction Sub-Contractors Association

The Hong Kong Institute of Architects

The Hong Kong Institution of Engineers

Hong Kong International Arbitration Centre

Hong Kong Housing Authority

MTR Corporation Limited

The Chartered Institution of Civil Engineering Surveyors

The Hong Kong Construction Association Limited

The Hong Kong Federation of Electrical and Mechanical Contractors Limited

The Hong Kong Institute of Surveyors

The Real Estate Developers Association of Hong Kong

(Also in attendance: the consultant – Pinsent Masons)



發展局
Development Bureau