

PROPOSED SECURITY OF PAYMENT LEGISLATION FOR HONG KONG'S CONSTRUCTION INDUSTRY



- Joseph Chung

In June 2015, the Development Bureau (DEVB) of the Hong Kong Government issued a consultation document on the "Proposed Security of Payment Legislation for the Construction Industry". In April 2016, following the consultation period (which received some 1116 responses), the DEVB issued a Report, detailing its findings and conclusions, which support the introduction of Security of Payment Legislation (SOPL). The background to the consultation paper and details of the consultation paper itself are outlined in our previous article "Security of Payment Legislation for the Construction Industry proposed in Hong Kong".

The aim of the SOPL is to help main contractors, sub-contractors, consultants and suppliers receive payments on time for their work and provide a mechanism whereby disputes can be resolved quickly and to bring Hong Kong in line with other common law jurisdictions which already have such legislation to address similar problems, such as the United Kingdom, Australia, New Zealand, Singapore and Malaysia.

The Report concludes that although there was a divergence of views in respect of some aspects of the proposed framework, there was positive support for SOPL and the Government intends to proceed with the legislation. The next step is for the DEVB to finalise the framework for the legislation and prepare a Bill for submission to the Legislative Council.

The Report states that the following key elements of SOPL received particular positive public support:

- SOPL applying to all Government contracts and contracts entered into by specified statutory and/or public bodies and corporations.
- Limiting the coverage of SOPL to contracts relating to construction activities in Hong Kong.
- SOPL applying to contracts for the supply of materials or plant.
- Retaining full freedom for parties to agree when payments can be claimed and the basis of valuation of the same, but limiting the maximum payment periods which can be imposed once a party is entitled to claim.
- Providing a recognised mechanism to ensure those who undertake work or provide services, materials or plant can claim payments and payers can respond to the same.
- Providing "default" payment terms in the event that parties do not make express provision in their contracts as to when payments can be claimed, how they are to be valued and responded to and when amounts due must be paid.

- No set off against a payment claim to be allowed unless notified in a timely payment response.

- “Pay when paid” and conditional payment provisions will be unenforceable, including in relation to nominated sub-contracts.

- Parties who have not been paid an amount admitted as due in a payment response or decided as due by an adjudicator will be entitled to suspend or slow down works and will be entitled to additional costs and extensions of time to compensate them for any resulting delays.

- Either party to a contract will be entitled to refer disputes arising in relation to payment claims to adjudication within 55 working days (or a longer period agreed by the parties). There is a 28 calendar day time limit for commencing adjudication once a right to adjudicate arises.

- Parties are free to agree adjudicator nominating bodies in their contracts.

- Adjudicators’ decisions to be enforced in the same way as court judgments without set off or deduction and allowing paying parties only a short period within which to challenge the enforceability of a decision.

The Report also sets out a number of issues on which divergent views were received and which require further consideration, as follows:

- Whether private sector coverage should be limited to contracts for “new buildings” with a main contract value in excess of HK

\$5million.

- Whether SOPL should apply to oral (and partly oral) as well as written contracts.

- Whether SOPL should apply to professional services contracts.

- The setting of appropriate maximum permissible payment periods and whether there should be different periods applicable to interim and final payments. The setting of the maximum period to be allowed to payers to respond to a payment claim.

- Whether payers who fail to serve a timely payment response should or should not be automatically liable to pay the full amount of the relevant payment claim.

- Whether parties should be entitled to refer disputes in relation to extension of time under the contracts to adjudication.

- Whether a better process/procedure is needed for appointment of an adjudicator and referral of the dispute to the adjudicator once a notice of adjudication is served.

- Whether parties should only be able to agree an adjudicator after a dispute has arisen or whether it would be better if they could do so in their contracts or after their contracts are entered into.

- Whether the default nominating body should be HKIAC or whether a different or other bodies should be able to carry out default nominations of adjudicators.



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