

For information
21 June 2016

Legislative Council Panel on Development

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

Purpose

This paper briefs Members on the results of the public consultation, the legislative framework and the way forward for the proposed Security of Payment Legislation for the Construction Industry (SOPL).

Background

2. SOPL promotes fair payment and helps main contractors, sub-contractors, consultants, sub-consultants and suppliers to receive payment on time for work done and services provided. Legislations similar to SOPL have been enacted in the United Kingdom (UK), Australia, New Zealand, Singapore, Malaysia and Ireland since 1996.

3. There have been voices in the Hong Kong construction industry advocating the introduction of SOPL to improve payment practices and provide rapid dispute resolution. The Development Bureau (DEVB) and the Construction Industry Council (CIC) jointly conducted an industry-wide survey¹ in 2011. The survey revealed that significant payments problems being experienced by main contractors, sub-contractors, consultants, sub-consultants and suppliers. Particular problems included the use of “pay when paid” clauses and payment being delayed by disputes. Unpaid parties were often obliged to continue performing and funding their work increasing the financial pressure and risks they face. The Secretary for Development advised the Legislative Council on 22 June 2012 that the Government would study the enactment of SOPL. The CIC issued the “Report on Security of Payment Legislation to Improve Payment Practices in the Construction Industry” recommending introduction of SOPL in August 2012.

¹ The Survey on Payment Practice in the Construction Industry Executive Summary has been uploaded to the DEVB website at http://www.devb.gov.hk/filemanager/en/content_31/Survey_on_Payment_Practicce_in_the_Construction_Industry_Executive_Summary.pdf

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

5. In October 2012, DEVB set up a Working Group on Security of Payment Legislation for the Construction Industry (the Working Group) comprising representatives from developers and public bodies, professional institutions, consulting and contracting trade associations. The Working Group discussed the options and issues for the proposed legislation identified by the consultant under the following broad headings –

- scope of coverage;
- payment;
- prohibition of “pay when paid” and conditional payment;
- suspension for non-payment; and
- adjudication and enforcement.

6. After thorough studies and making reference to overseas practices, the Working Group recommended to legislate on security of payment and reached consensus on the draft legislative framework of the SOPL (**Enclosure 1**) in November 2014.

Public Consultation

7. DEVB prepared the Consultation Document² based on the draft legislative framework and launched the 3-month public consultation for the SOPL on 1 June 2015. Consultation activities included –

- 2 stakeholder and 2 public consultation forums were held and attended by more than 260 people;
- 10 briefing sessions / meetings with professional bodies and trade associations;

² The Consultation Document has been uploaded to the DEVB website at http://www.devb.gov.hk/filemanager/en/content_880/SOPL_Consultation_Document.pdf

- posting of the consultation on the Public Affairs Forum, the Business Consultation e-Platform and the Trade and Industry Department's E-newsletter; and
- promulgation of the consultation through TV and radio API (announcement of public interest), newspaper advertisement.

Soft copies of the bi-lingual Consultation Document, leaflets, summary and guide and posters together with radio and TV announcements of public interests (API) were uploaded onto the website of DEVB whereas hard copies were available from the Public Enquiry Centers of the District Offices, public libraries. The Consultation Document was also mailed to Legislative Councilors, District Councilors and stakeholders by post.

Responses to Public Consultation

8. A total of 1 116 written responses were received by post, email and fax. The Report on Public Consultation has been uploaded to the DEVB website for viewing and downloading³. A summary of the responses is at **Enclosure 2**.

Way Forward

9. There has been an enthusiastic response to the public consultation. The responses show that there is general public support on the proposed legislation and consensus on majority of the key issues of the legislative framework. We summarise at **Enclosure 3** the main issues with positive support and the broad directions ahead. The Government will continue to further consider the views of the public and stakeholders on the remaining issues summarised in **Enclosure 4**.

10. The Government will proceed with the legislative work with the aim of introducing the bill to the Legislative Council in 2017.

³ The Report on Public Consultation has been uploaded to the DEVB website at http://www.devb.gov.hk/filemanager/en/content_880/SOPL_consultation_report.pdf

Advice Sought

11. Members are invited to note the results of public consultation, issues of concerns and way forward for the legislation on security of payment for the construction industry.

Development Bureau

June 2016

Proposed Security of Payment Legislation for the Construction Industry (SOPL)

Draft Legislative Framework

Scope of application

- In the public sector, SOPL shall apply to all construction works and consultancy contracts entered into by the Government and 31 specified statutory/public bodies and corporations (**Enclosure 5**).
- In the private sector¹, SOPL shall apply to construction works contracts for “new buildings” as defined in the Buildings Ordinance with original contract value exceeding \$5 million (\$0.5 million for professional services contracts).
- When the main contract is covered by SOPL, sub-contracts at all tiers irrespective of contract value will be covered by SOPL.
- SOPL shall cover oral, partly oral and written contracts.
- SOPL shall cover contracts for professional services, supply of materials or plant.

Payment

- Parties shall be free to agree when payments can be claimed and the basis of valuation of work or services.
- Default payment terms will apply if parties do not make express provisions in their contracts.
- Paying parties shall be entitled to serve payment response within 30 calendar days of receipt of a payment claim. Paying parties who fail to serve Payment Response within 30 calendar days of receipt of a payment claim shall not be automatically liable to the full amount of the payment claim but will not be able to raise any set off against amounts properly due against the payment claim.

¹ For the purpose of this Paper, private sector refers to any non-government organisation/company which is not on the list of specified statutory and/or public bodies and corporations at Enclosure 5.

“Pay when paid” clauses

- “Pay when paid” type contractual clauses shall be rendered ineffective, without exception for insolvency of and nominated sub-contracts.

Suspension on non-payment

- Unpaid parties shall have the right to suspend or reduce progress of work by giving written notice of their intention of suspension to the non-paying party, the principal² and the site owner.
- Unpaid parties shall be entitled to costs and additional time in respect of delay and disruption arising from the suspension.

Adjudication

- Both parties shall have the right to refer disputes related to payment, time for performance or entitlement to extension of time for performance to adjudication within 28 calendar days of dispute arises.
- The adjudicator shall publish his decision within 55 working days of appointment.
- Procedure for nomination of adjudicator –
 - ✧ nomination by the adjudicator nominating body (ANB) in the contract;
 - ✧ parties to agree an adjudicator for specific dispute but only after the dispute and the right to adjudicate has arisen; and
 - ✧ if there is no ANB agreed in the contract and if there is no adjudicator agreed for the dispute, the Hong Kong International Arbitration Centre (HKIAC) should be the default ANB.
- Adjudicator’s decisions shall be enforced in the same way as court judgments.

² The principal means the party who pays the non-paying party along the same supply chain.

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

Summary of Consultation Responses

General Note

The responses were classified as:

- (i) “Agree” or “Disagree” if the respondents gave a definite “agree” or “disagree” answer
- (ii) “Other” if the respondents did not explicitly indicate “agree” or “disagree”
- (iii) “Did not answer” if the respondents did not respond to the question

Scope of SOPL

Question 1(1): Do you agree that Hong Kong’s SOPL should apply to 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 the Consultation Document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier?

	Agree	Disagree	Did not answer	Other	total
Association	31 (76%)	0 (0%)	9 (23%)	1 (2%)	41
Company	165 (93%)	1 (1%)	12 (7%)	0 (0%)	178
Individual	657 (73%)	17 (2%)	223 (25%)	0 (0%)	897
Total	853 (76%)	18 (2%)	244 (22%)	1 (0%)	1 116

Question 1(2): Do you agree that Hong Kong’s SOPL should apply to private sector contracts¹ 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)?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	9 (22%)	9 (23%)	1 (2%)	41
Company	137 (77%)	30 (17%)	11 (6%)	0 (0%)	178
Individual	372 (41%)	304 (34%)	221 (25%)	0 (0%)	897
Total	531 (47%)	343 (31%)	241 (22%)	1 (0%)	1 116

Question 2: Do you agree that if private sector main contract is not subject to the SOPL then all lower sub-contracts will not be subject to 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?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	1 (2%)	10 (24%)	3 (7%)	41
Company	157 (88%)	10 (6%)	11 (6%)	0 (0%)	178
Individual	656 (73%)	19 (1%)	222 (25%)	0 (0%)	897
Total	840 (75%)	30 (3%)	243 (22%)	3 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	2 (5%)	9 (22%)	2 (5%)	41
Company	163 (91%)	4 (2%)	11 (6%)	0 (0%)	178
Individual	658 (73%)	17 (2%)	222 (25%)	0 (0%)	897
Total	849 (76%)	23 (2%)	242 (22%)	2 (0%)	1 116

¹ For the purpose of Question 1(2) and this Paper, private sector contracts are those contracts not covered by Question 1(2) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Enclosure 5 of this Paper.

Question 4: Should Hong Kong's SOPL apply to oral and partly oral contracts as well as written contracts? Or only contracts in writing or evidenced in writing?

	Oral and partly oral contacts	Only written contracts	Did not answer	Other	total
Association	15 (37%)	17 (41%)	9 (22%)	0 (0%)	41
Company	102 (57%)	61 (34%)	13 (7%)	2 (1%)	178
Individual	499 (56%)	172 (19%)	225 (25%)	1 (0%)	897
Total	616 (55%)	250 (22%)	247 (22%)	3 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	12 (29%)	0 (0%)	41
Company	164 (92%)	6 (3%)	7 (4%)	1 (1%)	178
Individual	608 (68%)	278 (31%)	10 (1%)	1 (0%)	897
Total	799 (72%)	286 (26%)	29 (2%)	2 (0%)	1 116

Question 6: Do you agree that contracts for 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?

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	5 (12%)	14 (34%)	1 (2%)	41
Company	135 (76%)	10 (6%)	33 (19%)	0 (0%)	178
Individual	592 (66%)	20 (2%)	238 (27%)	47 (5%)	897
Total	748 (67%)	35 (3%)	285 (26%)	48 (4%)	1 116

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 works carried out?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	11 (27%)	1 (2%)	41
Company	142 (80%)	2 (1%)	34 (19%)	0 (0%)	178
Individual	625 (70%)	34 (4%)	237 (26%)	1 (0%)	897
Total	794 (71%)	38 (4%)	282 (25%)	2 (0%)	1 116

Payment

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 calculation amounts due?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	2 (5%)	9 (22%)	2 (5%)	41
Company	152 (85%)	14 (8%)	12 (7%)	0 (0%)	178
Individual	435 (48%)	237 (26%)	224 (25%)	1 (0%)	897
Total	615 (55%)	253 (23%)	245 (22%)	3 (0%)	1 116

Question 9: Do you agree that the maximum Payment Periods which can be agreed for payments should be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments?

	Agree	Disagree	Did not answer	Other	total
Association	18 (44%)	12 (29%)	9 (22%)	2 (5%)	41
Company	93 (52%)	74 (42%)	11 (6%)	0 (0%)	178
Individual	178 (20%)	493 (55%)	225 (25%)	1 (0%)	897
Total	289 (26%)	579 (52%)	245 (22%)	3 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	9 (22%)	3 (7%)	41
Company	162 (91%)	4 (2%)	11 (6%)	1 (1%)	178
Individual	613 (68%)	9 (1%)	227 (25%)	48 (5%)	897
Total	802 (72%)	15 (1%)	247 (22%)	52 (5%)	1 116

Question 10B: Do you agree that paying parties should be entitled to serve Payment Response no later than 30 calendar days after receipt of Payment Claims?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	8 (20%)	11 (27%)	0 (0%)	41
Company	95 (53%)	72 (40%)	11 (6%)	0 (0%)	178
Individual	241 (27%)	430 (48%)	225 (25%)	1 (5%)	897
Total	358 (32%)	510 (46%)	247 (22%)	1 (5%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	4 (10%)	9 (22%)	2 (5%)	41
Company	162 (91%)	5 (3%)	11 (6%)	0 (0%)	178
Individual	609 (68%)	13 (1%)	228 (25%)	47 (5%)	897
Total	797 (72%)	22 (2%)	248 (22%)	49 (4%)	1 116

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 valuation based on any relevant contract price or pricing or in the absence of the same on the market rates prevailing at the time the contract was entered into?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	3 (7%)	10 (24%)	2 (5%)	41
Company	164 (92%)	3 (2%)	11 (6%)	0 (0%)	178
Individual	614 (68%)	9 (1%)	226 (25%)	48 (5%)	897
Total	804 (72%)	15 (1%)	247 (22%)	50 (4%)	1 116

Question 11C: Do you agree that in the absence of express agreement, paying parties should be entitled to serve Payment Response within 30 calendar days of receiving the Payment Claim?

	Agree	Disagree	Did not answer	Other	total
Association	17 (41%)	12 (29%)	10 (24%)	2 (5%)	41
Company	95 (53%)	71 (40%)	12 (7%)	0 (0%)	178
Individual	193 (22%)	429 (48%)	226 (25%)	49 (5%)	897
Total	305 (27%)	512 (46%)	248 (22%)	51 (5%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	15 (37%)	14 (34%)	10 (24%)	2 (5%)	41
Company	75 (42%)	92 (52%)	11 (6%)	0 (0%)	178
Individual	130 (14%)	539 (60%)	226 (25%)	2 (0%)	897
Total	220 (20%)	645 (58%)	247 (22%)	4 (0%)	1 116

Question 12A: Do you agree that paying parties who fail to serve Payment Response 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?

	Agree	Disagree	Did not answer	Other	total
Association	16 (39%)	13 (32%)	11 (27%)	1 (2%)	41
Company	63 (35%)	104 (58%)	11 (6%)	0 (0%)	178
Individual	119 (13%)	506 (56%)	224 (25%)	48 (1%)	897
Total	198 (18%)	623 (56%)	246 (22%)	49 (4%)	1 116

Question 12B: Do you agree that paying parties who fail to serve Payment Response 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?

	Agree	Disagree	Did not answer	Other	total
Association	25 (61%)	7 (17%)	9 (22%)	0 (0%)	41
Company	144 (81%)	23 (13%)	11 (6%)	0 (0%)	178
Individual	419 (47%)	252 (28%)	225 (25%)	1 (0%)	897
Total	588 (53%)	282 (25%)	245 (22%)	1 (0%)	1 116

Prohibition of “Pay when paid” and Conditional Payment

Question13A: Do you agree that “pay when paid” clauses should be rendered ineffective?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	5 (12%)	7 (17%)	3 (7%)	41
Company	159 (89%)	7 (4%)	6 (3%)	6 (3%)	178
Individual	603 (67%)	72 (8%)	11 (1%)	211 (24%)	897
Total	788 (71%)	84 (7%)	24 (2%)	220 (20%)	1 116

Question13B: Do you agree that “pay when paid” clauses should be rendered ineffective even where the reason of non-payment is insolvency higher in the supply chain?

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	8 (20%)	8 (20%)	2 (5%)	41
Company	154 (87%)	12 (7%)	11 (6%)	1 (1%)	178
Individual	592 (66%)	81 (9%)	224 (25%)	0 (0%)	897
Total	769 (69%)	101 (9%)	243 (22%)	3 (0%)	1 116

Question14A: 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?

	Agree	Disagree	Did not answer	other	total
Association	25 (61%)	5 (12%)	9 (22%)	2 (5%)	41
Company	145 (81%)	21 (12%)	12 (7%)	0 (0%)	178
Individual	370 (41%)	303 (34%)	223 (25%)	1 (0%)	897
Total	540 (48%)	329 (30%)	244 (22%)	3 (0%)	1 116

Question14B: Do you agree that no exception should be made for nominated sub-contractors?

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	10 (24%)	7 (17%)	3 (7%)	41
Company	154 (87%)	12 (7%)	12 (7%)	0 (0%)	178
Individual	601 (67%)	71 (8%)	225 (25%)	0 (0%)	897
Total	776 (70%)	93 (8%)	244 (22%)	3 (0%)	1 116

Suspension for Non-Payment

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?

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	8 (20%)	1 (2%)	41
Company	163 (92%)	4 (2%)	11 (6%)	0 (0%)	178
Individual	607 (68%)	68 (8%)	222 (25%)	0 (0%)	897
Total	800 (72%)	74 (7%)	241 (21%)	1 (0%)	1 116

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 amount admitted as due in a Payment Response?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	5 (12%)	8 (20%)	1 (2%)	41
Company	159 (89%)	8 (4%)	11 (6%)	0 (0%)	178
Individual	608 (68%)	66 (7%)	222 (25%)	1 (0%)	897
Total	794 (71%)	79 (7%)	241 (22%)	2 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	4 (10%)	10 (24%)	0 (0%)	41
Company	165 (93%)	2 (1%)	11 (6%)	0 (0%)	178
Individual	611 (68%)	62 (7%)	223 (25%)	1 (0%)	897
Total	803 (72%)	68 (6%)	244 (22%)	1 (0%)	1 116

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?

Question 17B(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

	Agree	Disagree	Did not answer	Other	total
Association	7 (17%)	6 (15%)	26 (63%)	2 (5%)	41
Company	37 (21%)	16 (9%)	125 (70%)	0 (0%)	178
Individual	92 (10%)	29 (3%)	728 (81%)	48 (5%)	897
Total	136 (12%)	51 (5%)	879 (79%)	50 (4%)	1 116

Question 17B(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 from which suspension starts to the expiry of the set period for resumption of work; or

	Agree	Disagree	Did not answer	Other	total
Association	5 (12%)	8 (20%)	26 (63%)	2 (5%)	41
Company	37 (21%)	18 (10%)	123 (69%)	0 (0%)	178
Individual	91 (10%)	27 (3%)	731 (81%)	48 (5%)	897
Total	133 (12%)	53 (5%)	880 (79%)	50 (4%)	1 116

Question 17B(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.

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	4 (10%)	12 (29%)	2 (5%)	41
Company	152 (85%)	10 (6%)	16 (9%)	0 (0%)	178
Individual	591 (66%)	12 (1%)	246 (27%)	48 (5%)	897
Total	766 (69%)	26 (2%)	274 (25%)	50 (4%)	1 116

Question 17B: If your preferred option is (ii) or (iii), what should be the set period for resumption of work after payment be (in working days)?

1 to 4 working day: 18 responses
 5 to 6 working days: 13 responses
 7 working days: 373 responses
 8 working days: 2 responses
 10 working days: 315 responses
 12 working days: 1 response
 14 working days: 23 responses
 21 to 30 working days: 7 responses
 Other periods: 4 responses
 Other comments: 48 responses
No input: 312 responses
 1 116 responses

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 the party which pays the non-paying party (the “principal”) and to the site owner?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	4 (10%)	10 (24%)	1 (2%)	41
Company	162 (93%)	4 (2%)	12 (7%)	0 (0%)	178
Individual	621 (69%)	52 (6%)	223 (25%)	1 (0%)	897
Total	809 (73%)	60 (5%)	245 (22%)	2 (0%)	1 116

Question 18B: Option (i) - Should a single notice period be adopted for all circumstances? If so, what would be 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 adjudicator’s decisions? If so, what would be an appropriate notice period be (in working days) for each?

	Single Notice Period	Different Notice Periods	Did not answer	Other	total
Association	24 (59%)	6 (15%)	10 (24%)	1 (2%)	41
Company	151 (85%)	12 (7%)	14 (8%)	1 (1%)	178
Individual	584 (65%)	81 (9%)	231 (26%)	1 (0%)	897
Total	759 (68%)	99 (9%)	255 (23%)	3 (0%)	1 116

Question 18B: Option (i) Single Notice Period

1 working day:	244 responses
2 to 3 working days:	6 responses
5 working days:	321 responses
6 working days:	4 responses
7 working days:	139 responses
10 to 30 working days:	34 responses
Other comment:	8 responses
<u>Not answered:</u>	<u>360 responses</u>
	1 116 responses

Option (ii) Different Notice Periods

After non-payment of amount admitted as due in a Payment Response

3 to 6 working days:	6 responses
7 working days:	21 responses
10 working days:	13 responses
12 to 15 working days:	5 responses
30 to 60 working days:	7 responses
<u>Not answered:</u>	<u>1 063 responses</u>
	1 116 responses

After non-payment of adjudicator's decision

1 to 3 working days:	4 responses
5 working days:	16 responses
6 working days:	1 responses
7 working days:	20 responses
8 to 14 working days:	5 responses
20 to 30 working days:	7 responses
<u>Not answered:</u>	<u>1 063 responses</u>
	1 116 responses

Adjudication and Enforcement

Question19A: Do you agree that both parties to a contract should be entitled to refer disputes to adjudication?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	4 (10%)	9 (22%)	0 (0%)	41
Company	157 (88%)	10 (6%)	11 (6%)	0 (0%)	178
Individual	659 (73%)	15 (2%)	222 (25%)	1 (0%)	897
Total	844 (76%)	29 (2%)	242 (22%)	1 (0%)	1 116

Question 19B: Do you agree that the right to adjudicate should be limited to disputes related to the following:

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

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	9 (22%)	0 (0%)	41
Company	164 (92%)	8 (4%)	6 (3%)	0 (0%)	178
Individual	612 (68%)	268 (30%)	12 (1%)	5 (1%)	897
Total	806 (72%)	278 (25%)	27 (2%)	5 (0%)	1 116

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

	Agree	Disagree	Did not answer	Other	total
Association	29 (71%)	3 (7%)	9 (22%)	0 (0%)	41
Company	163 (92%)	9 (5%)	6 (3%)	0 (0%)	178
Individual	612 (68%)	270 (30%)	10 (1%)	5 (1%)	897
Total	804 (72%)	282 (25%)	25 (2%)	5 (0%)	1,116

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

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	9 (22%)	0 (0%)	41
Company	160 (90%)	12 (7%)	6 (3%)	0 (0%)	178
Individual	613 (68%)	270 (30%)	10 (1%)	4 (0%)	897
Total	803 (72%)	284 (26%)	25 (2%)	4 (0%)	1 116

(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?

	Agree	Disagree	Did not answer	Other	total
Association	63 (63%)	4 (10%)	9 (22%)	2 (5%)	41
Company	156 (88%)	16 (9%)	6 (3%)	0 (0%)	178
Individual	594 (66%)	289 (32%)	11 (1%)	3 (0%)	897
Total	776 (70%)	309 (28%)	26 (2%)	5 (0%)	1 116

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 amount admitted as due in a Payment Response; or

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	3 (7%)	9 (22%)	2 (5%)	41
Company	148 (83%)	4 (2%)	26 (15%)	0 (0%)	178
Individual	648 (72%)	15 (2%)	233 (26%)	1 (0%)	897
Total	823 (74%)	22 (2%)	268 (24%)	3 (0%)	1 116

(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

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	6 (15%)	9 (22%)	2 (5%)	41
Company	145 (81%)	6 (3%)	27 (15%)	0 (0%)	178
Individual	597 (67%)	54 (7%)	234 (26%)	1 (0%)	897
Total	766 (69%)	77 (7%)	270 (24%)	3 (0%)	1 116

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

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	7 (17%)	8 (20%)	2 (5%)	41
Company	159 (89%)	5 (3%)	14 (8%)	0 (0%)	178
Individual	605 (67%)	64 (7%)	227 (26%)	1 (0%)	897
Total	788 (71%)	76 (7%)	249 (22%)	3 (0%)	1 116

- (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.

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	7 (17%)	10 (24%)	2 (5%)	41
Company	143 (80%)	10 (6%)	25 (14%)	0 (0%)	178
Individual	578 (64%)	84 (9%)	234 (26%)	1 (0%)	897
Total	743 (67%)	101 (9%)	269 (24%)	3 (0%)	1 116

Question 20B: If not 28 calendar days then what period do you consider appropriate?

3 to 7 days:	3 responses
14 days:	256 responses
15 days:	2 responses
21 days:	65 responses
28 days:	2 responses
29 to 60 days:	7 responses
Any time/no time limit:	4 responses
Other comments:	56 responses
<u>Not answered:</u>	<u>721 responses</u>
	1 116 responses

Question 21A: Do you agree that the adjudication procedure should have the following features?

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

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	0 (0%)	10 (24%)	3 (7%)	41
Company	166 (93%)	0 (0%)	12 (7%)	0 (0%)	178
Individual	668 (74%)	5 (1%)	223 (25%)	1 (0%)	897
Total	862 (77%)	5 (1%)	245 (22%)	4 (0%)	1 116

- (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.

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	2 (5%)	11 (27%)	4 (10%)	41
Company	160 (90%)	6 (3%)	12 (7%)	0 (0%)	178
Individual	608 (68%)	65 (7%)	223 (25%)	1 (0%)	897
Total	792 (71%)	73 (7%)	246 (22%)	5 (0%)	1 116

- (c) The claiming party must serve their submission 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.

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	10 (24%)	2 (5%)	41
Company	166 (93%)	5 (3%)	7 (4%)	0 (0%)	178
Individual	658 (73%)	222 (25%)	13 (1%)	4 (0%)	897
Total	851 (76%)	229 (20%)	30 (3%)	6 (1%)	1 116

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

	Agree	Disagree	Did not answer	Other	total
Association	16 (39%)	12 (29%)	11 (27%)	2 (5%)	41
Company	97 (54%)	69 (39%)	12 (7%)	0 (0%)	178
Individual	191 (21%)	482 (54%)	223 (25%)	1 (0%)	897
Total	304 (27%)	563 (51%)	246 (22%)	3 (0%)	1 116

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

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	6 (15%)	10 (24%)	2 (5%)	41
Company	119 (67%)	48 (27%)	11 (6%)	0 (0%)	178
Individual	476 (53%)	197 (22%)	223 (25%)	1 (0%)	897
Total	618 (55%)	251 (23%)	244 (22%)	3 (0%)	1 116

- (f) The adjudicators shall have the power to vary the time for the responding to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manners 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.

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	7 (17%)	10 (24%)	3 (7%)	41
Company	116 (65%)	48 (27%)	13 (7%)	1 (1%)	178
Individual	432 (48%)	194 (22%)	223 (25%)	48 (5%)	897
Total	569 (51%)	249 (22%)	246 (22%)	52 (5%)	1 116

- (g) The adjudicator shall be entitled to disregard any submission 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 adjuration 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.

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	3 (7%)	10 (24%)	2 (5%)	41
Company	162 (91%)	4 (2%)	12 (7%)	0 (0%)	178
Individual	620 (69%)	53 (6%)	223 (25%)	1 (0%)	897
Total	808 (73%)	60 (5%)	245 (22%)	3 (0%)	1 116

- (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).

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	8 (20%)	9 (22%)	2 (5%)	41
Company	106 (60%)	60 (34%)	12 (7%)	0 (0%)	178
Individual	469 (52%)	204 (23%)	223 (25%)	1 (0%)	897
Total	597 (54%)	272 (24%)	244 (22%)	3 (0%)	1 116

- (i) Each party will bear its own legal costs of 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

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	3 (7%)	9 (22%)	2 (5%)	41
Company	120 (67%)	45 (25%)	12 (7%)	1 (1%)	178
Individual	374 (42%)	298 (33%)	224 (25%)	1 (0%)	897
Total	521 (47%)	346 (31%)	245 (22%)	4 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	25 (61%)	3 (7%)	11 (27%)	2 (5%)	41
Company	143 (80%)	23 (13%)	12 (7%)	0 (0%)	178
Individual	426 (47%)	246 (27%)	224 (25%)	1 (0%)	897
Total	594 (53%)	272 (25%)	247 (22%)	3 (0%)	1 116

Question 22A: Do you agree that parties should be free to agree adjudicator nominating bodies (“ANBs”) in their contract?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	3 (7%)	8 (20%)	2 (5%)	41
Company	162 (91%)	5 (3%)	11 (6%)	0 (0%)	178
Individual	613 (68%)	60 (7%)	224 (25%)	0 (0%)	897
Total	803 (72%)	68 (6%)	243 (22%)	2 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	17 (41%)	12 (29%)	9 (22%)	3 (7%)	41
Company	73 (41%)	94 (53%)	11 (6%)	0 (0%)	178
Individual	146 (16%)	525 (59%)	225 (25%)	1 (0%)	897
Total	236 (21%)	631 (57%)	245 (22%)	4 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	5 (12%)	10 (24%)	4 (10%)	41
Company	146 (82%)	24 (13%)	8 (4%)	0 (0%)	178
Individual	375 (42%)	511 (57%)	11 (1%)	0 (0%)	897
Total	543 (49%)	540 (48%)	29 (3%)	4 (0%)	1 116

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?

	Agree	Disagree	Did not answer	Other	total
Association	29 (71%)	2 (5%)	8 (20%)	2 (5%)	41
Company	163 (92%)	3 (2%)	12 (7%)	0 (0%)	178
Individual	610 (68%)	63 (7%)	223 (25%)	1 (0%)	897
Total	802 (72%)	68 (6%)	243 (22%)	3 (0%)	1 116

Proposed Security of Payment Legislation for the Construction Industry (SOPL)

Major Issues with Positive Support and Broad Directions

Scope of application

- In the public sector, SOPL shall apply to construction works and consultancy contracts entered into by the Government and 31 specified statutory and/or public bodies and corporations (**Enclosure 5**).
- When the main contract is covered by SOPL, sub-contracts at all tiers irrespective of contract value will be covered by SOPL.
- SOPL shall cover contracts for supply of materials or plant.

Payment

- Parties shall be free to agree when payments can be claimed and the basis of valuation of work or services except that the duration for payment shall not exceed 60 calendar days.
- There should be a single default payment period of 60 calendar days for all payments under the contract, including interim and final payments.
- Default payment terms will apply if the parties do not make express provisions in their contracts.
- Paying parties who fail to serve payment response within 30 calendar days will not be automatically liable to the full amount of the payment claim but will not be able to raise any set off against amounts properly due against the payment claim.

“Pay when paid” clauses

- “Pay when paid” type contractual clauses shall be rendered ineffective even when the reason for non-payment is insolvency higher in the supply chain.

Suspension on non-payment

- Unpaid parties shall have the right to suspend or reduce progress of work.
- Unpaid parties must give written notice of their intention to suspend to the non-paying parties and take reasonable steps to notify the site owner.
- Unpaid parties shall be entitled to costs and additional time in respect of delay and disruption arising from the suspension

Adjudication

- Both parties shall have the right to refer payment-related disputes to adjudication.
- There shall be a 28 calendar day limit for commencing adjudication of payment-related disputes.
- There shall be no time limit for commencing adjudication for disputes on time for performance or entitlement to extension of time for performance.
- The adjudicator shall publish his decision within 55 working days of appointment.
- Parties shall be free to agree the adjudicator nominating body.
- Parties shall be free to agree on adjudicator for specific disputes only after the dispute and right to adjudicate has arisen.
- The Hong Kong Institute of Architects, the Hong Kong Institution of Engineers, the Hong Kong Institute of Surveyors and the Hong Kong International Arbitration Centre to jointly set up the default adjudicator nominating body.
- Adjudicator’s decisions shall be enforced in the same way as court judgments.

Proposed Security of Payment Legislation for the Construction Industry (SOPL)

**Issues that the Government will Further Consider
in Finalising the Legislative Framework**

Scope of application

- Whether private sector coverage should be limited to contracts for “new buildings” with an original contract value in excess of \$5 million, including extension to repair, maintenance, alternation and addition (RMAA) works.
- Whether SOPL should apply to oral, partly oral and written contracts.
- Whether SOPL should apply to professional services contracts.

“Pay when paid” clauses

- Whether “pay when paid” clauses should be rendered ineffective in nominated sub-contracts.

Adjudication

- Whether parties should be entitled to refer disputes on time for performance or entitlement to extension of time for performance to adjudication.

Proposed Security of Payment Legislation for the Construction Industry (SOPL)

Specified Statutory and/or Public Bodies and Corporations

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