

Construction Industry Security of Payment Bill

Debate and voting arrangements

- Object of the Bill** : The Bill seeks to:
- (a) facilitate the recovery of payments under construction contracts;
 - (b) provide a mechanism for speedy resolution of payment disputes under certain construction contracts through adjudication proceedings;
 - (c) give a right to a party to a construction contract, under certain circumstances, to suspend or reduce the rate of progress of the construction work or the supply of related goods and services under the contract; and
 - (d) provide for related matters.

Joint debate	:	Clauses and Schedules with no amendments, and clauses and a Schedule with amendments and a new clause proposed by the Secretary for Development (“SDEV”)	—	Clauses 1 to 71 and Schedules 1 to 4, and the proposed new clause 49A
Joint debate on the original clauses, Schedules and the amendments (including the proposed new clause 49A).				
<u>SDEV’s amendments</u>				
<u>Arrangements for the court to process applications for setting aside and enforcing adjudication determinations</u>				
Clauses 22, 44, 48, 49 and 55, and the proposed new clause 49A				
<ul style="list-style-type: none">- To amend clauses 22(1), 44(a), 48(4), 49(1), 49(6) and 55(3) to confer jurisdiction upon the Court of First Instance and the District Court (“courts”) to process applications for setting aside and enforcing adjudication determinations within their jurisdiction, so as to enable the courts to utilize its resources more effectively. Consequential amendments are also made to clauses 48(5) and 49(7) to respectively provide that the leave of the courts is required for any appeal from a decision of the courts on a set aside application and an enforcement application.- Clause 48(1) is amended to provide that the courts may, on a set aside application, set aside a determination in whole or in part. Consequential amendments are also made to the Chinese text of paragraphs (a) to (d) of clause 48(1) for grammaticality.				

- Clause 49(4) is amended to **provide that the applicant must state in an affidavit related matters in support of his enforcement application.** In addition, clause 49(5A) is added to provide that an enforcement application not complying with the requirements under clauses 49(2) to 49(4) constitutes **a case of refusal to grant leave** by the courts.
- To amend clause 49(5) to revise **the time limit** for the courts **to make a decision** on an enforcement application from within 7 days (except in exceptional circumstances) to **within 14 days (or a longer period the courts considers appropriate)**, so as to enable the courts to deal with the application within **a more flexible timeframe** having regard to the complexity of individual cases.
- To add a new clause 49A to **empower the Chief Judge to make rules** to provide for the practice and procedure relating to a set aside application and an enforcement application, and such provisions as he considers necessary or expedient.

Resignation of adjudicators and potential conflict of interest

Clauses 38 and 39

- To add a provision to clause 38 to provide that where a party to an adjudication proceedings intends to change its representative (including adding or substituting a new representative) during the adjudication proceedings, if the adjudicator considers that the appointment of the new representative may give rise to a **conflict of interest** or **justifiable doubts** as to the adjudicator's independence or impartiality in considering the payment dispute, the adjudicator has **the right to prohibit the new representative from participating in the adjudication proceedings.**
- Clause 39(1) is amended to provide that a resigning adjudicator should **serve a written notice of resignation on each party** to the adjudication proceedings **and the nominating body on the same date**, and that the resignation **takes effect on that date** (i.e. the date on which the written notice is served). Consequential amendments are also made to clauses 39(2) and 39(4).

Applications for setting aside and enforcing adjudication determinations

Clauses 48 and 49

- To add clause 48(1AA) to provide that **a party to the adjudication may make a set aside application** to the courts in respect of a determination made in the adjudication proceedings.
- To amend clause 48(4) to specify that **an applicant for setting aside a determination shall make payment into the courts as security.** The relevant **procedure** will be **provided for in the rules** to be made by the Chief Judge pursuant to the new clause 49A.
- To amend clause 49(2) and make consequential amendments to clause 49(6) to make it clear that an application for enforcing a determination is **an application to the courts for leave to enforce the determination.**

General issues relating to adjudication

Clauses 51 and 56

- To amend clause 51(2)(e) to provide that a person **may make disclosure** or provide information relating to the adjudication proceedings or determinations **in other adjudication proceedings, court proceedings or other dispute resolution proceedings only if such other proceedings also arise** from the construction contract in respect of which the payment dispute under adjudication arises and **between the same contracting parties**.
- To amend clause 56(1) to provide that if only part of a payment dispute in respect of **main private contracts and subcontracts which** involves an extension of time, the adjudicator **may still handle the part that does not involve an extension of time**.¹

Functions of Secretary

Clause 61

- Clause 61(2)(d) is amended to **provide that directions** which may be **given by SDEV** to a nominating body under the clause **include directions in relation to the contents of the adjudication rules, practice notes and code of conduct for adjudicators** to be made by the nominating body under clause 63, so as to reflect more clearly that there will be a certain degree of consistency among the nominating bodies in implementing the adjudication mechanism, and to better reflect the actual operation of the relevant provisions.

Definition of “specified entity”

Schedule 3

- Schedule 3 is amended to **include major telecommunications service providers** as bodies specified in the definition of “**specified entity**” under clause 4(3).

Drafting amendments

Clauses 2, 6, 9, 25, 39, 46, 58 and 59

- To make textual amendments to the English text of clauses 6(1)(b)(iii), 25(3)(a), 25(7), 46(2) and 46(3) for **grammaticality**.
- Clause 9(1)(a) is amended and the Chinese text of clause 9(1)(b) is also amended **to make the drafting clearer as to the scope or circumstances which are not applicable** under the Bill and **to avoid any misunderstanding** that the security of payment does not apply to the construction work carried out or the related goods and services supplied. Consequential amendments are also made to paragraph (b) of the definition of “construction contract” under clause 2(1).

¹ Under the Bill, adjudication of payment disputes involving an extension of time will first be implemented for construction contracts procured by public organizations, and the Administration will review the effectiveness of adjudicating such disputes before announcing in due course by notice published in the Gazette the time of implementing adjudication of payment disputes involving an extension of time for private works.

- To amend clause 39(3) to **specify** more clearly and **directly** that **an adjudicator shall resign** under the clause if the adjudicator considers that conflict of interests or circumstances which give rise to justifiable doubts as to his/her independence or impartiality have arisen.
- To amend the wording of clauses 58(4) and 59(4) by amending “the date after 5 working days after the date” to “the 5th working day after the date” to **enhance clarity**.

Voting order	:	<ol style="list-style-type: none">1. Clauses and Schedules with no amendments (i.e. clauses 1, 3 to 5, 7, 8, 10 to 21, 23, 24, 26 to 37, 40 to 43, 45, 47, 50, 52 to 54, 57, 60, 62 to 71, and Schedules 1, 2 and 4) standing part of the Bill2. SDEV’s amendments (to amend clauses 2, 6, 9, 22, 25, 38, 39, 44, 46, 48, 49, 51, 55, 56, 58, 59, 61 and Schedule 3)3. Clauses 2, 6, 9, 22, 25, 38, 39, 44, 46, 48, 49, 51, 55, 56, 58, 59, 61 and Schedule 3 with or without amendments standing part of the Bill4. The proposed new clause 49A be read the second time and added to the Bill
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SDEV’s amendments

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Council Business Divisions
Legislative Council Secretariat
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