

立法會
Legislative Council

LC Paper No. LS35/2024

**Paper for the House Committee Meeting
on 31 May 2024**

**Legal Service Division Report on
Construction Industry Security of Payment Bill**

I. SUMMARY

- 1. 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.

- 2. Public Consultation** According to the Administration, public consultation was conducted in 2015 and there was general public support for the legislative proposal. The Administration consulted the Business Facilitation Advisory Committee (“Committee”) on the legislative proposal on 28 June 2023, and the Committee welcomed the proposal.

- 3. Consultation with LegCo Panel** The Panel on Development was consulted on the legislative proposal at its meeting on 28 November 2023. Members supported the legislative proposal but also expressed various concerns.

- 4. Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. As the Bill proposes to introduce a new legal framework for security of payment in the construction industry, Members may form a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 29 May 2024. Members may refer to the Legislative Council (“LegCo”) Brief (File ref.: DEVB(CR)(W) 1-10/48) issued by the Development Bureau (“DEVB”) on 16 May 2024 for further details.

Object of the Bill

2. 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.

Background

3. At present, Hong Kong has no legislation that provides for the security of payment in the construction industry. According to paragraphs 10 and 38 of the LegCo Brief, the Bill aims to bring transformative change to the prevailing improper payment practices in the construction industry, and DEVB has established a task force comprising key stakeholders in 2016 in aid of the preparation of the legislative proposal. The Bill is introduced to implement the proposed legal framework for security of payment in the construction industry. Key provisions of the Bill are summarized in the ensuing paragraphs.

Provisions of the Bill

Scope of application of the Bill (Part 1 of the Bill)

4. Clauses 7 and 8 of the Bill propose that the Bill would apply to two types of construction contracts for carrying out construction work¹ or supplying related goods and services for construction work² (“Construction Contract”) in Hong Kong that are entered into on or after the Bill as passed by LegCo comes into operation pursuant to clause 1(2) of the Bill (see paragraph 11 below):

- (a) certain public contracts and their subcontracts (written or oral, and irrespective of whether they are governed by the law of Hong Kong) entered into by the Government, a body specified in Schedule 3 to the Bill³ or its subsidiary

¹ Clause 3 of the Bill seeks to define “construction work” as the construction, installation or erection of a specified structure as set out in Schedule 2 to the Bill (“Specified Structure”), or the replacement, extension, renewal, alteration, repair, restoration, maintenance, dismantling or demolition of, or the addition to, an existing Specified Structure.

² Clause 6 of the Bill seeks to define “related goods and services” in relation to construction work to include the supply of plant for carrying out construction work, consultancy services.

³ Schedule 3 to the Bill provides for a list of bodies including the Airport Authority, The Hong Kong and China Gas Company Limited, MTR Corporation Limited.

undertaking (collectively “Specified Entity”), the contract value of which is not less than the value specified in Schedule 4 to the Bill, i.e. \$5 million for carrying out construction work whether or not the contract is also for the supply of related goods and services, and \$500,000 for the supply of related goods and services only (“Minimum Contract Value”) (clause 7); and

- (b) certain main private contracts and their subcontracts (written or oral, and irrespective of whether they are governed by the law of Hong Kong) entered into by a non-Specified Entity, the contract value of which is not less than the Minimum Contract Value and not including the value of (i) Construction Contracts for an existing residential unit⁴ or common parts of a building that contains one or more existing residential units (clause 8(4)), and (ii) works not requiring the approval and consent of the Building Authority under section 14(1) of the Buildings Ordinance (Cap. 123) (clause 8(3)(b)(ii)).

Proposed payment terms (Part 2 of the Bill)

5. The Bill proposes the following payment terms:

- (a) a person who has carried out construction work or has supplied related goods and services under a Construction Contract would be entitled to a progress payment (clause 13), the amount of which would be determined in accordance with the contract or (if the contract does not provide for the assessment method) on the basis of the value of construction work carried out (or related goods and services supplied) under the Construction Contract (clause 14);
- (b) a progress payment would be required to be settled within 60 days after a payment claim is served or on a specified date agreed by the parties (whichever is earlier) (clause 15); and
- (c) a conditional payment provision in a Construction Contract would be unenforceable and would have no effect in relation to any payment for a Construction Contract (clause 17).

6. Clauses 18 to 21 of the Bill seek to provide for the procedures for a claiming party to make a payment claim and for a paying party to make a payment response, deadline to serve a payment response, and consequences of a paying party’s failure to serve a payment response.

Proposed adjudication proceedings (Part 3 of the Bill)

7. The Bill seeks to introduce adjudication proceedings to enable parties to handle payment disputes as follows:

- (a) it is proposed that when a payment dispute⁵ arises, a claiming party could initiate adjudication proceedings for the payment dispute within 28 days beginning on the

⁴ Under clause 2(1) of the Bill, “residential unit” is proposed to mean a separate unit contained in the building constructed solely or principally for human habitation, but does not include premises specified in Schedule 1 to the Bill (e.g. hotel, guesthouse, student hostel, staff quarter).

⁵ A payment dispute would be regarded as having arisen when a payment claim has been served, and (a) the paying party disagrees with the claimed amount; (b) the paying party fails to pay the admitted amount on or before the deadline; or (c) the paying party fails to serve a payment response on or before the deadline (see clause 23 of the Bill).

date on which the payment dispute arises (clause 24). Clauses 25 to 32 of the Bill seek to provide for procedural matters such as the requirement on a claimant to serve a written notice of adjudication on the respondent and an adjudicator nominating body (“ANB”) within a specified time, eligibility of an adjudicator and appointment of an adjudicator by ANB, duty of adjudicators to declare and disclose interests in writing, and requirements on service of submissions, responses and replies by parties to the proceedings;

- (b) clauses 33 to 41 of the Bill seek to provide for matters such as the jurisdiction of adjudicators, proposed powers and duties of adjudicators (including power to request a party to produce any document or evidence), right of parties to be represented at proceedings, and proposed mechanisms for the withdrawal and termination of proceedings;
- (c) clause 42 of the Bill proposes that an adjudicator would have to make a written determination (which would be binding on the parties under clause 44) within 55 working days after his/her appointment or a longer period agreed by the parties. The party liable to pay an adjudicated amount pursuant to a determination would be required to pay the adjudicated amount within the period specified by the adjudicator in the determination (if any) or within 30 days after the determination is served (clause 43); and
- (d) it is proposed that a determination could be set aside by the Court of First Instance (“CFI”) upon a party’s application (clause 48), and a determination could be enforced in the same way as a judgment of the High Court in its civil jurisdiction with leave of CFI (clause 49). Clauses 50 to 54 of the Bill seek to provide for matters such as the confidentiality of adjudication proceedings, fees and expenses which would constitute the costs of proceedings, and how to determine the proportions of costs of proceedings.

Proposed right to delay work or supply (Part 4 of the Bill)

8. Clauses 58 and 59 of the Bill propose to provide a right for a claiming party or a claimant to delay carrying out the construction work, or supplying the related goods and services, under a Construction Contract if the conditions prescribed under clauses 58(2) and 59(2) of the Bill are satisfied (e.g. when the paying party or respondent failed to pay the admitted amount or adjudicated amount in full by the payment deadline, and the claiming party or claimant has served a written notice on both the paying party/respondent and the owner (under clause 2(1) it means a person who enters into the Construction Contract with another person for that other person to carry out construction work or supply related goods and services) at least five working days prior to the intended starting date of delay).

9. It is further proposed that the claiming party or claimant, among other things, would not be regarded as in breach of the Construction Contract and would not be liable for any loss or damage resulting from the delay in carrying out construction work or supplying related goods and services. It is also proposed that the construction work or supply of the related goods and services would have to resume within five working days after the date on which the admitted amount or the adjudicated amount is received in full (clauses 58(5) and 59(5)).

Miscellaneous matters and related amendment (Parts 5 and 6 of the Bill)

10. Part 5 (clauses 60 to 69) of the Bill seeks to provide for miscellaneous matters, including the functions of the Secretary for Development (“Secretary”) and ANB for the purposes of the Bill, right to appeal against decisions of the Secretary to the Administrative Appeals Board, service of documents other than an adjudication notice or written notice regarding the appointment of ANB, and empowering the Secretary to amend Schedules 1 to 4 to the Bill by notice published in the Gazette (such notice would be subsidiary legislation subject to the negative vetting procedure under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)). Part 6 (clauses 70 and 71) of the Bill seeks to make a consequential amendment to the Schedule to the Administrative Appeals Board Ordinance (Cap. 442).

Commencement

11. The Bill, if passed, would come into operation on the expiry of eight months after the day on which it is published in the Gazette as an Ordinance, except for provisions mentioned in clause 1(3) of the Bill⁶ (including those relating to the functions of the Secretary and ANB, the Secretary’s proposed power to amend the Schedules to the Bill and the proposed consequential amendment to Cap. 442) which would come into operation on the day on which the enacted Ordinance is published in the Gazette.

Public Consultation

12. According to paragraph 37 of the LegCo Brief, the Administration has conducted public consultation in 2015 and there was general public support for the legislative proposal. According to paragraph 40 of the LegCo Brief, the Administration has consulted the Business Facilitation Advisory Committee (“Committee”) on the legislative proposal on 28 June 2023, and the Committee welcomed the proposal.

Consultation with LegCo Panel

13. As advised by the Clerk to the Panel on Development, the Panel was consulted on the legislative proposal at its meeting on 28 November 2023. Members supported the legislative proposal but were concerned that industry stakeholders may split projects in order to circumvent the legislative proposal. Members also raised enquiries about the implementation details of the adjudication mechanism.

Conclusion

14. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. As the Bill proposes to introduce a new legal framework for security of payment in the construction industry, Members may form a Bills Committee to study the Bill in detail.

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30 May 2024

⁶ Division 1 of Part 1, clause 2 (in so far as it relates to Divisions 1, 2 and 4 of Part 5, except clause 66), Divisions 1, 2 and 4 of Part 5 (except clause 66), and Part 6 of the Bill.