

Insights

HONG KONG SECURITY OF PAYMENT BILL GAZETTED

May 29, 2024

SUMMARY

The long-anticipated Construction Industry Security of Payment Bill (“Bill”) was gazetted on 17 May 2024 and was introduced into LegCo for its first reading on 29 May 2024. The Bill aims to establish a legislative framework for addressing improper payment practices among contracting parties in the Hong Kong construction industry. Once in force, the Bill will replace the Development Bureau’s pilot scheme for the introduction of security of payment provisions into public sector construction contracts which we discussed in our earlier Insights at *Security of payment circular issued by the Development Bureau of Hong Kong – to take effect from 31 December 2021* and *The new security of payment regime in Hong Kong – key issues to consider before its implementation*.

The key provisions of the Bill are as follows:

1. Prohibition of conditional payment provisions [section 17]

Conditional payment provisions (including “pay when paid” provisions) will be unenforceable between the parties to a construction contract. In other words, a paying party cannot deny or defer payment to a claiming party just because the paying party has not received payment up the line.

2. Deadlines to respond and pay [sections 15 and 20]

A paying party must serve a payment response no later than the specified date in the contract or 30 calendar days after the service of a payment claim (whichever is earlier), and must make payment of the admitted amount no later than the specified date in the contract or 60 calendar days after a payment claim is served (whichever is earlier).

3. Adjudication mechanism [sections 23 to 56]

When a payment dispute arises, a claiming party may initiate adjudication proceedings to have the dispute resolved by an independent adjudicator, who must make the determination within 55 working days after the appointment. If the claiming party is dissatisfied with the adjudicator’s

determination, both parties may refer the payment dispute to litigation or arbitration. The adjudicator's determination is binding on the parties unless and until the dispute is determined by litigation or arbitration.

4. A claiming party's right to suspend or slow down work [section 57 to 59]

Provided that a written notice is served on the paying party, the claiming party may suspend or slow down works if (a) the paying party has admitted the amount payable but fails to pay the admitted amount in full, or (b) the adjudicator has made a determination but the paying party fails to pay the adjudicated amount in full.

5. Application to public and main private contracts [sections 7 to 11]

This Bill applies to both public and main private contracts with main contract values not less than HK\$5 million for construction work contracts and HK\$0.5 million for supply of goods contracts and services related to the construction work.

The Bill will not apply to: (a) contracts for works on existing private residential buildings (e.g. interior renovation, building maintenance, etc) (which will not include hotels, serviced apartments and hospitals); and (b) contracts for relatively minor works on existing private non-residential buildings, i.e. those works not requiring approval and consent of the Building Authority under the Building Ordinance (Cap. 123) (e.g. maintenance and repair of building services installation, shop renovation, etc).

The LegCo briefing note accompanying the Bill indicates that the operation of the main provisions of the Bill will commence eight months after the date on which the Ordinance is published in the Gazette.

The Ordinance, once gazetted, will apply to construction contracts which are entered into on or after the commencement date (which is likely to be early to mid-2025). It will therefore be necessary for both employers and contractors to start updating the payment provisions in their template construction contracts for compliance with the requirements of the new legislation, in readiness for the commencement of the Bill.

In addition, participants in the construction industry should look out for amendments to the industry standard forms in use in Hong Kong. These will be required to deal with mandatory rules and prohibitions particularly around conditional payment provisions. Of particular interest is the recently released Hong Kong Edition of the New Engineering Contract (NEC) jointly published by NEC and the Development Bureau in July 2023 (see: [NEC ECC Hong Kong Edition: 5 Key Features](#)), which was designed with the upcoming security of payment legislation in mind. The Hong Kong specific dispute resolution Option W4, which provides for dispute resolution by way of adjudication (for payment disputes) as well as mediation and arbitration and, importantly, includes a contractual process for initial assessment of claims by the Project Manager, is consistent with the requirements

of the Bill. Nonetheless, additional provisions may be required to reinforce the payment mechanisms and remedies provided for in the Bill.

The Bill represents a transformational change for the way in which the construction industry in Hong Kong will operate and its impact will be felt by all participants up and down the supply chain. There is much work for both Government and all affected parties to do in preparation for the these changes.

RELATED PRACTICE AREAS

- Commercial Construction & Engineering
- Construction Disputes

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