



The British  
Chamber of Commerce  
in Hong Kong  
香港英商會

Mr. Vitus Ng  
Principal Assistant Secretary (Works)  
Development Bureau  
15/F, West Wing, Central Government Offices  
2 Tim Mei Avenue  
Tamar, Hong Kong

26<sup>th</sup> July 2018

Dear Mr. Ng,

**Re: Security of Payment Legislation ('SOPL')**

We refer to the 'Report on Public Consultation on the Proposed Security of Payment Legislation for the Construction Industry' dated April 2016 (The Report).

The Report concluded that the public and industry stakeholders had divergent views on some issues that should be further considered in finalising the legislative framework for SOPL.

One of the issues listed was whether parties should be entitled to refer disputes in relation to extension of time under their contracts to adjudication (Question 19(B)(d)).

It is our understanding that the Government and/or the original Working Group are actively considering the issue and seeking views. We gather that representations have been made by several interest groups that are particularly opposed to the application of adjudication to disputes in relation to extension of time (19(B)(d)).

As you will be aware, the British Chamber of Commerce Construction Industry Group (CIG) has a broad membership from across the construction industry which does not represent any particular sector or interest.

Having discussed this issue, we are writing to express our support for including the right to adjudicate disputes concerning the time for performance or entitlement to the extension of time (19(B)(d)).

The rationale behind the original proposal was that extension of time issues are often crucial to unlocking financial disputes on construction projects both in terms of entitlements to loss and expenses and employer entitlement to liquidated damages for delay. Although they can be complex, and may be hard to resolve in the tight timeframe of adjudication, their early resolution may help prevent future disputes. It was therefore considered to make sense to allow these disputes to be adjudicated in isolation and not just when they form part of a time related financial claim.

With respect, CIG considers this analysis to be absolutely correct.

It is noted that there was only very marginally less support for 19(B)(d) with 70% agreeing and 28% disagreeing compared to 19(B)(a) to (c) with around 72% agreeing and 25-26% disagreeing. On this basis 19(B)(d) only narrowly deserved to go into the list of divergent views at the end of the Report, and in our view excluding 19(B)(d) altogether from the legislation would be entirely unwarranted and certainly go against the vast majority that supported it.

The Report fairly reflects that some of the professional institutions representing certifiers (and the members of the professional institution organised to respond in generally identical terms as described in Chapter 1 of the Report) argued for a narrower application of rights to adjudication on contracts where a third party certifier considers and evaluates claims. However there does not appear to have been a significant difference between their opposition to 19(B)(a)-(c) as compared to the opposition to 19(B)(d).

It is also noted that there were a number of comments with objections based on concerns that delay related money claims and extension of time issues often involve complex factual, expert and legal issues and are difficult to deal with in the timescales of adjudication.

However, it is our understanding that the matter under current consideration is to exclude 19(B)(d) i.e. 'pure' extension of time claims, it is not to exclude extension of time issues when they form part of a time related financial claim. If 19(B)(d) is excluded, this would lead to the illogical result where extension of time issues are capable of unlocking financial disputes both in terms of entitlements to loss and expense and employer entitlement to liquidated damages for delay in isolation, they could not be adjudicated, whereas, when they form part of a more complex time related financial claim, they could be adjudicated.

It is our understanding that there is no suggestion that extension of time issues should be excluded even when they form part of a time related financial claim. CIG would be strongly opposed if this was in contemplation, and indeed this would bring the Hong Kong legislation in line with Singapore and New South Wales with the most limited rights of adjudication, and not achieve the balance sought with the UK which has the widest rights to adjudicate.

CIG would advocate a wider application than the proposed model. For example, it would be in favour of coverage of claims for breach of contract as well as claims under contract on the basis that in many instances loss and expense for delays due to breaches would not be recoverable unless there was a contractual provision providing for the same.

Also, with reference to list of other issues with divergent views, CIG has serious misgivings with regard to whether private sector coverage should be limited to contracts for "new buildings" with a main contract value in excess of HK\$5M. This would seem to exclude the vast majority of disputes adjudicated in the UK, for example, and in respect of whom adjudication was, in many ways, invented. Our general fear is that limitation of scope of adjudication will only lead to a larger number of jurisdictional challenges.

We hope that this feedback is useful to you in your deliberations over the new legislation, and fully concur with the conclusion of the Report, that while the responses to the consultation indicated a divergence of views on some issues of the proposed framework, there was, and still is, very positive support for SOPL.

In this regard we are hopeful that the draft legislation will be introduced as soon as possible and would be grateful for any indication that you can give as to when this may be.

We would of course be delighted to provide feedback at any stage of the process, and please do not hesitate to ask if we can be of any assistance to you.

Yours faithfully,



Andrew Seaton  
Executive Director