

9 September 2015

Mr Chan Mo Po, Paul, MH, JP
Secretary for Development
Development Bureau
18/F, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Paul,

Proposed Security of Payment Legislation for the Construction Industry

The Chamber is pleased to see the Government take action in addressing payment disputes that have been plaguing the construction industry for years and in proposing a security of payment legislation in Hong Kong to align with other developed jurisdictions such as the UK, Ireland, New Zealand, Singapore, Malaysia and some Australian states.

2. We note that the proposed legislation will apply to construction activities carried out both in and outside of Hong Kong, and in the case of the latter, for oral or written contractual arrangements concerning work products that are delivered to, and incorporated into, a project in Hong Kong.

3. The Chamber also notes that some private construction contracts will be excluded from the proposed legislation. For example, private construction contracts entered into with residential occupiers as counterparties at a contract value of less than HK\$5 Mn, or less than HK\$500,000 for professional services or supply-only contracts will not be covered under the law. This is welcomed because it will help address the concerns of individuals or small businesses who are usually unfamiliar with construction contracts and relevant legislations, and generally do not have easy recourse to professional advice on contract administration and their legal rights.

4. Although we support in principle the intent behind the legislation, which is to rectify the issue of non-payment, we are however concerned about the unintended consequences that may be inflicted on the construction industry. These concerns are set out as follows:-

Impact on cash flow

- (a) While we acknowledge that there are certain shortcomings with the existing “pay when paid” terms of arrangement, an across-the-board ban on this could however impose extra financial burdens to industry players at the upper stream of a contractual chain, particularly architectural firms serving as “lead consultants” managing a team of sub-consultants. This is because the lead consultants will be obliged to pay sub-consultants even when they have yet to receive payment from clients. Lead consultants who rely mainly on clients as the primary source of funding may encounter cash flow problems. They will be placed in the unsavoury position of having to request early payment, which could in turn undermine hard-earned commercial relationship.

Unnecessary construction delays

- (b) The introduction of an adjudication process may have a disruptive effect on the timely completion of construction projects. Furthermore, it could adversely impact the contractual administration/fulfillment of a project whereby any aggrieved party could raise disputes on the pretext of such claims as value of work, non-payment and extension of time entitlement regardless of their merit. Once adjudication is in process, the role played by an architect, civil engineer, quantity surveyor, and/or any other professional consultants who serve as a contract administrator and/or a valuator will have to be suspended creating a knock-on effect throughout a construction project, which will inevitably be subjected to costly delays.

Restrictive adjudication process

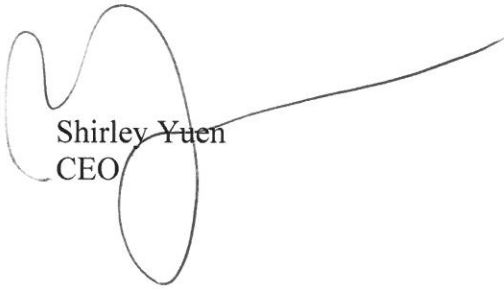
- (c) The proposed adjudication mechanism is perceived to be restrictive in the sense that it requires an adjudication case to be concluded within 55 working days from the date of appointment of an adjudicator or any extended period agreed by both parties. We understand that the Government intends to introduce this mechanism as an interim solution. However, the nature of non-payment dispute cases necessarily involves time to establish reasons, collect evidence, and negotiate a settlement. As an adjudicator’s decision is binding and enforceable in the same way as a court judgment and there can be no set off against such decisions, we are worried that by requiring cases to be concluded within a predetermined period, this would limit the flexibility currently available to the parties involved in settling a payment dispute in accordance with the contractual terms. We believe that the current legal regime for handling payment disputes as currently provided to be effective should the need for legal recourse to arbitration or the courts arise.

Legal ambiguities

- (d) As the proposed legislation will also apply to construction work and services performed outside of Hong Kong, members are concerned that this may create legal ambiguities in relation to the laws of other jurisdictions for any disputes arising from offshore activities, as well as imposing additional legal liabilities on project managers and administrators. Instances of “double jeopardy” may very well arise should this proposal be adopted.

5. The Chamber appreciates and welcomes the Government's effort to address the issue of timely payments in the construction industry. We also support policies that are conducive to the creation of a level play field. We would however urge the Administration to adopt a wholistic approach by taking into account the interests and well-being of all stakeholders before finalizing its proposals.

Yours sincerely,



Shirley Yuen
CEO

cc: Works Policies 1 Section, Development Bureau