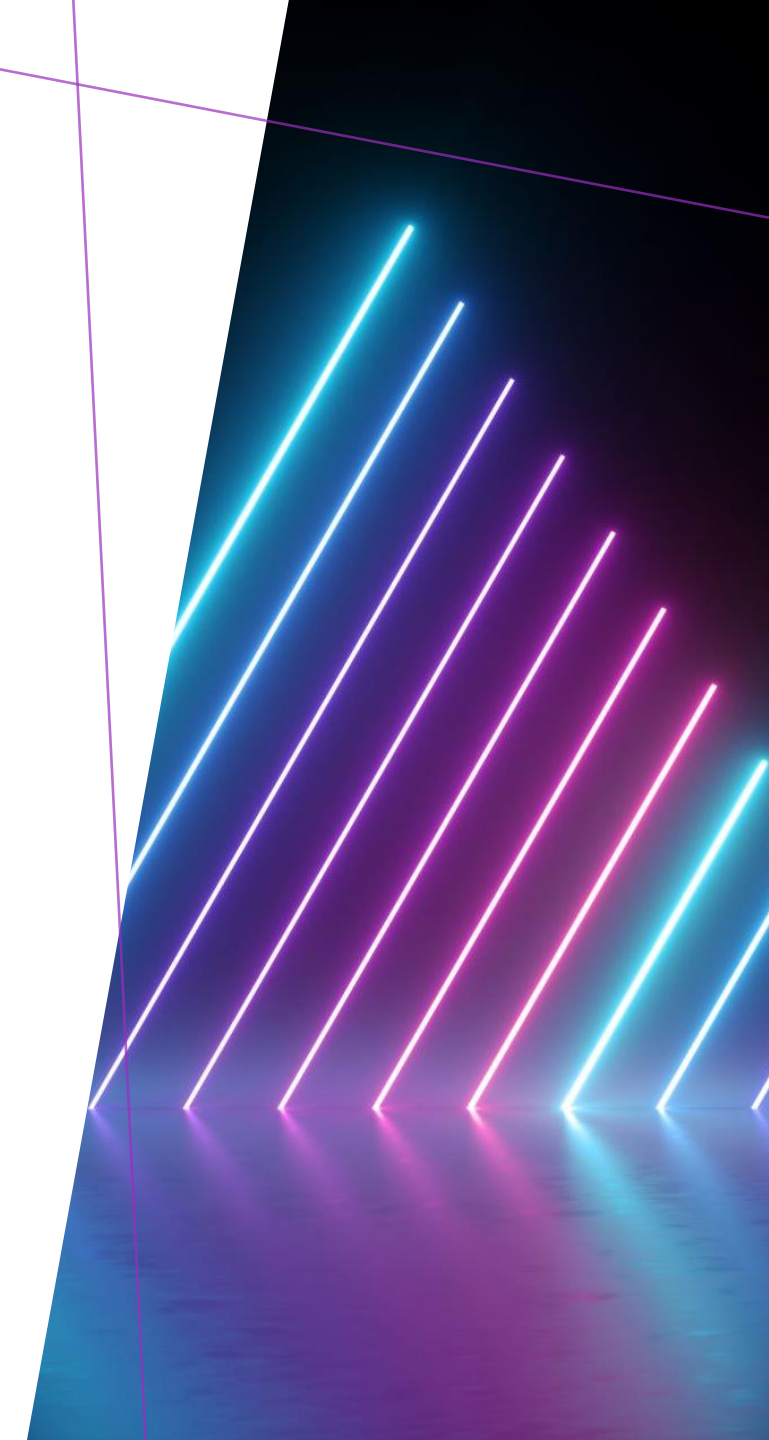


Resolving International Disputes in GBA and ASEAN (Part II)

**The Roles and Contributions of Engineers
for Construction Dispute Adjudication**

29 March 2023

Albert Leung



Hong Kong as dispute resolution centre

- i. The Chief Executive 2022 Policy Address
- ii. Hong Kong as an international centre for legal and dispute resolution services in the Asia Pacific region under the national 14th five-year plan
- iii. The Greater Bay Area Cross-Boundary Disputes Mediation Model Rules, endorsed by the fourth Guangdong-Hong Kong-Macao Greater Bay Area (GBA) Legal Departments Joint Conference on December 16, were released and took effect.
- iv. The Department of Justice has also established the Legal Enhancement and Development Office (LEAD Office) to help seize the valuable opportunities generated by the Greater Bay Area plan.

Overview of the presentation

- i. Security of Payment Legislation
- ii. SOPL Spirit for Government Projects by Development Bureau
- iii. HKIE Preparation for Adjudication
- iv. 2022 Construction Adjudication Annual Report
- v. Roles of Engineers in Adjudication
- vi. Contributions from Engineers
- vii. Recent Cases

Security of Payment Legislation

- i. History
 - a) The Tang Report 2001 with 109 recommendations
 - b) 2011 DEVB and CIC survey
 - c) 2015 Consultation Document, Summary and Guide
 - d) 2022 Draft SOP Bill
 - e) 2023 Legco discussion?

Security of Payment Legislation

(cont'd)

- ii. Problems
 - a) Adversarial working relationship – disputes
 - b) Withheld payments
 - c) Dispute resolution - lengthy and costly

Security of Payment Legislation

(cont'd)

- iii. SOP adjudication
 - a) Improve payment practices in construction industry
 - b) Improve cash flow in supply chain
 - c) Improve operating environment
 - d) Build up construction capacity and enhance competition

Security of Payment Legislation

(cont'd)

iv. SOPL Highlights

- a) **payment response** by the paying party shall be served on the claiming party **within 30 days** and the paying party shall make **payment of admitted amount within 60 days** to the claiming party from the date of payment claim served by the claiming party;
- b) **conditional payment provisions** (such as 'pay when paid' clause, etc.) shall be rendered **ineffective and unenforceable**;

Security of Payment Legislation

(cont'd)

iv. SOPL Highlights

(cont'd)

- c) claimant may refer a payment dispute to **adjudication** through which the adjudicator shall decide on the payment dispute **within 55 working days from the date of his appointment**, and the adjudicated amount shall be paid as decided by the adjudicator. The contractual claim handling procedures, as specified in the contract, should be gone through before any claims for additional payment can be submitted for determination by the adjudicator;
- d) claiming party / claimant may exercise his **right to suspend or reduce rate of progress** if admitted amount / adjudicated amount is not received.

Security of Payment Legislation

(cont'd)

- v. Draft bill
 - a) Part 1 Preliminary
 - b) Part 2 Payments
 - c) Part 3 Adjudication of Payment Disputes
 - d) Part 4 Right to Delay Work or Supply
 - e) Part 5 Miscellaneous Matters
 - f) Schedule 1 Structures and Works
 - g) Schedule 2 List of Statutory and Public Bodies
 - h) Schedule 3 Minimum Original Contract Value of Main Private Contracts

SOPL spirit for government projects by Development Bureau

- i. 2021-10-05 Technical Circular (Works) No 6_2021 Security of Payment Provisions in Public Works Contracts
 - a) Implementation
 - From 31 December 2021, all tenders for Group B or Group C Contractors on the “List of Approved Contractors for Public Works”
 - From 1 April 2022, other contractors on the “List of Approved Contractors for Public Works” or the “List of Approved Suppliers of Materials and Specialist Contractors for Public Works”
 - b) Employer’s direct payment for settlement of unpaid adjudicated amount.

SOPL spirit for government projects by Development Bureau

(cont'd)

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- i. 2021-10-05 Technical Circular (Works) No 6_2021 Security of Payment Provisions in Public Works Contracts *(cont'd)*
- c) Parties' right to mediation or arbitration for final resolution of payment dispute is unaffected.
- d) Statutory Register of Adjudicator Nominating Bodies (ANBs).
- e) Challenges
- The direct payment mechanism
 - The importance of a system for ensuring adequately skilled and trained adjudicators
 - The time periods relating to payment and adjudication

SOPL spirit for government projects by Development Bureau

(cont'd)

- ii. 4 ANBs
 - a) HKIA
 - b) HKIAC
 - c) HKIE
 - d) HKIS

SOPL spirit for government projects by Development Bureau

(cont'd)

- iii. Contracts assigned for implementation
 - a) HKIE nominated as ANB in 48 public works contracts with SOP provisions which have been gazetted for tenders on or before 28/2/2023
 - b) ArchSD – 7 contracts
 - c) CEDD – 13 contracts
 - d) DSD – 8 contracts
 - e) EMSD – 10 contracts
 - f) HyD – 6 contracts
 - g) WSD – 4 contracts

SOPL spirit for government projects by Development Bureau

(cont'd)

iv. Adjudication Trial Study

a) 9 Contracts selected for the trial study:

- 6 government departments of ArchSD, CEDD, DSD, EMSD, HyD and WSD participated.
- 3 project consultants are involved.
- HKIE given 3 trial projects No. 4 from CEDD, No. 5 from DSD and No. 9 from WSD.

b) The determination and decision of the adjudicator would be for the purposes of the Trial Adjudication Study only, and will not constitute a binding decision on any participants.

SOPL spirit for government projects by Development Bureau

(cont'd)

iv. Adjudication Trial Study

(cont'd)

c) Trial Study time table:

- Trial adjudication proceedings, Nov 2022 to February 2023
- Feedbacks, January 2023 to March 2023
- Final assessment report, End of 2023 Q1.

d) HKIE participation

- Secretariat support
- Nomination of adjudicator
- Feedback

HKIE preparation for adjudication

i. CDRC

Hkie.org.hk

HKIE preparation for adjudication

- ii. Rules and regulations set up for adjudication

HKIE preparation for adjudication

iii. List of adjudicators

HKIE preparation for adjudication

- iv. Training Courses
 - a) Adjudication training courses
 - b) Mediation training courses
 - c) Arbitration training courses
 - d) Expert witness courses

2022 Construction Adjudication Annual Report

- i. Kings College London (KCL) and the Adjudication Society
- ii. 10 ANB and 257 individuals
- iii. The most common types of claims adjudicated are
 - a) extension of time claims,
 - b) final account and interim payment disputes and variations,
 - c) professional liability claims
- iv. The most common value of claims brought before adjudicators was reported to be between £125,001 and £500,000

2022 Construction Adjudication Annual Report (cont'd)

v. Causes of disputes:

a) inadequate contract administration (49% of disputes)

b) changes by the client,

c) exaggerated claims, and

d) lack of competence of the project particulars (41% of disputes).

Lord Justice Coulson commenting in the forward: “...*it appears that construction professionals still have much to learn about the ways to ensure the smooth running of any project*”.

2022 Construction Adjudication Annual Report (cont'd)

- vi. The Report highlights the importance of training project participants to administer construction contracts correctly before and throughout the duration of the project.
- vii. Problems with adjudication
 - a) Perceived bias
 - Disclosure
 - Adjudicator's relationship with a party or their representatives
 - b) Lack of diversity
 - c) 'Smash and grab' adjudications

Roles of engineers in adjudication

- i. Project engineers
- ii. Project advisors on contract
- iii. Adjudicators

Contributions from engineers

- i. Short duration
 - a) Change of mindset
 - b) Practical, speedy and to the main points
- ii. Be prepared
 - a) Special team to be set up?
 - b) Good project management
 - c) Clear and good records

Contributions from engineers

(cont'd)

iii. Electronic documents

- a) Project filing system
- b) Digitization and backing up
- c) Planning at project commencement
- d) Implementation and review of the system

iv. Act as adjudicators

- a) Natural justice
- b) Enhance the cash flow
- c) Improve the working environment of Hong Kong construction industry

Recent cases

- i. Settlement without agreement – MSB International Ltd v Lok & Anor [2022] HKCFI 3751
- ii. Time bar on electronic submission - Microsoft Ireland Operations Ltd v JJH Enterprises Ltd [2022] EWCA Civ 1509
- iii. Time bar for payment claim - LJR Interiors Ltd v Cooper Construction Ltd [2023] EWHC 3339 (TCC)
- iv. NEC dissatisfaction notice - Ravestein B V v Trant Engineering Limited [2023] EWHC 11 (TCC)
- v. Oral agreement - Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24