



THE HONG KONG
INSTITUTION OF ENGINEERS
香港工程師學會

Can adjudication cure all disputes within the construction industry

Adopting Dispute Resolution Mechanism for the Construction Industry in Hong Kong and the Greater Bay Area

This Presentation is not legal advice but general information for discussion.

The Presenter made references to a variety of sources in compiling these slides.

Should you require such reference, please contact the presenter.

Dr. Christopher To

*“Adjudication is a **private** and **confidential** dispute resolution process that can be used to resolve disputes resulting from building and construction contracts, including the work of builders, specialist trades, contractors, subcontractors, quantity surveyors, engineers and designers. Issues resolved in adjudication typically range from disputes over **unpaid invoices** to disagreements over **defective work** or code of compliance, among many others.*

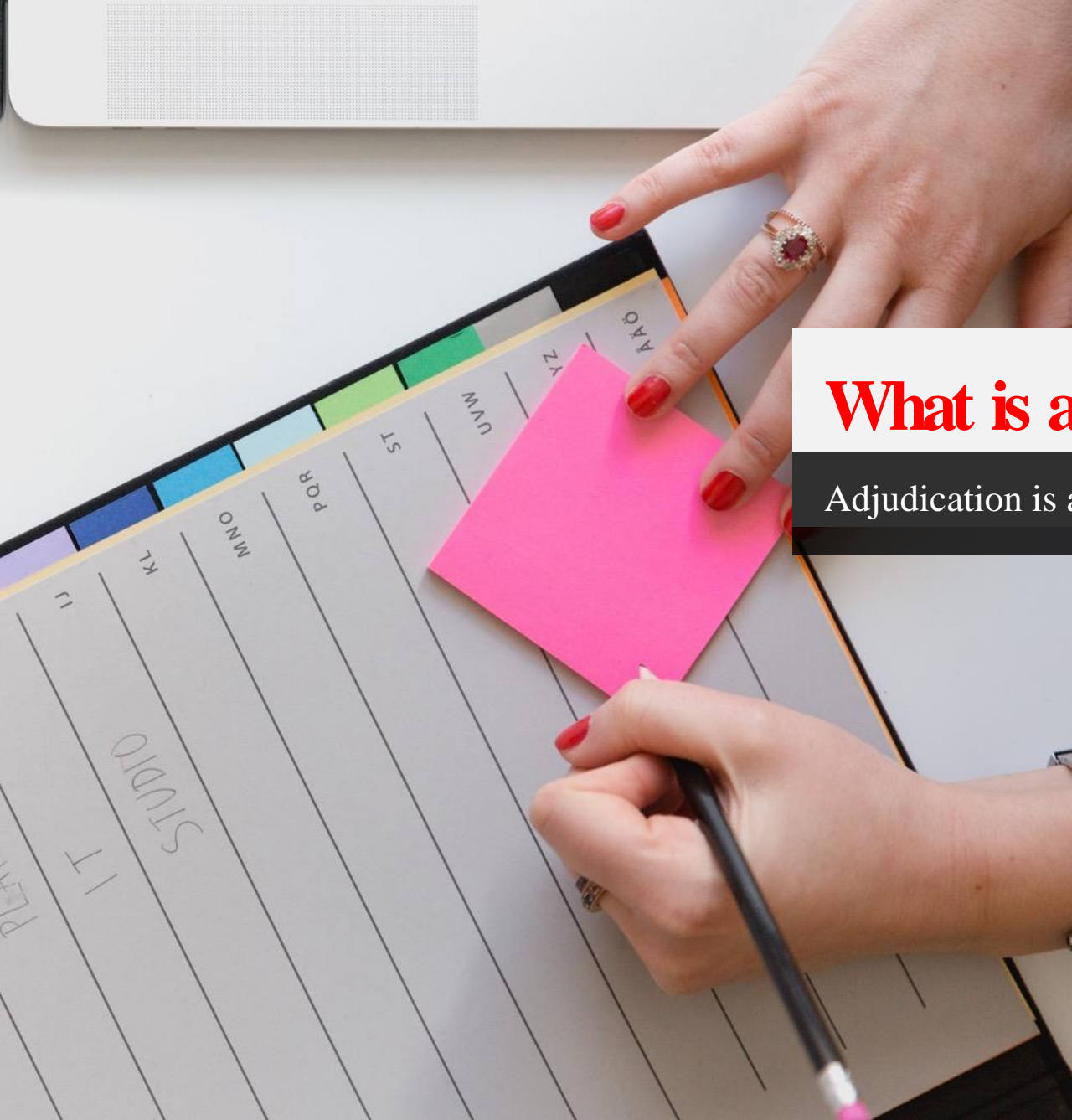
*Adjudication is usually **conducted entirely on the documents** –this means that there are no hearings or meetings...both parties will be **bound by the outcome**, whether or not the respondent has participated in the process.” (with emphasis added).*

<https://www.buildingdisputestribunal.co.nz/>

A close-up photograph of a person's hand in a white shirt pointing towards the right. The background is blurred, showing more of the person's torso and another person's hand holding a smartphone.

Adjudication

What is it?



What is adjudication appropriate for?

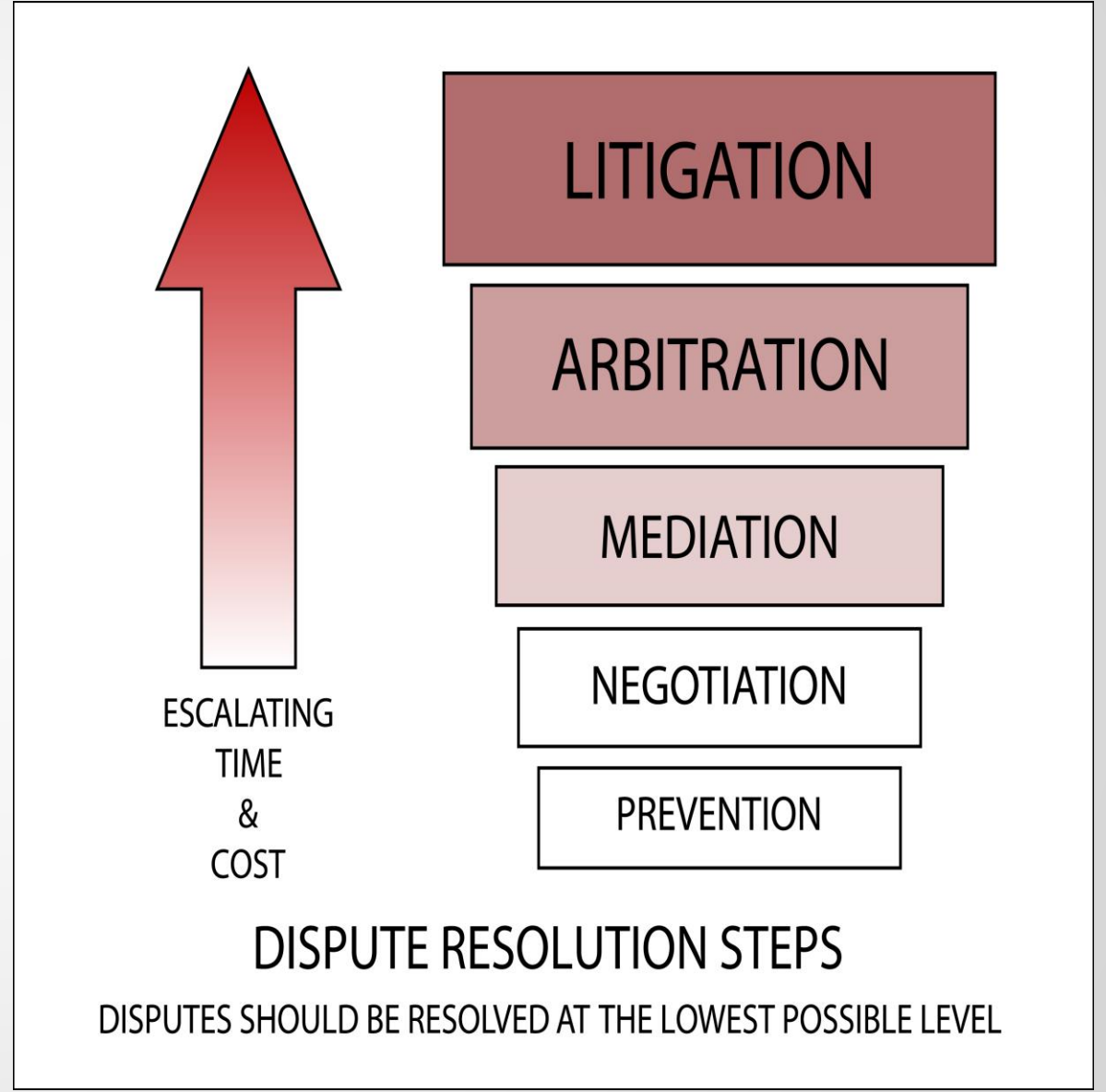
Adjudication is appropriate for resolving claims relating to:

- Interim payments.
- Delay and disruption of the works.
- Extensions of time for completion of the works.
- Defects in the works.
- The final account.
- Breach of contract.
- Termination of a contract.
- Professional negligence.

Advantages of Adjudication

- Quick determination with quick injection of cash.
- Streamline process for determination.
- Due payments can be enforced without waiting for an arbitration award.
- Final determination.
- Party Autonomy in choosing the Adjudicator.
- The adjudicator has inquisitorial powers.
- Limited submissions.
- No cross examination.
- Rules of Evidence do not apply.
- No risk of paying the other side's costs.
- Confidential.





Disadvantages of Adjudication

- The speediness of the process – “*Rough Justice*”.
- Limited scope and jurisdiction.
- The referring party has the element of surprise.
- Jurisdictional Challenges – Basis and Threshold.
- Duties and powers of the Adjudicator are confined.
- Adjudication does not always lead to final settlement of a dispute – court/arbitration.
- Legal and expert fees are not normally recoverable, as a result mistakes can therefore cost significantly - little margin for error.
- A mistaken decision has to be honoured in the short-term, which may cause issues of cash-flow.
- There is no testing of evidence or assertions.
- Outcome is decided within 55 days, a rough way of determining crucial contentions.
- Difficulty of challenging the adjudicator’s decision.



Jurisdiction

There two types of jurisdiction – internal and threshold

- **Internal:**

- Rare in nature.
- Failed to apply contractual or payment provisions properly (statutory).

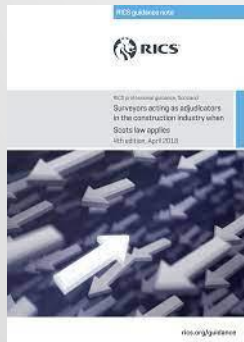
- **Threshold:**

- Whether a jurisdiction should proceed.
- Whether the adjudicator agrees to resign.
- If adjudicator reject the challenge, the challenge is maintained until the enforcement stage.



Threshold jurisdiction

- *“Is there a contract?”*
- *Are the parties to the contract the same parties who are bringing the adjudication?*
- *Does the appointment comply with the requirements of the applicable contractual adjudication provisions?*
- *If not, does the contract fall within the ambit of the Construction Act, such that the parties are entitled to commence adjudication?*
- *Has the appointment been made in accordance with the applicable procedure, including by the appropriate ANB?*
- *Is there a crystallised dispute?”*

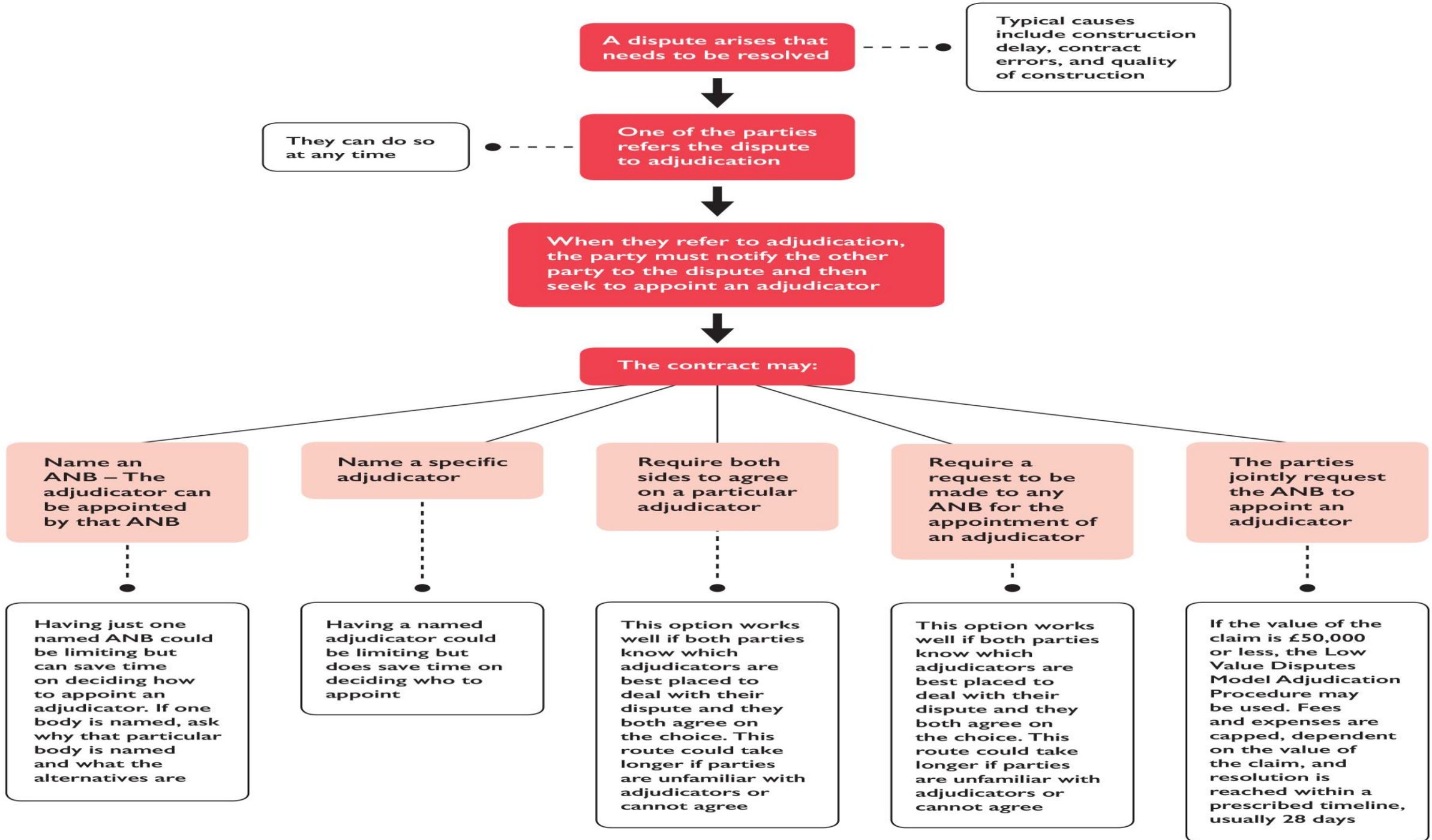


Surveyors acting as adjudicators in the construction industry 4th edition, January 2017

Overview of an adjudication

- Broadly speaking, each adjudication goes through the following stages:
 - Claim under the construction contract;
 - Crystallisation of the dispute;
 - Serve the notice of adjudication;
 - Select and appoint the adjudicator;
 - Challenge the adjudicator's jurisdiction;
 - Serve the submission;
 - Serve the reply and any other submissions;
 - Further investigations by the adjudicator;
 - Receive the adjudicator's decision;
 - Enforce the adjudicator's decision if not complied with; and
 - Challenge enforcement of the adjudicator's decision.



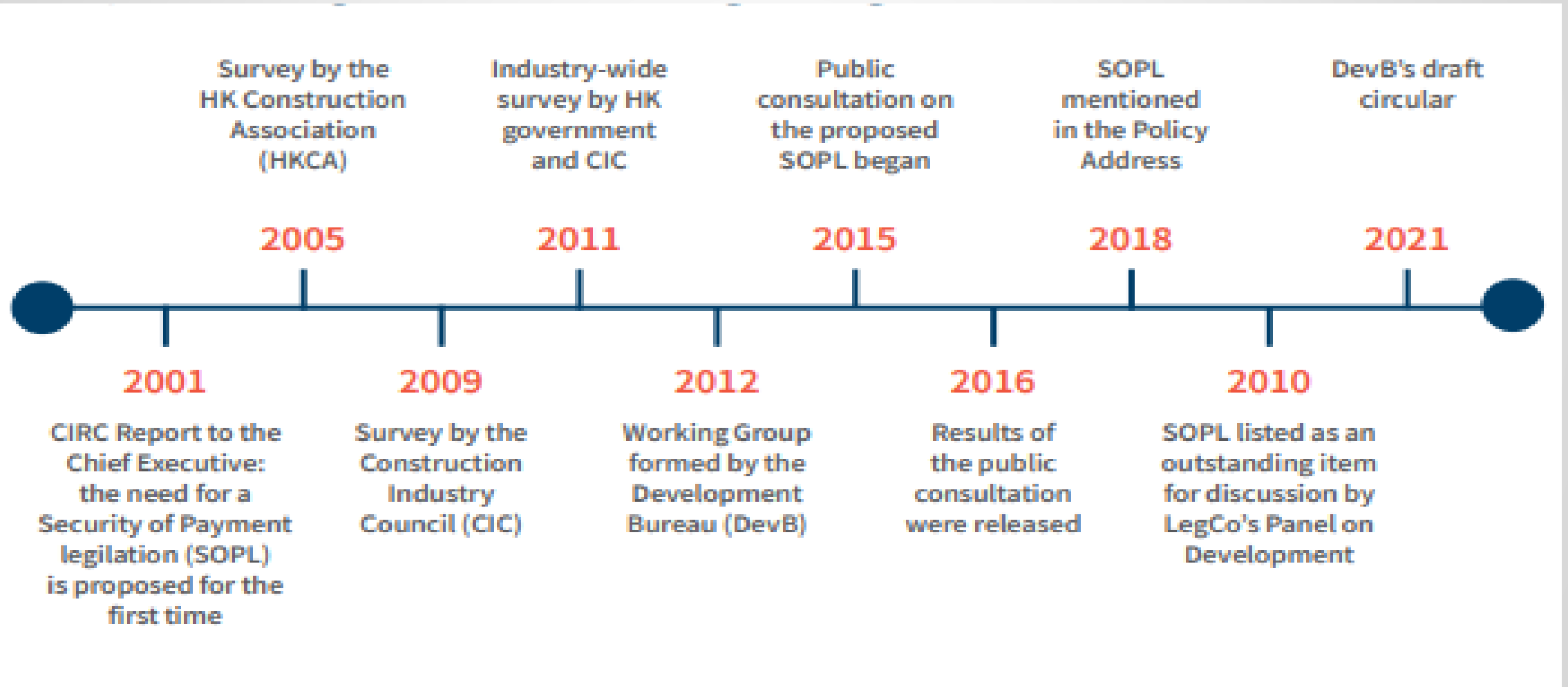


Typical timetable of the process

From start to finish

Steps	Working Days	Party
Notice of Adjudication		Claimant (Referring Party)
Appointment of Adjudicator	5	Claimant (Referring Party)
Adjudication Submission	1	Claimant (Referring Party)
Adjudication Response	20	Respondent (Responding Party)
Adjudication Decision	55 from appointment	Adjudicator
Enforcement of Decision	Depends	

Historical Developments of the SOP Regime in Hong Kong



Security of Payment Regime – Hong Kong (No Contracting Out)

Development Bureau - Technical Circular (Works) No. 6/2021

<https://www.devb.gov.hk/filemanager/technicalcirculars/en/upload/386/1/C-2021-06-01.pdf>

Due dates:

Respondent has 30 days following receipt of a Payment Claim to serve a Payment Response, and 60 days to pay the admitted amount

Conditional payment provisions:

“Pay-when-paid” clauses are unenforceable

Referral to adjudication:

A Claimant may refer a dispute about payment to adjudication, and the Adjudicator must determine the dispute (and the amount payable to the Claimant) within 55 days of being appointed

Suspension / go-slow rights:

A Claimant that has not been paid an amount which the Respondent admits is due, or an amount the Adjudicator has decided is owing, may suspend work or reduce their rate of progress

Key Aspects of the Circular

- The **prohibition** of “pay if paid” or “pay when paid” provisions.
- Contractors or subcontractors should **submit payment claims at the time specified** in the relevant contract or subcontract.
- The recipient of the payment claim, either the employer or main contractor, must provide **a response to the payment claim within 30 days** of the contractor’s payment claim or any agreed shorter period.
- The **admitted amounts must be paid within 60 days** of the payment claim.
- If any payment dispute arises between the contractor or subcontractor and the employer, the contractor or subcontractor can **refer the payment dispute to adjudication**.
- The adjudicator must issue **a determination within 55 days** of the appointment to resolve the dispute unless the parties agree otherwise.
- The paying party must **pay the amount** which is determined by the adjudicator **within 30 days** of the notification of the adjudicator’s decision. Failure by the main contractor to pay a sum which is admitted or adjudicated to be payable will entitle its subcontractor to **suspend work** or apply for **direct payment** by the employer.

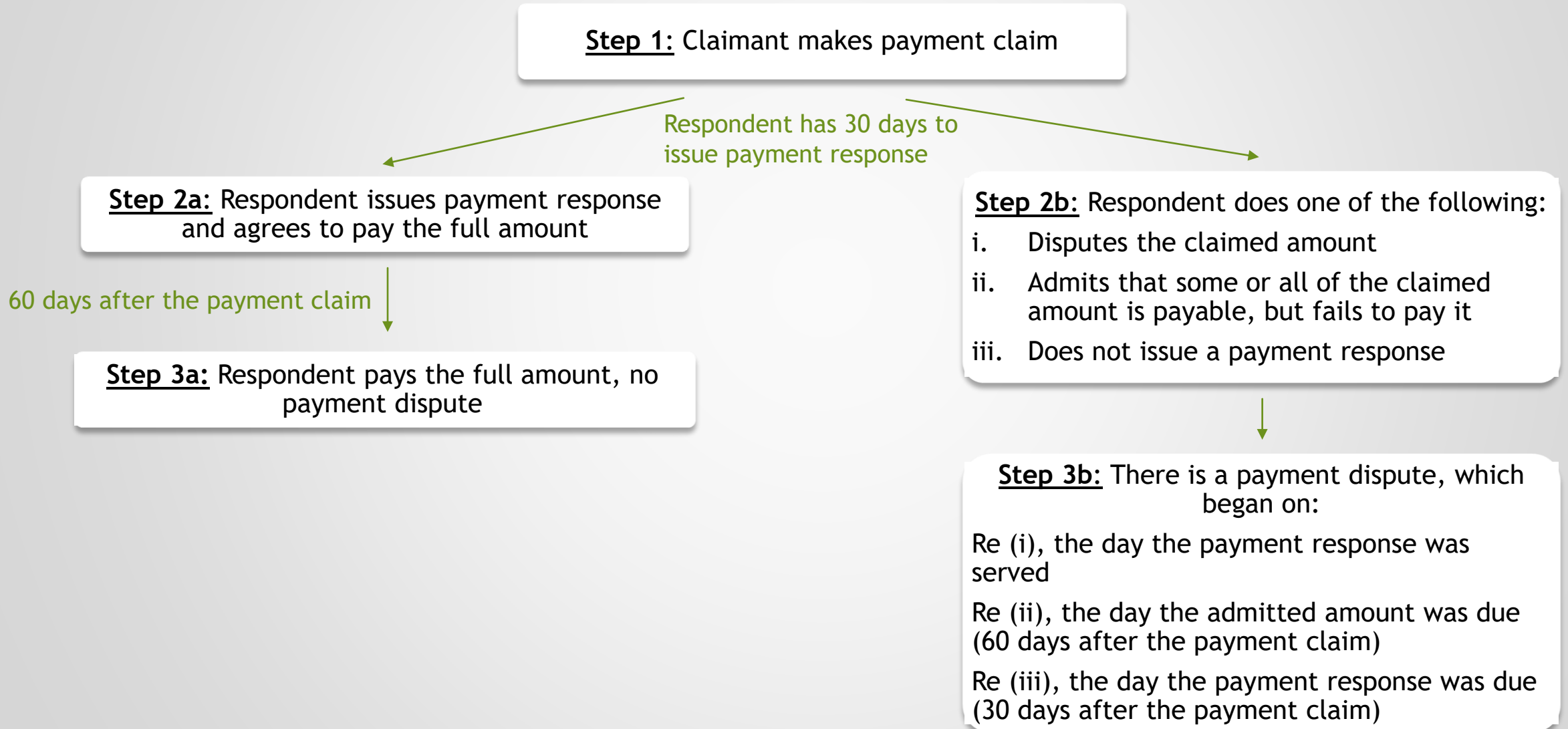
Note: (UK cases referred to the Technology Construction Court – **Adjudication enforcement – 133 cases** (2019-2020))

Differences between SOP Regime and future SOP Legislation

SOP Regime	Future SOP Legislation
<p>Only applies to public contracts (contracts with the Government or a statutory public body)</p>	<p>Applies to both public contracts and “main private contracts”:</p> <ul style="list-style-type: none">• New construction contracts exceeding \$5 million• Contracts for supply of related goods and services exceeding \$500k
<p>Adjudication decisions are not enforceable through the Courts</p>	<p>Adjudication decisions are enforceable through the Courts</p>

OVERVIEW OF HONG KONG REGIME

Adjudication process



Adjudication process (continued)

Step 3b: Payment Dispute arises

28 days ↓

Step 4: Claimant serves Adjudication Notice to Respondent and Adjudicator Nominating Body

1 working day ↓

Step 5: Adjudication commences

5 working days ↓

Step 5: Appointment of Adjudicator

1 working day ↓

Step 6: Claimant serves adjudication submission

Adjudication process (continued)

20 working days ↓

Step 7: Respondent serves Adjudication Response

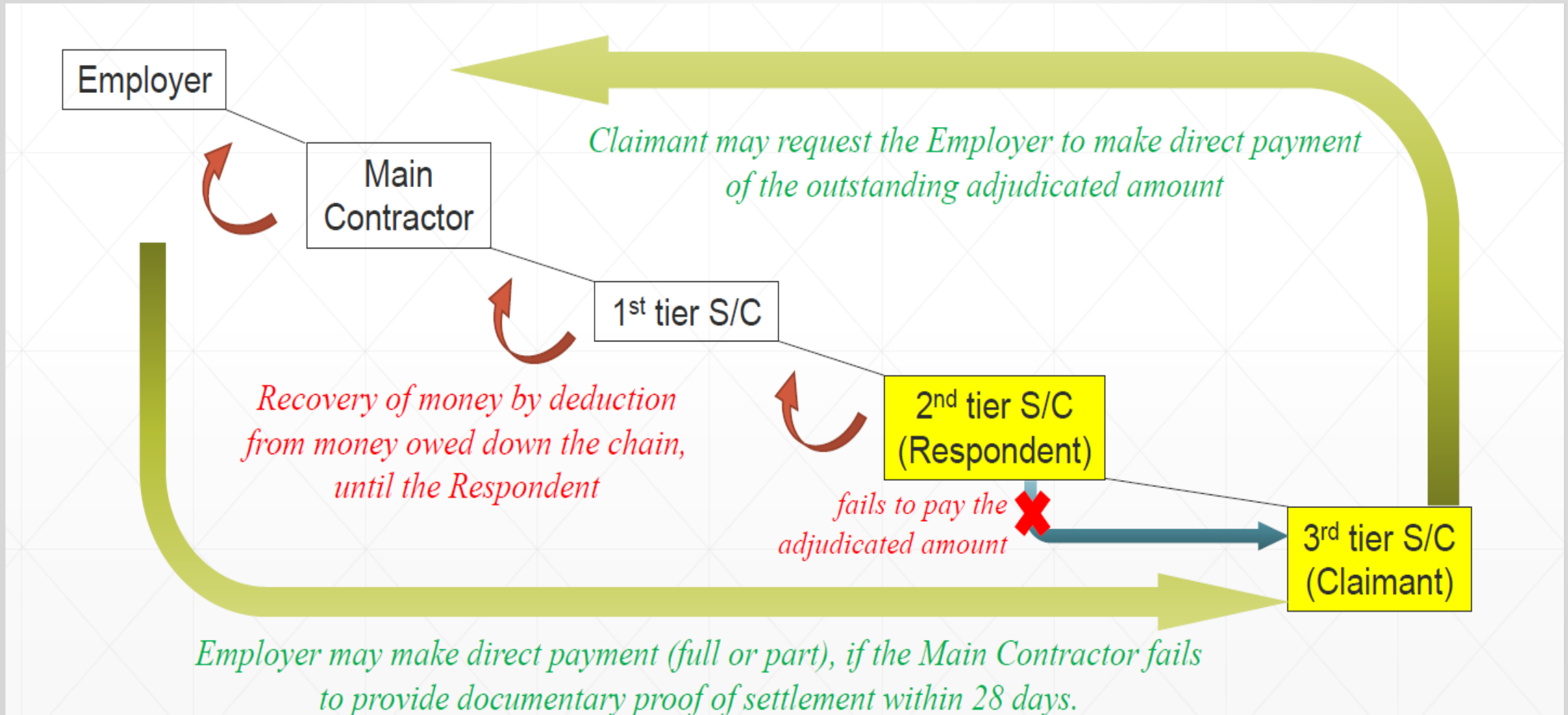
55 working days, starting from
the date of their appointment ↓

Step 8: Adjudication decision

Step 9: Enforcement of adjudication through direct
payment or suspension of work

ENFORCEMENT UNDER THE SOP REGIME

1. Direct Payment - “leapfrogging”



ENFORCEMENT UNDER THE SOP REGIME

2. Suspension rights

Adjudicated amount unpaid for 30 days or more



Claimant gives notice of intention to suspend/delay progress



Claimant takes reasonable steps to give notice and is still unpaid after 5 working days



Claimant imposes suspension or delay to progress



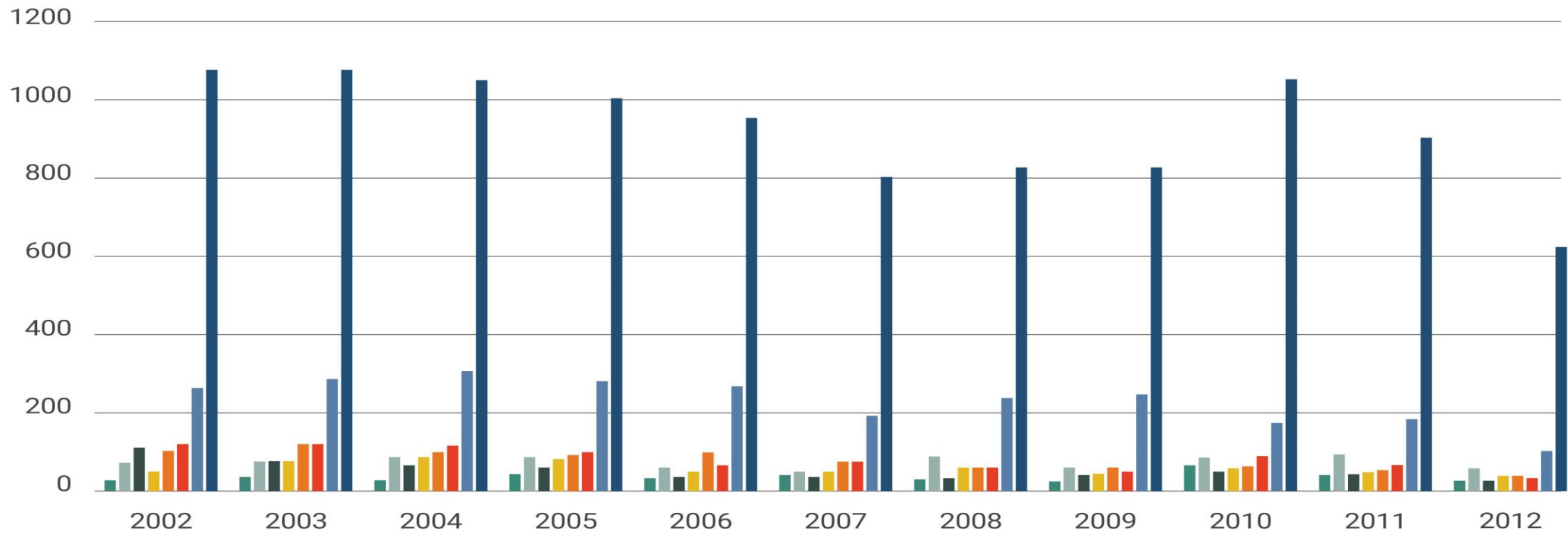
Claimant resumes work within 7 days of receiving payment of adjudicated amount



Image Credit: Propertydome

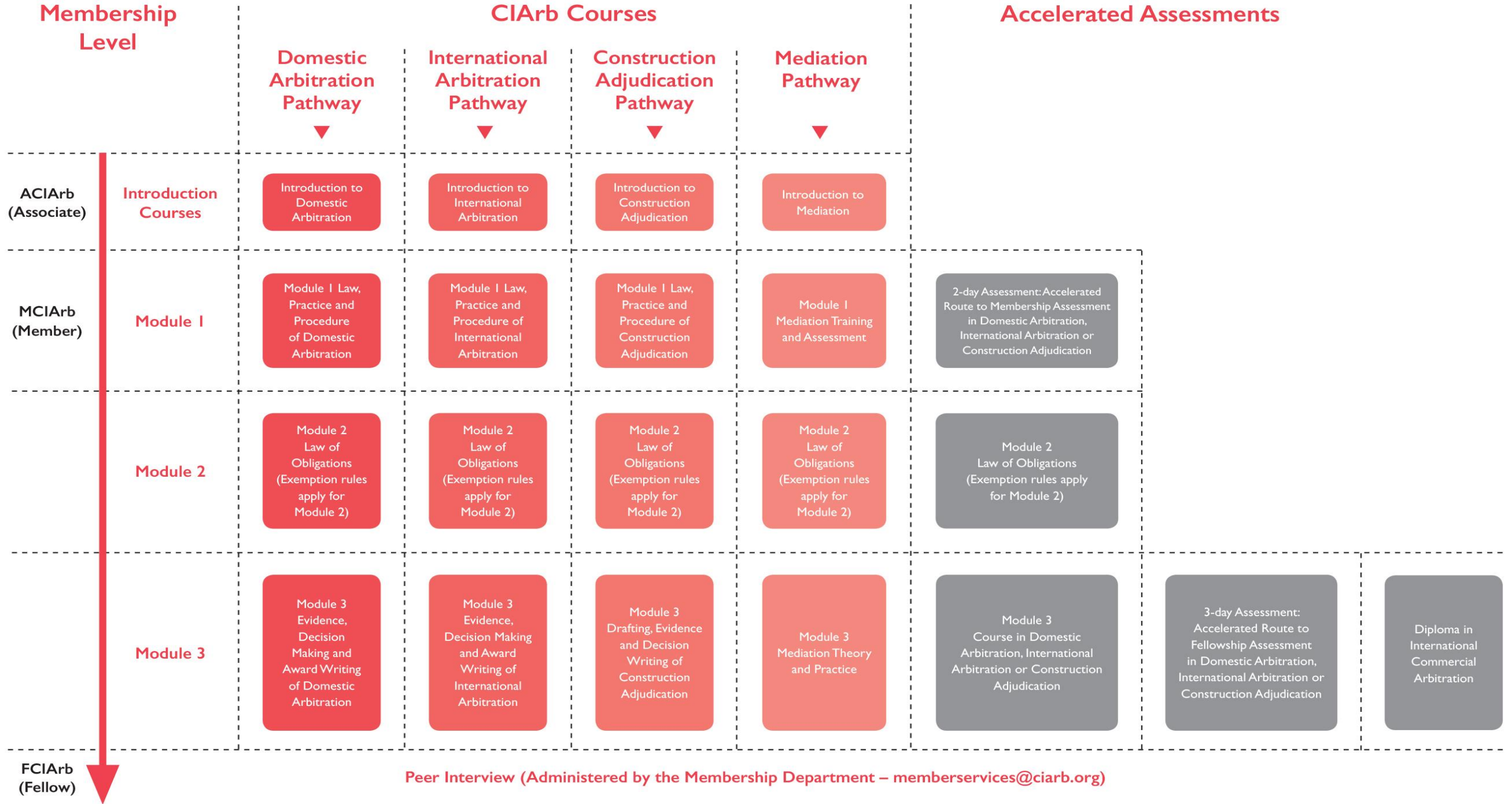
Proshare.

Appointments of ANBs



- Construction Industry Control
- Technology and Construction Solicitors Association
- ACCA
- RICS (S)
- CIArb
- ICE
- RIBA
- RICS

DISCIPLINE	Year 20 April 2018	Year 21 April 2019	Year 21 April 2020
Lawyers	41.7%	43.4%	42.5%
Quantity Surveyors	34.2%	34.8%	34.7%
Civil Engineers	10.2%	7.9%	7.4%
Architects	7.6%	6.9%	6.4%
Construction Consultants	1.7%	1.8%	2.0%
CIOB/Builders	1.4%	1.4%	2.0%
Others	3.2%	3.8%	5.0%



Please note that an assessment follows after each course which you have to book separately

No.	Item	Hong Kong	UK	NSW	Western Aus	NZ	Malaysia	Singapore
1	Legislation	<i>X</i>	✓	✓	✓	✓	✓	✓
2	Ability to contract out of adjudication	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>
3	Pay-when-paid	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>
4	Direct payment	✓	<i>X</i>	<i>X</i>	<i>X</i>	<i>X</i>	✓	✓
5	Suspension / go-slow rights	✓	✓	✓	✓	✓	✓	✓

Key Adjudication timelines

6	Response to payment claim	30 days	/	10 business days	Within the time period stated in the contract; if not specified, 14 days	/	/	7 days if the contract does not specify a deadline; 21 days if the contract does specify
7	Payment of admitted amounts	60 days	/	/	/	/	/	/
8	Start of Adjudication process: Notice of Adjudication to Respondent and Adjudicator Nominating Body	28 days	/	10 business days after service of payment schedule, or 20 business days after due date of payment	90 business days	/	/	Within 7 days of entitlement
9	Appointment of Adjudicator	5 working days	7 days	As soon as practicable (no set timeframe)	5 business days	5 working days	/	/
10	Claimant's service of Adjudication Submission	1 working day	Within 7 days of the Notice of Adjudication	5 business days after receipt of application, or 2 business days after receipt of notice of adjudicator's acceptance of application	10 business days	5 working days	10 working days	/
11	Respondent's service of Adjudication Response	20 working days	At Adjudicator's discretion - usually 7 days			5 working days	10 working days	7 days
12	Adjudication decision	55 working days	Within 28 days of referral notice	10 business days	10 business days	Within 20 working days of Adjudication Response	45 working days	Typically 28 days



Thank You For Listening

Dr. Christopher To



chriswto@gmail.com



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