

The Hong Kong Institute of Surveyors

Response to the Consultation on the Proposed Security of Payment Legislation for the Construction Industry

1.0 Introduction

1.1 The Hong Kong Institute of Surveyors (“HKIS”) has prepared the following comments for submission to the Development Bureau in response to the open consultation on the Proposed Security of Payment Legislation (“the SOPL”). The consultation period was from 1st June 2015 to 31st August 2015. After the meeting with the Development Bureau on 20th August 2015, the HKIS received a written reply from the Development Bureau that the Bureau would consider HKIS’s comments sent to the Bureau by 30th September 2015.

1.2 The HKIS has studied and reviewed the SOPL and considers that the proposed legislation would have a profound effect on the payment arrangement between the contracting parties of construction contracts. Apart from contractual requirements, contract administrators will be required to observe additional statutory duty imposed by the SOPL when administering the contract, in particular when dealing with payments, extensions of time and the associated loss and expenses claims.

1.3 The HKIS organised 3 forums on 2nd and 20th July 2015 and 19th September 2015 for introducing and collecting members’ comments and opinions on the SOPL.

The HKIS also met with Development Bureau on 20th August 2015 for a preliminary discussion and exchange of opinions on the SOPL.

2.0 HKIS Response to the Consultation of SOPL

2.1 The HKIS, in principle, supports the SOPL. However, there are comments from our members on some of the details of the current proposed legislation and these are set out below.

2.2 Proposal 1

2.2.1 Hong Kong's SOPL will apply to:

- (1) all contracts entered into by the Government (and the specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of the document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier; and
- (2) private sector contracts* where an employer is procuring construction activities or related services, materials or plant for a “new building” (or “new buildings”) as defined in the Buildings Ordinance (Cap 123) and the original contract value is more than HK\$5,000,000 (or HK\$500,000 in the case of professional services and supply only contracts).

** For the purposes of Proposal 1(2) and the Consultation Document, private sector contracts are those contracts not covered by Proposal 1(1) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A.*

2.2.2 Comments and Opinions

1. It is unsatisfactory for the SOPL to adopt the definition of “New Building” from Building Ordinance (Cap 123). A more precise definition is required.
2. The HK\$500,000 threshold for professional services and supply contracts is considered appropriate. However, surveying firms often assume the role of lead-consultants and the risks brought about by the prohibition of “Pay when Paid” will pose risks to surveying firms in particular to those small and mid-sized firms. It is suggested that exemption shall be given to lead-consultants in this regard.
3. The thresholds of HK\$5,000,000 (for new building construction) and HK\$500,000 (for professional services and supply only contracts) may require regular updating in line with inflation or some genuinely accepted mechanism to adjust the values of these threshold sums.

2.3 Proposal 2

2.3.1 Where a private sector main contract is not subject to the SOPL then all lower tier sub-contracts will not be subject to the SOPL. Where a private sector main contract is subject to the SOPL then all lower tier sub-contracts will be subject to the SOPL.

2.3.2 Comments and Opinions

Nil

2.4 Proposal 3

2.4.1 Hong Kong's SOPL will only apply to contracts relating to construction activities carried out in Hong Kong and will apply to such contracts even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law.

2.4.2 Comments and Opinions

1. The proposed SOPL applies to supply contracts involving foreign parties for those materials to be used in Hong Kong construction sites. However, it is anticipated that there might be difficulties of conflicts between SOPL and the laws of other jurisdictions.
2. There appears to have insufficient justifications for applying the SOPL to supply contracts as the suppliers often have better bargaining power.
3. There is a concern over whether it is practicable for adjudicators to make decisions on contracts for which the law governing the interpretation and construction of the contract is not Hong Kong law.

2.5 Proposal 4

2.5.1 Hong Kong's SOPL will apply to oral and partly oral contracts as well as written contracts.

2.5.2 Comments and Opinions

1. It is considered that applying SOPL to oral contracts is not recommended.
2. It would be inappropriate for any adjudicator to decide whether an oral contract exists because there will be paradoxical situation that if the oral contract does not exist, he has no authority under any contract to decide.
3. It is difficult for adjudicators to deal with oral evidences given the relatively short time frame for conducting the adjudication. It was considered that restricting the application of the SOPL to written contracts will encourage the practitioners and stakeholders in the industry to put all agreement in writing – a promotion of good practice indeed.
4. It can be foreseen that the application and number of cases of adjudication will be reduced significantly if the SOPL do not apply to oral contracts.
5. If oral contracts are not excluded from the SOPL, it can be foreseen that the parties might engage lawyers and with voluminous submissions for adjudications.

2.6 Proposal 5

2.6.1 Professional services contracts for the provision of services directly related to planned or actual construction activities in Hong Kong will be covered by the SOPL.

2.6.2 Comments and Opinions

1. On Question 5B, the SOPL should be applicable to professional services related to design, engineering, surveying, advice on constructability (e.g. project management), testing and commissioning, systems or operation verification.

2.7 Proposal 6

2.7.1 Contracts for the supply of materials or plant (even if they do not include for any installation or operation on site) will be covered by Hong Kong's SOPL.

2.7.2 Comments and Opinions

Nil

2.8 Proposal 7

2.8.1 Employment, insurance, guarantee, loan and investment contracts will be excluded from the scope of Hong Kong's SOPL.

2.8.2 Comments and Opinions

Nil

2.9 Proposal 8

2.9.1 Parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong's SOPL will be entitled to Progress Payments but the parties to the contract will be free to agree the number of Progress Payments, when they can be claimed and the basis for calculating amounts due.

2.9.2 Comments and Opinions

1. The various terms introduced under the SOPL i.e. Progress Payment, Payment Interval, Payment Period, Payment Claim, Payment Response should be clear and unambiguous, and preferably be consistent with the defined terms generally adopted and in common use by the industry stakeholders under various standard forms of construction contracts.

2.10 Proposal 9

2.10.1 The maximum Payment Period which can be agreed for payments shall be 60 calendar days for Interim Progress Payments and 120 calendar days for Final Progress Payments.

2.10.2 Comments and Opinions

1. The Payment Period as proposed should be reviewed with caution as for some Government sub-vented projects or some professional services engagement, it is not uncommon to take more than 60 calendar days to settle the interim progress payment.
2. The term "Final Progress Payment" is a seriously incorrect term. A progress payment is always an interim payment and will never be final. A final payment should be the one after the satisfactory completion of the defects liability period and the agreement of the final account or after some stipulated attempts to agree the final account.
3. It is crucial to clarify the starting day for counting the 120 calendar days of Maximum Payment Period for final Progress Payments in the context of the prevailing standard forms of building contracts. In any event, the operation of the SOPL shall not reduce the customary period (in most case 12 months upon the certified Substantial Completion of the project) of final measurement.
4. Without a proper definition of "final payment", the lower tier work or service providers would immediately file a payment claim after the completion of the works or services and declare it to be a final payment claim. This would cause undue injustice and hardship to the paying parties when the final payment should usually be due after the satisfactory completion of the defects liability period and the agreement of the final account.

2.11 Proposal 10

2.11.1 Parties who are entitled to Progress Payments under the terms of a contract covered by Hong Kong's SOPL will be entitled (but not obliged) to claim the Progress Payments by way of statutory Payment Claims. Paying parties will be entitled to serve Payment Responses no later than 30 calendar days after receipt of Payment Claims. Parties who are entitled to payments under statutory Payment Claims which are disputed or ignored will be entitled to pursue adjudication.

2.11.2 Comments and Opinions

1. It was noted from page 20 of the Consultation Document, parties will have two options for claiming their payments. Firstly, claims can be made purely on a contractual basis under the terms of their contracts. Secondly, in addition or alternatively and in the case of not able to solve the issue under the Contract, payments can be claimed by way of Payment Claims under the SOPL. This provision will cause doubt and concern to the payer as the payee could choose, to their advantage, between the 2 methods for the payment.
2. Under the above provision, the contractors could apply and obtain payment without the need for the Architect's inspection of the quality of the works. This is especially the case when the nominated specialist sub-contractor could apply for payment from the Main Contractor at a time that would not be consistent with the normal payment application cycle under the Main Contract with the Employer.
3. There are merits to require a first respect by both contract parties to third party's valuation and certification, while providing a room for redress if any of the contract parties feels aggrieved by the third party's valuation and certification.

2.12 Proposal 11

2.12.1 **Default Provisions:** When parties do not make express agreements about when payments can be claimed and/or how they will be calculated and/or when and how the paying party can respond to them and/or when payment will be made the following will be implied as necessary by Hong Kong's SOPL:

- a) Parties undertaking work or providing services, materials or plant will be entitled to make Payment Claims at calendar month Payment Intervals.
- b) The payment due will be calculated based on the value of work, services, materials or plant provided and valuation will be based on any relevant contract price or pricing or in the absence of the same on market rates prevailing at the time the contract was entered into.
- c) Paying parties will be entitled to serve a Payment Response within 30 calendar days of receiving a Payment Claim.
- d) The Payment Period will be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payment) after receipt of a Payment Claim.

2.12.2 Comments and Opinions

1. The SOPL should also consider the industry norm of withholding 5% to 10% of the payment as retention. This withholding of retention money is essential in order to ensure that contractors will follow through their obligations or duties to rectify defects in their works to the quality and standard they have been committed to and agreed to undertake.

2.13 Proposal 12

2.13.1 Paying parties who fail to serve Payment Responses within 30 calendar days (or any earlier period agreed in the contract) of receipt of a Payment Claim will not be automatically liable to pay the full amount of the Payment Claim but they will not be able to raise any set off against amounts properly due against the Payment Claim.

2.13.2 Comments and Opinions

Nil

2.14 Proposal 13

2.14.1 'Pay when paid' clauses will be rendered ineffective under Hong Kong's SOPL even where the reason for non-payment is insolvency higher in the supply chain.

2.14.2 Comments and Opinions

1. The prohibition on “pay when certified” will bring about a radical change to the well-established system of sub-contracts, in particular Nominated Sub-Contracts.
2. The public may have the impression that there is no need to engage a consultant as a certifier because of the prohibition of the “pay when certified” mechanism.
3. Contract administrators are customarily required to make independent payment valuation and certification, but the SOPL is not in line with this customary practice. Such an across the board prohibition of "pay when certified" is not reasonable.
4. Pages 24 and 25 of CD suggest prohibition of “pay when paid” conditions. One of the effects of such prohibition is that main contractors are guaranteeing Employer’s solvency and each sub-contractor in the sub-contracting chain guarantee to sub-contractor below solvency of the sub-contractor at upper tier. It is questionable whether this guarantee of solvency of the one in the upper tier of the contracting chain is desirable as it may result in a snowball effect of bankruptcy rolling from the Main Contractor to the lower tiers of sub-contractors. The SOPL should deal with the situation when insolvency of the upper tier party to the paying party has occurred or when the insolvency of the payee is imminent without the prospect of going on after receiving the payment.
5. The risk of insolvency of parties in the upstream of supply chain may become prominent during the downturn of the construction market.

2.15 Proposal 14

2.15.1 Clauses which have the same effect as 'pay when paid' will be rendered ineffective under Hong Kong's SOPL including in nominated sub-contracts.

2.15.2 Comments and Opinions

1. Same comments as on Proposal 13
2. Question 14A at page 25 and para 20 at page 47 of the Consultation Document are on prohibition of making payment contingent or condition on the operation of another contract/ agreement. It seems the reality that in our industry, making payment contingent or condition on the operation of another contract/ agreement may be necessary. For example, one may be cautious to certify materials on site without knowing whether terms of the supply contract have been complied with, like terms of payments to the supplier are satisfied, titles of materials under the supply contract have been properly transferred to the contractor seeking payment for materials on site.
3. In the Consultation Document, it is said that the contracting parties could have freedom to agree the terms of the contract, but on the other hand it is also stated that the "pay when certified" clause was unfair to the subcontractors and suppliers. Under normal circumstances, the whole payment cycle (i.e. Quantity Surveyor's valuation, Architect's certification and Employer's payment) can be completed within the maximum period of 60 days. However, if there is a contractual claim, it is not unusual that the contractor is requested to furnish further and better information and the whole assessment and negotiation process would likely take more than 60 days even for a simple case. Strictly speaking, once the statutory maximum period is exceeded, the contractor can refer the dispute to the adjudication without waiting for the Architect's (final) decision.
4. Proposal 14 at page 25 of the Consultation Document seems to propose prohibition of "pay when certified" clauses in the context of sub-contract level. It is not clear whether it is intended to prohibit "pay when certified" clause in main contracts. Proposal 14 at page 25 of the Consultation Document is under the context of prohibiting provisions of making payment conditional on the operation of any other contract or agreement. Under most standard forms of main contract currently in use, the Employer does not need to pay unless there is a payment certificate certified by Contract Administrator/ Architect/ Engineer but such certification is NOT any performance/ obligation/ operation of another contract, but rather a process under the same contract (i.e. the main contract), i.e. the "pay" and "certified" are under the same contract.

5. Not only it is unclear whether Proposal 14 at page 25 of the Consultation Document is intended to prohibit “pay when certified” clause in main contracts (when “pay” and “certified” are under the same main contract rather than having the former condition upon the latter in another contract), but also when reading para 3 at page 17 of the Consultation Document, it seems to intend to allow the current practice of “pay when certified” in main contracts. Under standard forms of main contract, the current norm is Employers “pay when certified” by Contract Administrators/ Architects/ Engineers such that payment certificate is conditions precedent to the contractor’s entitlement to be paid. Para 3 at page 17 of the Consultation Document proposes to apply and enforce conditions precedent (which include payment certificates under main contract).

6. Para 3 at page 17 of the Consultation Document on Payment Claim can be read as “A claiming party is not entitled to claim more than they would be entitled under their contract in a Payment Claim. Also, they cannot claim amount any sooner than provided for by the contract and any conditions precedent to payment.....will still apply.” Under most standard forms, it is opened to the Employer to argue that the contractor is not entitled to claim more than what has been certified by the Architect in a payment certificate, that the contractor cannot claim sooner than the honouring period of the Architect’s payment certificate (and is limited to the sum so certified) and that the Architect’s payment certificate is conditions precedent to the contractor’s entitlement to be paid.

2.16 Proposal 15

2.16.1 Hong Kong's SOPL will introduce a right for parties to suspend all or part of their works or reduce the rate of progress in the event of non-payment.

2.16.2 Comments and Opinions

1. Para 22 at page 47 of the Consultation Document seems to be an incomplete repetition of para 21 at the same page.

2.17 Proposal 16

2.17.1 The right to suspend or reduce the rate of progress will only arise after either non-payment of an adjudicator's decision or non-payment of an amount admitted as due in a Payment Response.

2.17.2 Comments and Opinions

1. As to the right to slow down progress of works conferred by the SOPL, it would appear that it is difficult and controversial to gauge the rate at which the contractor has slowed down the works.

2.18 Proposal 17

2.18.1 Parties which suspend or slow down work for non-payment will have rights to additional time to complete their obligations and to reasonable costs and expenses in respect of delay and disruption arising from the suspension.

2.18.2 Comments and Opinions

Nil

2.19 Proposal 18

2.19.1 Unpaid parties must give written notice of their intention to suspend to the non-paying party and (if known) to any party which pays the non-paying party (the "principal") and to the site owner.

2.19.2 Comments and Opinions

Nil

2.20 Proposal 19

2.20.1 Both parties to a contract will be entitled to refer disputes to adjudication but limited to disputes concerning the following:

- a) the value of work, services, materials and plant supplied and claimed in a Payment Claim; and/or
- b) other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or
- c) set offs and deductions against amounts due under Payment Claims; and/or
- d) the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract.

2.20.2 Comments and Opinions

1. There shall be a tolerance of valuation of interim payments. There is a suggestion that the enforcement of the adjudication award shall be inapplicable if the award figures fall within the stipulated tolerance. This will provide disincentive to frivolous reference to adjudications.

2.21 Proposal 20

2.21.1 There is a time limit for commencement of adjudication of 28 calendar days from either:

- a) non-payment of an amount admitted as due in a Payment Response; or
- b) service of a Payment Response disputing all or part of a Payment Claim and/or identifying amounts to be set off against or deducted from amounts otherwise due in respect of the Payment Claim; or
- c) the failure of the paying party to serve a Payment Response in relation to the Payment Claim within the required time; or
- d) a dispute arising as to the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract by one of the parties to the contract.

2.21.2 Comments and Opinions

1. The durations to commence adjudications are all the same for these different scenarios starting from different triggering dates.

The priority objective of the proposed legislation should make sure that the payment of the non-disputed amount (after all set-off) is enforced within the contractual time frame without the need to go to adjudication. It is only the disputed or non-responded amount which may need to be adjudicated. The foregoing cannot be found explicitly stated in the Consultation Document.

Currently, the Employer can set-off (e.g. liquidated damages in private contracts or cross-contract set-off) after the Architect's or Engineer's payment certificate (which presumably has already accounted for most deductions authorised under the contract). To follow the proposed legislation, the Employer would need to serve a Payment Response after the payment certificate. It may be helpful and neater if the payment certificate is deemed to be a Payment Response and the payment certificate should take into account or show concurrently any set-off intended by the Employer. Government Contracts already require the liquidated damages to be deducted from the certified amount. This would help identify what the non-disputed amount is.

2. In the main contract level, there is no under-payment by the Employer if he pays the contractor the full certified sum which the Architect has certified. If the proposed legislation is intended to assist contractors, it must be drafted clearly that not only under-payment is a matter which can go to adjudication but also under-valuation and under-certification can go to adjudication (though this means the contractor can proceed to adjudication every time when the Quantity Surveyor's/ Architect's valuation/ certification is not that the contractor applies for).

2.22 Proposal 21

2.22.1 Adjudication shall have the following key features:

Timetable and Procedure

- a) The claiming party will commence adjudication by serving on the other party a notice of adjudication, setting out brief details of the parties, the nature of the dispute and the redress sought.
- b) The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) by Hong Kong International Arbitration Centre (HKIAC) within 5 working days of commencement.
- c) The claiming party must serve their submissions together with all supporting evidence they rely on (which may include documents, photographs, witness statements and expert reports) on the responding party on or before the date of appointment of the adjudicator and on the adjudicator on the day of their appointment or the next working day.
- d) The responding party has 20 working days from receipt of the claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.
- e) The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from the date of appointment of the adjudicator and to in excess of 55 working days if both parties agree.
- f) The adjudicator shall have the power to vary the time for the responding party to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manner as they think fit including being able to require further submissions and evidence from either party, to call meetings with the parties, to inspect relevant matters and set deadlines and issue procedural directions provided always that the adjudication can be concluded within 55 working days from the date of appointment of the adjudicator or any agreed extended period.

Addressing Ambush

- g) The adjudicator shall be entitled to disregard any submission or evidence or part thereof submitted by the claiming party to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served with a Payment Claim or otherwise in advance of the notice of adjudication and which cannot fairly be considered and responded to by the responding party in the adjudication.
- h) The adjudicator shall be entitled to resign if they consider that it is not possible to decide the dispute fairly in the time available (being the maximum time available including any extended periods agreed by the parties).

Costs

- i) Each party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator's fees and expenses or the proportions in which they are to be jointly paid by the parties.

2.22.2 Comments and Opinions

1. It was suggested that the adjudicator shall be given the power to extend the adjudication period beyond 55 working days.
2. Adjudication award on certain matters relating to interim payments may cause problems as the contractor's entitlement to interim payments varies with time.
3. Despite what have been discussed in the Consultation Document, the risk of repeated requests for adjudication on closely related matters still exists.
4. On payment response, if the Employer imposes a Liquidated Damages and sets off most of the claimed amount, the Contractor would very likely disagree and commence the adjudication. It would appear it is not likely to resolve the extension of time claim and maybe the associated loss and expenses within the current proposed time frame of 55 days, or even with mutually agreed extended period, say 80 days?
5. The safeguards against ambush seem to be not very effective.
6. Adjudication is not appropriate for cases that involve substantial claim and it is doubtful if the current proposal in the Consultation Document can serve its intended purposes.
7. The current proposed legislation may not be able to overcome the abuses of the legislation as seen from overseas experience.

2.23 Proposal 22

2.23.1 Parties are free to agree adjudicator nominating bodies (“ANBs”) in their contract and are free to agree an adjudicator for specific disputes but only after a dispute and right to adjudicate has arisen. Where no ANB is agreed in the contract and where no adjudicator is agreed after a dispute has arisen, the Hong Kong International Arbitration Centre (“HKIAC”) will be the default ANB.

2.23.2 Comments and Opinions

1. The period of 5 days for appointing an adjudicator upon commencement of adjudication may be too short. Para 16 at page 41 of the Consultation Document suggests the claiming party to seek nomination from the relevant nomination body at the same time when it tries to agree an adjudicator with the responding party to ensure this 5-day period can be met. If this is adopted:-
 - a) Appointing fee to nomination body may be wasted if the responding party agrees to the claiming party’s proposed adjudicator.
2. It will be more realistic to say, upon commencement of adjudication, give 5 days for the parties to agree an adjudicator and if no adjudicator is agreed within these 5 days, the claiming party seeks nomination from the relevant nomination body who will then make an appointment within 5 days. This will add 5 days to the timeframe proposed in the Consultation Document and unlikely to materially prejudice either party.
3. The detailed timeframe for the appointment of an adjudicator should be clearly stated, particularly when one party objects to a proposed appointment due to whatsoever reasons.

2.24 Proposal 23

2.24.1 Hong Kong's SOPL will include provision allowing adjudicator's decisions to be enforced in the same way as judgments of the court and without set-off or deduction and allowing responding parties only a short period within which to lodge any challenge to validity.

2.24.2 Comments and Opinions

1. It should be clarified whether adjudicators should enjoy some degree of immunity like other jurisdictions.
2. Page 42 of the Consultation Document suggests adjudicator's decisions to be enforced in the same way as court judgments without set-off or deduction. The concepts of "court judgments" and "without set-off or deduction" are contradicting under current law but before going into this, it is unclear whether by suggesting adjudicator's decisions to be enforced in the same way as court judgments, it is intended that sums awarded by an adjudicator to be taken as judgment debts. This is important because one of the means to enforce a judgment debt is petition winding-up of a party if it fails to satisfy the judgment debt (a very powerful tool in fact). However, in Re Rightop Investment Ltd [2003] 2 HKLRD 123, it was held that if taking a winding-up petition is to put pressure on the solvent debtor to pay a disputed sum, it would amount to an abuse of process (in that case, the plaintiff was ordered to pay costs on an indemnity basis). SOP legislation should make it clear whether sums awarded by an adjudicator are to be taken to be judgment debts (in such case, the debtor is a judgment debtor and petitioning winding-up of judgment debtor is in order) or whether sums awarded by adjudicator remain disputed sums until the court turns them to judgment debts (similar to the situation in enforcing arbitration awards by turning awards into judgments).
3. The concepts of "court judgments" and "without set off or deduction" are contradicting because under existing law, court judgments can be set off (though with limits). Rules of the High Court Order 45 rule 16 provides that "If there are cross-judgments between the same parties for the payment of money execution shall be taken out by that party only who has obtained a judgment for the larger sum and for so much only as may remain after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the judgment for the larger sum as well as satisfaction on the judgment for the smaller sum, and if both sums are equal satisfaction shall be entered on both judgments." In Re: Lam Lam ex p Bank of China (Hong Kong) Ltd, CACV 396 of 2002, Justice Reyes ruled at para 9 that "In my view, the wording of Order 45 rule 16 is clear. A set-off is automatic. As a result of that set-off, satisfaction for the smaller sum shall be entered and satisfaction of the largest sum to the extent of the smaller sum shall be entered as well. One does not have to apply to the court before the set-off takes place."

4. This being the case, if adjudicator's decisions to be enforced in the same way as court judgments, under the existing law, the norm is they should be subject to automatic set-off of cross-judgments between the same parties. The proposed SOP legislation seeks to change the norm.
5. In terms of fairness, set-off of cross-adjudicators' decisions between the same parties should be allowed. For example, a main contractor may have an adjudicator's decision under which it has to pay a sub-contractor in one sub-contract but at the same time, there is another adjudicator's decision under which the same sub-contractor has to pay the main contractor in another sub-contract. It seems unfair to require the main contractor to pay the first adjudicator's decision and to ignore the other adjudicator's decision which is in the main contractor's favour. Similarly, a main contractor may have an adjudicator's decision under which it has to pay a sub-contractor in one sub-contract but at the same time, there is a court judgment under which the same sub-contractor has to pay the main contractor in the same or another sub-contract or under statutory provisions. Again, it seems unfair to require the main contractor to pay the adjudicator's decision and to ignore the court's judgment which is in the main contractor's favour.
6. The proposed legislation is apparently silent on *res judicata*, i.e. could the decision of a previous adjudicator be over-ruled by the next adjudicator? An example is, if there is a dispute about the right to payment about a particular VO, and the adjudicator decides that no right has been established, thus no payment due. This decision will be binding unless and until it is revised in arbitration. Suppose the same point is raised 2 months later, further documents are produced (e.g. an email from the Main Contractor confirming that the Main Contractor had agreed to reimburse the Sub-contractor for the VO in question and demanded commencement of the varied work by him, which he did in consequence of this email. Can this matter be raised and adjudicated upon again in light of this new substantiation for the purpose of seeking payment for the VO for the second time?

The example is a common occurrence. If this is a matter of civil litigation, the same matter cannot be litigated twice by the same parties thus preventing the court from achieving finality in the resolution of the dispute between them. (*res judicata*). The example will be barred by "the cause of action estoppel", which is an "absolute" rule. If the new evidence is one that was not available, then subject to other conditions, it might be relied upon and "used" for an appeal (*Ladd v Marshall*) but not a ground to being another action. The example is one raised in the context of having another go at adjudication. If the whole feature of adjudication is a statutory product, there is no question of discretion. Either the SOPL provides for it or it does not, expressly or impliedly. It cannot be right that depending on who will be the next adjudicator is.

3.0 Response from the HKIA, HKIE and HKIS on default Adjudicator Nominating Body

The HKIA, HKIE and HKIS have expressed in the same letter to the Development Bureau on 30th September 2015 the mutual comment that the default Adjudicator Nominating Body shall be a joint panel comprising the three professional bodies in lieu of the proposed one as stated in the Consultation Document. The three professional bodies share the same opinion that an adjudicator must be able to evaluate the financial claim and/or durations of delays etc. which are closely related to the construction practice and knowledge on methodologies and usual industry norms. Adjudicators should therefore be well acquainted with the technical expertise. Architects, Engineers and Surveyors have been professionally trained, and through years of practice gaining abundant experience to be well qualified as adjudicators for the purposes as stated in the SOPL.

4.0 Conclusion

The above are the views of the HKIS after listening to the comments from its members on the SOPL. The HKIS sincerely hopes that the Development Bureau will study and include the comments into their further development of the SOPL. Should there be any queries on the comments or the Development Bureau would wish to engage the HKIS in reviewing the SOPL, the HKIS will be very pleased to offer its advice on professional knowledge and expertise that will have a bearing on the formulation of the SOPL.