

Insights

HK GOVERNMENT RESPONDS TO 19 JUNE LETTER FROM LEGCO IN-HOUSE LAWYER REGARDING THE SECURITY OF PAYMENT BILL

Aug 05, 2024

SUMMARY

Our earlier Insight “[LegCo in-house lawyers request clarifications regarding the Security of Payment Bill](#)” reported that the Legal Service Division of the LegCo wrote a letter on 19 June 2024 to the HK Government seeking to clarify certain matters in the Construction Industry Security of Payment Bill (“Bill”).

On 18 July 2024, [the HK Government responded by a letter](#).

MAIN POINTS IN THE GOVERNMENT’S RESPONSE

The Government’s responses to the various comments by the Legal Service Division as highlighted in our earlier Insight are as follows:

SPLITTING OF CONTRACTS

- The Government was of the view that the splitting of contracts to circumvent the application of the Bill would be unlikely, because an owner who does so would need to manage a large number of contracts, thereby imposing difficulties in project management.
- The Government did not agree with the suggestion to expand the scope of clause 11 of the Bill (which bans contracting out of the Bill) to include multiple contracts which have the effect of excluding, modifying or restricting the operation of the Bill. This is because to do so will require differentiation between the deliberate split of contracts to avoid the operation of the Bill, and the genuine need of the owner to procure construction work by phases. Given that this differentiation is difficult to establish in practice, the Government did not adopt this suggestion to expand the scope of clause 11.

ELIGIBILITY OF ADJUDICATORS

- The Government was requested to clarify whether it is appropriate to require the adjudicators to possess certain professional qualifications (e.g. degree or diploma in construction and engineering) or a minimum period of relevant experience under the Bill.
- The Government responded that the Government will establish a set of “basic criteria” (e.g. the professional qualification and post-qualification experience requirements). A body wishing to be registered as a “nominating body” must provide a set of draft eligibility criteria (for including an individual in its panel of adjudicators) for the Government’s consideration. If a body’s draft eligibility criteria are not in line with the Government’s “basic criteria”, the Government may exercise its powers under clause 61(2)(a) of the Bill to refuse to admit the body into the register of nominating bodies. The Government also may give direction to a nominating body to amend its eligibility criteria pursuant to the “basic criteria” (under clause 61(2)(d) of the Bill), or suspend or cancel a nominating body’s registration (under clause 61(2)(b) of the Bill) if the nominating body fails to comply with any of the conditions of registration.

ADJUDICATOR’S INDEPENDENCE AND IMPARTIALITY

- The Government was requested to clarify the proposed procedure for a nominating body upon receiving a declaration or disclosure from an adjudicator during the adjudication process concerning circumstances likely to give rise to justifiable doubts as to the adjudicator’s independence and impartiality.
- The Government responded that its intention was that the relevant procedure will be provided for in the adjudication rules (to be prepared by the nominating bodies). The Government expected that relevant adjudication rules would include the nominee providing the declaration and/or disclosed information to the parties and the nominating body, the parties to be given an opportunity to raise objection on the ground of conflicts of interest or justifiable doubts on the nominee’s independence or impartiality, and the nominating body making a final decision on the adjudicator’s appointment.
- The Government also stated that it was formulating a unified guideline on conflicts of interest in adjudication (“Unified Guideline”) based on IBA’s [Guidelines on Conflicts of Interest in International Arbitration 2024](#). The Government will publish the Unified Guideline online and may direct nominating bodies to comply with the Unified Guideline pursuant to clause 61(2)(d) of the Bill.

TERMINATION OF ADJUDICATION PROCEEDINGS

- Under clause 41(f) of the Bill, adjudication proceedings are terminated if the nominating body considers that the adjudicator is unable or ineligible to act as the adjudicator. The Government was requested to clarify how the nominating body would make this determination and whether

the nominating body would exercise any supervisory function during the adjudication proceedings.

- The Government responded that the adjudication rules will provide for the procedure for challenging an adjudicator, e.g. rules regarding a party raising a challenge and an opportunity for the other party and the adjudicator to respond.
 - If the adjudicator agrees with the challenge, the adjudicator must resign under clause 39(3) of the Bill.
 - If the adjudicator disagrees with the challenge, the nominating body will consider the challenge. If the nominating body agrees with the challenge, the adjudication proceedings are terminated under clause 41(f) of the Bill. In making its determination, the nominating body is required to follow the Unified Guideline.

The Government's response also contains the following interesting and important points.

CORRECTION OF ERRORS

- Under clause 45 of the Bill, an adjudicator may correct in a determination any "*computational or typographical error or any error of a similar nature*".^[1]
- The Government stated that an adjudicator's power to correct errors is not limited to those that is of a "*immaterial nature*". In particular, the Government also made it clear that the errors that an adjudicator can correct include errors in the computation of the "*adjudicated amount*".
- The Government also stated its intention that the adjudication rules will provide for the procedures of correcting computational and typographical errors in a determination.

CONSISTENCY OF ADJUDICATION CODES, PRACTICE NOTES AND CODES OF CONDUCT

- To address concerns about the consistency of adjudication codes, practice notes and code of conduct for adjudicators, the Government will formulate "*the main content of adjudication rules, practice notes and codes of conduct to be made by nominating bodies*", and that the nominating bodies must then comply with the "*main content*".

COMPLAINT AGAINST NOMINATING BODIES / ADJUDICATORS

- As regards complaints against nominating bodies, the Government will set up a communication channel to receive these complaints, and will follow up the complaints, investigate and take necessary action.

- As regards complaints against adjudicators, the Government's view is that these complaints would be best handled by the nominating bodies, given that the adjudicators will be governed by the respective nominating bodies' adjudication codes, practice notes and codes of conduct.

GENERAL COMMENTS

A general theme in the Government's response is that the Bill's intention is to provide a framework for the statutory adjudication regime, the details and procedures of which will be supplemented and complemented by the various adjudication rules to be issued by the nominating bodies^[2]. The Government is acting cautiously in trying not to "over-regulate" or to limit the professional nominating bodies' flexibility in preparing and developing their own adjudication rules. Also, the Government has stated its intention to leave it to the nominating bodies to deal with any complaints regarding adjudicators.

However, that does not mean that the Government is adopting a laissez-faire approach in respect of the statutory adjudication regime. It is not. The Government has undertaken to establish mechanisms to deal with any complaints to the nominating bodies. Further, as highlighted above, the Government has stated that it will issue the "basic criteria" (regarding an adjudicator's professional qualification), the Unified Guidelines (regarding conflicts of interest) and the "*main content of adjudication rules, practice notes and codes of conduct*", which will provide a minimum standard for the nominating bodies to follow. As stated in the Government's response, the Government will actively exercise its powers under clause 61 (including to suspend or cancel the registration of a nominating body) to police the nominating bodies in order to ensure that they fulfill the Government's standards. The Government's approach, which strikes a balance between regulation and devolution of powers to nominating bodies, is welcome and confirms and indeed extends Hong Kong's history and well-deserved reputation as a world leading pro-arbitration (and now pro-adjudication) jurisdiction.

FOOTNOTES

[1] Under Article 33(1) of the UNCITRAL Model Law (as adopted in section 69 of the Arbitration Ordinance), an arbitral tribunal may correct "*any errors in computation, any clerical or typographical errors or any errors of similar nature*". The power under Article 33(1)(a) to correct an award is narrow, being confined to errors which stem from a "mental lapse" or a "slip of the pen". Given the similarities in the wording between Article 33(1) of the UNCITRAL Model Law and clause 45 of the Bill, it remains to be seen as to whether the HK courts would interpret the power to correct an adjudicator's determination as narrowly as an arbitrator's power to correct an award. For an example as to how the HK courts deal with applications to correct arbitral awards, see BCLP's earlier Insight: [HK Court explains principles regarding correction of arbitration awards](#).

[2] To confine the length of this present article, not all of the Government's responses are set out here. For completeness, the Government also has stated its intention to leave it to the adjudication rules to regulate other matters, including for example, how the adjudicators should declare and disclose interest, the procedure of requesting the parties to settle deposits and any final payment of the fees and expenses or return of any unexpended balance to the parties, and to provide the schedule of fees and expenses of the nominating bodies.

RELATED PRACTICE AREAS

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- Construction Disputes

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