

**Report on Public Consultation on**

**Proposed Security of Payment Legislation**  
**for the Construction Industry**

**April 2016**



**發展局**

**Development Bureau**

# **C O N T E N T S**

<b>Chapter</b>	<b>Contents</b>	<b>Page</b>
Chapter 1	The Consultation and this Report	1
Chapter 2	Views on Scope	6
Chapter 3	Views on Payment	19
Chapter 4	Views on Prohibition of “Pay When Paid” and Conditional Payment	29
Chapter 5	Views on Suspension for Non-payment	34
Chapter 6	Views on Adjudication and Enforcement	41
Chapter 7	Conclusion	59

## **Annexes**

Annex A	Membership of Working Group on Security of Payment for the Construction Industry
Annex B	List of Consultation Forums and Meetings
Annex C	Summary of Consultation Responses
Annex D	Specified Statutory and/or Public Bodies and Corporations under SOPL

# Chapter 1: The Consultation and this Report

## The Consultation and this Report

1. The Development Bureau (“**DEVB**”) of the Hong Kong Special Administrative Region Government (“**Government**”) is committed to supporting and encouraging best practice in the construction industry.
2. Payment delays, disputes and unfair contract terms adversely affect many in the construction industry as confirmed by a comprehensive survey undertaken by the Government in 2011. A number of other jurisdictions, with common law legal systems similar to Hong Kong, including the United Kingdom, Australia, New Zealand, Singapore and Malaysia have enacted Security of Payment legislation (“**SOPL**”) to address similar problems in their own construction industries.
3. The Government believes that an efficient and competitive industry benefits the wider Hong Kong community as well as those whose livelihoods depend on it. When industry participants are distracted or starved of funding by disputes or late payments, hardship can result and projects can suffer delays and falling standards.
4. In late 2012 DEVB brought together a Working Group on Security of Payment for the Construction Industry (“**Working Group**”) comprising representatives of key construction industry stakeholders (the member list is set out in Annex A) in Hong Kong and solicited their views and comments on the essential elements and framework for SOPL for Hong Kong. To provide points of reference for the Working Group they were referred to the different approaches to SOPL taken in those jurisdictions where it is already enacted.

5. After thorough studies and making reference to overseas practices, the Working Group recommended to legislate on security of payment in the construction industry. On 1 June 2015 DEVB issued a Consultation Document entitled “*Proposed Security of Payment Legislation for the Construction Industry*” and embarked on a three-month public consultation. The Consultation Document sought views by putting forward a series of questions asking respondents to tick whether they agreed or disagreed with each individual question. In addition, respondents were, of course, able to make whatever written submissions they wished whether in relation to the specific questions or otherwise. The public consultation exercises ended on 31 August 2015.
6. Soft copies of the bilingual Consultation Document, leaflets, summary and guide and posters together with radio and TV announcements of public interests (API) were uploaded onto the website of DEVB whereas hard copies were available from the Public Enquiry Centres of the District Offices, public libraries and the said documents were also mailed to stakeholders by post. Two stakeholder and two public forums, conducted in Cantonese with one with simultaneous interpretation into English, were also held on 11, 18 and 25 July 2015 and 1 August 2015 and were attended by over 260 people. DEVB also met directly with 10 professional institutions and industry and trade associations to explain and discuss the proposed SOPL and listen to their views. A list of the forums and meetings attended is at Annex B. A discussion topic on SOPL was also opened at the Public Affairs Forum website of the Home Affairs Bureau (<http://www.forum.gov.hk>) and promulgated through the Trade and Industry Department’s SME e-newsletter.
7. A total of 1 116 responses to the Consultation Document were received by way of email, facsimile or post. Some responses comprised only

ticking of agreement or disagreement to all or some of the questions. Other responses comprised written comments with many respondents choosing to tick agreement or disagreement to questions but also supplementing with comments in relation to particular questions.

8. This report sets out the views expressed during the public consultation exercise and the analysis of them. Chapters 2 to 6 summarize respondents' views on issues discussed in or related to the Consultation Document. Chapter 7 sets out the final observations on a number of prominent issues, having regard to the responses and comments received during the public consultation exercise.
9. As respondents were asked to tick agreement or disagreement to individual questions, statistical analysis is provided of the responses to each question before written comments are considered. However, when considering the statistical analysis, account has to be taken of the fact that views from associations, companies and individuals may be different and there were two groups of similar responses indicating that certain organisations had organised members to ensure a large number of "votes" and identical comments were made. Other stakeholder organisations did not take this approach but made single representative replies. In total about 53% of replies were organised by two groups. Note that where reference is made to "associations" in this Report this includes professional institutions as well as trade associations.
10. It is stressed that no criticism at all is intended of those bodies which organised member responses. They clearly engaged proactively with their members to highlight the issues which could affect them and encouraged involvement in the consultation. Nonetheless, the figures should be viewed in light of the fact that stakeholder organisations took

different approaches both to responding and engaging with their members. The two groups of similar or identical responses were as follows:

- a) 267 responses (24%) were separately submitted by members of a particular professional institution. The responses comprised letters of similar content. Most of these respondents did not separately answer the majority of the consultation questions. Consequently, it will be seen in the analyses in later sections of this report that for most questions it is reported that around 20% of respondents did not indicate whether they agreed or disagreed with a question. In essence, through the submitted letters, these respondents opposed application of SOPL to consultancy contracts, argued that SOPL should treat construction contracts with certifiers differently so that adjudicators could not open up certificates and also objected to the Hong Kong International Arbitration Centre (“**HKIAC**”) being the default nominator of adjudicators.
- b) 327 responses (29%) were submitted collectively by a particular trade association. These respondents were generally supportive of the proposed SOPL but advocated shorter timescales in relation to payment obligations and adjudication.

11. The approach taken in Chapters 2 to 6 of this Report when commenting on the responses made to the various Questions in the Consultation Document is not to try and set out and address each individual comment. Instead, a summary of the main points and issues raised is provided. If some respondents feel on reading this report that some of their specific responses have not been considered, this is not the case. All responses

have been read and considered but it would make this Report overly long to try and address every individual comment.

12. The overall responses of the associations, companies and individuals, collated as to whether they “agree”, “disagree”, “not answer” or provide an “other” response for each of questions, are summarized in Annex C.

## **Chapter 2: Views on Scope**

This chapter is all about the scope of application of the proposed SOPL. It covers contracts entered by the Government (and the specified statutory and/or public bodies and corporations listed in Schedule 1 to Appendix A of the Consultation Document (Annex D)) and private sector contracts.

### **What We Invited the Public and Stakeholders to Consider**

#### **Question 1:**

*Do you agree that Hong Kong's SOPL should 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 consultation document) for procurement of construction activities or related services, materials or plant and subcontracts 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 Question 1(2) and this Report, private sector contracts are those contracts not covered by Question 1(1) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A of the consultation document (Annex D).*

**Responses Received to Question 1(1) – application of SOPL to public sector contracts**

13. 76% of respondents agreed with only 2% disagreeing and 22% not answering. The percentages of respondents agreeing were 76%, 93% and 73% for associations, companies and individuals respectively. There is clearly overwhelming support for the SOPL applying to all Government contracts and associated sub-contracts of any tier.
14. However, many respondents made separate comments and submissions on scope which are relevant to consider here.
  - a) In relation to the specified statutory and/or public bodies and corporations to be covered by SOPL (identified in Schedule 1 to the SOPL Model in Appendix A of the Consultation Document), it was suggested that provision should be made to add to those bodies in the future if required.
  - b) A number of respondents suggested that Government should trial SOPL contractually before the legislation is finalised or implemented as a practical way of road testing its implications.
  - c) A number of respondents suggested that Government’s tendering procedures should be clarified so that adjudicating or using SOPL rights against Government cannot result in a party being disadvantaged in relation to future tenders and opportunities.
  - d) A number of professional institutions, whose members often discharge certification roles or assess claims for payment, urged a more limited role for adjudication on contracts with third party certification. In effect, they urged a much reduced scope of application of the SOPL for such contracts which would include

many Government and private sector contracts. One of the specified statutory/public bodies/corporation responsible for significant procurement of construction work also advocated this approach.

- e) The rationale advanced by these respondents is founded on the idea that when certifying claims for payment, a certifier is discharging an independent role under which they are already obliged to act fairly and impartially. Certifiers will generally have close knowledge of the on-going works and issues arising and therefore they should be best placed to fairly evaluate claims. It has been said an adjudicator would be unlikely to make a better or fairer decision than a certifier especially given the tight timescales they must work under.
- f) There have been suggestions by some that it would be wrong in principle to impose a statutory regime over contractual arrangements for certification and payment. Also, there have been suggestions it would be wrong in principle for adjudicators to be able to open up what are interim and not final valuations in certificates and that if this happens it will undermine the role of the certifier, damage relationships in the industry and potentially harm the professional practice of the certifier.<sup>1</sup>
- g) Suggested limitations on the reach of SOPL in contracts with certifiers included:

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<sup>1</sup> Some respondents have suggested that in some overseas jurisdictions with SOPL, it is not possible to rapidly adjudicate certificate and/or that the SOPL does not allow review of certificates which are stated to be final and binding under the contract.

- i. The right to adjudicate not applying at all save in relation to non-payment of certified amounts.
  - ii. The right to adjudicate only being available after contractual dispute resolution procedures are exhausted. For example, on a typical Hong Kong civil engineering contract this would mean an Engineer's decision must be obtained (or requested but not provided within contractually required timescales) before adjudication could be commenced.
- h) One of the specified bodies responsible for significant procurement of construction work pointed out that it successfully used a Dispute Avoidance and Resolution Advisor (“**DARA**”) approach whereby DARAs could often successfully avoid escalation of disputes to formal legal proceedings. They expressed the view that adjudication under SOPL could undermine this successful scheme if used frivolously and submitted that SOPL adjudication should not apply where the DARA system operated.

**Responses Received to Question 1(2) – application of SOPL to private sector contracts**

15. 47% of respondents agreed with 31% disagreeing and 22% not answering. The respondents from the different sectors who answered this question generally supported the underlying proposal (association respondents: 54% agreed and 22% disagreed, company respondents: 77% agreed and 17% disagreed and individual respondents: 41% agreed and 34% disagreed). There were also many separate comments in relation to this question.
16. The comments fell into two broad categories. Firstly, comments advocating a greater scope of private sector coverage. Secondly, comments raising possible practical or procedural difficulties with the question as currently formulated. One professional institution suggested the private sector should be excluded completely until experience and capability had been gained on (generally) better resourced and managed public sector contracts.
17. Many of the comments advocating greater (or total) coverage of the private sector pointed out that it was often smaller contractors and sub-contractors involved in undertaking lower value new build work and renovation, maintenance, alteration and addition (“**RMAA**”) work who would be excluded from the SOPL scope. A number of respondents pointed out that these were the very people SOPL was intended to help. It was also observed that many RMAA contracts in Hong Kong were of high value and were often procured by larger, sophisticated parties or by parties with professional advisors to assist them. One respondent made the observation that *“There should be no exclusions as the law should apply to everyone equally.”*

18. Some respondents advocated covering RMAA contracts with a value in excess of HK\$20 million on the basis that at this value the employer would be likely to have professional advisors. Some suggested coverage of private sector maintenance works with or without a threshold value and others suggested covering all private sector work but subject to different proposed threshold values. A number of responses suggested limiting the exclusion of private sector contracts to contracts where the procurer is a residential occupier.
19. Potential practical and procedural issues raised included a number of respondents noting that a mechanism would be needed to keep the proposed financial limits under review. Some wondered whether they would be high enough (or would remain high enough for long) to exclude, for example, new build of a Hong Kong village house.
20. Concerns were expressed that referencing the original contract value may cause some employers to split works up into different contracts or instruct work via variations so that the original contract value or values can be kept under the relevant threshold to avoid SOPL. Concerns were also raised about the ease of applying the Buildings Ordinance definition of “new building” and how sub-contractors would be able to verify the original main contract value to identify whether SOPL applied or not.

**Question 2:**

*Do you agree that 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 and that where a private sector main contract is subject to the SOPL then all lower tier sub-contracts will be subject to the SOPL?*

## **Responses Received to Question 2**

21. 75% of respondents agreed with only 3% disagreeing and 22% not answering. This question gained majority support from associations (66% agreed and 2% disagreed), companies (88% agreed and 6% disagreed) and individuals (73% agreed and 1% disagreed). There is clearly overwhelming support for this question notwithstanding the many comments received about the coverage of private sector contracts generally as described in paragraphs 17 and 18 above.

### **Question 3:**

*Do you agree that Hong Kong's SOPL should only apply to contracts relating to construction activities carried out in Hong Kong and that it should apply even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law?*

## **Responses Received to Question 3**

22. 76% of respondents agreed with only 2% disagreeing and 22% not answering. Respondents from the associations (68% agreed and 5% disagreed), companies (91% agreed and 2% disagreed) and individuals (73% agreed and 2% disagreed) all gave overwhelming support to the underlying proposal.
23. A small number of comments were made. Some suggested that unfairness might arise if foreign parties could pursue claims in adjudication in Hong Kong in circumstances where it might be difficult for Hong Kong parties to pursue the foreign parties and enforce in their

foreign jurisdictions. Some noted reciprocal rights to adjudicate would not always be available in foreign jurisdictions and others noted that conflicts could arise between the SOPL and foreign law and enforcement practices in some instances.

24. Notwithstanding the sentiments expressed above, a small number of submissions pointed to the international nature of construction in Hong Kong and the supply of materials into Hong Kong as supporting the rationale for the underlying proposal and necessary to avoid reducing the effect and impact of SOPL.

#### **Question 4:**

*Should Hong Kong's SOPL apply to (A) oral and partly oral contracts as well as written contracts? or (B) only contracts in writing or evidenced in writing?*

#### **Responses Received to Question 4**

25. 55% of respondents agreed that Hong Kong's SOPL should apply to oral and partly oral contracts as well as written contracts with 22% disagreeing and 22% not answering. Well in excess of 50% of company respondents (57% agreed and 34% disagreed) and individual respondents (56% agreed and 19% disagreed) agreed with question 4(A) with most opposition coming from associations (37% agreed and 41% disagreed). A number of comments were made, mostly expressing concern on the inclusion of oral and partly oral contracts.
26. The primary objection raised was that disputed oral agreements could be difficult for an adjudicator to resolve in the available time and could

give rise to difficult issues of fact and law. It was also pointed out that business in Hong Kong is often bi-lingual. Some observed that if SOPL only applied to contracts in writing it would provide an incentive for parties to enter into written terms therefore encouraging good practice.

27. One of the professional institutions suggested implementing the legislation on the basis of application to written contracts only but anticipating considering extending to oral contracts by legislative amendment once adjudicators had gained sufficient experience of SOPL. Another suggestion was that SOPL should not apply to oral contracts but could apply to oral agreements made in the course of execution of a written agreement - it is presumed that this is referring to matters such as oral variations of the terms of a written agreement or oral agreements as to the value of variations or claims.
28. There were also written responses expressing support for SOPL applying to oral and partly oral contracts. One professional institution noted that it was important to protect smaller contractors and sub-contractors in particular. Another professional institution noted that with proper training, the need to decide disputes arising on oral contracts ought not to add to the burden on adjudicators.

**Question 5:**

- (A) *Do you agree that professional services contracts which relate directly to planned or actual construction activities in Hong Kong should be covered by the SOPL?*
- (B) *Are there any specific types of professional services contract which you feel should definitely be covered by Hong Kong's SOPL?*

*(C) Are there any specific types of professional services contract which you feel should definitely be excluded from Hong Kong's SOPL?*

### **Responses Received to Question 5**

29. 72% of respondents agreed with 26% disagreeing and 2% not answering. 24% of the disagreeing comments came from members of the professional institution mentioned in Chapter 1. The question had majority support from associations (66% agreed and 5% disagreed), companies (92% agreed and 3% disagreed) and individuals (68% agreed and 31% disagreed). A clear majority of respondents are therefore supportive.
30. There were, however, objections to professional services contracts being covered by one professional institution, one trade association of consultants and members of the professional institution mentioned in Chapter 1 who were organised to respond in largely identical terms. Nonetheless, the majority of institutions representing the key construction and engineering industry professional groups and other respondents were supportive.
31. The main arguments raised against professional services contracts being covered were that there are fewer disputes involving or between consultants and that many lead consultants would be unlikely for commercial reasons to adjudicate against their employers whereas they would be at risk of adjudications from sub-consultants. Some argued for consultants not to be covered at this stage but accepted that the issue could be considered again assuming the SOPL were to be reviewed and updated after a few years.

32. A small number of respondents indicated they were happy to see professional services contracts covered provided that professional negligence claims could not be adjudicated, whether as a claim or counterclaim. The view was expressed that adjudication was unsuitable for determining professional negligence.
33. Finally, respondents were given the opportunity to specify any particular types of professional services which they felt should definitely be covered or definitely not be covered. A fair number of responses were received but the vast majority reflected Government's proposal as set out in the proposed SOPL Model at Appendix A to the Consultation Document. For ease of reference, the intended coverage is "*Services contracts relating to construction activities including contracts for the provision of engineering/architectural design, surveying, quantity surveying, project management, landscaping design, interior / exterior design, planning, testing and advisory services including feasibility studies.*"
34. A number of respondents expressed the view that dispute resolution, legal, claims and financial consultancy type services should be specifically excluded as should public relations work. One respondent suggested that contracts with Dispute Resolution Advisors should be covered but noted this could perhaps be achieved by contractual agreement. Another respondent suggested registered energy assessors, inspectors and qualified persons should be covered and finally a respondent suggested that environmental and safety professionals should be covered.

### **Question 6:**

*Do you agree that contracts for the supply of materials or plant (even if they do not include for any installation or operation on site) should be covered by Hong Kong's SOPL?*

### **Responses Received to Question 6**

35. 67% of respondents agreed with 3% disagreeing, 26% not answering and 4% giving a response other than agreeing or disagreeing. Respondents from the associations (51% agreed and 12% disagreed), companies (76% agreed and 6% disagreed) and individuals (66% agreed and 2% disagreed) showed majority support to the question. There is clearly majority support for this question.
36. Many comments were made in response to this question. Many were supportive. A number suggested (in identical terms) an exclusion for private sector contracts but no rationale for this was provided. Some respondents expressed the view that sale of goods contracts did not need protection, were protected by the Sale of Goods Ordinance and typically negotiated by parties of equal bargaining power. One respondent suggested that items such as supply of furniture should be included.

### **Question 7:**

*Do you agree that contracts of employment, insurance, guarantee and loan should be excluded from the scope of Hong Kong's SOPL as should investment contracts and other contracts where payment is made by reference to something other than the value of the works carried out?*

### **Responses Received to Question 7**

37. 71% of respondents agreed with only 4% disagreeing and 25% not answering. Respondents from the associations (66% agreed and 5% disagreed), companies (80% agreed and 1% disagreed) and individuals (70% agreed and 4% disagreed) all gave overwhelming support.

## **Chapter 3: Views on Payment**

This chapter concerns how SOPL will affect the rights of parties to reach agreements as to the timing and valuation of payments. It also concerns proposals to provide parties who are entitled to claim a payment under a contract with a right to claim the payments by means of a statutory “Payment Claims” if they wish. There is an important link with the right to adjudication as it is proposed that the right to adjudicate financial claims will only arise when a Payment Claim has been made and been ignored or disputed.

### **What We Invited the Public and Stakeholders to Consider**

#### **Question 8:**

*Do you agree that parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong’s SOPL should be entitled to Progress Payments but the parties to the contract should be free to agree the number of Progress Payments, when they can be claimed and the basis for calculating amounts due?*

### **Responses Received to Question 8**

38. 55% of respondents agreed with 23% disagreeing and 22% not answering. The question gained majority support from associations (68%) and companies (85%). In the individual group of respondents 48% agreed, 26% disagreed and 25% did not answer.
39. There were a number of comments on this question the majority being supportive including some noting the importance of limiting interference

with freedom of contract. The main thrust of opposing comments was that Payment Intervals should not be allowed to exceed one month.

**Question 9:**

*Do you agree that the maximum Payment Period which can be agreed for payments should be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments?*

**Responses Received to Question 9**

40. 26% of respondents agreed with 52% disagreeing and 22% not answering. The respondents from associations (44% agreed, 29% disagreed and 22% did not answer) and companies (52% agreed, 42% disagreed and 6% did not answer) were generally supportive with the majority of individual respondents opposing (55% disagreed).
41. Over four hundred written comments were received in largely identical terms and mostly from individuals. In other words this question had been subject to an organised mass response as described in Chapter 1 above. The responses revealed that actually there is widespread support for limiting permissible payment periods with the high level of disagreement relating to what the permissible periods should be. Typically, respondents who expressed a view (most in identical terms) suggested 45 and 90 days respectively for interim and final Progress Payments. A number noted that there was a danger of any period set in SOPL leading to longer payment periods being introduced into contracts

where previously employers may have been happy to have shorter periods.

42. Some comments pointed to difficulties in defining what would be the final Progress Payment under a contract and a few suggested that a single maximum payment period should apply whether a Progress Payment is interim or final.

**Question 10:**

*Do you agree that :*

- (A) *Parties who are entitled to payments under the terms of a contract covered by Hong Kong's SOPL should be entitled (but not obliged) to claim their payments by way of statutory Payment Claims?*
- (B) *Paying parties should be entitled to serve Payment Responses no later than 30 calendar days after receipt of Payment Claims?*

**Responses Received to Question 10(A) – entitlement to serve Payment Claims**

43. 72% of respondents agreed with 1% disagreeing, 22% not answering and 5% giving a response other than agreeing or disagreeing. Respondents from the associations (66% agreed and 5% disagreed), companies (91% agreed and 2% disagreed) and individuals (68% agreed and 1% disagreed) all gave overwhelming support.
44. A number of comments were made on this question. Many were supportive but a number of respondents felt that having both a

contractual framework and a separate statutory framework could cause difficulties and confusion especially if the claiming party can choose between a contractual or statutory route to make a claim.

45. Other suggestions included applying SOPL and rights to adjudicate to all types of contractual claims for payment and making it obligatory for claimants to claim all payments using statutory Payment Claims. At least one respondent felt that to be effective Payment Claims should have to state on their face that they are statutory Payment Claims.
46. Some respondents were concerned that the statutory Payment Claim route might enable contractual requirements to be sidestepped or might mean, for example, a payment could be claimed for defective work without the ability for an architect to inspect and make adjustments for the same.
47. Responses from some of the professional institutions argued that the statutory Payment Claim mechanism should not be available until completion of contractual processes in any event. These comments relate more to the general application and approach of SOPL on contracts with third party certifiers in relation to Question 1(1) above.

### **Responses Received to Question 10(B) – entitlement to serve Payment Responses**

48. 32% of respondents agreed with 46% disagreeing and 22% not answering. Respondents from the associations (54% agreed and 20% disagreed) and companies (53% agreed and 40% disagreed) were supportive but individuals (27% agreed and 48% disagreed) were not.

49. There were over four hundred written comments made in relation to this question, many in identical terms reflecting a mass, organised response as explained in Chapter 1 above. It was the individual responses where a majority of respondents opposed the underlying proposal. The reason the majority of respondents did not agree was that they considered a maximum period for provision of a Payment Response of 14 or 15 days to be more appropriate. The professional institutions were generally supportive of the underlying proposal although one of the main organisations representing private employers felt 30 days could be too short for complex projects or where multiple parties were involved. Another institution suggested that it should be provided that all certificates act as Payment Responses.

**Question 11:**

*Do you agree that in the absence of express agreements:*

- (A) *Parties undertaking work or providing services, materials or plant should be entitled to make Payment Claims at calendar month Payment Intervals?*
- (B) *Payments due should be calculated based on the value of work, services, materials or plant provided and with valuations 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 should be entitled to serve a Payment Response within 30 calendar days of receiving a Payment Claim?*

- (D) The Payment Period for any amount due should be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payment) after receipt of a Payment Claim?*

**Responses Received to Question 11(A) – default Payment Claims**

50. 72% of respondents agreed with only 2% disagreeing, 22% not answering and 4% responding other than agreeing or disagreeing. Respondents from the associations (63% agreed and 10% disagreed), companies (91% agreed and 3% disagreed) and individuals (68% agreed and 1% disagreed) all gave overwhelming support.
51. A small number of comments (9) were made, almost all supportive. It appears that the limited disagreement is from those who believe that where there is no express agreement the position should be resolved on a case by case basis by reference to existing principles of contractual interpretation. In other words, the status quo is maintained, there are no default provisions and so an adjudicator, court or arbitrator would have to decide on the facts and the law as to when payments can be claimed. No rationale was given as to why this would be fairer or more efficient than what is proposed.

**Responses Received to Question 11(B) – default calculation of payment**

52. 72% of respondents agreed with 1% disagreeing, 22% not answering and 5% providing a response other than agreeing or disagreeing. Respondents from the associations (63% agreed and 7% disagreed),

companies (92% agreed and 2% disagreed) and individuals (68% agreed and 1% disagreed) all gave overwhelming support.

53. A number of comments were received almost entirely supportive but with a number suggesting that where market rates apply they should be market rates at the time work is carried out rather than at the time the contract was entered into. In other words, a number of respondents wanted to see allowance for inflation and price fluctuations built into the default provisions.
54. One respondent warned that the term “market rates” could lead to arguments and difficulties ascertaining what relevant market rates actually were at the relevant time whereas using the term “reasonable rates” would be less likely to generate arguments and difficulties.
55. One professional institution suggested that the default provisions should provide for retention to apply if not expressly provided for.
56. As with Question 11(A), one respondent suggested matters should be left to normal principles of contractual interpretation.

### **Responses Received to Question 11(C) - default Payment Response**

57. 27% of respondents agreed with 46% disagreeing, 22% not answering and 5% providing a response other than agreeing or disagreeing. Respondents from the associations (41% agreed and 29% disagreed) and companies (53% agreed and 40% disagreed) gave majority support to the underlying proposal but individuals (22% agreed and 48% disagreed) were opposed.

58. Over four hundred written comments were received, mostly in identical terms (suggesting an organised response as described in Chapter 1) and almost all suggesting that the 30 day period be cut to 14 or 10 days (probably the references are intended as calendar and working days respectively).
59. A small number of respondents suggested that paying parties should be “obliged” and not merely “entitled” to serve a Payment Response.
60. One respondent again suggested such matters should be left to be decided in line with normal legal principles of interpretation.

#### **Responses Received to Question 11(D) – default Payment Periods**

61. 20% of respondents agreed with 58% disagreeing and 22% not answering. Respondents from the associations (37% agreed and 34% disagreed) supported the underlying proposal by a small margin. Companies (42% agreed and 52% disagreed) and individuals (14% agreed and 60% disagreed) were opposed.
62. The position in relation to Question 11(D) is much the same as for Question 9. In other words, there is not actually any serious opposition to the idea that there should be default Payment Periods but over four hundred, mainly identical comments were submitted by respondents who would prefer much shorter periods and suggesting time periods of 45 and 90 days respectively. This reflected an organised, mass response as described in Chapter 1. One respondent again suggested all such matters should be addressed using general principles of legal interpretation.

**Question 12:**

*Do you agree that 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:*

*(A) should not be automatically liable to pay the full amount of the Payment Claim?*

*(B) should not be able to raise any set off against amounts properly due against the Payment Claim?*

**Responses Received to Question 12(A) - payers not automatically liable to pay full amount of Payment Claims**

63. 18% of respondents agreed with 56% disagreeing, 22% not answering and 4% providing a response other than agreeing or disagreeing. Respondents from the associations (39% agreed and 32% disagreed) supported by a small margin. Companies (35% agreed and 58% disagreed) and individuals (13% agreed and 56% disagreed) were opposed. The highest levels of objection came from companies and individuals probably reflecting those with most to gain from their Payment Claims becoming payable in full on a default basis.

64. There were 39 comments submitted. Some made the point that the requirements for serving Payment Responses were not onerous and so the paying party should pay in full in the absence of a valid Payment Response. It was also noted that this question would leave payers effectively able to ambush claimants with new arguments and reasons for not paying in the event of adjudication being commenced.

**Responses Received to Question 12(B) - no set off if not raised in a timely Payment Response**

65. 53% of respondents agreed with 25% disagreeing and 22% not answering. Respondents from the associations (61% agreed and 17% disagreed), companies (81% agreed and 13% disagreed) and individuals (47% agreed and 28% disagreed) all gave majority support.
66. A total of 17 comments were made and were overwhelmingly supportive. In a few instances comments were made to clarify the understanding of respondents as to how the provision would operate in practice.
67. It is not immediately apparent why a relatively high 25% of respondents disagreed although possibly many who considered Payment Claims should be paid in full in the absence of a timely Payment Response may have concluded that they should disagree as a result.

## **Chapter 4: Views on Prohibition of “Pay when Paid” and Conditional Payment**

This chapter is all about the proposal of rendering “pay when paid” and conditional payment clauses ineffective. “Pay when paid” has long been regarded as an unfair block to cash flow which has the potential to harm smaller sub-contractors and traders who are generally the parties least able to fund and withstand significant delays in payment. Currently in Hong Kong, the courts will uphold and enforce “pay when paid” clauses provided they are sufficiently clearly drafted. In the absence of legislation, the courts have little other option.

### **What We Invited the Public and Stakeholders to Consider**

#### **Question 13:**

*Do you agree that :*

*(A) “Pay when paid” clauses should be rendered ineffective?*

*(B) “Pay when paid” clauses should be ineffective even where the reason for non-payment is insolvency higher in the supply chain?*

### **Responses Received to Question 13(A) – “pay when paid” should be rendered ineffective**

68. 71% of respondents agreed with 7% disagreeing, 2% not answering and 20% providing a response other than agreeing or disagreeing. Respondents from associations (63% agreed and 12% disagreed),

companies (89% agreed and 4% disagreed) and individuals (67% agreed and 8% disagreed) all gave clear majority support.

69. A number of individual comments were made. Only a small minority of the individual comments were opposed to the underlying proposal. One professional institution and one trade association representing consultants suggested “pay when paid” questions should not be ineffective in consultancy sub-contracts. This was also the stance of the individuals members of the professional institution who submitted largely identical letters in response to the consultation (as described in Chapter 1).
70. The reasoning of those objecting to “pay when paid” being ineffective in consultancy contracts was that consultants do not suffer significant problems from “pay when paid”, that otherwise hardship could result to lead consultants and (as one respondent suggested) negotiation of consultancy contracts was generally between “independent professionals” who did not need protecting in the same way as smaller sub-contractors or self-employed workers. However, other professional institutions supported this question.
71. The majority of other, non-supportive, comments were that nominated sub-contracts should be excluded.

**Responses Received to Question 13(B) – “pay when paid” ineffective even in insolvency situations**

72. 69% of respondents agreed with 9% disagreeing and 22% not answering. Respondents from associations (56% agreed and 20% disagreed),

companies (87% agreed and 7% disagreed) and individuals (66% agreed and 9% disagreed) all gave clear majority support.

73. Similar to Question 13(A) there is generally strong support for pay when paid provisions being ineffective even when non-payment is due to insolvency higher up the supply chain.
74. One UK based respondent advised that the insolvency exception in the UK SOPL “...has not had much practical effect...”. It is not a feature of SOPL in other jurisdictions save for Ireland.

#### **Question 14:**

*Do you agree that :*

*(A) Clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be rendered ineffective?*

*(B) No exception should be made for nominated sub-contractors?*

#### **Responses Received to Question 14(A) - clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be ineffective**

75. 48% of respondents agreed with 30% disagreeing and 22% not answering. The majority of disagreement came from individual respondents (41% agreed and 34% disagreed). There was clear majority support from respondents from associations (61% agreed and 12% disagreed) and companies (81% agreed and 12% disagreed).

76. A number of comments were made. Many again expressed concerns in relation to the position of nominated sub-contractors.
77. One professional institution expressed concern as to whether the proposal underlying the question would impair the ability of certifiers to refuse to certify materials on site where, for example, it was not clear title had passed from the supplier. They also queried whether the underlying proposal would preclude a main contract providing that an employer only had to pay what had been certified by the certifier.
78. At least one other professional institute expressed clear support for this provision stating that they agreed in principle “...*that clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be rendered ineffective...*”

**Responses Received to Question 14(B) – no exception should be made for nominated sub-contractors**

79. 70% of respondents agreed with 8% disagreeing and 22% not answering. Respondents from associations (51% agreed and 24% disagreed), companies (87% agreed and 7% disagreed) and individuals (67% agreed and 8% disagreed) all gave clear majority support.
80. Notwithstanding the degree of support expressed there were a number of detailed comments made in opposition. Almost all argued that it was unfair to impose the burden of independent valuation and the risks of adjudication on main contractors who had no involvement in selection of nominated sub-contractors, their terms and conditions or their pricing.

At least one respondent went as far as suggesting that without an exception some main contractors could be driven to insolvency.

81. A small number of respondents suggested that as well as making an exception the SOPL could provide for nominated sub-contractors to have rights to pursue adjudications directly against the employers who nominate them.
82. All but one of the professional institutions were opposed and in favour of an exception with one suggesting that the practice of nominated sub-contracting had worked well to date.

## **Chapter 5: Views on Suspension for Non-Payment**

This chapter is all about the right to suspend due to non-payment. Without such a right, unpaid parties can be contractually obliged to continue performing and funding their work increasing the financial pressure and risks they face. It may be open to them to exercise termination provisions in their contracts (if any) or to treat the non-payment as a breach of contract which is serious enough to amount to repudiation at common law.

### **What We Invited the Public and Stakeholders to Consider**

#### **Question 15:**

*Do you agree that Hong Kong's SOPL should 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?*

### **Responses Received to Question 15**

83. 72% of respondents agreed with 7% disagreeing and 21% not answering. Respondents from the associations (73% agreed and 5% disagreed), companies (92% agreed and 2% disagreed) and individuals (68% agreed and 8% disagreed) all gave overwhelming support.
84. A number of comments were made, almost all supportive of the general principle. A few respondents expressed concern that entitlement to reduce the rate of progress might cause uncertainty. Another wondered whether the main contractor would be entitled to extension of time if a suspension due to non-payment further down the contractual chain led to

delay. A trade association representing employers suggested that suspensions at any level of the contractual chain could affect the entire chain and cause delays to project completion with potentially unfair consequences for innocent parties and potential further disputes. The professional institutions gave a mixed response to this question with one suggesting that instead of rights to suspend consideration should be given to introducing rights to compound interest and expedited court enforcement (presumably of adjudicators' decisions).

### **Question 16:**

*Do you agree that the right to suspend or reduce the rate of progress should only arise after either non-payment of an adjudicator's decision or non-payment of an amount admitted as due in a Payment Response?*

### **Responses Received to Question 16**

85. 71% of respondents agreed with 7% disagreeing and 22% not answering. Respondents from the associations (66% agreed and 12% disagreed), companies (89% agreed and 4% disagreed) and individuals (68% agreed and 7% disagreed) all gave overwhelming support.
86. A number of comments were made, almost all supportive except a number argued that the right to suspend should arise in the event a Payment Response is not served on time or at all and some argued it should be available if a Payment Claim was disputed or not accepted. The rationale for these submissions was that it can take a considerable

period of time to adjudicate a Payment Claim which has been ignored or disputed.

**Question 17:**

- (A) *Do you agree that parties which suspend or slow down work for non-payment should 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?*
- (B) *If answer to 17(A) is agreed, then which is your preferred option for establishing the party's obligations to resume work and entitlement to additional time:*
- (i) *entitlement to additional time is to reflect all delay arising out of the suspension which will allow consideration of the periods required for resumption of work and achievement of full rates of production based on the circumstances of each case; or*
  - (ii) *there is an express obligation for work to be resumed within a set period of time after payment is made and the entitlement to additional time is limited to the period from which suspension starts to the expiry of the set period of time for resumption of work; or*
  - (iii) *a hybrid of (i) and (ii) above where there is a set period within which work must be resumed but account can be taken of other circumstances such as where work cannot be fully resumed or full rates of production achieved by the expiry of the set period.*

*If the preferred option is (ii) or (iii), what should the set period for resumption of work after payment be (in working days)?*

**Responses Received to Question 17(A) - rights to time and cost for suspending parties**

87. 72% of respondents agreed with 6% disagreeing and 22% not answering. Respondents from the associations (66% agreed and 10% disagreed), companies (93% agreed and 1% disagreed) and individuals (68% agreed and 7% disagreed) all gave overwhelming support.
88. There were a number of dissenting comments but none which convincing explained why a party legitimately exercising a statutory right to suspend should not be compensated for the time and cost consequences of doing so. All other jurisdictions with SOPL either provide rights to extension of time or relief from liability in respect of delays arising from suspensions. Around half of other jurisdictions with SOPL also provide for recovery of cost.

**Responses Received to Question 17(B) - preferred option for obligations to resume work and method to evaluate time entitlement**

89. Question 17(B) in the Consultation Document offered 3 options as to obligations to resume work following payment and as to evaluation of the extension of time entitlement arising from a suspension. It is not proposed to review feedback on all 3 options as a clear favourite emerged. However, the respondent's agreement, disagreement and not answering percentages are included for reference.
90. For option 17(B)(i), 12% of respondents agreed with 5% disagreeing and 79% not answering (respondents from associations: 17% agreed, 15% disagreed and 63% did not answer; companies: 21% agreed, 9% disagreed and 70% did not answer; individuals: 10% agreed, 3%

disagreed and 81% did not answer). The majority of the respondents did not answer this question as they picked one of the other options.

91. For option 17(B)(ii), 12% of respondents agreed with 5% disagreeing and 79% not answering (respondents from associations: 12% agreed, 20% disagreed and 63% did not answer; companies: 21% agreed, 10% disagreed and 69% did not answer; individuals: 10% agreed, 3% disagreed and 81% did not answer). The majority of the respondents did not answer this question as they picked one of the other options.
92. For option 17(B)(iii), 69% of respondents agreed with 2% disagreeing and 25% not answering. Respondents from the associations (56% agreed, 10% disagreed and 29% did not answer), companies (85% agreed, 6% disagreed and 9% did not answer) and individuals (66% agreed, 1% disagreed and 27% did not answer) which showed the majority of the respondents favoured this option.
93. Option 17(B)(iii) attracted the support of 69% of respondents compared to 12% for each of the other two options. Respondents envisaged a set period following payment within which work must be resumed but for extension of time purposes, account can be taken of other circumstances such as where work cannot be fully resumed or full rates of production achieved by the expiry of the set period.
94. Respondents were also asked for their views on an appropriate period within which work would have to resume. 373 respondents suggested 7 working days and 315 suggested 10 working days. Various other periods were suggested but none had the support of more than 23 respondents.

**Question 18:**

- (A) *Do you agree that unpaid parties should be obliged to 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?*
- (B) *Option (i) Should a single notice period be adopted for all circumstances? If so, what would an appropriate notice period be (in working days)?*
- Option (ii) Should there be different notice periods for non-payment of amounts admitted as due in a Payment Response and non-payment of adjudicators’ decisions? If so, what would an appropriate notice period be (in working days) for each?*

**Responses Received to Question 18(A) – Unpaid parties to give written notice of suspension**

95. 73% of respondents agreed with 5% disagreeing and 22% not answering. Respondents from the associations (63% agreed and 10% disagreed), companies (93% agreed and 2% disagreed) and individuals (69% agreed and 6% disagreed) all gave overwhelming support.
96. A number of comments were received either supportive or objecting to the requirement for notice to be given to either or both of the principal and site owner. The reasons given were essentially that if no notice was given to either of these parties it could lead to arguments over whether they were “known” to the suspending party and whether the suspension

was therefore invalid. Some responses suggested that a clear definition of “site owner” was required.

### **Responses Received to Question 18(B) - notice periods**

97. For Question 18(B), respondents were asked whether there should be a single notice period for suspensions or a different period depending on whether suspension followed non-payment of an admitted amount or non-payment of an adjudicator’s decision. Respondents were also asked for their views as to appropriate notice periods.
98. For option (i), 68% of respondents agreed with this option of a single notice period. This was supported by associations (59% agreed), companies (85% agreed) and individuals (65% agreed). For option (ii), only 9% of respondents agreed with this option of different notice periods comprised of associations (15% agreed), companies (7% agreed) and individuals (9% agreed). A clear majority of respondents therefore supported a single period.
99. Few respondents went on to express a view on what the appropriate period should be but of those who did, 321 respondents suggested 5 working days, 244 suggested 1 working day and 139 suggested 7 working days, and 13 suggested 10 working days. No other suggested period gained more than 10 supportive responses.
100. A small number of comments were made mostly arguing that there was no need for a split period and that where there was non-payment of an admitted amount there was no justification for a longer notice period than after an adjudicator’s decision.

## **Chapter 6: Views on Adjudication and Enforcement**

This chapter is all about the rights parties would have for certain types of disputes to be referred to and decided by an adjudicator and the processes and procedures associated with adjudication.

### **What We Invited the Public and Stakeholders to Consider**

#### **Question 19:**

- (A) Do you agree that both parties to a contract should be entitled to refer disputes to adjudication?*
- (B) Do you agree that the right to adjudicate should be limited to disputes concerning the following:*
  - (a) the valuation 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.*

### **Responses Received to Question 19(A) – right to adjudication**

101. 76% of respondents agreed with 2% disagreeing and 22% not answering. Respondents from the associations (68% agreed and 10% disagreed), companies (88% agreed and 6% disagreed) and individuals (73% agreed and 2% disagreed) all gave overwhelming support. Only a small number of comments were made, mostly neutral or supportive.

### **Responses Received to Question 19(B) – scope of adjudication**

102. Respondents were given the opportunity to agree/disagree each of Question 19(B) (a), (b), (c) and (d) individually.
103. For 19(B)(a) to (c) the results were fairly uniform with around 72% agreeing broken down by respondents from associations (71-73% agreeing), companies (90-92% agreeing) and individuals (68% agreeing). In total 25-26% disagreed broken down by respondents from associations (5-7% disagreeing), companies (4-7% disagreeing and individuals (30% disagreeing). There were 2% of respondents did not answer broken down by respondents from associations (22% not answering), companies (3% not answering) and individuals (1% not answering). There was marginally less support for 19(B)(d) with 70% agreeing, 28% disagreeing and 2% not answering. Respondents were from the associations (63% agreed and 10% disagreed), companies (88% agreed and 9% disagreed) and individuals (66% agreed and 32% disagreed).
104. There were a number of comments with objections mostly based on concerns that delay related money claims and extension of time issues often involve complex factual, expert and legal issues and are difficult to

deal with in the timescales of adjudication. A small number of comments argued for wider application including coverage of claims for breach of contract as well as claims under a contract on the basis that in some instances loss and expense for delays due to breaches, for example, would not be recoverable unless there was a contractual provision providing for the same.

105. Some of the professional institutions representing certifiers (and the members of the professional institution organised to respond in generally identical terms as described in Chapter 1) argued for a narrower application of rights to adjudicate on contracts where a third party certifier considers and evaluates claims.

**Question 20:**

- (A) *Do you agree that there should be 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.*

*(B) If not 28 calendar days then what period do you consider appropriate?*

**Responses Received to Question 20(A) – time limit for commencing adjudication**

106. Respondents had the opportunity to respond individually in respect of each of (a) to (d) above. In terms of the extent of agreement/disagreement the position is as follows:

- a) For Question 20(A)(a), 74% of respondents agreed with 2% disagreeing and 24% not answering. Respondents from the associations (66% agreed and 7% disagreed), companies (83% agreed and 2% disagreed) and individuals (72% agreed and 2% disagreed) all gave overwhelming support.
- b) For Question 20(A)(b), 69% of respondents agreed with 7% disagreeing and 24% not answering. Respondents from the associations (59% agreed and 15% disagreed), companies (81% agreed and 3% disagreed) and individuals (67% agreed and 7% disagreed) all gave clear majority support.
- c) For Question 20(A)(c), 71% of respondents agreed with 7% disagreeing and 22% not answering. Respondents from the associations (59% agreed and 17% disagreed), companies (89% agreed and 3% disagreed) and individuals (67% agreed and 7% disagreed) all gave overwhelming support.

- d) For Question 20(A)(d), there was marginally less support from respondents with 67% agreed, 9% disagreeing and 24% not answering. Respondents from the associations (54% agreed and 17% disagreed), companies (80% agreed and 6% disagreed) and individuals (64% agreed and 9% disagreed) all gave majority support.
107. For Question 20(B), there was a clear majority in favour of the proposed 28 calendar day time limit for commencing adjudication.
108. A number of comments were received. Many were supportive but there were a small number of objections. Some were from those opposed to delay and extension of time issues being adjudicated (in relation to Question 19(B)(d) above). In addition, a few respondents suggested that there should be no time limit on commencing adjudication because a time limit may force commencement of adjudication unnecessarily and / or the requirement may cause complications in practice. Finally, a number of respondents pointed out that in relation to pure extension of time / time for performance disputes, it could be difficult to establish when disputes arose leading to jurisdictional arguments over whether adjudications had been commenced in time.

**Question 21:**

- (A) *Do you agree that the adjudication procedure should have the following key features:*
- (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.*

- (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).*
- (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.*
- (B) *Do you agree that adjudicators should have the power to remit disputes back to the parties where a claiming party introduces significant new material in an adjudicator?*

### **Responses Received to Question 21(A)(a) – notice of adjudication**

109. 77% of respondents agreed with less than 1% disagreeing and 22% not answering. Respondents from the associations (68% agreed and 0% disagreed), companies (93% agreed and 0% disagreed) and individuals (74% agreed and 1% disagreed) all gave overwhelming support.

### **Responses Received to Question 21(A)(b) – appointment of adjudicator**

110. 71% of respondents agreed with 7% disagreeing and 22% not answering. Respondents from the associations (59% agreed and 5% disagreed), companies (90% agreed and 3% disagreed) and individuals (68% agreed and 7% disagreed) all gave clear majority support.
111. A number of comments were received in response to this question. Some related to HKIAC being the default nominator and concerns over training and standards of adjudicators.
112. Of the other comments received a relatively small number of respondents (but including some of the professional institutions) suggested the 5 working day period was too short to allow for attempts to agree adjudicators and that duplication of effort and expense could arise if an application for nomination were made in parallel with seeking agreement of an individual. Generally, respondents raising this point suggested a two stage process allowing a period to try and agree an individual and then a period for nomination if that fails. One respondent queried the position if no nomination / appointment were achieved within the 5 working day period.

**Responses Received to Question 21(A)(c) – claimant’s submissions and evidence**

113. 76% of respondents agreed with 20% disagreeing, 3% not answering and 1% providing a response other than agreeing or disagreeing. Respondents from the associations (66% agreed and 5% disagreed), companies (93% agreed and 3% disagreed) and individuals (73% agreed and 25% disagreed) all gave clear majority support.
114. There is majority support for this question. There were a number of comments and most comments received did not raise objections. It is not entirely clear why 20% disagreed as those respondents did not give written comments substantiating their objections. One respondent suggested the question was too complex and that the party which commenced the process might not know when the adjudicator would be appointed. They suggested instead providing that the submissions be served on the adjudicator and responding party within 7 days of the notice of adjudication.

**Responses Received to Question 21(A)(d) – respondent’s response**

115. 27% of respondents agreed with 51% disagreeing and 22% not answering. Respondents from associations (39% agreed and 29% disagreed) and companies (54% agreed and 39% disagreed) gave a narrow margin of support and individuals (21% agreed and 54% disagreed) were not supportive.
116. More than 400 comments were received. The majority were in identical terms suggesting a period of 10 or 14 days (it is believed that those suggesting 10 days intended to refer to working days with those

suggesting 14 days referring to calendar days – i.e. the same). These comments reflect the organised approach taken by some groups to respond to the consultation as described in Chapter 1 above. However, comments from some of the professional institutions and a number of others expressed concerns that the timescale was too short especially for more complex disputes and those involving final accounts or issues of extensions of time. One professional institution and one individual (being an experienced UK adjudicator) suggested not specifying any time at all and leaving the period for the response to the discretion of the adjudicator.

#### **Responses Received to Question 21(A)(e) – adjudicator’s decision**

117. 55% of respondents agreed with 23% disagreeing and 22% not answering. Respondents from the associations (56% agreed and 15% disagreed), companies (67% agreed and 27% disagreed) and individuals (53% agreed and 22% disagreed) all gave majority support.
118. Quite a large number of comments were received. The majority suggested the proposed timescales were too long and many comments were organised individual comments made in identical terms suggesting a proposed period of 30 days. It is presumed this was intended as a suggestion that the overall period for adjudication be 30 days. In addition a number of respondents, including some of the professional institutions expressed concern that the proposed time periods are inadequate for more complex disputes. In essence, there was a continuation of the debate referred to in relation to Question 21A(d) above.

### **Responses Received to Question 21(A)(f) – procedural powers**

119. 51% of respondents agreed with 22% disagreeing, 22% not answering and 5% providing a response other than agreeing or disagreeing. Respondents from the associations (51% agreed and 17% disagreed), companies (65% agreed and 27% disagreed) and individuals (48% agreed and 22% disagreed) all gave majority support.
120. Very few substantive comments were received. Although 22% of respondents disagreed with the underlying proposal, it appears that disagreement arose primarily because a significant minority of respondents feel the overall timetable and procedure proposed for adjudication is too long (or in some cases too short).

### **Responses Received to Question 21(A)(g) – adjudicator entitled to disregard new submissions / evidence**

121. 73% of respondents agreed with 5% disagreeing and 22% not answering. Respondents from the associations (63% agreed and 7% disagreed), companies (91% agreed and 2% disagreed) and individuals (69% agreed and 6% disagreed) all gave clear majority support.
122. There were a number of comments on this question. Some suggested that the power to disregard submissions and evidence should extend to submissions and evidence from the responding party too, essentially for reasons of fairness but also because it could be a means of avoiding a dispute becoming too complex to decide fairly resulting in the adjudicator resigning. One professional institution commented that this

power could lead to a “*case within a case*” generating arguments and costs that would be best avoided with a simpler model being to limit parties to (in effect) documents and evidence exchanged before the adjudication leading to the dispute.

123. One respondent made the point that the provision risked inconsistent application in practice between different adjudicators and risked pushing claimants to prepare each application for payment like an adjudication submission in case adjudication were later needed which was wasteful and unnecessary.

#### **Responses Received to Question 21(A)(h) – adjudicator entitled to resign**

124. 54% of respondents agreed with 24% disagreeing and 22% not answering. Respondents from the associations (54% agreed and 20% disagreed), companies (60% agreed and 34% disagreed) and individuals (52% agreed and 23% disagreed) all gave clear majority support.
125. Only a few specific comments were made on this question. Insofar as there was disagreement, it seems respondents were concerned at the idea that adjudication could be thwarted by a resignation. Some suggested there should be a specific onus or time limit on adjudicators requiring them to rapidly consider and decide whether or not a dispute could be decided fairly and therefore whether they would resign. This was with a view to providing certainty and limiting wasted costs. The position as to responsibility for the adjudicator's fees following a resignation was also queried.

**Responses Received to Question 21(A)(i) – party costs and adjudicators’ fees and expenses**

126. 47% of respondents agreed with 31% disagreeing and 22% not answering. Respondents from the associations (66% agreed and 7% disagreed), companies (67% agreed and 25% disagreed) and individuals (42% agreed and 33% disagreed) all gave majority support.
127. There were more than 400 comments on this question but most were in identical terms (suggesting the losing party should bear the costs of adjudication) and reflecting the organised approach of certain groups to responding to the consultation as described in Chapter 1 above.
128. The divergence of views is primarily between those who think adjudicators should be able to decide liability for parties’ own legal costs on the grounds it will deter frivolous or speculative claims and compensate “winning” parties in adjudications and those who accept that the risk of paying another party’s legal costs is a significant deterrent for smaller parties contemplating adjudication.

**Responses Received to Question 21(B)**

129. 53% of respondents agreed, 25% disagreed and 22% did not answer. Respondents from the associations (61% agreed and 7% disagreed), companies (80% agreed and 13% disagreed) and individuals (47% agreed and 27% disagreed) all gave majority support. A few comments were received mostly arguing that the power was unnecessary and would lead to delay. Some observed that the nature of the power was uncertain and could be difficult to operate in practice. In other words,

most of the comments were in line with the reasoning for not adopting the underlying proposal as expressed in the Consultation Document.

**Question 22:**

- (A) *Do you agree that parties should be free to agree adjudicator nominating bodies (“ANBs”) in their contract?*
- (B) *Do you agree that parties should be free to agree an adjudicator for specific disputes but only after the dispute and right to adjudicate has arisen?*
- (C) *Do you agree that 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”) should be the default ANB?*

**Responses Received to Question 22(A) – parties free to agree ANBs in contracts**

130. 72% of respondents agreed with 6% disagreeing and 22% not answering. Respondents from the associations (68% agreed and 7% disagreed), companies (91% agreed and 3% disagreed) and individuals (68% agreed and 7% disagreed) all gave overwhelming support.
131. A small number of comments were made. Two respondents raised concerns over conduct and possible vested interests of ANBs absent any administered panel of ANBs. Four respondents supported the proposal essentially on the basis it was consistent with party autonomy.

One respondent suggested consideration be given to making HKIAC the default nominator but subject to any contrary agreement between the parties after a right to adjudicate had arisen. Another respondent suggested that ANBs should not be named in the contract at all but agreed after the right to adjudicate had arisen and in a similar vein. A further respondent suggested that for Government contracts, adjudicators could be appointed for contracts after they are entered into and in the way Dispute Resolution Advisors are sometimes appointed at present. Finally, there was a concern from one respondent that there would be no recourse if the adjudicator is not appointed within 5 days.

**Responses Received to Question 22(B) – parties free to agree an adjudicator only after dispute/right to adjudicate has arisen**

132. 21% of respondents agreed with 57% disagreeing and 22% not answering. Respondents from the associations (41% agreed and 29% disagreed) were supportive. Respondents from companies (41% agreed and 53% disagreed) and individuals (16% agreed and 59% disagreed) were not supportive. A clear majority of those who answered oppose the underlying proposal.
133. More than 400 comments were received on this question but many were in identical terms advocating that parties should be able to agree an adjudicator when entering into a contract who would then take up all subsequent adjudications. These responses reflected the approach of certain groups to responding to the consultation described in Chapter 1 above. A small number of comments were supportive. The majority were not.

134. Respondents pointed out that parties would be unlikely to agree an adjudicator after a dispute had arisen and would be most likely to respect a decision from an agreed adjudicator so parties should be able to agree an adjudicator before a dispute arises. One respondent suggested that reference should be made to the guidance applicable to the New Engineering Contract (NEC) form of contract which is increasingly being used by Government and in its un-amended form anticipates appointment of an adjudicator in advance of commencement of works.

#### **Responses Received to Question 22(C) – HKIAC as default ANB**

135. 49% of respondents agreed with 48% disagreeing and 3% not answering. Respondents from the associations (54% agreed and 12% disagreed) and companies (82% agreed and 13% disagreed) were supportive but individuals (42% agreed and 57% disagreed) were unsupportive. However, as explained in Chapter 1, above 24% of responses were in the form of largely identical letters from members of a professional institution who did not complete the “agree” / “disagree” questions but raised a number of specific points, one of which was objection to the HKIAC being the default ANB. These responses therefore make up around half of the responses disagreeing with this question.
136. The main thrust of the organised objections was that “*members of HKIAC are mostly legal in background which is quite irrelevant to SOPL adjudication when nothing like judicial or arbitral practices are being called for or needed at all.*” They urged that adjudications are better conducted by experienced construction and dispute resolution professionals who are conversant in contract administration,

construction operations and construction disputes. They therefore proposed a new nominating body be formed represented by professionals from different professional associations and institutes.

137. There were a number of other written comments made in relation to this question typically advocating a new nominating body comprised of various institutions. At least one respondent suggested HKIAC could administer a body comprised of other professional institutes.
138. Of other professional bodies responding to this Question, four supported the underlying proposal (being primarily those representing contractors and subcontractors) and four opposed including three who jointly urged that the default ANB be led by the construction industry comprising relevant professionals and other stakeholders.
139. There is clearly a divergence of opinion on the best way to approach the question of default nomination of adjudicators.

**Question 23:**

*Do you agree that Hong Kong's SOPL should include provision allowing adjudicators' 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?*

**Responses Received to Question 23 – enforcement of adjudicators’ decisions**

140. 72% of respondents agreed with 6% disagreeing and 22% not answering. Respondents from the associations (71% agreed and 5% disagreed), companies (92% agreed and 2% disagreed) and individuals (68% agreed and 7% disagreed) all gave overwhelming support.
141. A number of comments were made and were overwhelmingly supportive. Many suggested that the SOPL make clear expressly that challenges could only validly be made based on serious lack of jurisdiction, serious breach of natural justice or where there has been fraud or bribery involved. Given that the precise enforcement mechanism is unformulated, a number of comments queried what was envisaged. For example, it was queried whether a party wishing to challenge validity of a decision would have to lodge their objections within a set timescale after the decision or only after commencement of enforcement proceedings.
142. One respondent suggested that there should be scope to rapidly challenge decisions in court where there are errors of fact or law. The rationale was that an erroneous adjudicator's decision could have adverse impacts for a project. For example, an incorrect decision that significant extension of time is due could lead to a contractor not accelerating to mitigate its delays and then completing significantly late.

## **Chapter 7: Conclusion**

### **Issues with General Support**

143. There has been an enthusiastic response to the public consultation exercise. It has provided a very good opportunity for the public and stakeholders to focus on and debate the proposed legislative framework for SOPL for Hong Kong's construction industry. Judging from the comments received from respondents, consensus is generally built on many of the proposals for SOPL, which will provide a concrete basis on which the Government can formulate the legislative framework for SOPL in Hong Kong's construction industry. In particular, there is positive public support for the following key elements of the SOPL:

- (a) SOPL applying to all Government contracts, and contracts entered into by the specified statutory and/or public bodies and corporations.
- (b) Limiting coverage of SOPL to contracts relating to construction activities in Hong Kong.
- (c) SOPL applying to contracts for the supply of materials or plant.
- (d) Retaining full freedom for parties to agree when payments can be claimed and the basis of valuation of the same but limiting the maximum payment periods which can be imposed once a party is entitled to claim.
- (e) Providing a recognised mechanism to ensure those who undertake work or provide services, materials or plant can claim payments and payers can respond to the same.
- (f) Providing "default" payment terms in the event that parties do not make express provision in their contracts as to when payments can be claimed, how they are to be valued and responded to and when amounts due must be paid.

- (g) No set off against a payment claim to be allowed unless notified in a timely payment response.
- (h) “Pay when paid” and conditional payment provisions will be unenforceable, including in relation to nominated sub-contracts.
- (i) Parties who have not been paid an amount admitted as due in a payment response or decided as due by an adjudicator will be entitled to suspend or slow down works and will be entitled to additional costs and extensions of time to compensate them for any resulting delays.
- (j) Either party to a contract will be entitled to refer disputes arising in relation to payment claims under their contract to adjudication for a decision within 55 working days (or longer period agreed by the parties). There is a 28 calendar day time limit for commencing adjudication once a right to adjudicate arises.
- (k) Parties are free to agree adjudicator nominating bodies in their contracts.
- (l) Adjudicator’s decisions to be enforced in the same way as court judgments without set off or deduction and allowing paying parties only a short period within which to challenge the enforceability of a decision

## **Issues with Divergent Views and Areas for Further Consideration**

144. The public and industry stakeholders have divergent views on some issues that should be further considered in finalising the legislative framework of the SOPL.
- (a) Whether private sector coverage should be limited to contracts for “new buildings” with a main contract value in excess of HK\$5 million.
  - (b) Whether SOPL should apply to oral and partly oral contracts as well as written contracts.
  - (c) Whether SOPL should apply to professional services contracts.
  - (d) The setting of appropriate maximum permissible payment periods and whether there should be different periods applicable to interim and final payments. The setting of the maximum period to be allowed to payers to respond to a payment claim.
  - (e) Whether payers who fail to serve a timely payment response should or should not be automatically liable to pay the full amount of the relevant payment claim.
  - (f) Whether parties should be entitled to refer disputes in relation to extension of time under their contracts to adjudication.
  - (g) Whether a better process / procedure is needed for appointment of an adjudicator and referral of the dispute to the adjudicator once a notice of adjudication is served.
  - (h) Whether parties should only be able to agree an adjudicator after a dispute has arisen or whether it would be better if they could do so in their contracts or after their contracts are entered into.
  - (i) Whether the default nominating body should be HKIAC or whether a different or other bodies should be able to carry out default nominations of adjudicators.

## **Final Note**

145. Although the responses to the consultation indicate a divergence of views on some questions of the proposed framework, there is positive support for SOPL. Government intends to proceed with the legislation.
146. The Government will carefully examine the above issues and give due consideration to the public and stakeholder's views in formulating the legislative framework for SOPL. The next step is for DEVB to finalise the framework of the legislation and to prepare the Bill for submission to the Legislative Council of the Hong Kong Special Administrative Region.

## **Annex A**

### **Membership of the Working Group on Security of Payment Legislation for the Construction Industry**

The Association of Architectural Practices

The Association of Consulting Engineers of Hong Kong

The Chartered Institution of Civil Engineering Surveyors

Construction Industry Council

Development Bureau

The Hong Kong Construction Association Limited

The Hong Kong Construction Sub-Contractors Association

The Hong Kong Federation of Electrical and Mechanical Contractors Limited

Hong Kong Housing Authority

Hong Kong International Arbitration Centre

The Hong Kong Institute of Architects

The Hong Kong Institute of Surveyors

The Hong Kong Institution of Engineers

MTR Corporation Limited

The Real Estate Developers Association of Hong Kong

## Annex B

### List of Consultation Forums and Meetings

Date	Consultation Forum and Meetings
12.6.2015	Meeting the Chairman and representatives of the Registered Minor Works Contractor Signatory Association Ltd.
11.7.2015	SOP Induction Seminar organized by HKIAC, HKIE, HKIS and HKIA
11.7.2015	Consultation Forum for construction industry stakeholders
18.7.2015	Consultation Forum for the general public and construction industry stakeholders
25.7.2015	Consultation Forum for construction industry stakeholders
30.7.2015	Briefing to the Society of Construction Law Hong Kong
1.8.2015	Consultation Forum for the general public and construction industry stakeholders
5.8.2015	Meeting the President and executive members of the Hong Kong Institute of Architects
6.8.2015	Briefing to the Hong Kong Institute of Architects
18.8.2015	Meeting the Hong Kong Construction Sub-Contractors Association
20.8.2015	Briefing to the UK Trade and Investment
20.8.2015	Meeting the President and executive members of the Hong Kong Institute of Surveyors
25.8.2015	Briefing to the Federation of Hong Kong Electrical & Mechanical Industries Trade Union
26.8.2015	Briefing to the Hong Kong Institution of Engineers

## Annex C

### Proposed Security of Payment Legislation for the Construction Industry Summary of Consultation Responses

#### General Note

The responses were classified as:

- (i) “Agree” or “Disagree” if the respondents gave a definite “agree” or “disagree” answer
- (ii) “Other” if the respondents did not explicitly indicate “agree” or “disagree”
- (iii) “Did not answer” if the respondents did not respond to the question.

#### Scope of SOPL

Question 1(1): Do you agree that Hong Kong’s SOPL should apply to 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 Consultation Document) for procurement of construction activities or related services, materials or plant and sub-contracts of any tier?

	Agree	Disagree	Did not answer	Other	total
Association	31 (76%)	0 (0%)	9 (23%)	1 (2%)	41
Company	165 (93%)	1 (1%)	12 (7%)	0 (0%)	178
Individual	657 (73%)	17 (2%)	223 (25%)	0 (0%)	897
Total	853 (76%)	18 (2%)	244 (22%)	1 (0%)	1,116

Question 1(2): Do you agree that Hong Kong’s SOPL should apply to private sector contracts<sup>1</sup> 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)?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	9 (22%)	9 (23%)	1 (2%)	41
Company	137 (77%)	30 (17%)	11 (6%)	0 (0%)	178
Individual	372 (41%)	304 (34%)	221 (25%)	0 (0%)	897
Total	531 (47%)	343 (31%)	241 (22%)	1 (0%)	1,116

<sup>1</sup> For the purpose of Question 1(2) and this Report, private sector contracts are those contracts not covered by Question 1(2) including contracts entered into by statutory and/or public bodies and corporations which are not listed in Schedule 1 to Appendix A of the Consultation Document.

Question 2: Do you agree that if private sector main contract is not subject to the SOPL then all lower sub-contracts will not be subject to SOPL and that where a private sector main contract is subject to the SOPL then all lower tier sub-contracts will be subject to the SOPL?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	1 (2%)	10 (24%)	3 (7%)	41
Company	157 (88%)	10 (6%)	11 (6%)	0 (0%)	178
Individual	656 (73%)	19 (1%)	222 (25%)	0 (0%)	897
Total	840 (75%)	30 (3%)	243 (22%)	3 (0%)	1,116

Question 3: Do you agree that Hong Kong's SOPL should only apply to contracts relating to construction activities carried out in Hong Kong and that it should apply even if one or both parties are foreign parties and even if the law of the contract is not Hong Kong law?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	2 (5%)	9 (22%)	2 (5%)	41
Company	163 (91%)	4 (2%)	11 (6%)	0 (0%)	178
Individual	658 (73%)	17 (2%)	222 (25%)	0 (0%)	897
Total	849 (76%)	23 (2%)	242 (22%)	2 (0%)	1,116

Question 4: Should Hong Kong's SOPL apply to oral and partly oral contracts as well as written contracts? Or only contracts in writing or evidenced in writing?

	Oral and partly oral contracts	Only written contracts	Did not answer	Other	total
Association	15 (37%)	17 (41%)	9 (22%)	0 (0%)	41
Company	102 (57%)	61 (34%)	13 (7%)	2 (1%)	178
Individual	499 (56%)	172 (19%)	225 (25%)	1 (0%)	897
Total	616 (55%)	250 (22%)	247 (22%)	3 (0%)	1,116

Question 5A: Do you agree that professional services contracts which relate directly to planned or actual construction activities in Hong Kong should be covered by the SOPL?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	12 (29%)	0 (0%)	41
Company	164 (92%)	6 (3%)	7 (4%)	1 (1%)	178
Individual	608 (68%)	278 (31%)	10 (1%)	1 (0%)	897
Total	799 (72%)	286 (26%)	29 (2%)	2 (0%)	1,116

Question 6: Do you agree that contracts for supply of materials or plant (even if they do not include for any installation or operation on site) should be covered by Hong Kong's SOPL?

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	5 (12%)	14 (34%)	1 (2%)	41
Company	135 (76%)	10 (6%)	33 (19%)	0 (0%)	178
Individual	592 (66%)	20 (2%)	238 (27%)	47 (5%)	897
Total	748 (67%)	35 (3%)	285 (26%)	48 (4%)	1,116

Question 7: Do you agree that contracts of employment, insurance, guarantee and loan should be excluded from the scope of Hong Kong's SOPL as should investment contracts and other contracts where payment is made by reference to something other than the value of works carried out?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	11 (27%)	1 (2%)	41
Company	142 (80%)	2 (1%)	34 (19%)	0 (0%)	178
Individual	625 (70%)	34 (4%)	237 (26%)	1 (0%)	897
Total	794 (71%)	38 (4%)	282 (25%)	2 (0%)	1,116

## Payment

Question 8: Do you agree that parties undertaking work or providing services, materials or plant under a contract covered by Hong Kong's SOPL should be entitled to Progress Payments but the parties to the contract should be free to agree the number of Progress Payments, when they can be claimed and the basis for calculation amounts due?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	2 (5%)	9 (22%)	2 (5%)	41
Company	152 (85%)	14 (8%)	12 (7%)	0 (0%)	178
Individual	435 (48%)	237 (26%)	224 (25%)	1 (0%)	897
Total	615 (55%)	253 (23%)	245 (22%)	3 (0%)	1,116

Question 9: Do you agree that the maximum Payment Periods which can be agreed for payments should be 60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments?

	Agree	Disagree	Did not answer	Other	total
Association	18 (44%)	12 (29%)	9 (22%)	2 (5%)	41
Company	93 (52%)	74 (42%)	11 (6%)	0 (0%)	178
Individual	178 (20%)	493 (55%)	225 (25%)	1 (0%)	897
Total	289 (26%)	579 (52%)	245 (22%)	3 (0%)	1,116

Question 10A: Do you agree that parties who are entitled to payments under the terms of a contract covered by Hong Kong's SOPL should be entitled (but not obliged) to claim their payments by way of statutory Payment Claims?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	9 (22%)	3 (7%)	41
Company	162 (91%)	4 (2%)	11 (6%)	1 (1%)	178
Individual	613 (68%)	9 (1%)	227 (25%)	48 (5%)	897
Total	802 (72%)	15 (1%)	247 (22%)	52 (5%)	1,116

Question 10B: Do you agree that paying parties should be entitled to serve Payment Response no later than 30 calendar days after receipt of Payment Claims?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	8 (20%)	11 (27%)	0 (0%)	41
Company	95 (53%)	72 (40%)	11 (6%)	0 (0%)	178
Individual	241 (27%)	430 (48%)	225 (25%)	1 (5%)	897
Total	358 (32%)	510 (46%)	247 (22%)	1 (5%)	1,116

Question 11A: Do you agree that in the absence of express agreement, parties undertaking work or providing services, materials or plant should be entitled to make Payment Claims at calendar month payment Intervals?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	4 (10%)	9 (22%)	2 (5%)	41
Company	162 (91%)	5 (3%)	11 (6%)	0 (0%)	178
Individual	609 (68%)	13 (1%)	228 (25%)	47 (5%)	897
Total	797 (72%)	22 (2%)	248 (22%)	49 (4%)	1,116

Question 11B: Do you agree that in the absence of express agreement, payments due should be calculated based on the value of work, services, materials or plant provided and with valuation based on any relevant contract price or pricing or in the absence of the same on the market rates prevailing at the time the contract was entered into?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	3 (7%)	10 (24%)	2 (5%)	41
Company	164 (92%)	3 (2%)	11 (6%)	0 (0%)	178
Individual	614 (68%)	9 (1%)	226 (25%)	48 (5%)	897
Total	804 (72%)	15 (1%)	247 (22%)	50 (4%)	1,116

Question 11C: Do you agree that in the absence of express agreement, paying parties should be entitled to serve Payment Response within 30 calendar days of receiving the Payment Claim?

	Agree	Disagree	Did not answer	Other	total
Association	17 (41%)	12 (29%)	10 (24%)	2 (5%)	41
Company	95 (53%)	71 (40%)	12 (7%)	0 (0%)	178
Individual	193 (22%)	429 (48%)	226 (25%)	49 (5%)	897
Total	305 (27%)	512 (46%)	248 (22%)	51 (5%)	1,116

Question 11D: Do you agree that in the absence of express agreement, the Payment Period for any amount due should be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payments) after receipt of a Payment Claim?

	Agree	Disagree	Did not answer	Other	total
Association	15 (37%)	14 (34%)	10 (24%)	2 (5%)	41
Company	75 (42%)	92 (52%)	11 (6%)	0 (0%)	178
Individual	130 (14%)	539 (60%)	226 (25%)	2 (0%)	897
Total	220 (20%)	645 (58%)	247 (22%)	4 (0%)	1,116

Question 12A: Do you agree that paying parties who fail to serve Payment Response within 30 calendar days (or any earlier period agreed in the contract) of receipt of Payment Claims should not be automatically liable to pay the full amount of the Payment Claim?

	Agree	Disagree	Did not answer	Other	total
Association	16 (39%)	13 (32%)	11 (27%)	1 (2%)	41
Company	63 (35%)	104 (58%)	11 (6%)	0 (0%)	178
Individual	119 (13%)	506 (56%)	224 (25%)	48 (1%)	897
Total	198 (18%)	623 (56%)	246 (22%)	49 (4%)	1,116

Question 12B: Do you agree that paying parties who fail to serve Payment Response within 30 calendar days (or any earlier period agreed in the contract) of receipt of a Payment Claim should not be able to raise any set off against amounts properly due against the Payment Claim?

	Agree	Disagree	Did not answer	Other	total
Association	25 (61%)	7 (17%)	9 (22%)	0 (0%)	41
Company	144 (81%)	23 (13%)	11 (6%)	0 (0%)	178
Individual	419 (47%)	252 (28%)	225 (25%)	1 (0%)	897
Total	588 (53%)	282 (25%)	245 (22%)	1 (0%)	1,116

## Prohibition of “Pay when paid” and Conditional Payment

Question13A: Do you agree that “pay when paid” clauses should be rendered ineffective?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	5 (12%)	7 (17%)	3 (7%)	41
Company	159 (89%)	7 (4%)	6 (3%)	6 (3%)	178
Individual	603 (67%)	72 (8%)	11 (1%)	211 (24%)	897
Total	788 (71%)	84 (7%)	24 (2%)	220 (20%)	1,116

Question13B: Do you agree that “pay when paid” clauses should be rendered ineffective even where the reason of non-payment is insolvency higher in the supply chain?

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	8 (20%)	8 (20%)	2 (5%)	41
Company	154 (87%)	12 (7%)	11 (6%)	1 (1%)	178
Individual	592 (66%)	81 (9%)	224 (25%)	0 (0%)	897
Total	769 (69%)	101 (9%)	243 (22%)	3 (0%)	1,116

Question14A: Do you agree that clauses which make payment under a contract conditional on certification or performance of obligations under another contract should be rendered ineffective?

	Agree	Disagree	Did not answer	other	total
Association	25 (61%)	5 (12%)	9 (22%)	2 (5%)	41
Company	145 (81%)	21 (12%)	12 (7%)	0 (0%)	178
Individual	370 (41%)	303 (34%)	223 (25%)	1 (0%)	897
Total	540 (48%)	329 (30%)	244 (22%)	3 (0%)	1,116

Question14B: Do you agree that no exception should be made for nominated sub-contractors?

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	10 (24%)	7 (17%)	3 (7%)	41
Company	154 (87%)	12 (7%)	12 (7%)	0 (0%)	178
Individual	601 (67%)	71 (8%)	225 (25%)	0 (0%)	897
Total	776 (70%)	93 (8%)	244 (22%)	3 (0%)	1,116

## Suspension for Non-Payment

Question 15: Do you agree that Hong Kong's SOPL should 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?

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	8 (20%)	1 (2%)	41
Company	163 (92%)	4 (2%)	11 (6%)	0 (0%)	178
Individual	607 (68%)	68 (8%)	222 (25%)	0 (0%)	897
Total	800 (72%)	74 (7%)	241 (21%)	1 (0%)	1,116

Question 16: Do you agree that the right to suspend or reduce the rate of progress should only arise after either non-payment of an adjudicator's decision or non-payment of amount admitted as due in a Payment Response?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	5 (12%)	8 (20%)	1 (2%)	41
Company	159 (89%)	8 (4%)	11 (6%)	0 (0%)	178
Individual	608 (68%)	66 (7%)	222 (25%)	1 (0%)	897
Total	794 (71%)	79 (7%)	241 (22%)	2 (0%)	1,116

Question 17A: Do you agree that parties which suspend or slow work for non-payment should 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?

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	4 (10%)	10 (24%)	0 (0%)	41
Company	165 (93%)	2 (1%)	11 (6%)	0 (0%)	178
Individual	611 (68%)	62 (7%)	223 (25%)	1 (0%)	897
Total	803 (72%)	68 (6%)	244 (22%)	1 (0%)	1,116

If your answer to Question 17A is agreed, then which is your preferred option for establishing the party's obligations to resume work and entitlement to additional time?

Question 17B(i): entitlement to additional time is to reflect all delay arising out of the suspension which will allow consideration of the periods required for resumption of work and achievement of full rates of production based on the circumstances of each case; or

	Agree	Disagree	Did not answer	Other	total
Association	7 (17%)	6 (15%)	26 (63%)	2 (5%)	41
Company	37 (21%)	16 (9%)	125 (70%)	0 (0%)	178
Individual	92 (10%)	29 (3%)	728 (81%)	48 (5%)	897
Total	136 (12%)	51 (5%)	879 (79%)	50 (4%)	1,116

Question 17B(ii): there is an express obligation for work to be resumed within a set period of time after payment is made and the entitlement to additional time is from which suspension starts to the expiry of the set period for resumption of work; or

	Agree	Disagree	Did not answer	Other	total
Association	5 (12%)	8 (20%)	26 (63%)	2 (5%)	41
Company	37 (21%)	18 (10%)	123 (69%)	0 (0%)	178
Individual	91 (10%)	27 (3%)	731 (81%)	48 (5%)	897
Total	133 (12%)	53 (5%)	880 (79%)	50 (4%)	1,116

Question 17B(iii): a hybrid of (i) and (ii) above where there is a set period within which work must be resumed but account can be taken of other circumstances such as where work cannot be fully resumed or full rates of production achieved by the expiry of the set period.

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	4 (10%)	12 (29%)	2 (5%)	41
Company	152 (85%)	10 (6%)	16 (9%)	0 (0%)	178
Individual	591 (66%)	12 (1%)	246 (27%)	48 (5%)	897
Total	766 (69%)	26 (2%)	274 (25%)	50 (4%)	1,116

If your preferred option is (ii) or (iii), what should be the set period for resumption of work after payment be (in working days)?

1 to 4 working day: 18 responses  
 5 to 6 working days: 13 responses  
 7 working days: 373 responses  
 8 working days: 2 responses  
 10 working days: 315 responses  
 12 working days: 1 response  
 14 working days: 23 responses  
 21 to 30 working days: 7 responses  
 Other periods: 4 responses  
 Other comments: 48 responses  
No input: 312 responses  
 1,116 responses

Question18A: Do you agree that unpaid parties should be obliged to give written notice of their intention to suspend to the non-paying party and (if known) to the party which pays the non-paying party (the “principal”) and to the site owner?

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	4 (10%)	10 (24%)	1 (2%)	41
Company	162 (93%)	4 (2%)	12 (7%)	0 (0%)	178
Individual	621 (69%)	52 (6%)	223 (25%)	1 (0%)	897
Total	809 (73%)	60 (5%)	245 (22%)	2 (0%)	1,116

Question18B: Option (i) - Should a single notice period be adopted for all circumstances? If so, what would be an appropriate notice period be (in working days)?

Option (ii) - Should there be different notice periods for non-payment of amounts admitted as due in a Payment Response and non-payment of adjudicator’s decisions? If so, what would be an appropriate notice period be (in working days) for each?

	Single Notice Period	Different Notice Periods	Did not answer	Other	total
Association	24 (59%)	6 (15%)	10 (24%)	1 (2%)	41
Company	151 (85%)	12 (7%)	14 (8%)	1 (1%)	178
Individual	584 (65%)	81 (9%)	231 (26%)	1 (0%)	897
Total	759 (68%)	99 (9%)	255 (23%)	3 (0%)	1,116

Option (i) Single Notice Period

1 working day:	244 responses
2 to 3 working days:	6 responses
5 working days:	321 responses
6 working days:	4 responses
7 working days:	139 responses
10 to 30 working days:	34 responses
Other comment:	8 responses
<u>Not answered:</u>	<u>360 responses</u>
	1,116 responses

Option (ii) Different Notice Periods

After non-payment of amount admitted as due in a Payment Response

3 to 6 working days:	6 responses
7 working days:	21 responses
10 working days:	13 responses
12 to 15 working days:	5 responses
30 to 60 working days:	7 responses
<u>Not answered:</u>	<u>1,063 responses</u>
	1,116 responses

After non-payment of adjudicator's decision

1 to 3 working days:	4 responses
5 working days:	16 responses
6 working days:	1 responses
7 working days:	20 responses
8 to 14 working days:	5 responses
20 to 30 working days:	7 responses
<u>Not answered:</u>	<u>1,063 responses</u>
	1,116 responses

## Adjudication and Enforcement

Question19A: Do you agree that both parties to a contract should be entitled to refer disputes to adjudication?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	4 (10%)	9 (22%)	0 (0%)	41
Company	157 (88%)	10 (6%)	11 (6%)	0 (0%)	178
Individual	659 (73%)	15 (2%)	222 (25%)	1 (0%)	897
Total	844 (76%)	29 (2%)	242 (22%)	1 (0%)	1,116

Question 19B: Do you agree that the right to adjudicate should be limited to disputes related to the following:

(a) the valuation of work, services, materials and plant supplied and claimed in a Payment Claim; and/or

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	9 (22%)	0 (0%)	41
Company	164 (92%)	8 (4%)	6 (3%)	0 (0%)	178
Individual	612 (68%)	268 (30%)	12 (1%)	5 (1%)	897
Total	806 (72%)	278 (25%)	27 (2%)	5 (0%)	1,116

(b) other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or

	Agree	Disagree	Did not answer	Other	total
Association	29 (71%)	3 (7%)	9 (22%)	0 (0%)	41
Company	163 (92%)	9 (5%)	6 (3%)	0 (0%)	178
Individual	612 (68%)	270 (30%)	10 (1%)	5 (1%)	897
Total	804 (72%)	282 (25%)	25 (2%)	5 (0%)	1,116

(c) set offs and deductions against amounts due under Payment Claims; and/or

	Agree	Disagree	Did not answer	Other	total
Association	30 (73%)	2 (5%)	9 (22%)	0 (0%)	41
Company	160 (90%)	12 (7%)	6 (3%)	0 (0%)	178
Individual	613 (68%)	270 (30%)	10 (1%)	4 (0%)	897
Total	803 (72%)	284 (26%)	25 (2%)	4 (0%)	1,116

(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?

	Agree	Disagree	Did not answer	Other	total
Association	63 (63%)	4 (10%)	9 (22%)	2 (5%)	41
Company	156 (88%)	16 (9%)	6 (3%)	0 (0%)	178
Individual	594 (66%)	289 (32%)	11 (1%)	3 (0%)	897
Total	776 (70%)	309 (28%)	26 (2%)	5 (0%)	1,116

Question 20A: Do you agree that there should be a time limit for commencement of adjudication of 28 calendar days from either:

(a) non-payment of amount admitted as due in a Payment Response; or

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	3 (7%)	9 (22%)	2 (5%)	41
Company	148 (83%)	4 (2%)	26 (15%)	0 (0%)	178
Individual	648 (72%)	15 (2%)	233 (26%)	1 (0%)	897
Total	823 (74%)	22 (2%)	268 (24%)	3 (0%)	1,116

(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

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	6 (15%)	9 (22%)	2 (5%)	41
Company	145 (81%)	6 (3%)	27 (15%)	0 (0%)	178
Individual	597 (67%)	54 (7%)	234 (26%)	1 (0%)	897
Total	766 (69%)	77 (7%)	270 (24%)	3 (0%)	1,116

(c) the failure of the paying party to serve a Payment Response in relation to the Payment Claim within the required time?

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	7 (17%)	8 (20%)	2 (5%)	41
Company	159 (89%)	5 (3%)	14 (8%)	0 (0%)	178
Individual	605 (67%)	64 (7%)	227 (26%)	1 (0%)	897
Total	788 (71%)	76 (7%)	249 (22%)	3 (0%)	1,116

- (c) 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.

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	7 (17%)	10 (24%)	2 (5%)	41
Company	143 (80%)	10 (6%)	25 (14%)	0 (0%)	178
Individual	578 (64%)	84 (9%)	234 (26%)	1 (0%)	897
Total	743 (67%)	101 (9%)	269 (24%)	3 (0%)	1,116

Question 20B: If not 28 calendar days then what period do you consider appropriate?

3 to 7 days:	3 responses
14 days:	256 responses
15 days:	2 responses
21 days:	65 responses
28 days:	2 responses
29 to 60 days:	7 responses
Any time/no time limit:	4 responses
Other comments:	56 responses
<u>Not answered:</u>	<u>721 responses</u>
	1,116 responses

Question 21A: Do you agree that the adjudication procedure should have the following features?

- (a) The claiming party will commence adjudication by serving on the other party a notice adjudication setting out brief details of the parties, the nature of the dispute and the redress sought.

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	0 (0%)	10 (24%)	3 (7%)	41
Company	166 (93%)	0 (0%)	12 (7%)	0 (0%)	178
Individual	668 (74%)	5 (1%)	223 (25%)	1 (0%)	897
Total	862 (77%)	5 (1%)	245 (22%)	4 (0%)	1,116

(b) The adjudicator is appointed by agreement or by nomination from an agreed nominating body or (if none) from HKIAC within 5 working days of commencement.

	Agree	Disagree	Did not answer	Other	total
Association	24 (59%)	2 (5%)	11 (27%)	4 (10%)	41
Company	160 (90%)	6 (3%)	12 (7%)	0 (0%)	178
Individual	608 (68%)	65 (7%)	223 (25%)	1 (0%)	897
Total	792 (71%)	73 (7%)	246 (22%)	5 (0%)	1,116

(c) The claiming party must serve their submission 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.

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	2 (5%)	10 (24%)	2 (5%)	41
Company	166 (93%)	5 (3%)	7 (4%)	0 (0%)	178
Individual	658 (73%)	222 (25%)	13 (1%)	4 (0%)	897
Total	851 (76%)	229 (20%)	30 (3%)	6 (1%)	1,116

(d) The responding party has 20 working days from receipt of claiming party's submissions to respond with their own submissions and all supporting evidence they rely on.

	Agree	Disagree	Did not answer	Other	total
Association	16 (39%)	12 (29%)	11 (27%)	2 (5%)	41
Company	97 (54%)	69 (39%)	12 (7%)	0 (0%)	178
Individual	191 (21%)	482 (54%)	223 (25%)	1 (0%)	897
Total	304 (27%)	563 (51%)	246 (22%)	3 (0%)	1,116

(e) The adjudicator shall reach and publish their decision, with reasons, within 20 working days of receipt of the responding party's submission extendable by the adjudicator up to 55 working days of appointment of the adjudicator and to excess of 55 working days if both parties agree.

	Agree	Disagree	Did not answer	Other	total
Association	23 (56%)	6 (15%)	10 (24%)	2 (5%)	41
Company	119 (67%)	48 (27%)	11 (6%)	0 (0%)	178
Individual	476 (53%)	197 (22%)	223 (25%)	1 (0%)	897
Total	618 (55%)	251 (23%)	244 (22%)	3 (0%)	1,116

- (f) The adjudicators shall have the power to vary the time for the responding to provide their response to a time earlier or later than aforesaid and to conduct the adjudication in such manners 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.

	Agree	Disagree	Did not answer	Other	total
Association	21 (51%)	7 (17%)	10 (24%)	3 (7%)	41
Company	116 (65%)	48 (27%)	13 (7%)	1 (1%)	178
Individual	432 (48%)	194 (22%)	223 (25%)	48 (5%)	897
Total	569 (51%)	249 (22%)	246 (22%)	52 (5%)	1,116

- (g) The adjudicator shall be entitled to disregard any submission 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 adjuration 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.

	Agree	Disagree	Did not answer	Other	total
Association	26 (63%)	3 (7%)	10 (24%)	2 (5%)	41
Company	162 (91%)	4 (2%)	12 (7%)	0 (0%)	178
Individual	620 (69%)	53 (6%)	223 (25%)	1 (0%)	897
Total	808 (73%)	60 (5%)	245 (22%)	3 (0%)	1,116

- (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).

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	8 (20%)	9 (22%)	2 (5%)	41
Company	106 (60%)	60 (34%)	12 (7%)	0 (0%)	178
Individual	469 (52%)	204 (23%)	223 (25%)	1 (0%)	897
Total	597 (54%)	272 (24%)	244 (22%)	3 (0%)	1,116

- (i) Each party will bear its own legal costs of 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

	Agree	Disagree	Did not answer	Other	total
Association	27 (66%)	3 (7%)	9 (22%)	2 (5%)	41
Company	120 (67%)	45 (25%)	12 (7%)	1 (1%)	178
Individual	374 (42%)	298 (33%)	224 (25%)	1 (0%)	897
Total	521 (47%)	346 (31%)	245 (22%)	4 (0%)	1,116

Question 21B: Do you agree that adjudicators should have the power to remit disputes back to the parties where a claiming party introduces significant new material in an adjudication?

	Agree	Disagree	Did not answer	Other	total
Association	25 (61%)	3 (7%)	11 (27%)	2 (5%)	41
Company	143 (80%)	23 (13%)	12 (7%)	0 (0%)	178
Individual	426 (47%)	246 (27%)	224 (25%)	1 (0%)	897
Total	594 (53%)	272 (25%)	247 (22%)	3 (0%)	1,116

Question 22A: Do you agree that parties should be free to agree adjudicator nominating bodies (“ANBs”) in their contract?

	Agree	Disagree	Did not answer	Other	total
Association	28 (68%)	3 (7%)	8 (20%)	2 (5%)	41
Company	162 (91%)	5 (3%)	11 (6%)	0 (0%)	178
Individual	613 (68%)	60 (7%)	224 (25%)	0 (0%)	897
Total	803 (72%)	68 (6%)	243 (22%)	2 (0%)	1,116

Question 22B: Do you agree that parties should be free to agree an adjudicator for a specific dispute but only after the dispute and right to adjudicate has arisen?

	Agree	Disagree	Did not answer	Other	total
Association	17 (41%)	12 (29%)	9 (22%)	3 (7%)	41
Company	73 (41%)	94 (53%)	11 (6%)	0 (0%)	178
Individual	146 (16%)	525 (59%)	225 (25%)	1 (0%)	897
Total	236 (21%)	631 (57%)	245 (22%)	4 (0%)	1,116

Question 22C: Do you agree that 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 should be the default ANB?

	Agree	Disagree	Did not answer	Other	total
Association	22 (54%)	5 (12%)	10 (24%)	4 (10%)	41
Company	146 (82%)	24 (13%)	8 (4%)	0 (0%)	178
Individual	375 (42%)	511 (57%)	11 (1%)	0 (0%)	897
Total	543 (49%)	540 (48%)	29 (3%)	4 (0%)	1,116

Question 23: Do you agree that Hong Kong's SOPL should 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?

	Agree	Disagree	Did not answer	Other	total
Association	29 (71%)	2 (5%)	8 (20%)	2 (5%)	41
Company	163 (92%)	3 (2%)	12 (7%)	0 (0%)	178
Individual	610 (68%)	63 (7%)	223 (25%)	1 (0%)	897
Total	802 (72%)	68 (6%)	243 (22%)	3 (0%)	1,116