



## SECURITY OF PAYMENT BILL: INTERIM THOUGHTS ON ENFORCING ADJUDICATION DECISIONS IN INSOLVENCY

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Construction projects involve an array of components – including construction work, consultancy services, and materials/plant supplies – linked through a supply chain. An obvious risk is that it only takes one party to delay payment to cause a ripple effect of financial pressure down the chain. Especially affected are small enterprises where cash flow is critical.

But there is now hope for Hong Kong's buoyant construction industry. After ongoing discussions between the relevant stakeholders going back over two decades, the government has recently introduced the Security of Payment (SOP) Bill. The intention is to speed up the flow of cash down the various tiers of the supply chain, in line with similar legislation in the United Kingdom, Australia, Singapore and Malaysia. The bill is currently being shepherded through the legislative process and is expected to be enacted into law in late 2024.

One key element of the bill is that parties to a construction contract will be statutorily entitled to refer disputes over payment claims to adjudication, a process where a third-party adjudicator makes a binding interim decision without the delays and formalities of litigation or arbitration. That said, unlike the approach in some jurisdictions, litigation or arbitration before an adjudication decision is not prohibited. Subject to being set aside, an unpaid adjudication decision may be enforced by the Court of First Instance as if it were a judgment.

The bill has already attracted much scrutiny. In the insolvency context in particular, some potentially thorny issues arising out of the enforcement of adjudication decisions are worth noting, as informed by overseas

case law.

First, the enforcement of payment claim debts underlying a winding-up petition may raise questions on the interplay between the statutory regime and parties' agreement, the proper forum for resolving payment claims, and related policy issues.

For instance, the English court in [Breyer Group Plc v RBK Engineering Ltd](#) (2017) had struck out a winding-up petition as an abuse of process by reason that, inter alia, the proper avenue for the dispute between the parties is adjudication under the terms of their agreement.

Useful analogies may also be drawn from the topical arbitration stay-versus-winding up debate in the common law world: contrast the recent decisions of [Re Simplicity & Vogue Retailing \(HK\) Co Ltd](#) (2024) and [Sian Participation Corp v Halimeda International](#) (2024). In Simplicity, the Hong Kong Court of Appeal essentially decided that the parties' agreement to refer disputes to arbitration trumps the court's jurisdiction in insolvency proceedings. By contrast, in Sian Participation, the Privy Council decided to the opposite effect.

A related issue is whether an adjudicated amount, given its interim nature, is a right due and payable to a claimant which could constitute a petitioning debt or genuine cross-claim for the purpose of winding up. In the Australian case of [Diploma Construction \(WA\) Pty Ltd v KPA Architects Pty Ltd](#) (2014), the Court of Appeal of the Western Australia Supreme Court held that a judgment entered in terms of certain adjudication determinations gave rise to debts that are due and payable according to the relevant statute, and in turn could form the basis of a statutory demand, against which there was no genuine dispute to justify setting aside.

Finally, there is the question of the enforceability of adjudication decisions by or against insolvent companies in the winding-up process. This hinges on whether the liquidation regime can be reconciled with enforcing temporarily binding decisions. The English Court of Appeal has recently examined this issue in [John Doyle Construction Ltd v Erith Contractors Ltd](#) (2021), reiterating (in obiter) that an interim adjudication decision does not resolve (cross)claims in an insolvency context, and so should not be summarily enforced in that process.

It will be interesting to see how the Hong Kong courts will grapple with these issues in the unique local context as and when they arise for determination after the SOP Bill is passed.