

FAST-TRACK CONSTRUCTION ADJUDICATION IN THAILAND: AN IMPORTANT UPDATE ON THE DRAFT SECURITY OF PAYMENT ACT

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In a previous article, WFW highlighted an innovative draft bill with significant and reformative implications for Thailand's construction industry. Primarily, it discussed the possible roll out of a new fast-track adjudication mechanism to promote efficient resolution of payment disputes for Thai construction projects. The bill aims to boost the country's construction sector and alleviate clogged cash flows through an ethos of *"pay first, argue later"*, bringing the resolution of payment disputes in the construction and engineering industry in line with those adopted by the likes of Singapore and Malaysia.

We have since seen several important updates on the progress of this draft bill, now referred to as the "Security of Payment Act", as it progresses through the Thai legislative system, along with further interesting details as to its prospective features. Most notable are the reveal of the Thailand Arbitration Centre ("THAC") as the proposed entity to administer the rapid adjudication process, the predicted timeframe and required steps for adjudicative resolution of payment disputes and

the expected scope of application to construction contracts.

We summarise this new information below and consider potential *"teething problems"* identified in our previous article, along with some broader analysis on what the draft bill means for employers, contractors and subcontractors in Thailand. Readers should remember that these reforms are presently in draft form. Work remains to be done before the bill can be signed into law and its current proposed content remains subject to change.

NEW EMERGING DETAILS:

- **Adjudication administered by the THAC:** it is expected that the THAC, under the supervision of the Ministry of Justice, will act as the administrative entity which will oversee and be responsible for the proposed fast-track adjudication procedure. As detailed below, the THAC will play a key role in procedural coordination and will step in to appoint a suitable adjudicator to a payment dispute where parties have not expressly considered this in their contract conditions or cannot agree to a joint appointment.

"Timeframes have been put forward in relation to the above procedural steps, including: (i) a period of 10 to 15 business days for the payor to make requested payment upon receipt of a claim form and (ii) a total duration of minimum 30 days for the adjudicative process."

Procedural roadmap and timeframes: significant provisional details concerning the procedure and timeline of adjudication have emerged, as follows:

- where a payment dispute arises, the prospective payee must submit a completed claim form to the payor, stating: (i) the amount of the disputed payment for works/goods/services; (ii) the payment due date; and (iii) the supporting, relevant provisions from the underlying construction contract;
- should the payor fail to make payment following receipt of a claim form and expiration of the applicable time for payment, or if the payee is not satisfied with the outcome, the payee may apply to the THAC to formally commence the adjudication process to swiftly resolve the dispute;
- the THAC shall notify the respondent that the adjudication process has commenced, and the parties may agree to the appointment of a particular adjudicator, failing which the THAC shall itself appoint an appropriate candidate to determine the disputed payment; and

• provisional estimated timeframes have been put forward in relation to the above procedural steps, including: (i) a period of 10 to 15 business days for the payor to make requested payment upon receipt of a claim form and (ii) a total duration of minimum 30 days for the adjudicative process, potentially extending to around 60 days where the matter is complex and requires additional consideration.

Although the above information is indicative, these short, sharp timeframes make clear the intention of the draft Security of Payment Act to facilitate regular and timely payments through a dispute resolution mechanism which is much faster than litigation or arbitration.

- **Enforcement and challenges:** the decision of the adjudicator is expected to be interim in nature. It will be temporarily binding pending any further contest and ultimate determination of the payment dispute at arbitration or through Thai court proceedings. The applicant can enforce a favourable adjudicative decision by requesting certification from the THAC within a certain timeframe, which can then be used as a warrant to effect payment by court order. Conversely, a dissatisfied respondent can seek that an adjudicator's determination is later set aside or revoked by the Thai courts, or that any broader underlying issues are determined at arbitration.

DEVELOPMENTS TO PREVIOUS PROPOSED REFORMS

- **Scope of application:** as noted previously, if passed, the Security of Payment Act will likely be broad in its application and further suggestions as to its content confirm this. It is expected that provisions will apply to formal construction contracts, as well as related contracts such as consultancy agreements, in written form executed in Thailand. However, current discussions point to the potential exclusion of certain private construction agreements relating to private dwellings from the scope of the bill; and

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- **Restricted provisions:** the draft Security of Payment Act also seeks to promote fairness in the Thai construction industry and better balance the allocation of payment risk between contracting parties. To this end, we previously highlighted the likely restriction on “*pay-when-paid*” clauses, which involve payments to subcontractors and suppliers being dependent on payment being made to the lead contractor by the employer. Since then, it has also been suggested that “*pay-if-paid*” and “*back-to-back*” contractual provisions (which are similar in effect to “*paid-when-paid*” clauses) will be considered void where they feature in applicable construction contracts. Conditional payment clauses are currently common practice in the Thai construction industry and the bill targets their eradication in a bid to reform payment culture, combat unfair payment practice and increase industry professionalism.

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FURTHER CONSIDERATION OF “TEETHING PROBLEMS” AND BROADER ANALYSIS

As per our **previous article**, the features of the draft act were shaping up to be contractor and sub-contractor “*friendly*”. We also noted two potential “*teething problems*” in particular: (i) that employers cannot practically refuse the adjudication procedure when faced with a payment claim form which they are unwilling to pay and (ii) that such a rapid mechanism for resolution of payment disputes leaves minimal time for an employer to prepare its defence within the tight timeframes for adjudication.

In light of the emerging details noted above, this is still very much the case. The ultimate goal of the act appears to be the reform of payment culture in Thailand’s construction sector. This would bring with it a faster flow of payments from employers to contractors and beyond, improved professional payment practice and

fewer lengthy disputes stifling project progress. Clearly, contractors and subcontractors stand to gain from the draft Security of Payment Act’s proposed changes.

However, it is not entirely bad news for employers. As considered above, an adjudicator’s decision is envisaged as being interim only. Employers may seek further redress at a later stage through arbitral proceedings or through the Thai courts. Moreover, practically, employers may also benefit from systematic settlement of payment disputes due to a likely reduction in overall incurred delay and, one would hope, (with a mechanism for contractors to recover regular payments) a likely improvement in the overall quality of construction work ultimately produced.

In any case, the possibility of the draft Security of Payment Act passing into law is an exciting prospect for the Thai construction industry as a whole. With similar acts already adopted in Australia, Singapore, Malaysia and the United Kingdom, Thailand would stand to gain from increased interest, confidence and investment in its construction sector.

WHAT’S NEXT?

We understand that, following in-depth discussion and debate between industry professionals and the drafting committee, the original draft of the bill has been revised and is nearing readiness for submission to the Ministry of Justice and the Council of State. It is hoped that the draft will reach parliament within this year and, with necessary support from key stakeholders, that it will make crucial progress towards becoming law.

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WFW is grateful to the Asian Institute of Technology (“AIT”) for recently hosting a webinar on ‘**Security of Payment Act for a Construction Project – Practice in Western Australia and Thailand Perspective**’, in which key actors in the preparation of the draft Security of Payment Act – Assoc. Prof Dr Nopbhorn Leeprechanon, Mr Chamnan Pichedpan and Dr Narong Luengbootnak – provided important updates on the status and content of the draft bill.

WFW will continue to closely monitor developments in this space and will provide further updates in the coming months.

UK Trainee Anna Clarke also contributed to this article.

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