

# THE AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

## Implications for Potential Claimants and Respondents

[2019] SAL Prac 15

*Parliament amended the Building and Construction Industry Security of Payment Act (the “SOP Act”) in 2018. Although the amendments are not in effect yet, they will materially affect potential claimants and respondents. The amendments also incorporate the decisions of major cases regarding the existing SOP Act and clarify many of the issues raised. This article considers those cases, as well as the implication of the amendments on claimants and respondents.*

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### **I. Introduction**

1 Adjudications under the Building and Construction Industry Security of Payment Act (the “SOP Act”) have grown in popularity since its enactment, increasing from less than 100 per year (in the early years) to around 400 a year since 2014.<sup>1</sup>

2 In 2018, Parliament enacted several amendments to the SOP Act (the “Amendments”) to enhance the low-cost and speedy dispute resolution mechanism.<sup>2</sup> Although the Amendments are not in effect yet, they will materially affect the

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1 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for National Development).

2 The Amendments are enacted in the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018).

potential claimant and respondent. The Amendments also incorporate the decisions of notable cases concerning the existing SOP Act and clarify many of the issues raised.

3 This article reviews the major cases that dealt with the existing SOP Act, as well as the implications of the Amendments on the potential claimant and respondent. However, other parts of the Amendments which do not directly affect the potential claimant and respondent will not be reviewed.

## **II. The Amendments' impact on potential claimants**

4 There are several changes affecting the potential claimant, which can be generally regarded as changes to the limitation period and the types of contracts, as well as the scope of items that a claimant can submit for adjudication.

### **A. Shortened period of 30 months to file payment claims**

5 Presently, a claimant is entitled to submit a payment claim within six years after the construction works were carried out.<sup>3</sup>

6 The period of six years has been contentious, particularly as the length of time provided did not seem to be compatible with Parliament's aim of an interim and speedy measure to resolve cash-flow problems. This issue was discussed as early as 2013 in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd*, where the High Court observed that other jurisdictions with similar adjudications regimes only provided a claimant with 12 months to submit a claim after the construction works/services were carried out.<sup>4</sup>

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3 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 10(4).

4 *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 at [44] and [65].

7 Moving forward, the Amendments reduce a claimant's entitlement period to submit a payment claim from six years to 30 months, which is calculated from the later of:<sup>5</sup>

- (a) the date which the construction work was last carried out/goods or services supplied;
  - (b) the last document certifying the completion of the construction project; or
  - (c) the last temporary occupation permit issued for the construction project.
- (the "Claim Entitlement Period")

8 The shortened period might seem draconian, since it reduces a claimant's entitlement period by more than half of the time presently allowed. However, such an approach arguably provides the right balance between a claimant's need for payment and a respondent's need to manage claims.

9 As Parliament intended for the SOP Act to only provide an interim and temporary remedy for claimants facing cash-flow issues, it is arguable that claimants which are able to wait for almost six years before submitting a payment claim do not face pressing cash-flow issues and would fall outside of the group envisaged by Parliament that need support under the SOP Act.

10 Additionally, such claims which fall outside the Claim Entitlement Period could still be dealt with in court or in arbitration (as long as they do not fall outside the statutory limitation period set out in s 6 of the Limitation Act<sup>6</sup>).

11 In the light of the above, potential claimants presently considering adjudication applications for works done more than 30 months ago should apply for adjudication as soon as possible,

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5 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 5.

6 Cap 163, 1996 Rev Ed.

to ensure that their claims can be adjudicated before the Amendments take effect.

**B. Terminated contractors can apply for adjudication, subject to conditions**

12 Presently, the SOP Act does not specify whether claimants whose contracts have been terminated can apply for adjudication. In 2013, the High Court clarified in *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* (“*Choi Peng Kum*”) that such claimants could apply for adjudication.<sup>7</sup>

13 The Amendments give effect to the High Court’s decision, making clear that a contractor whose contract has been terminated can apply for adjudication for unpaid works, as long as they were carried out before the termination.<sup>8</sup>

14 However, where a terminated contract permits suspension of payment until a specified event (the “Suspension Period”), the Amendments will give effect to such clauses and prevent a claimant from applying for adjudication until the Suspension Period is over.<sup>9</sup>

15 A possible clause that contains a Suspension Period could be cl 31.2(3) of the Public Sector Standard Conditions of Contract (“PSSCOC”), which states (in summary) that no sums will be due to the contractor until the expiry of the Defects Liability Period and after the Superintending Officer certifies a sum setting out the employer’s damages, defects and delay (the “Employer’s Cost”).<sup>10</sup>

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7 *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 at [39].

8 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) ss 2(b) and 3(c).

9 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 3(b).

10 Clause 31.2(3) of the Public Sector Standard Conditions Of Contract for Construction Works 2014 states: “No sum shall be certified as due to the Contractor nor shall the Employer be liable to pay to the Contractor any sum ... until the expiry of the Defects Liability Period ... and thereafter until the  
(cont’d on the next page)

16 However, an issue might arise if the Suspension Period exceeds the Claim Entitlement Period of 30 months. Taking the example of cl 31.2(3) of the PSSCOC again, it is possible that the Suspension Period exceeds the Claim Entitlement Period, since there is no defined period for the Superintending Officer to issue the certificate for the Employer's Cost. In such cases, a contractor whose contract has been terminated might be prevented from applying for adjudication entirely by the end of the Suspension Period, if it exceeds the Claim Entitlement Period.

17 It is unclear whether Parliament intended for such a contradictory outcome, given that the Amendments expressly provide that a contractor whose contract has been terminated would be allowed to apply for adjudication. As observed by the High Court in *Choi Peng Kum*, termination does not end a contractor's cash-flow concerns, given that other expenses or liabilities may still be ongoing.<sup>11</sup>

18 In the writer's view, a better solution would be to limit the Suspension Period to a period of less than 30 months, in order to ensure that a terminated contractor can still apply for adjudication.

19 In the alternative, potential claimants should review their contracts to see if such Suspension Period clauses are present and consider applying for adjudication before being terminated.

### **C. Contracts for prefabrication of construction components**

20 The Amendments will allow potential claimants carrying out prefabrication of components for construction works ("Prefabrication Works") (whether in or outside Singapore) to

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Superintending Officer has ... certified an amount ... representing the total of the cost to the Employer of completion and remedying of any Defects, damages for delay in completion ... and all other expenses incurred ...".

11 *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 at [38].

apply for adjudication, as long as the Prefabrication Works are for construction works in Singapore.<sup>12</sup>

21 The Amendments also allow parties that carry out Prefabrication Works in Singapore (and export these works outside Singapore) to apply for adjudication if the contracting parties are Singapore-registered entities.<sup>13</sup>

22 The Minister explained that this change would provide for the expected increase in construction companies that incorporate such prefabrication construction technologies in construction projects.<sup>14</sup>

#### ***D. Damage, losses or expenses excluded from adjudication***

23 After the Amendments take effect, potential claimants will no longer be able to claim for damage, loss or expense when applying for adjudication, unless this is supported by documents showing agreement between the parties or contractual certificates for the same (*eg*, an architect's certificate pursuant to the Singapore Institute of Architects Conditions of Contract or a Superintending Officer's certificate pursuant to the PSSCOC).<sup>15</sup>

24 This change effectively excludes most indirect claims incurred by the claimant in a construction project (*eg*, increased preliminary costs due to delay, costs resulting from extensions of time and prolongation costs), unless there is documentary evidence confirming that such claims are undisputed.

25 The impact of this change will most likely reduce the adjudicator's burden in rendering the determination, since the

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12 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 3(c).

13 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 3(b).

14 *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for National Development).

15 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 11(c).

adjudicator will only be required to consider the direct claims for payment for work done.

26 However, it may be onerous for the potential claimant to incur these indirect costs without being paid. As such, potential claimants should ensure that such indirect costs are first confirmed as variation orders before incurring these costs during a construction project, to ensure that they can be adjudicated upon in the event that payment is not forthcoming.

**E. Deeming provision for serving payment claim**

27 At present, claimants must be very careful in selecting the date to serve a payment claim, lest it be thrown out by respondents alleging that invalid service of a payment claim results in an invalid adjudication application. This is particularly the case as the SOP Act presently requires a claimant to serve a payment claim at the time set out in the contract.<sup>16</sup>

28 The case of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* (“*Audi Construction*”) is such an example, where the respondent—main contractor appealed to the Court of Appeal over the claimant—subcontractor’s payment claim, which was served two days earlier than its contractual date.<sup>17</sup>

29 With the enactment of the Amendments, early service of a payment claim will no longer result in questions as to its validity. As long as a payment claim is served earlier than the contractual date, the Amendments deem that the payment claim is valid and will take effect on the contractual date.<sup>18</sup>

30 Such a change effectively ensures that respondents cannot allege that early service results in the invalidity of the

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16 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 10(2)(a).

17 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [3].

18 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 5(a).

entire payment claim. It also clarifies the situation where a claimant might need to serve a payment claim early (eg, where the contractual date for service falls on a Sunday or public holiday).

**F. Repeat and final claims**

31 At one point, the issue of “repeat” claims was contested, particularly as to whether such claims were allowed under the SOP Act. Essentially, a “repeat” claim is an unpaid and unadjudicated claim which contains no new item of work when compared to a claimant’s previous claim.<sup>19</sup>

32 The issue was settled in the Court of Appeal’s decision in *Lee Wee Lick Terence v Chua Say Eng* (“*Chua Say Eng*”), which made clear that “repeat” claims were allowed, as long as they were not adjudicated on their merits.<sup>20</sup>

33 Additionally, the Court of Appeal observed in *Chua Say Eng* that the definition of a payment claim under the SOP Act was wide enough to encompass a final claim for payment.<sup>21</sup>

34 The Court of Appeal’s decision and observation in *Chua Say Eng* are now codified in the Amendments. The Amendments make clear that an unpaid payment claim which has not been adjudicated on its merits before (essentially a “repeat” claim) will be allowed.<sup>22</sup> Additionally, final claims for payments will be capable of being adjudicated upon under the SOP Act.<sup>23</sup>

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19 *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 at [47].

20 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [92].

21 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [95].

22 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 5(b).

23 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 2(d).



### III. The Amendments' impact on potential respondents

35 As with the potential claimant, there are several changes which affect the potential respondent, most of which deal with the issues surrounding the payment response.

#### A. *Default period to provide payment response increased*

36 Presently, a respondent only has seven days to provide its payment response, if the provisions in the contract do not provide for the same. After including the dispute settlement period, a respondent will have a total of 14 days to provide the payment response.<sup>24</sup>

37 Moving forward, the Amendments increase a respondent's time to provide a payment response to 14 days.<sup>25</sup> This, coupled with the dispute settlement period, gives a respondent a total of 21 days (from the present 14 days) to provide its payment response, even if there are no terms regarding the provision of a payment response in the contract.<sup>26</sup>

#### B. *All objections must be set out in the payment response*

38 In *Audi Construction*, the Court of Appeal made clear that a respondent would be required to set out all jurisdictional and substantive objections to a claimant's payment claim. A failure to do so would mean that a respondent would be deemed to have waived the objection to a claimant's payment claim.<sup>27</sup>

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24 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 11(1)(b), 12(4) and 12(5).

25 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 6(a).

26 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ss 12(4) and 12(5).

27 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [66], [67] and [69].

39 While the Court of Appeal’s decision caused some controversy amongst legal practitioners,<sup>28</sup> the decision has now been enshrined in the Amendments.

40 The Amendments make clear that a respondent will only be allowed to include an objection in its adjudication response if it was first included in the payment response.<sup>29</sup>

41 The only exception is if the circumstances of the objection in the adjudication response arose after the payment response was served, or if the respondent did not reasonably know of the circumstances of the objection when serving the payment response.<sup>30</sup>

42 This requirement is welcomed as it furthers the SOP Act’s objective in enabling a low-cost and speedy adjudication to resolve payment disputes for the following reasons.

43 Firstly, requiring a respondent to raise all objections in the payment response allows the claimant the opportunity to rectify any jurisdictional invalidity by issuing a new payment claim, saving parties time and money that would otherwise be spent disputing jurisdictional issues in adjudication or in court.

44 Secondly, allowing a respondent to raise objections which were not in a payment response creates an anomaly, as such respondents could obtain a better outcome (by setting aside the adjudication determination on technical grounds) as opposed to a respondent that takes the trouble to provide a payment response.

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28 See for example Tan Tian Luh & Tan Xian Ying, “The Respondent in Adjudication Proceedings – The Unwanted Child of Administrative Law” [2018] SAL Prac 5.

29 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 9.

30 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 9

45 Given the above, all potential respondents will have to ensure that all objections (jurisdictional and substantive) to a payment claim are included in the payment response, in order to rely on these objections during an adjudication.

**C. Damage, losses or expenses excluded from adjudication**

46 Like the claimants, the Amendments prevent potential respondents from including items for damage, loss or expense in the payment response, unless they are supported by documents showing agreement between the parties or contractual certificates confirming the same.<sup>31</sup>

47 These mean that potential respondents will not be able to back-charge claimants in situations where they suffer specific damage arising from the claimant's fault (*eg*, the increased cost of replacing a contractor whose contract has been terminated or other counterclaims), unless there is documentary evidence for these items by agreement or by a contractual certificate allowing for it.

48 While this reduces an adjudicator's burden in rendering his determination by limiting his scope of work, this may result in a situation where a respondent is unfairly disadvantaged.

49 As an example, if there is no agreement or contractual certificates of damage, loss or expense, a potential respondent may have to first pay the claimant whose contract has been terminated for work done pursuant to an adjudication determination and thereafter sue the same claimant to recover these back-charges, effectively helping to fund the claimant's defence against any lawsuit by the respondent.

50 As such, it may be preferable for the potential respondent to ensure that the agreement provides the contractual certification mechanism for damage, loss or expense, as well as

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31 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 11(c).

ensure that these provisions are strictly adhered to, in order to raise any damage, loss or expense incurred at an adjudication.

#### **IV. Others changes affecting both parties**

##### **A. Service by e-mail**

51 The Amendments confirm that documents can be served by e-mail, if the e-mail was capable of being retrieved by the person at the time the e-mail was sent.<sup>32</sup>

52 This confirms the High Court's decision in *Progressive Builders Pte Ltd v Long Rise Pte Ltd*, which decided that e-mail was a valid and alternative mode of service.<sup>33</sup>

53 The Amendments go a step further by making clear that even if a person refuses to open the e-mail account, service by e-mail would still be valid if the e-mail was capable of being retrieved at the time the e-mail was sent.<sup>34</sup>

##### **B. Adjudication review application**

54 Presently, only a respondent is entitled to apply for an adjudication review.<sup>35</sup>

55 Moving forward, the Amendments allow both claimants and respondents to apply for an adjudication review.<sup>36</sup>

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32 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 23(c).

33 *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 at [39].

34 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 23(d).

35 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 18(1).

36 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 12(a).

56 However, potential claimants applying for an adjudication review will be limited to situations where the payment claim exceeds the adjudicated amount by a stipulated sum.<sup>37</sup>

### C. *Interest rates*

57 Lastly, the SOP Act presently allows for parties to set interest rates.<sup>38</sup> This can result in some contracts stipulating that interest on unpaid claims be as low as 0.5% per annum.

58 The Amendments make clear that such clauses will no longer be allowed, and the default interest rates will not be lower than the prescribed rate for judgment debts (which presently stands at 5.33% per annum). Contracts that set out a lower rate will have no effect.<sup>39</sup>

### V. **Conclusion**

59 The Amendments affect all parties in the building and construction industry materially. It is hoped that this article will assist these parties in understanding the Amendments and prepare for these changes timeously.

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37 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 12(a). As a point of reference, respondents can presently apply for adjudication review only if the adjudicated amount exceeds the response amount by \$100,000, *per* s 18(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) read with r 10 of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed).

38 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 8.

39 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018) s 4.