

AMENDMENTS TO SECTION 10 OF THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

Effects and Future Uncertainties

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The recent proposed amendments to the Building and Construction Industry Security of Payment Act (“SOP Act”) on the timing for submission of payment claims seem to have over-extended the scope of the court’s decision in Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd. This article explores how these amendments may create future uncertainties for users of the SOP Act.

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I. Introduction

1 The Building and Construction Industry Security of Payment (Amendment) Act¹ (the “SOP Amendment Act”) was passed in Parliament on 2 October 2018. It introduced a number of well-anticipated changes to the current Building and Construction Industry Security of Payment Act² (the “SOP Act”), including the inclusion of the following new ss 10(2)(a) and 10(2A):³

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1 Act 47 of 2018.

2 Cap 30B, 2006 Rev Ed.

3 The Building and Construction Industry Security of Payment (Amendment) Act (Act 47 of 2018) has also included a new s 10(2)(b), which provides for a “limitation period” of 30 months, beyond which the adjudication procedure would no longer apply. This provision does not fall within the scope of discussion of the present article.

**Amendments to section 10 of the Building and Construction Industry
Security of Payment Act**

- (2) A payment claim must be served —
 - (a) not later than —
 - (i) the date, or the last day of a period, specified in, or determined in accordance with, the terms of the contract relating to the purpose of this subsection; or
 - (ii) the date prescribed for the purpose of this subsection if the contract does not contain such terms;

...

- (2A) In subsection (2) —
 - (a) a payment claim that is served before the date or last day mentioned in subsection (2)(a)(i) is deemed to have been served on that date or day, as the case may be; and
 - (b) a payment claim that is served before the prescribed date mentioned in subsection (2)(a)(ii) is deemed to have been served on that date ...

2 This article will examine the position pre-dating the SOP Amendment Act, which is marked in particular by the Singapore Court of Appeal's recent landmark decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*⁴ (“Audi”). This article will then examine how s 10(2A) appears to have departed from the pre-Amendment position in *Audi*, expanding the scope of the decision. From the view of this author, s 10(2A) has created uncertainty around the deemed date for the submission, creating more potential difficulties for the administration of the SOP Act.

II. Position before the Building and Construction Industry Security of Payment (Amendment) Act

3 The current position in law governing the timing of service of payment claims is governed by the current s 10(2) of the SOP Act, which states:

4 [2018] 1 SLR 317.

- (2) A payment claim shall be served —
 - (a) at such time as specified in or determined in accordance with the terms of the contract; or
 - (b) where the contract does not contain such provision, at such time as may be prescribed.

4 Also relevant is the Building and Construction Industry Security of Payment Regulations⁵ (“SOP Regulations”), which states at reg 5(1):

5.—(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made.

5 Section 10(2) and reg 5(1) have been the subject of scrutiny in a number of judicial decisions. As a brief summary:

- (a) Section 10(2) is a mandatory provision, breach of which would render an adjudication determination invalid.⁶
- (b) Section 10(2)(a) applies if the contract provides for the date of service of the payment claim; ascertaining this date is a matter of contractual interpretation.
- (c) Section 10(2)(b) applies if the contract *does not* provide for the date of service of the payment claim. In such a case, reg 5(1) provides that the date of service would be the “last day of each month following the month in which the contract is made”. This has been interpreted to mean a calendar month from the date on which the contract commenced. Thus, where parties have entered into a contract on 3 December 2008, the proper date for service of the payment claim would be the third day of each calendar month.⁷

5 Cap 30B, Rg 1, 2006 Rev Ed.

6 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [53].

7 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [94].

6 The Court of Appeal in *Audi* further considered a situation where the contract provides for the service of the payment claim to be “on” a stipulated date (as opposed to “by” that date). It held that “where the parties’ contract provides for the service of payment claims on a stipulated date, this means service on that date and not service by that date”.⁸ Thus, where the claimant had failed to serve its payment claim *on* that date, it would have breached s 10(2).

7 However, the court in *Audi* went on to find that a payment claim may be *deemed* to be validly served if certain specific conditions are met. It held that where there was “good reason” for serving a payment claim early (or late, as the case may be), such service could be considered valid service. The court found that the claimant in that case had provided good reason for its early service of the payment claim as (a) the stipulated date for service of payment claim was a Sunday, and there was no dispute that the respondent’s office was closed on Sundays; and (b) there could not have been any confusion as to the payment claim’s operative date, as the payment claim was correctly dated with the date on which the claimant was entitled to serve the payment claim.⁹ In such a situation, the payment claim was *deemed* to have been served on the proper date, and thus the claimant in that case was found to not have breached s 10(2).

8 This holding in *Audi* decisively laid to rest previous debate on the interpretation of contractual provisions which provided for the date of service of a payment claim to be “by” or “on” a certain date.¹⁰ More importantly, for the purposes of the present discussion, *Audi* laid down narrow guidelines for when a payment claim would be deemed to be served when it is actually served on a *different* date than the contractually stipulated date.

8 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [23].

9 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [26].

10 See, for example, the discussion in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at paras 5.131–5.134.

The court in *Audi* took care to circumscribe such cases strictly to situations where there is good reason to serve the payment claim on a different date from the contractually specified date and where it is clear that the intention of the party serving the payment claim is for the payment claim to have been served on the contractually stipulated date.¹¹

9 Subsequent case law has followed in the footsteps of *Audi*. A case in point would be that in *Benlen Pte Ltd v Authentic Builder Pte Ltd*¹² (“*Benlen*”). This case concerned an application to set aside an adjudication determination rendered in favour of the claimant on the basis that, *inter alia*, the payment claim was invalid as it had been served out of time. Chan Seng Onn J held that the claimant in that case had indeed served its payment claim late as the contract stipulated that the payment claim must have been served on the 25th of every month, but the payment claim was in fact dated 23 June 2017 and served on 23 June 2017. While Chan J held that the claimant had “good reason” to serve on 23 June 2017, as 25 June 2017 was a Sunday and also a public holiday (and therefore the respondent’s premises would not have been open),¹³ Chan J observed that the claimant had fallen “just short” of availing himself of the “deeming” defence in *Audi*.¹⁴ This was because the payment claim was dated 23 June 2017 instead of 25 June 2017, and the respondent would have been “reasonably be confused about the operative date” of the payment claim.¹⁵

11 See *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [28]: “We emphasise, however, that our decision in this regard was made on the basis of the combination of the two facts set out at [26] above.”

12 [2018] SGHC 61.

13 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [37].

14 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [33]–[41].

15 *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 at [38].

III. Effect of section 10(2A) of the Building and Construction Industry Security of Payment (Amendment) Act

10 Section 10(2A) of the SOP Amendment Act appears to be a legislative *response* to *Audi* but seems to have gone beyond the strict requirements in *Audi* for the timing of service of payment claims.

11 On its face, the effect of s 10(2A) (read with the new s 10(2)) of the SOP Amendment Act seems to have effectively rendered s 10(2) a provision with no metaphorical “teeth”:

(a) If the contract provides for the payment claim to be served *by* a particular date, a payment claim served before that date would be deemed to have been served on that date: s 10(2)(a)(i) read with s 10(2A)(a).

(b) If the contract provides for the payment claim to be served *on* a particular date, a payment claim served before that date would be deemed to have been served on that date: s 10(2)(a)(i) read with s 10(2A)(a).

(c) If the contract does *not* provide for any date or deadline by which the payment claim must be served, a payment claim would be deemed to have been served on the “prescribed date” in the SOP Regulations:¹⁶ s 10(2)(a)(ii) read with s 10(2A)(b).

12 Section 10(2A) arguably nullifies the service requirements set out in s 10(2) as all payment claims served before the contractually stipulated date under the SOP Amendment Act would be deemed to have been served in accordance with the contract or the provisions of the SOP Amendment Act (as the case may be), regardless of whether there are good reasons for the early service, regardless of parties’ intentions, and regardless of whether the payment claim is dated on the

16 At the date of writing, this author is not aware of any prospective amendments to the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed).

contractually stipulated date¹⁷ or the date on which the payment claim was actually served.¹⁸

13 This was confirmed during the Second Reading of the SOP Amendment Act by the Minister of State for National Development, Zaqy Mohamad, on 2 October 2018:¹⁹

Currently, the Act requires claimants to serve payment claims according to the contract terms. Typically, a contract will stipulate a specific date or fixed period for payment claims to be served so that employers can better manage payment claims from multiple sub-contractors. However, there have been past cases where claimants unintentionally serve their claims on the wrong date.

This technically invalidates the payment claim during adjudication. Such issues have also been raised before the Courts, leading to payment delays. *To address this, [the new Section 10(2A)] will provide that the payment claim will be valid even if it is served before the date or the period specified in the contract.*

In such cases, the payment claim will be deemed as served on the contract specified date or on the last day of the fixed period. To illustrate, if a contract specifies that the payment claim must be made on the 29th of the month, the payment claim will still be valid if the claimant serves it before the 29th of the month. However, the respondent's deadline for payment response will only start running from the 29th of the month. If the claimant serves a payment claim on the 30th of the month instead of 29th, his claim will be treated as being served in the next month.

[emphasis added]

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

18 See the case of *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61, where the payment claim in question was dated the 23rd and served on the 23rd on a Friday to avoid a public holiday on a Sunday, the 25th. The court found that the payment claim was invalidly served, and that the contractor could not avail itself of the arguments in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317.

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

IV. Future uncertainties as a result of the amended section 10

14 The proposed amendments arguably extend the scope of *Audi* by validating payment claims served *any time before* the contractually stipulated date, regardless of whether there were good reasons for doing so and regardless of the claimant's intentions. In fact, the proposed amendments are arguably contrary to the holding in *Audi*, where the court was clear that "where the parties' contract provides for the service of payment claims on a stipulated date, this means service on that date and not service by that date".²⁰

15 This gives claimants almost unfettered freedom to serve their payment claims as and when they like, with little to no consequence. This stands in contrast to the position pre-dating the SOP Amendment Act where claimants who submitted their payment claims early or late ran the risk of having their adjudication application dismissed on the ground of non-compliance with the requirements of the SOP Act. In fact, coupled with the new requirement that respondents have to raise jurisdictional objections in the first instance in the payment response or lose the right to do so at adjudication, the proposed amendment of s 10 of the SOP Act will likely bring with it a drop in the number of jurisdictional objections raised in adjudication, especially if respondents are ill-advised.

16 From a procedural perspective, this could be a good thing as jurisdictional fights only prolong proceedings and add to costs. Proponents of the speed and efficacy of the adjudication process would argue that if they can be avoided or minimised, they should be. But at what cost? It is arguable that the recent proposed amendments to s 10 over-extend the flexibility afforded to claimants in serving their payment claims. This results in uncertainty – a difficulty the SOP Act is supposedly aimed at minimising.

20 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [23].

17 The proposed amendments at s10(2A) mean that regularity will no longer be mandated by the SOP Act. Although a respondent confronted with an early payment claim will not have to respond to the same until the deemed due date for service, the amendments at s10(2A) nonetheless give the claimant the opportunity to serve payment claims at *any time before* the contractual due date in any given month. For example, a claimant could arguably wait close to two months before serving the next payment claim (by serving the first payment claim in the early part of the month and the next payment claim in the later part of the month, assuming the due date for service falls at the end of each month). It remains to be seen if latitude for this kind of irregularity was the practical effect envisaged when s 10(2A) was proposed.

18 The proposed amendments to s 10 also beg the question of what purpose, if any, s 10(2) now serves in the light of s 10(2A). The apex court in Singapore has affirmed that the time for service of payment claim is a mandatory one, breach of which would render the adjudication determination liable to be set aside. With the proposed amendments in s10(2A), the circumstances under which a claimant could be found in breach of s10(2) are extremely limited. Any payment claim served before the contractually stipulated date is deemed to be served on that date, regardless of whether the contract provides for the payment claim to be served “by” or “on” a particular date. This means that if a contract provides that the payment claim should be served on or by the 25th of the month, a payment claim served on the 18th of that month would fall within the scope of s 10(2A) and would be deemed to have been served on the 25th. It remains to be seen if a payment claim served on the 28th of the month will also be deemed to be early in respect of the 25th of the next month, thereby bringing it within the ambit of s 10(2A) as well.

19 It suffices to say that claimants now have a wide latitude in respect of the timing of the service of their payment claims, leaving respondents with limited ground to challenge the payment claim on the basis of s 10(2).

V. Conclusion

20 Although s 10(2A) seems to have been targeted at bringing statute in line with the developments in case law, it may have over-extended the limited scope of the decision of the court in *Audi* and, in so doing, unwittingly left other established sections of the SOP Act without bite. This is especially so given that the contracting parties may not contract out of the deeming provision in s 10(2A).²¹ At this juncture, it would be apposite to observe that there appears to be no comparable provision in other jurisdictions similar to s 10(2A), and it remains to be seen how our courts will interpret the potential uncertainties that arise from this provision.

21 See s 36 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), which has not been amended by the Building and Construction Industry Security of Payment (Amendment) Act (Act 47 of 2018).