

Presentation at the Launch of the
Construction Law Blog

CHOW KOK FONG

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Dispute Resolution amidst Business Uncertainties

Challenging Environment

Recent Singapore Case Law

UKSC Decision on LDs

Developments with the SOP Scene

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Singapore Construction
Market Review & Overview

April 2021

State of the industry

Construction **Demand**

Total construction demand in 2020 fell 54.9% from an initial projected demand of S\$33 billion (upper bound) to S\$21.3 billion, the lowest on record since 2009.

Business Times, 28 August 2021

Construction firms at risk of insolvency as reliefs and government assistance end

The toll on businesses

In the first seven months of this year, ACRA data showed that

1,324

business entities in the construction sector had ceased operations.

Optimistic angle:

This is only slightly more than 2020.



Cash flow crunch

50%

B2B invoices are
overdue and
payments take one
month longer

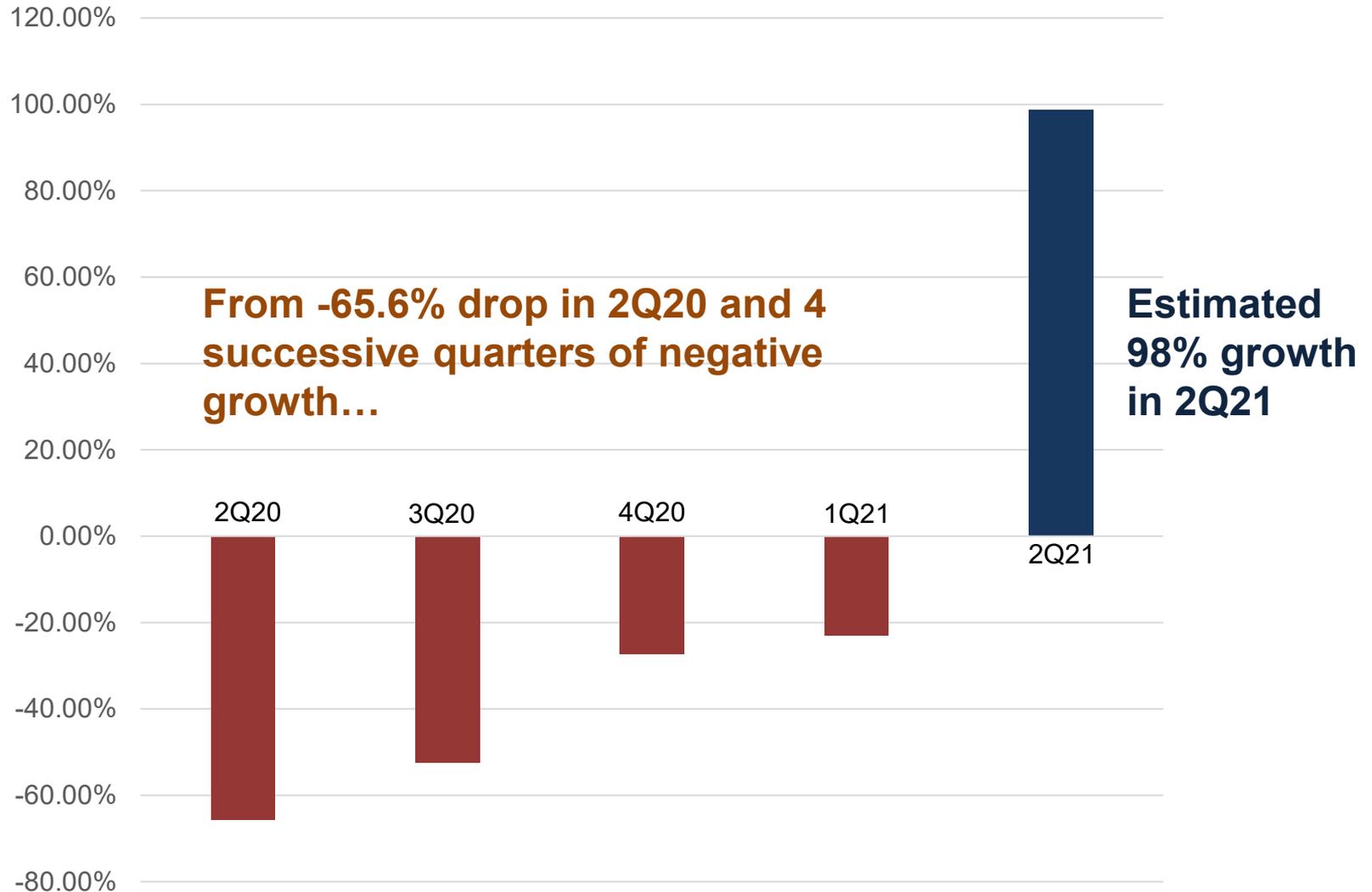
67%

spent more on
payment collection
efforts

Payments take

**one
month**

longer to settle



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**Ramo Industries
Pte Ltd v DLE
Solutions Pte Ltd**
[2020] SGHC 4

Ingredients for
finding existence
of a construction
contract

A contractor and a steel fabricator signed an LOA but at the time of signing, parties were still in negotiations. The LOA stated the rate of LD and the quantity of work (1,295 MT). An email recorded the fabricator's offer to supply steel at USD1,100/MT but parties orally agreed to a rate of USD960/MT ("Oral Price Agreement").

Held: While the LOA was an incomplete agreement, the terms were agreed subject to the finalisation of the price. The contract was constituted by the LOA and the Oral Price Agreement. Chan Seng Onn J considered that in the ordinary course of business, the scope of works are first discussed before the price is agreed. [68]

This position approaches that in some civil law jurisdictions

Article 874 of the UAE Civil Transactions Law (Law No 5 of 1985) requires for a valid construction contract (*muqawala*), a description of the subject matter of the contract, particulars about the type, amount, manner of performance, period over which it is to be performed, and the price/consideration to be specified

***GA Engineering Pte
Ltd v Sun Moon
Construction Pte Ltd***
[2020] SGHC 167

Principles
governing
incorporation of
terms

The issue was whether certain “glass specifications” were incorporated into the subcontract for a glass curtain wall system. The glass specifications came into existence only after parties entered into the subcontract.

Held: There is no principle of law that a document which comes into existence only after a contract is formed cannot be incorporated by reference into that contract. Vinodh Coomaraswamy J decided that parties may first agree on a set of essential terms and act on that basis while continuing “discussions on the incorporation of other usually detailed terms”. [44]

**Comfort
Management Pte
Ltd v OGSP
Engineering Pte Ltd
and another (No. 2)
[2020] SGHC 165**

Delay analysis and
liquidated
damages

A subcontract for air-conditioning works and mechanical ventilation works was priced as a lump sum, “back to back” contract with the upstream contract. Variations were ordered which amounted to almost 50% of the subcontract sum. The issues were (a) whether the variations contributed to delay to the works; (b) whether the rate of liquidated damages was extravagant or unconscionable and (c) a) whether the variations were valid variations.

Held:

On (a) the court affirmed that it falls on the subcontractor in this situation to prove that the variations are on the critical path. However, the subcontractor provided no delay analysis to establish this.

On (b), the court accepted evidence that a rate of LD calculated at 0.04% of the contract price could not be considered extravagant or unconscionable and is therefore not a penalty. An enforceable LD clause may be enforced without proof of loss.

On (c) it was held that a variation has to be supported by a valid instruction and that the work has to fall within the definition of a “variation” as intended by the contract.

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***British Glanzstoff
Manufacturing v
General Accident,
Fire and Life
Assurance***

[1913] AC 143; [1913] SC
(HL) 1

Applied in Singapore in
***Re Sanpete Builders (S)
Pte Ltd*** [1989] 1 SLR(R) 5
at [22]

Glanzstoff employed Brown to build a new factory. The contractual completion date was 31 January 1910 (extended to February 1910) but Brown ceased work before that date. On 16 September 1909, Glanzstoff engaged Henshaw to complete the contract who completed the works on 28 March 1910. The issue was whether Glanzstoff could claim LD from Brown under the contract for the period from February 1910 to 28 March 1910.

The House of Lords decided that the liquidated damages clause does not apply once the contract is terminated and another contractor completed the works.

Applied in Singapore in
***Re Sanpete Builders
(S) Pte Ltd***

[1989] 1 SLR(R) 5 at [22]

...If the contract is brought to an end by determination or otherwise, then *prima facie* all future obligations cease and no claim can be made for liquidated damages accruing after determination... There is nothing [which] has the effect of keeping the provision for payment of liquidated damages alive although the work has been taken out of the hands of the contractor.

Statement cited from Keating
4th Ed at pp 163-164.

The premise is that, following termination, the contractor can neither control nor determine progress of the works

Triple Point Technology Inc v PTT Public Company Ltd

[2021] UKSC 29



Triple Point was appointed by PTT under a to design, install maintain and license a customised software system for PTT’s “commodities trading, risk management and vessel chartering system” (“CTRM Contract”). The project had two phases. **Phase 1** involved replacing PTT’s existing software system and **Phase 2** involved developing the Triple Point system for new types of trade.

Triple Point was to be paid by "milestones".

The LD clause in the contract provided provided for LD at the rate “0.1% of undelivered work per day of delay”.

Triple Point Technology Inc v PTT Public Company Ltd

[2021] UKSC 29

Triple Point achieved completion of **Phase 1** on 19 March 2014, 149 days late. PTT paid Triple Point's invoice for that work.

PTT terminated the CTRM Contract on 23 March 2015 before **Phase 2** was completed. The issue of interest is the extent to which PTT could enforce the LD clause.

Technology and Construction Court

Jefford J dismissed Triple Point's claim, holding that PTT was entitled to damages of USD4.5 million which included a sum of USD3.5 million for liquidated damages.

English Court of Appeal

Overruled the High Court decision, holding that *British Glanzstoff* continues to apply.

Triple Point Technology Inc v PTT Public Company Ltd
[2021] UKSC 29

The Supreme Court overruled the Court of Appeal, holding:

- (a) Liquidated damages comes to an end on termination of the contract.
- (b) After that, the contract is at an end.
- (c) Parties must seek damages for breach of contract under the general law (this is the so-called “orthodox approach”).

The decision in *British Glanzstoff* is correct only on the particular drafting of LD clause in that case.

Essentially, the UK Supreme Court affirmed the “orthodox approach” which is the approach associated with *L W Infrastructure*

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Developments with the SOP Scene

What has been happening to the SOP scene

Section 17(2A) Amendments Act 2018

“...an adjudicator must disregard any part of a payment claim or payment response related to damage, loss or expense that is not supported by

- (a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response or
- (a) any certificate or other document that is required to be issued under the contract.

What has been happening to the SOP scene

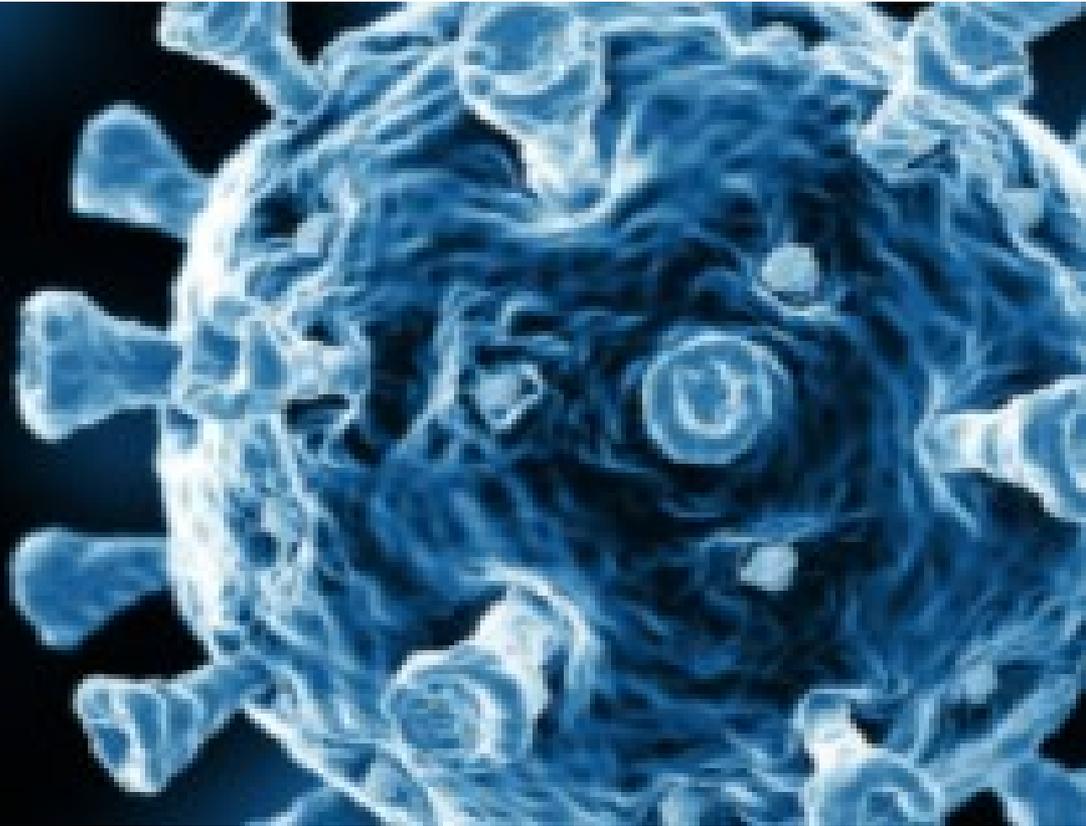
Section 17(2A)
Amendments Act 2018

Series of Court of Appeal
decisions

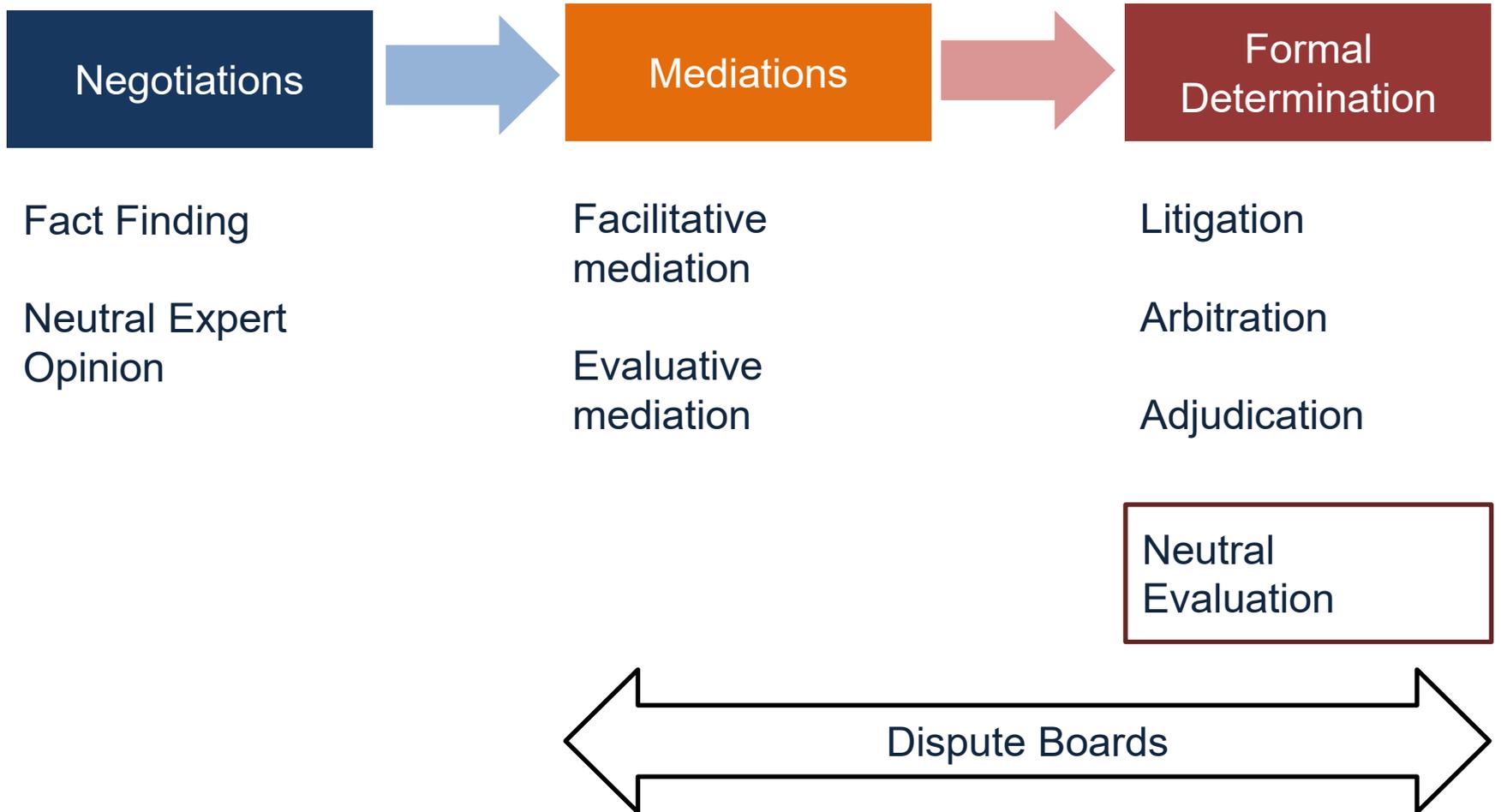
Beginning with *Far East Square v Yau Lee* (2019) and then entrenched in *Shimizu v Stargood* (2020) which has the effect of shutting out two groups of claims (unless the contract expressly provides to the contrary)

- (a) Payment claims served after the contract has been completed and
- (a) Payment claims served after termination of the contract

**State of options
for pursuing a
claim**



Current dispute resolution landscape



Managing costs of claim recovery

Legal Merits

Certainty of relevant legal principles

Evidence

Availability of witnesses and documents

Costs of certain evidence, e.g. expert evidence

Legal Costs

Review with legal advisors on the approach

Decisions at points when legal proceedings become expensive

Biography

CHOW KOK FONG

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Chow Kok Fong is a Chartered Arbitrator and currently practices as a mediator, arbitrator and adjudicator. He was previously CEO of Changi Airports International, Managing Director of Capitaland Commercial Ltd, Director of Projects of City Developments Ltd and Chief Executive and General Manager of the Construction Industry Development Board. During his corporate career he led teams which secured several international awards including Airport Investor of the Year and the first FIABCI Prix d'Excellence for the development of one of his projects. As an arbitrator he has been appointed to tribunals under the SIAC, ICC, UNCITRAL and KLRCA Rules. He is Founder President of the Society of Project Managers and Past Chairman of the Society of Construction Law. He has held adjunct positions as associate professor between 1988 and 2008 with both the National University Singapore and the Nanyang Technological University.

Currently he chairs the Construction Adjudicators Accreditation Committee of the SMC. He has authored 19 books including the two-volume work *Law and Practice of Construction Contracts* (now in its 5th edition 2018); *Security of Payments and Construction Adjudication* (now in its 2nd edition 2013); *Construction Contracts Dictionary* (now in its 2nd Edition 2014), Construction Volume of *Halsbury's Laws* (2019 Reissue) as well as commentaries on the 3 major standard forms of contract. He was awarded the quinquennial Singapore Academy of Law Award 2013 for contributions in promoting and advancing the development of Singapore law and conferred a National Day Award for services to mediation, adjudication and alternative dispute resolution.