

# Adjudication Proceedings under the Building And Construction Industry Security Of Payment Act

**Timothy Yong**  
Senior Associate, TSMP Law Corporation

# Roadmap



- **Overview of Adjudication Proceedings**
- **The Payment Claim**
- **The Payment Response**
- **The Adjudication Process**

# Overview



- Statutory / compulsory claim mechanism
- Similar schemes in the UK, Australia and Malaysia
- First took effect in Singapore in April 2005
- Amendments to the SOP Act came into operation on 15 December 2019

# Overview

- Primary objective is to facilitate cash flow in the construction industry
- No moratorium on adjudication proceedings under the COVID-19 (Temporary Measures Act) (“**COTMA**”)
  - Adjudication proceedings under the SOP Act remain available to preserve cash-flow relief
- What is prohibited is the enforcement of adjudication determinations (provided Notification for Relief is served) – Section 5(3)(n) of COTMA

# Overview

## Entitlement to progress payment (s. 5, SOP Act)

- **Construction Work**

- main contract / sub-contract / specialist works
- may include supply of goods or services as part of works

- **Supply of Services**

- E.g. architects and engineers

- **Supply of Goods**

- E.g. goods, materials, equipment for construction work

# Overview

## Entitlement to progress payment (s. 5, SOP Act)

- The starting point is the contractor's entitlement to receive progress payments under the contract: Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd and Shimizu Corp v Stargood Construction Pte Ltd
- Where a determination has been made under Part 8 of COTMA, in relation to prescribed contracts for rental of goods for construction works (where the lessee has been affected by a delay / breach in a construction / supply contract that is materially caused by a COVID-19 event), adjudications are bound by the terms of the adjusted contract (s. 38B of COTMA)

# Overview

## Does not apply to:

- Construction work or supply of goods or services in relation to any residential properties which do not require the approval of the Commissioner of Building Control under the Building Control Act (s. 4(2)(a), SOP Act)
- Construction work carried out outside Singapore, or goods or services supplied in relation to construction work carried outside Singapore (s. 4(2)(b), SOP Act)

# Overview

## Does not apply to:

- Terminated contracts, to the extent that there are provisions in the terminated contract that permit the respondent to suspend progress payments until a specified date or event (which has not yet passed or occurred) (s. 4(2)(c), SOP Act)
  - See also cases of *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 and *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862
- Contracts for prefabricated components intended for construction work carried out outside Singapore, and one of the parties is not a Singaporean entity (s. 4(2)(d), SOP Act)
  - SOP Act applies to contracts for prefabricated components meant for overseas projects, but where both parties are Singaporean entities



# Overview

## Key features of the SOP Act

- Process for quick resolution of payment claim disputes
- Enforcement of determination
- Review / challenge of determination

# The Payment Claim

- A party entitled to progress payment is entitled to serve a payment claim
- First step to initiate the Adjudication process
  - Must be in writing
  - Identify the contract
  - State the claimed amount, calculated by reference to the period to which the payment claim relates
  - Details of claimed amount, including descriptions, breakdown and calculations of items in claim, must be included

# The Payment Claim

- For claims for costs-sharing under a construction contract, these claims must be made in payment claims, and disputes submitted to in adjudication proceedings (Sections 39D(6) and 39E(1) and (2) of COTMA)
  - A party is only entitled to make a claim for qualifying costs incurred from 7 April 2020 to 30 Sept 2021

# The Payment Claim

- **Service of Payment Claim (s. 37(1), SOP Act)**
  - Personal delivery
  - Leaving at the usual place of business during normal business hours
  - Post or fax to the usual or last known place of business
  - Email
  - Instant messaging platform (with consent of the other party)

# The Payment Claim

- **Time for Submission of Payment Claim (s. 10(2)(a), SOP Act)**
  - In accordance with the terms of the contract
  - If the contract does not specify, “by the last day of the month”
  - Early submission of a payment claim is allowed, and will be deemed to have been served on the specified or prescribed date (s. 10(2A), SOP Act)

# The Payment Claim

- **Shorter Time Limit for Service of Payment Claims (s. 10(2)(b), SOP Act)**
  - Limitation period for service of payment claims is 30 months from the later of the following dates:
    - When works were last carried out
    - A document certifying completion of the works; or
    - The issuance of the last TOP at the time the payment claim is served
  - Only applies to contracts entered into after 15 December 2019

# The Payment Response

- For construction contracts, the respondent is to respond to a payment claim by serving a payment response (s. 11(1), SOP Act)
  - For supply contracts, the respondent responds to a payment claim by paying (wholly or in part) the claimed amount, or raising objections in writing, by the due date (s. 11(2), SOP Act)
- In essence, the payment response:
  - Must state reasons and calculations for lower certification or any amounts withheld
  - Must also state any and all other objections to the payment claim, e.g. payment claim is invalid or served out of time

# The Payment Response

- In the Adjudication Response, the Respondent cannot rely on matters / reasons for withholding amounts unless these reasons / objections were stated in the payment response (s. 15(3), SOP Act)
- Objections not raised in payment responses can only be raised where these objections
  - Only arose after the payment response was provided; or
  - The respondent could not reasonably have known of the circumstances when providing the payment response
- See s. 15(3A), SOP Act



# The Payment Response

- **Time for Submission of Payment Response (s.11(1), SOP Act)**
  - Where specified in the contract, by the date specified in the contract but maximum of 21 days after the payment claim is served
  - Where contract is silent, within 14 days after payment claim is served
  - Additional 7-day dispute settlement period in which a payment response may be submitted or varied (s.12(4)(b), SOP Act)
  
- **Service of Payment Response**
  - Same mode/manner of service as with payment claim

# The Adjudication Process



- **Adjudication Application**

- Must be lodged within 7 days after the expiry of the dispute settlement period
- Claimant must give written notice of intention to apply for adjudication
- Must be lodged with the Singapore Mediation Centre (“**SMC**”) by 4.30pm
- SMC has introduced electronic lodgment procedure in light of COVID-19
- Must include all documents that the Claimant intends to or might rely on

# The Adjudication Process

- **Adjudication Application**

- Must include all documents that the Claimant intends to or might rely on
- In particular, for claims on costs-sharing, the adjudication application must:
  - state the cost-sharing amount claimed; and
  - Provide all information and documents relevant to the claim, including extract of the supporting contract relating to the qualifying costs, invoices and receipts showing amount and date the costs were incurred, and information and documents showing the amount of relief that the contractor may have received from other reliefs.

# The Adjudication Process



- **Adjudication Response**

- Must be lodged within 7 days after service of the adjudication response
- Must be lodged with the SMC by 4.30pm. Electronic lodgment likewise available
- Must include all documents that the Respondent intends to or might rely on
- Any reason in the adjudication response for withholding payment will be disregarded, unless the reason is stated in the payment response.

# The Adjudication Process



- **Merits Conference**

- Adjudicator will usually require parties to attend a Merits Conference (hearing) and may direct further written submissions
- SMC's supplementary rules also provides Adjudicators with the flexibility of holding Merits Conferences virtually in light of COVID-19

# The Adjudication process

- **Adjudication Determination**

- For construction contracts, within 7 days after deadline for adjudication response if no payment response and no adjudication response submitted
- All other cases, within 14 days after deadline for adjudication response. Deadline may be extended if requested by Adjudicator and all parties agree
- Unless Adjudicator requests the submission of additional documents, he will only consider the documents contained in the adjudication application and adjudication response.

# Amendments to the SOP Act

- **Adjudication Determination**

- Section 17(2A) of SOP Act

“In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a 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

(b) any certificate or other document that is required to be issued under the contract.”

# Amendments to the SOP Act

- **Adjudication Determination**

- Section 17(2A) of SOP Act

- Parliament's stated intention was to restrict prolongation claims and complex loss and expense claims from being raised in adjudication.
- The term “*damage, loss or expense*” is wide enough to include backcharges and liquidated damages.
- The Court of Appeal decision in *Range Construction* appears to have finally settled this issue: the new section 17(2A) has changed the law, such that set-offs for claims related to damage, loss or expense (including liquidated damages) are no longer allowed.



# Amendments to the SOP Act

- **Adjudication Determination**

- Section 17(2A) of SOP Act

- What this means is that claims for prolongation costs and loss and expense arising out of COVID-19 (e.g. additional costs in engaging more workers to expedite works or the added costs of bringing in foreign workers) is precluded under s. 17(2A)
- The defences to liquidated damages under section 6(5) of COTMA and the extensions of time granted under section 39B of COTMA are also unlikely to be considered relevant

# The Adjudication process

- **Adjudication Determination**
  - For claims for costs-sharing, adjudicator must determine (a) whether Part 8B of the COMTA applies; and (b) the amount under Section 39D which the respondent is liable to pay
    - This overrides Section 17(2A) of SOP Act
  - For determinations made under Part 8 of COTMA, adjudicators are also bound by the terms of the adjusted contract
- Ultimately, an Adjudication Determination is interim and temporarily-binding → determinations made by the Adjudicator may be challenged in subsequent arbitration / court proceedings

# The Adjudication process

- **Adjudication Review**

- **Under what circumstances?**

- Where adjudicated amount exceeds the response amount by S\$100,000 or more
- Below S\$1,000,000: One Review Adjudicator
- Above S\$1,000,000: Three Review Adjudicators

- **Claimant and/or Respondent can apply for review**

- **Respondent must first pay the Adjudicated Amount to SMC**

# The Adjudication process

- **Setting Aside of Adjudication Determination**
  - Application to Court
  - Adjudicated Amount must be paid into Court
  - Very limited grounds for setting aside
    - Generally, Court will only set aside an Adjudication Determination where the Adjudicator had no jurisdiction or the Claimant did not comply with an essential condition under the SOP Act
    - Court will not review the merits of the Adjudicator's decision

# Thank you

**Timothy Yong**

Senior Associate

✉ [timothy.yong@tsmplaw.com](mailto:timothy.yong@tsmplaw.com)

☎ (+65) 6216 9956

**TSMP Law Corporation.** 6 Battery Road Level 4I S(049909)

☎ (+65) 6534 4877 📠 (+65) 6534 4822

🌐 [www.tsmplaw.com](http://www.tsmplaw.com)