AN OVERVIEW OF THE RECENT AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

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Introduction

The Building and Construction Industry Security of Payment Act ("**SOPA**") was introduced in 2004 to improve cash-flow in the building and construction industry. The SOPA Amendment Act 2018, passed by Parliament on 2 October 2018 ("**Amendments**"), introduces several improvements to SOPA. The Amendments are expected to come into force once changes to the Security of Payment Regulations are completed, which is slated to take place in the second half of 2019. This update provides a brief overview of the Amendments as regards construction contracts.

Inclusion of certain prefabrication works

As presently enacted, SOPA does not apply to any contract to the extent that the contract deals with construction work carried out outside Singapore. As such:

- prefabrication works conducted overseas for construction work or projects to be carried out in Singapore; and

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- prefabrication works conducted in Singapore for construction work or projects to be carried out overseas,

("**Prefabrication Works**") currently, fall outside the scope of SOPA.

The Amendments introduce sections 4(2A) and 4(2)(d) to ensure that Prefabrication Works are now covered by SOPA. It must, however, be noted that section 4(2)(d) limits the application of SOPA only to Prefabrication Works under contracts entered into between Singapore parties in relation to projects in Singapore.

Exclusion of disputed claims for "*damage, loss, or expense*"

The Amendments helpfully clarify that the adjudication mechanism under SOPA is intended to cover *simple* claims, i.e., for construction work done or goods and services supplied. On the other hand, complex claims, whether by a claimant or by a respondent in their payment response, for "*damage*, *loss*, *or expense*" (such as, for example, prolongation costs) are to be precluded. This is provided for by the new section 17(2A), which states that adjudicators are to only consider claims for "*damage*, *loss*, *or expense*" where such claims are supported by documents showing the parties' *agreement* on the quantum of the claim, or a certificate that is required to be issued under the contract, e.g., an architect's certificate.

Parties that wish to bring complex claims like those for prolongation costs, which are likely to be disputed, should, therefore, consider other avenues, such as arbitration or litigation as may be provided for under the construction contract.

Payment claims made after the contract has been terminated

Can a payment claim be made for work done under a contract that has been terminated, if payment for the work is still outstanding? It is important to note that contracts are routinely terminated because, e.g., a contractor has defaulted. As a result, it is common industry practice for a term to be included in the contract to allow a party to suspend payment until a later date/event has occurred. The amended definition of a "contract" under section 2, read with the new section 4(2)(c), will require adjudicators to give effect to such clauses.

Claimants that have defaulted on a contract that contains such a clause will, therefore, be precluded from making a payment claim under SOPA until *after* the conditions in the contract (if any) have been met. Moreover, section 4(2A)(b) further clarifies that claims for work done or goods or services supplied *after* the termination of the contract do not fall within the ambit of SOPA.

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On service: early payment claims

In the case of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* SGCA 4 ("**Audi Construction**"), the contract had stipulated that payment claims were to be served on the 20th calendar day of each month. The 20th calendar day of the relevant month in question in Audi Construction was a Sunday. So the claimant served its payment claim on Friday the 18th, and post-dated the same to Sunday the 20th. The respondent did not file a payment response, and an adjudication determination was made in the claimant's favour. The respondent then sought to set aside the determination on the technical basis that the claim was not served in accordance with the contract.

The respondent was initially successful, but the claimant succeeded on appeal. Whilst the Court of Appeal accepted that the contract expressly required the payment claim to be served *on* (and not, as asserted by the claimant, *by*) the 20th calendar day of each month, the Court of Appeal nevertheless found that the payment claim was validly served by the claimant in accordance with the contract. This was because the claimant post-dated the payment claim to the 20th despite having served it on the 18th (which indicated that the claimant expressly intended for the payment claim to be treated as having been served on the 20th), and the fact that the respondent's office was closed on Sundays.

The amendments now address the peculiar issue that arose in *Audi Construction*. The amended section 10(2) and the new sub-section (2A) now expressly provide that payment claims continue to be valid even if served before the date specified in the contract. Under the new section 10(2A), a payment claim served prior to the date stipulated in the contract will be deemed as served on the date specified in the contract, and the time within which a respondent is to serve its payment response will only start running after that specified date.

The saving of certain objections not made in a payment or adjudication responses

The new sections 15(3A) and 17(4A) allow a respondent to raise objections:

- in its adjudication response despite not having raised the said objection in its payment response; and
- in the course of the adjudication despite not having raised the said objection in its adjudication response,

if the objections could not have been raised earlier or where the respondent could not reasonably have

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known of the circumstances when providing the payment/adjudication response.

In other words, if a respondent takes issue with the validity of the service of a payment claim (as was the case in *Audi Construction*), the respondent must raise this objection at the earliest possible opportunity (i.e. in the case of *Audi Construction*, in the payment response), rather than at a later stage (in *Audi Construction*, the respondent raised its objection for the first time in contesting the claimant's application to enforce the determination). For the avoidance of doubt, the new section 17(4A)(c) clarifies that a respondent continues to have the right to raise objections relating to patent errors.

Service by emails provided capable of retrieval by the recipient

The amended section 37(2) introduces email as an acceptable method of service of documents under SOPA. This is perhaps welcome news for many. Crucially, however, it must be noted that service by email will only be effective "*at the time the becomes capable of being retrieved by the person*" – section 37(2)(b). As such, the successful delivery of the email *to the server of its recipient* is a prerequisite for service by email to be effective.

Truncation of the time within which a payment claim is required to be served

The existing section 10(2)(b) has been amalgamated into section 10(2)(a), which will, post-Amendment, provide that a payment claim must be served by:

- the deadline specified in accordance with the contract – section 10(2)(a)(i);
- the time prescribed for the purpose of subsection 10(2)(b) if the contract is silent on the deadline within which a payment claim is to be served – section 10(2)(a)(ii)

(*Note: presently prescribed by the existing SOP Regulations as the last calendar day of each month following the month in which the contract is made*).

The new section 10(2)(b) sets out the additional requirement for payment claims to be served not later than 30 months (i.e. 2 ½ years) from the latest of:

- the date on which the construction work to which the amount in the payment claim relates was last carried out;
- the issuance date of the last document, as at the time the payment claim is served, certifying the

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completion of the construction work under a contract; and
- the issuance date of the last temporary occupation permit as at the time the payment claim is served.

Unpaid payment claims

The existing section 10(4) allows a claimant to serve an unpaid payment claim within 6 years after the construction work to which the unpaid payment claim relates was last carried out. In order to ensure that claims for unpaid payment claims are brought timeously, the new section 10(4) effectively shortens the 6-year time period to 30 months (i.e. 2 ½ years) by allowing a claimant to serve an unpaid payment claim (defined in the new sub-section (5) as a payment claim for which full payment has not been received, among others) in accordance with section 10(2)(b).

More time to file a payment response

The amended section 11(1) will lengthen the period for the respondent to provide a payment response from 7 days to 14 days if the contract does not provide for the same. However, even with this time extension, a 14-days period may be too short a period within which to provide a payment response, particularly where complex issues arise. It, therefore, remains advisable for the contract to expressly provide for the time within which a respondent is required to serve a claimant with a payment response.

Other welcomed clarifications

The new section 12(2A) provides that a claimant is considered to dispute a payment response if the claimant does not accept the payment response in writing, whilst the definition of a "progress payment" in section 2 will be amended to include "final payments".

Only reject adjudication applications for errors that cause material prejudice

The new section 16(2A) empowers an adjudicator to accept any adjudication application that does not have the required information or documents so long as this does not materially prejudice the respondent. This is based on recent decisions such as *UES Holdings v Grouteam* SGHC 275 where it was held that errors, such as the failure to provide an extract of the contract which was relevant to the payment claim, would not

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invalidate the application.

Higher interest rates

The amended section 8(5) will set a minimum interest rate of 5.33% per annum for progress payments for which payment is due and outstanding. Currently, section 8(5) provides that interest will be based on the rate set in the contract (which can be as low as 1% per annum, as sub-contractors may have less bargaining power) *or* at the rate prescribed under the Supreme Court of Judicature Act. The amendment to section 8(5) will be of great benefit to claimants as it is likely to encourage respondents to pay claimants on time.

Adjudication review by Claimants and Payment of the Adjudicated sum

Currently:

- SOPA only allows for *respondents* to apply for a review of the adjudication determination in the prescribed circumstances (section 18(1)); and
- SOPA requires a respondent to pay the adjudicated amount to the claimant prior to making an application for a review (section 18(3)).

The amendments to section 18 allow *claimants* to also submit an application for review provided that the conditions stipulated under section 18 are met, and, will require the respondent to make payment (of the adjudicated amount) to the authorised nominating body instead.

Partial setting aside

As presently enacted, SOPA is silent as to whether the court has the power to partially set aside an adjudication determination. The new section 27(8) expressly provides the court with the power to do so, enhancing the efficiency of the adjudication regime and saving the time and resources of the claimant and of the court (as otherwise, a claimant would have to risk having to commence proceedings for the relevant payment claim and the adjudication thereof afresh).

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Conclusion

The Amendments make SOPA clearer, fairer, and ultimately more effective by:

- expanding the scope and application of SOPA and providing some much-needed clarity in relation to the existing provisions;
- dictating how certain issues relating to payment claims and responses are to be handled; and
- enhancing the adjudication processes by making it fairer, more comprehensive, and more efficient.

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