

Construction Adjudication – The commencement of the amendments to the Building and Construction Industry Security of Payment Act and Regulations

Introduction

The Building and Construction Industry Security of Payment (Amendment) Act (“**Amendment Act**”) was passed by Parliament in October 2018. The changes brought about by the Amendment Act came into force on 15 December 2019.

We [previously](#) provided you with an overview of the amendments to the Building and Construction Industry Security of Payment Act (“**SOP Act**”) that were brought about by the Amendment Act, and now turn to briefly discuss the applicability of the amendments and to provide you with an overview of the amendments to the Building and Construction Industry Security of Payment Regulations (“**Regulations**”) that were also published on 15 December 2019.

Do the amendments apply retrospectively?

The Amendment Act came into force on 15 December 2019. However, not all of the changes brought about by the amendments apply retrospectively. Section 25 of the Amendment Act saves the applicability of the provisions of the SOP Act that were in force prior to 15 December 2019. Generally speaking, if you are a claimant and your construction contract or payment claim was respectively dated or served prior to 15 December 2019, the amendments do not apply. If you are a respondent, and you were served with a payment claim on or after 15 December 2019, however, do note that

the amendments will apply such that your payment response is due within 14 days (as opposed to 7 days) thereafter.

If you are unsure about the applicability of the amendments to your particular circumstances, refer to [section 25](#) of the SOP Amendment Act to see which of its 18 subsections apply.

How do the SOP Regulations impact you?

Limitation to an adjudicator’s discretion to allow amendments to adjudication applications and responses other than to correct clerical errors

Previously, regulations 7(2A) and 8(1A) permitted an adjudicator to allow “*such amendments to be made*” to an adjudication application and response “*on such terms as to costs or otherwise*” as the adjudicator thinks fit. These regulations have since been amended such that the adjudicator can only now allow “*any amendment to correct a clerical mistake*”. Claimants and respondents should therefore take care to ensure that their adjudication applications and responses are accurate and complete, as save for typographical errors, adjudicators can no longer rely on regulations 7(2A) and 8(1A) to permit amendments to be made.

In the case where you have inadvertently omitted a submission or

document from your adjudication application or response, you may still attempt to persuade the adjudicator to consider your submission or document by relying upon sections 17(3)(g) and (h). Section 17(3) prescribes exhaustively the matters that adjudicators shall have regard to in determining adjudication applications. Section 17(3)(g) provides that adjudicators are to have regard to the submissions and responses of the parties, and any other information or document that has been provided to the adjudicator at the adjudicator's request. As such, in the event that your application or response has omitted a submission or document, you must first persuade the adjudicator to request the submission or document in order to invoke section 17(3)(g). Alternatively, you can seek to persuade the adjudicator to rely upon section 17(3)(h), a catch-all provision that provides that an adjudicator can have regard to any other matter that they reasonably consider to be relevant to the adjudication.

Only one payment claim per calendar month

Section 10 of the SOP Act and regulation 5 of the Regulations relate to payment claims. Section 10 still requires payment claims to be served by the time stated in the construction contract, and provides that where the construction contract is silent, the payment claim is to be served by such time as may be prescribed. However, prior to 15 December 2019, the Regulations were silent as to whether more than 1 payment claim could be served in the same calendar month. The question of whether more than 1 payment claim could be served within the same "month" was a live issue in the case of *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481. There, the High Court held the answer to be in the

negative. The Amendment Act inserted a new sub-regulation (1A) into Regulation 5 to state that only 1 payment claim may be served per month, codifying this position.

As for what constituted a "month", the pre-Amendment wording of Regulation 5(1) necessitated that a "month" "... ends on the same day that it commences. For example, 05 March 2012 to 05 April 2012 equals one month". However, a new sub-regulation (3) has been inserted into Regulation 5, such that Regulation 5(3) defines a "month" as a calendar month (i.e. a period beginning the first day of one of the 12 months into which a year is divided, and ending on the last day thereof), consistent with the Interpretation Act.

Miscellaneous amendments

Consequential amendments have been made to the regulations to incorporate the changes introduced by the Amendment Act. For example, regulation 10 now provides, amongst other things, that a claimant can lodge an adjudication review application in the event the claimed amount exceeds the adjudicated amount by at least S\$100,000. Further, regulation 11, which prescribes the circumstances in which a person would be disqualified from acting as an adjudicator, has been substantially amended. A person will no longer be disqualified from so acting if more than 3 years have passed since the adjudicator was an employee, partner, director, or a substantial shareholder (namely, holding 5% or more) of, or had certain relationships with a party to an adjudication. However, under the newly-inserted regulation 11(2)(c), a person will be automatically disqualified from acting as an adjudicator if they or their affiliate (defined under the regulation as including an employee or employer) advised a party to the adjudication,

helped to prepare any document in relation to the construction contract or project to which the adjudication relates, or otherwise provided any advice or service in relation to that construction contract or project.

The Code of Professional Conduct and Ethics for authorized nominating bodies and the development of a complaint and feedback system

Apart from the above, the Regulations now contain a new regulation, namely, regulation 16, which states that “[e]very authorized nominating body must comply with the Code of Professional Conduct and Ethics set out in the Schedule”. This is a notable development. Together with the requirement for authorized nominating bodies to develop and maintain a complaint or feedback management system (whether written or oral) about the authorized nominating body itself and the adjudicators registered with the authorized nominating body, the amendments to the Regulations will ensure that the service levels provided by authorized nominating bodies and adjudicators to claimants and respondents continually improve and adapt to address the needs and concerns of those in the construction industry.

Conclusion

The changes brought about by the Amendment Act, summarized in our [earlier article](#), came into force on 15 December 2019. However, if your construction contract is dated or if you served your payment claim before this date, these changes may not apply. Critically, take note that changes have been made to the Regulations such that it will no longer be possible to rely on regulations 7(2A) and 8(1A) to amend your adjudication applications and responses.

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This update is provided to you for general information only and should not be relied upon as legal advice.

For further information on the above, please contact our [Construction Team](#).