

RECENT DEVELOPMENTS IN CONSTRUCTION LAW IN SINGAPORE

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Presentation Overview

- **Overview of new Security of Payment Act**
  - Statutory Right to Progress Payment
  - Payment Claims and Payment Responses
  - Adjudication of Payment Claim Disputes
  - Measures to enforce payment of adjudication amounts
  - General provisions relating to adjudication
- **Review of recent cases:**
  - Quality and fitness for purpose
  - Incorporation of main contract terms into sub-contract
  - "Pay when paid" arrangements
  - Architects powers and duties re EOT
  - Liability for defects caused by negligence of independent contractors.

OVERVIEW OF NEW SECURITY OF PAYMENT ACT

Objectives of The Act and Background

- The objective of the Act is to facilitate cash flow in the construction industry.
- In October 2003, Minister for National Development, Mr Mah Bow Tan announced intention to introduce security for payment legislation. BCA was asked to carry out survey.
- Representations were received from various bodies in the industry.

Approach To The Act

The best way to approach the Act is by having a check list of questions namely :

(a) Does the Act apply to the contract in question?
(b) Has the Claimant put in a proper payment claim ?
(c) Has the Respondent provided a valid payment response?
(d) Has the Claimant applied for adjudication?
(e) Has the Adjudicator made an adjudicated determination?
(f) Is the Respondent entitled to review?
(g) What are the consequences of non-payment on adjudicated amount?
(h) Can the Respondent set aside the adjudication determination or judgment ?

Scope of The Act

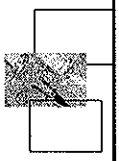
The Act applies to :

- Construction or supply contract as defined in the Act.
- The contract is made in writing on or after commencement of the Act.
- Regardless of whether the contract is expressed to be governed by the law of Singapore.

Scope of The Act

Construction or Supply Contract

- A construction contract is defined in section 2 of the Act.
- It means a contract or other arrangement which one party undertakes to carry out. Construction work whether including the supply of goods or services or otherwise.
- The key term is "construction work". This has in turn been defined to embrace entire spectrum of building, construction and engineering activities concerned with or related to buildings, structures or works forming or to form part of land in Singapore.
- It include temporary works.



Scope of The Act

Construction or Supply Contract *(cont'd)*

- The construction work need not be carried out insitu and extends to manufacture of prefab materials.
- The definition of construction contract would include services rendered by professional Consultants e.g. design, engineering services, quantity surveying etc

Scope of The Act

Supply Contract

There are three pre-requisites :

A. There must be contract or arrangement to supply goods to party engaged in business of carrying out construction work or who causes to be carried out construction work.

- The supply is for purpose of construction work carried out or caused to be carried out by the second mentioned party.
- The supplier is not required to assemble, construct or install the goods at or on the site.
  - In addition, the goods must be supplied in relation to construction work carried out in Singapore.



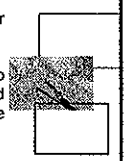
Contract Made In Writing

<u>Illustration</u>

Contract for fabrication and supply of curtain wall components for project in Singapore.

If fabrication is done in factory in Batam, the Act would not apply to fabrication work although prefabrication of components is defined as "construction work" under section 3 of the Act. This is because the work was done outside Singapore.

However, once components are fabricated, they can come under definition of "goods" and the Act would apply to this portion of the Contract.



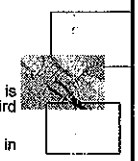
Contract Made In Writing

- The SOP only governs contracts in writing as defined in the Act - to avoid disputes about terms of contract.
- "Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication."
- Per Judge Bowsher in ***Grovedeck Ltd v Capital Demolition Ltd*** (2000) TCC.



Contract Made In Writing

- Under section 4(3), a contract is treated as being made in writing if:
  - A. The contract was made in writing. (whether signed by parties or not)
  - B. The contract is made by exchange communications in writing.
  - C. The contract is made otherwise than in writing is recorded by one of the parties thereto or by a third party with authority of the parties thereto.
  - D. The parties to the contract agree otherwise than in writing by reference to terms which are in writing.
- Under section 4(4), where a contract is not wholly made in writing, it shall be treated as being made in writing under the Act if the matter in dispute between the parties is in writing.



Exceptions

Three exceptions where the Act will not apply :

- The Act will not apply to carrying out of construction works or supply of goods or services outside Singapore.
- For residential property which do not require COB approval under the Building Control Act.
- The Act does not cover employer-employee relationship.



Right To Progress Payment

Entitlement to progress payments

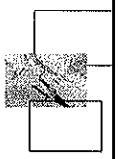
- *Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.*

Amount of progress payment

- *The amount of a progress payment to which a person is entitled under a contract shall be –*
  - *the amount calculated in accordance with the terms of the contract; or*
  - *if the contract does not contain such provision, the amount calculated on basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract.*

Right To Progress Payment

- Section 5 confers statutory right to progress payment in construction contract and supply contract.
- Section 6 deals with how progress payment is to be assessed.
- The starting point is the contract. If the valuation method is stated in the contract, then the method will apply.

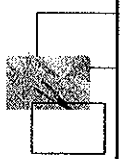


Right To Progress Payment

Meaning of 'Progress Payment'

Does it include:

- Retention
- Variations
- Loss and expense for delay/disruption
- Final Account and Payment



Right To Progress Payment

Walter Construction Group Ltd v CPL (Survey Hills Pty Ltd (2003) NSW SL 266

Payment claim included loss and expense for extensions of time and delay/disruption costs.

Nicholas J said at para 67 of judgment :

"It is irrelevant in my opinion that an item which is a component of a payment claim may be disputed...inclusion of disputed item does not render a payment claim invalid. The statutory requirement for provision of payment schedules and the scheme for adjudication allow for the ventilation and determination of disputes following service of a payment schedule under s 13.. The question is whether the payment claim adequately identifies such work or goods or services."



Right To Progress Payment

Jemzone Pty Ltd v Tvytan Pty (2002) NSW SL 345

Issue is whether request for final payment could be a "progress payment".

The Defendant submitted claim for final payment after practical completion. Austin J held that on a proper interpretation of the NSW Act then, the definition of "progress payment" did not include the final claim. He said:

"The definition of "progress payment" is unhelpful, because s 8 confers only for a "progress payment", without further defining or explaining those words. In my opinion the words "progress payment" when used in s 8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to...



Right To Progress Payment

Jemzone Pty Ltd v Tvytan Pty (2002) NSW SL 345

define the rights of the parties but makes "default provisions" to fill in the contractual gaps: see second reading speech, at p 1013. It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion,it would have been a simple matter for the drafter of the statement of the object in the Act in s 3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only "specified progress payments". The minister's concern with the cash-flow of subcontractors (second reading speech at, at pp1012 and 1013) also suggests that attention was focused on progress payments rather than the final balancing of account between the contracting parties."

Right To Progress Payment

Valuation of construction work, goods and services

7(1). Construction work carried out, or goods or services supplied, under a contract are to be valued –

(a) in accordance with the terms of the contract; or

(b) if the contract does not contain such provision, then having regard to the matters specified in subsection (2).

Right To Progress Payment

- Under section 7(2), if there is no provision for method of valuation, then the following factors to be taken into account in valuation namely:

A. Contract price for construction work, goods or services.
B. Any other rates or prices specified in the contract.
C. Any variation agreed to by the parties to the contract by which the contract price or any other rate or price set out in the contract is to be adjusted by a specific amount.
D. Estimated costs of rectifying defects.
E. Rates or prices prevailing in the building industry at time work done or goods or services supplied

Right To Progress Payment

- In respect of materials or components that are to form part of any building, structure or works, only the value of materials or components which will on payment become property of the party for whom the construction work is being carried out will be taken into account.

Due Date For Progress Payment

- Section 8 sets out guidelines in determining when payment is due under construction and supply contract.

Construction Contract

- Payment becomes due and payable on the earlier of the following dates :

A. Date specified or determined in accordance with contract terms; or
B. The date immediately upon expiry of 35 days after :
   (i) the date the relevant tax invoice is submitted to the respondent (if the claimant is a taxable person under GST)
   (ii) the date the payment response is provided or varied (if the claimant is not taxable person under the GST Act) whichever is the later.

Due Date For Progress Payment

Construction Contract *(cont'd)*

- If the construction contract does not provide date on which progress payment become due, then payment becomes due and payable 14 days after the date the relevant tax invoice is submitted by taxable person under GST Act or date the payment response is provided or varied in the case of a non-taxable claimant

Due Date For Progress Payment

<u>Illustration</u>

The Main Contractor shall submit his progress claim at end of each calendar month to the SO. The SO shall issue a payment certificate within 30 days thereafter certifying the sum due to the Contractor for work done. The Employer shall make payment within 30 days thereafter.



Under Section 8(1) of the Act, the due date would be:
- 30 days after payment certificate;
- 35 days after tax invoice if taxable person;
- If Main Contractor not a taxable person, within period for payment response.

Due Date For Progress Payment

<u>Supply contract</u>

- For supply contracts, the due date for payment is the earlier of the following dates :

  A. Date specified or determined in accordance with terms of the contract;
  or
  B. 60 days after payment claim is served.

- If the contract does not contain provision for determining the due date payable, then the due date would be 30 days after payment claim is served.

Effect of Pay When Paid Clauses

- A "pay when paid" clause is one which provides that a party does not get paid until the party liable for payment in turn receives payment from his principal or employer.
- Section 9 of the Act outlaws "pay when paid" clauses insofar as they are found in construction or supply contracts governed by the Act.
- For contracts which fall outside the Act, such clauses will continue to be valid :

  see *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd (1998) 1 SLR 694*



Payment Claims

<u>Timing of Progress Claim</u>

- The right to make a payment claim is statutory and not contractual.
- If payment claim is submitted before date specified in or determined by the contract, the payment claim may not be valid:
  see ***Walter Construction***
- A party entitled to a progress payment is entitled to serve a payment claim.

Payment Claims

- Section 10 sets out rules governing the format and content of payment claims.
- In brief, payment claims shall be :
  A. Addressed to the party or parties liable to make payment.
  B. Only one payment claim shall be served.
  C. Served at such time as may be specified in the contract or if no such provision in the contract, as may be prescribed under the Act or Rules promulgated thereunder.



Payment Claims

- The payment claim shall state the amount claimed and be made in such form, manner and contain such information or documentation as may be prescribed.
- There is nothing to stop a claimant from including a previous unpaid payment claim in a subsequent payment claim.

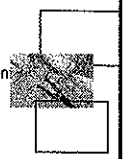


Payment Responses

- Section 11 introduces the requirement for payment responses to payment claims.
- This provision is designed to foster greater transparency in the manner in which payment claims are evaluated.
- A payment response must be made within one of the following time frames :
  - A. The date specified in the contract or within 21 days after payment claim is served, whichever is earlier.
  - B. If no date is specified in the contract, then within 7 days after payment claim is served.

Payment Responses

- The payment response must :
  - A. Identify payment claim;
  - B. state the response amount;
  - C. state the reasons for difference between payment response and payment claim and reasons for withholding money;
  - D. be made in such form and manner and contain such information or documents as may be prescribed.



Payment Responses

- The Respondent can vary payment provided :
  - A. the variation is made in such form and manner as prescribed;
  - B. is provided by the date by which payment response is required to be furnished under Section 12 (3) or Section 11 (1).



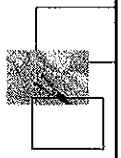
Payment Responses

CONSEQUENCES OF NON PROVISION OF PAYMENT RESPONSE

- This will have bearing on the adjudication response which the Respondent can make.
- Under Section 15(3), the respondent cannot include matters for withholding amounts unless stated in the payment response.
- Under Section 17(3), the adjudicator is expected to confine consideration only to the matters stated therein which includes the payment response. Thus, if no payment response is provided, the respondent will be prejudiced.

Payment Responses

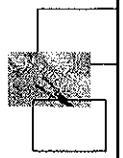
- During the dispute settlement period, the parties may :
  - A. Take steps to settle the dispute.
  - B. Seek clarification from each other on the payment claim.
- The respondent may provide payment response where he has to do so.



Payment Responses

<u>Practical Problems posed by Payment Response</u>

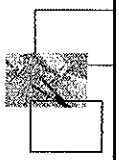
- Given tight time constraints for payment response, there can be problem in compliance if payment response depends on certification by another party.



(b) Right of set-off may not have accrued e.g. latent defects.

Adjudication Applications

- The Act introduces a new form of dispute resolution called adjudication. This is intended to a speedy and cheaper mechanism for resolving payment related disputes and thereby ease cashflow in the industry.



Adjudication Applications

WHEN CAN ADJUDICATION APPLICATION BE MADE?

- It can be made in three situations namely :

  A. In relation to construction or supply contract, where claimant fails to receive payment of the whole or part of the claimed amount; or

  B. in relation to construction contract, the claimant disputes the payment response; or



Adjudication Applications

WHEN CAN ADJUDICATION APPLICATION BE MADE?

C. in relation to construction contract, the respondent fails to furnish payment response by the date or within the relevant period required under section 11(1) and the dispute is not settled or the respondent does not make payment response by the end of the dispute settlement period.

- The dispute settlement period means 7 days after the date on which or the period within which the payment response is required to be furnished under Section 11.

Adjudication of Payment Claim Disputes

PROCEDURE

- The procedure involved is as follows:

  A. Claimant applies for adjudication by lodging the adjudication application with authorised nominating body.

  B. Prior to lodging the adjudication application, the claimant has given written notice containing the required particulars and informing the respondent of intention to apply for adjudication.

Content of Adjudication Application

- The adjudication application should :

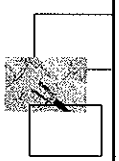
  A. Be made within 7 days after claimant's entitlement to do so has accrued under section 12.

  B. Be made in writing to authorised nominating body requesting appointment of adjudicator.

  C. Contain such information or documents as may be prescribed.

  D. Be accompanied by application fee.

  E. Contain such other information or documents as the claimant consider relevant.



Content of Adjudication Application

- Please note that the adjudication application runs the risk of rejection by the nominating body for non compliance with the requirements.

Appointment of Adjudicator

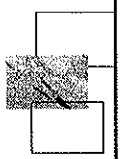
- The Act does not permit parties to choose their own adjudicator.
- Appointment is made from panel of adjudicators established under the Act.
- The nominating body must within 7 days of acceptance of the adjudication application serve notice in writing to confirm the appointment of adjudicator on the claimant, the respondent, the principal and the owner.

Adjudication Response

- Once the Respondent receives the adjudication application from the authorised nominating body, it has 7 days to file the adjudication response.
- The adjudication response must satisfy the following requirements:
  - A. made in writing to the authorised nominating body;
  - B. identify the adjudication application;
  - C. contain such information or documents as may be prescribed;
  - D. contain such other information or documents relevant to the response;
  - E. not contain any reasons for withholding amounts not found in the payment response.

Adjudication Response

- An adjudication response which does not comply with (A) to (C) will be rejected by the nominating body.
- If the adjudication response is not lodged within the 7 day period, the adjudicator has discretion to reject it.



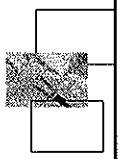
Adjudication Proceedings

- For the purpose of the Act, the adjudication commences on the date after :
  - A. the adjudicator is confirmed by the nominating body;
  - B. the respondent lodges adjudication response with the nominating body, if the response is lodged within the period referred to in Section 15(1); whichever is later.



Adjudication Proceedings

- The adjudicator is under a duty to :
  - A. act independently, impartially and in a timely manner;
  - B. avoid incurring unnecessary expense;
  - C. observe principles of natural justice.



Adjudication Proceedings

- The adjudicator has wide range of powers conferred by section 16(3) including :
  - A. conducting the adjudication in any manner he thinks fit;
  - B. requiring submissions or documents from any party;
  - C. setting deadlines for submissions or documents and response;
  - D. appoint an independent expert to inquire and report on the specific issues relevant to adjudication;
  - E. call conference of the parties;
  - F. conduct site inspections;
  - G. issue any directions for conduct of the adjudication

Adjudication Determination

- The Act lays down strict time frames for the adjudicator to make his determination.
- There are two possible time frames :
  - A. within 7 days after adjudication commences where the respondent fails to respond to the claimant and the nominating body or fails to pay response amount which has been accepted by the claimant by the due date;
  - B. in any other cases, within 14 days after adjudication commences or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.



Matters Governing Adjudication Determinations

- There are 8 matters set out in the Act which the adjudicator has to have regard to :
  - A. provisions of the Act;
  - B. provisions of the contract;
  - C. payment claim, adjudication application and documents;
  - D. payment response, adjudication response and documents;
  - E. results of inspection;
  - F. reports of any expert appointed;
  - G. submissions and responses of parties;
  - H. any other matter which the adjudicator reasonably considers to be relevant.

Matters Governing Adjudication Determinations

- The adjudicator shall not be bound by payment response or certificate or assessment provided in the contract to be final or binding on the parties whether subject to any term, or condition or otherwise.



- In determining an adjudication application where an adjudicator has determined the value of construction work, goods or services, then the adjudicator or any other adjudicator shall adopt the same value as that previously determined unless the claimant or the respondent satisfies the adjudicator that the value has changed since the previous determination.

Matters Governing Adjudication Determinations

SLIP RULE

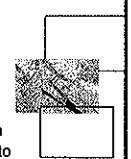
- The "slip rule" permits correction of clerical mistakes, errors arising from accidental slips/omissions or defects of form but not otherwise.

Direct Payment from Principal

- Section 24 provides that the principal of the respondent may make payment of the outstanding amount to the claimant should the respondent fails to pay the whole or any part of the adjudicated amount in accordance to Section 22.
- The principal may make payment to the claimant as follows :
  - (a) to serve a notice of payment on the claimant stating that direct payment shall be made, with copies serve on the respondent and the owner (if the principal is not the owner);
  - (b) the respondent shall show proof of such payment within 2 days to the principal and the owner (if the principal is not the owner) if he has paid the adjudicated amount to the claimant.

Direct Payment from Principal

  - (c) the principal shall be entitled to pay the outstanding adjudicated amount or any part thereof to the claimant if the respondent fails to show proof of payment.



- Any payment by the principal :
  - (a) may be treated as payment to the respondent in reduction (by the amount of the payment) due or to become due;
  - (b) may be treated as a debt due from the respondent to the principal.

Direct Payment from Principal

- The subsequent setting aside of the relevant adjudication determination does not affect any rights conferred on the principal.

- Where the principal is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) with a project account opened under section 9 of that Act, the claimant is not entitled to exercise lien or suspend work or supply for 21 days after being served the notice of payment by the principal, unless the principal had previously defaulted on any payment to the claimant under this section in relation to the same contract.

Liens on Goods Supplied

- A 'lien' is the right to seize and sell goods in order to recover payment.

- The Act provides that the claimant has a lien or charge over '***unfixed and unpaid goods***' he supplied.

- Difficulty arises when the claim is paid a percentage of the value of the goods in advance or upon delivery of the goods on site.

Retention of Title Clauses

- Buyers shall not become the owner of the goods until the seller has been paid a sum.

- These clauses have not gain much prominence in Singapore.

Liens on Goods Supplied

- Under section 25, the claimant has a lien on goods supplied under the contract concerned that are unfixed and which have not been paid for.

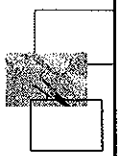
- The lien is only applicable if :

  (a) the claimant has served on the respondent a notice in writing of the claimant's intention to exercise a lien;

  (b) the claimant has served the notice on the principal and the owner;

  (c) 7 days have elapsed since the notice was served on all parties concerned;

  (d) the claimant has not been paid the adjudicated amount.



Liens on Goods Supplied

- The claimant shall have no priority over the liens on the goods existing before the date on which the first-mentioned lien arises.

- The claimant has no rights to exercise the lien :

  (a) if the goods are owned by some other person other than the claimant or the respondent; or

  (b) during the period referred to in section 24(3).

Right to Suspend Work or Supply

- There is no general right at common law to suspend work if payment is wrongly withheld.

- Sections 23 and 26 of this Act changes this common law position.

- Subject to the provisions in the Act, the Claimant has a statutory right to suspend performance of his obligations in the absence of payment.



Right to Suspend Work or Supply

- Section 26 provides that the claimant may suspend the construction work or the supply of goods and services under the contract only if :

  (a) the claimant has served on the respondent a notice in writing of the claimant's intention to suspend the construction work or the supply of goods and services;

  (b) the claimant has served the notice on the principal and the owner;

  (c) 7 days have elapsed since the notice was served on all parties concerned;

  (d) the claimant has not been paid the adjudicated amount.

Right to Suspend Work or Supply

- During the period of suspension :
  - (a) the claimant is not liable to the respondent, the principal or the owner for any loss or damage suffered, or by any person claiming through or under the respondent, the principal or the owner; and
  - (b) the respondent, the principal and the owner shall have no claim against the claimant for any loss or damage suffered, but the principal and the owner may recover LD or any other remedy from the respondent pursuant to any contract or under any law.



Right to Suspend Work or Supply

- If the claimant incurs any loss or expenses as a result of the suspension :
  - (a) the respondent is liable to pay the claimant the amount of such loss or expenses; and
  - (b) any such loss or expenses may be recovered by the claimant as a debt due from the respondent.

Right to Suspend Work or Supply

- The claimant shall resume construction work or supply within 3 days after :
  - (a) being paid the adjudicated amount; or
  - (b) the principal who is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) served a notice of payment on the claimant; and
  - (c) the principal has not previously defaulted on any payment to the claimant under the same contract.
- The claimant shall be liable for any loss or damage suffered by the respondent or the principal as a result of the claimant's failure to resume work or supply upon receipt of the adjudicated amount or notice of payment.



Right to Suspend Work or Supply

- The period of suspension shall not be used for the computation of contractual time limit by the claimant or by a third party (other than the respondent).
- Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

Right to challenge Adjudication Determination

- Adjudication determination and review shall have temporary finality, until the the dispute is finally determined by a court or tribunal or settled by agreement of the parties.
- This temporary finality shall not affect the right of any party to challenge the adjudication determination.

Right to challenge Adjudication Determination

<u>Grounds for challenge</u>

- **The determination exceeded the jurisdiction of the adjudicator**
  eg. absence of a valid or underlying contract or the adjudicator has gone beyond his terms of reference
- **The adjudicator failed to act independently and impartially**
  This duty is imposed on adjudicators by Section 16(2)(a) of this Act. See also *Glencot Development v Ben Barret & Son*
- **The adjudicator failed to observe the principles of natural justice**
  2 principal rules, namely (a) the rule against bias and (b) the rule to 'hear the other side'

Right to challenge Adjudication Determination

Grounds for challenge *(cont'd)*

- **There is manifest unreasonableness in the adjudicator's exercise of his discretion**
  Wednesbury principles

- **There are errors of law or fact**
  see *Bouygues* and *Macob Civil Engrg v Morrison Construction*

- **The adjudication determination was made out of time**
  The Act is silent on the consequences for the parties. However, under section 31 of the Act, an adjudicator will be penalised for failure to render his determination within the stipulated time limits.

Measures to Enforce Payment

- An adjudication determination may be enforced in the same manner as a judgment or an order of court.

- The applicant may file an affidavit stating the unpaid adjudicated amount as at the time the application is filed.

- The party making an application to set aside the adjudication determination shall pay into the court as security the unpaid portion of the adjudicated amount as directed by the court.

General Provisions Relating to Adjudication

Cost of Adjudication Proceedings

- The costs of any adjudication shall not exceed the amount as may be prescribed by the Minister.

- The adjudicator can determine the party to pay the costs of the adjudication or the amount contributable by each party.

- The adjudicator may order the party making frivolous or vexatious conduct, unfounded submissions to pay part or all of the costs.

- A party to an adjudication shall bear all other costs and expenses incurred in relation to the adjudication which may also include all or part of the costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

General Provisions Relating to Adjudication

Adjudicator's Fees and Expenses

- The fees of an adjudicator are as specified by the authorised nominating body.

- Such fees and expenses may be agreed between the adjudicator and the parties to the adjudication or as determined by the authorised nominating body.

- The adjudicator is not entitled to be paid if he fails to make an adjudication determination within the time frame allowed by section 17 or 19.

- Should an adjudication application be withdrawn, terminated or settled, the adjudicator is entitled to fees and expenses up to and including the date where the adjudication application is withdrawn, terminated or settled.

General Provisions Relating to Adjudication

Effect on other Proceedings

- The Security of Payment Act shall not affect the right of a party to :

  (a) submit a dispute arising from the contract to the court, tribunal or any other dispute resolution proceeding;
  (b) apply for adjudication, notwithstanding that the dispute is the subject of a proceeding in court, tribunal or any other dispute resolution,
  (c) enforce payment of any adjudicated amount.

- The adjudication application will not be affected by any submission of a dispute arising from the contract to a court, tribunal or any other dispute resolution proceeding.

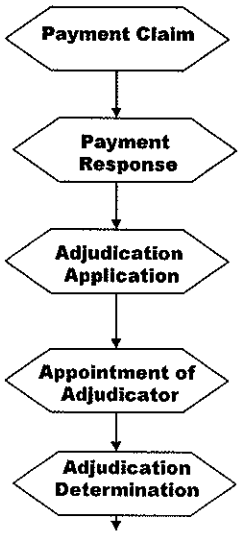
General Provisions Relating to Adjudication

Effect on other Proceedings

- However, the adjudicator shall terminate the adjudication proceedings on a dispute if the dispute is determined by a court, tribunal or any other dispute resolution proceeding before the adjudication determination.

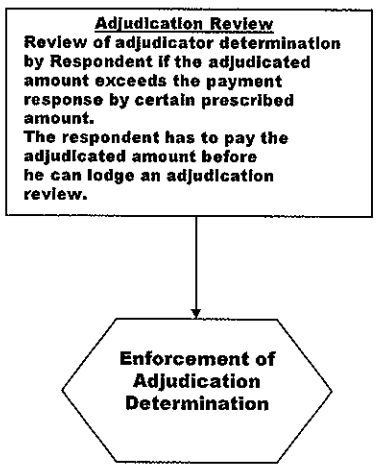
OVERVIEW

FLOW CHART 1 OF 2

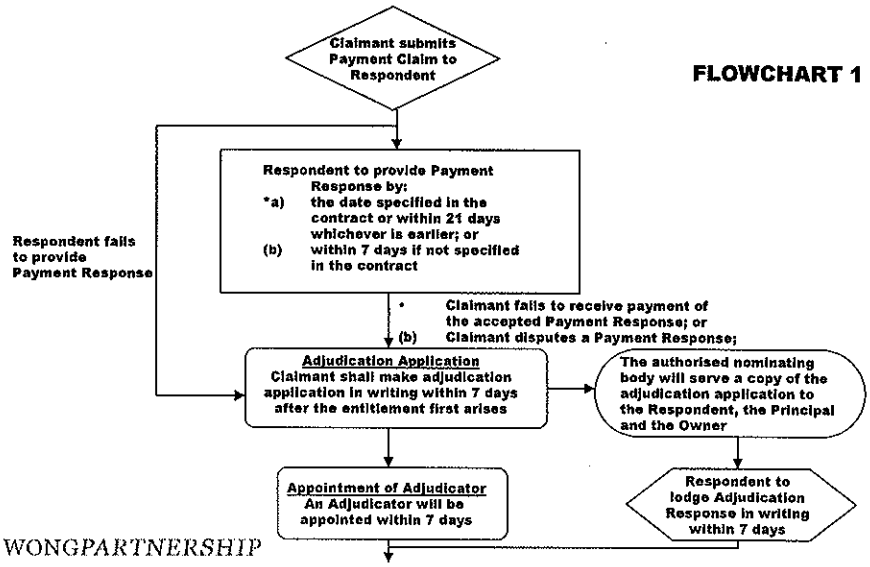


OVERVIEW

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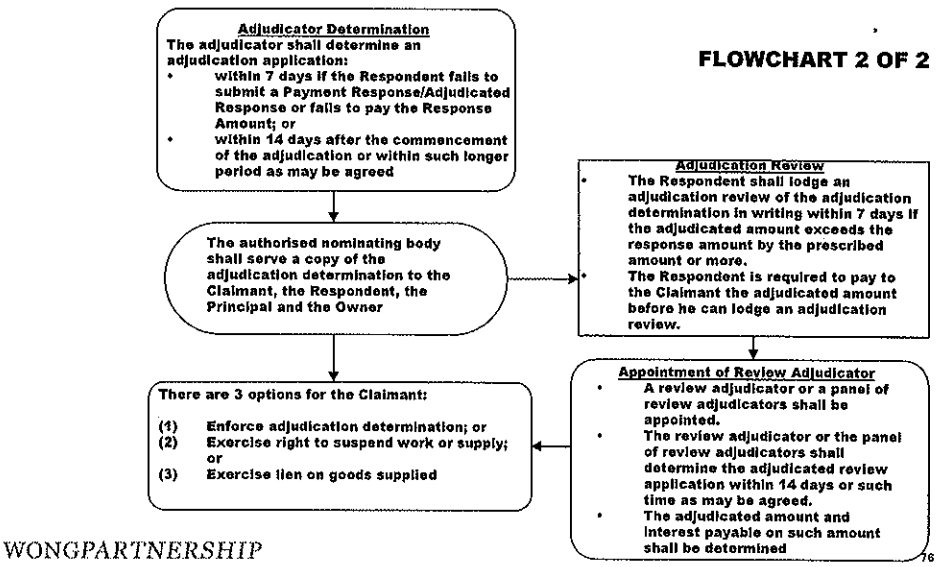


Overview
Construction Contract



WONGPARTNERSHIP

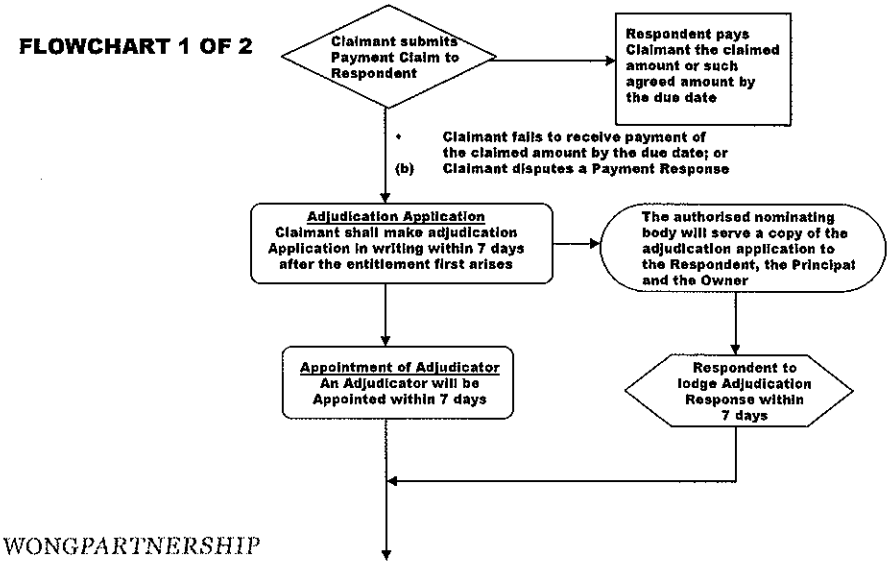
Overview
Construction Contract



WONGPARTNERSHIP

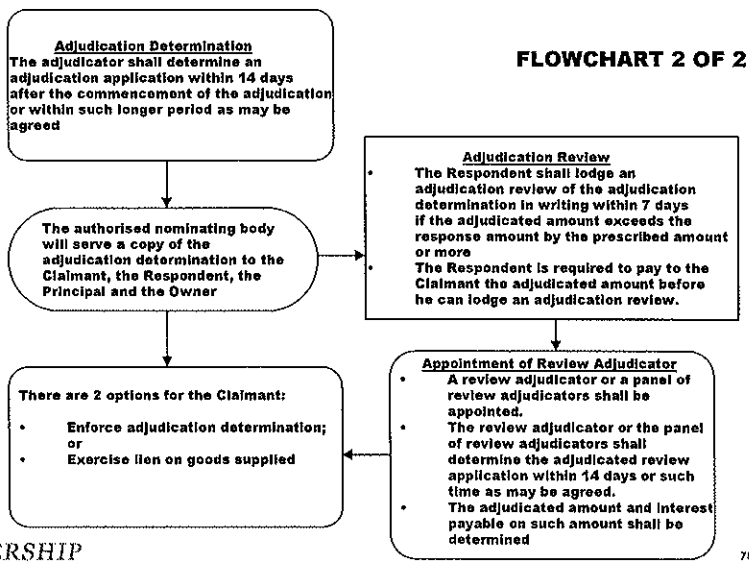
Overview
Supply Contract

FLOWCHART 1 OF 2



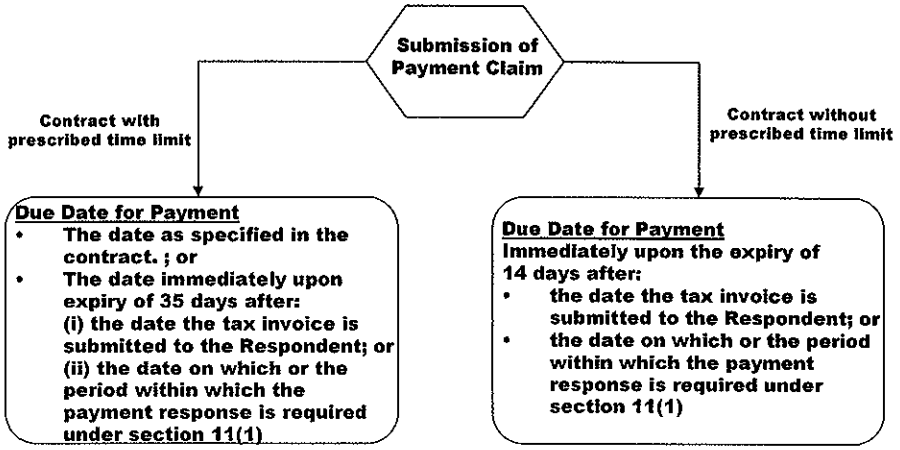
Overview
Supply Contract

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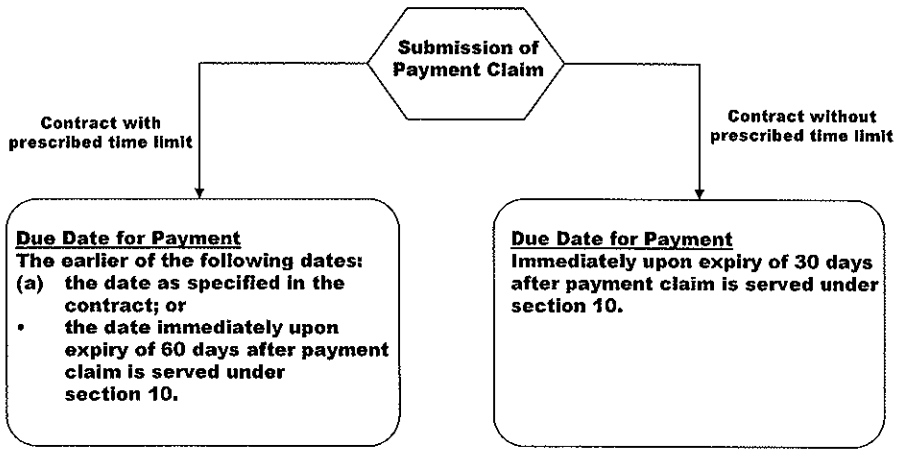
Date Due & Payable for Progress Payment

Construction Contract

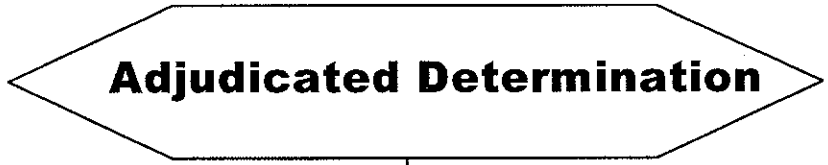


Date Due & Payable for Progress Payment

Supply Contract



Consequences of Non Payment of Adjudicate Determination



Non payment or payment response

Right to Suspend Work or Supply

Claimant may suspend the carrying out of construction work, or supply of goods or services only if:

- **the Claimant has served on the Respondent a notice under section 23(1)(b);**
- **the Claimant has served a notice on the principal and the owner**

(c) 7 days have elapsed since the notice was served on the Respondent, the Principal and the Owner

- **the Claimant has not been paid the adjudicated amount**

Right to Exercise Lien on Goods Supplied

Claimant may exercise a lien on goods supplied on unfixed materials only if:

- **the Claimant has served on the Respondent a notice under section 23(1)(a);**
- **the Claimant has served a notice on the Principal and the Owner;**

(c) 7 days have elapsed since the notice was served on the Respondent, the Principal and the Owner;

- **the Claimant has not been paid the adjudicated amount**

Enforcement of Adjudication Determination

The Claimant may enforce an adjudication determination:

(a) with leave of the court in the same manner as a judgment or an order of the court.

- **where leave of the court is granted, judgment may be entered in the terms of the adjudication determination.**
- **file an affidavit stating the whole or part of the adjudicated amount that has not been paid.**

REVIEW OF RECENT BUILDING AND CONSTRUCTION CASES

Incorporation of main contract terms into sub-contract

Hi-Amp Engineering v Technicdelta Electrical Engineering

- This case involved a claim by the plaintiffs (sub-contractors) against the defendants (main-contractors) on a sub-contract for the supply of manpower for the completion of electrical services works at the Boon Keng and Potong Pasir MRT stations.
- One of the main contractor's arguments in this case was that the subcontract's terms were 'back-to-back' with the main contract's terms. They relied on cl 4 of the Letter of Award which read:

  "*...all terms and conditions of the MAIN CONTRACT shall apply mutatis mutandis to the SUBCONTRACT*".

Incorporation of main contract terms into sub-contract

Hi-Amp Engineering v Technicdelta Electrical Engineering

- Rubin J held that the main contract's terms were not incorporated into the sub-contract for two reasons:
  - Firstly, the phrasing of cl 4 of the Letter of Award was ambiguous and 'not so precise'; and
  - Secondly, the main contractor had not shown the sub-contractor the Main Contract documents when the Sub-contract was entered into.

Incorporation of main contract terms into sub-contract

Hi-Amp Engineering v Technicdelta Electrical Engineering

Rubin J held:

"I am inclined to accept [the sub-contractor's] evidence that the [main contractors], for reasons known to them, did not furnish the [sub-contractors] with the [Main Contract] documents except for some in dribs and drabs. Inasmuch as the [main contractors] chose not to provide the [Main Contract] to the [sub-contractors], I am of the view that the [main contractor's] present contention that the [Sub-contract] was to be qualified by the terms of the [Main Contract] was without merit".

Incorporation of main contract terms into sub-contract

Hi-Amp Engineering v Technicdelta Electrical Engineering

- Therefore it appears that for incorporation of main contract terms into a sub-contract, one must firstly ensure that the incorporation clause is sufficiently clearly worded.
- Secondly, it the main contract itself must have been shown to the sub-contractor at the time when the sub-contract was entered into, for the incorporation to be effective.

'Pay when paid' arrangements

Hi-Amp Engineering v Technicdelta Electrical Engineering

- In the same case, the main contractors also argued that they were entitled to withhold payments from the sub-contractors because of cl 7 of the subcontract which provided: *"PERIOD OF INTERIM PAYMENT: 14 days after receiving payment from MAIN CONTRACTOR"*.
- Rubin J seemed to accept the validily of the 'pay when paid' clause, but nevertheless rejected the main contractor's argument because it did not give any evidence showing that any payments had been been withheld from them under the Main Contract for works completed.

'Pay when paid' arrangements

Hi-Amp Engineering v Technicdelta Electrical Engineering

- Therefore it appears that where the main contractor relies on a 'pay when paid' clause to justify not paying the sub-contractor, the onus is on the main contractor to show that the developer had not paid the main contractor for the works in question.
- But note the effect of section 9 of the new Security of Payment Act on pay when paid clauses in contracts to which the Act applies!

Architect's powers and duties on EOT

Liew Ter Kwang v Hurry General Contractor

- This case involved an application for leave to appeal on three questions of law arising out of an arbitration award. The judge, in granting the application, made several interesting observations pertinent to the powers and duties of an architect in granting extensions of time under a building contract.
- On the power to grant EOT, it was held that the architect only has power to grant EOT in the circumstances set out in the contract.

Architect's powers and duties on EOT

Liew Ter Kwang v Hurry General Contractor

- *"[The] power to extend time for performance of building works under a construction contract is entirely a contractual matter for the parties to determine. It is the contract that decides what power, if any, to extend time the architect will have. He can only extend time if the contract gives him this power and he can only exercise this power in the manner specified by the contract…In this case, it was clear that the architect's powers were derived from and circumscribed by the language of cl 23. Thus, he could only grant an extension of time if the event justifying the extension fell within one of the applicable sub-paragraphs of cl 23(1)".*

Architect's powers and duties on EOT

Liew Ter Kwang v Hurry General Contractor

- The judge also held that the power to grant EOT had to be exercised fairly and rationally:

  "In making any determination under a building contract, an architect has a duty to act fairly and on a rational basis. Any assessment he makes must be based on reasons that can stand up to scrutiny…[Whilst] the assessment of a fair and reasonable [EOT] involves an exercise of judgment, that judgment must be fairly and rationally based".

Liability for defects caused by sub-contractors

MCST Strata Title Plan No. 2297 v Seasons Park Ltd (No 2)

- A claim was made on behalf of all subsidiary proprietors against the developers for defects and damage to the common property and to the individual units of the subsidiary developers.
- One of the judge's determinations was that a developer is not liable in negligence if it employed independent sub-contractors and the damage was caused by the negligence of the sub-contractors. All the developer had to prove was that it used reasonable care and skill in employing the independent sub-contractors.
- The claim for such works should therefore be made directly against those sub-contractors.

Quality and fitness for purpose

Adventure Training Systems v Signature Lifestyle Pte Ltd

- Contractor brought claim against defendants for balance of work done and materials under a contract to build outdoor adventure facilities at Ubin Island.
- Defendants accused contractor of breaching implied terms that the equipment and components supplied should be of satisfactory quality and reasonably fit for the purposes for which they were acquired, and that the Contractors would carry out work with reasonable care and skill.
- Defendants cited rust problems in various components in the facilities - rivets, shackles, cable clamps and bots, washers, steel karabiners.

Quality and fitness for purpose

Adventure Training Systems v Signature Lifestyle Pte Ltd

- In dealing with Defendants' allegation that the rusty parts rendered the equipment defective, Lai Kew Chai J held:

  "It was quite obvious that the items in question rust because there is in Ubin Island salt in the air and that corrodes the equipment, despite maintenance. It is not sustainable to contend that because there was rust the items were defective. They just have to be kept rust free by such regular maintenance as would be necessary to keep rust at bay".

THANK YOU