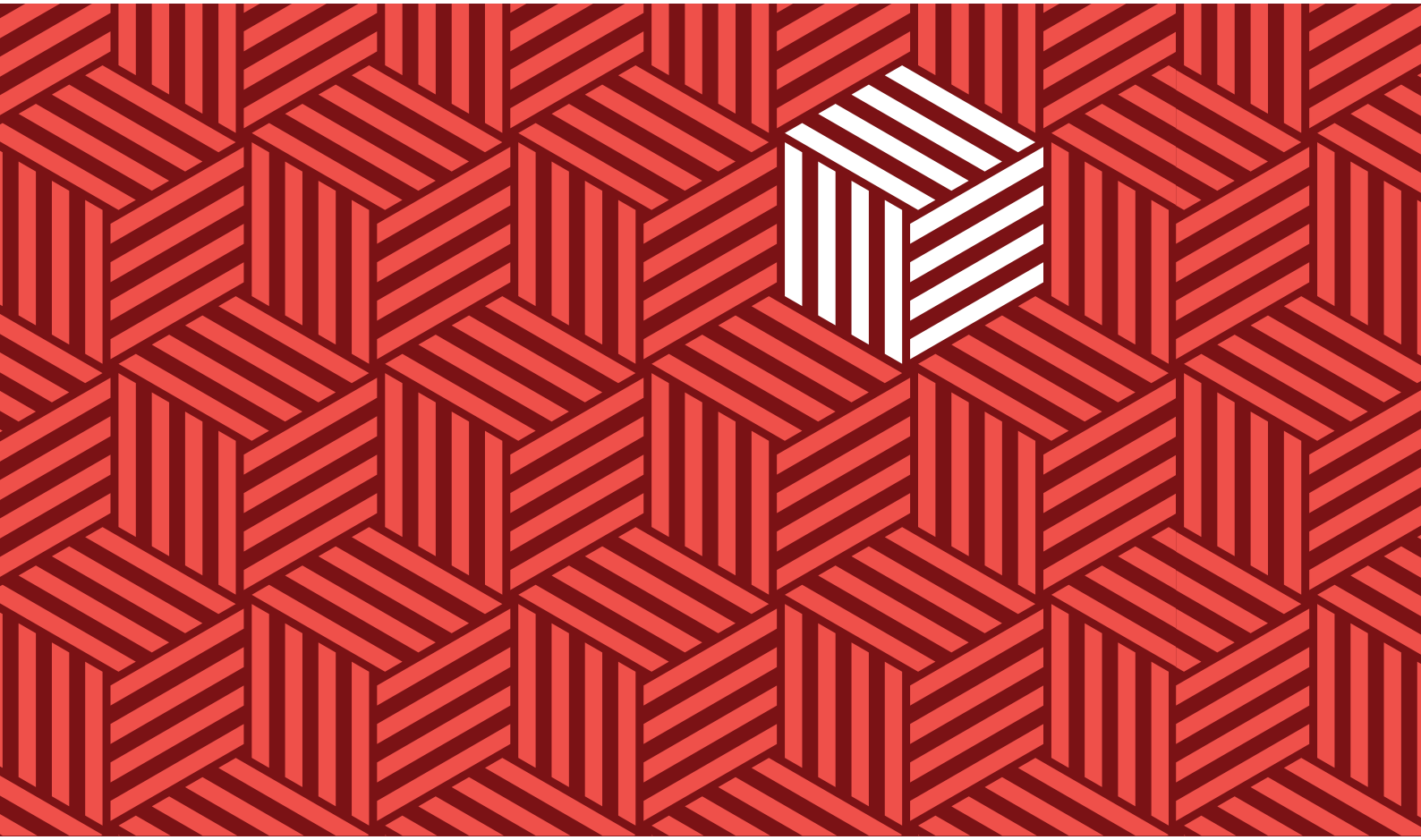
Singapore Academy of Law
Law Reform Committee

Proposals for Amending the Building and Construction Industry Security of Payment Act

September 2015



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ISBN 978-981-09-9024-4

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The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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1 The authors would like to acknowledge the research assistance provided by Charles Tay and Bernice Koh in the review of adjudication determinations from 2005 to 2014.

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INTRODUCTION

1 This paper is divided into three parts. Part 1 provides an overview of the issues arising from the reception and operation of the *Building and Construction Industry Security Payment Act*[2] ("SOP Act") since its enactment and argues the case for a review of the SOP Act. Part 2 identifies aspects of the Act which should be amended to simplify the statutory regime and to clarify matters on which the attainment of the legislative purpose critically depends. Finally, in Part 3, we propose a number of refinements to improve the administration of the statutory regime. In preparing this report we have received valuable inputs and comments from senior adjudicators as well as leading practitioners of the construction industry.

2 For the purpose of this report we reviewed the adjudication determinations made between 2005 and 2013. The adjudication determinations record in some detail the approach taken by parties in the processes leading up to the adjudication as well as the issues which have to be addressed by the adjudicator in each case. We have also circulated earlier versions of the draft of this paper among the persons we have consulted in the course of the review. Apart from a few issues, most of these recommendations reflect the consensus of the persons we have consulted. Where there is no unanimity of views, we have stated our reasons for taking the positions presented in the paper.

2 Cap 30B, 2006 Rev Ed.

PART 1
RECEPTION AND OPERATION OF THE SOP ACT

A. INCEPTION

3 The intellectual inspiration for the SOP Act may be traced to a 1994 report of the Latham Committee in the UK. Sir Michael Latham had sought legislative intervention designed to avert cash flow difficulties encountered by contractors with the inadvertent impact these have on the delivery capacity of the construction industry in the UK.[3] Latham therefore wanted "to reduce the amount of time, money and other resources wasted on disputes about building contracts".[4]

4 There are two central features in the scheme of legislative intervention proposed by the Latham Committee.

(a) The first is the requirement that a party who seeks to be paid for construction work is entitled to make a payment claim and the other party against whom the payment claim is made has to pay the claimed amount or state its reasons why payment should not be made to the extent claimed.

(b) The second is the provision of an economical and fast track adjudication machinery of any dispute between parties to a construction contract. The decision by an adjudicator, referred to in the SOP Act as a "determination", binds both parties until such time as the matter is decided by an arbitrator or the courts.

B. ENACTMENT OF THE SOP ACT

5 In Singapore the SOP Act was enacted on 16 November 2004 but came into force only on 1 April 2005. While the Singapore SOP Act was modelled substantially on the New South Wales legislation of the same name, it included additional features which are still considered to be novel.

C. RECEPTION

1. Effect of the SOP Act

6 There is little doubt that the SOP Act had its desired impact in terms of improving payment behaviour within the industry.[5] Even where a dispute

3 Sir Michael Latham, "Dispute Resolution" in *Constructing the Team* (HMSO 1994) ch 9.

4 This observation was made by Lord Walker of Gestingthorpe in *Reinwood Ltd v L Brown & Sons Ltd* [2008] Bus LR 979; [2008] UKHL 12 at [15].

5 Based on anecdotal evidence from users.

does not lead to adjudication the existence of an undeniably cost-effective dispute resolution machinery which enables an aggrieved party to obtain payment for construction work imposes a degree of discipline on both sides to maintain a reasonable stance in these disputes.

2. Volume of cases

7 The number of adjudication applications has grown over the years. Figure 1 shows the volume of adjudication applications filed since 2005, the year the SOP Act came into operation.[6]

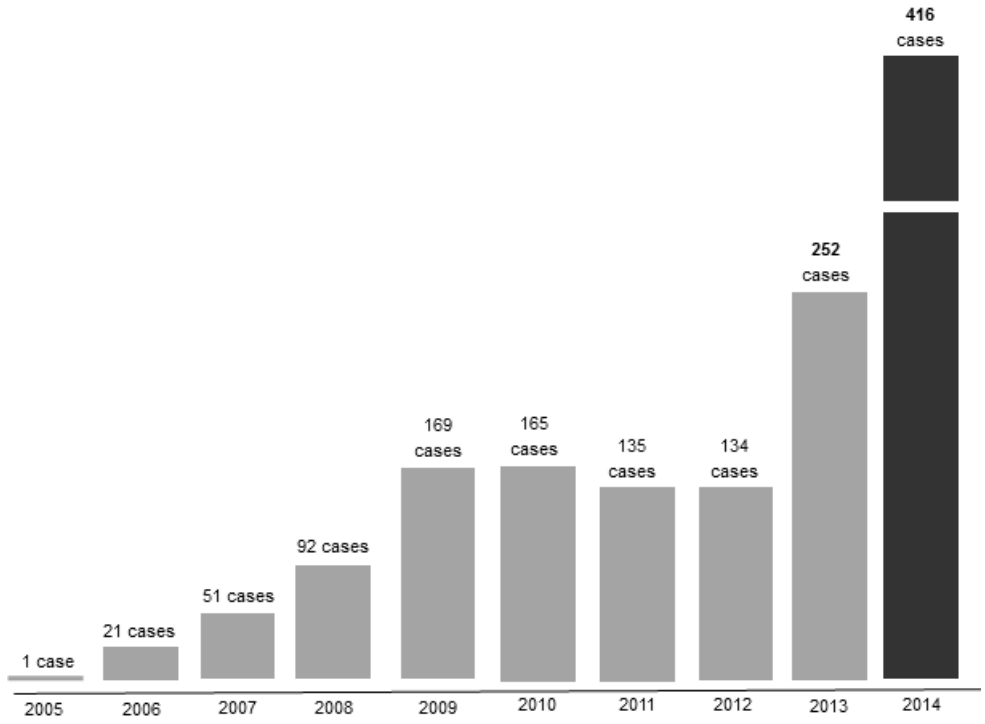

Figure 1: Annual Volume of Adjudication Cases

8 Significantly after averaging between 130 and 170 cases between 2009 and 2012, the number of adjudication applications rose by 88% to 252 in 2013. It increased by a further 65% to 416 in 2014.

3. Quantum of disputes

9 The reception of the SOP Act within the industry probably exceeded the expectations of the Building and Construction Authority, the statutory body overseeing the administration of the SOP Act. Although the majority of the disputes fell within the range of $100,000 to $500,000; exceptionally

6 Figures are based on data from adjudication cases handled by the Singapore Mediation Centre from 1995 to 2014.

there have been several cases where the disputed sums exceeded $100m.[7] In effect this demonstrates the claimant's confidence in the adjudication process notwithstanding that the result of an adjudication determination is necessarily coarse and is only intended to temporarily bind parties until the matter is finally resolved in arbitration or the courts.

4. Parties in adjudication

10 When the SOP Act was conceived, it was expected that the regime would be invoked mainly by subcontractors. This has been borne out by experience with the regime thus far.[8]

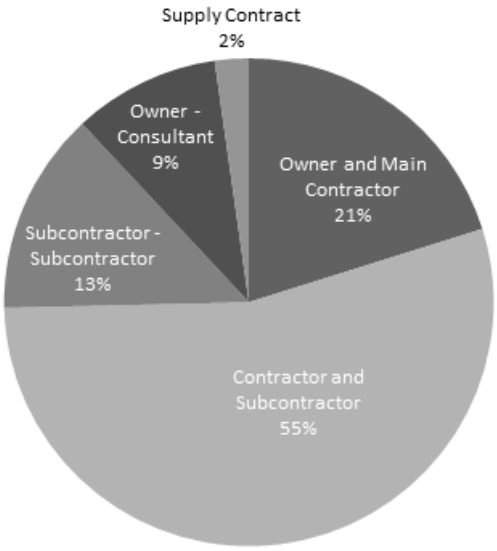

Figure 2: Parties involved in Adjudications

11 Figure 2 displays the distribution of the types of contracts featured in the matters filed in 2013. Slightly more than half of the adjudication applications (55%) relate to disputes between the main contractor and the most immediate tier of subcontractors. Adjudication applications involving owners and main contractors account for around one-fifth of total cases. Interestingly, consulting firms have also applied for adjudication under the regime to secure the payment of consulting fees.

7 For example, in *SOP AA002 (2013)*, the quantum of the payment claim was $116,251,933.51.

8 Figures are based on data from adjudication cases handled by the Singapore Mediation Centre from 1995 to 2014.

D. APPROACH OF THE REVIEW

1. Jurisdictional and procedural issues

12 Despite the growing familiarity with the application and operation of the SOP Act, a significant proportion of cases turned on "jurisdictional" and procedural grounds. In these cases, a considerable proportion of the time is taken up addressing objections relating to compliance with timelines, matters relating to form, and whether the subject claim falls within the scope of the SOP Act.

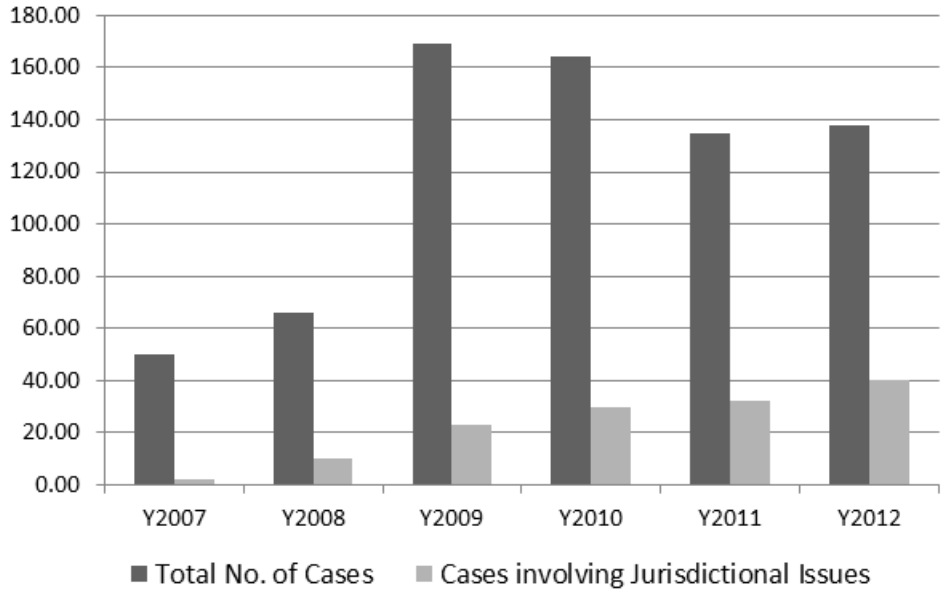

Figure 3: Proportion of Cases Involving Jurisdictional Issues

13 For the purpose of this paper we studied the bases for the adjudication determinations for the years 2007 to 2012. Figure 3 shows that the proportion of cases which turned on jurisdictional and procedural issues increased over this period. In 2012, cases involving jurisdictional issues accounted for approximately 30% of the matters determined. The decision of the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*[9] towards the end of 2012 had the important effect of resolving a number of these issues but several other issues remain.

14 Experience suggests that a number of aspects of the legislation can be improved to focus the adjudication process on resolving the merits of the substantive issues in dispute between the parties rather than being diverted to addressing complex jurisdictional and legal issues. In an ideal situation, recourse to the SOP Act should not require parties to engage in complex jurisdictional disputes. This aspect of the legislative intention was

9 [2013] 1 SLR 401.

underscored in the following passage of a judgment in a leading case on the subject:[10]

> [I]t is necessary to emphasise that in balancing the rights of contractors and employers under building contracts, courts should bear in mind that the Act is intended to ease the cash flow problems of contractors by providing a framework to speed up the processing of their claims for progress payments without having to go to court or go before an arbitral tribunal ….

2. Constituencies in the industry

15 It will be appreciated that there are many constituencies whose pecuniary interests have been shaped by the legislation. The various tiers of subcontractors are the clearest beneficiaries and they may attempt to enlarge the ambit of the SOP Act. From the vantage of the owner, the interest is to ensure that the project is not held up unduly because subcontractors and sub-subcontractors are not paid on time. However, owners are exposed to adjudication proceedings launched by main contractors, and consequently owners and consultants have to diligently respond to payment claims. Similarly, the SOP Act benefits main contractors in terms of securing payments from owners but at the same time it exposes them to adjudication proceedings from subcontractors and sub-subcontractors.

16 These interests appear to be finely balanced at present. From time to time, representations have been made for legislative amendments to serve constituency-specific interests. Not surprisingly these interests are not always reconcilable. Owners and their consultants criticised the short timelines and questioned whether certain categories of claims should be exempted. On their part, the subcontracting community argued for expanding the ambit of reliefs and remedies under the SOP Act.

3. Considerations

17 The review of the SOP Act should take into account two important considerations:

(a) The first relates to the objectives for which the SOP Act was enacted, specifically to prevent any unjustified disruption to the cash flow of parties who have contracted to carry out construction work or supply goods and services relating to construction work.

(b) The second consideration relates to the conditions under which the regime is expected to operate. The decision to commence adjudication has to be made within a relatively short time and this in turn means that the filing and appointment of the adjudicator has to

10 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [77].

be done very quickly. Consequently, ambiguities arising from the interpretation of these requirements should be reduced as much as possible.

18 Arising from our consultations with the industry, we are reinforced in the view that the basic structure and the central features of the statutory adjudication process are sound and there is no need to tamper with them. From the cases which have been lodged with the authorised nominating body ("ANB") over the past ten years, there is little evidence to suggest that the SOP Act has imposed rights and obligations on parties which have not been anticipated at the time when the statute was passed. It is perhaps premature to consider amendments designed to tilt the scales of any single constituency in one direction or the other. Nevertheless, there are areas in the SOP Act which should be improved, in particular to address issues which are clearly evident from the adjudication determinations we have surveyed for the purpose of this paper. In our recommendations for the amendment of the SOP Act we have taken a calibrated approach to refine and improve a number of its important provisions while retaining the essential features of the statutory regime.

19 Crucially, we should review those provisions which do not serve the purpose of any party and those which inject a dose of uncertainty in the operation of the regime. Since the regime affords only a temporary resolution of the dispute until arbitration or trial, amendments should be directed towards simplification and clarification of its basic processes with the objective of reducing the cost and time associated with these processes. The cost of the tribunal is low relative to arbitration and other dispute resolution routes. However, costs may be incurred by the parties themselves in preparing their cases for adjudication. These relate to the cost of documenting and filing the payment claim, payment response and the adjudication documents, as well as the cost of employing technical experts and legal advisers. With a number of relatively straightforward amendments, these costs could be reduced significantly.

PART 2
SUGGESTED AREAS OF LEGISLATIVE REVISION

A. MULTIPLICITY OF TIMELINES

1. Existing situation

20 The SOP Act prescribes timelines for the service of the payment claim, the payment response, the adjudication application, the adjudication response, the making of the adjudication determination and the payment of any sum to which the claimant is entitled.

21 The Singapore SOP Act is unique in providing multiple timelines for different categories of situations. There are:

(a) different timelines for the payment of a progress payment that is due depending on whether the payment claim relates to a construction contract or supply contract;[11]

(b) different procedural requirements for a construction contract and that for a supply contract – significantly there is no provision for a respondent to serve a payment response in relation to a payment claim under a supply contract;[12]

(c) different timelines for payment depending on whether the claimant is a taxable person under the Goods and Services Tax Act[13];[14]

(d) different periods for the adjudicator to determine an adjudication application depending on whether the respondent serves either a payment response and/or adjudication response.[15]

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11 See ss 8(1) and 8(2) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) which apply to construction contracts with ss 8(3) and 8(4) which apply to supply contracts.

12 See ss 11(1) and 11(3) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) which apply to construction contracts with s 11(2) which applies to supply contracts.

13 Cap 117A, 2005 Rev Ed.

14 See ss 8(1) and 8(2) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed); contrast this with ss 8(3) and 8(4) where no distinction is made between supply firms which are taxable persons for goods and services tax and those which are not.

15 Compare s 17(1)(*a*) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) which prescribes a seven-day period where (i) the respondent fails to serve either a payment response and adjudication response or (ii) the claimant has accepted the amount offered by the respondent and s 17(1)(*b*) which prescribes a 14-day period for all other cases.

The periods allowed for these steps are determined by either the default periods stipulated in the SOP Act or, subject to certain conditions, the periods stipulated in the underlying contract.

22 Arising from these distinctions, there are at least a dozen permutations of timelines. The situation may be readily contrasted with that in jurisdictions elsewhere – the UK, New South Wales, New Zealand and the other States in Australia – there are two timelines, the contractual timeline and the default statutory timeline. The potential confusion presented by the myriad of timelines was noted by the High Court in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd*[16] ("*LH Aluminium*") where Lee Seiu Kin J said:[17]

> I should add that the conclusion I have reached is the result of a balancing exercise between two unsatisfactory situations. It is the consequence of the Act which, from the rich case law it has spawned in the decade of its existence, is sorely in need of review, not only in respect of this aspect, but also in relation to a number of other areas. In a piece of legislation that has such dire consequences for breaching short timelines, it is amazingly complicated and vague at the same time … In *Admin Construction* at [63]–[65], Loh J had also called for a review of the Act and identified several areas for consideration. I wholeheartedly support his call.

23 The distinctions and the different timelines could have been spawned from an abundance of caution. This is understandable. However, with the benefit of the experience with the SOP Act over the past decade, it seems to us that the concerns which led to the imposition of the multiple timelines may have been overstated. In the paragraphs which follow, we highlight the areas which may be usefully reconsidered.

2. Construction contracts and supply contracts

24 The Singapore SOP Act is alone in distinguishing between construction contracts and supply contracts. As noted earlier, aside from the different periods provided for payment, the specific provision for supply contracts dispenses with the requirement for a respondent to serve a payment response in relation to a payment claim.[18] In addition, a claimant in respect of a supply contract has only seven days after the time prescribed for payment to file its adjudication application.[19] Unlike the situation with payment claims arising from construction contracts, there is no intervening dispute settlement period. In our view, this difference in the treatment of the two groups of contracts is unnecessary.

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16 [2015] 1 SLR 648.

17 [2015] 1 SLR 648 at [49].

18 See ss 11(1) and 11(3) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) which apply to construction contracts with s 11(2) which applies to supply contracts.

19 Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) ss 12(3) and 13(3).

25 There are at least two reasons why the distinction is unnecessary. Firstly, it will be noted from Figure 2 above that less than 2% of cases involve supply contracts. It is not clear how suppliers are necessarily prejudiced in applying for adjudication if they were required to follow the timeline prescribed for construction contracts. In a typical supply contract, the purchaser pays for the goods on delivery or upon invoice. There is no prejudice to the claimant if the respondent is provided with an opportunity to file a payment response, as is required presently with payment claims arising from construction contracts.

26 Secondly, the retention of the distinction necessarily requires the adjudicator to inquire into the construction of the definitions of a construction contract and a supply contract.[20] This presents issues in practice. For example, a contractor who purchases prefabricated components has to follow the process prescribed for supply contracts. If this contract incorporates a slight element of installation, the question arises as to whether this is sufficient to turn the contract into a construction contract. In the latter case, the contractor is required to issue a payment response and the proceedings take a different course from that with a payment claim under a supply contract. Thus, if the contractor had assumed that the subject contract is a supply contract but it is subsequently determined that the subject contract is a construction contract, the contractor would have been unfairly prohibited by section 15(3) from presenting its reasons for withholding payment before the adjudicator. The adjudication application itself would also be held to have breached the timeline stipulation under section 13(3)(*a*) of the SOP Act.

3. Whether there has been acceptance of the response amount

27 There is a dichotomy between a claim situation where a response amount has been accepted[21] and a situation where the response amount has been disputed (or where no payment response is issued) under section 12(2).[22] In the case where the response amount has been accepted by the claimant but the claimant fails to receive this amount by the due date, the right to apply for adjudication may be exercised within seven days from the expiry of the due date for payment. Where the response amount is disputed, the adjudication application may only be lodged after the expiry of (a) the period prescribed for the payment response and (b) the seven-day dispute settlement period. It seems to us that the claimant in the

20 See definitions of "construction contract" and "supply contract" under s 2 of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) and the definitions of "construction work", "goods" and "services" under s 3.

21 Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) s 12(1).

22 Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) s 12(2).

first case is unlikely to be materially prejudiced if the Act provides for one timeline, formulated on the process currently prescribed for disputed response amounts. The present distinction between the two groups of cases only serves to trip all except parties who are very familiar with the SOP Act.

4. Existing adjudication timeline for less contentious cases

28 The SOP Act prescribes a seven-day timeline for the making of an adjudication determination for arguably less contentious cases. Section 17(1)(*a*) provides that the seven-day timeline shall apply where, in a construction contract, the respondent fails to make a payment response and lodge an adjudication response or fails to pay the response amount which has been accepted by the claimant. This seven-day timeline contrasts with the 14-day timeline for other cases as provided under section 17(1)(*b*).

29 While it is laudable to contemplate a shorter timeline for less contentious cases, this distinction presents a number of issues in practice. For example, if it is disputed that a document constitutes a payment response, the applicable timeline then turns on the determination of this issue. Whether a document constitutes a payment response turns on whether the document tendered as a payment response complies with the requirements of a payment response as prescribed in the SOP Act. This is often the subject of submissions and, in certain cases, a hearing at the adjudication conference. By the time the adjudicator decides that the document does not qualify as a payment response, he may well be out of time to issue the determination within the stipulated seven-day period. Furthermore, unlike the situation in section 17(1)(*b*), where a case falls under section 17(1)(*a*), there is no provision for the parties to agree to extend the period for making the determination. Thus the adjudicator has no means to rectify any breach of the timeline.

30 In our view, a single period of 14 days should be provided for the making of an adjudication determination under all circumstances. This obviates contentions of this nature, reduces the steps which need to be taken by the parties and ensures that both the parties and the adjudicator would not inadvertently adopt the wrong timeline. We can see no material prejudice to the claimant in the situation under section 17(1)(*a*) for the two timelines to be conflated. It would simplify the regime and dispense with the need for the submissions and the inquiry by the adjudication tribunal into this issue.

5. Summary of recommendations

31 To sum up we recommend the:

(a) abolition of the distinction between supply contracts and construction contracts: The SOP Act should cover all contracts

where one party carries out construction work or supplies goods or services for such work;

[See proposed amendments to **Sections 2, 8(3), 8(4), 11(2), 12(3) and 15(3)**.]

(b) conflation of the timelines for crystallisation of a dispute arising from a construction contract irrespective of whether a claimant has accepted a response amount;

[See proposed amendments to **Sections 12(1) and 12(2)**.]

(c) provision for a common 14-day timeline for the making of the adjudication determination (with provision for parties to extend the timeline as necessary) for all disputes.

[See proposed amendments to **Section 17(1)**.]

B. PAYMENT CLAIMS

1. Existing situation

32 Section 10(2) of the SOP Act requires a payment claim to be served at such time as specified in the contract or "where the contract does not contain such provision at such times as may be prescribed". This is read strictly to mean that any payment claim which is not served according to these terms is invalid.

33 In *Lee Wee Lick Terence v Chua Say Eng*[23] ("*Chua Say Eng*"), the Court of Appeal discussed the operation of regulation 5(1) of the Building and Construction Industry Security Payment Regulations[24] ("SOP Regulations). The latter provides that "where the contract does not specify the time by which a payment claim shall be served or by which such time may be determined", a payment claim is to be "served by the last day of each month following the month in which the contract is made".[25] The Court of Appeal read this to mean that if a contract was made on the 3rd of a month, then each payment claim would have to be made by the 3rd of every subsequent month.

34 In *Chua Say Eng*, the contract was made on 16 August 2008, but there was a subsequent supplemental agreement dated 3 December 2008. The Court of Appeal held that the "end of the month" in the circumstances meant the 3rd of every month.

35 The analysis needed to establish the effect of the terms of the contract and the supplemental agreements on the timeline for the service

23 [2013] 1 SLR 401 at [93].
24 Cap 30B, Rg 1, 2006 Rev Ed.
25 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [93].

of a payment claim is a meticulous process which requires considerable effort. However, it is an inquiry which does little to advance the purpose of the SOP Act. In *Chua Say Eng*, it was necessary for the courts to determine the issue through a detailed review of the provisions of the supplementary agreement. The contractual provisions in that case were relatively straight forward but because of the requirement in section 10(2) and regulation 5(1) a considerable volume of submissions had to be made and both the High Court and the Court of Appeal devoted considerable time and effort in the inquiry.

36 Aside from supplemental agreements, parties may also agree to vary the contract during the course of the contract. Evidence of this may be found in correspondence and emails. If the date of the agreement and hence the date of service of a payment is crucial to the validity of a payment claim, the volume of documents which have to be reviewed can be disproportionately consuming. This time and effort could have been better deployed to addressing the substantive issues in dispute.

37 In our view, very little is lost by dispensing with the prescribed timeline for the service of the payment claim. Neither section 8 of the New South Wales Building and Construction Industry Security of Payment Act 1999[26] ("NSW Act") nor section 109 of the UK's Housing Grants, Construction and Regeneration Act 1996[27] ("UK Act") makes this a condition which goes to the validity of the payment claim.

38 We have also considered the suggestion that the service of a payment claim should be left to be governed by the terms of the contract. However, as discussed above, this may lead to adjudications being mired in the exercise of reconciling and interpreting the applicable term that applies to the service of the payment claim. Since the rationale for the statutory adjudication regime is to economise on time and expense, we think efforts dissipated in determining this issue could be better directed at determining the merits of the substantive issues relating to the payment claim and payment response.

39 In our view, it is unnecessary for the SOP Act to prescribe the time for the service of the payment claim. A claimant should be entitled to serve a payment claim as and when he considers it necessary to do so, subject only to the proviso that the interval between payment claims should not be

26 Act 46 of 1999; amended by the Building and Construction Industry Security of Payment Amendments Act 2002 and the Building and Construction Industry Security of Payment Amendment Act 2010.

27 The legislative framework found in Pt II of the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("HGCRA") came into force on 1 May 1998 and provides a statutory Scheme for Construction Contracts. In 2009, a series of amendments to the HGCRA were enacted under Pt 8 of the Local Democracy, Economic Development and Construction Act 2009 (c 20) (UK).

less than a month. In *Chua Say Eng*, the Court of Appeal appropriately observed:[28]

> The Act is intended to facilitate the payment of progress payments at monthly intervals. If a claimant chooses not to make a payment claim at monthly intervals, because, for example, he is not experiencing any cash flow problems or because it is not convenient for him to do so, there is no reason to compel him to do otherwise. If a claimant decides to serve payment claims at *longer than monthly intervals*, *eg*, *quarterly payment claims*, it would also benefit the respondent, who need not pay monthly claims. [emphasis in original]

40 We respectfully agree with the Court of Appeal in *Chua Say Eng* that a contractor should not be compelled to make the claim during the course of the construction if it does not wish to do so. Indeed, in practice, the better approach is frequently for the contractor to continue negotiating with its employer so long as there appears a reasonable prospect that the parties could settle the matter amicably. Our recommendation would not compel the contractor to launch a payment claim where the financial circumstances at the particular point of time are not particularly pressing. It would allow the contractor to engage the statutory adjudication process only when it is clear that negotiations for a settlement of the payment dispute appear unlikely to succeed.

41 The payment claim should of course satisfy the requirements of section 10(3) of the SOP Act and the proposed requirement that the claimant should expressly state that the payment claim is made under the SOP Act, as discussed below.

[See proposed amendments to **Sections 10(2), 10(3) and Regulation 5(1)**.]

2. Intention of payment claim

42 Unlike its counterparts in New South Wales,[29] New Zealand and elsewhere, the Singapore SOP Act does not expressly require a payment

28 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [90].

29 Although in New South Wales, the requirement has been removed as of 21 April 2014 by the Building and Construction Industry Amendment Act 2013, ostensibly because parties are already familiar with the legislation and there was concern that the requirement would lead to underutilisation of the legislation. In New South Wales, the second reading speech of the Minister for Finance and Services (the Hon Mr Andrew Constance) on 24 October 2013 was as follows:

> The [Collins] inquiry found that this requirement was one of the factors that had led to an underutilisation of the [Principal] Act by subcontractors and should be abolished. Many subcontractors are reluctant to include such a statement in their payment claims to head contractors as it may be viewed as a signal of a possible dispute. The statement was made a requirement under the [Principal] Act to ensure that respondents to claims were made aware of their obligations should a dispute arise. However, the [Principal] Act is now in its fourteenth year of operation and is generally well understood by industry.

claim to state that it is made under the SOP Act. The Court of Appeal in *Chua Say Eng* had ruled that, in the absence of express words to the contrary, a claimant's subjective intention is irrelevant to determining whether the claim he has served on the respondent is a payment claim.[30] Consequently, as noted in a number of decisions,[31] there is a risk under the Singapore SOP Act that a document which is in essence a payment claim may be mistaken for a document intended for some other purpose, for example, a draft of a claim for discussion.

43 The SOP Act should expressly require a payment claim to state that it is made under the SOP Act if the claimant intends to seek recourse under the Act in the event that a dispute arises from the payment claim. We consider this to be highly desirable for a number of reasons:

(a) First, it ensures that the respondent, upon receiving the payment claim, appreciates fully that any dispute arising from the payment claim can potentially be the subject of adjudication proceedings under the Act.

(b) Secondly, it reduces the likelihood that the respondent may be ambushed by the claimant who may draft the payment claim in a manner as to misdirect the respondent into thinking that the document is a draft or anything other than a payment claim.

(c) Thirdly, it is particularly important that it is made known to the respondent that the claimant has recourse to the Act where the respondent is not in the business of property development or construction. An example may be an individual home owner who may be unaware of the consequences if the matters stated in a payment claim are not properly addressed.

[See proposed amendment to **Section 10(3)**.]

3. Limitation period for making a payment claim

44 In *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd*[32] ("*Vivaldi*"), Quentin Loh J anticipated that the statutory adjudication process may be abused where claims are made long after the works have been completed. The earlier position taken by the High Court in *Chua Say Eng* (overruled on appeal) was that payment claims can only be made for work done in the month before the claim was made. This is too restrictive since a contractor usually requires an interval following substantial completion to bring its progress payment claims up to date. The Court of Appeal's overruling of the first instance decision in *Chua Say Eng* means that at present the position on this issue reverts to the six-year period limitation stipulated under

30 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [74].

31 *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459; *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 at [49].

32 [2013] 3 SLR 609 at [42]–[46].

section 10(4) of the SOP Act. The six-year period is too long and may be subject to abuse as noted by Loh J in *Vivaldi*.

45 The NSW Act stipulates a 12-month limitation period. This period runs from the date "the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied)". The experience in Singapore is that there is a 12 to 15 months maintenance period (or defects liability period) following substantial or practical completion. During this period minor outstanding work or repairs may be carried out. At the end of this period, the contract typically provides for the remaining portion of the retention fund to be released and the performance bond to be discharged. From our consultations, the preference is for the calculation of the limitation period to take into account the operation of these terms. We would therefore recommend a reduction of the six-year limitation period to a limitation period which is determined by *the later* of:

(a) 12 months from the time when the construction work to which the claim relates was last carried out; or

(b) 3 months from the date when the last portion of the retention money is due to be released or when the performance bond should have been discharged or when the security deposit is refunded to the contractor.

[See proposed amendment to **Section 10(4)**.]

C. PAYMENT RESPONSE

1. Section 15(3) of the SOP Act

46 Section 15(3) is an important pillar of the regime. It compels a respondent to pay or answer a payment claim. It does this by providing that a respondent is not entitled to include any reason for withholding any amount (including any cross-claim, counterclaim or set-off) in the adjudication response and the adjudicator shall not consider the same unless the reason is provided in the payment response.

47 In *WY Steel Construction Pte Ltd v Osko Pte Ltd*[33] ("*WY Steel*"), the Court of Appeal held that in a situation where a respondent fails to issue a payment response in accordance with the SOP Act, an adjudicator has to still "adjudicate the claim". The adjudicator has to determine the amount of work done and the value of those works. Thus while a respondent in a section 15(3) situation is reduced to pointing out patent errors arising from the payment claim, the adjudicator is not permitted to simply "rubber-stamp" the payment claim as suggested in an earlier decision.

33 [2013] 3 SLR 380.

48 It seems to us that adjudicators will appreciate clarification on the expression "adjudicate the claim" and the standard of proof which the adjudicator should hold the claimant to in a situation to which section 15(3) applies. In the absence of a payment response, some adjudicators considered that the ruling in *WY Steel* requires that they should confine themselves to determining whether there are any patent errors in the claimant's claim. In the absence of these errors, the full claimed amount is awarded. There are a few adjudicators who read the ruling in *WY Steel* to mean that the claimant is required to prove its case on the standard of proof of a balance of probabilities. This is to be established on the basis of the documents and other materials which are properly before the adjudicator.

49 In our view, an appropriate standard of proof in a section 15(3) situation lies somewhere between the "patent error" basis and proof on a "balance of probabilities". The former is arguably too permissive and may unduly prejudice a respondent because an adjudicator would not on this premise inquire into whether the quantum of the claim had been unduly inflated. On the other hand, proof on a balance of probabilities may impose an inordinate weight of the onus on the claimant in this situation. Since no payment response was filed by the respondent when a respondent is generally expected to do so, the tribunal should not be required to inquire into the claimant's case as would a respondent who had complied with the statutory provision.

50 Furthermore, given that the adjudicator has only the short period of between 7 to 14 days to make his determination, it is impractical and may be too onerous to require that he should be satisfied on a balance of probabilities on each and every item of the claim. In our view, the standard should be whether *prima facie* the claimant's claim has been made. An adjudicator should satisfy himself that there is *at least* a *prima facie* basis in law and in fact for the claim and the amount claimed. The test to be applied by the adjudicator may be prescribed in section 17 of the Act.

[See proposed amendment to **Section 17(3)**.]

D. TIME FOR MAKING THE DETERMINATION

1. Single time frame for making determination

51 Section 17(1) prescribes two different timelines for the making of an adjudication determination:

> An adjudicator shall determine an adjudication application —
>
> > (*a*) within 7 days after the commencement of the adjudication, if the adjudication relates to a construction contract and the respondent —

(i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or

(ii) has failed to pay the response amount, which has been accepted by the claimant, by the due date; or

(*b*) in any other case, within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

52 It might be thought that the situations provided under section 17(1)(*a*) warrant a shorter period for making the adjudication determination because there was no payment response and no adjudication response lodged. In the situations under section 17(1)(*b*), it could have been contemplated that the respondent had presented its position either in the payment response or adjudication response and a longer period of time is allowed to enable the adjudicator to inquire into the basis for the matters in contention.

53 However, experience suggests that the distinction is unnecessary. Few matters falling under section 17(1)(*a*) are as cut-and-dried as envisaged in the drafting of the provision. In our view, as recommended earlier, a common 14-day timeline for making the determination should apply to all situations.

[See proposed amendment to **Section 17(1)**.]

2. Extending the time for making the determination

54 Section 17(1)(*b*) of the SOP Act provides for the time for making the determination to be extended with the consent of both parties. One party or both parties may occasionally, for tactical reasons, deliberately choose to withhold consent even where the case presented is complex and would reasonably require more than 14 days. The objective of the party withholding the consent (usually the respondent) is to force the adjudicator to come to a decision within a very short time, a time frame within which the adjudicator cannot reasonably make a decision on the complex claim before him. This may lead to a flawed adjudication determination and the respondent may subsequently challenge the determination when it is sought to be enforced. Alternatively, it is also conceivable that the intent may be to compel the adjudicator to avoid determining the claim on the ground that within the time allowed a proper determination of the claim could not be properly made. In each of these situations, the claimant is unfairly prejudiced.

55 One potential solution is to amend the provision to allow the adjudicator, in a situation where one party is holding out, to apply to the ANB for an extension of time.

56 It will be noted that at present there is no provision for parties to agree to extend the time for making the determination in a situation falling under section 17(1)(*a*). We have recommended to abolish the distinction between situations falling under section 17(1)(*a*) and situations which fall under section 17(1)(*b*). However, if it is considered desirable to retain this distinction, it would be preferable for parties to agree to extend the time for making the determination for both groups of situations.

[See proposed amendments to **Section 17(1)**.]

E. ADJUDICATOR'S POWERS

1. Scope of power to allow amendments to the adjudication application

57 Regulation 7(2A) of the SOP Regulations (inserted by the Building and Construction Industry Security Payment (Amendment) Regulations 2012)[34] allows an adjudicator to allow such amendments to be made to an adjudication application as he thinks just. It is not clear whether the new power extends beyond the correction of mere clerical errors. Some have relied on the Building and Construction Authority's ("BCA's") circular to suggest that this was the intention. However, there should not be any reason why it should be so limited, and it is arguable that on the wording of the amended regulation the power is not limited to the extent stated in BCA's circular. A wider power will save applications from being rejected on highly technical grounds of non-compliance with the Act even when no real prejudice has been caused to the respondent. For the avoidance of doubt, we recommend that the SOP Regulations should be amended to reflect the wider scope of this power.[35]

[See proposed amendment to **Regulation 7(2A)**.]

2. Valuations in previous adjudication determinations

58 Section 17(5) of the SOP Act provides that, in any adjudication that involves the determination of the value of an item of claim that has already been determined by an earlier adjudication determination between the same parties, the subsequent adjudicator is required to give to that item the same value as that previously determined unless either of the parties

34 S 488/2012.

35 It should be noted that an adjudicator may, pursuant to s 17(6) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed), amend an adjudication determination in respect of clerical mistakes, accidental slips or defect of form. Regulation 7(2A) of the Building and Construction Industry Security Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) should be clarified to allow an adjudication application to be amended on wider grounds, for irregularities which do not prejudice the respondent.

"satisfies the adjudicator that the value of the item has changed since the previous determination".

59 It is interesting to consider the operation of this provision where the respondent did not furnish a payment response in the situation to which the earlier determination relates. Section 15(3) would have applied in that adjudication to preclude the previous adjudicator from considering the respondent's reasons for withholding or deducting payment. If, for the purpose of the subsequent adjudication, the respondent has furnished a payment response with reasons for withholding part of or the whole of the claimed amount, the question arises as to whether the subsequent adjudicator would still be bound by section 17(5) to give the same value as that determined in the earlier adjudication. It is arguable that since the valuation in the earlier determination was based only on the claimant's evidence and submissions, the valuation had been reached without a full consideration of the merits of the case. An allied consideration is whether an adjudicator's interpretation of a particular provision of the contract is binding on the subsequent adjudicator, especially when the interpretation led to a certain assessment being taken on the value of the claim.

60 We agree with the present position in the SOP Act that an adjudicator in a subsequent adjudication should be bound by the assessment made in a previous adjudication in respect of the same item of claim. This should apply to both the construction of any term of the contract as well as the valuation of an item of a claim. However, we consider that it is useful to clarify that section 17(5) should permit the adjudicator in the subsequent adjudication to take into account any material or evidence that was not available at the time of the previous adjudication. Before admitting such material or evidence, the adjudicator should require the party seeking to adduce such evidence or material to demonstrate that the material or evidence was not available during the period when the previous determination was made.

[See proposed amendment to **Section 17(5)**.]

F. SERVICE OF DOCUMENTS

61 Section 37 of the SOP Act specifies the modes for the service of documents (example, payment claims and payment responses) referred to in the SOP Act. One issue that has emerged lately is whether section 37 may be read to permit the service of documents by email.

62 There are two views on this. One view is that section 37 of the SOP Act is permissive, and prescribes "additional" modes of service only, but it does not prohibit other modes of service. On this construction, service by email therefore is not precluded. The other view is that the permitted modes of service have to be expressly prescribed. Since email has not been expressly prescribed under any statute, it cannot qualify as a mode of service contemplated by section 37 the SOP Act. There have been

adjudication determinations made on the basis of the second view with the result that the adjudicator has held in each of these cases that either the payment claim or payment response had not been properly served when it was made by email.

63 Despite the widespread use of email within the construction industry, we do not think it is appropriate at the present time to include email as a prescribed mode of service. However, where parties have agreed to use email as a mode of service of documents, it seems to us that it should be permitted as a mode of service for the purposes of the SOP Act. Our recommendation is that the service of documents by email should be permitted only where parties have agreed to receive documents through this mode of service and section 37 should be amended accordingly.

[See proposed amendment to **Section 37(1)**.]

G. JURISDICTIONAL CHALLENGES

1. Power of adjudicator to determine his jurisdiction

64 In *Chua Say Eng*, the Court of Appeal pointed out a lacuna in the powers conferred by the SOP Act on an adjudicator. Unlike an arbitrator, an adjudicator has no power to decide his own jurisdiction. As a consequence, any jurisdictional challenge necessarily has to be referred to the courts. The practical problems arising from this were noted by Chan Sek Keong CJ in the course of the judgment in that case:[36]

> In our view, if the respondent's objection to the jurisdiction or power of the adjudicator to conduct the adjudication is based on an invalid appointment, such a jurisdictional issue should be raised immediately with the court and not before the adjudicator. The reason is that since the objection is against the adjudicator's jurisdiction as an adjudicator, he has no power to decide if he has jurisdiction or not. He cannot decide his own competency to act as an adjudicator when such competency is being challenged by the respondent. An adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent's objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent's objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide.

65 An application to the court on the issue of the adjudicator's jurisdiction would take time and the outcome may be subject to at least one further round of appeal. Aside from the costs of the application, there is an additional element of uncertainty until the application is finally decided. It

36 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [36].

does not seem to us that Parliament contemplated that in resolving payment disputes through statutory adjudication, court proceedings may have to be launched even before the commencement of the adjudication itself. Clearly the result is not consistent with the primary object of the SOP Act, which is to facilitate cash flow for contractors by introducing a *fast* and relatively *low cost* adjudication regime to resolve payment disputes.

66 It seems to us that there is a strong case for the SOP Act to confer on the adjudicator the power to decide his own jurisdiction. This would be similar to that conferred on an arbitrator under the Arbitration Act.[37] In the face of a jurisdictional challenge made by either party, the adjudicator can decide on the merits of the challenge, without being burdened with objections that he is not entitled to do so, thereby saving time and expense for all parties. His determination on this issue, as with his determination on other aspects of the matter, would in any case be subject to the supervisory jurisdiction of the courts. If the issue is subsequently referred to the courts, the court would be able to determine the issue with the benefit of the adjudicator's reasons for arriving at his decision.

[See proposed amendment to **Section 17(5A)** and consequential amendment to **Section 31**.]

H. ADJUDICATION REVIEW PROCEDURE

67 The adjudication review procedure as provided under sections 18 and 19 of the SOP Act is unique to Singapore. In 2014, out of a total of 416 adjudication applications, five cases were referred for review pursuant to these provisions. Although this is a small percentage of the cases, experience suggests that the review procedure performs a useful function. We consider that the SOP Act should make clear that if a respondent is aggrieved by a determination it should take this step before applying to set aside the adjudication determination in court as held by Andrew Ang J in *RN & Associates Pte Ltd v TPX Builders Pte Ltd*.[38]

68 Currently the SOP Act only provides for a respondent to apply for an adjudication review. There is no provision for review if the adjudication application is dismissed. A claimant who is aggrieved by the adjudicator's determination has to apply under section 27 to set aside the adjudication determination. Furthermore, given that the review procedure is only available to the respondent, an adjudicator may prefer in a suitable situation to err in favour of the respondent. As exemplified by the adjudication determination in *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd*,[39] an adjudication determination which is clearly wrong may inflict further injustice on a claimant. This position arises because a

37 Arbitration Act (Cap 10, 2002 Rev Ed) ss 21(1), 21(2) and 21(3).
38 [2013] 1 SLR 848 at [61].
39 [2015] 2 SLR 70.

claimant is essentially precluded from making another payment claim and a further adjudication application on matters which have been adjudicated.

69 It is at present also unclear whether on the respondent's application for review, the claimant may also argue for a reconsideration of his claim and seek to improve his recovery of payment in a review. In principle, since the matter is under review, the review adjudicator (or panel of review adjudicators) should have the power to revise the claim in favour of the claimant. The review panel's remit should not be limited to only re-examining selected aspects of the first instance determination which the respondent refers to the review adjudicator. The possibility of an upward revision in favour of the claimant may conceivably serve to deter respondents from applying for a review on speculative grounds. As it stands at present, the review panel is arguably only empowered to reduce the adjudicated amount. The only downside which a respondent incurs is the amount payable as the costs of adjudication and this, in accordance with the prescribed scale of fees, is very modest.

70 We would recommend therefore that, as a matter of fairness to the claimant and to deter frivolous applications for adjudication review:

(a) both parties should be entitled to apply for an adjudication review under the SOP Act; and

(b) the review adjudicator or the panel will be able to review all the matters in the adjudication application and response, and will not be limited by what the party chooses to submit for review only.

[See proposed amendments to **Sections 18(1), 18(2), 19(6) and Regulation 10(1), 14**.]

I. JUDICIAL SUPERVISION

1. Power to remit an adjudication determination

71 The SOP Act does not provide for the courts to remit an adjudication determination to an adjudicator or to set aside an adjudication determination in part. It may be useful to consider the case for the SOP Act to provide specifically for such powers. First, this would bring the SOP Act in line with the Arbitration Act. Secondly and more importantly, it prevents the extreme "all or nothing" kind of results in judicial review which very often would compel the claimant to recommence the adjudication proceedings should the determination be set aside.

[See proposed amendments to **Section 27**.]

PART 3
ADMINISTRATION OF THE REGIME

A. APPOINTMENT ISSUES

1. Renomination of adjudicator

72 Section 14(3) of the SOP Act provides that the ANB has seven days within which to appoint the adjudicator. There is no express provision for any extension of the time to make the appointment. Any slippage in the timeline for appointing an adjudicator may therefore potentially nullify the adjudication application.

73 The appointment process involves the ANB identifying and approaching available adjudicators for a matter. Time has to be allowed for an adjudicator to ensure that he/she is not in conflict with the matter which forms the subject of the adjudication. If the adjudicator first approached declines the invitation or is in conflict, the ANB has to commence the search process all over again. The seven-day timeline is therefore very tight to accommodate all these steps.

74 Issues arise where after the appointment has been made, the adjudicator discovers that he or she is in conflict. This may arise because of new information belatedly lodged by one of the parties, or because a particular relationship (parent-subsidiary) or fact was not known at the time when the appointment was made. An adjudicator may also fall ill or be faced with some exigencies which would leave him unable to continue with the adjudication.

75 Under section 28(1) of the Interpretation Act,[40] a person with the power to appoint arguably has the power to re-appoint. However, it is not clear under the SOP Act that the re-appointment has to be made within the original seven-day period prescribed under section 14(3).

76 We would suggest that the SOP Act expressly provides for the ANB to re-appoint an adjudicator under certain circumstances. Such circumstances would include death, illness or disablement of the adjudicator, or where the adjudicator considers that facts disclosed/made available after his appointment may potentially give rise to a conflict of interest or a perception of a potential lack of independence. In these circumstances, the timeline for making the re-appointment should be made within seven days from the date when the ANB is notified or is aware of the qualifying circumstances. The period for making the adjudication determination

40 Cap 1, 2002 Rev Ed.

should then run from the date of appointment of the replacement adjudicator.

[See proposed amendments to **Sections 2, 14 and 18(7)(*a*)**.]

2. Definition of "day"

77 The SOP Act requires parties and the adjudicator to adhere strictly to the periods of time for each step in the proceedings as prescribed under the Act. At present, the periods prescribed in the Act are stated in days and a day is taken to mean a calendar day other than a public holiday. Set against the short timelines, this may be unfair to one party or the other where a period prescribed for a step in the proceedings falls on a Saturday or Sunday. It seems to us that it is preferable for the purpose of the SOP Act to define a "day" as a working day. Under the NSW Act, the periods are stipulated in terms of "business days" and a business day is defined to expressly exclude Saturday, Sunday and public holidays as well as 27–31 December.[41]

[See proposed amendment to **Section 2**.]

3. Direct service by claimant and respondent

78 The Singapore SOP Act is alone in requiring the ANB to serve the adjudication application on the respondent. There is a significant amount of "double handling" arising from this requirement. A prescribed number of copies of the adjudication application are filed with the ANB who in turn serves one copy of the adjudication application on the respondent[42] and forwards another copy to the adjudicator. The timeline for making the adjudication response runs from the date the respondent receives the adjudication application from the ANB. A corresponding process is stipulated for the adjudication review procedure.

79 With the view of saving costs and time, we recommend that the process should be changed to that practised in other jurisdictions. The claimant should be entitled to serve a copy of the adjudication application on the respondent and concurrently file a copy with the ANB with a written record that the adjudication application had been received by the respondent. The ANB should only be responsible for appointing the adjudicator and serving its copy on the adjudicator. The timeline of seven days for the adjudication response can then begin to run from the

41 Section 4 of the Building and Construction Industry Security of Payment Act (Act 46 of 1999) (NSW); amended by the Building and Construction Industry Security of Payment Amendments Act 2002.

42 Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) s 13(4).

next working day following the filing of the adjudication application with the ANB.

[See proposed amendments to **Sections 13(1), 13(4), 13(5), 15(1), 15(4), 15(5), Regulations 7(3) and 8(2)**.]

CONCLUSION

80 The SOP Act has been in force for a decade. While the legislation has admirably achieved the objectives laid down in Parliament, both the salutary effect of the statutory regime and its reach can be significantly extended if certain of its features are improved. When the corresponding legislation was introduced in the UK and New South Wales, it was recognised that the changes introduced were highly novel for the construction industry. Not surprisingly in both these jurisdictions the respective regimes were subsequently refined and improved. The UK Act was amended extensively by Part 8 of the Local Democracy, Economic Development and Construction Act 2009. In the case of the NSW Act, the amendments were introduced by the Building and Construction Industry Security of Payment Amendments Act 2002 and the Building and Construction Industry Security of Payment Amendment Act 2010.

81 In Singapore, timely calls have been made for the SOP Act to be amended on a number of occasions by senior judges and jurists. Arising from our review, we agree that the SOP Act should be reviewed without further delay to remove aspects of the regime which inject a degree of uncertainty in its operation and consume an unnecessary amount of time and effort. On this point, the observations expressed by the former Chief Justice Chan Sek Keong are particularly apposite:[43]

> The overriding legislative objective must be to ensure that the merits of the payment claim (*ie*, the amount payable to the claimant) receive a hearing, even if a short and limited one, as the payment is only meant to be provisional, pending a final resolution if the respondent is dissatisfied. It is only where the substantive merits of a dispute are addressed that the parties to a construction contract can anticipate how subsequent payment issues in a particular construction project are likely to play out and be resolved. This in turn provides for a better regulation of the conduct of the parties for the remainder of the project.

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43 Chan Sek Keong, "Foreword" in Chow Kok Fong, *Security of Payments and Construction Adjudication* (Lexis Nexis, 2nd Ed, 2013) at p x, para 14.

SCHEDULE A

PROPOSED AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT / REGULATIONS

Submitted by: Philip Chan and Edwin Lee Peng Khoon

A. PROPOSED AMENDMENTS TO THE ACT[1]

Amendment to Section 2

1. To amend section 2 as follows:

   (a) By revising the definition of "adjudicator" as follows:

   " "adjudicator" means a person appointed under this Act to determine a payment claim dispute that has been referred for adjudication, and includes a substitute adjudicator appointed under section 14(4) and a review adjudicator or a panel of review adjudicators appointed under section 18(5)(*b*);"

   (b) By revising the definition of "construction contract" as follows:[2]

   " "construction contract" means ~~an agreement under which —~~

   (*a*) an agreement under which one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more parties; ~~or~~

   (*b*) an agreement under which one party undertakes to supply services to one or more other parties; or

   (*c*) a supply contract;"

   (c) By revising the definition of "day" as follows:

   " "day" means any day other than a Saturday, a Sunday, or a public holiday within the meaning of the Holidays Act (Cap. 126);"

Amendment to Section 8

2. To delete sections 8(3) and 8(4).

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1 Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed).

2 *Cf* s 4 of the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (New South Wales).

Amendment to Section 10

3. To delete section 10(2) and replace with the following:

"(2) A claimant shall not serve more than 1 payment claim in respect of each reference month under the construction contract, save that a claimant may include in a payment claim an amount that has been the subject of a previous claim."[3]

4. To amend section 10(3) as follows:

"(3) A payment claim shall —

(*a*) ~~shall~~ state the claimed amount, calculated by reference to the period to which the payment claim relates; ~~and~~

(*b*) ~~shall~~ be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed; and

(*c*) state that it is made under the Act."[4]

5. To delete section 10(4) and replace with the following:

"(4) A payment claim may be served only within —

(*a*) 12 months from the time the construction work to which the claim relates was last carried out (or goods and services to which the claim relates was last supplied); or

(*b*) 3 months from the date when the last portion of the retention money is due to be released, or when the performance bond should be discharged, or when the security deposit should be refunded to the contractor,

whichever is the later."

Amendment to section 11

6. To delete section 11(2).

Amendment to section 12

7. To delete section 12(1) and add to section 12(2) as follows:

"(2) Where, in relation to a construction contract —

(*a*) the claimant disputes a payment response provided by the respondent; ~~or~~

(*b*) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11(2); or

(*c*) the claimant fails to receive payment by the due date of the response amount which he has accepted,

the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response or pay the response amount to the claimant, as the case may be."

8. To delete section 12(3).

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3 *Cf* ss 13(5) and 13(6) of the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (New South Wales).

4 *Cf* s 13(2)(c) of the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (New South Wales).

Amendment to Section 13

9. To amend section 13 as follows —

(a) By deleting section 13(1) and replacing it with the following subsection:

"(1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by serving a copy of the adjudication application on the respondent and on the same day lodging a copy of the adjudication application with an authorised nominating body together with a written record that the adjudication application had been received by the respondent."

(b) By deleting section 13(4) and replacing it with the following subsection:

"(4) The authorised nominating body shall, upon receipt of an adjudication application serve on the principal and the owner (if known) concerned a notice in writing that the application has been made."

(c) By deleting the word "(*b*)" in section 13(5).

Amendment to Section 14

10. To insert immediately after section 14(3) the following section 14(4):

"(4) In the event of the death, resignation or removal of an adjudicator after his appointment, the authorised nominating body shall appoint a substitute adjudicator within 7 days after having been notified of the relevant event referred to, and the time for the substitute adjudicator to make his determination shall be extended to 14 days after his appointment or within such longer period as may be requested by the adjudicator and agreed to by the claimant and the respondent."[5]

Amendment to Section 15

11. To delete section 15(1) and replace with the following:

"(1) A respondent shall, within 7 days after receipt of a copy of an adjudication application under Section 13(1) serve a copy of the adjudication response on the claimant and on the same day lodge a copy of the adjudication response with the authorised nominating body together with a written record that the adjudication response had been received by the claimant."

12. To delete sections 15(3)(*a*) and 15(3)(*b*) and revise the wording of section 15(3) as follows:

"(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless the reason was included in the relevant payment response provided by the respondent to the claimant."

13. To delete section 15(4) and replace with the following:

"(4) The authorised nominating body shall, upon receipt of an adjudication response serve on the principal and the owner (if known) concerned a notice in writing that the adjudication response has been lodged."

14. To delete the word "(*b*)" in section 15(5).

5 *Cf* r 14 of the Singapore International Arbitration Centre Rules 2013 (5th Ed).

Amendment to Section 17

15. To delete section 17(1) and replace with the following:

" (1) An adjudicator shall determine an adjudication determination —

(*a*) within 14 days after the commencement of the adjudication; or

(*b*) within such longer period as may have been requested by the adjudicator and agreed to by the parties, or failing agreement by the parties such further period not exceeding 14 days as may be granted by the authorised nominating body on the application of the adjudicator."

16. To add the following to section 17(3):

"(*i*) where section 15(3) applies, the adjudicator should consider whether *prima facie* the value of the construction works carried out or the goods or services supplied in respect of the claimant's claim has been made out."

17. To amend section 17(5) as follows:

"(5) If, in determining an adjudication application, an adjudicator has determined in accordance with section 7 —

(*a*) the value of any construction work carried out under a construction contract; or

(*b*) the value of goods or services supplied under a contract,

the adjudicator (or any other adjudicator) shall, in any subsequent adjudication application that involves the determination of the value of that work or of those goods or services, give the construction work or the goods or services, as the case may be, the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value thereof has changed since the previous determination <u>or that the value should change based on material that was not in existence during the period when the previous determination was made</u>."

18. To add section 17(5A) as follows:

"(5A) An adjudicator may determine his own jurisdiction, including a plea that he has no jurisdiction and any objections to the existence or validity of the construction contract, at any stage of the adjudication proceedings."[6]

Amendment to Section 18

19. To amend sections 18(1) and 18(2) as follows:

(a) By deleting sections 18(1) and 18(2) and substituting the following subsections:

"(1) This section shall apply to adjudications —

(*a*) where the adjudicated amount —

(i) is lower than the relevant claim amount; or

(ii) exceeds the relevant response amount

by the prescribed amount; or

(*b*) where the adjudicator has rejected the adjudication application.

(2) A party aggrieved by the determination of the adjudicator may, within 7 days after being served the adjudication determination, lodge an application

6 *Cf* s 21(1) of the Arbitration Act (Cap 10, 2002 Rev Ed).

for the review of the determination with the authorised nominating body with which the application for the adjudication had been lodged under section 13."

20. To amend section 18(7)(*a*) as follows:

"(*a*) section 14(1), (2) and (4) shall apply with the necessary modifications; and"

Amendment to Section 19

21. To amend section 19(6) as follows:

(a) By deleting "(*h*)" and replacing it with "(*i*)" at paragraph (*a*).

(b) By inserting a new paragraph (*c*) as follows:

"(*c*) while complying with section 16(3), shall not be bound or limited by the scope of the submissions made by either party at the adjudication review."

Amendment to Section 27

22. To amend section 27 by inserting the following subsection:

"(6) On an application to set aside an adjudication determination under this section, the court may by order:

(*a*) confirm the adjudication determination;

(*b*) vary the adjudication determination;

(*c*) remit the adjudication determination to the adjudicator, in whole or in part, for reconsideration in the light of the court's determination; or

(*d*) set aside the adjudication determination in whole or in part."[7]

Amendment to Section 31

23. To amend section 31(4) as follows:

"(4) Where an adjudication application is rejected or withdrawn or terminated or the dispute between the claimant and respondent is settled, the adjudicator is entitled to be paid the fees and expenses in relation to the adjudication up to, and including, the date on which the adjudication application is rejected or withdrawn or terminated or the dispute is settled, as the case may be."

Amendment to Section 37

24. To amend section 37 as follows:

(a) By inserting immediately after section 37(1)(*c*), the following paragraph:

"(*d*) in such manner (including by electronic mail) as may have been agreed between the parties."[8]

7 *Cf* s 49(8) of the Arbitration Act (Cap 10, 2002 Rev Ed).

8 *Cf* s 31(1)(e) of the Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (New South Wales).

B. PROPOSED AMENDMENTS TO THE REGULATIONS[9]

Amendment to Regulation 5

25. To delete regulation 5(1).

Amendment to Regulation 7

26. To amend regulation 7(2A) as follows:

"(2A) The adjudicator appointed under section 14 of the Act may, at any time before the making of the determination and on such terms as to costs or otherwise as he thinks just, allow such amendments (not being limited to clerical mistakes, accidental slips or omissions, or defect of form) which do not prejudice the respondent to be made to an adjudication application as he thinks fit."

27. To amend regulation 7(3) by deleting the words "section 13(4)(*b*)" and replacing them with "section 13(4)".

Amendment to Regulation 8

28. To amend regulation 8(2) by deleting the words "section 15(4)(*b*)" and replacing them with "section 15(4)".

Amendment to Regulation 10

29. To amend regulation 10(1) by deleting the words "respondent who is a".

Amendment to Regulation 14

30. To amend regulation 14 as follows:

(a) In relation to regulation 14(1), by deleting the words "the respondent" and replacing them with the words "the applicant for adjudication review proceedings".

(b) In relation to regulation 14(2)(*a*), by deleting the words "the respondent's initial deposit" and replacing them with the words "the applicant's initial deposit".

(c) In relation to regulation 14(2)(*b*), by deleting the words "the respondent" and replacing them with the words "the applicant".

(d) In relation to regulation 14(2), by deleting the words "may require the respondent" and replacing them with the words "may require the applicant".

(e) In relation to regulation 15(5), by deleting the words "the respondent" and replacing them with the words "the applicant".

9 Building and Construction Industry Security Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed).

SCHEDULE B

MATTERS THAT WERE CONSIDERED AND NOT ADOPTED BY THE LAW REFORM COMMITTEE ON 8 APRIL 2015

The following other main areas for amendment were raised for discussion in the original paper by Chow Kok Fong and Edwin Lee, but were not adopted by the Committee for the reasons given below:

TOPIC 1: "CLAIMS FOR PROLONGATION COSTS

1 There is some difference in views in Singapore as to whether the Building and Construction Industry Security Payment Act[1] ('SOP Act') extends to claims for disruption and prolongation arising from extensions of time granted under the contract. The minority view is that the scope of the Act is confined only to payment claims for physical construction work because disruption and prolongation claims should be thought of as a form of damages for breach of contract and adjudicators are not in a position to assess such damages. This issue is often advanced as a jurisdictional issue, affecting the adjudicator's power to make the determination. So far this issue has not come before the courts.

2 The majority takes the position as that settled in the UK, Australia and New Zealand that, on a purposive reading of the respective statutes in each of these jurisdictions, the regime is intended to extend to prolongation claims. The leading decision in New South Wales is the Court of Appeal decision in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*[2] following the similar position taken in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd*.[3] In the UK, there are many decisions on this point, most notably *Balfour Beatty Construction Ltd v London Borough of Lambeth*[4] and *Try Construction Ltd v Eton Town House Group Ltd*.[5] In New Zealand, the point has been authoritatively settled by the New Zealand Court of Appeal in *George Developments Ltd v Canam Construction Ltd*.[6]

3 The minority's view is difficult to reconcile with the thrust of the Latham Report. The cash flow of parties who carry out construction work is as likely to be affected by the withholding of payments for 'physical construction work' as by the withholding of payments on account of prolongation expenses incurred when the works are disrupted or suspended. In any case, the delineation between items of work which are relevant in the assessment of disruption and prolongation claims (such as site preliminaries and equipment) and items of physical work (such as reinforced concrete) is at best coarse. This is because the rates and the sums priced are subject to the distribution of costs considered appropriate by the contractor at the time of tendering.

4 Conceptually, there is no difficulty in addressing these claims in adjudication. In our view, the better position is to consider it as an issue of proof. It should be left to the

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1 Cap 30B, 2006 Rev Ed.
2 [2005] NSWCA 228.
3 [2004] NSWSC 116.
4 [2002] EWHC 597; (2002) 84 ConLR 1.
5 [2003] EWHC 60; (2003) 87 ConLR 1.
6 [2006] 1 NZLR 177.

adjudicator to determine whether, within the time allowed for the making of the adjudication determination and on the materials properly before him, the claimant has made its case for these claims. At present a majority of adjudicators in Singapore allow for these claims where the terms of the contract provide a basis for these claims. For example, most contracts contain a section called 'Preliminaries Bill'. This contains prices for items such as supervisory costs or insurances. The costs of these items inevitably vary when the period of construction is extended.

5 It seems to us desirable to avoid arguments as to the admissibility of these claims in adjudication. We recommend that the SOP Act should expressly state that the ambit of the Act extends to prolongation claims."

Committee's view:

It was considered that there was no pressing need for amendment, given that the majority of adjudicator's determinations accorded with the position set out in New South Wales.

TOPIC 2:
"NOTICE OF INTENTION TO MAKE AN ADJUDICATION APPLICATION

6 Section 13(2) of the SOP Act provides that, before making any adjudication application, the claimant has to notify the respondent of his intention to apply for adjudication of the payment claim dispute ('adjudication notice').

7 At present, section 13(2) of the SOP Act provides for the adjudication notice to be served after the expiry of the dispute settlement period[7] and before the filing of the adjudication application. In practice, most claimants choose to comply with the letter of this provision by serving the adjudication notice merely hours before they lodge the adjudication application. The adjudication notice served in this manner is of limited use to the respondent. Its only purpose is to alert the respondent that the adjudication process has already been triggered and that they may expect to be served with the adjudication application in due course by the ANB (authorised nominating body).

8 For the purpose of encouraging parties to negotiate and settle their disputes before resorting to adjudication and to further reduce the likelihood of ambush, we suggest that the adjudication notice should be considered in relation to the dispute settlement period. It is more useful for the adjudication notice to be served before the start of the dispute settlement period. If the respondent fails to serve a payment response, this should be pointed out in the adjudication notice and the respondent can rectify this within the seven-day dispute settlement period.

9 This change should again reduce the likelihood of ambush. By expressly drawing the attention of the respondent to the start of the dispute settlement period it affords the respondent an opportunity to review his position and where necessary file a payment response (if he had not done so) or amend his payment response. We think this makes for a more constructive use of the dispute settlement period."

Committee's view:

The risk of ambush would have been reduced by the introduction of the notice in the payment claim that it was a claim made under the Act.

7 As required under ss 12(4) and 12(5) of the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed).

TOPIC 3:
"CURING OF IRREGULARITIES

10 At present, an adjudicator may dismiss an adjudication application on the ground that the claimant fails to comply with certain requirements prescribed under the SOP Act, regardless as to the materiality of the requirements. As a consequence, the claimant in this situation is required to relaunch a new payment claim and re-apply for adjudication. We consider it useful that an adjudicator should be vested with a power akin to that provided under Order 2 rule 1 of the Rules of Court.[8] An adjudicator should be empowered to allow certain irregularities to be cured for the purpose of savings of costs and ensuring that the underlying dispute is fairly disposed of.

11 The issue is particularly important because the SOP Act tends to over-state the mandatory character of certain procedural matters. This was observed in *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd*[9] where the payment claim in question failed to comply with regulation 5(2)(*c*)(iii)–(iv) of the Building and Construction Industry Security Payment Regulations.[10] Woo J in that case decided that a payment claim should only be invalidated if the instance of non-compliance was 'so important that it was the legislative purpose that an act done in breach of those provisions should be invalid'. This decision is consistent with the approach taken by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*[11] and it is sound on policy considerations. However, the salutary effect of these jurisprudential developments can be enhanced by embedding the distinction between mandatory and non-mandatory requirements in the statute itself.

12 For example, some adjudicators have ruled that an adjudication application which fails to include sufficient extracts of the underlying contract is invalid, notwithstanding that in many situations a respondent is not necessarily prejudiced. It is considered that the test in this case should be whether any omission in terms of form or documentation goes towards prejudicing the other side in terms of their ability to respond to a payment claim and whether the defect can be remedied, for example, by the adjudicator granting leave to enable the respondent to submit on this issue or file supplementary materials within the timeline allowed for making the determination. A provision akin to Order 2 r 1 of the Rules of Court would reduce these and other technical objections and ensure that the statutory process is engaged at the end of the day to address the substantive issues between the parties in relation to a payment dispute."

Committee's views:

The need for the adjudicator to assess prejudice to the parties brought about by any irregularities would add to the material that may be raised to the adjudicator and the matters that the adjudicator would have to consider. Further, what is stated in the current case law would suffice as a guide to adjudicators.

8 Cap 322, R 5, 2014 Rev Ed.
9 [2013] 2 SLR 776.
10 Cap 30B, Rg 1, 2006 Rev Ed.
11 [2013] 1 SLR 401.

TOPIC 4:
"RECOURSE TO THE SUPERVISORY JURISDICTION OF THE COURTS

13 An important issue was clarified in *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd*.[12] The High Court held in that case that an application to set aside an adjudication application under section 27 is an appeal to the supervisory jurisdiction of the courts. This is open to either of the parties and not just the respondent. While the decision has settled the issue, we think it is useful for the language of section 27 to be suitably amended to make this point clear.

Forum

14 It has been suggested that applications to the court in respect of SOP matters should be heard by a judge of the High Court (as is the case in Australia) instead of an assistant registrar.[13] In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd*,[14] the Court of Appeal determined that in exercising its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination or a section 27 judgment, the court is essentially exercising its supervisory jurisdiction. Although the issue is now settled, for ease of reference and to avoid any doubt, we recommend that the proposition that this supervisory jurisdiction shall be exercised by the High Court should be stated in the Act itself."

Committee's views:

This matter has already been settled by the court decisions.

12 [2015] 2 SLR 70.
13 Chan Sek Keong, "Foreword" in Chow Kok Fong, *Security of Payments and Construction Adjudication* (Lexis Nexis, 2nd Ed, 2013) at p vii, para 8.
14 [2015] 1 SLR 797.

TOPIC 5:
"APPOINTMENT ISSUES

Establishing conflict

15 Conflict situations should be defined plainly in the SOP Act for two reasons. First, many adjudicators are drawn from the construction professions. They are non-lawyers and they should not be subject to spurious challenges on this front. Secondly, the period for appointment is short and there is considerable time pressure on potential appointees to clear issues of conflict and block off time in their diary for the appointment.

16 We recommend that the principles for determining conflict for adjudication purposes should not be unduly complex so that these could be cleared with reasonably expediency to enable appointments to be made within the seven-day time frame. In our view, a candidate should be considered sufficiently independent to accept an appointment if:

(a) the candidate has no direct interest in the outcome; and

(b) over the period of three years preceding the adjudication application, the candidate has no business dealings with the parties involved, either personally or by virtue of the candidate's association with or employment by a firm."

Committee's views:

This can be provided for in the Singapore Mediation Centre Rules.

PROPOSALS FOR AMENDING
THE BUILDING AND CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT ACT

Chaired by: Philip Chan

Submitted by: Chow Kok Fong and Edwin Lee Peng Khoon

AN EXECUTIVE SUMMARY

1. The purpose of the reform proposals is to reduce uncertainties that have mired the operation of the Act. The suggested amendments are directed at simplifying and clarifying the basic processes of the Act; the objective is to reduce the cost and time associated with compliance.

2. All adjudication determinations from 2005 to 2013 were reviewed. From them, the commonly-occurring procedural and jurisdictional challenges were identified. Experienced adjudicators were also consulted on earlier drafts of the proposals, for their concerns with the Act's application and suggested solutions.

3. The basic structure and central features of the statutory adjudication process are sound. It would be premature to consider amendments which may tilt the scales of any single constituency in one direction or the other. The approach to the proposals has therefore been to refine and improve a number of the Act's important provisions while retaining the essential features of the statutory regime.

4. The main proposals for reform are as follows:

(a) Multiplicity of timelines – to avoid the many permutations and multiple timelines provided for in the Act, we have recommended the abolition of the distinction between supply contracts and construction contracts. We have also conflated the timelines for the filing of the adjudication application, and for the making of the adjudication determination. All these would go towards streamlining the process and avoid confusion to the users of the Act.

(b) Payment claim timelines – we have proposed to do away with the Act prescribing when payment claims may be served. Instead, we have left it to be served by the claimant whenever it considers it to be appropriate. This would be subject to the proviso that the interval between payment claims should not be less than a month, and the claim should state that it is made under the Act. This proposal would avoid the oft-encountered situation where instead of spending time and effort on determining the merits of the claim, an adjudicator has to address the challenge by a respondent that the payment claim has been filed at the wrong time. Often, this would involve the

interpretation of the terms of the contract and a consideration of whether other contract terms have been incorporated by reference.

(c) Limitation period for payment claims – while repeat claims should be allowed, we have proposed to have limitation periods for the issuance of payment claims. This seeks to strike a balance between a claimant's interest to submit its claim for adjudication and the respondent's right not to risk being ambushed by a claimant years after the completion of the works. A limitation of one year after the last work was done or three months from the time when the retention or bond ought to have been released (whichever is the later) is proposed.

(d) Absence of payment response – in the absence of a payment response, an adjudicator would still have to determine the claim on the merits. For standard of proof, adjudicators have either applied the "patent error" test or required proof on a balance of probabilities. We have proposed a standard that is somewhat in-between – whether *prima facie* the claim has been made out, notwithstanding the lack of a response.

(e) Adjudicator's powers – empowering adjudicators to allow amendments to the adjudication application would save applications from being rejected on grounds of technical non-compliance even when no real prejudice has been caused to the respondent. We have so proposed.

(f) Service by email – where parties have agreed to use email as a mode of service of documents, we have proposed that this should be a mode recognised by the Act.

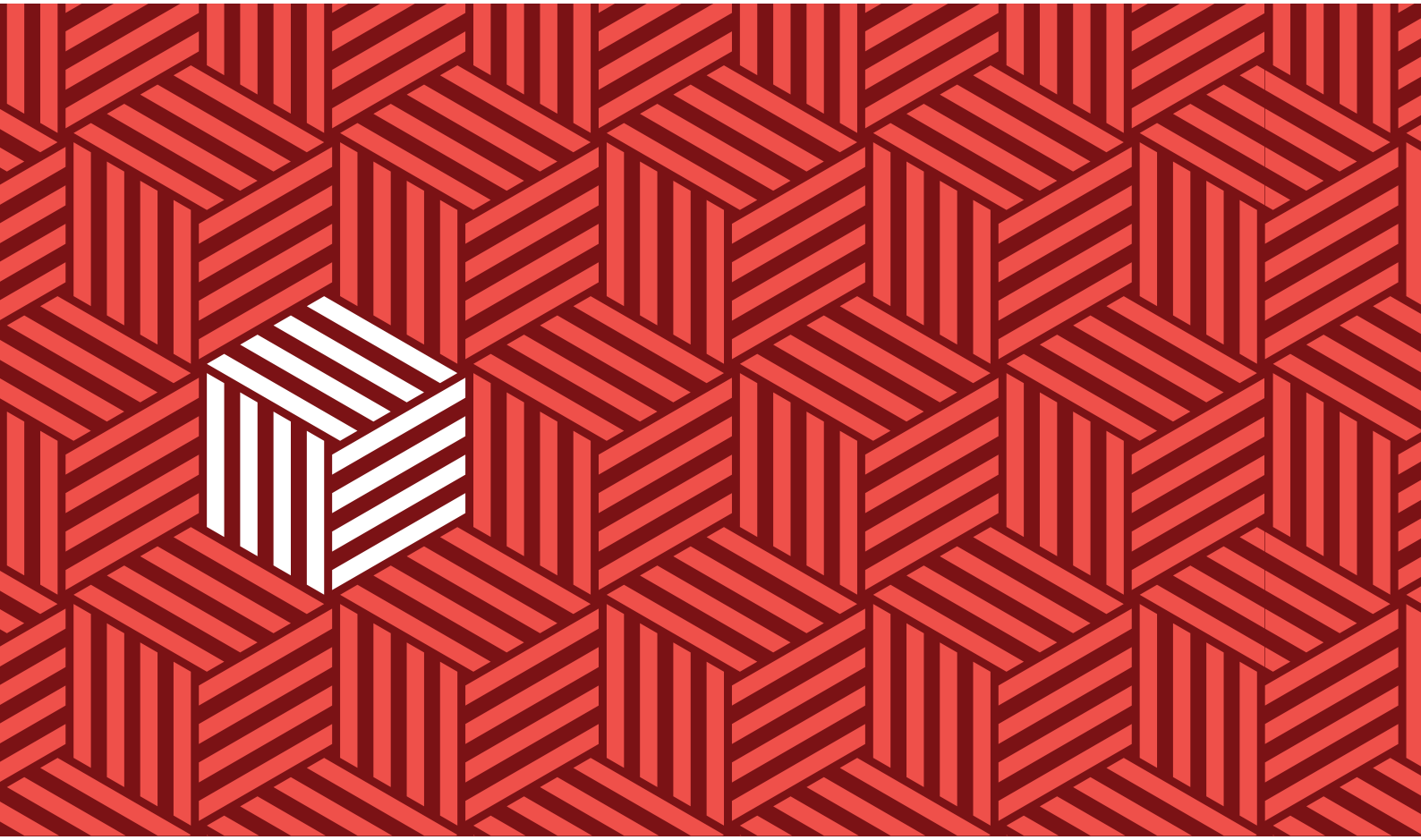
(g) *Kompetenz-kompetenz* – adjudicators commonly encounter challenges to their jurisdiction. We have proposed to allow for adjudicators to be able to decide their own jurisdiction.

(h) Administration of the regime – to facilitate administration, we have proposed that:

(i) the Singapore Mediation Centre should have the power to renominate adjudicators, with timelines being extended accordingly;

(ii) "day" in the Act should refer to working days; and

(iii) claimants and respondents should directly serve their adjudication applications and responses on each other, rather than have the Singapore Mediation Centre do so.



ISBN 978-981-09-9024-4