

Building and Construction Industry Security of Payment (SOP) Act

by
*Lim Jue Meng
Jennifer Leong
Ng Cher Cheng*



Introduction to SOP

- Background
- Objectives of Act
- Principles of Act
- Key Provisions of Act
- Feedback and Concerns



2

Background

- Since the economic downturn, annual construction demand has fallen. Cashflow problems worsen and resulted in project failures, and non-payment or delayed payment to contractors, subcontractors and suppliers.
- BCA held dialogue sessions with the industry and major public agencies to explore measures for improvement.
- Studied overseas SOP models in Australia, UK and New Zealand



3

Background

- BCA conducted extensive consultations to come up with the features of the Act.
 - **Industry Parties:** REDAS, SCAL, SIA, IES, ACES, SISV, Six+6TA, SFIC
 - **Public Agencies:** MOE, HDB, LTA, JTC, PUB, DSTA, CAAS, MOF
 - **Legal Profession:** SMC, SIAC, Law Society of S'pore, S'pore Academy of Law
- The Bill was introduced in the Parliament on 19 Oct and passed on 16 Nov 2004.



4

Objectives of SOP Act

- Improve cash flow by upholding rights of parties to seek progress payments for work done and goods/services supplied.
- Provide quick and low-cost resolution of payment disputes through adjudication.



5

Principles of SOP Act

- Any party who has carried out construction work or supplied goods or services is entitled to payments.
- Any party who is not paid (after adjudication) for work done is allowed to suspend work.
- "Pay when paid" clause in contracts made unenforceable.
- Provisions to contract out of the Act is void.



6

Parts of Act

- The Act comprises of 7 parts (42 sections):-
 - PART I - Preliminary
 - PART II - Rights to Progress Payments (entitlement, valuation, due date, pay when paid provision)
 - PART III - Payment Claims and Responses
 - PART IV - Adjudication of Payment Claim Disputes (procedure, determination and its effect, payment of adjudicated amount)



7

Parts of Act

- PART V – Measures to Enforce Payment of Adjudicated Amount (consequence, direct payment, lien, right to suspend work, judgment debt)
- PART VI – General Provisions on Adjudication (Authorised nominating bodies, adjudicators, adjudication costs, confidentiality, effect on other proceedings)
- PART VII – Miscellaneous (No contracting out, service of documents, exemption, Minister's powers, regulations)



8

Commencement of Act

- The Act shall come into operation on 1st Apr 2005.



9

Application of Act

Application

- Applies to all written contracts for: -
 - Construction work and consultancy services; and
 - Supply of goods or materials for construction projects.
- Contracts are classified into construction and supply contract.



10

Application of Act

Interpretation & definitions

- “Construction contract” means 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 other parties; or
 - One party undertakes to supply services to one or more other parties.



11

Application of Act

- “Construction work” means: -
 - Construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of building or structures or any works (eg road works, power lines, telecommunication apparatus, pipelines, water mains, sewers) that form, or are to form, part of the land.



12

Application of Act

- Installation of fittings that form, or are to form part of the land, eg. Air-conditioning, ventilation, drainage, sanitation, fire protection.
- Any operation or preparatory works, eg land reclamation, site clearance, foundations, scaffolding prefabrication of components, landscaping.
- External/internal cleaning or painting/decorating of external/internal surfaces.



13

Application of Act

- Examples of “Services” are
 - Conduct feasibility studies
 - Planning services
 - Engineering services
 - Architectural or design services
 - Quantity surveying services
 - Project Management services



14

Application of Act

- “Supply contract” means an agreement under which:-
 - One party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work;
 - The supply is for the purpose of construction work carried out;
 - The first-mentioned party is not required to assemble, construct or install the goods.



15

Application of Act

- “Goods” means
 - Materials or components to form part of any building, structure or works arising from construction work; or
 - Plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work.
- Detailed definition of construction work, goods and services is in Section 3.



16

Application of Act

Application

- Act does not apply to: -
 - Works or supply of goods/services for residential properties that do not require building plan submission (e.g. renovation work in HDB flats).
 - An employee of the party for whom the work is to be carried out.



17

Application of Act

- Work or goods/services carried out outside Singapore.
- Subcontracts will be exempted for 6 months following 1st Apr 05 if main contract is awarded before 1st Apr 05. Thereafter all written contracts will be included



18

Application of Act

- Contracts made in writing
 - Regardless of written contract is signed or unsigned
 - Contract is made by exchange of written communication
 - A non written contract but is recorded by any party authorised to do so
 - Parties agree by reference to terms in writing



19

Rights to Progress Payment

Entitlement

- Any person who has carried out construction work, or supplied good/services is entitled to a progress payment.
- Progress payment includes: -
 - a single or one-off payment; or
 - a payment based on event or a date (eg. monthly payment).



20

Rights to Progress Payment

Amount

- Amount of progress payment is calculated: -
 - in accordance with the contract terms; or
 - if contract does not provide, on the basis of the value of the work done, or goods/services supplied.



21

Rights to Progress Payment

Valuation

- Valuation of construction work or goods/services: -
 - in accordance with contract terms; or
 - if not stated in contract, having regard to
 - Contract price
 - Any other rate or price specified in the contract;
 - Any adjusted contract price or rate agreed by the parties.
 - In the absence of the above 3, it shall be based prevailing rates or prices.



22

Pay when Paid is void

- Pay when paid provision in contract is void and has no effect in relation to any payment for work done or goods/services supplied.
- The Act defines the meaning of pay when paid provision.



23

Payment Claims and Responses

Serving claim

- A payment claim shall be served:
 - at such time in accordance with the contract; or
 - if the contract does not provide, by the last day of each subsequent month.



24

Payment Claims and Responses

- A payment claim shall:
 - state the claimed amount, calculated by reference to the period to which the payment claim relates;
 - be in writing;
 - identify the contract to which the progress payment relates;
 - describe the items and specify the quantity;



25

Payment Claims and Responses

- include breakdown of the items;
- be supported with calculations of the claimed amount (ie show basis how the claimed amount is derived).



26

Payment Claims and Responses

Serving response

- Payment response is required for construction contracts. No need for payment response for supply contracts
- The respondent must respond to the payment claim by providing a payment response to the claimant:
 - by the date specified in the contract; or within 21 days after the payment claim is served, whichever is the earlier; or
 - if the contract does not provide, within 7 days after the payment claim is served.



27

Payment Claims and Responses

- A payment response shall:
 - identify the payment claim to which it relates;
 - state the response amount (nil amount to be indicated if the respondent does not wish to pay any amount);
 - in writing and addressed to the claimant
 - give reasons for any amount withheld together with supporting calculations;



28

Payment Due Date

Payment due date for construction contract

- Payment due date is the earlier of the following dates:
 - The date specified in the contract;
 - 35 days after
 - The date tax invoice is submitted to the respondent (if claimant is a taxable person under the GST Act); or
 - The date which the payment response is required to be provided.



29

Payment Due Date

- If not stated in the contract, payment due date shall be 14 days after
 - The date tax invoice is submitted to the respondent (if claimant is a taxable person under the GST Act); or
 - The date which the payment response is required to be provided.

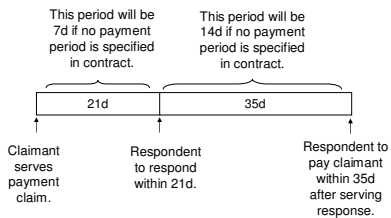


30

Payment Due Date

Periods for response and payment

(For Construction Contracts)



31

Payment Due Date

Payment due date for supply contract

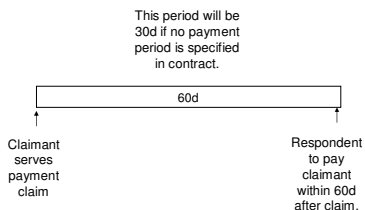
- Payment due date is the earlier of the following dates:
 - The date specified in the contract;
 - 60 days after the claim is served.
- If not stated in the contract, payment due date shall be 30 days after the claim is served.

32

Payment Due Date

Periods for claims and payment

(For Supply of Goods Contracts)



33

Payment Due Date

Payment on interest due

- Interest payable on unpaid progress payment that has become due shall be:-
 - The rate specified in the contract; or
 - Where the contract does not provide, at the rate prescribed in respect of judgment debt under the Supreme Court of Judicature Act.

34

Adjudication of Disputes

Introduction to adjudication

- An alternative form of dispute resolution
- Simpler, faster and less expensive compared to arbitration or litigation
- Aims to achieve interim settlement
- Only a claimant can initiate adjudication
- Consent of all parties not required

35

Adjudication of Disputes

Introduction to adjudication

- An independent adjudicator determines the amount payable (adjudicated amount)
- Adjudication determination is binding on parties
- Parties can still pursue their contract rights in Court or arbitration

36

Adjudication of Disputes

Comparison of Dispute Resolution Cost

Adjudication	Arbitration	Litigation
Adjudicator's fee is \$250/hour [Max=10% of claimed amount exceeding \$20,000, or about \$28,000 (14 days) whichever is lower].	Arbitrator's fee from \$300 to \$800 per hour. Total range from \$80,000 to \$100,000.	Court fee close to arbitrator's fee. For a 14-day hearing: Court fee is about \$65,000.
Adjudication requires no or little involvement of lawyers. Lawyers' fee is minimal.	Lawyers' fee is much higher. About 2 to 5 times or more of the arbitrator's fee.	Lawyers' fee is same as in arbitration.



37

Adjudication of Disputes

Comparison of Dispute Resolution Time

Adjudication	Arbitration	Litigation
Take 21 days to complete from application of adjudication.	Take 6 months or more to complete upon appointment of arbitrator.	Usually a few months. Court hearing is faster than arbitration.



38

Adjudication of Disputes

Authorised Nominating Body (ANB)

- An organisation authorised to:
 - train and appoint adjudicators
 - maintain register of adjudicators
 - administer codes of conduct / practice
 - establish the schedule of fees
 - manage and facilitate adjudication process



39

Adjudication of Disputes

Establishing a right to adjudicate

- For construction contract:
 - respondent fails to respond to payment claim by payment response due date
 - respondent responds to payment claim but claimant disputes response amount
 - respondent responds to payment claim, claimant accepts but respondent fails to pay claimant by payment due date



40

Adjudication of Disputes

Establishing a right to adjudicate

- For first 2 instances under construction contract, there is a **7-day** dispute settlement period after payment response due date
- During settlement period,
 - parties may seek clarification
 - respondent may vary / serve payment response
 - claimant cannot apply for adjudication



41

Adjudication of Disputes

Establishing a right to adjudicate

- For supply contract:
 - respondent fails to pay claimant by the payment due date
 - respondent pays less than the claimed amount on or before payment due date and claimant disputes the amount



42

Adjudication of Disputes

Adjudication application

- Claimant applies to ANB for adjudication within **7 days** after:
 - payment due date (if respondent fails to pay by payment due date)
 - last day of settlement period (if dispute remains unresolved)
- Claimant notifies respondent on intention to apply for adjudication



43

Adjudication of Disputes

Adjudication application

- The application shall:
 - be accompanied by
 - a copy of the notice of intention to adjudicate, payment claim & payment response
 - the application fees & partial adjudicator's fees
 - state the particulars of the parties concerned
 - state the particulars of the relevant contract
 - contain an extract of the relevant terms / conditions of the contract



44

Adjudication of Disputes

Adjudication application

- ANB serves a copy of application on the respondent and notifies principal and owner
- ANB appoints adjudicator within **7 days** after receipt of application and confirms appointment with all parties



45

Adjudication of Disputes

Adjudication response

- Respondent to lodge adjudication response with ANB within **7 days** after being served a copy of the application
- Adjudication response should substantiate the reasons for amount withheld and contain the necessary details (eg. main contract award date) as prescribed in the Act & Regulations



46

Adjudication of Disputes

Adjudication response

- ANB serves a copy of adjudication response on claimant and notifies the principal and owner
- Reasons for withholding payment may be included only if these have earlier been communicated to the claimant (e.g. in payment response for construction contract or email in supply contract)



47

Adjudication of Disputes

Adjudication procedure

- Adjudication commences immediately after the end of the 7-day adjudication response period
- Adjudicator may decide on the procedural method (eg. document-only, conference or any combination) for adjudication



48

Adjudication of Disputes

Adjudication procedure

- The adjudicator shall reject adjudication application and response not lodged in proper order and not within the allowable 7-day period
- Adjudicator's power to determine an application is not affected by any parties' non-compliance



49

Adjudication of Disputes

Adjudication determination

- The adjudicator makes a determination within:
 - 7 days after commencement of adjudication (for construction contract) if the respondent fails to
 - serve a payment response and an adjudication response
 - pay the response amount accepted by the claimant by the relevant payment due date



50

Adjudication of Disputes

Adjudication determination

- 14 days after commencement of adjudication (in any other case); or
- any longer time requested by the adjudicator and agreed by the parties



51

Adjudication of Disputes

Adjudication determination

- Adjudicator's determination takes into consideration the following:
 - the SOP Act
 - the contract
 - payment claim & payment response
 - adjudication application & adjudication response
 - results of any inspection and any other relevant information



52

Adjudication of Disputes

Adjudication determination

- Adjudicator determines
 - the adjudicated amount,
 - interest payable,
 - date of payment, and
 - proportion of adjudication costs payable by each party
- ANB serves determination on claimant and respondent and notifies principal and owner



53

Adjudication of Disputes

Adjudication determination

- Respondent must pay the adjudicated amount within **7 days** after determination or by a later date determined by the adjudicator
- Adjudicator may, on own initiative or at claimant or respondent's request, correct clerical mistake or errors in determination



54

Adjudication of Disputes

Adjudication review

- Respondent may apply for adjudication review within **7 days** after the adjudication determination only if:
 - the respondent has paid full adjudicated amount
 - the difference between adjudicated amount and response amount is at least \$100,000
 - the respondent has earlier served a payment response under a construction contract



55

Adjudication of Disputes

Adjudication review

- The adjudication review application shall:
 - be accompanied by
 - the application fees & partial adjudicator's fees
 - a copy of the adjudication determination
 - contain proof of payment of the adjudicated amount



56

Adjudication of Disputes

Adjudication review

- ANB serves a copy of the review application on claimant and notifies principal and owner
- ANB appoints adjudicator within **7 days** after receipt of application and confirms appointment with all parties



57

Adjudication of Disputes

Review procedure & determination

- Adjudication review commences immediately after review adjudicator's appointment is confirmed
- Review is carried out under same boundaries as adjudication



58

Adjudication of Disputes

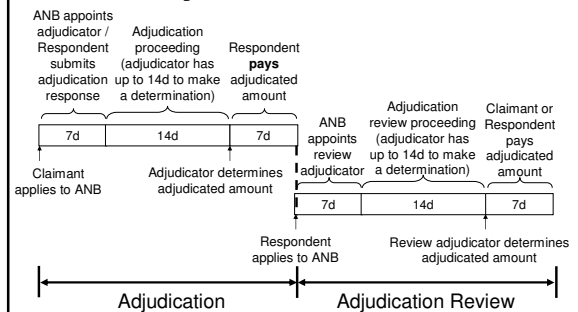
Review procedure & determination

- Review adjudicator makes determination within:
 - 14 days after commencement or
 - any longer time requested by adjudicator and agreed by the parties
- Party to pay within **7 days** after determination or by a later date determined by adjudicator



59

Adjudication Process



60

Adjudication of Disputes

Withdrawal of application

- Applicant serves a notice on the ANB to withdraw an adjudication or adjudication review
- Upon withdrawal, applicant is liable to pay the adjudicator's fees and expenses incurred



61

Adjudication of Disputes

Adjudication cost

- 2 main elements of cost:
 - the ANB application fees and adjudicator's fees and expenses
 - any other related costs and professional expenses that a party may incur
- Adjudicator will not award costs due to other professional expenses that a party may incur



62

Adjudication of Disputes

Adjudication cost

- Adjudicator decides which party is liable to pay the adjudication costs and the amount of contribution by each party
- Adjudicator may withhold determination until the adjudicator's fees are paid



63

Measures to Enforce Payment

Consequences of not paying adjudicated amount

- If respondent fails to pay after adjudication, claimant may:
 - serve written notice on respondent to place a lien on unpaid and unfixed goods
 - serve written notice on respondent to suspend work / supply
 - file adjudication determination as judgment debt



64

Measures to Enforce Payment

Direct payment from principal

- Principal may make direct payment to claimant if respondent fails to pay the adjudicated amount
- Principal can recover payment by deducting from subsequent payments to respondent or as debt due from respondent
- Applies to parties within a principal-respondent-claimant relationship (eg. developer-main contractor-1st tier subcontractor)



65

Measures to Enforce Payment

Direct payment from principal

- Procedure:
 - principal serves notice of direct payment on claimant and copies to respondent and owner
 - respondent to show proof of payment of adjudicated amount within **2 days**
 - principal entitled to make direct payment if respondent fails to show proof of such payment



66

Measures to Enforce Payment

Lien on goods supplied

- Claimant has the right to recover unpaid and unfixed goods when:
 - claimant is not paid adjudicated amount by due date
 - claimant has notified the respondent, principal and owner of his intention to exercise lien
 - the adjudicated amount remains unpaid **7 days** after notification is served



67

Measures to Enforce Payment

Lien on goods supplied

- Claimant has
 - no priority over liens on goods existing before the date on which the first mentioned lien arises
 - no rights to exercise lien
 - if a third party owns the items; or
 - for 21 days, when the principal (licensed housing developer) has served a direct payment notice



68

Measures to Enforce Payment

Suspension of work / supply

- Claimant has the right to suspend work / supply when:
 - claimant is not paid adjudicated amount by due date
 - claimant has notified the respondent, principal and owner of his intention to suspend
 - the adjudicated amount remains unpaid **7 days** after notification is served



69

Measures to Enforce Payment

Suspension of work / supply

- During suspension, the claimant is not liable for any loss or damage as a result of his suspension
- Principal and owner may recover loss from respondent under the contract or any law
- Claimant may recover loss or expenses from respondent if respondent removes any of the claimant's work during suspension



70

Measures to Enforce Payment

Suspension of work / supply

- Claimant must resume work / supply within **3 days** after:
 - claimant is paid the full adjudicated amount; or
 - principal (licensed housing developer) has served a direct payment notice;

(Claimant's right to suspend will resume if the developer fails to pay within 21 days after the notice)



71

Measures to Enforce Payment

Suspension of work / supply

- Claimant is liable for loss or damage if he fails to resume work / supply accordingly
- Contractual time limit, other than for the respondent, affected by the suspension shall be adjusted accordingly



72

Measures to Enforce Payment

Judgment debt

- The applicant may file an adjudication determination in a court, accompanied by an affidavit
- With leave of court, the determination may be enforced as judgment for the unpaid amount
- Any party applying to court to set aside the judgment must pay into court the unpaid amount as security



73

Effects of Adjudication

Effect of determination

- Adjudication determination is binding on parties unless:
 - the dispute is determined by a court or tribunal or settled by agreement of the parties; or
 - grant by the court to enforce determination as judgment debt is refused



74

Effects of Adjudication

Confidentiality

- Document and information created, made or disclosed for adjudication is confidential unless such disclosure is required for purpose under the Act



75

Effects of Adjudication

Effect on other proceedings

- Party may apply for adjudication even if the dispute is subject of a court proceeding or any other dispute resolution procedure
- Act does not limit one's contractual right to other dispute resolution procedure
- Application to court / other dispute resolution procedure does not affect or bring an end to the adjudication



76

Features Agreed by Industry

- Apply to written contracts only
- Scope of works and services
- Ban "Pay when Paid" provision
- Provide for adjudication review
- Provide for direct payment in principal-responder-claimant relationship
- Allow for dispute settlement period
- Allow suspension of work only if not paid after adjudication



77

Feedback Partially or Not Accepted

- No maximum time limits for serving payment response and making payment
- Architect's certificate not subject to adjudication
- Apply only to main contracts awarded after commencement date and then all subcontracts of these main contracts
- Cover insolvency cases



78

Thank you



79