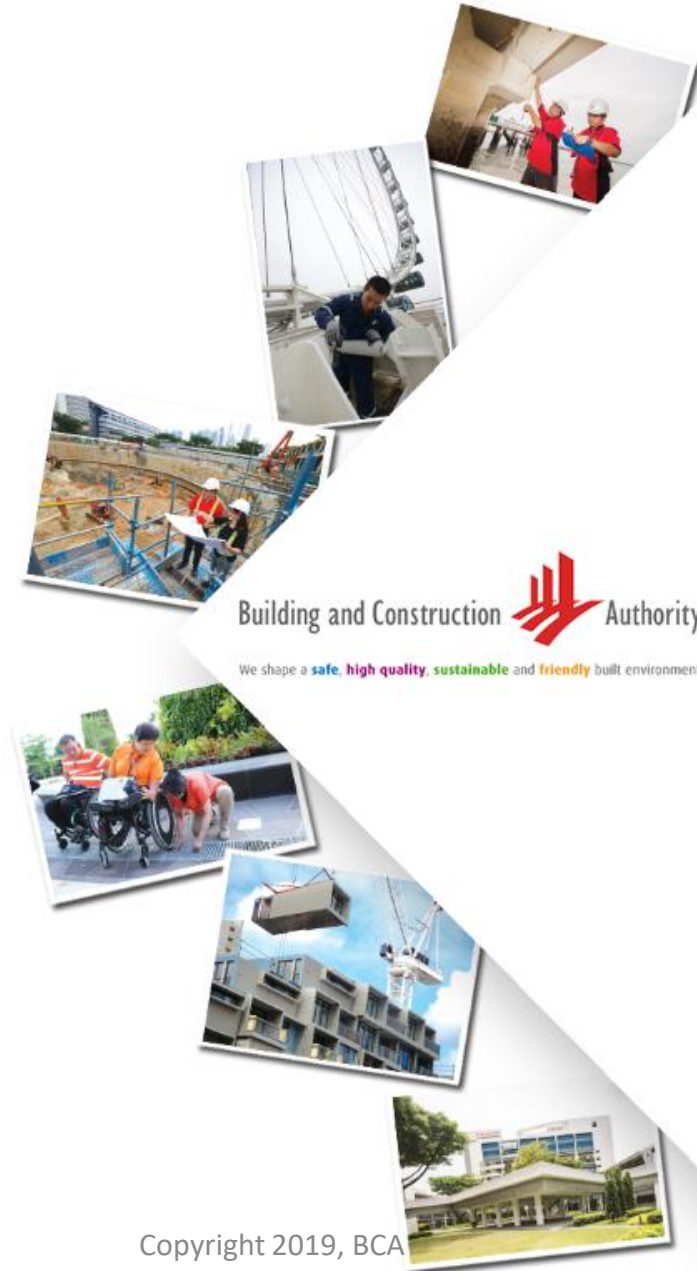


Security of Payment (Amendment) Act / Regulations



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AGENDA

- Background of the Building & Construction Industry Security of Payment (SOP) legislation
- Amendments to the SOP Act (SOPA) and Regulations
 - 1) Scope of Application
 - 2) Payment Claim, Payment Response
 - 3) Adjudication process
 - 4) ANB and adjudicators, Courts

BACKGROUND

- Main objectives of SOPA:
 - ❖ Preserve the rights to payment for work done and goods supplied of all the parties in the construction industry.
 - ❖ Facilitate cash flow by establishing a fast and low cost adjudication system to resolve payment disputes.
- Recent review to address:
 - ❖ Feedback from Industry, e.g. CIJC, STAS, GPEs, SAL, SMC and adjudicators, etc *
 - ❖ Latest industry development (e.g. DfMA)
 - ❖ Case law decided by Courts



*CIJC: Construction Industry Joint Committee, STAS: Specialist Trade Alliance of Singapore, GPEs: Government Procuring Entities, SAL: Singapore Academy of Law, SMC: Singapore Mediation Centre

AMENDMENTS

(A) Scope of application

(B) Payment claims and payment responses

(C) Adjudication processes

(D) Role of ANB and adjudicators, Courts

OVERVIEW

Scope of Application

1. Rights of recourse notwithstanding contract termination
2. Extend SOPA coverage relating to production of prefabricated components
3. Final payment claims are covered under SOPA
4. Damages, loss and expense NOT to be adjudicated
5. Allowable modes for Service of Documents
6. Minimum interest rate for late payment

Payment Claim & Response

7. Allow early service of payment claim
8. Unpaid payment claims can be included in subsequent payment claims
9. A shorter time limit for service of payment claims
10. Extend default period for payment response from 7 days to 14 days
11. Requiring acceptance of payment response to be in writing
12. Requiring reasons for non-payment of supply contract to be in writing
13. Default date for payment claim pegged to the last day of each month

Adjudication Process

14. Respondent prohibited from raising objections if not raised at the onset
15. Allow claimants to lodge an adjudication review
16. Safeguard adjudicated amount pending respondent's adjudication review
17. Discretion for adjudicators to accept a non-compliant adjudication application
18. Allow adjudicators to extend adjudication time for simple cases

ANB and adjudicators, Courts

19. Allow replacement adjudicator or replacement review adjudicator
20. Adjudicators to disclose potential conflict or ineligibility at any time
21. Clarify situations when an adjudicator must disclose any conflict of interest
22. Grounds to set aside an adjudication determination in Court
23. Court's power when hearing a setting aside application
24. Allow adjudicators to collect expenses incurred
25. Prescribing duties and roles of ANB in the Regulation
26. ANB to perform their duties with reasonable care

1. Rights of recourse notwithstanding contract termination

Current Provision

- SOPA is silent on whether it covers claims made under terminated contracts.

Amendment

- SOPA applies to a contract that has been terminated.
- Claims can be raised only for work done or goods/services supplied before termination.
- Contract provisions relating to termination that allows suspension of payments have to be followed.

*For all processes after
Commencement Date*

Rationale

- To ensure claimants have the right to rely on SOPA for works carried out or goods and services supplied before a contract is terminated, while respecting relevant contractual provisions.

2. Extend SOPA coverage relating to production of prefabricated components

Current Provision

- SOPA does not apply to 'construction work' carried out outside Singapore.
- Definition of 'construction work' includes prefabrication of components.

Amendment

- SOPA applies to ***overseas production of prefabricated components*** for use in Singapore projects.
- SOPA also applies to ***locally produced prefabricated components*** for use in overseas projects, where both parties are Singapore registered entities.

*For all processes after
Commencement Date*

Rationale

- To support greater adoption of prefabrication and support our push for internationalisation.

3. Final payment claims are covered under SOPA

Current Provision

- SOPA is silent on whether final payment claims are covered.

Amendment

- SOPA applies to final payment claims.

*For all processes after
Commencement Date*

Rationale

- To preserve the claimant's entitlement to adjudication before resorting to other means of dispute resolution, even without any additional work done or good/services supplied.

4. Damages, loss and expense NOT to be adjudicated

Current Provision

- SOPA is silent on the adjudicator's power to decide on damage, loss or expense items included in a payment claim or payment response.

Amendment

- Adjudicators should only consider damage, loss or expense which is supported by a written agreement between parties or a document/certificate issued under the contract.

For payment claims served after Commencement Date

What are some examples of these documents?

These can be payment certificates, certificate of substantial completion, etc

Rationale

- Adjudication is meant to provide a fast resolution of disputes. This will prevent the adjudication process from being delayed by the assessment of complicated items on damage, loss or expense.

5. Allowable modes for Service of Documents

Current Provision

- Documents may be served by:
 - personal delivery;
 - leaving at usual place of business during normal business hours;
 - post or facsimile.

Amendment

- Document must be served by:
 - *any of the existing methods as above;*
 - email;
 - an instant messaging platform consented to by the parties in an agreed file format.

*For payment claims served
after Commencement Date*

Rationale

- To allow documents to be served using latest technologies.
- To clarify that other modes of service will not be permitted, so as to remove contention during adjudication.

6. Minimum interest rate for late payment

Current Provision

- Interest payable on unpaid amount of a progress payment shall be:
 - at the rate specified in the contract or
 - the rate for judgement debts under the Supreme Court of Judicature Act (if contract is silent).

Amendment

- Interest payable on unpaid amounts shall be the higher of:
 - the rate specified in the contract or
 - the rate for judgment debts under the Supreme Court of Judicature Act (currently 5.33% pa).

*For all processes after
Commencement Date*

Rationale

- To create an impetus for respondents to make payments on time, so as to ensure continued cash-flow for the claimants.

7. Allow early service of payment claim



Current Provision

- Payment claim are to be served at such time as stipulated under the contract.



Amendment

For new contracts entered after Commencement Date

- Payment claim can be served earlier but will be deemed to have been served on the last day for service stated in the contract (contractual date).
- Payment response timeline will only start running from the contractual date.



Rationale

- To allow more flexibility for the service of a payment claim.

8. Unpaid payment claims can be included in subsequent payment claims



Current Provision

- SOPA is silent on whether 'unpaid payment claims' may be repeated.



Amendment For new contracts entered after Commencement Date

- Claimant can serve 'unpaid payment claims' again as a new payment claim.
- Unpaid payment claim refers to claim that has not been paid in full and have not been adjudicated upon its merits.



Rationale

- To preserve the claimant's entitlement to adjudication before resorting to other means of dispute resolution, even without any additional work done or new items.

9. A shorter time limit for service of payment claims



Current Provision

- Claimant has up to 6 years to serve a payment claim after the construction work was last carried out or goods/services were last supplied.



Amendment For new contracts entered after Commencement Date

- For construction contracts, within 30 months from (whichever is latest):
 - when work was last carried out; or
 - the issuance of last document certifying completion; or
 - the issuance of the last TOP (or CSC).
- For supply contracts, within 30 months of when the goods/services were supplied.



Rationale

- To ensure that claims are served on a timely basis after works are carried out.

10. Extend default period for payment response from 7 days to 14 days



Current Provision

- A 7-day default payment response timeline where the contract does not contain any timeline for payment response.



Amendment

For payment claims served after Commencement Date

- A 14-day default payment response timeline where the contract does not contain any timeline for payment response.



Rationale

- To give respondents sufficient time to provide their payment response to the payment claim.

11. Requiring acceptance of payment response to be in writing



Current Provision

- SOPA is silent on what constitutes acceptance of a payment response by the claimant.



Amendment

For payment claims served after Commencement Date

- Claimant is considered to dispute a payment response if there is no written acceptance.

What are some examples of written acceptance?

These can be a tax invoice or written request for payment



Rationale

- To differentiate when a claimant (a) has accepted the payment response or (b) is disputing a payment response.
- This will avoid factual dispute on whether the Dispute Settlement Period[^] is applicable.

Note: (^) A 7-day Dispute Settlement Period (DSP) applies before making an adjudication application only if the claimant disputes a payment response or respondent fails to provide a payment response. DSP is not required if claimant fails to receive payment by the due date of the response amount which he has accepted.

12. Requiring reasons for non-payment of supply contract to be in writing



Current Provision

- SOPA is silent on what a respondent should do if he disagrees with the payment claim in relation to a supply contract.



Amendment

For payment claims served after Commencement Date

- Respondent in a supply contract to provide reasons for non-payment in writing to the claimant before the due date.



Rationale

- To ensure that adjudication process remains fast and low-cost by preventing parties from bringing up verbal / oral objections to a payment claim.

13. Default date for payment claim pegged to the last day of each month *[where the contract does not contain any provision]*



Current Provision

- Payment claim shall be served by the last day of each month following the month in which the contract is made.



Amendment

For all processes after Commencement Date

- Payment claim may be served by the last day of each month following the month in which the contract is made.
- “Month” means a period of time beginning on the first day and ending on the last day of each of the 12 named months.



Rationale

- To align service of payment claims with industry practice.

14. Respondent prohibited from raising objections if not raised at the onset

Current Provision

Adjudicator shall not consider respondent's objections if the respondent does not include them in the payment response.

SOPA is silent on whether respondent's reasons for withholding any amount can be raised before the Courts during setting aside if the reasons are not raised earlier.

Amendment For payment claims served after Commencement Date

Respondent's failure to raise an objection in the payment response will also prohibit them from using these objections to commence proceedings to set aside the adjudication determination before the Courts.

Exceptions: respondent must be able to show that (1) new circumstances had arisen or (2) the circumstances giving rise to the objections could not be known earlier or (3) patent error.

Rationale

To encourage respondents to raise their objections at the earliest opportunity and not raise objections at different intervals, thereby hindering claimant's right to receive payment.

Amendment supports the speedy interim justice intent of SOPA. Respondent is not denied the opportunity to seek a final resolution of the merits of the claimed items through other tribunals.

15. Allow claimants to lodge an adjudication review

Current Provision

Respondents can apply for adjudication review, if the adjudicated amount exceeds the payment response amount by $\geq \$100K$.

Amendment

For payment claims served after Commencement Date

Claimants are also allowed to apply for adjudication review, if the claimed amount exceeds the adjudicated amount by $\geq \$100K$.

Where claimant is entitled to apply for adjudication review, the respondent is required to pay the adjudicated amount not earlier than 7 days but within 10 days after the adjudication determination is served on the respondent.

Rationale

To give aggrieved claimants a chance to redress their grievances before resorting to commence civil suit proceedings. Also potentially to minimize the SOPA cases that have to be brought before the Courts.

16. Safeguard adjudicated amount pending respondent's adjudication review

Current Provision

Respondent has to pay the adjudicated amount directly to the claimant before lodging an adjudication review.

Amendment

For payment claims

served after

Commencement Date

ANB to set up and maintain a trust account.

Respondent has to deposit the adjudicated amount to the ANB trust account as stake-holding monies pending the outcome of the review.

Rationale

To safeguard the adjudicated amount paid by a respondent pending an adjudication review determination.

17. Discretion for adjudicators to accept a non-compliant adjudication application

Current Provision

Adjudicator to dismiss an adjudication application for not complying with the requirements in Section 13(3)(c) – i.e. Regulation 7(2).

Regulation 7(2) requires an adjudication application to state the names and address of the parties, whether it is a construction or a supply contract, etc.

Amendment For payment claims served after Commencement Date

Adjudicator can accept an adjudication application if respondent is not materially prejudiced by claimant's non-compliance with the Regulations.

Rationale

To ensure that adjudication applications can still proceed as SOPA was intended to provide speedy justice to facilitate cash flow.

18. Allow adjudicators to extend adjudication time for simple cases

Current Provision

Adjudicator is not allowed an extension of time for determination where applications involve (i) failure by respondent to provide both a payment and an adjudication response or (ii) failure by respondent to pay the response amount by the due date.

Amendment

Adjudicator will be allowed to request for extension time for all cases, so long as both claimants and respondents agree to the extension.

For payment claims served after Commencement Date

Rationale

To ensure that adjudicators would have sufficient time to adjudicate the claim as some cases may need more time even if the respondent fails to provide payment & adjudication responses or pay by the due date.

19. Allow replacement adjudicator or replacement review adjudicator

Current Provision

- SOPA is silent on the Authorised Nominating Body (ANB)'s power to appoint replacement adjudicator(s).

Amendment

- ANB can appoint replacement adjudicator(s) / review adjudicator(s) in the event the original adjudicator(s) ceases to meet the eligibility criteria or resigns for various reasons.
- The timeline will start anew upon substitution if all adjudicator(s) are substituted[#].

For payment claims served after Commencement Date

Rationale

- To ensure that an adjudication application will continue to be heard by replacement adjudicator(s) due to unforeseen events.

Note: (#) for panel of review adjudicators, timeline for determination will start anew only if all 3 adjudicators are substituted.

20. Adjudicators to disclose potential conflict or ineligibility at any time

Current Provision

- A person is not eligible to be an adjudicator if the person is conflicted; but is silent if adjudicator becomes conflicted during the adjudication proceedings or cease to meet the eligibility criteria at any time.

Amendment

- Adjudicators must immediately disclose to the ANB any conflict of interest or ineligibility conditions.

Rationale

- To clarify an adjudicator must disclose any conflict of interest or ineligibility should they arise at any time throughout the proceedings.

*For payment claims served
after Commencement Date*

21. Clarify situations when an adjudicator must disclose any conflict of interest

Current Provision

- A person is ineligible to be an adjudicator if the person has been an employee, a director, a partner or a shareholder of the party or assisted the party to prepare any document for, or has provided any advice to, the party in relation to the contract.

Amendment

- Clarify conflict of interest of the adjudicator in terms of percentage of shareholding and the period of time lapse preceding the adjudication application
- Added that a person is ineligible if the person or his/her affiliates (e.g. co-directors) has assisted the party to prepare any document for, or has provided any advice to, the party in relation to the contract.

*For all processes after
Commencement Date*

Rationale

- To better clarify the situations when the adjudicator is deemed conflicted.

22. Grounds to set aside an adjudication determination in Court

Current Provision

- SOPA is silent on the grounds to set aside an adjudication determination in Court.

Amendment

- SOPA set out the grounds to set aside an adjudication determination based on existing case law. The grounds are not exhaustive.
- For example, the payment claim was not served in accordance to the SOPA.

*For payment claims served
after Commencement Date*

Rationale

- To ensure all parties are mindful of these grounds when making or responding to a payment claim or adjudication application.

23. Court's power when hearing a setting aside application

Current Provision

- SOPA is silent on the Court's powers in respect of a setting aside application on the adjudication determination (AD).

Amendment

- The Court has the power to (i) set aside an AD in whole or in part, (ii) remit an AD in whole or in part to the adjudicator, (iii) correct errors made by the adjudicator (example, typo errors) and (iv) award costs of the adjudication application.

*For payment claims served
after Commencement Date*

Rationale

- To ensure the Court has the flexibility to decide on the outcome of a setting aside application.

SUMMARY

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1. Rights of recourse notwithstanding contract termination
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KEY TAKE-AWAY



Claimant

- New modes for Service of Documents → email, instant messaging platform
- Early service of payment claim → payment claim can be served earlier
- Allow repeat payment claims → unpaid payment claims can be served again
- Accept payment response in writing → a tax invoice or written request for payment
- Apply for review → claimed amount exceeds adjudicated amount by $\geq$ \$100K

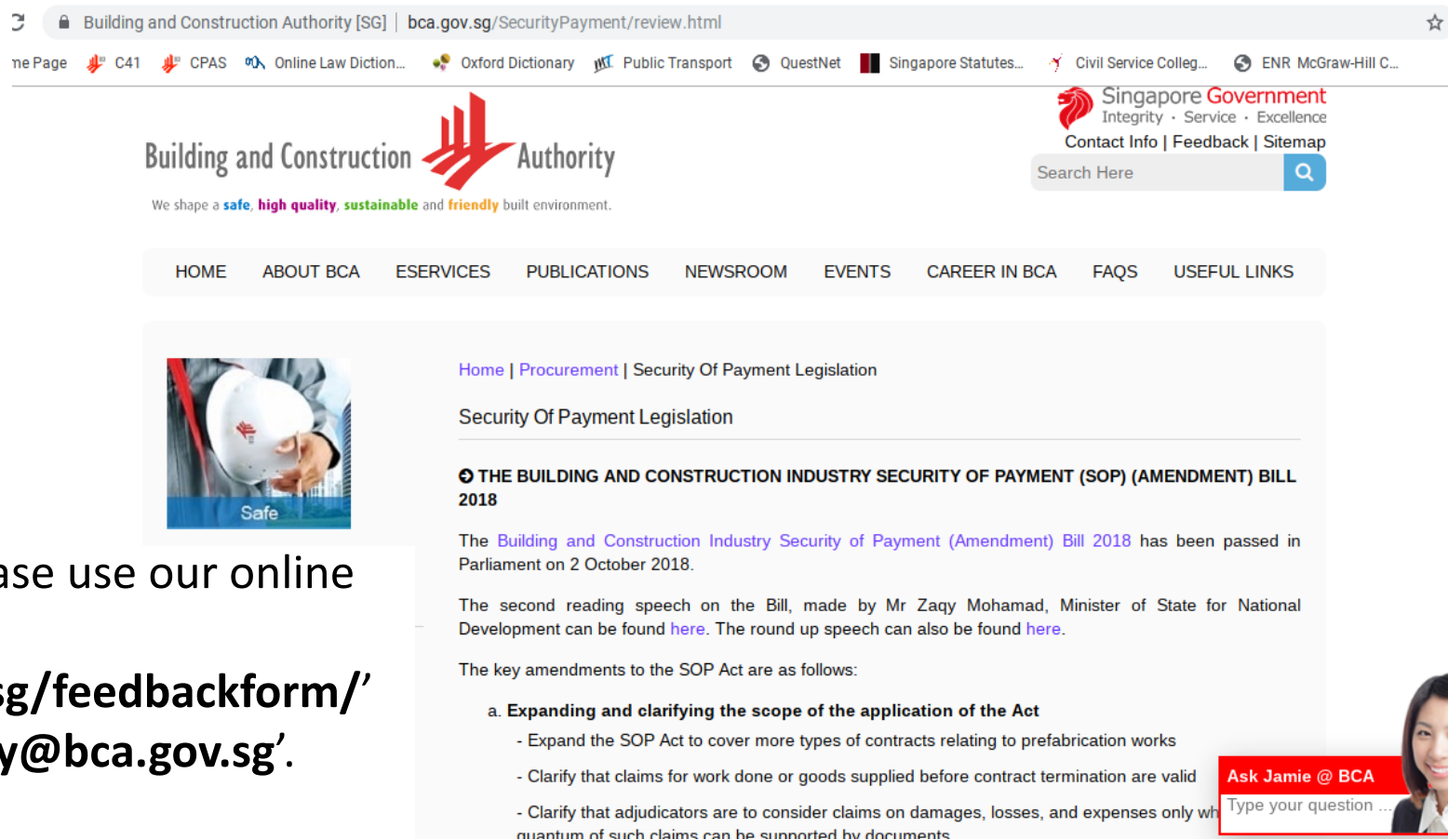
Respondent

- New acceptable modes of service → email, instant messaging platform
- Interest rate for late payment → contractual rate or 5.33%, whichever higher
- Early service of payment claim → payment response timeline will remain status quo
- Raise objections at the onset → “speak now or forever hold your peace”

REFERENCES

<https://www.bca.gov.sg/SecurityPayment/review.html>

- (updated) Information Kit, Flowchart, Sample Forms
- (new) Brochure
- Briefing slides



Building and Construction Authority [SG] | [bca.gov.sg/SecurityPayment/review.html](https://www.bca.gov.sg/SecurityPayment/review.html)

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Security Of Payment Legislation

THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT (SOP) (AMENDMENT) BILL 2018

The [Building and Construction Industry Security of Payment \(Amendment\) Bill 2018](#) has been passed in Parliament on 2 October 2018.

The second reading speech on the Bill, made by Mr Zaqy Mohamad, Minister of State for National Development can be found [here](#). The round up speech can also be found [here](#).

The key amendments to the SOP Act are as follows:

a. **Expanding and clarifying the scope of the application of the Act**

- Expand the SOP Act to cover more types of contracts relating to prefabrication works
- Clarify that claims for work done or goods supplied before contract termination are valid
- Clarify that adjudicators are to consider claims on damages, losses, and expenses only where the quantum of such claims can be supported by documents

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or email to ‘bca_enquiry@bca.gov.sg’.

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