1 INTRODUCTION

(1) Basic features of Singapore building and construction law

26.1.1 Building and construction law in Singapore shares common features with its equivalent in other common law jurisdictions. Contracts between participants within the building and construction industry are typically in standard form.

26.1.2 The terms and conditions of standard form contracts used in Singapore are not identical to international contracts, but follow a similar basic structure.

(2) Relevant areas of law: contract, tort and statutes

26.1.3 Aside from the law of contract, the law of torts also has a significant impact on the rights and liabilities of parties in the building and construction industry.

26.1.4 Statutes and regulations also govern the conduct of the industry and give expression to public policy considerations. For instance, as with many of the Commonwealth jurisdictions, Singapore has introduced legislation to govern the substantive rights of parties in terms of payments, and mandatory dispute resolution in support of the right to timely payment.

2 BUILDING AND CONSTRUCTION CONTRACTS IN SINGAPORE

A. Types of Contractual Arrangements

26.2.1 Building and construction contracts in Singapore have been shaped by both colonial and indigenous arrangements and practices. There are significant differences between local and international standard form contracts; however, the organisational structure of the local standard form and the contractual arrangements between parties fall into internationally recognisable categories, namely:

- “traditional” contracts;
- “design and build” contracts; and
- traditional contracts

(1) Traditional contracts

(i) Appointment

26.2.2 In the traditional system of contracting, the owner or developer of an intended project first engages someone to administer the contract. For a building project, this is typically the architect. Other professionals, such as the quantity surveyor, structural engineer, and the mechanical and electrical engineers are then appointed. Contracts are entered into between the employer and these consultants. Popular standard form contracts for the appointment of:

- architects: Singapore Institute of Architects (“SIA”) Conditions of Appointment (containing the Scale of Professional Charges); and
- engineers: Association of Consulting Engineers (“ACES”)

(ii) Design

26.2.3 The architect or engineer then prepares a design. The architect (sometimes in collaboration with other consultants) prepares documentation in sufficient detail to enable contractors to submit competitive tenders, such as:

- drawings;
- specifications;
- bills of quantities; and
- other documentation constituting contract documents.

(iii) Tender, design and/or construction

26.2.4 The successful tenderer is awarded the contract. In the course of construction, the design function is usually left in the hands of the consultants. There will not be any competitive design submitted by contractors.

(iv) Contract arrangements

26.2.5 Contract arrangements between parties in a "traditional" system are generally based on a standard form contract. For the construction of buildings, the most popular forms include standard forms and their derivatives by:

- The SIA (currently 9th Ed.);
- The Royal Institute of British Architects ("RIBA"); and
- The Joint Contracts Tribunal ("JCT").

26.2.6 The public sector has its own set of standard forms for the traditional system, the Public Sector Standard Conditions of Contract for Construction Works (PSSCOC, currently in its 7th Ed).

(2) Design and build contracts

26.2.7 In recent years, the international and local trend has been to move away from the "traditional system" to alternative contract arrangements. For instance, "design and build" contracts have increased in popularity.

26.2.8 Under a design and build contract, the contractor agrees to accept all responsibility for the structure he constructs. In addition to his usual obligations for the completed work, he also agrees to accept obligations relating to design.

(i) Local standard forms

26.2.9 To accommodate such new arrangements, the following local standard forms are available:

- For the public sector: Public Sector Standard Conditions of Contract ("PSSCOC") for Design and Build.
- Real Estate Developer's Association, Singapore ("REDAS") Design and Build Conditions of Contract.

(ii) International standard forms

26.2.10 International standard forms are also available:

- FIDIC Design and Build Conditions of Contract (commonly known as the 'Orange Book').
- JCT series of standard form contracts, the latest of which is the 2005 series (with amendments in 2009 and 2011), for use in the construction of petrochemical and pharmaceutical facilities involving the main contractor in the design of the facilities and the procurement of equipment and machinery, bespoke Engineering Procurement and Construction ("EPC") contracts are commonly used.

B. Types of contracts and related contract documents

(1) Standard form contracts

26.2.11 Standard form contracts usually contain provisions relating to certification of payment, variations, and defective work within its general terms and conditions which usually has priority over any other document forming part of the contract. The standardisation of such terms and conditions makes the administration of such contracts much easier. In addition, the evolution of changes resulting from case law will be more easily identifiable in standard form contracts.

(2) Non-standard form contracts

26.2.12 In contrast, the general terms and conditions of non-standard form contracts, may be less easily identifiable and may require greater scrutiny for contract administration purposes. In the absence of a priority of documents clause, ambiguities could be difficult to resolve and the contra proferentem rule would apply against the contract originator.

(3) Related documents

26.2.13 Disputes could occur if the contract is contained in or evidenced by the main contract together with drawings, specifications, bills of quantities, exchanges of correspondence, and quotations. It may be contested as to which related documents form part of the contract: Ohbayashi-Gumi Ltd v Kian Hong Holdings Pte Ltd [1987] SLR 94; [1987] 2 MLJ 110, CA). Related documents are either admissible as evidence in the interpretation of contracts, or as express terms.

(i) Admissibility of extrinsic evidence in the interpretation of contracts

26.2.14 In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029* ("*Zurich Insurance*"), the Court of Appeal held that s 94(f) of the Evidence Act is "a fundamental rule of interpretation" and governs contractual interpretation in Singapore. S 94(f) allows extrinsic evidence to be admitted in the contextual interpretation of contracts, if the evidence:

- does not contradict, vary, add to or subtract from the contract's terms;
- is relevant, in that it would affect the way in which the language of the document would be understood by a reasonable man;
- is reasonably available to all contracting parties; and
- relates to a clear and obvious context.

However, the plain language of the contract must be ambiguous or absurd, before the Court is allowed to interpret the contract differently from that demanded by its plain language.

(ii) As an express term

26.2.15 Aside from written documents, an express term may also be found in diagrams and plans. In *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd [2011] 4 SLR 1094*, a dispute arose as to whether a precondition to the tenancy agreement was that permission would be granted for the premises concerned to be used as a supermarket.

26.2.16 The High Court decided in favour of Sheng Siong. It found that a plan of the premises annexed to the final tenancy agreement showed a supermarket, and therefore constituted an "express provision" in support of such a precondition.

3 ARCHITECTS, ENGINEERS AND SURVEYORS

26.3.1 In Singapore, in order to comply with the requirements of planning and building legislation, the appointment of a `qualified person´ by the employer is often necessary (Building Control Act, Cap 29, s 6(3). The qualified person must be a registered architect or a professional engineer. The qualified person has statutory obligations that he must properly discharge.

A. Architects

(1) Regulated by the Architects Act

26.3.2 Architects in Singapore are regulated by the Architects Act, Cap 12, While the Architects Act does not define who is an architect, “architectural services” are defined under s 2(b) to include selling or supplying for gain or reward any architectural plan, drawing, tracing or the like for use in the construction, enlargement or alteration of any building or part thereof.

(2) Registered architect

26.3.3 Under s 10(1), no one can "draw or prepare any architectural plan, drawing, tracing, design, specification or other document intended to govern the construction, enlargement or alteration of any building or part thereof in Singapore" unless he is a registered architect with a practising certificate or unless he is someone working under the direction or supervision of such an architect. Under s 10(3), the designation “architect” or any of its derivatives cannot be used by anyone unless he is a registered architect.

(3) Board of Architects

26.3.4 A register of architects is kept and maintained by the Board of Architects (see also s 8). The Board is also responsible for the issuance of practising certificates and exercises overall control over the profession. It has power to conduct disciplinary proceedings and may cancel the registration of any registered architect or suspend him from practice in specified circumstances.

(4) Other professional bodies

26.3.5 In addition to registration, most architects are also members of professional bodies. In Singapore, the main body is the Singapore Institute of Architects (SIA) (http://sia.org.sg/). Besides membership of the SIA, architects educated abroad are often also members of foreign professional bodies like the Royal Institute of British Architects (RIBA) for those educated in the United Kingdom

Engineers

(1) Regulated by the Professional Engineers Act

26.3.6 In Singapore, engineers are regulated by the Professional Engineers Act, Cap 253. There are no restrictions in Singapore against anyone describing himself as an “engineer”. Under s 2 of the Act, “professional engineering services” and “professional engineering work” are defined; however, there is no definition of the term “engineer” or “professional engineer” in the Act.

(2) Registered engineer

26.3.7 Nonetheless, a person must be properly registered under the Act before he is entitled to call himself a “professional engineer”, or use the word “engineer” or the abbreviation “Er.” or “Engr.” as a title before his name, or to use any word, name or designation that will lead to the belief that the person is a registered professional engineer.

(3) Professional Engineers Board

26.3.8 A Professional Engineers Board was established by the Professional Engineers Act. The Board keeps and maintains a register of professional engineers, a register of practitioners and a register of licensees. The register of professional engineers contains the names, qualifications and other particulars of all persons registered under the Act whereas the register of practitioners, kept and maintained annually, contains the particulars of those professional engineers with practising certificates.

(4) Other professional bodies

26.3.9 Besides registration as a professional engineer, an engineer in Singapore is usually also a member of a professional body, like the Institution of Engineers, Singapore (IES) or Association of Civil Engineers, Singapore (ACES). Many engineers who are trained overseas are also members of foreign professional bodies like the Institution of Civil Engineers, United Kingdom.

Quantity Surveyors

26.3.10 The term “surveyor” encompasses a large number of fields, including:

- building surveyors who examine and evaluate defects to buildings;
- land and hydrographic surveyors;
- valuers of properties; and
- quantity surveyors.

(1) Regulated by the Land Surveyors Act

26.3.11 The registration of land surveyors is provided for under the Land Surveyors Act, Cap 156. It is also provided that no person can certify to the correctness or accuracy of any title survey unless he is a registered surveyor who has in force a practising certificate. Surveyors practising other types of survey work, such as topographical, engineering and hydrographic surveying, need not be registered under the Act.

(2) Land Surveyors Board

26.3.12 A Land Surveyors Board is also established by the Act. Among its other functions, it keeps and maintains a register of surveyors, a register of practitioners, and a register of licensees.

(3) Quantity surveyors

26.3.13 Quantity surveyors, who are sometimes described by themselves and other construction professionals as “costs consultants” or “construction economists”, are responsible for the evaluation of construction costs.

26.3.14 These costs would usually include site preparation costs, labour, material and equipment costs, professional fees, taxes and maintenance costs. There are no registration requirements before someone can practise as a quantity surveyor nor are there any prohibitions against anyone styling himself as a quantity surveyor. There is no equivalent of the Board of Architects or the Professional Engineers Board to govern the professional conduct of quantity surveyors.

(4) Singapore Institute of Surveyors and Valuers

26.3.15 Many are also members of the local professional body for valuers and surveyors, namely, the Singapore Institute of Surveyors and Valuers (“SISV”). SISV has three divisions that represent the various fields of surveying, namely, quantity surveyors, land surveyors, and valuation and the general practice surveyors. An acceptable degree or professional qualification and at least two years of relevant postgraduate experience are necessary for membership. A person can also

seek membership of professional bodies like the Royal Institution of Chartered Surveyors, United Kingdom which conduct examinations in the various fields of surveying.

Duties, Obligations and Liabilities of Owners, Architects, Engineers and Surveyors

26.3.16 The obligations of the owners, architects, engineers and surveyors are determined by the agreement between parties, regulations and statutory requirements, and common law.

(1) Standard form contract

26.3.17 In Singapore, professional bodies like SIA and ACES have published standard form agreements that architects and engineers can put forward to the person engaging them. Contracts of engagement can also be specially drafted, or adapted from the standard form agreements. A contract might just state that the terms and conditions of engagement are to be "in accordance" with the standard agreement of the relevant professional body: *Soon Nam Co Ltd v Archynamics Architects [1978-1979] SLR 123*.

26.3.18 The arrangement between parties generally determines each party's duties, obligations and liabilities.

(2) Traditional building contract model

26.3.19 In the traditional building contract model, the obligation of the employer or owner includes:

- securing planning permission and regulatory permits to enable works to proceed, under the Planning Act (Cap 2323, 1998 Rev Ed);
- allowing the contractor sufficient possession of and access to the site to enable works to proceed, viz. a physical means of access and opportunity to enter the site by this access: *LRE Engineering Services Ltd v Otto Simon Carves Ltd (1983) 24 BLR 127* at 137.
- Paying the contractor on time; typically, this is made through progress payments on an interim valuation of works completed up to a particular date or milestone.

(3) Duties of an Architect or Engineer

26.3.20 The general duties of an architect or engineer can include:

- working with the project manager (if any);
- completing the design and overseeing the development of the project;
- taking on the role of a "lead consultant";
- supervising the works and ensuring the owner's interests are properly served by the contractor;
- performing the role of both certifier and approving authority, on progress payments and final accounts, and other issues such as prolongation, quality, and workmanship; and
- the positive obligation of informing the quantity surveyor of defective work, such that the work is not included in the interim valuation (in the absence of express terms to the contrary).

(4) Duties of a Quantity Surveyor

26.3.21 The general duties of a quantity surveyor can include:

- preparation of tender documents;
- contract documentation work;
- providing estimates for feasibility studies;
- advising on construction procurement; and

- supporting the architect or engineer in certification, in the evaluating the contractor's progress payment and final account claims.

(5) Duties and obligations under design and build contracting model

26.3.22 In a design and build arrangement, the functions of design and construction are integrated. The design architect, structural engineer and other design consultants are not directly employed by the owner, but employed instead by the contractor.

26.3.23 In comparison to the obligations under a traditional arrangement, the architect or engineer is not expected to extensively supervise or administer the contract, except where statutory regulations require professional oversight. Instead, the contractor takes on additional obligations, such as ensuring that the works delivered are fit for purpose.

26.3.24 Further, the architect and engineer are not directly accountable to the owner, but may be liable in tort.

26.3.25 Subject to express provisions, the obligations of the quantity surveyor are generally similar to that of the traditional contracting model.

(6) Liabilities of professionals

26.3.26 In common law, an architect is subjected to "minimum standards" in carrying out his duties. These duties include:

- The duty to act in good faith and to the best of his uninfluenced professional judgment: *Aoki Corporation v Lippoland (Singapore) Pte Ltd [1995] 2 SLR 609*;
- The duty to perform his duty, or exercise his power with reasonable diligence and in accordance with the contract: *Lian Soon Construction v Guan Qian Realty Pte Ltd [1999] 3 SLR(R) 518* at [22];
- The duty to act fairly and on a rational basis in making any determination: *Liew Ter Kwang v Hurry General Contractor Pte Ltd [2004] 3 SLR(R) 59; [2004] SGHC 97*;
- The duty to apply professional skill and function, but not to be an agent of the developer: *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd [2001] 1 SLR(R) 458; [2001] SGCA 17*.

26.3.27 The Architect and Quantity Surveyor ought to "apply [their] mind[s] to the issue" in the valuation of amounts when issuing instructions or certificates: *H P Construction & Engineering Pte Ltd v Chin Ivan [2014] 3 SLR 1318 (HC)* at para [52]. If there is proof of damage, the Quantity Surveyor may also be liable in a claim for negligence: *Hyundai Engineering & Construction Co Ltd v Rankine & Hill (Singapore) Pte Ltd [2004] SGHC 178*.

26.3.28 An engineer cannot contract out of regulatory oversight of his professional conduct by the Professional Engineers Board ("PEB"); however, the Professional Engineers Act allows, but does not compel complaints to be made to the PEB. That said, parties should not seek to interfere with a professional engineer's independence or influence the professional engineer in his course of work: *Poh Cheng Chew v K P Koh & Partners Pte Ltd and another [2014] 2 SLR 573* at [81] and [95].

4 PERFORMANCE BONDS

26.4.1 Performance bonds provide the employer with some security against non-performance by the contractor: see *Wah Heng Glass & Metal Products Pte Ltd v Gammon-CCI Construction Ltd [1998] SGHC 48* for a brief description of the purpose and usage of a performance bond.

A. Performance Bonds Issued in Singapore

26.4.2 In Singapore, the bond is usually given by financial institutions, such as banks and insurance companies, who in turn act as sureties. The amount secured is typically 5% to 10% of the value of the contract. It is typically issued valid for one year and subject to annual renewals until the completion of the project or the expiry of the maintenance or defect liability period. The extent and security provided by the bond depends on its nature and type, and its terms and conditions. The only standard form performance bond used in Singapore is found in the appendix of the PSSCOC.

(1) Nature and types

26.4.3 Confusion could arise as to the meaning to be attached to what is commonly referred to as a "performance bond", for four reasons:

1. It has been described by various labels, including:
    a. performance bond;
    b. b. performance guarantee;
    c. c. first demand bond, or its American sibling, the stand-by letter of credit.
2. In its application or usage, it could be used to secure various stages of the construction process. The documentation concerned is often described with reference to that particular process. For example:
    a. tender or bid bond;
    b. advance payment bond;
    c. retention money bond; or
    d. maintenance bond, etc.
3. Conditions attached to the call on the bond can differ, depending on whether it is:
    a. payable on demand ("demand bonds"); or
    b. upon proof of default ("default bonds")
4. It could require the surety to either:
    a. pay money; or
    b. perform the works left undone by the contractor.

Such a bond is usually given by the parent company of the contractor. However, such a bond is not popular with local employers who prefer cash payment. They are usually accepted by MNC employers operating in Singapore, who have engaged contractors from their home country under arrangements and conditions similar to those found in the home country.

26.4.4 Disputes typically involve whether the conditions attached to the call on the bond have been triggered, and in particular, whether an injunctions against the financial institution is justified.

(2) Demand bonds: Only fraud or unconscionability will permit injunction against payment

26.4.5 It has been recognised that performance bonds, particularly, those expressed to be payable on demand, stand on a similar footing as irrevocable letters of credit and that an injunction restraining a call or payment upon the bond will not be granted unless fraud or unconscionability is involved. There is also no distinction between the principles to be applied in the cases dealing with attempts to restrain banks from making payment from those dealing with restraint of beneficiaries from calling upon the bond: *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733 (CA)*.

(3) Clear case of fraud or unconscionability required for injunction

26.4.6 The sole consideration in the application for an injunction is whether there is fraud or unconscionability. The party seeking the injunction would be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is not enough to raise "mere allegations". In the UK, an interlocutory injunction will not therefore be granted against a bank which has given a bond or guarantee to restrain its payment, since the bank must honour it according to its terms, unless it has clear notice or evidence or fraud: *Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976*. As regards the standard of proof of fraud, the courts have accepted, for cases involving letters of credit, what is known as "the Ackner standard" in assessing allegations of fraud in applications for interlocutory injunctions (propounded by Ackner LJ in *United Trading Corporation v Allied Arab Bank [1985] 2 Lloyd's Rep 554*; applied in Singapore in *Korea Industry Co Ltd v Andoll Ltd [1989] 3 MLJ 449*).

(4) Unconscionability is distinct from fraud

26.4.7 There is a recent line of cases, mostly in the High Court, elaborating on the requirement of "unconscionability" as distinct from "fraud", thus departing from the UK position. In the decision of the High Court in *Min Thai Holdings Pte Ltd v Sunlabel & Anor [1999] 2 SLR 368*, the court stated that the concept of unconscionability "involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party." The doctrine that unconscionability is a separate ground from "fraud" was reiterated by the Court of Appeal in *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd [2002] 1 SLR 1*; see also *JBE Properties v Gammon [2010] SGCA 46*.

26.4.8 More recently, the Court of Appeal has noted that the letter of credit serves a different function from a performance bond; hence, a lower threshold of unconscionability (instead of fraud) applies in restraining a call on a performance bond: *JBE Properties v Gammon [2010] SGCA 46*.

(5) Strong prima facie case of unconscionability for contractor to restrain employer as beneficiary

26.4.9 Nonetheless, a contractor who seeks to restrain the employer as beneficiary of the performance bond from calling on it must establish a strong prima facie case of unconscionability: *Liang Huat Aluminium Industries Pte Ltd V Hi-Tek Construction Pte Ltd [2001] SGHC 334*.

26.4.10 It has been suggested that the "current conception of the ground of unconscionability by the Singapore courts may be disproportionately wide in light of the causes that have led to it being introduced as a disjunctive ground for injuncting a call on a performance bond" (see Injuncting Calls on Performance Bonds: Reconstructing Unconscionability [2003] 15 SAcLJ 30). The article contains a detailed discussion on this subject.

26.4.11 More recently, Quentin Loh J has pointed out on case precedent, the call of the bond was considered unconscionable “where either the beneficiary of the performance bond had by its own default contributed to the circumstances which founded the call, or both parties were wholly innocent”: *Ryobi-Kiso (S) Pte Ltd v Lum Chang Building Contractors Pte Ltd [2013] SGHC 86 at [19]*).

5 SUBCONTRACTS

A. Explanation of Subcontracts

(1) Usual practice for contractors to engage subcontractors

26.5.1 In Singapore, as is the case elsewhere, it is usual for the contractor to engage sub-contractors to whom he will owe and be entitled to contractual obligations according to the terms of the sub-contract. For larger projects, sub-contracts are also usually in standard forms that are mostly derivatives of the main contract forms. There would be appropriate cross-references between the main and sub-contract forms and some provisions of the main contract may even be replicated in the sub-contract. The sub-contractor will not normally owe any direct contractual obligations to the employer or consultants.

(2) Subcontracts can vary considerably in type

26.5.2 The type of contractual arrangements that can be arrived at in sub-contracts can vary considerably. They can involve the supply of labour only, a supply of goods and materials only, a supply and build arrangement, or even a complete “design and build” arrangement. Most of the principles of law applicable to a main contract would also be applicable to a sub-contract.

B. Employer’s selection of sub-contractors

(1) Traditional system: Employer selects specialist contractors who enter into sub-contract with main contractor

26.5.3 In the traditional system, it is usual to provide in the main contract, terms that allow the employer to select for the main contractor, certain specialist contractors whose participation in the project he desires. The specialist contractor is then usually made to enter into a sub-contract with the main contractor. This process is usually described as a “nomination”.

(2) Two standard form nominated sub-contracts widely used in Singapore

26.5.4Two standard form nominated sub-contracts are in wide usage in Singapore. They are:

- the Standard Conditions of Nominated Sub-Contract for use in conjunction with Public Sector Conditions of Contract for Construction Work 2008 (now in its 5th edition); and
- the SIA Conditions of Sub-Contract for use in conjunction with the main contract (now in its 4th edition).

C. Incorporation of Main Contract Terms

(1) Express terms and contra proferentum

26.5.5 As the sub-contract obligations commonly mirror that of the main contract (in a limited aspect), the draftsman of sub-contracts typically incorporates the terms of the main contract by reference. As a general rule, anything in the main contract that is not applicable or appropriate in the sub-contract ought not to be impliedly incorporated: *Star-Trans Far East Pte Ltd v Norske-Tech Ltd [1996] 2 SLR 409 (CA)* .

(2) Whether or not a provision is incorporated depends on intention of parties

26.5.6 The relevant principle in ascertaining whether a provision or a document ought to be incorporated is to ascertain the intention of the parties. Where the meaning of the provisions already in the sub-contract is perfectly clear, there can be no resort to other documents to give another meaning to it. Where the draftsman had purposely left out any condition which he could without difficulty have put in, then the contra proferentem rule may be applied to prevent the clause or document from forming part of the sub-contract: *Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd [1978] 2 MLJ 22*. Where the alleged clause incorporating terms of the main contract in the sub-contract is unclear or ambiguous, as

where it merely provides that "the sub-contractor shall observe, perform and comply with all the provisions of the main contract on the part of the contractor to be observed, performed and complied with so far as they relate and apply to the sub-contract works" it is unlikely that the court will find that such a clause has the effect of incorporating the provisions of the main contract into the sub-contract: *Kum Leng General Contractor v Hytech Builders Pte Ltd [1996] 1 SLR 751*.

(3) Incorporation via back-to-back provisions

26.5.7 Similarly, incorporation solely via back-to-back provisions will not suffice. Rather, back-to-back provisions should be "construed in light of the factual matrix known to the parties at the time they contracted". However, the right to payment may still persist on a back-to-back basis with the main contract, if "work had been accepted or certified for payment following an application for payment for such work having been made" by the subcontractor: *per* Menon JC (as he then was) in *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd [2007] 2 SLR(R) 918; [2007] SGHC 48* at [49].

(4) Subcontract formed by conduct

26.5.8 A subcontract may also be concluded by conduct before the terms are wholly reduced to writing: in *United Eng Contractors Pte Ltd v L&M Concrete Specialists Pte Ltd [2000] SGHC 74* OR [1999] SGHC 141 OR *CS Bored Pile System Pte Ltd v Evan Lim & Co Pte Ltd [2006] 2 SLR(R) 1; [2006] SGHC 11* .

(5) Subcontract formed by oral agreement

26.5.9 In addition, extrinsic proof of oral collateral contracts is admissible under proviso (b) of s 94 of the Evidence Act, if its terms are not inconsistent with those contained in the main agreement.

D. "Pay When Paid" Provisions (now prohibited)

(1) "Pay When Paid" Provisions: Sub-contractor only entitled payment when main contractor receives payment

26.5.10 "Pay when paid" provisions stipulate that the sub-contractor is only entitled to be paid when the main contractor has himself received payment. "Pay when paid" provisions operate even if payments have been certified but not received yet by the main contractor, or if payment has been withheld from the main contractor by the employer due to the main contractor's own default or breach, and the default or breach was not caused or contributed to by the sub-contractor: Brightside Mechanical and Electrical Services Group Ltd v Hyundai Engineering and Construction Co Ltd [1988] SLR 186; Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694.

(2) "Pay when paid" clauses prohibited by statute

26.5.11 In Singapore, "pay when paid" clauses are now prohibited by s 9 of the Building and Construction Industry Security of Payment Act 2004 ("SOPA") for contracts that are governed by the legislation. However, while s 9 of the SOPA renders void unenforceable "pay when paid" payment structures, it "does not absolve a party of its payment obligations owed to the other": *SKK (S) Pte Ltd v Management Corporation Strata Title Plan No 1166 [2013] SGHCR 11* at [23]. E. Direct and Indirect Claims

(1) Generally, sub-contractor may not make direct claim against employer

26.5.12 As a general rule, a sub-contractor cannot make any claim against the employer for the price of work done or material supplied under the sub- contract: *Henderick Engineering v Kansai Paint Singapore Pte Ltd [1992] SGHC 184*. The existence of a direct payment clause, permitting the employer to make direct payments to the sub-contractor, does not create a contractual relationship between the employer and the sub-contractor: *A Vigers Sons & Co Ltd v Swindell [1939] 3*

All ER 590. Similarly, an employer cannot make any claim against the sub-contractor directly: *Dawber Willamson Roofing Ltd v Humberside County Council (1979) 14 BLR 70*.

(2) CRTPA and exceptions to privity

26.5.13 With the enactment of the Contracts (Rights of Third Parties) Act 2001 that came into operation on 1 January 2002, it may be possible for a nominated sub-contractor to assert rights as a third party against the employer even in the absence of a direct contract with the employer. Section 2(3) of the Act provides that the third party should be expressly identified in the contract by name, as a member of a class, or as answering to a particular description. It is possible that a wide category of persons can qualify as third parties under the Act.

26.5.14 In the case of an undisclosed principal, there remains controversy in Singapore as to whether the common law exceptions to privity apply.

26.5.15 In what was referred to by the Court of Appeal as a "leading decision", Judith Prakash J held that in a disclosed principal situation, Prosperland (a developer of a condominium) was entitled to sue the building contractor (Civic) and the architects (collectively "the defendants") for substantial damages, even though Prosperland had suffered no loss arising from the breach of contract: *Prosperland Pte Ltd v Civic Construction Pte Ltd [2004] 4 SLR(R) 129; [2004] SGHC 157 (HC)*.

(i) Undisclosed principal

26.5.16 It is less certain as to whether an exception to privity could apply in an undisclosed principal situation, as the Court of Appeal's observations on the matter have, thus far, been in obiter. Nonetheless, the undisclosed principal could be made a party to the proceedings, as the court has the power to order joinder under O 15 r 6(2)(b) of the Rules of Court: *Family Food Court (a firm) v Seah Book Lock and anor [2008] 4 SLR 272; [2008] SGCA 31 (CA)* at [63]; see also the doctrine of the undisclosed principal, M P Furmston in *Cheshire, Fifoot and Furmston's Law of Contract* (OUP, 16th Ed, 2012).

(3) Contractor's negligence liability owed to subcontractor

26.5.17 The main contractor may also be liable in negligence to the subcontractor, if a duty of care is owed to the subcontractor: *Jurong Primewide v Moh Seng Cranes & ors [2014] 2 SLR 360; [2014] SGCA 6 (CA)* ; see also, *Spandeck* test under "Section 8 Construction and the Law of Negligence".

(4) Estoppel and unjust enrichment

26.5.18 Other indirect claims include estoppel and unjust enrichment: see Laws of Singapore, Chapter 19: Restitution.

6 TIME AND COMPLETION

26.6.1 This section will look at the issue of completion and extension of time in construction projects within the contractual framework of the SIA standard form as most of the case law has arisen in that context.

A. Completion Criteria

(1) "Completion" is determined by construing the standard form in question

26.6.2 Where standard form contracts are being used, the issue of completion is often reduced to construing what is meant by `completion´ in the standard form in question. A number of standard form contracts, including pre-1980 versions of the SIA Contract defined completion in terms of `practical completion´. Usage had also been made of the term `substantial completion´ in some other standard form contracts. For the SIA Contract, the term completion is used without the description “practical” or “substantial”.

B. Time for Completion

(1) Construction contracts should contain provisions relating to time, absenting which the court will imply term to complete within a reasonable time

26.6.3 Construction contracts contain provisions relating to the commencement and completion of the works that the contractor is engaged to carry out. If the contract is silent on this, a reasonable time for completion would be implied: *Charnock v Liverpool Corp [1968] 3 All ER 473*; *Lee Kai Corp (Pte) Ltd v Chong Gay Theatres Ltd [1992] 2 SLR 68911 (CA)*. If in a standard form contract, the time for completion in the schedule to a contract is left blank, the court will imply a term to complete within a reasonable time: *Hick v Raymond and Reid [1893] AC 22*; *Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd [2001] SGHC 68*). What is a reasonable time will be treated as a question of fact.

(2) SIA contract contains time extension and liquidated damages clauses

26.6.4 The SIA contract, as with most building and infrastructure contracts, contains extensions of time and liquidated damages clauses (See SIA Clauses 23 and 24 respectively). The liquidated damages clause gives the employer a remedy in pre-agreed damages if the contractor fails to complete on time and caps the contractor's.

C. Extension of Time Clauses

(1) Contractor's work may be affected by acts of employer

26.6.5 The contractor´s progress and completion may be affected by acts of the employer or his agents. These employer related events can be found in SIA 7th Edition and 8th Edition, Clauses 23(1)(f), (g), (h), (i), (j), (k), (n) (o) and (p). Clauses 23(1)(a), (b), (c), (d), (e), (l), (m) deal with neutral events, mainly arising from circumstances not reasonably foreseeable.

(2) Neutral events and employer-related events may render original date of completion inapplicable

26.6.6 The contract date for completion may be affected by neutral events and employer related events to such an extent that it is rendered inapplicable. Without an applicable date for completion, time will be set “at large” and the obligation to complete becomes assessable by normal common law principles of reasonableness instead of the agreed contractual framework. With an extension of time, on the other hand, a new date may be set for completion and the right to liquidated damages preserved.

(3) Employer could potentially lose right to compensation where there is a “nil” for liquidated damages in the contract, but the legal position is unclear

26.6.7 The employer could arguably lose his right to compensation where the express provision for liquidated damages is exhaustive of his rights and "nil" is inserted for the rate of liquidated and ascertained damages: *Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 34*. However, in the local decision of *Shia Kian Eng (trading as Forest Contractors v Nakano Singapore (Pte) Ltd [2001] SGHC 68*, the parties agreed that there should be no liquidated damages. Judith Prakash J found it “difficult to accept the proposition that simply because it was agreed that there should be no liquidated damages clause, no damages at all could be claimed” if the plaintiff´s delay had caused loss to the defendants.

D. Contra Proferentem

(1) Liquidated damages and extensions of time clauses construed by the courts against the employer, unless the contract stipulates otherwise

26.6.8 Both liquidated damages and extensions of time clauses (see *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd (No 2) [2000] 1 SLR 495*, *per* Warren Khoo J) operate primarily for the employer in that the main contractor is sufficiently protected by the common law rules on impossibility and interference with performance. Thus, the attitude of the courts has been to construe them *contra proferentem*, strictly against the employer: *Peak Construction Ltd v McKinney Foundations Ltd (1971) 1 BLR 111*.

26.6.9 However, it should be noted that Article 7 SIA 8th Edition excludes the application of the *contra proferentem* rule of construction.

E. Requirements of Notice of Cause of Delay

(1) Clause 23(2) has two aspects: contractor's notice requirements and architect's in principle intimation

26.6.10 Clause 23(2) of SIA 7th Edition states that it is a condition precedent to the contractor´s entitlement to an extension of time that he gives notice in writing within 28 days of the event entitling him to an extension of time. However, Clause 23(2) then contains the proviso "unless the architect has already informed the contractor of his willingness to grant the extension of time".

26.6.11 There are two aspects to Clause 23(2): the contractor's notice requirements and the architect´s in principle intimation.

(2) Architect required to inform contractor within 1 month whether delay caused entitles contractor "in principle" to time extension

26.6.12 Once the contractor has given notice, the architect is required to inform the contractor in writing within 1 month of receipt of the contractor´s application for extension of time whether or not he considers the delay caused entitles the contractor "in principle" to the extension of time.

26.6.13 In *Assoland Construction Pte Ltd v Malayan Credit Properties Pte Ltd [1993] 3 SLR 470*, it was held, inter alia, that the architect's failure to comply with the procedural requirements in Clause 23(2) meant that the purported exercise of power to later grant an extension of time was invalid. As such there was no date by which liquidated damages could be computed. In contrast, in *Aoki Corporation v Lippoland (Singapore) Pte Ltd [1995] 2 SLR 609*, it was held, inter alia, that while the contractor's notification under Clause 23(2) is a condition precedent to his entitlement to an extension of time, the architect's "in principle" intimation is not expressed as a condition precedent to the validity of his decision on the extension of time or the delay certificate.

26.6.14 A detailed analysis of Clause 23 and its requirements can be found in the more recent decision of *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd (No 2) [2000] 1 SLR 495*. Generally, "the claim for liquidated damages is inextricably tied to the issue of the plaintiff's request for EOT [extension of time]", for "if the plaintiff succeeds in its claim for EOT, the defendant will fail in its claim for liquidated damages" (and the converse applies): *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd [2010] SGHC 106* at [53].

(3) No SIA forms after 1980 have a loss and expense clause for prolongation other than a limited entitlement under Clause 12(4)

26.6.15 Most standard forms of contract provide for loss and expense to be certified by the architect where the contractor has been delayed by breaches or acts of prevention by the employer or his agent. However, none of the SIA forms after 1980 has a loss and expense clause for prolongation. In fact, Clause 31(14) expressly provides that the architect has no power to decide or certify any claim for breach of contract made against the Employer by the Contractor. However, one might consider that Clause 12(4) [Valuation of Variations] does provide a limited express entitlement under the contract to additional `preliminaries´ costs which are associated with variations, which in themselves do not amount to a breach of contract.

7 TERMINATION

26.7.1 A typical construction contract usually lasts for a fairly long period of time and the option to terminate the contract by an innocent party in the event of a breach by the defaulting party before the date of completion is an important remedy. While every breach is entitled to a remedy in damages, the innocent party is entitled to terminate a contract only if the breach constitutes a repudiatory breach.

A. The General Position: RDC Concrete v Sato Kogyo

(1) Four situations in which innocent party may terminate contract

26.7.2 A repudiatory breach could arise under common law or pursuant to express provisions in the contract. In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and anor appeal [2007] 4 SLR 413* ("RDC"), the Court of Appeal summarised four situations in which an innocent party might be entitled to terminate: at para [113].

SITUATION	CIRCUMSTANCES IN WHICH TERMINATION IS LEGALLY JUSTIFIED	RELATIONSHIP TO OTHER SITUATIONS
I EXPRESS REFERENCE TO THE RIGHT TO TERMINATED AND WHAT WILL ENTITLE THE INNOCENT PARTY TO TERMINATE THE CONTRACT		
1	The contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract.	None – it operates *independently of all other* situations. In other words — Situations 2, 3(a) and 3(b) (*ie*, all the situations in II, below) are *not* relevant.
II NO EXPRESS REFERENCE TO THE RIGHT TO TERMINATED AND WHAT WILL ENTITLE THE INNOCENT PARTY TO TERMINATE THE CONTRACT		
2	Party in breach *renounces* the contract by clearly conveying to the innocent party that it *will not perform* its contractual obligations at all. *Quaere* whether the innocent party can terminate the contract if the party in breach *deliberately* chooses to perform its part of the contract in a manner that amounts to a substantial breach.	None – it operates *independently* of *all* other situations. In other words — Situation 1 is *not* relevant. Situations 3(a) and 3(b) are *not* relevant.
3(a)	Condition-warranty approach – Party in breach has breached a *condition* of the contract (as opposed to a *warranty*).	Should be applied *before* the "*Hongkong Fir* Approach" in Situation (3)(b).

		Situation 1 is *not* relevant. Situation 2 is *not* relevant.
3(b)	*Hongkong Fir* approach – Party in breach which has committed a breach, the consequences of which will deprive the innocent party of substantially the whole benefit which it was intended that the innocent party should obtain from the contract.	Should be applied only after the Condition-warranty approach in Situation (3)(a) and if the term breached isnot found to be a condition. Situation 1 is *not* relevant. Situation 2 is *not* relevant.

(i) Situation 1: Where express term states innocent party entitled to terminate contract upon an event or certain events occurring

26.7.3 In the first situation ("Situation 1"), there is an express contractual term which clearly and unambiguously states that the innocent party is entitled to terminate the contract, upon an event or certain events occurring. In effect, the parties have agreed that a breach of such a nature is sufficiently serious to entitle the innocent party to bring the contract to an end. This form of discharge therefore arises "from the mutual agreement of the contracting parties.

(ii) Situation 2: Where party in breach renounces contract by conveying to innocent party that it will not perform contractual obligations

26.7.4 In the second situation ("Situation 2"), the party in breach renounces the contract by clearly conveying to the innocent party that it will not perform its contractual obligations at all.

(iii) Situation 3(a): Term breached is a condition

26.7.5 In the third situation ("Situation 3(a)"), the term breached is a condition of the contract, under the "condition-warranty approach". To determine whether a term is a condition or warranty, the focus is on the nature of the term breach, not so much on the actual consequences of the breach.

(iv) Situation 3(b): Breach is considered repudiatory

26.7.6 In the fourth situation ("Situation 3(b)"), the breach is considered repudiatory, as it deprives the innocent party of substantially the whole benefit which it intended to obtain from the contract. In Situation 3(b), the focus is on the nature and consequences of the breach. This approach is commonly referred to as "The *Hongkong Fir* approach", following the seminal English Court of Appeal Decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26*.

26.7.7 Following RDC, the right to termination should thus be considered in line with the approach set out above.

B. Termination in Construction Law

(1) Employer entitled to withhold payment after accepting wrongful repudiation

26.7.8 Under Clause 32(10) of the SIA Main Contract, an employer is entitled to withhold payment under the interim certificates if he accepts the wrongful repudiation of a contractor as terminating the contract: *SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd [2000] 2 SLR 12*.

(2) Innocent party must unequivocally accept the breach as terminating contract

26.7.9 If an innocent party elects to terminate a contract, it is vital that there is an unequivocal acceptance of the breach as terminating the contract. Where the contract provides for a procedure and timing in which the termination is to be effected, there must be strict compliance for the termination to be effective. Failure to do so may result in wrongful repudiation.

(3) Contractual provisions prescribing termination procedures must be fully complied with

26.7.10 As termination, also known as forfeiture clauses, is construed strictly (*Roberts v Bury Commissioners (1870) LR 5 CP 310*), the contractual provisions prescribing the procedures by which a contract may be determined must be properly and faithfully complied with for the termination to be effective. Otherwise, the termination may be wrongful and amount to a wrongful repudiation by the employer instead - *Lodder v Slowey [1904] AC 442*. The contractor is then entitled to sue the employer for the actual value of the work done and materials supplied or damages or both.

26.7.11 Typical grounds for termination by the employer include:

- default of the contractor;
- bankruptcy of the contractor;
- failure to start work;
- failure to proceed with the work;
- failure to comply with architect´s instructions;
- failure to comply with the contract;
- failure to complete the works; and
- failure to remedy defects.

(4) Forfeiture clauses construed contra proferentum

26.7.12 Since forfeiture clauses have such serious consequences, they are construed contra proferentem and the requirements for notices to be given need careful observation - *Central Provident Fund Board v Ho Bok Kee [1980-1981] SLR 180*; *AL Stainless Industries v Wei Sin Construction Pte Ltd [2001] SGHC 243* .

(5) Contractor may contest ejection from site when contract does not contain termination clause by common law

26.7.13Where the contract does not contain a termination clause and the contractor disputes the alleged default, he may contest or resist any attempt to eject him from the site: *London Borough of Hounslow v Twickenham Garden Developments Ltd [1971] Ch 233*. See also *Mayfield Holdings Ltd v Moana Reef Ltd [1973] 1 NZLR 309*.

(6) Deliver possession of site on receipt of Notice of Termination

26.7.14 Clauses 32(4) & 32(5) of the SIA Main Contracts, however require the contractor to deliver possession of the site upon receipt of the Notice of Termination, irrespective of the validity of the notice.

8 CONSTRUCTION AND THE LAW OF NEGLIGENCE

26.8.1 The law of negligence has a significant impact on construction projects. Owners may find recourse in a claim in tort if they have no contractual relationship with the parties responsible for the negligent design or construction of their property, or if the operation of the Contract (Rights of Third Parties Act (Cap 53, 2002 Rev Ed) is excluded by express contract terms.

(1) Duty of care under Spandeck Engineering v Defence Science and Technology Agency

26.8.2 Following the seminal decision by the Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science and Technology Agency [2007] 4 SLR(R) 100* ("*Spandeck*"), there is now a single, universal test for determining a duty of care in the law of negligence, irrespective of the type of the damages claimed.

26.8.3 In *Spandeck* , the contractor claimed against the superintending officer for negligently under-valuing and under-certifying works carried out by the contractor. There was no contractual relationship between the contractor and the superintending officer. The Court of Appeal formulated and applied a two-stage test, preceded by a threshold test of factual foreseeability: at [75] ff.

(2) Two-stage test under Spandeck

(i) First stage: Legal proximity

26.8.4 In the first stage, sufficient legal proximity must be established between the plaintiff and defendant, *viz.* on physical, circumstantial and causal proximity, and supported by a voluntary assumption of responsibility and reliance.

(ii) Second stage: Policy considerations

26.8.5 If the threshold of factual foreseeability and the first stage are surmounted, the second stage examines if there are policy considerations that ought to negate the prima facie case established in the first stage of the test.

(3) Application of Spandeck test

26.8.6 The Court of Appeal added that the *Spandeck* test should be applied incrementally, with reference to prior cases in analogous situations. Further, the mere existence of statutory duty is not in itself conclusive of a common law duty of care: *Tan Juay Pah v Kimly Construction & Ors [2012] 2 SLR 549 (CA)*; see also *Resource Piling v Geospecs [2014] 1 SLR 485* (HC decision referred to at CA). Ultimately, whether the "requisite proximity is present in a particular case, …will turn on the precise factual matrix concerned": *Ngiam Kong Seng v Lim Chiew Hock [2008] 3 SLR(R) 674 (CA)* at para [123].

26.8.7 Nonetheless, the Court may not be too particular about whether a particular aspect of the factual matrix was considered under the first or second stage, or indeed both stages, so long as the reason for doing so was clearly articulated: *Tan Juay Pah v Kimly construction Pte Ltd [2012] 2 SLR 549*.

26.8.8 Since *Spandeck*, policy factors identified by the Court include:

- indeterminate liability;
- conflict and coherence with contractual and other tortious frameworks, statutory frameworks, institutional duties and public functions and justiciability; and
- not being overly paternalistic in imposing a common law duty of care, given personal autonomy, self-determination and personal responsibility.

9 ARBITRATION

26.9.1 Arbitration features a tribunal empowered to judge and determine a matter, distinct and separate from litigation in constituted courts. As the arbitral decision is binding, arbitration ought to be distinguished from other Alternative Dispute Resolution methods.

A.. Arbitration Provisions in Standard Form Contracts

26.9.2 Arbitration provisions exist in many of the standard forms, such as the JCT Contract (2005 Ed.), ICE Form of Contract (7th Ed. 1999), PSSCOC and the new suite of standard forms of contract introduced by FIDIC (Federation Internationale des Ingenieurs-Counseils).

(1) Security of Payments Act renders void any arbitration provision that aims to circumvent the Act

26.9.3 Notably, section 36 of the Security of Payments Act ("SOPA") renders void any provision that has the effect of "modifying, restricting or prejudicing" its operation, or which may "reasonably be construed as an attempt to deter a person from taking action under the Act". An arbitration provision which aims to circumvent the SOPA would thus be rendered void. The SOPA is discussed below, under "Legislation".

(2) Arbitration Act allows party to challenge an arbitral award

26.9.4 Under the Arbitration Act, a party can also challenge an arbitral award either by:

- 1. Filing an appeal with the High Court on a question of law arising out of the award under s 49(1) of the Act; or
- 2. Applying to the court to set aside the award on the grounds prescribed under the s 49(3) of the Act.

26.9.5 International and domestic arbitration are discussed in detail in the Laws of Singapore Chapter 4.

10 LEGISLATION

A. Building Control Act 1989

(1) Standards of safety and good building practices

26.10.1 The Building Control Act is a prescriptive code. It prescribes standards of safety and good building practice. The legislation provides a blueprint to control legally the construction of building works, the monitoring of existing structures with powers to deal with them where safety is in issue. It is well known that the current legislation was a direct consequence of the Hotel New World collapse.

(2) Every person for whom building works are to be carried out have to appoint an accredited checker as an extra level of control in process of design

26.10.2 A central feature of the legislation was the conception of the role of an "accredited checker". The accredited checker operates as an extra level of control in the process of design. The legislation obliges "every person for whom building works are to be carried out" to appoint an accredited checker. The accredited checker must be registered with the Building Authority and maintain no professional or financial interest (other than the stipulated appointment) in the building works concerned. In addition, only qualified civil or structural engineers of 15 years' standing in terms of practical experience in the design and construction of buildings, in addition to being distinguished by ability, standing or special

knowledge or experience could be appointed as accredited independent checkers. This is clearly to ensure that the professional stature of the expert would safeguard his independence when appointed as accredited checker. The appointed accredited checker is required to check the key structural elements in the plans and issue a certificate and evaluation report approving them. This is the independent technical control prescribed by the legislation.

(2)(3) Commissioner of Building Control relies solely on certificate and evaluation report of accredited checker to approve plans

26.10.3 Section 6(1) provides for approval of plans by the Commissioner of Building Control. Among the documents to be submitted with the plans is the certificate of the accredited checker in relation to the adequacy of the key structural elements. By section 6(3), the Commissioner of Building Control is authorised to rely solely on the certificate and evaluation report of the accredited checker to approve plans. Hence, the Commissioner of Building Control has no duty to check the plans when granting "approval".

(4) Commissioner has discretion to carry out random checks on structural plans and design calculations and may revoke approval if any information given previously was false

26.10.4 Notwithstanding the earlier section, section 5(6) gives the Commissioner the discretion to carry out random checks with respect to structural plans and design calculations of the building works. The Commissioner also retains the right to revoke acquiescence of the building plans if satisfied that any information given in respect of the approval had been false in a material particular.

(5) Government and public officers are excluded from liability by reason that works are carried out in accordance with the Act or works are subject to approval by the Commissioner

26.10.5 Section 32 is an extremely comprehensive exclusion of liability of the Government and public officers. It even protects the government and any public officer from suit arising by reason of the fact that any building works are carried out in accordance with the provisions of this Act or that such building works or plans of the building works are subject to inspection or approval by the Commissioner or the public officer. Accordingly, the Building Authority has been given unequivocal protection which the decision of Murphy v Brentwood District Council [1991] 1 AC 398 achieved to a limited extent in England in 1991.

(6) Amendments were made in 2003 to move from procurement methods to design and build, give the Commissioner the power to stop dangerous building works and may require the person for whom works are being carried out to take actions to avert such danger

26.10.6 Various amendments have been made to the Act. In September 2003, amendments were made to take into account the move away from the traditional form of procurement to the design and build method. Section 7A gives the Commissioner the power to issue an order to immediately stop building works that pose a danger to persons, property or other buildings. In addition, the Commissioner may require the person for whom the works are carried out to take certain remedial and other measures to avert such danger. An example of the type of situation to which this section could apply may be found in *Xpress Print Pte Ltd v Monocrafts Pte Ltd & Anor [2000] 3 SLR 545*.

26.10.7 In September 2007, further amendments were made to update building control systems, to enhance building safety and raise professionalism in the industry.

26.10.8 For instance, section section 8(f)(ii) introduced a new requirement for developers to appoint an Instrumentation Specialist Builder (“ISB”). The scope of the Act also extended to “Underground Building Works” under part II of the Act. Builder’s licensing was introduced. Provisions on existing requirements were also strengthened.

26.10.9 In 2008, the Building Control Regulations and the Building Control (Accredited Checkers and Accredit Checking Organisations) Regulations were similarly amended, and the Building Control (Builders' Licensing) Regulations were introduced.

26.10.10 These changes are delineated in "A Guidebook to the Changes in Building Control", published by the Building and Construction Authority.

B. Building and Construction Industry Security of Payment Act 2004

(1) Singapore's Building and Construction Industry Security of Payment Act 2004 incorporates most key features of New South Wales' Act with several differences

26.10.11 In 2005, Parliament introduced the Building and Construction Industry Security for Payment Act 2004 ("SOPA") in Singapore. The Act is primarily based on the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) ("the NSW Act"). The NSW Act and SOPA have similar structure and purpose, with several important modifications in SOPA taking into account local concerns and circumstances. However, frequent comparison has been made between the NSW Act and SOPA in Parliamentary debates.

(2) Most standard form contracts in use in Singapore have been amended to accommodate the Act; Building and Construction Industry Security of Payment Regulations 2005 accompany the Act

26.10.12 SOPA came into operation on 1 April 2005. Since then, most of the standard form contracts in use in Singapore accommodate the provisions of the SOPA. In exercise of the powers conferred by section 41 of the Building and Construction Industry Security of Payment Act 2004, the Minister for National Development has introduced the Building and Construction Industry Security of Payment Regulations 2005 ("the Regulations") that accompany the Act. Like the parent Act, the Regulations came into operation on 1st April 2005. The Regulations contain, inter alia, requirements that were left by the Act to the Minister to prescribe.

(3) Legislation's far-impact on practices of construction industry

26.10.13 The legislation has also had far-reaching impact on the practices of the construction industry. For instance, amendments have been made to the Public Sector Standard Conditions of Contract to bring it in line with the legislation.

(4) Primary objective of legislation is to reduce difficulties faced by construction industry

(i) Purpose

26.10.14 The primary objective of the legislation is to redress the difficulties faced by the construction industry in obtaining payment for work done and services rendered. The intention of the legislature is unequivocally to facilitate payment in the construction industry. In that regard, the Act not only categorically affirms the right to payment, it goes further and also provides a mechanism for obtaining payment through the speedy dispute resolution procedure of adjudication. Anticipating that efforts may be made to impede the right to payment, the Act prohibits any attempt to hamper the right to payment with its anti-avoidance provisions.

26.10.15 Adjudication has "temporary finality", as adjudication is provisional in nature and is final and binding until the parties' differences are ultimately and conclusively determined or resolved. The court has the power to set aside or stay enforcement of an adjudication determination where necessary, if justified by a high threshold of "securing the ends of justice", such as the insolvency of the claimant: *W Y Steel Construction v Osko Pte Ltd [2013] 3 SLR 380* at [70].

(ii) Process

(a) Jurisdiction of adjudicator and natural justice

26.10.16 Under s 15(3) of the Act, an adjudicator's jurisdictional powers are set out and circumscribed. A respondent cannot raise new grounds for withholding payment that were not included in his payment response. The Court of Appeal observed that this is not a violation of natural justice and the right to be heard; rather, a respondent has failed to exercise his chance to respond to a payment claim and make his case. Nonetheless, the adjudicator is not entitled to simply take the payment claim at face value and must "consider the material properly before him": *W Y Steel Construction v Osko Pte Ltd [2013] 3 SLR 380* (per Sundaresh Menon CJ, CA) at [33], [40] and [52].

(b) Jurisdiction of adjudicator and validity of payment claim

26.10.17 The outcome of a number of adjudication cases turned on issues relating to compliance with the requirements of SOPA. Many of these involved the validity of payment claims (see for example, *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd [2010] SGHC 105* and *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd [2009] SGHC 237*. There were some uncertainties as to what kind of irregularities were fatal. Some of these uncertainties were resolved in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engieering) and anor appeal [2013] 1 SLR 401* ("*Chua Say Eng*") where the Court of Appeal distinguished between two types of defective payment claims, at [31]:

- First, a payment claim in the form of a payment claim, but not intended to be such.
- Second, a payment claim which was in the form of a payment claim and intended to be such, but which did not satisfy all the requirements of the SOPA.

26.10.18 The Court held that in the first instance, an adjudicator would have no jurisdiction as the payment claim was not an existent and operative claim. However, in the second instance, the adjudicator had valid jurisdiction to decide whether to reject the payment claim for non-compliance with the Act.

26.10.19 In *Admin Construction Pte Ltd v Vivaldi [2013] SGHC 95*, Quentin Loh J referred to *Chua Say Eng* and opined that there should be no prohibition against a "repeat claim", where claimants incorporate an unpaid payment claim into a subsequent payment claim, even though there is no new work done. Loh J referred to extra judicial comments by former Chief Justice Chan Sek Keong in *Security of Payments and Construction Adjudication*, and concluded there should be no prohibition against a "repeat" claim unless it was a payment claim or part thereof that had been validly brought to adjudication before, and dismissed on its merits.

26.10.20 In contrast, in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd [2012] SGHC 243*, a repeat claim which did not have an additional item of claim was held to be not valid for the purpose of SOPA s 10(1).

26.10.21 In *Tiong Seng Contractors v Chuan Lim Construction [2007] 4 SLR(R) 354*, it was held that SOPA applies to both final and interim payment claims. In response to the decision, the use of the term "Final Claim" in the SIA 7th edition has since been replaced with "Final Account".

26.10.22 The SIA 8th edition also stipulates its own timelines as to the Statement of Final Account. In addition, where no final payment claim has been served, there is no requirement for a payment response to be provided. Notably, in *AJN v AJO [2011] SGSOP 31*, it was said (in reference to *Doolan (Sandra & Stephen) v Rubikon [2007] Adj LR 07/10*) at [43]:

> "… it was not repetition per se that was objectionable. Instead, what was objectionable was that the claimant in Doolan's case served more than one payment claim corresponding to the final stage of works that gave rise to the last reference date. The

repetition of the claim made it easier to identify the fact that both claims were based on the final stage of works. The re-dating of what was essentially a previous invoice would also be confusing to the respondent."

26.10.23 To date, the Court has not had the opportunity to consider the distinction between repeat final and interim payment claims, and the operation of s 10 SOPA.

26.10.24 More recently, the High Court adopted a strict interpretation of s 10. In *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Ptd Ltd [2014] SGHC 142*, the Court held that the payment claim was invalid as it had not stated the claimed amount.

(iii) Adherence to SOPA timelines

26.10.25 In *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd [2013] SGHCR 4*, it was held that an adjudication determination must be set aside if the adjudication application was lodged later than the period stipulated in s 13(3) of the SOPA.

26.10.26 It is suggested that in accordance with the legislative intent of the Act for quick resolution, timelines should be strictly adhered to.