

PART I PRELIMINARY

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1 Short title

Short title

1.

This Act may be cited as the Building and Construction Industry Security of Payment Act.

2 Interpretation

Interpretation

2.

In this Act, unless the context otherwise requires —

"adjudicated amount" means the amount of a progress payment that is determined to be payable under section 17 or 19, as the case may be;

"adjudication" means the adjudication of a payment claim dispute in accordance with Part IV, and includes an adjudication review under that Part;

"adjudication determination", in relation to an adjudication, means the determination of the adjudicator;

"adjudication response" means a response to an adjudication application lodged by a respondent under section 15 (1);

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

"authorised nominating body" means a person authorised under section 28 (1);

"claimant" means a person who is or claims to be entitled to a progress payment under section 5;

"claimed amount" means the whole or part of any progress payment claimed by a claimant in a payment claim, and includes any interest payable under section 8 (5);

"construction contract" means an agreement under which —

(a) 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

(b) one party undertakes to supply services to one or more other parties;

"construction site" , in relation to a contract between a claimant and a respondent, means —

(a) the land on which or the premises at which the claimant has been, is or will be carrying out construction work; or

(b) the land or the premises in relation to which goods or services have been, are being or will be supplied under the contract;

"contract" means a construction contract or a supply contract;

"costs" , in relation to an adjudication, includes —

(a) the application fee payable to an authorised nominating body; and

(b) the fees and expenses of the adjudicator;

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

"due date" , in relation to a progress payment, means the date on which the progress payment becomes due and payable under section 8;

"land" has the same meaning as in section 4 of the Land Titles Act (Cap. 157);

"owner" , in relation to a contract between a claimant and a respondent, means —

(a) a person who —

(i) enters into a contract, whether with the respondent or any other person, for the carrying out of construction work at or on, or for the supply of goods or services in relation to, the construction site concerned by the respondent or other person (as the case may be); and

(ii) is not engaged by any other person to carry out construction work at or on, or to supply goods or services in relation to, the construction site concerned; or

(b) where there is no such person, a person who owns the construction site concerned;

"payment claim" means a claim made by a claimant for a progress payment under section 10;

"payment response" , in relation to a construction contract, means a response to a payment claim made by a respondent under section 11 (1) or 12 (4);

"principal" , in relation to a respondent named in a payment claim served by a claimant under section 10, means a person who is liable to make payment to the respondent for or in relation to the whole or part of the construction work that is, or the whole or part of the goods or services that are, the subject of the contract between the respondent and the claimant;

"progress payment" means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —

(a) a single or one-off payment; or

(b) a payment that is based on an event or a date;

"respondent" means a person who is or may be liable to make a progress payment under a contract to a claimant;

"response amount" means —

(a) in relation to a construction contract, the amount that a respondent proposes to pay to a claimant in a payment response provided under section 11 (1) or 12 (4) or as varied under section 12 (4); or

(b) in relation to a supply contract, the amount of the claimed amount in a payment claim that a respondent has paid to the claimant on or before the due date (if any);

"supply contract" means an agreement under which —

(a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work;

(b) the supply is for the purpose of construction work carried out or caused to be carried out by the second-mentioned party; and

(c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site,

but does not include such agreements as may be prescribed.

3 Definitions of “construction work” “goods” and “services”

Definitions of “construction work” , “goods” and “services”

3.

—(1) In this Act, unless the context otherwise requires and subject to subsection (2) —

"construction work" means —

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures (whether permanent or not) that form, or are to form, part of the land;

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works that form, or are to form, part of the land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purpose of land drainage, coast protection or defence;

(c) the installation in any building, structure or works of fittings that form, or are to form, part of the land, including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems;

(d) any operation which forms an integral part of, is preparatory to, or is for rendering complete, works of the kind referred to in paragraph (a), (b) or (c), including —

(i) land reclamation;

(ii) site clearance, earth-moving, excavation, tunnelling and boring;

(iii) the laying of foundations;

(iv) the erection, maintenance or dismantling of scaffolding;

(v) the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere; and

(vi) site restoration, landscaping and the provision of roadways and other access works;

(e) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; or

(f) the painting or decorating of the external or internal surfaces of any building, structure or works;

"goods" means —

(a) materials or components to form part of any building, structure or works arising from construction work; or

(b) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

"services" means —

(a) the conduct of feasibility studies, planning services, the submission of applications or other documents to any relevant authority, site supervision services, professional engineering services, or architectural, design, surveying or quantity surveying services, in relation to construction work;

(b) project management services in relation to construction work;

(c) building, engineering, exterior or interior decoration or landscape advisory services in relation to construction work; or

(d) the provision of labour to carry out construction work.

(2) The Minister may, by order published in the *Gazette*, modify the definition of “construction work”, “goods” or “services” in subsection (1) by adding to, varying or deleting any part of the definition.

4 Application of Act

Application of Act

4.

—(1) Subject to subsection (2), this Act shall apply to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.

(2) This Act shall not apply to —

(a) any contract for the carrying out of construction work at or on, or the supply of goods or services in relation to, any residential property (within the meaning of the Residential Property Act (Cap. 274)), which do not require the approval of the Commissioner of Building Control under the Building Control Act (Cap. 29);

(b) any contract to the extent that —

(i) it contains provisions under which a party undertakes to carry out construction work, or supply goods or services, as an employee (within the meaning of the Employment Act (Cap. 91)) of the party for whom the construction work is to be carried out or the goods or services are to be supplied; or

(ii) it deals with construction work carried out outside Singapore, or goods or services supplied in relation to construction work carried out outside Singapore; and

(c) such contract or class of contracts as may be prescribed.

(3) For the purpose of this section, a contract shall be treated as being made in writing —

- (a) if the contract is made in writing, whether or not it is signed by the parties thereto;
- (b) if the contract is made by an exchange of communications in writing;
- (c) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party, with the authority of the parties thereto; or
- (d) if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.
- (4) Where a contract is not wholly made in writing, the contract shall be treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties thereto is in writing.

PART II RIGHTS TO PROGRESS PAYMENTS

PART II RIGHTS TO PROGRESS PAYMENTS

5 Entitlement to progress payments

Entitlement to progress payments

5.

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

6 Amount of progress payment

Amount of progress payment

6.

The amount of a progress payment to which a person is entitled under a contract shall be —

- (a) the amount calculated in accordance with the terms of the contract; or
- (b) if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract.

7 Valuation of construction work goods and services

Valuation of construction work, goods and services

7.

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

- (a) in accordance with the terms of the contract; or
- (b) if the contract does not contain such provision, having regard to the matters specified in subsection (2).

(2) For the purpose of subsection (1) (b), construction work carried out, or goods or services supplied, under a contract are to be valued —

(a) having regard to —

- (i) the contract price for the construction work, goods or services;
- (ii) any other rate or price specified in the contract; and
- (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price specified in the contract, is to be adjusted by a specific amount,

or, in the absence of the matters referred to in sub-paragraphs (i), (ii) and (iii), then having regard to the rates or prices prevailing in the building and construction industry at the time the construction work was carried out, or the goods or services were supplied;

- (b) if any part of the construction work, goods or services is defective, having regard to the estimated cost of rectifying the defect; and
- (c) in the case of materials or components that are to form part of any

building, structure or works arising from the construction work, having regard to the basis that the only materials or components to be included in the valuation are those that have become or, on payment, will become the property of the party for whom the construction work is being carried out.

8 Due date for payment

Due date for payment

8.

— (1) Where a construction contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:

(a) the date as specified in or determined in accordance with the terms of the contract; or

(b) the date immediately upon the expiry of 35 days after —

(i) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or

(ii) in any other case, the date on which or the period within which the payment response is required to be provided under section 11 (1) (whether or not a payment response is provided).

(2) Where a construction contract does not provide for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable immediately upon the expiry of 14 days after —

(a) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or

(b) in any other case, the date on which or the period within which the payment response is required to be provided under section 11 (1) (whether or not a payment response is provided).

(3) Where a supply contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the

earlier of the following dates:

(a) the date as specified in or determined in accordance with the terms of the contract; or

(b) the date immediately upon the expiry of 60 days after the relevant payment claim is served under section 10.

(4) Where a supply contract does not provide for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable immediately upon the expiry of 30 days after the relevant payment claim is served under section 10.

(5) The interest payable on the unpaid amount of a progress payment that has become due and payable —

(a) shall be at the rate specified in or determined in accordance with the terms of the contract; or

(b) where the contract does not contain such provision, shall be at the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act (Cap. 322).

(6) For the purpose of subsections (1) and (2) and subject to the Goods and Services Tax Act (Cap. 117A), the claimant may submit the tax invoice referred to in subsection (1) (b) (i) or (2) (a) at any time after the payment response referred to in subsection (1) (b) (ii) or (2) (b), respectively, is provided, notwithstanding anything to the contrary in the contract.

9 Effect of “pay when paid provisions”

Effect of “pay when paid provisions”

9.

— (1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.

(2) In this section —

"money owing" , in relation to a contract, means money owing for construction work carried out, or for goods or services supplied, under the contract;

"pay when paid provision" , in relation to a contract, means a provision of the contract by whatever name called —

(a) that makes the liability of one party (referred to in this definition as the first party) to pay money owing to another party (referred to in this definition as the second party) contingent or conditional on payment to the first party by a further party (referred to in this definition as the third party) of the whole or any part of that money;

(b) that makes the due date for payment of money owing by the first party to the second party contingent or conditional on the date on which payment of the whole or any part of that money is made to the first party by the third party;

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement; or

(d) that is of such kind as may be prescribed.

PART III PAYMENT CLAIMS AND RESPONSES

PART III PAYMENT CLAIMS AND RESPONSES

10 Payment claims

Payment claims

10.

— (1) A claimant may serve one payment claim in respect of a progress payment on —

(a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

(2) A payment claim shall be served —

(a) at such time as specified in or determined in accordance with the terms of the contract; or

(b) where the contract does not contain such provision, at such time as may be prescribed.

(3) A payment claim —

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

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

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

11 Payment responses etc.

Payment responses, etc.

11.

— (1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —

(a) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or

(b) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.

(2) A respondent named in a payment claim served in relation to a supply contract may respond to the payment claim by paying to the claimant the claimed amount, or such part of the claimed amount as the respondent agrees to pay, by the due date.

(3) A payment response provided in relation to a construction contract —

(a) shall identify the payment claim to which it relates;

(b) shall state the response amount (if any);

(c) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and

(d) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

(4) A respondent may vary a payment response which he has provided to a claimant if, and only if, the variation —

(a) is made in such form and manner as may be prescribed; and

(b) is provided to the claimant by the date or within the period that a payment response is required to be provided under subsection (1) or within the dispute settlement period under section 12 (4).

12 Entitlement to make adjudication applications

Entitlement to make adjudication applications

12.

— (1) Subject to subsection (2), a claimant who, in relation to a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.

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

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

(b) the respondent fails to provide a payment response to the claimant by the

date or within the period referred to in section 11 (1),

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

(3) A claimant who has served a payment claim in relation to a supply contract is entitled to make an adjudication application under section 13 in relation to the payment claim if —

(a) the claimant fails to receive payment by the due date of the claimed amount; or

(b) the claimant disputes the response amount, where the response amount is less than the claimed amount.

(4) During the dispute settlement period, in addition to any other action that the claimant or the respondent may take to settle the dispute —

(a) the claimant or the respondent may seek clarification from the other party on any matter relating to the relevant payment claim; and

(b) the respondent may provide the claimant with a payment response where he has failed to do so under section 11 (1), or vary the payment response provided under that section.

(5) In this section, “dispute settlement period”, in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11 (1).

PART IV ADJUDICATION OF PAYMENT CLAIM DISPUTES

PART IV ADJUDICATION OF PAYMENT CLAIM DISPUTES

13 Adjudication applications

Adjudication applications

13.

—(1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.

(2) An adjudication application shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.

(3) An adjudication application —

(a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;

(b) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;

(c) shall contain such information or be accompanied by such documents as may be prescribed;

(d) shall be accompanied by such application fee as may be determined by the authorised nominating body; and

(e) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the claimant may consider to be relevant to the application.

(4) The authorised nominating body shall, upon receipt of an adjudication application —

(a) serve a copy thereof on the respondent; and

(b) serve on the principal (if known) and the owner concerned a notice in writing that the application has been made.

(5) The notice referred to in subsection (4) (b) shall contain such particulars as may be prescribed.

14 Appointment of adjudicator

Appointment of adjudicator

14.

— (1) The authorised nominating body shall, upon receipt of an adjudication application, refer the adjudication application to a person who is on the register of adjudicators established under section 28 (4) (a) and whom the authorised nominating body considers to be appropriate for appointment as the adjudicator to determine the adjudication application.

(2) The person to whom the adjudication application has been referred under subsection (1) may agree or decline to determine the adjudication application.

(3) The authorised nominating body shall, within 7 days after receipt of the adjudication application, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned.

15 Adjudication responses

Adjudication responses

15.

— (1) A respondent shall, within 7 days after receipt of a copy of an adjudication application under section 13 (4) (a), lodge with the authorised nominating body a response to the adjudication application.

(2) The adjudication response —

(a) shall be made in writing addressed to the authorised nominating body;

(b) shall identify the adjudication application to which it relates;

(c) shall contain such information or be accompanied by such documents as may be prescribed; and

(d) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the respondent may consider to be relevant to the adjudication response.

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or

(b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

(4) The authorised nominating body shall, upon receipt of an adjudication response —

(a) serve a copy thereof on the claimant; and

(b) serve on the principal (if known) and the owner concerned a notice in writing that the adjudication response has been lodged.

(5) The notice referred to in subsection (4) (b) shall contain such particulars as may be prescribed.

16 Commencement of adjudication and adjudication procedures

Commencement of adjudication and adjudication procedures

16.

— (1) An adjudication commences immediately upon the expiry of the period referred to in section 15 (1) within which the respondent may lodge an adjudication response.

(2) An adjudicator shall reject —

(a) any adjudication application that is not made in accordance with section 13 (3) (a), (b) or (c); and

(b) any adjudication response that is not lodged within the period referred to in section 15 (1).

(3) An adjudicator shall —

- (a) act independently, impartially and in a timely manner;
- (b) avoid incurring unnecessary expense; and
- (c) comply with the principles of natural justice.

(4) Subject to subsection (3), an adjudicator may do all or any of the following in relation to an adjudication:

- (a) conduct the adjudication in such manner as he thinks fit;
- (b) require submissions or documents from any party to the adjudication;
- (c) set deadlines for the submissions or documents to be provided by any party and for the submissions or responses thereto by any other party;
- (d) appoint, after notifying the parties, an independent expert to inquire and report on specific issues relevant to the adjudication;
- (e) call a conference of the parties;
- (f) carry out an inspection of any construction work, construction site, goods or any other matter to which the adjudication relates;
- (g) issue such directions as may be necessary or expedient for the conduct of the adjudication.

(5) Where an adjudicator has called for a conference of the parties to an adjudication, a party to the adjudication shall not be represented by more than 2 representatives (whether legally qualified or otherwise) unless the adjudicator permits otherwise.

(6) The parties to an adjudication shall comply with any requirement made or direction issued by the adjudicator in accordance with this section.

(7) An adjudicator's power to determine an adjudication application is not affected by the failure of —

- (a) the respondent to provide a payment response or lodge an adjudication response; or
- (b) any of the parties to comply with the adjudicator's call for a conference

of the parties or any other requirement made or direction issued by the adjudicator,

and in the event of any such failure, the adjudicator may determine the application on the basis of the information and documents available to him.

(8) The determination of an adjudicator on any adjudication application shall be in writing.

17 Determination of adjudicator

Determination of adjudicator

17.

— (1) An adjudicator shall determine an adjudication application —

(a) within 7 days after the commencement of the adjudication, if the adjudication relates to a construction contract and the respondent —

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

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

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

(2) An adjudicator shall, in relation to an adjudication application, determine —

(a) the adjudicated amount (if any) to be paid by the respondent to the claimant;

(b) the date on which the adjudicated amount is payable;

(c) the interest payable on the adjudicated amount; and

(d) the proportion of the costs of the adjudication payable by each party to the adjudication,

and shall include, in the determination, the reasons therefor.

(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:

- (a) the provisions of this Act;
- (b) the provisions of the contract to which the adjudication application relates;
- (c) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
- (d) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
- (e) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;
- (f) the report of any expert appointed to inquire on specific issues;
- (g) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
- (h) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

(4) In determining an adjudication application, an adjudicator shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.

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

- (a) the value of any construction work carried out under a construction contract; or
- (b) the value of goods or services supplied under a contract,

the adjudicator (or any other adjudicator) shall, in any subsequent adjudication application that involves the determination of the value of that

work or of those goods or services, give the construction work or the goods or services, as the case may be, the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value thereof has changed since the previous determination.

(6) If the determination of an adjudicator contains —

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission; or
- (c) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the mistake, error or defect, as the case may be.

(7) Except as provided in subsection (6), the adjudicator shall not change his determination on any adjudication application.

(8) The authorised nominating body —

(a) shall serve a copy of the adjudication determination, and any amended adjudication determination, on the claimant and the respondent; and

(b) shall serve on the principal (if known) and the owner concerned a notice in writing that the adjudication determination has been made or amended, as the case may be.

(9) The notice referred to in subsection (8) (b) shall contain such particulars as may be prescribed.

18 Adjudication review applications

Adjudication review applications

18.

— (1) This section shall apply to a respondent who is a party to an adjudication if the adjudicated amount exceeds the relevant response amount by the prescribed amount or more.

(2) Subject to subsection (3), where a respondent to whom this section applies is aggrieved by the determination of the adjudicator, the respondent may, within 7 days after being served the adjudication determination, lodge an application for the review of the determination with the authorised nominating body with which the application for the adjudication had been lodged under section 13.

(3) Where the respondent is required in consequence of the adjudication determination to pay an adjudicated amount to the claimant, the respondent shall not lodge any application for the review of the determination unless he has paid the adjudicated amount to the claimant.

(4) An adjudication review application —

(a) shall be made in writing addressed to the authorised nominating body requesting it to appoint one or more review adjudicators to determine the application;

(b) shall contain such information or be accompanied by such documents as may be prescribed; and

(c) shall be accompanied by such application fee as may be determined by the authorised nominating body.

(5) The authorised nominating body shall, upon receipt of an adjudication review application —

(a) serve —

(i) a copy thereof on the claimant; and

(ii) a notice in writing that the application has been made on the principal (if known) and the owner concerned; and

(b) subject to subsection (7) and in accordance with the prescribed criteria, appoint a review adjudicator or a panel of 3 review adjudicators.

(6) The authorised nominating body shall, within 7 days after receipt of the adjudication review application, serve a notice in writing confirming the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, on the parties to the adjudication review, the principal (if known) and the owner concerned.

(7) For the purpose of subsection (5) (b) —

- (a) section 14 (1) and (2) shall apply with the necessary modifications; and
- (b) the authorised nominating body shall not appoint an adjudicator whose determination is the subject of the adjudication review.

19 Adjudication review procedures etc.

Adjudication review procedures, etc.

19.

—(1) An adjudication review commences on the date immediately after the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, is confirmed by the authorised nominating body under section 18 (6).

(2) The review adjudicator or the panel of review adjudicators, as the case may be, shall reject any adjudication review application that is not made —

(a) within the period referred to in section 18 (2); or

(b) in accordance with section 18 (4) (a) or (b).

(3) The review adjudicator or the panel of review adjudicators, as the case may be, shall determine the adjudication review application within 14 days after the commencement of the adjudication review or within such longer period as may have been requested by the review adjudicator or the panel of review adjudicators, as the case may be, and agreed to by the claimant and the respondent.

(4) In relation to any adjudication review application, a review adjudicator or a panel of review adjudicators, as the case may be, may —

(a) substitute the adjudication determination that is the subject of the adjudication review for any other determination as is considered appropriate; or

(b) refuse the adjudication review application.

(5) A review adjudicator or a panel of review adjudicators, as the case may be, shall determine under subsection (4) (a) —

(a) the adjudicated amount (if any) to be paid by the respondent to the claimant;

(b) where the adjudicated amount referred to in paragraph (a) is different from the amount that the respondent has paid to the claimant under section 18 (3), the date on which the difference in amount is payable;

(c) the interest payable on any such amount; and

(d) the proportion of the costs of the adjudication review payable by each party to the adjudication review,

and shall include, in the determination, the reasons therefor.

(6) In determining an adjudication review application, the review adjudicator or the panel of review adjudicators, as the case may be —

(a) shall only have regard to the matters referred to in section 17 (3) (a) to (h) and the adjudication determination that is the subject of the adjudication review; and

(b) shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.

(7) Where a panel of review adjudicators is appointed to determine an adjudication review application, the determination shall be decided in accordance with the opinion of the majority of the review adjudicators on the panel.

(8) Sections 16 (3) to (8) and 17 (5) to (9) shall apply, with the necessary modifications, in relation to adjudication review applications.

20 Withdrawal of adjudication applications and adjudication review applications

Withdrawal of adjudication applications and adjudication review applications

20.

—(1) An adjudication application may be withdrawn by the claimant at any time

upon serving a notice of withdrawal on —

- (a) the adjudicator;
- (b) the authorised nominating body which appointed the adjudicator; and
- (c) the respondent.

(2) An adjudication review application may be withdrawn by the respondent at any time upon serving a notice of withdrawal on —

- (a) the review adjudicator or the panel of review adjudicators, as the case may be;
- (b) the authorised nominating body which appointed the review adjudicator or the panel of review adjudicators, as the case may be; and
- (c) the claimant.

21 Effect of adjudication determinations and adjudication review determinations

Effect of adjudication determinations and adjudication review determinations

21.

— (1) An adjudication determination made under this Act shall be binding on the parties to the adjudication and on any person claiming through or under them, unless or until —

- (a) leave of the court to enforce the adjudication determination is refused under section 27;
- (b) the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or
- (c) the dispute is settled by agreement of the parties.

(2) An adjudication review determination under section 19 (4) (a) shall have effect as if it were an adjudication determination for the purposes of this Act.

(3) This section shall not affect the right of any party to challenge an adjudication determination or an adjudication review determination in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

22 Payment of adjudicated amount

Payment of adjudicated amount

22.

— (1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except as provided in section 18 (3), the respondent shall pay that amount —

(a) within 7 days after the adjudicator's determination is served on the respondent; or

(b) by the date on which the adjudicated amount is determined by the adjudicator to be payable,

whichever is the later.

(2) Where an application for the review of an adjudicator's determination has been lodged and the adjudication review determination differs from the adjudicator's determination, the party required to make payment in consequence of the adjudication review determination shall do so —

(a) within 7 days after the adjudication review determination is served on that party; or

(b) if the review adjudicator or the panel of review adjudicators has determined that payment may be made on a later date under section 19 (5) (b), on or before that date.

PART V MEASURES TO ENFORCE PAYMENT OF ADJUDICATED AMOUNT

PART V

23 Consequences of not paying adjudicated amount

Consequences of not paying adjudicated amount

23.

—(1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the claimant may do either or both of the following:

(a) serve a notice in writing on the respondent of the claimant's intention to exercise a lien under section 25 on goods supplied by the claimant to the respondent under the contract concerned that are unfixed and which have not been paid for;

(b) serve a notice in writing on the respondent under section 26 of the claimant's intention to suspend carrying out construction work or supplying goods or services under the contract concerned.

(2) Without prejudice to the generality of subsection (1), where a party to an adjudication fails to pay the whole or any part of the adjudicated amount to any other party in accordance with section 22, the aggrieved party may apply for and enforce the adjudication determination as if it were a judgment debt in accordance with section 27.

24 Direct payment from principal

Direct payment from principal

24.

—(1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the principal of the respondent may make payment of the amount outstanding, or any part thereof, in accordance with the procedure set out in subsection (2).

(2) The procedure by which the principal may make payment to the claimant shall be as follows:

(a) the principal shall serve a notice of payment on the claimant stating that direct payment shall be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner);

(b) the respondent shall, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and

(c) if the respondent fails to show proof of payment in accordance with paragraph (b), the principal shall be entitled to pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.

(3) Where the principal is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) with a project account opened under section 9 of that Act, the claimant shall not be entitled to exercise the lien under section 25 or suspend work or supply under section 26 for 21 days after being served the notice of payment under subsection (2) (a) by the principal, unless the principal had previously defaulted on any payment to the claimant under this section in relation to the same contract.

(4) Any payment by the principal under this section —

(a) may be treated by the principal as payment to the respondent in reduction (by the amount of the payment) of any amount that the principal owes, or may in future owe, to the respondent in connection with the construction work, or the goods or services, concerned; or

(b) may be recovered by the principal as a debt due from the respondent.

(5) Where the principal has paid the adjudicated amount or any part thereof under this section, the subsequent setting aside of the relevant adjudication determination does not affect any rights conferred on the principal under this section.

25 Lien on goods supplied

Lien on goods supplied

25.

—(1) Subject to the provisions of this Act, the claimant has a lien on goods

supplied by the claimant to the respondent under the contract concerned that are unfixed and which have not been paid for.

(2) The lien under subsection (1) subsists if, and only if —

(a) the claimant has served on the respondent the notice referred to in section 23 (1) (a);

(b) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;

(c) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and

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

(3) The lien under subsection (1) shall not give the claimant any priority over the liens on the goods existing before the date on which the first-mentioned lien arises.

(4) The claimant has no rights to exercise the lien referred to in subsection (1) —

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

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

26 Right to suspend work or supply

Right to suspend work or supply

26.

—(1) Subject to the provisions of this Act, a claimant may suspend the carrying out of construction work, or the supply of goods or services, under a contract if, and only if —

(a) the claimant has served on the respondent the notice referred to in section 23 (1) (b);

(b) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;

(c) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and

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

(2) During the period of suspension exercised in accordance with subsection

(1) —

(a) the claimant is not liable to the respondent, the principal or the owner for any loss or damage suffered by the respondent, the principal or the owner, respectively, or by any person claiming through or under the respondent, the principal or the owner; and

(b) the respondent, the principal and the owner shall have no claim against the claimant for any loss or damage suffered as a result of the suspension, but the principal and the owner may recover liquidated damages or any other remedy from the respondent pursuant to any contract or under any law.

(3) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of goods or services in accordance with subsection (1), incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply —

(a) the respondent is liable to pay the claimant the amount of any such loss or expenses; and

(b) any such loss or expenses may be recovered by the claimant as a debt due from the respondent.

(4) Where a claimant has suspended the carrying out of construction work or the supply of goods or services under a contract in accordance with subsection (1), he shall resume such work or supply within 3 days after being paid the adjudicated amount.

(5) Where a claimant has suspended the carrying out of construction work or the supply of goods or services under a contract in accordance with subsection (1), and —

(a) the principal, who is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) with a project account opened under section 9 of that Act, has served a notice of payment under

section 24 (2) (a) on the claimant; and

(b) the principal has not previously defaulted on any payment to the claimant under section 24 in relation to the same contract,

the claimant shall resume such work or supply within 3 days after being served the notice of payment under section 24 (2) (a).

(6) The claimant shall be liable to pay for any loss or damage suffered by the respondent or the principal as a result of any failure to resume carrying out construction work or supplying goods or services, as the case may be, under subsection (4) or (5).

(7) Any period of suspension under subsection (1) shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right of suspension or by a third party (other than the respondent), to complete any construction work or the supply of any goods or services directly or indirectly affected by the exercise of the right of suspension.

(8) Where the contractual time limit referred to in subsection (7) is set by reference to a date rather than a period, the date shall be adjusted accordingly.

27 Enforcement of adjudication determination as judgment debt etc.

Enforcement of adjudication determination as judgment debt, etc.

27.

— (1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.

(2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.

(3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.

(4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the judgment shall be for the unpaid part of the adjudicated amount.

(5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

PART VI GENERAL PROVISIONS RELATING TO ADJUDICATION

PART VI

GENERAL PROVISIONS RELATING TO ADJUDICATION

28 Authorised nominating bodies

Authorised nominating bodies

28.

— (1) The Minister may —

(a) upon the application of any person, authorise the person to appoint adjudicators and undertake such other functions or duties as may be imposed under this Act, subject to such terms and conditions as the Minister may think fit; and

(b) withdraw any such authorisation.

(2) The Minister may limit the number of persons who may, for the time being, be authorised under subsection (1).

(3) An authorised nominating body shall provide the Minister with such information or documents as may be requested by the Minister from time to time in relation to the activities of the authorised nominating body or its register of adjudicators established under subsection (4) (a), including but not limited to information as to the fees charged by the authorised nominating

body or by the persons on its register of adjudicators for any service provided under or by virtue of this Act.

(4) An authorised nominating body shall, in relation to its authorisation under subsection (1) —

- (a) establish and maintain a register of adjudicators;
- (b) establish and administer codes of conduct or practice;
- (c) provide training for the persons who are on the register of adjudicators;
- (d) establish a schedule of fees for adjudication services provided under or by virtue of this Act, including an adjudicator' s fees;
- (e) facilitate the conduct of adjudications under this Act, including the establishing of rules therefor not inconsistent with this Act or any other written law, and provide general administrative support therefor; and
- (f) undertake such other functions or duties as may be imposed under this Act or as may be directed by the Minister.

29 Eligibility criteria for adjudicators

Eligibility criteria for adjudicators

29.

—(1) A person is eligible to be on the register of adjudicators established under section 28 (4) (a) if the person is an individual with such qualifications, expertise or experience as may be prescribed.

(2) A person is not eligible to be an adjudicator in relation to a contract —

(a) if the person is a party to the contract, or is otherwise related to a party to the contract in such manner as may be prescribed; or

(b) if there exists such circumstances as may be prescribed.

(3) A person who is in any way, whether directly or indirectly, interested in any contract or other matter which relates to an adjudication application referred to him by the authorised nominating body under section 14 or 18 shall

immediately disclose the nature of his interest to the authorised nominating body.

30 Costs of adjudication proceedings

Costs of adjudication proceedings

30.

— (1) The costs of any adjudication shall not exceed such amount as may be prescribed by the Minister.

(2) An adjudicator shall, in making his determination in relation to any adjudication application, decide which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party.

(3) Where an adjudicator is satisfied that a party to an adjudication incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the second-mentioned party shall pay some or all of those costs.

(4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

31 Adjudicator' s fees and expenses

Adjudicator' s fees and expenses

31.

— (1) Subject to this section, an adjudicator is entitled to be paid, in relation to an adjudication application —

(a) such fees as may be specified by the authorised nominating body which appointed the adjudicator; and

(b) such amount, by way of expenses, as may be agreed between the adjudicator and the parties to the adjudication or, if no such amount is agreed, then as

the authorised nominating body considers to be reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) An adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application if he fails to make a determination on the application within the time allowed by section 17 or 19, as the case may be, otherwise than because the application is withdrawn or terminated or the dispute between the claimant and respondent is settled.

(3) Subsection (2) shall not apply —

(a) in circumstances in which an adjudicator requires payment of the fees and expenses referred to in subsection (1) before the issue of his determination on the adjudication application; or

(b) in such other circumstances as may be prescribed.

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

(5) For the purposes of subsection (4) —

(a) in the case of the withdrawal of an adjudication application, the applicant shall be liable to pay the fees and expenses of the adjudicator; and

(b) in any other case, the parties to the adjudication shall be jointly and severally liable to pay the fees and expenses of the adjudicator.

(6) An adjudicator may recover his fees and expenses from a person liable to pay them as a debt due to the adjudicator.

32 Protection from liability for adjudicators and authorised nominating bodies

Protection from liability for adjudicators and authorised nominating bodies

— (1) No suit or other legal proceedings shall lie against an adjudicator with respect to anything done or omitted to be done in good faith in the discharge or purported discharge of his functions or duties under this Act.

(2) No suit or other legal proceedings shall lie against an authorised nominating body or any person acting under the direction of the authorised nominating body with respect to anything done or omitted to be done in good faith in the discharge or purported discharge of the authorised nominating body's functions or duties under this Act.

33 Confidentiality of adjudication

Confidentiality of adjudication

33.

— (1) This section shall apply to the following information:

(a) any statement or document created or made for the purposes of an adjudication; and

(b) any information (whether written or oral) that, for the purposes of an adjudication, is disclosed in the course of the adjudication.

(2) No party to a dispute or adjudicator shall disclose to any other person (not being the principal or the owner concerned) any information to which this section applies, except —

(a) with the consent of the party to whom the information relates;

(b) to the extent that the information is already in the public domain;

(c) to the extent that the disclosure is necessary for the purposes of, or in connection with, the adjudication, the enforcement of the adjudicator's determination, or any proceeding before a court or tribunal or any other dispute resolution proceeding;

(d) to the extent that the disclosure is required for any purpose under this Act; or

(e) if the information will not be published in a form that could reasonably be expected to identify any particular person.

34 Effect on other proceedings

Effect on other proceedings

34.

— (1) Nothing in this Act shall affect any right that a party to a contract may have —

(a) to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding;

(b) to apply for adjudication under this Act, notwithstanding that the dispute is the subject of proceedings in a court or tribunal or the subject of any other dispute resolution proceeding; or

(c) to take such measures as he is entitled under Part V to enforce payment of any adjudicated amount.

(2) If a party to a contract submits a dispute relating to or arising from the contract to a court or tribunal or to any other dispute resolution proceeding while the dispute is the subject of an adjudication under this Act, the submission to that other dispute resolution proceeding shall not bring to an end or otherwise affect the adjudication.

(3) An adjudicator shall terminate the adjudication proceedings on a dispute relating to or arising from the contract if, before the adjudicator determines the dispute, the dispute is determined by a court or tribunal or at any other dispute resolution proceeding.

(4) In any proceeding before a court or tribunal in relation to any matter arising under or by virtue of a contract, the court or tribunal —

(a) shall allow for any amount paid to a party to the contract under, or for the purposes of, this Act in any order or award it makes in the proceeding; and

(b) may make such orders as it considers appropriate, having regard to any action taken by a party to the contract in good faith and in reliance on an adjudication determination made under this Act.

PART VII MISCELLANEOUS

PART VII MISCELLANEOUS

35 Act to bind Government

Act to bind Government

35.

This Act shall bind the Government.

36 No contracting out

No contracting out

36.

— (1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.

(2) The following provisions in any contract or agreement (whether in writing or not) shall be void:

(a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;

(b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

(3) The Minister may, for the purpose of subsection (2) (a), prescribe the type of provisions in any contract or agreement, or any class thereof, which are deemed to have the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof.

(4) Nothing in this Act shall, except as provided in subsection (1), limit or otherwise affect the operation of any other law in relation to any right,

title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement.

37 Service of documents

Service of documents

37.

— (1) Where this Act authorises or requires a document to be served on a person, whether the expression “serve”, “lodge”, “provide” or “submit” or any other expression is used, the document may be served on the person —

- (a) by delivering it to the person personally;
- (b) by leaving it during normal business hours at the usual place of business of the person; or
- (c) by sending it by post or facsimile transmission to the usual or last known place of business of the person.

(2) Service of a document that is sent to the usual or last known place of business of a person under subsection (1) (c) shall be deemed to have been effected when the document is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents.

38 Exemption

Exemption

38.

The Minister may, by regulations, exempt —

- (a) any person or class of persons; or
- (b) any contract, agreement, matter or transaction, or any class thereof,

from all or any of the provisions of this Act, subject to such terms or conditions as may be prescribed.

39 Amendment of specified periods

Amendment of specified periods

39.

The Minister may, by order published in the *Gazette*, amend section 8 (1) (b), (2), (3) (b) or (4), 11 (1) (a) or (b), 12 (5), 13 (3) (a), 14 (3), 15 (1), 17 (1) (a) or (b), 18 (2) or (6), 19 (3), 22 (1) (a) or (2) (a), 24 (2) (b) or (3), 25 (2) (c) or 26 (1) (c), (4) or (5) by substituting a different period for the period for the time being specified therein.

40 Delegation of powers

Delegation of powers

40.

— (1) The Minister may, subject to such terms or conditions as he thinks fit, delegate to any person all or any of his powers, functions and duties under this Act, except —

- (a) the power of delegation conferred by this section; and
- (b) the power to make subsidiary legislation.

(2) The Minister may exercise any power or perform any function or duty conferred upon him under this Act notwithstanding the delegation of that power, function or duty under subsection (1).

41 Regulations

Regulations

41.

—(1) The Minister may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without prejudice to the generality of subsection (1), regulations may be made for or in connection with —

(a) the forms to be used and the information or documents to be furnished;

(b) the manner in which authorised nominating bodies are required to exercise their functions or perform their duties;

(c) the form of records to be kept and maintained by the authorised nominating bodies, the information to be recorded and the submission of such records; and

(d) the conduct of adjudicators.

42 Transitional and savings provisions

Transitional and savings provisions

42.

The Minister may, within 2 years of 1st April 2005, prescribe such transitional and savings provisions as he may consider necessary or expedient.

LEGISLATION HISTORY

Building and Construction Industry Security of Payment Act 2004

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