

Building and Construction Industry
Security of Payment Act
Information Kit

Building & Construction Industry Security of Payment Act Information Kit

Disclaimer

The Information Kit outlines the basic rights and obligations arising under the Building and Construction Industry Security of Payment Act (hereinafter referred to as the “Act”). It covers the more commonly occurring contractual arrangements. However, it does not cover all situations. The provisions of the Act shall prevail over the Information Kit. The reader should, for a full appreciation of his rights and obligations under the Act, refer to the Act or consult the relevant professionals for advice.

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CONTENTS

	Page
1. INTRODUCTION	1
1.1 The claimant, respondent, principal and owner	
1.2 What are the types of contract covered under the Act?	
1.3 Contract provisions void under the Act	
1.4 Insolvency	
2. PAYMENT CLAIMS, PAYMENT RESPONSE AND RIGHTS TO PROGRESS PAYMENT	5
2.1 Who can make payment claims under the Act?	
2.2 Types of payment claims under the Act	
2.3 How to make a payment claim under the Act?	
2.4 Who should respond to a payment claim?	
2.5 What is a payment response?	
2.6 Serving and receiving a payment response	
2.7 Dispute settlement period	
2.8 When should the claimant receive payment?	
2.9 Making payment to the claimant	
3. PRINCIPAL AND OWNER INFORMATION	10
3.1 Intervening the dispute	
3.2 Notifications	
4. INTRODUCTION TO ADJUDICATION	11
4.1 What is an adjudication?	
4.2 Authorised Nominating Body (ANB)	
4.3 Establishing a right to adjudication application	
4.4 Adjudication application	
4.5 Adjudication response	
4.6 Cost of adjudication	
5. ADJUDICATION PROCESS	16
5.1 Adjudication procedure and duration	
5.2 Form and substance of an adjudicator's determination	
5.3 Payment of adjudicated amount	
5.4 Adjudication review application and procedure	
5.5 Withdrawal of adjudication or review proceedings	
5.6 Error in determination	
5.7 Challenging the adjudicator's jurisdiction and determination	
6. MEASURES TO ENFORCE PAYMENT OF ADJUDICATED AMOUNT	20
6.1 Direct payment from the principal	
6.2 Lien over goods supplied	
6.3 Right to suspend work or supply	
6.4 Enforcement of adjudication determination as judgment debt	

Summary of the Building and Construction Industry Security of Payment Act

This Act aims to improve cash-flow by helping to speed up payment in the building and construction industry. Any party who has carried out construction work or supplied related goods or services¹ in the building and construction industry under a contract made in writing will have a statutory right to receive progress payment. The Act applies to both private and public sector projects. It can be used even where the contract has no provision for progress payment. The Act does not allow “pay when paid” clauses to be enforced where these are included in the contract.

To benefit from the Act, a claimant (payee) must serve payment claims according to the provisions in the contract and the Act. A respondent (payer) who withholds any payment must give reasons in a payment response to the claimant. If the claimant disagrees with the response amount or fails to receive payment stated in the payment response, he may apply for adjudication through an Authorised Nominating Body (ANB).

Adjudication is a simple process to resolve disputes in a quick and relatively low-cost manner. An independent adjudicator appointed by the Authorised Nominating Body decides on the amount to be paid for a claim made under the Act.

The adjudicator’s decision (known as a determination) is binding and the adjudicated amount must be paid by a stipulated due date. However, the aggrieved party (claimant or respondent) may apply for the review of the determination, provided the disputed amount is large, and the adjudicated amount is paid first. Under the Act, the principal (respondent’s client) may make direct payment to the claimant when the respondent fails to pay the adjudicated amount. The principal then recovers it from the respondent.

The claimant is entitled to suspend work or supply of goods/services if the respondent fails to pay after adjudication. The right of suspension ends when payment is made. The Act also allows the claimant other options such as the right to exercise lien on goods supplied that are unfixed and not paid for. Adjudication determinations can also be enforced as a judgment debt in a court of law.

The mechanism of this Act is time-sensitive and there is a strict timeline² imposed under the Act that needs to be observed.

¹ Construction work, goods and services as defined in section 3 of the Act.

² Days refer to calendar days (excluding all official public holidays).

1. INTRODUCTION

1.1 The claimant, respondent, principal and owner

The claimant is a person who is entitled to progress payment and serves a payment claim for the construction work carried out and/or construction-related goods or services supplied under a contract.

The respondent is a person who has to make payment to the claimant under the contract with the claimant. The respondent is the claimant's immediate client.

The principal is a person who engages the respondent for construction work, goods or services specified in the contract between the respondent and the claimant. The principal is the respondent's immediate client.

The owner of a project, in relation to the contract between the respondent and the claimant, is usually a person who engages the main contractor for the project. He may own or have control over the construction site concerned.

Examples of owners include government agencies and property developers.

1.2 What are the types of contract covered under the Act?

The Act covers two types of contracts³ – construction contracts and supply contracts. A construction contract also covers consultancy services. The Act applies only to written contracts or the written portion of the contract for the construction work or the construction-related services or goods.

Residential properties

All written contracts for the carrying out of construction work, or for the supply of goods and services will be covered under the Act. However, the Act does not apply to contracts involving construction works or for the supply of related goods or services for *residential properties* where Building Plan submission is not required under the Building Control Act.

Example:

A contractor carrying out home renovation work for a HDB homeowner is not entitled to claim under the Act as such work does not require Building Plan submission under the Building Control Act. Similarly, the subcontractors and suppliers engaged by this contractor cannot claim against him under the Act.

Also, private residential renovations that do not require Building Plan submission are excluded from the Act.

³ Construction contract and supply contract as defined in section 2 of the Act.

Supply contract

In the case of supply contracts where no on-site assembly, construction or installation of the goods supplied is required, the Act will only apply if the contract specifies the project or the construction site for which the goods are supplied (whether or not delivered to the site). In addition, the party supplied to should be carrying out construction work at the site. The Act will not apply to supply of goods for the purpose of trading.

Example:

A party (Party A) purely supplies goods to another party (Party B) who in turn purely supplies to a third party (Party C) where Party C carries out the construction work at the site.

In this case, Party A will not be able to claim under the Act as this is considered a form of trading but Party B will be able to claim from Party C under the Act. But, the contract between Party B and Party C must identify the construction project concerned.

Project location

Generally, construction work or related goods and services must be carried out or supplied for a project or site located in Singapore.

Example:

If a consultant provides consultancy services from overseas to a project located in Singapore, he is entitled to claim under the Act.

However, if a person or a Singapore-based company provides construction-related services from Singapore to a project located outside Singapore, the service provider is not entitled to claim under the Act.

The Act will also apply to any contract that deals with the prefabrication of components (whether in or outside Singapore) for construction work to be carried out in Singapore; as well as to locally produced prefabricated components for construction work to be carried out overseas provided that both parties to the contract are registered entities in Singapore.

Example:

If a party produces prefabricated components from overseas to a project located in Singapore, he is entitled to claim under the Act.

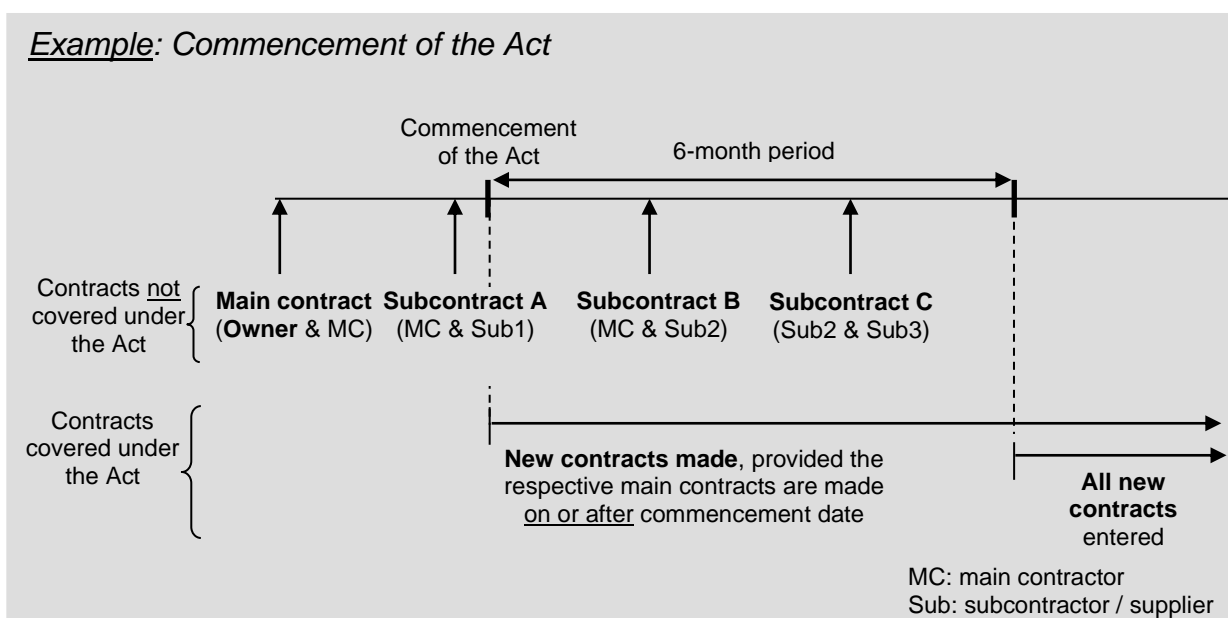
Separately, a party (Party D) who produces prefabricated components in Singapore to another party (Party E) for a project located outside Singapore is entitled to claim under the Act, only if both Party D and Party E are registered entities in Singapore.

Employment contract

An employee (within the meaning of the Employment Act), under an employment contract for carrying out construction work and/or supply related goods and services cannot claim under the Act.

Subcontract

Any subcontract made within a 6-month period following the commencement of the Act (on 1st April 2005) is excluded from the Act if its main contract was made before the commencement of the Act. Therefore, a subcontractor entering into a subcontract during the 6-month period should find out the relevant main contract award date to determine whether or not the subcontract would be covered by the Act.



A contract is generally considered made (or entered into) on the date of a written acceptance of an offer for the carrying out of construction work and/or supply of goods / services, unless otherwise specified.

1.3 Contract provisions void under the Act

The following contract provisions are void under the Act:

- a) any provisions that are inconsistent with the Act or undermine the intention of the Act;
- b) “pay if paid” and “pay when paid” clauses or clauses with similar connotation;
- c) clauses that attempt to “contract out” of the Act;
- d) clauses aimed to deter a person from taking action under the Act; and
- e) any provision which limits interest imposed on late progress payments.

Example of “pay if paid” or “pay when paid” clause made void under the Act:

The main contractor reserves the right not to pay the subcontractor for work carried out until and unless the main contractor has received his payment from the owner in relation to the same project.

1.4 Insolvency

Some provisions of the Act are not applicable if one party is insolvent. The Act does not override the provisions in the Companies Act and the Bankruptcy Act that address insolvency issues. It is important that the parties seek legal advice where insolvency is involved.

2. PAYMENT CLAIMS, PAYMENT RESPONSE AND RIGHTS TO PROGRESS PAYMENT

2.1 Who can make payment claims under the Act?

A person who has a written contract and has carried out construction work or supplied goods or services according to the contract can make a payment claim under the Act. These include:

- a) Main contractor claiming from project owner;
- b) Nominated / domestic subcontractors claiming from main contractors;
- c) Sub-subcontractors claiming from nominated / domestic subcontractors;
- d) Consultants claiming from project owners or main contractor, if engaged by the main contractor under a design & build arrangement;
- e) Suppliers, plant and equipment hirers or related service-providers claiming from nominated / domestic subcontractors, main contractors or owners.

2.2 Types of payment claims under the Act

Any payment that is claimed under the Act covers progress payment for the carrying out of construction work or for the supply of related goods or services under a contract. This includes the following types:

- a) a single or one-off payment;
- b) a payment that is based on an event or date;
- c) payments made in intervals.

Progress payment claims made after completion dates, including claims for final payments (where applicable), are also covered under the Act. The payment claims must be made in relation to the contract.

The claimant can serve a payment claim on the respondent for:

- a) construction work done by the claimant;
- b) consultancy and related services provided by the claimant;
- c) provision of construction materials, equipment or plant or labour to carry out construction work.
- d) authorised variation work;
- e) interest on overdue progress payment.

2.3 How to make a payment claim under the Act?

A claimant is entitled to serve a payment claim not later than the payment claim date or last day of a period stated in the contract or mutually agreed in writing. If there is no date or period provided in the contract, a payment claim may be served by the last day of any month following the month in which the contract is made but a claimant must not make more than 1 payment claim in each month.

The payment claim must:

- a) be made in writing and served on the respondent or anyone else as specified in the contract for this purpose;
- b) identify the contract to which the progress payment relates;
- c) state the claimed amount, calculated by reference to the relevant period to which the claim relates to;
- d) contain sufficient details to identify and describe the items (e.g. type of work done, goods or services supplied) and quantity of each item which the claimant is claiming;
- e) be supported with relevant documentation and calculations of the claimed amount according to the contract or on the basis of reasonable value; and
- f) be served on the respondent by delivering to the person personally, pre-paid registered mail, faxing or other methods of service as provided under the contract or in the Act.

The claimant who is a pure supplier may serve the invoice containing the necessary details as a means of payment claim.

The claimant can highlight that the payment claim is made under the Act although this is not necessary.

Only one claim for a particular amount of work done or goods/services supplied can be made under the Act for each claim date. However, the claimant may include in a payment claim an amount from a previous payment claim made in relation to the same contract but remains unpaid by the respondent. Generally, this Act does not cover claims that are made more than 30 months after the construction work to which the amount in the claim relates was last carried out or the goods or services were last supplied.

2.4 Who should respond to a payment claim?

A respondent who entered into the contract with the claimant should respond to a payment claim. Another person⁴ if so specified in the contract, may respond on

⁴ In public sector main contracts (i.e. contract between the project owner and the main contractor), the public sector agency usually carries out the construction projects through a representative called Superintending Officer (SO) who helps to administer the contract. The SO can be a person from within the Agency or an external consultant engaged by the Agency. The SO can certify payment to the contractor and issue instruction to the contractor to vary the scope of the works under the contract. In private sector projects, the Architect may undertake this role. The appointment of the

behalf of the respondent (e.g. Architect, Engineer, Superintending Officer or equivalent). The respondent should respond within the stipulated response timeframe.

2.5 What is a payment response?

A payment response is a written statement that a respondent serves on the claimant stating the proposed amount to be paid to the claimant, in relation to the claim. It includes payment certificates issued by the Superintending Officer or Architect provided such certificates meet the requirements of a payment response as defined in the Act. A payment response must:

- a) be in writing and addressed to the claimant;
- b) identify the payment claim to which it relates;
- c) state the amount that the respondent proposes to make and if the respondent does not intend to pay any amount, "nil" is to be indicated;
- d) include all supporting reasons if payments are withheld or the response amount is less than the claimed amount;
- e) include reasonable breakdown of the items (e.g. type of work done, goods or services supplied) for each of the supporting reasons provided;
- f) include calculations showing how the amount that the respondent proposes to pay is derived; and
- g) include any other applicable documents for the purpose.

Response amount under a supply contract

Unlike a construction contract, which involves valuation of the work done or services provided, a payment response is not required for claims relating to pure supply contracts.

The respondent may respond to the payment claim by paying to the claimant the relevant amount. However, if the respondent is withholding any amount from the payment claim, he must provide reasons in writing by the payment due date. If not, any reason for withholding any amount will not be considered by the adjudicator if the claimant applies for adjudication.

2.6 Serving and receiving a payment response

A payment response is required in all circumstances in a construction contract. This is regardless of whether the respondent intends to pay or not to pay any part or the whole of the claimed amount. If no payment response is provided, the claimant will be entitled to make an adjudication application under the Act.

respondent's representative is specified in the contract. There is usually no such arrangement for subcontracts and below.

The respondent must provide the payment response to the claimant on or before the due date for payment response according to the terms of the contract, subject to a maximum of 21 days after the date or last day of a period when a payment claim is required to be served. If the contract does not specify a date, the respondent must provide the payment response within 14 days after the date or last day of a period when a payment claim is required to be served.

The respondent may deduct or set-off any sum for which the claimant is or may be liable if allowed under the contract. As “pay when paid” provisions are void under the Act, the respondent is expected to value the claimant’s work or services separately and independently according to the work done or services supplied by the claimant.

If the claimant accepts the payment response, the claimant should notify the respondent in writing by submitting the relevant invoice (tax invoice if the claimant is a taxable person under the GST Act) to the respondent. A claimant is considered to dispute a payment response if the claimant does not accept the payment response in writing.

2.7 Dispute settlement period

If the claimant does not receive a payment response by the stipulated date or if the claimant disputes the payment response, the claimant or the respondent may try to settle such disputes with the other party within 7 days after the due date for payment response. This 7-day period is referred to as the dispute settlement period in the Act.

During the dispute settlement period, the claimant cannot initiate any adjudication but may seek clarification from the respondent or try to achieve amicable settlement of any dispute. Parties may wish to record attempts to settle the dispute during this period, which could be used as supporting documentation if the claimant decides to apply for adjudication.

The respondent may provide a payment response during this period if he has not done so previously or he may vary the response he has provided previously. The respondent should identify the payment response being varied and state whether the variation would override or supplement the payment response.

If the dispute remains unresolved at the end of the settlement period, the claimant has the right to apply for adjudication after notifying the respondent. Details on adjudication applications can be found in Chapter 4.

2.8 When should the claimant receive payment?

For construction contracts, payment must be made by the payment due date stated in the contract, subject to a maximum of 35 days after the due date for payment response or the date of the tax invoice. If the payment due date is not provided in the contract, payment must be made 14 days after the due date for payment response or the date of the tax invoice.

For pure supply contracts, payment must be made by the payment due date stated in the contract, subject to a maximum of 60 days after the payment claim (e.g. invoice) is served. If the payment due date is not provided in the contract, payment must be made 30 days after the payment claim is served.

2.9 Making payment to the claimant

The respondent must make full payment to the claimant according to the amount proposed in the payment response that is accepted, or the amount stated in the payment claim (invoice) of the goods supplied on or before the payment due date.

The claimant is entitled to interest on the unpaid amount that has become due and payable (by the payment due date) at the higher rate of the following:

- a) the rate specified in or determined in accordance with the terms of the contract; or
- b) the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act.

If the claimant remains unpaid by the payment due date, the claimant has the right to apply for adjudication. Details on adjudication applications can be found in Chapter 4.

3. PRINCIPAL AND OWNER INFORMATION

3.1 Intervening in the dispute

Under the Act, the principal may choose to intervene in a dispute after non-payment of any part of an adjudicated amount, through direct payment to the claimant. Details on direct payment can be found in Chapter 6.

3.2 Notifications

The principal (if known to the party serving the notification) and the project owner concerned will be kept informed of:

- a) the claimant's adjudication application (or the claimant's/respondent's adjudication review application) via the Authorised Nominating Body (ANB);
- b) the respondent's adjudication response via the ANB;
- c) the appointment of the adjudicator(s) via the ANB;
- d) the adjudicator(s)' decision (known as a determination) or changes (if any) to the determination via the ANB;
- e) the claimant's intention to suspend work via the claimant; and
- f) the claimant's intention to exercise lien via the claimant.

Failure to notify the principal of the above notifications does not affect the claimant's right to adjudication or the claimant's/respondent's right to adjudication review.

4. INTRODUCTION TO ADJUDICATION

4.1 What is an adjudication?

Adjudication is an alternative dispute resolution mechanism for the building and construction industry in Singapore. It is a simple process to resolve disputes in a quick and relatively low-cost manner, where an independent adjudicator determines impartially the amount payable for a claim made under the Act. This is carried out through a set of procedures.

Only a claimant can initiate adjudication under the Act. The adjudication determination is binding on the parties unless or until the dispute is finally determined by a court or tribunal or by agreement of the parties.

4.2 Authorised Nominating Body (ANB)

The ANB is an organisation authorised by the Minister for National Development (or an appointing authority exercising powers delegated by the Minister) to facilitate the adjudication process.

The ANB is responsible for establishing and maintaining a register of adjudicators, establishing and administering the codes of conduct for adjudicators, and training and accrediting adjudicators. Adjudicators cannot operate outside of the ANBs. They must be appointed by an ANB to adjudicate a payment claim dispute. The claimant cannot select or propose an adjudicator to adjudicate. The ANB will appoint the adjudicator and notify the claimant, respondent, principal (if known) and owner concerned accordingly.

The ANB that is currently appointed under the Act is the Singapore Mediation Centre (SMC). The ANB is a neutral administering body and will be unable to assist or advise parties pertaining to the process, completion of forms and/or accompanying documents, or possible outcomes of the adjudication. Should parties require assistance or clarification in relation to these matters, they should refer to the Act or consult the relevant professionals for advice.

4.3 Establishing a right to adjudication application

The Act provides that the claimant has the right to apply for adjudication under the following circumstances:

For construction contracts

- a) the claimant accepts the payment response provided by the respondent and has provided the tax invoice (if applicable) to the respondent. The respondent fails to pay the claimant the whole or any part of the response amount by the payment due date;
- b) the respondent does not respond to the claimant with a payment response by the payment response due date and this dispute remains unresolved at the end of the dispute settlement period; or

- c) the claimant disputes the response amount proposed by the respondent in the payment response and this dispute remains unresolved at the end of the dispute settlement period.

Supply contracts

- a) the claimant fails to receive payment by the due date of the claimed amount, or
- b) the claimant disputes the response amount (being less than the claimed amount) paid on or before the due date.

Effect on other proceedings

The Act allows a party to a contract to apply for adjudication even if the dispute is the subject of a court proceeding or arbitration, or of any other dispute resolution procedure. Similarly, the Act does not limit any other entitlement the party may have under the contract for remedies under any such other dispute resolution procedures.

Submission to other dispute resolution procedures, including application to court, does not end or affect the adjudication. However, an adjudicator must terminate the adjudication proceedings if the dispute is resolved by that other dispute resolution procedure in the meantime.

Notice of intention to apply for adjudication

The claimant is advised to first establish the award date of the relevant main contract under which his subcontract is made (if applicable) before applying for adjudication. Prior to any adjudication application, the claimant must notify the respondent of his intention to apply for adjudication. The notice must contain the following details:

- a) date of the notice;
- b) project title or reference, or a brief description of the project;
- c) contract number or a brief description of the contract;
- d) date of the contract;
- e) the claimed amount and the response amount (if any);
- f) nature and brief description of the dispute; and
- g) names and contact details (including the service addresses) of the claimant and respondent to this contractual claim.

4.4 Adjudication application

The claimant must apply to the ANB for adjudication within 7 days after:

- a) the payment due date when the respondent fails to pay accordingly by the payment due date, or

- b) the last day of the dispute settlement period when there is no payment response or the response amount remains disputed.

If a claimant does not apply for adjudication within 7 days, he has no further rights under the Act to adjudication for this payment claim. However, he may include the unpaid portion of this payment claim in his next payment claim (see also paragraph 2.3).

The adjudication application must:

- a) be in writing addressed to the ANB, requesting the ANB to nominate an adjudicator;
- b) be accompanied by the ANB adjudication application fee as may be determined by the ANB;
- c) indicate the name and contact details (including the service address) of the respondent, principal (if known) and owner of the project;
- d) state whether the relevant contract is a construction contract or a supply contract;
- e) contain particulars of the relevant contract, including project title or reference, or a brief description of the project, contract number or a brief description of the contract, and date of the contract;
- f) include an extract of the relevant contract terms and conditions;
- g) attach a copy of the notice of intention to apply for adjudication served on the respondent;
- h) attach a copy of the payment claim by the claimant; and
- i) attach a copy of the payment response (if any) by the respondent.

The adjudication application may also contain other relevant information (including expert reports, photographs and correspondence) which the claimant wants to submit to the adjudicator to support his claim and refute any reasons given by the respondent in the payment response for withholding payments.

The claimant should lodge an adjudication application to an ANB during the business hours of the ANB. Proper preparation and presentation of the claimant's written case to the adjudicator may be a critical factor in the success or failure of one's case. It is best to keep them simple so that the adjudicator can quickly grasp the essential points of the arguments and make his determination expeditiously.

After the adjudication application has been received by the ANB, the ANB will serve a copy of the application on the respondent and at the same time, notify the principal (if known) and the owner that the application has been made. The ANB will also appoint an independent adjudicator within 7 days after the application is received.

4.5 Adjudication response

The respondent must submit an adjudication response to the ANB anytime within 7 days after being served a copy of the claimant's adjudication application by the ANB. The adjudicator will disregard an adjudication response that is not lodged within the 7-day period. In the adjudication response, the respondent can substantiate his or her payment response or explain the difference between the amount due and payable and the actual paid amount, whichever is applicable.

The adjudication response submitted to ANB:

- a) must be in writing addressed to the ANB;
- b) must identify the adjudication application to which it relates by stating the reference number assigned by the ANB;
- c) state the main contract award date;
- d) contain details of the response amount; and
- e) may contain other relevant documents or information such as expert reports or photographs showing defective work, correspondences and submissions to supplement the relevant payment response.

The respondent may include objections of any nature (e.g. any reasons for withholding payment such as cross-claim, counterclaim and set-off) only if the respondent has earlier communicated these reasons to the claimant. For construction contracts, such reasons must have been included in the relevant payment response to the claimant. For supply contracts, these objections must be communicated in writing to the claimant by the payment due date.

There should not be any new response amount proposed in the adjudication response. Where the claimant makes any new claim that was not previously contained in the relevant payment claim, the respondent may bring this to the attention of the adjudicator, preferably in his adjudication response.

The ANB will serve a copy of the adjudication response on the claimant and at the same time, notify the principal (if known) and the owner that the response has been lodged.

4.6 Cost of adjudication

The cost of adjudication can be kept to a minimum if the issues are kept simple and submissions by the parties are complete, clear and concise. The adjudicator is also required to avoid incurring unnecessary expense. There are two main elements of cost:

- a) the ANB application fee and adjudicator's fees and expenses (including fees required for appointment of any external expert if necessary); and
- b) any other related costs and professional expenses that each party (i.e. the claimant or the respondent) may incur, e.g. cost of obtaining professional assistance from lawyers, consultants or other specialists.

The ANB application fee and adjudicator's fees and expenses will be shared between the parties in dispute but the adjudicator has the power to decide on the proportion payable by each party to the adjudication. The adjudicator will not award costs due to any other related professional expenses that a party has incurred, but these costs may be recoverable from the other party through some other dispute resolution procedure.

The adjudicator's fees and expenses are specified by the ANB and the amount would depend on the work done and expenses incurred by the adjudicator. The ANB collects a deposit when receiving an adjudication application.

An adjudicator is not entitled to be paid and should not retain any fees in connection with the adjudication if there is no determination made within the time required by the Act.

However, if the adjudication is withdrawn by the claimant or the dispute between the parties is resolved, the adjudicator is entitled to be paid the fees and expenses incurred up to and including the withdrawal date or date on which the dispute is resolved. The adjudicator may withhold the adjudication determination until the adjudicator's fees and expenses are paid by any or all the parties.

To ensure that adjudication remains affordable, the adjudication application fee and adjudicator's fees must not exceed the limits specified in the regulations⁵.

⁵ (a) The fee payable to an authorised nominating body shall not exceed:
(i) \$600 for each adjudication application; and
(ii) \$1,200 for each adjudication review application.
(b) The fee payable to an adjudicator (including a review adjudicator or a panel of review adjudicators) shall be computed on the basis of a rate not exceeding \$2,400 per day or \$300 per hour, subject to:
(i) where the claimed amount exceeds \$24,000, a maximum of 10% of the claimed amount; or
(ii) in any other case, a maximum of \$2,400.

5. ADJUDICATION PROCESS

5.1 Adjudication procedure and duration

The adjudicator decides on the procedure to be adopted for adjudication, for example a document-only procedure, a conference or both. If the adjudicator calls for a conference of the parties, a party to the adjudication is entitled to be represented by not more than 2 representatives (whether legally qualified or not) unless the adjudicator permits otherwise.

The adjudicator may also require further submissions or documents from any party to the adjudication or carry out inspection of items to which the adjudication relates.

The adjudicator's power to make an adjudication determination is not affected if any party does not comply with a requirement made or direction issued by the adjudicator, or if any party is absent at the conference. In such circumstances, the adjudicator may proceed to determine the application on the basis of the information and documents available to him.

The adjudication commences immediately after the expiry of the 7-day period within which the respondent may lodge an adjudication response. The adjudicator must make a determination within:

- a) 7 days after commencement of the adjudication procedure, in relation to a construction contract -
 - (i) if the respondent fails to respond to the claimant and the ANB (i.e. did not give both the payment response and adjudication response), or
 - (ii) if the respondent fails to pay the response amount accepted by the claimant by the relevant payment due date, or
- b) 14 days after commencement of the adjudication in any other case, or
- c) any longer time requested by the adjudicator and agreed to by both the claimant and respondent.

5.2 Form and substance of an adjudicator's determination

The adjudicator will determine the amount of the progress payment to be paid by the respondent to the claimant (known as the adjudicated amount) as well as the interest payable on the unpaid amount of a progress payment that becomes due and payable.

The adjudicator will make an adjudication determination after taking into consideration the following matters:

- a) the provisions of the Act and the relevant contract;
- b) the payment claim and the adjudication application, together with all supporting documents;
- c) the payment response (if any) and the adjudication response (if any), together with all supporting documents;

- d) the results of any inspection carried out by the adjudicator and the reports of the expert appointed to advise on specific issues, if any;
- e) any other information or documents provided at the request of the adjudicator in relation to the adjudication; and
- f) any other matter that the adjudicator reasonably considers to be relevant.

The adjudicator is not bound by the payment response, or any assessment related to the progress payment that is provided by the contract to be final or binding on the parties. The adjudicator must disregard an objection of any nature (e.g. any reason for withholding any amount, cross-claim, counterclaim and set-off) unless:

- a) that objection was included in the relevant payment response provided by the respondent to the claimant for a construction contract; or
- b) that objection was provided by the respondent to the claimant by the payment due date for a supply contract.

The adjudicator must also disregard item(s) relating to damage, loss or expense (e.g. prolongation claims and liquidated damages) unless the amount has been agreed by the parties or the item(s) have been certified under the contract. For example, the adjudicator may have regard to a payment certificate indicating the respondent's set-offs in accordance to the terms of the contract.

The value of work, goods or services determined through a previous adjudication shall be given the same value unless the claimant or respondent satisfies the adjudicator concerned that the value of work, goods or services has changed since the previous determination.

The adjudication determination must be in writing and state the following:

- a) the adjudicated amount to be paid by the respondent to the claimant;
- b) the date on which any such amount is due and payable;
- c) the interest payable on the adjudicated amount;
- d) the reasons for the determination; and
- e) the proportion of the costs of the adjudication payable by each party to the adjudication.

5.3 Payment of adjudicated amount

The respondent must pay the adjudicated amount within 7 days after the adjudicator's determination is served on the respondent or by a later date determined by the adjudicator. However, where the claimant is entitled to lodge an adjudication review, the respondent only pays the adjudicated amount after 7 days but within 10 days once the adjudicator's determination is served on the respondent.

To facilitate the payment, the claimant who is taxable under the GST Act should follow up with the submission of a tax invoice or issue a credit note to adjust for the difference, whichever is applicable.

Failure to pay the claimant may result in suspension of work or lien over goods supplied by the claimant. The claimant may also file the adjudication determination as a judgment debt. Details on measures to enforce payment of adjudicated amount can be found in Chapter 6.

5.4 Adjudication review application and procedure

An aggrieved claimant or respondent may lodge a single adjudication review with the ANB. For the respondent, this applies only if the adjudicated amount exceeds the relevant response amount by at least S\$100,000 and, where the adjudication relates to a construction contract, the respondent had earlier served a payment response. For the claimant, this applies only if the claimed amount exceeds the adjudicated amount by at least S\$100,000.

The review application must be made within 7 days after the adjudication determination is served on the parties. The respondent cannot lodge the adjudication review unless the respondent first pays the adjudicated amount into a trust account maintained by the ANB.

Where the claimant has lodged a review application, the respondent is not required to make payment of the adjudicated amount until the adjudication review determination is served on the respondent.

The adjudication review application must:

- a) be in writing addressed to the ANB, requesting the ANB to nominate adjudicator(s) for review;
- b) be accompanied by the ANB adjudication review application fee as may be determined by the ANB;
- c) attach a copy of the adjudication determination in relation to the adjudication application lodged by the claimant; and
- d) contain proof of payment of adjudicated amount to the ANB.

For the review, the ANB will appoint another adjudicator who will not be the same person who determined the dispute (or a panel of 3 adjudicators if the adjudicated amount exceeds the relevant response amount or the claimed amount exceeds the adjudicated amount by at least S\$1,000,000) within 7 days after the review application. The adjudication review starts on the date immediately after the appointment of the review adjudicator(s) is confirmed by the ANB.

The adjudication review procedures are similar to those for the initial adjudication. The review adjudicator(s) will determine the review application within 14 days after the start of the adjudication review or any longer time requested by the review adjudicator(s) and agreed by both the claimant and respondent. The review

adjudicator(s) may substitute the adjudication determination with another appropriate determination or refuse the adjudication review application.

If the adjudication review determination differs from the adjudication determination, either the ANB or the respondent is required to make payment within 7 days after the review determination is served on the parties or by a later date determined by the review adjudicator(s).

5.5 Withdrawal of adjudication or review proceedings

Only the party who lodged the application is entitled to withdraw an adjudication application or an adjudication review application. The applicant may do so, at any time, by serving a notice of withdrawal on the ANB, adjudicator(s) and the other parties to the adjudication or adjudication review. The applicant will then be liable to pay the fees and expenses incurred by the adjudicator(s) up to and including the date of withdrawal.

5.6 Error in determination

If there is a clerical mistake, or an error arising from an accidental slip or omission, the adjudicator may, on his own initiative or on the application of the claimant or the respondent, correct the mistake or error. The adjudicator cannot make any substantive change to the determination. The ANB will notify the parties to the adjudication about the amendments.

5.7 Challenging the adjudicator's jurisdiction and determination

There may be circumstances when parties to the adjudication feel that the adjudicator has conducted the adjudication in an improper manner or has no jurisdiction (authority), including any conflict of interest. If the party is in any doubt about the adjudicator's authority to act, legal advice should be sought at an early stage.

The respondent or the claimant may also take the dispute to arbitration or litigation but this, in itself, does not affect the adjudication process.

The adjudicator's determination remains binding, and the adjudicated amount is to be paid, unless the dispute is re-adjudicated by the review adjudicator(s) or finally determined by court proceedings, arbitration, or agreement by parties.

6. MEASURES TO ENFORCE PAYMENT OF ADJUDICATED AMOUNT

6.1 Direct payment from the principal

If a respondent fails to pay the whole or any part of the adjudicated amount to the claimant by the due date for payment of the adjudicated amount, a principal of the respondent may decide to make payment of the outstanding amount directly to the claimant. The procedure by which a principal makes payment to a claimant is as follows:

- a) the principal serves a notice of payment on the claimant stating that direct payment would be made, and at the same time, serve a copy of the notice to the respondent and the owner (if the principal is not the owner);
- b) the respondent must, if he has paid the adjudicated amount to the claimant, show proof of 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 will be entitled to pay the outstanding amount to the claimant.

Under the Act, the principal may treat such payment as payment to the respondent. The principal can recover the amount paid to the claimant from the respondent, through payment the principal owes or may in future owe to the respondent in connection with the construction work or goods or services concerned. Alternatively, the principal may also recover as a debt due from the respondent.

The Act only allows direct payment in a principal-respondent-claimant relationship, in which the work done or goods or services supplied by the claimant to the respondent is part of the construction work or goods or services that the principal has engaged the respondent to carry out or supply.

Example of direct payment in a principal-respondent-claimant relationship:

A developer (principal) can only pay a first level subcontractor (claimant) directly, if the main contractor (respondent) fails to pay adjudicated amount to the subcontractor.

6.2 Lien over goods supplied

Under the Act, the claimant has a lien over goods supplied to the respondent that are unfixed and which have not been paid for.

The lien on unfixed goods subsists only if:

- a) the claimant is not paid the adjudicated amount on or after the due date for payment of the adjudicated amount;
- b) the claimant has first notified the respondent of his intention to exercise the lien in relation to the unpaid adjudicated amount;

- c) the notification must be copied to the principal (if known) and owner; and
- d) at least 7 days have passed since the notification is served on the respondent, principal (if known) and the owner.

The lien granted by the Act does not give the claimant a priority over pre-existing liens on the goods. The claimant has no right to exercise the lien if a third party owns the goods. The claimant should ascertain the unpaid portion and only exercise lien on the goods corresponding to that unpaid portion.

Principal is licensed housing developer

If the principal is a licensed housing developer with a Project Account opened under the Housing Developers (Control & Licensing) Act, the claimant will not be entitled to exercise the lien for a period of 21 days after being served a notice of payment by the principal. The claimant's right will resume if the principal fails to make the payment after the 21-day period. However, a principal would not be entitled to the 21-day reprieve if he had previously defaulted on any direct payment to the claimant in relation to the same contract.

It is important that the claimant does not trespass upon the rights of others and thereby incur a liability to a third party. Therefore, it is advisable that the claimant seek legal advice before exercising a lien under the Act.

6.3 Right to suspend work or supply

The claimant has the right to suspend construction work, or the supply of goods or services, relating to the contract between the respondent and the claimant where the payment is in dispute, only if:

- a) the claimant is not paid the adjudicated amount by the due date for payment of the adjudicated amount;
- b) the claimant has first notified the respondent of his intention to suspend work, or the supply of goods or services under the contract;
- c) a copy of the notification is served on the principal (if known) and the owner; and
- d) at least 7 days have passed since the notification is served on the respondent, principal (if known) and the owner.

During the period of suspension, the claimant is not liable to the respondent, principal or owner for loss or damage suffered by the respondent, principal or owner or any person claiming through or under the respondent, principal or owner. However, the owner or principal may recover liquidated damages or other remedy from the respondent pursuant to any contract or under any law.

If the respondent removes any work from the claimant's contract during the course of suspension, the claimant may recover from the respondent, any loss and expenses incurred as a debt due.

Resuming work

However, the claimant has no right to suspend work or supply and, if he had suspended work, must resume work within 3 days after he is paid the adjudicated amount in full. If not, the claimant is liable for any loss or damage suffered by the respondent or the principal.

Principal is licensed housing developer

If the principal is a licensed housing developer with a Project Account opened under the Housing Developers (Control & Licensing) Act, the claimant shall not be entitled to suspend work or supply for a period of 21 days and, if he had suspended work, must resume work within 3 days after being served a notice of payment by the principal.

The claimant's right to suspend work or supply will resume if the principal fails to make the payment after the 21-day period. A principal will, however, not be entitled to this 21-day reprieve if he had previously defaulted on any direct payment to the claimant in relation to the same contract.

6.4 Enforcement of adjudication determination as judgment debt

An adjudication determination made under this Act may be enforced as a judgment for the unpaid part of the adjudicated amount. The applicant may file an application for leave to enforce an adjudication determination in a court, accompanied by an affidavit stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.

If any party wish to set aside the adjudication determination or the judgment that has been obtained with leave of court, that party must first pay into court as security the unpaid portion of the adjudicated amount.