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Timelines for SOPA Payment Claims, Responses, and Adjudication

Introduction

The Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("**SOPA**") sets out a regime for interim payments and a procedure to resolve payment disputes in the construction industry. To ensure the smooth flow of payment, the SOPA contains strict timelines for responses, notices, and adjudication.

Parties to construction contracts are free to customise their agreements to provide for specific dates or periods for the service of payment claims and responses. Does such freedom extend to having 'weekly progress claims' and having payment conditioned on the provision of a performance bond? The Singapore High Court decision in *Asia Grand Pte Ltd v A I Associates Pte Ltd* [2023] SGHC 175 gives us some food for thought.

This Update provides a summary of the Court's decision and the approach towards such contractual provisions on payment.

Brief Facts

The employer, AGPL, had entered into an agreement ("**Contract**") with the contractor, AI, to carry out works on a project. The Contract did not contain a provision specifying the date on which payment claims under the Contract were to be served by AI, nor did it specify the date on which payment responses under the Contract were to be served. Instead, it provided for 'weekly progress claims'.

On the facts, the following took place:

- AI served a payment claim ("**PC**") on AGPL on 16 November 2022.
- On 13 December 2022, AI served a Notice of Intention to Apply for Adjudication in respect of the PC.
- On 14 December 2022, AGPL served a payment response in respect of the PC, asserting that the payment response was in compliance with the SOPA.

The main issue was when AI's PC was deemed to have been served – AI submitted that it should be deemed to have been served on 16 November 2022, while AGPL submitted that it should be 30 November 2022. This would in turn determine the following timeline that applies under the SOPA, and whether AI's adjudication application had been made prematurely.

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The Adjudicator accepted AI's position, determining that AI's adjudication application had not been made prematurely. Accordingly, the Adjudicator determined that he had jurisdiction to adjudicate the dispute.

AGPL applied to set aside the Adjudicator's determination.

Holding of the High Court

The Court found that the adjudication application was lodged prematurely. The Court thus found that the Adjudicator did not have jurisdiction over the dispute and set aside his determination.

Timeline under the SOPA

The timeline under the SOPA is as follows:

- **Payment claim** – Under section 10 of the SOPA, the payment claim must be served by the date or period specified in the contract or, if there are no such terms, by the "prescribed date". A payment claim served before such "prescribed date" is deemed to have been served on the "prescribed date".
- **Payment response** – The payment response must be served by the date specified in the contract or within 21 days after the payment claim is served, whichever is the earlier. If there are no terms specifying the date for service of payment response, the payment response must be served within 14 days after the payment claim is served under section 10.
- **Adjudication application** – If a payment response is not received, a claimant is entitled to lodge an adjudication application after seven days from the date on which the payment response was required to be provided. The adjudication application must be lodged within seven days after such entitlement arises.
- **Adjudication response** – The adjudication response must be lodged within seven days after receipt of a copy of the adjudication application.

The dispute in this case was over the "prescribed date" for the service of payment claims where there is no provision for date of service of payment claims in the contract. The Court held that the "prescribed date" for the purposes of section 10 of the SOPA is "the last day of the month", with "month" referring to a calendar month. Therefore, in such a situation, a payment claim served before the end of the calendar month is deemed to have served at the end of the calendar month.

The Court set out illustrations of how the date on which a payment claim is "served under section 10" of the SOPA should be ascertained:

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Scenarios	Contractual date for service of payment claim	Actual date of service of payment claim	Date on which payment claim is deemed served under section 10
Scenario A: Where the contract contains terms that stipulate a payment claim service date	Assuming that the contract provides for the 15 th of the month	Assuming that it is on 10 July	15 July
Scenario B: Where the contract contains terms that stipulate a payment claim service period	Assuming that the contract provides for the 15 th –18 th of the month	Assuming that it is on 10 July	18 July
Scenario C: Where the contract is silent on when a payment claim must be served	No date is stated	Assuming that it is on 10 July	31 July

Application

Based on the above reading of the SOPA timeline, the Court found that AI had lodged the adjudication application prematurely.

- Since the PC was actually served on 16 November 2022 and the Contract did not stipulate the date for service (falling under scenario C above), the PC was deemed to have been served on 30 November 2022, being the last day of November 2022.
- Since the Contract did not prescribe a timeline for the provision of the payment response, the payment response should have been provided by 14 December 2022, which was 14 days after the deemed date of service of the PC.
- The date from which AI was entitled to lodge an adjudication application was 22 December 2022, which was after seven days from the date on which AGPL was required to provide the payment response (i.e., 14 December 2022).
- AI's adjudication application, which was lodged on 13 December 2022, was thus premature.

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Other Observations

The Court also provided some guidance on two other issues.

First, the Court considered the provision for 'weekly progress claims' and whether this took the Contract out of the ambit of the SOPA.

- As the Contract was silent on a service date for the payment claim, the Court made its determination on the basis of the statutory provisions above. The Court did not have to determine what would happen had the Contract provided for a weekly service date for the payment claim, e.g. every Friday of the week.
- While this remains an open question, the Court helpfully observed that the inclusion of the 'weekly progress 'claims' provision did not thwart the operation of the SOPA or contravene its provisions.

Second, the Court considered the provision for a performance bond.

- It was not clear on the face of the judgment whether the Contract provided that AI's entitlement to progress payments would be contingent on AI providing a performance bond. As an illustration, Clause 2.1.2 of the REDAS Design and Build Conditions of Contract provides that the provision of a performance bond is a condition precedent to the contractor's right to receive any progress payments.
- The impact of this decision on such contractual provisions remains to be seen. However, the Court provided insight in this regard by observing that it is not stated anywhere in the SOPA that a contractor's entitlement to a progress payment is contingent on the provision of a performance bond, even if there is a contractual stipulation for the provision of such a bond.

Concluding Words

This decision highlights the importance of complying with the relevant timelines under the SOPA. In particular, where the dates for service of payment claims and payment responses are not specified in the contract, the SOPA prescribes deemed dates of service. Parties should be aware of these deemed dates and the resulting timelines.

For greater certainty, parties should consider including provisions in their construction contracts specifying when payment claims and payment responses should be served. This would avoid any unnecessary uncertainty in the SOPA timelines. Parties may also wish to specifically address obligations that would impact on entitlement to progress payments.

If you have any further queries, please feel free to contact our team below.

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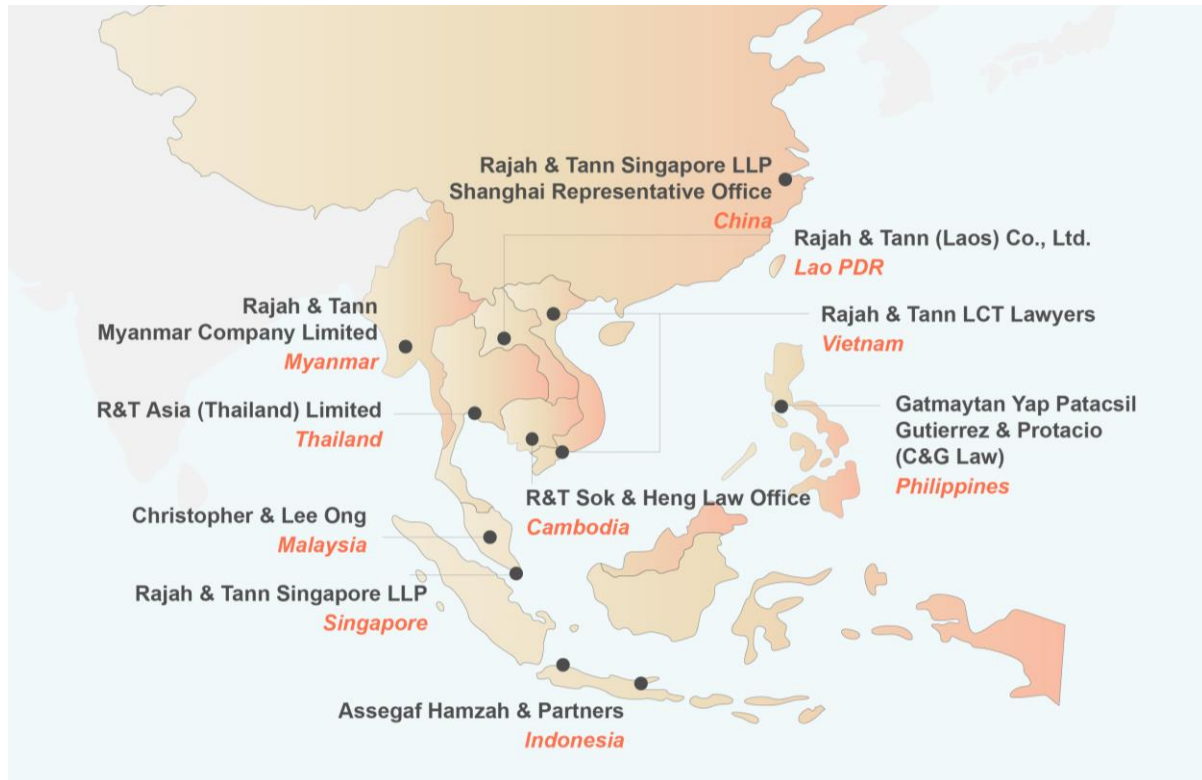
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