

Latest Issues in the Building and Construction Industry: Amendments to the SOP Act (In force since 15 Dec 2019) and Impact of COVID-19

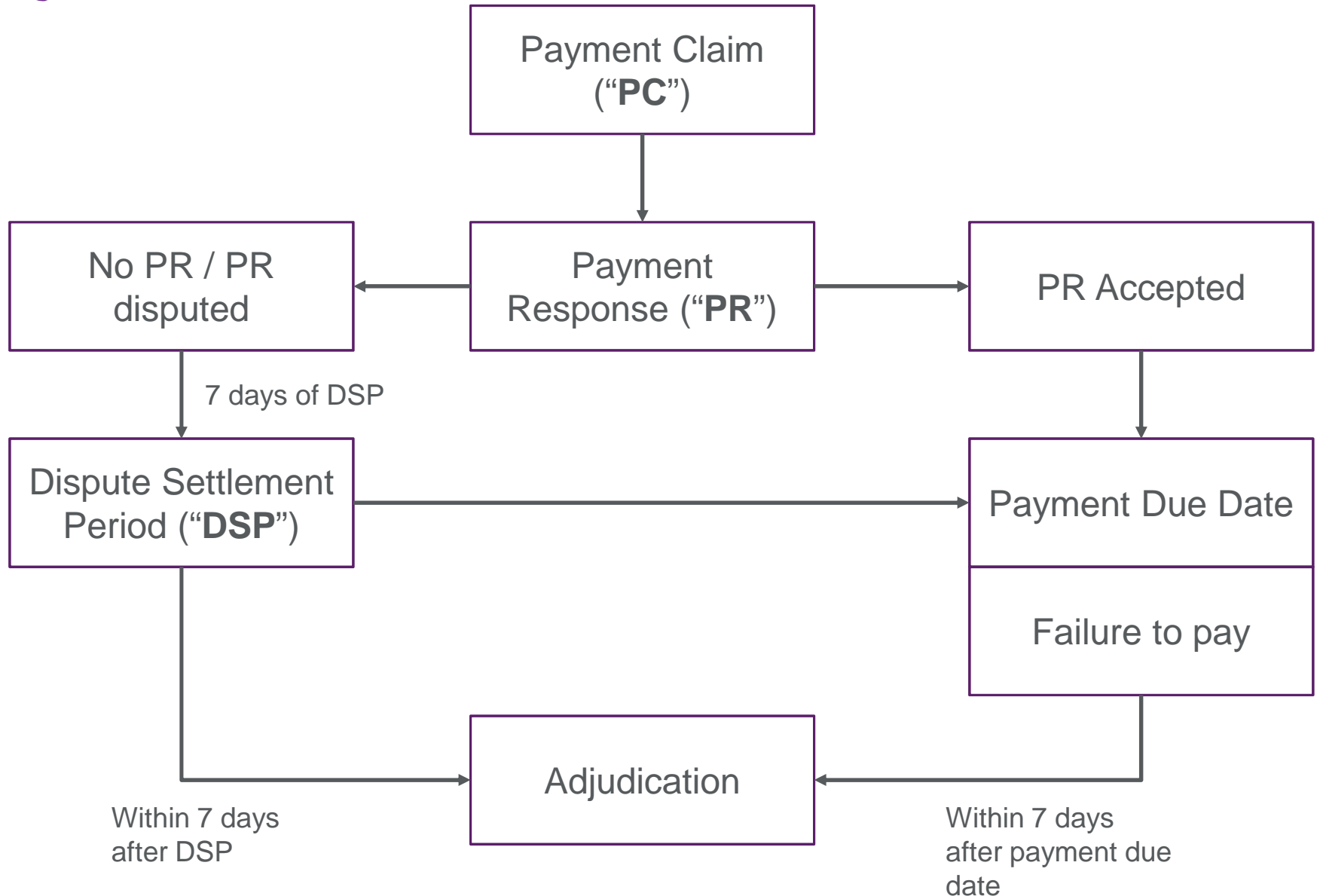
Webinar Guidelines

- You will be muted automatically.
- You may ask questions using the questions chat box.
- The speakers will answer your questions during the Q & A at the end of the webinar
- We will have the QR code for the presentation materials at the end of the session.

Latest Issues in the Building and Construction Industry: Amendments to the SOP Act (In force since 15 Dec 2019) and Impact of COVID-19

Introduction to the SOP Act and the 2018 Amendments

Adjudication Process

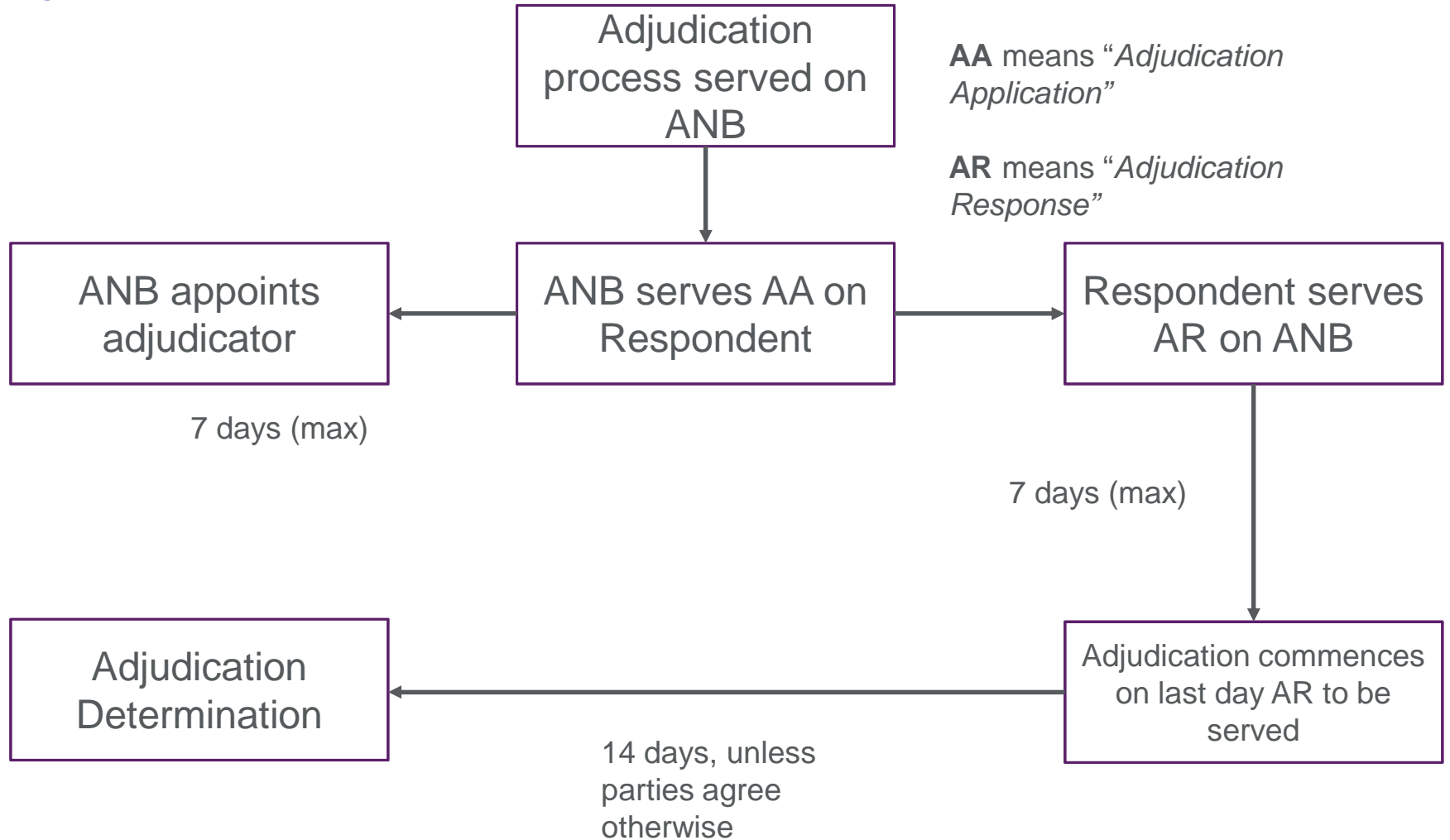


Adjudication Process

ANB means “*Authorised Nominating Body*”

AA means “*Adjudication Application*”

AR means “*Adjudication Response*”



Amendments

- Why?
 - Expand / clarify scope of the Building and Construction Industry Security of Payment Act (the “**SOP Act**”)
 - Enhance handling of PCs and PRs
 - Improve administration of the SOP Act
- When?
 - Amendments came into force on 15 December 2019 (save for amendments to Section 10 on service of payment claims)
 - Amendments to Section 10 will apply to contracts entered into after the amendments came into operation

Expanding and Clarifying the Scope of the SOP Act

Prefabrication Works	
Previously <ul style="list-style-type: none">• Did not apply to contracts pertaining to construction work carried out outside Singapore or goods or services supplied in relation to construction work carried out outside Singapore.• Status of pre-fab works may not be clear.• Took a case to decide that it can cover pre-fab works for Singapore projects.	Amended <ul style="list-style-type: none">• Overseas production of pre-fabricated components supplied for construction work to be carried out in Singapore; and• Prefabricated components in Singapore intended for overseas projects where the contracting parties are entities incorporated / registered in Singapore.

Expanding and Clarifying the Scope of the SOP Act

Terminated Contracts	
Previously <ul style="list-style-type: none">• Wording of SOP Act silent.• Case law allowed adjudication of payment claim disputes after termination.• See also clauses that allow suspension of progress payments where employment terminates until employer's cost of completion is known (i.e. SIA Clause 32(8), REDAS Clause 30.3.1 and PSSCOC Clause 31.2(4)) – previously unenforceable.	Amended <ul style="list-style-type: none">• Now includes contracts that have been terminated – codifies case law position.• Overrules case law position on provisions allowing a respondent to suspend progress payments until a date or occurrence of a specified event.

Expanding and Clarifying the Scope of the SOP Act

“Patent Error”	
Previously <ul style="list-style-type: none">• Case law held that whether there are “patent errors” is the decisive test for whether an adjudicator has breached his duties under the SOP Act and his determination liable to be set aside.• Not defined.	Amended <ul style="list-style-type: none">• <i>Patent error</i>” is now defined as, in relation to a payment claim, an error that is “<i>obvious, manifest or otherwise easily recognisable on the face of the claim...</i>”.

Expanding and Clarifying the Scope of the SOP Act

Setting Aside Adjudication Determinations	
Previously <ul style="list-style-type: none">• SOP Act was silent on the grounds to set aside an adjudication determination.• Case law set out some non-exhaustive grounds upon which a respondent may set aside an adjudication determination, but this was not codified.	Amended <ul style="list-style-type: none">• Now includes non-exhaustive grounds upon which a respondent may set aside an adjudication determination.• The courts also now have the power to do a partial setting aside of an adjudication termination.

Expanding and Clarifying the Scope of the SOP Act

Claims for Damage, Loss and Expense

Previously

- Various theories and decisions regarding complex claims and their involvement in adjudication proceedings.
- Respondent allowed to set off claims via back-charges for defects, delay damages and liquidated damages.

Amended

- Seems to exclude all claims for damage, loss or expense unless an agreement on these claims can be showed or such claims are supported by a certificate or document required to be issued under the construction contract.
- Claimant may no longer claim for prolongation costs or loss and expense claims in its payment claims unless the respondent had previously agreed on the quantum.
- Respondents can no longer set-off or counterclaim back-charges and delay damages (Appears possible under contracts which provide for certification of delay like the SIA forms of contract).

Expanding and Clarifying the Scope of the SOP Act

Minimum Interest Rate	
Previously <ul style="list-style-type: none">• No minimum interest rate.	Amended <ul style="list-style-type: none">• Now includes a minimum interest rate based on the rate specified under the Supreme Court of Judicature Act, which currently stands at 5.33% per annum.• A higher interest rate will be used if it is stipulated in the parties' contract terms.• No more 1% per annum for SOP

Changes to Payment Claims / Payment Responses

Limitation Period for Payment Claims	
Previously <ul style="list-style-type: none">• 6 years after the construction works were last carried out or goods / services last supplied – in line with Limitation Act.	Amended <p>30 months from when:</p> <ul style="list-style-type: none">• Works were last carried out;• A document certifying completion of the works has been issue under the contract; or• Issuance of the last TOP at the time the payment claim is served, whichever is the latest.

Changes to Payment Claims / Payment Responses

Email Service of Payment Claims	
Previously <ul style="list-style-type: none">• Unclear that service of documents by way of email was permissible under the SOP Act.• Claimant need to show that the document had been brought to the attention of the intended recipient before email service could be deemed compliant with the requirements of the SOP Act.• Case law generally accepted email service although we have argued before email service is non-compliant.	Amended <ul style="list-style-type: none">• Service by email is a valid mode of service as long as the email is capable of being retrieved by the addressee.• This appears to have reversed the burden of proof – the addressee must now show that the email is not capable of being retrieved by the addressee.

Changes to Payment Claims / Payment Responses

Deeming Provisions for Payment Claims	
Previously <ul style="list-style-type: none">• Payment claim needs to be served on specific day or fixed period as stipulated under the contract.• Mandatory requirement that must be complied with.	Amended <ul style="list-style-type: none">• Allows claimant to serve payment claims on or before specified date.• These payment claims will be deemed to have only been served on the contract date or last day of the period.

Changes to Payment Claims / Payment Responses

Unpaid Payment Claims	
<p>Previously</p> <ul style="list-style-type: none">• SOP Act silent on whether “unpaid payment claims” may be repeated and included in future payment claims.• Based on case law, repeat claims were allowed so long as they have not been adjudicated upon.	<p>Amended</p> <ul style="list-style-type: none">• Expressly allows unpaid payment claims to be included in subsequent payment claims unless claims have been adjudicated on the merits.• Codification of case law.

Changes to Payment Claims / Payment Responses

Final Payment Claims	
Previously <ul style="list-style-type: none">• SOP Act silent on whether “final payment claims” considered as progress claims under the SOP Act.• Based on case law, possible to commence adjudication on final payment claims.	Amended <ul style="list-style-type: none">• Expressly states that “progress payment” includes final payment to make clear that final payment claims covered under the SOP Act.• Codification of case law.

Changes to Payment Claims / Payment Responses

Extended default period for provision of payment response	
Previously <ul style="list-style-type: none">• 7 days under the SOP Act where the construction contract is silent.	Amended <ul style="list-style-type: none">• Extended to 14 days to provide a payment response if contract is silent on this.

Improving the administration of the adjudication process

Adjudication Review	
Previously <ul style="list-style-type: none">• Only respondent can apply for adjudication review where the adjudicated amount is greater than the payment response amount by at least S\$100,000.00.• Respondent required to pay the adjudicated amount to the claimant within 7 days after the adjudication determination.	Amended <ul style="list-style-type: none">• Claimant will also be allowed to apply for review of the adjudication determination within 7 days from service of the adjudication determination• Where adjudicated amount is lower than the amount claimed by the claimant by at least S\$100,000.00.

Improving the administration of the adjudication process

Trust Account for Adjudication Amount

Previously

- Respondent required to pay the adjudicated amount to the claimant within 7 days after the adjudication determination before lodging adjudication review.
- Respondent cannot apply for review unless he does this.

Amended

- Adjudicated amount will be deposited in a trust account (to be established) by the ANB as stakeholding monies pending outcome of the adjudication review, instead of payment to the claimant.

Improving the administration of the adjudication process

Non-Compliance with the SOP Act

Previously

- Adjudicator obliged to dismiss an adjudication application where there was “*material non-compliance*” with the SOP Act and the Building and Construction Industry Security of Payment Regulations (the “**SOPR**”).

Amended

- An adjudicator is now empowered to accept an adjudication application that is not compliant with the SOPR where non-compliance with those regulations does not *materially prejudice* the respondent.

Improving the administration of the adjudication process

Respondent's right to raise objections if not raised in payment response

Previously

- Adjudicator cannot consider respondent's reasons for withholding any amount if respondent does not include them in the payment response.

Amended

- Adjudicator empowered to consider reasons or objections not raised in a payment or adjudication response where (a) new circumstances had arisen or (b) the respondent could not have reasonably known of such circumstances.
- Respondent is also precluded from raising any fresh objections to the payment claim or adjudication application in any setting aside application before the courts unless new circumstances had arisen or that the respondent could not reasonably have known of these new circumstances.

The background of the slide features a close-up photograph of two hands. One hand is holding a blue pen, and the other hand is positioned as if about to write or is in the process of writing on a surface. The lighting is soft, and the colors are muted, with a focus on the hands and the pen. A large, semi-transparent purple triangle is overlaid on the left side of the image, containing the main title text.

Impact of **COVID-19** on the Building and Construction Industry in Singapore

Force Majeure

- An unforeseeable event beyond the control of any of the parties to the Contract
- The effect of which is to excuse or suspend performance of the relevant contractual obligations
- Depends on precise language of *force majeure* clause
 - Different thresholds of impossibility vs. impracticability



SIA Articles and Conditions of Building Contract 2016, 1st Ed. – Domestic (Without Qty), International (Without Qty), and Design and Build (collectively, “SIA”)

- Grounds for Extension of Time (“EOT”)
 - *Force majeure* (Clause 23(2)(a))
 - However, no definition of *force majeure*
 - Labour shortage resulting from domestic or foreign government actions, embargoes or regulations (Clause 23(2)(l) in SIA Domestic and International; Clause 23(2)(k) in SIA Design and Build)
 - Shortage of goods or materials (Clause 23(2)(m) in SIA Domestic and International; Clause 23(2)(l) in SIA Design and Build)

Public Sector Standard Conditions of Contract 2014, 7th Ed. (“PSSCOC”)

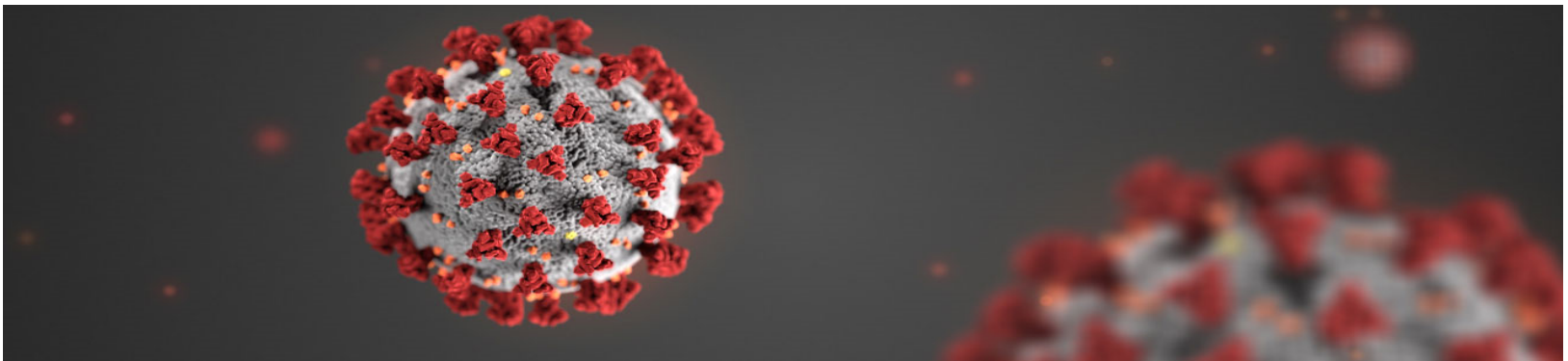
- Grounds for EOT
 - *Force majeure* (Clause 14.2(a))
 - However, no definition of *force majeure*
 - Compliance with the requirements of any law, regulation, by-law or public authority or public service company (Clause 14.2(e))

REDAS Design and Build Conditions of Main Contract, July 2013, 3rd Ed. (“REDAS”)

- Ground for EOT
 - *Force majeure* (Clause 16.1.2)
 - *force majeure* is defined at Clause 18.2
- ““ *Force Majeure event*” means the following: ...
- 18.2.4 *Industrial action by workmen, strikes, lockouts or embargoes affecting directly the Works.*”

Claims for EOT arising from Covid-19 under the different contracts

- Number of gateways for claims for EOT: SIA > PSSCOC > REDAS
- Clear and express definition of *force majeure*: REDAS



Frustration



- Sometime described as an alternative, but much narrower doctrine
- Question is whether the supervening event was reasonably foreseeable, and if not, whether it renders the contractual obligation *so radically or fundamentally different* from what has been agreed in the contract that it would be unjust to hold the parties to the terms of the contract.
- If it does, the contract is frustrated, and the parties will be discharged from any further obligations.
- More expensive or onerous – not sufficient

Further Considerations

- Prudent to issue notices for EOT to preserve position
- Legal effect of Chinese *force majeure* certificates unclear, but can be useful supporting material
- Obligation to mitigate?
- Are alternatives feasible?
- Does Covid-19 cause delay, or even critical delay?

Loss and Expense Claims



- PSSCOC
 - Can claim if there is an SO instruction of a variation (Clause 22.1(f)), but unlikely to apply in present Covid-19 situation
- SIA and REDAS
 - No clause allowing for L&E claims
 - Depends on construction of contract, but likely that Employer has not agreed to bear the risks caused by Covid-19

Questions?

Please drop us an email at sg.academy@dentons.com or email Kia Jeng, Weilin or Guo Xi if you have further enquiries.

