

## WHAT A DIFFERENCE A DAY MAKES

### When Does the Time for Lodging an Adjudication Application Start and End?

[2019] SAL Prac 29

Section 13(3)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) provides that an adjudication application (“AA”) shall be made within seven days after the entitlement of the claimant to make an AA first arises under s12. This period for the lodgement of an AA is crucial. In practice, two interpretations of how this period should be computed have surfaced. This article attempts to provide a definitive answer.

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#### **I. Introduction**

1 What a difference a day makes.<sup>1</sup> Certainty in deadlines is of utmost importance to ensure an efficacious adjudication. A breach of a deadline under the Building and Construction Industry Security of Payment Act<sup>2</sup> (“SOP Act”) can be ruinous to an adjudication application<sup>3</sup> (“AA”). Even a transgression of one day can lead to rejection. However, although the SOP Act has been in force for 15 years, there is still lingering uncertainty

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1 This is also the title of a song by Dinah Washington in 1959: <[https://en.wikipedia.org/wiki/What\\_a\\_Diff%27rence\\_a\\_Day\\_Made](https://en.wikipedia.org/wiki/What_a_Diff%27rence_a_Day_Made)> (accessed 28 November 2019).

2 Cap 30B, 2006 Rev Ed.

3 See s 16(2)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and *Chua Say Eng v Lee Wee Lick Terence* [2013] 1 SLR 401.

regarding the starting date of the period when a claimant is entitled to lodge an AA under s 13(3)(a) of SOP Act (“Lodgement Period”), which is one of the most critical deadlines in the SOP Act.

2 Non-compliance with s 13(3)(a) will result in the rejection of the AA. There are, in practice, two schools of thought on when the Lodgement Period starts. One opinion is that it starts immediately after the expiry of the dispute settlement period (“DSP”). The other concludes that it starts one clear day after the expiry of the DSP. This issue does not appear to have been directly considered in any court judgment or reported adjudication determinations in the Singapore Construction Adjudication Review (“SCAdjR”).

3 This article hopes to clarify the position and illustrate how the Lodgement Period in s 13(3)(a) should be construed in relation to disputes arising from construction contracts.<sup>4</sup>

4 Section 13(3)(a) is not amended by the Building and Construction Industry Security of Payment (Amendment) Act 2018<sup>5</sup> (“SOP Amendment Act”). The views in this article would remain relevant even after the SOP Amendment Act comes into force.

## **II. Section 13(3)(a) of the Building and Construction Industry Security of Payment Act**

### **A. *The Lodgement Period***

5 The Lodgement Period is described in s 13(3)(a) of the SOP Act as follows:

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4 “[C]onstruction contract” is defined in s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

5 Act 47 of 2018.

- (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;
- [emphasis added]

## **B. The Short and Long Positions**

6 There are two views on when the Lodgement Period commences under s 13(3)(a) of the SOP Act. For ease of reference and discussion, they will be referred to in this article as “the Short Position” and “the Long Position”.

### **(1) The Short Position**

7 In the Short Position, the Lodgement Period starts immediately after the expiry of the DSP. For instance; if the DSP ends on 11 September 2019, the Lodgement Period will start on 12 September 2019 and end on 18 September 2019.

8 The adoption of the Short Position is reflected in judgments of the Singapore courts as well as in adjudication determinations. For instance:

(a) *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd*<sup>6</sup> (“*LH Aluminium*”). Here, the DSP ended on 31 December 2013 and the Lodgement Period was expressed to be seven days after 31 December 2013.

(b) *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd*<sup>7</sup> (“*Sunray Woodcraft*”). In this case; the DSP was stated to expire on 5 April 2018 and the Lodgement Period was from 6 to 12 April 2018.

(c) *MN Pte Ltd v MO Pte Ltd*.<sup>8</sup> The adjudicator applied the seven-day time period as follows:

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6 [2014] SGHC 254 at [24].

7 [2019] 3 SLR 285 at [24].

8 [2009] SCAJr at [44]–[46].

- (i) 27 April 2009: last date for submission of payment response;
- (ii) 5 May 2009: end of DSP;
- (iii) 5 May 2009: date when the claimant's entitlement first arises; and
- (iv) 13 May 2009: last date of the seven-day period considering the public holiday on 9 May 2009.

(d) *AWK Pte Ltd v AWL Pte Ltd*.<sup>9</sup> The DSP was stated to be from 16 to 22 February 2017 and the Lodgement Period from 23 February to 1 March 2017.

(2) *The Long Position*

9 In the “Long Position”, the Lodgement Period starts one day after the expiry of the DSP. The first day after the expiry of the DSP is the day when the entitlement of the claimant to make an AA first arises.

10 This is illustrated by the following example:

- (a) Expiry of DSP: 11 September 2019.
- (b) Day when claimant's entitlement first arises: 12 September 2019.
- (c) Lodgement Period: 13–19 April 2019.

11 Under the Long Position, the claimant would effectively have a total of eight days from the end of the DSP to lodge its AA.

12 The Long Position was accepted by the court in *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd*<sup>10</sup> (“YTL”). In this case; the claimant disputed the payment response and lodged an AA in relation to the dispute. The claimant succeeded in the adjudication proceedings and the

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9 [2017] SCAJr 184 at [98].

10 [2014] SGHC 142.

respondent applied to court to set aside the adjudication determination. One of the grounds for setting aside the determination was that the AA, which was lodged on 20 November 2013, had been lodged outside the Lodgement Period. The respondent advanced the following deadlines in support of its position:<sup>11</sup>

- (a) DSP: 1–7 October 2013.
- (b) Date of entitlement to lodge AA: 8 October 2013.
- (c) Lodgement Period: 9–15 October 2013.

13 Tan Siong Thye J accepted the respondent’s position and held that the claimant had lodged its AA out of time and failed to comply with s 13(3)(a) of the SOP Act.<sup>12</sup>

14 The Long Position does not seem to be reflected in any adjudication determinations reported in SCAdjR.

15 There are nevertheless two determinations where the Long Position appears to find some support.

16 In *AUO Pte Ltd v AUP Pte Ltd*,<sup>13</sup> the DSP ran from 12 to 18 April 2016 and the learned adjudicator held that the entitlement under s 13(3)(a) “would first arise on 19 April 2016 (*ie, the day after the dispute settlement period ended*)” [emphasis added]. This is consistent with the Long Position. However, the learned adjudicator went on to state that the “adjudication application would have to be made within seven days of that date, *ie, by 25 April 2016*” [emphasis added].<sup>14</sup>

17 With respect, the latter part of the adjudicator’s determination may be erroneous. It is inconsistent with the express words of s 13(3)(a) that the AA should be “made within

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11 *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [36].

12 *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [42].

13 [2016] SCAdjR 215.

14 *AOU Pte Ltd v AUP Pte Ltd* [2016] SCAdjR 215 at [18].

7 days *after* the entitlement of the claimant to make an adjudication application first arises under section 12” [emphasis added]. The learned adjudicator appears to have construed the word “after” in s 13(3)(a) to mean “of”. He did not cite any legal authority for his interpretation or explain why he decided to read the word “after” in s 13(3)(a) as “of”.

18 In *AUW Pte Ltd v AUX Pte Ltd*,<sup>15</sup> the claimant’s position was that the DSP ended on 10 June 2016 and that its entitlement to apply for adjudication “commences on” 11 June 2016, the day after the end of the DSP. At the same time, the claimant asserted that the last day for the lodgement of the AA fell on 17 June 2016. The respondent did not object to the claimant’s deadlines and the adjudicator accepted these deadlines without providing any detailed reasons.<sup>16</sup> This was possibly because the respondent had accepted the deadlines as well.

19 Additionally, the author of this article is personally aware of two unreported adjudication determinations in which the Long Position had been accepted by adjudicators.<sup>17</sup>

### **C. Case for the Long Position**

#### **(1) When entitlement first arises**

20 In order to determine the starting point for the Lodgement Period, the end of the DSP must first be established. This is because the claimant’s entitlement to lodge the AA first arises upon the expiry of the DSP if the dispute is not resolved by then. This is provided by ss 12(2)(a) and 12(2)(b) read with ss 12(5) and 13(3)(a) of the SOP Act.

21 For construction contracts,<sup>18</sup> the claimant’s entitlement under s 12 of the SOP Act arises when:

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15 [2016] SCAadjR 341.

16 *AUW Pte Ltd v AUX Pte Ltd* [2016] SCAadjR 341 at [65]–[67].

17 The unreported adjudication determinations in SOP AA 256 of 2017 and SOP AA 219 of 2019.

- (a) “the claimant disputes a payment response” and if the dispute is not settled by the end of the DSP;<sup>19</sup> or
- (b) “the respondent fails to provide a payment response” and does not provide a response by the end of the DSP.<sup>20</sup>

22 The DSP is defined in s 12(5) to mean “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)” [emphasis added] of the SOP Act.

23 Since the DSP runs for seven days, the seventh day of the DSP is the last day of the DSP and is the “end of the DSP”.

24 In *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd*<sup>21</sup> (“*Mansource*”), the respondent received the AA at 5.25pm on 29 August 2013. Pursuant to s 15(1) of the SOP Act, the respondent had up to seven days after receipt of the AA to lodge its adjudication response. Accordingly, the last day for the lodgement of the adjudication response fell on 5 September 2013. The respondent lodged its adjudication response with the Singapore Mediation Centre (“SMC”) at 4.32pm on 5 September 2013.

25 Rule 3.2 of the SMC’s Adjudication Procedure Rules<sup>22</sup> provided that documents lodged with the SMC after 4.30pm would be treated as being lodged the next working day. Applying this rule, the SMC treated the adjudication response as having been lodged on 6 September 2013. During the adjudication proceedings, the claimant objected to the adjudication response

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18 “[C]onstruction contract” is defined in s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

19 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 12(2)(a).

20 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 12(2)(b).

21 [2014] 3 SLR 264.

22 6th Ed, 1 April 2017.

on the grounds that it had been lodged out of time. The learned adjudicator agreed with the claimant.

26 The respondent applied to set aside the determination on the basis that it had up to midnight on 5 September 2013 to lodge the adjudication response. The High Court agreed with the respondent. Tan J accepted the common law definition of “day” as being “any period of 24 hours beginning with one midnight and ending with the next”.<sup>23</sup> Applying this to determine the expiry of the seven-day period in s 16(2)(b) of the SOP Act, the court held at [15], *inter alia*, that:

... A seven-day time period that only starts running on 30 August 2013 ends on 5 September 2013. *The last day for lodging of the adjudication response with the SMC would then be anytime before midnight of 5 and 6 September 2013 as midnight straddled on both dates. As long as the Appellant is deemed to have lodged its adjudication response on or before 2359 hours of 5 September 2013, then it is lodged within time.* If this is not so, then s 16(2)(b) of the SOP Act requires the adjudicator to reject the adjudication response. [emphasis added]

27 The same definition of “day” can be used to determine the expiry of the DSP. Applying the definition of “day” in *Mansource*, the DSP would end at 23:59 on the seventh day of the DSP. To be more precise; the DSP would end at 23:59:59.<sup>24</sup>

28 It follows that a claimant’s entitlement to make an AA would have first arisen at 00:00:00, which is the second immediately after the expiry of the DSP at 23:59:59.

29 By way of illustration and taking 11 September 2019 as being the last day of the DSP:

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23 *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 at [15]; overturned on appeal, although not on this point: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482.

24 Time is represented in [hours]: [minutes]: [seconds] on the 24-hour time specification of ISO 8601.

(a) The DSP would expire at 23:59:59 on 11 September 2019.

(b) The claimant's entitlement to lodge an AA will first arise at 00:00:00 on 12 September 2019.

(2) *Seven days after*

30 Having determined when the claimant's entitlement first arises, the next issue for consideration would be the computation of the Lodgement Period which is the seven-day period after "the entitlement of the claimant to make an adjudication application first arises under section 12".

31 It has been established by the High Court in *Mansource*<sup>25</sup> that since there are no provisions in the SOP Act to explain the computation of time, guidance can be sought from s 50(a) of the Interpretation Act<sup>26</sup> ("IA").

32 Section 50(a) of the IA provides as follows:

**Computation of time**

50. In computing time for the purposes of any written law, *unless the contrary intention appears* —

(a) a period of days *from the happening of an event* or the doing of any act or thing shall be *deemed to be exclusive of the day on which the event happens* or the act or thing is done;

[emphasis added]

33 However, the prepositions used in s 13(3)(a) of the SOP Act and s 50(a) of the IA are dissimilar. In s 13(3)(a), the Lodgement Period is expressed to commence "after" the claimant's entitlement first arises while s 50(a) describes how time should be computed for a period of days "from" the happening of an event.

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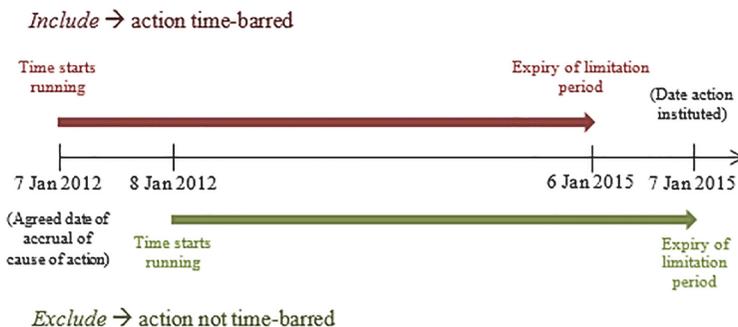
25 *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 at [13].

26 Cap 1, 2002 Rev Ed.

34 There are no provisions in the IA to define how time should be computed if the preposition “after” is used instead of “from”.

35 Order 3 r 2(2) of the Rules of Court<sup>27</sup> stipulates that both prepositions would have the same effect. It states that “[w]here the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date”. The Rules of Court are, however, not of general application and may be referenced only for the purposes of reckoning periods of time fixed by the Rules of Court “or by any judgment, order or direction for doing any act”.<sup>28</sup>

36 This issue was considered by the Singapore High Court in *Suresh s/o Suppiah v Jiang Guoliang*<sup>29</sup> (“*Suresh s/o Suppiah*”). The central issue before the court was whether the date on which the appellant’s cause of action accrued is to be excluded or included for the purposes of computing the three-year limitation period under s 24A(2)(a) of the Limitation Act.<sup>30</sup> It was not disputed that the cause of action accrued on 7 January 2012. The issue was whether the time started running on 7 January 2012 or 8 January 2012. If it was the former, the action would be time-barred as the writ was issued on 7 January 2015, one day after the expiry of the limitation period. This is illustrated in the diagram below, which is extracted from the judgment:<sup>31</sup>



27 Cap 322, R 5, 2014 Rev Ed.

28 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 3 r 2(1).

29 [2016] 4 SLR 645.

30 Cap 163, 1996 Rev Ed.

31 *Suresh s/o Suppiah v Jiang Guoliang* [2016] 4 SLR 645 at [14]. Diagram reproduced with permission.

37 After considering the historical development of s 50(a) of the IA and relevant older English cases; Chan Seng Onn J held that he agreed with the view of the learned author Jack Lee Tsen-Ta in “Getting Called: Recent Developments”<sup>32</sup> stating that “where an act is required to be done within a specified period *after* or *from* a specified date, the period begins *immediately after that date*, not on the date itself” [emphasis in original].<sup>33</sup>

38 Chan J further accepted that s 50(a) of the IA and O 3 r 2(2) of the Rules of Court reflect “the same principle”.<sup>34</sup>

39 The same approach was adopted by Tan J in *Mansource* although explicit reasons for this were not spelt out in the judgment. The court in *Mansource* was tasked with reckoning the time period in s 15(1) of the SOP Act which provides as follows:

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. [emphasis added]

40 The court applied s 50(a) of the IA and held that the time for the respondent to lodge its adjudication response started running on the day after the day on which the respondent received the AA. This is clear from the judgment of the court which reads as follows:<sup>35</sup>

... the Appellant received the Respondent’s adjudication application at 5.25pm on 29 August 2013. Applying s 50(a) of the Interpretation Act, the seven-day time limit should only start running on 30 August 2013 since it shall be exclusive of 29 August 2013.

41 Applying the above approaches to the interpretation of s 13(3)(a) of the SOP Act, it can be convincingly argued that the day on which the claimant’s entitlement to lodge an AA first

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32 (1998) 19 Sing LR 298.

33 *Suresh s/o Suppiah v Jiang Guoliang* [2016] 4 SLR 655 at [38].

34 *Suresh s/o Suppiah v Jiang Guoliang* [2016] 4 SLR 655 at [39].

35 *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 at [14].

arises should be *excluded* from the computation of the Lodgement Period.

42 Section 50(a) of the IA provides that “a period of days *from the happening of an event* or the doing of any act or thing shall be *deemed to be exclusive of the day on which the event happens* or the act or thing is done” [emphasis added].

43 The “event” would be the time at which the claimant’s entitlement first arises under s 12 of the SOP Act and the “day on which the event happens” has to be excluded from the computation of any period of time “from” or “after” the “event”.

44 This is illustrated by the following example:

- (a) expiry of DSP at 23:59:59 on 11 September 2019;
- (b) time and date when claimant’s entitlement first arises will be at 00:00:00 on 12 September 2019; and
- (c) the period of seven days after 12 September 2019 will be from 13 to 19 September 2019.

(3) *Due date for determination*

45 There is a similarly worded provision in s 17 of the SOP Act in relation to the due date for an adjudicator to issue the adjudication determination. Section 17(1) provides that an adjudicator shall determine the AA within either seven or 14 days *after* the commencement of the adjudication. The commencement of the adjudication is defined to start “immediately upon the expiry of the period referred to in section 15(1) within which the respondent may lodge an adjudication response”.<sup>36</sup>

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36 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 16(1).

46 Applying the same method of analysis and using the dates in *Mansource* for illustration, the due date for the determination would be computed as follows:

- (a) date of receipt of AA: 29 August 2013;
- (b) last date and time for lodging adjudication response: 5 September 2013 at 11:59:59;
- (c) commencement of adjudication: 00:00:00 on 6 September 2013;
- (d) period of seven days after the commencement of adjudication: 7–13 September 2013; and
- (e) period of 14 days after the commencement of adjudication: 7–20 September 2013.

47 In other words, the due date for the determination should be computed from the date of the commencement of the adjudication and *not* from the last day for the lodgement of the adjudication response.

48 However, in practice, there are also two schools of thought on this point. Some adjudicators have computed the due date for the determination without considering the date of commencement. Under this view; the period for the making of the adjudication determination is taken to start on the day immediately after the last day for the lodging of the adjudication response.<sup>37</sup>

49 Other adjudicators have adopted the same approach outlined in this article.<sup>38</sup>

50 It is submitted the former position is incorrect. Nevertheless, there is no prejudice suffered by the parties. Under

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37 See for example *ATW Pte Ltd v ATX Pte Ltd* [2016] SCAJr 25 at [20]; *AUC Pte Ltd v AUE Pte Ltd* [2016] SCAJr 78 at [15]–[17]; and *AWY Pte Ltd v AWZ Pte Ltd* [2017] SCAJr 394 at [17].

38 See for example *AUY Pte Ltd v AUZ Corp* [2016] SCAJr 358 at [24]–[26]; *AVC Pte Ltd v AVD Pte Ltd* [2016] SCAJr 414 at [17]–[21]; *AWM Pte Ltd v AWN Pte Ltd* [2017] SCAJr 210 at [17]–[19]; and *AYF v AYG* [2017] SCAJr 1041 at [43].

the former position, the determination would be made a day earlier.

### **III. Conclusion**

51 In conclusion, it is humbly submitted that, based upon first principles for the computation of time which have been accepted by the High Court in *Mansource* and *Suresh s/o Suppiah*, the Lodgement Period for an AA for a construction contract should properly commence one clear day after the expiry of the DSP. Thus, a claimant would have effectively eight days from the end of the DSP to lodge its AA. This observation may have minimal impact in practice. A prudent claimant would avoid lodging the AA on the last day of its entitlement regardless of whether it takes the Short Position or the Long Position. Nevertheless, it may be of considerable importance to claimants in certain situations to know that they have one additional day to lodge the AA.