

CHANTAN LLC



**The Building & Construction Industry
Security of Payment Act
Key Areas of the Legislation**

George Tan



Reasons for legislation

EXTRACTED FROM SPEECH BY MR CEDRIC FOO, MINISTER OF STATE FOR NATIONAL DEVELOPMENT AND DEFENCE , AT THE SINGAPORE CONTRACTORS ASSOCIATION LIMITED (SCAL) ANNUAL DINNER, WEDNESDAY, 1 SEPTEMBER 2004

One such measure is the introduction of a proposed security of payment legislation, which seeks to facilitate cash flow across the industry. The underlying principle is that any party carrying out construction work or supplying construction-related goods or services has the right to receive progress payments for work done. The legislation will also provide a framework for quick resolution of payment dispute through adjudication.

Reasons for legislation

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This legislation is not a universal remedy for all the payment problems faced by the industry. Nonetheless, it should provide a more equitable operating environment for all parties along the construction value chain. We are now ready to move forward. We intend to table the Bill in Parliament in the coming weeks.

Reasons for legislation

EXPLANATORY STATEMENT FROM BILL

EXPLANATORY STATEMENT

The object of the Bill is to improve cash-flow by expediting payment in the building and construction industry. The Bill provides that any person who has carried out construction work or supplied goods or services under a construction contract or supply contract (contract) has a statutory entitlement to payment. The Bill also establishes a procedure by which the person may claim such payment, known as adjudication, and makes provision for remedies where the amount determined to be payable at adjudication is not paid.

Reasons for legislation: existing models

- **Housing Grants, Construction and Regeneration Act 1996 (U.K).**
- **Building and Construction Industry Security of Payment Act 1999 (Australia, New South Wales).**
- **Building and Construction Industry Security of Payment Act 2002 (Australia, Victoria).**
- **Construction Contracts Act 2002 (New Zealand).**

Key features of legislation

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Most of the suggestions raised will be incorporated into the proposed legislation. Some of the key features of the proposed legislation include:

- Making void ‘pay when paid’ clauses in contracts;**
- Preserving the rights of contractors and sub-contractors to suspend work and to place a lien on unfixed materials on site, if not paid after adjudication; and**
- Allowing developers to make direct payments to sub-contractors.**

Scope of legislation

- Applies to Contract (construction or a supply contract: s.2) made in writing.
- Applies whether or not the contract is expressed to be governed by Singapore law: s. 4(1).
- Applies notwithstanding any provision to the contrary in any contract or agreement: s. 36 (no contracting out).

Scope of legislation

Construction Contract means an agreement under which one party undertakes to:

Carry out construction work

Supply services

Scope of legislation

Construction work is widely defined to include:

- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures (whether permanent or not) that form, or are to form, part of the land;
- (e) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; or
- (f) the painting or decorating of the external or internal surfaces of any building, structure or works;

...

Scope of legislation

“supply contract” means an agreement under which —

- (a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work;
- (b) the supply is for the purpose of construction work carried out or caused to be carried out by the second-mentioned party; and
- (c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site,

but does not include such agreements as may be prescribed.

Scope of legislation

The Act does not apply to (s. 4(2)):

- **Residential property, which does not require the approval of the Commissioner for Building Control.**
- **Any contract under which a party undertakes work as an employee in supplying goods or services.**
- **Construction work outside Singapore.**
- **Such contracts or class of contracts as may be prescribed.**

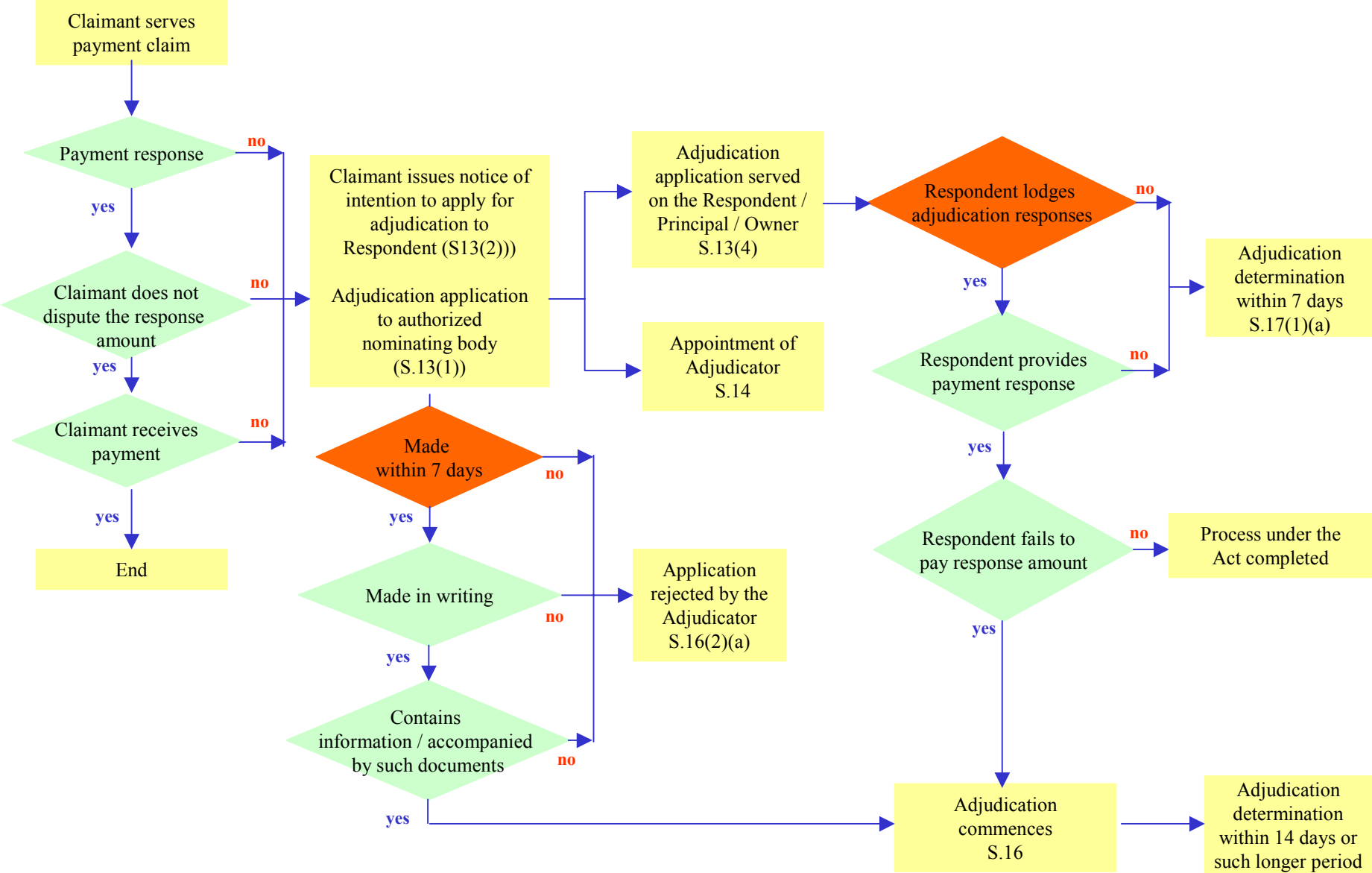
Structure of legislation

The Act introduces and provides:

- **Rights and obligations.**
- **A Payment Claim & Responses procedure.**
- **A new process of Adjudication.**

Overview of Payment Claims & Adjudication Processes

Overview of Security of Payment Act (SOP)



Rights and Obligations

The rights and obligations involve:

- **Entitlement to progress payments: s. 5**
- **Valuation of progress payment, work done or goods & services supplied.**
- **Timelines for payment.**
- **Unenforceability of “pay when paid” clauses.**

Right to progress payments

The right involve:

- **Entitlement to progress payments does not depend on contract**
- **Amount and valuation of progress payment, work done or goods & services supplied & the timelines for payment depends on whether contract:**
 - **Contains a provision**
 - **Does not contain a provision**
- **Timelines for payment.**

Progress Payment

Amount of progress payment

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

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

Progress Payment

According to (a) terms of contract or (b) the Act:

Valuation of construction work, goods and services

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

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

Progress Payment

If no provision in Contract: s. 7(1)(b)

- (a) having regard to—
- (i) the **contract price** for the construction work, goods or services;
 - (ii) any other rate or price specified in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price specified in the contract, is to be adjusted by a specific amount,
- or, **in the absence** of the matters referred to in sub-paragraphs (i), (ii) and (iii), then having regard to the **rates or prices prevailing in the building and construction industry at the time the construction work was carried out, or the goods or services were supplied;**
- (b) if any part of the construction work, goods or services is defective, having regard to the **estimated cost** of rectifying the defect; and
- (c) in the case of materials or components that are to form part of any building, structure or works arising from the construction work, having regard to the basis that the only materials or components to be included in the valuation are those that have become or, on payment, will become the property of the party for whom the construction work is being carried out.

Due date for payment

Due date for payment

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

- (a) the date as specified in or determined in accordance with the terms of the contract; or
- (b) the date immediately upon the expiry of 35 days after —
 - (i) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or
 - (ii) in any other case, the date on which or the period within which the payment response is required to be provided under section 11(1) (whether or not a payment response is provided).

Due date for payment

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

- (a) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or
- (b) in any other case, the date on which or the period within which the payment response is required to be provided under section 11(1) (whether or not a payment response is provided).

Interest on unpaid amount

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

- (a) shall be at the rate specified in or determined in accordance with the terms of the contract; or
- (b) where the contract does not contain such provision, shall be at the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act (Cap. 322).

“Pay when paid” provisions generally

- **Such clauses which make payment dependant on payment being first received by the main contractor was first endorsed in Singapore in *Brightside Mechanical and Electrical Services Group Ltd v Hyundai Engineering and Construction Co Ltd* [1988] SLR 186**
- **It was later accepted in *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694**
- **The only help in the SIA regime are procedures whereby the main contractor can be ‘deemed to be paid’ if he is not paid because the employer held back money in a set-off based on claims arising from the main contractor’s default**
- **PSSCOC does not have a “pay when paid” regime.**

“Pay when paid” provision: s. 9

Effect of “pay when paid” provisions

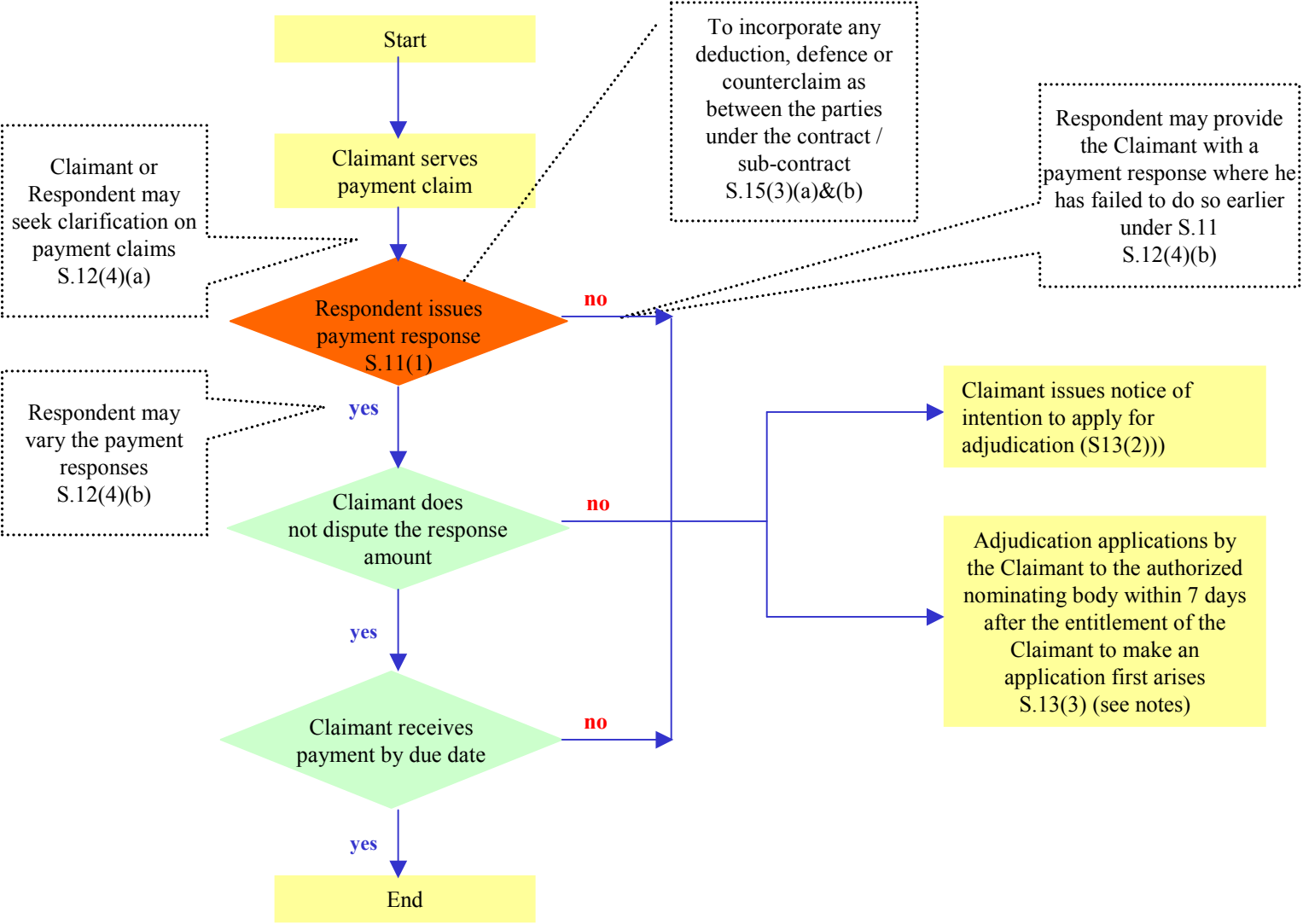
9.—(1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.

“Pay when paid” provision: s. 9

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

- (a) that makes the liability of one party (referred to in this definition as the first party) to pay money owing to another party (referred to in this definition as the second party) contingent or conditional on payment to the first party by a further party (referred to in this definition as the third party) of the whole or any part of that money;
- (b) that makes the due date for payment of money owing by the first party to the second party contingent or conditional on the date on which payment of the whole or any part of that money is made to the first party by the third party;
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement; or
- (d) that is of such kind as may be prescribed.

Payment Claims & Payment Responses Procedures



Payment claim & response procedures

Payment claims

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

- (a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
- (b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

The employer
or whoever is
liable to pay

Architect or S.O

Payment claim & response procedures

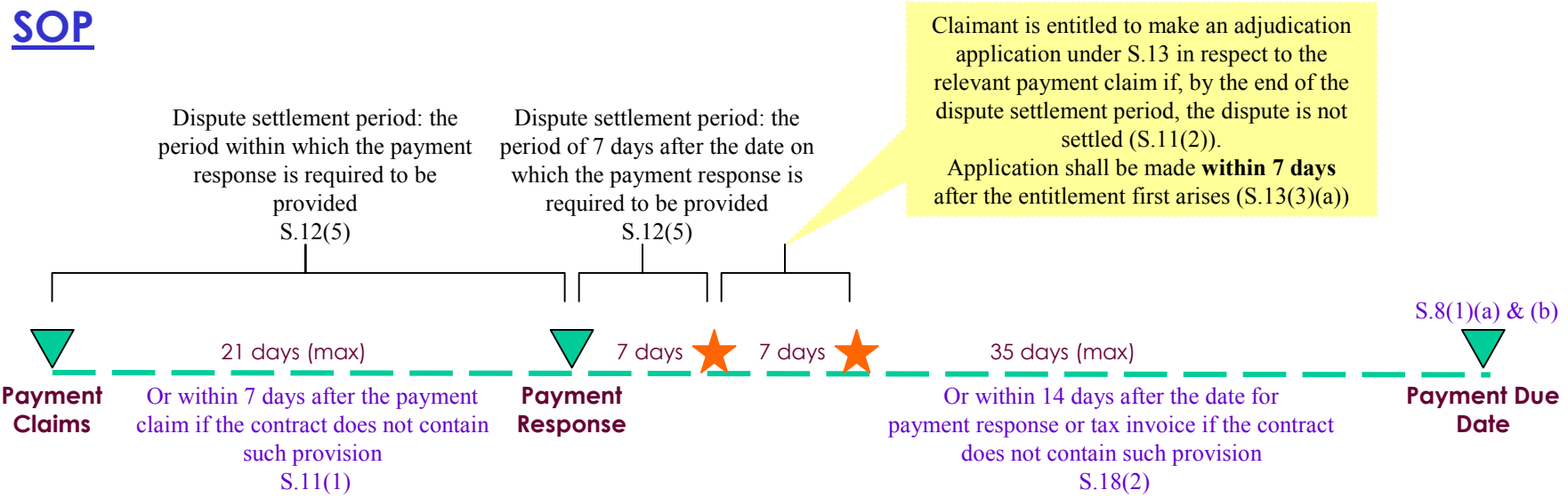
(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned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

A Payment Response – S.11(3):

- a) shall identify the payment amount (if any);
- b) shall state the response amount (if any);
- c) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld;
and
- d) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

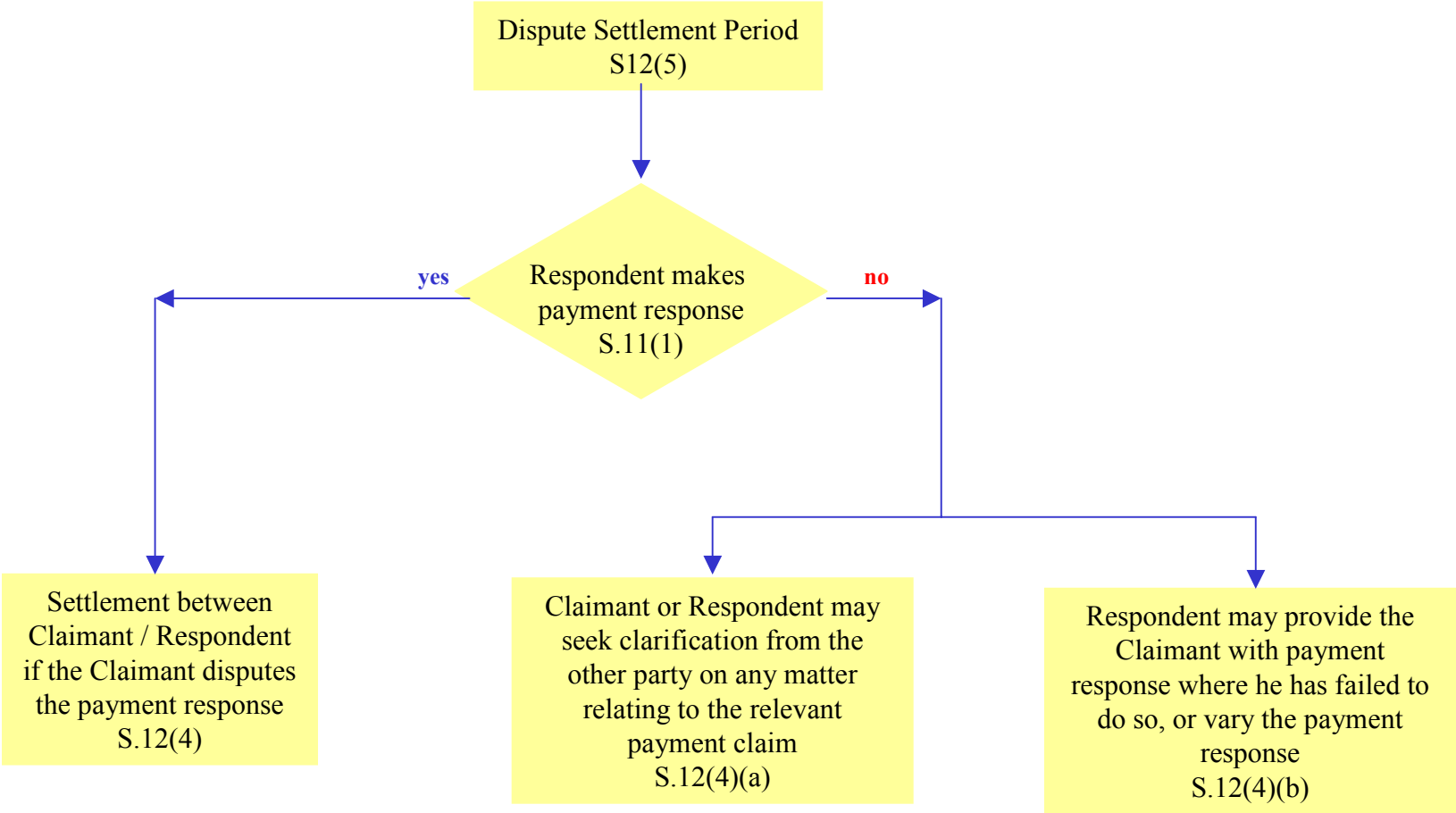
Timelines for Payment Responses and Payment Due Date

SOP



Dispute Settlement Period - S.12(4)

(continued from Timelines for Payment Responses and Payment Due Date)



Inter-relationship of Certification in Contract and Payment Claims/Responses

SIA Standard form of Condition



Public Sector Standard Condition



SOP



Inter-relationship of Certification in Contract and Payment Claims/Responses

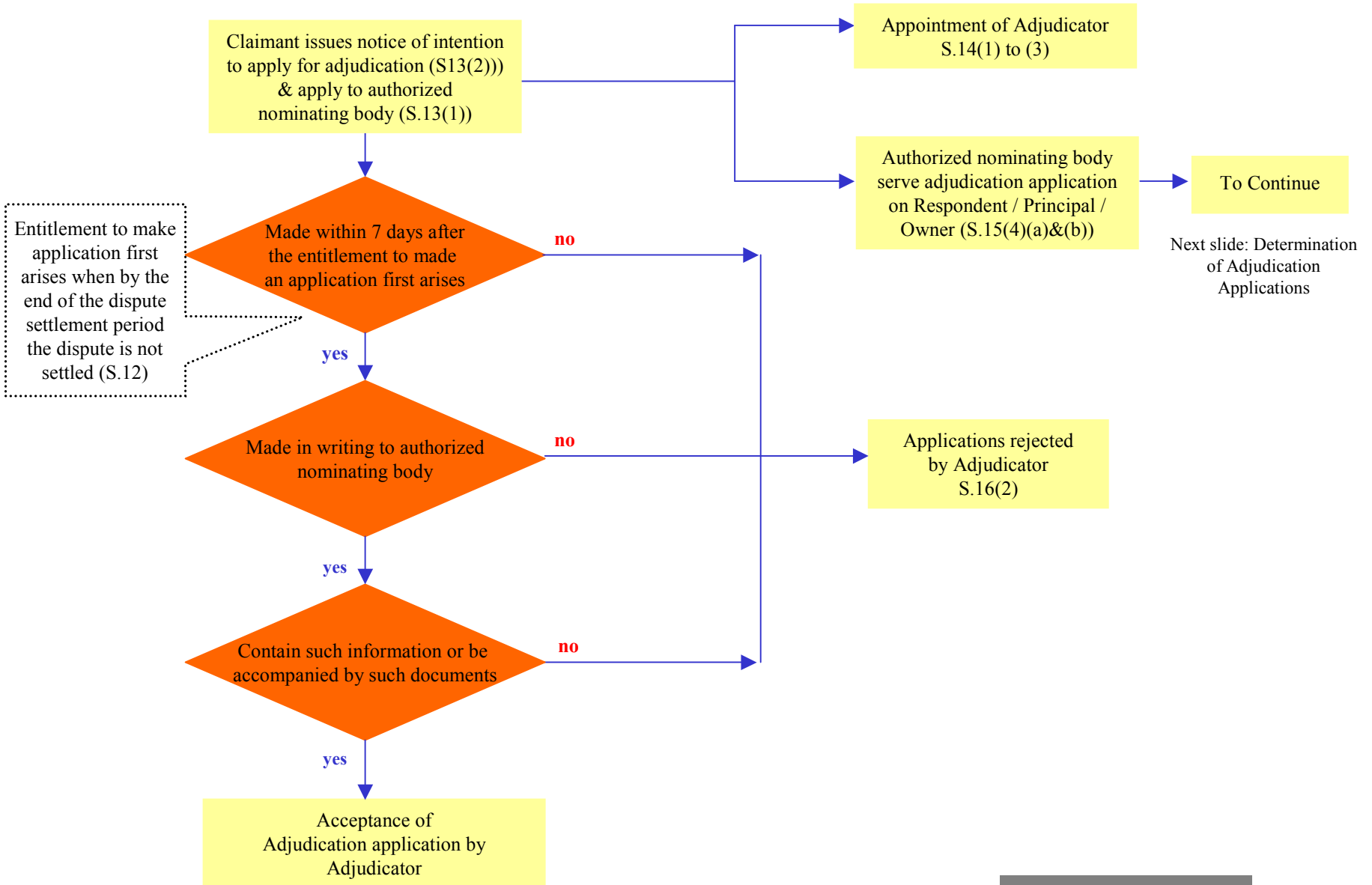
(continued from Certification And Payment)

S/No.	Description	SIA Standard Form of Conditions	Public Sector Standard Conditions of Contract	Security of Payment Act (SOP)
1	Progress payment claims (Payment claims)	-	Monthly (Clause 32.1)	Section 10
2	Period for issuing Interim Certificates	If none stated, monthly and not later than 7 days from the day of receipt of the Contractor's payment claims (Clause 31(1) and 31(2))	Within 21 days of receiving a statement duly submitted by the Contractor (Clause 32.2(1))	-
3	Payment responses (S.11(1)(a) & (b))	-	-	(a) By the date as specified in accordance with the terms of the contract, or within 21 days after the payment claim is served, whichever is earlier (Section 11(1)(a)); or (b) Where the contract does not contain such provision, within 7 days after the payment claim is served (Section 11(1)(b))
4	Tax invoice	-	-	Claimant to submit tax invoice to the Respondent (Section 8(1)(b))
5	Due date for payment	If none stated, within 14 days of receipt of the Architect's certificate (clause 31(1))	If none stated, within 21 days after the date of SO's certificate (Clause 32.6)	Where a construction contract provides for the date on which a progress payment becomes due and payable: (a) By the date as specified in the contract (Section 8(1)(a)); or (b) Immediately upon the expiry of 35 days after (Section 8(1)(b)): i) the Claimant submits (who is a taxable person under the GST Act) to the Respondent a tax invoice for the progress payment; or ii) the period within which the payment response is required to be provided (whether or not a payment response is provided) Where contract does not provide such provision, the progress payment becomes due immediately upon the expiry of 14 days after (Section 8(1)(2)): i) the Claimant submits (who is a taxable person under the GST Act) to the Respondent a tax invoice for the progress payment; or ii) the period within which the payment response is required to be provided (whether or not a payment response is provided)

An Adjudication application – S.13(3):

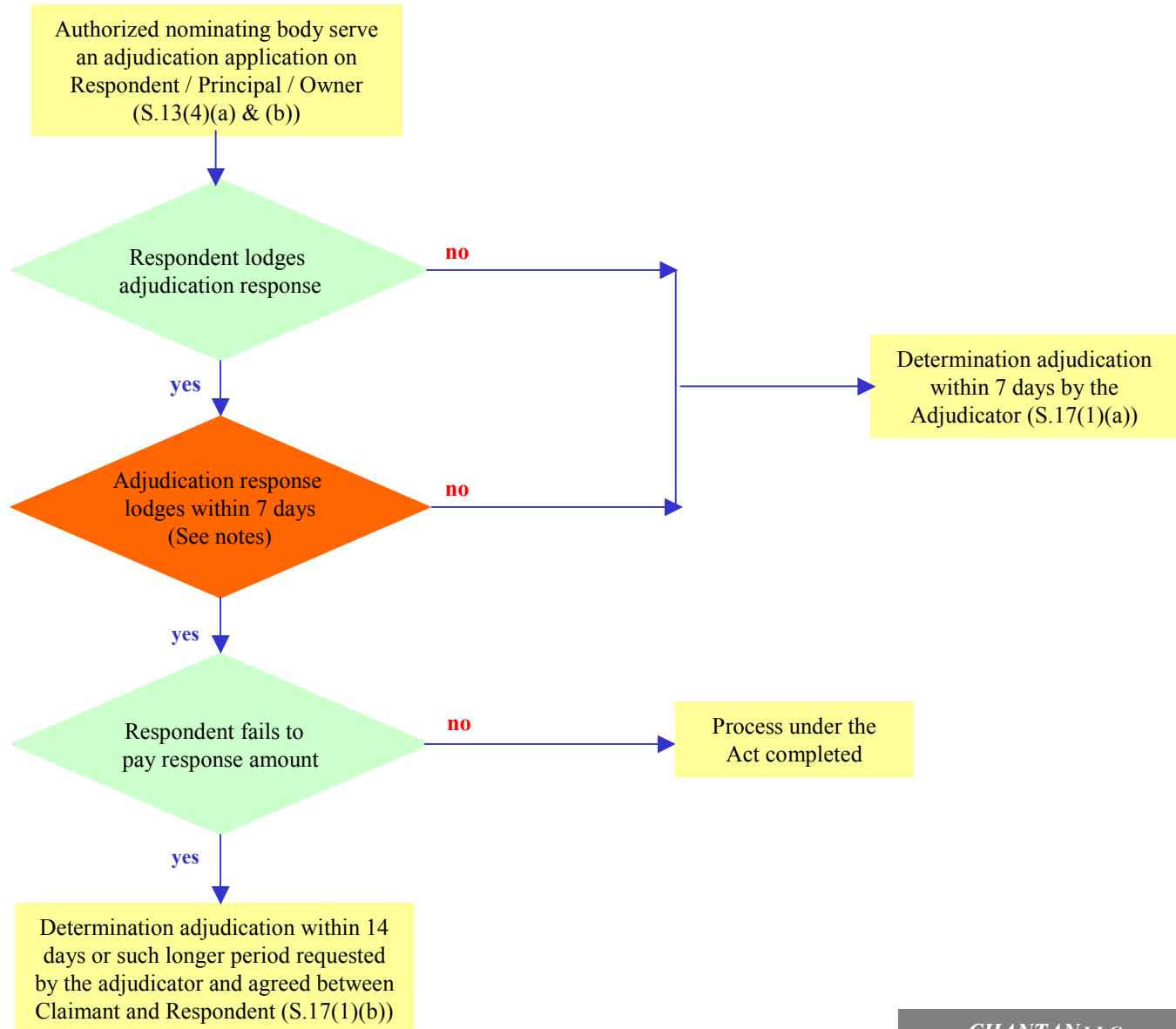
- a) Shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;
- b) Shall be made in writing addressed to the authorized nominating body requesting it to appoint an adjudicator;
- c) Shall contain such information or be accompanied by such documents as may be described;
- d) Shall be accompanied by such application fee as may be determined by the authorized nominating body; and
- e) May contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the claimant may consider to be relevant to the application.

Acceptance of Adjudication Applications



Determination of Adjudication Applications

(continued from Acceptance of Adjudication Applications)

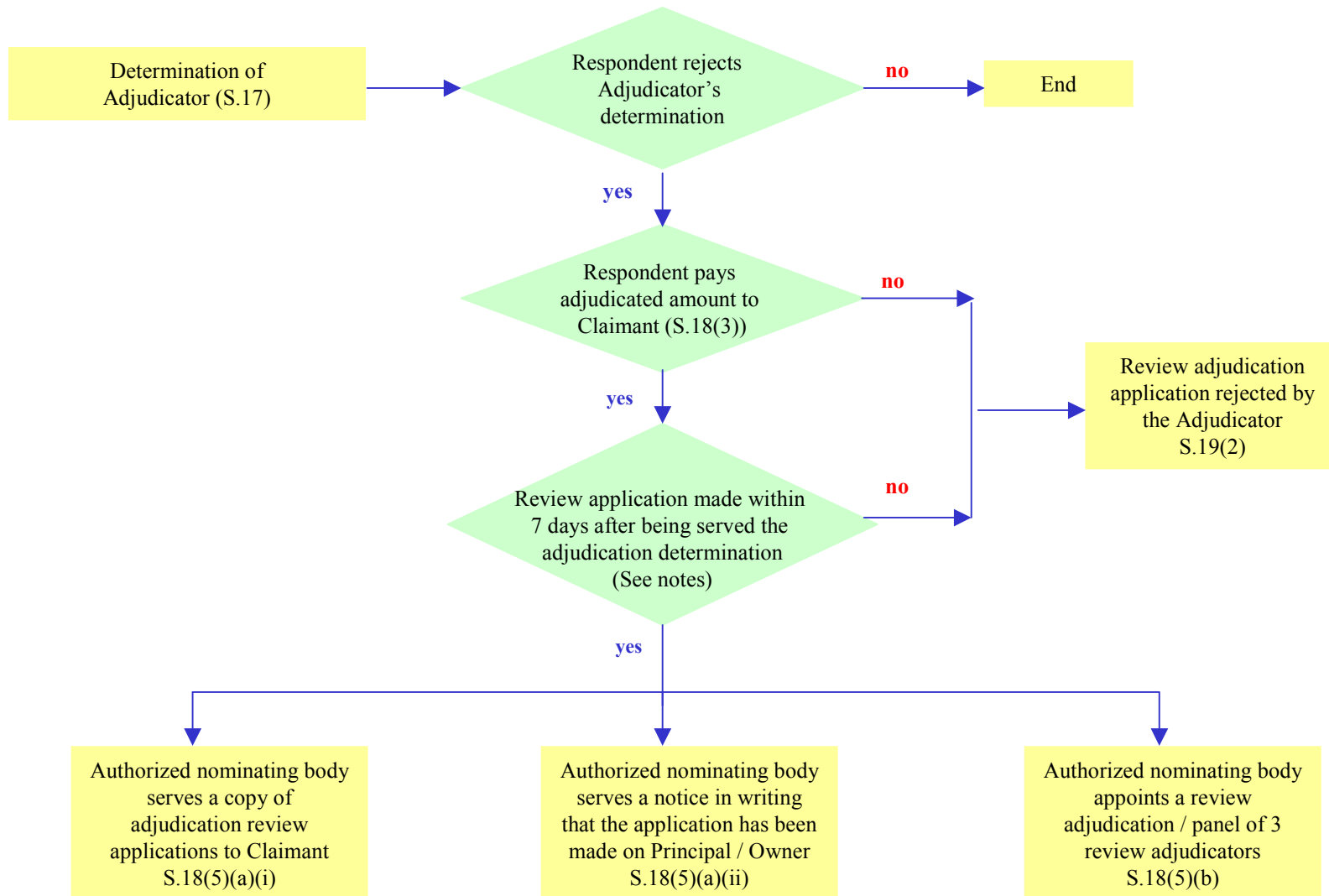


An Adjudication responses -S.15(2):

- a) Shall be made in writing addressed to the authorized nominating body;
- b) Shall identify the adjudication application to which it relates;
- c) Shall contain such information or be accompanied by such documents as may be prescribed; and
- d) May contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the respondent may consider to be relevant to the adjudication response.

Review of Adjudication Procedures

(continued from Determination of Adjudication Applications)

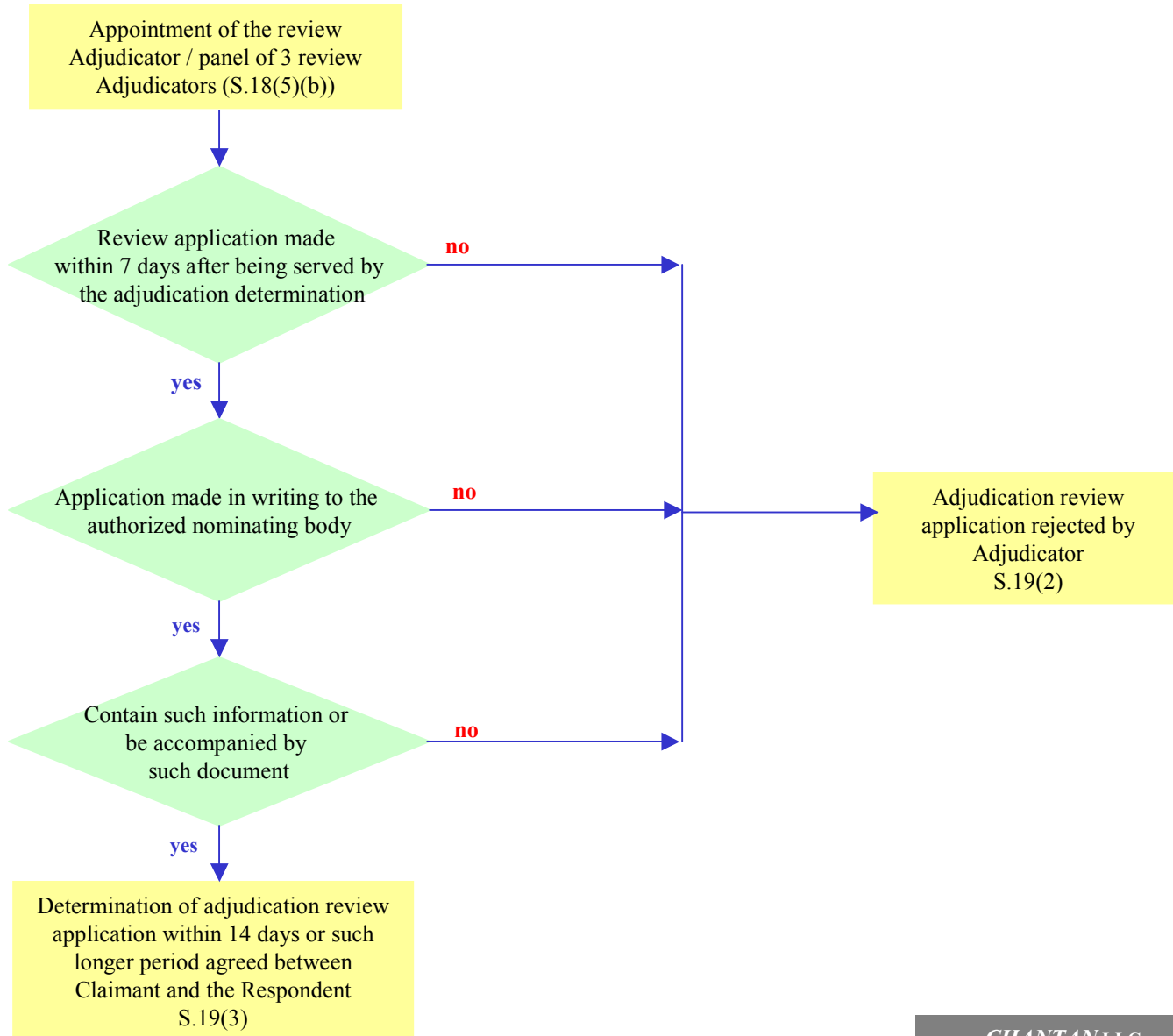


An Adjudication review application -S.18(4):

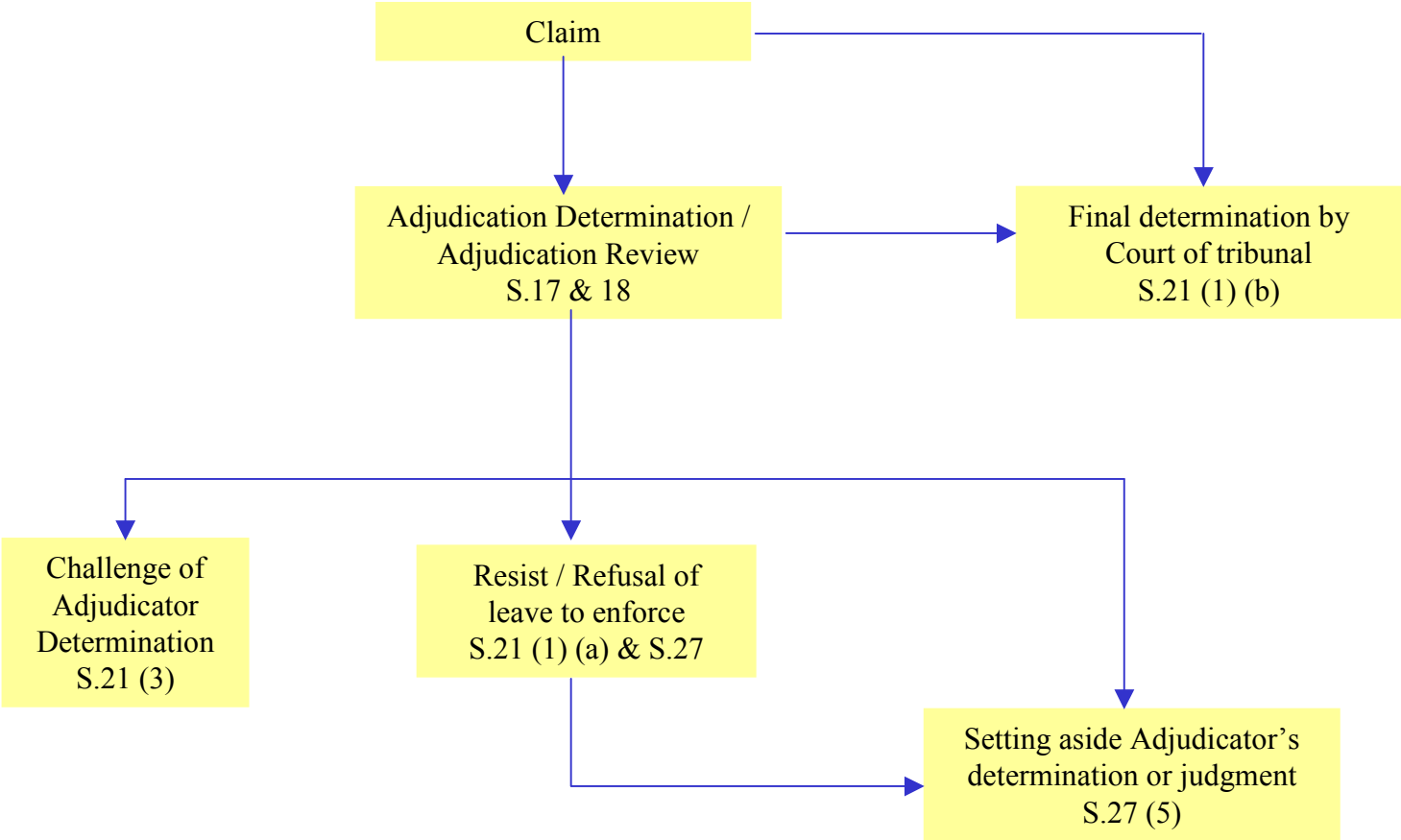
- a) Shall be made in writing addressed to the authorized nominating body requesting it to appoint one or more review adjudicators to determine the application;
- b) Shall contain such information or be accompanied by such documents as may be prescribed; and
- c) Shall be accompanied by such application fee as may be determined by the authorized nominating body.

Determination of Adjudication Review Application

(continued from Review of Adjudication Procedures)



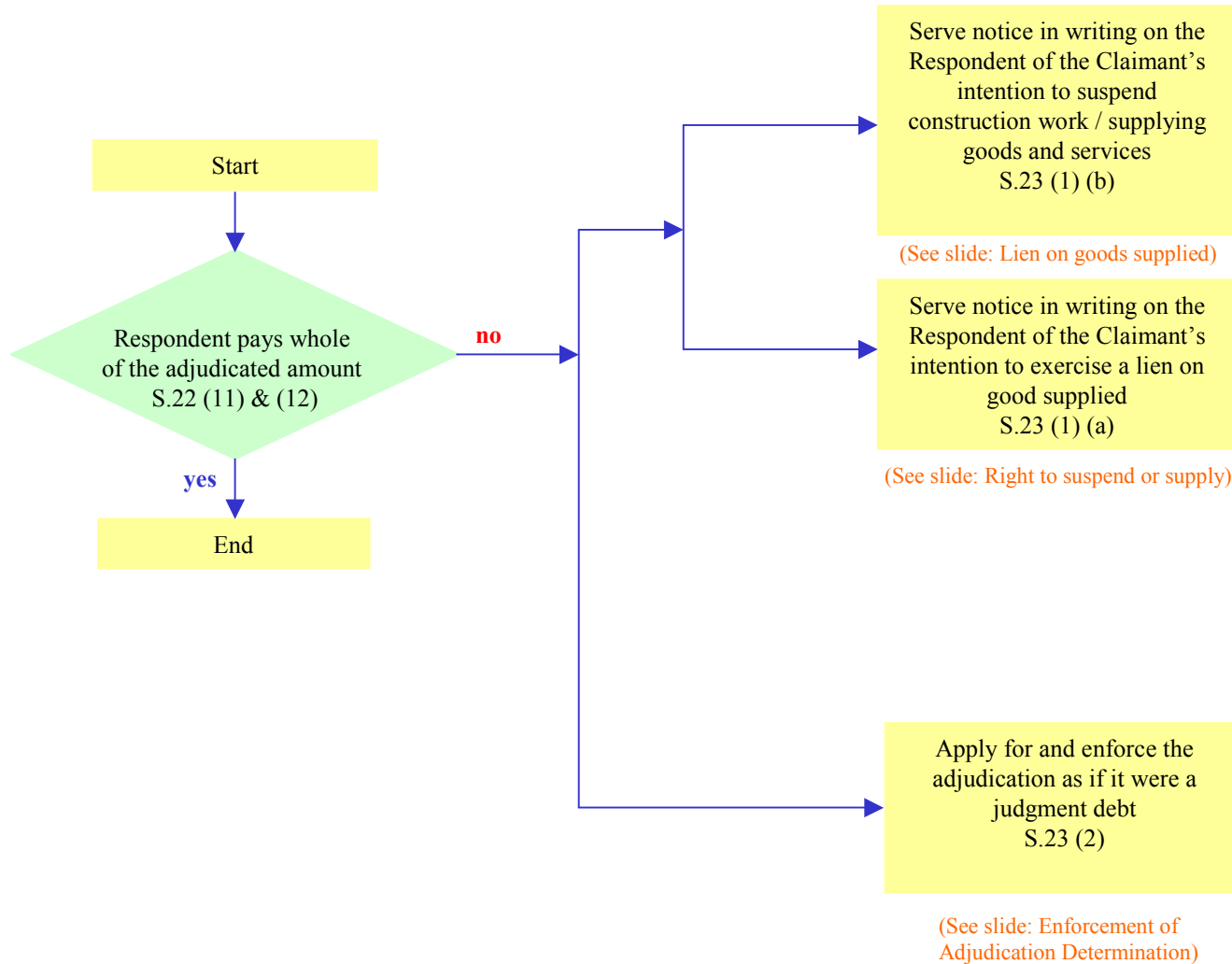
Procedures Available on Dissatisfaction with Adjudicator's Determination



Effect of adjudication determinations and adjudication review determinations

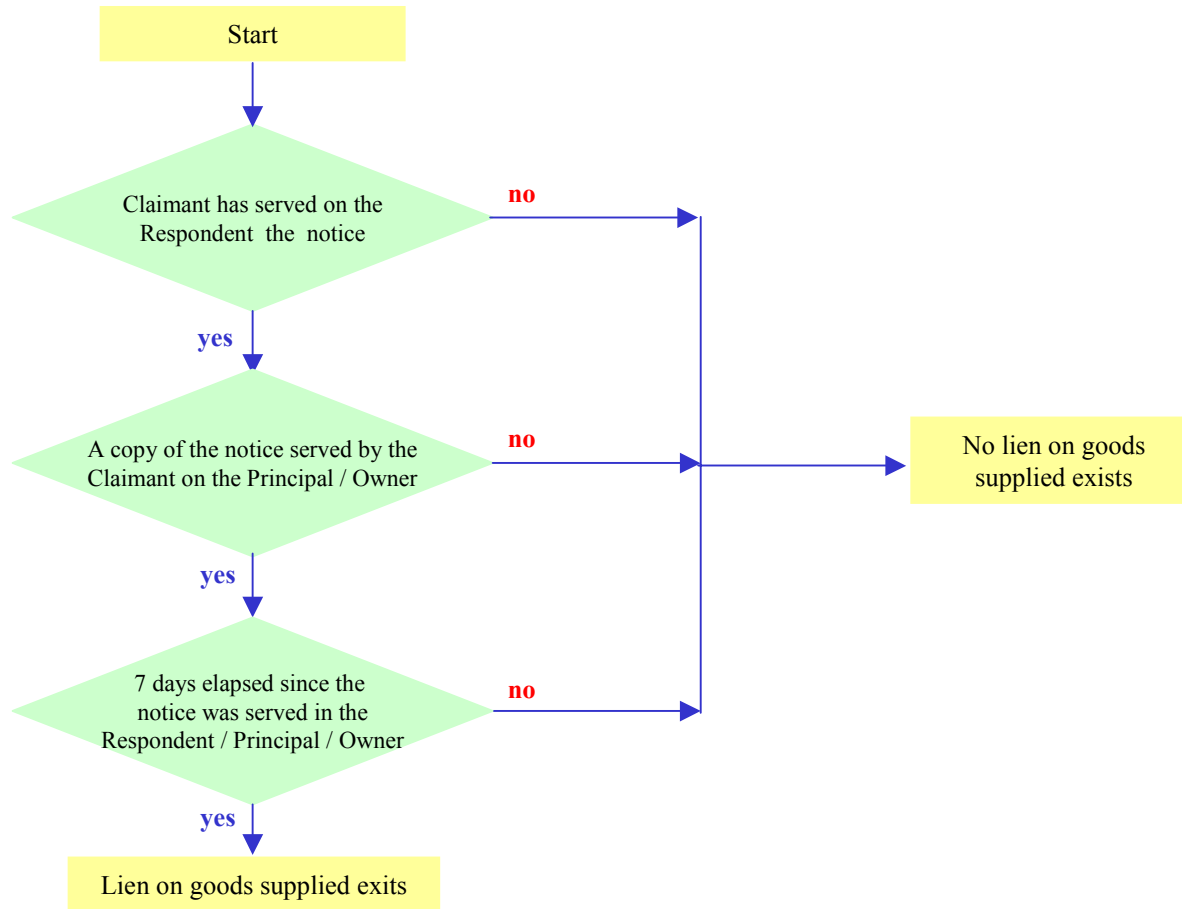
- 21. – 1) An adjudication determination made under this Act shall be binding on the parties to the adjudication and on any person claiming through or under them, unless or until –
 - a) Leave of the court to enforce the adjudication determination is refused under section 27;
 - b) The dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or
 - c) The dispute is settled by agreement of the parties.

Measures To Enforce Payment of Adjudication Amount



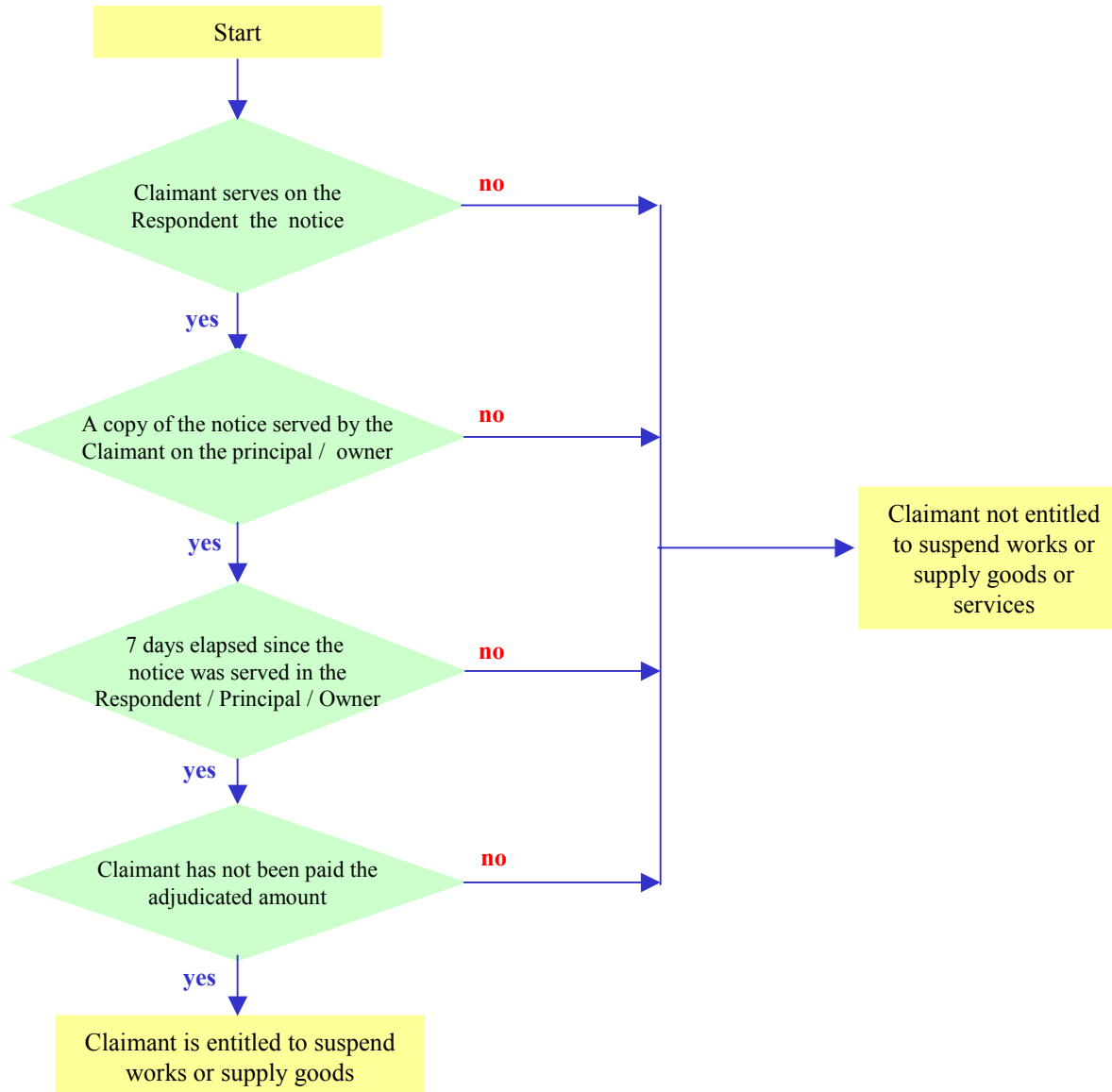
Lien on Goods Supplied - S.25

(continued from Measures To Enforce Payment of Adjudication Amount)



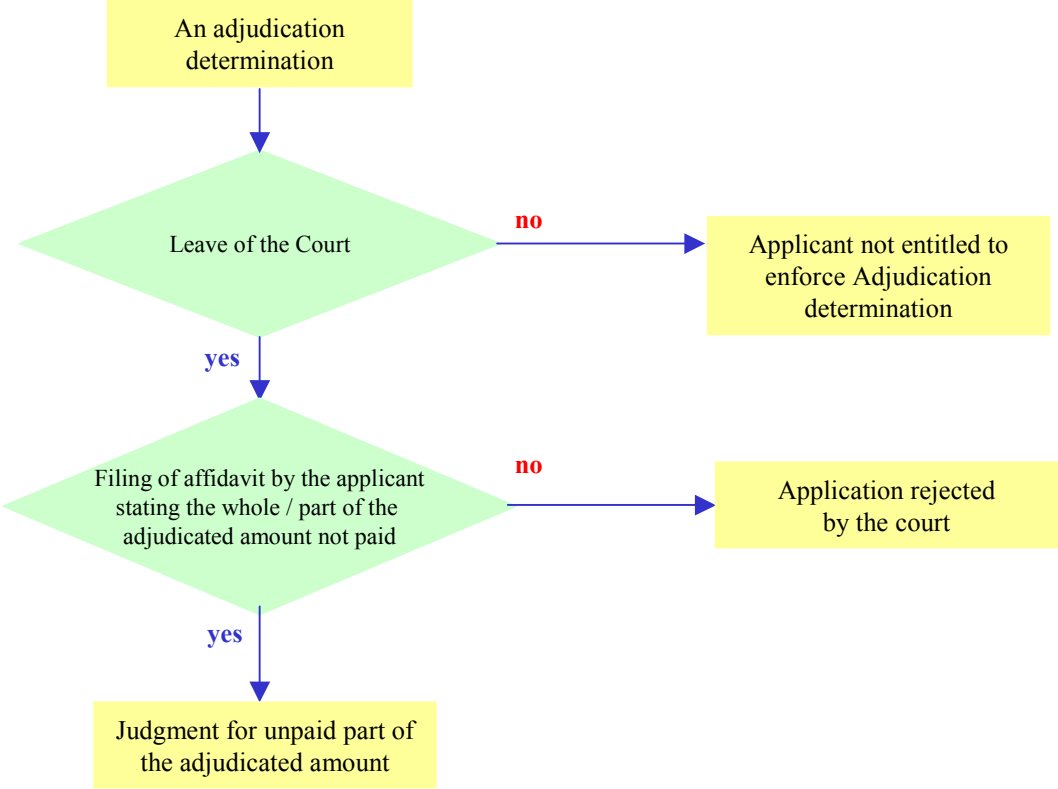
Right to Suspend or Supply - S.26

(continued from Measures To Enforce Payment of Adjudication Amount)



Enforcement as Judgment, an Adjudication Determination - S.27

(continued from Measures To Enforce Payment of Adjudication Amount)



Some possible areas of contention: finality of adjudicator's determination

- **Right of challenge (s. 21(3)) acknowledged but would probably be given effect by way of an injunction and declaration: *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 and *Transgrid v Siemens Ltd* [2004] NSWCA 395.**
- **Challenge cannot be made based on non-jurisdictional error of law.**
- **NSW case provide some guidance of what could be the basis of the challenge.**

Some possible areas of contention: finality of adjudicator's determination

NSW's decisions suggest that the following considerations should be important:

- **Adjudicator's determination satisfying the "basic and essential requirements" or conditions of validity, eg:**
 - **Existence of construction contract.**
 - **Service of payment claim.**
 - **Making of an adjudication application, etc**
- **Adjudicator exercising properly power provided by the Act.**
- **Adjudicator's determination flawed because of denial of natural justice or fraud involving adjudicator.**

Some possible areas of contention: finality of adjudicator's determination

Enforcement of adjudication determination as judgment debt, etc.

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

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

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

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

(5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the

Some possible areas of contention: adjudicator's determination and summary judgment/interim award

- **On a plain reading, s. 34 allows a party to commence legal proceedings although there is a pending adjudication.**
- **In the proceedings, the party can make an application for summary of judgment (in court) or an interim award (in arbitration).**
- **If summary judgment is obtained, then the adjudicator's determination may be displaced by the judgment: s. 21(1)(b) and s. 34(3).**

Some possible areas of contention: adjudicator's determination and summary judgment/interim award

s. 21(1)(b) provides as follows:

(b) the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or

s. 34(3) provides as follows:

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

Some possible areas of contention: meaning of dispute settlement period

s. 12(5) provides as follows:

“dispute settlement period”, in relation to a payment claim dispute, means:

the period of 7 days after the date on which the payment response is required to be provided under section 11(1); or

the period within which the payment response is required to be provided under section 11(1)

There is a view that:

The dispute settlement period is only limited to 7 days after the date on which the payment response is required to be provided under section 11(1)

Some possible areas of contention: notice of intention to apply for adjudication

s. 13(2) provides as follows:

An adjudication shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication

s. 16(2)(a) provides, on the other hand

- 3 grounds on which an adjudicator shall reject any adjudication application.
- Section 16(2)(a) does not say an adjudicator have to reject any adjudication application if the claimant fails to give a written notice

CONCLUSION

CONTRACTORS SHOULD:

- **Review payment claim and payment response procedures in their organization.**
- **Put in place procedures and measures to be taken during the dispute settlement period.**
- **Set up work flows to take into account (a) SOP and (b) Contract timelines.**
- **Put in place triggers for Adjudication.**
- **Give consideration to what should be done post-adjudication.**

CHANTAN LLC



THE END

Thank you for listening



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Executive Committee Member, Senate, Academy of Law (2004)

Member, Regional Panel, Singapore International Arbitration Centre

Member, Disputes and Commercial Resolution Panel, Singapore Wholesale Electricity Market (2003)

General Secretary, Singapore Institute of Arbitrators (1994-1996)

Member of the Standing Committee, Commission on Post-Construction

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Chairman, Multi-Disciplinary Committee, Law Society

Member, Technology Law Development Group, Academy of Law.

Publications (author or co-author)

Building and Construction title of Halsbury Laws of Singapore

“Construction Law in Singapore and Malaysia”

“Singapore Court Forms and Precedents.”

Singapore Civil Procedure 2003 (White Book)

Involvement in the following journals/periodicals:

Annual Review of Building and Construction Law, Singapore Academy of Law Journal

Author, Construction Law Column, Law Gazette (1994-1996)

About *CHANTAN* LLC

ChanTan LLC is a law corporation that specialises in Building and Construction Law, is a member of the International Construction Law Alliance and has a “best friends” relationship with Masons, the international construction law firm.

Further details concerning the firm can be obtained from the its website at: <http://www.chantan.com.sg>. Publications and materials concerning the topic dealt with and other areas of construction law can also be downloaded from this website.