

failure, the adjudicator may determine the application on the basis of the information and documents available to him."

Concluding Remarks

This paper has taken the reader through the provisions of the SOPA which regulates the role of evidence. As mentioned earlier, the Evidence Act does not apply. It is submitted that the common law principles as modified by the SOPA would apply. Nevertheless, certain concepts relating to evidence have been used to examine the framework in the light of the express provisions touching on evidence.

Given the very tight time lines for the whole adjudication process, the scope of evidence to be used and considered by the adjudicator is significantly limited. The highlight must be the provision that disallows the use of evidence proving set-offs and counter-claims once the reasons for withholding moneys have not been included in the payment response.

The other important point that all adjudicators should remember to consider is whether the claimants have discharged their burden of proof either in reliance of the formula agreed to determine the progress payment amount or the default formula where construction work carried out must be valued to

determine the progress payment amount payable. Unless sufficient evidence is given by the claimants to support the claimed amount, a site inspection may be necessary to assist the adjudicator in determining that amount.

This leads to the last point as regards natural justice which must necessarily take a different form in accordance with the framework of time and exclusion of evidence when the adjudicator is determining the adjudication amount.

NOTES

1. See section 2(1) of the Evidence Act which provides that, "Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator." It is noted that the judicial proceedings must involve a court. The process of statutory adjudication is limited to the involvement of courts at the enforcement of the adjudication determination. In this paper, the enforcement part is not covered.

2. See section 3(3) of the Evidence Act which provides that, "A fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

3. By Section 3, "fact" includes (a) any thing, state of things, or relation of things, capable of being received by the

senses; and (b) any mental condition of which any person is conscious;

4. By section 13(1), "A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body." (emphasis given)

5. By section 10(3)(a), "A payment claim shall state the claimed amount, calculated by reference to the period to which the payment claim relates;..."

6 See section 2 which defines "progress payment" as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes (a) a single or one-off payment; or (b) a payment that is based on an event or a date;"

7 See section 8(5) which provides that, "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).

8 See section 13(3)(c).

9 See section 13(3)(e).

10 See section 17(4).

11 See section 19(6)(b).

Brief history of construction adjudication in Singapore

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In Singapore, adjudication of claims for payment for work and supply of goods and services in the construction industry is facilitated by the Building and Construction Industry Security of Payment Act ("SOP Act") and its accompanying Regulations, both of which came into operation on 1 April 2005. All construction industry adjudications are administered by the Singapore Mediation Centre ("SMC"), which is the authorized body under the SOP Act for maintaining a register of adjudicators, codes of conduct and

practice, schedules of fees, providing training and administering construction adjudications.

To describe the scheme under the SOP Act in a nutshell: In line with its objective of facilitating payment and cash-flow for work and supply of goods and services in the construction industry, the SOP Act, amongst other things, renders as unenforceable any "pay when paid" provisions in contracts and any other contract terms which are contrary to the Act.

The mechanism is as follows:

- (1) Upon being served with a Payment Claim, the Respondent is to serve, within the prescribed period, a Payment Response setting out the amounts it proposes to pay or withhold and the particulars prescribed by the Act and Regulations.
- (2) There is a 7-day "dispute resolution period" for the parties to clarify matters, and for the Respondent to provide

a Payment Response if he has failed to do so hitherto.

- (3) If the claim is not settled by then and the Claimant wishes to proceed to adjudication, he has to serve a notice to the Respondent that he so intends to proceed to adjudication. He must then file an adjudication application in the prescribed form within 7 days after the end of the dispute resolution period.
- (4) The Adjudicator is then quickly appointed by the SMC.
- (5) The Respondent must file his Adjudication Response within 7 days.
- (6) Thereafter, with or without an Adjudication Response, the Adjudicator has to make his determination within the prescribed period – which is within 7 days if there has been no payment response or adjudication response or he has failed to pay his response amount, or within 14 days in other cases – or such longer periods as agreed by the parties.
- (7) The Adjudicator can consider any matter relevant to the adjudication, *save that* the Act expressly prohibits the adjudicator from considering any reasons, set-offs or counterclaims not referred to in the Payment Response.

In its two-year history in Singapore, there have been about 30 adjudications administered by the SMC. The new scheme has indeed afforded claimants (mainly contractors and sub-contractors, as well as some unpaid architects) a remarkably faster and easier alternative to pursuing payment claims via arbitration or litigation. The main onus on most claimants is to ensure they satisfy the strict requirements of the Act as to time, particularity and eligibility, and thankfully this is greatly facilitated by the provision of prescribed forms by the SMC.

Some past adjudication determinations of SOP adjudications are published and available for

reference at the SMC website (www.mediation.com.sg/Adjudication).

The following points are significant from a general review of the reported determinations during this 2-year history of the SOP Act. Some statistics are also available at http://www.bca.gov.sg/SecurityPayment/security_payment_statistics.html:

- (1) Most adjudications under the SOP Act (over 70%) resulted in determinations in favour of the Claimants (these include adjudications where at least partial payments were awarded to Claimants), with interest and costs, and most claimants did indeed satisfy the requirements of the Act.
- (2) Some claims were withdrawn or settled after commencement of adjudication. Other claims failed, either for jurisdictional or factual reasons and/or did not satisfy the strict requirements of the Act as to time, particularity and eligibility. For example, there were claims for construction work or supply of goods for construction work *outside* Singapore (which is expressly excluded by the SOP Act) and others that did not provide the essential particulars required under the Act and Regulations.
- (3) A common occurrence has been respondents raising reasons for withholding payment, which were not hitherto raised in their Payment Response. In such situations, adjudicators have been duty-bound not to consider such reasons in accordance with the strict prohibition in section 15(3) of the Act.
- (4) Nevertheless, respondents have not been shut out during the adjudication from raising jurisdictional or legal submissions, as these submissions understandably

could not have arisen before sight of the contents of the claimants' adjudication application.

- (5) To date, as far as the writers are aware, there have not been any adjudication review applications by any aggrieved respondents within the limited ambit for review allowed by the SOP Act and Regulations. Neither have there been any reported applications to set aside any adjudication applications, which is a method of recourse provided under the Act that notably requires the aggrieved respondent to pay any unpaid portion of the adjudicated amount into court as security. There are therefore, at time of writing, no judicial decisions yet on adjudications yet in Singapore.

The following is a sampling of some of the issues raised in selected published SOP adjudications in the relatively brief history of this dispute resolution mechanism in Singapore:

Requirement for contract or terms in writing

In the very first SOP adjudication in Singapore, *AA Pte Ltd v AB Pte Ltd*, which was determined in December 2005, one of the issues raised by the Respondent contractor was that the Claimant sub-contractor did not finalise and execute the Letter or Award or the Sub-contract document. The contention was that, as such, there was no "written contract", which is a pre-requisite for the application of the SOP Act. The Adjudicator ruled that even though the parties did not sign the contract, they did deal with each other during the project on a set of agreed written key-terms. There was therefore no doubt that the Act applied, as section 33 of the Act provides that a contract is treated as having been made in writing if, for instance, they agree "otherwise than in writing by reference to terms which are in writing".

Similarly, in *L practicing under Company AW v Company AX*,

determined in August 2006, the Adjudicator decided that, despite the absence of a signed contract, there was no doubt that the Claimant was appointed by the Respondent as the architect for the project. This was evidenced by the correspondence, submissions of plans by the architect to the building authorities, and the reference in the correspondence to the terms of the standard SIA Conditions of Appointment.

Paramount importance of the Payment Response

In *AA Pte Ltd v AB Pte Ltd*, the Adjudicator determined that the alleged Payment Response was deficient, as all it did was to require the Claimant to submit further documents without stating any response amount, whether the Respondent would pay or not, nor reasons for non-payment. Accordingly, in accordance with Section 15(3) of the Act, the Adjudicator could not consider any reason for withholding such amount which was put forward by the Respondent in the adjudication but not in the prior Payment Response.

For instance, one of the reasons for non-payment put forth by the Respondent during the adjudication in *AA Pte Ltd v AB Pte Ltd* was that the Claimant had not yet provided a performance bond required by the sub-contract. In addition to deciding that this reason was invalid anyway as it was not raised in the Payment Response, the Adjudicator also dismissed an alternative ground submitted by the Respondent that the provision of a performance bond was a condition precedent to the contractor receiving payment under the contract, as amongst other things the sum of S\$20,750/- secured by the performance bond was relatively small compared to the claimed amount of S\$520,428/- and could have been deducted from payment claims instead of withholding the whole amount of the payment claim.

Common Jurisdictional issues

In *AH Pte Ltd v AI and AJ Pte Ltd*, determined in May 2006, the Adjudicator had to make decisions on a minefield of jurisdictional issues

raised by the Respondents, who had failed to file an Adjudication Response. The Adjudicator decided that, under the SOP Act, he could decide on his own jurisdiction. In addition, it was recorded that, in accordance with the Act, the Adjudicator had no power to extend the time for filing any Adjudication Response and he could not consider matters not raised in a Payment Response or Adjudication Response.

However, the Adjudicator determined that he nevertheless still had the duty to consider the adjudication application on its merits, and determine if the requirements of the SOP Act as to time, eligibility and particularization are satisfied, irrespective of whether these matters were in any Payment Response or Adjudication Response.

In the event, he found that, indeed, the Claimants' adjudication application *did* fall *outside* the jurisdiction of the SOP Act, in that it was for a claim for work done (in this case concept design services) for construction work to be carried out *outside* Singapore, which is expressly excluded from the ambit of the SOP Act.

In *Company AU v Company AV* (No. 1) of August 2006 (as in several other adjudications in 2006) although certain objections were not raised in the Payment Response, the Adjudicator found that he could consider those objections, as they were procedural objections concerning the adjudication application and could not possibly have been raised in a payment response prior to the adjudication application.

Similarly, in *Company BQ v Company BV*, determined in October 2006, the Respondent did not file a Payment Response, but asked the Adjudicator for an opportunity to be heard on jurisdictional objections in accordance with the rules of natural justice, stating that in any case those objections could not possibly have been raised in a Payment Response before the adjudication application.

The Adjudicator decided to hear the Respondent's submissions and

ultimately determined that the adjudication application be dismissed on one of the grounds put forth by the Respondents. As explained by the Adjudicator:

"Despite the Respondent's failure to provide a payment response, I am of the view that I am entitled to decide whether to hear the Respondents as Section 16(7) provides that "An adjudicator's power to determine an adjudication application is not affected by the failure of (a) the respondent to provide a payment response or lodge an adjudication response ... and in the event of any such failure, the adjudicator may determine the application on the basis of the information and documents available to him."

Right to Progress payments: includes final payments, and also survives contract termination

The Adjudicator in *Company AU v Company AV* (No. 2), of September 2006, decided that the SOP Act does apply even after a contract is terminated, stating:

" ... I am of the view that the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be [sic] achieved [if] the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects. Secondly, although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the contract continues to govern the relationship between the parties in relation to the work already done."

Likewise, in *Company BO v Company BP*, in September 2006, the Adjudicator also agreed that **final** payments are also covered by the term "progress payments" in the Act (as does the "Toolkit" on the SOP Act of the Building Construction Authority – which one can also refer to at the SMC website).