



ADJUDICATION: SCOPE OF AN ADJUDICATION REVIEW

Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd [2017] SGHC 9

IN SUMMARY

This Singapore High Court decision of 24 January 2017 involving an application to set aside an adjudication review determination, considered for the first time the scope of an adjudication review, in particular whether the review adjudicator is restricted to the issues framed by the party seeking the adjudication review, and whether the *Building and Construction Industry Security of Payment Act* ("SOP Act") sets boundaries of the matters to be considered.

FACTS

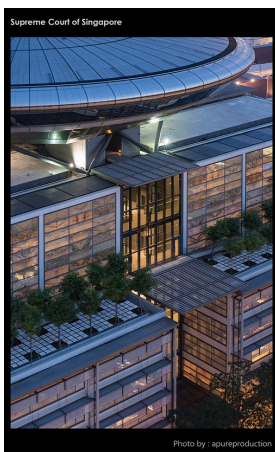
Adjudication Application (SOP/AA 102 of 2016)

Ang Cheng Guan Construction Pte Ltd (the "Applicant") was engaged by Corporate Residence Pte Ltd (the "Respondent") to carry out works in a construction project. On 18 March 2016, the Applicant submitted its payment claim dated 22 February 2016 (the "Payment Claim"), and thereafter lodged an Adjudication Application (SOP/AA 102 of 2016) (the "Adjudication Application") with the Singapore Mediation Centre in relation to its Payment Claim.

The following 5 issues were determined by the adjudicator in SOP/AA 102 of 2016 (the "Adjudicator"):

- (a) Whether the Adjudication Application was invalid in that the Payment Claim was served out of time (the "1st AA Issue");
- (b) Whether the first and second payment responses provided by the Respondent in response to the Payment Claim were valid (the "2nd AA Issue");
- (c) Whether the Applicant was entitled to an extension of time ("EOT") in excess of what was granted by the architect (the "3rd AA Issue");
- (d) Whether the delay certificate dated 27 November 2015 issued by the architect against the Applicant was invalid and of no effect and therefore liquidated damages were wrongfully imposed (the "4th AA Issue"); and
- (e) Whether any, and if so what, amounts were payable to the Applicant for work done and for variations/prolongation claims (the "5th AA Issue").

The Respondent was found by the Adjudicator to be liable to pay the Applicant the sum of S\$ 467,428.69 (the "Adjudicated Amount"), together with interest and 70% of the costs of the Adjudication.





Adjudication Review Application

On 19 May 2016, the Respondent lodged an Adjudication Review Application pursuant to *Section 18(2)* of the *SOP Act* (and paid the Adjudicated Amount to the Applicant prior to its lodgement in compliance with *Section 18(3)* of the *SOP Act*.) A review adjudicator (the "RA") was appointed by the Singapore Mediation Centre.

At the Adjudication Review, the Respondent sought a review of the Adjudicator's determinations on the 3rd and 4th AA Issues, namely:

- (a) in relation to the 3rd AA Issue, that the Applicant was entitled to EOT of 133 days in addition to the EOT granted by the Architect;
- (b) in relation to the 4th AA Issue, the Respondent was not entitled to impose liquidated damages.

In connection with the review of the above 2 determinations, the Respondent framed a list of issues for the determination by the RA (the "Respondent's Issues").

At the same time, the Applicant was dissatisfied with the Adjudicator's determinations in relation to some of the AA Issues, and at the Adjudication Review submitted a list of issues outside of the Respondent's Issues (the "Applicant's Issues"). However the RA formed the view that his jurisdiction was limited to the determination of the Respondent's Issues. The RA also determined that the Applicant's Issues were completely separate and distinct or not inextricably linked to the Respondent's Issues (subject to certain observations on one of the Applicant's Issues).

In light of the RA's views above, the Applicant took out its application in these proceedings to set aside the Adjudication Review Determination.

ISSUES BEFORE THE HIGH COURT

- (a) what is the scope of an adjudication review; and
- (b) whether the Adjudication Review Determination is liable to be set aside.

HOLDING OF THE HIGH COURT

Scope of Adjudication Review

The High Court disagreed with the Respondent's submission that the adjudication review process is analogous to an appeal in court proceedings where the respondent is not permitted to raise any matter on appeal unless he has filed a cross-appeal, since the adjudication regime is an entirely new regime for the purpose of providing a fast but interim means for resolving payment disputes in the construction industry. Thus it was incorrect to draw an analogy to appeals in court proceedings which are not only governed by different legislation, but also provide for a final decision reached after a comprehensive process that ensures that all relevant facts and legal arguments are fully ventilated.

The High Court then went on to consider the relevant provisions of the *SOP Act* (which the High Court held to be the proper approach to determine the scope of review), citing *Sections 18 and 19* of the *SOP Act* and *Regulation 10* of the *Building and Construction Industry Security of Payment Regulations* ("SOP Regulations").



The High Court made the following observations in relation to the relevant provisions:

- (a) as a starting point, the provisions of the *SOP Act* do not explicitly set out the scope of an adjudication review, but with the operative words “*the review of the determination*” in *Section 18(2)* of the *SOP Act*, prima facie, this refers to the entire adjudication determination and supports the “Broad Interpretation” – i.e. that the review adjudicator is entitled to review the entire adjudication determination;
- (b) the *SOP Act* clearly does not state whether an adjudication review is or is not limited to issues raised by the respondent in the adjudication, however if this was Parliament’s intention, the draftsman could have easily inserted in either provision words to the effect to restrict adjudication;
- (c) furthermore, *Section 19(6)(a)* of the *SOP Act* states the matters that the review adjudicator may have regard to, including those set out in *Sections 17(3)(a) to (h)* of the *SOP Act*, and also the adjudication determination under review (and not part of it). As such, there is no indication in *Section 19(6)(a)* that an adjudication review is limited to the issues raised by the respondent in an adjudication, and the language is broad enough to cover the entire adjudication determination;

- (d) *Section 19(5)* of the *SOP Act* also states that an adjudication review shall determine the adjudicated amount (if any) to be paid by the respondent to the claimant and, if this is different from that determined by the first instance adjudicator, the review adjudicator shall also determine “*the date on which the difference in amount is payable*”. If the adjudication review was restricted to the issues raised by the respondent in the adjudication, *Section 19(5)* would have expressly restricted a review adjudicator to simply maintaining or decreasing the adjudicated amount. The provision leaves it to the review adjudicator to increase the adjudicated amount, which is consistent with the Broad Interpretation.

The High Court then considered the policy of the *SOP Act*, which the Court held to be ambivalent as to whether the Narrow or Broad Interpretation is preferred, and on this issue concluded that based on an analysis of the relevant provisions of the *SOP Act*, the Broad Interpretation is the correct one. Therefore, the entire adjudication determination is liable to be reviewed by the review adjudicator.

Adjudication Review Determination Liable to be Set Aside

The Applicant relied on the ground of a breach of natural justice in the RA’s refusal to hear its arguments on the Applicant’s Issues in its submissions that the Adjudication Review Determination be set aside.



The High Court rejected the above ground, but held that considering the Broad Interpretation was the correct one, the RA had misdirected himself in a point of law and the Applicant's Issues were relevant considerations that he had failed to take into account. As such, the Adjudication Review Determination must be set aside on this basis.

Concluding Views

This is the first time the question of the scope of an adjudication review has come up before the High Court. It is important to note that the adjudication review procedure is unique to Singapore and is not found in other jurisdictions with similar regimes to expedite payments in the construction industry. In reach its holding, the Court reiterated Parliament's intentions behind the adjudication regime, while balancing the interests of an applicant and respondent in an adjudication review process, in order to preserve the very nature and purpose of the regime that ensures cash flow in the cash-sensitive construction industry. With this recent holding, the number of adjudication review applications would inevitably increase, which one might argue may dilute the effect of adjudication determinations.

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THIRD PARTY FUNDING IN SINGAPORE

Key Changes introduced through the Civil Law (Amendment) Bill and Additional Guidelines put in place to Promote Best Practices with respect to Third Party Funding in Singapore

We covered the key changes introduced through the Civil Law (Amendment) Bill (Bill No. 38/2016) in our earlier Issue (Issue No.1 of 2017). The Bill has since come into force on 1st March 2017.

The aim of this Issue is two-fold. It sets out the specific amendments introduced by the Bill and seeks to provide an overview of additional guidelines put in place to promote best practices with respect to Third Party Funding in Singapore, namely the:

- (a) Practice Guidelines for Third Party Funders issued on 28th February 2017 by the Singapore Institute of Arbitrators ("SI Arb"); and
- (b) Practice Note (PN – 01/17) on Arbitrator Conduct In Cases Involving External Funding issued on 31st March 2017 by the Singapore International Arbitration Centre ("SIAC").

Amendments introduced by the Civil Law (Amendment) Bill

Civil Law Act

New Sections 5A and 5B were introduced to the Civil Law Act ("CLA") to:

- (a) abolish the tort of maintenance and champerty (which currently restrict the use of Third Party Funding); and

- (b) give validity to Funding Contracts where the Third Party Funder is a Qualifying Third Party Funder and the Funding is in relation to international arbitration proceedings.

Civil Law (Third Party Funding) Regulations 2017

The Civil Law (Third Party Funding) Regulations 2017 ("Regulations") were made pursuant to Section 5B(8) of the CLA.

The CLA and the Regulations now permit Third Party Funding for the following proceedings:

- (a) International arbitration proceedings;
- (b) Court proceedings arising from or out of international arbitration proceedings;
- (c) Mediation proceedings arising out of or in connection with international arbitration proceedings;
- (d) Application for a stay of proceedings referred to in Section 6 of the International Arbitration Act (the "IAA") and any other application for the enforcement of an arbitration agreement; and
- (e) Proceedings for or in connection with enforcing an award or foreign award under the IAA.



The *CLA* and the *Regulations* define Qualifying Third Party Funder to be a Funder that carries on the principal business of funding the cost of dispute resolution proceedings whether in Singapore or elsewhere and has a paid up share capital, or managed assets, of not less than \$5 million or the equivalent amount in foreign currency.

It is also interesting to note that while a Third Party Funder will not be able to enforce its rights under a Funding agreement entered into with a claimant if it fails to comply with the requirements prescribed by, or ceases to be a Qualifying Third Party Funder under the *CLA* and the *Regulations*, it nevertheless would still be obliged to fulfil its obligations to the claimant in respect of the said Third Party Funding agreement.

Legal Profession Act

New Sections 107(3A) and 107(3B) were introduced in the *Legal Profession Act* to allow a solicitor to:

- (a) introduce or refer a Third Party Funder to the solicitor's client as long as the solicitor does not receive any direct financial benefit from the introduction or referral;
- (b) advise, draft or negotiate a Third Party Funding Contract on behalf of a client; and
- (c) act for a client in respect of a dispute arising out of the Third Party Funding Contract.

Legal Profession (Professional Conduct) Rules

The *Legal Profession (Professional Conduct) Rules 2015* have also been amended to include a new *Part 5A* which:

- (a) makes it mandatory for a legal practitioner to disclose to the court or tribunal, and to every other party to those proceedings, the existence of any Third Party Funding agreement and the identity and address of any Third Party Funder involved in funding the costs of those proceedings; and
- (b) prohibits a legal practitioner from directly or indirectly holding any share or ownership interest in the Third Party Funder which it refers to the client, or any Third Party Funder which has a Third Party Funding contract with the legal practitioner's client.

Additional Guidelines put in place to Promote Best Practices with respect to Third-Party Funding in Singapore

SIArb Practice Guidelines for Third Party Funders

The SIArb Practice Guidelines for Third Party Funders (the "Guidelines") set expectations of transparency and accountability between the Third Party Funder and Funded Party and encourages Third Party Funders to behave with high ethical standards towards Funded Parties.



The Guidelines covers the following aspects:

- (a) Preliminary steps a Third Party Funder should take before executing a Funding Contract;
- (b) Requirements (including Terms) of a Third Party Funding Contract;
- (c) Financial Obligations of a Third Party Funder including taking all reasonable steps to ensure that it will continue to meet the qualifications and other requirements of a Qualifying Third Party Funder; notifying the Funded Party if it reasonably foresees or believes that it will no longer be able to meet such qualifications and requirements; undertaking to be audited regularly; and maintaining access to adequate financial resources to meet the obligations of the Funder;
- (d) Confidentiality Obligations of a Third Party Funder and the Funded Party (including observing the Privileged nature of information and documentation);
- (e) Conflicts of interest and Control of Proceedings;
- (f) Extent to which and when the Third Party Funder may withdraw Funding; and
- (g) Disclosure Obligations of a Third Party Funder and the Funded Party of any information concerning the Funding.

SIAC Practice Note (PN – 01/17) on Arbitrator Conduct In Cases Involving External Funding

The SIAC Practice Note (the “Practice Note”) sets out standards of practice and conduct to be observed by Arbitrators in respect of Arbitration Proceedings administered by the SIAC under the SIAC Arbitration Rules where there is involvement of an External Funder.

The Practice Note covers the following aspects:

- (a) Disclosure Obligations of the Arbitrator to the Registrar and Parties to the arbitration proceedings (whether before appointment or after) of any circumstances that may give rise to justifiable doubts to his impartiality or independence, including any relationship with a Third Party Funder;
- (b) Power of the Tribunal to conduct enquiries into Funding relationship, including making Directions on Disclosure of Involvement, Withdrawal or Change of a Third Party Funder;
- (c) Order for Security for Costs where the existence of a Third Party Funder alone shall not an indication of the financial status of a Party; and
- (d) Arbitrator’s discretion to consider existence of any Third Party Funder when making Costs orders and/or Apportionment of Costs.



Concluding Remarks

While the amendments introduced by Bill is a step in the right direction in setting up the framework for Third Party Funding in Singapore, it bears to note that the Bill neither regulates the terms of the Third Party Funding agreement nor adequately addresses the risk of impecunious claimants, against whom a costs order cannot be fully satisfied.

In this respect, the SI Arb Practice Guidelines for Third Party Funders and SIAC Practice Note are particularly useful as they set out the terms to be included in a Third Party Funding agreement,

imposes continuing Disclosure Obligations on the Third Party Funder and the Funded Party to ensure that the Tribunal is aware of the Funding arrangement, and provides some guidance on ordering security for costs and making costs orders where a Third Party Funder is involved.

It remains to be seen whether and how such finer details will be dealt with through further enactments of subsidiary legislation and regulations.

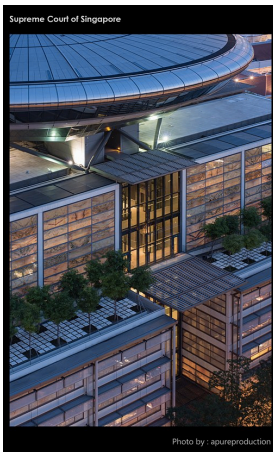


ADJUDICATION: SETTING ASIDE AN ADJUDICATION DETERMINATION

Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd [2017] SGHC 34

IN SUMMARY

This Singapore High Court decision of 28 February 2017 deals with the novel issue of whether a part of an adjudication determination may be set aside when a particular portion of it is held by the court as a nullity in an application to set aside the adjudication determination, or whether the entire determination must be set aside.



FACTS

Contract Works

On 28 December 2012, the Housing Development Board of Singapore ("HDB") engaged C.P. Ong Construction Pte Ltd (the "Respondent" in these proceedings) as main contractor to carry out addition and alteration works (including electrical and fire alarm works) to 15 car parks in the eastern part of Singapore. The Respondent was required under the contract to commence work on 29 January 2017 and to finish the said works on or before 27 January 2014.

Before the award of the main contract and during the tender phase in November 2012, Rong Shu Engineering & Construction Pte Ltd (the "Applicant") was invited by the Respondent to submit quotations for the electrical works and the fire alarm works. The Applicant responded by submitting 2 written quotations in 2 separate documents dated 20 December 2012, and quoted S\$ 550,108.57 for the electrical works and S\$ 289,334.00 for the fire alarm works. The Respondent made a counter-offer of S\$ 740,000.00 for both electrical and fire alarm works, to which the Applicant accepted, with the Applicant issuing 2 revised quotations (with terms virtually identical to the original quotations save for indicating the reduced prices for each scope of work as agreed).

Progress Claim No. 24

The Applicant commenced work on or about April 2013, and in the course of carrying out the work a dispute arose between the parties, causing the Respondent to delay and eventually cease payment to the Applicant. The Applicant submitted 24 progress claims, the last being Progress Claim No. 24 for the sum of S\$ 342,530.80. The Respondent did not provide any payment response.



Adjudication Application & Orders of Court

The Applicant then lodged its Adjudication Application with the Singapore Mediation Centre pursuant to the Building and Construction Industry Security of Payment Act ("SOP Act"), and an Adjudication Determination was rendered on 1 March 2016 awarding the Applicant the full sum claimed in Progress Claim No. 24 and the retention sum of S\$ 37,000.00. The Applicant obtained an order of court granting it leave to enforce the determination in the same manner as a judgment and ordered that judgment be entered against the Respondent in terms of the determination under *Order 95* of the *Rules of Court*.

Application to Set Aside Determination

In turn, the Respondent applied to set aside the Adjudication Determination on 3 alternative grounds:

- (a) that the Adjudicator exceeded his jurisdiction by adjudicating upon a claim for payment which did not arise from a single contract;
- (b) the adjudicator exceeded his jurisdiction by adjudicating upon the Applicant's claim to recover the retention sum when the Applicant did not advance that claim in its Progress Claim No. 24; and
- (c) the adjudicator breached the rules of justice by determining this retention sum claim without hearing from the Respondent.

HOLDING OF THE HIGH COURT

The High Court rejected the Respondent's first and third grounds for setting aside the Determination, but held that the adjudicator did not have the authority at all to adjudicate upon the Applicant's retention sum claim, that claim being outside its Progress Claim No. 24.

The High Court cited the case of *Lee Wee Lick Terence (alias Li Weil Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*"), where the Court of Appeal in that case drew a distinction between 2 types of argument on a setting-aside application:

- (a) an argument asserting that an adjudicator was not clothed with the statutory authority to determine an adjudication application; and
- (b) an argument conceding that the adjudicator was clothed with that authority, but asserting that the claimant contravened a provision of the SOP Act in invoking that authority or that the adjudicator contravened a provision of the SOP Act in exercising that authority.

In this case, the High Court held that the adjudicator's error was a jurisdictional error, and not an error within jurisdiction. Whilst the adjudicator failed to comply with *Section 17(3)* of the SOP Act, his breach did not come in the course of determining a claim which was properly before him. Thus the adjudicator's error fell under the second type described in *Chua Say Eng* above, and thus nullity must be the consequence.



Next, the High Court considered whether it had the power to sever and set aside that only that part of the Determination which it had found to be a nullity due to jurisdictional error.

The High Court reiterated that the power to set aside an adjudication determination is a common law power which exists outside the *SOP Act*, and nowhere in the *SOP Act* creates a power to set aside an adjudication determination, let alone define the grounds on which that power ought to be exercised. This was confirmed in the case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*"), and is an aspect of the High Court's supervisory jurisdiction.

The High Court then held that an adjudication determination under the *SOP Act* is severable for jurisdictional error on the following principles, drawing on the English cases of *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 ("*Hutchinson*") and *Cantillon Limited v Urvasco Limited* [2008] BLR 250 ("*Cantillon*"):

- (a) the court may set aside a severable part of an adjudication determination (what is a severable part being ascertained in accordance with paragraphs (b) to (d) below) for jurisdictional error without undermining by that act alone the interim finality and enforceability of the remainder of the determination under the *SOP Act*;
- (b) subject to paragraph (e) below, a part of a determination is severable for jurisdictional error only if it is both textually severable and substantially severable from the remainder of the determination;

- (c) a part of a determination is textually severable if the textual elements of the adjudicator's determination on that part, including his reasons in writing supporting that part given under *Section 17(2)* read with *Section 16(8)* of the *SOP Act*, may be disregarded, with what remains of the adjudicator's reasons still being grammatical and coherent;
- (d) a part of a determination is substantially severable if the remainder of the determination which is to be upheld as valid and which is to carry interim finality and be enforced may be identified in terms of liability and quantum without adjustment or contribution to the content of the valid part by the court; and
- (e) by way of exception to paragraphs (c) and (d) above, the court may modify the text of the adjudicator's determination in order to achieve severance if the court is satisfied that it is effecting no change in the substantial effect of the adjudication determination after accounting for the jurisdictional error and its necessary editorial consequences.

Thus in applying the above principles, the High Court held that the adjudicator's determination on the retention sum claim is both textually and substantially severable. The Determination is textually severable as the adjudicator gave his reasons for allowing the retention sum claim in only 2 paragraphs and nowhere else. Disregarding those paragraphs and reasons they compromise entirely, the remainder of the adjudicator's reasons remain both grammatical and coherent.



The determination is also substantially severable, as content of the applicant's payment claim and the content of the retention sum claim are entirely separate and involve separate considerations of fact and law. The adjudicator's decision on the retention sum can be severed from the remainder of the determination without any interference with his determination on the applicant's progress claim and without the court adjusting to or contributing to the content of the valid part of the determination apart from the arithmetical consequences of the jurisdictional error.

The effect of severance was to quash the adjudicator's determination on the retention sum claim and to uphold the remainder of the determination as being valid and as carrying interim finality.

However the High Court in its decision excluded situations where the challenge against a determination succeeds on natural justice grounds, leaving it for when the issue actually arises for decision before the court.

If you would like more information on this or any other area of law, you may wish to contact us.

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Concluding Views

The High Court in this case has set out the principles upon which and adjudication determination is severable for jurisdictional error, preserving the temporary finality of determinations made under the SOP Act.

The Respondent has since appealed against this High Court decision, and it remains to be seen if the Court of Appeal will uphold the High Court's decision and the principles laid down by it.

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