

ADJUDICATION CONFERENCE 2016 – TRENDS IN ADJUDICATION

Keynote Address

“SOPA, 10 years on – Has it Fulfilled Its Objectives?”

Justice Quentin Loh

1. The Hon. Justice Belinda Ang, Chairperson SMC, the Hon. Justice Lai and Judicial Commissioner Ramesh Kannan, Distinguished speakers and delegates, good morning. It is a great pleasure to have been invited to deliver the Keynote Address for today’s conference. It is also a great honour because when the Adjudication Scheme was first started, as one of the senior practitioners at the construction bar, I was “asked” by the then Solicitor-General Lee Sieu Kin, to apply to become an adjudicator. You can imagine how terrified I was at having to take an examination because the last time I did so was over 30 years ago at my final year law school examinations. But the faculty were very kind, knowing the acute embarrassment I would face if I failed, and I passed.
2. More than 10 years have passed since the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), known commonly as “SOPA”, came into effect. Conceived of as a panacea to difficult economic conditions faced by the construction industry in the early 2000s, SOPA promised much. The question is – has it delivered?
3. Parliament’s intention underlying SOPA was clearly expressed by the Minister of State for National Development in his Second Reading speech.¹ SOPA is aimed at preserving liquidity – the life blood of the building and construction industry.² It protects the right to payment for work done and goods supplied in the industry, which is facilitated by way of a “fast and low cost adjudication system to resolve payment disputes”. It did away with the

¹ *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development).

² *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [18]

pernicious pay-when-paid clauses and would hopefully stem the tide of some very tragic insolvencies of large, medium and small construction companies as a result of non-payment for materials supplied or work done.

4. In the intervening years, it would be fair to say that SOPC has succeeded in many of its aims. The pay-when-paid clauses have disappeared. There has been, by and large, some success in reforming payment behaviour in the building and construction industry. Those up the contracting chain know that if they do not pay, there is every likelihood of an adjudication application being made. In fact I have seen some surprising profit margins in the construction disputes that come before me.
5. The use of the adjudication for the resolution of disputes has come to gain widespread acceptance in the industry. From 2010 to 2015, the number of adjudication applications filed with the Singapore Mediation Centre has almost tripled from 164 to 481.³ More importantly, the mere availability of a cost-effective dispute resolution process for interim payments has averted the need for legal proceedings in some cases. As observed in the report of the Law Reform Committee,⁴ which I will come to later, parties tend to adopt a more reasonable stance when there is a realistic prospect that their positions will be assessed by a neutral third-party. There is also an oft-overlooked result. When payment and adjudication occurs over the life of a contract, the sum in dispute at the end of the project is likely to be much less than if these unresolved issues are left to balloon into large figures and this inevitably translates into one “grand” dispute at the end of the contract. Anecdotally I am told that this caused a large drop in the number of mega construction arbitrations and legal proceedings in England.
6. However, 11 years is a long time and when you have lawyers continually testing the limits and intricacies of a statute’s provisions, you will inevitably

³ See Ms Sabiha Shiraz’s email dated 1 September 2016.

⁴ Law Reform Committee, Singapore Academy of Law, *Proposals for Amending to Building and Construction Industry Security of Payment Act* (September 2015) (Authors: Chow Kok Fong and Edwin Lee Peng Khoo”) at para 6.

find question marks. In fact I remember the time when I attended the adjudicator's course, quite a few questions raised by us went unanswered because they could not be found in any of the statutory provisions or regulations. It is therefore timely for a review of SOPA. Let me draw a comparison. When Singapore adopted Model Law, the International Arbitration Act was enacted in 1994 and it came into force on 27 January 1995. Since then it has been amended 7 times. The first was on 1 November 2001, then again in October 2002, January 2006, January 2010, June 2012 (a second amendment was made in relation to the Foreign Limitation Periods Act) and the latest amendment was on 1 August 2016. SOPA has not undergone any amendment since its inception.

7. A brief search in Lawnet found at least 34 written decisions by the High Court and Court of Appeal alone in relation to applications to set aside adjudication determinations. This does not include those decisions where no written grounds or brief oral grounds were issued. All but four of these written judgments were made in the past six years. This is a fairly significant number for an Act that purports to operate in a low cost, "rough and ready" manner to ensure speedy cash flow and resolution of immediate issues in the building and construction industry.⁵ I know there have been so many appeals from decisions of High Court Judges that the Court of Appeal has had to make a special 'fast track' for SOPA appeals. In this regard, it is noteworthy that many of these decisions reflect a disagreement not just between the parties, but between adjudicators and judges as to how particular issues arising under SOPA should be resolved.
8. One good example is whether repeat claims, which merely repeat earlier claims without any additional item of claim, is prohibited under SOPA. This was first considered by the assistant registrar ("AR") in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("*Doo Ree*"), who held on a plain reading of s 10 of SOPA that repeat claims are not permitted under the

⁵ *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 at [23].

Act. The view that all repeat claims were prohibited did not find favour with the Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 (“*Chua Say Eng*”).

9. This, however, did not put an end to the controversy. In *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 (“*JFC Builders*”), Justice Woo Bih Li canvassed a number of decisions, both local and foreign, with regard to the issue of repeat claims. The cases, which included *Doo Ree* as well as decisions of the courts of Queensland and New South Wales, spoke differently. While the cases prior to *Doo Ree* were unanimous in their rejection of repeated claims under SOPA, the Queensland Court of Appeal in *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355 departed from the position taken in those earlier decisions. Justice Woo nonetheless preferred the position taken in *Doo Ree*, taking the view that the opinion expressed in *Chua Say Eng* was made in *obiter*. Two reasons were cited: first, that to adopt a contrary position would render s 10(1) of SOPA nugatory; and second, it would open SOPA to abuse by allowing claimants to resurrect deadlines by issuing and serving repeat claims.
10. The same issue thereafter came before me in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 (“*Admin Construction*”). While I considered the reasons given by Justice Woo to be very persuasive, I found myself bound to follow the decision in *Chua Say Eng*. Not long after, Justice Lee Seiu Kin also came to consider the same issue in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 (“*LH Aluminium*”). He found s 10 of SOPA to be *equivocal* as to whether repeat claims are permitted, and that the question of where the line should fall was ultimately a matter of judicial policy. On the one hand, to allow repeat claims would allow claimants to abuse the adjudication process set out under SOPA by repeatedly serving the same payment claim and waiting for the respondent to slip up. On the other hand, to disallow such claims would apply pressure on claimants to seek adjudication as soon as a payment claim was rejected, either in full or in part. Ultimately, he preferred the approach in *Chua Say Eng*, which permits repeat

claims so long as they have not been adjudicated on the merits. These observations were subsequently endorsed by Judicial Commissioner Kannan Ramesh in *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481. These differing views cry out for clarification by an amendment to SOPA.

11. The facts in *Admin Construction* also raised another possibility of abuse of the SOPA regime through the filing of payment claims in bad faith. *Admin Construction* involved a payment claim that was filed nine to ten months after works had ceased. I set aside the adjudication determination as there had been a binding settlement agreement, but in any case went on to consider whether it should be permissible to issue a payment claim long after works have been completed and the contract or subcontract is at an end. I expressed my strong reservations as to whether the position as set out in *Chua Say Eng*, which imposes no time limit other than that stipulated under the Limitation Act (Cap 163, 1996 Rev Ed), was desirable. Given the complicated and involved nature of disputes arising out of the final progress claim, as well as the tight deadlines that adjudicators are expected to adhere to, I find the adjudication process to be wholly unsuitable for such claims. Indeed, the filing of such claims long after a contract has ended is invariably an attempt to overwhelm the respondent and adjudicator with voluminous materials. This is clearly something the adjudicatory process was not designed for. Those of us who practice or who have practiced in this area know the voluminous documents and myriad issues involved at this stage in a project, *a fortiori*, where there are numerous and intertwined disputes between the parties. It seems a monstrous proposition that final accounts or final payment of a construction project can be made subject to this process. Such facts and issues are properly dealt with in arbitration or final legal proceedings. It is perhaps for these self-evident reasons that the equivalent legislation in New South Wales stipulates a 12-month limitation period for the service of payment claims unless otherwise agreed.⁶

⁶ Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (NSW) s 13(4).

12. Another area of contention, albeit to a lesser degree, lies in the distinction drawn in SOPA between supply and construction contracts. They are subject to different procedural requirements and timelines. For instance, supply contracts do not require that a payment response be filed, merely that a reason had been provided before the “relevant due date”.⁷ Further, the deadline for payment in respect of a construction contract is calculated with reference to the filing of a payment response, while that in respect of a supply contract simply starts from the service of a payment claim.⁸ This may not an arbitrary distinction; because supply contracts are less likely to engender disputes as to the amounts to be paid, one could see why Parliament decided that payment responses would not be required for such contracts.
13. Well-meaning as that may be, the supply contract and construction contract dichotomy has created a whole host of problems in the building and construction industry. This is not a problem that has arisen in other jurisdictions such as the United Kingdom, Australia and New Zealand, for the simple reason that no such distinction is drawn in the corresponding legislation in these jurisdictions.
14. The multiplicity of timelines is particularly troubling for an Act that demands certainty, perhaps even at the expense of one’s ordinary sense of fairness or justice. The need for strict compliance with the timelines set out in SOPA is now well-established, and is none better exemplified than by the decision of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482, in which the Court of Appeal held that the *de minimis* rule had no application given the principle of temporary finality that undergirds SOPA. An adjudicator was therefore entitled to disregard an adjudication response that was filed two minutes out of time.
15. Temporary finality notwithstanding, there is no denying that the consequences can be harsh for a party that fails to adhere to the stipulated timelines. What exacerbates the uncertainty that arises from the multiplicity of deadlines is the

⁷ SOPA s 15(3)(b).

⁸ SOPA s 8.

uncertainty that lies within the definitions of supply contract and construction contract themselves. *Eng Seng Precast Pte Ltd v SLF Construction Pte Ltd* [2015] 5 SLR 948 (“*Eng Seng Precast*”) concerned a contract for the supply and delivery of precast concrete components, and the key issue in that case was whether the contract was a supply contract or a construction contract. Because the contract called for the supply and delivery of goods and required no work to be performed on site, it fell within the definition of a supply contract. However, it also arguably fell within the definition of a construction contract as the plaintiff was required to produce prefabricated components. Justice Lee rejected that the contract could at the same time be both, finding that it was a construction contract. He therefore set aside the adjudication determination on the ground that it had been filed out of time.

16. What is perhaps of greater concern, as highlighted in the written grounds, is that there was no consensus between adjudicators as to how such contracts should be categorised. The adjudicator that rendered the determination that was the subject of *Eng Seng Precast* held that the proviso to the definition of a supply contract – that it does not include “such agreements as may be prescribed” – referred to prescription in subsidiary legislation. Since there were none prescribed in subsidiary legislation to SOPA, he found there to be no reason why the contract was not a supply contract. Other adjudicators, in contrast, have construed the proviso as referring to construction contracts. That is, any contract that falls within the definition of a construction contract is necessarily precluded from the ambit of supply contracts.

17. Interestingly, counsel for the successful main contractor in *Eng Seng Precast* had appeared before me just two days prior to the hearing before Justice Lee. He argued the same issue on behalf of a sister company of the main contractor in *Eng Seng Precast*.⁹ The sister company, the main contractor in the contract before me, was also seeking to aside the adjudication determination. However, this required him to argue from the opposing viewpoint – that a contract for

⁹ See Adjudication Determination of Aw Wei Keng Kelvin in Adjudication Application 40 of 2015, 1st Affidavit of Tan Boon Yee in Originating Summons No 410 of 2015 at p 15. Sunhuan Construction Pte Ltd was referred to by SLF Pte Ltd as its sister company.

the production and supply of prefabricated components was a supply contract for the purposes of SOPA. I do not suggest in any way that he was wrong to do so; in fact, it is probably a testament to his skill as an advocate. Rather, I highlight this to point out the absurdity of the situation that his clients were in. They might reasonably have expected to prevail in one of the adjudication sessions given that they were arguing diametrically opposed viewpoints before each adjudicator. Unfortunately, the adjudicators, legally-trained practitioners with years of experience in the industry, came to different conclusions that could be rationalised in their own right. That is, despite one finding that a contract for the production and supply of prefabricated parts is a construction contract and the other finding that it is a supply contract, both found against the sister companies. Clearly, this would have been an unsatisfactory state of affairs. In the event, I took the view that such contracts were clearly construction contracts as defined in SOPA and gave my immediate ruling to the parties with, if my memory serves me correctly, very brief oral grounds. Justice Lee also took the same view when the other matter came before him, so hopefully that is one issue put to bed.

18. While the sizable body of case law has helped to add some much needed clarification to the operation of SOPA, new challenges continue to be brought, spurred often by the ingenuity of counsel rather than the merits of the case. From the perspective of the legal profession, this may not be a bad thing. But the spawning of satellite litigation in the form of such setting aside applications is clearly antithetical to the main objectives of the Act. It is something that we must seek to guard against, especially where such disputes are preventable.
19. It is for these reasons that both the High Court and the Court of Appeal have on separate occasions called for changes to be made to the Act.¹⁰ As I observed in *Admin Construction*, there continues to be doubts in the minds of adjudicators as to how jurisdictional challenges should be dealt with. I called for the Building and Construction Authority (“BCA”), SMC and other

¹⁰ See, eg, *Eng Seng Precast Pte Ltd v SLF Construction Pte Ltd* [2015] 5 SLR 948; *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 at [63]; *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [83].

stakeholders to consider legislative reform, and this was echoed by Justice Lee Seiu Kin in *LH Aluminium* and Judicial Commissioner Ramesh in *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481. Save for what I am going to say in concluding, these calls went unanswered for a considerable period of time. In contrast, equivalent legislation in the United Kingdom and Australia have undergone multiple amendments. In particular, the Building and Construction Industry Security of Payment Act 1999 (NSW), on which SOPA is based, has undergone amendments as recently as 2010 and 2013.¹¹

20. Nevertheless, the Law Reform Committee of the Singapore Academy of Law released a report about a year ago that proposed a number of refinements to SOPA while retaining its essential features. Drafted in consultation with practitioners and members of the Teaching Faculty on Adjudication at the SMC, it suggests a number of significant changes which address some of the concerns that I have highlighted above. Among other things, it is proposed that the distinction between supply and construction contracts be abolished. The Committee has also proposed that limitation periods be imposed for the issuance of payment claims, so as to safeguard against the potential for an “ambush” in the form of a payment claim that is submitted years after the completion of works.

21. In conclusion, I am happy to report that Judge of Appeal Prakash as head of the Law Reform Committee and I, together with some members of Mr Chow’s committee finally managed to meet with the BCA in November 2015. There were follow-up meetings in December 2015 and the last being in January 2016. The process has been completed and I understand amendments to the legislation are now with the Attorney-General’s drafting division. When the draft Bill is ready, there will be public consultation and I hope all of you will give your feedback. Having spent the better part of the last fifteen minutes pointing out some flaws of SOPA, I must emphasise that I do not mean to downplay the contributions of all who were involved in the enactment of the

¹¹ Building and Construction Industry Security of Payment Amendment Act 2010 (NSW) and Building and Construction Industry Security of Payment Amendment Act 2013 (NSW).

Act. As I mentioned, it has undoubtedly gone a long way in achieving some of its principal aims. The building and construction industry is in a much better shape today than it was before SOPA. What we should not do is to rest on our laurels or be content with the status quo. Today's conference looks not just at the past decade but to also the next and in this regard, your feedback and participation at events such as what we have today is especially invaluable. I am sure you will all enjoy the rest of the conference and it remains for me to wish you all a very interesting and fruitful conference. Thank you.

Quentin Loh, J
Supreme Court of Singapore
25 October 2016