

No cross-contract set-off under Security of Payment Act

August 2017

Authors: [Matthew Secomb](#), [Adam Wallin](#), [Philip Tan](#)

In *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd*, the Singapore High Court considered whether counterclaims and set-offs arising outside the context of the contract in dispute can operate as a defence in adjudication under the Building and Construction Industry Security of Payment Act ('**SOP Act**').

The answer was 'No'.

Background: Adjudication under the SOP Act

Singapore's SOP Act applies to construction and supply contracts entered on or after 1 April 2005.

The SOP Act aims to improve cash-flow in the construction industry by giving parties the right to seek progress payments for work done, and providing fast and low-cost adjudication for payment disputes.

The claims process is relatively straightforward. A contractor first serves a 'payment claim' on a respondent, who must then serve a 'payment response'. Where payment is disputed (or the respondent otherwise fails to pay), the contractor may apply to an authorised nominating body, which appoints an adjudicator. The respondent may reply to the application, after which the adjudicator will make a determination. The process typically takes a matter of weeks.

The adjudication decision is binding on the parties unless or until any dispute between them is resolved by agreement or determined by a court or arbitral tribunal. Where a respondent fails to pay an adjudication amount, the contractor can take enforcement steps and (upon giving due notice) suspend work.

The speed of the adjudication process, coupled with robust sanctions for non-payment, means that a successful claimant can often obtain payment quite quickly.

Case commentary: *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179

Facts

The parties were involved in two projects for the construction of new stations on Singapore's transport network. The projects were known as 'T211' and 'C933'. The claimant sub-contractor, Hua

Rong Engineering Pte Ltd ('HRE'), was engaged by Civil Tech Pte Ltd ('CTP') to supply labour for construction work on both projects, under separate contracts.

HRE submitted a payment claim to CTP for work done under the T211 contract. Although CTP accepted the amount due under the T211 contract, CTP argued that it was entitled to withhold that amount to set off overpayments made to HRE under the C933 contract. CTP alleged that the overpayments on the C933 contract arose from false and fraudulent payment claims made by HRE.

HRE subsequently lodged an adjudication application in respect of its T211 payment claim. The adjudicator ruled in favour of HRE, and held that CTP could not as a matter of law set off a counterclaim based on another contract.

CTP applied to the Singapore High Court to set aside the adjudicator's decision.

Issue

The key question for the Court was whether a SOP Act adjudicator can consider claims which arise *outside* the context of the contract under which payment is claimed. In particular, can a respondent rely on another contract to resist payment under the SOP Act?

Decision

The Court held that an SOP Act adjudicator does not have jurisdiction to consider claims arising from contracts other than the contract under which payment is claimed. In summary, it reasoned:

- First, the Court considered the text of the statute. It found that the SOP Act referred mainly to 'a construction contract' in the singular, suggesting that defences based on rights under other contracts fell outside the scope of adjudication.
- Second, the Court considered the policy justification for the 'single-contract' interpretation. Allowing parties to raise claims relating to other contracts could create unmanageable complexity, which would undermine the quick and cost effective adjudication the SOP Act aims for.
- Third, having surveyed practices in other jurisdictions, the Court found no examples of cases in which cross-contract withholding of payments had been allowed in adjudication. Likewise, common standard form industry contracts did not specifically contemplate cross-contract set-off.
- It was not unjust to order CTP to make the payments under the T211 contract because CTP could still obtain relief for any overpayments on the C933 contract. It could do that either by withholding future payments under the C933 contract, or by commencing proceedings against HRE under the C933 contract to recover the alleged overpayments.

Significance

The Court's decision in *Hua Rong Engineering* is a robust reaffirmation of the policy considerations underlying SOP Act adjudication. The decision emphasises the priority given to quick dispute resolution and prompt payment. It underlines the need to avoid becoming bogged down in multi-contract complexity. As the Court observed, adjudication 'may not be perfect', yet provides a swift form of relief (even if the decision might be revisited later).

The Court observed that the general attitude in other jurisdictions was 'generally suspicious' of cross-contract claims, even though the Courts in England, New South Wales and New Zealand do not appear to have directly grappled with the issue to date. The Court also noted that in Victoria, cross-contract set-off has been expressly excluded from the scope of adjudication by statute.

In England, there is nevertheless some authority to suggest that – at least when *enforcing* an adjudicator’s decision – it may be possible to rely on cross-contract set-off to reduce or extinguish amounts payable under an adjudicator’s decision. That might be the case, for instance, where the contract in dispute itself provides for cross-contract set-off.¹ The English Courts have also allowed different adjudicator’s decisions arising under separate contracts to be set off from each other.²

It is not clear whether the Singapore Court was referred to the English case law above. However, the *Hua Rong Engineering* decision is significant in that it appears to suggest (albeit *obiter*) that cross-contract set-off in the adjudication context will not be possible at all, even where the contract in dispute expressly allows this.

Although the Court has taken a robust stance in this case, in exceptional situations a payment under an adjudication decision might still be deferred. This might arise where there are legitimate concerns that a contractor might not be able to repay amounts that become due under a counterclaim/set-off. In that situation, it may be possible for a respondent to obtain a stay of enforcement to delay payment until the counterclaim/set-off has been determined. Although this point did not arise in *Hua Rong Engineering*, support exists for this approach both in Singapore and elsewhere (including England and New South Wales)³ – although a stay is only likely to be granted in the most exceptional cases.

Conclusion

The decision is good news for claimant contractors seeking to be paid promptly. It reaffirms the emphasis on speed and minimising complexity under the SOP Act adjudication regime.

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
018960
Singapore
T +65 6225 6000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

¹ See discussion in *Beck Interiors Limited v Classic Decorative Finishing Limited* [2012] EWHC 1956 (English Technology and Construction Court (“TCC”), at [9-12].

² *Management Solutions & Professional Consultants Ltd v Bennett (Electrical) Services Ltd* [2006] EWHC 1720 (English TCC).

³ See discussion in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32 (Singapore Court of Appeal), in particular at [56-72] (although a stay was not ultimately granted on the facts).