

Update: No cross-contract set-off between construction contracts in adjudication

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Singapore's highest court has found that set-off between different construction contracts is not possible in adjudication. Adjudication aims to ensure prompt and efficient payment for contractors. The court concluded that the process should not be delayed by 'cross-construction contract claims'.

Decision: *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] SGCA 12

Background

For an overview of Singapore's Building and Construction Industry Security of Payment Act ('**SOP Act**') and its claims process, please see our earlier [Client Alert](#) on the High Court's decision in this case.

Facts

The parties were involved in two construction projects for new stations on Singapore's transport network. The projects were known as 'T211' and 'C933'. Civil Tech Pte Ltd ('**CTP**') engaged a sub-contractor, Hua Rong Engineering Pte Ltd ('**HRE**'), for each project under separate contracts.

HRE sought payment from CTP under the T211 contract. CTP agreed that the payment was due, but withheld it to set-off overpayments made to HRE under the C933 contract.

The dispute proceeded to adjudication. The adjudicator ruled in favour of HRE, and held that the SOP Act did not allow CTP to set-off a counterclaim based on another contract. CTP challenged the adjudicator's determination in the High Court, but was unsuccessful. CTP then appealed to the Court of Appeal.

Issue

The key question was whether an adjudication respondent can assert a claim or set-off under a construction contract other than the contract under which the claimant seeks payment.

Decision

The Court of Appeal dismissed CTP's appeal.

An adjudication respondent is not entitled to withhold payment based on a claim or set-off under another construction contract. The court referred to this as a 'cross-construction contract claim'.¹

The Court reached this conclusion after analysing the purpose, scheme and text of the SOP Act:

□ **Purpose of the SOP Act:**

The SOP Act addresses the problem of delayed payment to contractors. Before the SOP Act was implemented, employers could readily delay payment by asserting set-offs or cross-claims. In many cases, these issues could only be resolved after lengthy and expensive litigation or arbitration. The SOP Act addresses this problem by aiming to create a level playing field, where downstream parties are paid promptly by upstream parties.

□ **Scheme of the SOP Act:**

Under the SOP Act, each construction contract has its own payment framework. This imposes payment deadlines and long-stop dates. Parties could evade this payment framework if they were allowed to withhold payment based on cross-claims or set-offs arising under a different construction contract.

In addition, only downstream parties (i.e., those seeking payment) can start an SOP Act adjudication. An upstream party is only allowed to raise claims in adjudication 'as a shield rather than as a sword'. This precludes cross-construction contract claims. But this does not mean that an employer is left without any remedy at all – it can still bring its claim in arbitration or in court.

□ **Text of the SOP Act:**

The language of the SOP Act envisages that only one contract should be in issue in any adjudication – the contract under which the claimant seeks payment. Requiring the adjudicator to consider claims under multiple construction contracts could involve potentially extensive documentary evidence about other contracts. This would delay the resolution of the payment dispute overall.

Comment

The decision is welcome news for contractors. It emphasises that adjudication aims to offer contractors a swift and efficient route to payment (subject to possible review later by a court or arbitral tribunal). This, in turn, facilitates cash flow from upstream parties to downstream parties in construction projects. Complex and time-consuming cross-claims and set-offs about other construction contracts would undermine these aims. The decision thus makes clear that cross-construction contract claims have no place in Singapore adjudication.

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¹ The decision focuses only on cross-claims and set-offs between construction contracts governed by the SOP Act. It expressly reserves for another day the issue of whether an adjudicator may consider *any* set-off or cross-claim arising outside the contract under which payment is sought. However, given the Court's reasoning, it would perhaps be surprising if the conclusion were different for set-offs/cross-claims arising under non-SOP Act construction contracts.