
SINGAPORE

THE TRIPLE TROUBLING TOWERS OF ADJUDICATIONS UNDER THE SINGAPORE SECURITY OF PAYMENTS ACT¹

ANAND ANTHONY

Director, Singapore

BACKGROUND

The Singapore Security of Payment Act [SOPA] is the statutory provision for adjudication in Singapore. The SOPA provisions are included in all the main Singapore construction industry standard form of conditions of contract, such as the Singapore Institute of Architect (SIA) conditions, the Public-Sector Standard Conditions of Contract (PSSCOC) and the Real Estate Developers' Association of Singapore (REDAS) conditions. The SOPA is also implied by law, as many drafters have found out when they tried to contract out of it. The SOPA is administered by the Singapore Mediation Centre (SMC) which is housed in the Singapore Supreme Court building and the SMC is the Authorised Nominating Body referred to in the SOPA.

The SOPA drafting is interesting. It is drafted in a positive instructive manner, meaning the SOPA tells us exactly and precisely what is allowed.

The SOPA adjudication process is designed to provide speedy resolution of disputes, however there are restrictions within it.

From this the "Triple Troubling Towers" of the SOPA arise: -

- (1) Can the parties claim expert fees and legal fees?
- (2) Can the Claimant be ordered to pay the Respondent? And,
- (3) Can the Claimant insist on a review of the Adjudicator's Decision?

[1] CAN THE PARTIES CLAIM EXPERT FEES AND LEGAL FEES?

i Article as at 15 October 2018

EXPERT FEES

I shall start with an area that is of most interest, since clients who engage experts will want to know this.

The answer is debatable, because it lies in whether there is a provision to claim expert fees in the SOPA, but there is no provision that allows claims for expert fees to be found in the SOPA sections. However, expert reports themselves are expressly mentioned in the SOPA.

Since experts are external independent parties, experts' fees would be incurred by the parties in the production of expert reports to support their position in the adjudication process.

Under Part IV, Adjudication of Payment Claims Disputes, Section 17(3), it is stated 'inter alia' as follows:

"Determination of Adjudicator

17.(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:

(f) the report of any expert appointed to inquire on specific issues;"

This suggests that the Adjudicator must consider any expert report that has been put before him/her.

Based on the specific wordings of Section 17.(3)(f), there are only four (4) ways for an expert to be appointed and report with fees made available through the following documents:

- (a) Payment Claim (possibility for the expert fees to be paid) or
- (b) Payment Response (NO possibility for the expert fees to be paid) or
- (c) Adjudication Application (NO possibility for the expert fees to be paid) or
- (d) Adjudication Response (NO possibility for the expert fees to be paid).

Note, the Act refers to expert reports and not reports from claims consultants or other types of external consultants.

QUESTION: IS IT POSSIBLE TO RECOVER EXPERT FEES?



Since the Act refers to mainly the Payment Claim for the Adjudicator’s consideration, logically it must then follow that the expert reports and the expert fees must be in the Payment Claim (only); in order for the expert fees to be claimed.

Expert Fees in the Payment Response will be considered by the Adjudicator but cannot be paid as this would mean that the Claimant will pay the Respondent; which is not provided for in the SOPA.

QUESTION: BASED ON THE WORDINGS OF SECTION 17.(3)(F), CAN AN ADJUDICATOR APPOINT AN EXPERT?

s.16 (3) (d) states that

*“An adjudicator shall - appoint, after notifying the parties, an **independent expert** to inquire **and report** on specific issues relevant to the adjudication.”*

Based on the express wordings of Section 16.(3) (d), an Adjudicator can appoint an expert.

QUESTION: BASED ON THE WORDINGS OF SECTION 17.(3)(F), IS AN ADJUDICATOR ENTITLED TO PAYMENT OF THE EXPENSE OF AN EXPERT HE HAS APPOINTED?

s.31.(1) states:

“Subject to this section, an adjudicator is entitled to be paid, in relation to an adjudication application —

- i) such fees as may be specified by the authorised nominating body which appointed the adjudicator; and*
- ii) Such amount, by way of expenses, as may be agreed between the adjudicator and the parties to the adjudication or, if no such amount is agreed, then as the authorised nominating body considers to be reasonable having regard to the work done and expenses incurred by the adjudicator.”*

Based on the express wordings of Section 31.(1)(b), an adjudicator may be entitled to payment of the expense of an expert he has appointed insofar as it has either been agreed with the parties or, if not agreed, the authorised nominating body considers to be reasonable.

LEGAL FEES

Legal fees cannot be recovered for two reasons. Firstly, there is no mention of legal fees anywhere in the Act. Secondly, the Act only allows for two types of fees to be recovered through the adjudication process: -

(1) the application fees to the SMC, and

(2) the adjudicator’s fees (and expenses).With reference to the SOPA, under Part I Preliminary, Section 2 states ‘inter alia’ as follows: -

“Interpretation

2. In this Act, unless the context otherwise requires “costs”, in relation to an adjudication, includes

- a) the application fee payable to an authorised nominating body; and*
- b) the fees and expenses of the adjudicator;”*

There are also further restrictions for claims which look like legal fees in the SOPA.

Under Part VI General Provisions Relating to Adjudication, Section 30.(4) states ‘inter alia’ as

follows:

“Costs of Adjudication Proceedings

30.(4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.”

The wordings of Section 30.(4) above seems very narrow.

Therefore, I do not think that, unlike expert fees, the parties can get around this by including their legal fees in the Payment Claim and/or Payment Response.

Legal fees are an important consideration for all parties to an adjudication. Most of the clients I have met in the last decade or so, simply cannot understand why when they ‘win’ their case, they cannot claim back their legal fees. This is because of the perception that they are suing the other party or being sued; often through lawyer exchanges; giving them the impression that they are in a legal forum.

Could it be that SOPA never expected parties to engage lawyers? This is unlikely, as from the time the Act came into being in 2004, lawyers have been actively involved in the SOPA adjudications.

CAN PARTIES NOT USE LAWYERS?

The Act certainly seems to discourage parties from using lawyers and incurring legal fees, since these legal fees cannot be recovered.

Is it realistic for parties not to use lawyers? My view is, that it is unrealistic for parties not to use lawyers as the whole Act is a legal minefield. Parties with lawyers will use ‘legal’ or ‘jurisdictional’ arguments, potentially rendering a party without legal representation at a disadvantage. It should also be noted that many of the Adjudicators nominated are lawyers themselves.

The legal fees incurred by parties, in my experience, can be disproportional to the claim – for example a SGD\$ 200k claim incurring a SGD\$ 100k legal fee. In such a situation, even if the party ‘wins’ the entire SGD\$ 200k, it is still going to feel like it has ‘not won’.

For parties, especially the Claimants, the fact that legal fees cannot be recovered even when the decision is in their favour, is a sticky point. So, unless the amounts are large enough and the legal fees are capped somehow, the 'winning' party is still going to walk away feeling like it has lost.

CONCLUSION

For expert fees, if the parties intend to claim for this, the expert reports and associated expert fees must be included in the Payment Claim and/or the Payment Response. This would be a good incentive for parties to engage their experts early in the process, prior to the submission of the Payment Claim and/or the Payment Response.



For legal fees, I can only conclude at this point, barring any major court decision on this issue, that parties have to bear their own legal costs.

[2] CAN THE ADJUDICATOR DECIDE THAT THE CLAIMANT SHALL PAY THE RESPONDENT?

The SOPA does not make any provision for the Claimant to pay the Respondent, as the Adjudicator has no power, under the Act, to order the Claimant to pay the Respondent. There are two clear provisions in the Act that prevent the Adjudicator to decide that the Claimant must pay the Respondent.

Firstly, with reference to SOPA, under Part IV Adjudication of Payment Claims Disputes, Section 17.(2)(a) states 'inter alia' as follows:

“Determination of Adjudicator

17.(2) An adjudicator shall, in relation to an adjudication application, determine

(a) the adjudicated amount (if any) to be paid by the respondent to the claimant”

Secondly, with reference to the SOPA, under Part IV Adjudication of Payment Claims Disputes, Section 22.(1) states ‘inter alia’ as follows:

“Payment of adjudicated amount

22.(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant”

What if the Respondent can evidence and prove any of the following situations?

1. that the Respondent had overpaid the Claimant; or
2. that the Respondent had incurred costs caused by the Claimant; or
3. that the Claimant caused delays and therefore has incurred Liquidated Damages under the contract or subcontract.

For a Respondent in a legal forum that hears their side of the story, as well as considering evidence, it would seem natural to expect that justice is done swiftly and cheaply – but this is not to be.

It seems that the only option available for the Respondent is to sue the Claimant in arbitration or litigation; which is a very costly affair in Singapore.

CONCLUSION

The best result a Respondent can therefore hope for is that he does not need to pay the Claimant, as he can never hope to get the Claimant to pay him through this process; even if the evidence is stacked in his favour.

[3] CAN THE CLAIMANT ASK FOR THE ADJUDICATION DECISION TO BE REVIEWED?

The answer is simply no. The current SOPA only allows the Respondent to apply for an adjudication review when the adjudicated amount is substantially greater than the payment response amount. It does not make any provision for the Claimant to lodge an adjudication review. Furthermore, it disallows the aggrieved Claimant from seeking redress before resorting

to further legal action.

Reference is made to the SOPA, under Part IV Adjudication of Payment Claims Disputes, Section 18.(1) states 'inter alia' as follows:

“Adjudication Review Applications

18. (1) This section shall apply to a respondent who is a party to an adjudication if the adjudicated amount exceeds the relevant response amount by the prescribed amount or more.”

The Act seems to go on the tangent that the Claimant can put in another Adjudication Application in the following month, if the earlier one is not satisfactory.

IS THE SOPA REALISTIC?

Quite frankly, the answer here ought to be no. The Act is not realistic, because the majority of the SOPA adjudications are for final claims. The Claimant would have been 'chasing' for his money for months, if not years, and not getting any response from the other side. Further, the Claimant's decision to head to adjudication is an expensive one, as they must bear all legal costs. It is fair to say that an arbitration or court litigation is going to cost more - but that cannot be the point. The legal costs for an adjudication are not small either.

For a Claimant who does not have a large claim, this seems like an unfair situation that forces him to spend even more money - whereas a simple adjudication review may satisfy him better.

The adjudication review may not wield a different result, but at least the Claimant is satisfied that the first decision was reviewed, and he does not need to start a fresh adjudication application.

CONCLUSION

The Claimant cannot call for an adjudication review.

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA GROUP HEADQUARTERS

25 Eastcheap
London
United Kingdom
EC3M 1DE

Tel: +44 (0)203 961 5340

BIRMINGHAM
MANCHESTER
NOTTINGHAM
LEEDS
BRISTOL
MAIDSTONE

Tel: +44 (0)121 698 2148

Tel: +44 (0)161 932 1222

Tel: +44 (0)1332 638 061

Tel: +44 (0)113 251 5017

Tel: +44 (0)117 344 5023

Tel: +44 (0)1622 673 021

UNITED ARAB EMIRATES

Office 615
Park Lane Tower
Al A'amal Street
Business Bay
United Arab Emirates

Tel: +971 4 437 2470

SINGAPORE

20 Anson Road
#19-02
Twenty Anson
Singapore 079912
Singapore

Tel: +65 6291 2482

Tel: +65 62916208

CANADA

160 Quarry Park Boulevard SE
Suite 300
Calgary
Alberta
Canada
T2C 3G3

Tel: +1(403) 279-1603

HONG KONG

Suite 2802
Lippo Centre Tower 2
89 Queensway
Admiralty
Hong Kong

Tel: +852 2295 2678

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054