

Singapore: Effect of Section 17(3) of the Building and Construction Industry Security of Payment Act on Raising Liquidated Damages and Back-Charges in Adjudication Proceedings

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1. Introduction

Adjudication under the Building and Construction Industry Security of Payment Act (2020 Rev Ed) ('SOP Act') is a form of dispute resolution whereby parties in the construction industry can obtain prompt, cost-effective resolution of payment claim disputes.

The SOP Act was amended in 2018, and the revisions came into force on 15 December 2019. Of note, these included new Section 17(3)¹ which states that except in certain situations, an adjudicator is to disregard any part of a payment claim or payment response related to "*damage, loss or expense*".

Prior to the amendments to the SOP Act, it was common for respondents to raise liquidated damages or back charges as a set-off against amounts claimed by the claimants during adjudication proceedings.

This newsletter considers the interpretation of Section 17(3) and whether respondents still are entitled to raise these items as setoffs in adjudication proceedings.

2. Section 17(3) of the SOP Act

Section 17(3) of the SOP Act states that an adjudicator must disregard any part of a payment claim or payment response related to damage, loss or expense that is not supported by –

- a) either a document showing agreement of the parties on the quantum of that part of the payment claim or the payment response; or
- b) any certificate or other document that is required to be issued under the contract.

(1) Legislative Purpose

Section 17(3) was enacted to address the lengthening of the adjudication process due to the introduction of

¹ Prior to 31 December 2021, Section 17(3) was numbered Section 17(2A). For purposes of this newsletter, we treat all references to Section 17(2A) as references to Section 17(3).

“*complex claims*”.² These complex claims include prolongation costs claims raised by claimants, which are more appropriately resolved in litigation or arbitration proceedings, rather than in adjudication proceedings. This is because adjudicators typically issue determinations within a short period of time, which may be insufficient to consider challenging issues, some of which require expert evidence.

The Court of Appeal recently clarified, in *Range Construction v Goldbell Engineering Pte Ltd*³ (“**Range Construction**”), that the legislative intent not to consider “*complex claims*” applies only to claims brought by contractors as claimants. The SOP Act regime was intended to address claims that normally are the subject of progress payment claims, and excluding liquidated damages for delay would be too restrictive, given their common occurrence in adjudication.⁴ The lower court⁵ judge also opined that Section 17(3) was not a signal of parliamentary disapproval for adjudicators considering liquidated damages claims under the SOP regime.

Thus, the legislative intent to prohibit “*complex claims*” does not apply to respondent’s claims, for example, claims for liquidated damages and back-charges. However, and as will be discussed further below, respondents still need to bring these claims within the Section 17(3) Exceptions before they can be considered by an adjudicator.

(2) Scope of “damage, loss and expense”

The Court of Appeal in *Range Construction* opined that liquidated damages (unlike unliquidated damages) typically are capable of straightforward computation, by multiplying the number of days for which liquidated damages are payable by the daily rate.

The reasoning in *Range Construction* also ought to apply to back-charges raised by respondents, which are imposed by respondents for costs incurred in relation to the claimant’s work, for example, for rectification of defects and work done on the claimant’s behalf. This balances the claimant’s entitlement to progress payments and the respondent’s need for interim resolution regarding delays and defects caused by the claimant.

Nevertheless, the scope of “*damage, loss or expense*” in Section 17(3) remains unclear. In particular, even though the legislative intent was not to prohibit adjudicators from considering liquidated damages or back-charges, it is necessary to consider whether or not these liquidated damages and back-charges still fall within the definition of “*damage, loss and expense*” in Section 17(3).⁶ If the answer is yes, respondents will need to show that the exceptions in Section 17(3) (a) and (b) are met before they can raise liquidated damages or back-charges as a set-off against amounts claimed by the claimants in adjudication proceedings.

(a) Whether liquidated damages fall within the definition of “damage, loss and expense”

² *Parliamentary Debates, Official Report* (2 October 2018), vol 94 (Zaqy Mohamad, Minister of State for Manpower and National Development)

³ [2021] SGCA 34 at [52 – 53].

⁴ *Range Construction* at [54].

⁵ *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191

⁶ For completeness, *Range Construction* did not expressly mention whether liquidated damages for delay fall within the definition of “*damage, loss and expense*” in Section 17(3)

The amended SOP Act does not define “*damage, loss or expense*”.

One commentator has opined that the word “*damage*” stems from a breach of contract and aims to restore parties to a position in which there is no breach; this would extend to liquidated damages also.⁷

There have also been at least two published adjudication determinations⁸ opining that liquidated damages fall within the definition of “*damage, loss or expense*”. In particular, the adjudicator in SOP AA100 (2020) determined that Section 17(3) applied to all types of claims for “*damage, loss or expense*”, including liquidated damages, regardless of their complexity.

Therefore, the position under the new SOP Act is that while respondents still are permitted to raise liquidated damages as a set-off, those liquidated damages claims fall within the definition of “*damage, loss or expense*”, and thus respondents need to show that the exceptions in Section 17(3) (a) or (b) are met.

(b) Whether back-charges fall within the definition of “*damage, loss and expense*”

A commentator has opined that a back-charge is likely to constitute “*damage*” if it is the result of damage to work at a construction site, whereas a back-charge is likely “*loss*” or “*expense*” if it was incurred by the respondent in connection with a task that should have been carried out by the claimant.⁹ This presumably is broad enough for Section 17(3) to encompass most categories of back-charges, as most back-charges relate primarily to defects or rectification work performed by a respondent on behalf of a claimant.

However, respondents should take note of the following two published adjudication determinations, which allowed setting-off of back-charges without the respondent needing to show that the exceptions in Section 17(3) (a) and (b) were met.

First, if the terms of a contract clearly allow deduction of back-charges, it follows that the deduction of back-charges pursuant to the contract terms cannot be treated as a breach of contract, and the back-charges clearly were intended to be taken into account in the final accounting between the parties.¹⁰ In other words, those back-charges are not “*damage*”.

Second, Section 17(3) should not apply to a respondent’s claim for defect rectification costs that relate directly to work done by the claimant within the original scope of work.¹¹ In imposing this type of back-charges, a respondent should re-frame the back-charge as a reduction in the value of the work done on account of the defects.

In short, if a respondent frames back-charges as a settlement in the final accounting or as a deduction from

⁷ Danna Er, No Rose Without a Thorn. Claims for damage, loss or expense under the new adjudication regime [2021] SAL Prac 28 at [9].

⁸ SOP AA100 (2020) at [267 – 268] and SOP AA142 (2020) at [150].

⁹ Er, *supra*, at [14].

¹⁰ SOP AA105 (2020) at [71].

¹¹ SOP AA142 (2020) at [171 and 176].

work performed, there might be a higher chance to argue that the back-charges are not "*damage, loss or expense*".

3. Section 17(3) Exceptions

The exceptions set forth in Section 17(3) of the amended SOP Act ("**Section 17(3) Exceptions**") are as follows:

- a) either a document showing agreement of the parties on the quantum of that part of the payment claim or the payment response; or
- b) any certificate or other document that is required to be issued under the contract.

Some uncertainty remains regarding the Section 17(3) Exceptions, as the amended SOP Act does not elaborate on the nature of the documents required.

(1) Document Showing Agreement

The following cases illustrate that difficulty respondents face in proving a "*document showing agreement*". In the context of liquidated damages, this may entail proving an agreement concerning the (i) method used to calculate delay and (ii) complex issues of causation. This is unlikely to be achieved during adjudication proceedings.

In SOP AA142 (2020), the adjudicator determined that the respondent had to provide a document showing agreement on the precise quantum of liquidated damages to be imposed, the rate to be applied, and the number of days of delay. However, the claimant in this case disagreed with the respondent's basis or quantum of liquidated damages by issuing monthly invoices for the relevant amount.

In SOP AA314 (2020)¹², the respondent unsuccessfully argued that the liquidated damages clause itself was a "*document showing agreement*". The adjudicator disagreed, stating that an agreement necessarily means that parties are on common ground with respect to liability and the quantum thereof. In particular, an agreement on the issue of culpable delay and entitlement to extension of time ("**EOT**") needed to be reached before liability for liquidated damages could arise.

Likewise, it is unlikely that claimants will reach agreement with respondents readily over allegations of defects or the amount of back-charges to be imposed.

(2) Certificate or Other Document Required to be Issued

The second Section 17(3) Exception is a certificate or other document required to be issued under the Contract. In the context of liquidated damages, some contract forms provide for the issuance of a "*delay certificate*" by the contract administrator, certifying the number of days of delay caused by the contractor. However, this begs the question of situations in which the contract does not provide for the issuance of such certificates.

In SOP AA100 (2020), the contract incorporated the Singapore Institute of Architect's Conditions of Sub-

¹² At [361 – 362 and 367]

Contract (“**SIA Subcontract**”). The Adjudicator found that the provision of notice of set-off under Clause 11.5 of the SIA Subcontract was “*a document that is required to be issued under the contract*” that was “*akin to a certificate*”, but that this notice was not issued.

In SOP AA285 (2020)¹³, the Adjudicator opined that for matters involving contract forms in which delay certificates are not required to be issued, the handing-over certificate or EOT certificate (if any) should suffice equally as a certificate required to be issued under the contract supporting a claim for liquidated damages. Crucially, the adjudicator found that the uncertainty surrounding the extending of the completion date was not an impediment to imposing liquidated damages; the adjudicator used the provisional assessment of EOT to determine the amount of liquidated damages to deduct.¹⁴

Based on the reasoning in SOP AA285 (2020), it is possible for respondents to argue that provisional assessments of EOT make it possible to calculate liquidated damages payable, and fall within the second Section 17(3) Exception. Even so, and consistent with the principle of temporary finality, the adjudicator’s determination will not affect the parties’ subsequent right to deduct further liquidated damages or to finalize the EOT assessment.

With regard to back-charges, respondents can rely on directions from the architect or engineer that are required to be issued under the contract, which typically allow for money to be recovered by the respondent from the claimant on the basis of breach of contract for failure to rectify defects. Such a document potentially qualifies as a “*document required to be issued*”.

4. Conclusion


Liquidated damages have been determined to be “*damage, loss and expense*” covered by Section 17(3) of the SOP Act. As a general rule, adjudicators must disregard this portion of the payment claim or payment response. However, adjudicators remain allowed to consider these claims if they fall within the Section 17(3) Exceptions.

A respondent will have higher chance of arguing that a back-charge does not constitute “*damage, loss and expense*” if the terms of the contract provide for the deduction of back-charges, and if the back-charges can be reformulated as a reduction in the value of work done.

When attempting to utilise the Section 17(3) Exceptions, it is difficult to obtain a “*document showing agreement*” for both liquidated damages and back-charges as required by Section 17(3)(a). However, it is possible for respondents to satisfy the certification requirement in Section 17(3)(b) by relying on instructions from an architect or engineer regarding defects, making timely certifications imposing liquidated damages where provided for in the Contract, or giving timely notice of an intent to set-off those sums.

¹³ At [65]

¹⁴ At [103 – 105]



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