When Time is of the Essence – The Importance of Complying with SOPA Timelines

Introduction

The Building and Construction Industry Security of Payment Act ("SOPA") provides for a system of adjudication of payment disputes, which has become a central pillar of the construction industry, supporting the efficient flow of cash and payments. One of the features of the SOPA is the strict timelines in the adjudication process, including the timings for payment claims, payment responses and submission for adjudication. The importance of complying with these timelines was highlighted in a few recent cases before the Singapore High Court.

In Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd [2017] SGHC 165 ("Audi v Kian Hiap"), the Court had to determine whether a payment claim was invalid for being served prematurely, and when a respondent may be said to have waived its right to object to a payment claim.

AES Façade Pte Ltd v WYSE Pte Ltd [2017] SGHC 171 ("AES v WYSE") involved a payment response which had been served out of time, and whether the respondent was still entitled to raise a right to set-off to resist payment. Related to this is also the question of whether such set-offs are limited to claims under the particular contract or whether the SOPA permits a respondent to also raise cross-contract claims – that was a question that was recently addressed in the case of Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd [2017] SGHC 179 ("Hua Rong v Civil Tech").

This Update takes a look at these decisions, as well as the various stages of the SOPA timeline and the consequences of non-compliance.

SOPA Timelines

The SOPA was introduced to provide the construction industry with a low-cost and efficient process for the adjudication of payment disputes so that main contractors would not unfairly delay payments to their subcontractors. This was in acknowledgement of the fact that the downstream cash flow is the life blood of the construction industry. The speedy adjudication process was balanced by allowing the dispute to be reopened at a later time and more thoroughly ventilated.

The SOPA thus places great importance on its timelines. This includes the following stages:

(i) The Payment Claim must be served at such time as specified in the contract, or at such time as may be prescribed if the contract does not specify.

(ii) The Payment Response must be served by the date as specified in the contract (provided it does not exceed 21 days from the date the Payment Claim is served), or within 7 days of the date the Payment Claim is served if the contract does not specify.

(iii) An Adjudication Application must be made within 7 days after the entitlement of the claimant to make an Adjudication Application first arises.

(iv) The respondent must then lodge an Adjudication Response within 7 days after the receipt of the Adjudication Application.
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(v) After the adjudicator has made his determination, the respondent must make payment within 7 days, or any date specified by the adjudicator.

Payment Claims

An agreement between a main contractor and sub-contractor is likely to address the time frame within which a Payment Claim must be made. If the actual Payment Claim is served in breach of this provision, the service of the Payment Claim and any adjudication award arising from the Payment Claim will be deemed invalid.

In Audi v Kian Hiap, the Court was faced with the relatively uncommon scenario of a Payment Claim having been served prematurely. The contract stated that the sub-contractor would be entitled to serve Payment Claims “on the date for submission of progress claims as set out in Appendix 1”. Appendix 1 set this date as the “20th day of each calendar month”.

The Court determined that, on a proper construction of the relevant provisions, Payment Claims had to be made on the 20th day of each month, and not by the 20th day (as contended by the sub-contractor). As the sub-contractor had served the Payment Claim before the 20th, the service was found to be invalid. The fact that service was early rather than late did not aid the sub-contractor; early service could nonetheless prejudice the main contractor, and parties should in any event be held to the terms of their agreement.

The Court acknowledged that this may leave an undesirable degree of uncertainty due to imprecise drafting of contracts and ambiguous interpretations, particularly where timeliness is the cornerstone of the SOPA framework. However, it remained bound by the explicit provisions of the SOPA.

Payment Responses

Upon receiving a Payment Claim, the respondent has a limited time to serve a Payment Response. However, the failure to make a timely Payment Response, or to include all grounds of objection to payment, may have greater consequences beyond having the dispute submitted to adjudication. Such failure may affect the respondent’s right to rely on certain grounds of objection or counterclaims in future proceedings.

Waiver of objection

The Court of Appeal in Groutem Pte Ltd v UES Holdings Pte Ltd [2016] 5 SLR 1011 had previously held that objections should be raised by the respondent at the earliest opportunity, before taking any further step which would be inconsistent with the objection being maintained. This would generally be before the deadline to submit the Payment Response.

In Audi v Kian Hiap, the Court applied the above principles in considering when grounds of objection to a Payment Claim may be said to have been waived by the respondent. Generally, filing a Payment Response without raising an objection to service would be inconsistent with the subsequent position that the service was invalid, and is likely to constitute a waiver. However, where no Payment Response is served at all, the Court would be slower to find that there is a waiver of grounds of objection to service; there must be other facts to signify such waiver.
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Here, the main contractor had not submitted any Payment Response. However, in its Adjudication Response, it raised an objection to the service of the Payment Claim for being premature. The Court held that there was no waiver of this ground of objection just because it had not been raised at the time of Payment Response.

However, in these High Court proceedings, the main contractor also raised an objection relating to the Payment Claim header. The Court was of the opinion that this objection would have been waived as the main contractor had not even brought it up at the adjudication.

**Set-off and counterclaim**

Payment Responses should also include any reasons for withholding payment, including set-off, counterclaims and cross-claims. This is because, where the adjudication relates to a construction contract, section 15(3) of the SOPA states that the adjudicator cannot consider such reasons if they were not included in the Payment Response. Therefore, if no Payment Response was served, no withholding reasons may be raised in adjudication.

In AES v WYSE, the High Court confirmed that withholding reasons not included in the Payment Response also cannot be raised at the stage where the claimant seeks to enforce an adjudication determination against the respondent. To allow such action would be to go against the scheme and purpose of the SOPA.

The main contractor in this case attempted to raise a right to set-off before the adjudicator. The adjudicator found that the main contractor was not allowed to raise the withholding reason as it had not submitted a Payment Response. When the sub-contractor sought to enforce the adjudication determination before the Court, the main contractor tried to raise the same right to set-off. However, the Court held that the main contractor was prohibited from doing so.

The main contractor also sought to argue that clauses 11.4 – 11.5 of the Singapore Institute of Architects Conditions of Sub-Contract conferred on it the right to raise a right to set-off even after an adjudication determination had been handed down. The Court disagreed, and held that the clauses did not extend to the post-adjudication context. Notably, the Court stated that any contractual provision which purported to do so would run contrary to the SOPA, and would thus be invalid.

In Hua Rong v Civil Tech that High Court clarified that section 15(3) of the SOPA does not allow cross-contract set-offs (i.e. only set offs imposed pursuant to the same contract are allowed). The High Court had even gone as far as to state that even in the case of the PSSCOC standard form which arguably allows cross-contract set-off, once parties enter into the SOPA adjudication system they would have to “adapt their expectations to what the statute provides”.

**Concluding Words**

Parties subject to the SOPA should take note of the relevant timelines and ensure strict compliance. As demonstrated in the cases above, the failure to comply with certain deadlines can result in drastic consequences. Payment Claims should thus be served in a timely manner, and Payment Responses should optimally be both prompt and comprehensive.

Parties entering into construction agreements should also be particularly careful about provisions dealing with such timelines. For example, the timelines for the service of Payment Claims and Payment Responses are often specified in the contract. These terms should be clearly drafted so as to avoid any uncertainty or conflict in interpretation.
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