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**4TH NATIONAL CONFERENCE ON CONSTRUCTION
ADJUDICATION**

**SESSION 3 – LATEST DEVELOPMENTS IN
ADJUDICATION AND THEIR IMPLICATIONS**

CROSS-CONTRACT SET-OFFS?

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2 SECTION 15(3) SOP ACT – REASONS FOR WITHHOLDING PAYMENT?

Pre-Amendment SOP Act	Post-Amendment SOP Act
<p>s. 15(3) SOP Act</p> <p>(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —</p> <p>(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or</p> <p>(b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.</p>	<p>s. 15(3) SOP Act</p> <p>(3) Subject to subsection (4), the respondent must not include in the adjudication response an objection of any nature, unless —</p> <p>(a) where the adjudication relates to a construction contract — that objection was included in the relevant payment response provided by the respondent to the claimant; or</p> <p>(b) where the adjudication relates to a supply contract — that objection was raised by the respondent to the claimant in writing on or before the relevant due date.</p>
<p>Plain Reading: s. 15(3) (alone) does not deal with whether cross-contract set-offs are permissible (or not).</p>	

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[2018] 1 SLR 584;
[2018] SGCA 12

- **Facts:** Claimant entered into two separate contracts with the Respondent: the T211 Contract, and the C933 Contract.
- Respondent submitted a payment claim under the T211 Contract, and in the payment response, the Claimant sought to set-off claims under the C933 Contract.
- **Issue:** Whether the respondent under the SOP Act may withhold payment based on an asserted claim / set-off which does not arise under the Payment Claim Contract, but from a separate construction contract that is also governed by the SOP Act?
- **Holding:** No cross contract set-off (decided under pre-amendment SOP Act).

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- The SOP Act promotes cash flow by facilitating prompt payments down the chain of contractors
 - Flow of monies from upstream parties to downstream parties
 - *Not* to give effect to a net financial position
- Key features of SOP Act
 - Each contract has its own payment framework
 - Only downstream parties can commence adjudication
 - Claims by upstream parties can only be used as a shield
- **s. 15(3) SOP Act deals with the *timing*** of the reasons for withholding payment, and not the *contents* of the reasons
- **s. 17(3) SOP Act exhaustively sets out matters that an adjudicator can consider**
 - S. 17(3) does not suggest adjudicator entitled to consider other construction contracts
 - See sequence and structure of s. 17(3)
 - Considering other contracts: added complexity and time

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COMPARISON BETWEEN PRE- AND POST- AMENDMENT S. 17(3) SOP ACT SECTIONS RELEVANT TO SET-OFF

Pre-Amendment s. 17(3)	Post-Amendment s. 17(4)
<p>(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:</p> <ul style="list-style-type: none">a. the provisions of this Act;b. the provisions of the contract to which the adjudication application relates;c. the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;d. the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication	<p>(4) Subject to subsection (5), in determining an adjudication application, an adjudicator shall only have regard to the following matters:</p> <ul style="list-style-type: none">a. the provisions of this Act;b. the provisions of the contract to which the adjudication application relates;c. the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;d. the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication

THE SINGLE CONTRACT INTERPRETATION ISSUE

- “21 The narrow issue of law before us was therefore whether under the Act, a respondent to a payment claim may withhold payment based on a claim or asserted set-off which does not arise from the Payment Claim Contract, but from a separate construction contract that is also governed by the Act. We will refer to such a claim or set-off as a “Cross-Construction Contract Claim”. It was **not necessary for us to decide the broader question of whether the Single Contract Interpretation – the view that the only valid withholding reasons under the Act are those arising from the Payment Claim Contract (see [10] above) – was correct.**”

“80 In conclusion, we reiterate that the only issue before us in this appeal was whether Cross-Construction Contract Claims are valid withholding reasons under the Act. It was not necessary for us to decide whether the Single Contract Interpretation is correct (see [21] above). In this regard, we note that although endorsing the Single Contract Interpretation might expedite payment to downstream contractors, the Act only regulates construction contracts and supply contracts. With these remarks, we leave the question of whether the Single Contract Interpretation is correct for another day.”

CL. 32.2.(1) PSSCOC

- **Public Sector Standard Conditions of Contract for Construction Works 2020, 8th Edition, Cl. 32.2.(1):**
 - “Within 14 days of receiving a Payment Claim duly submitted pursuant to Clause 32.1, the Superintending Officer shall issue a certificate ... to the Contractor ... showing the amounts, which may consist of deduction of any sums which have been or may become due and payable by the Contractor to the Employer **under the Contract or otherwise** ...” (emphasis added)

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CIVIL TECH WAS NOT DECIDED ON CONTRACTUAL INTERPRETATION

Would a clearly worded clause, that claims in Contract B can be set-off against payment claims in Contract A, fall foul of the rule in *Civil Tech*?

Would s. 36 SOP Act apply to strike it down for the reasons given in *Civil Tech*?

Court judgments and
Adjudication
Determinations?

THANK YOU

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