AN OVERVIEW OF THE SINGAPORE SECURITY OF PAYMENTS REGIME

CHOW KOK FONG
e-mail: kfchow@equitascorp.com

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CASE FOR STATUTORY INTERVENTION

The Building and Construction Industry Security of Payment Act 2004 was enacted on 16 November 2004 and under the regulations made by the Minister pursuant to section 41 of the Act, the Act is to come into operation with effect from 1st April 2005. The Act represents the culmination of a remarkable effort on the part of a particular constituency within the construction industry to redress some of the payment issues which have confronted the industry for a long time. This effort was organized around the same time when a number of highly publicized financial failures on the part of main contractors spectacularly ground several huge housing projects to a halt. These difficulties had, in turn, unleashed a torrent of financial insolvencies down the construction process – wiping out sub-contractors, sub-subcontractors, suppliers and other parties who are placed unfortunately at the end of the food chain.

Nevertheless, the issue with payments for work done and cash-flow is not new. It has been with the industry for some time and this is reflected in the development of the legal framework on this subject. A quick review of some of the milestones in this development will be helpful in understanding the policy issues surrounding this new statutory regime.

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1 Building and Construction Industry Security of Payment Regulations 2004 (hereinafter cited as “BCISP Regulations”).
DEVELOPMENT OF THE LEGAL FRAMEWORK

Set-Offs and Counterclaims

It is necessary to begin with the position that a party who is presented with a payment claim is entitled, under the general law, to extinguish or diminish the substance of the claim by way of set-off or counterclaim. Thus, against a payment claim from a contractor for work done, an owner may argue that several items of the works were defective and which had not been rectified. The owner may estimate the costs of rectifying the works to the state which he considers is required under the contract. If the cost of rectifying the defects sought to be recovered by the owner is less than the amount of the payment claim, the owner may set-off the quantum of these costs against the amount of the payment claim. The contractor is thus paid the net amount so that the result is the same as if the owner pays the sum claimed and recovers for the defects under a separate action against the contractor.

The right to plead set-off or bring a counterclaim is inherent in the general law. It does not have to be expressly provided in a contract. On the other hand, parties may, by express terms, exclude this right. This is consistent with the

general principle that the exclusion of a right generally available at law can only be achieved by clear provisions to that effect and is not to be effected by way of implied term.³

Initially only legal set-off was available. This is where both the claim and cross-claim could be quantified or easily quantifiable but they must be independent of each other.⁴ Subsequently, the equity courts allowed “equitable set-off”. This is available as a self-help remedy so that the debtor may validly meet the creditor’s primary claim only after this has been adjusted for the debtor’s cross-claim. The general principle is that this type of set-off is available even where either the claim or cross-claim is unliquidated: Hanak v. Green (1958).⁵ Thus a claim for the price of goods supplied may be met by a cross-claim for damages in respect of the defects found in the goods.

Although there are principles attempting to ensure that the right of set-off is not abused, it will be appreciated that the position can easily frustrate a contractor or sub-contractor seeking payment. Payments under a construction contract are particularly vulnerable to manipulation by unscrupulous parties who may erect inflated counterclaims and set-offs to defeat the expectations of a party seeking to be paid.

The Dawnays Case

An attempt to address this issue was made more than thirty years ago when Lord Denning decided the English Court of Appeal case in Dawnays Ltd v. Minter Ltd (1971). In that case, the Master of Rolls famously propounded the case for interim payment certificates to be enforceable by summary judgment against owners. Lord Denning in that case held that set-offs against interim certificates for delay or defects should be determined only when a payment dispute goes before an arbitrator or the courts and that, in the meantime, they should be strictly enforced on the premise that “cash-flow is the life blood of contractors”. This life blood was rudely drained in 1974 when the House of Lords in Gilbert-Ash (Northern) Ltd v. Modern Engineering Ltd (1974) restored the previous position laid down in Hanak v. Green (1958), holding that, in the absence of any express provision to the contrary, an interim payment certificate cannot be enforced without taking into consideration cross claims or set-offs.

Concept of Temporary Finality

A few years later, in the course of drafting the a new form of building contract for the Singapore Institute of Architects, Duncan Wallace resuscitated the Dawnays’ position on the enforceability of interim payment certificates under the umbrella of “temporary finality”. This is entrenched in clause 31(11) of the

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6 [1971] 1 WLR 1205.
8 (1958) 2 QB 9.
conditions and has been held to operate very much along the lines intended by Wallace. In *Tropicon Contractors Pte Ltd v. Lojan Properties Pte Ltd* (1989), the first of the decisions to address this subject, L P Thean J (as he then was) was clear in his judgment that, on the construction of the SIA provisions, the rights of parties in relation to interim payments must be defined by the certification of the architect. In what must be now one of the most frequently cited passages of judgments in this area of law, the learned judge said:

In so far as interim certificates of payment are concerned, it seems to me that the intention...is...that the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by the employer it is intended to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provision, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate.

Although this approach to progress payments was not followed in the subsequent drafting of the Public Sector Standard Conditions of Contract, it did help to define the parameters for an acceptable payment regime in the industry.

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9 [1989] SLR 609, *per* Thean J (as he then was)
10 *ibid.* at 617.
The Public Sector provision, for example, provides expressly for interest to be paid to the contractor for late payment, suggesting some concession to the policy considerations which led to the Dawnays position.

Limitations of the Contractual Route

Nevertheless the limitations of the impact of such contract drafting initiatives were soon felt. Firstly, all these efforts depend on the timely certification of payments. The underlying assumption is that certifiers are able to resist commercial pressures from owners to adopt unjustifiably conservative valuations of work done and to ensure that certifications are made regularly. This is supposedly the underpinning of the payment regime of a modern construction contract but it is by no means consistently honoured. Secondly, while the incidents of certification and the intervals of payments have been largely formulated with the relationship between main contractors and owners, many aspects of this regime do not serve properly the requirements of those further down the production chain. There are frequently attempts to draw out the time for these parties to be paid either by the ingenious insertions of “pay when paid” arrangements or stipulation of inexorably lengthy payment periods. Thirdly, the entire regime can only presume to work right through the production chain if every party along the chain is presumed to be financially solvent throughout the duration of the contract. Although a contract may contain specific provisions to deal with financial insolvency, their operation is frequently subject to
insolvency laws and, at any rate, they appear to address the issues which surface in these situations in an ad hoc manner. Consequently, when one party becomes insolvent, the payment flows are disrupted and can prove intractably difficult to resolve.

**Issues with Enforceability**

The final aspect of this issue which may be mentioned was probably not anticipated at the time when initiatives were being gathered for the Bill but it serves to further reinforce the case for the statutory regime. As noted earlier, under clause 31(11) of the Singapore Institute of Architects Standard Form, the contractor is to be paid the amounts stated in the interim certificates, and if no payment is made by the employer it is intended that the contractor, in the absence of fraud, improper pressure or interference or in the absence of express provision, is to be entitled to obtain quick summary judgment for the amounts certified as due. However, an amendment was made to Order 14 of our Rules of Supreme Court on 1 December 2002, the effect of which is to extend considerably the time frame within which an application for summary judgment in respect of an interim payment certificate may be obtained. The subject amendments require that a party seeking an Order 14 relief has to wait and a defendant applies for a stay in the proceedings on the ground, for example, that the dispute ought to have been referred to arbitration, the Order 14 application
can only be heard after the stay application has been disposed of.\textsuperscript{12} The Court of Appeal in \textit{Samsung Corporation v. Chinese Chamber Realty Pte Ltd, China Square Holdings Pte Ltd and Church Street Properties Pte Ltd} (2003)\textsuperscript{13} held that this rule cannot be avoided with the result that the quality temporary finality assiduously drafted into the payment provisions of a standard form like the SIA Contract no longer carried the same sense of immediacy in terms of enforcement.

\section*{RIGHT TO PROGRESS PAYMENT}

\subsection*{Entrenchment of the Right}

The Act has to therefore address two central matters. The first is that it must reclaim for a party who undertakes construction work or supplies goods and services the right to progress payment. The objective is to ensure that this right will no longer be ignored disdainfully by the group of parties who are admittedly in the minority but whose actions have precipitated the intolerable financial difficulties encountered in the industry. The Act therefore removes any doubt as to the existence of this right by its specific provision under section 5 of the Act. It is said that in so doing, the Act does not create a new right but merely re-affirm a right on the part of the party who carries out construction work or supply goods and services.

\footnotesize\textsuperscript{12} \textit{Samsung Corporation v. Chinese Chamber Realty Pte Ltd, China Square Holdings Pte Ltd and Church Street Properties Pte Ltd} [2003] SGCA 50, CA.

\footnotesize\textsuperscript{13} [2003] SGCA 50, CA.
Requirement for Reasoned Response

The respondent has to pay the claimed amount in full. If he does not, he has to furnish a payment response setting out the reasons why he is only paying part of this amount or nothing at all.\textsuperscript{14} There are two elements: the making of this payment response within the time prescribed under the Act and the statement of the reasons. Under the Singapore Act, unlike its New South Wales counterpart, a failure to furnish the payment response within the prescribed period is not necessarily fatal – a payment response can still be furnished during the dispute settlement period. However a failure to furnish reasons can be fatal to the respondent’s case.

The uncompromising demand for compliance with the procedural prescriptions of the Act is demonstrated by the case of \textit{Walter Construction Group Ltd v. CPL (Slurry Hills) Pty Ltd} (2003).\textsuperscript{15} That case concerns a $26.6 million contract for the construction of a residential development. The plaintiff-contractors submitted a payment claim for a sum of $14.92 million pursuant to the New South Wales Act. The claim was submitted in the midst of the Christmas season and the employers’ consultants overlooked the strict time frame within which the New South Wales Act requires them to issue the payment schedule (the equivalent of the payment response) in reply to the claim. As a consequence, the New South Wales Supreme Court held that (after deducting a

\footnotesize{\textsuperscript{14} Section 11 of the Singapore BCISP Act.\textsuperscript{15} [2003] NSWSC 266.}
sum paid by the employers outside the stipulated timeframe) an outstanding amount of $13.9 million was due and payable. This is notwithstanding that, within the sum awarded to the claimant, there were several highly contentious amounts including a sum of $3.14 million described as a sum in respect of “EOT Consolidated Claim”, another sum of $1.86 million for a “Special Measures Claim” and a sum of $3 million for “Further Entitlements Claim”.\(^{16}\)

**Anti-Avoidance Provisions**

This is buttressed by the general umbrella statement of policy intent that provisions of the Act could not be contracted out [section 36] and, in particular, any provision which purports to exclude, modify, restrict or in any way prejudice the operation of the Act (or has this effect) is to be rendered void [section 36(1)].

In addition, drawing from experiences in the United Kingdom and Australia, the Act also addresses directly some of the common avoidance attempts which have been made in order to avoid some of the uncertainties which have been encountered in cases before both the Technology and Construction Court and the New South Wales Supreme Court.

**“Pay when Paid” Provisions**

\(^{16}\) In view of the express provisions for a dispute settlement period under section 12(4) of the Act and for the respondent to provide a payment response where he has failed to do so within the prescribed period under section 11(1), it is considered that the risk of a respondent unconsciously allowing the situation to be triggered in the manner it did in the *Walter Construction* case is considerably reduced.
An aspect of practice which troubles Sir Michael Latham prior to the enactment of these statutes has been the preponderance of conditional payment terms found in many sub-contracts and sub-subcontracts. These are normally described generically as “pay when paid” provisions. The effect of these provisions is to make a party’s entitlement to be paid by a second party conditional on the second party being paid by a third party in respect of the same matter. In the manner in which it is formulated in sub-contracts, it allows a main contractor to resist a claim by a sub-contractor so long as the main contractor is not paid by the employer notwithstanding that the non-payment may arise from defaults of the main contractor under the main contract. Designed originally as a means to distribute risks between contractors and their sub-contractors, this device could be used by certain main contractors to effectively transfer part of the consequences of their own defaults to sub-contractors. The operation of these provisions is thus incompatible with any right of a sub-contractor or supplier to enforce progress payment as of right. Not surprisingly, as a basic tenet, in all the jurisdictions where a security of payment regime has been introduced, the enabling Act expressly renders these provisions unenforceable.

While the United Kingdom Act renders unenforceable “pay when paid” provisions, for some reason it did not extend this effect to other versions of such provisions. A particularly unfortunate omission is a “pay when certified” clause. This typically makes the certificate of the architect or engineer under the main contract a condition precedent to payment under the subcontract. Although this
was realized at the time of drafting the UK Bill and a last minute amendment was rushed to Parliament, the government of the day decided at that time not to accept the amendment. This difficulty will not be encountered with the Singapore Act. Under the Act here, “pay when paid provisions” are rendered unenforceable “by whatever name called” and includes expressly for the different forms which these provisions could conceivably take.\textsuperscript{17}

**Default Timelines**

Since the objective of the Act is to compel payments to be made promptly, it would again be incompatible with contracts which attempt to circumvent this by providing for inordinately long certification and payment periods. The Act strives to give effect to the operation of the terms of the underlying contract which apply to the regulation of the periods for certification and the making of payments. However where the contract is silent or where the contract provides for periods in respect of these activities which exceed the limits placed on these deadlines prescribed by the Act, the default timelines take over. Thus the Act prescribes in effect that a construction contract cannot provide for the payment response to be made later than 21 days after the service of the payment claim and where the contract is silent then, the payment response has to be made within 7 days.\textsuperscript{18} [section 11(1)]. In the case of a supply contract, the payment date stipulated in the contract cannot exceed 60 days from the date of the payment claim [section 9(1), (2) of the Singapore BCISP Act. Section 11(1) of the Singapore BCISP Act.]

\textsuperscript{17} Section 9(1), (2) of the Singapore BCISP Act.
\textsuperscript{18} Section 11(1) of the Singapore BCISP Act.
11(2) and 8(3) read together] and where the contract is silent on this matter, this
duration is shortened to 30 days.\textsuperscript{19}

\textbf{Impact on Certificates}

Construction contracts frequently provide that certain matters which have
been duly certified are binding unless and until the certification is reviewed in
arbitration or the courts. An example of such a provision is the delay certificate
issued by an architect pursuant to clause 24(1) of the SIA Conditions of Contract.
Under this standard form of contract, all certificates of architect are to have
temporary finality. Consequently the effect of a delay certificate is to bind the
contractor to accept the liquidated damages deducted by the employer against
sums certified by the architect in interim certificates until the same has been
reviewed by an arbitrator or a court of competent jurisdiction.

In New South Wales, there have been several instances where this is
seized by a party to argue that an adjudicator should be prevented by these
contractual stipulations from determining the matters which have been certified.
In \textit{Abacus Funds Management Ltd v. Davenport (2003)},\textsuperscript{20} a challenge was raised
on this basis in respect of a component of an adjudicator’s award for on-site
costs as a result of the prolongation of the project. It was argued that where,
under the terms of a contract, the architect had certified the amount of a progress

\textsuperscript{19} Section 8(4) of the Singapore BCISP Act.
\textsuperscript{20} [2003] NSWSC 1027.
claim, the builder’s entitlement was to the progress claim so certified and an
adjudicator had no power to re-evaluate the architect’s certification. McDougall J
in that case dismissed this challenge, holding that while it is clear that the terms
provide for the builder is entitled to be paid amounts certified as progress
payments by the architect, it cannot be correct to say that “an adjudicator under
the Act is bound by the terms of any progress certificate issued”.21 A different
view was taken in Transgrid v. Siemens Ltd (2004).22 The challenge in that case
was brought on the grounds that an adjudicator is bound by the certification of
the superintendent under the contract in respect of progress payments and so
long as the superintendent had so certified, there is no reason why Parliament
would intend that the adjudicator should re-visit the evaluation and certification
function. Although the application in that case was rejected eventually on the
basis that the action was brought too late in the day, the situation does add to the
grounds on which a jurisdictional challenge may be mounted.

The Singapore Act removes this avoidance route by providing expressly
that an adjudicator shall not be bound by any payment response, or any
assessment in relation to the progress payment, that is provided in the contract
to be final or binding on the parties.23

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21 Ibid., para 35. Although the part of the judgment in this case relating to the principles
governing relief in the nature of certiorari against the determination of an adjudicator is
reversed by the New South Wales Court of Appeal in Brodyn Pty Ltd v Davenport [2004]
NSWCA 394; TransGrid v Siemens Ltd [2004] NSWCA 395, the remaining part of
McDougall J’s judgment specifically the part relating to the architect’s certificate was not
disapproved.


23 Section 17(4) of the Singapore BCISP Act.
ADJUDICATION MACHINERY

Affordability and Speed

A right to progress payment must be capable of being enforced readily. It would be futile to provide for the right to progress payment without radically transforming the supporting enforcement machinery. Implicit in the consideration for the regime is the view that recourse to arbitration or the courts to enforce a particular progress payment claim takes considerable time and expense. As noted, even the summary judgment procedure which was thought at one time to be sacrosanct in the context here has been essentially reversed and although this was not anticipated when the case for the Bill was made, it serves to reinforce the need for an adjudication regime which is both affordable and capable of dispatching a result within a relatively short time.

Dispute Settlement Period

One of the distinguishing features of the Singapore regime is the 7-day dispute settlement period. The claimant is required to withhold any adjudication application until the expiry of the 7-day dispute settlement period.\(^{24}\) There is no equivalent of this feature in either the United Kingdom or New South Wales Act. This requirement applies to all cases except where the claimant has basically accepted the response amount offered by the respondent in which case the

\(^{24}\) Section 12(2) of the Singapore BCISP Act.
claimant may proceed directly to adjudication. It is thought that this will reduce
the occasion for a respondent to be taken by surprise as exemplified by cases
where a payment claim is timed deliberately on the eve of a major public holiday:
see, for example, Walter Construction Group Ltd v. CPL (Slurry Hills) Pty Ltd
(2003).25

The Time Frame

The adjudication process itself is characterized by the short period within
which a determination has to be made. Where the respondent has not complied
with the Act in responding to the payment claim and the adjudication application,
the determination has to be made within 7 days from the commencement of
adjudication.26 In any other case, that is, where the application for adjudication is
resisted by the filing of a adjudication response – which will be the majority of the
situations – the period for determination is 14 days.27 By any standard, these
periods are very short, although in the case of the former, parties can jointly
agree to extend this period.

The Process

To accommodate this demanding schedule, not surprisingly, the process
has to sacrifice a number of the features which one normally associate with

25 [2003] NSWSC 266.
26 Section 17(1)(a) of the Singapore BCISP Act.
27 Section 17(1)(b) of the Singapore BCISP Act.
arbitration or trial. Firstly, instead of a lengthy process of pleadings, the
adjudication application lodged by the claimant and the adjudication response
lodged by the respondent serve essentially as the statements of the respective
cases before the adjudicator. The Act provides that these are to be
accompanied by materials such as expert reports, photographs,
correspondences and submissions.\footnote{28} An adjudicator is entitled to determine the
dispute on the basis of these materials without convening a conference.

\textbf{Latitude of the Adjudicator}

The Act also provides for the adjudicator is “to conduct the adjudication n
such manner as he thinks fit”.\footnote{29} He is empowered specifically to “take the
initiative” to require submissions or documents,\footnote{30} to appoint independent experts
to inquire on specific issues and to carry out inspection of any work or goods or
matter to which the adjudication relates.\footnote{31}

\textbf{Application of Principles of Natural Justice}

There have been some unfortunate suggestions in some early decisions
of the Technology and Construction Court that the principles of natural justice

\footnotesize{\begin{itemize}
\item [28] Section 13(3) of the Singapore BCISP Act.
\item [29] Section 16(4)(a) of the Singapore BCISP Act.
\item [30] Section 16(4)(b) of the Singapore BCISP Act.
\item [31] Section 16(4)(f) of the Singapore BCISP Act.
\end{itemize}}
applied to adjudication in a qualified sense.\textsuperscript{32} These views have since been revised and the position now is that what was said earlier in essence amounted to nothing more than that the courts will not fault an adjudicator merely because he committed a procedural error so long as these do not produce a material consequence on the outcome of the case.\textsuperscript{33} The Singapore Act removes any doubt on this matter by expressly providing that the principles of natural justice apply to adjudication.\textsuperscript{34}

The concept of “natural justice” is normally understood in relation to the fairness of the procedures adopted for arbitration or trial proceedings. In providing that an adjudicator must comply with the principles of natural justice,\textsuperscript{35} the Act affirms the position that the principles of procedural fairness are not to be diluted for the purposes of the adjudication process. Indeed, it has been suggested that in relation to these principles, “that which is applicable in arbitration is basically applicable in adjudication”,\textsuperscript{36} but it is probably more accurate to consider the position in the following terms:

\textsuperscript{32} See Dyson J’s judgment in Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93 and the judgment of Judge Bowsher QC in Discain Project Services Ltd v. Opecprime Development Ltd (No. 1) [2000] BLR 402 at p 405. Doubts were expressed over Dyson J’s views in Homer Burgess Ltd v. Chirex (Annan) Ltd [2000] BLR 124.


\textsuperscript{34} Section 16(3)(c) of the Singapore BCISP Act.

\textsuperscript{35} Section 16(3)(c) of the Singapore BCISP Act.

The principles of natural justice applied to an adjudication may not require a party to be aware of the case that it has to meet in the fullest sense since adjudication may be inquisitorial or investigative rather than adversarial. That does not however mean that each party need not be confronted with the main points relevant to the dispute and to the decision.\textsuperscript{37}

The application of the principles of natural justice to adjudication may be illustrated by two decisions of the United Kingdom Technology and Construction Court. In \textit{Balfour Beatty Construction Ltd v. Lambeth Borough Council} (2002),\textsuperscript{38} the subject dispute involves delay claims. The parties had not furnished the adjudicator with a proper delay analysis and the adjudicator took upon himself to choose a method of delay analysis and performed that analysis. He then proceeded to apply the results of the analysis to the adjudication. It was held that he had committed a breach of the rules of natural justice because, when he did this, he did not afford the parties a reasonable opportunity to review and comment on his choice of method and his analysis; in effect he denied the parties from being heard on this issue.

The situation in \textit{Balfour Beatty} may be usefully compared with that in \textit{Try Construction Ltd v. Eton Town House Group Ltd} (2003).\textsuperscript{39} In this case, the adjudicator was appointed to determine a dispute which involves delay issues

\textsuperscript{37} [2002] EWHC 597 at para 33.
\textsuperscript{38} [2002] EWHC 597; (2002) 84 ConLR 1, TCC.
\textsuperscript{39} [2003] EWHC 60; [2003] BLR 286, TCC.
but neither party was able to provide the adjudicator with a full “as-built” delay analysis. With the agreement of the parties, the adjudicator thereupon employed a programming expert to assist with the analysis of the delays. During the course of his analysis, the expert contacted the parties’ respective programming experts and taken on board the respondents’ comments on the claimants’ case. Following the adjudicator’s decision, the respondents appealed. The court held that the adjudicator had conducted himself correctly in the proceedings when he used the results of the expert’s analysis and considered these results together with both the defences and concessions made by the respondents in reaching his decision. Judge David Wilcox in that case considered that the proceedings amounted to “a transparent process sensibly and pragmatically agreed by the parties”.40

**Interim Binding Quality**

The essence of the regime is that an adjudication determination is binding on the parties in the interim, that is, it is binding until the dispute is finally determined by a court or other dispute resolution tribunal (notably arbitration).41 Until and unless the result of the final determination by the court or tribunal has the result of reversing the adjudication determination, the respondent has to pay the adjudicated amount to the claimant within the period prescribed.42 If the respondent (the party against whom the adjudication is initiated) accepts that the

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40 [2003] EWHC 60 at para 63; [2003] BLR 286 at 295, TCC.
41 Section 21(1) of the Singapore BCISP Act.
42 Section 22(1) of the Singapore BCISP Act.
adjudication process has been properly conducted then he has to comply with the adjudication determination.

**Adjudication Review**

If the respondent disagrees with the determination, despite its interim nature, he can apply for an adjudication review provided that the difference between the adjudicated amount exceeds the response amount by a figure prescribed by the Minister.43 Again, there is no equivalent of this feature in the United Kingdom and the New South Wales regimes. The imposition of this condition of materiality is intended to ensure that the review machinery is not paralysed by an overload of applications relating to differences between the parties which are considered too inconsequential. The prescribed amount for this purpose is left to be decided by the Minister44 and will no doubt be reviewed from time to time. At present, the Regulations fix this amount at $100,000.45 Thus if the response amount was stipulated as $200,000 and the adjudicated amount is $250,000, the respondent will have no recourse to adjudication. The adjudication review is conducted by either one or three review adjudicators and is made on the same submissions and documents.46

**Enforcing Payment of Adjudicated Amount**

43 Section 18 of the Singapore BCISP Act.
44 This is pursuant to the general power of the Minister to make regulations under section 41 of the Act.
45 Clause 10(1) of the Singapore BCISP Regulations.
46 Section 19(6) of the Singapore BCISP Act.
An important feature of the regime consists of the measures which are available to a claimant to enforce the payment of the adjudication amount. These are set out in Part V of the Act:

1. Firstly, if the respondent fails to pay the whole or any part of the adjudicated amount in accordance with section 22, the claimant may apply for and enforce the adjudication determination “as if it were a judgment debt”.\(^{47}\) The adjudicated amount may thus be enforced as a judgment or an order of the court.\(^{48}\)

2. Secondly, a claimant may suspend the carrying out of construction work or the supply of goods or services.\(^{49}\) The Act makes it clear that during this period of suspension, the claimant is not liable to the respondent, principal or owner for any loss or damage occasioned by the exercise of this right\(^{50}\) although the principal or owner may claim such loss or damage from the respondent. The Act anticipates that a respondent may attempt to remove the suspended portion of work from the contract and provides that, in such an event, the respondent is liable for any loss or expense.

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\(^{47}\) Section 23(2) of the Singapore BCISP Act.
\(^{48}\) Section 27(1) of the Singapore BCISP Act.
\(^{49}\) Section 26 of the Singapore BCISP Act.
\(^{50}\) Section 26(2) of the Singapore BCISP Act.
occasioned by this removal. It is further provided that the period of suspension shall be disregarded for the purpose of the time taken by the claimant in completing the work. It is necessary to stipulate this consequence as a ground for extension of time under the terms of the contract.

3 Thirdly, where the claimant is a sub-contractor or supplier, the principal – that is the employer or the party higher up the contracting chain – may invoke provisions of the contract to pay the adjudicated amount directly to the claimant. The principal may elect to do this in order to forestall the claimant from exercising his right to suspend work or supply of goods, but it is uncertain whether the exercise of this right may prevail against insolvency laws: see *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* (1990). The Minister in his speech suggested that this right is not intended to be exercised in a manner which is in conflict with insolvency laws: “If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable.”

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51 Section 26(3) of the Singapore BCISP Act.
52 Section 24 of the Singapore BCISP Act.
54 Speech of Mr Cedric Foo, the Minister of State for National Development, in Parliament 16 November 2004
Finally, under the Act, the claimant has a lien on goods supplied by the claimant to the respondent which are unfixed and which have not been paid for.\textsuperscript{55}

\section*{JURISDICTIONAL CHALLENGES}

\subsection*{Likelihood of Challenge}

Experience in both New South Wales and the United Kingdom suggests that a proportion of adjudication determinations may be expected to be challenged at the time of enforcement. It may be that in Singapore, most disgruntled respondents may prefer to route their grievance through the adjudication review process since this offers a simpler and cheaper platform. On the other hand, assuming that a respondent is successful in persuading the review adjudicator to substitute a new adjudication determination for the previous determination, this remains susceptible to jurisdictional challenge in the courts. Admittedly, where the review adjudicator refuses the review application, the effect might be to discourage the respondent from following through with a jurisdictional challenge and instead prompting him to leave the dispute to be dealt with as a matter for final determination by an arbitrator or the courts.

\section*{The Hodgson Principles}

\textsuperscript{55} Section 25 of the Singapore BCISP Act.
In New South Wales, the basis for considering the nature of the challenges which could be mounted against an adjudication determination has been laid down definitively by two recent decisions of the New South Wales Court of Appeal. In *Brodyn Pty Ltd v Davenport* (2004), the adjudicator determined that the claimant contractor is entitled to a payment claim for the sum of $180,059. The respondent sought judicial review pursuant to quash the determination on “the basis of an error of law that appears on the face of the record of the proceedings”. The Court of Appeal upheld the lower court’s decision that there was no basis for resisting the determination. Hodgson JA in delivering judgment of the Appeal Court affirmed that the legislative intention behind the security of payment regime is to “provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay”. In arriving at his decision he considered that “for a document purporting to be an adjudicator’s determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination”. On his approach, an adjudicator’s determination would be void in any of the following situations:

1. if the determination does not comply with certain “*basic and essential requirements*”. These are considered further below,
2 if the determination does not represent a bona fide attempt by the adjudicator to exercise the relevant power for the purpose for which it was given by the legislation,

3 If there is a substantial denial of natural justice.\(^{58}\)

The learned judge appeared to suggest that these may be distinguished from the other more detailed (but nevertheless, non-essential) requirements. These requirements may equally demand compliance but, in his view, legislature did not intend the compliance with these requirements to reach the same exactitude.\(^ {59}\) He considered the requirements under this second category to include the provisions relating to the content of payment claims, the time when an adjudication application can be made and the time when an application can be determined.

“Basic and Essential Requirements”

The learned judge of appeal then listed the “basic and essential requirements” which he considers necessary to sustain an adjudicator’s determination:

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\(^{58}\) [2004] NSWCA 394, para 55.

There exists a construction contract between the claimant and the respondent to which the Act applies.

The claimant has served on the respondent a payment claim.

The claimant has made an adjudication application to an authorised nominating body.

The adjudication application had been referred to an eligible adjudicator who had accepted the application.

The adjudicator has determined the application in accordance with the Act. In particular, he must have determined the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the determination must have been issued in writing.\(^{60}\)

This approach was followed by the Court of Appeal in *Transgrid v. Siemens Ltd* (2004),\(^{61}\) where Hodgson JA again delivered the judgment of the Appellate Court. The *Transgrid* decision is particularly instructive on the subject.

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\(^{60}\) [2004] NSWCA 394, para 53. Although Hodgson JA cited *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, with respect, the approach taken by the learned appeal judge appears to be quite different that taken by the House of Lords in *Anisminic*. It may be that his approach is appropriate given the highly prescriptive feature of the New South Wales Act.

of errors of law in a determination. In that case, the respondent alleged that the adjudicator had committed a jurisdictional error when he had not calculated the progress payment strictly in accordance with the payment terms of the contract as required by the Act. Hodgson JA in that case applied the same approach which he adopted in *Brodyn* and held that the determination in this case complied with the basic and essential requirements of a determination as required under the Act. He then pointed out that there was not complaint of fraud or breach of the principles of natural justice. Accordingly the only complaint was that the adjudicated amount was not calculated in accordance with the terms of the contract as required by section 9(a) of the NSW Act. He ruled that even if this was indeed the case the error of the adjudicator would have been “a mere error of law and this alone was not sufficient to render the determination invalid”.

Thus, so long as an adjudicator has regard to the provisions of the contract, the fact that he misconstrued the operation of the provisions and then proceeded with his determination on this misconstruction will not afford sufficient ground for an aggrieved party to resist the enforcement of a determination.

**CONCLUSION**

The anxieties on the part of owners and, to some extent, main contractors with the operation of the Act are understandable. The regime does not fine tune

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existing payment practices in the industry but seeks, instead, to reform payment behaviour among the players in the industry. Closer examination, however, suggests that it creates no new rights. Its prescriptions are intensely procedural. Certainly, the right to be paid and to withhold work when payment is not forthcoming has always existed but the overlays of contractual drafting and legal processes have not always been able to ensure that these rights could be enforced with reasonable dispatch. The situation is aggravated by a degree of complacency within the industry for some years in recognizing these rights. The telling effect of the regime, therefore, is no more than a reform of payment practices to restore to parties carrying out work or supplying goods and services the right to be paid in a timely manner.
About the Author

CHOW KOK FONG is an arbitrator and mediator, practicing under his firm, EQUITAS Corporation. He was previously Managing Director for the International Division in Capitaland Commercial and, prior to that, Director of Projects for City Developments Ltd. Earlier, he was the Chief Executive of the Construction Industry Development Board (predecessor of the Building and Construction Authority). He has written 6 books, including the standard text, Law and Practice of Construction Contracts (now in its third edition) and will be releasing his 7th book on Security of Payments and Construction Adjudication in April 2005. Mr Chow has consulted as a construction industry specialist to the World Bank and was founding President of the Society of Project Managers. Recently, he was elected Chairman of the Society of Construction Law.

Contact Particulars:

Equitas Corporation Pte Ltd
1 Raffles Place #39-01
OUB Centre
Singapore 048616

Tel: (65) 6327 6113
Fax: (65) 6538 4538
E-mail: kfchow@equitascorp.com