

JUDICIAL DECISIONS IN SETTING ASIDE ADJUDICATION
DETERMINATION UNDER THE SINGAPOREAN BUILDING AND
CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

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A thesis submitted in partial fulfilment of the
requirements for the award of the degree of
Master of Science (Construction Contract Management)

Faculty of Built Environment and Surveying
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MARCH 2021

ACKNOWLEDGEMENT

First of all, I would like to give million thanks to my thesis advisor Dr. Farrah Azwanee binti Aminuddin for her kind guidance and patience in leading me to complete this topic. Without her supervision and advice, this thesis may not be great at all. I would like to express my truly appreciation to my current employer Er. Chua Chin Hiang, the director of GeoAlliance Consultant Pte Ltd for providing me a part-time basis job during my master studies. The flexibility of working hours enables me to complete this thesis within a semester while having a fixed income to feed up my family. The reason of choosing this topic is that adjudication is one of the most common dispute resolutions in Singapore. In my experience having in Singapore's construction industry, so long as there is the payment dispute which cannot be settled amicably, the SOPA will be the first to be adopted commonly to settle the payment dispute. By doing this thesis, I have the opportunity to explore deeply how the adjudication system work in Singapore and perhaps can become a registered adjudicator in future.

ABSTRACT

The purpose of this study is to investigate the grounds that can successfully be used to set aside the adjudication determination under Singaporean Building and Construction Industry Security of Payment Act (SOPA). The recent amendment made to the previous Act had been officially enforced in 15 December 2019. In relation to the section for any party to an adjudication commences proceedings to set aside the adjudication determination, the several grounds are furnished in Section 27 (6) of Building and Construction Industry Security of Payment (Amendment) Act 2018 which are considered non-exhaustive and may require some times to practise. It's not difficult to anticipate that there will be more potential challenges for the party to an adjudication who think they are aggrieved to the adjudication determination or adjudication review determination under these grounds. By referencing and analysing the most recent law cases, the author hopes to figure out and establish the extent of success of setting aside adjudication determination based on court decisions. The research methodology adopted will be literature review and law cases analysis as these methods are able to align with this research intention and objectives. Data collection will be mainly from case laws. There are total of fourteen (14) Singaporean local law cases to be selected for analysis. Every selected case will have different substantial matters and issues in setting aside of adjudication determination. The author will furnish the details in the respective cases such as backgrounds, issues (grounds to set aside the Adjudication Determination) and the final judgements in a summary table form which provides the facts and fundamental information for each case analysis. The completion of cases analysis will assist in getting the findings on the specific circumstances to challenge the Adjudication Determination and viable grounds to set aside the Adjudication Determination. The findings from the case studies are the court definitely not to review the merits of the adjudicator's decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA. Summarily, theory of "dual railroad track system" had been rejected in the recent law cases, such that the party seeking payment has the option to elect between the statutory and contractual entitlement to payment is no longer valid. It is confirmed that the "gap-filling" role of SOPA is only invoked where there are no relevant contractual provisions to progress payment. Upon studying local cases, it's found that in order to set aside an adjudication determination, the respondents in an adjudication tend to challenge the technical issues on jurisdiction and conducts of an adjudicator or review adjudicator; or rely on the breach of natural justice by an adjudicator but all too often it is used mistakenly and unlikely to succeed; set aside the adjudication determination based on the ground of fraud when the claimant is not acted with probity when pursuing claims. After identifying all the specific circumstances of succeed in setting aside the adjudication determination and establishment of mutual understanding by the clients, contractors and suppliers can only significantly reduce setting aside cases in future and thus achieve the purpose of the Act which is to facilitate cash flow to downstream players in the Singaporean construction industry.

ABSTRAK

Tujuan kajian ini adalah untuk menyelidiki alasan yang berjaya digunakan untuk menyetujui penentuan keputusan di bawah Singaporean Building and Construction Industry Security of Payment Act (SOPA). Pindaan baru-baru ini yang dibuat terhadap Undang-undang sebelumnya telah dikuatkuasakan secara rasmi pada 15 Disember 2019. Sehubungan dengan bahagian untuk mana-mana pihak yang melakukan pengadil memulakan prosiding untuk menyetujui penentuan keputusan, beberapa alasan diberikan dalam Seksyen 27 (6) Building and Construction Industry Security of Payment (Amendment) Act 2018 yang dianggap tidak lengkap dan mungkin memerlukan beberapa waktu untuk berlatih. Tidak sukar untuk menjangkakan bahawa akan ada lebih banyak tantangan yang berpotensi bagi pihak yang mengadili yang berpendapat bahawa mereka terkilang dengan penentuan keputusan atau penentuan kajian semula berdasarkan alasan ini. Dengan meneliti dan menganalisis kes-kes undang-undang yang paling baru, penulis berharap dapat mengetahui dan menentukan sejauh mana kejayaan menyetujui penentuan keputusan berdasarkan keputusan mahkamah. Metodologi penyelidikan yang digunakan adalah tinjauan literatur dan analisis kes undang-undang kerana kaedah ini dapat selaras dengan tujuan dan objektif penyelidikan ini. Pengumpulan data akan terutamanya dari undang-undang kes. Terdapat empat belas (14) kes undang-undang tempatan Singapura yang akan dipilih untuk dianalisis. Setiap kes yang dipilih akan mempunyai masalah dan permasalahan penting yang berbeza dalam mengesampingkan penentuan keputusan. Penulis akan memberikan perincian dalam kes masing-masing seperti latar belakang, isu (alasan untuk menyetujui Penentuan Adjudikasi) dan penilaian akhir dalam bentuk jadual ringkasan yang memberikan fakta dan maklumat asas untuk setiap analisis kes. Penyelesaian analisis kes akan membantu mendapatkan penemuan mengenai keadaan tertentu untuk mencabar Penentuan Adjudikasi dan alasan yang layak untuk menyetujui Penentuan Adjudikasi. Penemuan dari kajian kes tersebut adalah pengadil yang pasti tidak akan mengkaji kebaikan keputusan pengadil, dan pengesahan apa pun mesti dibuat berdasarkan isu-isu yang berkaitan dengan bidang kuasa pengadil, pelanggaran keadilan semula jadi atau ketidakpatuhan terhadap SOPA. Secara ringkas, teori "sistem landasan kereta api ganda" telah ditolak dalam kes-kes undang-undang baru-baru ini, sehingga pihak yang meminta pembayaran memiliki pilihan untuk memilih antara hak berkanun dan kontrak untuk pembayaran tidak lagi berlaku. Telah disahkan bahawa peranan "mengisi jurang" SOPA hanya digunakan apabila tidak ada peruntukan kontrak yang relevan untuk memajukan pembayaran. Setelah mengkaji kes-kes tempatan, didapati bahawa untuk menyetujui penentuan keputusan, responden dalam pengadilan cenderung untuk mencabar isu-isu teknikal mengenai bidang kuasa dan tingkah laku seorang pengadil atau penilai penilai; atau bergantung pada pelanggaran keadilan semula jadi oleh pengadil tetapi terlalu sering ia digunakan secara salah dan tidak mungkin berjaya; menyetujui penentuan penghakiman berdasarkan alasan penipuan apabila pihak yang menuntut tidak bertindak dengan pasti semasa mengejar tuntutan. Setelah mengenal pasti semua keadaan khusus untuk berjaya menyetujui penentuan keputusan dan persefahaman oleh pelanggan, kontraktor dan pembekal hanya dapat mengurangkan kes pengesahan secara signifikan pada masa akan datang dan dengan demikian mencapai tujuan Akta ini adalah untuk memudahkan aliran tunai ke pemain hiliran dalam industri pembinaan Singapura.

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LIST OF ABBREVIATIONS

ANB	-	Authorised Nominating Body
ADR	-	Alternative Dispute Resolution
BCA	-	Singapore's Building and Construction Authority
NSW Act	-	New South Wales' Building and Construction Industry Security of Payment Act
PSSCOC	-	Public Sector Standard Conditions of Contract for Construction Works 2014
SAL	-	Singapore Academy of Law
SIA	-	Singapore Institute of Architects, Articles and Conditions of Contract, Measurement Contract 9 th Edition
SMC	-	Singapore Mediation Centre
SOPA	-	Singapore's Building and Construction Industry Security of Payment Act
SOPR	-	Singapore's Building and Construction Industry Security of Payment Regulations
TOP	-	Temporary Occupation Permit
UTM	-	Universiti Teknologi Malaysia

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Payment in any industry has generally been an issue of concern. In the construction industry payment is an issue of major concern. This is generally because: (a) The durations of construction projects are relatively long compared to other industries; (b) The amount of each progress payment claim is relatively large due to the construction project size is relatively large; and (c) Payment terms are usually on credit rather than payment on delivery (Ali, 2006). Today, there has been an increase of large and complex disputes to be referred to adjudication such as delay, disruption and acceleration claims. (Ansary et al., 2017)

The enactment of Building and Construction Industry Security of Payment Act of 2004 (SOPA) came into effect on 1 April 2005 and the Singaporean construction industry has grown in familiarity with its implementation over the years. The Singaporean regime was introduced after the precedent regimes in the United Kingdom, Australia (in the states of New South Wales, Queensland, Victoria, and Western Australia), and New Zealand (Teo, 2008). The legislation has broadly followed the Australian regimes and closely resembled the regime under the *Building and Construction Industry Security of Payment Act 1999 (New South Wales Act)*. (Gaitskell, 2007). The Act aims to improve cash-flow in the built environment sector by giving parties the right to facilitate progress payment for construction work done in Singapore. It establishes a quick and inexpensive adjudication mechanism to resolve payment disputes and the parties can still proceed concurrently or subsequently to other dispute resolution processes such as arbitration for the more complex final account or damages claims. After all, the sum paid under an adjudication determination is taken into account in any subsequent arbitration award (Mahtani, 2009). Its stated objective was the implementation of changes to payment obligations across the

construction industry and to ensure the smooth completion of construction projects in Singapore through the improvement of cash flow. The mechanism by which this stated objective was to be achieved was the statutory adjudication process. (Pillai & Yap, 2011)

According to the former Chief Justice Chan Seek Keong (Chow, 2013): *“Despite the considerable efforts which have gone into the setting up of the statutory regime to make the construction industry financially more efficient, it will be necessary to periodically review and refine various aspects of the Act to achieve the policy objectives behind the Act”*. The Singapore SOPA is indeed necessary to be constantly reviewed in order to fit the contemporary environment of the construction industry.

Nothing is perfect and some sections with flaws in SOPA emerged since the implementation of SOPA. It can be observed from the law cases of setting aside the adjudication determination that the parties tend to raise the payment disputes due to some ambiguous and unclarified clauses in SOPA. More than a decade has passed since the issuance of previous revised edition 2006 of SOPA, the Building and Construction Authority (BCA) recently launched Building and Construction Industry Security of Payment Amendment Act 2018 and the Building and Construction Industry Security of Payment (Amendment) Regulations 2019 to amend the Building and Construction Industry Security of Payment Act (Chapter 30B of the 2006 Revised Edition) on 15 December 2019 and this will apply to all payment claims served after that date. The main objectives of amendments are known to expand and clarify the scope of the application of the Act. Secondly, requirements on handling of payment claims and responses are enhanced. Thirdly, the adjudication process is further improved in the latest amendment act. Lastly, it provides other revisions to improve the operation of the Act and Regulations.

The amendment is deemed to effectively improve the administration of the Act and proceedings under the Act, it will be helpful to all the construction stakeholders. The SOPA and its accompanying Regulations are interrelated, the former is a bill that has been enacted by parliament whereas the latter is issued by the relevant authorities in charge of the Act. E.g., Acts regarding construction industry will have regulations

issued by Building and Construction Authority (BCA). The SOPA is considered as a legislation that is more specific in adjudication of claims for payment for work and supply of goods and services in the Singaporean construction industry whereas the purpose of regulations is to assist in the administration of the Acts and provide more details of how the Act is to be implemented.

Based on the statistic made in early stage of SOPA, it would appear that the Singapore regime has enjoyed some success thus far in achieving its policy objectives of expediting payment and improving cash flow within the construction industry. (Fenn & O’Shea, 2008). The questions whether apparent early success can be sustained and improved upon had been answered in recent statistic. With reference to Figure 1.1, since year 2005 of its enactment, the bar chart indicates more disputes pertaining to the payment issues were chosen to be settled through adjudication in the recent years. A record number of around 500 cases had been lodged for adjudication in 2016 (which is only specific to disputes under construction contracts). Since 2014, the popularity of adjudications under the SOPA has been increasing from less than 100 per year (in the early years) to around 400 cases a year. As of mid-2018, the adjudication process has facilitated payments of over \$940 million. (J. Tan, 2019). The increment of the number of adjudication cases represents many payment disputes have been adjudicated successfully under the SOPA.

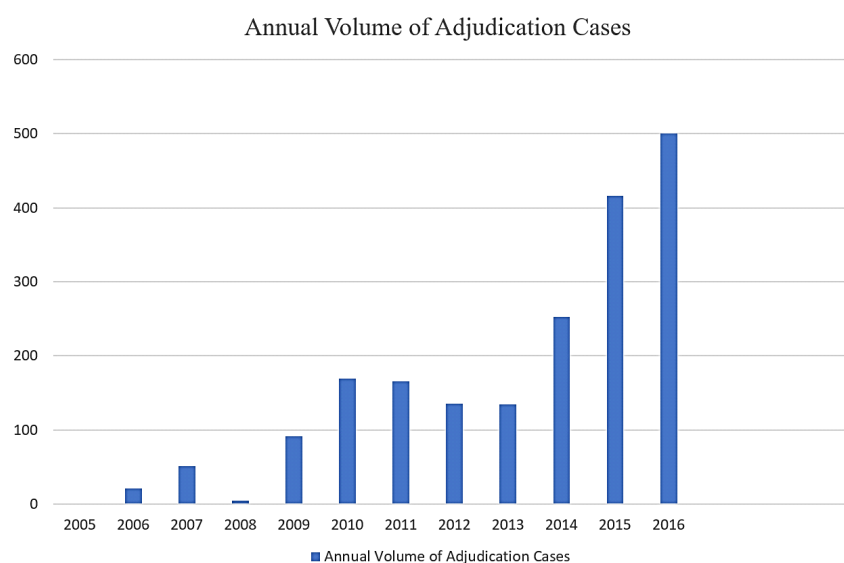


Figure 1.1 Annual Volume of Adjudication Cases in Singapore Construction Industry (Data Obtained from Singapore Mediation Centre)

1.2 Background of Study

What is adjudication? Adjudication is a statutory dispute resolution process and effectively private temporary ‘Legal System’ agreed by the parties. It has been described as a procedure where, by contract, a summary interim decision-making power in respect of disputes is vested in a third-party individual (the adjudicator) who is usually not involved in the day-to-day performance or administration of the contract, and is neither an arbitrator nor connected with the state. It is considered to be a judicial process, albeit under the great time pressure and following non-judicial procedures (S. G. Tan, 2007). Adjudication is available to a party (Claimant) who has carried out construction works and has not received payment. The process is engaged by the lodgement of an adjudication application with the Singapore Mediation Centre (SMC) and afterwards the dispute will be heard and decided by an adjudicator appointed by the SMC.

The adjudication regime in Singapore is focused on the resolution of ‘‘payment disputes’’ within the construction industry. SOPA is known as the shortest timeframe adopted among all the other regimes; the timeframe prescribed under the Singapore Act for an adjudicator to make a determination is generally within 14 days from the commencement of the adjudication (section 17(1)(b)) (Teo, 2008).

According to the latest amendment of SOPA section 27(7), respondent’s reasons for withholding any amount cannot be raised before the Courts during setting aside if the reasons are not raised earlier as in the adjudication response. However, it allows the respondent to utilise the reasons as an objection to commence proceedings to set aside the adjudication determination before the Courts if he is able to prove that (i) new circumstances had arisen; (ii) the circumstances giving rise to the objections could not be known earlier; or (iii) patent error. Therefore, the respondent shall raise every objection at the onset when preparing the payment response, the concept of ‘‘*speak now or forever hold your peace*’’ is implied in the latest amendment of SOPA.

The purpose of SOPA is to prevent the delays of payment by the client to the suppliers and contractors who have completed the certain work done. Therefore, the

adjudication always emphasises “award of the adjudicator should be implemented immediately” and that “any appeals to arbitration or the court should not be permitted to delay the implementation of the award, unless an immediate and exceptional issue arises for the courts...” (S. G. Tan, 2007). SOPA has the shortest period that claimant is entitled to receive the adjudicated amount is within 21 days from the date of adjudication application thereby the operation and progress of the construction will not be seriously disrupted due to any bad debt. The earliest the respondent shall pay that adjudicated amount within 7 days after the adjudicator’s determination is served on him according to the section 22 (1) (a) of the amended Act.

However, the adjudicator sometimes may get the determination wrong, but the courts will still enforce the wrong determination of an adjudicator (Fenn & O’Shea, 2008). Mr Justice Dyson took a firm approach and held that the adjudicator’s determination appeared on its face to have been properly issued, and it was binding and enforceable in the courts whether or not the merits of the validity of the decision were being challenged (Gaitskell, 2007).

The SOPA interprets “adjudication determination” the determination of the adjudicator in relation to an adjudication. According to section 17(2) of SOPA, the adjudicator shall determine the adjudicated amount to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount; and the proportion of the costs of the adjudication payable by each party to the adjudication. The adjudicator’s determination is temporarily binding on the parties and only resolves the dispute on a single progress payment. Any other types of disputes, such as disputes relating to defects or delays, must be dealt with elsewhere such as via arbitration or mediation.

Particularly, SOPA provides its own procedures whereby an aggrieved party may lodge an application to the Authorised Nominating Body (ANB) for the review of the Adjudication Determination (“Adjudication review application”). This adjudication review mechanism allows a respondent or claimant who is a party to an adjudication to request the review of the Adjudication Determination by another adjudicator (known as “the review adjudicator”) if the adjudicated amount exceeds the

response amount by the respondent or the adjudicated amount less than claimed amount by the claimant.

Sections 18 and 19 of the SOPA set out the procedures for the review of an adjudicator's determination on a payment claim dispute. According to section 18 of SOPA, any application for review of an adjudication determination must be made within seven days of receipt of that determination, and in making the application the respondent is obliged to pay the amount already determined in the challenged adjudication determination (Gaitskell, 2007). Once the review is determined, the determination is binding on both parties to the Adjudication unless a court refuses to enforce the Adjudication determination or the dispute is finally resolved in subsequent court proceedings or arbitration or the parties have decided to settle the dispute. (Pillai & Yap, 2011)

Further, section 21 of the SOPA provides for a party dissatisfied with the Adjudication Determination or Adjudication Review Determination to apply to the High Court to set aside the determination. At the outset, it is important to note that a challenge against the determination is not an appeal against the determination of the adjudicator to the Court (Pillai & Yap, 2011). It would follow that the court in determining the case for a challenge does not have to theoretically revisit the matters dealt with by the adjudicator. This feature, therefore, distinguishes an adjudication review from a legal challenge against an adjudication determination (S. G. Tan, 2007). There is no right of appeal to Court. The Court may however set aside an adjudication determination if there has been procedural impropriety (e.g. breach of natural justice) or illegality (e.g. fraud), this principle was declared by the judge in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd [2015] SGCA 42*.

If a respondent (i.e., the “Employer”) applies for a review of the Adjudication Determination, the respondent would be required to pay the Adjudicated Amount to the Claimant prior to his application for review so that the claimant (i.e., the “Contractor”) would not be deprived of payment and the cash flow for the construction project. But, there has been a spate of recent cases where the jurisdiction of the adjudicator has been challenged and consequently payment delayed. (Lim, 2015)

In determining whether a challenge to an Adjudication Determination falls within this limited supervisory role of the courts, a distinction is drawn between jurisdictional errors and non-jurisdictional errors. Errors of fact or law made by the adjudicator which impact upon his jurisdiction to hear the dispute are regarded as jurisdictional errors. Conversely, errors of fact or law which do not affect the adjudicator's jurisdiction to hear the dispute are considered non-jurisdictional errors. Where the error is jurisdictional in nature, the courts have been willing to intervene and set aside the adjudicator's determination. Where the error is non-jurisdictional in nature, that is to say an error with regard to the substance of the dispute, the courts have declined to intervene. The challenge is in identifying which of an adjudicator's errors affects his jurisdiction to hear the dispute and which do not. (Pillai & Yap, 2011)

The construction players shall look into the matter of what extent should the court interfere with an adjudicator's determinations. If not, a liberal approach would invite more setting aside applications and undermine the statutory purpose of creating a speedy and low-cost adjudication process while turning away from putting right erroneous adjudication determinations could create the impression that the court countenances injustice. (Pillai & Yap, 2011)

As a safeguard, there would be a limited window within which responding parties can challenge the validity of adjudicators' determinations. This would not allow them to 'appeal' or challenge the correctness of determinations but instead to challenge validity from a procedural perspective. Grounds on which challenges may be made would include an adjudicator acting without or in excess of their jurisdiction, an adjudicator failing to act independently and impartially, an adjudicator breaching principles of natural justice and (in extreme cases) fraud or bribery has occurred. (Development Bureau [DEVB], 2015)

The law surrounding challenges to validity of adjudicators' determinations can be complex. The process can be rough and ready, so only in very clear cases of an adjudicator having no jurisdiction or conducting proceedings unfairly and in breach of natural justice will a challenge succeed and a determination not be enforced (Development Bureau [DEVB], 2015). There are safeguards and there is a basic

requirement that the adjudicator must conduct the adjudication in accordance with the principles of natural justice. (Dancaster, 2008)

Jurisdiction challenge in adjudication are common, nevertheless, the construct of the challenge is the key (Sahab & Ismail, 2011). Perhaps from the analysis of the previous law cases enables to understand what type of challenge is being successfully in setting aside the adjudication determination. Possible legal issues that may arise towards the implementation of SOPA (Singapore), hence affecting its effectiveness. (Mohamed Nasir et al., 2018)

1.3 Problem Statement

In Singapore, the main objective of having a detailed account of the provisions for payments is to ensure cash flow by way of payment for works properly done. The use of legislation, which may conceivably violate the conventional wisdom of freedom of contract, is nonetheless a blunt but practical and equitable instruction for ensuring healthy cash flow (Cheung, 2006). The Courts in New South Wales have consistently spoken of the scheme of the Act to be “pay now, argue later”. (Ansary et al., 2017)

According to the statistics of adjudication application published in Building and Construction Authority (BCA)’s website, the tendency indicates that the filing number for adjudication has increased significantly thereby we can determine the implementation of adjudication has achieved certain success in Singapore. Correspondingly, the adoption of litigation and arbitration as procedures for settling payment disputes in Singaporean construction has reduced as well. Therefore, we could affirm that the SOPA has effectively operated its function as a payment dispute resolution for various parties involved in the construction industry and it indeed creates a more favourable operating environment. However, in actual practice, Chow (2013) found that many respondents are prone to raising defences to challenge the adjudication determination and consequently delay the payment to the contractors or suppliers for work done. The respondents (“the aggrieved parties”) can challenge the

Adjudication Determination in adjudication review under section 18 or in court under section 27 (5) of SOPA.

Before the new amended SOPA comes into effect, the previous SOPA only contains provisions for the application to challenge the Adjudication Determination and no grounds of challenge are provided under the Act (S. G. Tan, 2007). But then now the latest amended SOPA has added the new section 27 (6) which listed down the grounds to set aside an Adjudication Determination in Court as follows: -

- (a) The payment claim was not served in accordance with section 10 (“Payment Claims”);
- (b) The claimant served more than one payment claim in respect of a progress payment, otherwise than permitted under section 10;
- (c) The payment claim was in respect of a matter that has already been adjudicated on its merits in proceedings under this Act;
- (d) The adjudication application or the adjudication review application was not made in accordance with the provisions of this Act;
- (e) The adjudicator failed to comply with the provisions of this Act in making the adjudication determination;
- (f) The adjudication determination requires the claimant to pay an adjudicated amount to the respondent;
- (g) A breach of the rules of natural justice occurred in connection with the making of the adjudication determination;
- (h) The making of the adjudication determination was induced or affected by fraud or corruption.

Even though the grounds have been included in the latest amendment of SOPA, they are not exhaustive (Koh & Wong, 2019). For instance, the payment claim was not served in accordance to the SOPA but no specific circumstance and extent of non-compliance are given which confirms the adjudication determination to be set aside.

Therefore, the set aside Adjudication Determination will be being challenged in high courts and it will defeat the purpose of reduction in the use of litigation and arbitration proceedings at the same time affecting its effectiveness. Furthermore, the respondents of adjudication shall identify the limited extent of grounds to which one party is allowed under the law to challenge the adjudicator's determination and jurisdiction.

1.4 Research Objectives

This paper aims to identify judicial decision in setting aside adjudication determination under the Singaporean Building and Construction Industry Security of Payment Act (the "SOPA").

1.5 Scope of Research

The main idea of this research is to identify the point of view of Courts to the set aside adjudication determination. The most recent cases which involved the application of setting aside of adjudication determination will be reviewed and analysed accordingly to achieve the research objective. There are total of fourteen (14) cases be studied collectively in identifying the judicial decision in setting aside application. In short, this research will concentrate in the context of jurisdiction of adjudicator; technical breaches; the principle and rule of natural justice; and the fraud.

1.6 Significant of Research

Having no doubt that the latest enacted amendment of SOPA will unquestionably bring the Act forward and be more effective as most of the issues had been fully tackled and responded by adding the additional points in the relevant sections. However, the listed grounds under section 27 (6) are still not exhaustive and it may cause more setting aside cases in future as the respondents may prone to

procrastinate the payment to the claimant and hence undermining the claimants' cash flow.

Perhaps identifying the judicial decision from the passed law cases enables the respondents to understand the extent of successful set aside the adjudication determination. The collected reviews and outcome from the judicial point of views on the grounds that the courts decide to interfere with an adjudicator's determination in the context of jurisdiction of adjudicator; technical breaches; the principle and rule of natural justice; and the fraud, may assist and promote the adjudication as the alternative dispute resolution mechanism in Singapore construction industry, if it has clearer sight on the new particular sections.

1.7 Research Methodology

Research methodology is important and defined as systemic way of resolving a problem. The research approaches are mainly focused as follow: -

1. Doctrinal legal research as in the well-established legal rules will be applied for the research.
2. Non- doctrinal research was carried out by observing the behaviour through law cases. (Arzlee Hassan et al., 2019)

(i) The implementation of Building and Construction Industry Security of Payment Act of 2004 in Singapore.

(ii) Data analysis & findings- grounds to challenge the adjudication determination.

(iii) Jurisdiction in Questions: Study of Law Cases. The cases were reviewed to explore the implementation of statutory adjudication and the question of adjudicators' jurisdictional issues.

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