

## OUT OF THE FRYING PAN, INTO THE FIRE

### Does Section 17(3) Really Resolve the Status of Claims for Damage, Loss or Expense in Adjudication Proceedings?

[2026] SAL Prac 1

This article explores the ambiguities in the wording, scope and exceptions in s 17(3) of the Building and Construction Industry Security of Payment Act 2004, which enterprising employers and contractors can take advantage of to raise claims for damage, loss or expense in adjudication proceedings.

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#### I. Introduction

1 On 15 December 2019, the amendments to the Building and Construction Industry Security of Payment Act<sup>1</sup> (“Pre-Amendment SOP Act”) came into operation. These amendments were aimed at improving the administration of the Act and the adjudication regime thereunder.

2 Amongst these amendments, a new s 17(3) was introduced to limit the scope of claims for damage, loss or expense in adjudication proceedings. However, this has proven to be like the nine-headed Hydra monster that Hercules was tasked to slay in his Second Labour, because when one head was cut off, two more would grow back in its place. Indeed, the issues surrounding the interpretation of s 17(3) have not only rendered it ineffective in staving off damage, loss or expense claims from adjudication

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<sup>1</sup> Cap 30B, 2006 Rev Ed.

proceedings, but have also created a backdoor for such claims to be raised in adjudication.

## II. Background to section 17(3)

3 The Pre-Amendment SOP Act was enacted to facilitate cash flow in the building and construction industry by ensuring that contractors and subcontractors receive timely payment for work done and materials supplied.<sup>2</sup> This purpose was achieved in two principal ways: (a) the Pre-Amendment SOP Act established that parties who have done work or supplied goods are entitled to payment as of right; and (b) the Pre-Amendment SOP Act created a fast and low-cost adjudication system to resolve payment disputes.<sup>3</sup>

4 However, following the commencement of the adjudication regime, claimants raised complex claims for prolongation costs and acceleration costs in adjudication proceedings, whilst respondents also raised complex crossclaims for liquidated damages, defects and back charges.<sup>4</sup> This disrupted the very purpose that the Pre-Amendment SOP Act sought to achieve – namely, to facilitate cash flow in the industry – because: (a) such complex claims were predominantly not claims for works done or goods and services supplied;<sup>5</sup> and (b) such complex claims unduly protracted or delayed the adjudication process.<sup>6</sup>

5 Therefore, on 15 December 2019, a new s 17(3) was introduced to expressly limit the scope of claims for damage, loss and expense in adjudication.<sup>7</sup> Section 17(3) of the Building

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2 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [1].

3 *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 370 at [18]–[19].

4 Singapore Parl Debates, Vol 94, Sitting No 84; [2 October 2018] (Zaqy Mohamad, Minister for National Development).

5 Singapore Parl Debates, Vol 94, Sitting No 84; [2 October 2018] (Zaqy Mohamad, Minister for National Development).

6 Singapore Parl Debates, Vol 94, Sitting No 84; [2 October 2018] (Zaqy Mohamad, Minister for National Development).

7 Chow Kok Fong *et al*, *Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at para 2.002.

and Construction Industry Security of Payment Act 2004<sup>8</sup> (“SOP Act”) reads as follows:

(3) In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —

(a) any document showing agreement between the claimant and the respondent 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.

6 Essentially, s 17(3) prescribes that an adjudicator must disregard a claim related to damage, loss or expense, unless either of the following exceptions apply:

(a) the claim is supported by any document showing that parties agreed to the quantum of the claim; or

(b) the claim is supported by a certificate or some other document issued pursuant to the contract.

7 Since s 17(3) took effect on 15 December 2019, there have been more questions than answers regarding the status of claims for damage, loss or expense in adjudication proceedings. Such questions include:

(a) What constitutes “damage, loss or expense”?

(b) What qualifies as a “document showing agreement between the claimant and the respondent on the quantum” of damage, loss or expense?

(c) What qualifies as a “certificate or other document that is required to be issued under the contract”?

(d) If any of the exceptions in s 17(3) apply, does an adjudicator simply allow the claim for “damage, loss or expense” or does he/she still have to adjudicate the claim?

8 Such questions, and the lack of concrete answers thereto, have not only resulted in s 17(3) being ineffective in limiting the scope of claims for damages, loss and expense in adjudication proceedings, but have also created backdoors for such complex claims to be brought to adjudication.

### III. What constitutes “damage, loss or expense”?

9 The SOP Act has provided no definition nor elaboration about what amounts to “damage, loss or expense”. Therefore, unsurprisingly, disputes have arisen as to whether a claim is related to “damage, loss or expense” or not.

10 Over the last six years, local courts and adjudicators have provided some principles to elaborate on the scope of “damage, loss or expense” under s 17(3), namely:

(a) The words “damage, loss or expense” in s 17(3) encompass a very broad scope of claims,<sup>9</sup> whether quantifiable or otherwise.<sup>10</sup>

(b) The type of claims for damage, loss or expense covered by s 17(3) is unqualified and not restricted by complexity of the claim.<sup>11</sup>

(c) The legislative intent behind s 17(3) was to exclude the consideration of claims that are not in the nature of work done or goods and services supplied.<sup>12</sup>

11 In addition, local jurisprudence has now established that the following categories of claims generally fall within the scope of “damage, loss or expense” under s 17(3):

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9 *BEM Pte Ltd v BEN Pte Ltd* [2021] SCAdjR 190 at [114].

10 *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [146].

11 *BCP Pte Ltd v BCQ Pte Ltd* [2020] SCAdjR 204 at [267]; *BEQ Pte Ltd v BER Pte Ltd* [2021] SCAdjR 248 at [130]–[131].

12 *BEM Pte Ltd v BEN Pte Ltd* [2021] SCAdjR 190 at [114].

- (a) liquidated damages;<sup>13</sup>
- (b) prolongation costs;<sup>14</sup>
- (c) acceleration costs;<sup>15</sup>
- (d) standby costs;<sup>16</sup>
- (e) back charges;<sup>17</sup>
- (f) defects and rectification costs;<sup>18</sup>
- (g) damages arising from breach of contract;<sup>19</sup>
- (h) costs incurred as a result of termination;<sup>20</sup>
- (i) third-party takeover extra costs;<sup>21</sup> and
- (j) loss of revenue.<sup>22</sup>

12 However, the above categorisations are not set in stone. Indeed, due to the lack of a clear definition for “damage, loss or expense”, clever claimants and respondents have now sought to frame their claims in such a manner to avoid falling within the precluded scope of “damage, loss or expense” under s 17(3).

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13 *Chow Kok Fong et al, Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at paras 1.012 and 2.006; *BEQ Pte Ltd v BER Pte Ltd* [2021] SCAdjR 248 at [132]; *BCP Pte Ltd v BCQ Pte Ltd* [2020] SCAdjR 204 at [271]; *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [151].

14 *Chow Kok Fong et al, Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at paras 2.005–2.006; *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [45]; *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [148].

15 *Chow Kok Fong et al, Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at paras 1.012 and 2.006.

16 *BEM Pte Ltd v BEN Pte Ltd* [2021] SCAdjR 190 at [115]–[116].

17 *Ee Hup Construction Pte Ltd v China Jingye Engineering Corp Ltd (Singapore Branch)* [2025] 1 SLR 175 at [25]; *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [127].

18 *Chow Kok Fong et al, Amendments to the SOP Act: A Commentary on the Building and Construction Industry Security of Payment (Amendment) Act 2018* (Sweet & Maxwell, 2019) at para 2.006; *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [156].

19 *BEQ Pte Ltd v BER Pte Ltd* [2021] SCAdjR 248 at [133]; *BEM Pte Ltd v BEN Pte Ltd* [2021] SCAdjR 190 at [141].

20 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [46].

21 *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [206].

22 *BEQ Pte Ltd v BER Pte Ltd* [2021] SCAdjR 248 at [133].

**A. Claims for defect rectification costs**

13 One such example are claims for defect rectification costs. It is trite that defective work is work that fails to comply with the requirements of the contract and so is a breach of contract.<sup>23</sup> Hence, defect rectification costs generally fall within the realm of “damage, loss or expense” in s 17(3) and are supposed to be disregarded in adjudication proceedings (if the exceptions in s 17(3) do not apply).<sup>24</sup>

14 However, notwithstanding s 17(3), a respondent can raise a valid crossclaim for defect rectification costs in adjudication proceedings in one of two ways:

(a) If the contract contains a term that permits the value of an item of work to be discounted due to defects in that item of work, then a respondent is entitled to deduct rectification costs from the value of work done claimed in adjudication proceedings.<sup>25</sup> Examples of such a term are cl 11.(3) and 31.(4)(g) of the SIA Articles and Conditions of Building Contract (Lump Sum Contract, 9th Edition)<sup>26</sup> which read as follows:

11.(3) Without prejudice to his power to vary the work under Clause 1.(3) of these Conditions, the Architect may give directions for the removal or demolition of any work, goods, or materials, whether fixed or unfixed, which are not in accordance with the Contract, and for their reconstruction or replacement in exact accordance with the Contract. *Provided that the Architect may, but shall not be bound to, accept any work containing defects unremedied and without removal or replacement, in which event the Contract Sum shall be reduced by any loss of value or otherwise suffered by the Employer, or by any saving in cost obtained by the Contractor in carrying out the defective work, whichever is greater. Such reduction may be effected in any payment certificate under Clause 31 of these Conditions*

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23 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2019] 4 SLR 1075 at [226].

24 *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [156].

25 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 10.46 and 10.48.

26 Singapore Institute of Architects, *Articles and Conditions of Building Contract, Lump Sum Contract*, 9th Ed, 2010.

or alternatively shall be taken into account by the Architect in his Final Certificate.

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31.(4) Where in accordance with Article 2(c), interim payment is to be based on periodic valuation, the sum certified in interim certificates shall be based on a retrospective re-evaluation of all the work carried out under the Contract as claimed by the Contractor up to a date (which shall be named in the Certificate) not exceeding 7 days before the date of issuing the Certificate itself. Such valuation (subject to the provision of adequate vouchers and information by the Contractor) shall be carried out in accordance with the following rules:

...

(g) *deducted from the total of the preceding paragraphs, a fair allowance in respect of any defective or incomplete work for which the Contractor or any sub-contractor direct or indirect is responsible and of which the Architect is aware at the time of the certificate; ...*

[emphasis added]

(b) If the contract does not contain such a term, then a respondent is entitled to rely on s 7(2)(b) of the SOP Act to assert that the value of an item of work should be reduced to account for the estimated cost of rectifying any defects in that item of work.<sup>27</sup> Under s 7(2)(b), the costs of rectifying defects are taken into account by way of valuing the claim for work done, and not by way of set-off.<sup>28</sup> Section 7(2)(b) reads as follows:

(2) For the purpose of subsection (1)(b), construction work carried out, or goods or services supplied, under a contract are to be valued —

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<sup>27</sup> *BGE Pte Ltd v BGF Pte Ltd* [2022–2023] SCAJr 333 at [95]–[97].

<sup>28</sup> *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 at [37].

...

(b) *if any part of the construction work, goods or services is defective — having regard to the estimated cost of rectifying the defect; ...*

[emphasis added]

15 Therefore, if the respondent’s claim for defect rectification costs is directly related to work done by the claimant under a contract, s 17(3) is no longer applicable and an adjudicator has to consider the defect rectification costs when assessing the value of work done.<sup>29</sup>

16 This example highlights that a respondent can indirectly claim for defect rectification costs in adjudication by simply framing its defects claim as a deduction or diminution in the value of works done, as opposed to a claim for damages. This effectively bypasses the s 17(3) preclusion, thereby rendering s 17(3) ineffective in stopping complex defects claims from being raised in adjudication.

## **B. Claims for prolongation costs**

17 Another example of claims that can be reframed to avoid falling within the precluded scope of “damage, loss or expense” under s 17(3) are claims for prolongation costs. Generally, such claims are construed as “damage, loss or expense” under s 17(3) and are therefore disregarded in adjudication proceedings (provided the exceptions in s 17(3) do not apply).<sup>30</sup>

18 However, claims for prolongation costs do not necessarily fall within the scope of “damage, loss or expense” if they are cleverly framed as variation claims for additional works done. This occurred in *BGI Co (Pte) Ltd v BGJ Pte Ltd*,<sup>31</sup> where the claimant claimed for (among other things) site maintenance and equipment rental costs during the circuit breaker period from 7 April 2020

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29 *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [172]–[176]; *BDD Pte Ltd v BDE Pte Ltd* [2020] SCAdjR 414 at [48]–[49].

30 *BCJ Pte Ltd v BCK Pte Ltd* [2020] SCAdjR 121 at [146]–[148].

31 [2022–2023] SCAdjR 369.

to 6 August 2020. Such costs are essentially prolongation costs<sup>32</sup> during the automatic 122 days' extension of time granted under section 39B of the COVID-19 (Temporary Measures) Act 2020.<sup>33</sup> Notwithstanding this, the learned adjudicator allowed this claim in part because such additional costs were claimed as a "variation" under the contract and not claimed as a loss and expense.<sup>34</sup>

19 Therefore, if claims for prolongation costs are framed differently as variation claims for additional works done under a contract, such claims can fall outside the ambit of "damage, loss or expense" under s 17(3) and be raised in adjudication proceedings.<sup>35</sup> This again renders s 17(3) ineffective in limiting complex claims for prolongation costs from being raised in adjudication proceedings.

### **C. Claims for back charges**

20 Similarly, claims for back charges do not necessarily fall within the scope of "damage, loss or expense". This ultimately turns on how the back charge is framed.<sup>36</sup> If the back charge is framed as a claim arising from a breach of the claimant's obligations under a contract, then the back charge would be a "damage, loss or expense" under s 17(3).<sup>37</sup> However, if the back charge is framed as a deduction that is clearly contemplated under the contract, then such a deduction for a back charge cannot be treated on the same footing as a claim for damages.<sup>38</sup>

21 For example, if an employer seeks to recover its \$20 costs in carrying out testing and commissioning for an item of work

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32 See *BEM Pte Ltd v BEN Pte Ltd* [2021] SCAdjR 190 at [115]–[116], where the learned adjudicator found that the claimant's claim for equipment or machine rental costs arising from the suspension of works during the circuit-breaker period from 7 April 2020 to 6 August 2020 was a claim for damages, loss or expense that fell within the ambit of s 17(3).

33 Act 14 of 2020.

34 *BGI Co (Pte) Ltd v BGJ Pte Ltd* [2022–2023] SCAdjR 369 at [120]–[126] and [146]–[148].

35 *BDW Pte Ltd v BDX Consortium* [2020] SCAdjR 810 at [178].

36 Danna Er, "No Rose Without a Thorn – Claims for Damage, Loss or Expense Under the New Adjudication Regime" [2021] SAL Prac 28 at para 14.

37 *BEC Pte Ltd v BED Joint Venture* [2021] SCAdjR 80 at [77].

38 *BCR Pte Ltd v BCS Pte Ltd* [2020] SCAdjR 258 at [83].

that the contractor was contractually obliged to carry out but failed to do so, then the recovery of such \$20 costs would fall within the scope of “damage, loss or expense” under s 17(3). However, if the employer were to deduct the same \$20 from its valuation of that item of work in accordance with the valuation mechanism in the contract, then such a deduction does not necessarily fall within the scope of “damage, loss or expense” under s 17(3).

22 Therefore, if claims for back charges are formulated as deductions contemplated under a contract, it is possible for such claims to fall outside the ambit of “damage, loss or expense” under s 17(3) and be raised in adjudication proceedings.<sup>39</sup>

23 Ultimately, the lack of a clear definition for “damage, loss or expense” has created an opening for parties to manipulate the characterisation of their claims to avoid falling within the precluded scope of “damage, loss or expense” claims in s 17(3). This undermines the very function that s 17(3) is supposed to serve, which is to limit such complex claims from being raised in adjudication proceedings.

#### **IV. What qualifies as a “document showing agreement between the claimant and the respondent on the quantum”?**

24 Another issue with s 17(3) is the lack of guidance or explanation as to what qualifies as a “document showing agreement between the claimant and the respondent on the quantum” of damage, loss or expense under s 17(3)(a).

25 Nevertheless, local jurisprudence has helpfully shed some light on this issue by way of the following principles:

- (a) Section 17(3)(a) does not specify any form for the requisite document.<sup>40</sup> It also does not require the

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39 *BCR Pte Ltd v BCS Pte Ltd* [2020] SCAdjR 258 at [83].

40 *BGM Ltd v BGN Pte Ltd* [2022–2023] SCAdjR 696 at [127].

production of a formal written agreement.<sup>41</sup> The term “document” includes familiar records or documents issued in the course of construction, such as e-mail exchanges, minutes of meetings, handwritten notes on drawings and invoices.<sup>42</sup>

(b) The test is whether the document is capable of showing that there has been an agreement between the claimant and the respondent on the quantum of damage, loss or expense.<sup>43</sup> Therefore, a payment response that accepts and certifies a claim for damage, loss or expense can qualify as an agreement on the quantum of damage, loss or expense.<sup>44</sup>

(c) The task of an adjudicator is to determine, on the documents presented, whether there is a basis to conclude that there is an agreement on the quantum of damage, loss or expense.<sup>45</sup>

(d) The document showing agreement under s 17(3)(a) must be an agreement between the claimant and the respondent on the *precise* quantum (*ie, both* rate and quantity) of the claim for damage, loss or expense.<sup>46</sup> It is insufficient if there is merely an agreement on the rate, but not the overall quantum, of the claim for damage, loss or expense.<sup>47</sup>

26 The above principles have gone some way in clarifying the scope and application of the exception in s 17(3)(a). Nevertheless, there remains one troubling issue in the application of this exception, which has emerged in practice.

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41 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.184.

42 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.184.

43 *BGM Ltd v BGN Pte Ltd* [2022-2023] SCAdjR 696 at [127].

44 *BDW Pte Ltd v BDX Consortium* [2020] SCAdjR 810 at [183] and [185]–[186].

45 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.184.

46 *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [150], [191] and [193]; *BDM Pte Ltd v BDN Pte Ltd* [2020] SCAdjR 480 at [367]–[378].

47 *BDY Pte Ltd v BDZ (Pte) Ltd* [2020] SCAdjR 863 at [63]–[65]. *BDJ Pte Ltd v BDK Ltd* [2020] SCAdjR 454 at [61].

27 To utilise the exception in s 17(3)(a), some respondents have cultivated a practice of requiring claimants to endorse their payment responses, which set out (among other things) the respondents' crossclaims for damage, loss or expense and the quantum thereof. Such signed payment responses can qualify as a "document showing agreement between the claimant and the respondent on the quantum" under s 17(3)(a), thereby entitling respondents to raise claims for damage, loss or expense in adjudication proceedings.

28 This was the case in *BGM Ltd v BGN Pte Ltd*,<sup>48</sup> where the claimant endorsed on the respondent's previous payment certificates, as well as a cover letter to one of those payment certificates, which included the respondent's set-off for "Post-Tripartite Back Charges". By endorsing these payment certificates, the claimant acknowledged that it had no objections to the contents of these payment certificates (which included a list of the said back charges) and it also acknowledged the respondent's certification for the value of work done (which included the back charge amount).<sup>49</sup> However, in the claimant's subsequent letter issued to the respondent, the claimant stated that it never agreed to the back charges or their amounts, and it signed on the payment certificates because "failure to sign the payment certificates carried the threat of delays to payment".<sup>50</sup> Nevertheless, the learned review adjudicators found that the claimant's sign-offs on the previous payment certificates and cover letter constituted an agreement between the parties on the quantum of the back charge.<sup>51</sup>

29 This finding is troubling because it means that unsuspecting claimants who endorse payment responses are deemed to have agreed to the quantum of any damage, loss or expense therein. More worryingly, this can morph into a surreptitious practice of respondents forcing claimants into endorsing their payment responses (and thereby agreeing to the quantum of damage, loss

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48 [2022-2023] SCAdjR 696.

49 *BGM Ltd v BGN Pte Ltd* [2022-2023] SCAdjR 696 at [163]–[164] and [169]–[170].

50 *BGM Ltd v BGN Pte Ltd* [2022-2023] SCAdjR 696 at [147].

51 *BGM Ltd v BGN Pte Ltd* [2022-2023] SCAdjR 696 at [174].

or expense therein) by threatening to *inter alia* delay payments, not issue variation orders or instructions, or not grant extensions of time. By being in a position of power as the employer and pay-master, respondents can abuse s 17(3)(a) as a backdoor to bring their claims for damage, loss or expense to adjudication.

30 Nevertheless, there are some practical measures that a claimant can adopt to avoid such endorsements on payment responses from being construed as an agreement on the quantum of a respondent's claim for damage, loss or expense:

(a) When endorsing a payment response, the claimant should expressly state "Signed Under Protest" next to its signature or stamp.

(b) If the claimant accepts a response amount in a payment response, the claimant should issue a correspondence to the respondent stating that, whilst it seeks payment of the undisputed portions of the response amount, the claimant also objects or rejects the deductions for damage, loss or expense in the payment response.<sup>52</sup>

(c) The claimant should state in its subsequent payment claims (or cover letters thereto) that it does not agree to the damage, loss or expense set out in the respondent's previous payment response(s).<sup>53</sup>

31 Essentially, the claimant should leave a paper trail recording its dispute over the damage, loss or expense imposed in the payment response, and the quantum thereof. Regardless, it is concerning that s 17(3)(a) has created an avenue for respondents to trick or coerce unsuspecting claimants into agreeing to the quantum of their claims for damage, loss or expense, which are then raised in adjudication proceedings.

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52 *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [154].

53 *BCX Pte Ltd v BCY Pte Ltd* [2020] SCAdjR 315 at [152].

**V. What qualifies as a “certificate or other document that is required to be issued under the contract”?**

32 Unlike the exception in s 17(3)(a), the wording of the exception in s 17(3)(b) is vaguer and more unrestrained. It only states that the “certificate or other document” must be one that is required to be issued under a contract. Other than this, the SOP Act provides no further guidance nor explanation as to *what* qualifies as a “certificate or other document” and *who* should issue it.

33 As a result, local jurisprudence has provided conflicting views on the scope of the exception in s 17(3)(b). To elaborate, there are some authorities that state that the “certificate or other document” should only be issued by an independent third party, such as an architect, engineer or contract administrator.<sup>54</sup> However, there are other authorities that suggest that such a “certificate or other document” can also be issued by the employer or contractor themselves.<sup>55</sup>

34 To add more confusion to the mix, there are also authorities stating that the requirement for a “certificate” would only apply in contracts where there is a certifier who is empowered to certify claims for damage, loss or expense.<sup>56</sup> However, the requirement for “other document” would apply to contracts that do not have a certifier role, but which would still require the issuance of a document that is akin to a certificate to support claims for damage, loss or expense.<sup>57</sup>

35 Regardless, based on a reading of the plain text of s 17(3)(b), the position appears to be that the “certificate or other document” can be issued by anyone, *ie*, the employer, contractor or consultant, so long as: (a) the contract provides for a claim to be made in respect of “damage, loss or expense”;

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54 Danna Er, “No Rose Without a Thorn – Claims for Damage, Loss or Expense Under the New Adjudication Regime” [2021] SAL Prac 28 at para 22; *BDY Pte Ltd v BDZ (Pte) Ltd* [2020] SCAdjR 863 at [71].

55 *BCR Pte Ltd v BCS Pte Ltd* [2020] SCAdjR 258 at [82]; *BDJ Pte Ltd v BDK Ltd* [2020] SCAdjR 454 at [111].

56 *BCP Pte Ltd v BCQ Pte Ltd* [2020] SCAdjR 204 at [269].

57 *BCP Pte Ltd v BCQ Pte Ltd* [2020] SCAdjR 204 at [270].

and (b) the relevant terms of the contract provide for some certificate or document to be generated as part of a contractual mechanism for processing the claim.<sup>58</sup> Indeed, Parliament has not indicated otherwise.

36 As a result, it is now possible for employers to rely on their own payment certificates or responses<sup>59</sup> and/or set-off notices<sup>60</sup> to qualify for the “certificate or other document” exception in s 17(3)(b).<sup>61</sup> Alternatively, employers can procure their consultants to issue delay certificates,<sup>62</sup> handing over certificates<sup>63</sup> and/or extension of time certificates<sup>64</sup> to qualify for the “certificate or other document” exception in s 17(3)(b) – indeed, it is no secret that there are certain consultants that operate as agents of the employers, such as the employer’s representative in the REDAS Design and Build Conditions of Main Contract (3rd Edition).<sup>65</sup> This creates a practical problem – namely, that employers can now issue, or procure the issuance of, self-serving certificates or documents under the contract for the purpose of bringing their claims for damage, loss or expense to adjudication.

37 Similarly, due to the broad wording of s 17(3)(b), it is equally possible for contractors to rely on their own payment claims to qualify for the “certificate or other document” exception in s 17(3)(b).<sup>66</sup> This means that a contractor merely needs to include its claim for damage, loss or expense in its own payment claim to raise the said claim in adjudication.

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58 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.185.

59 *BDW Pte Ltd v BDX Consortium* [2020] SCAdjR 810 at [180] and [184]; *BCR Pte Ltd v BCS Pte Ltd* [2020] SCAdjR 258 at [82].

60 *BCP Pte Ltd v BCQ Pte Ltd* [2020] SCAdjR 204 at [277].

61 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.186.

62 *BGI Co (Pte) Ltd v BGJ Pte Ltd* [2022-2023] SCAdjR 369; *BFO Pte Ltd v BFP* [2022-2023] SCAdjR 57 at [279]; *BGY Pte Ltd v BGZ Pte Ltd* [2022-2023] SCAdjR 547 at [90].

63 *BDJ Pte Ltd v BDK Ltd* [2020] SCAdjR 454 at [65]–[66].

64 *BDJ Pte Ltd v BDK Ltd* [2020] SCAdjR 454 at [65]–[66].

65 *CEQ v CER* [2020] SGHC 70 at [25].

66 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.186.

38 This cannot be the intention behind s 17(3)(b) because it would create a backdoor for both employers and contractors to raise complex claims for damage, loss or expense in adjudication. Moreover, if a payment claim, payment response or payment certificate can qualify as a “certificate or other document” under the exception in s 17(3)(b), this would render s 17(3) otiose and incapable of limiting complex claims for damage, loss or expense from being ventilated in adjudication.<sup>67</sup>

39 More worryingly, enterprising contractors and employers have started to incorporate express terms into their contracts that entitle them, or consultants engaged by them, to issue certificates or documents that support their claims for damage, loss or expense in their payment claims and payment responses. Such examples include cll 19.1.1, 19.1.2 and 19.2 in the recently published REDAS Design and Build Conditions of Main Contract (4th Edition), which provide for a delay certificate to be issued by the employer’s representative under the contract so that the employer can deduct liquidated damages in its payment certificates. Clauses 19.1.1, 19.1.2 and 19.2 read as follows:

19.1.1. In the event that the Contractor fails to complete the Works by the Date of Completion or the extended Date of Completion, as the case may be, the Employer’s Representative may at any time up to the issue of the Handing Over Certificate issue a Delay Certificate setting out the total period of extension of time determined (if any), the extended Date of Completion (if any) and the latest Date of Completion for the Works and certifying that the Contractor is in default in failing to complete the Works by the latest Date of Completion.

19.1.2. The Contractor shall pay to the Employer the relevant sum calculated at the rate stated in Appendix 1 as liquidated damages for every day of default during the period which the Works remain incomplete pursuant to the Delay Certificate.

...

19.2. The Employer may, without prejudice to any other method of recovery, deduct the amount of liquidated damages from any monies due, or to become due, to the Contractor under

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67 *BGE Pte Ltd v BGF Pte Ltd* [2022–2023] SCAdjR 333 at [71]–[72]; *BGY Pte Ltd v BGZ Pte Ltd* [2022–2023] SCAdjR 547 at [97].

the Contract including but not *limited to any sums due in the Interim Payment Certificates issued under clause 22.*

[emphasis added]

40 From these developments, it is evident that employers and contractors are likely to abuse the exception in s 17(3)(b) as a backdoor to bring their claims for damage, loss or expense to adjudication. This impinges on s 17(3)'s efficacy in limiting such claims from being ventilated in adjudication.

41 This problem is already seen in practice, as evident from the case of *BHG Pte Ltd v BHH Pte Ltd*<sup>68</sup> where the respondent sought to rely on (among other things) its payment response, "Summary of Back Charges" and "Manpower Supply Deduction Form" to qualify for the "certificate or other document" exception in s 17(3)(b). The learned adjudicator determined that such documents do not satisfy the requirements in s 17(3)(b),<sup>69</sup> and helpfully provided the following principles in construing the requirements under the s 17(3)(b):

(a) A certificate or other document satisfies the requirement under s 17(3)(b) if:

(i) it is required to be issued under the contract; *and*

(ii) it has such probative value in supporting the claim for damage, loss or expense that the adjudicator can fairly and reasonably rely on it to speedily and properly determine the claim for damage, loss or expense, on a *prima facie* basis, without having to engage in a time-consuming inquiry that will unduly lengthen or delay the adjudication process.<sup>70</sup>

(b) However, if a certificate or other document is one that is not required to be issued under the contract, then it does not *ipso facto* satisfy the requirement under

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68 *BHG Pte Ltd v BHH Pte Ltd* [2022-2023] SCAdjR 747 at [98(b)]-[98(d)].

69 *BHG Pte Ltd v BHH Pte Ltd* [2022-2023] SCAdjR 747 at [100]-[107].

70 *BHG Pte Ltd v BHH Pte Ltd* [2022-2023] SCAdjR 747 at [98(b)].

s 17(3)(b), regardless of whether it supports the claim for damage, loss or expense in question.<sup>71</sup>

(c) Similarly, if a certificate or other document does not support the claim for damage, loss or expense in that it does not have such probative value as to enable the adjudicator to fairly and reasonably rely on it to speedily and properly determine the said claim, at least on a *prima facie* basis, without having to engage in a time-consuming inquiry that will unduly lengthen or delay the adjudication process, then that certificate or other document does not satisfy the requirement under s 17(3)(b), regardless of whether it is required to be issued under the contract.<sup>72</sup>

42 The above principles not only restrict the scope of the exception in s 17(3)(b) but are also in line with both the plain text of s 17(3)(b) as well as Parliament’s intention behind the enactment of s 17(3). These principles also account for the situation where the “certificate or other document” is procured by fraud, improper pressure and/or interference, which logically have zero probative value and should be disregarded by adjudicators.<sup>73</sup>

43 That said, until Parliament or the courts intervene to circumscribe the scope of s 17(3)(b), parties to construction contracts are likely to continue taking advantage of the nebulous wording in s 17(3)(b) to bring their claims for damage, loss or expense to adjudication.

## VI. What happens if the exceptions in section 17(3) apply?

44 If either of the exceptions in s 17(3) applies, does an adjudicator then accept at face value the amount of damage, loss or expense agreed or certified, or does he/she still have to consider the merits of the claim for damage, loss or expense?

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71 *BHG Pte Ltd v BHH Pte Ltd* [2022–2023] SCA<sup>d</sup>JR 747 at [98(c)].

72 *BHG Pte Ltd v BHH Pte Ltd* [2022–2023] SCA<sup>d</sup>JR 747 at [98(d)].

73 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 3.129.

45 The position on this appears to be quite clear. If the exception in s 17(3)(a) applies, and the adjudicator is satisfied that there is an agreement on the quantum of damage, loss or expense, the adjudicator *may* include the agreed quantum as part of the adjudicated amount<sup>74</sup> – in other words, it is not mandatory for the adjudicator to accept the agreed quantum of damage, loss or expense at face value.

46 If the exception in s 17(3)(b) applies, the adjudicator is also not necessarily bound to accept the amount of damage, loss or expense certified at face value.<sup>75</sup> Instead, the adjudicator will have to inquire whether the certifier properly determined the claim for damage, loss or expense, and whether the certificate was properly issued.<sup>76</sup> This accords with s 17(5) of the SOP Act, which prescribes that an adjudicator is not bound by any assessment in relation to the progress payment that is provided in the contract to be final and binding on the parties (such as a certificate).<sup>77</sup>

47 If it is not mandatory for an adjudicator to accept at face value the amount of damage, loss or expense that is certified or agreed, then this would mean that an adjudicator would have to still determine, on a *prima facie* basis, the entitlement, liability and quantum of the claim for damage, loss or expense. This again defeats the very objective of s 17(3), which is to avoid such complex claims from being ventilated in, and unduly protracting, adjudication proceedings.

## **VII. Conclusion**

48 To slay the Hydra monster, Hercules and his nephew, Iolaus, had to cut off each head of the monster and cauterize the neck to stop any regeneration. Perhaps, this is what needs to be

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74 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at para 6.184.

75 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 3.128, 5.146 and 16.76.

76 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 3.128, 5.146 and 16.76.

77 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) at paras 3.128, 5.146 and 16.76.

done for s 17(3) – Parliament and/or the Singapore courts will need to clarify the scope of s 17(3) and its exceptions, address the above practical issues arising from s 17(3) and quell any potential for abuse of this provision.