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**Insights**

# ADJUDICATION AND INSOLVENCY: INTERFACE OF TWO STATUTORY REGIMES AFFECTING THE CONSTRUCTION INDUSTRY

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SUMMARY

Adjudication has become a key tool in the construction industry, helping employers and contractors resolve disputes quickly and keep cash flowing on projects. But when insolvency enters the picture, things can get tricky — especially when it comes to enforcing adjudication decisions or allowing insolvent parties to take part in the process. In this insight, we take a closer look at the legal approach to the interaction between adjudication and insolvency in England & Wales and Singapore, and what to look forward to in Hong Kong SAR as the Construction Industry Security of Payment Ordinance was gazetted on 27 December 2024 and will come to effect fully on 28 August 2025.

## ENGLAND & WALES

Adjudication was introduced to England & Wales by the Housing Grants Construction & Regeneration Act 1996. It has been hailed as a major success in providing parties to construction contracts access to a swift, efficient and cost-effective form of dispute resolution. The legislative intent behind its introduction (alongside minimum requirements for interim payment mechanisms in construction contracts) was to promote cash flow in the industry and so prevent contractors and subcontractors (in particular) being starved of cash. However, it is the interface between the statutory regimes of adjudication and of insolvency that has created a substantial body of case law since the inception of adjudication over 25 years ago.

Parties to a construction contract can refer a dispute in respect of that contract to adjudication at any time. The outcome is a temporarily binding decision that can be summarily enforced. If a party is dissatisfied the with the decision, the dispute can be finally determined in either litigation or arbitration, although in the vast majority of cases the parties live with the outcome and move on. This has massively alleviated the burden on the Technology & Construction Court whilst also fulfilling the legislative objectives of the Construction Act. Pending final determination of the

dispute by the Court or arbitral tribunal (if that happens), the policy of "pay now, argue later" results in summary enforcement of the Adjudicator's decision by the Court save for very limited circumstances. The insolvency of the referring party is one of those circumstances and has presented the courts with questions regarding the compatibility of the two statutory regimes.

Two areas where this has been so in particular, and the approach adopted by the Courts in England & Wales are summarised below:

## STAY OF ENFORCEMENT WHERE REFERRING PARTY IS INSOLVENT

Adjudication is (relative to full-blown court or arbitral proceedings) a swift and summary process before a professional from the industry. By its nature, it may not produce a perfect result. So, it is an important feature of adjudication that (unless the parties agree to it being finally binding upon them) the losing party can refer the dispute to litigation or arbitration. However, where a successful referring party is or becomes insolvent, summary enforcement of the Adjudicator's decision is likely to deprive the losing party of effective recourse to recover sums that the Court or a tribunal might eventually determine to have been wrongly awarded by the Adjudicator.

This has been recognised by the courts in a series of decisions (in particular that of *Wimbledon Construction Co 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC). In those cases, it was confirmed that, in exercising the court's discretion to summarily enforce an Adjudicator's decision, a stay of that enforcement could be justified if the contractor is insolvent. The following principles have been applied in the Court exercising its discretion:

- The probable inability of the contractor to repay the judgment sum after trial or arbitration may constitute special circumstances rendering it appropriate to grant a stay;
- If the contractor is in insolvent liquidation or it is not disputed that they are insolvent, a stay should usually be granted;
- If the contractor's financial position is either (a) the same or similar to that at the time when the contract was made; or (b) due either wholly or significantly in part to the employer's failure to pay the sums awarded by the Adjudicator, then this would not usually justify the granting of a stay;
- If there is evidence of a real risk that the contractor would organise its affairs to dissipate or dispose of the sums awarded by the Adjudicator so it would not be available to be repaid, then this would justify the granting of a stay.

## ABILITY OF A COMPANY IN LIQUIDATION TO REFER DISPUTES TO ADJUDICATION

In the particular case of liquidation where the parties may have claims and cross-claims against one another and sometimes across multiple contracts, the Insolvency Rules automatically apply

“insolvency set-off” resulting in a “net balance” of those claims. It has been argued that the referral of individual disputes under a construction contract, which might form only part of the net balance, is incompatible with the Insolvency Rules and so, absent agreement of the parties, an Adjudicator would lack jurisdiction to determine either a single dispute as a component of the net balance or the net balance itself. Secondly, even if a company in liquidation could refer individual disputes to adjudication, it has been argued that it is “an exercise in futility” given the court’s consistent position (as summarised above) that such decisions should not be summarily enforced in favour of an insolvent party.

These issues were considered by the Supreme Court in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

On the first issue, the Supreme Court confirmed that individual claims and cross-claims maintained their distinct nature and did not ‘simply melt away’ through insolvency set-off such that they were incapable of being determined by adjudication. Indeed, the Supreme Court recognised adjudication as a successful form of dispute resolution that lent itself exactly to the exercise to be carried out by the liquidator in determining individual disputes arising under construction contracts for the purposes of assessing the overall net balance. The Supreme Court also decided that, insofar as the Construction Act only allows a single dispute to be referred to adjudication at a time, a ‘single dispute’ can incorporate many different smaller aspects, including claims for set-off that can be raised in defence.

On the second issue, the Supreme Court repeated the view that adjudication can be of real utility during insolvency and should not automatically be declared a futile exercise even if an Adjudicator’s decision on a single component dispute could not be summarily enforced. The Court underlined the time and cost efficiency of adjudication proceedings and maintained that such procedures could assist the insolvency practitioner in settling individual disputes that form part of the net balance by operation of insolvency set-off. As to summary enforcement, the Supreme Court recognised that there may be certain cases where the Technology & Construction Court could enforce a decision where the liquidator provides appropriate undertakings, including ring-fencing of the proceeds from the adjudication.

This last point was subsequently considered by the Court of Appeal in *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd* [2021] EWCA Civ 1452. The Court of Appeal held that a company in liquidation will not be able to obtain summary enforcement where there is a potential set-off via a cross-claim that has not been finally determined. As Adjudicators’ decisions are provisional in nature, the Court confirmed that such decisions will not (absent agreement of the parties) amount to final determination to allow enforcement. The only way decisions could be enforced was if sufficient security via ring-fencing of the award was guaranteed and there are no disputed cross-claims.

## CONCLUSION

A tension thus remains between the statutory regimes of (a) security of payment on the one hand; and (b) final determination of the net balance between parties in insolvency on the other. However, in *Bresco Electrical Services*, the Supreme Court disagreed that this amounted to an "incompatibility" between those two regimes. Instead, the Supreme Court confirmed the valuable role that adjudication plays as a form of specialist dispute resolution in its own right in respect of claims and cross claims arising from construction contracts – even if it does not result in an immediately enforceable decision in favour of an insolvent party.

## SINGAPORE

The Building and Construction Industry Security of Payment Act 2004 ("**SOPA**") was introduced in 2005 with the intention of easing cash-flow support for suppliers and contractors with a range of statutory remedies to secure payment for their work.

Under the SOPA, the claimant ("**Claimant**") may file an adjudication application with the Singapore Mediation Centre to formally kickstart the statutory adjudication process ("**Adjudication**"). A respondent ("**Respondent**") will be under a strict timeframe to file an adjudication response before the matter is placed before an adjudicator, who will issue his adjudication determination within a short period. Similar to the UK regime, Adjudication is a dispute resolution process which is designed to deliver "rough and ready justice".

It is the intersection of the Adjudication and insolvency that forms the basis of the current discussion. The approach adopted by the Singapore courts is outlined below:

### STAY OF ENFORCEMENT WHERE CLAIMANT IS INSOLVENT

If the Claimant succeeds on its claim, the Respondent generally has 7 days after service of the adjudication determination to make payment to the Claimant. A dissatisfied Respondent has a few recourse but in any case, payment to the successful party need to be made before final determination of the matters raised in Adjudication is obtained. The approach is consistent with the principle of "pay now, argue later" under the SOPA.

Given the potential disadvantaged position of the Respondent, especially where the Claimant has a solvency issue that would hinder the chance of recovering the payment upon the final resolution of the dispute, the Singapore Court of Appeal has emphasized the claimant's right to payment is not absolute. In *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32, the court ruled that enforcement of Adjudication Determinations may be stayed under the following circumstances:

- There is "clear and objective evidence" of the Claimant's insolvency; or
- The court is satisfied that if the stay was not granted, money paid to the claimant would not ultimately be recovered if the dispute between the parties was finally resolved in the respondent's favour.

The court would also take into consideration if the Claimant's financial distress was caused by the Respondent, for instance, due to the Respondent's failure to pay the adjudicated amount.

Subsequent cases adopted a pragmatic approach in deciding whether a stay of proceeding would be granted. For example in *CEQ v CER* [2020] SGHC 70, the High Court granted a partial stay of enforcement of the adjudication determination based on a real risk of dissipation of assets by the claimant. The court also allowed a partial release of the adjudicated sums to the claimant for its legal fees at arbitration and appeal.

## WINDING UP AS A MEANS OF ENFORCEMENT

Where an adjudication determination is obtained requiring payment from a debtor and such payment is not forthcoming, the creditor's options for enforcement could include the draconian means of taking out a winding up petition based on the debt due under the unpaid adjudication determination. Balancing the right to be paid with the temporary finality nature of adjudication is important.

In *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61, the Court of Appeal examined the applicable standard of review of a cross-claim raised by a debtor to stay or dismiss a winding up petition raised against it. The Court pointed out that winding up petitions should not be used as a means of enforcement of payment of a debt that is bona fide disputed or can be extinguished by a cross claim. Doing so could be an abuse of court process.

Accordingly, where a winding up petition is founded on the non-payment of an adjudication determination (which is only temporarily final), a stay of the winding up petition may be granted if there is a *prima facie* existence of a justifiable cross claim that is likely to be equal to or exceed the claim against the debtor, and the said dispute or cross-claim is not being raised in an abuse of the court's process. Applying a *prima facie* standard of review alongside the requirement of no abuse of the court's process represents a practical solution to the apparent opposing considerations of the winding-up jurisdiction of the court and the temporary finality of adjudication determinations.

## COMMENCEMENT OF ADJUDICATION WHEN EITHER PARTY IS IN LIQUIDATION

The definition of a "claimant" under the SOPA does not draw a distinction between a solvent claimant and an insolvent claimant. Therefore, a Claimant's ability and entitlement to commence Adjudication does not appear to be affected by any application for a winding up order against the Claimant, or the making of a winding up order.

Where the company in liquidation is the Respondent, the Companies Act prohibits commencement or continuation of legal proceedings against a company after winding up has commenced, unless with leave of the court. The existing case authority in Singapore have been consistent in ensuring that the SOPA regime and Adjudication cannot be exploited to give a creditor Claimant an advantage in the winding up of the Respondent. In the case where the claimant would like to seek

(additional) recourse from the court, the overriding principle is “fair play and commercial morality” - The court will consider whether the detriment caused to the defendant’s general body of creditors would far exceed any hardship to the plaintiff (*W Y Steel Construction Pte Ltd v Tycoon Construction Pte Ltd (in liquidation)* [2016] SGHC 80).

### LOOKING FORWARD

In 2020, the SOPA-Insolvency Law Reform Sub-Committee (the “**Committee**”) has issued a report with analysis of insolvency issues arising in Adjudication and recommendations of change. For the readers’ interest and without going into too much detail, the Committee recommended changes to be made to the SOPA in cases of claimant insolvency, including provisions to allow adjudicated amount to be paid pending final determination or, alternatively, to prevent the commencement of adjudication altogether. Although the recommendations have yet to be acted upon, their consideration highlights the need for ongoing evaluation to address the challenges at the intersection of Adjudication and insolvency.

## HONG KONG SAR

As the Construction Industry Security of Payment Ordinance (Cap. 652) (the “**SOP Ordinance**”) was gazetted on 27 December 2024 and will come into effect fully on 28 August 2025, important questions linger as to what the court’s approach will be in a scenario where there are competing adjudication and winding-up processes on foot.

During the debate on the Construction Industry Security of Payment Bill (the “**SOP Bill**”), the Hong Kong Administration made it clear that the primary focus of the SOP Bill is not to address corporate insolvency, which will continue to be governed by the existing Companies (Winding Up and Miscellaneous Provisions) Ordinance.

The Administration’s rationale is that incorporating corporate insolvency matters into the Bill would overly complicate the SOP Bill and delay the legislative process. The Administration emphasised that the SOP Bill does not directly tackle a contractor’s insolvency situation, and that established legal frameworks for handling corporate insolvency should be followed.

The Administration consistently has stressed that the SOP Ordinance does not seek to resolve issues faced by downstream subcontractors when an upstream contractor becomes insolvent. The stance is supported by the findings of a 2015 consultation, which indicated broad industry support for a complete ban on pay-when-paid clauses without exemptions for upstream insolvency. This stance contrasts with the provisions of the UK’s Housing Grants, Construction and Regeneration Act 1996, which permit such exemptions.

The result is that important unanswered questions remain as to whether adjudication or related enforcement applications should be suspended where the referring party or the paying party is or subsequently becomes insolvent.

## NAVIGATING THE QUESTIONS OF ADJUDICATION AND ENFORCEMENT

The court holds a discretion under section 49(5) of the SOP Ordinance to decide whether to grant or refuse an enforcement application, within 14 days of an enforcement application or such other period that the court considers appropriate. While section 49(6) provides for certain scenarios where the enforcement application must not be granted, none of the criteria explicitly address insolvency.

This was a change that was introduced during the legislative process. Under the initial version of section 49 under the draft SOP Bill, the court was mandated to grant leave within seven days of the application unless any of the three grounds for refusing leave existed. By contrast, while the "new version" of section 49 under the SOP Ordinance gives the court greater flexibility, it also raises questions as to how or whether the court would prioritise the interest of subcontractors seeking payment or would defer to established insolvency processes.

Section 50 of the SOP Ordinance (which also is a provision that was introduced during the legislative process) empowers the Chief Judge to make rules governing enforcement applications. While there is room for using these rules to address the complexities of adjudication in the context of insolvency, it remains to be seen whether relevant rules will be introduced and, if so, to what extent such rules would clarify the interaction between adjudication and winding-up processes.

If no relevant rules are introduced, then it will remain uncertain how the court would handle scenarios akin to those in *Wimbledon Construction Co* and *Bresco Electrical Services*, until appropriate cases go to court for decision and judicial guidance to the industry.

## PRACTICAL HELP INSIDE AND OUT OF THE SOP ORDINANCE

Regarding an insolvent contractor in the payment chain, the main objectives of the SOP Ordinance, as outlined by the Administration, are two-fold: First, to ensure stakeholders throughout the supply chain receive payments to which they are entitled. Second, to reduce the build-up of outstanding debt by promoting timely payments. In our view, the right for lower-tier subcontractors to delay work in cases of non-payment (albeit available only in the very limited scenario where the paying party has not paid an admitted amount or an adjudicated amount) offers some additional safeguard: this mechanism helps prevent further debt accumulation, particularly when an upper-tier contractor is heading towards insolvency.

During the debate in the Legislative Council, nonetheless, the Administration expressed willingness to explore appropriate measures outside the SOP Ordinance to aid contractors facing the insolvency of an upstream contractor. There have been no discussions as to what these other measures might be. The only measure explicitly identified by the Administration as being under review is whether adjudication decisions obtained under the SOP Ordinance might expedite or assist recovery of amounts owed to lower-tier subcontractors under the winding-up process.

## LOOKING FORWARD

It is hoped that further guidance or measures will be introduced by the Administration or the Judiciary to address insolvency-related concerns in the context of adjudication as the implementation date of the SOP Ordinance approaches.

In the meantime, stakeholders must remain vigilant to the complexities arising from the potentially problematic interplay between adjudication and insolvency.

Apart from the Judiciary's approach towards the issue, we anticipate that the industry's experience also will shape how the regime evolve. Therefore, proactive industry engagement and advocacy inside and out of court will be essential, and will determine whether and to what extent the goals of timely payments will be achieved when a contractor in the payment chain is in financial strain.

## CONCLUDING REMARKS

The intersection of adjudication and insolvency presents complex challenges for the construction industry in England & Wales, Singapore, and soon in Hong Kong. As each region has developed its own approach to balancing the benefits of efficient dispute resolution through adjudication with the realities of insolvency, there remains a need for clarity and consistency in how these legal frameworks interact. The legal landscapes in the three jurisdictions have evolved differently to achieve these goals, and ultimately to ensure financial stability in the construction sector even in times of financial distress.

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