

# ADR NEWS



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SINGAPORE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2005  
PART I: PRELIMINARY

## Short title

1. This Act may be cited as the Building and Construction Industry Security of Payment Act.

## Interpretation

2. In this Act, unless the context otherwise requires —

*"adjudicated amount"* means the amount of a progress payment that is determined to be payable under section 17 or 19, as the case may be;

*"adjudication"* means the adjudication of a payment claim dispute in accordance with Part IV, and includes an adjudication review under that Part;

*"adjudication determination"*, in relation to an adjudication, means the determination of the adjudicator;

*"adjudication response"* means a response to an adjudication application lodged by a respondent under section 15 (1);

*"adjudicator"* means a person appointed under this Act to determine a payment claim dispute that has been referred for adjudication, and includes a review adjudicator or a panel of review adjudicators appointed under section 18 (5) (b);

*"authorised nominating body"* means a person authorised under section 28 (1);

*"claimant"* means a person who is or claims to be entitled to a progress payment under section 5;

*"claimed amount"* means the whole or part of any progress payment claimed by a claimant in a payment claim, and includes any interest payable under section 8 (5);

*"construction contract"* means an agreement under which —

(a) one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or

(b) one party undertakes to supply services to one or more other parties;

*"construction site"*, in relation to a contract between a claimant and a respondent, means —

(a) the land on which or the premises at which the claimant has been, is or will be carrying out construction work; or

(b) the land or the premises in relation to which goods or services have been, are being or will be supplied under the contract;

*"contract"* means a construction contract or a supply contract;

*"costs"*, in relation to an adjudication, includes —

(a) the application fee payable to an authorised nominating body; and

(b) the fees and expenses of the adjudicator;

*"day"* means any day other than a public holiday within the meaning of the Holidays Act (Cap. 126);

*"due date"*, in relation to a progress payment, means the date on which the progress payment becomes due and payable under section 8;

*"land"* has the same meaning as in section 4 of the Land Titles Act (Cap. 157);

*"owner"*, in relation to a contract between a claimant and a respondent, means—

(a) a person who —

(i) enters into a contract, whether with the respondent or any other person, for the carrying out of construction work at or on, or for the supply of goods or services in relation to, the construction site concerned by the respondent or other person (as the case may be); and

(ii) is not engaged by any other person to carry out construction work at or on, or to supply goods or services in relation to, the construction site concerned; or

(b) where there is no such person, a person who owns the construction site concerned;

*"payment claim"* means a claim made by a claimant for a progress payment under section 10;



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"payment response" , in relation to a construction contract, means a response to a payment claim made by a respondent under section 11 (1) or 12 (4);

"principal" , in relation to a respondent named in a payment claim served by a claimant under section 10, means a person who is liable to make payment to the respondent for or in relation to the whole or part of the construction work that is, or the whole or part of the goods or services that are, the subject of the contract between the respondent and the claimant;

"progress payment" means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —

(a) a single or one-off payment; or

(b) a payment that is based on an event or a date;

"respondent" means a person who is or may be liable to make a progress payment under a contract to a claimant;

"response amount" means —

(a) in relation to a construction contract, the amount that a respondent proposes to pay to a claimant in a payment response provided under section 11 (1) or 12 (4) or as varied under section 12 (4); or

(b) in relation to a supply contract, the amount of the claimed amount in a payment claim that a respondent has paid to the claimant on or before the due date (if any);

"supply contract" means an agreement under which —

(a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work;

(b) the supply is for the purpose of construction work carried out or caused to be carried out by the second-mentioned party; and

(c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site,

but does not include such agreements as may be prescribed.

#### **Definitions of "construction work", "goods" and "services"**

3(1) In this Act, unless the context otherwise requires and subject to subsection (2) —

"construction work" means —

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures (whether permanent or not) that form, or are to form, part of the land;

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works that form, or are to form, part of the land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purpose of land drainage, coast protection or defence;

(c) the installation in any building, structure or works of fittings that form, or are to form, part of the land, including systems of heating, lighting, air-conditioning,

ventilation, power supply, drainage, sanitation, water supply or fire protection, and security or communications systems;

(d) any operation which forms an integral part of, is preparatory to, or is for rendering complete, works of the kind referred to in paragraph (a), (b) or (c), including —

(i) land reclamation;

(ii) site clearance, earth-moving, excavation, tunnelling and boring;

(iii) the laying of foundations;

(iv) the erection, maintenance or dismantling of scaffolding;

(v) the prefabrication of components to form part of any building, structure or works, whether carried out at or on the construction site or elsewhere; and

(vi) site restoration, landscaping and the provision of roadways and other access works;

(e) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; or

(f) the painting or decorating of the external or internal surfaces of any building, structure or works;

"goods" means —

(a) materials or components to form part of any building, structure or works arising from construction work; or

(b) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

"services" means —

(a) the conduct of feasibility studies, planning services, the submission of applications or other documents to any relevant authority, site supervision services, professional engineering services, or architectural, design, surveying or quantity surveying services, in relation to construction work;

(b) project management services in relation to construction work;

(c) building, engineering, exterior or interior decoration or landscape advisory services in relation to construction work; or

(d) the provision of labour to carry out construction work.

(2) The Minister may, by order published in the Gazette, modify the definition of "construction work", "goods" or "services" in subsection (1) by adding to, varying or deleting any part of the definition.

#### **Application of Act**

4(1) Subject to subsection (2), this Act shall apply to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.

(2) This Act shall not apply to —

(a) any contract for the carrying out of construction work at or on, or the supply of goods or services in relation to, any residential property (within the meaning of the Residential Property Act (Cap. 274)), which do not require the approval of the

Commissioner of Building Control under the Building Control Act (Cap. 29);

- (b) any contract to the extent that —
  - (i) it contains provisions under which a party undertakes to carry out construction work, or supply goods or services, as an employee (within the meaning of the Employment Act (Cap. 91)) of the party for whom the construction work is to be carried out or the goods or services are to be supplied; or
  - (ii) it deals with construction work carried out outside Singapore, or goods or services supplied in relation to construction work carried out outside Singapore; and
- (c) such contract or class of contracts as may be prescribed.
- (3) For the purpose of this section, a contract shall be treated as being made in writing —
  - (a) if the contract is made in writing, whether or not it is signed by the parties thereto;
  - (b) if the contract is made by an exchange of communications in writing;
  - (c) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party, with the authority of the parties thereto; or
  - (d) if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.
- (4) Where a contract is not wholly made in writing, the contract shall be treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties thereto is in writing.

## **PART II : RIGHTS TO PROGRESS PAYMENTS**

### **Entitlement to progress payments**

5. Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.

### **Amount of progress payment**

6. The amount of a progress payment to which a person is entitled under a contract shall be —
- (a) the amount calculated in accordance with the terms of the contract; or
  - (b) if the contract does not contain such provision, the amount calculated on the basis of the value of the construction work carried out, or the goods or services supplied, by the person under the contract.

### **Valuation of construction work, goods and services**

- 7(1) Construction work carried out, or goods or services supplied, under a contract are to be valued —
- (a) in accordance with the terms of the contract; or
  - (b) if the contract does not contain such provision, having regard to the matters specified in subsection (2).

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

- (a) having regard to —
  - (i) the contract price for the construction work, goods or services;
  - (ii) any other rate or price specified in the contract; and
  - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price specified in the contract, is to be adjusted by a specific amount,
 or, in the absence of the matters referred to in subparagraphs (i), (ii) and (iii), then having regard to the rates or prices prevailing in the building and construction industry at the time the construction work was carried out, or the goods or services were supplied;
- (b) if any part of the construction work, goods or services is defective, having regard to the estimated cost of rectifying the defect; and
- (c) in the case of materials or components that are to form part of any building, structure or works arising from the construction work, having regard to the basis that the only materials or components to be included in the valuation are those that have become or, on payment, will become the property of the party for whom the construction work is being carried out.

### **Due date for payment**

- 8(1) Where a construction contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:
- (a) the date as specified in or determined in accordance with the terms of the contract; or
  - (b) the date immediately upon the expiry of 35 days after-
    - (i) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or
    - (ii) in any other case, the date on which or the period within which the payment response is required to be provided under section 11 (1) (whether or not a payment response is provided).
- (2) Where a construction contract does not provide for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable immediately upon the expiry of 14 days after-
- (a) if the claimant is a taxable person under the Goods and Services Tax Act (Cap. 117A) who has submitted to the respondent a tax invoice for the progress payment, the date the tax invoice is submitted to the respondent; or

- (b) in any other case, the date on which or the period within which the payment response is required to be provided under section 11 (1) (whether or not a payment response is provided).
- (3) Where a supply contract provides for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable on the earlier of the following dates:
- the date as specified in or determined in accordance with the terms of the contract; or
  - the date immediately upon the expiry of 60 days after the relevant payment claim is served under section 10.
- (4) Where a supply contract does not provide for the date on which a progress payment becomes due and payable, the progress payment becomes due and payable immediately upon the expiry of 30 days after the relevant payment claim is served under section 10.
- (5) The interest payable on the unpaid amount of a progress payment that has become due and payable –
- shall be at the rate specified in or determined in accordance with the terms of the contract; or
  - where the contract does not contain such provision, shall be at the rate prescribed in respect of judgment debts under the Supreme Court of Judicature Act (Cap. 322).
- (6) For the purpose of subsections (1) and (2) and subject to the Goods and Services Tax Act (Cap. 117A), the claimant may submit the tax invoice referred to in subsection (1) (b) (i) or (2) (a) at any time after the payment response referred to in subsection (1) (b) (ii) or (2) (b), respectively, is provided, notwithstanding anything to the contrary in the contract.

#### Effect of "pay when paid provisions"

- 9(1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.
- (2) In this section –
- "money owing" , in relation to a contract, means money owing for construction work carried out, or for goods or services supplied, under the contract;
- "pay when paid provision" , in relation to a contract, means a provision of the contract by whatever name called –
- that makes the liability of one party (referred to in this definition as the first party) to pay money owing to another party (referred to in this definition as the second party) contingent or conditional on payment to the first party by a further party (referred to in this definition as the third party) of the whole or any part of that money;
  - that makes the due date for payment of money owing by the first party to the second party contingent or conditional on the date on which

- payment of the whole or any part of that money is made to the first party by the third party;
- that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement; or
  - that is of such kind as may be prescribed.

### PART III : PAYMENT CLAIMS AND RESPONSES

#### Payment claims

- 10(1) A claimant may serve one payment claim in respect of a progress payment on –
- one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
  - such other person as specified in or identified in accordance with the terms of the contract for this purpose.
- (2) A payment claim shall be served –
- at such time as specified in or determined in accordance with the terms of the contract; or
  - where the contract does not contain such provision, at such time as may be prescribed.
- (3) A payment claim –
- shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
  - shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.
- (4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

#### Payment responses, etc.

- 11.(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant –
- by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
  - where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.
- (2) A respondent named in a payment claim served in relation to a supply contract may respond to the payment claim by paying to the claimant the claimed

amount, or such part of the claimed amount as the respondent agrees to pay, by the due date.

- (3) A payment response provided in relation to a construction contract –
- (a) shall identify the payment claim to which it relates;
  - (b) shall state the response amount (if any);
  - (c) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and
  - (d) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.
- (4) A respondent may vary a payment response which he has provided to a claimant if, and only if, the variation-
- (a) is made in such form and manner as may be prescribed; and
  - (b) is provided to the claimant by the date or within the period that a payment response is required to be provided under subsection (1) or within the dispute settlement period under section 12 (4).

#### **Entitlement to make adjudication applications**

- 12.(1) Subject to subsection (2), a claimant who, in relation to a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.
- (2) Where, in relation to a construction contract –
- (a) the claimant disputes a payment response provided by the respondent; or
  - (b) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11 (1),
- the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.
- (3) A claimant who has served a payment claim in relation to a supply contract is entitled to make an adjudication application under section 13 in relation to the payment claim if –
- (a) the claimant fails to receive payment by the due date of the claimed amount; or
  - (b) the claimant disputes the response amount, where the response amount is less than the claimed amount.
- (4) During the dispute settlement period, in addition to any other action that the claimant or the respondent may take to settle the dispute –
- (a) the claimant or the respondent may seek clarification from the other party on any matter relating to the relevant payment claim; and
  - (b) the respondent may provide the claimant with a payment response where he has failed to do so

under section 11 (1), or vary the payment response provided under that section.

- (5) In this section, “dispute settlement period”, in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11 (1).

### **PART IV**

#### **ADJUDICATION OF PAYMENT CLAIM DISPUTES**

##### **Adjudication applications**

- 13.(1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.
- (2) An adjudication application shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.
- (3) An adjudication application –
- (a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;
  - (b) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;
  - (c) shall contain such information or be accompanied by such documents as may be prescribed;
  - (d) shall be accompanied by such application fee as may be determined by the authorised nominating body; and
  - (e) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the claimant may consider to be relevant to the application.
- (4) The authorised nominating body shall, upon receipt of an adjudication application –
- (a) serve a copy thereof on the respondent; and
  - (b) serve on the principal (if known) and the owner concerned a notice in writing that the application has been made.
- (5) The notice referred to in subsection (4) (b) shall contain such particulars as may be prescribed.

##### **Appointment of adjudicator**

- 14(1) The authorised nominating body shall, upon receipt of an adjudication application, refer the adjudication application to a person who is on the register of adjudicators established under section 28 (4) (a) and whom the authorised nominating body considers to be appropriate for appointment as the adjudicator to determine the adjudication application.
- (2) The person to whom the adjudication application has been referred under subsection (1) may agree or decline to determine the adjudication application.

- (3) The authorised nominating body shall, within 7 days after receipt of the adjudication application, serve a notice in writing confirming the appointment of an adjudicator on the claimant, the respondent, the principal (if known) and the owner concerned.

#### Adjudication responses

- 15.(1) A respondent shall, within 7 days after receipt of a copy of an adjudication application under section 13 (4) (a), lodge with the authorised nominating body a response to the adjudication application.

- (2) The adjudication response –
- (a) shall be made in writing addressed to the authorised nominating body;
  - (b) shall identify the adjudication application to which it relates;
  - (c) shall contain such information or be accompanied by such documents as may be prescribed; and
  - (d) may contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions) as the respondent may consider to be relevant to the adjudication response.
- (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless-
- (a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or
  - (b) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.
- (4) The authorised nominating body shall, upon receipt of an adjudication response –
- (a) serve a copy thereof on the claimant; and
  - (b) serve on the principal (if known) and the owner concerned a notice in writing that the adjudication response has been lodged.
- (5) The notice referred to in subsection (4) (b) shall contain such particulars as may be prescribed.

#### Commencement of adjudication and adjudication procedures

- 16(1) An adjudication commences immediately upon the expiry of the period referred to in section 15 (1) within which the respondent may lodge an adjudication response.
- (2) An adjudicator shall reject –
- (a) any adjudication application that is not made in accordance with section 13 (3) (a), (b) or (c); and
  - (b) any adjudication response that is not lodged within the period referred to in section 15 (1).
- (3) An adjudicator shall –
- (a) act independently, impartially and in a timely manner;
  - (b) avoid incurring unnecessary expense; and

- (c) comply with the principles of natural justice.
- (4) Subject to subsection (3), an adjudicator may do all or any of the following in relation to an adjudication:
- (a) conduct the adjudication in such manner as he thinks fit;
  - (b) require submissions or documents from any party to the adjudication;
  - (c) set deadlines for the submissions or documents to be provided by any party and for the submissions or responses thereto by any other party;
  - (d) appoint, after notifying the parties, an independent expert to inquire and report on specific issues relevant to the adjudication;
  - (e) call a conference of the parties;
  - (f) carry out an inspection of any construction work, construction site, goods or any other matter to which the adjudication relates;
  - (g) issue such directions as may be necessary or expedient for the conduct of the adjudication.
- (5) Where an adjudicator has called for a conference of the parties to an adjudication, a party to the adjudication shall not be represented by more than 2 representatives (whether legally qualified or otherwise) unless the adjudicator permits otherwise.
- (6) The parties to an adjudication shall comply with any requirement made or direction issued by the adjudicator in accordance with this section.
- (7) An adjudicator's power to determine an adjudication application is not affected by the failure of –
- (a) the respondent to provide a payment response or lodge an adjudication response; or
  - (b) any of the parties to comply with the adjudicator's call for a conference of the parties or any other requirement made or direction issued by the adjudicator,
- and in the event of any such failure, the adjudicator may determine the application on the basis of the information and documents available to him.
- (8) The determination of an adjudicator on any adjudication application shall be in writing.

#### Determination of adjudicator

- 17(1) An adjudicator shall determine an adjudication application –
- (a) within 7 days after the commencement of the adjudication, if the adjudication relates to a construction contract and the respondent –
    - (i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or
    - (ii) has failed to pay the response amount, which has been accepted by the claimant, by the due date; or
  - (b) in any other case, within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

- (2) An adjudicator shall, in relation to an adjudication application, determine –
- (a) the adjudicated amount (if any) to be paid by the respondent to the claimant;
  - (b) the date on which the adjudicated amount is payable;
  - (c) the interest payable on the adjudicated amount; and
  - (d) the proportion of the costs of the adjudication payable by each party to the adjudication, and shall include, in the determination, the reasons therefor.
- (3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
- (a) the provisions of this Act;
  - (b) the provisions of the contract to which the adjudication application relates;
  - (c) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
  - (d) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;
  - (f) the report of any expert appointed to inquire on specific issues;
  - (g) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
  - (h) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.
- (4) In determining an adjudication application, an adjudicator shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.
- (5) If, in determining an adjudication application, an adjudicator has determined in accordance with section 7-
- (a) the value of any construction work carried out under a construction contract; or
  - (b) the value of goods or services supplied under a contract,
- the adjudicator (or any other adjudicator) shall, in any subsequent adjudication application that involves the determination of the value of that work or of those goods or services, give the construction work or the goods or services, as the case may be, the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value thereof has changed since the previous determination.
- (6) If the determination of an adjudicator contains –
- (a) a clerical mistake;
  - (b) an error arising from an accidental slip or omission; or
  - (c) a defect of form,
- the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the mistake, error or defect, as the case may be.
- (7) Except as provided in subsection (6), the adjudicator shall not change his determination on any adjudication application.
- (8) The authorised nominating body –
- (a) shall serve a copy of the adjudication determination, and any amended adjudication determination, on the claimant and the respondent; and
  - (b) shall serve on the principal (if known) and the owner concerned a notice in writing that the adjudication determination has been made or amended, as the case may be.
- (9) The notice referred to in subsection (8) (b) shall contain such particulars as may be prescribed.
- Adjudication review applications**
- 18(1) This section shall apply to a respondent who is a party to an adjudication if the adjudicated amount exceeds the relevant response amount by the prescribed amount or more.
- (2) Subject to subsection (3), where a respondent to whom this section applies is aggrieved by the determination of the adjudicator, the respondent may, within 7 days after being served the adjudication determination, lodge an application for the review of the determination with the authorised nominating body with which the application for the adjudication had been lodged under section 13.
- (3) Where the respondent is required in consequence of the adjudication determination to pay an adjudicated amount to the claimant, the respondent shall not lodge any application for the review of the determination unless he has paid the adjudicated amount to the claimant.
- (4) An adjudication review application –
- (a) shall be made in writing addressed to the authorised nominating body requesting it to appoint one or more review adjudicators to determine the application;
  - (b) shall contain such information or be accompanied by such documents as may be prescribed; and
  - (c) shall be accompanied by such application fee as may be determined by the authorised nominating body.
- (5) The authorised nominating body shall, upon receipt of an adjudication review application –
- (a) serve –
    - (i) a copy thereof on the claimant; and

- (ii) a notice in writing that the application has been made on the principal (if known) and the owner concerned; and
- (b) subject to subsection (7) and in accordance with the prescribed criteria, appoint a review adjudicator or a panel of 3 review adjudicators.
- (6) The authorised nominating body shall, within 7 days after receipt of the adjudication review application, serve a notice in writing confirming the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, on the parties to the adjudication review, the principal (if known) and the owner concerned.
- (7) For the purpose of subsection (5) (b) –
  - (a) section 14 (1) and (2) shall apply with the necessary modifications; and
  - (b) the authorised nominating body shall not appoint an adjudicator whose determination is the subject of the adjudication review.

#### **Adjudication review procedures, etc.**

- 19(1) An adjudication review commences on the date immediately after the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, is confirmed by the authorised nominating body under section 18 (6).
- (2) The review adjudicator or the panel of review adjudicators, as the case may be, shall reject any adjudication review application that is not made –
  - (a) within the period referred to in section 18 (2); or
  - (b) in accordance with section 18 (4) (a) or (b).
- (3) The review adjudicator or the panel of review adjudicators, as the case may be, shall determine the adjudication review application within 14 days after the commencement of the adjudication review or within such longer period as may have been requested by the review adjudicator or the panel of review adjudicators, as the case may be, and agreed to by the claimant and the respondent.
- (4) In relation to any adjudication review application, a review adjudicator or a panel of review adjudicators, as the case may be, may –
  - (a) substitute the adjudication determination that is the subject of the adjudication review for any other determination as is considered appropriate; or
  - (b) refuse the adjudication review application.
- (5) A review adjudicator or a panel of review adjudicators, as the case may be, shall determine under subsection (4) (a) –
  - (a) the adjudicated amount (if any) to be paid by the respondent to the claimant;
  - (b) where the adjudicated amount referred to in paragraph (a) is different from the amount that the respondent has paid to the claimant under section 18 (3), the date on which the difference in amount is payable;
  - (c) the interest payable on any such amount; and

- (d) the proportion of the costs of the adjudication review payable by each party to the adjudication review, and shall include, in the determination, the reasons therefor.
- (6) In determining an adjudication review application, the review adjudicator or the panel of review adjudicators, as the case may be –
  - (a) shall only have regard to the matters referred to in section 17 (3) (a) to (h) and the adjudication determination that is the subject of the adjudication review; and
  - (b) shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.
- (7) Where a panel of review adjudicators is appointed to determine an adjudication review application, the determination shall be decided in accordance with the opinion of the majority of the review adjudicators on the panel.
- (8) Sections 16 (3) to (8) and 17 (5) to (9) shall apply, with the necessary modifications, in relation to adjudication review applications.

#### **Withdrawal of adjudication applications and adjudication review applications**

- 20(1) An adjudication application may be withdrawn by the claimant at any time upon serving a notice of withdrawal on –
  - (a) the adjudicator;
  - (b) the authorised nominating body which appointed the adjudicator; and
  - (c) the respondent.
- (2) An adjudication review application may be withdrawn by the respondent at any time upon serving a notice of withdrawal on –
  - (a) the review adjudicator or the panel of review adjudicators, as the case may be;
  - (b) the authorised nominating body which appointed the review adjudicator or the panel of review adjudicators, as the case may be; and
  - (c) the claimant.

#### **Effect of adjudication determinations and adjudication review determinations**

- 21(1) An adjudication determination made under this Act shall be binding on the parties to the adjudication and on any person claiming through or under them, unless or until –
  - (a) leave of the court to enforce the adjudication determination is refused under section 27;
  - (b) the dispute is finally determined by a court or tribunal or at any other dispute resolution proceeding; or
  - (c) the dispute is settled by agreement of the parties.



- (2) An adjudication review determination under section 19 (4) (a) shall have effect as if it were an adjudication determination for the purposes of this Act.
- (3) This section shall not affect the right of any party to challenge an adjudication determination or an adjudication review determination in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

#### **Payment of adjudicated amount**

- 22.(1) Where, in relation to an adjudication application, the adjudicator has determined that the respondent shall pay an adjudicated amount to the claimant, then except as provided in section 18 (3), the respondent shall pay that amount –
- (a) within 7 days after the adjudicator's determination is served on the respondent; or
- (b) by the date on which the adjudicated amount is determined by the adjudicator to be payable, whichever is the later.
- (2) Where an application for the review of an adjudicator's determination has been lodged and the adjudication review determination differs from the adjudicator's determination, the party required to make payment in consequence of the adjudication review determination shall do so –
- (a) within 7 days after the adjudication review determination is served on that party; or
- (b) if the review adjudicator or the panel of review adjudicators has determined that payment may be made on a later date under section 19 (5) (b), on or before that date.

### **PART V : MEASURES TO ENFORCE PAYMENT OF ADJUDICATED AMOUNT**

#### **Consequences of not paying adjudicated amount**

- 23(1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the claimant may do either or both of the following:
- (a) serve a notice in writing on the respondent of the claimant's intention to exercise a lien under section 25 on goods supplied by the claimant to the respondent under the contract concerned that are unfixed and which have not been paid for;
- (b) serve a notice in writing on the respondent under section 26 of the claimant's intention to suspend carrying out construction work or supplying goods or services under the contract concerned.
- (2) Without prejudice to the generality of subsection (1), where a party to an adjudication fails to pay the whole or any part of the adjudicated amount to any other party in accordance with section 22, the aggrieved party may apply for and enforce the adjudication determination as if it were a judgment debt in accordance with section 27.

#### **Direct payment from principal**

- 24(1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the principal of the respondent may make payment of the amount outstanding, or any part thereof, in accordance with the procedure set out in subsection (2).
- (2) The procedure by which the principal may make payment to the claimant shall be as follows:
- (a) the principal shall serve a notice of payment on the claimant stating that direct payment shall be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner);
- (b) the respondent shall, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and
- (c) if the respondent fails to show proof of payment in accordance with paragraph (b), the principal shall be entitled to pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.
- (3) Where the principal is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) with a project account opened under section 9 of that Act, the claimant shall not be entitled to exercise the lien under section 25 or suspend work or supply under section 26 for 21 days after being served the notice of payment under subsection (2) (a) by the principal, unless the principal had previously defaulted on any payment to the claimant under this section in relation to the same contract.
- (4) Any payment by the principal under this section –
- (a) may be treated by the principal as payment to the respondent in reduction (by the amount of the payment) of any amount that the principal owes, or may in future owe, to the respondent in connection with the construction work, or the goods or services, concerned; or
- (b) may be recovered by the principal as a debt due from the respondent.
- (5) Where the principal has paid the adjudicated amount or any part thereof under this section, the subsequent setting aside of the relevant adjudication determination does not affect any rights conferred on the principal under this section.

#### **Lien on goods supplied**

- 25.(1) Subject to the provisions of this Act, the claimant has a lien on goods supplied by the claimant to the respondent under the contract concerned that are unfixed and which have not been paid for.
- (2) The lien under subsection (1) subsists if, and only if –
- (a) the claimant has served on the respondent the notice referred to in section 23 (1) (a);

- (b) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;
  - (c) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and
  - (d) the claimant has not been paid the adjudicated amount.
- (3) The lien under subsection (1) shall not give the claimant any priority over the liens on the goods existing before the date on which the first-mentioned lien arises.
- (4) The claimant has no rights to exercise the lien referred to in subsection (1) –
- (a) if the goods concerned are owned by some person other than the claimant or the respondent; or
  - (b) during the period referred to in section 24 (3).

#### **Right to suspend work or supply**

- 26.(1) Subject to the provisions of this Act, a claimant may suspend the carrying out of construction work, or the supply of goods or services, under a contract if, and only if –
- (a) the claimant has served on the respondent the notice referred to in section 23 (1) (b);
  - (b) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;
  - (c) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and
  - (d) the claimant has not been paid the adjudicated amount.
- (2) During the period of suspension exercised in accordance with subsection (1) –
- (a) the claimant is not liable to the respondent, the principal or the owner for any loss or damage suffered by the respondent, the principal or the owner, respectively, or by any person claiming through or under the respondent, the principal or the owner; and
  - (b) the respondent, the principal and the owner shall have no claim against the claimant for any loss or damage suffered as a result of the suspension, but the principal and the owner may recover liquidated damages or any other remedy from the respondent pursuant to any contract or under any law.
- (3) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of goods or services in accordance with subsection (1), incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply –
- (a) the respondent is liable to pay the claimant the amount of any such loss or expenses; and

- (b) any such loss or expenses may be recovered by the claimant as a debt due from the respondent.
- (4) Where a claimant has suspended the carrying out of construction work or the supply of goods or services under a contract in accordance with subsection (1), he shall resume such work or supply within 3 days after being paid the adjudicated amount.
- (5) Where a claimant has suspended the carrying out of construction work or the supply of goods or services under a contract in accordance with subsection (1), and –
- (a) the principal, who is a licensed housing developer under the Housing Developers (Control and Licensing) Act (Cap. 130) with a project account opened under section 9 of that Act, has served a notice of payment under section 24 (2) (a) on the claimant; and
  - (b) the principal has not previously defaulted on any payment to the claimant under section 24 in relation to the same contract,
- the claimant shall resume such work or supply within 3 days after being served the notice of payment under section 24 (2) (a).
- (6) The claimant shall be liable to pay for any loss or damage suffered by the respondent or the principal as a result of any failure to resume carrying out construction work or supplying goods or services, as the case may be, under subsection (4) or (5).
- (7) Any period of suspension under subsection (1) shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right of suspension or by a third party (other than the respondent), to complete any construction work or the supply of any goods or services directly or indirectly affected by the exercise of the right of suspension.
- (8) Where the contractual time limit referred to in subsection (7) is set by reference to a date rather than a period, the date shall be adjusted accordingly.

#### **Enforcement of adjudication determination as judgment debt, etc.**

- 27.(1) An adjudication determination made under this Act may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.
- (2) Where leave of the court is so granted, judgment may be entered in the terms of the adjudication determination.
- (3) An application for leave to enforce an adjudication determination may not be filed in court under this section unless it is accompanied by an affidavit by the applicant stating that the whole or part of the adjudicated amount has not been paid at the time the application is filed.
- (4) If the affidavit referred to in subsection (3) indicates that part of the adjudicated amount has been paid, the

judgment shall be for the unpaid part of the adjudicated amount.

- (5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 322, R 5), pending the final determination of those proceedings.

#### **PART VI : GENERAL PROVISIONS RELATING TO ADJUDICATION**

##### **Authorised nominating bodies**

28. (1) The Minister may –

- (a) upon the application of any person, authorise the person to appoint adjudicators and undertake such other functions or duties as may be imposed under this Act, subject to such terms and conditions as the Minister may think fit; and
  - (b) withdraw any such authorisation.
- (2) The Minister may limit the number of persons who may, for the time being, be authorised under subsection (1).
- (3) An authorised nominating body shall provide the Minister with such information or documents as may be requested by the Minister from time to time in relation to the activities of the authorised nominating body or its register of adjudicators established under subsection (4) (a), including but not limited to information as to the fees charged by the authorised nominating body or by the persons on its register of adjudicators for any service provided under or by virtue of this Act.
- (4) An authorised nominating body shall, in relation to its authorisation under subsection (1) –
- (a) establish and maintain a register of adjudicators;
  - (b) establish and administer codes of conduct or practice;
  - (c) provide training for the persons who are on the register of adjudicators;
  - (d) establish a schedule of fees for adjudication services provided under or by virtue of this Act, including an adjudicator's fees;
  - (e) facilitate the conduct of adjudications under this Act, including the establishing of rules therefor not inconsistent with this Act or any other written law, and provide general administrative support therefor; and
  - (f) undertake such other functions or duties as may be imposed under this Act or as may be directed by the Minister.

##### **Eligibility criteria for adjudicators**

29.(1) A person is eligible to be on the register of adjudicators established under section 28 (4) (a) if the person is an individual with such qualifications, expertise or experience as may be prescribed.

(2) A person is not eligible to be an adjudicator in relation to a contract –

- (a) if the person is a party to the contract, or is otherwise related to a party to the contract in such manner as may be prescribed; or
  - (b) if there exists such circumstances as may be prescribed.
- (3) A person who is in any way, whether directly or indirectly, interested in any contract or other matter which relates to an adjudication application referred to him by the authorised nominating body under section 14 or 18 shall immediately disclose the nature of his interest to the authorised nominating body.

##### **Costs of adjudication proceedings**

30(1) The costs of any adjudication shall not exceed such amount as may be prescribed by the Minister.

- (2) An adjudicator shall, in making his determination in relation to any adjudication application, decide which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party.
- (3) Where an adjudicator is satisfied that a party to an adjudication incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the second-mentioned party shall pay some or all of those costs.
- (4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

##### **Adjudicator's fees and expenses**

31(1) Subject to this section, an adjudicator is entitled to be paid, in relation to an adjudication application –

- (a) such fees as may be specified by the authorised nominating body which appointed the adjudicator; and
  - (b) such amount, by way of expenses, as may be agreed between the adjudicator and the parties to the adjudication or, if no such amount is agreed, then as the authorised nominating body considers to be reasonable having regard to the work done and expenses incurred by the adjudicator.
- (2) An adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application if he fails to make a determination on the application within the time allowed by section 17 or 19, as the case may be, otherwise than because the application is withdrawn or terminated or the dispute between the claimant and respondent is settled.
- (3) Subsection (2) shall not apply –
- (a) in circumstances in which an adjudicator requires payment of the fees and expenses referred to in

- subsection (1) before the issue of his determination on the adjudication application; or
- (b) in such other circumstances as may be prescribed.
- (4) Where an adjudication application is withdrawn or terminated or the dispute between the claimant and the respondent is settled, the adjudicator is entitled to be paid the fees and expenses incurred in relation to the adjudication up to, and including, the date on which the adjudication application is withdrawn or terminated or the dispute is settled, as the case may be.
- (5) For the purposes of subsection (4) –
- (a) in the case of the withdrawal of an adjudication application, the applicant shall be liable to pay the fees and expenses of the adjudicator; and
- (b) in any other case, the parties to the adjudication shall be jointly and severally liable to pay the fees and expenses of the adjudicator.
- (6) An adjudicator may recover his fees and expenses from a person liable to pay them as a debt due to the adjudicator.

#### **Protection from liability for adjudicators and authorised nominating bodies**

- 32(1) No suit or other legal proceedings shall lie against an adjudicator with respect to anything done or omitted to be done in good faith in the discharge or purported discharge of his functions or duties under this Act.
- (2) No suit or other legal proceedings shall lie against an authorised nominating body or any person acting under the direction of the authorised nominating body with respect to anything done or omitted to be done in good faith in the discharge or purported discharge of the authorised nominating body's functions or duties under this Act.

#### **Confidentiality of adjudication**

- 33(1) This section shall apply to the following information:
- (a) any statement or document created or made for the purposes of an adjudication; and
- (b) any information (whether written or oral) that, for the purposes of an adjudication, is disclosed in the course of the adjudication.
- (2) No party to a dispute or adjudicator shall disclose to any other person (not being the principal or the owner concerned) any information to which this section applies, except –
- (a) with the consent of the party to whom the information relates;
- (b) to the extent that the information is already in the public domain;
- (c) to the extent that the disclosure is necessary for the purposes of, or in connection with, the adjudication, the enforcement of the adjudicator's determination, or any proceeding before a court or tribunal or any other dispute resolution proceeding;
- (d) to the extent that the disclosure is required for any purpose under this Act; or

- (e) if the information will not be published in a form that could reasonably be expected to identify any particular person.

#### **Effect on other proceedings**

- 34.(1) Nothing in this Act shall affect any right that a party to a contract may have –
- (a) to submit a dispute relating to or arising from the contract to a court or tribunal, or to any other dispute resolution proceeding;
- (b) to apply for adjudication under this Act, notwithstanding that the dispute is the subject of proceedings in a court or tribunal or the subject of any other dispute resolution proceeding; or
- (c) to take such measures as he is entitled under Part V to enforce payment of any adjudicated amount.
- (2) If a party to a contract submits a dispute relating to or arising from the contract to a court or tribunal or to any other dispute resolution proceeding while the dispute is the subject of an adjudication under this Act, the submission to that other dispute resolution proceeding shall not bring to an end or otherwise affect the adjudication.
- (3) An adjudicator shall terminate the adjudication proceedings on a dispute relating to or arising from the contract if, before the adjudicator determines the dispute, the dispute is determined by a court or tribunal or at any other dispute resolution proceeding.
- (4) In any proceeding before a court or tribunal in relation to any matter arising under or by virtue of a contract, the court or tribunal –
- (a) shall allow for any amount paid to a party to the contract under, or for the purposes of, this Act in any order or award it makes in the proceeding; and
- (b) may make such orders as it considers appropriate, having regard to any action taken by a party to the contract in good faith and in reliance on an adjudication determination made under this Act.

### **PART VII : MISCELLANEOUS**

#### **Act to bind Government**

35. This Act shall bind the Government.

#### **No contracting out**

- 36(1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.
- (2) The following provisions in any contract or agreement (whether in writing or not) shall be void:
- (a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof;
- (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

- (3) The Minister may, for the purpose of subsection (2) (a), prescribe the type of provisions in any contract or agreement, or any class thereof, which are deemed to have the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereof.
- (4) Nothing in this Act shall, except as provided in subsection (1), limit or otherwise affect the operation of any other law in relation to any right, title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement.

#### Service of documents

- 37.(1) Where this Act authorises or requires a document to be served on a person, whether the expression “serve”, “lodge”, “provide” or “submit” or any other expression is used, the document may be served on the person –
- by delivering it to the person personally;
  - by leaving it during normal business hours at the usual place of business of the person; or
  - by sending it by post or facsimile transmission to the usual or last known place of business of the person.
- (2) Service of a document that is sent to the usual or last known place of business of a person under subsection (1) (c) shall be deemed to have been effected when the document is received at that place.
- (3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents.

#### Exemption

38. The Minister may, by regulations, exempt –
- any person or class of persons; or
  - any contract, agreement, matter or transaction, or any class thereof,
- from all or any of the provisions of this Act, subject to such terms or conditions as may be prescribed.

#### Amendment of specified periods

39. The Minister may, by order published in the *Gazette*, amend section 8 (1) (b), (2), (3) (b) or (4), 11 (1) (a) or (b), 12 (5), 13 (3) (a), 14 (3), 15 (1), 17 (1) (a) or (b), 18 (2) or (6), 19 (3), 22 (1) (a) or (2) (a), 24 (2) (b) or (3), 25 (2) (c) or 26 (1) (c), (4) or (5) by substituting a different period for the period for the time being specified therein.

#### Delegation of powers

- 40(1) The Minister may, subject to such terms or conditions as he thinks fit, delegate to any person all or any of his powers, functions and duties under this Act, except –
- the power of delegation conferred by this section; and
  - the power to make subsidiary legislation.
- (2) The Minister may exercise any power or perform any function or duty conferred upon him under this Act notwithstanding the delegation of that power, function or duty under subsection (1).

#### Regulations

- 41(1) The Minister may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without prejudice to the generality of subsection (1), regulations may be made for or in connection with –
- the forms to be used and the information or documents to be furnished;
  - the manner in which authorised nominating bodies are required to exercise their functions or perform their duties;
  - the form of records to be kept and maintained by the authorised nominating bodies, the information to be recorded and the submission of such records; and
  - the conduct of adjudicators.

#### Transitional and savings provisions

42. The Minister may, within 2 years of 1st April 2005, prescribe such transitional and savings provisions as he may consider necessary or expedient.

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#### COMMENT : FROM LITTLE ACORNS ...

I could never have guessed, when I attended a meeting in Cardiff in November 1995 to hear a fellow called Tony Bingham address us on a new fangled idea called adjudication, how successful the concept would prove to be and in particular the way it would gradually establish itself as a global alternative to arbitration and litigation.

Apart from the Schemes in England & Wales, the idea has been adopted and adapted first by New South Wales, Australia and subsequently by the other jurisdictions. In 2002 New Zealand came up with their own variation on theme. Now Singapore has followed suit. It is rumoured that Malaysia is at an advanced stage in the introduction of similar legislation. For two years in succession bills have been trailed through the Texas legislature which hopefully will eventually yield fruit.

In addition, the FIDIC and ICC have produced an amalgamated form of Adjudication and Dispute Review Board and subject specific variations have been introduced and are currently being refined for the World Bank. Now there is talk of adjudication training in central Europe.

The little acorn sown the DOM/1 contract in 1980 has not only developed a statutory root ball, but through effective husbandry, new varieties have been propagated and blossomed in different soil. Where next for adjudication one wonders.

## HOW LONG IS A PIECE OF STRING?

### The Duration of Mediation Sessions

The question for examination here is, *“How long should a mediation session last, with reference to the objectives of the session and the modus operandii adopted by the mediator?”*

In as much as mediation is purported to provide a cost effective alternative to third party determination, be that arbitration or litigation, this is a serious matter, since mediation can be very expensive. Even a few hours of mediation may well cost more than fast track litigation.

Section 1 of the Civil Procedure Rules is based on the perception that ADR is a cost effective alternative to litigation that should be considered in order to fulfil the over-riding objectives established by the CPR. To what extent does mediation fulfil this expectation?

Once the filing fee is paid for fast track litigation, apart from legal fees there is nothing more to for the parties to pay. Why then might the parties choose to defer legal proceedings to mediation? Do the benefits outweigh the additional costs?

Where the mediation is a free service then it is possible to concentrate purely on the added value arising out of the informality of the mediation process, speed, party autonomy and the scope for brokering settlements on terms not available at law, ranging from spread payments to wider interests and mutual opportunities. However, given the uncertainty of the process, which cannot guarantee an outcome, where the mediation involves additional costs, the parties are likely to take some convincing that the other benefits are sufficient to justify that expenditure. The greater the costs, the harder it will be to justify deferring to mediation. Whilst time may well be of the essence, the District Courts can often turn around small claims in 9-13 weeks. Experience indicates that in some courts it can take as long if not longer to arrange for a mediation session, which makes it virtually impossible to justify the use of mediation.

Without wishing to detract from the enthusiasm and commitment of those engaged in free mediation services and the service that they provide to clients, it is not a model that is likely to attract sufficient qualified and experienced practitioners to extend coverage to all courts. Whilst most would be prepared to offer pro-bono services in case of need, the number who would be able and willing to

provide blanket provision is likely to be very restricted.

The time allocated for free and low cost mediation tends to be quite restricted, with as little as half an hour face to face contact being allocated to some court schemes, particularly where subject to a fixed cost regime for small value disputes. In respect of moderate value disputes it is not uncommon for court mediation schemes to offer 2 to 3 hour mediation sessions, on graduated costs scales reflecting the value of the claim. It is only when the value of the claim rises above a quite generous threshold that the provision is extended to a full day.

Court mediation has a credible track record of success. Nonetheless many court based mediations fail to settle within the allocated time. Sometimes this meant that the mediation failed and the case went back into the court list. Other times it proved possible to keep going and extend the time. On other occasions the mediation has been moved to a different venue, or was continued on a virtual basis by phone or the mediation reconvened the next day. All of this indicates that the amount of time allocated to the mediation session may be crucial to the success of the process.

The question is, do the mediations that run out of time do so because the mediator's time management skills are in some way wanting, or is it simply because it is not possible to accurately prescribe the amount of time needed for a mediation session?

There is no doubt that it takes an experienced mediator to run a tight ship. Time is likely to become a major obstacle where a mediator loses control, but the unpredictable nature of clients is such that this may not be the mediator's fault.

A mediator has to expect the unexpected. Most mediators will have a range of game plans to chose from and will be able to switch seamlessly from one to another as the need arises as the process progresses.

Some measures can be taken to reduce the time needed for a mediation session. Advance preparation will remove elements of unpredictability, save the amount of time needed to establish a common understanding of the background, the issues and expectations of the parties. Any documentation produced for the first time during the mediation will take time for everyone to read and assimilate.

Despite the fact that pre-mediation documentation may encourage the exchange of documentation and even mandate it, providing pro-forma to assist the exchange, complete with strict schedules that the parties are expected to comply with, nonetheless it is not however uncommon for the mediator or go in cold, without any or very limited information. Either that or one party provides very complete documentation but the other does not. It is not unknown for a party to have complied with the exchange requirements, but for the documentation to have got lost in the system.

Where the mediator has the contract details of the parties in advance it may be possible for the mediator to contract each in turn and encourage exchanges of information. At the very least the mediator should be able to glean some additional information to help him prepare. Where documentation has got lost in the system this can give rise to client frustration and a loss of confidence in the process.

Following on from the initial opening session where the parties stake out their position there are three distinct stages to mediation, 1) information gathering 2) exploration and development of avenues for settlement and 3) the endgame leading to closure, drafting and signing the settlement.

Assuming that the time needed for the first stage can be kept to a minimum by prior exchanges of information, it is stage 2) that is likely to be the most time consuming. How much time is required depends partly on the degree of complexity of a dispute and the number of issues at stake. That apart much depends upon how the mediator perceives his role and accordingly the amount of control exercised by the mediator over the decision making process.

Whilst mediation is, by common agreement about party autonomy, putting the parties in control of their own destiny, the objective of mediation is to produce a settlement agreement which involves the parties compromising, to a greater or lesser extent, their initial expectations, until a stage is reached where the gap between them is closed. How can this be brought about? First the terms of the settlement have to be established, and much will depend on the how much movement each party concedes. Movement will not be equal. Otherwise mediation would simply amount to nothing more than dividing the cake.

The mediator can get each of the parties in turn to reconsider their positions, to re-examine what it is they want and whether or not it is reasonable or practicable to maintain their current stance. Often parties will be invited to view the situation from the perspective of the other side and to consider the extent to which they may have contributed to the situation. The parties may be asked to re-examine whether or not a court is likely to agree with them and to scale down inflated expectations. The mediator may encourage them to look beyond the current dispute to future relations. As progress is made, the mediator will move between the parties gradually closing the gap between them. Whilst all of this ensures that it is the parties that are making the decisions, albeit with a degree of manipulation by the mediator, none-the-less it all takes time.

There comes a time when the mediator has to close the deal. If a party makes it clear that they have reached their bottom line this must be conveyed to the other side, but the mediator does not have to endorse it. If it is not accepted the session ends. That surely must be the choice of the parties if party autonomy is the order of the day.

The alternative is for the mediator to take greater control over the decision making, to devise a solution and to persuade, bully and cajole the parties into accepting it. It might be what it takes to reach closure and the parties may welcome the intervention. However, how much party autonomy exists in such situations is questionable and is no doubt a matter of degree. It is true that a party has the right and power to decline but a forceful mediator could suborn the will of one or more parties. The greater the standing of the mediator the greater the likelihood is of this happening.

Does it really matter, providing there is an outcome, particularly where the mediator is of the view that it is fair and in the best interests of both parties? Perhaps not, but one must ask why the view of a mediator is to be preferred to that of a judge?

What will shape the deal sold by the mediator? For the judge it would be a judgement arising out of fact and law. The mediator is not constrained by either. The danger is that the mediator may shape a settlement that is in direct proportion to what he feels each of the parties would be able or willing to comply with. Thus the settlement would favour the most outspoken and obdurate of the two. The hardball negotiator would have the upper hand.

### The duration of adjudicatory processes

The second question for examination is *"How much time it is appropriate to accord to the adjudicatory process?"*

The statutory process established by the Housing Grants, Construction and Regeneration Act 1996 is subject to very restricted time limits. s108(2) provides that *"the contract shall-*

*(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*

*(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;"*

There were howls of protest at the idea that a construction dispute could be adjudicated upon within such a short period of time, particularly from the legal profession when the measure was enacted. The primary objection was that it allowed insufficient time for the parties to air their views and canvass the issues or for the adjudicator to reach a considered decision. Supporters of the proposals on the other hand tended to dismiss the objections as so much gate keeping of vested interests, in particular from those who made a living from arbitration and litigation.

The default position of supporters was that in the process has a built in safeguard. The outcome is not final. A party dissatisfied with the decision can always proceed to a *"de novo"* hearing of the case, with all the time safeguards of a full trial or arbitral hearing as the case may be.

This would not do for the detractors, since it had immediate cash flow implications for the loser, a *"de novo"* trial involved additional expense for the loser which might not be affordable and there was always the risk that at the end of the day the monies might not be recoverable. An addition perceived danger is that many might simply give up on chasing their entitlement, having been worn down by the process.

With the best part of eight years practical experience behind us, many of those who were initially opposed to construction adjudication have been won around by the apparent success of the process. Nonetheless there are others who remain adamant that whatever else adjudication achieves, it is not justice. The case for the detractors is reinforced by the fact that the adjudication process has often been shown to be a lot more expensive than originally imagines, with some of the most highly rated adjudicators commanding very high fees. With the consent of both parties it is

not uncommon for the adjudication process to be extended considerably with consequent cost implication, only for the decision to be successfully challenged during enforcement proceedings, followed on times by an appeal, and/or by a *de novo* trial or hearing as well. The process is not necessarily as speedy as anticipated and expensive to boot.

At first sight the critics seem to have it, but if one looks a little closer, there is a flaw in the argument which couples inadequate decision due to insufficient time with the cost argument arising out of extensions of time.

The issue therefore remains, are the time frames for adjudication inimical to fair judgement? The question as to whether or not the adjudication procedure by its nature is one capable of producing fair judgements is a separate issue. Thus whether or not what are essentially paper only dispute resolution procedures are appropriate should not be bundled up with the time constraint issue. The policy of imposing an intermediate mini-justice process, which by its very nature is likely to be somewhat rough and ready, between the party negotiation stage and the Rolls Royce arbitration/litigation stage is either right or wrong, depending upon one's view point. For some the compromise is justifiable in terms of cost and time savings and preserving cash flow within the industry. For others it is not. What it cannot do is provide the full R&R experience and cost and time benefits at the same time.

Over time the courts have defined and refined the parameters of a just adjudication procedure. A clear picture has emerged of what is and what is not acceptable and of what is expected by the court of the construction adjudicator. The adjudication dispute should have crystallised prior to issue of the notice and reference. These will establish the scope of the dispute before the adjudicator. Ambush should not be allowed to cast its shadow over the proceedings. No new issues should be permitted without consent. Nor is it for the adjudicator to investigate new causes. He is limited to the pleadings. The parties should present their case in a succinct manner, with clarity, directing the adjudicator to relevant evidence. The claimant should make out his case or fail and likewise the defence. If all that is done it should be possible for the adjudicator to reach a balanced view within the allotted time. If not, he should request additional time. If not acceded to he should resign.

C.H.Spurin



### IN SEARCH OF INTERNATIONAL JUSTICE Policy & International ADR.

The previous articles in this series “**In Search of Justice**” examined policy and procedure from the domestic context, noting the impact of judicial policy making. In this final article, the impact of judicial policy making is considered from the private international law perspective.

Whilst there is little the domestic litigant can do to circumvent the incidence of judicial policy making which impacts both upon litigation and arbitration, it is a factor to be taken into account by the prospective international commercial litigant when approaching the question of choice of law and jurisdiction during contract formation negotiations, since the judicial policy of the chosen forum may have a significant impact on the outcome of any future dispute arising out of that contract.

The arbitral process provides some limited protection against the vagaries of judicial policy-making and thus enhances the predictability of outcomes. The problem during contracting lies in the fact that the nature of future disputes is unpredictable. Even before the central issues gets to be considered, jurisdictional issues are often fiercely contested once it becomes clear to the parties that the governing law of one state might well produce a more favourable outcome to the dispute than that of another state. Whilst it is understandable that a party will argue any factor in their favour including jurisdiction, the choice of jurisdiction is a lottery at the time that the decision is made. The parties should be prepared to live with that decision for good or for bad. The way to ensure that that is the case is to take great care, in terms of clarity and completeness in the drafting of the choice of law and jurisdiction. Then, providing there are no loopholes, there should be no scope for expensive litigation about jurisdiction and governing law. If in hind sight the decision proves to have been unwise, that is too bad.

The main focus here is on the unpredictability of the courts when dealing with policy issues inherent in the governing law when faced with enforcement hearings under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958*. Article V provides as follows :-

1 *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

- (a) *The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
  - (b) *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
  - (c) *The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
  - (d) *The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
  - (e) *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
- 2 *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country' where recognition and enforcement is sought finds that:*
- (a) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
  - (b) *The recognition or enforcement of the award would be contrary to the public policy of that country.*

Mirror provisions are set out in s103(2)&(3) Arbitration Act 1996 as far as the UK is concerned. Article V(1) is uncontroversial. It covers much of the same ground as sections 67, 68, 72 and 73 Arbitration Act 1996. An action to enforce a Convention Award may be pursued under section 66 Arbitration Act 1996 as confirmed by section 104.

The policy issue is that set out in Article V(2). What then might be deemed to be capable of settlement by arbitration under the law and how might that differ from country to country? and how might public policy differ from state to state? Are these predictable matters and is should the parties be expected to anticipate such matters in advance?

Whilst it is trite law that ignorance of the law is no excuse and it is taken as a given that the citizen knows the law of the land (*even though this is unlikely to be the case beyond broad concepts*), how reasonable is it to expect someone to know the law of a foreign land? Should someone seek advice from an expert in foreign law before concluding a contract? Whilst that might seem extreme, it may well be a worthwhile precaution if it would not be possible to enforce that contract in the place where the other party keeps his assets, pre-supposing that one knows where that is at the time of contracting. Since nothing in the contract could remedy the situation the choice would be between making the contract or walking away. An even worse scenario would be one where the other party moves their assets to another jurisdiction after the contract is concluded. So much for taking sensible precautions.

For example, gambling is perfectly lawful in many countries and gambling debts enforceable in their court of law. This is not the case in England and Wales.

The English courts go out of their way to be even handed in all this and thus an additional twist to the tale is that they will not enforce an arbitration award where it is contrary to the law of the land of the country where the supposed liability was incurred. Thus in *Daad Sharab v Usama Salfiti* [1996] EWCA Civ 1189 the court had to determine whether or not mediation was contrary to Libyan Law. In the circumstances they decided that the activities of an agent were not contrary to that law and hence they were able to find for the claimant.

By contrast in *Soleimany v Soleimany* [1998] APP.L.R. 02/19 which involved the export of carpets from Iran, whilst a foreign award held that monies were due under the contract between two disputing brothers, the English court refused to enforce the contract because of illegalities that took place in Iran. The conduct was not illegal in England.

There tends to be a great deal of global communality regarding basic legal provision. That which is illegal in one country but lawful in another is likely to be related either to social oddities (e.g. dowries are permitted in some societies but not in others) or to special circumstances such as trade barriers to export/import. Nonetheless, in our highly mobile modern world, it can be anticipated that from time to time, litigants will fall foul of the policy exception to the New York Convention.

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### PRELIMINARY VIEWS

#### Which way is the wind blowing?

This article examines the question "*To what extent, if at all, should an adjudicator, arbitrator or judge be entitled to deliver a preliminary view as to the likely outcome of litigation – based on progress to date - during case management?*"

The problem inherent in issuing a preliminary view is that it could convey the message that the matter is done and dusted. Is there then any point in continuing or is it all too late? How much scope, if any at all, does this leave a dissatisfied party to challenge that view and turn the matter around? If the answer is none, then is there any value in issuing the view earlier rather than later?

On the other hand if it concentrates the mind on matters that need to be addressed, is this giving an unfair advantage to the dissatisfied party? After all, is it not for the parties to choose their grounds and to present argumentation. The arbitrator is not supposed to be an investigative magistrate directing the litigant's attention towards the matters that he feels go to the root of a matter. The task of the arbitrator is to decide the matter put to him by the parties.

It is a different matter where the tribunal signals that a matter is now closed and that the tribunal has heard all it needs to hear on the matter in order to reach a decision but no view is expressed as to the decision. Nothing here pre-empts the parties revisiting the issue briefly in summing up. It is a necessary part of management of the proceedings. It is the role of the tribunal to determine how much time will be allocated to the various aspects of the hearing. Thus section 33 Arbitration Act 1996 imposes a duty on the arbitrator to (a) *act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case,*

avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Further more, section 33(2) provides that *the tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*

Accordingly subject only to the agreement of the parties section 34 sets out the powers of the arbitrator to decide all procedural and evidential matters. The relevant matters over which the arbitrator exercises power are detailed in section 34(2) as follows :-

- (a) *when and where any part of the proceedings is to be held;*
- (b) *the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;*
- (c) *whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;*
- (d) *whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;*

- (e) *whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;*
- (f) *whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;*
- (g) *whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;*
- (h) *whether and to what extent there should be oral or written evidence or submissions.*

Again, it is a different matter where an arbitrator issues a preliminary award, since the decision is final. If a party disagrees then they have to explore the potential to appeal or otherwise challenge the enforceability of that decision. This is similar to an application to a court for a preliminary decision before further proceedings.

The European Court of Justice and the European Court of Human Rights sometimes issue preliminary opinions. It is normally anticipated, that apart from further insights and greater depth the final opinion will not differ significantly from the preliminary opinion.

C.H.Spurin

## MEDIATION CASE CORNER

C.H.Spurin

### APC Ltd v Amey Construction Ltd [2005] ScotCS CSOH\_147

The defendant asked the court to order the claimant to amend his pleadings because they were not supported by the facts, in order to facilitate a mediation. The request was declined because such an order would not assist mediation. Furthermore, whether or not the underlying alleged facts were correct or not was an issue that would be settled by proof. The case was set down for trial, leaving it to the parties to pursue the mediation, should they wish to do so, particularly since it had already taken 7 years to get this far and no mediation had yet taken place. Lord MacKay. Outer House, Court of Session. 11<sup>th</sup> November 2005

**COMMENT :** This is yet another failed attempt to induce a court to shift the balance of negotiating power in favour of one party. The courts have made it clear that they will not do this.

### Campbell v. MGN Ltd [2005] UKHL 61

The court examined the legality of 100% costs agreements in a Conditional Fee Agreement.. Lord Hoffman contrasts the potential for negotiated settlement under the current regime between negligence claims and libel actions, in the light of legal insurance.

House of Lords before Lords Nicholls of Birkenhead, Hoffmann, Hope of Craighead, Carswell, Baroness Hale of Richmond. 20th October 2005.

### Codent Ltd v Lyson Ltd (2005) Lawtel AC9400558

The claimant failed to beat a payment offer - not followed up with a payment in and made less than 21 days before trial. At 1st instance the court made no allowance for the payment in : the CA held costs should be split 70:30. CA :before May LJ, Arden LJ, Sir Peter Gibson. 8th December 2005.

**Decoma UK Ltd v Haden Drysys International Ltd. [2005] EWHC 2429 (TCC)**

Payment In : Can a claimant be said to be a successful party when he seeks to accept a payment into court after the expiry of the 21 days, which payment has been made in respect of some (but not all) of his claims, many of which have been subsequently dismissed by the court?

His Honour Judge Peter Coulson QC. 4th November 2005.

**Gosfield School Ltd v Birkett Long (a firm) [2005] ADR.L.R. 12/16**

Settlement advice : Duty of care of adviser. Settlement between school and parents for breach of contract to provide satisfactory standard of education failed to preclude further third party claims by the pupils themselves for loss of earnings and employment prospects. Privity issues. No duty to advise where it is not apparent that the client is mistaken as to the scope of the settlement.

His Honour Judge Tugendhat. QBD. 16th December 2005

**Hall v Pertemps Group Ltd [2005] EWHC 3110 (Ch) : LAWTEL AC9900805**

Allegations of threats occurring during a mediation featured in another action. The court was asked to decide whether or not this amounted to a waiver of the mediation privilege? The court held that it did not. It only amounted to a waiver of the discrete issue as to whether or not threats were made in the mediation or occurred subsequently and were made to a third party and hence were not relevant to the action. Accordingly the privilege that attached to the mediation process continued to apply and nothing that occurred or was said during the mediation was admissible in court.

Cases referred to included : *Rush & Tompkins Ltd. v. Greater London Council & Anor.* [1989] 1 A.C.1280; *Unilever plc v. The Procter & Gamble Co.* [2000] 1 W.L.R.2436; *Muller v. Linsley & Mortimer* [1996] P.N.L.R.74, *Reed Executive plc & Anor. v. Reed Business Information Ltd. & Ors.* [2004] 1 W.L.R.3026.; *Halsey v. Milton Keynes General NHS Trust* [2004] 1 W.L.R.3002 ; *Savings & Investment Bank Ltd. (in liquidation) v. Fincken* [2004] 1 W.L.R.667

HHJ Lewison. Chancery Division. 1st November 2005 .

**In the matter of a company (2005) Lawtel No. AC9100809**

Privilege : Where the parties refer to the conduct of a mediation satellite litigation they are deemed to have waived privilege.

Ch.Div. Lewison J. 1st November 2005.

**Locksley Brown v MCASSO Music Productions [2005] EWCA Civ 1546**

Refusal to mediate : settlement offer : In the circumstances there were no winners. The claimant got less than he sought. The defendant incurred great costs. The appropriate order was no costs : Order for claimant to pay costs quashed. Judge placed too much reliance on the settlement offer.

CA : Scott Baker LJ; Neuberger. 10th November 2005.

**Nicholas Drukker & Co v Pridie Brewster & Co [2005] EWHC 2788 (QB)**

Drukker sought by way of a detailed costs assessment to recover liquidation management fees. Entitlement was countered by allegations of professional negligence – in that the time taken for transfer of the business property concerned was unnecessarily delayed, preventing the business from operating at a commercial profit. The assessment hearing was stayed to mediation. The case dragged on from 1999 and the stay was eventually lifted two years after mediation had been either abandoned or had proved unsuccessful. At the assessment hearing an attempt was made to rely on allegations of negligence to challenge costs. This amounted to using a costs assessment as a means of trying the negligence issue which could and should have been heard at trial. The costs court held that this was an abuse of process and struck the negligence grounds out. Whilst under the CPR conduct of the trial is a relevant matter for costs, this went beyond that to substantive matters which are beyond the jurisdiction of the costs court.

QBD Costs Appeal. Openshaw J, Master Campbell, John Bucklow. 12th December 2005

**Pengelly v Enright-Redding [2005] EWCA Civ 1639**

Family Mediation : Rescheduled with approval of the court for the purpose of restoring / improving communications between separated parents to enable them to cooperate together over access etc for the benefit of the child. CA on appeal from Exeter County Court (HHJ Mackintosh)

CA before Thorpe LJ; Scott Baker LJ; Wall LJ. 9th November 2005.

**Percy v. Church of Scotland Board of National Mission (Scotland) [2005] UKHL 73**

House of Lords held that the applicant, a Church Minister had a contract of employment and was entitled to pursue a claim for Sexual Discrimination before an Employment Tribunal. In the interests of privacy (the case had already attracted the attention of the press because it involved allegations of infidelity between one of the first female ministers in the Scottish Church and a parishioner) Baroness Hale commended mediation in lieu of further litigation. Lords Nicholls; Hoffmann; Hope; Scott & Baroness Hale. 15th December 2005

**COMMENT :** Whilst, in the light of the House's decision it was highly likely that Percy could now establish entitlement, leaving quantum as the central issue, which is eminently negotiable, the problem, hinted at by Baroness Hale but not spelt out, is that Percy, having suffered widespread adverse press coverage would have no way of vindicating her position in the eyes of the public by brokering a private settlement. The prospects of mediation therefore would depend principally on the extent to which the applicant now wished to achieve closure and get on with her new life.

**Richards v Davis [2005] EWHC 90014 (Costs)**

Insurance : Legal Costs underwriters, not parties to a settlement agreement between the parties to a road accident, are not bound by the terms of the settlement. Accordingly, it is not an abuse of process for them to assert that the terms of a CFA had not been complied with.

Master Hurst, Senior Costs Judge. 25th November 2005

**Sarah Binch v David Freeman (2005) Lawtel AC0110543**

Costs : Proceedings commenced prematurely : No effort made to negotiate : However, this had not prevented the defendants pursuing negotiations even at that stage but they did nothing. Eventually the defendant made a payment in that was accepted. Court found defendant liable for costs to that date.

HHJ Jack. 6th December 2005.

**Walker Residential Ltd v Davis [2005] Lawtel AC9100839**

Mandatory Costs Order : A claimant is entitled to a costs order up to the date of acceptance of a Part 36 Payment In - the court cannot limit costs to the date of the original offer.

Park J. Chancery Division. 9th December 2005.

<b>CONSTRUCTION CASE CORNER</b>	<b>C.H.Spurin</b>
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**AWG Group Ltd v Morrison [2005] EWHC 2786 (Ch)**

This case raised questions in respect of conflict of interest and perceived bias in respect of the trial judge, but the same considerations would apply equally to an adjudicator or arbitrator. The trial judge declined to recuse himself from the trial on the grounds that he knew a potential witness who had not been called by the claimants. He concluded that since alternative witnesses had been called, there was no longer a problem. Furthermore, the enhanced costs of the trial that would arise out of appointing a replacement judge and the undesirability of postponing a trial where the judge was already up to speed on all the issues outweighed any concerns about potential bias, particularly since they had ceased to be relevant.

Mr. Justice Evans-Lombe. Chancery Division. 1st December 2005.

**Catlin Estates Ltd v Carter Jonas (a firm) [2005] EWHC 2315 (TCC)**

Third Party Rights : Right to recover on behalf of another : Shareholder rights : Defective Premises : Meaning of dwelling : Linden Gardens v Linesta Sludge revisited. HJH John Toulmin CMG QC. 31st October 2005.

**Clark Smith Partnership Ltd v Leyton Football Club [2005] EWHC 3102 (TCC)**

AEC Payment provisions : Whether notice pre-requisite to payment for variation.

Deputy Judge : Colin Reese QC : TCC. 14th December 2005

**Hackwood Ltd v Areen Design Services Ltd [2005] EWHC 2322 (TCC)**

This concerned an application under s72 Arbitration Act 1996 that Hackwood (the employer) was not party to an arbitration agreement. If it was a party, ADS applied for a declaration that by virtue of this application, Hackwood be debarred from taking part in any further arbitral proceedings.

ADS carried out refurbishment work to Hackwood House, commencing programming work on the basis of a letter of intent which envisage a formal contract on JCT "with contractor's design" 1998 terms. The tender document had contained a program of works A second letter of intent that referred to JCT resulted in commencement of works, whereby ADS submitted payment applications following the JCT procedure that were duly paid by the employer and otherwise applied for extensions of time and variations. The letter of intent was never replaced with a formal contract. Agreement was never finalised on a range of issues including start and finish date, CDR regulations and arrangements for a temporary roof.

Following issue of final certificate ADS referred a dispute as to extensions of time to an adjudicator. The adjudicator found against ADS. On the basis of the JCT follow on provisions from adjudication ADR then gave notice of CIMAR arbitration, since Art 6A had not been deleted. Hackwood asserted that they were not parties to an arbitration agreement and that the JCT did not apply, relying on the dicta of Lloyd J in **Amec v Whitefriars** [2003] and asserting that where the JCT annex's are not completed there is no finalised contract. ADS countered that Hackwood's position at the adjudication was that the JCT applied and they could not now assert the contrary.

Mr Justice Field held (1) that the 2<sup>nd</sup> letter of intent was on JCT terms (2) on the facts unlike **Amec v Whitefriars** sufficient terms were agreed to constitute a contract (3) the JCT adjudication / arbitration provisions applied (he also dismissed an assertion that insufficient notice in respect of time or detail had been furnished in order to make a valid appointment of an arbitrator (4) a s72 Arbitration Act 1996 reference does not automatically preclude an applicant from subsequently participating in arbitration where the application fails. Mr Justice Field declined to deal with the asserted adjudication consent estoppel issue because his finding that the JCT terms applied rendered it unnecessary to do so.

Mr Justice Field. TCC. 31<sup>st</sup> October 2005.

#### **Melville Dundas Ltd v. George Wimpey UK Ltd [2005] ScotCS CSIH\_88**

In this reclaiming motion the pursuers successfully appeal against the decision of Lord Clarke that under the terms of a JCT Contract, on the appointment of a receiver all claims cease to be payable. *SL Timber Systems Ltd v Carillion, Clark Contracts v The Burrell and Rupert Morgan v Jervis* considered.

The central issue was whether the effect of Clause 27 was to retrospectively alter the date when the monies (if any since a balancing act would then occur between the financial rights and liabilities of each party would be carried out) would become due or to defer payment, contrary to the requirements of the HGCRA. The court held that the effect was to defer payment contrary to the intention of the HGCRA provisions which were designed to improve cash flow. The provisions cannot be contracted out of by the parties. An assertion that the HGCRA only applied to on going contracts and did not apply once a contract had been determined was rejected. The provisions of the contract, for the purposes of payment etc continue after the contract comes to an end.

15<sup>th</sup> December 2005

Lords Nimmo Smith, Mackay and MacLean. Extra Division, Inner House, Court of Session.

**COMMENT :** The implications of this case are considerable and are likely to result in the redrafting of many standard form construction contracts. From the adjudication perspective, they address important issues of jurisdiction for adjudicators involved in disputes where one of the parties has entered into liquidation.

#### **Midland Expressway Ltd v Carillion Construction Ltd (No1) [2005] EWHC 2810 (TCC)**

Post adjudication litigation : A number of disputes arising out of the M6 Toll Road project were referred to adjudication. The disputes were considered together in a single action before Mr Justice Jackson. Whilst some of the outcomes changed many did not. This was a very speedy trial given its complexity - no doubt assisted by the recycling of material from the adjudications. The facts also set the scene for Case No2 below.

His Honour Mr Justice Jackson. TCC. 14<sup>th</sup> November 2005

#### **Midland Expressway Ltd v Carillion Construction Ltd (No2) [2005] EWHC 2963 (TCC)**

A variety of changes to the specifications for the merging of the M6 Toll road with existing motorways resulted in additional expenditure which CAMBBA (a consortium of contracts headed by Carillion) sought to recover through adjudication. MEL applied for a declaration and injunction to halt the adjudication. MEL did not dispute that monies were due to CAMBBA relying rather on a range of jurisdictional matters to

avoid/postpone payment. The contract was complex and in several parts, involving the Highways Agency (Minster for State) which part funded the project and the Consortium agreement. Part of the contract was based on PFI standard form but this was not a PFI contract. The various agreements contained a range of dispute resolution provisions.

The court had to decide who the relevant parties were to this dispute and whether or not a dispute could exist. The Highway's Agency had a role in this in that they were part-financing the project and had a veto over expenditure. The question therefore was whether the dispute was between CAMBBA (with or without MEL) and the Highways Agency or directly with MEL. MEL's problem was that if they paid out more than the Highway's Agency approved they might not be able to recover the balance from the Agency – but the HGCRA had abolished *Pay when Paid* provisions. The court held that in the circumstances the relevant parties were MEL and CAMBBA so that a dispute had come into existence.

MEL further sought to establish that a dispute could not come into being until the value had been determined by a certifying body. The court rejected this, stating that a provision which restricts the ability of a party to a construction dispute to refer that dispute to adjudication is invalid.

His Honour Mr Justice Jackson. TCC. 24<sup>th</sup> November 2005

#### **Phillip Small v Andrew Martin [2005] EWHC 2969 (TCC)**

A contractor ran into cash flow problems with a domestic contract, having seriously undervalued the works. This led to a bitter dispute between the parties following disruption to works and requests for additional payments. Eventually the contractor withdrew from site and the owner refused re-entry to complete work and consequent litigation. The paperwork presented to the court by both parties was very poor to non-existent and much of the trial was taken up with oral proofs. The owner successfully recovered damages. However, the owner's behaviour, together with that of an associate whilst trying to pressurise the builder into paying compensation amounted to criminal harassment, for which the court made a substantial award. One is left with the distinct impression that adjudication, mediation or early litigation would have been preferable.

His Honour Judge John Toulmin CMG QC : TCC. 21st December 2005.

## **PRACTICE & PROCEDURE CASE CORNER**

C.H.Spurin

#### **AIG Capital Partners Inc v Kazakhstan [2005] EWHC 2239 (Comm)**

Enforcement of arbitral award : State immunity - funds to the a/c of the National Bank of the State of Kazakhstan. Interim order attaching funds discharged.

Mr Justice Aitkens. Commercial Court. 20th October 2005.

#### **ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)**

Bias : apparent : Arbitrator acted as counsel in another case for a principal witness to the current arbitration. Tribunal prepared to continue without an Umpire and to resort to an alternative Umpire if the circumstances demanded. Held : Arbitrator should step down. Mr Justice Morison. Commercial Court. 19th October 2005

#### **Ashley Bell & George Wimpey v East Renfrewshire Council [2006] CSOH 9**

Costs of co-defender : Scottish procedure : Held : the losing party will not be required to pay out twice for legal costs of winning party - where the winning parties should have provided joint representation : they have the right to separate presentation but only the first party's costs are recoverable.

R F MacDonald QC (Sitting as a Temporary Judge. 9th December 2005

#### **Bernuth Lines Ltd v High Seas Shipping Ltd [2005] EWHC 3020 (Comm)**

The central issue for consideration here was whether or not email communications between the arbitrator and the parties were effective? In the circumstances "*any effective means*" of communication were anticipated by the contract. The arbitrator sent notices to the email address on the defendant's web site. The receiving department did not forward them to the legal department. In consequence they did not submit a defence or attend the arbitration resulting in a valid default judgement.

Mr Justice Christopher Clarke. Commercial Court. 21<sup>st</sup> December 2005.

**COMMENT** : It would appear that the booking department had treated all the emails as SPAM and ignored them. Note that on the facts the emails were not deleted by a SPAM detector – if they had been the outcome might have differed in that they may not have been regarded as having been received. They were received and electronic notification of receipt was sent out confirming this.

Given the drive towards electronic communications and the paperless office concept, without necessarily recommending that such a procedure be adopted in adjudication, it is possible to foresee a situation where an applicant might email a notice and all subsequent referral documents etc to the other party, and where the adjudicator, in a similar vein might send the defendant notice of appointment and instructions entirely by email, to the same address identified in the application for appointment and in the referral document.

**Catlin Estates Ltd v Carter Jonas (a firm) [2005] EWHC 2315 (TCC)**

Third Party Rights : Right to recover on behalf of another : Shareholder rights : Defective Premises : Meaning of dwelling : Linden Gardens v Linesta Sludge revisited. Had property been sold to Mr Catlin by CEL and if so did builder owe a tortious duty of care for defective premises arising out of breach of contract ? Held : CEL still owner  
HJH John Toulmin CMG QC. 31st October 2005.

**CGU International Insurance Plc v AstraZeneca Insurance Co Ltd [2005] EWHC 2755 (Comm)**

Challenge : s69. Conflicts of Law : UK or US : Reinsurance dispute.  
Mr Justice Cresswell. Commercial Court. 1st December 2005

**Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd [2005] EWHC 2912 (Comm)**

Challenge : s69. Existence of agreement is a mixed question of fact or law that can be corrected by the court if incorrectly determined by the tribunal. Mr Justice Langley. Commercial Court. 16th December 2005.

**Danepoint Ltd v AUA [2005] EWHC 2809 (TCC)**

Indemnity costs : Circumstances when costs will be ordered on an indemnity basis.  
HHJ Peter Coulson. TCC. 28th November 2005.

**Primetrade AG v Ythan Ltd [2005] EWHC 2399 (Comm)**

Challenge : s67. Existence of contract. Liability of holder of bill of lading for damage to vessel due to shipment of dangerous cargo. Mr Justice Aikens. Commercial Court. 1st November 2005.

**Protech Projects Construction (Pty) Ltd. v Moh'd Abdulmohsin Al-Kharafi [2005] EWHC 2165 (Comm)**

Challenge : s68 serious irregularity on grounds of non-disclosure not established. CFA incorrectly described as an irregularity. No injustice. Mr Justice Langley. Commercial Court. 14th October 2005.

**Svenska Petroleum Exploration AB v Lithuania & Anor [2005] EWHC 2437 (Comm)**

Conflicts : State Immunity : Lithuania took part in an arbitration in respect of an exploration venture defending a claim for damages in relation to the issuing of licences. The arbitral tribunal held that the State was a party to the arbitration agreement. Enforcement action in England unsuccessfully resisted on grounds of state immunity. Mrs Justice Gloster. 4th November 2005.

**TTMI Ltd of England v ASM Shipping Ltd of India [2005] EWHC 2666 (Comm)**

Freezing order. Application to freeze funds from 1st award pending outcome of a counterclaim in a subsequent arbitration refused. Shipowners entitled to freight earned.  
Mr Justice Christopher Clarke. Commercial Court. 23rd November 2005

**Wates Construction Ltd. v HGP Greentree Allchurch Evans Ltd. [2005] EWHC 2174 (TCC)**

Costs on indemnity basis : When applicable. HHJ Peter Coulson. 10th October 2005.

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