RICHARD TED.



INTERNATIONAL CONSTRUCTION LAW SEMINAR

Jointly organised by NUS, SCL (Singapore) and SCL (KL & Selangor)

NUS National University of Singapore

The Society of Construction Law (Selangor and Kuala Lumpur)

"Current Developments in Construction Law"

Accredited by PEB S'pore (6 PDUs) and BOA/SIA (4 CPD points)

Date: **Monday, 6 June 2005**
Time: **8.30am to 4.30pm**
Venue: **SDE3, 4th Floor, Lecture Room SDE3-427**
School of Design and Environment
National University of Singapore
4 Architecture Drive, Singapore 117566

This is an international seminar with two speakers from the UK, one from Malaysia and two from Singapore, covering the areas of Security of Payment, Sustainable Building and Safety in the Construction Industry.

SEMINAR PROGRAMME

8.30am-9.00am	Registration
9.00am-9.10am	Opening
9.10am-10.10am	**HHJ Humphrey LLoyd QC:** "The Building and Construction Industry Security of Payment Act 2004 – Experience of the UK Legislation of 1996 that may be Relevant to the Application of the Act in Singapore"
10.10am-10.40am	Refreshment break
10.40am-11.20am	**Mr Chow Kok Fong:** "The Security of Payment Regime in Singapore – Anticipating the Impact on Existing Payment Culture"
11.20am-12.00nn	**Mr Wilfred Abraham:** "Payment under Construction Contracts; Time for Legislation in Malaysia?"
12.00nn-12.30pm	Question & Answer session
12.30pm-2.30pm	Lunch (buffet provided for participants)
2.30pm-3.10pm	**Mr Philip Britton:** "Legislating for Sustainable Construction in the UK"
3.10pm-3.50pm	**Mr Philip Jeyaretnam SC:** "After Nicoll Highway: The Legal Roles and Responsibilities of the PE and QP (Supervision) for Temporary Works"
3.50pm-4.30pm	Question & Answer session

REGISTRATION FORM

Please register me for the International Construction Law Seminar on Monday, 6 June 2005.

Title: Prof / Dr / Mr / Mdm / Ms

Name: _____

Company: _____

Address: _____

_____

Tel: _____ Fax: _____

Amount: $_____ @ S$40.00/ S$160.00/ S$200.00 per participant.

Cheque No: _____
Payable to **National University of Singapore**

Matric No (students): _____

Seminar Fee

Students: S$40.00
SCL members: S$160.00 [SCL (Kuala Lumpur & Selangor) and SCL (Singapore)]
Others: S$200.00

The fee per participant is inclusive of GST. No refunds will be provided, but substitutions are allowed if the seminar organiser is informed by 2 June 2005.

Closing date for registration: **1 June 2005**.

Please send the completed registration form together with your cheque payment to:

Ms Chelvi
Department of Building
School of Design and Environment
National University of Singapore
4 Architecture Drive
Singapore 117566

DID: (65) 68745150; Fax: (65) 67755502
Email: bdgtp@nus.edu.sg

INTERNATIONAL CONSTRUCTION LAW SEMINAR

Jointly organised by NUS, SCL (Singapore) and SCL (KL & Selangor)

Current Developments in Construction Law

The Building and Construction Industry Security of Payment Act 2004

Experience of the UK Legislation of 1996 that may be Relevant to the Application of the Act in Singapore.

Humphrey LLoyd

The Major Differences in the Two Regimes.

I will start by identifying some of the principal features which are or do not appear to be present in the legislation in Singapore. Happily those responsible for the new Act learned from New Zealand and Australia as well as the United Kingdom.

First, the Act does not attempt to make the regime contractual. The UK legislation requires a construction contract (as defined) to meet certain requirements. If the contract does not do so, then the Act imposes the requirements as terms of the contract. Section 114(4) of the Act provides

> "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

Thus the Scheme (your Regulations) took effect as implied terms of the sub-contract. The claimants were only entitled to exercise their right to call for adjudication if it first complied with paragraph 1(3) of the Scheme.

Apart from legislation required to protect the consumer or national interests and in relation to monopolies it is hard to think of another comparable case of Parliament singling out parts of a sector of the commercial life of the country and requiring them to alter its contracts (including tried and tested standard forms promoted by representative bodies) on the basis that it knew better than its members how their commercial relationships should be regulated. It was a remarkable interference in the freedom of contract enjoyed by people who are normally well able to look after themselves. This policy has not been ignored in the UK in interpreting the Act. It is intriguing that statutory intervention has gone much further than, say, consumer legislation which has mainly been directed to securing that people cannot abuse freedom of contract by contracting *out* of what the common law regards as basic obligations inherent in certain relationships.

Many of the decisions in the UK turn therefore on contractual issues which are not likely to be relevant in Singapore. However the Act is concerned with contractual arrangements so it is possible that some in the UK will be relevant if consideration is given to amending new forms of contract or even in producing new contracts.

Secondly, the Singapore Act has avoided the problems of the UK legislation by opting for simpler definitions of what constitutes a "construction contract". In the UK the "mischief" rule was applied – a perfectly correct approach – legislate only where there is some thing wrong that needs to be put right. The state of the UK construction industry (or parts of it) was such that it was thought that legislative intervention was essential.

When drawing up the list of construction work which would not be subject to the Act the Government evidently carried out a most thorough investigation of the whole of the industry and was convinced that certain parts were already so efficient, had cut costs to the bone and

were so responsive to the needs of their clients that they should be exempt. It must have thought that the management of some types of construction work and the relationships between those whose business is in those areas are so good that no regulation of any of their contracts or sub-contracts (at whatever level or tier and in whatever respect) was needed. One cannot be but impressed by the detail of the investigations and the results: drilling for oil and gas is excluded but drilling for water (even if it is ultimately to be treated) is not; a contract for tunnelling to lay a sewer (even if it is going to a sewage works) or to construct a railway has to be regulated but not a contract to tunnel for minerals; installing plant for nuclear processing, and power generation, or for water and effluent treatment is excluded but not plant for an incinerator[1]. So apparently the constructional steelwork industry was such a paragon that it is exempt when carrying out work on a site where the primary activity is the production of pharmaceuticals, oil, gas, steel or food or drink. Alas it enjoys no such privileges if the structure is primarily for the warehousing of food or drink. So too does the contract or sub-contract for the concrete foundations to which exempt steelwork will be anchored. But if the owner decided on the advice of its engineer that the structure should be built in reinforced concrete rather than steel then all the ensuing contracts will not be excluded. Is the wide immunity given to much work in the water, oil and gas industries to be seen as a tribute to the facts that few if any of its contracts have pay when paid clauses and that disputes that bedevil other industries are conspicuously absent.

Thirdly, unlike the UK legislation, the Act is evidently directed only to safeguarding payment. Its adjudication regime does not extend to all types of dispute. However the terms of the contract may mean that a claim for payment may be made which includes claims for damages. The recent decision of the Court of Appeal in New Zealand in George Developments Ltd v Canam Construction Ltd 12 April 2005, CA244/04, unreported, held that under the New Zealand legislation, it was permissible to include a claim for payment a claim for the costs of an extension of time. Looking outside Singapore we can see a possible instance of how this might arise where there was a claim for damages sin clause 14.3 of the FIDIC Conditions:

---

1 Instances borrowed from the late Mr Ian Menzies' paper at page 21 of *Contemporary Issues in Construction Law.*

"14.3 The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [Progress Reports].

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:
(a) the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but excluding items described in sub-paragraphs (b) to (g) below);
(b) any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost];
(c) any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Contract Data to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Contract Data;
(d) any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [Advance Payment];
(e) any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [Plant and Materials intended for the Works];
(f) any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]; and
(g) the deduction of amounts certified in all previous Payment Certificates."

Quite early on the argument that a claim for damages for professional negligence fell outside the ambit of the Act was dismissed y the Court of Session in Scotland. [2]. Adjudications now regularly take place that require questions of professional negligence to be determined, often in answer to a claim for fees. A useful recent example is London and Amsterdam Properties v Waterman [2003] EWHC 3059 (TCC) (18 December 2003).

In addition it is possible that in Singapore contracts will provide for the method of adjudication to be extended to other disputes. Other cases in the UK may then be relevant.

Fourthly, in looking at the cases in the UK it is necessary to bear in mind that most arise from applications to enforce decisions of adjudicators. These are generally applications for

2

summary judgment being made under Part 24 of the CPR. The ultimate question is only whether the defendant can establish realistic prospects of success. There is no final decision. In Singapore provision is made the review of the primary decision so one might it to be even more difficult to satisfy a court that the decision was wrong (unless of course there was some pertinent flaw in the review procedure). In addition the Act provides for other methods by which an amount due may be recovered.

Fifthly, the courts have enforced the policy of the UK legislation. Since the decision of the adjudicator is provisional and subject to review, the fact that the adjudicator may have made a mistake is not a reason for to enforce the decision. It can be put right later. There have been many cases to that effect, starting with Macob Civil Engineering v Morrison Construction[3]. A striking illustration was given in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd[4] is striking illustration. The Court of Appeal considered an adjudicator's decision which was wrong as it failed to make allowance for retention. As a result Bouygues was ordered to pay £208,000 to Dahl-Jensen when Dahl-Jensen ought to have been ordered to pay Bouygues £141,000. It held that the decision was nevertheless valid and enforceable as it stood, since the adjudicator had acted within his jurisdiction. The Court endorsed the principle summarised by Knox J in Nikko Hotels (UK) Ltd v MEPC Plc[5]:

> "If he has answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

This principle appears now to be enshrined in the Act. (Exceptionally, there might be a stay of execution where, for example, there was real likelihood that money paid over would not be recovered.)

I deal later with another class of mistake. I now leave the differences between the act and the UK legislation to consider areas where the experience in the UK may be helpful.

---

3 [1999] BLR 93

4 [2000] BLR 522.

5 [1991] 2 EGLR 103 at page 108B.

Agreements in writing

Section 4(3) of the Act contains provisions which are much the same as those in the UK legislation, section 107 of which reads:

> "(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.
> The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.
>
> (2) There is an agreement in writing –
> if the agreement is made in writing (whether or not it is signed by the parties),
> If the agreement is made by exchange of communications in writing, or
> if the agreement is evidenced in writing.
>
> (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
>
> (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
> .....

These provisions derive from the UNCITRAL Model Law on Arbitration and the Arbitration Act 1996. The Court of Appeal in England has considered this section, principally in RJT Consulting Engineers Ltd v DM Engineering Ltd [2002] EWCA Civ 270, [2002] BLR 217; [2002] All ER (D) 108. I need only refer to certain parts of the judgment of Ward LJ (with whom Robert Walker LJ agreed):

> "**[12]** I turn to the construction of s 107. Section 107(1) limits the application of the Act to construction contracts which are in writing or to other agreements which are effective for the purposes of that part of the Act only if in writing. This must be seen against the background which led to the introduction of this change. In its origin it was an attempt to force the industry to submit to a standard form of contract. That did not succeed but writing is still important and writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.
>
> **[13]** Section 107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is signed by the parties, is made in writing. That must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the

agreement. The second category, an exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the *eiusdem generis* rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.

[14] Sub-section (3) is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record.

[15] Sub-section (4) allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is there contemplated is, thus, a record (which by sub-section (6) can be in writing or a record by any means) of everything which has been said. Again it is a record of the whole agreement.

[16] Sub-section (5) is a specific provision. Where there has been an exchange of written submissions in the adjudication proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other, then that exchange constitutes "an agreement in writing to the effect alleged". The last few words are important. The exchange constitutes an agreement in writing which does more than evidence the existence of the agreement. It also evidences the effect of the agreement alleged, and that must mean such terms which it may be material to allege for the purpose of that particular adjudication. It is not necessary for me to form a view about *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181. Dealing with s 107(5) His Honour Judge Bowsher QC said:–

> "Disputes as to the terms, express and implied, of *oral* construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by adjudicators under the Act, . . ." (Emphasis added by me)

I agree. That is why a record in writing is so essential. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute."

The decision was not questioned in Thomas-Fredric's Construction v Wilson, CA 21 October 2003 and in Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd, [2003] EWCA Civ 1750, 21 Nov 2003, the Court of Appeal said :

> "This court has decided that for an agreement to be in writing within section 107(2)(c) of the 1996 Act, the whole contract has to be evidenced in writing, not merely part of it, and that it was not sufficient to confer jurisdiction to entertain an adjudication under section 108 that there was evidence in writing capable of supporting merely the existence or substance of an agreement, the parties to it, the nature of the work and the price (Ward and Robert Walker LJJ in the R J T Consulting Engineers case). In that

case, it was held that, since the documents relied on by the defendant contained no evidence of the terms of the oral agreement made between the parties or of those terms on which the defendants sought to rely in the adjudication, there was no "agreement in writing" within the meaning of section 107. Auld LJ held that the material terms of the agreement were insufficiently recorded in writing in any of the forms for which section 107 of the 1996 Act made provision. It followed that the provisions of Part II of the Act did not apply to that agreement. Robert Walker LJ said that the purpose of the Part II of the 1996 Act was to facilitate and encourage swift and summary adjudication. Parliament decided that it was inappropriate for an adjudicator to have to deal with disputes as to the terms of an oral contract."

Auld LJ had said in RJT:

> "**[21]** I also agree that the appeal should be allowed. I do so, not because the whole agreement was not in writing in any of the forms for which s 107 of the 1996 Act makes provision, but because the material terms of the agreement were insufficiently recorded in writing in any of those forms.
>
> **[22]** Although clarity of agreement is a necessary adjunct of a statutory scheme for speedy interim adjudication, comprehensiveness for its own sake may not be. What is important is that the terms of the agreement material to the issue or issues giving rise to the reference should be clearly recorded in writing, not that every term, however trivial or unrelated to those issues, should be expressly recorded or incorporated by reference. For example, it would be absurd if a prolongation issue arising out of a written contract were to be denied a reference to adjudication for want of sufficient written specification or scheduling of matters wholly unrelated to the stage or nature of the work giving rise to the reference."

Although there is much practical sense in what Auld LJ said, in practice it could be quite easy for an adjudicator to be drawn into considering pre-contract discussions and negotiations which were once thought to be irrelevant. The better approach would be to stick to the contents of the documents. Since the time for arriving at a decision is in Singapore shorter than in the UK (although, sensibly, it can be extended) the reasoning of the majority of the Court of Appeal is perhaps applicable.

Jurisdiction

Given the clear purposes of the Act I do not expect that there will be problems over jurisdiction. Some in the UK resist enforcement on the ground that the adjudicator exceeded his or her jurisdiction, i.e. "the wrong question" has been answered.

My personal stating point has been Mercury Communications Ltd v. Director General of Communications, 22 July 1994, English Court of Appeal, unreported (the decision of the House of Lords was strictly on another point and does not affect the rationale of these observations: [1996] 1 WLR 48). The Director General had made a determination on a point in dispute between certain telecommunication companies. The plaintiffs contended that the Director General in his decision had misinterpreted the licence of the second defendants (British Telecommunications Plc) and sought a declaration as the correct meaning of the licence. The defendants maintained that the matters in question could be raised, if at all, in an application for judicial review under Order 53 of the Rules of the Supreme Court and that in any event the declaration would not settle the matters in dispute. There was therefore an issue as to the role or jurisdiction of the court. Hoffman LJ (who dissented) said this under the heading "Prematurity":-

> "The parties agree that a firm of accountants shall determine the value of a parcel of shares. They do not prescribe any particular principle of valuation, such as allowing a discount for a minority interest. In such a case, the court will not intervene to decide how the valuation should be done. Neither in advance of the valuation nor afterwards. The parties have agreed to accept the accountants' valuation and in the absence of fraud or collusion they are bound by whatever it is. The same is true of other decisions entrusted to experts. This is a rule of substantive law: Jones v. Computer Services plc [1992] 1 WLR 277.
>
> .....
>
> One must be careful about what is meant by "the decision-making authority". By "decision-making authority" I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to "decide" what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the

decision-maker the question of whether given facts fall within the specified criterion. The distinction is clearly made by Lord Mustill in Regina v. Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd [1993] 1 WLR 23 at page 32.

In every case the question is: what was the decision-maker authorised to do? In one sense no decision-maker is authorised to make a mistake. However in agreeing to adjudication the parties have to accept that the adjudicator may err. If the decision is one of fact and within the authority given to the adjudicator then the courts cannot and will not interfere: see for example Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd per Lord Hoffmann[6] echoing what he had said in Mercury:

> "The powers of the architect or arbitrator, whatever they may be, are conferred by the contract. It seems to me more accurate to say that the parties have agreed that their contractual obligations are to be whatever the architect or arbitrator interprets them to be. In such a case, the opinion of the court or anyone else as to what the contract requires is simply irrelevant. To enforce such an interpretation of the contract would be something different from what the parties had agreed. Provisions of this kind are common in contracts for the sale of property at a valuation or goods which comply with a specified description. The contract may say that the value of the property or the question of whether the goods comply with the description shall be determined by a named person as an expert. In such a case, the agreement is to sell at what the expert considers to be the value or to buy goods which the expert considers to be in accordance with the description. The court's view on these questions is irrelevant."

Lord Hope of Craighead said much the same[7]. This principle is directly relevant to objections to the enforcement of decisions which may be disguised as challenges to jurisdiction or authority. The court will leave them to be decided by the ultimate tribunal as the decision is only provisional and if wrong should then be put right. However, as Beaufort shows, a court will otherwise be able to scrutinise an adjudicator's decision to see if it is within the authority given to the adjudicator.

Mistakes of law might be considered separately, if only because an adjudicator's jurisdiction may be limited (e.g. to disputes *under* the contract, as in the UK). If they are part of the question that was asked and about the contract little or nothing can be done about them. A

---

6 [1998] 2 All ER 778 at page 784.

7 at page 797.

recent decision of the Court of Appeal in England provides some helpful guidance: C & B Concept Design Ltd v Isobars Ltd [2002] EWCA Civ 46. Sir Murray Stuart-Smith gave the judgment with which the other members agreed:

> "22. The real question is whether this error on the part of the Adjudicator went to his jurisdiction, or was merely an erroneous decision of law on a matter within his jurisdiction. If it was the former the Recorder was right to hold that summary judgment should not be entered. If it was the latter, then in my judgment the proper course, subject to any question of stay of execution, is that the Claimant is entitled to summary judgment.
>
> 23. The whole purpose of s. 108 of the Act, which imports into construction contracts the right to refer disputes to adjudication, is that it provides a swift and effective means of resolution of disputes which is binding during the currency of the contract and until final determination by litigation or arbitration. s.108(3). The provisions of s.109-111 are designed to enable the contractor to obtain payment of interim payments. Any dispute can be quickly resolved by the Adjudicator and enforced through the courts. If he is wrong, the matter can be corrected in subsequent litigation or arbitration.
>
> 24. In *Northern Developments (Cumbria) Ltd v J & J Nichols*, His Honour Judge Bowsher QC cited with approval the following formulation of principles stated by His Honour Judge Thornton QC in *Sherwood & Casson v Mackenzie*(2000) 2 TCLR 418 :
> "(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;
> (ii) a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;
> (iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;
> (iv) the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction;
> (v) an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence."
>
> 25. I respectfully agree with this formulation. I would also add, as I have already pointed out, the provisional nature of the adjudication, which, though enforceable at the time can be reopened on the final determination."

In the Scots case of Barr Ltd v Law Mining Ltd, 15 June 2001, Lord MacFadyen understandably thought that "soundness" was better than "validity", but the decision

otherwise shows that the law is probably the same in Scotland, although there have been some later indications that a mistake of law might not be so viewed. It is just possible that if the mistake in a decision was so egregious then court would decline to enforce it, but in the light of Bouygues it is hard to see what would be the circumstances to justify such a view. In London and Amsterdam Properties v Waterman [2003] EWHC 3059 (TCC) (18 December 2003) a submission that C & B Concept Design Ltd v Isobars Ltd and Macob had been decided per incuriam was rejected. The judgment sets out the argument:

> "192. He submitted that these cases are inconsistent with higher binding authority namely *Anisminic v Foreign Compensation Commission* (1969) 2 AC 147 and *O'Reilly v Mackman* [1983] 2 AC 287. He submitted that S108 should be read against the background of the ordinary law applying to public or private decisions as set out in those cases. (He contended that the Scheme of the Act is that the Adjudicator should find the facts and apply English law to the facts as found. There would be no purpose in the Adjudicator ascertaining the relevant law if he were empowered to decide according to his own ideas and not obliged to apply English law. If there is an error of law it means that the Adjudicator asked the wrong question.
>
> 193. In *Anisminic v. Foreign Compensation Commission [1969] 2 AC 147* the House of Lords considered a determination of the Foreign Compensation Commission as to the appellant's claim to be entitled to participate in an Egyptian compensation fund. Section 4(4) of the Foreign Compensation Act 1950 provided:-
> *"The determination by the Commission of any application made by them under the Act shall not be called into question in any court of law".*
>
> 194 The respondents contended that the court had no jurisdiction to entertain the proceedings. Lord Wilberforce at page 208 said:
> *"Just as it is the duty of the court to attribute autonomy of decision to the Tribunal within the designated area so the counterpart of this autonomy is that the courts must ensure that the limits of the area laid down are observed".*
>
> 195 Lord Reid at page 171 said
> *"I have come without hesitation to the conclusion that in this case we are not prevented from inquiring whether the order of the commission was a nullity.*
> *It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to*

take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".
(emphasis provided)

196 The words emphasised are particularly apposite in relation to the approach consistently followed by the Courts who have considered S 108 from Macob onwards. O'Reilly was also concerned with the question as to whether the decision of an inferior tribunal or body was susceptible of challenge, in that case by way of a private law action. The decision in question was the determination by prison visitors making a disciplinary award. The issue was whether it was within the protection afforded to statutory tribunals from private suit given the availability of judicial review. It was held that the decision was not challengeable in a private law action.

197 Mr Bartlett relied on the passage at p.287 in the speech of Lord Diplock.
The breakthrough that the Anisminic case made was the recognition by the majority of this house that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being "determination" within the meaning of the empowering legislation, was accordingly a nullity.
(emphasis provided)

198 This case emphasises the requirement that a court must scrutinise with care the extent of the empowerment conferred on a particular tribunal or body by statute or otherwise and to consider where appropriate whether or not a mechanism for challenge exists as to its determinations by way of appeal judicial review or by any other prescribed route.

199 It is evident from Anisminic and O'Reilly that if the Court concludes that the adjudicator was properly seized of the real dispute between the parties and comes to a decision relating to that dispute that involves an error as to law or fact that decision is a decision "within the meaning of the empowering legislation" because S 108 (3) H G C R A provides that "*the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or.....by agreement.*" Parliament has given provisional finality to the adjudicator's decision and laid down the mechanism whereby it may be challenged if in error.

200 Similar analyses were followed in those public and private law cases cited by Mr Bartlett.

201 Thus in Anisminic the question was whether the order of the Foreign Compensation Commission was within its powers under the Foreign Compensation Act and could it be the subject of challenge in court. It was held that the order in that case was susceptible of challenge. In *R v Lord President of the Privy Council Ex Parte Page* (1993) 682 the issue was whether the Visitor's decision within the power conferred by the relevant University requesting documents. In the absence of bad faith or of compliance with the requirements of natural justice it was held not to be susceptible of challenge. In *Racal Communications Ltd.* 1981 AC 374 the issue was

whether a judge's decision could be challenged where S441 Companies Act 1948 provided that the decision was final. The Court of Appeal held that the empowering provision was sufficiently clear to oust the jurisdiction of the Court of Appeal to entertain an appeal. In *Boddington v B.T.Police* [1999] AC 143 the issue was whether the statutory regime whereby an anti-smoking bye law was made under the Transport Act as amended was capable of challenge in criminal proceedings. It was held that it was but in *R v Wicks* 1998 A.C it was held that an administrative act triggering consequences for the purposes of the criminal law could not be challenged in the criminal court because there already existed a prescribed mechanism to challenge the planning enforcement notice in question:

202 The regime whereby an Adjudicator's decision may be effectively challenged is now well settled. The construction placed on Section 108 of the HGCR Act 1996 and the statutory scheme by courts both in England and Wales and in Scotland; starting with the analysis in *Macob* and *Outwing* and has been consistently followed at first instance."

Slips

Although section 17(6) of the Act deals with errors it does not say indicate the time within which an mistake may be corrected. The solution adopted by Judge Toulmin QC in In Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd[8] may not be helpful as it was based on contract. He decided that it was an implied term of the adjudication scheme of the JCT form of contract that an adjudicator had power to correct an accidental error or omission to clarify and remove an ambiguity within a reasonable time and if to do so would not prejudice the other party[9]. An approach of this kind should create no greater problems in practice than the comparable power given to an arbitral tribunal under arbitration legislation and rules to correct an award. Decisions have to be taken in a short time so the possibility of mistake is real and perhaps greater than with an arbitral award[10].

---

8 [2000] BLR 764.

9 In F.W. Cook Ltd v Shimizu (UK) Ltd [2000] BLR 199; the possibility of overpayment (since the decision did not take account of sums already paid) did not arise since the dispute referred was about valuation and not the amount due.

10 *Building* of 2 March 2001 reported one experienced solicitor saying that "there are lots of lots of mistakes" – referring to ones which everybody knows.

Payment Provisions – Cross Claims and Defences

Here the Act differs from the UK legislation but only in its formulation. There are a few instances where a contract does not contain terms whereby the amount of a progress payment may be calculated (cf section 6(a)) and the amount of the claim will be significant enough to justify contesting the claim, mindful that some money is likely to be ordered to be paid. It is more likely that the terms do not adequately set out a mechanism for calculating the amount (cf section (9b).

Adjudicators – their Qualities and Functions

I interpose at this stage a preview of parts of the latest report from Glasgow Caledonian University, with the kind permission of Dr Peter Kennedy.

The qualities expected of an adjudicator are essentially those expected of an arbitrator, but enhanced. Since a decision has to be reached quickly the adjudicator must be able to assimilate material and to express a conclusion clearly and decisively. Quite a few decisions in the UK are unenforceable since the outcome is not expressed with clarity.

Preparation of Claim and Response

In the UK adjudication is initiated by a party serving a notice of dispute. It is then followed by a referral notice – the claim itself. There has been an understandable tendency to concentrate on the latter document. The provisions in Singapore should not give rise to the same problems.

Natural Justice

The Act requires an adjudicator to conform to the principles of what the English common law calls natural justice. Its relevant attributes – an impartial tribunal and "audi alteram partem" are found elsewhere under other names, e.g. in the United States the concept of "due process" includes them. There have been complaints about whether the adjudicator has taken given each party a reasonable opportunity of dealing with points adverse to it. There have also been complaints about whether the adjudicator has given parties the opportunity to deal with the result of his own investigations – see e.g. Balfour Beatty v London Borough of Lambeth [2002] BLR 288. The Act in allowing an adjudicator to use experts does not indicate that if the results of the inquiries are to be made available to the parties. In the UK the recent Guidance for Adjudicators published by the Construction Umbrella Bodies Adjudication Task Group - a body that was widely representative of the construction industry – accepts that "the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit", following the decision of His Honour Judge Bowsher QC in Discain Project Services Limited v Opecprime Limited (No 1). [[2000] BLR 402. The phrase stems from submissions that were common ground in Glencot Developments v Ben Barrett [2001] BLR 207 at page 218 (paragraph 20). Given the time scale in Singapore the concept in the words "or as fairly as the limitations imposed by Parliament permit" is likely to be relevant. In Lambeth I said: "It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. Adjudication under the Act is necessarily crude in its resolution of disputes."

It is clear from Discain (and other cases) that there must be some causal connection between the apparent failure to comply with the rules of natural justice and the result, sufficient to justify refusing an an application to enforce a decision. The Court of Appeal in the context of a decision about whether an adjudicator erred in the way that he inquired into his jurisdiction has suggested that a robust approach should be adopted (which is indeed what it done in practice). In Amec Capital Projects v Whitefriars [2004] EWCA Civ 1418 Dyson LJ said:

> "A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. I respectfully disagree with the judge's view that the requirements of natural justice apply without distinction, whether the issue being considered by the

adjudicator is his own jurisdiction or the merits of the dispute that has been referred to him for decision. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have the right to make representations in relation to decisions which do not affect their rights, still less in relation to "decisions" which are nullities and which cannot affect their rights. Since the "decision" of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make such a "decision" after giving the parties an opportunity to make representations. The matter can be tested in this way. Let us suppose that the court were to hold that an adjudicator was right to "decide" that he had jurisdiction, but that he had reached this "decision" without giving the parties an opportunity to make representations on the point. The court would not declare the "decision" to be void. It would not do so because the adjudicator's "decision" was of no legal effect. No useful purpose would be served by such a declaration, not least because the court had held that the adjudicator did in fact have jurisdiction. The court would not grant any relief for the supposed breach of natural justice in such a case. It seems to me that this demonstrates that the rules of natural justice have no part to play in relation to issues that the decision-maker has no power to decide.

Nevertheless, I consider that, where time permits, adjudicators would be well-advised to give the parties the opportunity to make representations on an issue of jurisdiction: they may receive valuable assistance which will help them to decide whether they should proceed with the adjudication. And that is what happened in the present case. But I do not consider that an adjudicator who decides to proceed with an adjudication is acting in breach of natural justice if he does not allow the parties that opportunity."

However it must be emphasised that these observations apply to questions where the adjudicator does not reach a binding decision.

Role of Adjudicator - Mediation

It is noteworthy that international rules of arbitration make it clear that a person appointed to make decisions according to law should keep to that. The ICC Rules say very clearly in Art 17 that an arbitrator cannot make a "ex aequo et bono" (or as amiable compositeur) unless the arbitral tribunal has been given power to act "ex aequo et bono". That is because such a process will be concerned with the commercial interests of the parties which may not be synonymous with their legal rights and obligations. Thus such a person will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the arbitration but which might be prejudicial to its determination.

So too in adjudication. There is nothing to prevent a person becoming a mediator but it must be agreed expressly ("informed consent") and the consequences also agreed: if the mediation is unsuccessful can the mediator revert to being an adjudicator. If the parties agree there is (or should be) no problem. In Glencot Developments v Ben Barrett [2001] BLR 207 (at page 218) I expressed my view: "Mediation is a necessarily a flexible concept and like most forms of alternative dispute resolution it will be or should be tailored to suit the needs and interests of the parties. In contrast to the role of an adjudicator, arbitrator or judge, which is primarily to decide the facts and to apply the law (in the case of an adjudicator, the law of the contract), a third party (whether called a mediator, conciliator or neutral, the terms are sometimes interchangeable - the function is what counts) may well not be required to make any decision or express any view, still less a binding one. The role is understood to be more to assist the parties to arrive at their own binding agreement"

The Determination

I have already referred to the need for clarity in the decision. Obviously in Singapore the opportunity exists on a review for any lack of clarity to be corrected.

© Humphrey LLoyd 2005

The writer was a barrister (appointed Queen's Counsel in 1979) and arbitrator specialising in international construction disputes until 1993 when he became a judge of the Technology and Construction Court (the TCC) in London (formerly known as an official referee). He is now an arbitrator.

He has been Co-Editor-in-Chief of *The International Construction Law Review* since its foundation in 1983. He was Editor-in-Chief of the *Building Law Reports* from 1987 to 1993 and is Consultant Editor to other publications.

He was a founding member of the UK Society of Construction Law and its President 1985-1988. He was awarded the President's Medal of the UK Society in 2004. He is a member of the European Society of Construction Law and an Honorary Fellow both of the American College of Construction Lawyers and of the Canadian College of Construction Law.

He is chairman of the Review Body for the UK Construction Industry Model Arbitration Rules and a Fellow of the Chartered Institute of Arbitrators. He conducts a course in International Construction - Contracts and Arbitration for the University of London (where he is a Senior Visiting Fellow at Queen Mary College). He is Visiting Professor in the Construction Law and Arbitration at Leeds Metropolitan University.

He has been a Member of the Commission on International Arbitration of the ICC since 1980. He is currently co-chairman of an ICC group on the writing of arbitral awards which submitted its report in May 2005. In 2001 He was the joint leader of a Report to the ICC Commission on Construction Industry Arbitration in 2001. He has also served on ICC working parties or task forces on Terms of Reference, Multi-Party Arbitration, Arbitration and Construction, the Pre-Arbitral Referee Procedure (of which he was co-chairman), Small Claims, IT and Arbitration, Experts and Dispute Review Boards.

© Chow Kok Fong 2005

THE SECURITY OF PAYMENT REGIME – NAVIGATING AN UNCERTAIN RECEPTION

CHOW KOK FONG
LLB(Hons), BSc(Hons), MBA, FRICS, FCIArb, FCIS

kfchow@equitascorp.com

It has been barely two months since the Building and Construction Industry Security of Payment Act 2004[1] came into force. The often stated policy objective behind the enactment of this legislation is to address cash-flow disruptions in the construction industry by conferring a right to progress payment on any party who undertakes construction work, provides any service or supply any goods or materials relating to construction work or the carrying out of construction work. This statutory right is protected by an adjudication machinery conceived to provide a temporarily binding determination of any payment dispute between parties to a contract which falls within the ambit of the regime. This presentation examines how the main constituencies within the construction industry have reacted thus far to the introduction of the statutory regime and examines some of the issues which are likely to remain uncertain until these could be submitted for the ruling of the courts here.

---

1 This came into operation on 1 April 2005. Hereinafter, this shall be referred to as either "BCISP Act" or "the Act" as the context requires.

© Chow Kok Fong 2005

It is important to recognize that the legislation behind this new statutory regime is quite unlike any other seen in the construction industry thus far. The Honourable Judge of Appeal, Chao Hick Tin J in a recent speech noted:

> "First it is a rare instance of a statutory instrument seeking to impose a regime on matters in the construction industry which are normally left to be regulated by contract. Previous statutory enactments relating to the construction industry have largely been concerned with technical issues: for example construction safety, building control and the duties of architects and engineers. This is the first time that Parliament has sought to regulate the terms by which parties enter into a construction contract.

Secondly, the Act is unapologetically producer centric. It has been drafted to protect parties who (a) undertake construction work, (b) provide construction services or (c) supply construction goods and materials. The ambit is thus very wide—extending to include contractors, sub-contractors, sub-subcontractors, consultants, suppliers and, indeed every party in the delivery chain. This distinguishes it from legislation such as the Sale of Goods Act or the Misrepresentation Act which are generally intended to protect the party to whom the goods were sold or services rendered.

> Thirdly, the Act introduces adjudication. This is intended to provide a temporary but binding resolution of a dispute pending arbitration or trial. It is carefully prescribed under the regime so that the determination can be delivered speedily. An adjudicator has basically between 7 and 14 days to determine a dispute referred to him and he has to do so in accordance with the principles of natural justice."[2]

For these reasons, it is particularly important to bear in mind the policy considerations which led to the enactment of the statute in the course of adopting what has been described as a purposive approach to statutory construction in order "to give effect to the true purpose of legislation".[3]

Owners and Architects in the Private Sector

In the months leading up to 1st April 2005, owners and their consultants were primarily occupied with two areas: (a) the adaptation of the provisions of standard forms to comply with the requirements of the Act and (b) the re-

---

2 Speech delivered by Chao Hick Tin JA in the Launch of Chow Kok Fong *Security of Payments and Construction Adjudication* (2005: Lexis Nexis) on 16 May 2005 at the City Hall, Singapore.

3 *Per* Lord Griffifths in *Pepper* v. *Hart* [1993] AC 593 HL at 617. See also the speech by Lord Diplock in *Kammins Ballrooms Co Ltd* v. *Zenith Investments (Torquay) Ltd* [1971] AC 850 at 879 In Singapore this approach was applied by Tay Yong Kwang J in *United Engineers (Singapore) Pte Ltd* v. *Lee Lip Hiong and Ors* [2004] SGHC 190. Thus in *RJT Consulting Engineers Ltd* v *DM Engineering (Northern Ireland) Ltd* [2002] 1 WLR 2344, Ward LJ in the English Court of Appeal considered the policy objectives of the English Housing Grants, Construction and Regeneration Act 1996 and then described the thrust of the regime as "pay now, argue later".

organisation of contract administration and payment processes. The two principal standard forms of construction contract in this country are the Singapore Institute of Architects Standard Form ("SIA Form") and the Public Sector Standard Conditions of Construction Contract ("PSSCOC") and both the Singapore Institute of Architects and the Building and Construction Authority have recently released revisions of the respective standard forms following the enactment of the Act.

An interim certificate issued by an architect under the of the SIA Form enjoys temporary finality[4] and the law on this issue has been settled since the celebrated decision of Thean J (as he then was) in *Tropicon Contractors Pte Ltd* v. *Lojan Properties Pte Ltd* (1989).[5] There was some anxiety among architects that the adjudication machinery introduced by the Act would operate to undermine their authority in their role as certifiers of payments in a construction contract. Their situation was initially assuaged by one view asserting that the right to progress payment under the Act may be understood to be conditional on a claimant's entitlement to be paid and if this entitlement is itself dependent on the issue of an interim payment certificate then it is suggested that this does not warrant any tampering of the conventional interim payment machinery.[6]

---

4 See clause 31(11) of the SIA Form.

5 [1989] SLR 609

6 For an example of this line of argument see Philip Chan "Brief Update on Construction Law – the Impact of the Security of Payment Act 2004 on the Builder" *Law Gazette*, February 2005 at p 29. Criticised by Wong Meng Meng, SC and Chow Kok Fong "Security of Payments in the Construction Industry: When is the Claim Triggered?" *Law Gazette*, April 2005 at p 24.

The difficulty with this view is plain. It overlooks the fact that one specific mischief sought to be cured by the Act concerns the conduct of some architects and certifiers who, for various reasons, deliberately hold up certifications or certify sums which are so low that they must invite serious questions as to the *bona fide* character of the underlying valuations. The persistence of these situations led Duncan Wallace, an unapologetic critique of security of payments, to write that in order "to reinforce confidence in certification-based systems", institutions like the Singapore Institute of Architects would "be well advised to lend their full official support to proceedings for misconduct against any of their members who can be thought...to have given way to improper client pressures or interference".[7]

The authorities in New South Wales are instructive not least because section 5 of the Singapore Act was cast in basically similar terms as section 8(1) of the New South Wales BCISP Act 1999 (as amended). Both confer on a claimant who has undertaken construction work or supply related goods and services an unqualified entitlement to progress payment[8] notwithstanding that these rights are often cast against a contractual framework which features certification-based payment processes. Similarly, the anti-avoidance provisions in section 36(1) and (2) of the Singapore and sections 34(1) and (2) of the New

---

7 I. N. Duncan Wallace "Statutory Adjudicator or Contractual Certifier?" (2004) 16 SAcLJ 480 at 487.

8 There are minor differences in the wording of the two provisions but it is considered that these do not affect the point that is being made here.

South Wales Act are formulated in almost identical language.[9] In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003),[10] the claimant contractor served a payment claim on 20 December 2002 but the Superintendent (the counterpart of the Architect under the SIA Contract) did not issue a payment certificate in response to the claim until 23 January 2003, some 20 days after the date prescribed under the Act for the issue of the payment schedule (the equivalent of the payment response under the Singapore Act). Accordingly, the payment certificate was rejected by the New South Wales Supreme Court as a payment schedule (the equivalent of our payment response) for the purpose of the statutory regime. In holding that the contractor was entitled to proceed on the basis that no payment schedule (response) was in fact issued, the court did not consider it necessary to inquire whether the items of the constituent claim were disputed on the terms of the underlying contract. It is instructive to note the following passage in the judgment of Nicholas J:

> "It is irrelevant, in my opinion, that an item which is a component of a payment claim may be disputed...Inclusion of a disputed item does not render a payment claim invalid. The statutory requirement for provision of payment schedules and the scheme for adjudication allow for the ventilation and determination of disputes following

---

9 Obviously it is necessary to bear in mind that there are significant differences elsewhere in the two Acts as well as in terms of policy emphasis and it would be unwise to pretend that, in each case, similarly worded provisions in each of the Act should always be accorded the same construction.

10 [2003] NSWSC 266, see also *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103

> service of a payment schedule under s. 13....The question is whether the payment claim adequately identifies such work or goods and services..."[11]

In *Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd* (2004),[12] McDougall J of the New South Wales Supreme Court summarised the position of a claim under a security of payment regime when he said that a claimant's "ability to serve a valid payment claim depends on either actual or claimed entitlement, so that a payment claim served by a person who claims to be (but who in law may not be) entitled to a progress payment is sufficient to trigger the mechanism of [the Act]."[13] The validity of a claim under the Act thus derives essentially from its compliance with the statutory prescriptions contained in the Act and the question of the claimant's entitlement to the claimed amount on the terms of the underlying contract does not arise until the adjudication process has commenced.[14]

Another widely canvassed view is that the regime could be side-stepped if the contract expressly provide for the progress payment process to be triggered only at the initiative of the architect or certifier. Again, this view is quite unsustainable. First, section 10 of the Act provides for a claim to be served on "one or more persons who is or may be liable" to make the progress payment.

---

11 [2003] NSWSC 266, at para 67
12 [2004] NSWSC 110.
13 [2004] NSWSC 110 at para 61
14 ibid.

Once a payment claim is made, then by virtue of section 5 of the Act, the entire payment process is placed on a statutory footing. If a claim relates to a payment which is not due then, plainly, this has to be resisted during the formulation of the payment response or in adjudication. Secondly, the courts here have recognized that, as a matter of practice within the industry, the contractor usually submits a payment claim notwithstanding that this is not specifically demanded under the conditions of contract: see the Court of Appeal decision in *Hong Huat Development Co (Pte) Ltd* v. *Hiap Hong & Co Pte Ltd* (2000).[15]

A variation of the earlier objections was advanced on the premise that the adjudicator is bound by section 6(1) of the BCISP Act so that if the contract provides for the amount of progress claim to be certified by the certifier, the adjudicator is bound, in the absence of circumstances suggesting lack of good faith on the part of the certifier, to give effect to the certified sum. This objection should be examined in relation to the policy objectives of the Act. One mischief sought to be redressed by the entire scheme of security of payments is a situation where an architect has under-certified or withheld the issue of interim certificates. This consideration is particularly evident in the drafting of section 17(4) of the Act which provides that an adjudicator shall not be bound by any payment response or any assessment in relation to the progress payment that is provided in the contract to be final or binding on the parties. In *Abacus Funds Management Ltd* v *Davenport* (2003),[16] a challenge against an adjudication

---

15 [2000] 2 SLR 609, CA.
16 [2003] NSWSC 1027.

determination was made in the New South Wales Supreme Court on the basis that a certain portion of the adjudicator's award for on-site costs had been certified by the architect and that the adjudicator was bound by the architect's certification. The New South Wales Supreme Court rejected the challenge on the ground that while the contractual terms provide for the builder to be entitled to be paid amounts certified as progress payments by the architect, the adjudicator was not bound under the Act by the terms of any progress certificate issued.

Anti-Avoidance Provisions

The attention of the draftsmen of standard forms was also directed to the strictures of the specific anti-avoidance provisions of the Act. Like its counterpart in New South Wales, the two major areas addressed by the anti-avoidance provisions relate to firstly the "pay when paid" clauses in sub-contracts[17] and secondly provisions in a contract which attempt to contract out of the Act.[18]

The definition of a "pay when paid provision" under the Singapore Act is very extensive and covers any such provision "by whatever name called"[19] where the liability of one party to pay money owing to another is contingent or conditional on payment to the first party by a further party of the whole or any of that money.[20] It also includes any clause which makes "the liability to pay money

---

17 Section 9(1) BCISP Act 2004.
18 Section 36(2)(a), (b) BCISP Act 2004.
19 Section 9(2) BCISP Act 2004.
20 Section 9(2)(a) BCISP Act 2004.

owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement".[21] This would appear to include a provision in a sub-contract which provides for the sub-contractor to be paid only when a certificate of approval of the sub-contract works is issued by, say, an Architect under the terms of a main contract.

The prohibitions against contracting out of the Act are found in section 36. This provides that the Act shall have effect notwithstanding any provision to the contrary in any contract or agreement[22] and then specifically renders void a provision under which the operation of the Act is to be "excluded, modified, restricted or in any way prejudiced".[23] Attempts to overcome these strictures in relation to the United Kingdom Housing Grants, Construction and Regeneration Act 1996 and the New South Wales BCISP Act have been well documented. In *John Mowlem plc* v. *Hydra Tight Ltd* (2000),[24] the Technology and Construction Court in the United Kingdom had to consider a clause in the New Engineering Contract which provides that any difference between the parties is not to be characterised as a dispute but as "a matter of dissatisfaction" and that this has to be submitted for the decision of the engineer before it crystallises into a dispute which may be referred to adjudication under the UK Act. Judge Toulmin held that this provision had the effect of restricting the right of the parties to refer disputes to adjudication as intended by the Act. The result of this finding was

---

21 Section 9(2)(c) BCISP Act 2004.
22 Section 36(1) BCISP Act 2004.
23 Section 36(2)(a) BCISP Act 2004.
24 (2000) CILL 1650, *per* Judge Toulmin.

that, under the UK Act, the Scheme for Construction Contracts applied in place of the offending provisions in the subject contract.

In *Minister for Commerce v Contrax Plumbing & Ors* (2004)[25] a construction contract provided that the only payment entitlement of the builder was "the Contract Price". This could only be increased or decreased pursuant to clause 46. The Contract Price could only be adjusted by a process of submissions to the Superintendent's representative, the Superintendent, expert determination and (where the amount exceeded $500,000) arbitration. The builder claimed for variations. The variations had not been worked through the clause 46 procedure which would have taken 200 days or more. The adjudicator held that the builder was entitled to payment notwithstanding that the Contract Price had not been varied through the clause 46 mechanism. The Government submitted that the adjudicator had no power to determine an entitlement unless the clause 46 procedure had been followed. McDougall J in the New South Wales Supreme Court held that the contractual regime in this case effectively sought to displace the entitlement of the claimant to be paid from a reference date for construction work carried out to some time in the future when the clause 46 mechanism had been worked through. Accordingly, he concluded that the effect of these contractual provisions offended section 34 of the New South Wales BCISP Act and were void by operation of that section. Section 36 of the Singapore Act had been drafted in similar terms to section 34 of the NSW Act.

---

[25] [2004] NSWSC 823.

© Chow Kok Fong 2005

The Public Sector Clients

Given that the Building and Construction Authority (BCA) was behind both the Act and the standard form of contract it came as no surprise that the Authority decided very early on to ensure that the policy objectives behind the Act were fully imported in the drafting of the Public Sector Standard Conditions of Contact. There was none of the uncertainty as to the position accorded to the certification machinery as was encountered with the drafting of the SIA Form. Indeed, when the issues arising in connection with payment disruptions began to surface in the second half of 2003, the BCA had been prompted to publish an intermediate revision of the standard form of the contract (the 3rd Edition) under which the time for the administration and payment of progress payments were both simplified and shortened. This had prepared the ground for the more substantial revision with the enactment of the Act with the consequence that the 4th edition of the standard form was completed two months ahead of the date when the Act was to come into force.

One welcomed feature of the revised form is the adoption of the terminology used in the Act. The "monthly statements" submitted by the contractor to the Superintending Officer for the purpose of progress payments is now simply referred to as the "payment claim".[26] While the certification machinery has been retained, the contract provides expressly for the employer to issue a payment response under the Act. However, if the employer does not

[26] Clause 32.1 Public Sector Standard Conditions of Contract ("PSSCOC") 4th Ed, 2005

provide any response within 14 days from the payment claim, the contract prescribes that the payment certificate shall be deemed the payment response.[27] This feature of the revised form is a clever solution to reserve on one hand the employer's entitlement to decide whether to set-off any counterclaims against sums due to the contractor and, on the other, to preserve the effect of the certificate as the payment response in what will undoubtedly be the majority of situations where no contentious issues arise between the parties.

One matter which may be taken with the position set out in the revised form is that clause 32.2(1) provides for the payment certificate is to be issued within 14 days from the date of the payment claim and clause 32.2(2) requires the payment response to be made by the employer during the same period. Consequently, if the Superintending Officer takes the whole of the 14 day period to certify the progress payment, it leaves very little time of the employer to consider whether it should assert its rights in counterclaim. Thus, if the employer intends to issue a payment response to register a position which is different from that set out in the payment certificate he has to require that the Superintending Officer does not take up the whole of the 14 day period for the issue of the payment certificate in order to leave some time for the payment response to be made. It is also somewhat curious that the revised form did not take advantage of the full 21 day period allowed under section 11 of the Act for the making of the payment response. This apparently stems from the Government's stated policy

---

[27] Clause 32.2(1), (2) PSSCOC 4th Ed, 2005

to speed up the processing of progress payments in the administration of its construction contracts.

The dispute resolution provisions of the revised form raise a number of interesting points. There is some uncertainty over the drafting intent behind clauses 34.1 and 34.2. While clause 34.1 and clause 34.2(2) appear to provide for disputes to be referred to the Superintending Officer for his decision before triggering the arbitration or litigation process, clause 34.2(1) appears to permit a track to arbitration or litigation which is totally independent of the prior referral process of the dispute to the Superintending Officer. The draftsman seems to have in mind the strict disposition of the courts in England[28] and New South Wales[29] in rejecting any attempt in the underlying contract to circumvent the right to submit a claim under the Act. However, as drafted, the language to make the initial submission to the Superintending Officer does not appear to be mandatory and it will be interesting to observe how these provisions are likely to be invoked in practice. These provisions should thus be clarified notwithstanding that they do not affect directly the basic processes of the security of payment regime.

An important aspect of the dispute resolution machinery concerns the special provisions for recourse to adjudication under the Act. Clause 34.5(1) of the contract has been calibrated with respect to section 36 of the Act. The clause provides that "notwithstanding Clause 34.1, if a dispute or difference

---

28 *John Mowlem plc* v. *Hydra Tight Ltd* (2000) CILL 1650.
29 *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823.

involves a Payment Claim or Payment Response to which the Building and Construction Industry Security of Payment Act 2004 applies, the Contractor shall be entitled to make an adjudication application in accordance with [the Act], in which case the provisions of the Act shall apply." This position is further affirmed by clause 36.1 of the contract which clarifies that "where the Building and Construction Industry Security of Payment Act 2004 applies to this Contract, all provisions in this Contract shall be read to give effect to the provisions of the Act." The clarity of the BCA's position in submitting the payment provisions of the contract to the operation of the Act is consistent with its overall policy objective of reforming the prevailing payment culture in the industry. What is less clear is whether this still leaves the case for retaining the hitherto strict requirement for differences to be initially referred to the Superintending Officer[30] before these are permitted to crystallize into a dispute which allows the contractor to trigger his recourse in arbitration or litigation.

The General Contractors

There is little doubt that, to a large extent, the backdrop which provided the momentum for the passage of the bill through Parliament had been generated by an unexpectedly coherent coalition of sub-contractors and suppliers in the industry. Several of the highly visible public housing projects had been reportedly held up at the time by reason of payment issues between main contractors and key sub-contractors and suppliers. As a result, an

[30] Clause 34.1 Public Sector Standard Conditions of Contract ("PSSCOC") 4th Ed, 2005

important aspect of the deliberations surrounding the bill concerned the anti-avoidance provisions. In the case of sub-contractors and suppliers, these include the important section 9 of the Act which renders "pay when paid" provisions in a contract unenforceable for the purpose of the Act and the more general and extensive section 36 which seeks to thwart any attempt at contracting out of the Act.

Understandably main contractors reacted to the provisions of the Act relating to "pay when paid" provisions with a heightened sense of anxiety. They consider this aspect of the Act to constitute a serious incursion to the conventional sub-contract structure which ensure that, one the one hand, obligations of main contractors to employers in respect of the performance of sub-contracts are transmitted essentially to the sub-contractors and, on the other, payment obligations by main contractors to sub-contractors are financed by the essentially back-to-back cash inflow from progress payments received under the main contract. The drafting of the domestic sub-contracts issued by the Singapore Contractors Association Ltd (SCAL) in March 2005[31] demonstrated this reluctance on the part of main contractors to import the statutory regime into the framework of their contractual relationships with sub-contractors and suppliers.

[31] Singapore Contractors Association Ltd (SCAL) *Conditions of Sub-Contract for Domestic Sub-Contractors* 2005. A separate form is issued for Supply Contracts.

The Association's sub-contract form thus proceeded, quite unexpectedly, on the basis of a duality of regimes. It may be too early to assess the merits of this approach but it is suggested that this is an extremely complex approach to take and, with respect, one which is likely to generate some uncertainty in practice. As a starting point, it would appear that a sub-contractor is required under the sub-contract form to maintain two sets of processes and this cannot be well received in practice. Clauses 59 and 60 of the sub-contract deals with the operation of the Act and are drafted in a manner so that they operate effectively as a parallel but separate process from that of the contractual regime set out under clauses 16 through 20. The sub-contract form appears to underscore this intent by deliberately avoiding the import of the terminology in the Act and, further, by providing explicitly that "for the avoidance of doubt, the submission of a payment claim under the Act shall be separate and distinct from the progress claim under Clause 16." In the light of the authorities in the United Kingdom and New South Wales cited earlier,[32] it is conceivable that a sub-contractor would argue that the basic contractual regime as set out in the sub-contract form offends section 36 of the Act and that, as a consequence, he is entitled to ignore substantially, if not entirely, the strictures imposed on the payment process by these provisions of the sub-contract form.

Main contractors may be justifiably concerned with one particular aspect of contract administration arising from the new regime. In a substantial building

---

32 See *John Mowlem plc* v. *Hydra Tight Ltd* (2000) CILL 1650; *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823.

contract it is not unexpected to encounter anything between 30 and 100 different sub-contractors and suppliers. If all these parties submit their payment claims on or around the same date each month and, bearing in mind that the respondent main contractor has only 21 days to formulate his payment response together with reasons for any difference between the amount claimed and the response amount, the demands on the main contractor's capacity to process these claims simultaneously will be considerable. The difficulties are compounded in the event that any of the sub-contractors attempt to ambush the main contractor with an elaborate claim running into several volumes.[33] Although it is possible to mitigate the situation to some extent by staggering the dates for payment claims, there is little doubt that most main contractors will find it necessary to increase their contract administration resources.

Other Practice Issues

Unlike its New South Wales counterpart, the Singapore BCISP Act does not require that a payment claim has to state that it is a claim made pursuant to the Act.[34] The advantage of the New South Wales provision is that it leaves no room for the recipient of the claim to be in any doubt that the claimant is invoking the Act and that, accordingly, the subject matter of the claim requires a response

---

33 In *CIB Properties Ltd* v. *Brise Construction* [2004] EWHC 2365, TCC the claimant had been secretly preparing for adjudication while giving the false impression that they were prepared to negotiate a settlement. At the relevant time, they served a claim set out in 53 files and then filed a further 55 files during the course of adjudication. Judge Toulmin QC held that conduct such as ambush per se does not necessarily render the resulting adjudication unfair.

34 See section 13(2)(c) of the New South Wales *Building and Construction Industry Security of Payment Act 1999* (as amended).

to be made in accordance with the Act. The absence of this requirement under the Singapore Act imports the risk that what might have been construed by the respondent as draft claim (which may have been circulated for comments by the project consultants) was actually intended by the claimant as a payment claim. There will be consequently a need for documentation processes to be thoroughly reviewed. One solution may involve the stipulation in the contract of a requirement for a payment claim to be made using a prescribed template.

In their role as contract administrators, architects and engineers in this country tend to defer the confirmation of instructions for design changes and additional work at least until some stage close to the completion of the works. Section 11 of the Act provides that, in a payment response furnished in relation to a construction contract, where the response amount is less than the claimed amount, the reason for the difference shall be expressly stated in the response. Consequently if the payment claim includes an item for variation work, an architect or engineer can no longer defer the consideration of the variation claim beyond 21 days from the payment claim.[35] As the works progresses, he has to promptly determine whether instructions had been issued with respect to particular variations and, if he considers that a particular variation claim is baseless, this has to be formulated as a reason in the payment response. A failure on the part of the architect or contract administrator to do so is necessarily

[35] Technically, there is the second opportunity offered by the provisions relating to the dispute settlement period during which a respondent could furnish a reason by varying the payment response under section 12(4) of the Act but this is subject to the service of the requisite notice as prescribed under regulation 6(2) of the *Building and Construction Industry Security of Payment Regulations 2005*.

fatal to the respondent's case given that the adjudicator has no mandate to consider any reason for withholding any amount where the particular reason had not been include in the relevant payment response.[36]

Traditionally most contracts provide expressly for progress payments to be valued on the basis of measured work. This valuation is usually undertaken on the basis of approximate quantities prepared by quantity surveyors with respect to the work actually carried out on site. Given the strict time frame within which the payment response under the Act has to be formulated and since the payment response has to include a properly calibrated statement of reasons (which forms essentially the basis of the respondent's case in the event that a particular payment dispute is referred to adjudication), it may no longer be tenable for a quantity surveyor to take too much time with the measurement process. It is expected that the industry as a whole may gradually shift towards more simplified valuation approaches. An example is to provide for a prescribed list of events or activities which is offered as a basis for progress payment valuation and the more detailed valuation undertaken conventionally is confined to the final accounts when a more considered approach can be taken. While this will be inevitably less accurate than the present approach, it should be borne in mind that the whole thrust of the regime is to speed up the processing of progress payments and a certain reduction in accuracy may be deemed by contractors and sub-contractors to be an acceptable price for this purpose.

---

[36] See section 15(3), BCISP Act and note the second opportunity offered to vary or furnish a payment response under section 12(4).

Among the features which distinguish the Singapore Act readily from its New South Wales counterpart are the provisions for a dispute settlement period and an adjudication review process. The dispute settlement period affords parties a final opportunity to resolve outstanding differences before the activation of adjudication proceedings while the adjudication review may be commenced by an unsuccessful respondent for a re-consideration of the determination made by the initial adjudicator. On the dispute settlement period it might be supposed that where disputes typically precipitate when differences between the parties have accumulated over several payments, it is unlikely that there could be much scope for negotiation. Yet it must be surely right that any possibility which allow parties to meet and resolve disputes through negotiation must be encouraged and it could be argued that the delay of the enforcement process by 7 days may be less important than the larger perspective of promoting a less litigious climate in the industry. Similarly it might be thought that, since the determination arising from the adjudication review process would remain at best only temporarily binding and will be subject to the same limitations of time and evidence as the original adjudication, the adjudication review is inconsistent with the basic thrust of the regime. However, there is the benefit of a second tribunal in reviewing a subject dispute so that if the review determination affirms the results of the first determination, it will have the salutary result of making the results of the process more acceptable by the unsuccessful respondent.

While there are sound considerations for introducing both these features in the regime, an unfortunate consequence is that they do operate to extend considerably the time needed by a claimant to secure payment. A capricious respondent may invoke these provisions deliberately to delay the claimant's entitlement to his payment and, to this extent, it is possible that the Act in Singapore may not force a change in payment culture at the pace achieved by corresponding legislation in the United Kingdom and New South Wales.

Conclusion

Experience in both the United Kingdom and New South Wales suggest that it will take anything between one to two years before the courts are likely to be presented with opportunities to consider a challenge to an adjudication determination. Judicial pronouncements will be eagerly awaited at least with respect to the construction of provisions relating to the basic entitlement to the making of a claim under section 10 and the non-contracting out provisions under section 36 of the Act. Until then, the anxieties which have been expressed by various constituencies within the construction industry will remain. On the other hand, none of these anxieties amount to serious reservations with the Act. At any rate, it is expected that the Building and Construction Authority will monitor closely the implementation of the regime and, where necessary, it can refine some aspects of the regime through regulations made by the Minister pursuant to the powers conferred on him under the Act.

© Chow Kok Fong 2005

About the Author

CHOW KOK FONG is an arbitrator and mediator, practicing under his firm, EQUITAS Corporation and the current Chairman of the Society of Construction Law in Singapore. He was previously Managing Director for the International Division in Capitaland Commercial and, prior to that, Director of Projects for City Developments Ltd. Earlier, he was the Chief Executive of the Construction Industry Development Board (predecessor of the Building and Construction Authority). He has written 7 books, including the standard text, *Law and Practice of Construction Contracts* (now in its third edition) and *Security of Payments and Construction Adjudication* (released in April 2005). Mr Chow has consulted as a construction industry specialist to the World Bank, held adjunct professorial appointments at both the National University of Singapore and the Nanyang Technological University and was founding President of the Society of Project Managers.

Contact Particulars:

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

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

Payment under Construction Contracts... Time for Legislation in Malaysia?

Presented by

WILFRED ABRAHAM

6 June 2005

ZUL RAFIQUE *& partners*

In this paper, the main issue addressed is whether legislation is required to regulate payments under construction contracts in Malaysia. To facilitate the presentation, the paper is divided into three sections, namely (A) the current legal and contractual position in Malaysia; (B) legislation in other jurisdictions; and (C) whether similar legislation should be introduced in Malaysia.

A. The Position in Malaysia

1. The standard forms of construction contract in Malaysia include, the Public Works Department (PWD), the Pertubuhan Akitek Malaysia (PAM), and the Construction Industry Development Board (CIDB) Forms of Contract. Although there are other standard forms, emphasis is given to the PWD and PAM Forms as they are commonly used. The CIDB Form is also considered as it seeks to introduce changes to the usual contractual provisions on payment.

2. The employer is obliged[1], under all these standard forms, to pay the contractor *within a specified period* after the issuance of an interim certificate. The parties are, however, entitled to specify a period other than that stated in these forms.

3. Deductions

3. 1 All these standard forms entitle the employer to deduct sums from payments due to the contractor. The PWD Form has a general provision[2] that allows the employer to *deduct any money owing* from the contractor to the employer from any payments due to the contractor under the contract in question or any other contract between the parties.

[1] See PWD Form 203A, Clause 47(d) – 30 days; PAM 1998 Form, Clause 30.2 – 14 days; and CIDB Form, Clause 42.9(a) – 21 days
[2] See PWD From 203A, Clause 50

3.2 The PAM Form has specific provisions that allow the employer to make such deductions. These specific provisions allow for deductions in relation to the following namely:

- the cost of appointing other contractors to comply with instructions[3];
- insurance premiums[4];
- liquidated damages for delay[5];
- direct payments[6]; and
- retention sums[7].

3.3 In ***Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd***[8], in interpreting similar provisions in the PAM 1969 Form, it was held by the then Supreme Court of Malaysia that an employer cannot refuse to pay on an interim certificate except for deductions specifically provided. Accordingly, where there is no applicable provision, the contractor is entitled to immediate payment in full on the interim certificate and could obtain summary judgment on the certified amount. The employer, on the other hand, is free to dispute the interim certificate by referring the dispute to arbitration, or commencing legal proceedings.

[3] See PAM 1998 Form, clause 2.2
[4] See PAM 1998 Form, clauses 19.5, 20.A.1
[5] See PAM 1998 Form, clause 22.1
[6] See PAM 1998 Form, clauses 25.4(ii), 27.4
[7] See PAM 1998 Form, clause 30.4
[8] [1995] 2 MLJ 57

3.4 The PAM 1998 Form[9] now reflects this position, which confers *temporary finality* on an interim certificate.

3.5 Both the CIDB and PAM Forms include similar provisions on deductions. In addition, there appears to be a general requirement[10] that a sum, which is to be deducted, must be certified.

3.6 It is interesting to note that unlike the specific provisions in the PAM 1969 Form of Contract, the PAM 1969 Form of Sub-Contract has a general provision[11] that allows for deductions, and this is similar to the provision in the PWD Form.

3.7 In ***Mahkota Technologies Sdn Bhd v BS Civil Engineering Sdn Bhd***[12], it was held by the High Court of Malaysia that the main contractor's right of set-off had been *clearly preserved* by the general provision in the PAM 1969 Form of Sub-Contract.

3.8 The PAM 1969 Form of Sub-Contract has since been amended, and the 1998 Form[13] now requires the main contractor to notify the architect of deductions, and this to some extent, affords limited protection to the sub-contractor.

3.9 Based on the foregoing, it would appear that the ordinary common law right to set-off is limited in contracts such as the PAM and CIDB Forms, which contain specific provisions on deductions while, in contrast, such right is preserved in both the PWD Form and

[9] See PAM 1998 Form, clause 30.3(i), (ii)
[10] See CIDB Form, clause 42.2(a)(iii)
[11] See PAM 1969 Form of Sub-Contract, clause 13
[12] [2000] 6 MLJ 505
[13] See PAM 1998 Form of Sub-Contract, clause 11.4

the PAM Form of Sub-Contract, which contain a general provision on deductions.

4. Suspension or Determination

4.1 The PAM Form[14] entitles the contractor to determine the contract, in the event the employer fails to make payment pursuant to an interim certificate.

4.2 Similar provisions[15] are found in the CIDB Form, which in addition allows[16] the contractor to suspend or reduce the rate of progress of the works. The CIDB Form also expressly provides for interest payable on certified amounts, in the event that the employer fails to pay on an interim certificate within the specified period.

4.3 The PWD Form on the other hand does not provide for either suspension or determination in the event the employer fails to pay on an interim certificate.

4.4 The absence of such provisions in the PWD Form is of significance, as it has been held by the Malaysian courts[17] that an employer's failure to pay certified amounts does not amount to a repudiatory breach, which would allow the contractor to terminate the contract. It has also been held[18] that, in the absence of an express provision, there is no *intermediary right* in a construction contract for the contractor to suspend works due to non-payment.

[14] See PAM 1998 Form, clause 26.1(i)
[15] See CIDB Form, clause 45.1(a)(i)
[16] See CIDB Form, clause 42.10
[17] See *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1966] 2 MLJ 286; and *Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448
[18] See *Kah Seng* supra

5. *Pay When Paid*

5.1 A *pay when paid* clause, as it is commonly referred to in the construction industry, is a provision found in a sub-contract. This clause provides that the obligation of the main contractor to pay the sub-contractor arises only upon receipt of payment from his employer.

5.2 Although not found in the standard forms of sub-contract in Malaysia, a *pay when paid* clause is often introduced into the standard forms by way of amendment.

5.3 In ***Pernas Otis Elevator Co Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd***[19], it was held by the High Court that a *pay when paid* clause is enforceable (in Malaysia) and should be given its literal meaning. The main contractor is therefore under no obligation to pay the sub-contractor until he actually receives payment from the employer.

6. Remedies

6.1 Based on the foregoing, it appears that the following remedies are presently available to a contractor in Malaysia who is facing difficulties with respect to payment:

- *Summary Judgment* - The contractor is entitled to apply for summary judgment on certified amounts, which have either not been paid, or in relation to which unjustifiable sums, have been deducted;

[19] [2004] 5 CLJ 34

- *Determination of contract/ Suspension of works* - The contractor is entitled, where there are express provisions in the contract, to determine the contract or suspend works; or

- *Reference to arbitration* - The contractor is entitled to refer all disputes to arbitration.

6.2 What is of some concern is that the contractor appears not to have any immediate remedy for non-payment, except where the employer chooses to agree and to include in the contract, remedies such as determination and suspension.

6.3 In the absence of any immediate remedy, a contractor is left with no option but to struggle towards completion, and thereafter to refer disputes to lengthy and expensive arbitration proceedings.

6.4 He is, of course, at liberty to apply for summary judgment on certified amounts. However, legal proceedings, albeit summary judgment, are likely to be time-consuming.

6.5 The absence of effective legal remedies may result in a contractor failing to obtain progress payment when they are due. This will affect a contractor's cash flow, which in turn, is likely to reduce his productivity. The loss of productivity and slow progress of the works could eventually result in stalled development projects. Stalled projects are an ill that affects the economy as a whole and the public at large.

B. Legislative Redress in Other Jurisdictions

1. This section[20] of the paper draws a broad outline of the statutes in England, New South Wales, and Singapore, which are considered in section B of this paper, in the context of its advantages, disadvantages and possible adoption in Malaysia.

2. Examples of some statutes include:

- English Housing Grants, Construction and Regeneration Act 1996 ('English Act 1996');
- New South Wales Building and Construction Industry Security of Payment Act 1999 ('NSW Act 1999');
- Victoria Building and Construction Industry Security of Payment Act 2002 ('Victoria Act 2002')
- New Zealand Construction Contracts Act 2002 ('NZ Act 2002')
- Singapore Building and Construction Industry Security of Payment Act 2004 ('Singapore Act 2004')

3. Valuation and Certification

3.1 The statutes in England, New South Wales and Singapore provide for methods and periods for the valuation, certification and payment of certified amounts. By virtue of the English Act 1996[21] and NSW Act 1999[22], the parties are at liberty to agree on

[20] Note that in summarising the provisions of these statutes, the parties are, for convenience, referred to throughout as the employer and the contractor, although, of course, these provisions would apply to any person who is a party to the construction contract

[21] Sections 109 and 110

such methods and periods, and the statutory provisions will only apply in the absence of such agreement. In relation to the Singapore Act 2004[23], the parties are also entitled to agree on such matters except for the date when progress payments become due and payable.

4. Payment, Deduction and Adjudication

4.1 *England*

The English Act 1996 provides[24] that the employer may not withhold payment after the final due date for payment unless he has given an effective notice of intention to withhold such payment. The English Act 1996 also provides for matters that must be stated in such notice, and the period within which such notice is to be given. It is further provided that should the matter be referred to adjudication, and a decision thereafter made on the amount that should be paid, then such amount shall be paid within a specified period.

General provisions[25] with respect to adjudication are included in the English Act 1996. These provisions entitle a party to give notice of his intention to refer any difference, at any time, to adjudication. The reference is to be made, and the adjudicator appointed, within seven (7) days of such notice.

The adjudicator is to reach a decision within 28 days of the reference, or such longer period as agreed by the parties. The decision of the adjudicator is to be binding until the dispute is finally determined by legal proceedings, arbitration, or agreement. The

[22] Sections 8 to 11
[23] Sections 5 - 8
[24] Section 111
[25] See English Act 1996, section 108

parties are, however, at liberty to agree to the finality of the decision of the adjudicator.

4.2 *New South Wales*

The NSW Act 1999 differs in this context from the English Act 1996, in that the provisions in the former tend to be more specific and procedural.

The NSW Act 1999[26] provides for the contractor to make a payment claim and the employer is to respond with a payment schedule within a prescribed period.

In the event the employer fails to provide a payment schedule, he becomes liable to pay the claimed amount (ie the amount stated in payment claim). Should the employer provide a payment schedule that indicates a scheduled amount, which he fails to pay, he becomes liable for that amount. In these circumstances, the contractor may commence legal proceedings, or make an application for adjudication to recover either the claimed amount or the scheduled amount.

Should the employer provide a payment schedule, and the scheduled amount is less than the claimed amount, the contractor is again entitled to make an application for adjudication. The employer may then lodge an adjudication response with the adjudicator. The adjudicator is to determine the adjudication application within 10 business days after he has notified the parties of his acceptance of the application.

[26] Sections 13 - 26

In the event the employer fails to pay the adjudicated amount, the contractor may obtain an adjudication certificate, and file the same as a judgment debt in court.

4.3 *Singapore*

In this context, the provisions in the Singapore Act 2004[27] are similar to the NSW Act 1999. There are however differences, the more significant of which are as follows:

- the employer's failure to provide a payment response (payment schedule in the NSW Act 1999) or failure to pay the response amount (scheduled amount in the NSW Act 1999) does not in itself make him liable for the claimed or response amount. Instead, in such circumstances, the contractor is entitled[28] to make an application for adjudication;

- the adjudicator is to determine[29] an adjudication application within 7 days after the commencement of the adjudication, in the situation outlined in the paragraph above, where the employer has failed to lodge an adjudication response. In any other case, the adjudicator is to determine the application within 14 days or such longer period, as requested by the adjudicator and agreed by the parties; and

- the parties are at liberty to apply for an adjudication review[30], which appears to be a form of appellate adjudication jurisdiction.

[27] Sections 10 - 22
[28] See Singapore Act 2004, section 12
[29] See Singapore Act 2004, section 17
[30] See Singapore Act 2004, sections 18, 19

5. Suspension and Other Remedies

5.1 The statutes, whether in England, New South Wales or Singapore allow for the contractor to suspend works under certain specified circumstances.

- In England[31], the contractor is entitled to do so where he has not been paid by the final due date for payment.

- In New South Wales[32], a contractor may do so where the employer has failed to pay a claimed amount (without providing a payment schedule), scheduled amount or adjudicated amount.

- In Singapore[33], a contractor may suspend works where the employer has failed to pay an adjudicated amount.

5.2 In addition by virtue of both the NSW Act 1999 and the Singapore Act 2004, the contractor is entitled to exercise a lien on unpaid and unfixed goods that have been supplied by the contractor to the employer. In New South Wales[34], the contractor is entitled to exercise such a lien if there has been a failure to make a progress payment. In Singapore[35], the contractor is entitled to do so if an adjudicated amount has not been paid.

5.3 The Singapore Act 2004 also includes a provision[36] that entitles the employer's principal to make payment of an adjudicated amount.

[31] See English Act 1996, section 112
[32] See NSW Act 1999, section 27
[33] See Singapore Act 2004, section 23(1)(b)
[34] See NSW Act 1999, section 11(3) to (5)
[35] See Singapore Act 2004, sections 23(1)(a), 25
[36] Section 24

6. *Pay When Paid*

6.1 The English Act 1996[37], NSW Act 1999[38] and the Singapore Act 2004[39] all provide that *pay when paid* clauses are ineffective. In England, however, an exception is made where the third party (payment by whom is conditional for payment under the contract) is insolvent.

C. Time for Legislation in Malaysia?

1. The concerns with respect to payment in the construction industry, and the trend towards legislation in other jurisdictions, have received the attention of the authorities in Malaysia. As a result, the Construction Industry Development Board Working Group on Payment and Related Issues in the Construction Industry (CIDB Working Group) was formed, and it has since identified pressing issues and has even made specific proposals.

2. The CIDB Working Group has identified the following issues of concern with respect to payment in the construction industry:

- non-certification;
- under certification;
- deductions (or set-offs) without justification;
- delayed payment;
- non-payment; and
- *pay when paid* clauses.

[37] Section 113
[38] Section 12
[39] Section 9

3. To overcome these challenges, the CIDB Working Group has proposed that, as a temporary measure, certain provisions should be included in standard forms, and on a more permanent basis, that legislation should be introduced to ensure that such provisions are included in construction contracts.

4. The provisions, as proposed by the CIDB Working Group, that should be included in all standard forms, are presently found in the CIDB Form. These provisions, would entitle a contractor to suspend works[40] for non-payment, and to claim interest[41] for delayed payment.

5. Apart from these contractual provisions, the CIDB Working Group has made certain proposals in respect of legislation. The proposed legislation would in most aspects be similar to that found in other jurisdictions, and would provide for adjudication and the contractor's right to suspend works.

6. In relation to the prohibition of *pay when paid* clauses and the contractors' right to exercise a lien, the CIDB Working Group is of the view that they require further study.

7. There is also a proposal, from representatives of the construction industry, that retention sums should be held by independent stake-holders. This proposal is currently under consideration by the CIDB Working Group.

8. In considering these proposals, it would, perhaps, be instructive to look at the experience in other jurisdictions where similar statutes are already in place. In this context, particular emphasis is placed on the experience in England with respect to adjudication.

[40] See CIDB Form, clause 42.10
[41] See CIDB Form, clause 42.9(a)

9. The English Act 1996 provides[42] that the decision of the adjudicator is binding until the dispute is finally determined by court proceedings, arbitration, or agreement. The parties may, however, agree on the finality of the decision of the adjudicator.

10. There are no specific provisions in the English Act 1996 for the enforcement of the adjudicator's decision. In this context, it is noted that the NSW Act 1999, enacted subsequently, contains provisions[43] for the filing of an adjudication certificate as a debt in court. Further, in Singapore[44], an application may be made for leave to enforce the adjudication determination as a judgment.

11. Despite the absence of specific provisions on enforcement, the courts in England have been prepared to support adjudication by providing summary judgment when required to enforce the adjudicator's decision.

12. The courts in England have also adopted a strict approach in dealing with challenges to the adjudicator's decision, which appear to be limited to the following grounds:

- absence of jurisdiction[45];
- breach of natural justice[46]; and
- bias[47] (actual or apparent).

13. Challenges have not been permitted on grounds of:

- procedural error[48]; or

---

[42] Section 108(3)
[43] Section 25(1)
[44] See Singapore Act 2004, section 27(1)
[45] That is, where there is no 'construction contract' as defined in the English Act 1996, where there is no proper notice of reference, or where the adjudicator has decided on matter that were not referred to him
[46] See *Balfour Beatty Construction Ltd v. London Borough of Lambeth*
[47] See English Act 1996, section 108(2)(c), which imposes a duty on the adjudicator to act impartially; see also *Discain Project Services Ltd v. Opecprime Development Ltd*; *Woods Hardwick Ltd v. Chiltern Air Conditioning*; and *Glencot Development and Design Company Ltd v. Barrat & Son Contractors Ltd*
[48] See *Balfour Beatty* supra

- errors in the adjudicator's decision[49].

14. The courts[50] have also refused to allow set-offs or deductions from the amount due under an adjudicator's decision.

15. Many of the above principles, which have evolved in England since the Act came into operation, have been adopted or altered in subsequent legislation. For instance, it is provided in the NSW Act 1999[51] that, if the respondent applied to set aside the judgment (based on the adjudicator's decision that has been filed), he is not entitled to raise any cross claims or defence, or to challenge the adjudicator's determination.

16. There are no similar provisions in the Singapore Act 2004. However, in both the NSW Act 1999 and the Singapore Act 2004[52] it is provided that the respondent who applies to set aside the judgment is required to pay into court, as security, the unpaid portion of the adjudicated amount pending the final determination of the proceedings.

17. It is also provided in the Singapore Act[53] that the adjudicator shall:
    - act independently, impartially and in a timely manner;
    - avoid incurring unnecessary cost; and
    - comply with principles of natural justice.

18. The first, and last, of the above provisions reflect the position in England, and are likely to form the statutory grounds for setting aside the adjudicator's decision in Singapore.

19. It is proposed, that if legislation is introduced in Malaysia, specific provisions should be made for the enforcement of the adjudicator's

[49] See *Bouygues UK Ltd v. Dahl-Jensen (UK) Ltd*
[50] See *Levolux A T Ltd v. Ferson Contractors Ltd*
[51] Section 25(4)(a)
[52] See NSW Act 1999, section 25(4)(b); Singapore Act 2004, section 27(5)
[53] Section 16(3)

decision, and the grounds for challenging the same, to avoid uncertainty, which would result in the type of lengthy and expensive litigation that such legislation is intended to avoid.

20. The English Act 1996 has been in force for almost a decade. During this period, the following advantages, and disadvantages, have been identified with respect to adjudication:

20.1 *Advantages*

- **Cost** - Inevitably, the scope for detailed and therefore expensive preparation is curtailed by the tight schedule.

- **Speed of Redress** - The system provides for rapid means of obtaining a decision and payment of sums due. The courts, in England, are prepared to support adjudication by awarding summary judgment when required to enforce the adjudicator's decision.

- **Privacy** - In contrast to trials in court that are public and frequently reported in the press and legal journals, adjudication takes place in private.

- **Continuity of project** - One of the principal purposes of the English Act 1996 was to ensure that disputes be resolved while work continues on site and that disruption caused by insolvency could be reduced by encouraging prompt payment.

20.2 *Disadvantages*

- **Non-suitability for Complex Cases** - The schedule may be too tight for some disputes, although parties in England are now addressing this issue by dividing a complicated dispute into several issues or,

alternatively, agreeing to a longer period in which the adjudicator is to reach his decision.

- **'Ambush'** - If the claimant has taken a long time to put his claim together and has then taken the respondent by surprise, the adjudicator will usually deal with this 'ambush' by allowing the respondent a reasonably long period to respond, albeit within the constraints of the overall prescribed period.

- **Insolvency** - A party who pays money in accordance with the adjudicator's decision may be unable to recover it if he is successful in reversing the decision in subsequent court or arbitration proceedings, in the event that the recipient of the payment has in the interim become insolvent.

21. It is of general consensus that in both the construction industry and legal profession, there are more advantages of adjudication than otherwise and even in England, by virtue of the English Act 1996, the process of adjudication has to date proved successful.

22. In light of the success of statutory adjudication in England, and its subsequent introduction in other jurisdictions, there is no reason why Malaysia should not follow suit.

23. Caution should however be exercised in adopting such legislation. Bearing in mind the disadvantages, the statutes should be tailored according to the local construction industry.

24. Finally, it should, perhaps, be noted that since the aim of enacting the statute is merely to supplement the terms of the construction contract and not to encroach into the freedom of the parties to contract, such statue should be brief, concise and should not be drafted in too minute a detail.

THANK YOU – TERIMA KASIH – XIE XIE – NANDRI – SUKRAN – SALAMAT – ARIGATO - MERCI

Wilfred Abraham
Partner (Arbitration & Construction)
ZUL RAFIQUE & *partners*
Tel: 603-20773469
Email: wilfred_abraham@zulrafique.com.my

LEGISLATING FOR SUSTAINABLE CONSTRUCTION IN THE UK

Philip Britton
King's College London

NUS seminar, June 2005

1

INTRODUCTION

- Aims and objectives of presentation
- Why this topic now?
- Possible relevance to this region

2

THE ISSUES

- How to reduce negative impact on environment of materials used in construction, buildings' performance and their eventual demolition?
- Role of law in attaining that objective?

3

BACKGROUND

- Public law regulation of construction activity under statute
- Relevance to private law?
- England & Wales: system of Building Control
- Justification for this system
- Sources and main actors

4

ORIGINAL STATUTORY AIMS
Building Act 1984 s 1(1)

a) Health, safety, welfare and convenience of people
b) Conservation of fuel and power
c) Preventing waste, undue consumption, misuse or contamination of water

5

CONSTRUCTION AND THE ENVIRONMENT

- Design – impact of existing building control regime on fuel, power and water
- Process of construction (additional controls) –

1. Common law nuisance and *Rylands v Fletcher* liability to neighbour/s
2. Statutory liability (under conditions) for damage to environment and for improper disposal of waste (NB European Directives)

- Limits of these regimes

6

NEW CONCERNS

- Mounting evidence of likely human factors in global warming and increasing climatic instability – in UK, buildings contribute 46% of CO_2 emissions
- International commitment to reduction of CO_2 emissions via Kyoto Protocol (in force Feb 2005)
- How to guarantee (and afford) sources of energy in future to meet growing demand, as fossil fuels run down?

7

NEW INITIATIVES I

- 2002 Johannesburg World Summit on Sustainable Development
- 2003 Government Energy Policy: goal to reduce CO_2 emissions by 20% by 2010 against 1990 figures; aims to cut emissions from homes by about 10% (4-6 MtC) by 2020 via better building standards
- Many NGOs and QUANGOs active in encouraging awareness of more environmentally friendly construction: BRE BREEAM and EcoHomes standards, Energy Savings Trust, Sustainable Homes, Design Quality Initiative

8

NEW INITIATIVES II

- 2003 Better Buildings Summit: Government sets up Sustainable Buildings Task Force, which recommends development of non-statutory Code for Sustainable Buildings and, by law, 10% minimum recycled material for new buildings [Code now being developed]
- 2004: Commons Environmental Audit Committee criticises Code proposals as too timid, wants harder standards included within Building Regs

9

NEW INITIATIVES III

- 2004: Part 5 of Housing Act introduces 'Home Information Packs' – sellers of dwellings and their agents have on request to supply a verifiable record of key information about the property to a potential buyer, including its energy efficiency; s. 217 requires Sec'y of State to take reasonable steps to ensure that by 2010 the general level of energy efficiency of residential accommodation in England has increased by at least 20% compared with 2000 [not yet in force]
- 2004: Parliament passes Secure and Sustainable Buldings Act

10

NEW INITIATIVES IV

- 2005: Government adopts new Sustainable Development Strategy, including encouragement of Modern Methods of Construction (off-site fabrication), with a Sustainable Communities Summit
- 2005: cross-party group of MPs tables Climate Change Bill, to impose attaining reduction in CO_2 emissions as Government aim
- July 2005: Climate change on Edinburgh G8 Summit agenda

11

LEGISLATIVE CHANGE

- Liberal Democrat Energy Spokesman Andrew Stunell MP
- Private Member's Bill (with WWF-UK and Government support)
- Result: Sustainable and Secure Buildings Act 2004

12

THE 2004 ACT: EFFECT

- Adds three new statutory aims to Building Act s1(1) –

d) Furthering the protection or enhancement of the environment

e) Facilitating sustainable development (not further defined)

f) Furthering the prevention or detection of crime

13

OTHER CHANGES IN 2004 ACT

- Increases scope for continuing requirements under Building Regs and for applying current standards to existing buildings on a change of occupancy
- Can require single person to be appointed as responsible on client side for building control compliance during construction

14

OTHER CHANGES IN 2004 ACT

- Regular report to Parliament by DPM every two years on building stock, state of Building Regs and changes in energy efficiency, emissions and recycling and reuse and recycling of materials in buildings

15

2002 EUROPEAN DIRECTIVE ON THE ENERGY PERFORMANCE OF BUILDINGS

- New uniform way of calculating the energy performance of buildings
- New buildings to meet minimum energy standards, also large existing buildings being renovated
- When building constructed, sold or rented, certificate of energy performance to be handed to client, new owner or tenant
- Regular inspection and reporting on large heating boilers and air-conditioning systems
- To be transposed into national law w.e.f. 4/1/2006

LIKELY LIMITATIONS ON EFFECTIVENESS OF CHANGE I

- 2004 Act and Directive both depend on regulations to implement
- Reluctance in Gov't to adopt new 'hard' performance standards with legal force
- Serious doubts about effectiveness of enforcement of existing building control
- Risk of lack of co-ordination between different Gov't departments – DTI, ODPM, DEFRA

17

LIKELY LIMITATIONS ON EFFECTIVENESS OF CHANGE II

- Risk of more rhetoric than action and of 'initiative fatigue'
- Industry unlikely without extra incentives to provide better environmental performance of buildings, and consumers unlikely to demand this (perceived extra short-term cost)

18

SUMMARY

- Increased awareness in UK of urgent need to reduce negative environmental impact of construction and buildings
- Many Government and industry initiatives seeking to improve performance
- Modest legal changes so far - the 2004 Act the most significant

19