

Adjudication in Asia and Australasia

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This note looks at how three separate jurisdictions have approached adjudication thus far.

Hong Kong

1. Unlike UK, Australia and Singapore, Hong Kong has not adopted a statutory adjudication scheme. During the construction of the Chek Lap Kok Airport and the Airport Core Projects, a standard form of contract for the Airport Core Projects (ACP) have been developed. Under the ACP standard form of contract, a formal adjudication mechanism has been introduced. A dispute can only be referred to an adjudicator after mediation has been unsuccessfully conducted. The dispute in question that could be referred to adjudication must relate to time or money issues. If neither party refers the matter to adjudication, the dispute could proceed to arbitration.
2. In 1998, a review of the ACP general conditions of contract was carried out. Out of 124 disputes, ten requests for adjudication have been served. Out of those ten requests, four have been resolved by adjudication and four have been resolved through subsequent negotiation without resorting to adjudication. Two ultimately have to

be referred to arbitration. It can be seen therefore that adjudication during the construction of the Airport and the ACP contracts was not particularly popular.

3. The Hong Kong Government has adopted adjudication as a mode of dispute resolution mechanism in its general conditions of contract published after the ACP contracts. The dispute resolution clause provides for a contractual dispute resolution mechanism whereby the Engineer's decision could be referred to mediation, adjudication or arbitration. Either party can seek to refer a dispute to adjudication under the Adjudication Rules. The Adjudication Rules provide that the Hong Kong International Arbitration Centre (HKIAC) is to administer the adjudication. In the event that no agreement is reached between the parties as to who should be appointed as the adjudicator, the HKIAC would appoint an adjudicator and notify the parties accordingly.
4. The participation in the adjudication process is not mandatory or compulsory. The clause provides that despite the initiation of the adjudication process under the Adjudication Rules, if a party refuses to participate in the adjudication, they may by agreement refer the dispute to mediation.
5. The clause in truth merely gives a right to a party to request mediation or adjudication whilst preserving the right of the other party to refuse to mediate or adjudicate. If there is a refusal or abandonment of adjudication, the parties may then refer the dispute to arbitration within

90 days of the refusal to adjudicate or the abandonment of the adjudication. A party can also refer the dispute to arbitration if they are not satisfied with the adjudication decision and such request can be made within 90 days of the date of the adjudication decision.

6. The adjudicator is given the same power as an arbitrator to open up, review and revise any decision of the Engineer.

7. Under the Adjudication Rules, the adjudicator has to make his decision within 56 days of the Adjudication Commencement Date. The Adjudication Commencement Date is the date when an adjudicator has been appointed either agreement or by HKIAC. The decision has to be in writing and has to include reasons. The decision of the adjudicator shall be final and binding upon the parties and enforceable as such unless and until either the dispute has been settled or alternatively referred to arbitration and an arbitral award has been made. The adjudicator has to specify in his decision the total amount of his fees and expenses and the proportions in which the parties shall pay such fees and expenses. This of course is subject to what agreement the parties may otherwise have as to how the adjudicator's fees is to be dealt with. An initial deposit of \$50,000 has to be paid to the HKIAC by each party within 7 days of the Adjudication Commencement Date and this deposit may be revised from time to time depending on the particular dispute.

8. Adjudication enjoys the protection of privacy and confidentiality between the parties and the adjudicator. Information relating to the

adjudication can only be disclosed with the written consent of all the parties in the adjudication. However to cater for the procedures of obtaining funds, the Government has the right to disclose the outline of the dispute and the outcome of the adjudication to the Public Accounts Committee of the Legislative Council upon request by them. In that case, the other party will be informed in advance before the disclosure is made to the Committee. Furthermore, the Adjudication Rules provides that after the expiration of six months from the date of the outcome of the adjudication, the other party shall be deemed to have given his consent to disclose to the Public Accounts Committee. This arrangement is to enable the Government to obtain funds in settlement of the amount decided by the adjudicator.

9. The Rules provide that the adjudicator is not to act as the arbitrator in any subsequent arbitration unless the parties agree otherwise in writing. The adjudicator however may be called as a witness in any subsequent arbitration or litigation arising out of the Contract.

Singapore

10. Singapore has just introduced the Security of Payment Act. It provides for a statutory adjudication whilst preserving the right of the parties to submit any dispute that they may have under the contract to a court or tribunal or any other dispute resolution proceedings.

11. The application for adjudication is to be made to the Singapore Mediation Centre which is the Authorized Nominating Body under the Act. The Singapore Mediation Centre provides that administration service for adjudication under the Security of Payment Act and has promulgated the Adjudication Procedure Rules for the parties to follow. A claimant who is entitled to make an adjudication application has to file the application within 7 days of the entitlement. The claimant is so entitled, if by the end of the dispute resolution period, the dispute is not settled or the respondent does not provide the payment response. As the adjudication measures were intended to deal with progress payments, it is probably, at least arguably, correct to say that even if a claimant has missed the 7-day deadline, he could include that in a subsequent payment claim. This is so because it can still be classified as a claim which was the subject of a previous payment claim served in relation to the same contract but has not been paid.
12. The adjudicator is to be appointed from a register of adjudicators and is someone whom the Authorized Nominating Body considers appropriate.
13. After receipt of the adjudication application, the respondent has to file a response to the Authorized Nominating Body setting out the reasons for withholding payment and any cross claim or set off.
14. The Act expressly provides the arbitrator shall act independently, impartially and in a timely manner, avoiding unnecessary expense and complying with the principles of natural justice. Indeed the Singapore

Mediation Centre has a set of Adjudicator Code of Conduct rules.

15. The Act provides what the adjudicator should have regard to in the adjudication. These include the provisions of the Act and the contract, the payment claim and the adjudication application as well as the response and the accompanying documents. The adjudicator can carry out inspection, listen to experts as well as request for documents. The slip rule applicable to arbitrator is also permitted to be applied by the adjudicator.
16. After the determination of the adjudicator has been rendered, there is a provision which allows for reviews to be made. A respondent who has been adjudicated to pay more than what the response has specified may apply for a review. The adjudication review application has to be made within 7 days after being served with the adjudication determination and the application has to be lodged with the Authorized Nominating Body by then. The application is conditioned on the respondent paying the adjudicated amount to the claimant.
17. Upon receipt of such review applications, the Authorized Nominating Body shall appoint the review adjudicator or panel of review adjudicators. The review adjudicator can reject an application if the procedures laid down in respect of the filing of the adjudication review application have not been complied with.

18. In principle, the review application will be dealt with within 14 days but this period may be extended if requested by the review adjudicator and agreed to by the parties. The review adjudicator can substitute his new decision in place of the adjudication determination or refuse the application on its merits.
19. The determination can be enforced, with leave of the court, in the same manner as a judgment or an order of the court. The claimant is also given the right to suspend work if it has not been paid the adjudicated amount and a notice to suspend has been served in accordance with the Act.
20. The Act also caters for the situation when a party seeks to set aside the adjudication determination or the judgment obtained pursuant to an application for leave to enforce the adjudication determination. In such circumstances, the respondent has to pay into court as security the unpaid portion of the adjudicated amount that he is required to pay before his application to set aside is dealt with.
21. By allowing a party to apply to set aside the determination, parties can have redress to situations where the adjudicator has conducted the adjudication in an improper manner or has no jurisdiction or authority or is in conflict of interest. It would appear that the court, as it should, has the supervisory role on ensuring procedural fairness.

22. As the Act only came into operation on 1st April 2005 (the Bill being passed on 16th November 2004) the operation of it has yet to be seen.

New South Wales, Australia

23. The Security of Payment Act 1999 of Australia has been in place for a while and a number of cases has dealt with the statutory adjudication scheme laid down by the Act. The discussion is therefore focused on a more recent decision which has overruled a line of cases commencing from Musico v. Davenport [2003] NSWSC 977.
24. In Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport [2004] NSWCA 394 and Transgrid v. Siemens Ltd.[2004] NSWCA 395, the New South Wales Court of Appeal, Mason P, Giles JA and Hodgson JA (who gave the leading speech) overruled the line of cases emanating from Musico.
25. The Court of Appeal looked at the statutory provisions and then considered the line of cases starting from Musico. The Court of Appeal held that :-

The position of an adjudicator under the Act is not completely analogous to that of an administrative tribunal of the kind referred to by the court in Craig. [Note : Craig v The State of South Australia [1995] 184 CLR 163] Nor, of course, is it closely analogous to that of an inferior court (which, as the court pointed out in Craig at 179-180, has “authority to decide questions of law, as well as question of fact”, so that an error of

law in the determination of issues before it will not ordinarily lead to jurisdictional error). The position is, in my view, closely analogous to that of an expert by whose determination the parties have agreed to be bound This approach was confirmed by the English Court of Appeal in Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd. [2000] BLR 522 (although, for the reasons given in paragraph [41] above, care needs to be taken in seeking to apply decisions on a different legislative scheme).

I therefore conclude that, where the determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues. It would be otherwise, as the High Court pointed out in Craig (echoing, I think, what Lord Reid said in Anisminic), if the error of law causes the adjudicator to make one or other (or more) of the jurisdictional errors that the court identified : in such a case, relief would lie, subject to any relevant discretionary considerations.

26. The Court of Appeal then proceeded to look at the application of its decision.

*What then are the conditions laid down for the existence of an adjudicator's determination? The **basic and essential requirements** appear to include the following :*

- 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss. 7 and 8).*
- 2. The service by the claimant on the respondent of a payment claim (s. 13).*
- 3. The making of an adjudication application by the claimant to*

an authorised nominating authority (s. 17).

4. *The reference of the application to an eligible adjudicator, who accepts the application (ss. 18 and 19).*
5. *The determination by the adjudicator of this application (ss. 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss. 22(1)) and the issue of a determination in writing (ss. 22(3)(a)). (My emphasis).*

27. In considering whether and when there would be a jurisdictional error, in other words, when the basic and essential requirements that was set out in the judgment are not met, the Court of Appeal drew a distinction between the essential and basic requirements with the “*exact compliance with all the more detailed requirements*”. The Court of Appeal said :

*What was intended to be essential was **compliance with the basic requirements** (and those set out above may not be exhaustive), a **bona fide attempt by the adjudicator to exercise the relevant power** relating to the subject matter of the legislation and reasonably capable of reference to this power, and **no substantial denial of the measure of natural justice** that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. (My emphasis).*

28. These essential pre-conditions are presumably not exhaustive but the judgment has laid down some new guidelines for the court to consider in

deciding whether or not there is jurisdictional error which requires the determination to be set aside or rendered void.

29. In relation to the denials of natural justice, it would appear from the Court of Appeal judgment that compliance with the essential and basic requirements is a must. The Court of Appeal expressly agreed on the result of a number of decisions whereby issues of denial of justice were discussed. From these cases, it would appear that :-

(1) The parties must ensure strict compliance with the requirements regarding time and service set out in the Act.

(2) The adjudicator must consider the response from the respondent.

(3) The adjudicator must not come to a determination on a ground which has not been raised by either parties. If he intends to rely on such a ground, natural justice requires him to give the parties notice of that intention thereby entitling and enabling them to make submissions on the intention.

(4) The adjudicator should not decide the claim on a new contractual basis which the respondent has not had the opportunity to respond in the adjudication response as set out in the Act.

30. These statement of principles as enunciated from the cases approved by the Court of Appeal are familiar principles of natural justice.

31. This change in judicial approach to these questions illustrates, it seems, that the court will adopt an approach more compatible with the policy that the Act intends to implement.

TERESA CHENG, SC, JP
Senior Counsel, Chartered Arbitrator
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Tel: (852) 2905 1681

Fax : (852) 2525 0063

E-mail: tywcheng@netvigator.com