SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

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VIEWPOINT

THE PRESIDENT'S COLUMN

Members would have received by now my note on the impending re-launch of the Institute's web site. Our web site will be re-designed to enable it to be more easily navigated and user friendly. The re-launch is tentatively scheduled in April 2004 . We invite members' comments on the re-designed web site. You may wish to send your suggestions to the Institute by email to its address at siarb@siarb.org.sg

New Executive Director :

I would also like take this opportunity to introduce and welcome Ms Teresa Ee as our new Executive Director. She has taken over responsibility from Dr Alvin Oh as Executive Director effective from 19 January 2004. Teresa is an accredited arbitrator with the SIAC and is a Fellow of both the SIArb and CIArb. An architect by training, she has worked in commercial organisations and architectural firms before joining us.

Use of Institute's premises :

There is an encouraging use of the Institute's premises to conduct arbitration hearings. Our rates at $200 (members)/ $250 (non-members) per day for the use of the Main Arbitration Room and the two breakout rooms must be about the most competitive in the market. We will now be more flexible and allow the rooms to be hired out for half a day only if required. This will further encourage its use. With this added flexibility, I hope members will continue to support the use of the rooms. The revenue from the hire of the rooms is an additional source of income for the Institute and helps defray our operating costs including rental expenses. To date, the rooms have been used for about 12 arbitration hearings.

Joint Bid for ICMA XXIV Conference

The Institute made a Joint Bid with the Singapore International Arbitration Centre and the Maritime Law Association of Singapore to host the International Congress of Maritime Arbitrators (ICMA) XVI 2006/2007 in Singapore. The outcome of our bid will be known some time in May 2004. I am confident that we will be successful in our bid. With the hosting of the Conference in Singapore, we hope to raise the Institute's profile internationally as well as to encourage more of our members involved in the maritime industry to be more active in the Institute's activities.

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Proposed Security of Payment Act : Adjudication

The above-proposed legislation when it is introduced sometime this year will have an impact on the real estate and construction industries on the use of the existing ADR methods. One of the key features of this legislation will be the use of the adjudication process as a method for securing interim payment without the need to resort to the courts or to arbitration. This legislation is expected to have an impact on the use of arbitration in construction disputes.

As such, the Institute must be prepared to embrace and understand the adjudication process and contribute positively to its use in Singapore. In this regard, the Institute shall prepare it members for adjudication by providing training courses, workshops and talks on adjudication. Towards this objective, the Institute on 28 January 2004 organised a Seminar on Adjudication by Mr Tomas Kennedy Grant, an experienced ADR practitioner from New Zealand and co-author of the book, "A Guide to the Construction Contracts Act." A shortened version of his paper delivered at the seminar is included in this Newsletter.

The Institute has offered its services as an Authorised Nominating Authority (for the nomination of adjudicators) under the above-proposed legislation to the relevant authority in order that we may have a role to play in the adjudication process similar to the role of other Arbitration Institutes in Australia, England and Australia.

Courses:

The Institute's programme of courses is gathering momentum. Together with the CIArb, we successfully organised the Diploma in International Commercial Arbitration Course for 25 participants from 5 to 13 January 2004 at the Shangri-La's Rasa Sentosa Hotel. On 14 January 2004, the Institute organised a one-day course titled: "Introduction to Arbitration" for The Institution of Engineers Singapore. On 6 and 7 March 2004, the Institute together with CIArb conducted a Fast Track Fellowship Course for lawyers with more than 10 years' experience at the Regent Hotel.

The Institute will continue to train its members for Membership and Fellowship Courses and encourage participants who have attended introductory courses on arbitration organised by the Institute to join the Institute. I look forward to your continued support and if you have any matter which you wish to let me have your feedback on, you may do so by email at: siarb@siarb.org.sg

Raymond Chan
President

The New Executive Director of the Institute - Ms Teresa Ee

The Institute welcomes its new Executive Director, Teresa Ee. Teresa is an architect by training with a second degree in law. She is registered with the Board of Architects, Singapore. Inspired by her interest in construction law after practising as an architect in the construction industry for a decade, Teresa pursued a full-time postgraduate degree in construction law & arbitration at the King's College London. Teresa is not a stranger to the local arbitration community as she is a Fellow of the Institute and The Chartered Institute of Arbitrators. Teresa also sits on the Regional Panel of Arbitrators with the Singapore International Arbitration Centre. In addition to her new role as the Executive Director, Teresa also lectured on arbitration & mediation subjects at the National University of Singapore. Even though Teresa's keen interest in arbitration started out as "an expensive hobby", she is now breathing and smelling arbitration every day. On her new role at the Institute, Teresa has this to say: "I am excited at this challenging opportunity to enhance the professional development and training in alternative dispute resolutions, especially arbitration. My vision is to bring together not only more but better training opportunities to all aspiring and practising arbitrators."

ADJUDICATION

A paper presented to the Singapore Institute of Arbitrators at Goodwood Park Hotel on 28 January 2004
by Tómas Kennedy-Grant
MA(Oxon), Gray's Inn, FCIArb, FAMINZ(Arb/Med), FICA
Chartered Arbitrator

Introduction

1. The legislation that I want to consider this evening is in force in the United Kingdom, certain of the Australian States and New Zealand. In the United Kingdom it takes the form of the Housing Grants, Construction and Regeneration Act 1996. In Australia it takes the form of the Building and Construction Industry Security of Payment Act 1999 in New South Wales and the Building and Construction Industry Security of Payment Act 2002 in Victoria. In New Zealand the relevant Act is known as the Construction Contracts Act 2002.

The structure of the legislation

2. The United Kingdom legislation is found in Part II of the Housing Grants, Construction and Regeneration Act 1996 and in regulations and an order made under the Act. The Act defines "*construction contract*" (s 104) and "*construction operations*" (s 105) and provides that the Act does not apply to a "*construction contract with a residential occupier*" or to "*any other description of construction contract excluded from the operation of [the Act] by order of the Secretary of State*" (s 106). It provides that the provisions of the Act apply only where the construction contract is in writing (s 107). It then provides for adjudication in a single section (s 108), which:
   a. Requires a construction contract to provide for adjudication;
   b. Provides that, if the contract does not do so, the statutory Scheme for Construction Contracts applies. (There are, of course, separate Schemes for England and Wales, on the one hand, and Scotland, on the other.)

   The Act deals finally with the question of payment (ss 109- 113).

3. The Scheme for Construction Contracts which applies to England and Wales ("the English Scheme") has two parts, the first dealing with adjudication and the second with payment.

4. The structure of the Australian and New Zealand Acts is very different. They deal with payment first and then with adjudication, and contain the entire legislative framework for both payment and adjudication, so that there is no need to refer to subsidiary legislation as there is in the United Kingdom.

5. The Australian and New Zealand Acts also differ from the United Kingdom Act in that the provision which they make for adjudication is purely statutory. They do not, as the United Kingdom Act does (in s 108), permit of a contractual scheme of adjudication.

6. The New Zealand Act differs from the two Australian Acts in that its provisions for adjudication are considerably more prescriptive than those of the Australian Acts.

The definition of "*construction contract*", "*construction operations*" and "*construction work*"

7. The United Kingdom Act (s 104) defines a "*construction contract*" as:
   ... an agreement with a person for any of the following-
   i. the carrying out of construction operations;
   ii. arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
   iii. providing his own labour, or the labour of others for the carrying out of construction operations.
   and provides that the term shall be taken to include :
   ... an agreement –
   1. to do architectural, design, or surveying work, or
   2. provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape, in relation to construction operations.

8. The Australian Acts (s 4 in each case) define a "*construction contract* as:
   ... a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.
   They define "*related goods and services*" (s 6 in each case) as meaning:
   ... any of the following goods and services–
   (a) goods of the following kind–
      (i) materials and components to form any part of any building, structure or work arising from construction work;
      (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
   (b) services of the following kind–
      (i) the provision of labour to carry out construction work;
      (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
      (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,

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(c) goods and services of a kind prescribed by regulations for the purposes of the subsection.

9. The New Zealand Act, in contrast, limits the term "*construction contract*" to "*a contract for carrying out construction work*" (s 5). None of what the Australian Acts call, very aptly, "*related goods and services*" are covered by the New Zealand Act.

10. The definitions of the terms "*construction operations*" used in the definition of "*construction contract*" in the United Kingdom Act and "*construction work*" used in the definitions of "*construction contract*" in the Australian and New Zealand Acts are very similar (see s 105 of the United Kingdom Act, s 5 of the Australian Acts and s 6 of the New Zealand Act), although it is obviously necessary to have regard to the precise wording of the particular Act that one is considering in any given case.

11. One respect in which the various Acts differ in their definition of "*construction operations*" (in the case of the UK Act) or "*construction work*" (in the case of the Australian and New Zealand Acts) is in relation to the question of whether the protection of the Act should be extended to plant and equipment and to supply contracts. The UK Act (s 105(2)(d)) provides that the term "*construction operations*" shall not include:
manufacture or delivery to site of-
(i) building or engineering components or equipment;
(ii) materials, plant or machinery, or
(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation.

12. The Australian Acts, as will be clear from the definition of "*related goods and services*" given in paragraph 8 above, extend the protection of the legislation to materials and to supply contracts (whether linked with installation or not).

13. The New Zealand Act does not extend to plant and equipment but does provide limited protection in respect of prefabricated components. The definition of "*construction work*" in s 6 of the New Zealand Act includes:
... prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere.
The term "customised components" is defined as follows (in s 5 of the Act):
... in relation to a building or structure, means components that are specifically designed or modified for that particular building or structure.
That definition may be narrower than the Australian definition (see paragraph 8 above).

The application of the legislation to residential building

14. The United Kingdom Act (s 106) provides that the Act does not apply "to a construction contract with a residential occupier". The term "construction contract with a residential occupier" is defined (in s 106(2) of the Act) as meaning:
... a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

15. The Australian Acts (s 7 in each case) also have exclusions in respect of residential contracts, although expressed in terms of contracts to which other, domestic building-specific, Acts apply.

16. In contrast, the New Zealand Act applies to residential construction contracts as well as to commercial construction contracts, with some exceptions. I will refer to these later.

Adjudication : subject matter

17. The various Acts differ in their definition of what can be referred to adjudication :
a. The United Kingdom Act (s 108(1)) provides that:
A party to a construction contract has the right to refer adispute arising under the contract for adjudication ...
b. The New South Wales Act (s 17) provides that:
A claimant may apply for adjudication of a payment claim... if:
(a) the respondent provides a payment schedule .... but:
(i) the scheduled amount ... is less than the claimed amount ..., or
(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
(b) the respondent fails to provide a payment schedule to the claimant ...
and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount;
c. The Victorian Act (s 18) limits adjudication applications to those cases in which:
...the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim
d. The New Zealand Act (s 25) provides for the reference of a "*dispute*" to adjudication.

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Adjudication : procedure up to the decision or determination

18. The United Kingdom Act allows for the establishment of a contractual adjudication process whereas the Australian and New Zealand Acts only provide for a statutory scheme. I will only refer to the statutory schemes in this paper.

19. The English Scheme provides for the process to be initiated by the service on the other parties to the contract of a notice of intention to refer a dispute arising under the contract to adjudication (the "*notice of adjudication*") (paragraph 1). The referring party then requests the agreed adjudicator (if there is one) to act or (if there is no agreement as to adjudicator) requests a nominating body specified in the contract or, in the absence of such specification, an adjudicator nominating body to select a person to act as adjudicator (paragraph 2). A specified nominating body or adjudicator nominating body requested to select an adjudicator, does so and requests that person to act (paragraph 2). The chosen adjudicator then indicates whether or not he is willing to act (paragraph 2). If he is unable or unwilling to act or fails to respond within the prescribed period, the referring party has to start the process again (paragraph 6). If, on the other hand, the chosen adjudicator indicates that he is willing to act, the next step is the actual reference of the dispute to adjudication. This is done in writing (the "*referral notice*") addressed to the adjudicator and accompanied by "copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon". The referral notice is copied to the other parties to the dispute (paragraph 7). The Scheme then provides for the running to be made by the adjudicator (paragraph 13):

> The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication ...

The parties are required to comply with any request or direction of the adjudicator in relation to the adjudication (paragraph 14); and provision is made for the adjudication to proceed and the adjudicator to be able to make a decision notwithstanding any default by a party in complying with a request or direction of the adjudicator (paragraph 15). The Scheme provides for the parties to be represented by "*such advisers or representatives (whether legally qualified or not) as [they] consider ... appropriate*" (paragraph 16).

20. The New South Wales Act resembles the English Schemein providing that, where a respondent fails to provide a payment schedule to the claimant, no adjudication application may be made unless the claimant has notified the respondent, within the time prescribed, of the claimant's intention to apply for adjudication of the payment claim and the respondent has been given an opportunity to provide a payment schedule to the claimant within the prescribed period after receiving the claimant's notice (s 17(2)). In other cases there is no need for this prior notice. Prior notice is not required under the Victorian Act.

21. The New Zealand Act is similar to the English Scheme in that it provides for a two-step process in all cases:
    a. A notice of adjudication ;and
    b. An adjudication claim (or, in the English terminology, the referral notice) (ss 28 and 36)

22. Under the New South Wales Act every application for adjudication must be made to an authorised nominating authority chosen by the applicant (nominating authorities are authorised by the Minister responsible for the Act) (ss 17 and 28). Under the Victorian Act the adjudicator may be a person chosen by agreement between the parties to the dispute or, if there is no agreement on an adjudicator, be a person appointed by an authorised nominating authority chosen by agreement between the parties or, in the absence of agreement as to a nominating authority, chosen by the claimant. In Victoria nominating authorities are authorised by the Building Commission (ss 18 and 42). In New Zealand, it is only where approval is sought for the issue of a charging order (see paragraph 55 below) that the adjudicator must be appointed by an authorised nominating authority. In all other cases the adjudicator may be chosen by the parties or appointed by a nominating body chosen by the parties or by the claimant (ss 33 and 63).

23. All three Acts provide for the respondent to lodge with the adjudicator a response to the "*adjudication application*" (the Australian term) or "*adjudication claim*" (the New Zealand term) (s 20 of the New South Wales Act, s 21 of the Victorian Act and s 37 of the New Zealand Act.

24. The New Zealand adjudicator's powers are very similar to those of his or her English equivalent and considerably wider than the powers of his or her Australian counterparts. (Compare s 42(1) of the New Zealand Act with paragraph 13 of the English Scheme and both with s21(4) of the New South Wales Act and s22(5) of the Victorian Act.)

25. The New Zealand Act (s 42(2)), like the English Scheme, requires the parties to comply with the adjudicator's directions and (ss 43 and 44) contains similar provisions designed to ensure that the efficacy of the process is not affected by default by any of the parties.The Australian

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Acts do not expressly oblige the parties to comply with the directions of the adjudicator but simply provide that the adjudicator's power to determine the application is not affected by any failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties (s 21(5) of the New South Wales Act and s 22(6) of the Victorian Act).

26. The New Zealand Act (s 67) follows the English Act in providing for representation to be by whomever a party considers appropriate. The New South Wales Act prohibits legal representation in any conference called by the adjudicator (s 21). The Victorian Act places no restriction on representation.

Adjudication : criteria for appointment of the adjudicator

27. All the Acts prescribe criteria for appointment of the adjudicator (see paragraph 4 of the English Scheme, s18 of the New South Wales Act, s19 of the Victorian Act, and s34 of the New Zealand Act).

Adjudication : timing

28. Under the English Scheme (paragraph 19), the adjudicator is required to reach his decision:

... not later than –

(a) twenty eight days after the date of the referral notice ..., or

(b) forty two days after the date of the referral notice if the referring party so consents, or

(c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

29. Under the Australian Acts, the adjudicator is required to determine the adjudication application at the latest within 10 business days after the date on which he serves notice of acceptance (s 21(3) of the New South Wales Act and s 22(4) of the Victorian Act). The New Zealand adjudicator is allowed 20 working days after the end of the period within which the respondent may serve on the adjudicator its adjudication response. A New Zealand adjudicator can extend that period for a further 10 working days if the adjudicator considers that, even though the parties to the adjudication do not agree, further time for the determination of the dispute is reasonably required (s 46(2) (a) and (b)). Under both the Australian and New Zealand Acts, the parties may agree to an extension of time (s 21(3)(b) of the New South Wales Act, s 22(4)(b) of the Victorian Act and s 46(2)(c) of the New Zealand Act).

Adjudication : the adjudicator's duties

30. The English Scheme (paragraph 12) provides:

The adjudicator shall –

(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

(b) shall avoid incurring unnecessary expense.

31. The New Zealand Act provides (s 41):

An adjudicator must

(a) act independently, impartially, and in a timely manner; and

(b) avoid incurring unnecessary expense; and

(c) comply with the principles of natural justice; and

(d) disclose any conflict of interest to the parties to an adjudication; and

(e) if paragraph (d) applies, resign from office unless those parties agree otherwise.

32. The Australian Acts do not deal with the question of the adjudicator's duties.

Adjudication : the decision or determination

33. The English Scheme provides (paragraph 20) :

The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may –

(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract ... and ... when that payment is due and a final date for payment,

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for simple or compound rates of interest shall be paid.

34. The New South Wales Act (s 22) provides that:

An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant ..., and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

The Victorian Act does not give the adjudicator the last mentioned power.

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35. Under the New Zealand Act (s 48), the following provisions apply to the adjudicator's determination:

(1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine

(a) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and

(b) any questions in dispute about the rights and obligations of the parties under that contract.

(2) If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties under that contract.

(3) If an adjudicator determines under subsection (1)(a) that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment the adjudicator

(a) must also determine

(i) the amount payable or conditionally payable: and

(ii) the date on which that amount became or becomes payable; and

(b) may determine that the liability of a party to the adjudication to make a payment depends on certain conditions being met.

(4) Despite subsections (1) and (2), an adjudicator is not required to determine a dispute that has been withdrawn in accordance with section 39.

(5) If a dispute is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator

(a) must terminate the adjudication proceedings; and

(b) if requested by the parties, may record the settlement in the form of a determination on agreed terms.

36. The Australian and New Zealand Acts list the matters which the adjudicator may take into account in reaching his determination. There are differences both in scope and in content (see s22 of the New South Wales Act, s23 of the Victorian Act, and s 45 of the New Zealand Act).

Adjudication : the adjudicator's decision or determination: the additional powers of the adjudicator under the New Zealand Act

37. The New Zealand Act is unique in that it gives the adjudicator to whom a dispute arising under a commercial construction contract has been referred additional powers which are not enjoyed by an adjudicator under either the United Kingdom Act or the Australian Acts.

38. Under the New Zealand Act, a claimant under a commercial construction contract may, in the notice of adjudication, seek the adjudicator's approval for the issue of a charging order in respect of a construction site owned by a respondent (ss 29 and 49). If the owner of the construction site is not a party to the contract but is an associate of a party to the contract who is liable to pay the claimant under the contract, the adjudicator may be asked to determine that the non-respondent owner is jointly and severally liable with the respondent and to approve the issue of a charging order over the construction site owned by that non-respondent (ss 30 and 50).

39. The claimant who obtains approval for the issue of a charging order must apply to a court for the issue of the charging order.

Adjudication : the effect of the adjudicator's decision or determination

40. The English Scheme provides (paragraph 23(2)) that:
The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

41. The Australian Acts, in contrast, do not contain any such statement of the effect of the adjudicator's determination.

42. The New Zealand Act, like the English Scheme, provides for the effect of the adjudicator's determination (ss 58 and 61) as follows:

a. An adjudicator's determination that a sum of money is payable by one party to a contract to another is enforceable; but

b. An adjudicator's determination of the rights and obligations of the parties under the contract, whether made in the course of arriving at a determination as to whether money is payable or the sole object of the adjudication, is not enforceable, although any court before whom the rights and obligations in question are subsequently litigated *"must have regard to ... the adjudicator's determination."*

Adjudication: other aspects

43. The Acts we are considering all deal with the following further aspects of adjudication, although not necessarily in the same terms:

a. Immunity of the adjudicator (see paragraph 26 of the English Scheme, s 30(1) of the New South

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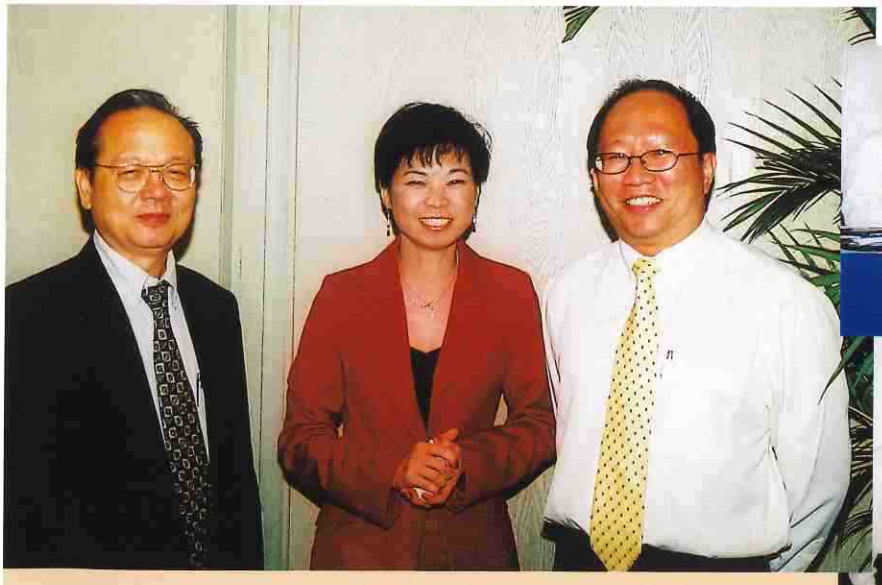
TALK ON CHALLENGING ARBITRAL AWARDS BY GOH P. C. SC (27 NOVEMBER 2003)

TALK ON ADJUDICATION BY TOMAS KENNEDY-GRANT (28 JANUARY 2004)



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Wales Act, s46 of the Victorian Act, and s 70 of the New Zealand Act);

b. The adjudicator's fees (see paragraph 25 of the English Scheme, s 29 of the New South Wales Act, s44 of the Victorian Act, and s 57 of the New Zealand Act);

c. Enforcement of the adjudicator's decision (see paragraph 24 of the English Scheme, ss 24 and 25 of the New South Wales Act, ss 25 and 27 of the Victorian Act, and ss 59, 72 and 73-75 of the New Zealand Act).

44. The Australian and New Zealand Acts all prohibit contracting out of their provisions (s 34 of the New South Wales Act, s 48 of the Victorian Act and s 12 of the New Zealand Act.). The United Kingdom legislation and the English Scheme do not prohibit contracting out of the provisions of the legislation, for the obvious reason that they envisage the possibility of contractual schemes which meet the requirements of the Act. By implication, however, there is no contracting out because, if the contractual arrangement made by the parties does not meet requirements of the Act, the provisions of the Scheme apply.

45. The following aspects are dealt with by the New Zealand Act but not the other Acts:

a. The relationship of adjudication to other proceedings (ss 25(3) and 26 of the New Zealand Act);

b. The parties' costs (s 56 of the New Zealand Act).

Some concluding comments

46. Legislation such as the Acts I have been discussing clearly has the potential to have a major impact on the construction industry in any country in which it is adopted.

47. That potential exists in five ways:

a. Adjudication legislation will provide an incentive to those who are due to make payment to do so when they should and in the amount that they should. They will not want to be involved in adjudication after adjudication with any particular party who is entitled to payment nor in multiple adjudications with a range of parties entitled to payment.

b. In those cases in which the existence of such legislation does not have this effect because the payer simply does not have the ability to pay, the legislation will result in the speedier collapse of that party, because of the fast-track procedure available to parties claiming payment and the ability to use the resulting determination as a basis for a statutory demand against the company or, on converting it into a judgment, as the basis for a bankruptcy petition.

c. The legislation will provide an effective fast-track method of obtaining a binding determination as to liability to pay, which can be enforced speedily.

d. If the New Zealand model is adopted, the successful claimant will be able to obtain a charging order on the basis of the adjudicator's approval of the issue of such an order.

e. If the process works well, it may well result in a significant reduction in the number of arbitrations.

48. What will it take for the process to work well? I suggest three things:

a. Adjudicators who are prepared to take an active role in directing the investigation/enquiry/consideration necessary before a determination can properly be made.

b. Lawyers who are prepared to limit applications for injunctions to restrain an adjudicator on the ground of absence of jurisdiction or for judicial review of the adjudication process to the cases in which such applications are really appropriate.

c. Judges who, while maintaining the implicit or explicit requirement that the adjudicator act in accordance with natural justice, will not require the formality of procedure that is the norm in the courts. You can be fair without being formal. You can give the parties an opportunity to put their case and comment on the other party's case without adopting an elaborate procedure. The tight time frames under adjudication legislation do not permit an elaborate procedure. Indeed, the procedural provisions of the Acts do not envisage it.

49. My interest in, and involvement in, arbitration go back nearly 30 years. My first arbitration as counsel was in 1974, as arbitrator in 1988. My first understanding of the wider range of alternative dispute resolution (of which adjudication is a part) was gained in 1987 when I went to the grandly styled "International Symposium on Pacific Basin Dispute Resolution" in San Francisco. One of the speakers at that conference was David Newton, who was then the Secretary-General of the Australian Commercial Disputes Centre. Mr Newton used as the theme of his speech a comment which I have remembered ever since: *If we cannot live together more harmoniously we must learn to disagree more efficiently*

50. Adjudication has the potential to be a more efficient means of resolving disputes. I am pleased that New Zealand has adopted the process; and I recommend it to your consideration.

Legal Development Affecting Arbitration

by Dr. Philip Chan Chuen Fye

ABC Co v XYZ Co Ltd [2003] 3 SLR 546 [Judith Prakash J].

This case required the court to interpret the provisions of the Model Law which is part of the International Arbitration Act and the Rules of Court governing applications to court made pursuant to the Model Law to set aside an award. An application was made to the court to amend the originating motion by the addition of new grounds to set aside the arbitral award of an international arbitration. The learned judge made a few points:

- "...the courts of Singapore have only such jurisdiction over the proceedings as is specifically conferred on them by the Act and the Model Law. The principle of party autonomy is one that is central to the Model Law. It is a principle that must be respected by the courts whenever they have cause to deal with any issues arising in relation to an international arbitration. Thus, the attitude to be adopted when a court is faced with such an issue is to be treated and, in the absence of such indication, to apply the applicable principles of general law in the manner best suited to uphold the parties' choice of arbitration as the appropriate method of dispute resolution."

- "Article 34 of the Model Law deals with the recourse that a party to an arbitration has when he is not satisfied with an arbitral award. ...Article 34 does not provide the procedure by which recourse to the courts is to be had. The drafters left this to the domestic law of the various states implementing the Model Law. In our case, the procedure has been provided by O 69A of the Rules of Court 1996 (Cap 322, R5)."

- "The starting point of this discussion must be the Model Law itself. On the aspect of time, art 34(3) is brief. ...It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court."

- "As stated, O 69A r 2(1) prescribed that applications to set aside awards under the Model Law are to be made by originating motion. Order 20 is the rule dealing with amendment of court documents. ...I do not accept that an application to amend a Notice of Appeal is analogous to an application to amend an originating motion to set aside an arbitration award. The two processes are entirely distinct. When an appeal is lodged, what is being demonstrated is a dissatisfaction with the way that the facts and the law have been analysed in the first instance court. The appellant, to succeed on his appeal, does not have to prove any new facts. What he has to do is to show that the evidence already before the court has not been considered adequately and that a proper consideration of that evidence and the applicable law must lead to a decision that is different from that arrived at by the trial judge. An appeal is not an originating process."

- "It is not an accident that O 69A specifies that an application to set aside an award should be made by an originating motion. ...Unlike an appeal, it is not a process designed to impugn a pre-existing judicial decision. The fact that in this case the remedy required is the setting a side of an arbitral award does not make the application the equivalent of an appeal. To succeed in the application, new facts which were not (and generally would not have had to be) considered by the arbitral tribunal in coming to its decision will have to be established by the applicant. ...It is not appropriate therefore to apply to an application to amend an originating motion the same principles that are applied to an application to amend an appeal."

- "Accordingly, ...I am governed by O 20 r5(2) and O 20 r5(5). As far as r5(2) is concerned, the relevant period of limitation current at the date of issue of the originating motion was the period of three months that commenced when the applicants received the award. That period expired ...well before the filing of this summons [to amend]. The effect of allowing the amendments asked for will be to add new causes of action because each new ground on which an award may be set aside constitute, as I have said, a separate cause of action. ...in accordance with r5(5), I am only able to allow such amendment if the new grounds proposed to be added arise out of the same facts or substantially the same facts as the grounds specified originally."

PT Tugu Pratama Indonesia v Magma Enterprises Pte Ltd [2003] 4 SLR 257[Judith Prakash J].

This case involved the application made pursuant to article 16(3) of the UNCITRAL Model Law which is part of the International Arbitration Act to declare that the tribunal had no jurisdiction over the dispute and to set aside the Interim award made by the tribunal because the arbitration clause was invalid. In particular, the tribunal has no power to award costs as it was contrary to the arbitration clause. The court found that the arbitration clause was valid. In respect of the award of costs, the learned judge said;

- "...the power given to the court by art 16(3) to decide the issue of jurisdiction after the tribunal has made its preliminary ruling must necessarily encompass any ancillary orders made by the tribunal in relation to that ruling. The court's power of determination must also relate to interpreting the jurisdiction conferred on the tribunal by the arbitration clause in question. In the case,

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cl 3.18 specifically prescribed how the costs ...must be borne. Therefore the tribunal was bound to follow that dictate and its jurisdiction to decide the substantive issue in dispute did not extend to empowering it to make any costs order that was not in accordance with cl 3.18. ...the agreement of the parties to shift the seat of the arbitration to Singapore under the SIAC Rules would not permit those rules to overrule the express terms of the arbitration clause except as expressly assented to."

Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd [2003] 4 SLR 492 [Court of Appeal with Judith Prakash J delivering the judgment]

This case involved a motion to set aside the Notice of Appeal against the High Court's decision to grant leave to appeal against an arbitral award although the said leave to appeal was already granted and was immediately followed by the hearing of the appeal. The case was decided based on the now repealed Arbitration Act but was applicable to the arbitration between the parties. The learned judge said:

- "The question we have to decide is of limited effect due to the changes effected to arbitration law by the New Act [Arbitration Act 200 (act 37 of 2001)]."

- "There is no set procedure for the hearing of an application for leave to appeal against an award and the hearing of the appeal proper. These can be heard at the same time by the same judge or at different times and by different judges. ...Thus, an application for leave and the appeal proper may be contained in the same motion papers and may be considered by the same judge on the same day. This, however, is not invariably the case and we are aware of the situations where, the court having considered the leave application first, has then adjourned the appealproper to another date for hearing despite the fact that both prayers were in the same motion papers. In our view, it is preferable that the application for leave be heard first and, if it is allowed, the appeal proper be heard later. This would prevent the kind of problem that faces us here from arising."

Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd [2003] 4 SLR 499 [Tay Yong Kwang J]

This is a case which involved an application for a stay of the proceedings based on the Arbitration Act (Cap 10 2002 Rev Ed). The applicant had filed a Defence and Counterclaim and stated in both in the Defence and the Counterclaim that it was filed without prejudice to its right to stay the proceedings. After the application for stay was dismissed, the defendant served a 48-hour notice on the plaintiff to file and serve its Defence to Counterclaim. This was followed by an appeal against the dismissal of its application for a stay of the proceedings. The learned judge held:

- "Section 691) Arbitration Act implies that an application for stay should be filed before the time for serving a Defence has lapsed, failing which judgment in default of Defence may be entered by the plaintiff. What a defendant ought to have done was to file its application for a stay immediately and not file such an application and the Defence at the same time. Nevertheless, the defendant did make it clear in its Defence that it was not intending to defend the claim in court."

- "The defendant was careful enough to reserve its right to apply for a stay in its Counterclaim... The defendant here would therefore be evincing an intention to sue on the subject matter covered by the arbitration clause if no reservation to apply for a stay had been stated in its Counterclaim as well."

- "However, the defendant undermined itself by its action of giving its own 48-hour notice to the plaintiff in respect of its Counterclaim in the period between the assistant registrar's decision and this appeal. That notice put it beyond doubt that it was serious in pursuing its Counterclaim in court and not by way of arbitration as the Counterclaim pertained to matters covered by the arbitration clause. ...The service of the 48-hour notice by the defendant was clearly a step in the proceedings within the meaning of s6(1) arbitration Act and thereby nullified the defendant's right to apply for a stay."

Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd [2004] 1 SLR 333[Lai Kew Chai J]

This is a case where there is an application for the interpretation of an arbitration clause. In particular, the court was asked to say whether the provision, "...the rules of arbitration promulgated by the Singapore International Arbitration Centre." refers to the SIAC Domestic Rules or the Arbitration Rules of the SIAC also known as the SIAC Rules used for international arbitrations. Although the SIAC Domestic Rules were not in existence at the time of the contract, the court held that

- "...once parties had agreed to adopt the rules of a particular arbitral institution, without specifying the particular set of rules, the applicable rules would be those that were current at the time of submission to arbitration, regardless of whether we are dealing with a new amended version, or an entirely different set of rules. ...generally,
...the most appropriate institutional rules existing at the time of submission, regardless of whether those rules were in existence at the time of the Contract."

- "In this case, the rules, which were current at the time of reference to arbitration were the SIAC Rules and the SIAC Domestic Rules. In the absence of any specification, the SIAC Domestic Rules would apply to domestic arbitrations and the SIAC Rules would apply to international arbitrations. This was clearly a domestic arbitration... The SIAC Domestic Rules would accordingly apply."

Fast Track Fellowship Workshop

The Singapore Institute of Arbitrators and The Chartered Institute of Arbitrators jointly conducted a "Fast Track - Assessment Workshop" programme at The Regent Singapore on 6 and 7 March 2004. The course director was Mr Neil Kaplan, CBE QC and the panel of tutors/assessors were Mr Richard Tan, Mr Raymond Chan, Mr Tony Houghton, Mr Michael Hwang SC and Mr Christopher Lau SC. The two-day workshop was well attended by 20 candidates, mainly from Singapore, with a few coming from as far as Australia, China, Nepal and Canada. The interesting mix of candidates provided an enlightening exchange on arbitration practices in different jurisdictions. Most importantly, all candidates were given a fair and equal opportunity to present their arbitration knowledge from their respective places of practice. For those who passed the assessment workshop, the next step will be an award writing course on their road to the Fellowship examination.

The following persons passed the assessment workshop and we offer them our congratulations:

Mr Chia Chor Leong, Mr Gan Hiang Chye, Mr Andre Yeap SC, Mr Gavin Denton (China), Mr Naresh Mahtani, Ms Mirina Muir (Australia), Mr Tan Heng Thye, Mr K Gopalan, Mr M Rajaram, Mr Andre Arul, Mr David Rasif, Mr Anil Kumar Sinha (Nepal), Mr Leo Cheng Suan, Ms Monica Neo, Mr Francis Xavier, Mr Guy Spooner and Mr James G Norton (Canada). (Names listed are not in any particular order)

We are encouraged by the positive response and feedback received from candidates. We will be looking into conducting another Fast Track - Assessment Workshop in the near future given the strong expressions of interest from members.

Arbitration - Award Writing Course

Following the successful completion od the Fast Track - Assessment Workshop on the 6 and 7 March 2004, the Institute conducted an Award Writing Course on 13 March for candidates who would like to sit for the upcoming Award Writing Exam scheduled to be held on the 23 March. The tutor was Mr John Barber MA LLB CEn, f FICE FCIArb - an independent consulting civil engineer, arbitrator, adjudicator and conciliator. He is also a part-time lecturer on the MSc in Construction Law and Arbitration at King's College London and National University of Singapore. He has been responsible for the Arbitration Award Writing Paper at King's which provides exemption from the CIArb Award Writing Examination) since 1997, as both examiner and tutor. He has served as a member of the ICE Advisory Panel on Legal Affairs and Arbitration Advisory Panel for 3 years each, and as Chairman of the Chartered Institute of Arbitrators' East Anglia Branch for 2 years.

Despite the fact that the course was arranged at relatively short notice, the evening lecture was well attended by 14 participants both from the recent Diploma in International Commercial Arbitration course and the Fast Track Assessment Workshop. In addition to lecture on award writing skill, participants were given feedback & guidance on an award writing exercise given prior to the evening course.

Lunch Talk by Neil Kaplan, CBE QC

Mr Neil Kaplan gave a talk on the subject of "Potpourri of Thoughts and Ideas on Arbitration" which was held at the Marina Mandarin on 10 November 2003. The talk was well attended by members and guests.

Neil Kaplan CBE QC shared the collection of his thoughts on the international commercial arbitration practice. He focused on the critical issues of enforceability under the New York Convention and emphasised the degree of consistency in the judgment of arbitration appeal cases under different jurisdictions. On the appointment of a single judge hearing all arbitration related matters, Neil was well informed of Singapore's practice of the same. Neil Kaplan CBE QC also touched on the transparency in the appointment of tribunal etc quoting the example in Hong Kong. On the impact of adjudication on arbitration in other jurisdictions, it appears that there is a drop in the number of arbitration cases referred.

Neil Kaplan CBE QC also touched on other considerable innovative ideas on the conduct of arbitration, among others, utilisation of IT tools in the submission of pleadings and hearing. Neil Kaplan CBE QC related his recent experience of conducting long-distance virtual hearing during the SARS period last year via video conferencing. Contrary to others who are doubtful of the practice of virtual hearing, Neil Kaplan CBE QC was of the opinion that tribunal may be more prepared to accept witness testimony over cyberspace with the physical presence of a neutral representative in the same room as the witnesses.

Some of the other practice issues covered were: fixing of dates after list of issues to be determined is submitted by parties (ie, terms of reference under ICC Rules.), strict adherence of time-table given by Tribunal, clarity in the style and presentation of witness statement, list of common basic factual background to be

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agreed by parties, division of bundle of documents with format of submission, limitation on the length of submission with stipulation of font size requirement, limitation of hearing times to give equal opportunities to parties etc.

It was truly an enriching lunch session with great update on the practice of arbitration and fellowship at the same time.

On Mr Neil Kaplan CBE QC: The Immediate Past Chairman of Hong Kong International Arbitration Centre and the President of the Chartered Institute of Arbitrators from May 1999 until May 2000. From March 1990 until the end of 1994, he was a judge of the Supreme Court of Hong Kong. From 1994 until the end of 1999, he was the Convenor of the Dispute Review Group for Hong Kong's new airport.

He is also currently the Chairman of Hong Kong's WTO Review Body on Bid Challenges and Deputy Chairman of Hong Kong's Telecommunications (Competition Division) Appeal Board.

He has co-authored two books on arbitration in Hong Kong and China and has recently co-authored Model Law Decisions, a book on cases which apply the UNCITRAL Model Law on International Commercial Arbitration. He has also published many articles. He is a Council member of the International Council of Commercial Arbitration (ICCA). He is a Fellow of the Chartered Institute of Arbitrators and is a Chartered Arbitrator. He is also a Fellow of the Hong Kong Institute of Arbitrators and the Singapore Institute of Arbitrators as well as a panellist of several other arbitral institutions including CIETAC. He is a member of the LCIA, and has conducted LCIA arbitrations. He has conducted numerous ICC arbitrations. He has conducted arbitrations in at least 12 different jurisdictions in Europe, Asia, Australasia and America.

Upcoming Events

- 16 April 2004 - Members Social Gathering: Talk on "Litigation Tools" by Wordwave International Asia
- 5 May 2004 - Members Social Gathering: Talk by Dair Farrar Hockley, Director - General of the Chartered Institute of Arbitrators
- 24 May 2004 - Talk by Dr Philipp Habegger, The Swiss Arbitration Association: "Arbitrators as Settlement Facilitators"
- Introduction to Arbitration
- Members Get-Together
- Annual Conference
- Annual Dinner
- International Entry Course

Announcements

•NEW MEMBERS•

The Institute extends a warm welcome to the following new members:

Fellows		
Bala Reddy	F 132	19 November 2003
Members		
Choy Kah Wai	M 515	22 October 2003
David Rasif	M 516	22 October 2003
Ho Poh Kong	M 517	22 October 2003
Loh Chee Kan Andrew	M 518	22 October 2003
Loy Wee Sun	M 519	22 October 2003
Luar Eng Hwa	M 520	22 October 2003
Tan Jing Poi	M 521	22 October 2003
Goh Kok Yeow	M 523	19 November 2003
Alban Kang	M 524	19 November 2003
Sim Chong	M 525	19 November 2003
Leong Tuck Fook	M 526	17 December 2003
Dr Lock Kai Sang	M 527	17 December 2003
Ooi Joo San	M 528	17 December 2003
Wong Por Luk Paul	M 529	17 December 2003
Dr Yogarajah Indrayogan	M 530	17 December 2003

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Sydney Melbourne Christchurch London Boston

Diploma in International Commercial Arbitration

The Singapore Institute of Arbitrators and the Chartered Institute of Arbitrators jointly organized this course at Shangri-La's Rasa Sentosa Resort from 5 Jan - 13 Jan 2004. Applications were invited from lawyers, law graduates and other professionals who had experience of arbitration or other forms of dispute resolution. Practising arbitrators were also involved in the programme.

A total of 23 delegates from a diverse range of countries such as Pakistan, Singapore, Indonesia, Hong Kong, UK, Taiwan and Australia participated in the programme. The course was conducted by tutors and speakers from London, Hong Kong, Singapore, Australia, Switzerland, Germany and Indonesia. The course adopted a comparative approach to considering various topics, including the nature and limits of arbitration, jurisdiction, powers and obligations of arbitrators, international arbitration distinguished from other forms of dispute resolution, the UNCITRAL Model Law, and arbitration procedures.

The course involves two examinations. Passing both examinations gives candidates exemptions from certain requirements leading to Fellowship.

The course was well received by the participants, who also had an enjoyable stay at the Resort.

Talk on Challenging Arbitral Awards

The Maritime Arbitration Group of the Singapore Institute of Arbitrators organised a luncheon talk on 27 November 2003, by Mr Goh Phai Cheng SC. The subject of his talk was "Challenging an Arbitral Award."

As might be expected, when an award is published, there is sometimes dissatisfaction over the award, leading the disappointed party to request the arbitrator to hear further arguments, or to seek other recourse against the award. Various avenues are open, and parties have made different attempts to challenge awards, including requesting further arguments, alleging errors of fact or law, and alleging procedural irregularities. In recent years, awards have also come under increasing scrutiny. As a result, Mr Goh's chosen subject was not only a fascinating one, but also extremely topical.

As a former Judicial Commissioner and an experienced arbitrator and mediator, Mr Goh's vast experience was readily apparent from his talk, which covered the full spectrum of relevant Singapore and foreign cases, and relevant amendments to the legislation. Indeed, Mr Goh was personally involved in a number of the cases which he considered.

The talk attracted a wide audience, including members of the Maritime Arbitration Group, members of the Institute, and guests. The audience found the talk most interesting, and benefited much from Mr Goh's familiarity with the subject.

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