



Asian Dispute Review

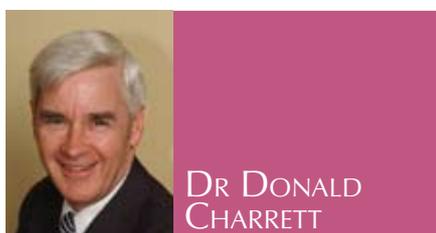
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Adjudication in Singapore: Challenges to an Adjudicator's Decision with Regard to Time Limits

This article discusses Singapore's Security of Payment legislation, which provides for rapid adjudication of construction payment disputes. The very short time limits for the taking of steps in adjudications raises the possibility of challenges to decisions for non-compliance. The implications of late issue of referrals to adjudication, late appointment of adjudicators and late rendering of determinations are also considered.



legislation has been widely used, particularly in New South Wales. The importance to parties of adjudicators' determinations can be gauged from fact that, over a 7-year period, there have been 230+ court challenges to adjudications in NSW, the majority in the Supreme Court and 30+ in the Court of Appeal.

common with Australian legislation². It confers on a *claimant* (contractor) who carries out *construction work* under a *construction contract*, or supplies related *goods* and *services* under a *supply contract*, a statutory entitlement to a *progress payment*, following submission of a *payment claim* to the *respondent* (principal). The respondent must provide a *payment response* to a payment claim made under a construction contract within a limited time.

Introduction

Adjudication of construction disputes is a relatively recent addition to the range of ADR methods. In essence, an independent adjudicator provides a provisional determination of the parties' rights under a contract following an impartial assessment of submissions from each party. Its key features are that it is generally quick and therefore relatively inexpensive and does not finally resolve the parties' rights.

Statutory adjudication of construction disputes of all types was introduced in the UK in 1997 by the Housing Grants, Construction and Regeneration Act 1996. Anecdotal evidence suggests that this legislation has substantially reduced the number of disputes referred to the English Technology and Construction Court for final determination. Statutory adjudication, albeit in the more limited class of payment disputes, has since been introduced in several Australian jurisdictions, New Zealand and Singapore under the rubric of Security of Payment legislation. This

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Summary of the Singapore legislation¹

The Building and Construction Industry Security of Payment Act 2004 (Singapore) ('the 2004 Act') took effect in April 2005. It has much in

The amount and timing of a progress payment to be made following a payment claim is defined by the terms of the contract, subject to minimum standards defined in the 2004 Act. Strict time limits are specified for a payment response (for claims under construction contracts only) and a progress payment, to facilitate cash flow to contractors, suppliers and service providers. A payment response must state the reason for any difference from the payment claim and the reason for any amount withheld.

The 2004 Act specifies an *adjudication* process for the rapid and economical resolution of payment claim disputes arising under construction and supply contracts, and to facilitate the rapid recovery of progress payments.

The terms 'construction work', 'goods' and 'services' are very broadly defined and include most activities involved in the planning, design, construction, maintenance



and repair of buildings and structures in Singapore. The definitions exclude, however, work in connection with residential property and work carried out as an employee. A progress payment includes a single one-off payment and is not limited so as to preclude a final payment.

Time limits relating to construction contracts and supply contracts are generally different, longer limits being allowed for supply contracts. Time limits also vary depending on whether there is a relevant contract provision. Provisions and time limits relating to the adjudication process are, however, the same for both types of contract. Parties may agree on dates relating to payment claims, payment responses (construction contracts only) and due dates for payment. These are, however, subject to maximum limits specified in the 2004 Act³. If the relevant contract is silent, the Act specifies maximum time limits.

The 2004 Act specifies formal requirements for a payment claim and a payment response to bring them within the statutory provisions. A payment claim can be made within a period of 6 years from the date of the work or the supply of goods or services.⁴ This contrasts with the much shorter time periods provided for in the Australian legislation, eg 12 months for NSW⁵ and 3 months for Victoria.⁶

The 2004 Act also has important and detailed provisions applicable to both construction and supply contracts which:

- make pay when paid provisions unenforceable;⁷ and
- give the contractor the right to suspend work or supply without liability in the event that it has not been paid a progress payment to which it is entitled.⁸

The adjudication process

For construction contracts only, there is a *dispute settlement period* of 7 days after the date on which the payment response is required to be provided. During this period, either party may seek clarification of

any matter and the respondent may provide a payment response where not previously provided, or vary a previous payment response.⁹

A claimant may make an *adjudication application* in the following cases.

- (1) *Construction contracts* – where the claimant fails to receive the accepted payment response amount by the due date, or disputes the respondent's payment response, or the respondent fails to provide a payment response by the due date.¹⁰
- (2) *Supply contracts* - where the claimant fails to receive payment of the claimed amount by the due date, or disputes a payment amount that is less than the claimed amount.¹¹

“**The terms ‘construction work’, ‘goods’ and ‘services’ are very broadly defined and include most activities involved in the planning, design, construction, maintenance and repair of buildings and structures in Singapore.**”

These provisions are significantly more respondent-friendly than those in corresponding Australian legislation. Under the NSW Act, if the respondent does not provide a payment schedule (equivalent to the payment response), it is liable to pay the entire claimed amount. If that amount is not then paid by the due date, the claimant may either recover it as a debt in any court of competent

jurisdiction or, alternatively, make an adjudication application.¹²

Strict time limits govern the making of an adjudication application and depend on whether the agreed payment amount has been received. The claimant must notify the respondent in writing of its intention to apply for adjudication before making its application. The application requesting appointment of an adjudicator must be lodged with an *authorised nominating body* within 7 days of entitlement to make the application, must contain the prescribed information and application fee, and may be accompanied by other information the claimant considers relevant.¹³ The nominating body must confirm appointment of the adjudicator in writing within 7 days after receiving the adjudication application.¹⁴ The respondent has 7 days from receipt of the application to lodge an *adjudication response*, containing such information and documents as the respondent considers relevant. The respondent may not, however, include any reason for withholding payment that was not included in the payment response provided to the claimant (construction contracts), or a reason that had not been previously provided to the claimant (supply contracts).¹⁵

The adjudication commences on the expiry of the 7-day period for lodging the adjudication response.¹⁶ Where the respondent has not made a payment response (construction contracts only), a payment or an adjudication response, the adjudicator must determine the adjudication application within 7 days after its commencement.¹⁷ In other cases, the adjudication application shall be determined within 14 days, unless the parties agree with a request by the adjudicator for an extension of time.¹⁸

Payment of the *adjudicated amount* must be made either within 7 days of the adjudicator's determination or by the date determined by the adjudicator.¹⁹



Case law on challenges to determinations

The 2004 Act has been considered by the courts on a few occasions only. In view of similarities with corresponding Australian legislation, Australian case law gives some guidance as to how Singapore courts may construe the provisions of the Act. This is subject to the important caveat that relevant provisions of Australian legislation must be carefully compared with 2004 Act provisions to ensure the persuasiveness and relevance of Australian decisions.

*Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*²⁰ contains a useful summary by Hodgson JA of grounds for review of adjudicators' determinations. A determination may be set aside where an adjudicator:

- does not satisfy essential statutory conditions for a valid determination;²¹
- does not exercise in good faith a relevant statutory power relating to the subject-matter of the legislation in a way that is reasonably capable of reference to that power;²²
- denies a party such measure of natural justice as the legislative scheme requires;²³ or
- is complicit in fraud.²⁴

Hodgson JA then listed some (but not all) "basic and essential requirements" for the validity of a determination²⁵. (The relevant references to the 2004 Act are substituted in brackets for the original references to the NSW legislation.)

- (1) The existence of a construction (or supply) contract between the parties to which the Act applies [ss 4, 5].
- (2) Service by the claimant on the respondent of a payment claim [s 10].
- (3) The making of an adjudication application by the claimant to an authorised nominating authority [ss 12, 13].
- (4) Reference of the application to an eligible adjudicator, who accepts the application [ss 29, 14].
- (5) Determination in writing by the

adjudicator [ss 14(3) and 16(7) & (8)], of the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable [s 17(2)].

Hodgson JA also referred to "more detailed requirements" of the legislation²⁶, including the time when an adjudication application can be made [s 13]. Importantly, he noted that

"[t]he legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination".²⁷

It is suggested that Hodgson JA's judgment can be applied to the 2004 Act, notwithstanding some detailed differences in the procedural aspects of the adjudication process in NSW and Singapore.

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Late issue of referral to adjudication

An adjudication application - "shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises".²⁸ (Emphasis added)

Such mandatory language does not, however, necessarily make this a "basic and essential requirement" for a valid determination.²⁹ A number of NSW cases³⁰ have held that the 12-month time limit for serving a claim was not a basic and essential requirement but a matter within the adjudicator's jurisdiction to determine.

A respondent who considers there are grounds to challenge an adjudication application because it was made out of time may do so either in its adjudication response or by challenging the validity of the adjudication post-determination.

The adjudicator must consider any submission in the adjudication response that the adjudication application was made out of time and provide a determination thereon with appropriate reasons. Provided that the issue is addressed *bona fide*, mere error of fact or law, including the interpretation of the Act or the construction of the contract, will not render the adjudication void. In *Multipower Corp Pty Ltd v S & H Electrics Pty Ltd*³¹ McDougall J considered that a failure to comply with the time limit would not vitiate the adjudication on the ground of failure to comply with a basic and essential precondition of validity. Furthermore, he considered that if the application had been made out of time, even an implicit conclusion by the adjudicator that it was made within time would not render the determination void. An error, if any, would be one within the scope of the adjudicator's jurisdiction and a mistake that the adjudicator would be entitled to make.³² This is supported by *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd*³³, per Einstein J (*obiter*), who considered that a time limit was one of the more detailed requirements of the legislation. Provided that the adjudicator addressed the question *bona fide*, an error would not make the determination void. However -

"a failure to address that question may indicate that there was not a bona fide attempt to exercise the power".³⁴ (Emphasis added)

The line of NSW authority that the adjudicator is 'entitled' to make such a jurisdictional error has been severely criticised by Jacobs, who considers it inconsistent with UK authority.³⁵ It appears inconsistent in principle that an adjudicator cannot be restrained



from making a determination for lack of jurisdiction but that a subsequent application to the court to set it aside could succeed. In *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd*³⁶ Palmer J left open the possibility of a challenge to the validity of an adjudicator's determination in the following terms:

"[I]f an adjudicator erroneously finds a fact essential to jurisdiction and an adjudication certificate issues accordingly, it is always open to a party adversely affected to seek to set aside any judgment sought to be entered under s 25(1) of the [NSW] Act [filing of adjudication certificate as judgment debt] on the ground that the adjudication was, in truth, a nullity because an essential ingredient of jurisdiction was absent".³⁷

In *Schokman v Xception Construction Pty Ltd*³⁸ the adjudication response apparently did not address the application being out of time, so the issue was not addressed by the adjudicator. Hearing an application to set aside the determination, Einstein J held that the application for adjudication was out of time and the determination therefore void. Compliance with the time limit was a basic and essential requirement of the NSW Act as a pre-condition of validity of the adjudication, because failure to comply would not provide the measure of natural justice intended by the legislature.³⁹ The apparent inconsistency of this case with the later *Multipower* case may have resulted from the fact that denial of natural justice was not specifically pleaded in *Multipower*.

The most fertile ground for challenge therefore appears to be that the adjudicator lacks jurisdiction to make a determination, on the basis that to do so is a denial of the measure of natural justice required by the statutory time limit provision, rather than because of a failure to comply with a basic and essential precondition of validity. If, however, an adjudicator considers the question and determines that s/he has jurisdiction, the adjudicator will not be prevented from acting,

although the determination may later be challenged as a nullity.

Late appointment of the adjudicator

An adjudicator must be appointed by the authorised nominating body within 7 days of receipt of the adjudication application.⁴⁰ Under the NSW, Victoria and Queensland⁴¹ legislation, by contrast, an adjudicator must be appointed "as soon as practicable", while under the Western Australia and Northern Territory legislation, an appointment must be made within 5 working days⁴².

Would failure to make an appointment within the prescribed 7 days provide valid grounds to challenge the adjudicator's jurisdiction of the adjudicator or any determination? On the authority of *Brodyn*, whether such grounds exist appears to depend on the answer to the following questions.

- Is appointment of the adjudicator within 7 days a "basic and essential requirement"?
- Would late appointment be a denial of the appropriate measure of natural justice to either party?

Absent any direct judicial authority, it is submitted that the answer to both questions is 'no'. As an appointment is made by a body independent of both parties, a late appointment is unlikely to be due to culpable party behaviour. There may be many valid reasons for a late appointment, eg difficulty in finding a suitable and available registered adjudicator, or the first nominee(s) having declined the appointment. It is suggested that strict compliance with the specified time limit for appointment of the adjudicator is not a basic and essential requirement.

Late appointment (provided that delay was not excessive) is unlikely to prejudice either party unreasonably. The claimant would be kept out of an award of money for longer, but would be unable to accelerate the process in any other way, while the respondent would have a longer period before any finding of liability. Furthermore, late appointment would not have any obvious impact on the fairness of

subsequent adjudication proceedings, other than the respondent effectively having more time to prepare its adjudication response. Accordingly, it is suggested that late appointment would not amount to a denial of the appropriate measure of natural justice required by the legislation.

As with a challenge based on late issue of the referral, the respondent may challenge a late appointment either in its adjudication response or by challenging the validity of the adjudication in court after it has been concluded. It is suggested that a late appointment would neither deny the adjudicator jurisdiction nor void the determination.

Late issue of the determination

The 2004 Act provides very powerful 'encouragement' to adjudicators to render a determination within the specified 7 days (or such other period agreed by the parties):

"An adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application if he fails to make a determination on the application within the time allowed by section 17 or 19, as the case may be ..."⁴³

Such a draconian consequence makes a late determination very unlikely. Should this happen, however, does late rendering of the determination constitute a breach of a "basic and essential requirement" of the legislation? On the one hand, there is authority that, as the statutory time limits are strict, the consequences of non-compliance may be significant and a rigid approach to compliance should be taken.⁴⁴ On the other, late issuance of the determination is not due to culpable party behaviour. It therefore seems unlikely that a court would consider the adjudicator's non-compliance with time limits to be a basic and essential requirement. For the same reason, it is suggested that late issuance of a determination would not be a denial of the appropriate measure of natural justice to either party.



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- 1 In this section and the next, words and phrases in italics are terms defined in ss 2 and 4 of the 2004 Act.
- 2 Building and Construction Industry Security of Payment Act 1999 (NSW) ('the NSW Act'); Building and Construction Industry Security of Payment Act 2002 (Vic) ('the Victoria Act').
- 3 The relevant provisions of the 2004 Act regarding time limits and their application are as follows (unless otherwise stated, these provisions apply to both construction and supply contracts): ss 8(1)-(4) (due date for payment), 10(2) (date payment claim served), 11(1) (date for payment response – construction contracts only), 12(5) (dispute settlement period – construction contracts only), 12(1)-(3) and 13(3) (adjudication application to authorised nominating body), 14(3) (appointment of adjudicator), 15(1) (adjudication response by respondent), 17 (adjudication) and
- 4 Section 10(4).
- 5 Section 13(4) of the NSW Act.
- 6 Section 14(5) of the Victoria Act.
- 7 Section 9 of the 2004 Act.
- 8 *Ibid*, s 26.
- 9 *Ibid*, s 12(4).
- 10 *Ibid*, s 12(1) & (2).
- 11 *Ibid*, s 12(3).
- 12 Sections 14(4) and 15 of the NSW Act.
- 13 Section 13 of the 2004 Act.
- 14 *Ibid*, s 14(3).
- 15 *Ibid*, s 15(1)-(3).
- 16 *Ibid*, s 16(1).
- 17 *Ibid*, s 17(1)(a).
- 18 *Ibid*, s 17(1)(b).
- 19 *Ibid*, s 22(1).
- 20 (2004) 61 NSWLR 421.
- 21 *Ibid*, [52].
- 22 *Ibid*, [55].
- 23 *Ibid*, [57].
- 24 *Ibid*, [60].
- 25 *Ibid*, [53].
- 26 *Ibid*, [54].
- 27 *Ibid*, [55].
- 28 Section 13(3)(a) of the 2004 Act.
- 29 *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* (2006) 22 BCL 31, per Campbell J at [19].
- 30 *Energetech Australia v Sides Engineering* [2005] NSWSC 1143; *Lifestyle Retirement Project No 2 Pty Ltd v Parisi Homes Pty Ltd*, note 29 above; *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 22 BCL 359.
- 31 [2006] NSWSC 757 per McDougall J.
- 32 *Ibid*, [40], [41].
- 33 [2005] NSWSC 439.
- 34 *Ibid*, [57].
- 35 M S Jacobs, *Commercial Arbitration Law and Practice* (2001) V2 [96.340].
- 36 [2005] NSWSC 411.
- 37 *Ibid*, [4].
- 38 [2005] NSWSC 297.
- 39 *Ibid*, [15].
- 40 Section 14(2) of the 2004 Act.
- 41 Building and Construction Industry Payments Act 2004 (Qld).
- 42 Construction Contracts Act (WA), s 28; Construction Contracts (Security of Payment) Act 2004 (NT), s 30.
- 43 *Ibid*, s 31(2).
- 44 *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439.

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