



The overall effect and implications of the Act can be summarised as follows:

- the Act provides a statutory right to progress payments and a regulated regime to enable sub-contractors and suppliers of goods and services to claim progress payments;
- to make the Act effective, it is not possible for parties to contract out of the legislation;
- the Act will accelerate the payment process where the contract is silent or inadequate with regards procedures for payment;
- the standard form contracts may require some amendment, particularly the provisions relating to time periods for payments, and on extensions of time and provisions relating to the claimant's right to suspend works;
- the time frames under the Act are tight and must be complied with;
- due to the tight deadline, a respondent receiving payment claims may be faced with the practical difficulty of not having enough time to assess claims. This is especially if the respondent receives several payment claims simultaneously;
- in such situations, a main contractor may need to issue payment responses without knowing the status of its own claims submitted to the owner;
- the legislation obliges main contractors to adhere to a payment protocol towards sub-contractors without the sub-contractors being

beholden to the main contractor's cash flow considerations;

- the main contractor may be more likely to challenge payment claims or undervalue work in payment responses to compensate for cash flow uncertainty. This strategy should be used with care, since a respondent is bound by its payment response, in the sense that it is not entitled to include in any subsequent adjudication response any reason for withholding any amount unless the reason was included in the relevant payment response;
- the uncertainty on the main contractor may possibly lead to increase in disputes;
- under the Act, "pay when paid" provisions are unenforceable. The main contractor / head contractor cannot now say that it will pay the sub-contractor only when it receives payment from the owner; and
- the overall effect of the legislation is that sub-contractors and suppliers are likely to benefit from receiving quicker progress payments.

The legislation is likely to have the effect of exposing the insolvency of an owner or head contractor much earlier, and allow contractors to limit their exposure through the suspension of work. The regime will also result in owners and developers becoming even more reliant on architects, engineers, project managers and other professional advisers to properly administer contracts, and to respond to contractors' progress claims.

* A separate paper covering the Act in greater detail is available on request.

17 February 2005

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CONSIDER THIS

A brief review of commercial issues relevant to the construction, engineering and energy industries.

By Mark McGeoch BSc, DIPArb, FRICS, FCI Arb, Associate Director, Stapleton International Limited

MEDIATE – (don't Litigate) A Mediator's viewpoint

Why spend a fortune in both time and money when there is a cheaper, shorter alternative to settling a dispute? Isn't it better to be in a position to be able to decide the outcome of your dispute yourself - rather than have a third party, be they Adjudicator, Arbitrator or Judge decide who wins and who loses? Isn't it better to have a win/win situation? Try mediation – it does what it says on the tin!

As you can guess, I am a great fan of mediation. Having mediated for some eight years now, it never ceases to amaze me how parties, seemingly so entrenched in their various positions in a dispute, are surprised at the success of a process that **gives them the power to decide the outcome**. Mediation gives them that opportunity. Furthermore, with it now being a requirement to have actively considered mediation as an alternative to litigation, any potential litigant should be aware of it. So, what is mediation and how does it work?

The process

The process of mediation has been given various definitions and descriptions. One of the best I have heard is **"helping two parties hold a difficult conversation"** and involves the use of an independent third party mediator assisting the parties to arrive at a voluntarily negotiated settlement. The role of the mediator is not that of a judge or arbitrator. The mediator does not make a decision or impose a solution. The mediator facilitates the parties in their decision making and he or she does this by consulting in an independent and impartial fashion with the parties, either privately or together in order to assist in bringing about a mutually agreeable solution to their problem. The trust that develops between the mediator and the parties during the process allows the mediator to perform a bridging role between the parties.

Before the day – the parties

Before the actual day of the mediation, several things will have taken place. As well as the parties signing an agreement to mediate they should have done a lot of work with their legal representative, including i) looking at the strengths and weaknesses of not only their own case, but also that of their opponent, ii) costs and disbursements to date, iii) are there any non-monetary areas for settlement? iv) what is the monetary range you feel the other side could settle for? v) what are the cost and time implications of not reaching a mediated settlement?, and, vi) one of the most important items; who should attend? Don't send the Project Manager alone when it is the Chairman who is the only person who can make strategic decisions. One would not go to court unprepared, so it is unrealistic to assume that one can go to mediation unprepared, especially if you are hoping

to reach agreement to what could eventually be a very expensive and time consuming piece of litigation. The parties should have examined all aspects of their case and be aware of the limits (be they financial or otherwise) that they are prepared to go to achieve that settlement.

Stapleton International Limited

Stapleton is a long established firm of consultants investigating contractual, financial and management issues within the construction, engineering and energy industries.

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Before the day – the mediator

The mediator in the meantime will have spoken (confidentially) to the parties and/or their legal representative to describe the process and obtain some background to the case. No mediator wants to go into a mediation unprepared; without knowing something about the personalities involved, brief details of the dispute as well as potential avenues for settlement. As well as discussing matters with the representatives, the mediator should request a case summary which will include:

- The factual background
- The issues in dispute and the key arguments on liability
- The issues in dispute and the key arguments on quantum
- Details of prior offers and/or negotiations
- Common ground
- Any essential and relevant documents

On the day

On the day, all parties including the mediator should arrive in plenty of time. Each party will be shown to a room which will be theirs for the day. The mediator will then come in and have an introductory (confidential) meeting with all present. This will be the first opportunity the mediator will have had to meet the parties (face to face) so it is hoped that it will be a relaxing opportunity for the parties to ask any questions they may have about the day.

All the parties will then be invited into one room, where, after an introduction

from the mediator each party will have an opportunity to tell the other what their problems have been and what they would like to achieve in the mediation. This is often the first meeting the parties will have had for a while and it is a good opportunity (and often the first) for each party to LISTEN to what the other has to say. What happens after that varies and is the wonderful thing about the flexibility of mediation. I have done mediations where we have stayed in the room all day and talked things through – that works. I have done mediations where the parties just want to get back to their own rooms because they can't stand the sight of each other and I end up shuttling back and forth to get a resolution – that works. What tends to happen though is that a discussion begins, normally with me asking some questions by way of clarification and then, gradually, there is a full discussion involving all participants seeking clarification about what someone said and/or explaining why they did what they did, or said what they said. This normally lasts for 2-3 hours, before there comes a natural break point where both parties wish to go back to their rooms to discuss, in private, what they have heard.

The mediator will then visit each party in turn, examining what has been said with a view to helping the parties reach a settlement. The mediator will look at the parties respective positions in light of what has been discussed, look at the strengths and weaknesses, examine with the parties their INTERESTS as well as legal rights. This is a vitally important difference between mediation and litigation/arbitration; courts can only have regard to legal rights and declare them' it cannot deal with the parties' other interests. An example of this is when I did a mediation between a lead backing singer of a band and the band leader. The dispute was over the contract between the parties and payment of royalties. A judge could only have decided what the contract was and if royalties were payable. The agreement reached between the parties basically ignored the contract, but gave them both a means to make some money; a classic win/win situation.

As well as meeting the parties separately and, after seeking agreement to do so, I have put the parties back together again so that one party can explain something to the other or ask a question of the

other. I have brought legal representatives together to talk over a legal point or two, I have met one solicitor or one party on his/her own to discuss something. At all times though what is being discussed is confidential, unless I have been given permission to take it to the other side. Similarly, everything discussed between the parties remains confidential and without prejudice. This gives the parties comfort that something that they may admit or acknowledge in a mediation, (but would not do so in a court of law), cannot be repeated later. This is what makes mediation so successful. The parties can get down to some real hard bargaining without the formality or pressure of legal proceedings. At the end of the day, everything the mediator does, is with the aim of helping the parties reach an agreement that they can live with, but, and just as importantly, put an end to the dispute between them allowing them to move on.

Examples

To highlight some of the successes (there have been many) and a low point (there have been one or two) in my mediation experience, I have given some examples below:

1. A mediation between two parties over a boundary. The 'natural boundary' between the parties' land, was a stream and first impressions were that the boundary should be down the centreline of the stream. First impressions are not always right and the agreement reached between the two parties involved the boundary starting one meter inside one parties' land, crossing the stream some way down and going the rest of the way down the centreline of a hedge on the other side. The parties were happy and so was I.

2. A dispute between a house owner who had purchased off plan and the builder. The wife made the opening statement showing photographs of the problems she and her family had endured. Having been fobbed off for three years, this was the first time the management of the builders had really listened to what the family had been through. After apologising, something they had not done up until the mediation, a timetable for rectifying the defects was eventually agreed as well as a sum by way of compensation. The

major sticking point was the size of the house owner's legal fees and who was going to pay them as they were four times the sum paid by way of compensation!

3. In a construction dispute both parties were so surprised at the Adjudicators decision, that they agreed to mediate any further problems (there were three subsequent mediations held). Doing this made each side realise the problems of the other in a non-confrontational environment and mended some of the bridges that had been burned in the adjudication; on a project that had not yet been finished.

4. I mentioned earlier that the key decision maker should attend. In another mediation, I had received assurances from both parties that their representatives had authority to settle. Having been mediating since 09:00 one of the parties' legal representatives asked to see me in private at 17:00. He advised that his parties' representative had telephoned his Chairman to outline progress so far. That effectively killed off the mediation because the Chairman would not allow any agreement anywhere near the sums being discussed. Had he been there to hear what had been discussed, he may have understood how his representative had arrived at the current situation.

Benefits of mediation

So, what are some of the benefits of mediation?

- It is private, informal and flexible
- It is a voluntary process (though some contracts are now including mediation as a means to resolve disputes)
- It is confidential and conducted on a without prejudice basis
- It is non binding until a signed agreement is reached
- It gives the parties control to decide the outcome of their dispute
- It allows the parties to look at not just legal rights but also their interests and needs
- It increases the options for settlement
- It is more cost effective and less time consuming than litigation and/or arbitration
- It facilitates communications and separates people from the problem
- It allows relationships to continue



Conclusion

The Centre for Effective Dispute Resolution (CEDR) figures for the year 2003 show that 75% of all cases mediated settle on the day, or shortly thereafter and this is a consistent figure throughout the mediation world. What are the odds of going to court and getting the decision that you can live with? By coming to mediation in the first place, parties have indicated a willingness to talk to each other. It makes sense therefore to go that extra mile to get your solution to your problem.

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DLA Piper Rudnick Gray Cary Singapore - Construction Law Update

Building and Construction Industry Security of Payment Act 2004 ("Act") Gordon Smith, Director, DLA Piper Rudnick Gray Cary Singapore

Key Features of the Act

- progress payment claims by a claimant and provision of payment responses by the respondent;
- fast-track adjudication / dispute resolution system for payment claim disputes with sanctions for breaches of payment obligations after adjudication;
- enforceability of adjudication determinations as judgments;
- rights to suspend work; and
- the abolition of "pay when paid" provisions.

Background

In the face of increased competition and reduced demand in recent years, many contractors in Singapore have struggled to cope with their cash flow during projects, which, in turn, has significantly affected sub-contractors and suppliers through delayed payments or non-payments for work done or materials supplied.

After wide consultation with industry bodies, the Singapore government enacted the Building and Construction Industry Security of Payment Act 2004 ("Act") on 16 November 2004. The Act is aimed at improving cash flow in the construction industry by facilitating expedited payment for construction work done or for related goods and services supplied. In addition, the Act establishes a procedure by which a party may claim its statutory entitlement to payment, known as adjudication, and provides remedies where the amount determined to be payable at adjudication is not paid.

The Act came into operation on 1 April 2005, and affects construction and supply contracts made in writing on or after the date of commencement of the Act. There are only a limited number of exceptions, specifically:

- contracts involving construction works or the supply of related goods or services for residential properties where Building Plan submission is not required under the Building Control Act;
- in the case of supply contracts where no on-site assembly, construction or installation of goods supplied is required, the Act will only apply if the contract specifies the project or the construction site for which the goods are supplied; and
- an employee (within the meaning of the Employment Act), under an employment contract for carrying out of construction work and/or supply related goods and services, cannot claim under the Act.

There is also a transition period such that the Act does not apply to any sub-contract entered into within a 6 month period following the commencement of the Act if its main contract was made before the commencement of the Act.

A brief overview of the key features of the Act is set out below.

Rights to Progress Payments

The Act confers a statutory entitlement to progress payment on any person who has carried out construction work or supplied goods or services under a construction contract or supply contract.



A due date for payment is provided by the Act even where a construction contract or supply contract does not provide for one, subject to a maximum statutory period of 35 days for construction contracts and 60 days for supply contracts. Interest is payable on any unpaid amount of progress payments due. The contract periods govern if these are less than the maximum periods, otherwise the latter override the terms of the contract.

Further, the Act renders unenforceable a "pay when paid" clause in a construction contract or supply contract.

Payment Claims and Responses

A claim for progress payment may be served by a claimant on the party liable to make the payment under the contract. Following receipt of a payment claim, the respondent shall provide a payment response to the claimant within the period stated in the contract, or 21 days, whichever is the latest, stating the amount to be paid to the claimant.

The Act provides for a system of enforceable adjudication on payment claims. A claimant is entitled to make an adjudication application under the Act where:

- the claimant did not receive payment of the response amount which was accepted by the due date;
- the claimant disputes a payment response provided by the respondent; or
- the respondent fails to provide a payment response to the claimant by the due date.

In the case of a supply contract, the claimant is entitled to make an adjudication application where:

- the claimant did not receive payment by the due date of the claimed amount or the claimant disputes the response amount; or
- where the response amount is less than the claimed amount.

Adjudication of Payment Claim Disputes

Adjudication Applications and Appointment of Adjudicator

A claimant is entitled to make an adjudication application in relation to a payment claim if, by the end of a 7 day "dispute settlement period", the dispute is not settled or the respondent does not provide a payment response, as the case may be.

Prior to lodging an adjudication application for adjudication of a payment claim dispute with an authorised nominating body ("ANB"), the claimant must notify the respondent in writing of his intention to do so. The claimant is not entitled to make an adjudication application unless the claimant has complied with the notification requirement.

A claimant must make an adjudication application within 7 days of the claimant's entitlement to do so, otherwise the adjudicator must reject any application not lodged within the required 7 days.

Upon receipt of an adjudication application, the ANB shall serve a copy of the adjudication application on the respondent, and serve on the principal, if known, and the owner a written notice that the adjudication application has been made. The ANB shall also refer the adjudication application to a person who is on the register of adjudicators established under the Act and whom it considers appropriate for appointment as



the adjudicator to determine the adjudication application.

The ANB shall, within 7 days after receipt of the adjudication application, serve a written notice confirming the appointment of an adjudicator on the claimant, the respondent, the principal, if known, and the owner concerned.

Adjudication Responses

Within 7 days after receipt of a copy of the adjudication application the respondent must lodge with the ANB a

written response ("adjudication response"), failing which an adjudicator shall reject any adjudication response.

A respondent is bound by its payment response, in the sense that it is not entitled to include in any subsequent adjudication response any reason for withholding any amount unless the reason was included in the relevant payment response, and this includes any counterclaims. This will place practical pressure on a respondent to ensure that its initial payment response contains full reasons for withholding payment.



The requirement for the respondent to provide an adjudication response in only 7 days is a limited period of time. Owners and contractors may need to review their contract administration procedures to ensure that information on payment and work done is kept up to date to minimise the work required to submit the response.

Upon receipt of an adjudication response, the ANB shall serve a copy of the adjudication response on the claimant, and serve on the principal, if known, and the owner concerned a written notice, with prescribed particulars, that the adjudication response has been lodged.

Determination of Adjudicator

An adjudication commences immediately upon the expiry of the period within which the respondent may lodge an adjudication response, i.e. 7 days after its receipt of a copy of an adjudication application.

An adjudicator shall determine an adjudication application within 7 days after the commencement of the adjudication if it relates to a construction contract and the respondent has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication or failed to pay the response amount, which has been accepted by the claimant, by the due date.

In any other case, an adjudicator shall determine an adjudication application within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

The period of 14 days for the adjudicator to determine the adjudication is very short, and in practice, most adjudicators are likely to request the parties to extend this time.

An adjudicator is obliged to act independently, impartially and in a timely manner. He is also obliged to avoid incurring unnecessary expense, and to comply with the principles of natural justice. Otherwise, an adjudicator is entitled to conduct the adjudication in such manner as he thinks fit, to require submissions or documents from any party, and to set deadlines for submissions.

The ANB shall serve a copy of the Adjudication Determination on the claimant and the respondent. The ANB is also obliged to serve on the principal, if known, and the owner a written notice that the Adjudication Determination has been made.

Adjudication Review Applications

A respondent who is aggrieved by the adjudicator's determination may, within 7 days after being served the Adjudicator Determination, lodge an adjudication review application for the review of the determination with the ANB, providing the adjudicated amount exceeds the relevant response by an amount of \$100,000. Such an application shall, however, not be lodged unless the adjudicated amount, which the respondent is required to pay the claimant consequent upon the adjudication determination, has been paid by the respondent to the claimant. The procedure for dealing with the adjudication review application is generally similar to that which applies to an adjudication application.

The review shall be carried out by a single adjudicator if the amount is between \$100,000 and \$1.0m, and by a panel of three adjudicators if the amount exceeds \$1.0m.

The adjudication review is a unique feature of the Act. In other jurisdictions, the adjudicator's decision stands and is temporarily enforceable unless and until a party takes the dispute to litigation or arbitration.

Effect of Adjudication Determinations and Adjudication Review Determinations

An Adjudication Determination or an Adjudication Review Determination made under the Act is binding on the parties to the adjudication and on any person claiming through or under them, unless or until:

- leave (or permission) of the court to enforce the adjudication determination is refused under the Act;
- the dispute is finally determined by a court or tribunal or at any other dispute resolution proceedings; or
- the dispute is settled by agreement of the parties.

Payment of Adjudicated Amount

The respondent is obliged to pay the amount of the Adjudicator's Determination within 7 days after the determination is served on the respondent or on a date as determined by the adjudicator. This generally applies to Adjudicator Review Determinations as well.

Measures to Enforce Payment of Adjudication Amount

Consequences of Not Paying Adjudicated Amount

For any portion of the adjudicated amount that remains unpaid to the claimant, the claimant may exercise a lien on goods supplied by the claimant to the respondent under the contract concerned and/or suspend carrying out construction work or supplying goods or services under the contract concerned. The remedy of suspension is different to the New South Wales Building and Construction Industry Security of Payment Act 1999 (NSW), where a claimant is entitled to suspend work, after notice, if the respondent fails to provide the equivalent of a payment response or fails to pay the claimant.

Further, the aggrieved party may enforce the adjudication determination as if it were a judgment debt for any portion of the adjudicated amount unpaid.

Direct Payment from Principal

Where a respondent fails to pay the whole or any part of the adjudicated amount, the principal of the respondent may make payment of the amount outstanding, or any part thereof.

It is clearly in the interest of the principal and the owner to keep tabs on any adjudication involving the participants with the primary aim to ensure that any adjudicated amount is paid, directly by the respondent concerned or otherwise

by the principal or the owner (subject to insolvency laws), to any claimant promptly to avoid or mitigate the possible adverse time and cost impact on the project.

Enforcement of Adjudication Determination as Judgment Debt, etc.

An adjudication determination may, with leave (or permission) of the court, be enforced in the same manner as a judgment or an order of the court to the same effect.

General Provisions Relating to Adjudication

Authorised Nominating Bodies

The ANBs are authorised by the Minister primarily to appoint adjudicators and to fulfill various responsibilities relating to the conduct of adjudications as outlined in the Act. The Singapore Mediation Centre is currently the sole ANB authorised under the Act.

Fees and Expenses

The ANB application fee is \$500 for each adjudication application, and \$1,000 for each adjudication review application.

The fee payable to an adjudicator is at a rate of \$2,000 per day or \$250 per hour.

However, this is subject to a maximum of 10% of the claim if the claim exceeds \$20,000, and in any other case, a maximum of \$2,000.

The adjudicator has the power to decide on the proportion of the ANB application fee and adjudicator's fees payable by each party.

Confidentiality of Adjudication

No party to a dispute or adjudicator shall, subject to the exceptions set out in the Act, disclose to any other person, not being the principal or the owner concerned, the prescribed information concerning the adjudication.

Comments

The Act's underlying policy of affording greater statutory protection to contractors and suppliers has eroded the principle of freedom of contract. For example, "pay when paid" clauses, which dictate downstream payments are dependent upon payment of upstream payments, have been relatively common in Singapore. The introduction of the Act will have a significant effect on contractors, subcontractors, consultants and suppliers.

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