



Adjudication in Malaysia

by Nicholas Gould, Partner

Brief Summary

This article considers the latest development in the international growth of adjudication as a rapid dispute resolution procedure for construction and engineering disputes. Adjudication was introduced in the UK in 1998 under legislation, providing for either party to a construction contract to call in an adjudicator. An adjudicator makes a binding decision within 28 days, and the Courts have readily enforced those decisions. Other jurisdictions have introduced similar procedures, for example New Zealand, Australia and Singapore.

Malaysia is the latest country to introduce adjudication. The Construction Industry Payment and Adjudication Act 2012 received Royal Assent on 18 June 2012. The procedure applies to construction contracts, and adjudicators are appointed by the Kuala Lumpur Regional Centre for Arbitration. The adjudicator has 45 working days after issue of the response to the claim (or a reply) in order to issue a written decision. This article considers the mechanics of the Malaysian adjudication procedure, its timetable and the powers of an adjudicator.

Dispute adjudication boards were introduced in 1999 in the FIDIC Suite of Contracts, and they are now reasonably widely used around the world. The increased use of adjudication domestically as a result of local legislation is also helping to make adjudication a frequently used procedure for the quick resolution of construction disputes. There is perhaps no doubt that those in the construction industry in Malaysia will make use of and certainly encounter adjudication under this new Act.

Introduction

The use of adjudication as a rapid binding dispute resolution procedure for construction contracts has been slowly spreading around the world. Adjudication was first introduced in the UK in May 1998 as a result of the Housing Grants, Construction and Regeneration Act 1996. The legislated scheme provided that anyone entering into the construction contract (with some exceptions) had the unilateral right to call in an adjudicator if a dispute arose. The adjudicator was to be appointed within 7 days and had to provide a written decision with 28 days. It quickly became apparent that the courts would enforce those decisions very quickly. The general rubric was, and remains, "pay up now, argue later". So if you did not like the adjudicator's decision you had no choice but to pay while then going on to arbitration or litigation in order to have the dispute reheard.

Other common law jurisdictions have followed this model. New Zealand adopted the Security of Payment Act, and each of the States in Australia has also introduced adjudication. Singapore introduced a similar process, and now Malaysia has introduced a Security of Payment Act bringing in rapid binding adjudication for those in the construction industry.

The important point about all of this legislation is that anyone carrying out work in those jurisdictions cannot avoid the binding dispute resolution procedure. Disputes can be dealt with quickly and economically, and more importantly the courts will enforce those decisions quickly.

This article looks at the most recent introduction of adjudication in Malaysia. Anyone entering into contracts in Malaysia after 22 June 2012 has a right not just to a statutory payment procedure but also to an adjudication process for resolving disputes.

The Malaysian Act 2012

After much debate the Construction Industry Payment and Adjudication Act 2012 of Malaysia received Royal Assent on 18 June 2012.¹ It came into force on 22 June 2012, and so Malaysia now has a statutory payment and adjudication regime for construction contracts.

The Act applies to all construction contracts made in writing after 22 June 2012, including those entered into by the Government of Malaysia. It applies to all construction work, including consultancy agreements, but excludes buildings of less than four storeys that are intended for occupation by a “natural person”. The Act takes some of the most successful features of the adjudication and security of payment legislation that has been enacted around the world. It provides a pre-adjudication procedure and then a short-form adjudication process, which takes slightly longer than other statutory adjudication processes.

Payment Procedures

The Act requires the parties initially to follow the payment mechanics of the construction contract. If a party remains unpaid then the pre-adjudication procedure can be used. This requires a payment claim based upon the unpaid claim under the construction contract. The responding party could then admit or dispute the claim in whole or in part within 10 days of the payment claim. A dispute that crystallises from the exchange can then be referred to adjudication.

Adjudication

Adjudication is initiated by a written notice setting out the nature of the dispute and remedy required. An application for the appointment of an adjudicator is made to a single nominating body, which is the Kuala Lumpur Regional Centre for Arbitration (“KLRC”). The adjudication claim must be served within 10 working days of receipt of acceptance of the appointment by the adjudicator. The responding party then has 10 days to serve a written response, and the claimant may within 5 working days from receipt of any response serve a reply. Supporting documents are attached to each of the submissions.

The adjudicator then has 45 working days from either the response or the reply, whichever is the later, to issue a written decision. If a response is not issued then the adjudicator has 45 working days from the date on which the response should have been served. The parties can agree to extend time further. The decision must be in writing and should also contain reasons. If the decision is not made within the specified time then the decision is void.

¹ Rules of Malaysia, Act 746, Construction Industry Payment and Adjudication Act 2012. English translation.

The Powers of the Adjudicator

The powers of the adjudicator are set out at section 25 of the Act. The adjudicator can establish the procedures for the adjudication as well as order disclosure and production of documents and set deadlines. He can explicitly draw upon his knowledge and expertise as well as appoint independent experts (but only with the consent of the parties). He can also require that evidence be given on oath. The power to review and revise certificates and other documents is expressly set out. In addition, an adjudicator can award finance costs and interest.

The parties can agree the terms of the adjudicator and his fees. However, if they fail to agree then the current standard terms of appointment and fees of the KLRCA apply. Parties are jointly and severally liable for these, in much the same way as other legislation around the world. However, security for those fees can be requested in the form of a deposit placed with KLRCA. An adjudicator has a specific lien in the Act and so may not be required to release his decision until full payment has been made.

The Act states that an adjudicator's decision is confidential. It is unusual for legislation of this type to include a specific confidentiality provision. This does, however, address a fundamental issue that is often overlooked: the usual immunity of an adjudicator, in this case KLRCA is also included, stating that no action or suit can be brought against them for any act or omission carried out in good faith.

The decision is binding unless it is set aside by the High Court, finally decided in arbitration or is subject to a settlement between the parties. The Act also specifically provides for the enforcement of an adjudication decision. A party can enforce an adjudication decision by applying to the High Court.

Finally, the limited payment provisions of the Act require that interim payments are made in respect of construction contracts. In the absence of any specific payment clauses then payments are made monthly. Conditional payment is prohibited, thus making any pay-when-paid provisions ineffective.

Conclusion

There is little doubt that those involved in the construction industry in Malaysia will make use of not just the payment procedures but also adjudication under the Act. There will perhaps be some hesitancy early on while those in the industry become familiar with the procedures. However, it will assist in easing cash flow and resolving disputes quickly. It will probably be the contractors that initiate adjudication first against employers that will not resolve claims or make payments. However, it will not be long before subcontractors are also bringing claims against contractors, and so contractors will find themselves very much "in the middle". Those providing professional services will also be able to use the Act to resolve payment issues in respect of their services. Clearly, then, employers and owners engaging in construction work in Malaysia will need to take particular care and attention not just with regard to the Act, but also to the management of their contracts, looking carefully at notices provisions in contracts and claims as they are issued, assessing them and not only dealing with them but also making properly assessed payments.

Other jurisdictions around the world are also considering legislation in order to introduce a rapid adjudication process. No doubt the supply side of the industry will welcome the continual slow introduction of adjudication worldwide.

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The link to the legislation is:

<http://www.rcakl.org.my/userfiles/File/CIPAA%20Act%20746%20ENG.pdf>

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