
by

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I. INTRODUCTION

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2. All that has changed, fundamentally, and differently around the world. Changes have been brought to adjudication, payment provisions, arbitration, mediation and court procedure. It seemed to me that it would be fun to see how different jurisdictions have dealt with it. That sort of survey has the benefit and disadvantage of being general.

II. ADJUDICATION

ENGLAND AND WALES, SCOTLAND AND NORTHERN IRELAND

The introduction of statutory adjudication

3. The introduction of the Housing Grants, Construction and Regeneration Act 1996 (“the Construction Act”) in England and Wales, Scotland and Northern Ireland brought considerable change to the use of adjudication in construction disputes. In summary, s108 of the Construction Act provides a party to a construction contract with the statutory right to refer a dispute arising under the contract to adjudication.

4. This provision of statutory adjudication was the government’s response to a perception that contractors in the construction industry needed legislative help in avoiding the problems associated with difficulties with cash flow which, in particular, was causing so many of them to fold prematurely.2 The unequivocal recommendation from the Latham Report3 commissioned in response to the slump in the industry during the 1980s was that the best way of resolving construction disputes was by way of adjudication.4

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1 Keating Chambers, London.
GOVERNMENT AND STATUTORY INTERVENTION IN CONSTRUCTION

CONTRACTS AND DISPUTE RESOLUTION ACROSS THE WORLD:

A COMPARATIVE REVIEW OF HOW THE DIFFERENT JURISDICTIONS

HAVE DEALT WITH ADJUDICATION, PAYMENT PROVISIONS,

ARBITRATION, MEDIATION AND COURT PROCEDURE

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5. Consequently, the intention of Parliament in enacting the Construction Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, with the aim of improving the cash flow of parties to an ongoing construction project. It is a ‘pay now argue later’ means of dispute resolution. There is little doubt over the impact of statutory adjudication to the construction industry.

Statutory adjudication provisions in England and Wales, Scotland and Northern Ireland

6. Statutory adjudication was first introduced through the Construction Act though the timing of its implementation was not uniform across England and Wales, Scotland and Northern Ireland. The Construction Act came into force on 1 May 1998 in England and Wales and in Scotland, while it was implemented in Northern Ireland on 1 June 1999 through the Construction Contracts (Northern Ireland) Order 1997. The law is the same in all three jurisdictions though there has been a noticeable difference in musical interpretation.

The Construction Act

7. S108 of the Construction Act provides “that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication”. Construction contracts to which this applies include contracts for the carrying out or arrangement of construction operations.

The Local Democracy, Economic Development and Construction Act 2009 (“the Second Construction Act”)

8. Statutory adjudication under the Construction Act was significantly amended through the implementation of the Second Construction Act which came into force in England and Wales on 1 October 2011 and on 1 November 2011 in Scotland. While these provisions have been incorporated into the Construction Contract (Amendment) Act (Northern Ireland) 2011, the implementation of this Act and thus the amendments to the Construction Act are pending.

Amendments under the Second Construction Act

9. The Second Construction Act amends the provision of statutory adjudication under the Construction Act in three significant respects.

10. First, s139 of the Second Construction Act repealed the previous s107 with the effect that statutory adjudication is now available to all construction contracts, and not just those made in writing. The practical effect of this has been that a much wider range of construction- and engineering-related contracts now fall under the ambit of statutory adjudication, and particularly those that are agreed orally. The likelihood is that this amendment will bring most benefit to sub-contractors, whose contracts are often poorly documented and supplemented by oral terms.

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5 Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93 per Judge Dyson at paragraph 24.
6 Lord Ackner, House of Lords debate on the Construction Act.
11. Second, s141 of the Second Construction Act introduced s108A into the Construction Act which provides that contractual provisions concerning the allocation of adjudication costs are only valid if made in writing after the service of notice of adjudication. The aim of this was to outlaw the operation of Tolent clauses in contracts which required the costs of adjudication to be paid by the party who referred the dispute, with the practical effect that a more powerful contracting party could discourage reference to adjudication from the outset.

12. Third, the introduction of s108(3A) into the Construction Act permits an adjudicator to correct his decision to the extent that he can remove a clerical or typographical error by accident or omission.

IRELAND

13. For many commentators and construction industry professionals, the progress of dispute resolution in Ireland and its construction industry is in a period of unprecedented change. At the helm of this is the imminent passage of the Construction Contracts Bill 2010 which is intended to introduce statutory adjudication into all construction contracts in Ireland.

Development of statutory adjudication in Ireland

14. Despite the success of statutory adjudication in other UK countries, there was initially little enthusiasm for its introduction in Ireland. Construction disputes were historically dealt with by arbitration and pursuant to the arbitration clauses typically contained in the general conditions of the standard form contracts. Included among these were the Institution of Civil Engineers of Ireland (ICE) Conditions of Contract in 1959 and the RIAI Form of Contract produced in 1977.

Judicial support for statutory adjudication

15. The changes in attitude towards the use of statutory adjudication have occurred against a backdrop of Irish judicial support for its implementation. In *Clarke Quarries v. PT Williams Ltd* Miss Justice Laffoy stated, albeit *obiter*, that she envisaged reference to adjudication as preliminary to reference to arbitration.

Background economic conditions

16. The introduction of statutory adjudication in Ireland was catalysed by the construction industry’s dramatic reduction in output after 2007. Peaking at 39 billion Euros in that year, it has subsequently decreased to a pale shadow of this, where it now lies at figure of around 8-9 billion Euros per year. Behind this trend was been the effect of financial recession and the burst of the property bubble, which left many sub-contractors and main contractors in serious financial difficulties.

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9 Ibid.
11 Supra note 8.
The Construction Contracts Bill 2010

17. In May 2010, Senator Feargal Quinn introduced a Private Members Bill in the Upper House of the Irish Parliament (the Seaned), to introduce statutory adjudication. It is understood that the Construction Contracts Bill 2010 has now completed its second stage in the Dail following debates from 10 May 2012\(^\text{13}\) and that in June 2012 the Irish Bill was referred to the Select Committee on Public Expenditure.\(^\text{14}\)

18. Sections 6 to 9 of the Bill deal with adjudication and provide the right to refer payment disputes to adjudication, the right to suspend work for failure to comply with adjudicator’s decision, the selection of a panel of adjudicators and the code of practice for adjudication.

19. The Construction Contracts Bill 2010 is modelled on the Construction Act. One major difference between the two provisions is contained at section 6(12) of the Bill:

“The decision of the adjudicator shall not be binding if the payment dispute is referred to arbitration or proceedings are otherwise initiated in relation to the decision unless the parties agree to accept the decision as finally determining the payment dispute”.

20. While the introduction of statutory adjudication in Ireland is now almost certainly inevitable, a major question mark hovers above the precise form it will take. With the Bill as it currently stands where adjudication is not binding under s6(12), its provisions have the potential to render the introduction of statutory adjudication meaningless. The purpose of adjudication is to allow swift resolution of disputes allowing projects to be completed without wasting time and money in litigation. This clause, if enacted unchanged, arguably makes this purpose impossible to achieve.

HONG KONG

21. There is no statutory right to adjudicate in Hong Kong.\(^\text{15}\) However, a pilot scheme requiring an amendment to the standard provisions of The Government of Hong Kong Special Administrative Region General Conditions of Contract has been introduced, with adjudications under the pilot scheme governed by “The Hong Kong Government Special Administrative Region Construction Adjudication Rules (2004)”.\(^\text{16}\)

22. This amendment permits a party to request a dispute to be referred to adjudication as an alternative to mediation. Should the other party decline, or should either party be dissatisfied with the result of the adjudication then the dispute may proceed to be resolved by arbitration.\(^\text{17}\)

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\(^\text{13}\) Dail Eireann Debate Vol. 765 No. 1, 10 May 2012.
\(^\text{14}\) The University of New South Wales, Adjudication Research and Reporting Unit, www.be.unsw.edu.au/programs/adjudication-research-reporting-unit/adjudication.
\(^\text{17}\) *Ibid.*
SINGAPORE

23. The Singapore Building and Construction Industry Security of Payments Act 2004 was passed on 16 November 2004 and came into force on 1 April 2005. Since its enactment, most of the standard form contracts in use in Singapore have been amended to accommodate the provisions of the Act.

24. The Act was in part the Government’s response to the turmoil of the construction industry in the years preceding its introduction. In a speech in May 2004, the Minister for National Development noted that construction demand in Singapore had recently dropped to $10 billion, the lowest in a decade. GDP estimates indicated that in the first quarter of 2004 there was a growth of 0.1% for the construction sector, its first growth in 11 quarters. Additionally, the Building Construction Authority (“the BCA”) projected that construction demand would at most reach $12-13 billion in the medium term, and that it was unlikely that construction demand would return to its peak of $24 billion in the 1990s.18

25. The Security of Payment Act (“SOPA”) was the product of the BCA’s consultation with the relevant professional and business organisations and study of the legislation of the United Kingdom, Australia and New Zealand. One result of this consultation is that SOPA generally replicates the provisions of the New South Wales Act which bears the same name.19

26. Like many other forms of statutory adjudication, the primary objective of the legislation is to redress the difficulties faced by the construction industry in obtaining payment for work done.20 The intention of the legislature in enacting SOPA was to facilitate payment in the construction industry. To this end, it achieves this by affirming the right to payment, and by providing a mechanism for obtaining payment through the speedy dispute resolution procedure of adjudication.21

Relevant provisions of SOPA

27. Under s12 of SOPA, a claimant is entitled to make an adjudication application in relation to a construction contract where:

a. He fails to receive payment by the due date of a response amount which he has accepted;

b. He disputes a payment response provided by the respondent or the respondent fails to provide a payment response to the claimant by the due date if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response; and

c. After the service of a payment claim he fails to receive payment by the due date of the claimed amount, or he disputes the response amount, where the response amount is less than the claimed amount.

20 Supra note 18.
21 SOPA, s12.
28. A construction contract under SOPA is an agreement under which one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or an agreement under which one party undertakes to supply services to one or more other parties.22

29. Time will be the main indicator of SOPA’s success. However, it is important to note that it will not solve all the problems it sought to respond to: ‘it’s not a panacea to the industry’s problem but it provides an effective vehicle for progress payments to be made so that cash flow moves’.23

AUSTRALIA

30. Australia is composed of a number of States and Territories, each of which demand separate consideration.24

31. Adjudication in the major Australian territories is governed by the following statutory provisions:
   e. Western Australia Construction Contracts Act 2004;

32. While they remain territory-specific, there is a remarkable level of similarity across the different adjudication provisions.

33. The adjudication legislation in two groups of territories is practically identical in its form and wording: those of NSW, Queensland and South Australia, and the enactments in Western Australia and the Northern Territory. Legislation in Victoria is different to both groups.

34. The Acts in the states of NSW, Queensland and Victoria are perhaps the most relevant to the Australian construction industry, where 70% of the total value of the country’s building, construction and engineering work occurs and 77% of the Australian population live.25

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22 SOPA, s2.
23 Professor Philip Chan, Brief Update on Construction Law- the Impact of the Security of Payment Act 2004 on the Builder; Low Chin Min of the BCA (reported by Derek Cher on 19 October 2004 at channelnewsasia.com).
25 Dr Ajibade Ayodeji Aibina, Construction Mediation in Australia: Trends and Developments (2009).
New South Wales

35. Under s17 of the Building and Construction Industry Security of Payment Act 1999, a claimant may apply for adjudication of a payment claim if:

   a. The respondent provides a payment schedule but: the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim;\textsuperscript{26} or 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;\textsuperscript{27} 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 the payment of the amount.\textsuperscript{28}

36. As has already been stated, these provisions are practically identical to those contained in s21 of the Queensland Building and Construction Industry Payments Act 2004, and s17 of the South Australia Building and Construction Industry Security of Payment Act 2009.

37. One significant aspect of NSW provision of statutory adjudication is that it applies to any construction contract, whether written or oral, or partly written and partly oral, and applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.\textsuperscript{29}

Queensland

38. Statutory adjudication in Queensland is provided by the Building and Construction Industry Payments Act 2004 (“the Queensland Act”). As stated in section 7, the object of this Act is to ensure that a person is entitled to receive, and is able to recover progress payments if the person undertakes to carry out construction work under a construction contract; or undertakes to supply related goods and services under a construction contract.

39. A claimant may submit an application for adjudication to an Authorised Nominating Authority under one of three conditions:

   a. The respondent has served a payment schedule and the payment schedule states an amount owing that is less than the claimed amount stated in the payment claim application under section;\textsuperscript{30}

   b. The respondent has failed to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount application under;\textsuperscript{31}

   c. The respondent has failed to serve a payment schedule on the claimant and failed to pay the whole or any part of the claimed amount by the due date for payment.\textsuperscript{32}

\textsuperscript{26} S17(1)(a)(i) NSW Act.
\textsuperscript{27} S17(1)(a)(ii) NSW Act.
\textsuperscript{28} S17(1)(b) NSW Act.
\textsuperscript{29} S17(1) NSW Act.
\textsuperscript{30} S21(1)(a)(i) Queensland Act.
\textsuperscript{31} S21(1)(a)(ii) Queensland Act.
\textsuperscript{32} S21(1)(b) Queensland Act.
40. One particularly interesting feature of the Queensland legislation is that the provision of legal advice can also fall within the ambit of construction work.33 In the case of Doyles Construction Lawyers v. Ulysses (QLD) Pty Ltd,34 the adjudicator was asked to consider whether the provision of legal advice was “construction work”, for the purposes of the Queensland Act. Whilst he did not consider that the provision of legal advice fell within the definition of either “construction work” or “related goods and services”, he noted that section 12 gives a right of a progress payment to a person who “has undertaken to carry out construction work”. The term “carry out construction work” is given a wide meaning in Schedule 2 of the Act, which defines the term to include the provision of advisory services for carrying out construction work.35

41. Thus, in Queensland, a person who provides advisory services for carrying out construction work actually carries out construction work within the meaning of the Act.36

South Australia

42. Under s17 of the Building and Construction Industry Security of Payment Act 2009, a claimant may apply for adjudication of a payment claim if:

a. The respondent provides a payment schedule but the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim;37 or the respondent fails to pay the whole or a part of the scheduled amount to the claimant by the due date for payment of the amount;38 or

b. The respondent fails to provide a payment schedule to the claimant and fails to pay the whole or a part of the claimed amount by the due date for payment of the amount.39

Western Australia

43. Under s25 of the Construction Contracts Act 2004 (“the West Australia Act”), any party to the contract may apply to have the dispute adjudicated if a payment dispute arises under a construction contract unless:

a. An application for adjudication has already been made by a party, whether or not a determination has been made;40

b. The dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.41

34 Adjudication Reference 1057877.
35 Supra note 33.
36 Legal advice is construction work for the purpose of security of payment legislation. Bede Lipman, 22 November 2006, Minter Ellison Website.
37 S17(1)(a)(i) South Australia Act.
38 S17(1)(a)(ii) South Australia Act.
39 S17(1)(b) South Australia Act.
40 S25(a) Western Australia Act.
41 S25(b) Western Australia Act.
Northern Territory

44. The provision of statutory adjudication under s27 of the Northern Territory Construction (Security of Payments) Act 2004 (“the Northern Territory Act”) is identical in scope to s25 of the Western Australia Act.

Victoria

45. Under s18 of the Victoria Building and Construction Industry Security of Payment Act 2002, the claimant may apply for adjudication of a progress payment to be made where the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim.

NEW ZEALAND

46. The Construction Contracts Act 2002 (“the New Zealand Act”) came into force on 1 April 2003 in New Zealand.42 Similar to almost all the jurisdictions discussed, it provides, or at least aims to provide a fast track procedure, accessible at the option of a claimant, for the determination of “disputes arising under a construction contract”.43

47. One distinct feature is that the scope of disputes that can be referred to adjudication under the New Zealand Act is much wider than the provisions in the Acts of other jurisdictions.

48. S25(1)(a) of the New Zealand Act provides that any party to a construction contract has the right to refer a dispute to adjudication. A dispute is a dispute or difference that arises under a construction contract, and under s25(2) of the Act, an example of a dispute is a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) or the reasons given for non-payment of that amount. It is impossible to state with certainty the scope of the Act but it seems to provide almost unlimited jurisdiction to refer disputes arising from construction contracts to adjudication.

III. PAYMENT PROVISIONS

ENGLAND AND WALES, SCOTLAND AND NORTHERN IRELAND

49. Payment provision legislation in England and Wales, Scotland and Northern Ireland is framed by five key provisions in the Construction Act, which are subject to the amendments implemented by the Second Construction Act. As with statutory adjudication, the aim of the provisions is to improve cash flow within the construction industry.

50. First, parties to construction contracts are entitled to payment by instalments, stage payments or other periodic payments unless44 the contract specifies that the duration of the work will be less than 45 days,45 or the parties agree that the duration of the work is estimated to be less than 45 days.46

43 S3(b) New Zealand Act.
44 S109(1) Construction Act.
51. Second, every construction contract shall provide a payment mechanism for determining what payments become due under the contract, and when, with a final date for payment in relation to any sum which becomes due. Additionally, every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment become due from him under the contract, or would have become due if the other party had carried out his obligations under the contract, and no set-off or abatement is permitted in respect of the sum claimed.

52. Third, a party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. An effective notice must specify the amount proposed to be withheld and the ground for withholding payment, or in the event that there is more than one ground, each ground and the amount attributable to it. It must also be given not later than the prescribed period before the final date for payment.

53. Fourth, a party to a construction contract is entitled to suspend the performance of his obligations under the contract where a sum due is not paid in full by the final date for payment and where no effective notice to withhold payment has been given.

54. Fifth, a provision in a construction contract that makes payment under that contract conditional on the payer receiving payment from a third person is ineffective, unless that that third person, is insolvent.

Amendments under the Second Construction Act

55. The Second Construction Act had amended the payment provisions under the Construction Act in three significant respects:

56. First, s142 of the Second Construction Act’s introduction of ss110(1A), 110(1B), 110(1C) and 110(1D) extend the range of conditional payment clauses prohibited under the Construction Act. They supplement s113 of the Construction Act which outlaws provisions under a construction contract that make payment conditional on the receipt of payment from a third person, except in insolvency situations.
57. Provisions for determining what payments become due under a construction contract and when they become due are now ineffective where payment is conditional on:

a. The performance of obligations under another contract;\textsuperscript{58}

b. A decision by any person as to whether other obligations under another contract have been performed;\textsuperscript{59} or

c. By reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.\textsuperscript{60}

58. In short, contractors cannot make payments under subcontracts conditional upon the issue of a payment certificate under the main contract, or the performance of obligations under another contract. Importantly, and unique to the Construction Act, pay-when-paid provisions are allowed to stand in the event of insolvency.\textsuperscript{61}

59. Second, s112(1) of the Construction Act has been amended so that an unpaid party can suspend the whole or part of its services. Under the previous law, the position was that an unpaid party was entitled to suspend the whole of its obligation to undertake work in the event that a sum due under the contract had not been fully paid. The problem associated with this is that it was viewed as ‘an all for nothing remedy’ which meant that parties were often unwilling to exercise it.

60. Third, the Second Construction Act has made the following changes to the payment framework for interim payments which apply to parties to contracts for work extending beyond 45 days:\textsuperscript{62}

i. The introduction of s110A provides that a contract may specify that either the payer, the payer’s specified person, or the payee may issue the payment notice. The payment notice must then be issued within 5 days of the payment due date, and must set out the sum considered to be due with the method for calculating it.

ii. Under the previous law, there was no sanction for the failure to serve notice of the amount due. The introduction of s110B provides that if the payer fails to serve a payment notice within the required 5 days after the due date, the payee must serve a default payment notice after the lapse of that period. A default payment notice obliges the payer to pay the amount due.

iii. The introduction of pay-less-notices through s111 replace withholding notices under the old law and apply to situations where the payer wishes to pay something less than the notified sum.

\textsuperscript{58} S110(1A)(a) Construction Act.
\textsuperscript{59} S110(1A)(b) Construction Act.
\textsuperscript{60} S110(1D) Construction Act.
\textsuperscript{61} S113 Construction Act.
\textsuperscript{62} S109(1) Construction Act.
IRELAND

61. Although not in force, once implemented, the Construction Contracts Bill 2010 will place the following payment provisions on a statutory footing:
   a. Section 7 of the Bill requires notice to be given by the paying party of an intention to withhold payment from monies otherwise due. The aim of this is to achieve a fairer balance within the construction sector.
   b. Section 9 provides for the right to suspend performance in the event of non-payment. A party which has not been paid may suspend performance of all or part of its obligations provided prior notice is given to the defaulting party.

HONG KONG

62. There is no statutory procedure available to contractors for obtaining payment in Hong Kong.

SINGAPORE

63. Payment provisions in the Singapore construction industry are governed by the Building and Construction Industry Security of Payment Act 2004. The most significant provisions are contained with ss 8 and 9.

64. Where the contracting parties agree on a period to respond to payment claims and to make payments, s8 SOPA stipulates maximum time limits to curb any unreasonably long period for payment in order to improve cash flow. These limits are consistent with construction industry practice. The parties are therefore not free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

65. For construction contracts:
   a. The respondent must respond to a payment claim by a claimant within a maximum of 21 days.
   b. After serving the payment response, the respondent must make payment within a maximum of 35 days.
   c. If the contract does not stipulate the payment periods, the default periods of 7 days for serving payment response and 14 days for making payment will apply.

64 Ibid.
66. For supply contracts:
   a. The respondent must make payment within a maximum of 60 days for payment due.
   b. If the contract does not stipulate the payment period, the default period for making payment is 30 days.
   c. Payment responses are not used in construction industry supply contracts.

67. In addition to this, clause 9 of SOPA stipulates that pay-when-paid provisions in contracts are unenforceable and of no effect in relation to progress payments.

AUSTRALIA

68. Australia’s payment provisions are shaped by the territory-specific legislation that also underpins the provision of adjudication. To reiterate, provisions in the major Australian territories comprise:
   b. The Queensland Act;
   c. The South Australia Act;
   d. The West Australia Act;
   e. The Northern Territory Act, amended in 2006;
   f. The Victoria Act, as amended in 2006;

New South Wales

Progress payments

69. A person who has undertaken to carry out construction work under a contract\(^{65}\) or has undertaken to supply related goods and services under a contract\(^{66}\) is entitled to a progress payment on and from each reference date under the contract.

70. The reference date in respect of the construction contract is either a date determined in accordance with the terms of the contract\(^{67}\) or in the absence of an express provision is the last day of the named month in which construction work was first carried out.

71. The amount to which a person is entitled in respect of a progress payment under the construction contract is either the amount calculated in accordance with the terms of the contract\(^{68}\) or in the absence of an express mechanism, the value of the construction work undertaken by the person under the contract.

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\(^{65}\) S8(1) NSW Act.
\(^{66}\) S8(2) NSW Act.
\(^{67}\) S8(2)(a) NSW Act.
\(^{68}\) S9(a) NSW Act.
Pay-when-paid provisions

72. S12 of the NSW legislation provides that a pay-when-paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out under the contract.

Queensland

73. Given the word-for-word similarity between the legislative provisions of adjudication in NSW and Queensland, it is unsurprising that its legislative payment provisions are also almost identical.

74. Minus the definition and inclusion of a reference date, ss12 and 13 of the Queensland Act are identical to ss8 and 9 of the NSW Act. Additionally, the law stated in s16 of the Queensland Act is the same as that in s12 of the NSW Act which outlaws the effect of pay-when-paid provisions.

South Australia

75. Ss8 and 9 of the South Australia legislation are identical, including the definition and inclusion of progress payments on a reference date, to ss8 and 9 of the NSW legislation. Additionally, s12 similarly outlaws the effect of pay-when-paid provisions.

Western Australia

76. The main payment provisions of the West Australia Act can be summarised as follows:
   a. S9 stipulates that contractual pay-when-paid provisions have no effect;
   b. S10 provides that a provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

Northern Territory

77. The payment provisions\(^{69}\) of the Northern Territory Act are identical to the Western Australia provisions, save that a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 28 days after it is claimed.

Victoria

78. Ss9 and 10 of the Victoria Act concerning the right to and valuation of progress payment are identical to the provisions under the NSW legislation. Like all of the other Acts, s13 outlaws the effect of pay-when-paid provisions.

\(^{69}\) Contained within s12 Northern Territory Act.
NEW ZEALAND

79. Payment provisions in New Zealand are underpinned by the provisions of the New Zealand Act. They bear remarkable similarity to the legislative provisions in other jurisdictions, and in summary, provide for:70

a. The prohibition of conditional payment provisions, also known as pay-when-paid provisions;
b. The inclusion of progress payment provisions in a construction contract; and
c. The prescription of the procedure that should be followed in making and responding to payment claims and the consequences of failure by the payer to follow the procedure.

IV. ARBITRATION

ENGLAND AND WALES, NORTHERN IRELAND

80. Arbitration has an extensive history within the courts of England and Wales, and Northern Ireland.71 For many years the Arbitration Act 1950 was the principal statute governing this area. It had a number of limitations, including giving excessive powers of review to the courts, and giving inadequate coverage of matters relating to procedure.

81. It was amended by the Arbitration Act 1979 following a report by Lord Donaldson, and was replaced by the Arbitration Act 1996, which rectified these defects providing a modern statement of the law with the intention of serving the needs of the international community.72

82. The Arbitration Act 1996 draws heavily on reports by the Departmental Advisory Committee (DAC) on Arbitration set up by the Department of Trade and Industry. It also borrows from concepts to be found in the United Nations Commission on International Trade Law (UNCITRAL) Model law on arbitration. It aims to ensure that English law on arbitration is consistent with international practice.73

83. The end result is that arbitrations in the jurisdictions of England and Wales and Northern Ireland are governed by the provisions of the Arbitration Act 1996. One continuing topic in this area is the extent to which domestic law should prescribe how arbitrations should be conducted balanced against the scope for parties to devise their own procedures. The division in the provisions of the act between those that are mandatory and non-mandatory is designed to reflect an awareness of this.

70 Kennedy-Grant, Kennedy-Grant on Construction Law (2012), p595.
72 Ibid.
73 Ibid, p380.
Mandatory provisions within the Arbitration Act 1996 include: the stay of legal proceedings, the extension of time limits for commencing arbitration, the application of the limitation act to arbitration, and the power of the court to remove an arbitrator for impartiality.

Non-mandatory provisions include: the seat of the arbitration, whether to adopt institution rules, whether to agree the arbitration agreement is not a separable agreement, when arbitral proceedings are regarded to commence, and the constitution of the arbitral tribunal.

In other words, the intention is that the mandatory provisions cover only the matters that are essential to the effective resolution of the matters referred to arbitration, with everything else covered by non-mandatory fall-back provisions, which the parties can change if they wish.

SCOTLAND

For those behind its new arbitration regime, it is hoped that Scotland is now poised to become a competitive global venue for international arbitration. The Arbitration (Scotland) Act 2010 (“the Scottish Act”) received Royal Assent on 5 January 2010 and came into force on 7 June 2010. This innovative piece of legislation codifies Scots law on arbitration into one streamlined, user-friendly document and creates a unitary, modern, and arguably efficient system.

Many of its plaudits have been highly praiseworthy. For some, the Scottish Act radically overhauls Scots arbitration and takes it “from caveman to spaceman in one step”, while for others, it is now not too strong a claim to suggest that Scotland now sits at the cutting edge of international arbitration law.

The development of the Scottish Act was designed to respond to the problems associated with its previous arbitration provisions. In 1990, Scotland adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (“the Model Law”) in respect of international arbitrations only. This created a dual arbitration regime.

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86. S13 Arbitration Act 1996.
89. S4 Arbitration Act 1996.
94. Ibid.
95. Hew Dundas, an independent arbitrator who had a significant role in the passing of the Scottish Act, as quoted in Kyriaki Karedelis, “Scottish Arbitration Bill brings in confidentiality obligation as a default rule” in Global Arbitration Review, 23 November 2009.
97. Pursuant to s66 and Schedule 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Model Law applied to commercial arbitrations in Scotland where one party had its place of business outside Scotland, or the place of performance or the subject matter of the dispute was outside Scotland.
90. Scotland’s adoption of the Model law was not successful. This was largely due to the legislature’s failure to fill in the gaps in the Model Law, with the result that many of the uncertainties in Scotland’s underlying arbitration regime continued to apply to international arbitrations seated in Scotland. Importantly, the Model Law is a framework document, intended to be supplemented by national law where required. Scots law failed to rectify the fact that the Model Law makes no provision for arbitrators to award damages, costs or interest.88

91. Additionally, Scotland’s inadequate implementation of the Model Law was compounded by its failure to incorporate the UNCITRAL amendments made in 2006. The overall result was that while Scotland had attempted to place itself on the map of international arbitration, this attempt was inadequate and largely unsuccessful. Scotland experienced no recognisable increase in its hosting of international commercial arbitrations.

92. Its implementation was a collaborative effort, developed following an extensive consultation process which included contributions from an unprecedented number of private parties such as the Scottish branch of the Chartered Institute of Arbitrators.

The Scottish Act

93. The Scottish Act creates a unitary arbitral regime, applicable to international and domestic arbitrations. It has worldwide extra-territorial effect, allowing non-Scottish parties to provide for arbitration outside Scotland to be governed by the Act. One legal effect of its implementation is that the enactment of the Model Law has now been repealed.

94. The unitary format of the Scottish Act is similar to Ireland’s Arbitration Act 2010 (“the Irish Act”). The Irish Act is also unitary, ending the historical distinction between international and domestic arbitrations caused by Ireland’s enactment of the Model Law only in respect of international arbitrations. However, one key difference between them is that Ireland has re-enacted the Model Law, extending its application to domestic and international arbitrations and incorporating the 2006 amendments.

95. The Scottish Act is broadly comparable to the Arbitration Act 1996, in many ways the benchmark for the modern statutory provision of arbitration. It makes clear that is founded on the principles of party autonomy and limited court intervention, and that the object of arbitration is to resolve disputes fairly and impartially without unnecessary delay and expense, with appropriate duties being imposed on both the parties and the tribunal to ensure that this is achieved.89

96. However, particular reference should be made to the several key features of the Scottish Act. The first of these is it distinctive, accessible format. The Scottish Act is user-friendly with a focus on party autonomy. In keeping with the Scottish Government’s plain English policy and commitment to accessible legislation,90 the Scottish Act is drafted in straightforward terms. In a key structural difference from its English counterpart, the Scottish Act separates procedure from law, siphoning the former into Schedule 1 to the Act, which constitutes a stand-alone code of Scottish Arbitration Rules.

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89 Ibid, p5.
97. The second key provision is the creation of “arbitral-appointments referees”. People appointed in this role are designed to rectify failures in the arbitrator-appointment process, with the aim of reducing the role of the courts in comparison to England’s regime. Under the Arbitration Act 1996, this role is given to the courts, which can lead to increased costs and delays.

98. Third, the Scottish Act provides clarity by including confidentiality as an express default obligation, unless the parties agree otherwise. This is an improvement on the previous Scottish position. It was previously unclear whether confidentiality was an implied term of Scots law, in the absence of express provision in the arbitration agreement. This new express default confidentiality obligation is designed to provide reassurance and in turn to affect parties in dispute that international arbitration in Scotland will be kept private.

99. Last, the Scottish Act contains broad immunity provisions which expressly grant immunity to the tribunal and its appointing institution together with experts, witnesses and legal representatives in relation to their acts and omissions. This extends to the level such parties would be afforded if the arbitration proceedings were civil proceedings.

IRELAND

100. Another aspect to the idea that dispute resolution in the Irish construction industry is experiencing a period of unprecedented change lies in the implementation of the Irish Act, which came into force on 8 June 2010. In doing so, the Irish Act repealed the previous provisions under the Arbitration Acts 1954, 1980 and 1998 in their entirety.

101. The purpose of the Irish Act is to “further and better [the] resolution of disputes by arbitration”, and it has dramatically restricted the ability of the court to intervene in the arbitral process, thereby fundamentally altering the relationship between arbitration and the courts. The most significant change to arbitration law in Ireland is that the 2010 Act gives the force of law to the Model Law in respect of both international and domestic arbitration.

102. In one sense, the policy to restrict the grounds for court interference in the arbitral process responds to the judicial opinion of McMahon J in Galway City Council v. Samuel Kingston Construction Ltd [2004] that the jurisdiction of the court to interfere in the arbitral process is limited and arises only where the error is so fundamental that it cannot be allowed to stand or is clearly wrong. This is evident from some of the changes introduced, as summarised:

a. Section 10 of the Irish Act specifies the powers of the court exercisable in support of arbitration proceedings. In particular, s.10(1) states that the High Court has the same powers in respect of Articles 9 and 27 of the Model Law as it has in any other action before the court. Nevertheless, pursuant to the provisions of s.10(2), unless the parties otherwise agree, the High Court cannot make any order in respect of security for costs or discovery. The power to make such an order now rests solely with the tribunal.

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91 Preamble to the Irish Act.
92 In Ireland, separate legislation applied to domestic and international arbitrations. Before the Irish Act, domestic arbitrations were governed by the Arbitration Act 1954 as amended by the Arbitration Act 1980, while international arbitrations were governed by the Arbitration (International Commercial) Act 1998.
b. Section 11 provides that the determination of the High Court in certain applications under the Model Law, the Geneva Convention and the New York Convention is final. This in effect removes any right of appeal to the Supreme Court from a decision of the High Court, a power that was previously enjoyed under section 53 of the 1954 Act.

c. Section 32 of the Irish Act deals with the power of the High Court to adjourn proceedings already pending before them, in order to facilitate arbitration where the court determines that the case is an appropriate matter for arbitration and both parties consent to the matter being decided by arbitration.

HONG KONG

103. Until June 2011, the principal statute governing arbitration in Hong Kong was the Arbitration Ordinance (Cap 341). This Ordinance provided for two distinct regimes: (i) the domestic regime, which was based largely on the English Arbitration Act 1996; and (ii) the international regime, which was based on the UNCITRAL Model Law. The significant difference between the two was that the domestic regime gave the Hong Kong courts additional powers to intervene in and assist with the arbitration process; powers that were not available under the international regime.

104. The new Hong Kong Arbitration Ordinance (Cap 609) came into force in 1 June 2011 and applies to arbitrations commenced on or after such date. It abolished the previously divided arbitration provisions adopting a unitary regime for arbitration in Hong Kong based on the Model Law. One of the main objectives of the new Ordinance is to minimise judicial intervention in the arbitration of a dispute94 and to support party autonomy in the arbitral process.

105. The case of Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd has sparked interest in the arbitration arena because it relates to a Court of First Instance decision95 by the Honourable Mr. Justice Saunders, to set aside an ICC award under Article 34 of the Model Law. Such a finding by the courts of Hong Kong is unusual and Saunders J himself confirmed in his judgment that “It is beyond argument that the overall scheme of both the (old Arbitration Ordinance) and the Model Law reflect a view of arbitration that the award will generally be upheld and enforced”. Nonetheless, on the specific facts of the case, Saunders J set aside the ICC award on the basis that the domestic regime gave the Hong Kong courts additional powers to intervene in and assist with the arbitration process; powers that were not available under the international regime.

106. The Hong Kong Court of Appeal overturned the decision96 by reinstating the US$55 million ICC award, thereby affirming the jurisdiction’s arbitration-friendly status. Mr. Justice Tang VP, said that “only a sufficiently serious error” undermining due process could be regarded as a violation of Article 34(2) of the Model Law. “A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process.” In the present case, Mr. Justice Tang VP held that there had been no violations of Article 34(2) and disagreed with the lower court’s ruling that the result of the award might have been different if Pacific China had been given leave to respond.

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94 Section 3(2)(b) and 12 of the Hong Kong Arbitration Ordinance (Cap 609).
95 (2011) HKLRD 188.
96 CACV 136/2011 (9th May 2012).
SINGAPORE

107. For Singapore arbitration, the overall picture appears to be one of growth and continuing popularity. The Singapore International Arbitration Centre (“SIAC”) handled 188 new cases during 2011, and in June 2012, Singapore hosted the 21st Congress of the International Council for Commercial Arbitration.

108. The laws governing private commercial arbitration in Singapore are divided into domestic and international regimes. The international regime is governed by the International Arbitration Act (“the IAA”) which was first enacted in 1994, which in effect, implemented the provisions of the UNCITRAL Model Law on International Commercial Arbitration, and gave effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

109. The Arbitration Act (“the AA”) governs the domestic arbitration regime in Singapore. In 2002, it underwent complete revision in order to synthesise the laws relating to domestic arbitration to those governing international arbitration.

110. Every arbitration in Singapore must be governed by either the AA or the IAA. The IAA applies to international arbitrations and defines it in terms comparable with though not identical to those of the Model Law (section 5 IAA and Article 1(3) and (4) Model Law). The AA operates as the default regime whenever an arbitration in Singapore falls outside the reach of the IAA. The AA also applies where the parties to an international arbitration which is otherwise subject to the IAA opt out of it.

111. One major difference between the AA and the IAA is the right of appeal from an arbitral award. There is no right of appeal under the IAA but the AA permits an appeal on a question of law with the leave of the court. S49(5) AA incorporates The Nema guidelines which have been followed in Singapore.97

112. In short, the decision of the arbitral tribunal on the point of law must be obviously wrong to give rise to an appeal on a question of law, unless it is a question of general public importance in which case the Court must be satisfied that the tribunal’s decision is at least open to serious doubt. Under the IAA, the challenges to an award are in the form of an application to set it aside, or to resist enforcement of the award.

Recent developments

113. The International Arbitration (Amendment) Bill was passed on 9 April 2012 to amend the International Arbitration Act (IAA). It includes a number of significant changes to the existing provisions in Singapore:

a. The definition of an ‘arbitration agreement’ in the IAA has been amended to extend the IAA’s application to arbitration agreements concluded by any means – orally, by conduct or otherwise - as long as their content is recorded in any form. For example, an arbitration agreement that is made orally but is documented through an audio recording will now fall within the scope of the IAA.

b. The new amendments also provide legislative support for the ‘emergency arbitrator’ procedure by according emergency arbitrators appointed under any arbitration rules the same legal status and power as that of a conventionally-constituted arbitral tribunal.

c. Additionally, the amendments enable the Singapore courts to review a ruling by an arbitration that it does not have jurisdiction to hear a dispute.

AUSTRALIA

114. Commercial arbitration in Australia is governed by two distinct statutory regimes.99 The first is state-based and regulates domestic arbitration. The second is Federal and regulates international arbitration.

Domestic arbitration

115. Domestic commercial arbitration in Australia was originally governed by the so-called “Uniform Acts” that were based on the English Arbitration Act 1979. However, from 2009 onwards, the arbitration provisions under the domestic legislation have been the subject of significant reform with the states committing to introducing uniform legislation. The three major Australian states - New South Wales, Victoria and South Australia - respectively enacted the uniform legislation in 2010, 2011 and 2011. The underlying policy agenda behind the changes to the domestic arbitration provisions was to minimise court intervention and promote finality in arbitral awards.

116. Three of the most significant amendments introduced by the Commercial Arbitration Act 2010 (“CAA”) are:

a. Section 8 of the CAA, identical in terms to Article 8 of the Model Law, which removes the court’s previous discretion to grant a stay of court proceedings, instead requiring that the court must grant a stay of the court proceedings and refer the matter to arbitration where an applicable arbitration agreement exists between the parties, unless the agreement is found to be “null and void, inoperative or incapable of being performed”.

b. Section 27E of the CAA imposes a statutory duty of confidence, which stipulates that neither the parties nor the arbitral tribunal may disclose confidential information unless an exception to the duty applies or unless the parties consent to opting out of the statutory duty.

c. Section 34A (1) of the CAA markedly narrows the scope of the right to appeal to circumstances in which the parties have opted in, that is by stipulating in the arbitration agreement or by doing so subsequently that such an appeal may be made. This departs from the previous position under the pre-2010 provisions where leave to appeal the decision of an arbitral tribunal could be granted where there was a “manifest error of law on the face of the award” or “strong evidence” that the arbitrator had made an error of law.

International arbitration

117. The International Arbitration Act 1974 (“IAA”) was amended in 2010 to ensure that the current arbitration law and, more importantly, the current arbitration practice complies with internationally accepted standards. Among the most significant of the provisions introduced by the 2010 amendments include: s23C (1) of the IAA which, like the domestic legislation, imposes a statutory duty of confidence between the parties; the introduction of s21 of the IAA which eliminates the possibility the qualifying parties can opt-out either expressly or by implication from the provisions of the IAA; and the limiting of the grounds under which the enforcement of an award can be refused.

NEW ZEALAND

118. Both domestic and international arbitrations in New Zealand are governed by the Arbitration Act 1996 which came into force on 1 July 1997. Its development and enactment was based on the 1991 Report of the New Zealand Law Commission which recommended the adoption of a new Act based on the UNCITRAL Model Law on International Commercial Arbitration.

119. The Act was amended in 2007 by the Arbitration Amendment Act 2007, which came into force on 17 October 2007. The amendments comprised of the 2006 amendments to the Model Law alongside those that were separate and specific to New Zealand.

120. While the Act covers both domestic and international arbitration, and aims to promote consistency between both regimes, it makes fundamental distinctions between “international arbitrations” and “domestic arbitrations” and prospective arbitrations in New Zealand, those not in New Zealand, and those for which it has yet to be agreed whether the place of arbitration will be New Zealand. The importance of these distinctions is that they dictate which provisions of the act apply to which type of arbitration.


101 S5 New Zealand Arbitration Act 1996.
V. MEDIATION

ENGLAND AND WALES, SCOTLAND, NORTHERN IRELAND AND IRELAND

121. Mediation in Europe has been subject to the EU Directive\(^{102}\) on Mediation in Civil and Commercial Cases since it came into force on 13 June 2008. The objective of the Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.\(^{103}\)

122. While the Directive required EU member states to implement its provisions into national law by 21 May 2011, this process has not been uniform. In England and Wales, the Mediation Directive has been implemented through the Civil Procedure (Amendment) Rules 2011, which added a new section III to Part 78 of the CPR and came into force on 6 April 2011, while Scotland has followed suit through the Cross-Border Mediation (Scotland) Regulations 2011 on the same date. For Northern Ireland, the Directive was brought into force on 18 April 2011 through the Cross-Border Mediation Regulations (Northern Ireland) 2011. Last of all, Ireland proceeded with the implementation of the European Communities (Mediation) Regulations on 18 May 2011, complying with the deadline set by the Directive.

123. Importantly, the provisions of the Directive apply only in cross-border disputes, in civil and commercial matters (Article 2). A cross-border dispute is a dispute in which at least one of the parties is domiciled or habitually resident in a member state (meaning any of the 27 states of the EU with the exception of Denmark).

124. Additionally, the EU Directive imposes several key obligations upon member states in their involvement on mediation. These are:

   a. Member states are required to encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct for mediators and organisations providing mediations services, as well as other effective quality control mechanisms concerning the provision of mediation services.\(^{104}\)

   b. Member states are required to encourage the initial and further training of mediators in order to ensure that mediation is conducted in an effective, impartial and competent way.\(^{105}\)

   c. Member states should ensure that the parties are able to request that a written agreement resulting from mediation is made enforceable by a court, by a judgment or decision or other means in accordance with national law, unless the content of the agreement is contrary to national law.\(^{106}\)

\(^{102}\) EU Directive 2008/52/EC.

\(^{103}\) Article 1 of the EU Directive 2008/52/EC; Sime, Blake, Brown, A Practical Guide to Alternative Dispute Resolution, p274.

\(^{104}\) Article 4(1) of the EU Directive 2008/52/EC.

\(^{105}\) Article 4(2) of the EU Directive 2008/52/EC.

\(^{106}\) Article 6(1) and Article 6(2) of the EU Directive 2008/52/EC.
To ensure the confidentiality of proceedings, member states must ensure that neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil or commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process unless: i) the parties agree otherwise; ii) it is necessary for overriding considerations of public policy; iii) disclosure of the content of the agreement is necessary in order to enforce or implement that agreement.

HONG KONG

125. Mediation in Hong Kong is now subject to the recently implemented Hong Kong Mediation Ordinance, which after being passed on 22 June 2010, came into effect on 1 January 2013. The Justice Department confirmed that the Ordinance is designed to “enhance Hong Kong’s status as a leading centre for dispute resolution in the Asia-Pacific Region”.

126. The Mediation Ordinance builds upon two earlier mediation provisions. While commercial mediation in Hong Kong was promoted in the courts prior to the introduction of any jurisdictional requirement, the first serious judicial endorsement of commercial mediation was in 2006 with the introduction of the pilot scheme. This offered voluntary mediation for cases in the Construction and Arbitration List, introduced in the High Court using the Mediation Rules of the Hong Kong International Arbitration Centre (“HKIAC”).

127. The second was the introduction of the Civil Justice Reform Practice Direction 31, as part of the Hong Kong Civil Justice Rules in 2009, which came into force on 1 January 2010. This Practice Direction on Mediation gave practical effect to the desire to promote the widespread use of mediation. It provides a pro-active mechanism by which a party who wishes to engage in mediation may serve a Mediation Notice on the opposing side, requiring a Mediation Response within 14 days.

128. In practical terms, the Mediation Ordinance provides a regulatory framework to remove impediments to the development of mediation and most significantly, it gives statutory effect to the confidential nature of “any mediation communication” made before, during or after mediation. The Ordinance applies to mediations conducted wholly or partly in Hong Kong or where the agreement to mediate is governed by Hong Kong law.

129. One issue with the Ordinance is that it does not provide a single accreditation body for mediators in Hong Kong. However, the Hong Kong Department of Justice has advised that it is working towards the establishment of the Hong Kong Mediation Accreditation Association, which was incorporated in August 2012, and which is expected to become the sole accreditation body for mediators in Hong Kong, and the default appointing body where parties cannot agree on the appointment of a mediator.
SINGAPORE

130. There are two main categories of mediation practice in Singapore: court-based mediation and private mediation. The first of these takes place in the courts after parties have commenced litigation proceedings, which is primarily carried out by the Subordinate Courts and coordinated by the Primary Dispute Resolution Centre (“PDRC”). Private mediation in Singapore is primarily administered by the Singapore Mediation Centre (“SMC”), a non-profit organisation under the Singapore Academy of Law.

131. It should be noted that many of the Standard Form Building Contracts in Singapore provide for non-mandatory mediation.

The SMC

132. The SMC was launched on 16 August 1997 after its incorporation on 8 August 1997. It is institutionally linked with many professional and trade associations and receives the support of the judiciary and Singapore Academy of Law.

133. The SMC maintains its own panel of trained and experienced Principal Mediators comprising distinguished members of different professions and fields, which include MPs, former High Court Judges, Senior Counsel etc. All Principal Mediators have undergone formal mediation and a strict evaluation before their appointment to the panel.

134. There is no national system or law which regulates the accreditation, the quality or standards of mediators nor is there a law regulating the practice of mediation as such in Singapore. The SMC has therefore developed its own system of mediator training and accreditation.

135. The success of the SMC in dispute settlement is reflected by its statistics. By 1 August 2004, more than 1000 disputes had been referred to SMC, with a settlement rate of between 75% and 80%.

136. The mediation process at the SMC is initiated in two ways: either the case may be referred to SMC by the court or one or more of the parties may contact SMC directly with a request for mediation.

Court-Based Mediation in the Subordinate Courts

137. Court Dispute Resolution (“CDR”) at the PDRC was introduced in a pilot project on 7 June 1994, and the Court Mediation Centre was subsequently established in 1995. Court-connected mediation deals with disputes referred to mediation once legal proceedings have commenced. CDR has undoubtedly had an enormous impact on the Singapore judicial system. From 1994 to 2004, 48,300 matters underwent CDR, and of these, 94.6% were successfully settled. Surveys conducted by the Subordinate Courts in 1997 revealed significant cost and time savings for both the parties and the judiciary.

138. However, for the most part, court-based mediation in the subordinate courts is likely to have little relevance to the settlement of construction disputes or other commercial cases in Singapore. While in 1997 the civil jurisdiction of the Subordinate Court was increased from S$100,000 to S$250,000 this threshold remains low, and is likely to exclude a significant proportion of construction dispute work.
AUSTRALIA

139. In Australia, mediation occurs within the courts (federal and states); within tribunals (federal and states); and privately. The Australian legal profession has endorsed its use alongside the promotion of ADR in general through the establishment of specialist organisations and lobby groups promoting the benefits of mediation and ADR. Examples of these include: the Institute of Arbitrators and Mediators (“IAMA”) in 1975; the Association of Dispute Resolvers in 1989; and the National Alternative Dispute Resolution Advisory Council in 1995.107

140. According to IAMA the trend for choosing mediation to resolve disputes is increasing.108 Between 2007 and 2009, mediation nominations increased 100 per cent.109 This has occurred alongside an extensive effort to establish uniform standards for mediators across the country. In January 2008, the National Mediator Accreditation Scheme, a voluntary opt-in scheme, was brought into force in Australia, with the aim of ensuring the provision of high quality mediation services.110

141. Victoria has endorsed the use of mediation through its Supreme Court Rules which provide at rule 50.07 that ‘the Court may, with or without the consent of any party, order the proceedings or any part of the proceedings to be referred to a mediator’.

142. Tribunals across Australia also operate a referral system. The Victorian Civil and Administrative Tribunal provides that a Tribunal or a principal registrar may refer a proceedings or part of it for mediation by a person nominated by the Tribunal or principal registrar.

NEW ZEALAND

143. The general law in New Zealand governs the enforceability of an agreement to mediate and any resulting settlement agreement following mediation, but does not extend to covering the provision of the process itself. There is no statute similar to the Arbitration Act 1996 which governs the process of mediation, but ss57 and 69 of the Evidence Act apply to mediations. Together, these sections provide protection for the parties to any mediation in respect of confidential documents created for the purpose of, and communications made in the course of the mediation. More generally, mediation in New Zealand is provided for by the New Zealand Standard Conditions.

VI. COURT PROCEDURE

144. Though left until last in this presentation, the codification of court procedure across the different jurisdictions discussed precedes the placing of dispute resolution and payment provisions on a statutory footing. In summary and not exhaustively, the jurisdictions that form the subject of this work are governed by, amongst other sources of procedural law, the following court procedure rules:


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108 Ibid.
109 Ibid.
b. The Rules of the Court of Session in Scotland;

c. The Rules of the Court of Judicature (Northern Ireland);

d. The Rules of the Superior Courts in Ireland;

e. The Hong Kong Civil Justice Rules;

f. The Supreme Court of Judicature Act; the Subordinate Courts Act, the Rules of Court in Singapore;

g. Uniform Civil Procedure Rules 2005 in Australia; and

h. New Zealand Civil Procedure.

Paul Darling QC

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| **Adjudication and Payment Provisions** | N/A       | Singapore Building and Construction Industry Security of Payments Act 2004 | Territory specific legislation:  
- Queensland Building and Construction Industry Payments Act 2004  
- South Australia Building and Construction Industry Security of Payment Act 2009  
- Western Australia Construction Contracts Act 2004  
| **Mediation**                   | The Hong Kong Mediation Ordinance 2012 | Primary Dispute Resolution Centre and Singapore Mediation Centre | Territory specific Supreme Court Rules | N/A |
| **Court Procedure**            | The Hong Kong Civil Justice Rules | The Supreme Court of Judicature; the Subordinate Courts Act; the Rules of Court in Singapore | Uniform Civil Procedure Rules 2005 | NZ Civil Procedure Rules |

by Paul Darling QC

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