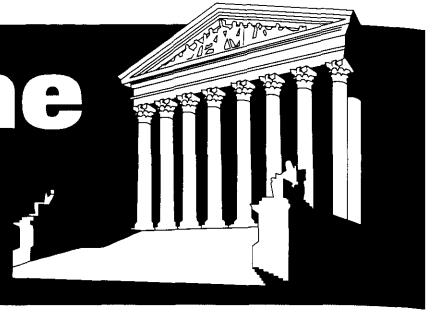


Claims under the ACP Conditions



A rare case under the General Conditions of Contract for the Airport Core Programme Civil Engineering Works (the ACP Conditions) will soon be published in the law reports. In *A-G v Trafalgar House Construction (Asia) Ltd and Others*, to be reported as [1996] 4 HKC 1, the Government opposed an adjudicator hearing a common law claim for damages for breach of contract. This month J.A. McInnis looks at the jurisdiction of the adjudicator under the ACP Conditions and the distinction between claims under the contract and common claims for damages for breach of contract.

Claims under the Contract versus Claims for Breach of Contract

In law there is a distinction between claims under the contract and claims for breach of contract. The distinction normally arises from the wording of the conditions of contract in issue. In the former case claims are often normally made pursuant to the provisions of the contract. In the latter case the claim arises separately and apart from the provisions of the contract. Under the former type of case the architect or engineer will normally have authority to settle it. In contrast it is an arbitrator or judge who will normally settle the latter type of claim. It should be noted that while the term claim is used in practice, if it proceeds to court, the claim will often be referred to and pleaded as a cause of action. Causes of action may be pleaded in tort, restitution, or breach of contract to name a few. In the Trafalgar House case it was this distinction, and the jurisdiction of an adjudicator to hear a claim for breach of contract under the ACP Conditions versus a claim pursuant to the contract, that was directly in issue.

The Facts

Trafalgar House Construction (Asia) Ltd was one of three contractors, along with Costain Civil Engineering Ltd and Mitsui & Co Ltd, who agreed with the Hong Kong Government to construct the Tsing Ma Bridge as part of the Lantau Fixed Crossing. A dispute arose between the parties over the concrete specifications and the dispute resolutions procedures under the ACP Conditions were invoked. Clause 92 of the ACP Conditions provides a four-stage procedure for the resolution of any and all disputes. Stage 1 refers the dispute to the engineer for a non-binding decision. Stage 2, if a party is dissatisfied with the Stage 1 result, refers the dispute to non-binding mediation which may end in an agreed settlement. Stage 3, if no settlement is reached in Stage 2, refers certain disputes to an adjudicator. Stage 4, if not referable to adjudication, permits

reference to arbitration after substantial completion of the contract. On the facts of the case the engineer rejected the contractors' claim and mediation failed to reach a settlement. Thus the contractors sought to refer their dispute to adjudication. The Government, through the A-G, sought a declaration from the Court that that the contractors' claim, namely a claim for common law damages, was not referable to and could not be heard by the adjudicator.

The Adjudicator's Jurisdiction

The short issue in the case was whether the adjudicator had jurisdiction to rule on the contractors' claim. The somewhat longer issue was whether condition 92(8)(c) restricted the matters that might be heard in the adjudication. Condition 92(8)(c) provided:

(c) A dispute shall not be referred to the decision of an adjudicator unless it concerns the entitlement of:- (i) one party to payment by the other pursuant to any provision of the contract: and/or (ii) the contractor to an extension of time pursuant to cl 53.

Once again, it was argued by the Government that this condition prohibited the reference of a common law claim for damages to the adjudicator. Justice Jerome Chan treated the issue as one of construction of the condition and approached it from two main perspectives: (1) the plain meaning of the words; and (2) the meaning of the words in the contract as a whole. First of all, to arrive at the plain meaning of the condition, Justice Chan focused on several words construing entitlement narrowly, distinguishing payment from damages and holding that pursuant to suggests conformity with contract terms. Thus, he concluded on the plain meaning of condition 92(8)(c), that it did not support an adjudicator having jurisdiction to rule on the contractors' claim.

Turning to a construction of the words in the contract as a whole Justice Chan dealt with the contractors' arguments under

conditions 53(3), 69(3), 89(1) and 92(1). Under condition 53(3) the contractors argued that if an adjudicator had jurisdiction to hear claims for extensions of time he should also be able to hear claims for damages at common law at the same time. Justice Chan answered this argument by noting a distinction between adjudication and arbitration or even litigation; that is, it is 'rough justice'. It was also important in the judge's reasoning that the adjudicator's decision was immediately final, binding and enforceable. This fact mitigated against claims for damages at common law, which could involve huge sums, also being heard by the adjudicator. As for the arguments which were raised under conditions 69(3) and 89(3) Justice Chan simply said they provided no assistance to the issue at hand. The final argument under clause 92(1) was perhaps logically the most difficult. That is, why should an engineer or mediator be able to hear claims for damages at common law when the adjudicator cannot. Justice Chan reasoned that it was because adjudication 'was designed to be a quick but final and binding decision', and even though the timeframes are also very short for Stages 1 and 2. In addition the judge felt that it made a difference that there was no obligation to follow an engineer's decision or accept the mediator's recommendation. He was thus able to conclude:

In the premises, there could plainly be no harm for all claims of whatsoever nature, including damages at common law, to be considered by an engineer or a mediator if they agreed to adjudicate upon such claims.

Indeed, the judge added: "Any injustice that may result from a hasty or ill-considered decision due to pressure of time could

be avoided by the party prejudiced by simply refusing to abide by such decision." However, it is suggested that this is an unusual position for a judge to take toward one stage of the parties' agreed method of dispute resolution. It seems more unusual when one considers what effect it would have on the site if parties simply ignored decisions of the engineer that they did not like - namely the relationship would very quickly break down.

Conclusion

In summary the rule in the Trafalgar House case is that claims for damages at common law are not referable to an adjudicator under clause 92(8)(c) of the ACP Conditions. However, apart from this rule, the obiter or extra comments of Justice Chan regarding the nature of adjudication and the limits which it operates under as a mode of dispute resolution perhaps go too far. It seems that there is not that much which distinguishes Stages 1 and 2 from Stage 3 especially when there is arbitration as a fall-back in Stage 4, and indeed the prospect of the courts' involvement after that. Therefore while the adjudicator's jurisdiction under the ACP Conditions may be circumscribed under the rule in the Trafalgar House case, it is submitted that this conclusion should not be reached in all cases of adjudication under other conditions of contract.

J.A. McInnis is an Associate Professor of Law at Hong Kong University and the author of Hong Kong Construction Law. Editor's note: this article in this special edition of AAC on PADS replaces part 2 of the article on the Government's new tender regime which would have run this month.

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