



Benefits of Adopting Dispute Resolution Mechanism

for the Construction Industry in Hong Kong and the Greater Bay Area

Final Report

Organiser:

HKIE THE HONG KONG
INSTITUTION OF ENGINEERS
香港工程師學會

Message from the Chairman, the HKIE Construction Dispute Resolution Committee



Ir. Dr. Christopher TO

Chairman for Session 2022/23

The Hong Kong Institution of Engineers -
Construction Dispute Resolution
Committee

robust and comprehensive framework to facilitate the development of ADR mechanisms that include adjudication, arbitration, mediation and expert determination so that HKIE members would be in a better position to provide their professional services to those disputants in need.

Since its inception the CDRC has been active in looking after the interests of HKIE members and the public at large, apart from becoming one of the four professional organizations admitted to the Register of Adjudicator Nominating Body (ANB) to support the policy of the Development Bureau, the CDRC has organized a variety of dispute resolution trainings programmes/courses to equip (and enhance) HKIE members with the necessary skills set to meet the ADR challenges and opportunities ahead.

I am confident that the PASS funding project, together with the various trainings conducted so far, do have the impetus to allow our HKIE members to develop further afield beyond the Greater Bay Area.

I would like to express my heartfelt gratitude to the Committee Members of the Construction Dispute Resolution Committee (CDRC) of HKIE for organizing these three events over a period of one year since our application to the Professional Services Advancement Support Scheme (PASS) for funding.

The events were successfully conducted despite the various restrictions encountered during the outbreak of COVID-19 and attracted over 1,000 audiences from online and offline to attend.

In line with HKIE theme of “Time to Change”, CDRC timely organised these events in response to the escalating demand for dispute resolution services within engineering and construction industry in recent years. Engineers with technical experience coupled with Alternative Dispute Resolution (ADR) knowledge are in an ideal position to serve as neutrals to handle construction and engineering disputes.

HKIE established CDRC in mid-2018, under the Chairmanship of Ir Sidney TONG together with a group of dedicated members with background experience in the engineering and the legal disciplines, tasked to create a

About the HKIE Construction Dispute Resolution Committee

The Hong Kong Institution of Engineers - Construction Dispute Resolution (CDR) Committee is responsible to the Learned Society Board for all matters relating to adjudication, arbitration, mediation, any other forms of dispute resolution, as well as the development of alternative dispute resolution, and in particular relating to the engineering profession.

Aims

- To promote the use of adjudication, arbitration, mediation or other appropriate forms of dispute resolution mechanism in handling disputes in relation to construction and engineering;
- To promote knowledge sharing and transfer about adjudication, arbitration, mediation and other forms of dispute resolution mechanism;
- To facilitate the provision of training relevant to adjudication, arbitration, mediation and other forms of dispute resolution mechanisms;
- To accredit arbitrators and maintain the Institution's Lists of Arbitrators and Mediators;
- To propose direction and provide assistance in the development, management, accreditation, and administration on matters relating to adjudication, such as the management of the proposed body of engineering adjudication nomination under the proposed Security of Payment Legislation; and
- To advise the Institution on adjudication, arbitration, mediation as well as other matters relating to alternative dispute resolution.

CDR Committee of Session 2022/2023

Capacity	Name
Chairman	Ir Prof TO Wing Christopher
Immediate Past Chairman	Ir TONG Pui Keung Sidney
Member	Ir CHAN Yu Sum Sam
Member	Mr MAK Wai Hung Otto
Member	Ir KWONG Hui Lok Anthony
Member	Ir YEUNG Ming Tai
Member	Ir TANG Ming Sum Michelle
Member	Ir LEUNG Man Yee Mandy
Member	Ir LEUNG Wing Keung Albert
Member	Ir PONG Chung Lai Jeremy
Member	Ir CHAN To Cheong Ben
Member	Ir MAK Ka Wai
Co-opted Member	Ir CHEUNG Kwan Wing Kenneth
Co-opted Member	Mr WONG Wing Fai Indi



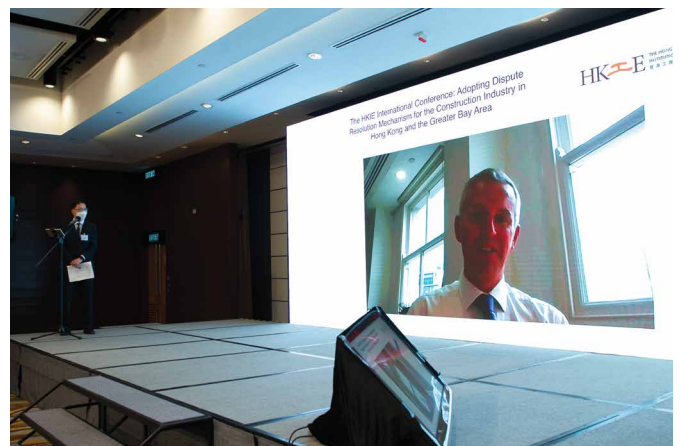
Conference | Adopting Dispute Resolution Mechanism for the Construction Industry in Hong Kong and the Greater Bay Area

Hong Kong Convention and Exhibition Centre (Hybrid) | 16 August 2022

at a Glance

12 Invited Guests & Speakers	2 Keynotes	7 Discussion Topics
171 Onsite Participants	437 Online Participants	577 Engineering Professionals







Summary and Highlights

(in presentation order)

Welcome Speech

Ir CHUNG Kwok-fai, Edwin
President for Session 2021/2022,
The Hong Kong Institution of Engineers



Review (Video)



Speech by Guest of Honour

Ir LAU Chun-kit, Ricky, JP
Permanent Secretary for Development (Works)
Development Bureau, the Government of the Hong Kong Special Administrative Region



Review (Video)



Speaker Notes



Keynote (Morning Session)

Mr YUEN Kwok-keung, Rimsky, GBM, SC, JP
Co-chair, Hong Kong International Arbitration Centre
Member of the Expert Committee of the China International Commercial Court



Review (Video)



Discussion

Can Adjudication Cure All Disputes within the Construction Industry?

Ir Dr TO Wing, Christopher

Barrister-at-law, Gilt Chambers



Ir Dr Christopher TO, is an independent mediator, adjudicator and arbitrator who is on the panels of various leading global alternative dispute resolution bodies. He has arbitrated a variety of international cases involving both ad hoc and institutional arbitrations; mediated and adjudicated many international and domestic cases and has represented clients as Counsel in cases at the Magistrate, District and High Courts, the Commission of Inquiry, disciplinary proceedings as well as in international arbitrations and mediations.

Dr To discussed various aspects of adjudication and its role in resolving disputes within the construction industry. He highlighted the advantages and disadvantages of adjudication, the challenges and limitations it poses, the process involved, the importance of proper documentation, the role of lawyers and E&M engineers, the need for legislation, and the global efforts towards consistent laws for adjudication. Christopher emphasised the importance of proactive management, commitment to utilizing dispute resolution processes, and staying updated with the latest developments in the field. He concluded by acknowledging the global adoption of adjudication and expressing confidence in the future implementation of legislation in Hong Kong.

Review (Video)



Speaker Notes



Discussion

The Current International Trend for Dispute Resolution in the Construction Industry

Ms Amanda LEES

Partner, King & Wood Mallesons Singapore



Amanda is a cross border dispute resolution specialist based in King & Wood Mallesons Singapore office. She assists her clients to resolve disputes through international arbitration, litigation and mediation. Amanda is an expert in international arbitration in the Asia Pacific region, including in Malaysia, Indonesia, Vietnam, Myanmar, India, China, Hong Kong, Singapore and Australia. Amanda has significant experience in both commercial and investment treaty arbitration. She also acts as international counsel in complex cross border litigation.

Amanda discussed the current international trend for dispute resolution in the construction industry. She highlighted two broad areas: macro global trends driving future disputes and trends in dispute resolution processes to increase efficiency. The macro trends include challenging economic and geopolitical conditions, as well as the drive towards decarbonization. Challenges in the construction industry, such as the ongoing effects of the COVID-19 pandemic, disruptions on sites, delays in projects, and pressure on lead times and costs, are major factors driving disputes. Amanda also emphasised the use of technology in dispute resolution, beyond just virtual platforms like Zoom, and the need for quicker resolution processes that address the longstanding issues of time and cost in resolving construction disputes.

Review (Video)



Speaker Notes



Discussion

Proposed Amendment of the Arbitration Law

Mr Lijun CAO

Partner, Zhong Lun Law Firm



Mr Cao Lijun was licensed to practice law in China and New York State. He has extensive experience in international arbitration and commercial litigation, and is now a co-head of Zhong Lun's Dispute Resolution Department. He has been recognized by various legal directories as a leading lawyer in China-related disputes and ranked as top-tier international arbitration lawyer.

Lijun elaborated the proposed amendment to the arbitration law in China, which aims to provide more flexibility and bring the country's arbitration regime in line with international standards. It includes changes such as removing the requirement for a specific form of arbitration agreement, recognizing foreign arbitration institutions on the same status as Chinese arbitration commissions, and clarifying the seat of arbitration. Lijun addressed the issues related to the recognition and enforcement of ICC awards, embraces the doctrine of competence-competence, expands the scope of interim measures, and introduces provisions for conducting virtual arbitrations. He also discussed the concerns on implementing ad hoc arbitration and the potential prejudicial effects of sham arbitration.

Review (Video)



Speaker Notes



Keynote (Afternoon Session)

Ir Dr Hon Lo Wai-kwok, GBS, MH, JP

Member of the Legislative Council of the Hong Kong Special Administrative Region



Review (Video)



Speaker Notes



Discussion

Benefits of Engaging Engineers in Handling Construction Disputes

Dr Robert GAITSKELL QC

Arbitrator, Keating Chambers



Dr Robert Gaitskell QC practises from Keating Chambers, specialising in technology, engineering and construction disputes, often of an international nature. He was called to the Bar in 1978, appointed Queen's Counsel in 1994 and sat as a Recorder (part-time judge) from 2000 - 2010. Robert Gaitskell predominantly acts as an arbitrator, adjudicator, dispute board member and mediator. He is both a lawyer and a professional engineer.

Dr Gaitskell emphasised the importance of engaging engineers in the handling of construction disputes. Engineers play crucial roles in various capacities such as adjudicators, arbitrators, and experts providing advice and generating reports. They are often at the core of construction disputes, particularly those with expertise in relevant engineering fields. Their evidence is instrumental in helping tribunals reach conclusions. Dr Gaitskell highlighted the significance of involving engineers in early dispute resolution methods, such as expert determination and early neutral evaluation, which can help in reaching settlements efficiently. He emphasised the importance of integrity, honesty, and expertise in the role of engineers in dispute resolution. Dr Gaitskell encouraged engineers to seek guidance from professional institutions and specialized bodies to enhance their knowledge and contribute effectively to resolving construction disputes.

Review (Video)



Discussion

Mechanism to Deal with Unforeseen Unprecedented Contractual Impacts

Ms Karen GOUGH

Barrister, 39 Essex Chambers



Karen Gough, is a Barrister, in practice from 39 Essex Chambers, London; an Attorney-at-law (Jamaica and Trinidad and Tobago), an accredited adjudicator and a Chartered Arbitrator. She is a past President of the Chartered Institute of Arbitrators, a UK member of the International Statutory Adjudication Expert Committee, a Vice Chairman of the ICP of the IPBA, the Vice Chairman of the Society of Construction Law UK and a teaching fellow at the College of Law in Australia.

Karen emphasised the importance of mechanisms to deal with unforeseen contractual impacts, especially in light of the COVID-19 pandemic. She discussed the allocation of risks in contracts and the need for contractors to conduct their own investigations and assessments to mitigate unforeseen impacts. Gough also highlighted the use of NEC contracts and the importance of carefully drafting new contracts to address post-pandemic issues. She emphasised the need for collaboration, creativity, and compromise to handle unforeseen events and suggests alternative dispute resolution methods like mediation. Gough concluded by discussing the question of compensation for unforeseen costs in lump sum contracts, highlighting the importance of records and a conservative approach.

Review (Video)



Speaker Notes



Discussion

Clauses Related to Dispute Resolution in FIDIC Contracts

Mr Tony DYMOND

Partner, Debevoise & Plimpton LLP



Tony Dymond is a partner in Debevoise & Plimpton LLP's London and Hong Kong offices, and a member of the International Dispute Resolution Group. He is Co-Chair of the firm's Asia Arbitration practice. His practice focuses on complex, multijurisdictional disputes, in both litigation and arbitration. He also regularly acts on shareholder and joint venture disputes and on corporate governance disputes. He has appeared in arbitrations under the principal arbitration rules and in the English and Hong Kong courts.

Tony Dymond discussed the clauses related to dispute resolution in FIDIC contracts. He explained that the 1999 edition introduced the Dispute Adjudication Board (DAB) to address concerns about the engineer's impartiality in deciding disputes, while the 2017 edition made significant changes to claim mechanisms. Dymond emphasised the importance of complying with time limits for claims and disputes and discusses the process of submitting a notice of dissatisfaction. He also highlighted the role of the DAB in providing advisory and binding decisions. However, he noted that the rigid process outlined in FIDIC contracts and potential conflicts with local laws can pose challenges to effective dispute resolution. Dymond concluded by discussing the risk allocation in contracts and the potential consequences of using one-sided contracts in terms of attracting bidders and facing claims in the future.

Review (Video)



Discussion

Concepts of Proof in Large Construction Disputes

Mr Julian BAILEY

Partner, White & Case LLP



Julian Bailey is a partner in the London office of White & Case LLP, practising in the firm's International Arbitration and Construction and Engineering Groups. Julian is actively involved in construction law issues and was Chairman of the Society of Construction Law (UK) (2015-2016), the leading industry body for construction law. He is also the author of "Construction Law, London Publishing Partnership", one of the leading books on construction law.

Julian Bailey discussed the concepts of proof in large construction disputes, emphasising the importance of evidence and proof in such cases. He presented historical examples and landmark cases that shaped the law of evidence in construction disputes. Bailey also explored different approaches that courts or tribunals can take when dealing with issues in large construction disputes. He discussed the use of sampling and extrapolation in construction disputes and highlights the challenges and potential pitfalls associated with these methods. Additionally, Bailey examined the role of factual witnesses and expert witnesses in dispute resolution for large construction disputes, considering the balance between efficiency and fairness. Overall, he emphasised the need for pragmatic approaches that consider the specific circumstances of each case while ensuring the pursuit of justice.

Review (Video)



Speaker Notes



Closing Speech

Ir TONG Pui-keung, Sidney

Chairman for Session 2021/2022,

The Hong Kong Institution of Engineers - Construction Dispute Resolution Committee



Review (Video)



Feedbacks

178

Number of Responses

173

No. of Responses with
Engineering Background

4.34_{/5}

Overall Satisfactory

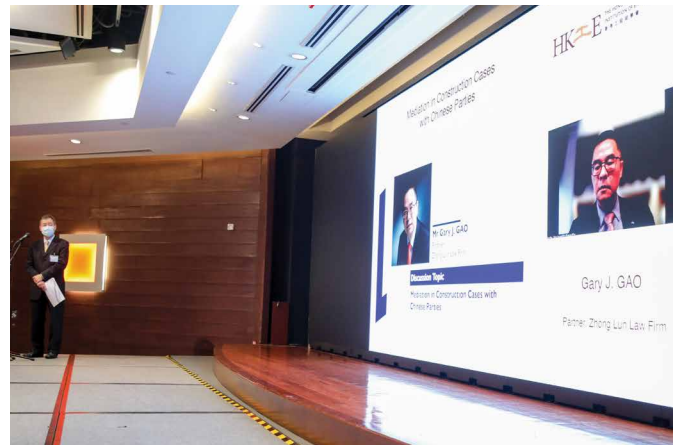


Seminar | Resolving International Disputes in the Greater Bay Area (Part I)

Hong Kong Convention and Exhibition Centre (Hybrid) | 22 November 2022

at a Glance

5 Invited Guests & Speakers	4 Discussion Topics	
28 Onsite Participants	209 Online Participants	237 Engineering Professionals





Summary and Highlights

(in presentation order)

Welcome Speech

Ir Aaron BOK Kwok-ming

President for Session 2022/2023,
The Hong Kong Institution of Engineers



Review (Video)



Discussion

Third Party Funding Arbitration in the Construction Industry

Mr YEUNG Ming-tai

Member, Anthony Rogers Chambers



Yeung Ming-Tai is both a practising barrister and a professional civil engineer. He has considerable experience in preparation of contract documentation and in contract administration and handling claims by contractors in infrastructure, highways and earthworks projects. He has practised as a civil engineer for 11 years. He has been acting as a sole arbitrator and co-arbitrator in many construction and commercial disputes. He is now listed in the HKIAC panel of arbitrators, the Bar Association panel of arbitrators and the Hong Kong Institution of Engineers panel of arbitrators.

Mr Yeung discussed the topic of third-party funding in arbitration in the construction industry. Third-party funding refers to someone providing funds for the arbitration process, usually in the form of a legal loan, and they receive a share of the recoveries if the proceedings are successful. This type of funding is common in other countries but is still being explored in Hong Kong. The speaker highlighted the allocation of risk and profit in third-party funding cases and the challenges posed by the doctrines of maintenance and charity. He discussed the various categories of cases where third-party funding can be justified and the need for further discussions on the issue in the law reform committee. Mr Yeung explored the stance of different jurisdictions on third-party funding and the potential benefits of allowing it in arbitration proceedings. He then delved into the introduction of legislation and a code of practice for third-party funding in arbitration, outlining the provisions related to funding agreements in the construction industry.

Review (Video)



Speaker Notes



Discussion

Mediation in Construction Cases with Chinese Parties

Mr Gary J. GAO

Partner, Zhong Lun Law Firm



Gary GAO is the Partner of Beijing Zhong Lun Law Firm Shanghai Office. He has extensive experience in cross-border litigation, international commercial arbitration and mediation, regulatory and compliance matter; domestic dispute resolution, crisis management and complex commercial litigation; corporate financing and restructuring, as well as foreign direct investment.

Gary discussed mediation in construction cases involving Chinese parties. He highlighted the increasing number of construction disputes in China and the benefits of using mediation to resolve them. Gao emphasised the importance of finding a skilled mediator who understands the specific characteristics and concerns of Chinese parties. He also discussed two common methods used in mediation for construction disputes and suggested incorporating more Chinese elements into international construction dispute mediations. GAO concluded by stating that mediation is a common and preferred approach in Chinese construction disputes, particularly due to the value placed on long-term cooperative relationships and the aversion to the uncertainty of litigation or arbitration.

Review (Video)



Speaker Notes



Discussion

A Real Construction Case Arbitrated with Interplays from the Mainland Courts

Mr Tim Yimin LIU

Partner, Global Law Office



Tim Yimin Liu, FCI Arb, mainly works on China domestic and cross-border dispute resolution arising from corporate governance, shareholder rights, complex commercial, merger and acquisition, liquidation and bankruptcy, etc. Tim's practices include parallel litigation, international commercial arbitration and mediation, seeking or rejecting recognition and enforcement of awards, setting aside awards before state courts. Tim is also involved in cross border bankruptcy and assets recovery in various jurisdictions.

In his presentation, Tim reviewed the real construction cases, the property preservation in arbitral proceedings, and the enforcement of arbitration awards in China. He also shared and compared the interim measures between the Mainland and Hong Kong under the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR".

Tim discussed a real construction case that involved a construction contractor filing for arbitration against a developer. The case explored the interplay between the arbitration commission and the court in construction disputes. Specifically, Liu discussed the process of applying for property preservation through the court, objections to the value of the dispute, rectification of calculations, and the option to set aside an award. He also explains the jurisdiction and legal processes involved in filing a property preservation application in China, the efficiency and importance of the mutual arrangement between Hong Kong and Mainland China regarding the enforcement of interim measures, and the different routes to challenge an arbitration award in mainland China.

Review (Video)



Speaker Notes



Discussion

Dispute Avoidance & Dispute Resolution

Mr Sean Sullivan GIBBS

Chief Executive Officer, Hanscomb Intercontinental Ltd



Sean has held directorships and senior commercial positions with contracting and consultancy firms in the United Kingdom and Internationally. With over 30 years' experience in the onshore and offshore construction and engineering industries across the globe Sean has worked across the continents of Europe, Asia, Middle East, Africa and the Americas. He has acted as quantum expert before various dispute resolution tribunals including adjudication, dispute board, expert determination and arbitration.

Sean discussed the importance of dispute avoidance and resolution in the construction industry. He highlighted the global problem of disputes in construction projects and the efforts being made to address it. Gibbs mentioned the Conflict Avoidance Pledge, which aims to prevent disputes by taking robust action before they escalate. He also discussed the different dispute resolution processes in contracts like the NEC and FIDIC forms, as well as the use of dispute boards in various regions around the world. Gibbs emphasised the need for parties to adhere to contract provisions and consider ways to avoid disputes when negotiating contracts. He also touched on the effectiveness of adjudication laws in different jurisdictions.

Review (Video)



Speaker Notes



Feedbacks

104

Number of Reponses

92

No. of Reponses with
Engineering Background

4.09_{/5}

Overall Satisfactory

The HKIE Seminar

29 March 2023 | HKCEC

Resolving International Disputes in GBA and ASEAN (Part II)



Seminar | Resolving International Disputes in GBA and ASEAN (Part II)

Hong Kong Convention and Exhibition Centre (Hybrid) | 29 March 2023

at a Glance

6 Invited Guests & Speakers	4 Discussion Topics	
32 Onsite Participants	157 Online Participants	189 Engineering Professionals





Summary and Highlights

(in presentation order)

Opening Remarks

Ir Dr TO Wing, Christopher

Chairman for Session 2022/23

The Hong Kong Institution of Engineers - Construction Dispute Resolution Committee



Review (Video)



Discussion

Good Choice of Venue and Arbitration Rules for Access to Justice in GBA Construction Cases

Mr WONG Chat Chor, Samuel

Barrister-at-Law, Chartered Arbitrator, FCIArb, FHKIArb, Mediator



Samuel Wong is an experienced dispute resolver. He practices as a barrister and adjudicates disputes as an arbitrator. He covers a wide range of commercial disputes in which the governing law of the contract spans from New York law, UK law, Hong Kong law and PRC law. Mr. Wong has extensive litigation experience in civil and commercial matters in the High Court of the Hong Kong SAR including enforcement and setting aside of arbitral awards, removal of arbitrator, land, construction, adverse possession, building management, probate, licensing, joint venture, shareholder, company, contractual and tort disputes. He was appointed in numerous institutional arbitrations carried out under the rules of CIETAC, ICC, HKIAC, KLRCA and PRC Arbitration Commissions and ad hoc arbitrations under UNCITRAL Arbitration Rules.

He has also advocated for parties in Hong Kong in ad hoc arbitrations and in FOSFA, LME and ICC arbitrations.

Samuel discussed the importance of choosing the right venue and arbitration rules for access to justice in construction cases in the Greater Bay Area (GBA). Wong argued that one set of rules cannot govern dispute resolution in all the jurisdictions within the GBA and emphasised the need for diversified sets of rules and institutions. He highlighted the importance of flexibility and choice in promoting access to justice in construction cases, and mentions Hong Kong as an ideal choice for dispute resolution due to its proximity to China, pool of legal practitioners and experts, bilingual abilities, and tradition of resolving disputes under common law. Wong also mentioned the Guangzhou Arbitration Commission as another institution that allows parties to choose where to arbitrate.

Review (Video)



Speaker Notes



Discussion

The Roles and Contributions of Engineers for Construction Dispute Adjudication

Ir LEUNG Wing Keung, Albert

Member, The Hong Kong Institution of Engineers - Construction Dispute Resolution Committee



Mr Albert Leung is a chartered civil engineer with over 40 years' experience in engineering works in Hong Kong, Mainland China, Macau, ASEAN countries, Solomon Island, Australia, New Zealand as well as the United Kingdom etc. He has worked on a wide spectrum of engineering projects and has particular expertise in modular integrated construction (MiC) application. He has been involved in mediation, arbitration, litigation and expert witness works on contract and payment, forensic engineering, marine engineering, structural and civil engineering disputes.

Albert discussed the roles and contributions of engineers in construction dispute adjudication. He emphasised Hong Kong's position as a dispute resolution centre and the efforts to enhance its status in the Asia Pacific region. Leung highlighted the importance of security of payment legislation in the construction industry to ensure timely payments and prevent financial difficulties for contractors. He also discussed the need for early intervention through mediation to prevent disputes from escalating. The proposed legislation aims to create a more collaborative working relationship and improve payment practices in the industry. Engineers play a vital role in adjudication, both as adjudicators and in preparing for adjudication by adopting efficient record-keeping practices. Leung emphasised the importance of adhering to the principles of natural justice and the Golden Rule in construction dispute adjudication.

Review (Video)



Speaker Notes



Discussion

Long Term Oriented Methods for Dispute Resolution in the Greater Bay Area

Mr ZHANG Yulin, Jerry

Founder, Beijing linli Law Office



Jerry Zhang has many years of experience in international intellectual property law, corporate/commercial and dispute resolution, particularly in Chinese law and its application in cross border investment and economic activities. In the area of dispute resolution, Mr Zhang has acted as counsel in prosecuting complaints, claims or acting on the defence/counterclaim in various foreign related cases. As arbitrator, he has accepted many appointments as sole arbitrator, co-arbitrator or presiding arbitrator or panellist in handling international arbitration or domain name matters with China International Economic and Trade Arbitration Commission (CIETAC) or Hong Kong International Arbitration Centre (HKIAC).

Jerry discussed long-term oriented methods for dispute resolution in the Greater Bay Area (GBA). He emphasised the importance of taking a global and long-term view on dispute resolution, using both international and domestic practices according to the needs of the GBA. Zhang discussed the structure of the Chinese legal system and how it operates, as well as the relevant laws and methods of dispute resolution. Zhang provided case studies to illustrate the lengthy process of civil litigation in China and the importance of alternative methods such as adjudication and neutralization. Zhang emphasised the need for alignment in interpretations and the importance of confirming the validity of contractual clauses to avoid lengthy legal battles.

Review (Video)



Speaker Notes



Discussion

Construction Adjudication – The Malaysian Experience

Mr Kevin PRAKASH

Principal, Kevin Prakash



Kevin has an active practice in dispute resolution and has been involved in complex disputes in various forms since being called to the Malaysian Bar in 1998. He is regularly engaged as counsel in arbitration as well as in trial and appellate advocacy at the High Court and the appellate Courts in Malaysia. His principal practice is in construction and building contract disputes and has represented a diverse set of clients including employer, main-contractor and sub-contractor. Kevin is a member of the AIAC Panel of Arbitrators and Adjudicators and is regularly appointed as adjudicator and arbitrator both by party appointment and by the appointing authority.

Kevin discussed the construction adjudication framework in Malaysia, specifically focusing on the Construction Industry Payment and Adjudication Act. This act, which came into effect in April 2014, aims to address payment issues faced by contractors and ensure cash flow in the industry. It provides statutory adjudication to resolve payment disputes quickly and prevent project delays or terminations. The act applies to all construction contracts and covers a wide range of construction work and consultancy services. Prakash explained the process of adjudication, highlighting the powers of an adjudicator and the binding nature of adjudication decisions. He also discussed the increase in references to adjudication in the Malaysian construction industry and emphasises the benefits of adjudication in resolving disputes effectively.

Review (Video)



Speaker Notes



Closing Remarks

Ir MA Siu-Cheung, Eric

Vice President for Session 2022/2023

The Hong Kong Institution of Engineers



Review (Video)



Feedbacks

83

Number of Responses

78

No. of Responses with
Engineering Background

4.28_{/5}

Overall Satisfactory

Representative Cases

Case 1 *Folkes v. Chadd* (1783) 3 Doug KB 157 [99 ER 589]

Folkes v. Chadd, which is also known as the Wells Harbour Case, was about whether the construction of an artificial embankment had caused the silting up of the harbour at Wells by the Sea, a town in Norfolk England and thus constituted a nuisance. Different experts had been heard. Mr Smeaton, a civil engineer was asked to present to the court his opinion the factual evidence presented earlier but his opinion initially deemed inadmissible.

Lord Mansfield, on his ruling on the appeal of admissibility of the opinion of Mr. Smeaton, stated:

It is objected that Mr. Smeaton is going to speak not to facts, but to opinion. That opinion, however is deduced from facts which are not disputed - the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all the facts is, that mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskill-fully navigating ships. The question depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is whether a defect arises from natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion, and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery and as to the impression of seal, whether the impression was made from the seal itself or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not taken. I have myself received the opinion of Mr. Smeaton respecting wills, as a matter of science. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, men such as Mr. Smeaton alone can judge. Therefore we are of the opinion that his judgment, formed on facts was very proper evidence".

Summary:

Lord Mansfield have laid down the first rules on the admissibility of opinion evidence in Common Law Judiciary. Opinion formed on facts can be admitted as evidence in court.

Case 2 Van Oord UK Limited and SICIM Roadbridge Limited v. Allseas UK Limited [2015] EWHC 3074 (TCC)

In this case, the claimant (Van Oord UK Limited and SICIM Roadbridge Limited) made a number of claims against the defendant (Allseas UK Limited) arising out of the onshore laying of a thirty-inch gas export pipeline in the Shetland Islands in Scotland.

Here the Judge refused a claim based on allegedly unforeseen ground conditions.

The claimant argued that, if the ground conditions were not expressly identified in the geotechnical information provided pre-contract, then they had a claim for unforeseen ground conditions.

Mr Justice Akenhead rejected that approach saying:

“I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise. In so doing not only do I accept the approach adumbrated by Mr Hall [the defendant’s geotechnical expert] in evidence but also I adopt what seems to me to be simple common sense by any contractor in this field.”

“Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall.”

The judge held the view that it is wrong in principle for a contractor to argue that, merely because, in some particular locations, the conditions were different from those set out in the pre-contract information, those different conditions must somehow have been unforeseeable.

In another part of the judgement, Mr Justice Coulson criticised the performance and professionalism of Van Oord UK Limited and SICIM Roadbridge Limited’s Quantum Expert.

“[the expert’s] abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the stress he was under. But I regret to say that I came to the conclusion that his evidence was entirely worthless”.

He supported his criticism by giving twelve reasons for his view. This case drove home the danger in putting forward an expert who is not only obviously partial but who has also failed to follow proper process and procedure in writing the expert report.

Summary:

The ruling demonstrates the importance of parties having full understanding of their obligations under the contract and the reliance that should be afforded to pre-contractual documentation. It reemphasises the common law position remains that, without an express provision to the contrary, ground condition is a responsibility that resides with the contractor

This case also drives home the danger in putting forward an expert who is not only obviously partial but who has also failed to follow proper process and procedure in writing the expert report.

Case 3 Court of Appeal's Decision on Building Design Partnership Ltd v. Standard Life Assurance Ltd [2021] EWCA Civ 1793

Standard Life was the developer of a mixed retail and residential development in Newbury, Berkshire. Costain was engaged to carry out the construction works. The contract sum for the building contract was agreed at £77.4m. The final account was almost twice that, at £146.6m. £50.3m of the final account paid to Costain was made up of 3,604 variations and associated loss and expense claims.

Standard Life brought claims against a number of the project team, including the contract administrator, Building Design Partnership (BDP), which it alleged was largely responsible for considerable overspend. Standard Life investigated 167 variations. The value of Standard Life's claim in relation to these 167 variations was £3.7m. Standard Life assessed that about 80% of those variation were This was one part of what was known as the Detailed Claim. Standard Life assessed that BDP was responsible 122 of those 167 variations, and of those 122 variation, BDP were responsible for around 81 percent of the value.

Standard Life then extrapolated these results across the remaining 3,437 variations which it had not investigated in order to make a series of specific allegations against BDP. First, Standard Life took the 83.1% (the % of variations for which it said the design team were responsible) and extrapolated that across the remaining 3,437 variations. This gave it a figure of £23.6m (being 83.1% of the £28.4m element of the final account paid to Costain for variations to the building contract). Secondly, Standard Life applied the 81.71% representing the proportion that BDP, as opposed to other members of the design team, was specifically said to be responsible for to arrive at a figure of £19.3m (i.e. £23.6m x 81.71%).

The Court of Appeal dismissed the appeal against Kerr J's decision to allow Standard Life to plead its original statement of case on an extrapolated basis without pleading a detailed case on each of the allegations.

Coulson LJ makes clear in paragraph 92 of his judgment that:

“The days of the court requiring parties in detailed commercial and construction cases to plead out everything to the nth degree are over. It is not sensible; it is not cost-effective; it is not proportionate ... Pleading out every last detail at the outset of the proceedings should not be regarded as the paradigm method of framing such disputes, particularly if there are more proportionate alternatives which still enable the defendant to know the case that it has to meet.”

The Court held that, in an appropriate case and with proportionality in mind, extrapolation can be used to plead claims against a professional in relation to an unknown population of the professional's work based on a known sample of the professional's work.

Summary:

Sampling is an established scientific discipline that is reliable when the proper methodology is applied. Where there may be flaws in the methodology used in establishing or supporting one's case, our adversarial legal system allows such flaws to be challenged by the other party, which mitigates the unfairness that may be posed by biased sampling. The advantage of accepting extrapolated claims is the ability of assessing a large amount of defects effectively while managing the litigation costs at a proportionate level to the subject in dispute.

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