Security of Payment in the Construction Industry: Does International Experience Provide a Crystal Ball for North America?

Matthew Bell, Christopher Ennis, Anand Juddoo, Sundra Rajoo, Bruce Reynolds and Sharon Vogel

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ABSTRACT

Over the past two decades, more than a dozen jurisdictions around the world have enacted legislative reform programs to promote ‘security of payment’ within their construction industries. There are two linked foundations to these reforms: ensuring prompt payment for work done, and rapid interim adjudication of disputes over the amount of payment due for that work. This paper examines the reform processes currently underway in North America, focusing on those recently implemented in Ontario, Canada. It then draws on the experience in several other jurisdictions which have had security of payment legislation in place for some time (the UK, Ireland, the Australian states and territories, New Zealand, and Malaysia), along with proposed legislation in Mauritius, in order to distil lessons which can be applied for the benefit of the reform programs in North America. These include the need for clarity and, to the extent possible, cross-border consistency in the drafting and application of the elements of the schemes.
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A Introduction

Construction law reform programs around the world are replete with sentiments along the following lines:

‘The Government believes that an efficient and competitive industry benefits the wider … community as well as those whose livelihoods depend on it. When industry participants are distracted or starved of funding by disputes or late payments, hardship can result and projects can suffer delays and falling standards.’\(^1\)

In this case, the statement comes from Hong Kong. However, it could have come from any of more than a dozen jurisdictions around the world which have enacted legislative reform programs to promote ‘security of payment’ within their construction industries over the past two decades. The enactment in the UK in 1996 of the *Housing Grants, Construction and Regeneration Act 1996* (‘HGCRA’) provided the model for these reforms.

As at mid-2018, the primary statutes coming out of the respective reform programs in each of these jurisdictions are as follows:\(^2\)

- Australian Capital Territory – *Building and Construction Industry Security of Payment Act 2009*;
- Ireland – *Construction Contracts Act 2013*;
- Isle of Man – *Construction Contracts Act 2004*;
- Malaysia – *Construction Industry Payment and Adjudication Act 2012*;
- Mauritius – *Construction Contracts Act 2016* (discussion draft – see Part C4 below);
- New Zealand – *Construction Contracts Act 2002*;
- Northern Territory – *Construction Contracts (Security of Payments) Act 2004*;
- Ontario – *Construction Act 1990*;\(^3\)
- Queensland – *Building Industry Fairness (Security of Payment) Act 2017*;\(^4\)

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\(^2\) In this paper, these Acts, other than the HGCRA, are referred to by their respective jurisdictions, i.e. ‘Irish Act’, ‘Malaysian Act’, ‘Ontario Act’, ‘Victorian Act’ and so forth.

\(^3\) This Act was, until 1 July 2018, named the ‘*Construction Lien Act*’: it was renamed as part of the first tranche of amendments effected by the *Construction Lien Amendment Act 2017*.

\(^4\) This Act was due to supersede the *Building and Construction Industry Payments Act 2004* (Qld) and *Subcontractors’ Charges Act 1974* (Qld) on 1 July 2018. However, that consolidation has now been postponed until 17 December 2018, leaving the progress payment and subcontractors’ charges provisions under these two Acts (rather than those under the 2017 Act) in place until then.
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- South Australia – Building and Construction Industry Security of Payment Act 2009;
- Western Australia – Construction Contracts Act 2004.

Jurisdictions which are considering the implementation of similar legislation include Hong Kong, South Africa and – as discussed in Part C4 below – Mauritius.

As the statement from Hong Kong reflects, there are two linked foundations to these reforms: ensuring prompt payment for work done, and rapid adjudication (albeit on an interim basis) of disputes over the amount of payment due for that work. Whilst the dual-headed policy goal is the matter of broad consensus, the way in which individual jurisdictions have designed the detail of their respective legislative vehicles differs markedly. This divergence can be appreciated immediately if the statutes are lined up against each other: for example, the Irish Act runs to some 13 pages whereas the Victorian one is close to 80. A detailed analysis of the differences between these approaches reveals disparities which have significant practical effects.5 The situation has been recognized as ‘absurd’ in the context of an industry which routinely operates across state (and, for that matter, international) borders.6

On 5 December 2017, the Construction Lien Amendment Act 2017 was passed by the Ontario Parliament. Its reforms, which are coming into force during 2018-19, were described by the province’s Attorney-General as ‘the biggest change to our construction laws in over 34 years.’7 They had their genesis in a report – Striking the Balance: Expert Review of Ontario’s Construction Lien Act –8 prepared by a team led by two of the contributors to this paper, Bruce Reynolds and Sharon Vogel.

As at mid-2018, several other Canadian provinces are pursuing or implementing similar reforms, and the Canada Prompt Payment Act remains before the federal parliament for

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6 Australian Senate (Economics References Committee), “I just want to be paid”: Insolvency in the Australian construction industry’ (December 2015), [9.105].

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consideration. With these reform programs in mind, this paper seeks to continue the process of sharing and digesting learnings across provincial and national borders which was exemplified by the Striking the Balance report.

The paper begins (in Part B) with a more detailed outline of the reform processes currently underway in North America, focusing on those in Ontario. It then proceeds, in Part C, to examine the experience in several other jurisdictions which have had HGCRA-derived legislation in place for some time, in order to distil lessons which can be applied for the benefit of the reform programs in North America.

B Security of Payment in North America

Bruce Reynolds and Sharon Vogel

1 Overview of Approaches in Canada and United States

Security of payment legislation is not new to North America. Lien legislation has existed in North America since it was introduced by Thomas Jefferson in 1791 in the state of Maryland during the construction of many key buildings in Washington DC. Lien legislation is in fact a form of security of payment legislation as it provides participants on a construction project with a limited security for the work they perform.

More recently, the global prompt payment movement is sometimes said to have originated in the United States given that, in the 1980s, the federal government of the United States and 49 states introduced legislation to address payment issues on construction projects by imposing time limits for processing payment claims and by imposing mandatory interest payments in circumstances where there is a breach of such payment timelines.

However, and unfortunately for parties to construction contracts that are subject to such legislation in the United States, there is no legislated dispute resolution mechanism to resolve gridlock scenarios when a dispute develops. However, adjudication, as a swift and flexible

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dispute resolution mechanism, has now been adopted in the Canadian province of Ontario and is being considered by the federal government in Canada.

1.1 US Prompt Payment Legislation

The federal Prompt Payment Act (US Code Chapter 39) was enacted in 1982\textsuperscript{11} and applies to all contracts for the supply of services and materials to federal agencies. Specific provisions applicable to construction contracts were not introduced until 1988. Under the Prompt Payment Act, payment timelines begin counting down following the delivery of a ‘proper invoice’ and an interest charge is imposed if payment is not made within 14 days in relation to progress payments (30 days in relation to the final invoice).

There are further requirements below the contractor/federal government level. In particular, payment obligations are imposed on contractors in respect of payments to their subcontractors under the US Federal Acquisition Regulation. Specifically, under the regulations, subcontracts are required to contain a provision that stipulates that a contractor is required to pay its subcontractor within seven days of receiving payment from a government owner.

In addition, 49 of 50 US states have enacted prompt payment legislation in relation to public sector projects. Unfortunately, the state level legislation suffers from the same inadequacy that exists at the federal level. That is to say, the remedy is restricted to mandatory interest and the right to proceed with an arbitration (if the contract provides for it) or to litigate. Of some concern, decisions in the US related to prompt payment\textsuperscript{12} have even, in some instances, shown a disregard for prompt payment and its mandatory interest requirements by \textit{inter alia}, denying that the statutes provide the basis for a private right of action in the courts\textsuperscript{13} or finding that interest was not payable given the existence of a good faith dispute.\textsuperscript{14}

\textsuperscript{11} USCA §§ 3901 to 3907 (West Supp. 2001).
\textsuperscript{12} See ‘Striking the Balance’ at Chapter 8, Section 2.4.1.3 (‘The Effectiveness of US Prompt Payment Legislation’) 169.
\textsuperscript{13} See, e.g., \textit{US. ex rel. IES Commercial, Inc. v Continental Ins. Co., Inc.} 814 F Supp 2d 1 (DDC 2011).
Broadly speaking, the case law in the US suggests that prompt payment legislation, while laudable in its intent, is largely of limited utility in the face of a disagreement about whether or not payment is due to a contractor or subcontractor.

1.2 Security of Payment Legislation in Canada

As in the US, the common law provinces and territories of Canada have historically relied on lien legislation to provide a measure of security of payment for contractors and subcontractors.

For example, Ontario’s lien legislation grants a person, who supplies services or materials to an ‘improvement’ for an owner, contractor or subcontractor, a lien upon the interest of the owner in the premises improved for the price of those services or materials. In other words, the person supplying materials or services is granted a security in the form of a limited interest in the land. In this manner, contractors, subcontractors and suppliers are granted a form of security of payment, although sometimes that security is difficult to realize upon.

Lien legislation is considered by many to be outdated and cumbersome. Most provinces and territories have not modified their lien legislation in a significant way for decades and in most of these jurisdictions the legislation no longer accurately reflects the reality of contracting on construction projects. Apart from seeking modernization of these legislative anachronisms, industry participants also often raise concerns with the level of security of payment afforded to contractors and subcontractors on construction projects. This is particularly the case in relation to circumstances of insolvency (i.e., what happens to the project funds when a contractor goes bankrupt). As a result of these and other concerns, certain Canadian provinces and the federal government have begun to consider reforms, as described below.

2 Reform in Canada

In Canada, the only jurisdiction to have enacted prompt payment and adjudication legislation is Ontario. In 2015, the authors of this section, Bruce Reynolds and Sharon Vogel, were retained by the Ontario Government to conduct a review of Ontario's Construction Lien Act. In the result, the Construction Lien Amendment Act 2017 received Royal Assent on 12
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December 2017. The Act is now titled the Construction Act (here, ‘Ontario Act’) and it includes prompt payment and adjudication provisions which will come into force in October of 2019.

2.1 Prompt Payment

The salient details of the Ontario Act, as they relate to promptness of payment, are as follows:

- **Payment Period**

  A 28-day payment period commences following the delivery of a proper invoice and a 7-day payment period for payment to sub-contractors. These time periods are subject to the delivery, by the payer, of a notice of non-payment.

- **Freedom of Contract in Respect of Invoicing Terms**

  The definition of ‘proper invoice’ includes a series of administrative requirements, as well as the stipulation that it meet ‘any other requirements that the contract specifies’. This permits parties a measure of flexibility in what constitutes a proper invoice. In particular, it allows for mechanisms such as milestone payments, phased payments, etc. It also allows parties to require certain documents be provided in advance of the payment clock being triggered (e.g., in the case of payment for roadwork, an owner may require asphalt or cement lab test results).

- **Certification**

  With some exceptions, certification processes are to take place within the 28-day payment period. Certification is not allowed as a pre-condition to the delivery of a proper invoice. However, in Ontario there was no recommendation for a corresponding prohibition on contractual clauses that stipulate payment can be delayed on account of delayed payment at a higher level on the contractual pyramid. In other words, there was no ban on pay-when-paid clauses.

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15 Ontario Act sections 6.4-6.6 (the provisions referred to in nn 15-27 are due to come into force on 1 October 2019).
16 Ontario Act section 6.1.
17 Ontario Act section 6.3.
Consequences of a Failure to Pay

In circumstances where a payer fails to make payment in relation to a proper invoice or following the determination of an adjudicator (as discussed below), certain consequences arise. In Ontario, interest begins to accrue on amounts not paid when due at the greater of the rate stipulated by the legislation and the rate under the contract. In addition, the right to suspend arises in circumstances where a payer fails to pay within 10 days of the adjudicator’s decision. The suspending party may suspend work until the payer pays the amount required under the determination, any interest accrued and any reasonable costs incurred as a result of the suspension (e.g., demobilization and remobilization costs).

2.2 Adjudication

In relation to adjudication as the enforcement mechanism for prompt payment, the Ontario Act includes the following key features:

- Targeted Adjudication

  Adjudication in Ontario is restricted, unless the parties agree otherwise, to a defined list of issues provided for under the legislation. These issues are focused on payment disputes and include the following: the valuation of services or materials, payment (including in respect of change orders, approved or not, or proposed), disputes related to notices of non-payment, retention amounts (i.e. set-offs), holdback payments and non-payments. Disputes related to claims for delay or extension of time are specifically not included, although they may be considered by an adjudicator if the parties agree, or elements of delay and time are considered as part of a change order.

- Availability of Adjudication

  Adjudication is available to all participants in the construction pyramid on projects in both the public and private sectors so long as they are a party to a construction contract or subcontract. The adjudication will be commenced by such a party delivering a notice of

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18 Ontario Act section 6.8.
19 Ontario Act section 13.19(5)-(6).
20 Ontario Act section 13.5.
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adjudication which must contain certain specified information (e.g., the nature and brief description of the dispute, the nature of the redress sought and the name of the proposed adjudicator).\(^2\) Adjudications must only address a single matter, except where the Act provides otherwise.\(^2\)

- **Consolidation of Adjudications**

  Adjudications in Ontario can be consolidated on consent of the parties so long as the dispute relates to same matter or related matters in respect of the same improvement.\(^3\) Also, adjudications relating to the same matter or related matters on the same improvement may be consolidated at the discretion of the general contractor. In consolidated adjudications, the adjudicator can consider multiple matters.

- **Adjudicator Qualifications**

  The regulations to the Ontario Act describe the requirements to be qualified as an adjudicator which includes, for example, the requirement that adjudicators: have significant experience in the construction industry (i.e. 10 years), complete training and certification, have no undischarged bankruptcy, have not been convicted of a criminal offense, and pay their fees. Furthermore, a holder of a certificate of qualification to adjudicate must comply with a code of conduct.

- **The Authorized Nominating Authority**

  In Ontario, a single Authorized Nominating Authority will be selected to administer adjudications. This entity will be selected following a rigorous application process designed by the Ontario Minister of the Attorney-General and to be implemented in late 2018.

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21 Ontario Act section 13.7.
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• **Selection of the Adjudicator**

  Parties cannot agree to nominate the adjudicator in advance. This requirement was imposed to avoid issues with adjudicators who are no longer able to act and resulting delays. The party who delivers a notice of adjudication will suggest an adjudicator. If the parties to the adjudication cannot agree on that adjudicator within four days, and that adjudicator does not consent to act within four days, the parties can either agree to a different adjudicator or the party who gave the notice shall apply to the Authorized Nominating Authority to select an adjudicator for them. In this circumstance, the Authorized Nominating Authority has seven days to select an adjudicator to act.

• **Powers of the Adjudicator**

  Powers of the adjudicator in Ontario are broad. Several powers are described in the legislation including: issuing directions, taking initiative to ascertain relevant facts or law, drawing inferences based on conduct, conducting on-site inspections, obtaining assistance of certain third parties and making a determination. Adjudicators also will have considerable discretion in setting the process.

• **The Process**

  In an Ontario adjudication, the total time frame of an adjudication will be 46 days, unless extensions are agreed to by the parties and the adjudicator. Included in this time period is the time for the parties to select an adjudicator, the time for the adjudicator to receive documents from the initiating party (five days after the adjudicator agrees to conduct the adjudication or is appointed to do so), and the time for the adjudicator to make his or her determination (30 days after receiving documents).

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24 Ontario Act section 13.9(3).
26 Ontario Act section 13.12.
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While Ontario is the first to province or territory in Canada to enact prompt payment and adjudication, is it likely not the last. At the provincial level, Manitoba, Quebec, and New Brunswick have formally begun processes towards legislative reform.

In Manitoba, the Manitoba Law Reform Commission commenced a project in 2017 to review The Builders’ Liens Act (i.e. Manitoba's lien legislation), which had not been fully reviewed since it was introduced in 1981. The Commission released a report in February 2018 that, among other things, considered security of payment legislation either as an amendment to the Builders’ Lien Act or a free-standing piece of legislation. In its review, the commission considered the efforts undertaken in Ontario and opened the door for future consultations on the subject of prompt payment and adjudication. Separately, advocates for prompt payment in Manitoba moved for a standalone piece of legislation in the form of Bill 218 (the Prompt Payments in the Construction Industry Act). This legislation is currently at the second reading stage in Manitoba’s legislature.

In Quebec, a coalition was formed by associations of general contractors, subcontractors, suppliers and consultants collectively interested in promoting a prompt payment regime in the province. As a result of their collective efforts, the Quebec government introduced Bill 108 (An Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics), which received Royal Assent in December of 2017. As part of this legislation, the government of Quebec was granted the authority to implement pilot projects aimed at testing various measures to facilitate payment on construction projects. Currently, those involved in the creation of the pilot projects are considering timely payment in the form of monthly schedules as well as faster dispute resolution processes (i.e. adjudication). The timing for implementation of the pilot projects has yet to be announced, but many in Quebec’s construction industry are eagerly awaiting the results.

As well, in December 2017, the Legislative Services Branch of the New Brunswick Office of the Attorney-General released an information package in relation to, among other things, the modernization of New Brunswick’s Mechanics’ Lien Act. This was followed by a note of supplementary considerations in June of 2018 whereby the Legislative Services Branch suggested a security of payment scheme similar to that in Ontario that applies to both the public
and private sector, to all construction projects at all levels of the construction pyramid. Results of this consultation process are pending further review.

Other provinces are also reviewing their legislation; however, these initiatives are in their infancy at the time of the writing of this paper.

Federally, the Canada Prompt Payment Act remains before the federal parliament for consideration. This potential legislation, known as Bill S-224, was brought forward in April 2016 and reached third reading in May 2017. Currently, the status of the legislation is pending as the Ministry of Public Services and Procurement Canada has engaged the services of Singleton Urquhart Reynolds Vogel LLP to conduct an expert review of prompt payment and adjudication at the federal level. The retainer was expected to result in a package of recommendations designed to help the Government of Canada implement comprehensive security of payment legislation including adjudication provisions. As a result of this retainer, a report with a package of recommendations was delivered to the federal government in early June 2018. The report has yet to be released to the public.

In conclusion, we note that there is great political momentum across Canada for the adoption of legislation introducing promptness of payment and targeted adjudication in support of prompt payment.

C What can North America Learn from Experience Elsewhere?

1 United Kingdom and Ireland

Christopher Ennis

1.1 UK

Adjudication in the UK can be traced directly to a July 1994 report called ‘Constructing the Team’ by Sir Michael Latham, a Conservative MP charged by the UK government with reviewing procurement and contractual arrangements in the construction industry following the major recession which began in around 1989. This recession resulted in extensive insolvency and unemployment in the industry, and apart from other baleful macro-economic effects, this led to
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major fiscal losses to the UK Treasury in unpaid tax and social security contributions owed by defunct construction enterprises.

Whilst the thrust of the Latham Report (as it became known)\(^{28}\) was promotion of collaboration and partnering to dispel the adversarial procedures and relationships seen as the root of the industry’s problems, an important recommendation was that adjudication should become the default form of dispute resolution.

The resulting enabling legislation appeared relatively swiftly after this, in July 1996, as Part 2 (sections 104–117) of the HGCRA (known more colloquially in some quarters as ‘the Hugh Grant Act’). This provided the framework for ‘The Scheme for Construction Contracts (England and Wales) Regulations 1998’ (‘Scheme’) published in March 1998, and which came into force in May 1998. Importantly, the HGCRA and Scheme provided not just for adjudication,\(^{29}\) but also for minimum requirements relating to payment,\(^{30}\) both to be deemed included in construction contracts perfected after this date. Whilst at first applicable only to England and Wales, later legislation extended a similar régime to Scotland and the six counties of Northern Ireland.

Salient features of the new régime as it then applied can be summarised in three parts:

- **Applicability:** a definition of ‘construction operations’ identified contracts to which the regulations would apply. Notably, contracts with residential occupiers (i.e., private householders) were excluded, as were contracts relating to power, fuel and utilities projects, off-site assembly of components where installation was not part of the contract, and artistic works.\(^{31}\) Only agreements made in writing would be affected.\(^{32}\) A notable further exclusion of PFI/ PPP Head Agreements (i.e., those involving government bodies) was effected subsequently by Statutory Instrument.\(^{33}\)

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\(^{29}\) HGCRA section 108 and the Scheme Part 1.

\(^{30}\) HGCRA sections 109-113, and the Scheme Part 2.

\(^{31}\) HGCRA sections 105 and 106.

\(^{32}\) HGCRA section 107.

\(^{33}\) 1998/648 Construction Contracts (England and Wales) Exclusion Order 1998. Interestingly, many such contracts tend anyway to include non-statutory adjudication provisions.
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- **Adjudication:** the now familiar 28-day timetable from referral of the dispute for a decision to be made; the temporary binding effect of that decision; immunity from suit of the Adjudicator. Part 1 of The Scheme set out a default minimum procedure which would be imported *in toto* into contracts lacking this basic framework.

- **Payment:** mandatory provisions for stage payments, dates when payment would become due and payable, notice of intention to withhold payment, a right to suspend performance for non-payment, and outlawing conditional payment except in the case of third party payer insolvency. These were to apply wherever the contract was non-compliant, but not *in toto*.

There was instant controversy over the introduction of adjudication on two counts. The first was general incredulity from influential sections of the UK legal establishment that a construction dispute could be decided with any kind of justice within 28 days. The second, more heated, was the question of who the adjudicator would be – the Scheme provided, somewhat Delphically, for referral to an ‘adjudicator nominating body’ (‘ANB’), in default of agreement, without further defining what or who an ANB should be.

In 1996, an article appeared in the *Construction Law Journal* entitled ‘Swarms of Wannabes’, by Professor IN Duncan Wallace, then the august editor of *Hudson*. The thrust of this was that non-lawyers could not be expected to act judicially. There were indeed ‘swarms of wannabes’ at first, banding together in ANBs that have since become extinct due to perceptions of unreliability and incompetence.

Amongst early ANBs still extant is the Royal Institution of Chartered Surveyors (‘RICS’) Dispute Resolution Service panel. Lawyers were comparatively slow in moving into the arena – perhaps because of their initial misgivings – but respected panels include those maintained by the Technology and Construction Solicitors Association (‘TeCSA’) and the Technology and Construction Bar (‘TeCBAR’). Notably, the RICS and TeCSA panels include both lawyers and non-lawyer construction professionals. In practice, and particularly for high-value disputes, parties are more likely to agree an adjudicator between themselves rather than applying to an ANB for a panel nomination. The existence of ANBs is, however, a useful back-stop which provides impetus for agreement – better the devil you know, perhaps.
Uptake of adjudication reflected the time lag between contract inception dates and the regulations coming into force. Appearance of enforcement proceedings in the courts was similarly affected. The first such case was *Macob v Morrison*, in which Dyson J (as he then was) gave the first of many UK court judgments signalling strong support for purposive interpretation of the legislation, disregarding any apparent deficiency in the adjudication process. In another early case, a well-known solicitor had awarded a substantial sum which failed to take into account the paying party’s entitlement to retention, but his decision was nevertheless enforced by the Court. Later cases settled ambiguities in the legislation. Other cases explored compatibility with the rules of natural justice, whether or not there could be oppressive additional provisions in the contract relating to payment of costs, and other finer procedural issues such as whether or not an adjudicable dispute had crystallised.

Judicial pronouncements over the years since 1999 created a robust environment in which payment obligations arising from adjudication decisions could not be avoided by impeaching the quality of the decision; enforcement was only likely to fail where there had been breach of natural justice or excess of jurisdiction.

The régime introduced in 1998 was therefore undoubtedly a success, but flaws and difficulties had emerged. There was consensus that overhaul was needed, and the result was Part 8 of the *Local Democracy, Economic Development and Construction Act 2009* (‘LDDEDCA’), together with a compatible revised version of the Scheme. These came into force on 1 October 2011. Changes included clarification of timetable issues, institution of a slip rule consistent with the 1996 *Arbitration Act*, and two more fundamental changes:

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36 For example, *Discain Project Services Limited v Opeprime Development Limited* [2001] EWHC (TCC) 435, which emphasised that adjudicators should not communicate with one party in the absence of the other, whatever their views on how an inquisitorial rather than adversarial process should be managed.
38 The leading case being *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC).
Eligible construction contracts no longer need to be in writing: a 2002 Appeal Court decision had interpreted ‘contract in writing’ to exclude even contracts that were part written, part oral;³⁹ this was often a difficult distinction, usefully removed.

Removing any distinction between sums due and sums claimed in the context of ‘pay less’ notices: a 2001 Scottish judgment⁴⁰ had made this distinction in the context of withholding notices. In amendments to HGCRA and the Scheme that are seen by many as Byzantine, LDEDCA requires a ‘pay less’ notice to be issued even if a contractor’s application for payment includes claims for payment that are plainly not due – whether because of defects, delay, non-conformity, etc. In the absence of a pay less notice, the full amount applied for becomes payable, whether right or wrong. This is seen by many to be draconian, allowing ‘smash and grab’ results where the paying party’s administration of the complex procedure has failed, but others argue that this is precisely what the original drafters of the HGCRA had intended when framing the provisions relating to withholding notices. The paying party’s only remedy where this occurs is to adjudicate in parallel on the amount actually due in order to secure a refund; it will readily be seen that this may present problems, particularly if the payee becomes insolvent between the first and second adjudication decisions.

This brief overview concludes by noting the UK construction industry generally considers the legislation relating to adjudication and payment protection to be successful. Adjudication has indeed become the default form of dispute resolution for eligible construction contracts, a key aspiration of the 1994 Latham Report. Adjudication is now used extensively throughout the UK, and not only where dictated by the legislation applicable to eligible contracts: it is also often chosen by agreement between parties to non-eligible contracts.

1.2 Ireland

There had been extensive discussion of the UK experience in the Irish parliament before similar payment protection legislation was enacted with the passing of the Construction Contracts Act in 2013 (here, ‘Irish Act’), and which came into force in July 2016. Similarities

³⁹ HGCRA section 107; RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270.
between the Irish Act and HGCRA include mandatory inclusion of adjudication provisions, with a similar timetable for publication of decisions, and a payment scheme which includes provisions similar to those in the 2009 LDEDCA adjustments to the UK régime. There are, however, notable differences, which include:

- Whilst there is a similar definition of ‘construction operations’, the Irish definition includes oil drilling and associated operations, artistic works, and residential works where the property comprises more than 200m². However, the Irish Act mirrors the UK exclusion of PFI contracts effected after enactment of HGCRA.
- Contracts for less than €10,000 are excluded.
- Most importantly, the right to adjudication is limited only to a ‘payment dispute’.

This last difference has been much discussed. The UK legislation permits adjudication decisions on purely technical matters such as specification conformance. Whilst most adjudications ultimately involve payment disputes, there can be many sub-disputes governing payment entitlement that may not be deemed payment disputes: conformance with specification, whether a change constitutes a variation, entitlement to extension of time, disruption, defects, etc. It is difficult to sever these kinds of underlying issues from resulting payment disputes. Whilst parties are permitted under the Irish Act to extend the adjudicator’s powers, this is potentially an Achilles heel; the paying party may take the position of a turkey unlikely to vote for Christmas unless the extension of jurisdiction has already been included in the governing contract. There is no data yet to say whether this is proving problematic, however.

Whereas the UK legislation’s Delphic reference to undefined ANBs caused initial teething problems, in contrast the Irish Act established a panel of adjudicators, specifying particular experience and expertise, appointment of a chair, and development of a code of practice. The panel includes lawyers and construction professionals, including several experienced UK-based adjudicators.

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41 Irish Act sections 1 and 2(1)(b).
42 Irish Act section 2(3).
43 Irish Act section 2(1)(a).
44 Irish Act section 6(1).
45 Maintained by the Construction Contracts Adjudication Service (‘CCAS’).
46 Irish Act sections 8 and 9.
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One of the panel chair’s functions is to publish an annual report on use of adjudication; at the time of writing there is only the July 2017 edition. This reveals an apparently slow uptake, with just one application for appointment of an adjudicator at that stage, but this was invalid because it referred to a contract entered into before the effective date of the Irish Act. The report also reveals one instance of an adjudicator appointed by agreement between the parties.

Whilst this slow start may be due to the time lag between legislative mandate and contract formation, similar to the UK experience in 1998-1999, some commentators have suggested that cultural differences and a reluctance to resort to formal dispute resolution processes, particularly by smaller subcontractors such as those who feature in many UK adjudications, may be a material factor: the panel report adverts to this as reluctance to engage in a process that ‘effectively bites the hand that feeds them’. The report also refers to a 2017 study\(^\text{47}\) which wisely observed that, ‘it is one thing to change the law; changing the culture is another thing entirely.’ A further explanation is that a number of adjudications have reportedly taken place without the parties applying to the panel for appointment of an adjudicator because they preferred to agree one between themselves – as now happens more frequently for high-value disputes in the UK.

1.3 Recommendations for North America

Recommendations for any legislation which seeks to learn from the UK and Ireland include:

- Do not restrict adjudication to ‘payment disputes’.
- Minimise exclusions from ‘construction operations’ definitions. The Irish inclusion of residential dwellings of over 200m\(^2\) is sensible. Consider carefully whether it is justifiable for PFI contracts to be excluded, given the potential effect on lower tiers of the supply chain.
- A minimum value for adjudication references contradicts one aim of adjudication – to deal swiftly and expeditiously with low-value disputes; abortive costs considerations will anyway police \textit{de minimis} disputes quite effectively.
- Establishment of a regulated ANB, with mandatory procedures for monitoring quality and standards of adjudicators. The ANB should comprise a mix of disciplines. It should not

automatically be assumed that lawyers who do not specialise in construction-related disputes, or construction professionals with no appropriate legal qualifications, will make good adjudicators.

- A policy decision is needed on whether pay less or withholding notices should be allowed to distinguish between sums due and sums claimed to avoid ‘smash and grab’ adjudication.

2 Australasia

Matthew Bell

2.1 Antipodean Security of Payment Laboratories

The Australasian experience offers insights from two decades of experimentation, within nine separate legislative ‘laboratories’, with HGCRA-based security of payment and adjudication schemes.48

Within half a decade of the HGCRA coming into force, legislation had been passed in Australia’s largest states by population, New South Wales and Victoria, and in New Zealand. By 2018, each Australian state and territory, along with New Zealand, had not only implemented legislation; it had also undertaken significant reforms to the originally-enacted statutes. The New South Wales Act, for example, has been the subject of eight substantial tranches of amendments since its original enactment in 1999.

Commentators have noted that the Australasian Acts fall broadly into two camps:49

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49 The distinction underpins, for example, the Society of Construction Law Australia report (above n 48).
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- those (referred to, in the Australian context, as the ‘West Coast’ Acts) which are more closely aligned with the original HGCRA because they are primarily focused on adjudication and are largely content to leave it to the parties to agree payment terms (Western Australia, Northern Territory and New Zealand); and

- those which more comprehensively intervene into what parties can and cannot agree (the other Australian states and territories – grouped together for convenience as the ‘East Coast’ Acts).

This sharpness of this distinction has, however, been eroded by subsequent reforms: for example, the Western Australian Act was recently amended with the effect of making the maximum payment period allowable under construction contracts within 42 days after payment is claimed.50

2.2 Towards Harmonization?

The ‘laboratory’ nature of the Australasian statutes is illustrated by there being diverse approaches taken, via the legislation and their respective judicial consideration, to key aspects of the schemes, including many of those identified above in respect of the UK and Irish schemes.51 Unfortunately, there has been little consensus as to which – if any – of the various Australasian approaches is most effective to meet the ‘pay now, argue later’ policy goal which underpins all HGCRA-derived schemes.

Until 2016, there had only been one review initiated at a federal level in Australia: that of the Hon Justice Terence Cole in 2001-3. Its recommendations in respect of harmonization were, unfortunately, largely ignored amongst the plethora of state-based reviews which ensued over the following decade. However, on 21 May 2018, the Federal Government released the Report which John Murray AM had prepared on its behalf and submitted in December 2017. Entitled Review of Security of Payment Laws: Building Trust and Harmony, the Murray Report represents a blueprint for harmonized reform across the Australian States and Territories via 86

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50 WA Act section 10, deeming any provision which purports to provide a period of more than 42 days to be read as providing for a 42-day period.
recommendations. As of mid-2018, the Report and its recommendations are being considered by Australia’s Commonwealth, State and Territory governments with a view to advising the Building Ministers’ Forum on how it should be responded to.

For the purposes of this paper, the Murray Report’s 400-odd pages provide a detailed commentary on the various approaches taken to key issues across jurisdictions. Thus, the Report also offers, for international readers, a valuable consolidation of lessons learned from the experiments performed in Australia’s eight ‘laboratories’.

### 2.3 Under the Microscope: Some Key Issues and their Treatment

Whilst a detailed description of the key issues dealt with in the Murray Report, and the various approaches to them, is not possible here given the constraints of the paper, several are worthy of note. They provide examples of how key aspects of the HGCRA-derived scheme have been grown (sometimes, with significant pruning and grafting) in the soil of various parts of Australia, and therefore a spectrum of approaches which could be considered elsewhere.

- **Opting in to the Legislative Payment Scheme**

  When the New South Wales Act was originally passed, it required claimants to endorse their claims as being under the Act: in other words, they needed to ‘opt in’ to the legislative payment scheme. In his 2012 Review, Bruce Collins QC accepted evidence from subcontractors that they were routinely threatened with not being awarded future work if they included those ‘magic words’ and therefore recommended that this requirement be removed. The endorsement requirement was subsequently omitted in Queensland as well via the enactment of its 2017 *Building Industry Fairness (Security of Payment) Act*, and a review in the Australian Capital Territory recommended its removal in 2015. However,
Murray has recommended that the endorsement be maintained (or, where it has been removed in NSW and Queensland, reinstated), primarily on the basis that it avoids confusion as to the formal legal status and consequences of the claim.57

• ‘Ambush’ Claims

Soon after the HGCRA was enacted, it was realized by claimants that strategic advantage could be taken of that Act’s expedited timeframes for adjudication processes continuing to run during traditional industry shutdown periods such as those (in the UK) between Christmas and the new year. Coulson J observed that it was ‘a matter of regret that the adjudication process, which was itself introduced as a method of dispute resolution which would avoid unnecessary legal disputes and procedural shenanigans, is now regularly exploited in the same way’.58 In a prominent example of the balance being tipped back towards the interests of respondents (and, their consultants and lawyers), by 2018, the legislation in the Australian Capital Territory, New South Wales, New Zealand, Queensland, South Australia, Tasmania and Western Australia (but not in the Northern Territory or Victoria) had been amended to provide for such ‘blackouts’ (applying in addition to the usual exclusions of public holidays) to a greater or lesser extent. The Murray Review recommended that a ‘blackout’ period from 22 December to 10 January (being currently the most extensive, under the Queensland Act) be used in a harmonized approach.59

• Appointment of Adjudicators

In most Australian states and territories, the HGCRA-based approach of having adjudicators appointed by private-sector AWBs (in Australia, generally known as Authorised Nominating Authorities or ‘ANAs’) prevailed until the mid-2010s. Under the NSW Act, for example, the claimant chooses which ANA to apply to when it makes its adjudication application, and the ANA then appoints the adjudicator (essentially, on a ‘cab rank’ basis by reference to adjudicators on that ANA’s list).60 In Queensland, appointment of adjudicators

57 Murray, above n 52, 144-147 (recommendation 23).
58 Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] EWHC 70 (TCC), [23].
59 Murray, above n 52, 114 (recommendation 8).
60 NSW Act sections 17-19.
was taken over by a government agency, the Queensland Building and Construction Commission, following the findings of the Wallace Review that there could at least reasonably be a perception of bias arising from the existing system (allowing, for example, a person to be referred by an ANA to assist with preparing a claim but then, on a different claim, referred by the same ANA to act as adjudicator). John Murray was similarly concerned by perceptions of bias, but also wished to preserve the ‘gatekeeper’ role of ANAs in advising parties whether they should proceed with claims. Therefore, he recommended an amalgam of the NSW and Queensland approaches, such that the ANAs’ role is limited to the nomination of adjudicators, with their appointment for particular claims left to a government regulatory body.

Quite apart from these specific matters of legislative design (along with the myriad others which are dealt with in the Murray Report), the Australian ‘laboratories’ have been the site of extensive ‘experimentation and findings’ in relation to the judicial review aspects referred to above in relation to the UK. Generally speaking, the Australian courts have – similarly to the UK – demonstrated a supportive approach to the expedited nature of adjudication, being willing to uphold decisions so long as they are made within jurisdiction and do not offend against the principles of natural justice. The exact limits of that support remain, however, contested.

By way of prominent recent example, in February 2018, Australia’s apex court – the High Court of Australia – handed down its decision on whether the New South Wales Act excluded that state’s Supreme Court’s jurisdiction to make an order in the nature of certiorari in respect of a purported adjudication determination for error of law on the face of the record. At trial, Emmett AJA had found that there was no such exclusion; on appeal to the NSW Court of Appeal, that

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62 Murray, above n 52, 183 (recommendations 36-37).
63 See, eg, Jacobs (above n 48). Coggins and Donohoe (above n 48) lists in its Appendix 1 cases on judicial review of adjudication determinations from 2014-17 and whether each of them resulted in the determination being quashed.
64 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2016] NSWSC 770, [74].
finding was overturned, and the Court of Appeal’s judgment was upheld by a full bench of the High Court.

2.4 Recommendations for North America

As will be clear from the above commentary, the nine Australasian jurisdictions which have enacted HGCRA-based legislation provide a smorgasbord of options for consideration by the international community as to how various elements of the legislative scheme might be dealt with. They also offer an object lesson in the importance of inter-jurisdictional consensus being firmly established as to the policy goals of the legislation, especially in a federal scheme – as in Australia, Canada and the United States – under which regulation of payment-related matters presently lies substantially within the legislative bailiwick of states (or, at an even more fragmented level, provinces, counties or cantons).

The Australian experience is one where, despite broad agreement that legislative intervention is appropriate to curb unfair payment practices, there has been little agreement as to the detail of any legislative vehicle required to deliver that policy goal. In turn, the state-based Acts have been susceptible to constant review and amendment due to the constant interplay of economic cycles (in particular, the pressure of insolvency during industry downturns), elections in which power oscillates between Australia’s two major political parties (turning security of payment regulation into a ‘political football’) and lobbying by diverse interest groups. This has made retrofitting of a harmonized model across the country extremely difficult, even though there seems a near-universal desire for it.

In turn, the ‘hasten slowly’ approach of jurisdictions, like Hong Kong and Ontario, which are recent ‘converts’ to the HGCRA-based approach, provides a model for other places which are considering joining this international club. That approach is to examine, articulate and interrogate thoroughly the policy goal in consultation with industry and other stakeholders, and

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then put forward, based on the range of legislative mechanisms available around the world, an optimal mix in order to achieve that goal in the local setting.

3  **Malaysia**

*Datuk Sundra Rajoo*[^67]

**3.1 Statutory Adjudication as the Problem Solver**

The construction industry has always been the driving force of the modern Malaysian economy. To wit, according to recent statistics, the Malaysian GDP attributed to the construction industry increased from approximately RM13 billion in the fourth quarter of 2017 to approximately RM14 billion in the first quarter of 2018.

Nonetheless, the construction industry has been plagued with problems related to non-payment for many years. Cash-flow issues have been on the rise due to the proliferation of pay-when-paid and pay-if-paid clauses in construction contracts. It was evident that, in the absence of stable cash flow, most of the construction projects would come to a halt. The disruption of cash flow could cause a chain reaction, affecting all stakeholders involved: sub-contractors, consultants, workers, and the industry as the whole.

Commonly-used ADR methods, such as arbitration, proved to be inefficient to resolve non-payment issues affecting the construction industry. Given the importance of the construction industry for the economy, it was of vital importance to find a solution to this problem to ensure the industry and the economy stayed afloat.

Upon the perseverance of the Malaysian construction industry and the hands-on participation of the then Kuala Lumpur Regional Centre for Arbitration (‘KLRCA’),[^68] one solution was devised – the *Construction Industry Payment and Adjudication Act 2012* (‘CIPAA’ – here, ‘Malaysian Act’).

[^67]: *Part C3* was up to date as of 21 June 2018.
[^68]: On 28 February 2018, the *Arbitration (Amendment) Act 2018* entered into force and the KLRCA was renamed to the Asian International Arbitration Centre (‘AIAC’). After 28 February 2018, all references to the KLRCA in any written law or in any instrument, deed, title, document, bond, agreement or working arrangement subsisting immediately before the coming into operation of this Act shall, are to be construed as a reference to the AIAC (see sections 2-3 of that Act).
3.2 The ABCs of the Adjudication Regime in Malaysia

The Malaysian Act provides a scheme under which a payment dispute arising out of a construction contract\(^{69}\) may be resolved within 105 working days (approximately five months). It follows the broad thrust of other HGCRA-derived schemes, but with some significant variations as discussed in Part C3.3 below.

To start adjudication under the Malaysian Act, the party seeking payment (defined as the ‘unpaid party’) may serve a payment claim upon the non-paying party. The unpaid party is to specify in the claim the amount claimed, the payment due date and also identify the cause of action, including the contractual provision on which the claim is based, and state that the claim is made under the Act.\(^{70}\)

Following the service of the payment claim, the non-paying party has ten working days to serve the Payment Response upon the unpaid party.\(^{71}\) The payment response shall address the claim(s) raised. The non-paying party can admit to the amount claimed (or part thereof) or dispute the said amount (or part thereof). If the non-paying party does not serve the payment response, the non-paying party is deemed to dispute the payment claim in its entirety.

After the payment response has been served or ten working days for service of the payment response has lapsed, any of the parties can serve a notice of adjudication.\(^{72}\) The party serving the notice of adjudication is deemed to be the ‘claimant’. Within ten working days, from the date when the notice of adjudication is served, the parties can agree on the person to adjudicate a dispute between them.\(^{73}\) If the parties fail to agree on an adjudicator, any party may request the Director of the AIAC to make an appointment.

The proceedings commence once the adjudication matter has been registered with the AIAC. Whether the adjudicator is appointed by the parties or the AIAC, the first procedural step is the notification by the adjudicator as to the acceptance to serve as adjudicator.\(^{74}\) The adjudicator and the parties are free to agree on the adjudicator’s terms of appointment (fees,\(^{69}\) Terms defined in the Malaysian Act are set out in italics here.\(^{70}\) Malaysian Act section 5.\(^{71}\) Malaysian Act section 6.\(^{72}\) Malaysian Act sections 7-8.\(^{73}\) Malaysian Act sections 21-23.\(^{74}\) Malaysian Act sections 22-23.
mode of service of the submissions, etc). In the absence of such agreement, default terms of appointment apply.

The notification stage is followed by the pleadings stage. The claimant has ten working days to serve its adjudication claim from the date when the parties were notified by the adjudicator. The same time period of 10 working days is given to the respondent to serve its adjudication response, however, the time period starts from the date when the respondent received the adjudication claim. The claimant is then given an opportunity to address issues raised in the adjudication response in its adjudication reply. The adjudication reply shall be served within five working days from the date when the claimant received the Adjudication Response.

After the pleadings stage and unless otherwise agreed between the parties and the adjudicator, the adjudicator has 45 working days following service of the adjudication response (or, if a reply to the adjudication response is served, from that service; or, if no adjudication response is received, from the expiry of the period for provision of that response) to deliver his or her decision. If the adjudicator fails to deliver the decision the statutory (or agreed extended) time period, his or her decision is deemed to be void. The decision is binding on the parties, but not final.

3.3 The Malaysian Act’s Salient Features

Having outlined the basic features of the Malaysian Act’s adjudication regime, we will discuss its salient features in more detail below:

- Payment Disputes

Section 4 of the Malaysian Act defines the term ‘payment’ as ‘payment for works done or services rendered under the express terms of a construction contract’ (emphasis added) – i.e. a ‘construction work contract’ or ‘construction consultancy contract’. The definition focuses on the work done or services rendered; it does not include payment for works or
services that have not commenced yet. The definition was framed with an aim to focus solely on improving cash flow in the industry, as non-payment for the works already done or services already rendered would drain cash flow from architects, contractors, sub-contractors or anyone else privy to the construction contract.

• **Construction Contracts**
  
  - *In writing requirement*
    
    The Malaysian Act only applies to construction contracts that are made in writing. The reason for the Act disallowing orally-agreed construction contracts is to prevent opening a floodgate of adjudication cases, as many construction contracts in Malaysia are still made orally or partly orally. It is difficult to provide a fair adjudication result without a written contract detailing the nature and description of the works. Thus, one may only ponder on how time-consuming and expensive an adjudication process would be if laid under these conditions.
  
    - *Construction’ defined*
      
      Unlike in some jurisdictions, the definition of construction works under the Malaysian Act includes ‘gas, oil and petrochemical’ works. This is meant to include all works related to them such as, but not limited to, demolition, assembly, installation of plant and steelworks. This represents the Act’s aim to ensure its applicability to a wide array of matters and disputes that may arise.
  
    - *Exemptions*
      
      Notwithstanding the above, ‘Government construction contracts’ as defined in Exemption Order 2014 are not subject to the Malaysian Act’s regime. The Act also does not apply to construction contracts entered into by a natural person for works in respect of any building that is less than four storeys high and wholly intended for that person’s occupation.
  
    - *Retrospective v prospective application*
      
      The Malaysian Act is silent as to whether it applies prospectively or retrospectively; in other words, whether or not payment disputes arising out of construction contracts entered
into on or before 15 April 2014 are subject to the statutory adjudication regime under the Act.

The Malaysian courts in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd* and *Capital Avenue Development Sdn Bhd v Bauer (M) Sdn Bhd* held that the Act’s temporal scope of application is retrospective.

Recently, the Malaysian Court of Appeal in *Bauer (Malaysia) Sdn Bhd v Jack-in-Pile (M) Sdn Bhd* has overturned the findings in *UDA Holdings*. The Court of Appeal held that the Malaysian Act applies prospectively since the Act does not contain a separate provision to the contrary. The position which the Malaysian Federal Court would take on the prospective-retrospective application dilemma remains to be seen.

• **Payment Claim, Payment Response, etc:**
  
  o **Documents-based proceedings**

  The adjudication proceedings under the Malaysian Act are documents-based in most cases. Yet, it is not uncommon to have an oral hearing, when the complexity of the case or the parties so require. In any event, the parties are to be treated equally, and the proceedings are to be conducted in a manner compliant with the principles of natural justice.

  o **Failure to serve the Payment Response**

  If the *non-paying party* fails to respond to the payment claim, that will not deprive it of disputing the adjudication claim in the course of the proceedings. However, for a long time, the Malaysian courts, relying on section 27 of the Act, took the view that the jurisdiction of the adjudicator is limited to the issues set out in the payment claim and the payment response.

  To wit, the Malaysian courts in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*, *Bina Puri Construction Sdn Bhd v Syarikat Kapasi Sdn Bhd* and *Milsonland*.

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81 Although, as indicated in its title, the Act was passed in 2012, the Act, in fact, came into operation two years later – on 15 April 2014.
82 [2015] 5 CLJ 527.
83 24c-5-09/2014.
84 Civil Appeal No: B-02(C)(A)-1187-06/2017.
85 Malaysian Act section 24.
86 Civil Case No.: BKI-24-6/1-2015, High Court in Sabah and Sarawak, Kota Kinabalu.
Development Sdn Bhd v Macro Resources Sdn Bhd and another appeal\footnote{[2017] MLJU 169.} held that, in the absence of the payment response, the adjudicator is allowed not to consider the defences raised in the adjudication response.

Nonetheless, in the landmark decision in View Esteem Sdn Bhd v Bina Puri Holdings Bhd,\footnote{[2018] 2 MLJ 22.} the Federal Court reversed the findings of the High Court and the Court of Appeal and held, inter alia, that an adjudicator does have the jurisdiction to consider matters raised in an adjudication response which had not been raised earlier in a Payment Response, provided that the matters relate to the payment claim.

\begin{itemize}
\item \textbf{Service}
\end{itemize}

Section 38 of the Act sets out the modes of service for any notice and document under the Act. Unless the parties agree otherwise, the default modes of service (eg personal delivery or registered post) are to be used. However, the data collected for the AIAC CIPAA Report shows that in 85\% of cases the parties agreed on the use of email as the mode of service to expedite the proceedings.\footnote{Available at https://aiac.world/wp-content/uploads/2018/CIPAA%20Report%202018.pdf.}

\begin{itemize}
\item \textbf{Binding, but not final}
\end{itemize}

As noted above, the adjudication decision rendered under the Malaysian Act is temporarily binding in nature. Section 13 of the Act states that the decision is binding until the dispute is finally decided by arbitration or the court. Furthermore, section 37(3) of the Act allows for a dispute in respect of payment to be concurrently referred to arbitration or court without affecting the adjudication proceedings.

\section*{3.4 The Role of AIAC}

In Malaysia, the parties and the adjudicator enjoy administrative support from the AIAC as the adjudication authority. For that purpose, the AIAC has adopted its \textit{Adjudication Rules & Procedure}.\footnote{Available via https://aiac.world(wp-content/adjudication/CIPAAAct-7.pdf.} The AIAC Adjudication Rules are to a certain extent akin to arbitration rules. The
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Rules are aimed to assist the parties in navigating the adjudication process and provide for safeguards in the event of default.

The AIAC also sets up competency standards and criteria for a person to serve as an adjudicator. Each year the AIAC conducts examinations in relation to the Malaysian Act and enlists only those persons who pass the exam on the roster of adjudicators.

3.5 Digging at the Roots Instead of Hacking at the Leaves

The AIAC along the years has come to the observation that the construction industry’s problems go beyond mere payment issues and stem from the contracts themselves. The trend observed showed that, once a dispute arises out of the main contract, there is an almost certain likelihood that the disputes will bleed into the sub-contract(s), affecting the whole contract chain.

To ensure that the disputes are promptly resolved when they arise, if not avoided, through the Malaysian Act’s adjudication regime, the AIAC has come up with its standard form of contracts (‘SFCs’): building construction main contracts (both with and without quantities); a sub-contract consistent with the main contract; a contract for minor works and design and build contracts. The SFCs are self-sufficient, assimilate provisions of the Malaysian Act, and thus have a quasi-statutory nature.

3.4 Recommendations for North America

The Malaysian experience allows us to make the following recommendations:

- The legislation should clearly state its temporal scope of application to avoid unnecessary and unwanted uncertainties and set-aside risk posed to the decisions rendered;
- The issues related to a non-responsive non-paying party shall be dealt with: the law should indicate the consequences of non-reply to a payment claim;
- As far as the service of documents is concerned, the AIAC CIPAA Report 2018 suggests that it may be worth considering including email as the default mode of service;
- Although standard form contracts are not a one-size fits all solution, they might improve project management and thus assist the parties in avoiding a dispute or at least minimising the costs, when a dispute arises. Therefore, the use of adjudication legislation-compliant standard form of contracts is worth exploring.
4 Mauritius

Anand Juddoo

4.1 Overview of Approaches in Mauritius

Mauritius is rife with cases of non-payment on both sides of the construction industry. Employers (public and private sector) delay payment to contractors which sometimes results in very long protracted disputes at the end of the project whilst, on the other hand, contractors fail to pass over the payments received to subcontractors, nominated or domestic. Mauritius has no security of payment or similar legislation in place. All disputes are either referred to arbitration (after the completion of the works) or to the courts. In addition, there is a continued imposition of abusive and unfair contract terms which impact adversely on project delivery and are a major source of disputes.

The local civil code legislation, however, has a provision whereby aggrieved parties can, in the case of non-payment, raise a lien on the property constructed, but such is the complexity and burden on the claimant in bringing a case under this law that an impasse result. Therefore, disputes tend to be long drawn out processes. The backlog of court cases does not help either. The domestic arbitration landscape does not assume prominence either because it mimicks court procedures and uses of inexperienced arbitrators and because the parties uses all sorts of delaying tactics. It was therefore not surprising that resolution of disputes has become very lengthy and is a curse to the development and sustainability of the industry. The issue of non-payment in the construction industry reached a tipping point where a parliamentary question was raised in 2015.92 The question was about whether the government would consider the introduction of a Building and Construction Industry Security of Payment Bill with the objective to safeguard the interests of the contractors, of the subcontractors and of the consultants thereof for timely payment in respect of goods and services provided.

With a view to addressing the payment situation in the industry, the Mauritius Construction Industry Development Board (‘CIDB’) was given the task to investigate and come

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92 PQ Nr. B/850.
up with some solutions. The writer was appointed on 19 October 2015 as Chairman of a sub-committee which produced a report recommending the introduction of appropriate legislation. The CIDB hastily tabled a draft Bill for this purpose. In fact, what was recommended for discussions was an amended version of the Construction Contracts Act 2004 then in force in Western Australia (the WA Act). The intention of the proposed legislation – named the ‘Construction Contracts Act 2016’ (here, ‘Draft Mauritian Act’) – was however clear in that there was a consensus to improve cash flow and rid the construction industry as a whole of bad payment practices.

However, the choice of the model legislation was not made in consultation with the industry. The Draft Mauritian Act proposed was quite revolutionary but lacked finesse in the sense that certain elements specific to the WA Act were omitted and not suitably replaced with appropriate provisions necessary to make the legislation effective.

The object of the Draft Mauritian Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work. The Draft Mauritian Act also includes provisions for consultants to recover payments when carrying out design and supervision works. This model is not restricted to the improvement of cash flow but also includes interim resolution of payment disputes under a construction contract (thus interim and final payment disputes) to be submitted to statutory adjudication (similar to the UK HGCRA), as opposed to progress payment disputes only (as per the Malaysian Act and Acts based on the New South Wales model). Thus, the Objectives of the Draft Mauritian Act include ‘to provide a means for adjudicating any disputes arising under construction contracts’.

4.2 The Draft Mauritian Act

The salient details of the Draft Mauritian Act, in so far as they relate to promptness of payment, are as follows:

- Construction Operations Covered
The definition of ‘construction work’ is wide ranging and includes housing. It encompasses physical forms of construction, and ‘related goods and services’, to be goods and services necessary for physical construction to take place. It also includes dealing with more complex payment claims, such as delay or disruption damages claimed by the contractor for a compensable cause under the contract.

- **The Prohibitions and Implied/Default Terms**

  The draft legislation outlaws ‘pay-when-paid’ / ‘pay-if-paid’ provisions in construction contracts and prohibits payments to be made later than 45 days after a claim is made. Opting out or waiving any right bestowed by the Act is not an option. The legislation imports various implied provisions applying by default where the contract does not contain provisions about the right to claim progress payment for obligations performed, the contents of a payment claim, claiming back the return of retention and security bonds, and sets out a variations procedure and provides a format for progress claims.

- **Payment Period**

  A 28-day payment period commences following the delivery of a proper invoice. The time period is subject to the delivery, by the payer, of a notice of non-payment within 14 days of the claim.

- **Procedure for Submission of Claim**

  The Draft Mauritian Act includes a series of administrative requirements for the submission of a proper claim. In particular, it allows for mechanisms such as milestone payments, phased payments, etc.

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93 Draft Mauritian Act section 4.
94 Draft Mauritian Act section 5.
95 Draft Mauritian Act section 9.
96 Draft Mauritian Act section 10.
97 Draft Mauritian Act section 49.
98 See Schedule 1 to the Draft Mauritian Act.
99 Draft Mauritian Act Schedule 1 section 6=7.
100 Draft Mauritian Act Schedule 1 sections 4, 5, 7.
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- **Certification**

  The certification processes are to take place within the 28-day payment period. A detailed process is prescribed in case the payer refuses to pay part or all of the claim.

- **Consequences of a Failure to Pay**

  In circumstances where a payer fails to make payment in relation to a proper invoice or following the determination by an adjudicator (as discussed below), the consequences can be disastrous for the payer. Interest begins to accrue on unpaid amounts when due at a rate of interest to be decided by regulations should the contract be silent.\(^{101}\) In addition, the right to suspend work arises in circumstances where a payer fails to pay within 14 days of the adjudicator’s determination.\(^{102}\) The applicant may suspend work until the payer pays the amount required under the determination, together with any interest accrued and any reasonable costs incurred as a result of the suspension (e.g., demobilization and remobilization costs).

4.3 **Adjudication**

- **Scope of Adjudicable Disputes**

  As noted above, the scope of adjudication under the Draft Mauritian Act is widespread and englobes all payment disputes. In fact, the draft legislation seeks to ‘provide a means for adjudicating any disputes arising under construction contracts’, whether those contracts are ‘in writing or not’.\(^{103}\) The Act is to apply prospectively in line with the constitution of the state, coming into force on a day to be proclaimed.\(^{104}\) Adjudication is mandatory for all participants in the construction pyramid on projects in both the public (the Draft Mauritian

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\(^{101}\) Draft Mauritian Act Schedule 1 section 8.
\(^{102}\) Draft Mauritian Act section 42.
\(^{103}\) Draft Mauritian Act: preamble (emphasis added); section 3 (definition of ‘construction contract’).
\(^{104}\) Draft Mauritian Act section 2.
Act also binds the state)\textsuperscript{105} and private sectors so long as they are a party to a construction contract or subcontract.

- **Commencing the Adjudication**

  Any party to the contract may initiate an adjudication by making a claim delivering a notice of adjudication within 28 days of the dispute arising.\textsuperscript{106} This is to outline the matter in dispute, the redress sought and the name of the agreed adjudicator (in absence thereof, a ‘Prescribed Nominating Body’ (‘PNB’) (see below) is to appoint an adjudicator within seven days).\textsuperscript{107} The party against whom the application is served must then submit a response within 14 days of the service of an application for adjudication; failure to do so will not impact on the adjudicator’s power to make his or her determination.\textsuperscript{108} Adjudication must only address a single matter in dispute unless the parties consent to the adjudicator simultaneously adjudicating two or more disputes.\textsuperscript{109}

- **Consolidation of Adjudications**

  The issue of consolidation is not present in the Draft Mauritian Act. It may of course arise by agreement.

- **Adjudicator Qualifications**

  One unfortunate aspect from the Draft Mauritian Act relates to its silence regarding the requirements relating to the adjudicator’s qualifications. However, the legislation provides for prescription of regulations which may prescribe the qualifications and experience of the adjudicator. Experience elsewhere with statutory adjudication systems suggests that this is not a fail-safe mechanism.

\textsuperscript{105} Draft Mauritian Act section 8.
\textsuperscript{106} Draft Mauritian Act section 26.
\textsuperscript{107} Draft Mauritian Act sections 26, 28.
\textsuperscript{108} Draft Mauritian Act sections 27, 32(5).
\textsuperscript{109} Draft Mauritian Act section 32.
• The Prescribed Nominating Body (PNB)

The Draft Mauritian Act names the CIDB, a statutory body, as the single Prescribed Nominating Body for administering adjudications and for registering adjudicators.110

• Powers of the Adjudicator

The powers of the adjudicator laid down in the Draft Mauritian Act are weak although adjudicators will have considerable discretion in setting the process/directions for the conduct of the adjudications, including being able generally to determine their own procedure where not otherwise provided.111

• The Adjudication Process

The Draft Mauritian Act provides a total of 28 days for an adjudication from its initiation, subject to extensions consented to by the parties.112 Included in this time period is the time for the respondent to provide its response to the application (14 days from being served with the application), and the time for the adjudicator to make his or her determination (14 days after receiving the response from the party served with the adjudication application, or that time expiring).113

• Effect of Adjudication Determination

Determinations made by the adjudicator are binding on an interim basis (subject to amendment with the consent of the parties or via the ‘slip rule’) and may, with the leave of a court, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.114 A successful contractor applicant can also by notice suspend the performance of its obligations

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110 Draft Mauritian Act section 3 (definition of ‘prescribed nominating body’).
111 Draft Mauritian Act section 32(6).
112 Draft Mauritian Act section 32(3)(a).
113 Draft Mauritian Act sections 26-31.
114 Draft Mauritian Act sections 41, 43.
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after giving three days’ notice to the principal. The unsuccessful party retains the option of referring the determination to arbitration for a final decision.

4.4 Recommendations for Mauritius and North America

- The proposed Draft Mauritian Act governing payments and interim dispute resolution mechanisms of construction disputes seeks to promote sustainable development of the construction industry in Mauritius. It prevents the withholding of payments without going through a defined procedure. It gives contractors a statutory right to suspend works and to charge interest on late payments. A ‘pay now and argue later’ culture is being introduced. Both North America and Mauritius have the advantages of assessing the most appropriate legislation in force by reference to what is already in force and working in other jurisdictions prior to adopting a model for their own construction industry.
- The issue relating to inclusion or exclusion (as is the case in other jurisdictions) of owner occupied housing under the definition of a construction contract needs to be resolved.
- It is beneficial to consolidate the same disputes with the consent of the parties so long as the disputes relate to the same contract/project or related contracts/projects in respect of the same claim.
- The qualification and requirements relating to an adjudicator must be legislated to guard against unwarranted interventions through excessive regulations.
- The impartiality and independence of a state body acting as a Prescribed Nomination Body in the face of the payer being the State creates a real possibility of at least a perception of bias. A suggestion is that the PNB as nominator should only be the default position and the legislation permit the parties to provide in the contract or agree once a dispute arises the identity of the adjudicator or the identity of the nominating body in order to maintain the fairness and impartiality of the process.
- The Draft Mauritian Act should contain more provisions on the powers of the adjudicator in order to forestall any challenge as to the powers and jurisdiction of the adjudicator.
- The core duties of the PNB should be included in the legislation.

\[115\] Draft Mauritian Act section 42.
\[116\] Draft Mauritian Act section 45.
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- The issue relating to a minimum amount of payment set out under the underlying contract must be addressed.
- There is a need to limit the use of regulations (this is raised on 20 occasions in the Draft Mauritian Act) in order to prevent future deliberate or inadvertent political intervention into delivery of the objects of the Act.
- There is a confusion in the Draft Mauritian Act over the use of the word ‘dispute’ and the phrase ‘payment dispute’ which causes an interpretation issue regarding for example an extension of time claim. This should be addressed before the law is passed.
- The enforcement regime included in the Draft Mauritian Act is not conducive with the aims of the legislation. The temporary nature of the determination must be emphasised followed by an expedited enforcement regime which carries the support of the judiciary. This might otherwise affect the credibility of the adjudication.
- The issue of ambush as referred to above (see Part C 2.3) must also be prescribed due to the rather long annual closing down affecting the industry.

D Conclusion

As this paper has sought to illustrate, payment problems in the construction industry around the world are nothing new; nor is legislative intervention to ameliorate the effects of those problems. The paper has provided a ‘tasting plate’ of approaches to addressing these issues, based upon the landmark UK reforms via the HGCRA, which have been implemented in Commonwealth countries over the past two decades.

For jurisdictions in North America (and, for that matter, Hong Kong, Mauritius, South Africa and others which are considering security of payment reforms), the smorgasbord of existing legislation presents a range of tools for cracking the ‘tough nut’ created by the way in which commercial pressures inevitably place cashflow – as the ‘very lifeblood’ of the construction industry – under strain. The plaudits and criticisms offered by the authors in respect of each jurisdiction described here also offers an opportunity for those considering

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117 Draft Mauritian Act section 3 (definition of ‘dispute’).
118 Draft Mauritian Act section 3 (definition of ‘payment dispute’).
119 Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd (1973) 71 LGR 162, 167 (Lord Denning).
implementation of reforms (including, further reforms in those jurisdictions which already have HGCRA-based legislation) to make sure that their legislation is framed in a way that is most likely to in fact crack that nut in the relevant jurisdiction.

Based on the foregoing discussion, at least the following questions need to be considered in that exercise:

- **What is the exact policy goal which the legislation is seeking to address?** There seems near-universal agreement about high-level goals; primarily, the need for those who have done work promptly to be paid for it. However, as soon as policy-makers begin to delve into the detail of how legislation is to intervene, they are faced with the maelstrom of embedded interests in the construction industry which makes striking an appropriate balance a fraught exercise. These interests range from the fundamental – preserving freedom of contract (and, therefore, competition) whilst protecting parties which are truly vulnerable – through to important practical details such as whether adjudicator nominating agencies should be state- or industry-based bodies.

- **How important is cross-border harmonization?** As with the policy goal, there seems general agreement, at the conceptual level, that – as an industry which increasingly is organized across national borders – construction should be regulated in a harmonized manner. However, when the question turns to ‘which of the existing approaches should be adopted?’, that consensus rapidly begins to evaporate, and parochial pressures tend towards the disparity which most markedly plagues the eight Australian jurisdictions. This tendency emphasises the need, not only for a firm grasp on the desired policy goal, but also for credible evidence as to the efficacy of the various approaches.

With these questions in mind, this paper – and, the debate we hope it facilitates – is offered as a contribution to the ongoing development of security of payment legislation around the world. Getting the balance right is a crucially-important exercise, not only for the globally-vital construction industry but also for the millions of people who depend upon it for their livelihood.
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