ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

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Welcome

In this edition of the *ADR Digest*, David Longbottom reviews the Mediation Ordinance which will come into operation on 1 January 2013. The Ordinance has retrospective effect and provides a basic statutory framework for the conduct of mediations. It enshrines in law a clearer regime regarding important issues such as confidentiality and admissibility of mediation communications.

We are pleased to welcome back Ian Cocking, Partner and Head of Construction of Clyde & Co as our guest writer. Ian reviews the recent English case of *Walter Lilly v Giles Patrick Mackay*, in which Akenhead J has taken the opportunity to provide some very useful guidance on a number of important legal issues which affect contractors' claims including concurrent delays, the ascertainment of loss and/or expense and global claims. The case is particularly contractor friendly due to the nature of some of the facts and individuals involved in the case.

Finally, we would like to wish you all season's greetings and a happy and prosperous New Year!

James B Longbottom
Managing Director

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The Enthusiasm for Mediation Continues...

By **David S Longbottom**
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Introduction

In the Winter 2010 issue of the *ADR Digest*, we discussed the Civil Justice Reforms (CJR) and one of the key implications of those reforms; to encourage and facilitate the early settlement of civil disputes. The CJR also seeks to facilitate the parties resolving their disputes by means other than litigation in Court, using Alternative Dispute Resolution. To this end, to promote the use of mediation, the Court may impose cost sanctions where a party unreasonably refuses to attempt mediation.

We reported in the Spring 2011 issue of the *ADR Digest*, the case of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd HCA 2032/2007* which demonstrated the court's willingness to impose cost sanctions when a party unreasonably refuses to attempt mediation. In this case, Justice Lam could not see any reasonable explanation on the part of the Defendant for refusing to mediate, and he considered that this was *"a relevant consideration in assessing whether a higher basis of taxation should be ordered against the Defendant in respect of the costs of the action"* incurred after the date of the Defendant's refusal to mediate.

The efforts to increase the use of mediation in Hong Kong continue, with the Mediation Ordinance No. 15 of 2012 ("Ordinance") passed in June this year. According to the Government's press release issued on 19 October 2012 when the Ordinance was gazetted:

> *"The ordinance provides a regulatory framework for the conduct of mediation without hampering the flexibility of the mediation process. The aim of the ordinance is to*

The Ordinance does not include provisions dealing with the mediation process ... there still remains a high degree of party control throughout the mediation process...

promote, encourage and facilitate the resolution of disputes by mediation, and protect the confidential nature of mediation communications."

This enthusiasm for mediation is not surprising. The success of mediation in CJR related cases filed in the District Court in 2011, as reported by the Secretary for Justice, Mr Wong Yan Lung, SC, at the "Mediate First" conference at the Hong Kong Convention and Exhibition Centre in May 2011:

"...showed that settlement was reached in 47.9 per cent of the cases."

The Mediation Ordinance

The Mediation Ordinance will come into operation on 1st January 2013. The Ordinance provides a basic statutory framework for the conduct of mediations and enshrines in law a clearer regime regarding important issues such as confidentiality and admissibility of mediation communications.

The Ordinance does not include provisions dealing with the mediation process. Its intentions are not *"hampering the flexibility of the mediation process"*. Hence, there still remains a high degree of party control throughout the mediation process, with the parties controlling the resolution process by developing their own solutions and forming their own agreements. True flexibility is therefore maintained in the way in which the mediation can be performed and with solutions which can be tailored to the needs and underlying concerns of the parties, and which are unavailable through the litigation process.

The Purpose of Mediation

Mediation as a dispute resolution procedure is well established in the Hong Kong construction industry and the process is generally well understood. The Ordinance, at Section 4, defines mediation as a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following:

- identify the issues in dispute;
- explore and generate options;
- communicate with one another;
- reach an agreement regarding the resolution of the whole, or part, of the dispute.

Applicability

The applicability of the Ordinance is detailed in Section 5 therein, and it applies when the mediation is wholly or partly conducted in Hong Kong, or the agreement provides that the Ordinance or the law of Hong Kong is to apply to the mediation. The Ordinance also applies to the Government. However, certain processes are excluded from the Ordinance and these are listed in Schedule 1 to the Ordinance and generally include Conciliation processes referred to in various other Ordinances.

It is interesting to note that the law will have retrospective effect and so will cover mediations that have already taken place. Hence, there is an importance in understanding the provisions of the Ordinance.

... the law will have retrospective effect and so will cover mediations that have already taken place.

Confidentiality

It is the issue of confidentiality where the Ordinance clearly seeks to bolster confidence. Although, the fundamental importance of confidentiality in mediation communications is already recognized by the Courts in *Champion Concord Ltd and Anor v Lau Koon Foo and Anor, FACV Nos. 16 and 17/2010*, 27th May 2011, Section 8 of the Ordinance provides that a person must not disclose a mediation communication except as provided in the Ordinance. A mediation communication is defined as anything said or done; any document prepared; or any information provided, for the purpose of or in the course of mediation. This confidentiality is in addition to the normal contractual confidentiality of the mediation process and the "without prejudice" nature of mediation communications between the parties.

However, there is an important exception in that the Ordinance defines mediation communications to exclude an agreement to mediate and a settlement agreement. Hence, if parties wish to maintain confidentiality in respect of a settlement agreement made following a mediation, the settlement agreement must therefore include a confidentiality clause.

The Ordinance provides circumstances when a person may disclose a mediation communication and these are listed in Sections 8(2) and 8(3) i.e.:

- the disclosure is made with the consent of each of the parties to the mediation; the mediator(s) for the mediation; and if the mediation communication is made by a person other than a party to the mediation or a mediator – the person who made the communication;
- the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;
- the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;
- there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child;
- the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates;
- the disclosure is made for the purpose of seeking legal advice; or
- the disclosure is made in accordance with a requirement imposed by law.

In addition, a person may disclose a mediation communication with leave of the court or tribunal under the circumstances listed in Section 10 of the Ordinance i.e.:

- for the purpose of enforcing or challenging a mediated settlement agreement;
- for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or
- for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.

It is noted that with the retrospective effect of the Ordinance (Section 5(4)), to the extent that a confidentiality provision in a mediation agreement is inconsistent with the provisions in Sections 8(2) and (3) of the Ordinance, these provisions may override the confidentiality provision (whether made before or after the commencement of the Ordinance).

...the Ordinance provides legal certainty regarding confidentiality and admissibility of mediation communications in evidence.

In summary, whilst confidentiality in mediation is already recognised by the courts in Hong Kong and through normal practice, the Ordinance provides legal certainty regarding confidentiality and disclosure of mediation communications. The Ordinance is therefore intended to provide greater certainty and confidence in the mediation process and consequentially aims to encourage more parties to engage in mediation with even greater vigour.

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Walter Lilly v Giles Patrick Mackay: Lessons Learned and Implications for Hong Kong

By **Ian Cocking**
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Introduction

In the recent case of *Walter Lilly v Giles Patrick Mackay*, published on 11th July 2012, Akenhead J has taken the opportunity to undertake a comprehensive review of the cases and to provide some very useful guidance on the following important issues:

(i) The correct approach to calculating extensions of time, including the use which can be made of prospective or retrospective expert-driven delay analysis;

(ii) The correct approach to notifying claims for loss and expense under standard form contracts; and

(iii) As part of (ii), the extent to which claims can be advanced on a "global" basis.

Extensions of Time

Prospective or Retrospective Analysis?

In his Judgment Akenhead J refocuses attention on the role which the court (or indeed an arbitrator or adjudicator) generally plays when considering questions of extensions of time.

Whilst the Architect prior to the actual Practical Completion can grant a prospective extension of time, which is effectively a best assessment of what the likely future delay will be as a result of the Relevant Events in question, a court or arbitrator has the advantage when reviewing what extensions were due of knowing what actually happened. The court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist. How the court or arbitrator makes that decision must be based on the evidence, both factual and expert.

The judge said that the employer's behaviour to his architect and the contractors was *"not simply coarse"* but *"combative, bullying and aggressive"*. As a result, there are passages from the decision that are particularly contractor friendly.

Concurrent Delay

In undertaking that exercise Akenhead J considered what the approach should be where a delay is caused both by a contractor and an employer default. Having considered the relevant caselaw, he approved the views of Dyson J in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32*, and expressly rejected the *"apportionment"* approach of *City Inn Ltd v Shepherd Construction Ltd [2010] BLR 473*.

The judge decided that, where there is a typical extension of time clause, and where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a Relevant Event, the contractor is entitled to a full extension of time. He reasoned that part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention, and that it would be wrong in principle to construe such clauses on the basis that the contractor should be denied a full extension of time in those circumstances. More importantly in his opinion, there is a straight contractual interpretation of such clauses which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. He observed that there is nothing in the wording of such clauses which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within the jurisdiction of England and Wales in the judge's views.

Notification of Claims for Loss and Expense

In his judgment Akenhead J considered the application of a typical "loss and expense" clause. He concluded the following in relation to that clause:

1. **Details Required**
   The condition precedent within Clause 26.1.3 (of the JCT Standard Form of Building Contract 1998, which is very similar to its equivalents in Hong Kong) only required the contractor to submit details which *"are reasonably necessary"* for the ascertainment of loss and expense. It does not say how the details are to be provided but there is no reason to believe that an offer to the Architect or Quantity Surveyor for them to inspect records at the contractor's offices could not be construed as submission of details of loss and expense.

   What is required is "details" of the loss and expense and that does not necessarily include all the backup accounting information which might support such details.

2. **Interpretation of Loss and Expenses Clauses**
   There is no need to construe Clause 26.1.3 in a peculiarly

strict way or in a way which is in some way penal as against the contractor, particularly bearing in mind that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer.

It is legitimate to bear in mind that the Architect and the Quantity surveyor are not strangers to the project in considering what needs to be provided to them.

3. **The meaning of "Ascertain"**
The word "ascertain" means to determine or discover definitely or, more archaically, with certainty. It was argued by the Employer that the Architect or the Quantity Surveyor cannot ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the contractor must produce material evidence such as is necessary to prove its claim beyond reasonable doubt. In the judge's view it was necessary to construe the words *"in a sensible and commercial way that would resonate with commercial parties in the real world"*. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain".

Global Claims

The Employer argued that the loss and expense claimed was "global" in nature and, as a result, irrecoverable. That prompted Akenhead J to consider with some care the case law surrounding "global" claims, and to conclude the following:

4. **Horses for Courses**
Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the contractor has to demonstrate on a balance of probabilities that:

(1) events occurred which entitle it to loss and expense;

(2) that those events caused delay and/or disruption; and

(3) that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be).

The judge did not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim. One needs to see what the contractual clause relied upon says, to see if there are contractual restrictions on global cost or loss claims. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities.

5. **No Set Way for Contractors to Prove Loss and Expense**
Clause 26 in this case, laid down conditions precedent which, if not complied with, would bar claims under that clause. If and to the extent that those conditions were satisfied, there was nothing in Clause 26 which stated that the direct loss and/or expense cannot be ascertained by appropriate assessments.

It is open to contractors to prove their claim with whatever evidence will satisfy the tribunal and the requisite standard of proof. There is no set way for contractors to prove the three elements. For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.

6. **Nothing wrong in principle with a global claim**
The judge opined that there is nothing in principle "wrong" with a "total" or "global" cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has proved are likely to have caused the loss). The Employer's Counsel suggested that the burden of proof in some way transfers to the defending party. The judge said that this is wrong. It is of course open to that defending party to raise issues or adduce evidence that suggest or even show that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor or that other events (which are not relied upon by the claimant as causing or contributing to the loss or which are the "fault" or "risk" of the claimant contractor) occurred which may have caused or did cause all or part of the loss.

7. **All or Nothing?**
The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on what the impact of those events or factors is.

8. **It's not impossible...**
Obviously, there is no need for the Court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined. The judge did not consider that Vinelott J was saying in the Merton case (at page 102 last paragraph) that a contractor should be debarred from pursuing what he called a *"rolled up award"* if it could otherwise seek to prove its loss in another way. It may be that the tribunal will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed. That does not mean that the global cost claim should be rejected out of hand.

Implications for Hong Kong

The first thing to be noted about the Walter Lilly case is that it is understood to be going to appeal, and therefore the views of the judge may not be the Court's last words on the broad subject matter covered by the decision. The second word of caution is that the facts of the case were somewhat unusual, and involved the colourful behaviour of a wealthy tycoon client who the judge clearly had no sympathy for. The judge said that the employer's behaviour to his architect and the

contractors was *"not simply coarse"* but *"combative, bullying and aggressive"*. As a result, there are passages from the decision that are particularly contractor friendly. The case is likely to be cited very widely in court and arbitrations as providing helpful guidance on common issues, and it is important to understand the context in which these comments were made.

One of the areas which will inevitably attract keen interest in Hong Kong is concurrent delay. In his recent address to the Society of Construction Law entitled *"Concurrent Delay Revisited"* John Marrin QC suggested that the practice of permitting apportionment in cases of damages for breach of contract may be followed in Hong Kong. He was referring to a passage in the judgment of Deputy Judge Simon Westbrook QC in *W. Hing Construction Co Ltd v Boost Investments Ltd [2009] BLR 339.*

In *W Hing Construction Co Ltd v Boost Investments Ltd [2009] 2 HKLRD* the main contractor claimed an extension of time of 84 days owing to the employer's change of building plans and design. Although the Hong Kong Court was not ultimately called upon to decide on the matter of concurrent delay, it explicitly approved the City Inn's ruling:

Deputy Judge Simon Westbrook QC stated;

> *"where there is true concurrency in delaying events it may, in some cases, be appropriate to apportion responsibility for the delays between the two parties so as to arrive at a fair and reasonable assessment".*

However in light of the emphatic rejection of City Inn in the Walter Lilly case, it must be open to doubt whether the Hong Kong Court would permit apportionment in Hong Kong.

Acknowledgement
I would like to thank Sean Brannigan QC, who appeared for the contractor, Walter Lilly, for his insights into the case.

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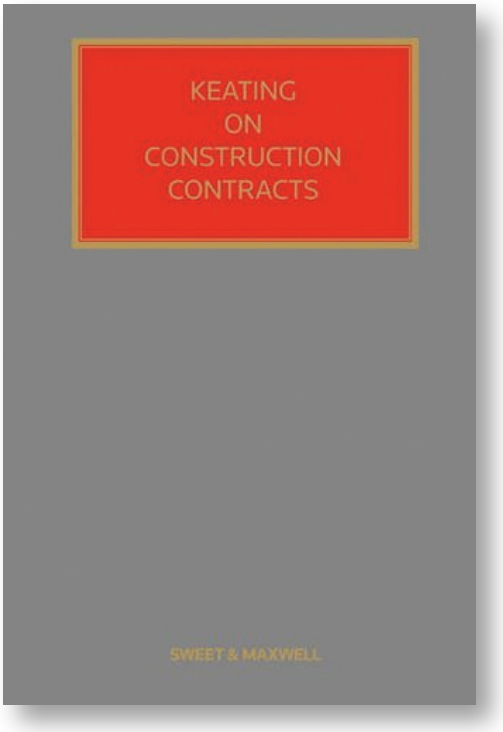
ADR | Review

Books:
Keating on Construction Contracts, Ninth Edition

by The Hon Sir Vivian Ramsey; Stephen Furst, QC



A classic, leading UK based construction law text, *Keating on Construction Contracts*, now in its 9th Edition, is generally recognised as the first point of reference for research on the history and principles governing building contracts. The popular title continues to be practical in its application and is a user-friendly book with a comprehensive index covering a multitude of areas, guiding the reader on key topics such as:

- the underlying principles of contract law applying to construction contracts, including, the nature of a contract, formation of contract and construction of contracts;
- interpreting legislation, analysing judicial decisions and illustrating how the law works in practice; and
- delay and disruption claims.

Although not all sections are relevant to the Hong Kong construction industry; updated it covers UK case law and relevant decisions from Europe and overseas, and it still remains an authoritative must have text for anybody involved in construction law.

"For the construction specialist it is quite simply indispensable."
Estates Gazette

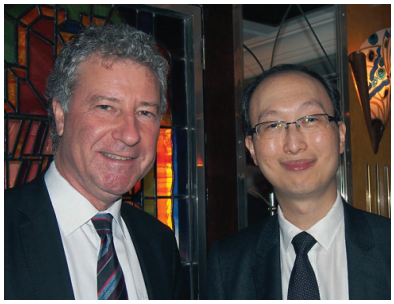
"If there is such a thing as a building contract bible, this is it."
Building Design

Keating also now comes in an e-book which is advertised as providing powerful search functionality to make navigating the text quicker and easier than ever, with hyperlinks to enable passage straight to the required text at the tap of a finger – eBook (Thomson Reuters ProView).

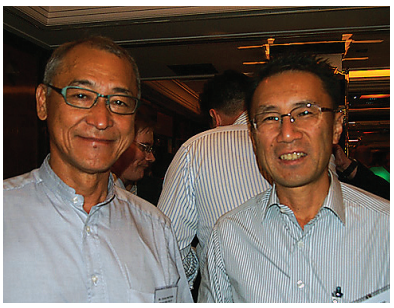
Further information:
Publisher: Sweet & Maxwell, 2012
ISBN: 978-041-404-792-1
Price: GB £430

ADR Annual Cocktails at the China Club, 7th June 2012















ADR | News

Britcham '*Sir Dance A Lot*' Annual Ball 2012

Gallant knights and fair maidens from the kingdom of ADR celebrated in grand style at the year's most royal of banquets, the Camelot themed Britcham and Standard Chartered Bank Annual Ball held at the Grand Hyatt Hotel in Hong Kong on 8th June 2012 in support of Youth Outreach. A full gallery of photos from the event can be viewed on ADR's website.

Youth Outreach was established in November 1991 and provides professional counselling services to young adolescents living on the margins of society as well as those who are incapable of handling life crisis incidents on their own.

Further information on the support group's activities can be found at: **http://www.youthoutreach.org.hk**

Marco Polo German Bierfest

On 29th October 2012, around 30 staff and guests joined us at the Marco Polo Hotel for the 21st Anniversary of the most traditional and authentic, largest and longest running outdoor German Bierfest in Asia.

Allegedly, there were some late risers for work the next day.

ADR | Diary

Forthcoming Events 2012/13

4 Dec	*RICS Hong Kong Matrics Annual Christmas Party – Sheraton Hong Kong Hotel, Kowloon*
11 Dec	*Society of Construction Law Christmas Cocktails – The Foreign Correspondents Club*
2013	
18 Jan	*Chartered Institute of Arbitrator's (East Asia Branch) Young Members Group Annual Party – Privé, Century Square, 1-13 D'Aguilar Street, Central*
12-24 Mar	*Hong Kong Rugby Sevens*

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at **info@adrpartnership.com**

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