

# Five Years On: A Review of Statutory Adjudication in Malaysia

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✉ Adjudication; Construction industry; Malaysia

## Introduction

Statutory adjudication was introduced in Malaysia when the Construction Industry Payment and Adjudication Act 2012 (“the CIPAA”) was gazetted on 22 June 2012. To support the statutory adjudication regime, two specialist Construction Courts in the High Court of Kuala Lumpur and the High Court of Shah Alam were established on 1 April 2013.<sup>1</sup> The CIPAA, however, only came into force on 15 April 2014 when the Construction Industry Payment and Adjudication Regulations 2014 and the Construction Industry Payment and Adjudication (Exemption) Order 2014 (“the Exemption Order”) were in place to support it. As of 2019, statutory adjudication has been in operation for five years in Malaysia and there has been steady growth in the number of adjudication cases and court cases concerning adjudication. Based on statistics<sup>2</sup> produced by the Asian International Arbitration Centre (“the AIAC”, formerly Kuala Lumpur Regional Centre for Arbitration), the sole adjudication nominating body in Malaysia, there have been over 1,500 adjudication cases and 450<sup>3</sup> court cases concerning adjudication as of 15 April 2018 and 28 February 2018 respectively. Given the large number of adjudication cases recorded and the growing body of case law developed, this article examines the fundamentals of adjudication under the CIPAA and provides procedural clarifications in respect of its operation from the viewpoints of case law.

## Statutory scheme

The Malaysian adjudication regime is a purely statutory scheme. This means that the requirements of adjudication are not imposed into construction contracts, but the adjudication regime operates as a statutory scheme alongside contractual dispute resolution processes provided in the contract. In other words, the adjudication regime is mandatory and operates independently from any contractual dispute resolution processes. This approach is commendable as contract drafters are not

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<sup>1</sup> The CIPAA requires the Malaysian High Courts to consider and decide disputes under the construction contract concurrently to adjudication (s.37(1) of the CIPAA); enforce adjudication decisions as if they are judgments of the court (s.28(1) of the CIPAA); consider applications for the stay of adjudication decisions, pending final determination by arbitration or the court (s.16(1) of the CIPAA); and consider applications to set aside adjudication decisions (s.15 of the CIPAA).

<sup>2</sup> “Sharing Solutions”, Asian International Arbitration Centre, 7 May 2018.

<sup>3</sup> Almost 50% of which concerns the applications under s.28 of the CIPAA to enforce adjudication decisions as reported in “Sharing Solutions”, Asian International Arbitration Centre, 7 May 2018.

permitted to draft their own adjudication procedures, thus preventing parties from avoiding the intended impact of the CIPAA Act through ingenious drafting.

## Function of adjudication

The preamble section of the CIPAA states that its adjudication regime is intended to function as a speedy dispute resolution mechanism. This is akin to the function of statutory adjudication under the UK<sup>4</sup> and New Zealand<sup>5</sup> regimes, which allow for the resolution of all types of dispute as long as they arise under a construction contract. However, the CIPAA adjudication regime confines its application to payment disputes crystallised through the exchange of a payment claim and a payment response between the parties.<sup>6</sup> This feature is analogous to the statutory adjudication regime operating in the Australian State of New South Wales,<sup>7</sup> which operates as a neutral certification scheme. The default function of the CIPAA adjudication regime is thus to determine the value of a payment dispute arising under a construction contract. It is important to note, however, by virtue of s.27(2) of the CIPAA, that the parties may agree in writing to extend the adjudicator's jurisdiction to decide disputes concerning matters unrelated to payment or outside the scope of the CIPAA. This means that the CIPAA adjudication regime can also function as a fully-fledged dispute resolution scheme covering all types of dispute, if agreed to by the parties. The approach taken by the CIPAA is commendable, as the parties' freedom of contract is upheld to refer their disputes outside payment, should they decide to do so.

## Scope of application

The scope of application of the Malaysian adjudication regime covers construction contracts made in writing for construction work and construction consultancy carried out wholly or partly in Malaysia.<sup>8</sup> Construction work includes construction, extension, installation, repair, maintenance, removal, renovation, alteration, dismantling and demolition of a long list of items including structures (mainly buildings constructed either above or below ground level), infrastructure (such as roads, harbours, railways and bridges) and specialist work (electrical, mechanical, oil and gas, petrochemical and telecommunication), and also includes preparatory and temporary works as well as procurement of construction materials, equipment or workers for construction work.<sup>9</sup> The definition of construction work under the

<sup>4</sup> Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the UK Act") came into force on 1 May 1998 in England, Wales and Scotland and 1 June 1999 in Northern Ireland when the relevant Schemes for Construction Contracts were in place to support it. The UK Act was amended in 2009 by Pt 8 of the Local Democracy, Economic Development and Construction Act 2009, which came into force on 1 October 2011 in England and Wales, on 1 November 2012 in Scotland and on 14 November 2012 in Northern Ireland, when the relevant Schemes were in place to support it.

<sup>5</sup> The Construction Contracts Act 2002, New Zealand ("the NZ Act"). The NZ Act was amended by the Construction Contracts Amendment Act 2015 and the Regulatory Systems (commercial Matters) Amendment Act 2017.

<sup>6</sup> See s.7 of the CIPAA.

<sup>7</sup> The Building and Construction Industry Security of Payment Act 1999 as amended in 2002 and 2010, New South Wales, Australia ("the NSW Act"). The NSW Act was amended again in 2018 when the New South Wales government passed the Building and Construction Industry Security of Payment Amendment Act 2018 ("the Amendment Act"). The Amendment Act received assent on 28 November 2018 and the amendments will take effect upon proclamation.

<sup>8</sup> Sections 2 and 4 of the CIPAA.

<sup>9</sup> Section 4 of the CIPAA.

enabling adjudication legislation is thus broad, covering virtually any work typically carried out or performed in the construction industry.

The High Court in *MIR Valve*<sup>10</sup> confirmed the broad scope of application of the CIPAA when it held that the supply of valves for installation onto a floating production storage and offloading vessel, transforming its purpose from shipping to serving the oil and gas industry, fell under “construction work” for the purposes of the CIPAA although the work was carried out on a vessel.

The definition of “construction consultancy contract” is also broad, taking into account:

“consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management surveying”.

In *Martego*<sup>11</sup> the High Court held that “construction consultancy contract” includes contracts which provide purely consultancy services such as architecture.

The CIPAA, however, does not provide a definition of a “construction contract in writing”. This gap is filled by CIPAA Circular 03, produced by AIAC, which clarifies that a construction contract is made in writing whether or not it is signed by the parties, or made by an exchange of communications in writing or evidenced in writing. The High Court agreed with the position of the AIAC when it took a liberal approach in defining a “construction contract in writing” in the cases of *Gazzriz Sdn*<sup>12</sup> and *Inovatif*.<sup>13</sup> In *Gazzriz*, the court held that a contract does not need to be signed by the parties to constitute a “contract in writing” to be subject to the statutory adjudication scheme under the CIPAA. In *Inovatif*, the court found that the purchase order, although dated prematurely pending execution of a different contract, was a “contract in writing” for the purposes of the CIPAA. Notwithstanding the above, construction contracts which are made orally, or partly orally and partly in writing are excluded from the provisions of the CIPAA by virtue of its s.2.

It is also not clear from the sections in the CIPAA whether it includes or excludes construction contracts made prior to the commencement of the CIPAA. The High Court in *UDA Holdings*<sup>14</sup> held that the CIPAA has a retrospective effect and is therefore applicable to construction contracts that predate it. However, the Court of Appeal in *Bauer*<sup>15</sup> held that the CIPAA has a prospective effect, and therefore the pay-when-paid clause that was included in the pre-CIPAA construction contract, being the subject of the dispute in this case, was valid and enforceable.<sup>16</sup> The Court of Appeal was of the view that the CIPAA legislation related to substantive rather than procedural rights, and given the absence of express wordings in the CIPAA concerning retrospective application, the CIPAA is thus prospective in nature.

Despite its wide scope of application, statutory adjudication under the CIPAA is not applicable to certain contracts. Construction contracts for buildings that are

<sup>10</sup> *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd* [2018] 7 MLJ 796.

<sup>11</sup> *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2017] CLJ 101.

<sup>12</sup> *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2016] MLJU 1054.

<sup>13</sup> *Inovatif Engineering (M) Sdn Bhd v Nomad Engineering Sdn Bhd* [2016] MLJU 1351.

<sup>14</sup> *UDA Holdings Bhd v Bisraya Construction Sdn Bhd* [2015] 5 CLJ 527.

<sup>15</sup> *Bauer (Malaysia) Sdn Bhd v Jack-In-Pile (M) Sdn Bhd* Civil Appeal No: B-02(C)[A]-1187-06/2017.

<sup>16</sup> Section 35 of the CIPAA renders conditional payment provisions (such as pay-when-paid, pay-if-paid and back-to-back payment provisions) invalid.

less than four storeys high and intended for occupation by a “natural person” are excluded from the CIPAA. This is probably because of policy reasons—largely aimed at relieving homeowners (who are essentially consumers) from difficulties concerning compliance with the elaborate and time-consuming payment and adjudication provisions. By virtue of the Exemption Order, government construction contracts that are carried out urgently due to natural disasters, floods, landslides, fires and other emergencies and unforeseen circumstances are also not subject to adjudication under the CIPAA. As the phrase “Government construction contract” is not defined in the Exemption Order, the question arose as to whether the exemption covers statutory bodies and government-linked companies or whether it is limited to contracts entered into by the Government. This question was answered by the High Court in *Mudajaya*<sup>17</sup> where it clarified that a “Government construction contract” is a construction contract in which one of the parties is the Government (either the Federal or a State Government).

## Payment disputes

The CIPAA does not define the type of “payment dispute” that is covered by the scope of its adjudication. It does, however, define “payment” as “a payment for work done or services rendered under the express terms of a construction contract”. Payments are therefore in respect of “work done” for the carrying out of “construction work” or “services rendered” in relation to the performance of “construction consultancy”. Payments must also arise “under the express terms of a construction contract”, which effectively excludes extra contractual claims such as torts/general damages arising from breach of contract or a common law claim such as wrongful repudiation of contract.

Given the definition of payment above, disputes arising from payment may include progress payments (stage, monthly, stage and milestone), final accounts,<sup>18</sup> variations, loss and expense claims,<sup>19</sup> cost adjustments due to price fluctuations, non-release of retention sums, interest on late/non-payment, acceleration costs, bonus payments for early completion,<sup>20</sup> diminution in value, liquidated damages and other issues related to payment as long as they arise under a construction contract and relate to the express terms contained therein. The scope of dispute subjected to the CIPAA adjudication is thus sufficiently broad to cover the main disputes that have historically been plaguing the Malaysian construction industry. The focused scope of application of the Malaysian adjudication regime warrants some merit, as it deals with the core issue in the construction industry (i.e. payment or the lack of it).

<sup>17</sup> *Mudajaya Corp Bhd v Leighton Contractors (M) Sdn Bhd* [2015] 5 CLJ 848.

<sup>18</sup> See *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd Appeal* [2018] 2 CLJ 163 and *Tidalmarine Engineering Sdn Bhd v Conlay Construction Sdn Bhd* [2017] 5 MLRH 69.

<sup>19</sup> See *Syarikat Bina Darul Aman Berhad & Another (collectively referred to as BDB-Kery (joint venture)) v Government of Malaysia* [2017] 4 AMR 477. The High Court in this case however made a distinction between a loss and expense claim arising from the contract and a loss and expense claim for special damages due to breach of the contract. The former is within the ambit of the CIPAA whilst the latter is excluded.

<sup>20</sup> *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd (and 3 Other Originating Summons)* [2017] 5 AMR 76.

## Procedure of adjudication

The statutory adjudication under the CIPAA provides for a two-stage process as the payment mechanism is linked to the adjudication regime. This requires the parties to follow the payment procedures prescribed by the CIPAA in the initial stages to properly crystallise a dispute (i.e. first stage), which is in turn referable to adjudication (i.e. second stage). The parties must then first exchange their payment claim and payment response in the prescribed manner and within the timeframes specified in the CIPAA to allow the opportunity for them to either settle the claim or to escalate the claim into a payment dispute.

Once the claim becomes a payment dispute, there are exchanges of adjudication claim, response and reply between the parties in the manner and within the timeframes required by the CIPAA. This process is overseen by the adjudicator, who has duties and obligations,<sup>21</sup> jurisdiction<sup>22</sup> and vast powers<sup>23</sup> under the CIPAA to conduct and conclude the adjudication proceedings. The adjudicator then makes a determination of the value of the payment dispute based on these documents within a specified period to temporarily settle the dispute between the parties. The decision is not subject to appeal<sup>24</sup> but has temporary finality as the CIPAA permits the parties to refer the same dispute to the High Court or an arbitration tribunal prior to, concurrent with, or even after the adjudication proceedings.<sup>25</sup>

### *Payment claim and payment response*

The adjudication process commences with the serving of a payment claim by the unpaid party on the non-paying party to the construction contract. The payment claim must be in writing and include the following requirements<sup>26</sup>:

- 1) the amount claimed and the due date for payment of the amount claimed;
- 2) details to identify the cause of action, including the provision in the construction contract to which payment relates;
- 3) description of the work or services to which payment relates; and
- 4) a statement that the claim is made under the CIPAA.

The High Court in *Terminal Perintis*<sup>27</sup> confirmed that a payment claim is valid when, prima facie, the above requirements are complied with by the unpaid party. It is thus important for the parties to comply with the requirements of a payment claim as prescribed by the CIPAA to avoid the possibility of their payment claims being rendered invalid during the adjudication proceedings or at the enforcement stage.

Upon receipt of the payment claim, the non-paying party must issue a written payment response within 10 working days<sup>28</sup> either to admit to the payment claim

<sup>21</sup> Section 24 of the CIPAA.

<sup>22</sup> Section 27 of the CIPAA.

<sup>23</sup> Section 25 of the CIPAA.

<sup>24</sup> As decided in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728 and *Construction Sdn Bhd v Bina MYK Sdn Bhd (and Another Originating Summons)* [2017] 2 AMR 502.

<sup>25</sup> Section 37 of the CIPAA.

<sup>26</sup> Section 5 of the CIPAA.

<sup>27</sup> *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd* [2017] MLJU 242.

<sup>28</sup> Section 4 of the CIPAA defines “working day” as “a calendar day but exclude[s] weekends and public holidays applicable at the State of Federal Territory where the site is located”.

together with the whole amount claimed or any amount as admitted or to dispute the amount claimed in the payment claim either wholly or partly stating the amount disputed and its reason(s).<sup>29</sup> If the payment response is issued in a manner not prescribed by the CIPAA, or if it is not issued at all, then the non-paying party is deemed to have disputed the entire payment claim.<sup>30</sup> It was held in *Terminal Perintis* that a non-paying party's desire to challenge the validity of a payment claim should be raised in the payment response.

Since Section 27(1) of the CIPAA states that the adjudicator's jurisdiction to make a determination on a dispute is limited to the matter set out in the adjudication claim and adjudication response, it was initially thought that the matters contained in the payment claim and payment response must be complete and exhaustive. This position was also given judicial approval in *View Esteem*<sup>31</sup> where the High Court held that the adjudicator's jurisdiction was limited to the matters raised in the payment claim and payment response except by agreement of the parties in writing. This meant that new claims or defences raised later in the adjudication claim and adjudication response respectively could not be considered by the adjudicator due to the lack of jurisdiction. The case<sup>32</sup> proceeded to the Court of Appeal where the position was confirmed. The Court of Appeal, however, went on to say that any irregularity and/or non-compliance of the payment claim and payment response did not mean that the adjudicator would not have the jurisdiction to hear the dispute. The court opined that such irregularity and/or non-compliance could be remedied by the adjudicator using the powers set out in Section 26 of the CIPAA. This section affords massive powers to the adjudicator to make any order or allow amendments to be made to the documents in respect of the adjudication proceedings, which may include allowing matters not raised in the payment claim and payment response.

The Federal Court where the case<sup>33</sup> was finally decided, reversed the decisions of the High Court and the Court of Appeal. The Federal Court held that an adjudicator has the jurisdiction to consider new matters (i.e. defences, set-offs, cross-claims or counter-claims) raised in the adjudication response, even if these were not included in the payment response, as long as these matters relate to the payment claim. The implication of this decision is that the adjudicator will not exceed their jurisdiction if the new matters raised in the adjudication claim are considered by the adjudicator. Conversely, the adjudicator would be in breach of natural justice, which is one of the grounds to set aside adjudication decisions, if these new matters were not considered.

Although this decision may appear controversial as it is inconsistent with Section 27(1) of the CIPAA, there seem to be valid grounds as to why new matters may be included in the adjudication response. Firstly, the respondent has only 10 working days from receipt of the payment claim to prepare their response—an arguably tight timeline for them to include all possible matters to defend their position. Secondly, in the event that no payment response is issued, the respondent is deemed to have disputed the entire payment claim although they are not precluded

<sup>29</sup> Section 6 of the CIPAA.

<sup>30</sup> Section 6(4) of the CIPAA.

<sup>31</sup> *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 1 CIDB-CLR 301.

<sup>32</sup> *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717.

<sup>33</sup> *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22.

from raising whatever defences they may have in the adjudication response. Accordingly, it appears justified to allow the respondent to include new matters in the adjudication response if such matters were not raised previously in the payment claim.

### *Commencement of adjudication*

Either party, i.e. the unpaid party or non-paying party, has the right to refer a dispute arising from the payment claim to adjudication.<sup>34</sup> This right can only be exercised after the period to serve a payment response has expired.<sup>35</sup> The fact that either party has access to statutory adjudication is commendable, as apart from contractors, an employer who seeks to recover costs from engaging a third-party contractor to remedy the defects caused by and failed to be remedied by the contractor can also refer this dispute to adjudication. Similarly, it may be argued that, in theory, an employer who has a professional negligence claim against their professional consultant can also do the same. However, this may be a step too far for adjudication, as professional negligence claims involve complex analyses of law and technical intricacies which may be unfit for a “rough and ready justice” type of dispute resolution.

To initiate adjudication proceedings, a notice must first be issued by the claimant to the respondent.<sup>36</sup> The notice must include the nature and description of the dispute and the remedy sought by the claimant together with any supporting documentation.<sup>37</sup>

### *Appointment of the adjudicator*

Issuance of the notice also triggers the process of appointing the adjudicator who will make a determination on the payment dispute crystallised through the payment procedures. Under the CIPAA, appointment of the adjudicator can be made by agreement between the parties or by the Director of the AIAC. The former must be made within 10 working days from the service of the notice of adjudication by the claimant. The latter is unique to the Malaysian adjudication regime and must be made within five working days upon receipt of the request of either party in the dispute if the parties fail to agree on the identity of the adjudicator or the request of the parties in dispute. The Director thus has broad powers to appoint the adjudicator suitable for a particular type of dispute. The fact that the parties have to agree on the adjudicator after a dispute has arisen is commendable, since an economically dominant party is prevented from making a prior selection at the time of concluding the contract that would be detrimental to the financially weaker party. This improves impartiality in the adjudication process and enhances the acceptability of decisions. It is important to note that an objection to the validity of the adjudicator’s appointment must be made during the adjudication proceedings and not at a later stage. A party who participated fully in the former without raising any objection would be estopped from raising the objection in the latter.<sup>38</sup>

<sup>34</sup> Section 7(2) of the CIPAA.

<sup>35</sup> Section 7(2) of the CIPAA.

<sup>36</sup> Section 8(1) of the CIPAA.

<sup>37</sup> Section 8(1) of the CIPAA.

<sup>38</sup> *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd* [2017] MLJU 146.

### ***Adjudication claim, adjudication response and adjudication reply***

Upon receipt of the acceptance of appointment from the adjudicator, the claimant has 10 days to issue their adjudication claim to the respondent.<sup>39</sup> It is unclear from the Federal Court's decision in *View Esteem* whether new claims that relate to the payment claim can be introduced in the adjudication claim. The preferred view is that given a party has considerable time to prepare the payment claim from which the jurisdiction of the adjudicator is established, it is perhaps sensible not to allow the claimant to introduce new claims in the adjudication claim if the same were not previously raised in the payment claim. The adjudication claim is thus basically an expansion of the payment claim and notice of adjudication issued previously.

The respondent has 10 working days to submit their response<sup>40</sup> upon receipt of the adjudication application from the claimant. As decided in *Esteem View*, the respondent can include new defences in the adjudication response as long as they relate to the payment claim. This is arguably favourable to the respondent, who under the previous position had to set out all possible defences within the limited period of 10 days from receipt of the payment claim. Such burden is now shifted to the claimant, who has five working days upon receipt of the response to submit a reply<sup>41</sup> to the defences raised in the adjudication response. This includes those issues that are being raised for the first time.

### ***Adjudication decision***

The adjudicator has 45 working days from the service of the adjudication response or reply (as the case may be) to make a decision.<sup>42</sup> This period excludes "weekends and public holidays applicable at the State of Federal Territory where the site is located".<sup>43</sup> The timeframe afforded to the adjudicator to make a determination is thus unreasonably long, given the fact that the Malaysian adjudication regime only deals with payment disputes. By way of comparison, the adjudication regimes in the Australian State of New South Wales, Australia, and Singapore, which are similar to the Malaysian adjudication regime in terms of application, procedure and scope of dispute provide only 10<sup>44</sup> and 14<sup>45</sup> working days respectively for the adjudicator to make a determination.

### ***Enforcement of the adjudication decision***

Section 28(1) states that, in order to enforce a decision, the successful party may apply to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court. The High Court in *Subang Skypark*<sup>46</sup> observed that s.28(1) provides the correct avenue for successful parties in adjudication to enforce their decisions. In addition, to put pressure on the losing

<sup>39</sup> Section 9(1) of the CIPAA.

<sup>40</sup> Section 10(1) of the CIPAA.

<sup>41</sup> Section 11(1) of the CIPAA.

<sup>42</sup> Section 12(2) of the CIPAA.

<sup>43</sup> Section 4 of the CIPAA.

<sup>44</sup> Following the date of notification of the adjudicator's appointment.

<sup>45</sup> Beginning from the date after the expiry of the respondent's responding period.

<sup>46</sup> *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818.

party, the winning party may also exercise the right to suspend or reduce the rate of progress of performance.<sup>47</sup> This right must be exercised within the provisions of the CIPAA. A notice of intention must be issued, after which the losing party has 14 calendar days to pay the adjudicated amount. Should the losing party fail to pay, the winning party may suspend or reduce the rate of progress of performance. If the winning party is a subcontractor, they also have the option to make a written request directly to the principal of the losing party contractor to pay the adjudicated amount.<sup>48</sup> In *Murni Environmental Engineering*<sup>49</sup> the High Court held that the principal is obliged to make payment to the party with a favourable adjudication decision against their contractor regardless of the fact that they are not aware of, or a party to, the adjudication proceedings.

Section 13 of the CIPAA provides that the decision made by the adjudicator will be binding on the parties until it is set aside by the High Court on any of the grounds listed under s.15, the payment dispute is finally settled by agreement in writing between the parties, or the dispute is ruled on by the arbitrator or the court. Section 15 of the CIPAA permits an “aggrieved party” to apply to the High Court to set aside an adjudication decision on the following limited grounds:

- 1) the decision was obtained improperly through fraud, or bribery<sup>50</sup>;
- 2) there has been a denial of natural justice<sup>51</sup>;
- 3) the adjudicator has not acted independently or impartially<sup>52</sup>; or
- 4) the adjudicator has acted in excess of their jurisdiction.<sup>53</sup>

The phrase “aggrieved party” is not defined in the CIPAA, but in the majority of cases this would be the respondent who has a decision against them as decided by the adjudicator. However, the High Court decided in *Syarikat Bina Darul Aman Berhad*<sup>54</sup> and *Wong Huat Construction*<sup>55</sup> that an “aggrieved party” can also be the claimant, as the judges in these two cases gave this phrase its plain and ordinary meaning. In the former case, the claimant sought to set aside an adjudication decision because their claim was alleged to have been dismissed in a peculiar manner and was, therefore, aggrieved. In the latter case, the claimant was not satisfied with the meagre sum of RM 29,791.73 that was awarded in their favour in an adjudication against the amount claimed (i.e. RM 231,277.17) and was therefore an “aggrieved party” for the purposes of the CIPAA.

The CIPAA recognises that a decision procured improperly through fraud or bribery is grounds for setting aside an adjudicator’s decision.<sup>56</sup> This inclusion is commendable, as it serves as a very stern warning from the government to the parties and adjudicator to act sensibly and ethically during the adjudication process.

A breach of natural justice on the part of the adjudicator is also recognised by the CIPAA as grounds to set aside an adjudicator’s decision. *ACFM Engineering*

<sup>47</sup> Section 29 of the CIPAA.

<sup>48</sup> Section 30 of the CIPAA.

<sup>49</sup> *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd and Other Suits* [2016] MLJU 691.

<sup>50</sup> Section 15(a) of the CIPAA.

<sup>51</sup> Section 15(b) of the CIPAA.

<sup>52</sup> Section 15(c) of the CIPAA.

<sup>53</sup> Section 15(d) of the CIPAA.

<sup>54</sup> *Syarikat Bina Darul Aman Berhad* [2017] 4 AMR 477.

<sup>55</sup> *Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd* [2018] 1 CLJ 536.

<sup>56</sup> Section 15(a) of the CIPAA.

& *Construction*<sup>57</sup> clarified that the breach must be “either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant”. In other words, the breach must be of a material nature that significantly affects the decision. In *Guangxi Dev*<sup>58</sup> the High Court held that the fact that the adjudicator did not allow a hearing does not amount to a denial of natural justice. Although the adjudicator has the power to conduct a hearing under s.25(g) of the CIPAA, this does not amount to an obligation for the adjudicator to conduct the same. Furthermore, there was no evidence to suggest that the adjudicator would have changed their decision had there been a hearing. Similarly, in *Permintex JSK Resources*<sup>59</sup> it was held that the fact that the adjudicator did not invite the parties to a face-to-face preliminary meeting was not a breach of natural justice given their broad powers, which included conducting a documents-only adjudication. In *Rimbunan Raya*<sup>60</sup> the court held that an error of fact on the part of the adjudicator would not amount to a breach of natural justice. However, in *WRP Asia Pacific*<sup>61</sup> the High Court held that the fact that the adjudicator communicated unilaterally with one of the parties via WhatsApp without giving the other party a chance to respond was a material breach of natural justice.

The other basis for setting aside an adjudication decision under the CIPAA is a lack of independence and impartiality on the part of the adjudicator. It was decided in *Inovatif* that a mere refusal to grant indulgence to overcome a breach of timelines did not amount to a lack of impartiality, as the party making such an allegation would be required to provide evidence of bias.

An adjudication decision can also be set aside if the adjudicator has exceeded their jurisdiction. In *Terminal Perintis* the High Court clarified the three types of jurisdiction that an adjudicator possesses. The first is core jurisdiction, which concerns whether the subject matter of the dispute is the subject of the CIPAA. For example, if the contract in question is not a construction contract for the purposes of the CIPAA, then the adjudicator has no jurisdiction from the outset and the court will set aside the decision made by the adjudicator on the grounds of an excess of jurisdiction. Secondly, it is important for the adjudicator to have been properly appointed so that they have competent jurisdiction in resolving a payment dispute, including compliance with the basic and essential requirements of the payment claim from which competent jurisdiction is derived. Lastly, the adjudicator must also have contingent jurisdiction in order for their decision to be valid and enforceable. As the name suggests, this jurisdiction is conferred on the adjudicator contingent upon further compliance with the requirements of the Act. It was earlier thought that an adjudicator could not consider a defence that was not raised in the payment response as they had no contingent jurisdiction to do so if such a defence was raised in the adjudication response since there was no further compliance with the requirements of the CIPAA. However, in *View Esteem*, the Federal Court decided that an adjudicator has the jurisdiction to consider new matters raised in the adjudication response, as long as these matters relate to the

<sup>57</sup> *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd* [2015] 1 LNS 756.

<sup>58</sup> *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2017] MLJU 878.

<sup>59</sup> *Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd (and Another Originating Summons)* [2018] 1 AMR 693.

<sup>60</sup> *Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd* [2016] MLJU 1189.

<sup>61</sup> *WRP Asia Pacific Sdn Bhd v NS Bluescope* [2016] 1 AMR 379.

payment claim, even though these were not included in the payment response. This decision effectively expanded the adjudicator's jurisdiction in Malaysia, as the adjudicator can now consider matters not previously raised.

The High Court in *Wong Huat Construction* held that the effect of the setting aside of an adjudication decision is that the parties are restored to their original positions as if no adjudication had taken place. This means that a party can have their payment dispute decided afresh in arbitration or in litigation. In theory, however, the repercussion of this decision is that a party is also not barred from having the payment dispute decided in a fresh adjudication. This may enliven the practice of “adjudicator shopping”, wherein dissatisfied claimants submit the same claim for the same work—a claim that is identical, or nearly identical, to that which was earlier referred to adjudication—for a second, or even a third time, until a favourable decision is achieved in an adjudication. The Malaysian courts, however, in *Kining Exeton*<sup>62</sup> and *PWC*<sup>63</sup> held that the principle of *res judicata* applies to adjudication proceedings commenced under CIPAA, thus precluding aggrieved parties from referring a claim to be re-adjudicated.

Apart from setting aside an adjudication decision, the losing party can also apply for a stay of enforcement made under the following grounds under s.16 of the CIPAA:

- 1) an application to set aside the adjudication decision under s.15 of the CIPAA has been made; or
- 2) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

Initially the courts adopted a cautious approach in granting a stay, which was only allowed in exceptional circumstances and limited to the financial aspects of payment or repayment. In *Subang Skypark*<sup>64</sup> the High Court held that a stay should only be granted in “exceptional circumstances” and “such circumstances must necessarily refer to the financial status of the other party”. The High Court and Court of Appeal in *View Esteem* agreed with this approach when they held that a stay was only available if it could be proven by the appellant that the respondent was unable to repay the adjudication sum. The Federal Court in *View Esteem*, however, disagreed with the approach; factors apart from the financial aspect of the other party should also be considered when granting a stay, including obvious errors, or the need to meet the demands of justice for an individual case. Notwithstanding the liberal approach in increasing the number of factors available for the granting of a stay, the Federal Court emphasised that the High Court should not readily grant a stay of an adjudication decision and should exercise caution when doing so. The Federal Court also held that, as a matter of practical utility, applications for stay and for setting aside adjudication decisions under and s.16 and 15 of the CIPAA respectively should be filed together to enable the High Court to make an appropriate order considering both applications.

<sup>62</sup> *Kining Exeton Sdn Bhd v Majlis Perbandaran Kuantan* [2017] 1 LNS 1905.

<sup>63</sup> *PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd* [2018] 1 LNS 164 (High Court).

<sup>64</sup> *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818.

## **Conclusion**

Although the statutory adjudication regime under the CIPAA has been in operation for only five years, there has been considerable growth in the number of adjudications. From this, it can be inferred that, based on industry use, it appears that the Malaysian adjudication system is working well and is widely-used by the industry. There have also been a large number of court cases concerning statutory adjudication; however, such a development is expected given its early years of operation and the “teething problems” that arise from the implementation of a new law. Parties have sought judicial guidance to clarify the courts’ standpoints on fundamental issues affecting the operation of the adjudication regime in terms of law and practice. The Malaysian adjudication regime has been fortunate to have specialist and supportive court systems ready, willing and able to enforce adjudication decisions consistent with the intentions of Parliament. The courts have been cautious in setting aside adjudication decisions or ordering stays of enforcement to prevent parties from abusing ss.15 and 16 of the CIPAA respectively, upholding the intention of Parliament to provide a speedy mechanism to resolve construction disputes with temporary finality.