



ABOUT KLRCA

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is a not-for-profit, non-governmental international arbitral institution that was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). It was the first centre of its kind to be established by AALCO in Asia.

The Centre provides institutional support for domestic and international arbitration and alternative dispute resolution (ADR) proceedings in Asia. Under the Construction Industry Payment and Adjudication Act 2012, it is also the adjudication authority in Malaysia and is responsible for training, setting the competency standard and criteria of adjudicators, and appointing adjudicators.

KLRCA also offers arbitration for Islamic banking and financial services, mediation/conciliation, and domain name dispute services. While it is fully funded by the Government of Malaysia under a host country agreement with AALCO, the Centre has been accorded certain privileges and immunities for the purposes of executing its functions as an independent, international organisation.

For more information, please visit www.klrca.org

ABOUT CIPAA 2012

The Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) was gazetted on 22 June 2012 and enforced on 15 April 2014 to:

- Facilitate regular and timely payment;
- Provide a mechanism for speedy dispute resolution through adjudication;
- Provide remedies for the recovery of payment in the construction industry; and
- Provide for connected and incidental matters.

KLRCA & CIPAA 2012

Under CIPAA 2012, KLRCA is responsible for:

- Setting the competency standard and criteria of an adjudicator. This is done by providing the relevant training courses to parties who are interested to become certified adjudicators.
- Certifying qualified adjudicators and listing them on KLRCA's panel of adjudicators.
- Determining the standard terms of appointment of an adjudicator and fees for their services.
- Providing administrative support for the conduct of adjudication under CIPAA 2012.
- Undertaking any other duties and functions as may be required for the efficient conduct of adjudication under this Act.





CIPAA Conference 2017 - Breaking Barriers

Statistical analysis, updates and commentary on the trajectory and growth of adjudication in Malaysia based on current and updated statistical data collected since the coming into force of the revolutionary Construction Industry Payment and Adjudication Act 2012 on 15th April 2014 up to 15th April 2017.

To be used for academic purposes only in conjunction with the CIPAA Conference 2017 - Breaking Barriers on 17th May 2017.

17th May 2017

Kuala Lumpur Regional Centre for Arbitration

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I. MESSAGE FROM THE DIRECTOR

Greetings from the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

It is my greatest pleasure to present to you with the KLRCA's exclusive annual statistical report and commentary on statutory adjudication, as a supplement to the CIPAA Conference 2017.

As the Construction Industry Payment & Adjudication Act 2012 (CIPAA) is now in its third year of operation, the regime has seen a remarkable growth in case load unlike any other jurisdiction with a comparable statutory adjudication framework, registering over 800 applications as of 2017, thus producing a hallmark year for the KLRCA in terms of adjudication case load record.

In light of this recent expansion, this year's CIPAA Report 2017 comprehensively captures these vital analytics, with the purpose of disseminating the growth of the framework to all industry stakeholders. With three fiscal years' worth of valuable data on adjudication trends collected, the report represents the KLRCA's ever present commitment to service the construction sector by disseminating statistical analysis, updates and commentary on the trajectory and growth of statutory adjudication in Malaysia.

I believe all stakeholders stand to benefit vastly from the informative statistical information and administrative guidelines that can be exerted from this year's CIPAA report. This year's report features an updated and concise design, incorporating a user friendly infographic layout that allows the reader to easily digest the areas identified for statistical analysis.

This year's report also sees the return of the analysis of adjudication trends based on questionnaire surveys returned by users. The questionnaire survey conducted allows the KLRCA to gauge a variety of fields that may be assessed on a macro level in the context of notable trends that occur. This year's edition features a broader scope that captures user input on concurrent referrals of disputes to arbitration or court litigation, user satisfaction on the outcome of proceedings and conduct of the adjudicator, equal opportunities for submissions and the rate of jurisdictional challenges, amongst other things.

Ultimately, as an annual initiative, I hope that this report not only keeps all stakeholders abreast with the key areas and issues surrounding the adjudication framework, but also shares with them several administrative observations that were gleaned from the KLRCA's point of view as the administrator, along with our recommendations that may prove useful towards frequent and first time users by improving their understanding of the administrative process flow of adjudications.

I am certain this report and its commentary is of particular use to the construction industry including construction users, legal practitioners and adjudicators, and to the general members of the public.

I would like to take this opportunity to thank all of you for your enduring support and commitment showed to the KLRCA and towards the statutory adjudication regime in Malaysia.

Finally, in keeping with the theme of this conference, I am confident that the availability of the concise information within this report to all stakeholders will break further barriers in the construction industry's understanding of statutory adjudication, along with its benefits relayed towards realising an equitable payment culture within the Malaysian construction industry.

Thank you.

Yours sincerely,

Datuk Professor Sundra Rajoo

Director

II. ANALYSIS OF DATA

1. Adjudication Applications Statistics

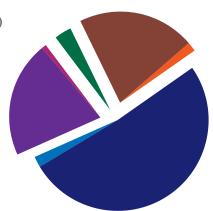
1.1 Type of Matters by Year to Year

2014 (As of 31st December 2014)

Total Matters: 29 Registered Matters: 29 Unregistered Matters: 0

2017 (1st January 2017 - 15th April 2017)

Total Matters: 186
Registered Matters: 181
Unregistered Matters: 5



2015 (1st January 2015 - 31st December 2015)

Total Matters: 194
Registered Matters: 181
Unregistered Matters: 13

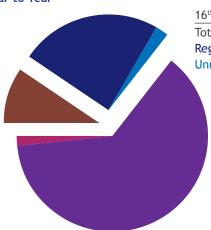
2016 (1st January 2016 - 31st December 2016)

Total Matters: 463
Registered Matters: 447
Unregistered Matters: 16

1.2 Type of Matters by (Fiscal) Year to Year

15th April 2014 - 15th April 2015

Total Matters: **84**Registered Matters: **84**Unregistered Matters: **0**



16th April 2015 - 15th April 2016

Total Matters: 228
Registered Matters: 207
Unregistered Matters: 21

16th April 2016 - 15th April 2017

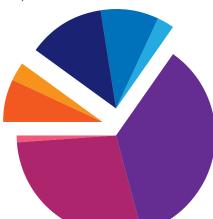
Total Matters: **560**Registered Matters: **547**Unregistered Matters: **13**

1.3 Type of Registered Matters (Fiscal) Year to Year

15th April 2014 - 15th April 2015

Active: 0

Decision Released: **60** Withdrawn Matters: **24**



16th April 2015 - 15th April 2016

Active: 106

Decision Released: **78**Withdrawn Matters: **23**

16th April 2016 - 15th April 2017

Active: 303

Decision Released: 235 Withdrawn Matters: 9

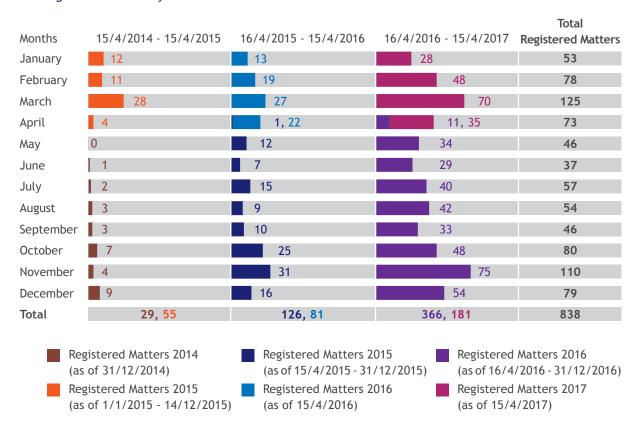
Analysis

The first quarter of the year 2017 recorded 181 cases, which is the same number of cases for the year 2015. When compared to the second fiscal year (16th April 2015 to 15th April 2016), the third fiscal year (16th April 2016 to 15th April 2017) shows an increase of 185% in terms of registered cases. In terms of withdrawn cases, there is a sharp decrease of 60% in the third fiscal year as compared to the second fiscal year. Since the implementation of CIPAA, a total of 373 decisions have been released, as of 15th April 2017.

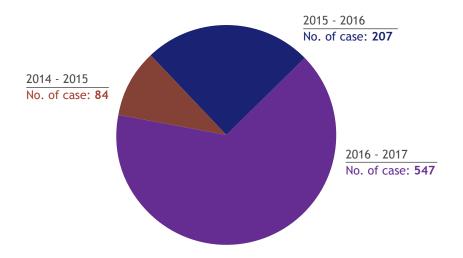


2. Registered Matters

2.1 Registered Matters by Months



2.2 Registered Matters from 15/4/2014 to 15/4/2017

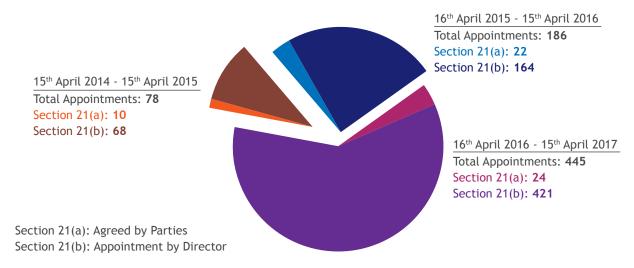


Analysis

A total of 547 cases were registered in the third fiscal year (16/4/2016 to 15/4/2017). For the first fiscal year, the highest number of registrations was recorded in the month of March 2015, with 28 cases in total. For the second fiscal year, the highest number of registrations was recorded in the month of November 2015, with 31 cases in total. A total of 75 cases were registered in November 2016, being the highest number of cases registered in the third fiscal year. In average, a total of 17.25 cases were registered per month for the second fiscal year. The average number of registered cases per month shows an increase of 164% with an average of 45.6 cases per month in the third fiscal year.

3. Appointment of Adjudicators under CIPAA 2012

3.1 Type of Appointment made under Section 21



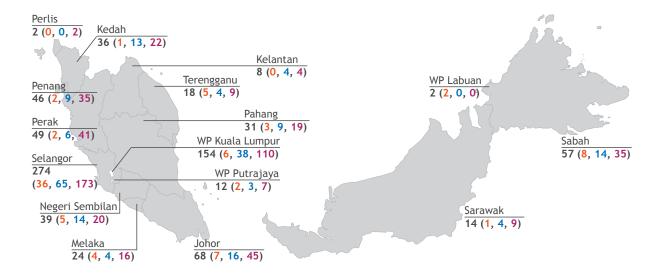
Analysis

94.6% of all appointments for the third fiscal year were made by the Director of the KLRCA, pursuant to section 21(b) of CIPAA. 5.4% of the appointments for the third fiscal year were based on parties' agreements pursuant to section 21(a) of CIPAA. In comparison, there are no apparent changes in the trend in terms on the number of appointments based on parties agreement. In the 3 years of administration of CIPAA disputes, the Director of the KLRCA has made 653 appointments of adjudicators, and this constitutes over 92% of all appointments of adjudicators made.

4. Analysis of Registered Matters

4.1 Analysis of Registered Matters by States

State
Total Matters from 15/4/2014 to 15/4/2017
(15/4/2014 - 15/4/2015, 16/4/2015 - 15/4/2016, 16/4/2016 - 15/4/2017)



Analysis

For the period of 16th April 2016 to 15th April 2017, 32% of the registered cases are from the state of Selangor. This is followed by Kuala Lumpur at 20%. Since the implementation of CIPAA in 2014, 52% of all registered cases originate from the Klang Valley (Selangor and Kuala Lumpur). This is a sustained trend for 3 years. Aside from the Klang Valley, the largest number of registered cases originate from Johor.



5. Claimant Statistics

5.1 Claimant Statistics by Claimant's Profile

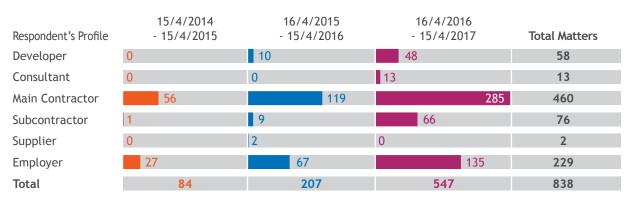
Claimant's Profile	15/4/2014 - 15/4/2015	16/4/2015 - 15/4/2016	16/4/2016 - 15/4/2017	Total Matters
Developer	0	0	0	0
Consultant	6	17	18	41
Main Contractor	22	86	222	330
Subcontractor	52	94	258	404
Supplier	4	10	36	50
Employer	0	0	13	13
Total	84	207	547	838

Analysis

For the third fiscal year, a majority of the Claimants are Sub Contractors (47%). This is followed closely by Main Contractors (40%). The same trend can be observed since 2014. Since the implementation of CIPAA, 48% of the Claimants who have brought their disputes to CIPAA, are Sub Contractors. The third fiscal year also sees an increase in the number of Suppliers referring their disputes to adjudication. The third fiscal year also sees a number of Employers filing their claims under CIPAA.

6. Respondent Statistics

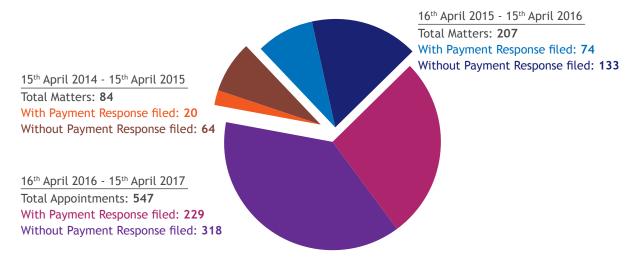
6.1 Respondent Statistics by Respondent's Profile



Analysis

Employers and Main Contractors continue to form the majority of Respondents in CIPAA cases. For the period of 16th April 2016 to 15th April 2017, the majority of the Respondents were Main Contractors (52%), followed by Employers (24%). The third fiscal year also recorded Consultants as Respondents for the first time (2%). The third fiscal year also sees an increase in the number of Developers acting as Respondents.

6.2 Matters with Payment Response filed



Analysis

As in previous years, a majority of Respondents do not issue a Payment Response. For the third fiscal year, 58% of the disputes referred to Adjudication did not have a Payment Response issued. In percentage terms, 23% of the disputes has a Payment Response issued for the first fiscal year, followed by 35% of the disputes for the second fiscal year and 41% for the 3rd fiscal year.

7. Adjudication Disputes

7.1 Type of Adjudication Disputes

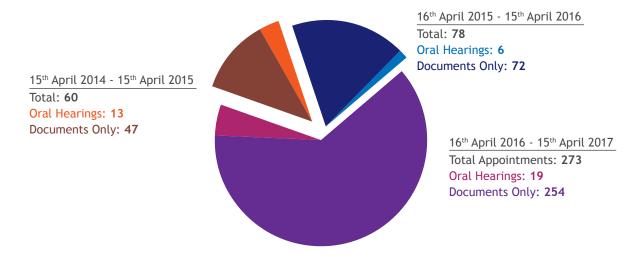
Stage of Payments	15/4/2014 - 15/4/2015	16/4/2015 - 15/4/2016	16/4/2016 - 15/4/2017	Total Matters
Final Account Value	27	36	100	163
Interim Payment	38	116	131	285
Extension of Time	1	1	6	8
Variations	4	3	56	63
Defective Work	0	3	5	8
Payment of	9	24	124	157
Professional Fees				
Withholding Monies	2	15	91	108
Contract Terms	3	3	20	26
Other/NA	0	6	14	20
Total	84	207	547	838

Analysis

The two categories of interim payment and final account value have always featured prominently since the implementation of CIPAA. The period from 16th April 2016 to 15th April 2017 however, saw a significant increase in the number of disputes which arose from the category of Payment of Professional Fees. In the third fiscal year, 24% of the disputes arose from the category of Interim Payment, followed by Payment of Professional Fees (22%) and Final Account Value (18%).

8. Type of Proceedings

8.1 Type of Proceedings (based on decision released)

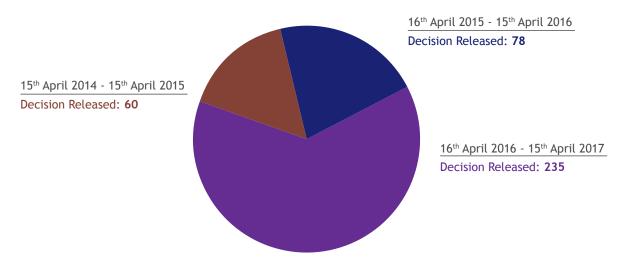


Analysis

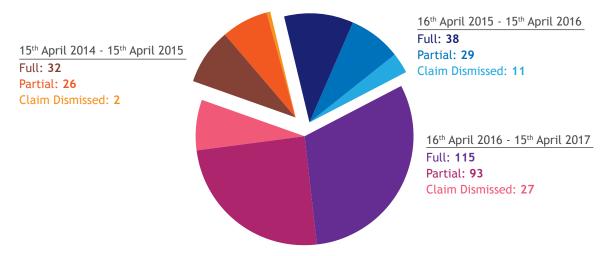
As in the previous one, most of the cases are conducted on a document-only basis. In terms of percentage, 78% of the proceedings were conducted on a document-only basis in the first fiscal year. The second fiscal year saw an increase of 53% in the number of proceedings conducted on a documents only basis. In the third fiscal year, 93% of all the proceedings were conducted on a document-only basis. Parties and/or adjudicators commonly opt for oral hearings after taking into account the circumstances and complexities of the case.

9. Decisions Released

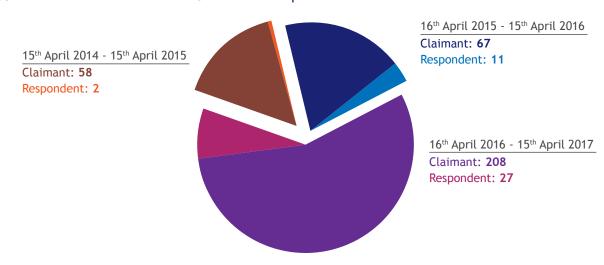
9.1 Decisions Released by Year



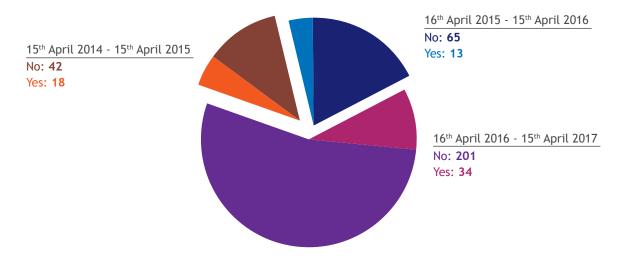
9.2 Types of Adjudicated Amounts (based on Decisions Released)



9.3 Decision Released in Favour of Claimant and Respondent



9.4 Jurisdictional Objections Raised



Analysis

Based on the decisions released, 49% of Claimants secured their full payment as claimed in the Payment Claim. 11% of the claims however, were dismissed in the third fiscal year, showing a decrease of 3% from the second fiscal year. For the third fiscal year, 88% of the decisions released were in favour of the Claimant. A majority of the cases in the third fiscal year also did not face any jurisdictional challenges.

10. Claimed Amount Statistics

10.1 Claimed Amount Statistics

15th April 2014 -15th April 2015 Total Claim Amount: RM283,824,839.33 Highest Claim Amount: RM63,315,380.92

Lowest Claim Amount: RM8,997.09

Average Claim Amount: RM3,378,867.13

16th April 2015 -15th April 2016 Total Claim Amount:

Lowest Claim Amount: RM9,477.60

RM1,119,939,216.06 Average Claim Amount: RM5,410,334.38

Highest Claim Amount: RM224,186,788.29

Highest Claim Amount: RM184,653,815.93

16th April 2016 -15th April 2017 Total Claim Amount: RM1,484,349,940.19

Lowest Claim Amount: RM2,850.00

Average Claim Amount: RM2,713,619.63

10.2 Adjudicated Amount Statistics

15th April 2014 - 15th April 2015

Total Adjudicated Amount

- Decision Released:

RM144,094,559.71

Highest Adjudicated Amount: RM32,487,217.53

Lowest Adjudicated Amount: RM8,997.00

Average Adjudicated Amount: RM2,401,576.00

16th April 2015 -15th April 2016

Total Adjudicated Amount

- Decision Released:

RM128,808,279.80

Highest Adjudicated Amount: RM19,970,332.21

Lowest Adjudicated Amount: RM21,500.00

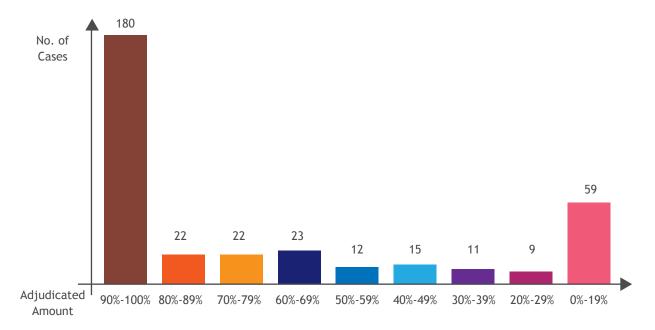
Average Adjudicated Amount: RM1,651,388.20

16th April 2016 -15th April 2017 Total Adjudicated Amount -Decision Released: RM573,707,568.05 Highest Adjudicated Amount: RM224,186,788.28

Lowest Adjudicated Amount: RM1,125.00

Average Adjudicated Amount: RM2,441,308.80

10.3 Percentage (%) of Adjudicated Amounts awarded out of claimed amounts



10.4 Number of Claims by Amount in Dispute

Claim Amount	15/4/2014 - 15/4/2015	16/4/2015 - 15/4/2016	16/4/2016 - 15/4/2017	Total
Over 15,000,000	5	14	15	34
	5	4	_	17
10,000,001 to 15,000,000		4	8	17
5,000,001 to 10,000,000	3	19	44	66
3,300,001 to 5,000,000	4	14	33	51
2,800,001 to 3,300,000	2	7	21	30
2,300,001 to 2,800,000	1	1	10	12
1,800,001 to 2,300,000	1	6	26	33
1,300,001 to 1,800,000	4	12	32	48
800,001 to 1,300,000	6	13	44	63
300,001 to 800,000	17	48	135	200
150,001 to 300,000	10	22	53	85
up to 150,000	26	47	126	199
Total	84	207	547	838

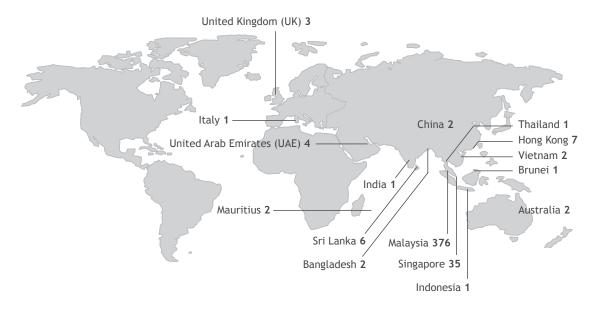
Analysis

The total claimed amount of all disputers registered thus far stands at RM2,888,113,995.58. The highest claim amount for the third fiscal year is RM224,186,788.29. This claim also stands as the highest adjudicated amount. For the third fiscal year, the average claim amount since the implementation of CIPAA stands at RM2,713,619.63 while the average adjudicated amount is recorded at RM2,441,308.80.

Since the implementation of CIPAA, 51% of the of the cases have received in the range of 80% to 100% of the claimed amount as the adjudicated amount. For the third fiscal year, the majority of cases were filed with payment claims in the range of RM300,001 to RM800,000. Over the span of 3 years, a majority (23%) of the payment claims were filed within this range.

11. Number of Adjudicators Empanelled

11.1 Number of Adjudicators Empanelled by Countries



11.2 Number of Domestic Adjudicators Empanelled by States



Analysis

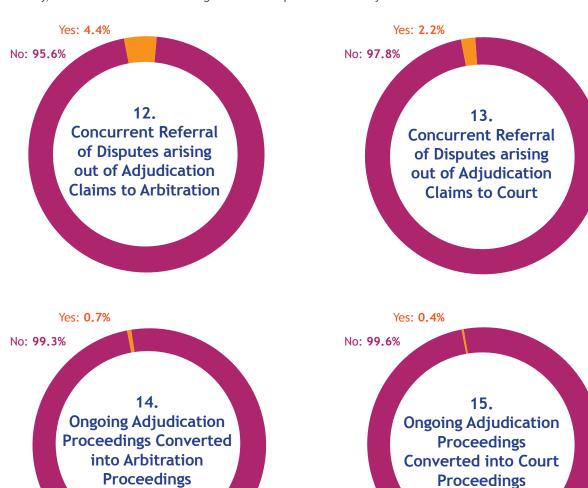
The total number of adjudicators empanelled by the KLRCA has increased from 363 as at 15th April 2016 to 446 as at 15th of April 2017. This marks an increase of 23% in uptake of empanelment. Domestic adjudicators empanelled have also increased by 24%. A majority of domestic adjudicators are centred in the Klang Valley with 44% of the adjudicators originating from WP Kuala Lumpur and 31% from Selangor. Kelantan is the only state where there is no adjudicator empanelled with the KLRCA.

Statistics based on feedback from stakeholders

Between the periods of December 2016 to March 2017, the KLRCA forwarded a series of survey questionnaire to all participating parties in CIPAA proceedings. The questionnaire was intended to gauge a variety of fields that may be assessed on a macro level by the KLRCA in respect of the notable trends occurring throughout the framework.

While the questionnaire attempts to survey all segments of involved parties, the responses received were not exhaustive. As such, the data reported by these populations may or may not be representative of the more general population of parties that have actively referred applications under CIPAA 2012. Nevertheless, the data suggests useful insights that support the development and implementation of educational and training programmes designed to further strengthen the use and utility of CIPAA 2012.

Readers are cautioned that while all steps were taken to verify the information provided by participants to the survey, KLRCA cannot and does not guarantee complete authenticity of this information.





Yes: **27.5**%

No: **50.5**%

No: **72.5**%

16.
Decided Adjudications
- Referrals to
Arbitration

17.
Decided
Adjudications Referrals to Court

Yes: **34.2**%

Yes: **28.6**%

No: **65.8**%

18.
Decided
Adjudications - Full
Payment Made

19.
Decided
Adjudications Timeline to Make
Payment Abided

Yes: **6.5**%

No: **93.5**%

Yes: **7.2**%

No: **92.8**%

No: **71.4**%

20. Adjudication Claims against Government

21.
Adjudication
Claims arising
from Government
Contracts



Yes: 60.5%

Yes: 94.9%

No: 5.1%

29.

Whether Parties Opted for CIPAA Adjudication

Decided Adjudications Whether the Outcome
Provided the Party
with Finalisation of the
Project Final Account

Whether Parties Opted
for CIPAA Adjudication
over other ADR
Procedures due to
Summary Nature and
Cost Effectiveness

Yes: **92.3**% Yes: **14.4**%

No: **7.7**%

30.
Whether Parties
were Satisfied with
the Conduct of the
Adjudicator

31.
Whether the Parties
Considered Entering
into Settlement while
the CIPAA Proceeding
was ongoing

Analysis

Of the disputes that were referred for Adjudication, only a small percentage were concurrently referred to Arbitration proceedings (4.4%), which is twice as many cases as compared with Adjudication proceedings that were concurrently referred to Court proceedings (2.2%). Moreover, 0.7% of ongoing Adjudication proceedings were converted into Arbitration proceedings as compared with 0.35% that were converted into Court proceedings. In respect of decided Adjudication matters, 27.4% were referred to Arbitration as compared with the higher concentration of 49.4% that were referred to Court. Of those decided Adjudications, full payment was made in 34.2% of cases, of which 84.6% complied with the timeline to make payment. It stems from this that 28.5% of decided Adjudications resulted in full payment within the prescribed timeline.

Of the disputes referred for Adjudication, 6.5% were against the Government, and 7.2% arose from Government contracts. Of the Adjudication claims that were against a Government party, 18.1% were allowed.

In terms of multiple payment claims, 6.5% of single Adjudication proceedings involved the filing of several payment claims and 2.4% involved the consolidation of several payment claims into a single Adjudication proceeding.

It is interesting to note that of the decided Adjudications, 98.1% of parties were satisfied with the outcome, with 74.5% of the parties reporting that they were allowed equal opportunity to make submissions. Of the decided Adjudications, 39.2% involved jurisdictional challenges and 60.5% provided the party with finalisation of its project's final account.

In respect of opting for CIPAA Adjudication as opposed to other ADR procedures, 94.9% was due to the summary nature and cost effectiveness of CIPAA Adjudication. Moreover, 92.3% of parties were satisfied with the conduct of the Adjudicator. During the CIPAA proceedings, 14.3% of parties considered entering into settlement while the Adjudication was ongoing.

Please note that the above analysis is based off statistics obtained from parties that have been involved in Adjudication proceedings pursuant to the CIPAA, obtained via a survey that was conducted by the Kuala Lumpur Regional Centre for Arbitration.

III. ADMINISTRATIVE OBSERVATIONS

PART A - Administrative observations

Introduction:

This section captures the key topical changes that have been observed throughout the administration of CIPAA matters by the KLRCA between years 2014 to 2017. The remarkable growth of CIPAA applications has coincided with a rise in procedural issues throughout the operation of the Act. As such, it is imperative that the KLRCA continues to service the construction sector through dissemination of information on such developments to all stakeholders, thus fulfilling the KLRCA's legislative mandate as the administrative authority under CIPAA.

For completeness, this section also focuses on key judgments that have provided support and direction to the administration of CIPAA matters. Much has been said about the Act's relentless development as a robust framework that affords construction stakeholders summary dispute resolution at a cost effective measure. As such, there is anticipation from all stakeholders that these judicial pronouncements provide useful interpretations of several provisions of CIPAA, thus underlining the crucial role played by the courts towards the support and success of the CIPAA framework.

It is hoped that the availability of this information in concise form to all stakeholders will aid the efficacious operation of the Act, thus breaking barriers in the construction industry's understanding of the Act and its benefits relayed towards realising an equitable payment culture within the Malaysian construction industry.

1. Confidentiality considerations in CIPAA proceedings

Question - What steps should the adjudicator and parties take in order to preserve confidentiality within adjudication proceedings?

Relevant provision - Section 20. Confidentiality of Adjudications:

The adjudicator and any party to the dispute shall not disclose any statement, admission or document made or produced for the purposes of adjudication to another person except—

- a) With the consent of the other party;
- b) To the extent that the information is already in the public domain;
- c) To the extent that disclosure is necessary for the purposes of the enforcement of the adjudication decision or any proceedings in arbitration or the court; or
- d) To the extent that disclosure is required for any purpose under this Act or otherwise required in any written law.

Observation - Statutory adjudication provides for confidentiality as preserved by Section 20 of the CIPAA 2012, resembling other Alternative Dispute Resolution processes like arbitration or mediation.

Under Section 20, confidentiality of an adjudication proceeding is as much thorough as it includes the adjudicator and both parties to the dispute and confines them into binding confidentiality.

Although throughout a normal course of an adjudication proceeding there will be additional persons participating (aside from the adjudicator, parties, counsels or representatives), it is implicit that adjudication proceedings are inherently private. Privacy can be taken to mean that only the stakeholders in a particular adjudication must be in attendance of any meetings or hearings that might be held during the course of the proceedings.

However, it is sometimes seen that adjudications involve other persons as well, including but not limited to witnesses, experts and even assistants. Adjudicators, increasingly, are members of colossal law firms with a number of persons including administrative staff as a part of their team.

In this regard, a question arises of whether it is ethically appropriate for an adjudicator to allow a perception of delegation of his judicial duty, for example to the adjudicator's secretary, associates in the adjudicator's law firms etc., by allowing their presence during proceedings.



Best practice - The confidentiality provision in Section 20 of the Act clearly mandates that no person other than the adjudicator himself and the parties may be privy to the matters of the adjudication.

As stated in the Act, the correct procedure to be followed in this regard would be for the adjudicator to seek prior consent of the parties for involvement of these additional persons in the adjudication, and only proceed to involve them upon receiving such consent.

Any lack of consent from either party ought to automatically rule out the presence and/or any contribution of such persons in the adjudication.

From a timeline standpoint, it is recommended for the adjudicator alongwith the parties to propose and reach an agreement on a roster of persons to be included within the information and correspondences regarding the adjudication prior to the acceptance of the appointment by the adjudicator via Form 6. From thereon, the adjudicator and parties are to ensure that the roster of persons involved in the adjudication proceedings is maintained at all times.

As an administrative step, the KLRCA periodically monitors such roster of persons involved in the adjudication and issues notices to its appointed adjudicators and parties on the fulfilment of the above requirements.

2. Adjudicator Expenses and Goods and Services Tax (GST) considerations

Question - How shall an adjudicator treat the collection of his expenses and GST taxes and can he exercise a lien on his decision until all outstanding expenses and GST taxes have been paid in full?

Relevant provision - Section 19. Adjudicator's Fees and Expenses, etc.

- 3) The parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses and the adjudicator may recover the fees and expenses due as a debt.
- 4) The parties shall contribute and deposit with the Director of the KLRCA a reasonable proportion of the fees in equal share as directed by the adjudicator in advance as security.
- 5) Before releasing the adjudication decision to the parties, the adjudicator may require full payment of the fees and expenses to be deposited with the Director of the KLRCA.

Observation - Pursuant to the Goods and Services Tax Act 2014 ("GST Act"), which commenced on 1st April 2015, a 6% Goods and Services Tax component is now payable on the provision of all services rendered by the KLRCA. The GST is imposed on all KLRCA Administrative Fee and the Adjudicator's Fee (should the adjudicator be registered under the GST Act).

In addition, pursuant to the 'Notes' section of 'Part I - Fees for the Services of an Adjudicator at Schedule [Regulation 6] of the KLRCA Standard Fees for Services and Expenses of Adjudicator', the fees calculated for the adjudicator shall be inclusive of all taxes as may be imposed by the Government on the fees earned by an adjudicator. Under 'Part II - Expenses of an Adjudicator at Schedule [Regulation 6] of the KLRCA Standard Fees for Services and Expenses of Adjudicator', any claim for additional expenses by the adjudicator is subject to the submission of actual invoices or receipts or such evidence acceptable to the parties in dispute or the KLRCA.

Despite these directives on expenses and taxes incurred, there is a prevailing practice of adjudicators (where applicable as registered persons) neglecting to collect expenses and/or GST taxes at the outset of deposit collection periods.

Such omissions may inadvertently delay the timeline for delivery of an adjudication decision, seeing as under Section 19 and Paragraph 7(d) of Schedule II of the KLRCA Standard Terms of Appointment, an adjudicator may exercise a lien on his decision until any outstanding fees and expenses, including the KLRCA's administrative fee and any taxes as may be imposed by the Government including, inter alia, goods and services tax, have been paid in full. Such delay would be considered undesirable if caused by the adjudicator's own omission to factor in these amounts when directing for deposits to be paid by the parties to the KLRCA.



Notable is case of *Econpile (M) Sdn Bhd* and *IRDK Ventures Sdn Bhd*¹, recently upheld by the Court of Appeal, which decided on whether an Adjudication Decision delivered within time but released to the parties only after the payment of GST was made for the KLRCA's Administrative Fee is void in the circumstances of the case.

On 15th March 2016, Judge YA Tuan Lee Swee Seng of the Construction Court of Kuala Lumpur held that the Adjudication Decision was validly made, delivered and released to the parties, based on the rationale that the release of the Adjudication Decision to the parties soon after confirmation that the GST of the adjudication authority, the KLRCA, had been paid was consistent and in compliance with the *KLRCA Standard Terms of Appointment of the Adjudicator* as provided for under *Schedule II* of the KLRCA Adjudication Rules and Procedure which was contractually agreed to by the parties when receiving the Adjudicator's Notice of Acceptance of Appointment (Form 6).

Best practice - Given these statutory requirements, it is imperative that the adjudicator includes within his letter accepting his appointment² a direction to the parties to deposit with the KLRCA his full fees and the KLRCA Administrative Fees, inclusive of GST wherever applicable. Alternatively, he may issue the direction after he has accepted the appointment. However, since adjudication is a summary process, it is advisable that the adjudicator direct the parties regarding the payment of the deposits in his letter of acceptance of appointment.

In his direction to the parties relating to the fees payable, the adjudicator is required to disclose whether he is GST registered, and if so, he is to incorporate the GST amount in addition to his adjudicator's fees in his direction.

It is recommended that the adjudicator include any additional expenses that he estimates to incur during the proceedings, for example, for travel and site visits. Both the Standard Fee Schedule and the Recommended Fee Schedule provide guidance for the claim of expenses.

It is to be noted that though estimated expenses may be included in the direction of the adjudicator, under the 'Notes' section of 'Part II - Expenses of an Adjudicator at Schedule [Regulation 6] of the KLRCA Standard Fees for Services and Expenses of Adjudicator', any claim for additional expenses by the adjudicator is subject to the submission of actual invoices or receipts or such evidence acceptable to the parties in dispute or the KLRCA.

Accordingly, for best practice purposes, it is advised that when adjudicators direct parties to deposit with the KLRCA the security deposit pursuant to Section 19(3) of the Act, the adjudicator ought to indicate to parties that such additional fees and expenses requested will be subject to the production of actual invoices or receipts evidencing use of such additional amounts. Any unexpended balances will be returned to the parties at the close of the adjudication proceedings.

The deadline for parties to remit deposits is also to be stated in the direction.

Upon receipt of this direction, the KLRCA issues invoices for the said amounts payable in equal share by the parties, inclusive of GST on the adjudicator's fees, if applicable, and on the KLRCA Administrative Fees, and issues the same to the parties. The deposits are thereafter collected pursuant to the timeframe as stipulated by the adjudicator in his Form 6.³

Further deposits may be collected from the parties if the expenses of the adjudicator exceed his prior estimation.

3. Considerations for the calculation of Adjudicator's Fees - KLRCA Standard Schedule of Fees & KLRCA Recommended Schedule of Fees

Question - Can an adjudicator consider a counter-claim / set-off or other additional amounts (aside from the claimed amount under Section 5) when computing his Adjudicator Fee component?

Relevant provision - Section 5. Payment Claim

The payment claim shall be in writing and shall include—
 The amount claimed and due date for payment of the amount claimed;

¹ KLHC Originating Summons No.: 24C-40-11/2015.

² See 'Form 6 - Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.

³ See 'Form 6 - Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.



- Schedule IV. Adjudicator Code of Conduct KLRCA Adjudication Rules and Procedure
- 8.1.1 Where the Adjudicator's has expressly agreed to the standard fees for adjudicator provided under the Regulations or the KLRCA's recommended schedule of fees under KLRCA CIPAA Circular 02, as the case may be, the fees calculated shall be based on the claimed amount under the Payment Claim pursuant to Section 5(2)(a) of the Act.

Observation - Recent trends indicate a practice by adjudicators to consider counter-claim or set-off amounts and/or further amounts into the computation of the Adjudicator's Fee when issuing directions to parties on the collection of Advanced Security Deposits.

As such, the position adopted by the Adjudicator will likely place financial constraints upon the party referring the payment dispute to adjudication under CIPAA, bearing in mind that the majority of Claimants under CIPAA are sub-contractors suffering from financial hardship due to of lack or no payment received.

It must be noted that all adjudications commenced under the CIPAA 2012 are conducted pursuant to the KLRCA Adjudication Rules and Procedure, under Rule 1(1).

Best practice - The proviso under Schedule IV mandatorily applies to all adjudications commenced under CIPAA 2012. Given this, under Paragraph 8.1.1, when applying the standard schedule of fees (under the CIPAA Regulations) or the KLRCA's recommended schedule of fees (under Circular 02), the adjudicator shall be confined to calculating his fees based on the claimed amount as defined under Section 5(2)(a) of the CIPAA Act. The rationale for this position is in line with the spirit of the act⁴, which is to provide all stakeholders a cost effective, time efficient and accessible dispute resolution procedure as part of the legislative mandate.

The only exception to the mandatory application of Paragraph 8.1.1 is if the adjudicator reaches an ad-hoc fee agreement with the parties, where the written consent of both parties is attained prior to the submission of the notice of acceptance of appointment (Form 6) by the adjudicator. From this juncture onwards, the adjudicator would be at liberty to factor in a higher claimed sum than the claimed amount under the Payment Claim (or for any other applicable fees calculated for that matter) for purpose of his Adjudicator's Fees.

Notwithstanding, pursuant to Section 19 of CIPAA 2012, Regulation 8 of the CIPAA Regulations 2014 and Rule 9 of the Adjudication Rules and Procedure, the KLRCA as the administrative authority shall periodically monitor all directions issued by adjudicators in respect of deposit payments, and subject to any fee agreement reached between the adjudicator and parties, refund to parties any unexpended balances (based on the parties' shares paid) that remain in deposit with the KLRCA.

4. Registration requirements (Form 3A) and proof of service of documents

Question - Is registration of a CIPAA adjudication at the KLRCA mandatory and must the party furnish along with the registration instrument copies of the proof of service of the Payment Claim, Payment Response (if any) and the Notice of Adjudication?

Relevant provision - Rule 2. Commencement & Registration of Adjudication

- 1. The Claimant shall upon serving a notice of adjudication on the Respondent pursuant to Section 8(1) of the Act register the adjudication matter at the KLRCA by serving a notice on the Director of KLRCA containing the following particulars and enclosing a copy of the Payment Claim and Payment Response (if any) and the Notice of Adjudication:
 - 1. the names and service addresses of the claimant and the respondent;
 - 2. the date of service of the Notice of Adjudication;
 - 3. the date of service of the Payment Claim;
 - 4. the date of service of the Payment Response (if any);

⁴ See the explanatory statement that accompanied CIPAA in its Parliament presentation in 2012.



- 5. the particulars of the relevant contract, comprising
 - i) the project title or reference, or a brief description of the project;
 - ii) the contract number or a brief description of the contract;
 - iii) the date the contract was made;
- 6. the claimed amount;
- 7. the response amount (if any);
- 8. a brief description of the dispute;
- 9. the remedy sought.

Observation - It is noted that since the KLRCA is the adjudication authority named under the Act with the designated function to administer adjudication proceedings, it is mandatory for the claimant in an adjudication to register the matter with the KLRCA according to the procedure described in Rule 2 of the KLRCA Adjudication Rules & Procedure ("the Rules").

When submitting their Form 3A instrument to the KLRCA for registration of their adjudications, occasionally parties omit to include within the registration instrument, the dates and proofs of service of all documents as described under sub-paragraph 2.1 (b) - (d) of Rule 2 of the Rules.

Best practice - It is imperative that the Claimant party conforms to the requirements under sub-paragraph 2.1 (b) - (d) of Rule 2 when lodging its Form 3A instrument at the KLRCA.

Certain due diligence checks are conducted by the KLRCA upon receipt of a request to register, including compliance with the time lines under the Act and the applicability of any Exemption Order, among others. These compliance checks enable the Claimant to rectify noticeable (and curable) procedural irregularities, if any, and this saves time and cost for the parties at a later stage. For example, if a Notice of Adjudication has been served prematurely on the Respondent, the KLRCA will point out the error to the Claimant who then has the opportunity to rectify this error.

Rules 2 and 3 stipulate that the Claimant may register the matter with the KLRCA at any time after the issuance of the Notice of Adjudication (before the appointment of the adjudicator), with an additional requirement for the submission of a copy of the Payment Claim, Payment Response (if any) and Notice of Adjudication along with proof of service for each of these documents. The request for appointment of adjudicator shall only be made after the expiry of ten (10) working days for mutual appointment of the adjudicator under Section 21(a) of the Act and is to be preceded by a notice of registration of the matter lodged at the KLRCA under Rule 2.

5. Payment Claim - Form and Content considerations

Question - What are the basic and essential requirements to be contemplated in the form and content of a Payment Claim by an unpaid party?

Relevant provision - Section 5. Payment Claim

- An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
- 2. The payment claim shall be in writing and shall include
 - a) The amount claimed and due date for payment of the amount claimed;
 - b) Details to identify the cause of action including the provision in the construction contract to which the payment relates;
 - c) Description of the work or services to which the payment relates; and
 - d) A statement that it is made under this Act.

Observation - In its administration of CIPAA adjudications, the KLRCA has observed that there is a disparity in the form and content of Payment Claims submitted, in the context of whether they comply with the basic and essential requirements of Section 5(2) of CIPAA. Can such omissions affect or negate the unpaid party's cause of action arising out of the Payment Claim?



Best practice - Guidance can be sought from the recently decided case of *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 which shed some light on basic and essential requirements expected in a Payment Claim.

On the issue of the validity of a Payment Claim, the Court confirmed that the Adjudicator's jurisdiction is limited to the matters raised in the Payment Claim and Payment Response, except by agreement of the parties in writing, which was not the case here.

The Court referred to Section 4 of the CIPAA, in which a "payment claim" is a claim for payment for work done or services rendered under the express terms of a construction contract.

In scrutinising whether a Payment Claim has met the requirements of Section 5 of the CIPAA, the Court stated that one should not be unduly critical, technical, or overly demanding of a Payment Claim, particularly considering that the Payment Claim is prepared and served by the Claimant. The words "cause of action" in Section 5 means that the Claimant must merely set out the basis of its claim in contract.

The Court stated that the Adjudicator has the jurisdiction to determine whether the Payment Claim is valid where, *prima facie*, it has all of the elements of a Payment Claim as follows:

- 1. The amount that is due;
- 2. When it was due;
- 3. The cause of action and the provisions of the contract to which the payment relates;
- 4. The nature of the work done; and
- 5. The fact that the claim is made under the CIPAA.

The Court found that the subject Payment Claim was adequately particularised within the framework of the CIPAA, in that the amounts claimed and the due dates for payment were stipulated therein. The cause of action related to provisions in the contract, with the sums claimed not being paid before their due dates.

If a Respondent wishes to challenge the validity, *prima facie*, of a Payment Claim, it should serve a Payment Response in which it raises this objection, which the Respondent failed to do.

The Court therefore found that the Payment Claim was valid in that, *prima facie*, it reasonably complied with the requirements of Section 5 of the CIPAA.

Accordingly, it can be assessed that the Courts have applied a wide approach when determining the validity of a Payment Claim.

Given this determination, future unpaid parties are expected to simply abide by the *prima facie* requirements for a Payment Claim as stipulated under sub-section 5(2). This would reduce the likelihood of their Payment Claims being rendered invalid, regardless if the Payment Claim is seen to particularise the claim in a partial or simplistic manner.

6. Issues regarding multiple payment disputes between same parties adjudicated by different adjudicators

Question - What are the steps to be taken in a situation where parties intend to consolidate two (2) or more payment disputes that are simultaneously being adjudicated by different adjudicators?

Relevant provision - Section 14. Consolidation of Adjudication Proceedings

"If two or more adjudication proceedings in respect of the same subject matter are being adjudicated before the same adjudicator, the adjudicator may, with the consent of all the parties to the adjudication proceedings, consolidate and adjudicate the matters in the same proceedings."



Observation - Section 14 of CIPAA enables a common adjudicator to consolidate two or more adjudications in respect of the same subject matter with the consent of all parties and adjudicate the disputes together in the same adjudication proceedings. Section 14 of CIPAA can only be applied where:⁵

- (a) one adjudicator has been appointed in two or more adjudication proceedings. Section 14 of CIPAA cannot apply where different adjudicators have been appointed for these adjudications concerned. However, if the parties intend to have these adjudications consolidated before a particular adjudicator, it will be possible if the parties agree to the withdrawal of one of the adjudicators, and recommence an adjudication before the preferred adjudicator;
- (b) the adjudication proceedings concerned are still pending;
- (c) the disputes in these adjudications relate to the same subject matter.

The related disputes can arise from the same contract, or from different contracts involving different parties provided the underlying subject matter is the same.

In a situation where there are two adjudications pending, one commenced by the main contractor under the main contract against the employer for payment of a particular work done, and the other commenced by the sub-contractor against the main contractor under the sub-contract contract for payment of the same work done in the same project, any determination regarding the payment of money for the same work done can be made to bind all these 3 parties to allow payment to be made (if any) from the employer to the main contractor and then from the main contractor to the sub-contractor, all in the same adjudication proceedings.

(d) All parties to the different adjudications must provide their consent in writing to the consolidations.

Occasionally the KLRCA receives multiple new matters between the same parties relating to separate projects or separate contracts. In such matters, as a default administrative step the KLRCA endeavours to appoint different adjudicators for disputes arising from different contracts or projects, thus abiding by the contours of confidentiality.

Best practice - Should parties intend for the appointment of a common adjudicator to adjudicate two or more separate matters, then prior to making a request for an appointment under Section 23, both parties shall endeavour to provide the KLRCA with their consent in writing for the appointment of a common adjudicator for these separate matters. As noted above, a consolidation of matters may only occur upon the fulfilment of the requirement for a common adjudicator to be appointed.

Alternatively, where different adjudicators have been appointed for these adjudications concerned, should the KLRCA Standard Terms of Appointment under Schedule II apply, it will be possible for the parties to mutually agree in writing to terminate the appointment of the present adjudicator concerned,⁶ followed by a recommencement of the adjudication before the preferred adjudicator of the parties' choice.

 $^{^{5}}$ See Lam W. L. and Ivan Y.F.L. (2013). Construction Adjudication in Malaysia, CCH Asia, at page 263.

⁶ See Paragraph 10(a) of the KLRCA Standard Terms of Appointment under Schedule II, KLRCA Adjudication Rules & Procedure.



PART B - Brief summaries of adjudication cases decided by the Courts

1. Bakti Dinamik Sdn Bhd v Bauer (Malaysia) Sdn Bhd, [2016] MLJU 916

In this case, the High Court was asked to decide on an application for an interlocutory *Fortuna* injunction sought to resist the filing of a winding up petition in accordance with Section 218 of the Companies Act 1965.

The Plaintiff, Bakti Dinamik, was the employer and developer of a project, who appointed HVC Hundred Vision Construction as the main contractor for the project. HVC in turn sub-contracted Bauer (the Defendant) for earthworks to be completed in the project. During the course of Bauer's works, one of the adjacent buildings claimed to have suffered damage, the owner of which instituted a suit to restrain the works and claim damages.

A Certificate of Non Completion to certify the delay and the imposition of damages was issued to the HVC, but not to Bauer. Bauer subsequently sought payment from the Bakti Dinamik for works completed in accordance with Section 218 of the Companies Act 1965.

Bakti Dinamik argued that Bauer's claim was brought in bad faith. Bakti Dinamik sought a declaration that the Section 218 Notice was void and of no effect, and an interlocutory Fortuna injunction to restrain Bauer from presenting any winding up petition. Firstly, Bakti Dinamik argued that that there is no privity of contract between itself and Bauer, and secondly, that the Certificates relied upon by Bauer were directed against the HVC and not itself.

Decision:

The Court confirmed that it may grant a Fortuna injunction preventing a winding up petition on the basis of either:

- 1. The petition has no chance of success and might produce irreparable damage to the company; or
- 2. That an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage.

The Court went on to say that it must be satisfied that the Plaintiff has established a *prima facie* case of an abuse of process, particularly on the basis of a disputed debt.

The Court was satisfied that the absence of a contractual nexus between Bakti Dinamik and Bauer was sufficient to grant the *Fortuna* injunction against Bauer. Furthermore, the Court was satisfied that Bakti Dinamik and the project would suffer irreparable harm if the injunction was not granted. The winding up notice was therefore found to be an abuse of process and held to be void.

In the Court's view, a more prudent and efficient dispute resolution mechanism for the subject dispute would be for Bauer to make an adjudication claim pursuant to the Construction Industry Payment and Adjudication Act 2012 (CIPAA). This would alleviate what the Court referred to as "undue pressure" via a winding up notice that could cause irreparable harm, and when there is no judgment debt.

2. BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd and another case [2016] MLJU 1567

In this case, the High Court considered a Setting Aside Application pursuant to Section 15 of the CIPAA. The Court was asked to clarify the definition of 'conditional payments' in the CIPAA, which are void, in the context of the PAM Contract 2006.

The facts read that BM City Realty & Construction Sdn Bhd (BMCRC) as the Employer under a PAM Contract 2006 (Without Quantities) had engaged MISB as the main contractor to carry out a mixed development project.

After terminating its contract with the Defendant Contractor, the Employer BMCRC argued that, pursuant to Clause 25.4(d) of the PAM Contract 2006, it was not bound to make any further payments to the Defendant Contractor until a final account was determined following full completion of the works by another Contractor.

In support of its argument, the Employer BMCRC argued that the CIPAA did not apply having regard to the term 'conditional payment', as this is limited to the two instances provided for in Section 35(2) of the CIPAA and nothing more. In contrast, the Contractor argued that the Court should interpret 'conditional payment' to be wider than the two instances provided for in that section. Amongst the issues before the Court were -



- 1. Whether Section 35(2) of the CIPAA was exhaustive, and by extension whether Clause 25.4(d) of the PAM Contract 2006 was inconsistent with Section 35 of the CIPAA in respect of conditional payment provisions;
- 2. Whether the Adjudicator had acted in excess of jurisdiction in his failure to consider the issue of set-off for LAD claimed by BMCRC;
- 3. Whether the Adjudicator had acted in excess of jurisdiction in granting quantified costs to the Claimant; and
- 4. Whether the Adjudicator had failed to act independently or impartially.

Decision:

The Court dismissed the application to set aside the Adjudication Decision. It was found that the instances of conditional payment referred to in Section 35(2) of the CIPAA are not exhaustive. To avoid doubt, the Court confirmed that Section 35(1) applies to "any" conditional payment provision in a construction contract in relation to payment and declared such a provision to be void.

On the issue of the Adjudicator's jurisdiction to consider the set-off for LAD claimed by BRCMC, the Court held the failure to raise the set-off in the Payment Response under Section 6, coupled with the Court's view that an LAD claim is a damages claim outside the definition of a "payment claim" susceptible to adjudication under CIPAA, meant that the adjudicator was correct in dealing with and dismissing BRCMC's claim for set-off for LAD.

On the Adjudicator's independence or impartiality, given the seriousness of the allegation, the Court held that BMCRC had failed to prove the failure Adjudicator's failure to comply with Sections 24 (a)-(e) of CIPAA.

Finally, the Court held that costs are within the discretion of the Adjudicator to determine as the adjudicator deems under fit, taking into account of all relevant circumstances including those set out in Regulation 7 of the CIPAA Regulations.

3. Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd [2016] MLJU 1054

This High Court case considered a particularly contentious Setting Aside Application pursuant to Section 15 of the CIPAA.

Hasrat Gemilang was appointed by Gazzriz as subcontractor for a Project. After completion of works, Gazzriz failed to make payments claimed by Hasrat Gemilang. The matter was referred by Hasrat Gemilang for Adjucation pursuant to the CIPAA. Gazzriz, the Respondent in the Adjudication proceedings, did not file a Payment Response or an Adjudication Response.

The Adjudicator indicated that it could make a decision based on the documents received and that no formal hearings or written submissions were required, and neither party objected. The Adjudication Decision was handed down in favour of the Claimant, Hasrat Gemilang.

Gazzriz thereafter brought an application to set aside the Adjudication Decision. Gazzriz argued that:

- 1. There was breach of natural justice in that:
 - a. The decision was made based on an invalid contract (it was not signed); and
 - b. Fresh evidence shows that the Contract Sum was incorrect.
- 2. The Adjudicator did not possess the experience and qualification and was therefore incompetent.

Decision:

Firstly, the Court distinguished an Application for setting aside of an Adjudication Decision and an Appeal of an Adjudication Decision. The Court noted that the 'fresh' evidence of the Respondent was available at the time of the Adjudication proceedings but simply not put forward by the Respondent. It therefore cannot be attributed to a breach of natural justice as it was not before the Adjudicator. Breach of natural justice should not be used as a "backdoor" option to attempt to set aside an Adjudication Decision, particularly when a Respondent opts not to file a Payment Response and Adjudication Response. The error referred to by the Respondent would have to be corrected by the fully final Arbitral Award or Litigation Judgment.



Having regard to the validity of the Contract, the Court noted the Guideline issued by the KLRCA on the meaning of "construction contract made in writing" accepted it as applying to all adjudication cases commenced under the CIPAA. According to that Guideline, the contract does not have to be signed to constitute a contract in writing as long as the parties have referred to the contract in writing and agreed to be bound by it.

In respect of the competency of the Adjudicator, the Court highlighted the delay in raising this objection, particularly drawing on the notion of bad faith. The Court highlighted that, inter alia, the fact that the KLRCA has included the Adjudicator's name in the register and seen it appropriate to appoint it as the Adjudicator lends to an assumption that the Adjudicator in question meets the standards and criteria set by the KLRCA subject to any evidence to the contrary.

The Court therefore dismissed the application to set aside the Adjudication Decision with costs.

4. Inovatif Engineering (M) Sdn Bhd v Nomad Engineering Sdn Bhd [2016] MLJU 1351

This case involved an application to set aside an Adjudication Decision pursuant to Section 15 of the CIPAA.

In the subject Adjudication proceedings, the Respondent was three (3) days late in the filing of the Adjudication Response. Consequently, the Adjudicator ruled that the Respondent's Adjudication Response would not be considered. Moreover, as to the issue of whether there existed a written contract, the Adjudicator found that due to the existence of certainty of parties, certainty of price and certainty of works, a written contract existed. It was also found that the Respondent failed to honour the payment certificate in question. Lastly, the Adjudicator advanced the date of the decision by two (2) days, which the Respondent and Plaintiff argued prevented the Adjudicator from considering its submission.

The Respondent and Plaintiff in the subject proceedings relied on subsections (b), (c), and (d) of Section 15 of the CIPAA.

Decision:

Firstly, the Court noted that the CIPAA does not provide any avenue for appeal of the Adjudication Decision on the merits and confirmed that a Decision can only be set aside pursuant to Section 15 of the CIPAA.

In respect of Section 15(d) of the CIPAA, the Court adopted the KLRCA Guideline in determining whether there was a contract in writing, which was given a "liberal" meaning. Despite the Purchase Order being dated prematurely pending execution of a different contract, the Court found that it was a written document that satisfies the meaning of a "contract in writing".

Moreover, the Court rejected the Plaintiff's argument that there was a denial of natural justice due to the Adjudicator's failure to exercise the discretion afforded to it by the CIPAA to extend the time limits imposed under the Act, specifically the time limit imposed for filing of the Adjudication Response. The Court stressed the overriding purpose of the CIPAA, particularly to ensure a speedy payment mechanism and, notwithstanding, the Respondent never sought an extension of time pursuant to Section 25(p) of the CIPAA.

Having regard to the advancement of the Adjudicator's Decision, the Court noted firstly that, at the hearing, the Adjudicator did not request submissions, but rather interrogatories pursuant to Section 25(k) of the CIPAA. The Respondent therein argued that it was aggrieved considering that the Claimant had submitted a case authority in its interrogatories which the Respondent did not manage to respond to due to the advancement of the Adjudicator's Decision by two (2) days. The Court noted that the Claimant had forwarded its interrogatories on 27 November 2015, and the Respondent on 4 December 2015. The Court stated that merely because the Respondent failed to address the case authority does not constitute a failure of natural justice.

The Court went on to state that an Adjudicator's mere refusal to grant indulgence to overcome a breach of timelines does not mean that he or she has acted impartially. Rather, evidence of bias would need to be adduced by the party alleging impartiality.

The Application to set aside the Adjudicator's Decision was dismissed with costs.



5. Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd [2016] MLJU 1051

The issue before the High Court in this case was whether an architect rendering architectural services on a construction project may make a claim via Adjudication for fees that are outstanding from his or client pursuant to the CIPAA.

Martego, the owner of the project and Respondent in the Adjudication proceedings, retained the services of Arkitek Meor & Chew (ARMC), the architect of the project and Claimant in those proceedings. In concurrent cases, Martego applied to set aside the Adjudication Decision, and ARMC sought to have the Adjudication Decision enforced.

Martego argued that fees stemming from architectural services on a construction project could not be the subject of Adjudication proceedings.

Decision:

The main issue before the Court was whether the contract between the Architect and its client Martego for the payment of fees for architectural consultancy services rendered was a 'construction contract' pursuant to Section 4 of the CIPAA.

The Court found that the word 'includes' used in the definition of a 'construction consultancy contract' in Section 4 of the CIPAA was designed to be expansive and not exhaustive. A 'construction consultancy contract' covers and includes a contract to carry out consultancy services in relation to construction work including, inter alia, architectural work. The definition of "construction consultancy contract" includes a "design and build" contract, but is not limited to that. The Court found that to construe it otherwise would be contrary to Section 17A of the Interpretation Act 1948 and 1967. The crucial component is that the works and/or services are integral to the construction consultant contract and not merely 'incidental' (for example, legal fees).

The Court quoted what it referred to as more 'mature' jurisdictions which were consistent with the above interpretation, namely that the definition of "construction consultancy contract" seeks to include the claim for architectural consultancy fees under the scheme of Statutory Adjudication.

The Court acknowledged Sub-Rule 24(1) of the Architects Rules which forces parties to refer disputes regarding Architect's fees to Arbitration as opposed to litigation, however the Court noted that this does not preclude Architects from pursuing a subsequent form of dispute resolution introduced later in Adjudication.

The Court held that an Architect's fees are claimable under the CIPAA. The purpose and benefits of the CIPAA must be ensured for all those affected by delayed payments in construction contracts.

The setting aside application was dismissed with costs.

6. Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd and another appeal [2017] MLJU 169

The issue dealt with in this High Court case was whether, in the absence of a Payment Response, the Adjudicator is acting in excess of his or her jurisdiction by going above and beyond the Payment Claim.

Milsonland, as employer, appointed Macro Resources as the Main Contractor for a project. After disputes arose regarding payment, Macro Resources proceeded with Adjudication, alleging that Milsonland failed to adhere to Certificate of Payments in its favour. There was no Payment Response filed by Milsonland.

The Payment Claim calculated the amount owing using the provisional contract figure, rather than the figure for actual work completed. In its Adjudication Response, the Respondent argued that the Claimant's figures were erroneously based on the provisional contract amount rather than the Certificates of Payment. Moreover, the Respondent argued defects in the works and delay of completion.

The Adjudicator disregarded the matters raised in the Adjudication Response except to the extent that they went to disproving the allegations raised in the Payment Claim and Adjudication Claim. Moreover, the Adjudicator investigated and successfully ascertained the correct amounts claimed, paid, and owing to the Claimant.

In the subject Setting Aside Application, the Respondent argued a denial of natural justice and an allegation that the Adjudicator acted in excess of his jurisdiction.



Decision:

The Court found that, because the Respondent had not filed a Payment Response, the Payment Claim was deemed to be disputed in its entirety. Accordingly, the Claimant's claim is put to proof and the Respondent yielded its right to assert positive defences by way of, for example, set-off or counterclaim. Accordingly, the contents of the Adjudication Response were right to be disregarded except in respect of disproving the assertions made in the Payment Claim and Adjudication Claim as served by the Claimant.

Having regard to discrepancies in the Claim regarding amount owed and total amount paid, the Adjudicator was therefore acting within his jurisdiction to investigate further pursuant to the 'broad powers' conferred by Section 25 of the CIPAA, particularly Section 25 (i) and (j). The Court held that the Adjudicator acted "within the scope and ambit of the matters referred to him in the Payment Claim in the absence of a Payment Response".

Furthermore, the Court held that there was no breach of natural justice when the Adjudicator failed to consider the issues of delay and defective works that were raised for the first time in the Respondent's Adjudication Response.

The Court dismissed the Setting Aside Application.

7. Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691

In this case, the High Court investigated the extent to which Section 30 of the CIPAA is applicable, whereby the principal is obliged to make payment to a party that obtained an Adjudication Decision in its favour.

The Claimant obtained an Adjudication Decision in its favour as against the Respondent main contractor. The main contractor failed to make payment and the Claimant thereafter invoked Section 30 of the CIPAA requesting that the principal make payment. The principal disputed the request arguing, inter alia, that it did not hold a contractual relationship with the Claimant, was not party to and had no knowledge of the adjudication proceedings.

Decision:

The Court held that it is irrelevant if a principal is not a party to or has knowledge of adjudication proceedings. As long as the requirements of Section 30 are satisfied, the principal is obliged to make payment to the party that obtained the Adjudication Decision in its favour as long the necessary written request is made. Moreover, Section 30 does not require for there to be a contractual relationship but only that the requested party is a principal.

8. Naim Engineering Sdn Bhd & Anor v Pembinaan Kuantiti Sdn Bhd [2016] MLJU 1318

The issues in this High Court case are twofold.

Firstly, whether the preliminary finding of an Adjudicator is binding on the parties if the Adjudicator resigns without making an Adjudication Decision. In the subject case, an Adjudicator found a matter to be beyond the scope of the CIPAA due to there being no written construction contract, after which he resigned from the matter as Adjudicator. Thereafter, a second Adjudicator was appointed, raising questions as to the second Adjudicator's jurisdiction as well as whether the CIPAA is applicable to the matter, bearing in mind the preliminary finding of the first Adjudicator.

The second issue before the Court was whether an Adjudication Decision, specifically in respect of whether there exists a written construction contract, falls within the scope of Section 15 of the CIPAA for the purpose of a Setting Aside Application.

In this case, the second Adjudication went ahead without the attendance of the Respondent, who thereafter argued that the Director of the KLRCA had no jurisdiction to appoint another Adjudicator to re-adjudicate the same subject matter. It argued that it would be prejudiced if the Claimant was allowed to re-ventilate the same issue before another Adjudicator, despite that issue already being dealt with by a prior Adjudicator. The second adjudication went ahead without the attendance of the Respondent who then commenced the subject proceedings.



The Respondent Plaintiff argued, inter alia, that:

- 1. The preliminary finding of the first Adjudicator is binding on the parties;
- 2. The second Adjudication Proceeding is outside the applicability of the CIPAA;
- 3. The second Adjudicator does not have jurisdiction to decide the matter; and
- 4. The second Adjudication Proceeding and any decision stemming therefrom is null.

Decision:

Firstly, the Court noted that the first Adjudicator had resigned after making a preliminary finding and that no Adjudication Decision had been handed down. The first Adjudicator had clarified with the Plaintiff that he had resigned and that he had not made or delivered any Adjudication Decision, which the Plaintiff did not challenge or make the subject of any application. On this basis, the Director of the KLRCA had jurisdiction to appoint another Adjudicator pursuant to Sections 12 and 17 of the CIPAA.

The Court then confirmed that a Setting Aside Application is not an appeal of the matter, and the decision of the Adjudicator cannot be reviewed on the merits. Rather, it is limited to the scope of Section 15 of the CIPAA.

The Court went on to consider in depth the issue of whether a written construction contract existed between the parties, which it found did not exist. On that basis, the Court held that the second Adjudicator did not have jurisdiction to decide on the matter and set aside the Adjudication Decision of the second Adjudicator.

It is important to note here that the findings of the first Adjudicator were irrelevant. The Court has instead allowed the Setting Aside Application on the basis that the issue of whether there exists a written construction contract is within the scope of Section 15 of the CIPAA.

9. Ranchan Heavy Engineering Sdn Bhd v Pelabuhan Tanjung Pelepas Sdn Bhd [2016] MLJU 1182

This High Court case grapples with the precise limitations of an Adjudicator's jurisdiction in circumstances where a Respondent has not filed a Payment Response. In particular, what constitutes going into the merits of a case in contrast with matters arising purely out of the Payment Claim. Moreover, the Court considered an Adjudicator's discretion when calculating quantum of costs to be awarded pursuant to Section 7 of the CIPAA Regulations.

In the subject Setting Aside Application, the Claimant Plaintiff argued that the Adjudication Decision should be set aside on the basis that the Adjudicator acted in excess of jurisdiction and denial of natural justice. The Plaintiff argued that the only matter referred to adjudication was the Payment Claim and that the Defendant was therefore not entitled to raise any issues except for patent or manifest error, and that any arguments regarding the merits of the case were inadmissible. The Defendant had submitted a defence that there was no mutual agreement as to the pricing of variations that occurred with the works, and the claim failed on this basis.

The Plaintiff alleged that the Adjudicator failed to consider Section 36(2) of the CIPAA, which would have allowed the Adjudicator to fix a price for the work done. Moreover, the Plaintiff alleged that the Adjudicator erred in his calculation of costs.

Decision:

The Court noted that at the heart of the dispute was a construction works contract between the parties which specifically and expressly requires, *inter alia*, that the any Variations Instructions will be by mutual agreement only and at the sole discretion of the Defendant. The Plaintiff had used this contract as the basis for its claim and it was therefore incumbent for the Plaintiff to justify its claim under the contract, even if the issue of lack of pricing agreement was not raised by the Defendant in its Adjudication Response. The Court noted the Adjudicator's inquisitorial powers and initiative required to ascertain the facts and the law pursuant to Section 25(i) of the CIPAA. The Court therefore held that the Adjudicator did not act in excess of his jurisdiction, and that an analysis of the contract in respect of any variations arose out of the Plaintiff's Payment Claim, and does not go into the merits.



It therefore followed that, as there was no agreement on the part of the Defendant to be liable for the cost of the variations, there was no need for the Adjudicator to consider Section 36(2) of the CIPAA. Moreover, because the parties had a means for agreeing on the cost of variations, that is, by mutual agreement, Section 36(1) does not come into effect. Of particular importance in Section 36(1) are the words "Unless otherwise agreed by the parties."

Having regard to the awarding of costs, the Court confirmed Section 7 of the CIPAA Regulations, specifically in respect of the relevant circumstances to consider when determining the quantum of costs. It was noted that the circumstances listed in Section 7 of the Regulations are not exhaustive and allows an Adjudicator to examine other circumstances, derived from the wording, "...with all relevant circumstances including...." Costs is at the discretion of the Court, and the same principle should apply to the quasi-judicial body of Adjudication.

The Setting Aside Application was dismissed with costs.

Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd and another case [2016] MLJU 1189

This High Court case deals with a Setting Aside Application pursuant to Section 15 of the CIPAA on the basis of denial of natural justice, the adjudicator not acting independently or impartially, and in excess of his or her jurisdiction. The main issue considered by the Court, albeit in mainly a hypothetical sense, is whether an error of fact on the part of the Adjudicator would satisfy the provisions of Section 15 of the CIPAA, most notably a breach of natural justice or failure to act impartially or independently.

Rimbunan Raya, as the Respondent Plaintiff in the matter, alleged that there was a double claim made by the Claimant between the Penultimate and Final Certificate that it said was not properly considered by the Adjudicator and thus resulted in a breach of natural justice. Secondly, the Respondent argued that payments under Variation Orders were not due as they were without the signatures of the Respondent's representatives. The Court was also asked to consider the Maybank Base Lending Rate and the resulting late payment interest.

Decision:

With regard to the allegation of a double claim the Court found that, based on the format for reporting for the Final Certificate, the amounts which had already been certified (whether paid or not) were already excluded and deducted from the amounts payable and claimed in the Final Certificate. Accordingly, the Court found there to be no double claim, that is, that the amounts in the Penultimate Certificate did not overlap with the amounts in the Final Certificate.

Notwithstanding, the Court stated that this is a finding of fact which the Court has no basis to interfere with in a Setting Aside Application. The Court went on to suggest that even if the Adjudicator had erred in this respect, this would need to be corrected at Arbitration. Therefore, even if the Adjudicator had made a bona fide error of fact, this would not substantiate an allegation of breach of natural justice nor an allegation of failure to act impartially or independently.

Moreover, the Court found that the Adjudicator had not erred in accepting the interest rates adopted by the Claimant, and suggested that this was something "within the pure province of the adjudicator to decide." Similarly, the Court stated that, even in the event that the Adjudicator "should get it wrong", it cannot substantiate an allegation of not acting impartially or independently. The Court held that the Adjudicator had given proper consideration to the issues and sufficient reasons to justify his findings, conclusion and decision despite the brief nature of the reasons.

The Setting Aside Application was dismissed with costs.

11. Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2016] MLJU 1371

In this case, the High Court was asked to consider the legality and enforceability of construction contracts executed by the undischarged bankrupt director of a company, and whether they were valid contracts upon which Adjudication could proceed.



In the adjudication proceedings, the Respondent, Sazean Engineering, failed to file a Payment Response or Adjudication Response. The Adjudicators in the three (3) adjudications were decided in favour of the Claimant, Bumi Bersatu.

The Respondent Plaintiff in these proceedings made a Setting Aside Application on the basis that the Adjudication Decisions were improperly procured through fraud pursuant to Section 15(a) of the CIPAA. This was based on the fact that the undischarged bankrupt director executed the subject contracts, and that the Respondent was unaware that the director was an undischarged bankrupt.

Decision:

The first issue considered by the Court was what the effect was on contracts executed by the bankrupt director on behalf of a company. With reference to Sections 125 and 127 of the Companies Act 1965 and Section 38(1)(d) of the Bankruptcy Act 1967, the Court found that the statute contemplates only a penalty to be imposed on the director but does not avoid contracts entered into by him on behalf of the company.

The Court noted that the Respondent did not adduce any evidence as to how the fraudulent conduct of the bankrupt director prejudiced or unduly influenced the Respondent, bearing in mind that the company is a separate legal entity from its directors and shareholders. The construction contracts were therefore found to be valid and upon which Adjudication could proceed. Moreover, the Court held that the Adjudication Decisions were not improperly procured through fraud under Section 15(a) of the CIPAA.

The Court then considered the Respondent's request for stay of the Adjudication Decision pursuant to Section 16 of the CIPAA, on the basis that Arbitration proceedings had been commenced. The Court clarified that the fact that there was an Arbitration suit on foot was only a threshold triggering condition under Section 16. The Court noted that it was for the Respondent Plaintiff to then show special circumstance, that is, that should it have paid at that moment to Bumi Bersatu, that it would not reasonably have been able to get its money back following the prospective Arbitration proceedings. The Court rejected this proposition, noting that Bumi Bersatu was not insolvent, and arguments to the contrary would have been partly nullified by the outstanding debt itself that was owed to Bumi Bersatu by the Plaintiff.

The Court reiterated the overarching purpose of the CIPAA which is to facilitate cash flow in the construction industry.

The Setting Aside Applications and stay applications were dismissed by the Court.

12. Sigma Elevator (M) Sdn Bhd v Isyoda (M) Sdn Bhd & Anor [2016] 10 MLJ 635

This High Court case dealt with a main contractor's attempts to rely on a pay when paid clause, also known as a back to back clause.

Isyoda, the main contractor and Defendant, entered into a subcontract agreement with Sigma, the Plaintiff. That subcontract agreement specified that Isyoda would only pay Sigma for works completed once Isyoda had been paid by Brampton Holdings, a third party that had appointed Isyoda as the main contractor.

Sigma argued that the pay when paid clause was void pursuant to Section 35 of the CIPAA. On the contrary, Isyoda argued that it was in fact pay *if* paid clauses that were void by the CIPAA, not pay *when* paid clauses which merely deal with the timing of payment.

The issue for the Court was, *inter alia*, whether Isyoda could still rely on the defence of the pay when paid clause under the subcontract, despite later entering into an agreement with Brampton Holdings whereby Brampton Holdings would pay Sigma directly.

Decision:

The Court found it difficult to accept the conflicting positions of Isyoda having respect to the subcontract with Sigma and the agreement that Isyoda had entered into with Brampton Holdings. This is because under the agreement with Brampton Holdings, Isyoda would never be paid by Brampton Holdings for work done by Sigma, however, in the pay when paid clause, Isyoda would only pay Sigma when it was paid by Brampton Holdings. Relevant here is that Sigma and Brampton Holdings are not in any contractual relationship. The Court found that Isyoda cannot hold on to both arguments which are inconsistent with one another.



Therefore, a contractor cannot rely on the defence of a pay when paid clause, if that contractor has a separate concurrent agreement with the third party stipulated in the pay when paid clause, to the effect that the third party would be paying the owed amount directly.

13. Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242

This landmark High Court Case looks at what constitutes a valid Payment Claim pursuant to Section 5 of the CIPAA, and whether an Adjudicator's decision in that regard goes to the jurisdiction of the Adjudicator in the validity of its appointment and competence to adjudicate.

Terminal Perintis, as Employer, had entered into a contract with Tan Ngee Hong Construction as Contractor for the completion of a project. During the course of completion of the project, the Employer issued the Contractor with a Notice of Default, and later a determination of the Contractor's employment.

The Contractor commenced Adjudication proceedings claiming outstanding payments under the contract, however it failed to raise the validity of the determination of employment in its Payment Claim. In its Payment Response, the Employer claimed, *inter alia*, that it was not obliged to make any further payments, however it failed to object therein to the validity of the Payment Claim.

Arbitration proceedings were also commenced concurrently.

The Adjudicator made a finding in respect of the Respondent's determination of the contract, namely that the determination was unlawful/wrongful. The Adjudicator allowed all of the Claimant's claims subject to certain deductions.

The Respondent lodged a Setting Aside Application pursuant to Section 15 of the CIPAA on the basis of denial of natural justice and, more importantly, the Adjudicator acting in excess of jurisdiction. In the alternative, the Respondent applied for stay of the Adjudication Decision or the Adjudicated Amount ought to be deposited with the Director of the KLRCA pursuant to Section 16. The crux of the Respondent's argument was the following:

- 1. The Payment Claim was invalid as it did not raise the validity of the determination, which it said was required for the Claim to have a cause of action;
- 2. The validity of the Claimant's employment under the contract was not referred to the Adjudicator in the Payment Claim, nor was it raised in the Payment Response; and
- 3. The Adjudicator nevertheless made a finding that the Respondent's determination of the contract was unlawful/wrongful, which was in excess of its jurisdiction.

The Claimant applied for the Adjudication Decision to be enforced as a Judgment pursuant to Section 28 of the CIPAA. Both matters were heard together.

Decision:

Validity of a Payment Claim

The Court confirmed that the Adjudicator's jurisdiction is limited to the matters raised in the Payment Claim and Payment Response, except by agreement of the parties in writing, which was not the case here.

The Court referred to Section 4 of the CIPAA, in which a "payment claim" is a claim for payment for work done or services rendered under the express terms of a construction contract.

In scrutinising whether a Payment Claim has met the requirements of Section 5 of the CIPAA, the Court stated that one should not be unduly critical, technical, or overly demanding of a Payment Claim, particularly considering that the Payment Claim is prepared and served by the Claimant. The words "cause of action" in Section 5 means that the Claimant must merely set out the basis of its claim in contract.

The Court stated that the Adjudicator has the jurisdiction to determine whether the Payment Claim is valid where, *prima facie*, it has all of the elements of a Payment Claim as follows:

- 1. The amount that is due;
- 2. When it was due;



- 3. The cause of action and the provisions of the contract to which the payment relates;
- 4. The nature of the work done; and
- 5. The fact that the claim is made under the CIPAA.

The Court found that the subject Payment Claim was adequately particularised within the framework of the CIPAA, in that the amounts claimed and the due dates for payment were stipulated therein. The cause of action related to provisions in the contract, with the sums claimed not being paid before their due dates. The Court found that these claims were therefore not dependent on wrongful determination of the Claimant's employment.

If a Respondent wishes to challenge the validity, *prima facie*, of a Payment Claim, it should serve a Payment Response in which it raises this objection, which the Respondent failed to do.

The Court therefore found that the Payment Claim was valid in that, *prima facie*, it reasonably complied with the requirements of Section 5 of the CIPAA.

Jurisdiction of the Adjudicator in deciding the validity of the Payment Claim

In respect of jurisdiction in the context of Adjudication, the Court distinguished between three types of jurisdiction that an Adjudicator may possess as follows:

Core Jurisdiction

This relates to whether the subject matter of the dispute is one which the Act has conferred on the Adjudicator. For example, if the subject contract is not a construction contract, but rather a shipping or mining contract, or a contract for a dwelling house for a natural person, then the Court will interfere as it is a case where the Adjudicator has no jurisdiction to begin with.

Competence Jurisdiction

This relates to whether the Adjudicator has been properly appointed in that, for example, the Payment Claim is not on the face of it a Payment Claim, or the Payment Claim was not served, or that it was not expressly stated to be made under the CIPAA. Put simply, if the Payment Claim does not comply with the basic and essential requirements of Section 5, then the Court is at liberty to set aside the Adjudication Decision on the basis of excess of jurisdiction.

The reasoning for this is twofold. Firstly, non-compliance with a basic and essential requirement of Section 5 of the CIPAA renders the Adjudication Proceedings and Decision a nullity. Secondly, the Adjudicator cannot decide on its own competence or capacity to adjudicate when the very validity of its appointment is questioned.

Contingent Jurisdiction

For there to be contingent jurisdiction, there must be further compliance with the requirements of the Act. For example, the dispute must be one falling within the matters raised in the Payment Claim and the Payment Response pursuant to Section 27(1). An Adjudicator could not, for example, decide on the defence of set-off arising out of costs of rectifying defective works if this was not raised in the Payment Response. Doing so would mean that the Court may set the decision aside.

In the subject case, the Court looked at whether the Adjudicator's decision to accept the validity of a Payment Claim that did not challenge the determination of employment is within the Adjudicator's jurisdiction, and whether that decision falls within the scope of Section 15 of the CIPAA.

So long as the action disclosed in the Payment Claim is on the face of it compliant, the Adjudicator is then descending into the merits of the claim. This is not a situation that affects the validity of the Adjudicator's appointment in contrast with, for example, a situation where the Payment Claim was not served at all. To interfere with the Adjudicator's decision to accept the Payment Claim would be to interfere on the merits, which is not permitted in a Section 15 Setting Aside Application.

Whether deciding on the determination of employment was in excess of jurisdiction



The Respondent, in its Payment Response, relied on the determination of the Claimant's employment, and in doing so submitted the issue of determination as forming part of its defence, consequently granting the Adjudicator jurisdiction to decide on the matter. The Court clarified that this is not a decision on the merits of the grounds of determination, but rather whether the Respondent has legally activated the determination.

In this case, the Court found that the Adjudicator did not decide beyond his jurisdiction in that he did not decide on the merits of the determination, but whether the Notice of Determination had been issued in compliance with the strict time frame requirement of Clause 25.2 of the PAM Contract.

Whether Clause 25.4(d) PAM Contract contravenes Section 35 CIPAA, making it void

The Respondent argued that the Claimant was not entitled to payment for the sums claimed consequent to the determination of the Claimant's employment pursuant to Clause 25.4(d) of the PAM Contract pending. The Court declined to rule on this point, stating that, generally, it is for the Adjudicator to construe the relevant clauses on a case by case basis in light of Section 35 CIPAA and Clause 25.4(d) PAM Contract. Such a decision does not go to the jurisdiction of the Adjudicator and the Court would not interfere, even if the Court did not agree with the Adjudicator's interpretation.

The stay application pursuant to Section 16 of the CIPAA

The Court noted that being in arbitration only satisfies the threshold of being within consideration for a stay application. However, the Respondent did not show that it can reasonably be concluded that it would not be able to recover its payment in the event that it succeeded at Arbitration.

14. View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2016] 6 MLJ 717

This landmark Court of Appeal case discusses the impact of Section 26 of the CIPAA as a potential means of circumventing the strict jurisdictional limitations imposed by Sections 5, 6 and 27. Moreover, the Court clarifies the operation of Section 41 in the context of making a Setting Aside Application.

Decision:

The Court confirmed that Adjudicators are bound by the matters contained in the Payment Claim and Payment Response pursuant to Sections 5, 6, and 27 of the CIPAA. However, the Court stated that any irregularity and/or non-compliance of the provision of Sections 5 and 6 do not necessarily mean that the Adjudicator will not have jurisdiction to hear the dispute. Non-compliance, if any, can be remedied and/or condoned by the Adjudicator as set out in Section 26.

Prasad Abraham JCA, in supporting the judgment of Hamid Sultan JCA, suggested that claims and defences not raised in the Payment Claim and Payment Response may be able to be raised later by moving the Adjudicator formally to allow matters not raised therein pursuant to Section 26(2)(b)-(c) of the CIPAA which allows the adjudicator wide powers in dealing with non-compliance in adjudication proceedings. His Lordship went on to observe that the intention of Parliament is clear in that any irregularity in wide terms will not render the adjudication proceedings a nullity in consonance with the spirit of the act, which is to facilitate regular and timely payment through the speedy dispute resolution mechanism of adjudication.

The Court provided a framework within which to deal with a Section 26 Application:

- 1. The Adjudicator should have regard to:
 - a. The interest of the defaulting party;
 - b. Likely prejudice to the other party resulting in any exercise of discretion by the Adjudicator;
 - c. The requirement of rules of natural justice; and
 - d. The object and intent of the CIPAA.

The Adjudicator must deal with that question and rule accordingly, and such a ruling would not be reviewable.

In relation to View Esteem's purported application challenging jurisdiction under Section 41 of the CIPAA, the Court stated that once an Adjudication is triggered, the only way to challenge the award is to make a Setting Aside Application under Section 15 of the CIPAA. There cannot be an application to challenge jurisdiction made under Section 41, as this section can only be used as the basis of an application that is made under Section 15.



Consequently, the Court stated that View Esteem's application for stay of the decision pursuant to Section 16 of the CIPAA must fail, as a stay application can only be filed upon having filed a Setting Aside Application under Section 15.

15. VVO Construction Sdn Bhd v Bina MYK Sdn Bhd and another case [2017] MLJU 79

This High Court case considers whether a bankrupt can use the vehicle of a business or a limited company to enter into a construction contract as a subcontractor, and then later proceed with Adjudication under the name of a limited company as the Claimant in the Adjudication.

VVO Construction, the Main Contractor on a project, appointed MYK Construction as its subcontractor for works to be completed on a project. MYK Construction informed VVO Construction that it had assigned the contract, with immediate effect, to Bina MYK, despite there being no contract executed as between VVO Construction and Bina MYK. This assignment was not made in writing. VVO Construction requested MYK Construction, as its subcontractor, to cease all work activities with immediate effect. Bina MYK responded, accepting the cease work order as termination and demanded payment.

Bina MYK, as Claimant, initiated Adjudication proceedings, in the Payment Claim of which it stated "NON" under the column of "Date Contract was made". The Payment Claim was signed by Jeffrey Lim, stated therein as the Project Director of Bina MYK.

VVO Construction, as Respondent, argued that no contract existed with the Claimant and that, rather, it existed with MYK Construction. The Respondent filed an Adjudication Response, stating that it had dealt at all times with Jeffrey Lim, who was the Project Director at MYK Construction. VVO Construction did a bankruptcy search and ascertained that Jeffrey Lim was a bankrupt, which was disclosed to the Adjudicator.

The Adjudication proceedings went ahead and decided in favour of the Claimant.

VVO Construction made a Setting Aside Application pursuant to Section 15 of the CIPAA.

Decision:

The Court found that, as the assignment by MYK Construction to Bina MYK was not made in writing, that there was no written construction contract for the purposes of Adjudication Proceedings under the CIPAA. Accordingly, the Court set aside the Adjudication Decision on the ground of excess jurisdiction on the part of the Adjudicator.

The Court went on to say that, even if there did exist a written construction contract, it would be contrary to law to allow the Claimant to be used as an instrument of fraud for the bankrupt Jeffrey Lim to defeat bankruptcy law, of which he was in clear contravention.

The Setting Aside Application was granted with costs.

16. Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case [2017] MLJU 146

This High Court case dealt with the issue of whether a Respondent can raise a contingent or core jurisdictional objection in Adjudication Proceedings when these arguments have not been raised in a Payment Response.

The Claimant, Zana Bina, instituted Adjudication Proceedings as against Cosmic Master Development, the Respondent, claiming payment for outstanding fees. The Respondent did not file a Payment Response.

In its Adjudication Response, the Respondent raised a jurisdictional objection as well as substantive issues. The jurisdictional objection was on the basis that the Letter of Award relied upon by the Claimant was not a valid, binding, or enforceable contract. In respect of substantive issues, the Respondent argued that there was no valid cause of action and disputed the validity of a Payment Certificate based on collusion between the Claimant and the Architect.

The Claimant submitted in Reply that the scope of the Adjudicator's inquiry did not extend to the matters raised in the Adjudication Response in the absence of a Payment Response.



The Adjudicator found in favour of the Claimant. The Respondent filed a Setting Aside Application under Section 15(b) and (d) of the CIPAA.

Decision:

The Court stated that the Respondent's objection as to the validity of the Payment Certificate is a matter of contingent jurisdiction. This is because the parties must fulfil the contingent condition of having referred to the matter in their Payment Claim or Payment Response under Sections 5 or 6 of the CIPAA. Accordingly, the Court held that the Adjudicator was correct in not considering this objection, as it was not raised in a Payment Response.

In contrast, the Court distinguished the issue of whether there was a construction contract made in writing, as this is a matter of core jurisdiction. If the CIPAA is not activated, thereby conferring jurisdiction on the Adjudicator, then the Adjudicator does not have jurisdiction in the first place. Accordingly, this objection can be raised for the first time in an Adjudication Response, even if, as was in this case, no Payment Response had been filed.

In fact, the Court stated that a core jurisdictional objection could be brought up at any time during the Adjudication proceedings and even at the stage of setting aside under Section 15 of the CIPAA, or in opposing a Claimant's application for enforcement of the Adjudication Decision under Section 28.

Similarly, the Court stated that the Respondent is entitled to raise for the first time in its Adjudication Response that it is objecting to the claim on the ground that the Payment Claim itself is not valid due to non-compliance with the CIPAA. This would also constitute a core jurisdictional objection, but only if the non-compliance is a patent one on the face of the Payment Claim.

The Court found that a construction contract in writing did exist. In respect of the Payment Claim, the Court found that it was not a case of patent non-compliance, meaning it was not a core jurisdictional objection and did not fall under a Section 15 Application.

The Court dismissed the Setting Aside Application with costs.

17. Bina Puri Construction Sdn Bhd v Syarikat Kapasi Sdn Bhd [BKI-24-78/8-2016]

This High Court decision is one dealing with a successful Setting Aside Application under Section 15 of the CIPAA on the part of a Claimant Applicant. It also dealt with the issue of what remedies are available in these circumstances.

The Respondent was the developer and the Claimant the main contractor for a tourist development project, the form of contract of which adopted the PAM Contract 2006.

The Claimant filed a Payment Claim and the Respondent filed a Payment Response, not disputing the amount claimed but raising the defence of set-off. Specifically, the Respondent alluded to Liquidated and Ascertained Damages (LAD) as being a matter to be determined "in due course" as the LAD had not been crystallised or determined at the time the Payment Response was issued.

After the Payment Response was filed, the Respondent obtained a Certificate of Non-Compliance (CNC) and enclosed it in a letter to the Claimant, stating its intention to recover (LAD).

This was disputed in the Claimant's Adjudication Reply on the basis that it was not raised in either the Payment Claim or Payment Response. The matter was dealt with on the documents and the Adjudicator dismissed the Claimant's claims, principally on the basis that the Respondent was entitled to set-off the LAD.

The Claimant made an application under Section 15, primarily on the basis that the Adjudicator acted in excess of his jurisdiction in determining and allowing the set-off on LAD.

Decision:

The Court noted that, without the CNC, the Respondent was powerless to impose LAD on the Claimant. Indeed, the CNC was only issued after the Payment Claim and Payment Response were filed, in the midst of Adjudication Proceedings.



The Court stated that it would be contrary to the standard form of contract to conclude that an employer was entitled to defeat a claim for sums due under the contract by reference to an event which occurred two and a half months after the money should have been paid. The Court found that, in adopting this approach, the Adjudicator had exceeded his jurisdiction by taking into consideration the CNC and LAD Notice which were not in existence when the Notice of Adjudication was issued.

Furthermore, the Court found that, under clause 22.1 of the contract, it was expressly stated that the imposition of LAD by the employer shall not be taken into account by the Architect in the issuing of payment certificates and the Final Certificate and is not subject to the set-off procedure under clause 30.4 and adjudication. Therefore, it was held that, contractually, the Adjudicator had no power to deal with LAD in adjudication proceedings.

The Court went on to reiterate that the Adjudicator is limited to the matters raised in the Payment Claim and Payment Response. The parties had not agreed that the Adjudicator's jurisdiction would extend to matters that transpired after the filing of the Payment Response.

In respect of the remedy available to the Claimant Applicant, the Court stated that the Claimant should have an enforceable right to recover the payment, as it was undisputed. The Court did not send the matter back for Adjudication as that would defeat the whole purpose and intent of the CIPAA and result in further delay and expense.

The Court set aside the Adjudication Decision with costs. The Court allowed the Claimant's claim and ordered the Respondent to pay the amount claimed in the Payment Claim.



IV. PROCESS IMPROVEMENTS BY THE KLRCA

As part of its ongoing commitment to further strengthen the use and utility of CIPAA 2012, KLRCA has implemented various process improvements, practice guidelines, publications and educational initiatives between the years 2014-2017.

These initiatives, in consonance with the KLRCA's responsibilities under Section 32 of the Act, has enabled the smooth operation of the Act in so far as the areas of administration, adjudicator competencies, training and outreach are concerned. These ongoing efforts are non-exhaustive and will continue act as the impetus for the development and maturation of the statutory adjudication framework in Malaysia.

Some of the key initiatives and improvements have been listed below:

a. Digitisation of documents in adjudication proceedings.

As part of its internal processes, the KLRCA has endeavoured to digitisation all incoming and outgoing documents relating to all adjudication proceedings registered at the centre, as part of its efforts to achieve a "paperless" record keeping system.

This internal initiative is aimed at delivering the following benefits to the KLRCA in respect of it's record-keeping for all administered adjudications -

- 1. For more efficient retrieval and circulation of documents to all relevant parties pertaining to CIPAA proceedings.
- 2. Reducing or eliminating the costs of physical storage.
- 3. Reduces the likelihood of misplaced records and documents.
- 4. Easier and more efficient tracking of all documents.
- 5. Improved digital storage that allows for a larger set of data to be stored.
- $\textbf{6.} \ \textbf{Improved coordination amongst KLRCA staff in respect of internal processes for a CIPAA proceeding}$
- 7. Provides the KLRCA with the opportunity to turn paper records into digital data that is compatible for analytics exercises.
- 8. Encourages an environmentally friendly process that reduces paper use at the KLRCA.

With the above benefits in mind, the KLRCA foresees an improved capability to meet all record-keeping requirements that is expected of an administrative authority, in light of the recent rise in adjudication applications.

b. KLRCA Publications - A Practical Guide to Statutory Adjudication in Malaysia

Since the CIPAA 2012 came into force on 15th April 2014, the KLRCA has overseen a remarkable growth of applications unlike any other jurisdiction with a comparable adjudication framework - a gargantuan total of over 800 applications have since been filed with the KLRCA as of 2017. Concomitantly, a wealth of materials have been produced as a result of the development of statutory adjudication - no doubt an all-important branch of construction dispute resolution for the subject matter of 'payment' as delineated under Section 4 of the Act.

Based on this experience, along with the markedly rapid rise in the practice of statutory adjudication, the KLRCA recently took the initiative to launch its publication entitled "A Practical Guide to Statutory Adjudication in Malaysia".

Available as a free publication circulated in print and electronic format, the publication is intended as an accompanying guide for adjudicators and parties towards navigating the various procedural issues that may potentially arise throughout the course of an adjudication proceeding. This publication takes into account the consultations sought not just with practising adjudicators, but includes the viewpoints of counsels and general users, all of whom have allowed important provisions of the Act to be debated and, in the process, enabled them to be more widely understood within the context of the construction industry.



The important features of this publication are three-fold. Firstly, it aims to provide the reader with a step-by-step guide of each procedural stage involved in an adjudication, with extensive commentary made to the relevant provision in the Act and references to recent case laws that have shaped the prevailing practice of the statutory adjudication regime.

Secondly, the publication provides the reader with a checklist that acts as a guide for readers who may potentially file an adjudication application in future. The checklist covers the procedures beginning from the filing of the Payment Claim up till the delivery of the adjudication decision or termination of the adjudication proceedings. It usefully conforms to the procedural and documentation requirements as listed under the KLRCA Adjudication Rules and Procedure. Additionally, the publication provides useful tips and best practices for budding adjudicators towards the conduct of adjudication proceedings, dealing with jurisdictional issues, the interplay between Court applications related to the adjudication proceeding and finally, on the form and content required for the writing of the Adjudication Decision.

Thirdly, the publication reproduces the relevant CIPAA procedural Forms as appearing in Schedule I of the KLRCA Adjudication Rules and Procedure, for the reader's ease of reference. Aside from providing formality and completeness to the adjudication process, the Forms encapsulate the matters and procedures which the relevant parties may have to consider when taking the steps in question.

The consideration of the rise in use of statutory adjudication invariably means that users are expected to face unique or newer issues that are only ever encountered in practice. Thus, through the launch of this publication, the KLRCA aims to bridge that gap by availing to all stakeholders valued commentary that equips them with the relevant procedural information, templates and best practices that are essential for adjudicators and parties alike towards the conduct of a successful adjudication proceeding.

c. Publication of redacted Adjudication Decisions - Rule 17 of the KLRCA Adjudication Rules and Procedure

Pursuant to valuable input received and consultations carried out with several stakeholders and authorities, the KLRCA has recently launched the initiative to redact selected published Adjudication Decisions. Pursuant to Rule 17 of the KLRCA Adjudication Rules and Procedure, the redaction process will strictly observe the parameters of confidentiality as stipulated under Section 20 of CIPAA.

Under Rule 17 of the KLRCAAdjudication Rules and Procedure, the KLRCA shall mandatorily delete and modify the following confidential information and details before the publication of the redacted Adjudication Decision occurs:

- a) the names of the parties in the adjudication;
- b) the name of the adjudicator;
- c) the name and details of the subject project;
- d) the payment claim amount;
- e) the payment response amount;
- f) the adjudicated amount.

As such, the parties and adjudicator involved in Adjudication Decisions shall be assured that all sensitive and confidential information will be safeguarded pursuant to the strict confines of Section 20 of the Act.

It is hoped that these redactions will act as a point of reference for all stakeholders, guiding them towards the efficient conduct of their future adjudication proceedings. Ultimately, these redactions are also seen as an opportunity to eventually develop the jurisprudence regarding statutory adjudication proceedings, thus ensuring continued education and improved advocacy skills amongst CIPAA users.



V. CONCLUSION

The CIPAA report this year reflects the remarkable rise of applications. This can be attributed not just to the expanded use by frequent users but also by first timers of adjudication. Given the continued focus on accessibility and dissemination we strongly believe that this trend is set to increase in the coming years. The outreach and training initiatives carried out by the KLRCA as the administrative authority, and by external programmes conducted through public and private entities have certainly benefitted all stakeholders, thus aiding this expansion.

If anything, 2017 can be seen as the year where the barriers were finally broken - as progressive developments that shaped the adjudication procedure saw the industry actively embrace and confide in the mechanism under the stewardship of the KLRCA, thus charting the successful trajectory of CIPAA.

This year's report further evinces this aspect, where user input gained from questionnaires revealed an improved satisfaction with the results produced from decided adjudications, and of the conduct of adjudicators throughout the process.

Participants of the CIPAA process have demonstratively treated the process as binding, as pointed out by the improved rate of compliance with the timeline to make payment under decided adjudications. Notwithstanding, there has been a higher concentration of decided matters referred to court or arbitration for means of final determination, thus indicating that stakeholders have come to terms with the mechanism's summary, "binding but not final approach".

The implementation of a slew of administrative improvements, publications on practice and procedure, and increased take-up in training programmes have ably aided stakeholders, resulting in a gain of trust and confidence in the statutory adjudication mechanism as an effective means of resolving payment disputes in Malaysia.

The success of this adjudication regime owes a debt of gratitude to the Malaysian judiciary, which has played a no less integral role through its adjudication related judgments, all parts of which are allowing important provisions of the Act to be analysed, debated and interpreted so as to be better understood in the context of the Malaysian construction industry. For instance, the Court of Appeal's ruling in *View Esteem*¹ dealt with the adjudicator's wide purview under Section 26, thus providing a useful guideline for adjudicators when addressing non-compliances and irregularities in adjudication proceedings.

Concomitantly, the KLRCA, through its continued training programmes and refinement of efficient administrative processes, shall strive to meet the demands set by the industry's increased use of CIPAA, thus consolidating its legislative mandate under the Act and ensuring that Malaysia's adjudication system is on par with its peers in the world.

 $^{^{\}mbox{\tiny 1}}$ View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2016] 6 MLJ 717



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