



REGIONAL RESOLUTION. GLOBAL SOLUTION

A PRACTICAL GUIDE TO STATUTORY ADJUDICATION IN MALAYSIA

BY DATUK PROFESSOR SUNDRA RAJOO

A Practical Guide to Statutory Adjudication in Malaysia

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PREFACE

About 16 years ago, YA Lim Chong Fong, now Judge of the High Court of Malaya together with his then partner, Mr. Rajendra Navaratnam approached me to recommend a world-renowned adjudication expert in order to introduce the process into Malaysia.

I recommended Mr. Tony Bingham QC from England. The rest is history as YA Lim Chong Fong with the backing of CIDB, MBAM and ISM drafted the statutory adjudication legislation in the construction industry, now known as Construction Industry Payment and Adjudication Act 2012 (CIPAA). We owe him a significant debt for his foresight and tenacity.

Initially, I was a sceptic of statutory adjudication in the ADR scheme in the form it was first mooted by CIDB. My reluctance was more to do with its wide application, overwhelming impact and monopolistic framing.

Thereafter, a number of institutions concerned with the construction industry provided valuable inputs. PEMUDAH under the able leadership of Tan Sri Sidek Hassan and Tan Sri Yong Poh Kon moulded the final legislation which was adjusted to accommodate the views of the various stakeholders.

KLRCA as an independent and competent body was made the sole adjudication authority. It was only natural, as KLRCA also plays the same role in arbitration and other forms of ADR in Malaysia.

KLRCA is also a neutral, not for profit international institution based in Malaysia under the Asian African Legal Consultative Organisation (AALCO) Host Country agreement complete with immunities and privileges covering the Asia Pacific Region.

Although it took 2 over years of persistent lobbying by industry players and KLRCA to persuade the Works Ministry to make the Act operative, the scheme was all in place the moment when the commencement date of April 15, 2014 was announced unexpectedly by the Works Ministry.

Before that, KLRCA expended considerable efforts with the help of key experts from the construction industry doing road shows, setting up the structure, negotiating the regulations and exemptions with the Works Ministry, training adjudicators and finally setting up the Rules and Procedure to ensure there was no gap in the implementation process.

As Director of KLRCA, I had to implement the CIPAA regime, and make it work. It afforded me a ringside view complete with the bitter sweet, travails and success in ensuring that it delivers what the Government and Parliament intended it to do to the benefit of the construction industry.

I am now a convert of the utility of CIPAA for the good of the country. It does deliver quick and accessible justice by ensuring cash flow in our vital construction industry. Statutory adjudication under CIPAA is a boon to all concerned. To date on 1st May 2017, over 850 applications for adjudications have been filed with the Kuala Lumpur Regional Centre for Arbitration.

It is a testament to not only its success, but also for fulfilling a real need in the early resolution of payment disputes in Malaysia. I predict that the figures will keep rising as more and more affected parties become familiar with the process and convinced of its efficacy.

The purpose of this publication is quite similar to the CIPAA itself namely, to provide a quick and effective pocket book to the understanding of the procedure of adjudication. It sets down the fundamental practice and procedure of statutory adjudication in Malaysia to use by practitioners, construction experts, employers, contractors, users and students with an over view of the procedural and administrative functioning of the regime.

I have attempted to cover the entire gamut of procedure to ensure ease of understanding of the statutory regime for adjudication in Malaysia from the collective experience gathered over the years wherein many important provisions have been debated and interpreted in the construction community and within KLRCA.

The important features of this pocket book 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 sufficient 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, it provides the reader with a checklist that acts as a guide for those 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 Rules and Procedure. In addition, it provides 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 pocket book reproduces the relevant CIPAA procedural Forms as appearing in Schedule I of the KLRCA Rules and Procedure, for the reader's ease of reference.

I hope that by providing this as a resource, it will serve to further solidify the adjudication regime in Malaysia. I also hope this will enable all players to effectively partake in the adjudication mechanism.

I am deeply grateful to my fellow expert practitioners of statutory adjudication and to my colleagues at KLRCA who have been locomotive and carriages to the success of the scheme. I have not mentioned specific names but they know who they are. They have been instrumental for the set up and smooth working of the statutory adjudication regime in Malaysia.

Finally, I hasten to add that the views in this pocket book are my own and is not intended to be that of KLRCA. As such, it frees KLRCA to be able to deal with issues when it does arise without being bound by extraneous factors other than the Law, Regulations, Rules and Procedures.

This is an evolutionary work which will be updated from time to time to reflect the reality on the ground and as the case law develops. I have made every effort to ensure that the information provided is accurate and current as on 1st May 2017.

A handwritten signature in black ink, appearing to read 'Sundra Rajoo', with a stylized, cursive script.

Datuk Professor Sundra Rajoo
Kuala Lumpur
1st May 2017

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HOW TO START AN ADJUDICATION PROCESS - PAYMENT CLAIM

To commence a process under the Construction Industry Payment and Adjudication Act (CIPAA) 2012, the party that is claiming payment ("the unpaid party"), is required to send a "Payment Claim".

Payment: Under CIPAA 2012, the unpaid party is only allowed to refer a 'payment' dispute to adjudication. Section 4 defines payment to mean "*payment for work done or services rendered under the express terms of a construction contract*". As such, the definition excludes reference of extra – contractual claims, such as tortious claims or general damages arising from breaches of contract.¹ Unlike the statutory adjudication regime in the United Kingdom which allows all disputes arose under a construction contract to be adjudicated upon, the scope of application of CIPAA 2012 is restrictive to payment disputes under a construction contract. However, the parties may expand the scope of reference of the adjudication to matters other than 'payment' disputes².

'Payment' in this context refers to payment for "*construction work*" done and "*consultancy services*" rendered arising "under the express terms" of the construction contract.

Falling under this category are progress payments, whatever their form and frequency of disbursement (i.e. monthly, stage payment, advance payment, etc.), final payment, etc. It should also cover items of payment such as for varied work or changes, diminution in value, prime cost sums, preliminaries, cost adjustments, provisional sums, contingent sums, retention sums etc. so long as these are expressly provided for under the construction contract in question.

It is suggested that "*The definition does not cover payments in respect of works done or services rendered which are outside the ambit of the construction contract, or arising from common law.*"³ Although not specifically enumerated, 'payment' should mean monetary payment in the context of the CIPAA Act.⁴ The requirements of a payment claim to state the amount claimed in Section 5(2)(a) and the definition of 'unpaid party' which refers to a 'payment of a sum which has not been paid' fortify this interpretation.⁵

Section 27(1) provides that the jurisdiction of the adjudicator is limited only to the matter referred to adjudication by the parties pursuant to sections 5 and 6 (which relate essentially to merely payment), unless the parties to the adjudication extends the jurisdiction by agreement in writing (see section 27(2)).

¹ Ir Harbans Singh KS, *The Application of Statutory Adjudication to the Construction Industry*, KLRCA Certificate in Adjudication Training Manual.

² Section 27(2) of CIPAA 2012.

³ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 57.

⁴ *Ibid.*

⁵ *Ibid.*

Pursuant to Section 27(2), parties may by agreement in writing expand the scope of the adjudication reference to other matters to be adjudicated upon in the same adjudication, including non-payment issues such as extension of time, liens, technical issues, licences to occupy site, determination, suspension of works, etc. and possibly also extra contractual or common law claims (e.g. negligence, nuisance, etc.).

Contract is in writing: Section 2 of the Act states that it is applicable only to construction contracts made in writing. However, no further guidance is provided in the Act for what is to be considered as “in writing”.

For administrative purposes, the Kuala Lumpur Regional Centre for Arbitration (KLRC) published a CIPAA Circular 03 on the 28th of April 2014 in an effort to streamline the meaning of the words “in writing”. The Circular provides:

- **There is a contract in writing,**
 - a) if the contract is made in writing (whether or not it is signed by the parties);
 - b) if the contract is made by exchange of communications in writing; or
 - c) if the contract is evidenced in writing.
- **Where parties agree otherwise than in writing by reference to terms which are in writing, they make a contract in writing.**
- **A contract is evidenced in writing if a contract made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the contract.**

What about oral agreements made after the Construction Contract: It is typical for parties to a construction contract to have oral discussions leading to oral agreements between the parties. In such cases, the contract contained in or evidenced by written documents will have been preceded by oral discussions and agreements.¹⁶

Section 2 of the CIPAA Act 2012 has the effect of excluding all construction contracts which are entirely made orally or made partly orally and partly in writing.

KLRC clarified this in CIPAA Circular 03 that “*where parties agree otherwise than in writing by reference to terms which are in writing, they make a contract in writing*”.

Singularity of Construction Contract: Section 4 defines “payment” as “*a payment for work done or services rendered under the express terms of a construction contract*”. Whereas, Section 5(1) of the CIPAA Act 2012 provides that “*An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract*”. Given these provisions, the express terms of ‘a construction contract’ in this context is to be construed as a single construction contract.

⁶ *Sprunt Ltd v Camden London Borough Council* [2012] BLR 83, per Akenhead J at paragraph 36, page 94.

Checklist

Form and contents of Payment Claim: A payment claim may take the form as appearing in Form 1 Schedule I of the KLRC Rules & Procedure. The Payment Claim should include the following information: -

- ✓ Name and addresses of unpaid and non-paying party;
- ✓ Claimed amount, basis of claim, due date for payment;
- ✓ Relevant contract provision and if none, the default provision of CIPAA will apply;
- ✓ Contract reference No., the date the contract was made; or other details evidencing the existence of a construction contract;;
- ✓ Project/work description;
- ✓ The contract sum;
- ✓ Include detailed particulars of claim;
- ✓ Ensure that the construction contract to which the payment claim is based on is confined under the scope of Section 4 and Section 5(1) of the CIPAA Act 2012, based on a single construction contract.

Mode of service of the Payment Claim: It is essential that your Payment Claim is served to the non-paying party in accordance to the one of the modes of service enumerated under Section 38 of the Act:

- a) By delivering the notice or document personally to the party;
- b) By leaving the notice or document at the usual place of business of the party during the normal business hours of that party;
- c) By sending the notice or document to the usual or last-known place of business of the party by registered post; or
- d) By any other means as agreed in writing by the parties.

The Unpaid Party must ensure that proof of service of the document is secured as evidence of the service. This applies for all the modes specified above.

For example, if the document is sent using courier service, the consignment note is to be kept as proof of service.

Matters to Consider:

Include all claims in the Payment Claim: Payment Claim defines the scope of the adjudicator's jurisdiction. The Unpaid Party should ensure that all the claims for unpaid payments due, including all the unpaid invoices and debit notes, are included in the Payment Claim.

New claims will not be allowed to be added to after the Payment Claim has been served, unless otherwise agreed by the parties concerned pursuant to Section 27(2) of CIPAA 2012.

If your payment dispute arose before the coming into force of the CIPAA: The CIPAA came into force on 15th April 2014.

In the recent decision of the High Court⁷ which was later upheld in the Court of Appeal, the CIPAA was held to be applied retrospectively. This means that even if your payment dispute arose before the coming into force of this Act, it is still covered under the Act and you may initiate an adjudication proceeding under the CIPAA. This is provided that the same payment dispute has not been referred to arbitration or court litigation prior to the Act coming into force. Refer to KLRCA CIPAA Circular 1A dated 11th November 2014.

Obtaining legal representation: Having a lawyer to assist you in drafting a payment claim is completely optional. You are not required to get assistance from a lawyer, unless you think that your dispute is legally and factually complex.

A lawyer may be able to help you, in such cases, to check whether all your documents are in order, to enable you to gauge whether you have enough documentary evidence to prove your claim.

⁷ UDA Holdings Bhd v. Bistraya Construction Sdn Bhd (24c-6-09/2014) and Capital Avenue Development Sdn Bhd v Bauer (M) Sdn Bhd (24c-5-09/2014)

Payment Claim
(Construction Industry Payment & Adjudication Act 2012, section 5)

Payment Claim Reference:	Date:
--------------------------	-------

Note: This is a payment claim made under the Construction Industry Payment & Adjudication Act 2012⁹

From the Unpaid Party: Name: Address:	To the Non-Paying Party: Name: Address:
	<i>(Mode of service¹⁰)</i>

Claimed Amount ¹¹ :	Basis of Claim / Reference period of this Claim ¹² :	Due date for payment ¹³ :	Relevant contract provision / Default Provision of the CIPA Act 2012 ¹⁴
<i>(Amount)</i>	<i>(e.g. Interim/Final Payment Certificate/ Claim Submission/ Joint Valuation conducted on (date), etc.)</i>	<i>(Date)</i>	<i>(Provision of Contract)</i>

Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:

⁸ © Professor Datuk Sundra Rajoo, Lam Wai Loon, Ivan Loo Y.F. Reproduced with permission of the copyright holders. These Forms contained in Schedule 1 are suggested forms only, intended merely to highlight the matters and procedures which the relevant parties may have to consider when taking the steps in question.

⁹ Section 5(2)(d) of the CIPA Act 2012.

¹⁰ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

¹¹ Section 5(2)(a) of the CIPA Act 2012.

¹² Section 5(2)(b) of the CIPA Act 2012.

¹³ Section 5(2)(a) of the CIPA Act 2012.

¹⁴ Section 5(2)(b) of the CIPA Act 2012. Refer to sections 36(3) and 36(4) of the CIPA Act 2012 for default provisions, if relevant.

****PARTICULARS OF CLAIM¹⁵:**

Description of Work/ Services	Amount	Supporting Documents¹⁶
(1) Total Contract Sum: (a) Original Contract Sum (b) Total Variation as of <i>(Date)</i> <i>(if applicable)</i> TOTAL ADJUSTED CONTRACT SUM	(A) (B) (A+B)	Schedule 1 Schedule 2
(2) Total Value of Works Certified/ Claimed/ as per Joint Valuation No: [] as of <i>(Date)</i> , etc. (a) Total original contract work certified/ claimed/ valued as of <i>(Date)</i> , etc. (b) Total variation work certified/ claimed/ valued as of <i>(Date)</i> , etc. (c) Total unfixed goods and materials on site <i>(if applicable)</i> <i> #(set out any other applicable items)</i> TOTAL VALUE OF WORKS CERTIFIED/ CLAIMED/ AS PER JOINT VALUATION, ETC. LESS:	(C) (D) (E) (F)=(C+D+E)	Schedule 3 Schedule 4 Schedule 5
(3) Retention Monies []% as per Clause [] of the Conditions of Contract <i>(if applicable)</i> (4) Total amount previously paid/claimed/certified <i>(*depending on how the payment claim is made)</i> <i> #(set out any other applicable items)</i> TOTAL DEDUCTION	(G) (H) (I)=(G+H)	Schedule 6 Schedule 7
AMOUNT CLAIMED	(J)=(F-I)	

¹⁵ Section 5(2)(c) of the CIPA Act 2012.

¹⁶ Section 5 of the CIPA Act 2012 does not envisage supporting documents to be provided in the Payment Claim. However, it may be good practice to do so.

****ATTACHMENTS:**

- Schedule 1: Relevant Extracts from the Contract showing the agreed Original Contract Sum. If the valuation is based on any of the default provisions in sub-sections sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 2: Relevant Instructions (e.g. Architect's Instructions/ S.O.'s Instructions/ Engineer's Instructions) and a Table showing the breakdown and description of each variation work ordered and the computation of the total value of these variation works. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 3: Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted / etc., and a Table showing the breakdown and description of the works done, the percentage of the works done as certified / claimed/ valued, and the total value completed as at the relevant date. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 4: Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted / etc. (as the case may be), and a Table showing the breakdown and description of the variation works done, the percentage of these variation works done as certified / claimed/ valued, and the total value completed as at the relevant date. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 5: Relevant extracts from the Contract showing the entitlement for payment for unfixed goods and materials delivered to site, the necessary documents to show the goods and materials delivered to the site, and a Table showing the breakdown and description of the unfixed goods and materials delivered to site, and the computation of the value of these goods and materials.
- Schedule 6: Relevant extracts from the Contract relating to the withholding of Retention Monies, and a Table showing the computation of the value of the Retention Monies entitled to be withheld as at the relevant date.
- Schedule 7: Relevant documents showing the amount previously paid/claimed/certified.

REPLYING TO A PAYMENT CLAIM - SERVING THE “PAYMENT RESPONSE”

Once the Payment Claim has been served on the non-paying party, the non-paying party has 10 working days to reply to the Payment Claim. This reply is to be made by serving on the unpaid party termed as the “Payment Response”. Section 6 of the Act governs the form and service of the Payment Response.

Upon receipt of Payment Claim, the non-paying party has the following options for considerations in the reply in its Payment Response:

- It may accept that it owes the unpaid party the claimed amount and propose to make payment to the unpaid party.
- It may accept that it owes a part of the claimed amount and propose to make payment of the said part to the unpaid party.
- It may completely deny the claimed amount and state its defence to the claim.
- It may opt to not reply to the Payment Claim within the 10 working days at all.

Each of the above four options results in a different consequence.

- **If the non-paying party accepts that it owes the unpaid party the claimed amount**, it can remit payment for the same to the unpaid party. The dispute comes to an end, and the adjudication proceedings are terminated.
- **If it accepts only a part of the claimed amount, and pays that part to the unpaid party**: In this case, the dispute for the admitted amount is over, but for the part of the payment denied, the dispute continues and may be brought to adjudication by the unpaid party.
- **If it denies the entire claimed amount**, the whole Payment Claim is disputed and this dispute can then be taken forward for adjudication proceedings.

If the non-paying party does not respond to the Payment Claim at all, then pursuant to Section 6(4) of the Act, the entire Payment Claim is deemed to be disputed and as such, the Payment Claim can be taken for adjudication proceedings.

Effect on the Jurisdiction of the Adjudicator

Pursuant to Section 27 of CIPAA, the matters contained in the Payment Claim (Section 5) and Payment Response (Section 6) circumscribe the jurisdiction of the adjudicator. This means that apart from the Payment Claim, the Payment Response is the most important document to define the scope of referral of the adjudication proceedings.

This entails that if the non-paying party does not put its defence in the Payment Response, then the adjudicator may later refuse to consider that defence in the adjudication proceedings, with the justification that since it was not included in the Payment Response, it is not within the jurisdiction (or scope of referral) of the adjudicator to take into consideration. Reference is to be made to the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*¹⁷ and more recently in *Bina Puri Construction Sdn Bhd v Syarikat Kapasi Sdn Bhd*.¹⁸

¹⁷ Civil Case No.: BKI-24-6/1-2015, High Court in Sabah and Sarawak, Kota Kinabalu.

¹⁸ Originating Summons No.: BKI-24-78/8-2016.

Checklist

If the non-paying party wants to issue a Payment Response, it is advisable to consider the following:

- ✓ If the contract in dispute is a “construction contract” under the CIPAA.
- ✓ If the contract relates to construction work carried out wholly or partly in the territory of Malaysia.
- ✓ If the contract falls into any exemptions under Section 3 of the Act, or under Schedule 1 of the CIPAA Exemption Order, or falls out of the scope of the Act under Section 41.
- ✓ In drafting the Payment Response, it is advisable that the non-paying party:
 - Address all the points raised in the Payment Claim to prevent the adjudicator from deciding against it in “apparently” undisputed claims.
 - That it enumerates all defences/ cross-claims and/or set-offs, if any. This is extremely important because if these are not included in the Payment Response, the adjudicator may refuse to consider these at a later stage.
 - Note: In circumstances where a set-off and/or counterclaim is sought, recent case law in *Bina Puri*, suggests that the adjudicator will refuse to consider a set-off and/or counterclaim that is introduced at a later stage.

Ideally, all relevant documentation is to be included in the Payment Response by reference which contains details of the disputed amount and the grounds for disputing such an amount. An example of the documentations are; Relevant Extracts from the Contract showing the agreed Original Contract Sum; Relevant Instructions (e.g. Architect’s Instructions/ S.O.’s Instructions/ Engineer’s Instructions); Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted; Relevant documents showing proof/ acknowledgement of the payments made as at the relevant date.¹⁹

Matters to Consider:

- **Calculation of working days under the Act**

The Act prescribes time limits in number of working days. A “working day” is defined under Section 4 of the CIPAA to mean “a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located”.

The first point of reference for calculation is the project site location. As different states carry different allocations of weekends and public holidays, a miscalculation can result in premature delivery of documents resulting in a necessity to re-serve, or in a more dangerous situation, the missing of a deadline prescribed under the Act. The first working day is calculated as the working day after the service of the relevant document.

A reliable source for a comprehensive list of public holidays in the different States and Federal Territories in Malaysia can be found at the following website:

¹⁹ See Schedules 1 – 10 of Form 2 – Payment Response at pages 80 – 82 of the KLRCAs Adjudication Rules & Procedure for guidance on this.

- **Date of service of the Payment Response**

The service of the Payment Response must be made within ten working days of the receipt of the Payment Claim. If the unpaid party is in different city and a longer duration is required to send the Payment Response by Pos Laju or courier, then the time required for the Payment Response to reach the unpaid party must be carefully considered.

It is to be noted that email and fax or other electronic modes of service are not explicitly recognised under the CIPAA, and cannot be used unless expressly agreed by the parties.

- **What happens to defences, set-offs and/or counterclaims when the Payment Response is not served within time**

Recent case law²⁰ has suggested that for defences, particularly set-offs and/or counterclaims that are not raised in the Payment Response, the adjudicator may refuse to consider them during the proceedings.

The implications caused by the decision in *Bina Puri* are significant. Firstly, the decision raises the issue of whether or not a set-off and/or counterclaim can form a defence in adjudication. Based on the judge's decision in *Bina Puri*, it was held that a counterclaim can only form a defence should it also be a set-off. Secondly, the decision addressed the issue of whether a counterclaim can be admitted when there was no Payment Response filed by the Respondent under Section 6 of CIPAA. Judge Ravinthran Paramaguru in *Bina Puri* was of the view that no counterclaim can subsist without a corresponding Payment Response, and that the adjudicator's jurisdiction to decide the counterclaim can only subsist should there exist an agreement between the parties to extend the jurisdiction of the adjudicator pursuant to Section 27(2) of CIPAA.

In suggesting that no counterclaim can subsist without a corresponding Payment Response, the case of *Bina Puri* has sparked uncertainty and ongoing debate as to whether the submission of even a partial payment response would have occasioned a markedly different outcome. Section 6(4) of CIPAA deems that the entire payment claims is disputed if the non-paying party has failed to serve a Payment Response, or serve a valid Payment Response to the Payment Claim after the expiry of 10 working days from the date of receipt of the Payment Claim. Thus, the non-paying party will not be precluded from challenging the Payment Claim in the adjudication proceeding even if he has failed to serve a Payment Response.²¹

Nevertheless, if the non-paying party has any objection to the validity of the Payment Claim or its service on the ground that it has not complied with Section 5 of CIPAA, the non-paying party is required to raise his objection to the unpaid party, or the adjudicator, as soon as he becomes aware or should become aware of the non-compliance after the Payment Claim is served on him. If he fails to do so, he could be estopped from making the objection later²², although he could still dispute the amount claimed by the unpaid party.²³

²⁰ *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*

²¹ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 104.

²² *Parist Holdings Pty Ltd v Wt Partnership Australia Pty Ltd* [2003] NSWSC 365; *Cowlin Construction Limited v CFW Architects* [2003] BLR 241; *AC Yule & Son Limited v Speedwell Roofing & Cladding Limited* [2007] BLR 499; *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658.

²³ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 104.

It is worth noting the clear position in Singapore wherein Section 15(3) of the Security of Payments Act 2004 provides that where a Respondent fails to provide any reasons for withholding payment in its Payment Response, it will not be permitted to raise those reasons later in its Adjudication Response. The Response to a Payment Claim, therefore, takes on a very significant role in the adjudication process. A Respondent's omission, through inadvertence or otherwise, to respond to the Payment Claim is tantamount to the Respondent conceding to an adjudication order in terms of the Payment Claim.

- **Is there a need for legal representation?**

Choosing to use legal representation is always optional. By virtue of the recent decisions alluded to above, whereby if certain information is omitted from the Payment Response, then the adjudicator may refuse to consider that information if raised later, it becomes pertinent to consider if the party able to handle to documentation that is required and issues that are raised.

- **Jurisdictional issues**

The following issues may be encountered by a non-paying party upon receipt and perusal of the Payment Claim:

- that the contract in dispute is not a "construction contract" under the Act.
- that the contract is not in writing.
- that the contract does not relate to construction work carried out wholly or partly in the territory of Malaysia.
- that the contract falls into any exemptions under Section 3 of the Act, or under Schedule 1 of the CIPAA Exemption Order, or falls out of the scope of the Act under Section 41.

Accordingly, the non-paying party may dispute the Payment Claim on grounds that that claim is not due to reasons such as it is in respect of works not done or outside the scope of the construction contract, or it is a premature claim or a fraudulent claim; or that the claim is invalid because the Payment Claim is invalid or defective, or the subject matter of the claim has already been determined in a previous adjudication or arbitration or litigation; or that the whole claim or a part thereof is not payable because the non-paying party has a valid cross-claim which sets off the whole or part of the claim. In the event the non-paying party chooses not to respond or fails to respond, within the prescribed ten working days period, Section 6(4) of CIPAA 2012 deems the entire Payment Claim to be disputed by the non-paying party. The possible situations surrounding Section 6(4) have been discussed above.

Should there be questions raised by the non-paying party as to contract in dispute not being a "construction contract" under the Act; or that the contract is not in writing; or that the contract does not relate to construction work carried out wholly or partly in the territory of Malaysia, the default position taken by the KLRCA as the adjudication authority is to allow registration of the adjudication to proceed pursuant to Rule 2 of the KLRCA Adjudication Rules & Procedure. In such circumstances, it is left to the adjudicator subsequently appointed to determine such issues pursuant to Section 25 and Section 27 of CIPAA 2012. At this juncture, the non-paying party will also be at liberty to refer such dispute concurrently to the Court or arbitration for determination of such jurisdictional issues, pursuant to Section 37 of CIPAA.

In event that the contract in question falls into any exemptions under Section 3 of the Act, or under Schedule 1 of the CIPAA Exemption Order (“Exemption Order”), or falls out of the scope of the Act under Section 41, the default position taken by the KLRCA as the adjudication authority is not to allow registration of the adjudication under Rule 2 of the KLRCA Adjudication Rules & Procedures. At the same time, the unpaid party will be at liberty to refer such dispute concurrently to the Court or arbitration for determination of such jurisdictional issue.

It is to be noted that the exemption under the Second Schedule of the CIPAA Exemption Order had lapsed on 31st December 2015. To this end, on the 1st of January 2016, the KLRCA issued a CIPAA Circular 06 to confirm the same. Accordingly, the procedure and the extended timelines provided under subparagraph 2(3) of the Exemption Order have therefore ceased to apply to a Government construction contract as specified in the Second Schedule of the Exemption Order from 1st January 2016 onwards.

Given that the scope of the Exemption Order had been determined by the Court in the case of *Mudajaya Corporation Berhad v Leighton Contractors (Malaysia) Sdn Bhd*²⁴ where the exemption is confined to the requirement that the Government must be a party to a “construction contract” within the meaning of Section 4 of the Act, the KLRCA is guided by the pronouncement in the course of its registration and administration of new adjudication matters.

The KLRCA’s internal due diligence process for new adjudication matters referred to the KLRCA for registration pursuant to Rule 2 of the KLRCA Adjudication Rules & Procedures requires for the disclosure of the names and service addresses of the Claimant and Respondent, as well as the particulars of the relevant contract comprising of the project title or reference or a brief description of the project.

Accordingly, the Court’s pronouncement in *Mudajaya* does provide a point of reference for the KLRCA in determining whether the subject matter of the relevant Payment Claim referred in the adjudication’s instrument of registration is able to proceed with registration i.e. whether the subject matter falls within the exemption scope as defined within the First Schedule of the Exemption Order.

- **If expert/ other witnesses are required**

Once a non-paying party receives a Payment Claim, it has to consider whether an expert or any other witnesses will be required to prepare the defences to the claimed amounts. It will be handy to have a report from these witnesses, for example, by a quantity surveyor or a delay analyst, for a ready response to a Payment Claim.

- **If a non-paying party anticipates a Payment Claim**

Though not evident in all cases, but if the non-paying party anticipates a possibility of being served with Payment Claim, then it is prudent to begin preparation well in advance, so as to remove the chance of an “ambush”. Some best practices that can be adopted are:

²⁴ KLHC O.S. No.: 24C-5-02/2015. Judgment by Dato’ Mary Lim Thiam Suan, J. dated 8 April 2015.

- Ensure that all your documents are in order e.g. Relevant Extracts from the Contract showing the agreed Original Contract Sum; Relevant Instructions (e.g. Architect's Instructions/ S.O.'s Instructions/ Engineer's Instructions); Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted; Relevant documents showing proof/ acknowledgement of the payments made as at the relevant date.²⁵
- Ensure that all correspondence with the other parties is recorded in writing, by way of letters or emails. This is because you can submit these communications as well as photographs as documentation in response to a Payment Claim.

²⁵ See Schedules 1 – 10 of Form 2 – Payment Response at pages 80 – 82 of the KLRC Adjudication Rules & Procedure for guidance on this.

Payment Response
(Construction Industry Payment & Adjudication Act 2012, section 6)

Payment Claim Reference:	Date:
From the Non-Paying Party: Name: Address:	To the Unpaid Party: Name: Address:
	<i>(Mode of service²⁷)</i>

In response to Payment Claim Reference:	Date of Receipt:	Amount Claimed:	Amount Admitted:	Amount Disputed:
<i>(Identify the Payment Claim)</i>	<i>(Date)</i>	<i>(Amount)</i>	<i>(Amount: State 'Nil' where no amount is admitted)</i>	<i>(Amount: State 'Nil' where no amount is disputed)</i>

Contract Reference Number:

Date Contract Was Made:

Project / Work Description:

Project Site Location:

Contract Sum:

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²⁷ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

****PAYMENT RESPONSE PARTICULARS:**

Description of Work/ Services	Amount Claimed	Response	Reason for difference/ dispute	Supporting Documents²⁸
(1) Total Contract Sum: (a) Original Contract Sum (b) Total Variation as of <i>(Date)</i> <i>(if applicable)</i> TOTAL ADJUSTED CONTRACT SUM	(as in Payment Claim)	(A) (B) (A+B)		Schedule 1* Schedule 2*
(2) Total Value of Works Certified/ Claimed/ as per Joint Valuation No: [] as of <i>(Date)</i> , etc. (a) Total original contract work certified/ claimed/ valued as of <i>(Date)</i> , etc. (b) Total variation work certified/ claimed/ valued as of <i>(Date)</i> , etc. (c) Total unfixed goods and materials on site <i>(if applicable)</i> <i> #(set out any other applicable items)</i> TOTAL VALUE OF WORKS CERTIFIED/ CLAIMED/ AS PER JOINT VALUATION, ETC.	(as in Payment Claim)	(C) (D) (E) (F)=(C+D+E)		Schedule 3* Schedule 4* Schedule 5*

²⁸ Section 6 of the CIPA Act 2012 does not envisage supporting documents to be provided in the Payment Response. However, it may be good practice to do so.

*** If the Response Amount differs from the Claimed Amount.**

****ATTACHMENTS:**

- Schedule 1: Relevant Extracts from the Contract showing the agreed Original Contract Sum. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 2: Relevant Instructions (e.g. Architect's Instructions/ S.O.'s Instructions/ Engineer's Instructions) and a Table showing the breakdown and description of each variation work ordered and the computation of the total value of these variation works. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 3: Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted / etc. (as the case may be), and a Table showing the breakdown and description of the works done, the percentage of the works done as certified / claimed/ valued, and the total value completed as at the relevant date. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 4: Relevant Payment Certificates/ Claim Submissions/ Records of Joint Valuation Conducted / etc., and a Table showing the breakdown and description of the variation works done, the percentage of these variation works done as certified / claimed/ valued, and the total value completed as at the relevant date. If the valuation is based on any of the default provisions in sub-sections in 36(1) or 36(2) of the CIPA Act 2012, a Table showing the computation of the value and the relevant documents supporting the basis of the valuation.
- Schedule 5: Relevant extracts from the Contract showing the entitlement for payment for unfixed goods and materials delivered to site, the necessary documents to show the goods and materials delivered to the site, and a Table showing the breakdown and description of the unfixed goods and materials delivered to site, and the computation of the value of these goods and materials.
- Schedule 6: Relevant extracts from the Contract relating to the withholding of Retention Monies, and a Table showing the computation of the value of the Retention Monies entitled to be withheld as at the relevant date.

Schedule 7: Relevant documents showing proof/ acknowledgement of the payments made as at the relevant date.

Schedule 8: Relevant Instructions (e.g. Architect's Instructions/ S.O.'s Instructions/ Engineer's Instructions) and a Table showing, essentially:

- (a) the breakdown and description of defective work identified/ rectification works ordered to be carried out;
- (b) the computation of the total value of these defective works / rectification works which have been carried and which have not been carried out;
- (c) the total value of defective works, or any rectification works carried out/ to be carried out by third party contractor (if any).

Set out or enclose extracts of the relevant contractual provision.

Schedule 9: Relevant Certificate/s of Extension of Time, Certificate of Non- Completion, Certificate of Practical Completion (if any), relevant extracts from the Contract showing entitlement to charge or deduct Liquidated and Ascertained Damages for delay from payment claims, and a Table showing the computation of the Liquidated and Ascertained Damages sought to be deducted. Set out or enclose extracts of the relevant contractual provision.

Schedule 10: Payment in respect of the amount as admitted by the Non-Paying Party.

INITIATING ADJUDICATION – SERVING A NOTICE OF ADJUDICATION

The CIPAA confers an unpaid party with a right to adjudicate. After the Payment Claim has been served on the non-paying party and the time for service of the Payment Response has expired, the adjudication process may be initiated pursuant Section 7.

A dispute may be referred to adjudication when:

- The non-paying party disputes a part of the claimed amount in the Payment Response;
- The non-paying party disputes the entire claimed amount;
- The non-paying party does not serve a Payment Response in the time given to them for this purpose.

A dispute under a Payment Claim may be referred to adjudication only after the time for the Payment Response has expired.

If a Notice of Adjudication is sent prematurely, the KLRCA will require the Claimant to serve a fresh Notice after the expiry of the 10 working days (service of a Notice of Adjudication is discussed later in this chapter).

Section 7(1) of CIPAA enables both the unpaid party and the non-paying party to refer a payment dispute to adjudication. The claimant is the party (unpaid or non-paying) who issues the Notice of Adjudication pursuant to Section 8(1) of the Act.

The Claimant is not allowed to refer to adjudication a dispute which falls outside the ambit of the Payment Claim under Section 5²⁹.

It is to be noted that the cross-claim must have been raised in the Payment Response by the non-paying party – reference made to recent Bina Puri decision.

Limitation of Action

Section 7(3) of CIPAA provides that the reference to adjudication is subject to the Limitation Act 1953 (Act 254), Sabah Limitation Ordinance (Sabah) (Cap 72) or Limitation Ordinance (Sarawak) (Cap 49), as the case may be.

If the right of an unpaid party to bring an action or to refer to arbitration a dispute arising under a construction contract is barred by reason of statutory limitation, then the unpaid party's or the non-paying party's right of reference to adjudication would equally be barred.

In other words, the parties' right of reference of a dispute arising from the Payment Claim ceases with the right of the unpaid party to pursue his claim in the court of law or arbitration. The date of initiation of adjudication refers to the date of the Notice of Arbitration.

²⁹ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 112

In the context of Peninsular Malaysia, Section 6(1) of the Limitation Act 1953 (Act 254), provides that any action founded on a contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. A cause of action founded on a contract accrues on the date of the breach, and time begins to run from that date.³⁰

In the case of a Payment Claim under a construction contract, the cause of action accrues on the date when the non-paying party has, in breach of the contract, failed to make the payment by the contractual due date for payment.³¹

In the absence of terms of payment, pursuant to Section 36(4), the due date for payment is thirty (30) calendar days from the receipt of the invoice.

Procedure for Initiation of Adjudication Proceedings

The method of initiating adjudication proceedings is established in Section 8 of the Act.

Section 8 states that a Claimant may initiate adjudication proceedings by serving a written "Notice of Adjudication". As per the Act, the notice of adjudication must contain:

- The nature and description of the dispute;
- Remedy sought; and
- Supporting documents.

The proper service of the Notice of Adjudication is important as it gives the Respondent notice that the unpaid party intends to initiate adjudication proceedings.

Form 3 provides guidance on how the Notice of Adjudication is to be served.

Checklist

When serving a Notice of Adjudication on the Respondent, the Claimant is to ensure that:

- ✓ That the time for service of Payment Response has expired.
- ✓ That the nature and description of the dispute are clearly defined in the Notice of Adjudication. Reference is made to the Payment Claim served earlier and a copy of the same is attached.
- ✓ The dispute that has arisen is laid down, either because the Non-Paying Party has denied a part/ whole of the Payment Claim in the Payment Response, or did not serve the Payment Response at all.
- ✓ The relief sought is listed out in the Notice of Adjudication, including costs, interest and any other reliefs that the adjudicator may grant.
- ✓ It has proposed the choice of adjudicator to be appointed. Although not mandatory, it provides the Claimant with an opportunity to attempt to agree on an adjudicator with the Respondent.

³⁰ *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon* [2005] 4 CLJ 717, F.C.; *Nasri v Mesah* [1970] MLJ 32.

³¹ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 117.

Service of a Notice of Adjudication is a critical step in the adjudication process as it marks the commencement of the time limitations set under CIPAA with which the parties and the adjudicator are required to comply strictly.

It is therefore prudent for the Claimant to record the proof of service of the Notice of Adjudication on the Respondent.

A Notice of Adjudication has to be validly served on the other party. Service can be affected by any of the prescribed modes stipulated in paragraphs (a) to (d) of Section 38 of CIPAA. Failure of proper service of would render the Notice of Adjudication invalid and the adjudication proceedings which follow would be a nullity³².

Matters to consider:

- Mandatory nature of service of Notice of Adjudication/ modes of service

A valid service of the Notice of Adjudication is a mandatory step in the adjudication process since many crucial procedures, such as time for mutual appointment of an adjudicator and time for registration of the matter with the KLRCA, start running upon the date of service of the Notice of Adjudication.

Section 38 of the Act lays down clearly the modes of service of all documents or notices under the Act. These modes of service are:

- By delivering the notice or document personally to the party;
- By leaving the notice or document at the usual place of business of the party during normal business hours of that party;
- By sending the notice or document to the usual or last-known place of business of the party by registered post.

Apart from these, the Act states that the parties may agree in writing on any other mode of service of notices or documents. Usually, these other modes may be by way of email and/or fax.

- **Non-compliance with time periods**

Section 7(2) of CIPAA expressly stipulates that the right of a party to refer a dispute to adjudication only arises after the expiry of 10 working days from the date the Payment Claim is served on the non-paying party by the unpaid party.

The question that may arise is whether non-compliance with the stipulated period prescribed by Section 7(2) for the exercise of a right of reference to adjudication is correctable by the adjudicator pursuant to Section 26 of CIPAA.

³² *Primus Build Ltd v Pompey Centre Ltd & Another* [2009] BLR 437. See also *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, per Hodgson JA at para 57; *Kell & Rigby v Guardian International Properties* [2007] NSWSC 554.

Under Section 26 of CIPAA, the adjudicator is entitled to exercise his discretion to cure such non-compliance, notwithstanding that it is cast in mandatory term, so long as the discretion is exercised in a way which in all the circumstances best reflects the requirements of justice.³³

In this regard, the adjudicator may take into account prejudice to the interests of the party who sought the cure, the interest of the other party to the proceeding and the interest of upholding the objective of the CIPAA 2012.

An author of adjudication text suggested that a situation where a premature initiation of adjudication proceedings by an unpaid party after the non-paying party has served his Payment Response is more likely to be curable as compared to a situation where the unpaid party commences adjudication proceedings prematurely before the non-paying party has been given the full opportunity to serve his Payment Response.³⁴

- **Whether to propose an adjudicator or not**

The Claimant has an option at this stage to propose a candidate as the adjudicator to conduct the adjudication proceedings. This is recommended if the Claimant has knowledge of an experienced and competent person to handle the adjudication matter expertly and independently. The proposed candidate will only sit as an adjudicator if both parties have agreed in writing. The CIPAA does not allow for unilateral appointments.

³³ See the Federal Court decision in *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565, which set out the principles in approaching Order 2, Rule 1 of the Rules of the High Court, 1980 (prior to the Rules of Court 2012).

³⁴ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 132.

Notice of Adjudication
(Construction Industry Payment & Adjudication Act 2012, sections 7 and 8)

From the Claimant ³⁶ : Name: Address:	To the Respondent: Name: Address:
	(Date)
	(Mode of service ³⁷)
Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:	
Payment Claim Reference: Payment Claim Amount: Payment Response Reference (if any): Payment Claim Amount Admitted and Paid (if any): Total abatement / set-off / cross-claim sum (if any): Amount In Dispute : [<i>Amount Claimed or Cross-Claimed by the Claimant</i>]:	

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³⁶ The Claimant refers to the aggrieved party in a construction contract who initiates adjudication proceedings. The Claimant can either be the Unpaid Party or the Non-Paying Party.

³⁷ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

NOTICE OF ADJUDICATION

1. A dispute has arisen between us and you under the Contract arising from the above referenced Payment Claim [*and Payment Response (if any)*].
2. The Payment Claim was served on [*us or you, as the case may be*] by [*state the mode of service*] on [*date*]. [*We or You (as the case may be) thereafter served a Payment Response by (state the mode of service) on (date) [*If applicable]*]
3. The dispute involves the following:

[*Set out the nature and description of the dispute*³⁸]
4. In accordance with sections 7 and 8 of the Construction Industry Payment & Adjudication Act 2012, we hereby give you notice to refer the aforesaid Dispute arising from the Payment Claim to adjudication.
5. We seek the following reliefs or remedies:

[*Set out the nature and description of the relief(s)/remedy(ies)*³⁹]
6. The documents in support of the relief(s) or remedy(ies) sought are as follows:

[*Identify the documents and attach all relevant documents in support hereof*]
7. Pursuant to section 21(a) of the Construction Industry Payment & Adjudication Act 2012, we propose [*name, occupation & address of the proposed person*] to be appointed as adjudicator to determine the dispute. Please indicate your agreement on the proposed person to be appointed as adjudicator, or any other suitable person of your choice for our consideration. If we do not receive any response from you by [*date*⁴⁰], we will proceed to make a request to the Director of the Kuala Lumpur Regional Centre for Arbitration to appoint an adjudicator pursuant to section 21(b)(i) of the Construction Industry Payment & Adjudication Act 2012.

[*signed*]

[*Name of the authorised representative of the Claimant and designation*]

Copy: (<i>Director of the Kuala Lumpur Regional Centre For Arbitration</i>)	(<i>Mode of Service</i>)
(<i>Service address</i>)	

³⁸ Section 8(1) of the CIPA Act 2012.

³⁹ Section 8(1) of the CIPA Act 2012.

⁴⁰ Section 21(a) of the CIPA Act 2012 provides that the parties may by agreement appoint an adjudicator within 10 working days from the service of the notice of adjudication by the claimant.

REGISTRATION OF THE ADJUDICATION WITH THE KLRCA - RULE 2 OF KLRCA ADJUDICATION RULES & PROCEDURE

Pursuant to Section 32 of CIPAA and Rule 1 of the KLRCA Adjudication Rules & Procedure, all adjudications commenced under the CIPAA shall be conducted and administered by the KLRCA in accordance with the CIPAA, CIPAA Regulations 2014 and the KLRCA Adjudication Rules & Procedure.

As such, once the Notice of Adjudication has been served on the Respondent, the next step is for the registration of the matter with the KLRCA. The procedure is set out in Rule 2 of the KLRCA Adjudication Rules & Procedure.

Registration of adjudication is mandatory: It is to be 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.

Procedure for Registration:

Rules 2 and 3 of the KLRCA Adjudication Rules & Procedure 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 Notice of Adjudication along with proof of service. The request for appointment of adjudicator must 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 under Rule 2.

For such registration of the matter, the Claimant is to provide KLRCA with a notice to register the adjudication matter which may be in the format as provided in Form 3A. This is to be served on the Director of the KLRCA.

Checklist

When registering the matter with the KLRCA, ensure that the Notice to Register includes:

- ✓ Claimed amount, basis of claim, due date for payment;
- ✓ A copy of the Payment Claim, along with proof of service;
- ✓ A copy of the Payment Response, if any, along with proof of service;
- ✓ A copy of the Notice of Adjudication, along with proof of service;
- ✓ Names and service addresses of the Claimant and Respondent;
- ✓ A copy of the relevant contractual document with the following particulars included:
 - Project title or reference;
 - Brief description of the project;
 - Contract number or a brief description of the contract; and
 - Date the contract was made.

- ✓ Claimed amount;
- ✓ Response amount, if any;
- ✓ Brief description of the dispute;
- ✓ Remedy sought, and;
- ✓ Registration fee amounting to RM265.00 (including the Goods and Services Tax (GST)), preferably by cheque made payable to “Kuala Lumpur Regional Centre

Matters to Consider:

- **Checks by KLRCA when registering an adjudication**

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.

Notice to the Director of KLRCA to register the adjudication
(KLRCA Adjudication Rules, Rule 2)

To: Director of the Kuala Lumpur Regional Centre For Arbitration (service address)
From: (Claimant) (Service address) Person In Charge: (Name and designation)
(Date)
(Mode of service)

PARTICULARS OF THE RESPONDENT

Respondent: (Name) (service address)
--

ENCLOSURES⁴²

1. A copy of the Payment Claim; 2. A copy of the Payment Response (if any).
--

NOTICE OF ADJUDICATION

Date of Notice of Adjudication: Date of Service of the Notice of Adjudication on the Respondent:

REGISTRATION FEE

Enclosed herewith is [cheque / Bank Draft/ any other approved mode of payment] in the amount of [amount] being payment for the registration fee for this adjudication reference.
--

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⁴² See Rule 2(1) of the KLRCA Adjudication Rules.

PARTICULARS OF CONTRACT

Contract Reference Number:
Type of Contract:
Date Contract Was Made:
Project / Work Description:
Project Site Location:
Contract Sum:

SUMMARY OF THE DISPUTE

Information of Claimant, Respondent and the dispute involved: <i>(set out the type of contract involved, the identity / role of both the Claimant and the Respondent under the Contract, and a brief description of the dispute involved)</i>
Payment Claim: Payment Claim Reference: Date of Payment Claim: Date when Payment was Due ⁴³ : Date of Service of Payment Claim the Non-Paying Party: Claimed Amount:
Payment Response: (if any) Payment Response Reference: Date of Payment Response: Date of Service of Payment Response on the Unpaid Party:
Amount Admitted (if any) and Date of Payment of the Amount Admitted:
Amount In Dispute: (Amount)
Relief(s) or Remedy(ies): <i>(set out the relief(s) / remedy(ies) sought as per the Notice of Adjudication)</i>

(signed)

(Name of the authorised representative of the Claimant and designation)

Copy: (Respondent) (service address)	(Mode of Service)
--	-------------------

⁴³ This refers to the date when the non-paying party is alleged to have failed to make payment by the contractual due date for payment.

APPOINTMENT OF AN ADJUDICATOR

After the Notice of Adjudication has been served by the Claimant on the Respondent, the next stage is the appointment of the Adjudicator to adjudicate the dispute between the parties.

The Adjudicator may be appointed in two ways:

- By mutual consent of the parties; and
- By the Director of the KLRCA

APPOINTMENT BY MUTUAL CONSENT

Section 21(a) of the Act states that the parties may agree in writing for the appointment of an adjudicator within 10 working days from the service of the Notice of Adjudication by the Claimant.

The appointment of an adjudicator in the manner prescribed under this provision should take place only after, and not before a valid Notice of Adjudication has been effectively served on the Respondent by the Claimant.⁴⁴

If the Claimant intends to propose an adjudicator to the Respondent, then it is recommended for the proposal to be included in the Notice of Adjudication. This is an opportunity for parties to exercise their party autonomy in deciding the adjudicator of the dispute.

The Claimant or the Respondent may also exchange proposals by separate correspondences to each other. However, an appointment may only be made when:

- By mutual consent of the parties; and
- By the Director of the KLRCA

If the above mentioned two factors are absent, then no mutual appointment may be made. The candidates proposed by either party will not be taken into consideration by the Director of the KLRCA in appointing the adjudicator.

It has been suggested that parties can still agree to appoint an adjudicator should the stipulated 10 working day period in Section 21(a) expire, and such proceeding appointment shall not render the adjudication proceedings a nullity.⁴⁵

⁴⁴ *Vision Homes Ltd v Lancsville Construction Ltd* [2009] BLR 525, per Justice Christopher Clarke at paragraph 56. See also *IDE Contracting Ltd v RG Carter Cambridge Ltd* [2004] BLR 72

⁴⁵ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 136.

Matters to Consider:

- **Factors to consider when selecting an adjudicator**

Choosing the right adjudicator for the dispute is vital to ensure successful adjudication proceedings. The Claimant and the Respondent when proposing and counter-proposing persons to be the mutually appointed adjudicator, may keep the following factors in mind:

- A complete list of adjudicators empaneled with the KLRCA is available on the following website: <http://panellists.klrca.org/panellists/adjudicators>
- The parties can search through this list to assist them in selecting an adjudicator for their dispute.
- The adjudicator must satisfy the competency standard and criteria required of an adjudicator as may be set by the KLRCA pursuant to Section 32(a) of CIPAA. If the person appointed as adjudicator to adjudicate a dispute under CIPAA does not satisfy the competency standard and criteria⁴⁶, the whole adjudication proceeding and the enforcement of any decision arising from the proceedings may be a nullity. This competency standard and criteria which affects the competency of the adjudicator may not be waived by any of the parties.⁴⁷
- Both parties should endeavour to agree on an adjudicator who is able to devote his time to the dispute. If the adjudicator discloses that he has prior matters to attend to, it is advisable for the both parties to agree on another adjudicator.

- **Procedure to approach an adjudicator selected by the parties**

If both parties have reached an agreement in writing over the selection of the adjudicator, then the next stage is to approach the adjudicator to obtain his consent to preside over the matter.

Form 4⁴⁸ may be used as guidance for this purpose, along with the provisions of Section 22 of the Act. This section lays down the procedure for approaching the adjudicator selected by the parties and states that the Claimant is required to notify the selected adjudicator in writing and also provide him with a copy of the Notice of Adjudication.

All other relevant documents, including the Payment Claim and the Payment Response may be provided to the adjudicator in order to apprise the agreed adjudicator of the ambit of the matters in dispute between the parties. Good practice dictates that this is undertaken by the Claimant.

⁴⁶ For further guidance, see Regulation 4 (a) – (d) of the Construction Industry Payment and Adjudication Regulations 2014.

⁴⁷ See Judith Prakash J's observation made in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co. Ltd* [2010] 1 SLR 658 on the distinction between, on the one hand, 'jurisdiction' which refers to the competence of the adjudicator to hear the application, and on the other 'jurisdiction' which concerns merely a question of irregularity of procedure or of a defect in 'contingent jurisdiction or non-compliance with statutory conditions precedent to the validity of a step in the proceeding'; *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2012] SGCA 63.

⁴⁸ See 'Form 4 – Request to the chosen adjudicator to act', of the KLRCA Adjudication Rules and Procedure.

At this stage, the parties and the adjudicator are free to agree on the terms of appointment including the fees chargeable.⁴⁹

Once the above procedures are carried out, the adjudicator is required to accept his appointment within 10 working days from the date he was notified by the Claimant.⁵⁰

APPOINTMENT BY THE DIRECTOR OF THE KLRCA

Where parties are unable to agree on the appointment of the adjudicator, then the appointment may be made by the Director of the KLRCA in the following manner:-

- Upon the expiry of the 10 working days from the service of the Notice of Adjudication, either party may request the Director of the KLRCA to appoint an adjudicator (Section 21(b)(i) of the Act);
- Before the expiry of the 10 working days, then both parties may jointly request the Director to appoint an adjudicator (Section 21(b)(ii) of the Act).

A request to the Director may also be made if the mutually selected adjudicator fails to indicate his acceptance of appointment within 10 working days from being notified by the Claimant.⁵¹

Once the Director receives a request to appoint an adjudicator after the expiry of the above mentioned time periods, the adjudicator shall be appointed within 5 working days from such request and the Director will notify the parties in writing.⁵²

The parties must ensure that the time provided for the parties to agree on the adjudicator and the other time limits described above have expired before they send the request to appoint to the Director of the KLRCA.

If such request is sent earlier, then it will be deemed to be premature and irregular, and the Director will not make any appointment pursuant to this request.

The Director of KLRCA's function in the appointment of an adjudicator is largely administrative in nature. He has no obligation to consider the bona fides of either party's request by looking into or questioning, for example, whether the Payment Claim or Notice of Adjudication is intended to be a Payment Claim or Notice of Adjudication, as the case may be, whether it has been served or properly served on the Respondent, or whether it complies with all the requirements of CIPAA.⁵³

⁴⁹ Section 19(1) of CIPAA 2012.

⁵⁰ Section 22(2) of CIPAA 2012.

⁵¹ Section 22(3) of CIPAA 2012.

⁵² Section 23(1) of CIPAA 2012.

⁵³ See *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2012] SGCA 63, per Chan Sek Keong CJ at paragraph 63.

Under Section 23(1), the Director of KLRCA is required to appoint an adjudicator within 5 working days from the receipt of a request and notify the parties and the adjudicator accordingly. However, the parties may agree, either expressly or by implication, to the appointment by the Director of the KLRCA made outside the stipulated 5 days period. In such instances, the appointment is to be treated as good as any appointment made by agreement of the parties under Section 21(a) of the Act.⁵⁴

It is important to highlight that the appointment of the adjudicator by the Director of the KLRCA does not immediately and automatically bind the adjudicator to the adjudication proceedings. The adjudicator still has the right to reject or refuse to accept the appointment under Section 23(2) which imposes an agreement to be reached by the parties and the adjudicator as to the terms of appointment and fees.

As such, should parties fail to reach an agreement on the same, in which the default position would be the application of the KLRCA's standard terms and fees under Section 19(2), the adjudicator would then be at liberty to either accept or decline his appointment. Should the latter occur, it would be sufficient to invoke Section 21(b) which allows parties to make a fresh request to the Director of KLRCA to make an appointment.

Procedure of making appointment by the Director

In making such appointment, the Director will send a conflict check to the selected adjudicator. This conflict check will be sent to the email address provided to the KLRCA by the adjudicator.

As the time granted to the Director to make an appointment is extremely strict, the conflict check email will also include a deadline for the adjudicator to revert to the conflict check. If the selected adjudicator does not revert by the deadline, then the KLRCA will be constrained to forward the conflict check to the next selected adjudicator.

Once a selected adjudicator confirms his willingness to be appointed, it also carries the direct implication that the adjudicator has cleared all conflict and is able to act independently and impartially over the matter. Consequently, the Director will issue the official Letter of Appointment, Letter of Acceptance and other relevant documents to the adjudicator. Once the Letter of Acceptance is executed, they are returned to the Director. A Letter of Acknowledgement is then sent to the parties notifying them that the appointment has been carried out.

The adjudicator now has 10 working days to indicate his acceptance of the appointment.⁵⁵

Checklist

If either party wishes to request the Director of the KLRCA to appoint the adjudicator pursuant to Section 23, the parties must include the following information within the request made:

- ✓ Refer to the KLRCA's reference no. of the adjudication matter previously registered;
- ✓ Enclose the appointment fee of RM424.00 (inclusive of GST), preferably by cheque payable to "Kuala Lumpur Regional Centre of Arbitration".

⁵⁴ Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 143.

⁵⁵ Section 23(2) of CIPAA 2012.

Time of sending request to the Director

It is to be noted that the request to appoint must be sent to the Director of the KLRCA from 8.30 a.m. to 4.00 p.m. from Monday to Friday (except public holidays) and from 9.00 a.m. to 12.00 noon on the eves of public holidays.⁵⁶ Any requests sent to the Director after these operation hours will be deemed to have been lodged on the next working day.

⁵⁶ See Rule 3(2)(e) of the KLRCA Adjudication Rules & Procedure.

APPOINTMENT BY THE DIRECTOR OF THE KLRCA

Once the adjudicator has been appointed, he is required to indicate his acceptance within 10 working days. Within this duration, he is required to negotiate his fees and terms of appointment with the parties, pursuant to Section 23(2).

Matters to be considered by the adjudicator when negotiating his fees:

- How high is the amount in dispute?
- What is the complexity of the matter – legal and factual?
- How much time is expected to be spent on writing an enforceable and reasoned decision?
- Is there any schedule of fees available?
- Is travel or other expenses anticipated?
- Are oral hearings anticipated?

Guided by the above matters, the adjudicator is free to negotiate his fee proposal with the parties. The adjudicator may refer to the KLRCA Recommended Fee Schedule for this purpose, which can be found in KLRCA's CIPAA Circular 02. The adjudicator may also come to a separate fee arrangement with the parties. For example, he could charge based on an hourly rate.

It is important to note, that under Paragraph 8.1.1 of the Adjudicator Code of Conduct in Schedule IV of the KLRCA Adjudication Rules & Procedure, where the adjudicator has agreed to apply the Standard Fee Schedule or the Recommended Fee Schedule, the amount in dispute would be taken to mean the claimed amount in the Payment Claim under Section 5, notwithstanding any set-offs / counterclaims raised by the Respondent at any later stage of the proceedings. This provision is consistent with the intent and spirit of the CIPAA 2012 Act.

It is advisable for the adjudicator to grant the parties a fairly short time frame to revert to his fee proposal, keeping in view that he must accept his appointment within 10 working days. A reasonable time frame is 4-5 working days.

Once the parties have agreed to the proposed fee schedule, that fee agreement becomes fixed and the adjudicator is prevented from charging any additional fees at a later part of the adjudication procedure save his disbursements.

If, however, the parties do not agree to the Recommended Fee Schedule or any other fee arrangement proposed by the adjudicator, then pursuant to Section 19(2) of the CIPAA, the KLRCA Standard Fees for Services and Expenses of Adjudicator ("KLRCA Standard Fee Schedule") and KLRCA's Standard Terms of Appointment provided under Schedule [Regulation 6] of the CIPAA Regulations 2014 becomes applicable.

To aid the adjudicator and the parties in calculation of the fees, the Fee Calculator in the KLRCA website can be utilised.

The KLRCA Administrative Fees is pegged at 20% of the adjudicator's fees in both schedules and equally applies to the total adjudicator fee as agreed between the parties if there is a separate fee arrangement.

Once the fees and terms of appointment are agreed between the parties, then the adjudicator may accept his appointment.

In either case, the adjudicator may use Form 6⁵⁷ as guidance to accept his appointment.

Checklist

In the letter for acceptance of appointment by the adjudicator, the adjudicator must:

- ✓ Refer to the letter by the Claimant (under Section 22) or the relevant letter of appointment issued by the Director of the KLRCA (Section 23), as the case may be, notifying him of his appointment as Adjudicator.
- ✓ Make a declaration that he accepts the appointment as per the fees and terms of appointment agreed.
- ✓ Declare under Section 24 that:
 - There is no conflict of interest in respect of his appointment.
 - He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense.
 - He shall comply with the principles of natural justice.
 - There are no circumstances likely to give rise to justifiable doubts as to his impartiality and independence.

This declaration under Section 24 is a mandatory requirement and to be made at the time of accepting appointment.

- ✓ Direction to the Claimant and Respondent to serve the Adjudication Claim, Adjudication Response and Adjudication Reply within the time limits specified under the Act.
- ✓ The adjudicator shall also include in the letter accepting his appointment⁵⁸ 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 acceptance of appointment.
- ✓ A direction to parties on the applicable modes of service for documents. For best practice purposes and for expediency, the Adjudicator is advised to seek the consent of both parties in writing before opting to utilise other means of service of documents by parties i.e. electronic mail or facsimile methods.
- ✓ In addition, the Adjudicator is advised to abstain from using obscure electronic communications such as mobile/internet text messaging, WhatsApp and other similar platforms which may potentially give rise to unnecessary technical challenges to the proceedings, given the confidential nature of adjudications and the need to avoid unilateral communications from occurring. This position has been reflected in recent case laws.⁵⁹

⁵⁷ See 'Form 6 – Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure.

⁵⁸ See 'Form 6 – Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.

⁵⁹ See the decision of Justice Dato' Mary Lim Thiam Suan in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* Kuala Lumpur High Court Originating Summons No.:24C-8-04/2015.

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 6.⁶⁰

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

⁶⁰ See 'Form 6 – Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.

IF THE ADJUDICATOR REJECTS HIS APPOINTMENT OR FAILS TO INDICATE HIS ACCEPTANCE WITHIN THE TIME PRESCRIBED UNDER THE ACT

There may be occurrences where there is no agreement between the parties and the adjudicator as to the fees and terms of appointment of the adjudicator, and as such the adjudicator may not be desirous of accepting his appointment.

Reference is made to Section 22(2) and Section 23(2). If the adjudicator does not accept his appointment for any reason:

- The parties may proceed to appoint another adjudicator by mutual consent under Section 21(a); or
- The parties may request the Director of the KLRCA to appoint another adjudicator under Section 21(b). The procedure for appointment enumerated above will apply in its entirety.

Once the adjudicator is appointed in either of the above manner, the remaining procedures will follow as per usual.

REQUEST TO THE CHOSEN ADJUDICATOR TO ACT
(Construction Industry Payment & Adjudication Act 2012,
Sections 21(a) and 22)

To: <i>(Name of the chosen adjudicator)</i> <i>(service address)</i>
From: <i>(Claimant)</i> <i>(Service address)</i> Person In Charge: <i>(Name and designation)</i>
<i>(Date)</i>
<i>(Mode of Service⁶²)</i>
Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum: Date of Notice of Adjudication: Date of Service of the Notice of Adjudication by the Claimant :

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⁶² As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

REQUEST TO ACT AS ADJUDICATOR
**(pursuant to sections 21(a) and 22 of the Construction Industry
Payment & Adjudication Act 2012)**

1. A dispute has arisen between [Name], the Claimant and [Name], the Respondent under the above referenced construction contract.
2. A copy of the above referenced Notice of Adjudication is attached. Please let us know should you require a copy of the documents identified in the Notice of Adjudication to be delivered to you.
3. The parties have agreed for you to act as adjudicator to determine the dispute between the parties. A copy of the documents evidencing the agreement is attached for your perusal.
4. Please indicate within [5]⁶³ working days from the date of receipt of this request whether you are willing and able to act as the adjudicator for the dispute, and if you are, forward to us and the Respondent the following:
 - (a) a written confirmation that you have satisfied the competency standard and criteria of an adjudicator as required under the Construction Industry Payment & Adjudication Act 2012⁶⁴ or any Regulations or rules made thereunder, and that you are eligible to act as adjudicator in our dispute; and
 - (b) your proposed terms and conditions for engagement (including your fees and expenses).

(signed)

(Name of the authorised representative of the Claimant and designation)

Copy: <i>(Respondent)</i> <i>(Service address)</i>	<i>(Mode of Service⁶⁵)</i>
Copy: <i>(Director of the Kuala Lumpur Regional Centre For Arbitration)</i> <i>(Service address)</i>	<i>(Mode of Service⁶⁶)</i>

⁶³ Pursuant to section 22(2) of the CIPA Act 2012, the adjudicator who is able and willing to act as adjudicator, is required to propose and negotiate his terms of appointment, including his fees chargeable, with the parties, and indicate his acceptance of the appointment and the terms of his appointment within 10 working days from the date he was notified of his appointment. The provision of 5 working days is merely a suggestion, intended to leave another 5 working days for the parties and the chosen adjudicator to negotiate and agree on the terms of appointment.

⁶⁴ Section 32(a) of the CIPA Act 2012.

⁶⁵ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

⁶⁶ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

**REQUEST TO THE DIRECTOR OF KLRCA TO APPOINT
AN ADJUDICATOR**
**(Construction Industry Payment & Adjudication Act 2012,
section 21(b)(i))**

To: <i>(Director of the Kuala Lumpur Regional Centre For Arbitration)</i> <i>(service address)</i>
From: <i>(Claimant and/or Respondent, as the case may be)</i> <i>(Service address)</i> Person In Charge: <i>(Name and designation)</i>
<i>(Date)</i>
<i>(Mode of Service⁶⁸)</i>
Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum: Date of Notice of Adjudication: Date of Service of the Notice of Adjudication by the Claimant :

APPOINTMENT FEE

Enclosed herewith is [cheque/Bank Draft/any other approved mode of payment] in the amount of [amount] being payment for the appointment fee for this request to appoint

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⁶⁸ As per Rule 3(2)(e) of the KLRCA Adjudication Rules and Procedure.

REQUEST TO APPOINT AN ADJUDICATOR

(pursuant to sections 21(b)(i) of the Construction Industry Payment & Adjudication Act 2012)

1. A dispute has arisen between [Name], the Claimant and [Name], the Respondent under the above referenced construction contract.
2. A copy of the above referenced Notice of Adjudication is attached. Please let us know should you require a copy of the documents identified in the Notice of Adjudication to be delivered to you.
3. The parties have been unable to agree on an adjudicator to determine the dispute within 10 working days from the date of service of the Notice of Adjudication by the Claimant pursuant to section 21(a) of the Construction Industry Payment & Adjudication Act 2012.
4. In accordance with section 21(b)(i) of the Construction Industry Payment & Adjudication Act 2012, we hereby request you to appoint a suitable person to act as adjudicator in our dispute and notify the parties in writing within 5 working days from the date of receipt of this request.

(signed)

(Name of the authorised representative of the Claimant and/or the Respondent, as the case may be, and designation)

Copy: <i>(Respondent and/or Claimant, as the case may be)</i> <i>(Service address)</i>	<i>(Mode of Service⁶⁹)</i>
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⁶⁹ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

NOTICE OF ACCEPTANCE OF THE APPOINTMENT TO ACT AS ADJUDICATOR

To: (Claimant) (Service address)
To: (Respondent) (Service address)
From: (Adjudicator) (Service address)
(Date)
(Mode of Service ⁷¹)
Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum: Date of Notice of Adjudication: KLRC Case Registration Number (if any):

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⁷¹ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

NOTICE OF ACCEPTANCE OF THE APPOINTMENT TO ACT AS ADJUDICATOR

1. I refer to the letter of [request⁷²/ appointment⁷³] dated [Date] for me to act as adjudicator in the dispute as identified in the above referenced Notice of Adjudication which was sent to me by [*the Claimant pursuant to section 21(a) of the Construction Industry Payment & Adjudication Act 2012 / the Director of the Kuala Lumpur Regional Centre For Arbitration pursuant to section 23(1) of the Construction Industry Payment & Adjudication Act 2012*].
2. I, [Name of the adjudicator] hereby accept the appointment to act as adjudicator as per the Terms and Conditions of the Appointment agreed by the parties, a copy of which is attached [*or, the KLRCA's standard terms of appointment and fees for the services of an adjudicator in force as of the date of this letter*]. My fees and expenses are as contained in the attached Terms and Conditions of the Appointment agreed by the parties [*or, the Schedule [Regulation 6] KLRCA's Standard Fees For Services And Expenses Of Adjudicator, or the KLRCA's Recommended Schedule of Fees pursuant KLRCA CIPAA Circular 02, as the case may be*].
3. I confirm that:
 - (a) I have satisfied the competency standard and criteria of an adjudicator as required under the Construction Industry Payment & Adjudication Act 2012⁷⁴ or any Regulations or rules made thereunder; and
 - (b) I am eligible to act as adjudicator in the dispute.
4. As required by section 24 of the Construction Industry Payment & Adjudication Act 2012, I hereby declare that:
 - (a) there is no conflict of interest in respect of my appointment;
 - (b) I am eligible to act as adjudicator in the dispute.
 - (c) I shall comply with the principles of natural justice; and
 - (d) there are no circumstances likely to give rise to justifiable doubts as to my impartiality and independence.
5. Pursuant to section 9 of the Construction Industry Payment & Adjudication Act 2012, I hereby direct the Claimant to serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the Respondent, and forward a copy of the same to me within 10 working days from the date of receipt of this notice of acceptance of my appointment as adjudicator.
6. I further direct the parties to contribute and deposit with the Director of the Kuala Lumpur Regional Centre For Arbitration a sum of [an amount representing a reasonable proportion of the adjudicator's fees and expenses, the KLRCA's administrative fee and any taxes as may be imposed by the Government] in equal share as security in advance within [] working days from the date of receipt of this notice.

⁷² Pursuant to section 21(a) of the CIPA Act 2012.

⁷³ Pursuant to section 23(1) of the CIPA Act 2012.

⁷⁴ Section 32(a) of the CIPA Act 2012.

(signed)
(Name of adjudicator)

Copy: (Director of the Kuala Lumpur Regional Centre For Arbitration) (Service address)	(Mode of Service ⁷⁵)
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⁷⁵ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

SERVING THE ADJUDICATION CLAIM

Section 9 of the Act provides that the Claimant must serve a written Adjudication Claim within 10 working days from the receipt of the acceptance of appointment by the adjudicator. The modes of service of the Adjudication Claim are prescribed under Section 38 of CIPAA.

There is no specific format for an Adjudication Claim. Reference is to be made to Section 9(1) of the CIPAA on the requirements of an Adjudication Claim. It may, however, be seen to be an expansion of the Payment Claim and/or Notice of Adjudication. In the Adjudication Claim, the Claimant may amplify the grounds or evidence or provide further details to support of the claim.

Whilst the Claimant may address the defences, cross-claims, set-offs or counterclaims raised in the Payment Response, the Claimant may not present new or additional claims in the Adjudication Claim which do not relate to the matters arising from the Payment Claim or the Payment Response.

Service of the Adjudication Claim on the KLRCA

Rule 4 of the KLRCA Adjudication Rules & Procedure provides that the Claimant shall serve a copy of the Adjudication Claim to the Director of the KLRCA, being the designated adjudication authority.

The Claimant is not required to submit the supporting documents to the Director of the KLRCA, unless specifically requested.

Checklist

The written Adjudication Claim must broadly contain:

- ✓ Brief description of the parties;
- ✓ Brief description of the construction contract out of which the dispute has arisen;
- ✓ Facts relating to the dispute;
- ✓ References to the earlier documents exchanged between the parties, including the Payment Claim, Payment Response and the Notice of Adjudication;
- ✓ Nature and description of the dispute;
- ✓ Grounds in support of the claimed amount;
- ✓ Remedy sought; and
- ✓ Other supporting documents.

Matters to Consider:

- **Whether more claims may be added in the Adjudication Claim**

The Adjudication Claim is an expansion of the claims and matters or issues raised in the Payment Claim and Payment Response. The Claimant may not introduce new claims.

Section 27 restricts the jurisdiction of the adjudicator to the claims, responses and matters raised in the Payment Claim and Payment Response. As such, if the Claimant raises a new claim, cross-claim or any new dispute, as the case may be, the adjudicator may not have the jurisdiction to adjudicate those matters, unless the parties agrees in writing under Section 27 of the Act to extend the jurisdiction of the adjudicator to deal with those new matters.

- **Whether compliance to time lines are strictly applied**

The time limits stated under the Act are mandatory and must be complied with, and consideration must be given to the time taken for delivery of the Adjudication Claim to the adjudicator.

In case the Claimant requires more time to deliver the Adjudication Claim, an application must be made to the adjudicator to grant an extension of time under Section 25(p) of the Act.

The basis for the extension of time requested has to be on reasonable grounds. The Respondent may object to such request.

Section 26(2) of CIPAA stipulates that an adjudicator has a wide discretion to consider and decide whether a non-compliance with the provisions of CIPAA is curable without the need to set-aside, either wholly or partly, the adjudication proceedings. The adjudicator can, in view of a non-compliance by any of the parties, set-aside either wholly or partly the adjudication proceedings, make any order dealing with the adjudication proceedings as he deems fit, or allow amendment to be made to the document produced in the adjudication proceedings.

ADJUDICATION CLAIM
(Construction Industry Payment & Adjudication Act 2012, section 9)

<p>From the Claimant:</p> <p>Name:</p> <p>Address:</p>	<p>To the Respondent:</p> <p>Name:</p> <p>Address:</p> <p>To the Adjudicator:</p> <p>Name:</p> <p>Address:</p>
	<i>(Date)</i>
	<i>(Mode of service⁷⁷)</i>
<p>Adjudication reference number <i>(if any)</i>:</p> <p>Date of Notice of Adjudication:</p> <p>Date of Receipt of Acceptance of Appointment by Adjudicator:</p> <p>Contract Reference Number:</p> <p>Date Contract Was Made:</p> <p>Project / Work Description:</p> <p>Project Site Location:</p> <p>Contract Sum:</p>	
<p>Payment Claim Reference:</p> <p>Payment Claim Amount:</p> <p>Payment Response Reference <i>(if any)</i>:</p> <p>Payment Claim Amount Admitted and Paid <i>(if any)</i>:</p> <p>Total abatement / set-off / cross-claim sum <i>(if any)</i>:</p> <p>Amount In Dispute: <i>[Amount Claimed or Cross-Claimed by the Claimant]</i>:</p>	

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⁷⁷ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

ADJUDICATION CLAIM

A: Parties

1. The Claimant is [*a private limited company, public listed company, partnership, individual, etc., as the case may be*] having its business address at [address].
[Describe the nature of its business]
2. The Respondent is [*a private limited company, public listed company, partnership, individual, etc., as the case may be*] having its business address at [address].
[Describe the nature of its business]

B: The Construction Contract

3. By a contract in writing entered into by the parties on [date the contract was made], the [claimant/the respondent] appointed [or engaged, etc.] the [respondent/claimant] as the [contractor/subcontractor/supplier/consultant etc.] for the [describe the nature of the construction work or consultancy services] for the [describe the project] in consideration of a contract sum of [amount].
4. Relevant extracts of the contract are attached hereto as **Schedule 1**.

C: Background facts relating to the claim in dispute

5. [set out the relevant background facts relating to the dispute]

D: Relevant contractual provisions and/or statutory default provisions relating to the claim in dispute

6. The following are the relevant terms and conditions of the contract [*and/or the relevant default provisions in section 36 of the CIPA Act 2012, if applicable*]:
[set out the relevant contractual provisions and/or statutory default provisions (if applicable)]

E: Payment Claim, Payment Response (if any) and Notice of Adjudication

7. On [date], [the Claimant/the Respondent] served the Payment Claim on [the Respondent/the Claimant] by [state the mode of service] on [date]. A copy of the Payment Claim is attached hereto as **Schedule 2**.
8. On [date], [the Claimant/the Respondent] served the Payment Response [*if any*] on [the Respondent/the Claimant] by [state the mode of service] on [date]. A copy of the Payment Response is attached hereto as **Schedule 3**.
9. On [date], the Claimant served the Notice of Adjudication on the Respondent by [state the mode of service] on [date]. A copy of the Notice of Adjudication is attached hereto as **Schedule 4**.

F: The nature and description of the dispute

10. The dispute involves the following:
[Set out the nature and description of the dispute⁷⁸]

G: [Grounds in support of the claimed amount in the Payment Claim (where the Claimant is the Unpaid Party) or, **Grounds for disputing the claimed amount by reasons of set-off, abatement and/or cross-claim** (where the Claimant is the Non-Paying Party)]

11. [Set out the relevant grounds in support]

12. The Claimant relies on the following documents in support of its claim:

- (a) [set out all the relevant documents], a copy of which is attached hereto as **Schedule 5**;
- (b) [factual witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as **Schedule 6**;
- (c) [expert witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as **Schedule 7**.

Wherefore, the Claimant seeks the following relief(s) and/or remedy(ies):

[Set out the nature and description of the relief(s)/remedy(ies)⁷⁹ sought as referred in the Notice of Adjudication]

[signed]

[Name of the authorised representative of the Claimant and designation]

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⁷⁸ Section 9(1) of the CIPA Act 2012.

⁷⁹ Section 9(1) of the CIPA Act 2012.

SERVING THE ADJUDICATION RESPONSE

Once the Claimant has served the Adjudication Claim, the Respondent has 10 working days to serve a written Adjudication Response (Section 10) together with any supporting document on the Claimant and on the adjudicator.

The Adjudication Response is meant to be an answer to the Adjudication Claim and must enclose with it all documents that the Respondent seeks to rely.

There is no specific format prescribed for the Adjudication Response. It is best practice that the Adjudication Response should sufficiently identify the factual and legal basis for the Respondent's case.

The Adjudication Response is also the Respondent's submissions on the defences taken by it, or any cross-claims, set-offs and counterclaims it had included in the Payment Response. No new defences, set-offs, cross-claims or counterclaims may be raised at this stage for the first time.

Section 6(4) of CIPAA expressly provides that non-response by the non-paying party to the Payment Claim deems that the entire Payment Claim is disputed by the non-paying party.

A possible implication of this provision is that, if the non-paying party does not serve a Payment Response and therefore the non-paying party is deemed to be disputing the entire Payment Claim, the non-paying party is then not prevented from later putting forward whatever defences available to him by way of an Adjudication Response.

In *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*⁸⁰, Judge Ravinthran Paramaguru was of the view that no counterclaim can subsist without a corresponding Payment Response, and that the Adjudicator's jurisdiction to decide the counterclaim can only subsist should there exist an agreement between the parties to extend the jurisdiction of the Adjudicator pursuant to Section 27(2) of CIPAA.

Accordingly, it remains to be seen how the decision in *Bina Puri* will affect future adjudications, bearing in mind the Respondents (with a view of possible defences that may be raised in their Adjudication Responses) will now be minded to respond by way of a Payment Response and will most likely not take the risk of relying on Section 6(4) of CIPAA by way of disputing the Payment Claim entirely by not filing a Payment Response.

Service of an Adjudication Response can be effected by any of the prescribed modes stipulated in Section 38(a) to 38(d) of CIPAA. Pursuant to Rule 5 of the KLRCA Adjudication Rules & Procedure.

The Respondent shall serve a copy of the Adjudication Response to the Director of the KLRCA, being the designated adjudication authority. Unless specifically required, there is no necessity for the Respondent to forward a copy of the supporting documents to the Director of the KLRCA.

⁸⁰ Civil Case No.: BKI-24-6/1-2015, High Court in Sabah and Sarawak, Kota Kinabalu.

Checklist

In an Adjudication Response, the Respondent:

- ✓ Replies to each of the claims made by the Claimant in the Adjudication Claim.
- ✓ Raise objections on issues / points of claim(s) raised for the first time in the Adjudication Claim. All issues raised are confined to the points of claim raised in the Payment Claim and Payment Response (if submitted).
- ✓ Verify the description of the parties, facts of the case, the contract or any other matter. If it differs from that which the Claimant states, to highlight and correct in the Adjudication Response.
- ✓ Expand and substantiate each of the defences raised in the Payment Response, including cross-claims and set-offs. Where the Respondent is the non-paying party, he should set out in the Adjudication Response the particulars of his defence to the Payment Claim.
- ✓ Where Payment Response was not served, to raise the defences and substantiate it.
- ✓ All counterclaims raised in the Payment Response are explained in detail with evidence to the adjudicator.

Issues that may be considered at this stage:

- **Time of submission**

The Act is very strict with the time given to the parties to serve their submissions. If the Respondent requires more time, he must apply to the adjudicator for an extension under Section 25(p) of the Act with reasonable grounds.

If the Respondent does not serve the Adjudication Response in time, and does not receive an extension of time from the adjudicator within the same time, then under Section 10(3) of the Act, the Claimant is entitled to proceed with the adjudication after the expiry of this time.

Notable is the provision of Section 26(2) of CIPAA, wherein stipulates that an adjudicator has a wide discretion to consider and decide whether a non-compliance with the provisions of CIPAA is pardonable or curable without the need to set, either wholly or partly, the adjudication proceedings. The adjudicator can, in view of a non-compliance by any of the parties, set-aside either wholly or partly the adjudication proceedings, make any order dealing with the adjudication proceedings as he deems fit, or allow amendment to be made to the document produced in the adjudication proceedings.

It is considered that the discretion of the adjudicator over such non-compliance must be exercised in a way which in all the circumstances best reflects the requirements of justice.⁸¹ In doing so, the adjudicator should have regard to the limited timeline imposed on the adjudication process under CIPAA 2012, and the object of the Act, which is to provide a speedy mechanism to resolve payment disputes on a provisional interim basis.⁸²

⁸¹ See the Federal Court decision in the case of *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565, which set out the principles in approaching Order 2, Rule 1 of the Rules of the High Court, 1980 (the predecessor of the Rules of Court 2012).

⁸² Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 151.

ADJUDICATION RESPONSE
(Construction Industry Payment & Adjudication Act 2012, section 10)

<p>From the Respondent:</p> <p>Name:</p> <p>Address:</p>	<p>To the Claimant:</p> <p>Name:</p> <p>Address:</p> <p>To the Adjudicator:</p> <p>Name:</p> <p>Address:</p>
	<i>(Date)</i>
	<i>(Mode of service⁸⁴)</i>
<p>Adjudication reference number <i>(if any)</i>:</p> <p>Date of Notice of Adjudication:</p> <p>Date of Receipt of Adjudication Claim:</p> <p>Contract Reference Number:</p> <p>Date Contract Was Made:</p> <p>Project / Work Description:</p> <p>Project Site Location:</p> <p>Contract Sum:</p>	
<p>Payment Claim Reference:</p> <p>Payment Claim Amount:</p> <p>Payment Response Reference <i>(if any)</i>:</p> <p>Payment Claim Amount Admitted and Paid <i>(if any)</i>:</p> <p>Total abatement / set-off / cross-claim sum <i>(if any)</i>:</p> <p>Amount In Dispute: <i>[Amount Claimed or Cross-Claimed by the Claimant]</i>:</p>	

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⁸⁴ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

ADJUDICATION RESPONSE

A: Parties

1. *[Describe the parties, if it differs from the Claimant's description]*

B: The Construction Contract and/or Default Statutory Provisions

2. *[Describe the Construction Contract, if it differs from the Claimant's description, e.g. the date of contract was made, the description of the work and project, the contract sum, the contract is oral or partly oral and partly in writing, etc.]*
3. *[Set out the any part of the default provisions in section 36 of the CIPA Act 2012, where relevant]*
4. Relevant extracts of the contract are attached hereto as **Schedule 1** *[e.g. the relevant contractual provisions relating to the valuation and claimed amount (where the Respondent is an Unpaid Party), or to the set-off, abatement and/or cross-claim (where the Respondent is the Non-Paying Party)].*

C: Background facts relating to the claim in dispute

5. *[set out the relevant background facts relating to the dispute if they differ from the Claimant's view]*

D: Relevant contractual provisions and/or statutory default provisions relating to the claim in dispute

6. The following are the relevant terms and conditions of the contract *[and/or the relevant default provisions in section 36 of the CIPA Act 2012]:*
[Set out the relevant contractual provisions relating to the valuation and claimed amount (where the Respondent is an Unpaid Party), or to the set-off, abatement and/or cross-claim (where the Respondent is the Non-Paying Party) and/or statutory default provisions (if relevant)]

E: Payment Claim, Payment Response (if any) and Notice of Adjudication

7. *[Identify and describe the Payment Claim, Payment Response (if any) and Notice of Adjudication, if they differ from the Claimant's view].*

F: The nature and description of the dispute

8. *[Set out the nature and description of the dispute, if it differs from the Claimant's view]*

G: Respondent's answer to the Adjudication Claim

9. [Set out the grounds and basis thereof in response to the claim(s) made in the Adjudication Claim⁸⁵]
10. The Respondent relies on the following documents in support of its contentions [and/or claim]:
- (a) [set out all the relevant documents], a copy of which is attached hereto as **Schedule 2**;
 - (b) [factual witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as **Schedule 3**;
 - (c) [expert witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as **Schedule 4**.

[Set out the relief(s) or remedy(ies) on which the Respondent seeks a determination from the adjudicator, if any]

[signed]

[Name of the authorised representative of the Respondent and designation]

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⁸⁵ Section 10(1) of the CIPA Act 2012.

SERVING THE ADJUDICATION REPLY

The Adjudication Reply is the opportunity granted to the Claimant to address any issues raised by the Respondent in his Payment Response. No new claims or arguments may be raised at this stage by the Claimant.

Section 11 of CIPAA permits that the Claimant may serve on the Respondent an Adjudication Reply within five (5) working days from the receipt of the Adjudication Response. The form and manner of the Adjudication Reply are as prescribed under Section 11. Supporting documents are to accompany the Adjudication Reply upon service onto the Respondent.

The adjudicator would not have the jurisdiction to adjudicate matters that fall outside the Payment Claim and Payment Response, subject to a written agreement by the parties to extend the adjudicator's jurisdiction.⁸⁶ Accordingly, the Adjudication Reply should be confined to addressing matters raised in the Adjudication Response.

Adjudication Reply is an optional submission. It is not a mandatory for the claimant to submit the Adjudication reply unless there is further information or documentation in reply to the Adjudication Response which the Claimant wishes to submit.

Where the Claimant finds that there are no further information or documents to add, the Claimant may omit submission of an Adjudication Reply.

Service of the Adjudication Reply may be effected by any of the prescribed modes under Sections 38 (a) to 38(d) of CIPAA. As for any non-compliance with the timelines for submission, under Section 26(2) of CIPAA, an adjudicator has a wide discretion to consider and determine whether such non-compliance is pardonable or correctable. The adjudicator's discretion should be exercised in a way which in all the circumstances best reflects the requirements of justice.⁸⁷

Checklist

While serving an Adjudication Reply, the Claimant:

- ✓ Ensure that the Adjudication Reply is confined to matters raised by the Respondent in the Adjudication Response.
- ✓ Ensure that all relevant documents are attached to the Adjudication Reply.
- ✓ Ensure that the Adjudication Reply is served on the Respondent and adjudicator within 5 working days from the receipt of the Adjudication Response.
- ✓ Ensure within seven (7) working days after serving an Adjudication Reply to the Adjudication Response pursuant to Section 11(1) of the Act, deliver a copy of the Adjudication Reply to the KLRCA. Unless otherwise directed by the Director of the KLRCA, the claimant is not required to deliver the supporting documents to the KLRCA.⁸⁸

⁸⁶ See Section 27(2) of CIPAA

⁸⁷ See the Federal Court decision in the case of *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565, which set out the principles in approaching Order 2, Rule 1 of the Rules of the High Court, 1980 (the predecessor of the Rules of Court 2012).

⁸⁸ See Rule 6 of the KLRCA Adjudication Rules & Procedure.

Should the Claimant decide to submit an Adjudication Reply, pursuant to Section 12(2)(a) the adjudicator shall then decide the dispute and deliver the Adjudication Decision within forty-five (45) working days from the service of the Adjudication Reply.

As a matter of best practice, it is advised that the adjudicator maintains the adjudication as a summary procedure, and as such, going into lengthy procedures of submissions, oral hearings, site visits and calling of many witnesses is not advisable. For any further submission of documents requested by any of the parties or the adjudicator himself, the adjudicator should be guided by his powers as enumerated under Section 25(a).

The few areas the adjudicator needs to consider would be; how evidence is to be submitted to the adjudicator; any limitation on the volume of documents to be submitted by the disputants; should there be a hearing and if so, the number of days; does the adjudicator still require further submissions (on arguments and/or evidence) from the disputants on top of what has already been submitted to the adjudicator. These aspects will be discussed in further detail in the following chapter on “*CONDUCTING ADJUDICATION PROCEEDINGS*”.

Adjudication Reply
(Construction Industry Payment & Adjudication Act 2012, section 11)

<p>From the Claimant:</p> <p>Name:</p> <p>Address:</p>	<p>To the Respondent:</p> <p>Name:</p> <p>Address:</p> <p>To the Adjudicator:</p> <p>Name:</p> <p>Address:</p>
	(Date)
	(Mode of service ⁹⁰)
<p>Adjudication reference number <i>(if any)</i>:</p> <p>Date of Notice of Adjudication:</p> <p>Date of Receipt of Adjudication Response:</p> <p>Contract Reference Number:</p> <p>Date Contract Was Made:</p> <p>Project / Work Description:</p> <p>Project Site Location:</p> <p>Contract Sum:</p>	
<p>Payment Claim Reference:</p> <p>Payment Claim Amount:</p> <p>Payment Response Reference <i>(if any)</i>:</p> <p>Payment Claim Amount Admitted and Paid <i>(if any)</i>:</p> <p>Total abatement / set-off / cross-claim sum <i>(if any)</i>:</p> <p>Amount In Dispute: [Amount Claimed or Cross-Claimed by the Claimant]:</p>	

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⁹⁰ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

ADJUDICATION REPLY

- 1. In reply to the Adjudication Response, the Claimant states:
[Set out the Claimant’s reply to the Adjudication Response]

- 2. In addition to the documents and/or evidence attached to the Adjudication Claim, the Claimant submit the following:

[Identify and attach the further documents / evidence that the Claimant relies on in support of its Adjudication Claim and/or in answer to the Adjudication Response]

[signed]
[Name of the authorised representative of the Claimant and designation]

Copy: (Director of the Kuala Lumpur Regional Centre For Arbitration) (Service address)	(Mode of Service) [Without Attachments]
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CONDUCTING ADJUDICATION PROCEEDINGS

In view of the summary nature of adjudication process under the CIPAA, adjudicators have been accorded with some degree of flexibility in the conduct the adjudication subject to the principles of natural justice.

Pursuant to Section 12(1) of the CIPAA, the adjudicator may conduct the adjudication “in the manner as the adjudicator considers appropriate within the powers provided under Section 25.”

Section 15 of CIPAA mandates the adjudicator:

- To ensure that the adjudication decision are not tainted with fraud or bribery;
- To apply the rules of natural justice;
- To act independently and impartially (this is reiterated in Clause 1 of Schedule II (Standard Terms of Appointment) of the KLRCA Adjudication Rules & Procedure; and further elaborated upon in Clauses 1 and 2 of Schedule IV (Adjudicator Code of Conduct) of the KLRCA Adjudication Rules & Procedure); and
- To not act in excess of jurisdiction.

Powers of the adjudicator

The adjudicator has been granted wide ranging powers under Section 25 of the Act amongst which are to:

- Establish the procedures in conducting the adjudication proceedings including limiting submissions of documents by the parties;
- Order discovery and production of documents and setting deadlines;
- Appoint independent experts;
- Call for meetings and hearings, if deemed required;
- Carry out inspections, of site, work, material or goods;
- Order that evidence be given on oath;
- Extend time limits granted under the Act, as reasonably required; and
- Issue any direction as may be necessary and expedient.

Matters to be considered by adjudicator when establishing procedures for conduct of the adjudication:

- Control over proceedings.
The adjudicator must bear in mind that adjudication is a summary procedure, and as such, going into lengthy procedures of submissions, oral hearings, site visits and calling of many witnesses is not advisable.
- Act fairly, impartially and according to principles of natural justice.
Whilst working under pressures of time, the adjudicator must always act fairly, impartially and according to principles of natural justice. The adjudicator must ensure that equal opportunity is accorded to both parties. Rule 8(2) of the KLRCA Adjudication Rules & Procedure emphasise this by stating that “the adjudicator shall exercise such powers with a view of fairness and impartiality, giving each party a reasonable opportunity, in light of the timetable, of putting his case and dealing with that of his opponents.”

- Maintain good time management.
is vital for the success of an adjudication proceeding. The adjudicator must always be mindful of the time scales under CIPAA. The adjudicator has to deliver the decision within the period of 45 working days from the last submission contemplated under the Act. Any extension to the time must be subject to both parties written agreement.
- The adjudicator must identify, comprehend and deal with the real factual and legal issues in dispute at the early stage of the proceedings, and to focus only on those issues and materials required for his determination in the particular reference and not get distracted by peripheral or unrelated issues.
- The adjudicator must provide a clear and enforceable decision.⁹¹
- An added duty upon the adjudicator under Section 24(b) of the Act is to avoid incurring unnecessary expense. This is prudent as the claimant in an adjudication proceeding is can be an entity on the lower end of the construction chain which may not necessarily have the finances to sustain an expensive dispute resolution process.

Additionally, Rule 8(3) of the KLRCA Adjudication Rules & Procedure sets out some deterrents for the adjudicator. These are laid out below. An adjudicator may not:

- Receive any submissions from one party that are not also made available to the others except in the event of misconduct by that representative, refuse any party the right at any hearing or meeting to be represented by any representative of that party's choosing who is present;
- Act or continue to act if he has a conflict of interest.

Keeping the above factors in mind, the adjudicator may set the procedures to be followed in an adjudication proceeding.

Procedure

How an adjudicator decides to conduct the adjudication is left quite open by CIPAA, subject to the principles of natural justice. Guided by the provisions under Section 25, it is therefore up to the adjudicator to ascertain, based on the available information presented to him, the best way to deal with the issues at hand so that he can eventually make his decision.

With Section 25(a) in consideration, a few areas an adjudicator needs to consider would be:-

- should the adjudicator call for a preliminary meeting and if so what needs to be discussed at the meeting;
- how evidence is to be submitted to the adjudicator;
- any limitation on the volume of documents to be submitted by the disputants;
- should there be a hearing and if so, the number of days;
- does the adjudicator still require further submissions (on arguments and/or evidence) from the disputants on top of what has already been submitted to the adjudicator.⁹²

⁹¹ See Coulson on Construction Adjudication (Oxford University Press, 2nd Edition), paragraphs 18.02 – 18.04.

⁹² Daniel Tan Chun Hao, *Being an Adjudicator: Are you up to the mark?*, Malaysian Society of Adjudicators (MSA) Newsletter, Vol. 1, Issue No. 2, July – December 2014.

Adjudicator to act in a timely manner and avoid incurring unnecessary expenses

The requirement for the adjudicator to act in a timely manner pursuant to Section 24(b) is aimed at ensuring that the process of adjudication is completed within the timetable set by the CIPAA. This is to ensure that adjudication are conducted speedily and kept relatively cheap.

The adjudicator ought to decide before accepting his appointment as to whether he can decide the dispute referred to him within the time period imposed by CIPAA. If he decides he is unable, then he should not accept the appointment.⁹³

Although the rationale for the adjudicator's duty to avoid unnecessary expense is to ensure that the process of adjudication is kept as inexpensive as possible, mere non-compliance with this requirement per se by the adjudicator would not result in the setting aside of the adjudicator's decision nor would it render the decision unenforceable.⁹³

A possible reference to the judgment of Judith Prakash J in the case of *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*⁹⁴, wherein her Ladyship stated:

"Whilst I note that S. 16(3)(b) [of the Singapore Building and Construction Industry Security of Payments Act 2004] requires the adjudicator to avoid incurring unnecessary expense, I do not consider that a failure to comply with that requirement should result in the setting aside of the adjudication determination since, even if the unnecessary expense is incurred in connection with the adjudication, that is unlikely to affect the correctness of the determination as long as the adjudicator was independent and impartial and afforded the parties natural justice."

Adjudicator to adhere to the principles of natural justice

The principles relating to the rules of natural justice to be applied in adjudications are set out in CIPAA. The adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed under the CIPAA.

In this respect, the adjudicator has to be conscious that whilst the procedure provided under CIPAA is quick and rough and therefore carries with it the risk of significant injustice, the adjudicator has to maintain a firm grasp upon the principles of natural justice and applying them without fear or favour so that the risk can be minimised.

The adjudicator may not make one sided communication. All communication to be made to both parties at the same time.

Where question of a breach of the rules of natural justice arises, reference may be made to the guidelines as laid down by Akenhead J in *Cantillon Ltd v Urvasco Ltd*⁹⁵ relating to breaches of natural justice in adjudication cases are a point of reference, as follows:⁹⁶

⁹³ See Section 15 for grounds for setting aside an Adjudication Decision, and Section 28 in respect of an application to the High Court to enforce the Adjudication Decision.

⁹⁴ [2010] SLR 733, at paragraph 46 of the judgment.

⁹⁵ [2008] BLR 250

⁹⁶ See Lam W. L. and Ivan Y.F.L. (2013). Construction Adjudication in Malaysia, CCH Asia, at page 179.

- (a) It must first be established that the adjudicator failed to apply the rules of natural justice;
- (b) Any breach of the rules must be more than peripheral; they must be material breaches;
- (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;
- (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree;
- (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side or, where the adjudicator puts in further evidence without giving the parties an opportunity to comment on that the breach of the rules of natural justice comes into play.⁹⁷
- (f) It follows that, if either party has argued a particular point and the other party does not come back on the point, there is not breach of the rules of natural justice in relation thereto.

Another reference is the recent decision by Judge Dato' Mary Lim Thiam Suan in the matter of the Kuala Lumpur High Court Originating Summons No.:24C-8-04/2015 between *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd*, where her Ladyship held that the adjudicator's conduct was in breach of the rules of natural justice. The Court found that the unilateral communication that took place between a party and the adjudicator was alone a sufficient ground to allow the Claimant's application to set-aside the Adjudication Decision.

In reaching its oral decision, the Court reasoned as follows:

- The Court held that in arriving at the Adjudication Decision, the adjudicator ought to draw on his own knowledge and expertise. He is also allowed, under Section 25 to take on inquisitorial role;
- That there is nothing wrong with unilateral communication as long as the adjudicator is aware of his overriding duty to inform and/or disclose the communication to the other side with opportunity to the other side to respond;
- That in this case, there was no effort by the adjudicator to inform the Claimant once the adjudicator had contacted the Respondent's representative which occurred not only once, but twice, for clarification purposes.

Evidence

CIPAA does not regulate as to how the adjudicators deal with evidence. Therefore, the powers of the adjudicator in respect of evidence are very wide.

Nonetheless, it is suggested that injudicious use of the powers can make the process a lot more difficult to manage unless the powers are exercised prudently and appropriately by the adjudicator.⁹⁸

⁹⁷ *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* [2002] BLR 288

⁹⁸ Daniel Tan Chun Hao, *Being an Adjudicator: Are you up to the mark?*, Malaysian Society of Adjudicators (MSA) Newsletter, Vol. 1, Issue No. 2, July – December 2014.

In dealing with evidence, the adjudicator may need to decide the following:

- if he can proceed with a documents-only adjudication;
- if he needs to limit documents;
- if witness statements are required;
- if oral examination is required;
- whether discovery and production of documents is necessary;
- when to draw on his own knowledge and expertise;
- when to appoint independent experts; whether to inspect work, etc. (see section 25 of CIPAA).

When a jurisdictional challenge arises

A jurisdictional challenge may be brought by a party on many grounds. Examples of the grounds are:

- That there is no construction contract in writing falling within the scope of the Act;
- That the construction contract does not relate to construction work carried out wholly or partly in Malaysia;
- That mandatory documents, such as Payment Claim and Notice of Adjudication, were not served on the party; and
- That the dispute has not crystallised between the parties.

The KLRCA has observed throughout the course of administration of adjudication proceedings of instances where the appointed adjudicator was not clear on the appropriate procedure required to address a jurisdictional issue raised by a party in the adjudication.

Some adjudicators directed parties to submit on these jurisdictional issues within their pleadings i.e. Adjudication Claim, Adjudication Response and/or Adjudication Reply, thereby inducing the party raising the jurisdictional issue to indirectly partake into the adjudication proceedings.

Section 27(3) of the Act expressly provides that, notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set-aside the adjudication decision under Section 15 or to oppose the application to enforce the adjudication decision under Section 28(1) of the Act. This provision deals specifically with any jurisdictional challenge which may be raised by a party during the course of the adjudication proceedings.

Accordingly, a party seeking to challenge the jurisdiction of the adjudicator has three options:-

- Firstly, the party may agree in writing with the other party to extend the jurisdiction of the adjudicator pursuant to Section 27(2) of the Act for the adjudicator to decide on the jurisdiction question, and to be bound by the result.

Should the other party agree, the adjudicator shall make a determination of his jurisdiction, for which neither party can subsequently challenge the decision on jurisdiction by the adjudicator at the setting aside or enforcement stage.

- Secondly, the party may seek a declaration from the Court that the adjudicator lacked jurisdiction.
- Thirdly, the party may raise his jurisdictional objection to the adjudicator and the other

party by setting out in clear terms the grounds of his objection. If the adjudicator, after having been informed of the jurisdictional challenge, decides to proceed with the adjudication proceedings, the party may choose whether to participate or not in the adjudication, and subsequently apply to the court to set-aside or resist the enforcement of the decision on the grounds of the adjudicator's lack of jurisdiction.

Accordingly, it is an accepted rule that an adjudicator cannot make a binding decision on his own jurisdiction.

Therefore, there is no obligation on the part of the adjudicator to make a decision on his own jurisdiction whenever a jurisdictional challenge is raised before he can proceed with the adjudication proceedings.

Section 27(3) of the Act confers on the adjudicator the discretion to proceed with and complete the adjudication proceedings despite a jurisdictional challenge being raised.

Challenge brought to the Court during an ongoing adjudication

The KLRCA has observed throughout recently administered adjudication proceedings, that there has been a trend where parties have objected to the adjudication process by way of applying to the Courts to intervene in respect of a challenge to the adjudicator's jurisdiction.

Recent decisions rendered in the construction division of the Malaysian High Courts showcase an active role played by the judiciary in respect of developing the jurisprudence relating to adjudication under CIPAA.

CIPAA does not oust the jurisdiction of the Courts, either expressly or by necessary implication, to entertain an application by either of the parties to the reference, during the adjudication process, in respect of a challenge to the adjudicator's jurisdiction⁹⁹, or to the adjudicator's independence or impartiality¹⁰⁰, or that there has been or will be a breach of natural justice by the adjudicator¹⁰¹. However, the court will only intervene in an ongoing adjudication in rare cases.¹⁰²

⁹⁹ *ABB Zantingh Ltd v Zedal Building Services Ltd* [2001] BLR 66

¹⁰⁰ *RG Carter Limited v Edmund Nuttall Limited* [2002] BLR 359

¹⁰¹ See the decision of Justice Dato' Mary Lim Thiam Suan in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* Kuala Lumpur High Court Originating Summons No.:24C-8- 04/2015. See also *The Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] BLR 135. See also *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2012] SGCA 63, per Chan Sek Keong CJ at paragraph 65 of the judgment. On the power of the High Court to grant declaratory reliefs, see Section 41 of the Specific Relief Act 1950 and Order 15 r 16 of the Rules of Court 2012.

¹⁰² Per Coulson J in the case of *The Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] BLR 135, wherein his Lordship held that the Court would only exercise its power to intervene only in rare cases in respect of any breach of natural justice where appropriate, and would grant such declarations as sought by the defendant only in clear cut cases; 'In my view, the result would be consistent with common sense and in accordance with the TCC's aim to provide assistance (albeit only in those limited circumstances where it is appropriate) in ongoing adjudications: see *Vitpol Building Service v Samen* [2008] EWHC 2283 (TCC) and the cases cited there. If an ongoing adjudication is fundamentally flawed in some way, or may be just about to go off the rails irretrievably, then it seems to me that it must be sensible and appropriate for the parties to be able to have recourse to the TCC: otherwise a good deal of time and money will be spent on an adjudication which will ultimately be wasted'.

These series of events showcases the significant role of the court in recognising the purpose of CIPAA and allowing the proceeding to run its course. This includes hearing the main application as expeditiously as possible upon the granting of an injunction. In the above matter, the duration between the granting the injunction and rendering the judgment to continue with the adjudication proceeding took 1 month and 20 days.

Accordingly, attempts to thwart the adjudication process must be carefully considered for its reason and intention. The adjudicator and the court must bear in mind that any attempted interference will also affect the certainty of cash flow, for which is the inherent purpose of CIPAA.

The outcome of any application made to court to set-aside an adjudication proceeding or decision will play a crucial role in setting precedents that shall have far reaching effects on the administration of the CIPAA adjudications under the KLRCA. The KLRCA remains optimistic towards the High Court's support and understanding towards realising the purpose and timeliness of the CIPAA.

Whether the adjudicator must call for oral hearings

Although not a strict requirement, some circumstances warrant for oral hearings to be held in an adjudication proceeding. While deciding whether or not such oral hearings are required, the adjudicator must have regard to the necessity of the having such hearings and the complexity of the matters, both factual and legal.

In a complex matter, the adjudicator may wish to have an oral hearing on parties' submission on points of law and may wish to hear testimony from witnesses when the matter is factually complex.

Once an adjudicator decides to call for oral hearings, bearing in mind the time restrictions under the Act, it is advisable to limit the hearing time for both parties under the power granted to him under Section 25(g) of the Act. The adjudicator must bear in mind that protracted oral hearings often have the effect of prolonging the proceedings, because of which the adjudicator may be constrained to request for extra time to write the adjudication decision.

The KLRCA has also observed that there is an indirect consequence of the adjudicator allowing oral hearings, resulting in the adjudicator having to ask the parties to extend the time given to him to write the adjudication decision to more than the statutorily provided 45 working days.

Such occurrences are inevitable, when considering Section 25(g) of the Act, which provides that in the conduct of the hearing, an adjudicator has the discretion to set down the length of the hearing. In determining this, the adjudicator may be expected to take into account the period for the delivery of the Adjudication Decision as provided under Section 12(2) of the Act. In a complex case and where the quantum in dispute justifies a longer period to enable a fuller analysis of the matter, an adjudicator may seek an extension to this period pursuant to Section 12(2)(c) of the Act.

The Act is silent on the notification arrangements for any oral hearings that may take place. It is considered that, consistent with his duty to act impartially and to comply with the

principles of natural justice, an adjudicator should provide sufficient notice to the parties if they are required to appear before him in order to allow time for the parties to instruct their representatives. The period of notice has to be considered against the time within which the adjudicator has to make the determination.

It is to be noted that the adjudication hearing should not be likened to a hearing in court or arbitration. Given the demanding timeline, the adjudicator will in most cases direct that written submissions be forwarded ahead of the hearing and usually taken as read. These submissions would also be expected to be readily supported by the relevant supporting documents, evidence and authorities.

At the hearing, an adjudicator may confine each of the parties to a short summary of their case and proceed to:¹⁰³

- 1) clarify points made in the submissions, allowing each party to rebut the points made by the other side;
- 2) explain technical issues which may not lend themselves to be properly presented in written submissions;
- 3) examine witnesses relied by the parties: in certain cases this may involve visits to the site.

Whilst most of the powers thus given to the adjudicator appear to be relevant and in consonance with the other provisions of the Act, others do seem to be rather contradictory. For instance, Section 12(9) stipulates that “*The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act*”, yet Section 25(l) empowers the adjudicator to “*order that any evidence be given on oath*”.¹⁰⁴

The KLRCA has been faced with enquiries from learned adjudicators, as to what precisely amounts to an evidence given on oath, and how such evidence shall be relied upon by the adjudicator in his or her rendering of the decision under Section 12 of the CIPAA.¹⁰⁵

To answer the same, Section 25(l) of the CIPAA is to be observed. The provision provided under Section 25(l) states where an adjudicator may direct witnesses to give their statements under oath to ensure the veracity of the evidence. An oath is an assertion by a person which invokes a plea to his deity to witness the truth of his statement. What is curious is that the provision does not also provide for a person to affirm his statement but it is considered that an adjudicator may properly do this under his general power to conduct the hearing pursuant to Section 25(g).

The application of a documents-only procedure in future cases is encouraged, so as to ensure the original emphasis of the Act is enforced, where disputes may be resolved summarily by the adjudicator via a documents-only basis hence avoiding possible entanglements that may occur through the use of oral hearings.

Section 25(f) of the CIPAA provides that an adjudicator may call for meetings with the parties in order to set procedural submissions, particularly on discovery, or to issue

¹⁰³ Chow, K., Lim, C. and Oon, C. (2014). *Adjudication of construction payment disputes in Malaysia*, LexisNexis.

¹⁰⁴ Rajoo, S. and Harbans Singh K. S., (2012). *Construction law in Malaysia*. Petaling Jaya, Selangor, Malaysia: Sweet & Maxwell Asia.

¹⁰⁵ Chow, K., Lim, C. and Oon, C. (2014). *Adjudication of construction payment disputes in Malaysia*, LexisNexis.

directions for the efficient conduct of the proceedings. Parties are reminded to take the opportunity of using such meetings as a preliminary step in agreeing to procedural guidelines that may avoid the need for use of oral hearings.

When a conflict of interest arises during the conduct of the proceedings

If the adjudicator becomes aware of a conflict of interest during the conduct of the adjudication proceedings at any time, he must disclose the conflict immediately to the parties. The duty to disclose is a continuing duty that extends throughout the proceedings.

In this regard, Rule 8(3)(c) of the KLRCA Adjudication Rules & Procedure clearly states that the adjudicator may not act or continue to act if he has a conflict of interest with either party. This is to preserve the dignity and integrity of the adjudication process.

Preserving confidentiality

Resembling all other Alternative Dispute Resolution processes like arbitration or mediation, statutory adjudication provides for confidentiality as preserved by Section 20 of the CIPAA 2012.

Section 20 of the Act provides,

“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.”

As seen from above, the provision relating to confidentiality of an adjudication proceeding is thorough in as much as it includes the adjudicator and both parties to the dispute and forces them into binding confidentiality.

Additional persons in adjudication proceedings

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 the KLRCA.

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.

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.

The Act states 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.

Multiple payment disputes between same parties adjudicated by different adjudicators

Occasionally the KLRCA receives multiple new matters between the same parties relating to separate projects or separate contracts. In such matters, the KLRCA endeavours to appoint different adjudicators for disputes arising from different contracts or projects.

However, the KLRCA has detected that in such cases, the contours of confidentiality are not properly understood by the parties.

Confidentiality of a dispute can be thought of as a peripheral boundary that encircles each dispute. If the same parties have multiple disputes being adjudicated before multiple adjudicators, then confidentiality extends to each and every one of those disputes, and there is no overlap merely because the parties to the dispute are the same.

Consequently, documents, admissions and proceedings of one adjudication between two parties are to be kept discreet and privy from another adjudication proceeding between the same parties.

Consolidation of adjudication proceedings

Section 14 of CIPAA enables the 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 be applied where:¹⁰⁶

- (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;

¹⁰⁶ See Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 263.

- (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.

Notice of consolidation of adjudication proceedings
(Construction Industry Payment & Adjudication Act 2012, section 14)

<p>Date of Notice of Adjudication <i>[and Adjudication reference number(if any)]</i>: <i>[Adjudication No. 1]</i></p> <p>Contract Reference Number:</p> <p>Date Contract Was Made:</p> <p>Project / Work Description:</p> <p>Project Site Location:</p> <p>Contract Sum:</p>
<p>To: <i>(Claimant – Adjudication No. 1)</i> <i>(Service address)</i></p>
<p>To: <i>(Respondent – Adjudication No. 1)</i> <i>(Service address)</i></p>
<p><i>[Adjudication reference number]:</i></p> <p>Date of Notice of Adjudication:</p> <p>Contract Reference Number:</p> <p>Date Contract Was Made:</p> <p>Project / Work Description:</p> <p>Project Site Location:</p> <p>Contract Sum:</p>
<p>To: <i>(Claimant – Adjudication No. 2)</i> <i>(Service address)</i></p>
<p>To: <i>(Respondent – Adjudication No. 2)</i> <i>(Service address)</i></p>
<p><i>(Set out any further adjudications sought to be consolidated, if there are more than two)</i></p>
<p>Copy: Director of Kuala Lumpur Regional Centre For Arbitration <i>(Service address)</i></p>
<p>From: <i>(Adjudicator)</i> <i>(Service address)</i></p>
<p><i>(Date)</i></p>
<p><i>(Mode of service¹⁰⁸)</i></p>

NOTICE OF CONSOLIDATION OF ADJUDICATION PROCEEDINGS

(pursuant to section 14 of the Construction Industry Payment & Adjudication Act 2012)

1. The following adjudication proceedings are pending in which I have been appointed as adjudicator:

[Set out the particulars of Adjudication No.1 & Adjudication No.2 (and of any other adjudications agreed to be consolidated)]

2. It is hereby confirmed that all parties to the above referenced pending adjudication proceedings have consented :

- (a) to consolidate the adjudication proceedings to be determined at the same time as one adjudication proceedings; and
- (b) that I shall adjudicate the matters in dispute in the same proceedings in accordance with section 14 of the Construction Industry Payment & Adjudication Act 2012 [and deliver the adjudication decision by (date)¹⁰⁹].

[signed]

(Name of Adjudicator)

[signed]

(Claimant – Adjudication No.1)
(Date)

[signed]

(Respondent – Adjudication No. 1)
(Date)

[signed]

(Claimant – Adjudication No.2)
(Date)

[signed]

(Respondent – Adjudication No. 2)
(Date)

[other Claimant(s) and Respondent(s), where applicable]

¹⁰⁷ © Professor Datuk Sundra Rajoo, Lam Wai Loon, Ivan Loo Y.F. Reproduced with permission of the copyright holders. These Forms contained in Schedule 1 are suggested forms only, intended merely to highlight the matters and procedures which the relevant parties may have to consider when taking the steps in question.

¹⁰⁸ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012. in question.

¹⁰⁹ If all parties agree to a specific date or extended date when the adjudicator is to deliver his adjudication decision.

ADJUDICATION DECISION, ENFORCEMENT AND RECOURSES

Once all the submissions – the Adjudication Claim, the Adjudication Response and/or the Adjudication Reply have come in, the adjudicator has then to write the Adjudication Decision.

The timeline for the adjudicator to adhere by is very strict. According to Section 12(2) of the Act, the adjudicator shall decide the dispute and deliver the Decision within:

- 45 working days from the service of the Adjudication Response or Adjudication Reply, whichever is later; or
- 45 working days from the expiry of the period prescribed for the service of the Adjudication Response if it is not served; or
- Further time agreed in writing between the parties.

Accordingly, upon service of the Adjudication Reply, the 45 working days for the delivery of the decision starts running. However, if there is no Adjudication Reply, then the 45 working days begin from the service of the Adjudication Response.

Another situation that has occurred is when the Respondent does not serve the Adjudication Response at all. In these circumstances, the 45 working days start running from the day the Adjudication Response was due, as under Section 10 of the Act.

Lastly, the parties may agree in writing that the time for the adjudicator to write the Decision be extended. In this case, the parties may, upon request of the adjudicator, or of their own motion, extend to a particular date the time given to the adjudicator. Then the extended agreed date becomes the due date for the delivery of the Decision.

In relation to Section 12(2)(c) of the Act, the agreement to extend the time for making and delivery of the adjudication by the adjudicator must be given by both parties.¹¹⁰ Needless to say, adjudicators do not have the jurisdiction to grant themselves extension of time without the agreement of both parties.¹¹¹

When can an adjudicator ask for an extension?

An adjudicator may make a request for extension to the parties if he finds that requires more time to write the adjudication decision than the statutorily provided 45 working days.

Such requests have been seen to arise for varied reasons such as:

- When the submissions made by the parties are unclear and there is a need for further submissions to be made. In these cases, generally the request for extension of time to write the decision is agreed to by the parties.
- When the parties request for oral hearings. It is generally believed that adjudication

¹¹⁰ See *Lorraine Lee v Chartered Properties (Building) Limited* [2010] EWHC 1540 (TCC), paragraph 32, where it was held that the indication by only one party of his non-objection to the adjudicator's request for additional time for delivery of this decision, without the other's agreement or expressed non-objection, was insufficient to found an agreement to extend the time for the delivery of decision.

¹¹¹ *Simons Construction Ltd v Aardvark Developments Ltd* [2004] 1 BLR 117, per HHJ Coulson QC at paragraph 75 of the judgment.

being a summary procedure, does not contemplate oral hearings. Accordingly, when the parties request for oral hearings to be held, due to the complexity of the matter or when evidence to be given by witnesses is necessary for due discharge of the adjudicator's duties, there will generally be an extension of time granted to the adjudicator to write the decision. There have been cases in which the adjudicator has declined to allow applications for oral hearings, presumably because of his belief that it was unnecessary to delay the process when the case did not warrant depositions by witnesses.

- When parties request for a site inspection. Site visits are also widely regarded as not essential to an adjudication process. However, when the matter is complex and the adjudicator is of the view that a site visit is required to write an effective decision, then the adjudicator may request for extra time to write the decision.

What happens if the Decision is not rendered within the time provided?

The Adjudicator has to take cognisance, at all times, of the due date for the delivery of the Decision. The consequence for defaulting on the 45 working days and absent any agreement to extend is severe. Under Section 12(3) of the Act, if the Decision is not served on the parties within the time granted to the Adjudicator under Section 12(2), then the Decision is void. The rationale for Section 12(3) of the Act is to ensure speed and certainty, which is an important feature of the statutory adjudication regime.

Accordingly, the adjudication regime would suffer uncertainty should the specified time limit within the Act for the delivery of the adjudicator's decision is not mandatory and merely instructive, as it *'might encourage the adjudicator, or indeed one of the parties, to string out the process beyond [the specified time period]'*.¹¹²

Referable is Lord Nimmo Smith in *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd*¹¹³ where it was held by a majority of the Inner House, Court of Session that the adjudicator's jurisdiction expired on the expiry of the statutory time limit for making his decision if it had not already been extended by agreement of the parties, and that the adjudicator's failure rendered his decision a nullity.

However, the mere fact that the adjudicator's decision is void because of the adjudicator's failure to make and deliver his decision within the specified time limit under Section 12(2) of the Act is not an end to the adjudication process¹¹⁴. In such an event, the parties are free to recommence adjudication proceedings afresh.¹¹⁵

If the adjudicator defaults on his timeline, then pursuant to Section 19(6) of the Act, the adjudicator is not entitled to any fees or expenses.

As a precautionary step, it is prudent for the adjudicator to confirm in writing the date and mode of delivery of the adjudication decision. The KLRCA will also confirm the deadline of the decision with the adjudicator once Section 12 has been satisfied. The onus then lies

¹¹² *A C Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] BLR 499, per HHJ Coulson QC at paragraphs 26-27 of the judgment.

¹¹³ [2005] BLR 384 at paragraph 46 of the judgment.

¹¹⁴ See Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 292.

¹¹⁵ *A C Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] BLR 499, per HHJ Coulson QC at paragraphs 28 of the judgment.

with the adjudicator to take all necessary measures to ensure that the decision is delivered before the expiry of the 45 working days.

However, it is to be noted that the obligation of the adjudicator under Section 12(2) of the Act is subject to his right to withhold delivery of his decision to the parties until full payment of the fees and expenses is deposited with the Director of the KLRCA as provided by Section 19(5) of the Act. As such, until full payment of the fees and expenses is deposited with the Director of the KLRCA by the parties, the adjudicator is entitled to withhold delivery of his decision, and any resulting delay in the delivery of the decision in this situation will not render the decision a nullity.

Where parties or one party have yet to make the relevant deposits to the KLRCA, the adjudicator is advised to proceed and complete its decision within the 45 days period and inform KLRCA of the same. The adjudicator may withhold the delivery of its decision until payment is made by the parties to the KLRCA.

Form and content of the Adjudication Decision

The Act prescribed basic requirements of the Decision. Under Sections 12(4) and 12(5) of the Act:

- The Decision must be in writing;
- The Decision must be reasoned, unless the parties have agreed in writing that reasons are not required;
- The Decision shall include the adjudicated amount; and
- The Decision must include the time and manner of payment of the adjudicated amount.

Accordingly, unless the giving of reasons is dispensed with by the parties, an adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what is that the adjudicator has decided and why.

Adjudicators may be guided by the following case:-

The summarised principles relating to the provision of reasons by an adjudicator established by Akenhead J in *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd*¹¹⁶ which would be instructive and relevant in the context of Section 12(4) of CIPAA 2012, as follows:

- a) The decision needs to be intelligible so that the parties, objectively, can know what the adjudicator has decided and why.¹¹⁷
- b) A decision which is wholly unreasoned is not
- c) Because the Courts have said time and again that the decision cannot be challenged on the grounds that the adjudicator answered the questions, which he or she was required to address wrongly, the fact that the reasons given are, demonstrably or otherwise, wrong in fact or in law or even in terms of emphasis will not give rise to any effective challenge.¹¹⁸

¹¹⁶ [2009] EWHC 2218 (TCC)

¹¹⁷ *Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC).

¹¹⁸ *C&B Scene Concept Design Ltd v Isobars Ltd* [2002] BLR 93, CA; *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522.

- d) The fact that the adjudicator does not deal with every single argument of the fact or law will not mean that the decision is necessarily unreasoned. He or she should deal with those arguments which are sufficient to establish the route by which the decision is reached.¹¹⁹
- e) The reasons can be expressed simply. If the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them, it will not be a reasoned decision.¹²⁰
- f) Adjudicators are not to be judged too strictly, for instance by the standards of judges and arbitrators, in terms of the reasoning. This reflects the fact that decisions often have to be reached in a short period of time and adjudicators are often not legally qualified. It certainly reflects the fact that there has not been a full judicial or arbitral type process.¹²¹
- g) The fact that reasoning in a decision is repetitive, diffuse or even ambiguous does not mean that the decision is unreasoned.¹²²

Aside from the requirements that the decision must be in writing and contain reasons for the decision, Section 12(5) of the Act further requires the adjudicator to determine the adjudicated amount, and the time and manner the adjudicated amount is payable.

The adjudicated amount here refers to the amount of the payment to be paid by the non-paying party to the unpaid party, after taking into account the set-offs or cross-claims in favour of the non-paying party (if any).

In addition, the CIPAA is silent on the adjudicator's power to make a decision in any currency other than Malaysian Ringgit.

It is now settled that the Malaysian courts can give judgment for a sum expressed in a foreign currency.¹²³

In *Inter Diam Pte Ltd v PJ Diamond Centre Sdn Bhd*¹²⁴, the learned High Court judge, Mohd Hishamudin J (as he then was), held that a plaintiff suing under a contract may make a claim in foreign currency provided such currency is the currency agreed upon by the parties to the contract for the purpose of payment under the contract, and that the date of conversion for the purpose of enforcement can either be the date of judgment or the date of payment. The principles as enunciated in *Inter Diam Pte Ltd* may be a point of reference for adjudication.

¹¹⁹ *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC), per Coulson J. See also *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733, per Judith Prakash J at paragraphs 48-60.

¹²⁰ *Gillies Ramsay Diamond vs PJW Enterprises* [2004] BLR 131, at paragraph 31 of the judgment. See also *CSC Braehead Leisure Ltd and Another v Laing O'Rourke Scotland Ltd* [2009] BLR 49, per Lord Menzies at paragraph 53 of the judgment.

¹²¹ *Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC), per HHJ Stephen Davies at paragraph 19-23 of the judgment. See also *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, at paragraph 15 of the judgment.

¹²² At paragraph 48 of the judgment, per Akenhead J.

¹²³ *Re Chan Teik Huat v; Ex p Overseas-Chinese Banking Corporation Ltd* [2008] 7 CLJ 617; *AMMB International (L) Ltd v Penas Holdings Sdn Bhd & Anor* [2005] 2 MLJ 509.

¹²⁴ [2002] 7 MLJ 189

Checklist

When writing the Adjudication Decision, it is advisable to include:

- ✓ The brief description, names and addresses of the parties;
 - ✓ Identification of the legal counsel of the parties, if any;
 - ✓ Identification of the construction contract and brief facts of the matter;
 - ✓ A brief procedural summary of the matter;
 - ✓ Submissions made by the parties in the Adjudication Claim, Adjudication Response and Adjudication Reply, if any;
 - ✓ Issues that were raised during the course of the adjudication;
 - ✓ Details of any meetings, hearings or site visits;
 - ✓ Detailed discourse of all issues raised and your findings with reasons for each issue. Ensure that all issues raised by the parties are addressed;
 - ✓ Costs of the proceedings;
 - ✓ Final summary determination of each issue;
 - ✓ Signature with the date of the Decision.
-

Delivery of the Adjudication Decision

The adjudicator must endeavour to complete the decision and have it delivered to the parties within the time frame in accordance with the agreed method of delivery pursuant to Section 38 of CIPAA.

Unlike an administered arbitration under the KLRCA Arbitration Rules where the arbitrator is required to deliver the award to the KLRCA, Section 12(6) of the CIPAA expressly requires the adjudicator himself to deliver the decision to the parties and to the Director of the KLRCA.

In light of this provision, if an adjudicator delivers the decision to the KLRCA with the view that the KLRCA will then deliver the decision to the parties, the adjudicator has failed to satisfy Section 12(2) of the CIPAA. The KLRCA will notify the adjudicator and request for the necessary remedial measures to be taken.

However, if the adjudicator has rendered his decision towards the end of the 45 working days period leaving no time for remedial action, the adjudicator runs the grave risk of the decision becoming void as he has failed to deliver the decision to the parties.

Error in the Adjudication Decision

Pursuant to Section 12(7) of the Act, any computational or typographical error in the Adjudication Decision may be corrected by the adjudicator on his own motion, or upon request made by a party. However, it is to be noted that the errors may only be computational or typographical in nature. The adjudicator cannot be made to revise or clarify any substantive portions of his Decision under the guise of a computational/typographical error.

Any correction made under this Section will be deemed to take effect from the date of the original Decision (Section 12(8)).

Effect of the Adjudication Decision

The Adjudication Decision of the adjudicator delivered within the prescribed time is binding upon the parties. This is subject to a few exceptions. The Decision is not binding upon the parties when:

- It is set-aside by the High Court under Section 15 of the Act;
- The subject matter of the decision is settled by a written agreement between the parties; or
- The dispute is finally decided by arbitration or the court.

Pursuant to Section 13 of CIPAA 2012, a decision of an adjudicator is binding (and therefore has to be complied with) until and unless the subject dispute of the decision is finally resolved by arbitration, litigation or agreement in writing, or is otherwise set-aside by the Court under Section 15 of the Act. The provision in Section 13 is in accordance with the object of the statutory adjudication mechanism; to provide an intervening provisional stage in the dispute resolution process to facilitate regular and timely payment for works done and services rendered under construction contracts.

Recent decisions rendered in the construction division of the Malaysian High Courts showcase an active role played by the judiciary in respect of the construing of Section 15 of the Act.

PRACTICAL CONSIDERATIONS WHEN WRITING THE ADJUDICATION DECISION

Is there a specific format my Adjudication Decision should be?

There is no specific format or style of writing an Adjudication Decision. As guidance, Sample Form 15 may be used as a format. The Act merely prescribes certain mandatory constituents of a Decision, including the fact that it must be in writing and must be reasoned. To ensure that the Decision is enforceable, the adjudicator must be wary that all issues that were raised have been comprehensively addressed.

How do I award costs in my decision?

This power of the adjudicator to award costs in statutory adjudication derives from Section 18 of the Act. Section 18(1) embodies the general common law principle of “costs follow the event”, which states:

“The adjudicator in making the adjudication decision in relation to costs of the adjudication proceedings shall order the costs to follow the event and shall fix the quantum of costs to be paid.”

Under Section 18(1) of the Act, the term ‘costs to follow event’ simply means that the unsuccessful party has to pay the costs to the successful party in the action.¹²⁵

¹²⁵ *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor* [2008] 5 MLJ 254.

If the claimant succeeds, the respondent is directed to pay the costs of the adjudication proceedings and if the claimant fails, the claimant is directed to pay the costs of the adjudication proceedings.

This costs 'event' does not cease to apply even though the successful party raises issues or makes allegations that later fail, but the successful party could be deprived of his costs in relation to the failed issues or allegations made.¹²⁶

It is further provided in Section 18(2) of the Act that the stipulated event on costs in Section 18(1) is to prevail over any agreement made by the parties prior to the commencement of the adjudication proceedings by which one party agrees to pay the other party's costs or bear the adjudicator's fees and expenses.

The Act makes it mandatory, with the use of the word "shall" instead of the word "may", for adjudicators to write cost orders, and fixing the amount of costs to be paid

by the decision debtor to the decision creditor. The discretion whether to apportion costs is not afforded to the adjudicators under the Act.

The Act also provides for the ultimate power of the adjudicator to use his discretion to override any and all previous agreements relating to costs entered into between the parties (Section 18(2)). The adjudicator is able to direct the parties to provide submissions as to costs to assist him in writing the cost order.

Regulation 7 of the CIPAA Regulations 2014 provides for the circumstances which the adjudicator needs to consider before awarding costs to the winning party. These include the complexity of the claim, difficulty or novelty of the issues, preparation of documents in the proceedings and the amount or value of the claim.

Should I award interest in my decision?

If the Claimant has submitted a claim for interest in its Payment Claim and Adjudication Claim, the adjudicator is required to address if interest should be awarded. Pursuant Section 25(o), the adjudicator is able to award "financing costs and interest".

It is to be noted that financing costs, also commonly known as financing charges, are different from the costs of adjudication proceedings provided in Section 18 of the Act.

There is no definition provided for the term 'financing costs' in the CIPAA 2012 Act. Generally, 'financing costs' would include

- a) financial costs or charges incurred by a party as a result of non-payment or late payment by the other party¹²⁷ ; and .
- b) financial costs incurred by a contractor as a result of a compensable delay caused by the employer as part of the increased cost of carrying out and completing the work, whether or not the construction contract expressly provides for the recovery of these costs by the contractor.¹²⁸

¹²⁶ See Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 304.

¹²⁷ *Sempra Metals Ltd v Commissioners of Inland Revenue* [2008] AC 561, HL.

¹²⁸ *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177

Decided cases suggests that to be entitled to financing costs, the claimant has to specifically claim for it and prove that he has actually incurred those costs.¹²⁹

Case law suggests that the general rule in a claim for a debt is that interest is to run from the date on which the debt became due and payable.¹³⁰

The purpose of awarding interest on the amount claimed is not to punish the non-paying party for withholding payment, but to compensate the unpaid party who has been wrongly deprived of the use of the money due to him for the period which he was deprived of its enjoyment.¹³¹

Thus, the adjudicator may award interest on the determined amount of the payment claim from the date of the payment became due and payable up to the date of the decision, and from the date of the decision until the date of realisation of the decision.

It has been held that, in respect of pre-award interest, an arbitrator has the same power as that of the court to award interest at such rate as he thinks fit.¹³² It has also been held that, in respect of post-award interest, an arbitrator, if he decides to award interest, he has to apply the interest rate that applies to a judgment debt.¹³³

Currently, the prescribed rate of interest for a judgment debt is fixed at 5% per annum.¹³⁴

It is inferred that these principles which apply to arbitrators should similarly apply to adjudicators. However, where the construction contract provides for a certain interest rate to be applied for late payment of amount due, and the unpaid party has made a claim for it, the adjudicator should apply the contractual rate of interest instead provided that it is not exorbitant and thereby caught by Section 75 of the Contracts Act 1950.¹³⁵

When is an adjudicator not entitled to his fees?

Section 19(6) of the Act states,

“An adjudicator is not entitled to any fees or expenses relating to the adjudication if the adjudicator fails to decide the dispute within the period specified under subsection 12(2) except when the delay in delivery of the decision is due to the failure of the parties to deposit the full payment of the adjudicator’s fees and expenses with the Director of the KLRC under subsection (5).” (emphasis added)

The Act must be read carefully as it makes a clear distinction between the decision of the adjudicator and the actual delivery of that decision to the parties.

¹²⁹ See Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 214.

¹³⁰ *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710, per Gopal Sri Ram JCA (as he then was) at paragraph 32; *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216.

¹³¹ *General Tyre & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 All ER 173; *Raja Lope & Tan Co v Malayan Flour Mills Bhd* [2000] 6 MLJ 228.

¹³² *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51; *Lau Tiong Ik Construction Sdn Bhd v The Government of Malaysia* [2008] 5 MLJ 604.

¹³³ *London & Overseas Freighters Ltd v Timber Shipping Co SA* [1972] AC 1 HL; *Associated Cover Sdn Bhd v MCIS Zurich Insurance Bhd* [2009] MLJU 1695

¹³⁴ Order 42 r 12 of the Rules of Court 2012; Practice Direction No. 1 of 2012.

¹³⁵ *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In Receivership)* [1996] 2 MLJ 461, FC; *BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd* [2007] 8 MLJ 427; *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501, at pages 523-525.

From a holistic reading of the provisions, it is apparent that the adjudicator must decide the dispute within the time limits prescribed under Section 12 of the Act.

What should I do if the parties have not deposited my fees with the KLRCA?

Section 19(5) of the Act recognises this practical difficulty, where the provision stipulates that the Adjudicator is entitled to request for full payment of his fees and expenses by the parties prior to releasing the adjudication decision to parties.

The Adjudicator may face the practical difficulty of recovering outstanding fees and expenses (including the portion of the KLRCA Administrative Fee) from the parties should the adjudicator erroneously release the Adjudication Decision prior to parties depositing to the KLRCA the full amount of fees and expenses.

According to Section 19(3) of the Act, the adjudicator may recover any outstanding fees and expenses due as a debt.

The adjudicator must be aware that even if the parties have not deposited his fees with the KLRCA, he still has an overriding duty of deciding the dispute and writing his decision within the time prescribed under Section 12(2). He may only withhold the delivery of the Decision to the parties.

In practice, the adjudicator should declare to the parties that the decision is rendered but has been withheld from them because of the reason of non-payment of his fees. At this stage, the adjudicator may also choose to provide a copy of the decision to the KLRCA for its records and safekeeping. Sample Form 14 may be used as guidance

What if the Claimant withdraws its adjudication claim before the delivery of the adjudication decision?

Section 17(1) of CIPAA and Rule 9(5A) of the KLRCA Adjudication Rules & Procedure provides that the adjudicator may, after consultation with the Director of the KLRCA, order the Claimant to pay reasonable costs arising out of the withdrawal of the adjudication proceedings.

In determining the quantum of costs payable by the Claimant, the adjudicator shall have regard to all relevant circumstances including the terms of the appointment of the adjudicator, the stage of the proceedings at the time of the withdrawal, the administrative fee payable to the KLRCA, and the reasonable costs incurred by the Respondent

The CIPAA is silent on the payment of adjudicator's fees and expenses following his death or resignation, his inability to proceed or the revocation of his appointment, or the setting aside of his decision.

ENFORCEMENT OF ADJUDICATION DECISION

The Act provides for the enforcement of the adjudication to provide an avenue if the losing party does not honour the Adjudication Decision within the time prescribed by the adjudicator. The three modes of enforcement are as follows:

- **As a judgment of the court (Section 28)**

The winning party may apply to the High Court to enforce the Adjudication Decision as if it were a judgment or order of the High Court. The High Court is empowered to make an order in respect of the Decision and the interest on the adjudicated amount.

This order of the High Court can be executed in accordance with the rules of the High Court.

- **Suspension or reduction of rate of progress of performance (Section 29)**

Another method of enforcement of the Adjudication Decision is for the winning party to suspend performance or reduce the rate of progress of performance of the construction work or consultancy under the construction contract.

Procedures (Section 29(2)):

- o The party intending to do so must give a written notice of intention to suspend performance or reduce the rate of progress to the other party.
- o From the receipt of this notice, the other party has 14 **calendar** days to pay the adjudicated amount.

Upon expiry of these 14 calendar days, the winning party may suspend or reduce the rate of progress of performance.

- **Direct payment from principal (Section 30)**

If the adjudicated amount is not paid by the losing party within the time granted in the Decision, then the winning party may make a written request directly to the principal of the losing party to make payment of the adjudicated amount.

A “principal” is defined in Section 4 of the Act as “a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts.”

Upon receipt of this request, the principal is obliged to request for payment proof from the losing party, and when no payment proof is provided by the losing party, is required to make payment of the adjudicated amount to the winning party.

However, this section is only applicable if money is due or payable by the principal to the losing party at the time of receipt of the request by the winning party. The principal has the right to recover the amounts paid from the losing party as a debt or set-off.

RECOURSES AGAINST THE ADJUDICATION DECISION

For the losing party, there are two recourses against the Adjudication Decision:

- Setting aside the Adjudication Decision under Section 15 of the Act;
- Stay of the Adjudication Decision under Section 16 of the Act.

Setting aside the Adjudication Decision

Section 15 of the Act provides certain grounds on which the Decision might be set-aside:

- If the Decision was improperly procured through fraud or bribery;
- If there was a denial of natural justice;
- If the adjudicator did not act independently or impartially; and
- If the adjudicator acted in excess of his jurisdiction.

What is denial of natural justice?

Natural justice can be said to correspond strikingly with the notions of fairness and justice. The adjudicator has a duty to be fair to both parties in conducting the proceedings and in deciding the matter.

Some instances where natural justice may be said to have been denied are:

- When the adjudicator did not give sufficient opportunity to one party to present his case, or completely deprived one party of its right of presenting its case.
- When the adjudicator does not give due consideration or completely fails to consider submissions made by one party.
- When the adjudicator unilaterally communicates with one of the parties to the adjudication discussing or clarifying the matter without the involvement of the other party.
- When the adjudicator applies his own knowledge to the dispute without consultations with the parties or giving the parties the chance to submit on his application of knowledge.
- When the adjudicator does not give any reasons in his Decision.

What is independence and impartiality?

It is integral to the adjudication that the adjudicator is both independent of the parties in dispute and impartial.

Independence of the adjudicator concerns his relationship with the parties while impartiality relates to the concept of fairness and equality with which the adjudicator treats both parties and considers their submissions.

The adjudicator must not have any preconceived notions of either party's case and must treat both sides with the same degree of justice.

Jurisdiction of the adjudicator

It is advisable that the adjudicator be guided by Section 27 of the Act to ensure that he does

not exercise power beyond his jurisdiction. When his Decision is challenged before the High Court, and the High Court determines that the adjudicator did not have the requisite jurisdiction to decide the disputes between the parties, the High Court will set-aside the Decision.

STAY OF ADJUDICATION DECISION

Another recourse available to the losing party against an Adjudication Decision is an application to stay its enforcement under Section 16 of the Act.

An application for stay of the Decision may be made on the grounds

- An application to set-aside the Decision under Section 15 has been made before the High Court and it is pending determination; or
- The subject matter of the Decision is pending final determination before the courts or an arbitral tribunal.

However, the High Court may be extremely wary to grant this stay unless there exist extraordinary circumstances warranting such order.

Referable is the case of *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd*¹³⁶ wherein the High Court dismissed an application by the Plaintiff to stay enforcement, execution, and further proceedings with respect to an adjudication decision issued under CIPAA 2012 until the final determination of pending arbitration proceedings between the Plaintiff and the Defendant. The application for stay was predicated on subsection 16(1)(b) of CIPAA 2012, the inherent powers of the court pursuant to Order 92 of the Rules of Court 2012, and clause 35.4 of the construction contract.

The Court in this case read Section 16 of CIPAA 2012 to permit a stay of the enforcement of an adjudication decision, albeit in the limited circumstances listed in subsection 16(1)¹³⁷:

*“Compliance with the adjudication decision is given and part of the rules of the game in this industry and what CIPAA is all about in the first place.”*¹³⁸

The Court observed that a successful claimant under CIPAA could enforce the adjudication decision as if it was a judgment or order of the High Court pursuant to subsection 28(1)¹³⁹. The limited rights afforded to a party by Section 16 was seen by the Court as consistent with the *“whole scheme of CIPAA 2012, which is to afford speedy disposal of payment disputes on a temporary note of finality.”*

¹³⁶ KL High Court (Civil Division) O.S. NO: 24C(ARB)-17-03/2015), judgment by Dato’ Mary Lim Thiam Suan, J dated 15 April 2015.

¹³⁷ See *Grounds of Decision* at paragraph [23], page 11.

¹³⁸ See *Grounds of Decision* at paragraph [25], page 13. See also Section 13 of CIPAA 2012.

¹³⁹ See *Grounds of Decision* at paragraph [23], pages 11-12.

Keeping in mind this mandate, the Court wrote that a “stay should only be granted in **exceptional circumstances**; and **such circumstances must necessarily refer to the financial status of the other party**.”¹⁴⁰ (emphasis added).

Furthermore, some factors – such as the merits of the case presented in arbitration or in court and the probability of success in setting aside the adjudication decision – are irrelevant to assessing whether a stay should be granted under Section 16 of CIPAA:

*“The merits of the case before the arbitration or the Court; or even the chances of success in setting aside the adjudication decision are not relevant considerations. The grant of any stay must always weigh in the primary object of CIPAA 2012; that it is to ensure a speedy resolution of a payment dispute; that it is to inject much needed cash flow into the contractual arrangements between parties that saw progressive payments of claims as the recognised and accepted way of doing business in construction contracts. It would be futile to encourage parties to resort to arbitration and then deprive a successful claimant of its claim by staying its access to the cash simply because there is another proceeding of the nature described in Section 16(1) which is pending. The whole concept of temporary finality would be lost and the object of the Act defeated if such was the consideration.”*¹⁴¹

¹⁴⁰ See Grounds of Decision at paragraphs [28] - 32, pages 14-16.

¹⁴¹ See Grounds of Decision at paragraph [32], pages 15-162.

FORM 13¹⁴²

Adjudicator's request for extension of time to deliver the adjudication decision
(Construction Industry Payment & Adjudication Act 2012, section 12(2)(c))

To: <i>(Claimant)</i> <i>(Service address)</i>
To: <i>(Respondent)</i> <i>(Service address)</i>
Copy: Director of Kuala Lumpur Regional Centre For Arbitration <i>(Service address)</i>
From: <i>(Adjudicator)</i> <i>(Service address)</i>
<i>(Date)</i>
<i>(Mode of service¹⁴³)</i>
<i>Adjudication reference number (if any):</i> Date of Notice of Adjudication: Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:

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¹⁴³ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

ADJUDICATOR'S REQUEST FOR EXTENSION OF TIME TO DELIVER THE ADJUDICATION DECISION

1. I refer to the above referenced adjudication whereby I am required to decide the dispute and deliver my decision by [date] under section [12(2)(a)/12(2)(b)] of the Construction Industry Payment & Adjudication Act 2012.
2. I request for the parties' agreement to extend the time for the delivery of my decision to [date] for the following reasons.

[set out reasons for the request]

3. Please indicate within [] working days of receiving this request whether you agree to the extension of time as requested.

[signed]

(Adjudicator)

FORM 14¹⁴⁴

Notice for withholding the release of the decision until payment of fees
and expenses in full

(Construction Industry Payment & Adjudication Act 2012, section 19(5))

To: <i>(Claimant)</i> <i>(Service address)</i>	
To: <i>(Respondent)</i> <i>(Service address)</i>	
Copy: Director of Kuala Lumpur Regional Centre For Arbitration <i>(Service address)</i>	
From: <i>(Adjudicator)</i> <i>(Service address)</i>	<i>(Date)</i>
<i>(Mode of service¹⁴⁵)</i>	
Adjudication reference number <i>(if any)</i> : Date of Notice of Adjudication: Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:	

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¹⁴⁵ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

**NOTICE FOR WITHHOLDING THE RELEASE OF THE
DECISION UNTIL PAYMENT OF FEES AND EXPENSES IN FULL**

(pursuant to section 19(5) of the Construction Industry Payment & Adjudication Act 2012)

1. This is to notify the parties that the adjudication decision has been completed and is ready to be delivered to the parties.
2. As of this date, the full sum of [amount] representing full payment of my fees and expenses, the KLRC's administrative fee [and any taxes as may be imposed by the Government] has not been deposited with the Director of the Kuala Lumpur Regional Centre For Arbitration as requested in my letter dated [date].
3. In accordance with section 19(5) of the Construction Industry Payment and Adjudication Act 2012, I will release the adjudication decision only after the full sum of [amount] has been deposited with the Director of the Kuala Lumpur Regional Centre for Arbitration, and after being duly notified and served with proof of such payment.

[signed]

(Adjudicator)

Sample Format of an adjudication decision

**IN THE MATTER OF AN ADJUDICATION
CONDUCTED PURSUANT TO THE KLRCA RULES AND
CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012**
[Adjudication Reference No:]

BETWEEN

XXX ... CLAIMANT

AND

YYY ... RESPONDENT

Before : [Name of the Adjudicator]

ADJUDICATION DECISION

DATED (DD/MM/YY)

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A: THE PARTIES

[Describe the parties to the adjudication and state whether they were represented. If they were represented, identify the representatives.]

B: THE CONSTRUCTION CONTRACT AND BACKGROUND FACTS

[Describe the relevant construction contract, and set out the background facts relating to the matters in dispute]

C: THE CLAIMANT'S PAYMENT CLAIM

[Set out the details of the Payment Claim, e.g. the amount claimed, the due date for payment of the amount claimed, the cause of action as identified therein, a description of the work or services to which the payment relates, etc.]

D: RESPONDENT'S PAYMENT RESPONSE (if any)

[Set out the details of the Payment Response, e.g. the amount admitted, the amount paid, the amount, in dispute, the reason for withholding payment such as set-off, abatement, cross-claim, etc.]

E: REFERENCE TO ADJUDICATION

Set out the scope of reference and the reliefs / remedies claimed in the Notice of Adjudication, and particulars relating to the Notice of Adjudication, i.e. the date when it was served, etc.]

F: APPOINTMENT OF ADJUDICATOR

[How the appointment was made, i.e. whether by agreement or by the Director of the KLRC, when the adjudicator accepted the appointment, etc.]

G: ISSUES

[Set out the issues requiring the determination of the adjudicator, e.g. relating to liability and quantum of the claim]

H: ADJUDICATION CLAIM

[Set out the details of the adjudication claim, e.g. nature and description of the claim, the basis for the claim, the relief(s) / remedy(ies) sought in the adjudication claim, and identify briefly the documents / evidence relied on by the Claimant]

I: ADJUDICATION RESPONSE

[Set out the details of the adjudication response, e.g. the Respondent's answer to the adjudication claim, the grounds advanced by the Respondent, and identify briefly the documents / evidence relied on by the Responde

J: ADJUDICATION REPLY (if any)

[Set out the answer by the Claimant to the Adjudication Response, and identify briefly any further documents / evidence produced by the Claimant]

K: HEARING / MEETING / SITE VISIT

[Set out the number of days of hearing / meeting, and the evidence taken during the hearing or meeting, the date of the site visit, any other action taken by the adjudicator etc.]

L: FINDINGS AND REASONS

[Discuss each issue by providing his findings and reasons for his findings.]

M: COSTS & ADJUDICATOR'S FEES AND EXPENSES

[Discuss as to who shall bear the costs, and fix the quantum of costs to be paid. Set out the amount of adjudicator's fees and expenses payable, and the details thereof]

N: DETERMINATION

[Set out the decision of the adjudicator]

e.g.

Example 1: Where claim or cross-claim is successful

- (a) *[State the adjudicated amount (if any), the paying party, and the party entitled to receive payment from the paying party, and the time within which the adjudicated amount is to be paid¹⁴⁷];*
- (b) *[Financing cost and/or Interest awarded pursuant to section 25(o) of the CIPA Act 2012, if any];*
- (c) *[Costs of the adjudication proceedings to be borne (by the losing party) pursuant to Section 18(1) of CIPA Act 2012 in the amount of (amount), which shall include the Adjudicator's fees and expenses in the amount of (amount). State the time within which payment of the costs of the adjudication proceedings are to be paid];*
- (d) *[State the manner the adjudicated amount, together with interests and costs, are to be paid¹⁴⁸].*

Example 2: Where claim is unsuccessful

- (a) *[State that the claim is dismissed];*
- (b) *[Costs of the adjudication proceedings to be borne (by the losing party) pursuant to Section 18(1) of CIPA Act 2012 in the amount of (amount), which shall include the Adjudicator's fees and expenses in the amount of (amount). State the time within which payment of the costs of the adjudication proceedings are to be paid];*
- (c) *[State the manner the costs are to be paid¹⁴⁹].*

Dated this (DD/MM/YY)

[signed]

(Adjudicator)

¹⁴⁷ Section 12(5) of the CIPA Act 2012.

¹⁴⁸ Section 12(5) of the CIPA Act 2012.

¹⁴⁹ Section 12(5) of the CIPA Act 2012.

Delivery of Adjudication Decision
(Construction Industry Payment & Adjudication Act 2012, section 12(2)
and KLRCA Adjudication Rules, Rules 9(5) & 9(7))

To: <i>(Claimant)</i> <i>(Service address)</i>	
To: <i>(Respondent)</i> <i>(Service address)</i>	
Copy: Director of Kuala Lumpur Regional Centre For Arbitration <i>(Service address)</i>	
From: <i>(Adjudicator)</i> <i>(Service address)</i>	<i>(Date)</i>
	<i>(Mode of service¹⁵¹)</i>
Adjudication reference number <i>(if any)</i> : Date of Notice of Adjudication: Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:	

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¹⁵¹ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

DELIVERY OF ADJUDICATION DECISION

**(pursuant to section 12(2) of the Construction Industry Payment & Adjudication Act 2012
and Rules 9(5) & 9(7) of the KLRCA Adjudication Rules)**

1. I enclose herewith my written Adjudication Decision made on *[date]*.
2. I confirm that:
 - (a) full payment of expenses and fees, including the KLRCA's administrative fee *[and any taxes as may be imposed by the Government]* for this adjudication as directed by me in my letter dated *[date]* have been deposited with the Director of the KLRCA pursuant to Section 19(5) of the Construction Industry Payment and Adjudication Act 2012¹⁵²;
 - (b) I have complied with the prescribed time for the delivery of adjudication decision as set out in Section 12(2) of the Construction Industry Payment and Adjudication Act 2012¹⁵³.

Yours faithfully,

[signed]

(Adjudicator)

¹⁵² Rule 9(5) of the KLRCA Adjudication Rules.

¹⁵³ Rule 9(7) of the KLRCA Adjudication Rules.

DISBURSEMENT OF FEES TO THE ADJUDICATOR

Once the adjudicator renders the Adjudication Decision within the deadline, the KLRCA will release the adjudicator's fees to the adjudicator.

The adjudicator is required to issue two invoices addressed to each party, for the adjudicator's fees and expenses. The amount in each invoice is half of his total fees. These invoices are to be forwarded to the KLRCA and not to the parties.

Upon receipt of these invoices, the KLRCA will release the adjudicator's fee.

If the adjudicator is GST registered, the adjudicator is required to issue tax invoices. The total adjudicator's fee will include the 6% GST.

The fee of the adjudicator is according to the fee schedule that has been predetermined at the start of the proceedings; the Standard Fee Schedule, the Recommended Fee Schedule or any other fee agreement. The adjudicator is not at liberty to impose any additional fees upon the parties at this stage.

For the payment of his expenses, the adjudicator is required to submit a separate invoice supported with original receipts or other proof of payment together with the invoices.

The KLRCA issues its own tax invoices for the payment of the Administrative Fee. Upon receiving the invoices/tax invoices from the adjudicator, the KLRCA will forward these together with the KLRCA tax invoice to the parties. Any unexpended balance will be returned to the parties.

Issues that may arise at this stage:

- **Direct payment from principal (Section 30)**

CIPAA provides for the adjudicator to be reimbursed for expenses incurred during the proceeding. The type, amount and limit of reimbursement are given in Regulation 6 of the CIPAA Regulations 2014 for the Standard Fee and in KLRCA's CIPAA Circular 02 (amended as at 1st August 2014) for the Recommended Fee.

It is advisable that the adjudicator request for reimbursement at either of the following junctures:

- a) When the adjudicator directs the parties to remit the adjudicator's fees and the KLRCA Administrative Fee in the Notice of Acceptance of the appointment to act as adjudicator; or
- b) At the start of the 45 working days to write and deliver the decision.

The adjudicator must appreciate that the KLRCA requires time to collect the deposit. As CIPAA is strictly regulated by time, often the KLRCA is faced with a short time period to collect the reimbursement from the parties.

This situation becomes critical when the deadline of decision is reached and parties have yet to remit the requisite reimbursement.

If a claim for expenses is made after the decision has been delivered, although the KLRCA will request parties to remit the requisite deposits, the KLRCA is unable to guarantee that it will be forthcoming.

WITHDRAWAL/TERMINATION OF ADJUDICATION PROCEEDINGS

Pursuant to Section 17 of the CIPAA, the claimant may withdraw the adjudication proceedings at any time by serving a notice of withdrawal in writing on the respondent and the adjudicator. Some reasons for which an adjudication proceeding may be withdrawn are:

- An offer of settlement from the other party;
- A procedural irregularity in the adjudication proceedings, which might later lead to issues with enforcement of the decision or setting aside of the decision;
- To include more claims within the same proceedings for which a new Payment Claim needs to be issued.

Upon withdrawal of the proceedings, the Claimant shall bear the costs arising out of the withdrawal unless the adjudicator orders otherwise.

The adjudicator is required to direct the Claimant for payment of the cost of the proceedings, which includes a reasonable proportion of the adjudicator's fees and expenses incurred by the adjudicator during the proceedings.

The adjudicator may refer to Regulation 7 of the CIPAA Regulations 2014 which defines costs of adjudication proceedings.

Additionally, the adjudicator may consult with the Director of the KLRCA regarding the appropriate proportion of the adjudicator's fees.

For this purpose, the adjudicator may write to the Director requesting for the Director's guidance, pursuant to Rule 9(5A) of the KLRCA Adjudication Rules & Procedure.

Notwithstanding the withdrawal of the matter, the full KLRCA administrative fees is payable by the claimant, pursuant to Paragraph 1.2 of Schedule III of the KLRCA Adjudication Rules & Procedure, and the adjudicator is to direct the claimant to pay such full Administrative Fees of the KLRCA.

Once the cost direction is issued by the adjudicator, if sufficient deposits are with the KLRCA, then the payment to the adjudicator and the KLRCA will be remitted accordingly. Alternatively, upon receipt of this cost direction by the adjudicator, the KLRCA will issue invoices for further deposits to be paid by the claimant.

Under the Act, the claimant who has withdrawn their adjudication claim can recommence adjudication on the same subject matter by serving a new Notice of Adjudication.

Issues to be considered at this stage:

- **If the fees of the adjudicator is not paid by the parties**

If the claimant refuses to pay the fees of the adjudicator, then pursuant to Section 19(3) of the Act, the adjudicator has the right to recover his fees and expenses as a debt, by commencing debt recovery proceedings under the relevant statute.

- **Parties wish to revoke adjudicator's appointment**

The Act is silent on allowing the parties to jointly revoke the adjudicator's appointment. It is suggested that in the circumstances where the adjudicator has lost the mandate of the parties, where both parties no longer wish to continue with the adjudication proceedings or where parties wish to recommence the adjudication with another adjudicator, the rational course of action is to allow for parties to proceed with the revocation.

- **Death, resignation or inability for the adjudicator to continue with the proceedings.**

- i. Death: The death of an adjudicator will draw the proceedings to an end.
- ii. Resignation: This may be caused by a variety of reasons, such as a medical condition, an occurrence of an event that jeopardises the independence and impartiality of the adjudicator or a jurisdictional challenge which the adjudicator feels is justified.

The adjudicator should also resign if the matter before him is substantially the same as one that has been previously referred to him and he has decided the matter.

In all these circumstances, absent any bona fide issues, the adjudicator is entitled to his fees proportioned accordingly. Pursuant Section 17(4) of the Act, the parties can choose to either end the proceeding and recommence fresh proceedings with a new adjudicator or pause the adjudication proceedings and continue from the same point with a new adjudicator.

Notice of withdrawal of adjudication claim/proceedings
(Construction Industry Payment & Adjudication Act 2012, section 17(1))

To: <i>(Respondent)</i> <i>(Service address)</i>
To: <i>(Adjudicator)</i> <i>(Service address)</i>
Copy: Director of Kuala Lumpur Regional Centre For Arbitration <i>(Service address)</i>
From: <i>(Claimant)</i> <i>(Service address)</i> Person In Charge: (Name and designation)
<i>(Date)</i>
<i>(Mode of service¹⁵⁵)</i>
Adjudication reference number <i>(if any)</i> : Date of Notice of Adjudication: Contract Reference Number: Date Contract Was Made: Project / Work Description: Project Site Location: Contract Sum:

¹⁵⁴ © Professor Datuk Sundra Rajoo, Lam Wai Loon, Ivan Loo Y.F. Reproduced with permission of the copyright holders. These Forms contained in Schedule 1 are suggested forms only, intended merely to highlight the matters and procedures which the relevant parties may have to consider when taking the steps in question.

¹⁵⁵ As per any of the prescribed modes of service under section 38(a) – 38(d) of the CIPA Act 2012.

NOTICE OF WITHDRAWAL OF ADJUDICATION CLAIM/PROCEEDINGS

(pursuant to section 17(1) of the Construction Industry Payment & Adjudication Act 2012)

1. 1. In accordance with section 17(1) of the Construction Industry Payment & Adjudication Act 2012, we, the Claimant herein, hereby give notice of withdrawal of our adjudication claim/proceedings against you, the Respondent, concerning *[describe the dispute]* which was referred to *[name of adjudicator]* for adjudication¹⁵⁶.
2. [Set out the reasons for the withdrawal, and *(if the Claimant is of the view that it should not bear the costs arising from the withdrawal, state the reasons)*].
3. *[We reserve our right to recommence adjudication on the same (or any part of the) matter in dispute¹⁵⁷].*

[signed]

(Claimant)

(Date)

¹⁵⁶ Section 17(1) of the CIPA Act 2012 requires the notice of withdrawal to be served on both the Respondent and the Adjudicator.

¹⁵⁷ See section 17(3) of the CIPA Act 2012.

ADMINISTRATIVE OBSERVATIONS BY THE KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRC)

This section has been taken from the CIPAA Report 2017 as produced by the KLRC and has been accordingly amended to capture the key topical issues and administrative challenges that have been observed throughout the administration of CIPAA matters by the KLRC 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 KLRC continues to service the construction sector through dissemination of information on such developments to all stakeholders, thus fulfilling the KLRC's legislative mandate as the administrative authority under CIPAA.

The format of this section is composed of four parts – firstly, it highlights the key practical problem usually encountered within an adjudication proceeding. Secondly, it links the relevant provision, where it be by the CIPAA Act, the CIPAA Regulations, CIPAA Exemption Orders, KLRC Adjudication Rules & Procedure or KLRC Circulars, that corresponds to the problem faced. Thirdly, it lays down in concise order of the observations made through the perspective of the adjudication authority, the KLRC, whilst also providing a detailed analysis of the problem, with references made to applicable case laws and provisions. Fourth and finally, it addresses the possible solutions that may guide stakeholders towards reaching the appropriate solutions for these unique issues. Strictly for the purposes of disclaimer, the thoughts in this are that of the author and does not in any way reflect the opinion of KLRC.

For completeness, this section also takes into consideration the 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.

These practices on an ongoing basis will ensure that CIPAA remains a robust statute that will transform dispute resolution of payment disputes in the construction industry and consequently also contribute to the strong economic health of a key industry.

1. 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*

- 1) *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, it is 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?

Matters to consider – Guidance can be sought from the recently decided case of *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case*¹ 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.

¹ [2017] MLJU 242

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.

2. 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:*
 - a) the names and service addresses of the claimant and the respondent;*
 - b) the date of service of the Notice of Adjudication;*
 - c) the date of service of the Payment Claim;*
 - d) the date of service of the Payment Response (if any);*
 - e) 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;*
 - f) the claimed amount;*
 - g) the response amount (if any);*
 - h) a brief description of the dispute;*
 - i) 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.

Matters to consider – 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.

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*

2) The payment claim shall be in writing and shall include—

a) The amount claimed and due date for payment of the amount claimed;

...

– 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 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).

Matters to consider – 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 act², 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.

² See the explanatory statement that accompanied CIPAA in its Parliament presentation in 2012.

4. Mode of service other than personal service

Question – What are the implications and requirements for the modes of service as prescribed under Section 38(d)?

Relevant provision – *Section 38: Service of Notices and Documents*

Service of a notice or any other document under this Act shall be effected on the party to be served—

- a) By delivering the notice or document personally to the party;*
- b) By leaving the notice or document at the usual place of business of the party during the normal business hours of that party;*
- c) By sending the notice or document to the usual or last-known place of business of the party by registered post; or*
- d) By any other means as agreed in writing by the parties.*

Observation – Being a summary process, procedural compliance is integral to the successful conduct of adjudication proceedings. In the course of administration, the KLRCA has come across instances where adjudicator or parties do not observe the timelines vis-à-vis the proper mode of service of documents as allowed under the CIPAA.

The modes of service have been exhaustively prescribed in Sections 38(a) to 38(c) of CIPAA. The acceptable mode of personal service (include the acceptable methods of physical delivery).

Section 38(d) permits other means such as electronic communication only when agreed in writing by the parties. Therefore, contemporary modes of service such as of facsimile³, ordinary post⁴ or electronic mail⁵ is only permissible if both parties so consent in writing.

Matters to consider – It is recommended to parties and adjudicators in the very early stages that such agreement be sought and recorded in writing. A copy of the agreement must be extended to the KLRCA. Any lapse in procedural compliance opens up the adjudication decision to potential challenges.

Given the time contingent provisions stipulated throughout the Act, the KLRCA has observed that frequent scenarios have occurred throughout the course of an adjudication proceeding i.e. late service of pleadings, requests for extensions, etc., which have undoubtedly affected the timeline for resolution of such proceedings. These scenarios can be pre-emptively rectified by parties agreeing in writing to apply the alternative modes of service as stipulated under Section 38(d) at the outset of the adjudication proceedings, in view of the practical considerations involved.

³ See *Zebicon Pty Ltd v Remo Construction Pty Ltd* [2008] NSWSC 1408, where the New South Wales Supreme Court held that the payment claim would have been received by fax when that document had been received into the memory of the respondent's fax machine, with the transmission report indicating "OK". See also *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd* [2010] NSWSC 319.

⁴ *Oyster Chase Bar v Hamo Industries* [2010] NSWSC 332.

⁵ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156. It was held by Vickery J, at paragraphs 131-132 of the judgment, that the date and time of filing of the document may be determined by the date and time when the email transmission arrived at the recipient's server where it might be accessed by the recipient.

For example, in instances where the adjudicator has to issue a Notice of Acceptance of Appointment (Form 6) pursuant to Section 23(2), it ought to be observed that unless the parties have expressly agreed in writing to apply an alternative mode of service such as stipulated under Section 38(d) i.e. through email or facsimile, the adjudicator is advised to avoid the risk of serving his Form 6 out-of-time (by way of personal service or registered post) on the very last day of the 10 working days permitted to him under Section 23(2) to accept the appointment.

Accordingly, the provisions of the Act indicate that it is imperative for KLRCA to receive the hard copy of all communication before the end of the working day timeline stipulated for each notice or document, unless the parties have agreed in writing prior for use of other modes of service pursuant to Section 38(d). To avoid any and all ambiguity, parties and the adjudicator are all notified that the end of working day time is 5:30 pm.

5. Considerations for Adjudicator's fee entitlement

Question – Whether the appointed adjudicator is entitled to a proportion of his fees if he resigns after holding that he has no jurisdiction to act in the reference?

Particular difficulties can arise in situations when an adjudicator resigns during the course of proceedings, before producing an adjudication decision, for reason being he has decided he has no jurisdiction to decide the matter. There arises a question of whether he is still entitled to his fees and expenses.

The consequence of the adjudicator's failure to deliver his decision within the period specified under Section 12(2) of CIPAA has a direct bearing on his entitlement to recover his fees or expenses. The position on this as spelt out in *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC); (2006) 110 Con LR 36 is to the effect that such a default would be considered to be a complete failure of consideration and as such the adjudicator will not be entitled to any fees at all.

This view is premised on the contention "that statutory adjudication was contractual and consisted of two agreements; the first being the Adjudication Agreement and the second, the agreement between the Adjudicator and one or both parties" (see J Milligan and M McShane, "The Cost of Adjudication: How much? and When?", *Adjudication Society Newsletter*, March 2012, p 6).

The Act however, is silent on the payment of the adjudicator's fees and expenses following his death or resignation – See Section 17(4) of CIPAA as the most relevant provision to this.

Relevant provision – 27. Jurisdiction of Adjudicator

...3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed with and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

Observation – The jurisdiction of an adjudicator depends on many factors – whether the dispute is within the scope of the CIPAA, whether the contract is a construction contract, whether the contract is in writing, whether the dispute has crystallized and whether the dispute falls within the Exemption Order, among others.

Pursuant to Section 27(3) of the Act, the adjudicator may continue to adjudicate the dispute and publish the adjudication decision notwithstanding a challenge to his jurisdiction during the proceedings.

Should the adjudicator proceed in this manner, the adjudicator will complete the adjudication decision within the time prescribed under Section 12 of the Act and will be paid his fees in accordance with Section 19(6). This is notwithstanding the fact that the court may later set aside the adjudication decision on grounds of lack of jurisdiction on application of a party.

However, some adjudicators have taken the view that should they find that they have no jurisdiction to act in the adjudication, they should step down as adjudicator and resign from their appointment. The rationale is to save time and cost for the parties.

In one adjudication matter before the KLRCA, the adjudicator resigned from the adjudication on the basis that there was no construction contract in writing between the disputing parties. The reasoning was stated clearly in the resignation letter of the adjudicator.

The unique issue that arises in these circumstances is whether the adjudicator is then entitled to payment of any fees.

The argument in favour of payment of a proportion of fees is that the adjudicator has undoubtedly invested time in the adjudication, has read the submissions of the parties and has then come to the reasoned conclusion that he has no jurisdiction to act in the matter. The only difference is that the adjudicator then proceeds to resign from the appointment. It is to be noted that in keeping with Section 27(3) of the Act, the adjudicator may well have gone on to write the adjudication decision and stated therein his conclusion that he had no jurisdiction to act.

However, the other side of the coin is that due to the resignation of the adjudicator (and not the issuance of an adjudication decision), the rights of the parties are not settled and as such, the adjudication proceedings do not come to an end. The parties may still request the KLRCA to appoint a substitute adjudicator to continue the proceedings. In this scenario, it would appear to be against the spirit of the Act to request the parties to pay the fees of two adjudicators.

Having given due consideration to the facts in question, the KLRCA in keeping with the legislation has maintained that the matter of payment of the fees of the adjudicator is best left to the parties' discretion. Though appreciative of the time taken by the adjudicator in the matter, the payment of a proportion of the fees could be seen to be an unreasonable burden on the parties.

The KLRCA Adjudication Rules and Procedure (“the Rules”) does shed some light in this regard, namely at Rule 9(10) which stipulates that “If a party shall request adjudication, and it is subsequently established that he was not entitled to do so, that party shall be solely responsible for the adjudicator’s fees and expenses and all administrative fees as may be chargeable by the KLRCA.”

The reading of the words ‘subsequently established’ is silent on whether there is a requirement for an Adjudication Decision to be made, or if the Adjudicator resigns by a preliminary ruling deciding that he has no jurisdiction to proceed further with the adjudication.

Referable is Rule 9(6) of the Rules, which stipulates that ‘the adjudicator shall from time to time, as requested by the Director of the KLRCA, furnish other documents and information as may be required by the Director of the KLRCA to indicate the fees and expenses payable, including the KLRCA’s administrative fee, and the timeline of such payment.’

When Rule 9(6) and 9(10) are read together, it would infer that should the adjudicator resign by deciding he has no jurisdiction, and subject to having done his honest best in performing his role as an adjudicator up till his resignation, the resigning adjudicator shall consult with the Director of the KLRCA with regard to the proportion of his reasonable fees and expenses incurred, including the KLRCA’s administrative fees, up till the point of resignation. In determining the quantum of costs payable by the party requesting the adjudication, the adjudicator shall have regard to all relevant circumstances, including the terms of appointment of the adjudicator, the stage of proceedings at the time of his resignation, the administrative fee payable to the KLRCA and the reasonable costs incurred by the Respondent.

Matters to consider – It is advisable that to put to rest any uncertainty regarding the payment of fees of the adjudicator in a matter where the adjudicator is of the opinion that he has no jurisdiction to act, it is advisable that the adjudicator go on to adjudicate the dispute and write his decision (whilst considering all such jurisdictional issues within his decision).

6. Challenges to the appointment of an Adjudicator by the Director of KLRCA

Question – Whether the KLRCA has the capacity to deal with challenges to the appointment of the adjudicator after the adjudicator has been appointed under Section 23 of the Act?

Relevant provision – 23. *Appointment of Adjudicator by Director of the KLRCA*

(1) The Director of the KLRCA shall appoint an adjudicator under paragraph 21(b) within five working days upon receipt of a request and shall notify the parties and the adjudicator in writing...

Observation – The role of the Director of the KLRCA is limited to appointment of the adjudicator when the parties fail to do so pursuant to the provisions of Sections 21(b) and 23(1) of the CIPAA. Keeping with the objective of the Act to provide expeditious and practical justice to the parties, the Act does not delineate any specific procedure for challenges to the appointment of the adjudicator. This is also the case with security for payment legislations in other jurisdictions such as England and Singapore.

Pursuant to Regulation 4 of the CIPAA Regulations 2014, the competency criteria of an adjudicator are, amongst others, having a working experience of at least 7 years in the construction industry, being a holder of a Certificate of Adjudication from the KLRCA, to not be an undischarged bankrupt and to not be convicted of any criminal offence in Malaysia.

The KLRCA maintains a roster of adjudicators who fulfil the above criteria and appoint from the same roster when a request to appoint is received by it.

Before sending the notification of appointment to an adjudicator, the KLRCA also conducts a formal conflict check with the adjudicator to determine any conflicts of interest with the parties and the subject matter of the dispute. The appointment is only made when the adjudicator proclaims to be free of any conflict and available to adjudicate the dispute. The IBA Guidelines on Conflict of Interest and the CIPAA Adjudicator Code of Conduct are referred to for an indication of the circumstances that may lead to an appearance of bias.

As such, the duty of the KLRCA is fulfilled when an adjudicator is appointed by it, keeping in view the abovementioned two principles. In the absence of any provisions in the Act related to challenges to the appointment of the adjudicator, the KLRCA does not take any steps when such a challenge is received from any of the parties.

Matters to consider – It is evident that for preservation of natural justice in an adjudication proceeding, should a party wish to challenge the appointment of an adjudicator on the grounds of independence or impartiality or incompetence, it must be allowed to do so. However, the recourse for such a party would be an application to the relevant court invoking its inherent jurisdiction.

The adjudicator and parties may be guided by the parameters for conflict of interest in the appointment of an adjudicator, as provided for under Regulation 5(6) of the CIPAA Regulations 2014, as follows:

For the purpose of sub regulation (5), an adjudicator has a conflict of interest in his appointment to adjudicate a dispute in respect of a construction contract if—

a) the adjudicator is—

- i) an employee or partner of either party in dispute; or*
- ii) a director or shareholder of a corporation, where the party in the dispute is a corporation;*

b) the adjudicator is an employee, a director, a partner or shareholder of a corporation owned by either party in the dispute;

c) either party in the dispute is a member of the adjudicator's family; or

d) the adjudicator—

- i) has assisted either party in the dispute to prepare any document; or*
- ii) has provided either party in the dispute any advice, in relation to the construction contract.*

Under Schedule IV of the KLRCA Adjudication Rules & Procedure stipulating the Adjudicator Code of Conduct, Paragraph 2.2 indicates that “*An adjudicator must seek to disclose any information which may lead to the impression that he may not be impartial or fair...*”. Further, Paragraph 7 of the Adjudicator Code of Conduct stipulates the following guidance to an adjudicator to consider in circumstances of such challenges:

- 7.2 In the event that an Adjudicator is requested to withdraw because of prejudice or bias, the Adjudicator should withdraw unless, the Adjudicator after carefully considering the matter and in consultation with the parties determine that:*
- a) The reason for the challenge is not substantial;*
 - b) The Adjudicator can act and decide the case impartially and fairly; and*
 - c) The withdrawal would cause unfair delay or expense or would be contrary to the ends of justice.*

7. 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*⁶, 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).

Matters to consider – Given these statutory requirements, it is imperative that the adjudicator includes within his letter accepting his appointment⁷ 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.

⁶ KLHC Originating Summons No.: 24C-40-11/2015.

⁷ See 'Form 6 – Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.

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, it is recommended 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 6.⁸

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

8. 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 – Rule 2. Commencement & Registration of Adjudication

"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:⁹

⁸ See 'Form 6 – Notice of acceptance of the appointment to act as adjudicator' of the KLRCA Adjudication Rules & Procedure, at paragraph 6.

⁹ See Lam W. L. and Ivan Y.F.L. (2013). *Construction Adjudication in Malaysia*, CCH Asia, at page 263.

(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.

Matters to consider – 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,¹⁰ followed by a recommencement of the adjudication before the preferred adjudicator of the parties' choice.

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

9. Scope of exemption to government contracts under the First Schedule of the Exemption Order

Question – What is the scope of exemption afforded to Government Contracts that fall under the meaning of the First Schedule of the Exemption Order?

Relevant provision – *Paragraph 2(1) of the Exemption Order:*

“A Government construction contract as specified in the First Schedule is exempted from all provisions of the Act”.

The paragraph makes reference to the First Schedule that provides the following:

“A contract for any construction works —

- a) that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;*
- b) that relates to national security or security related facilities which includes the construction of military and police facilities, military bases and camps, prison and detention camps, power plant and water treatment plant.”*

Observation – Having considered the above, there are important prerequisites for such exemption to be highlighted:

- 1) Whilst the term “Government construction contract” is not defined in CIPAA, the meaning of the term may be deduced from the definition of “*Government*” and “*construction contract*” in Section 4 of CIPAA.

As such, one of the contracting parties must be a Government entity, to ensure that the contract by its true meaning falls under the scope of a “*Government construction contract*” as stated in Paragraph 2(1) of the Exemption Order.

- 2) If this is the case, it is necessary to take into account that, if the contract fulfil the features required under the First Schedule, it could be exempted and therefore, the CIPAA might not be applicable to the contract. The party initiating the adjudication proceeding will not be entitled to claim the under the CIPAA.

Matters to consider – A different approach should be taken when two private parties are carrying out works for a contract that arises from a government project. In these circumstances, the contract is not a “*Government construction contract*” as per the definition given under Paragraph 2(1), since none of the parties is a government entity.

As such, if any payment dispute arises out of this type of contract, the unpaid party would be entitled to initiate adjudication proceedings under CIPAA, since the matter will not qualify for exemption and the KLRCA will proceed to register the matter.

Reference can be made to the case of *Mudajaya Corporation Berhad v Leighton Contractors (Malaysia) Sdn Bhd*¹¹, where the court dismissed Mudajaya's application and held that subparagraph 2(1) of the Exemption Order clearly exempted a construction contract that is a "*Government construction contract*". The court decided in favour of Leighton stating that in keeping with the language of the provision, the Government must necessarily be a party to the construction contract in question. All other contracts do not fall within the Exemption Order.

10. Conditional Payment Clauses

Question – Are conditional payment clauses limited to the two types as set out in Section 35(2)? Are these stated conditional payment clauses exhaustive?

Relevant provision – Section 35, CIPAA:

"1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

2) For the purposes of this section, it is a conditional payment provision when:

a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or

b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party".

Observation – The meaning arising out of Section 35(2) seems to be restrictive and limits the interpretation of the term 'conditional payment provision'. In this sense, it would be reasonable to think that conditional payment provisions are confined only to the two features as stated under subsections (2)(a) and (2)(b) of Section 35. The lack of those characteristics would provoke that no conditional payment provision would exist.

Matters to consider – When read in line with the Judgment of YA Tuan Lee Swee Seng in the case of *Econpile Sdn Bhd v IRDK Ventures Sdn Bhd*¹² however, the above proposition may not have been the will of the Parliament when CIPAA was enacted. Section 35(1) states that "*Any conditional payment provision...*", meaning that it allows more facts to determine what a conditional payment provision is.

Therefore, Section 35 of the CIPAA does not have to be interpreted exhaustively, as, in words of Judge YA Tuan Lee Swee Seng, "*a more expansive interpretation would accord with the purpose of the Act*". Based on the factual circumstances of their contractual dispute, parties may be able to prove that any contractual obligation might be considered a 'conditional payment provision', even though their current scenario may not specifically fall under the scope as stipulated in Section 35(2).

¹¹ [2015] 10 MLJ 745

¹² KLHC Originating Summons No.: 24C-40-11/2015.

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