

7 MAY 2018

SHARING SOLUTIONS



ABOUT THE AIAC

Backed by 40 years of experience providing local solutions and cross-continental resolutions, the Centre has positioned itself to embark on a journey focused on shaping the global system of conflict resolution. Drawing from the Centre's international presence, the Centre takes on a new face, rebranding itself to the Asian International Arbitration Centre (AIAC), [formerly known as the Kuala Lumpur Regional Centre for Arbitration (KLRCA)], pioneering and spearheading efforts to deliver the future.

As the industry steps into a new age of conflict resolution, we remain steadfast to our ongoing commitment to the global ADR ecosystem and the stakeholders we serve. From our humble inception under the auspices of AALCO over four decades ago, we have since evolved into a multi-purpose hub for the ADR community – pioneering initiatives such as the Standard For, Contracts for the construction industry, and spearheading transformation within the areas of sports and Islamic arbitration.

This rebranding is a milestone which signifies a new era of expansion for us in our continuous effort to provide the best possible services and innovation solutions, from Asia for the world. With a firm footing in the past, the AIAC is ready to expand and become a global hub for dispute resolution and dispute – standing out to be a catalyst of innovation, capacity building and holistic alternative dispute management for the industry.

ABOUT CIPAA 2012

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

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

AIAC & CIPAA 2012

Under CIPAA 2012, AIAC is responsible for;

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

*According to Section 3(1) of the Arbitration (Amendment) Act 2018 [Act A1563] and the Ministers' appointment of the date of coming into operation, gazetted on 27th February 2018, the name of Kuala Lumpur Regional Centre for Arbitration (the "KLRCA") was changed to the Asian International Arbitration Centre (Malaysia) (the "AIAC") starting from 28th February 2018. Any reference to the KLRCA in Construction Industry Payment and Adjudication Act 2012 published by the KLRCA, in any written law or in any instrument, deed, title, document, bond, agreement or working arrangement shall, after the 28th February 2018, be construed as a reference to the AIAC. All approvals, directions, notices, guidelines, circulars, guidance notes, practice notes, rulings, decision, notifications, exemptions and other executive acts, howsoever called, given or made by the KLRCA before 28th February 2018, shall continue to remain in full force and effect, until amended, replaced, rescinded or revoked.





CIPAA CONFERENCE 2018 – SHARING SOLUTIONS

Statistical analysis, updates and commentary on the trajectory and growth of adjudication in Malaysia based on current and updated statistical data collected since the coming into force of the revolutionary Construction Industry Payment and Adjudication Act 2012 on 15th April 2014 up to 15th April 2018.

This report is generated by the AIAC strictly for educational and awareness purposes and in connection with the CIPAA Conference 2018 only. It is not to be distributed or used for any other purposes without written authorisation from the AIAC.

7th May 2018

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PART I

MESSAGE FROM THE DIRECTOR





Greetings from the Asian International Arbitration Centre (AIAC).

It is with great pleasure I present to you the AIAC's annual analytical report and commentary on adjudication framework in Malaysia as part of the CIPAA Conference, 2018.

This year is very special to all of us at the AIAC for many reasons; it is the 4th year of coming into force of the Construction Industry Payment & Adjudication Act 2012 (CIPAA), our 40th year celebrations as centre for dispute resolution and the first year with new beginnings and aspirations as the Asian International Arbitration Centre. We are looking to progress together with our stakeholders while ensuring at all times that our focus continues to remain on our stakeholders and their evolving needs.

It is therefore no surprise that the theme of this year's CIPAA Conference is "Sharing Solutions." This theme is reflective not just of the various developments in the statutory adjudication mechanism but also the many initiatives that the AIAC has adopted to promote best practices and innovative measures. However, before I proceed any further, I must take this opportunity to express my gratitude to each one of you for your continued effort and contribution to this collective endeavour.

As of 15th April 2018, the AIAC has registered more than 1,500 adjudication cases in total with more than 760 new cases registered in the last financial year, representing a 30% increase in comparison to the previous year. The question of whether this trend will continue remains to be seen. However as always our focus at the AIAC is not to work towards the increase in cases but to ensure the most effective statutory adjudication system for the benefit of the construction industry in Malaysia. Towards this end, one of the initiatives undertaken by the AIAC in the year 2017 was also the launch of the 1st ever CIPAA compliant Standard Form Contract (SFC) for the building industry. We aim to introduce other standard forms in the coming months to promote holistic dispute management.

This year's analysis will continue to reinforce the success of the CIPAA as a time and cost-effective resolution of payment disputes in construction industry. In our analysis we have attempted to gather data through new and innovative measures such as extending our questionnaire and surveys to both adjudicators and stakeholders. In the spirit of transparency, the questions posed to these stakeholders are also enclosed in this report.

The analytics presented in this report is based on the adjudicators', parties' and their counsels' responses received to questionnaire surveys conducted by the AIAC. An input that all stakeholders provided allowed is invaluable and I would like to thank all those who participated in the surveys. The data collected allowed the AIAC to look at the adjudication proceedings from a different perspective, consider and assess the trends emerging. We also look forward to understand the learnings of these findings to promote process efficiency and continue to take steps to promote administrative efficiency.

The theme of the CIPAA Conference, 2018 is 'Sharing Solutions' and in this report the AIAC endeavors to share observations, administrative guidelines and best practices with all stakeholders, be it frequent or first time users of adjudication, to aid them in navigating the CIPAA and adjudication proceedings.

Without further ado, I take this opportunity to welcome you to the CIPAA Conference, 2018 and thank all of you for the support showed to the AIAC in preparation of this report.

Thank you.

Yours sincerely,



Datuk Professor Sundra Rajoo
Director of the Asian International Arbitration Centre (AIAC)



PART II

ANALYSIS OF DATA



THE DIRECTOR'S INTRODUCTION REGARDING THE AIAC'S NEW APPROACH TO COLLECTING STATISTICAL DATA FOR THE 2018 CIPAA REPORT

With 779 new cases received during the 2018 fiscal year – an increase of approximately 39% (217 more cases) from the 2017 fiscal year to the 2018 fiscal year – the AIAC has reached a new milestone. Based on the adjudication cases received during the 2018 calendar year up to 15 April 2018, the total number of cases for the 2019 fiscal year is anticipated to reach 882, which will be yet another increase.

As much as this is a testament to the success of CIPAA adjudications administered by the AIAC, it also signifies an increase in data and in analytical complexity. Businessman Tim O'Reilly is often quoted for stating "[w]e're entering a new world in which data may be more important than software" and this holds true in many respects. When it comes to the CIPAA Report and the AIAC's compilation of statistical data, both the raw data and the software or process for handling the raw data are important. Accounting for the fact that there were close to 800 matters received by the AIAC during the 2018 fiscal year, pursuing the traditional ways of compiling statistical information is no longer practical.

The AIAC, in line with its continuous efforts of digitising all internal processes of adjudication proceedings, therefore created online questionnaires for adjudicators and parties to adjudication proceedings. The AIAC selected a total of 461 matters from the 2018 fiscal year, for which the adjudicator had already rendered an adjudication decision, and then contacted all adjudicators who acted as adjudicators in these matters, requesting them to fill-in in a special online form the information the AIAC requested (the "adjudicator questionnaire").

The response to our questionnaire, which for this year contained only ten questions, was overwhelming. The AIAC received answers for around 75% of all matters directly from the (former) adjudicators. For the remaining matters, the AIAC compiled the necessary information internally.

The AIAC also created an online questionnaire for parties in adjudication proceedings and contacted the parties (or their representatives) of the same 461 adjudication proceedings, requesting them to fill-in another set of ten questions (the "party questionnaire". For the avoidance of doubt, these questions were different from the questions the AIAC asked to adjudicators.

In this chapter, you can find a compilation of

- (i) the answers the AIAC received on the adjudicator questionnaire from adjudicators;
- (ii) the answers the AIAC received on the party questionnaire;
- (iii) the AIAC's finalisation of the adjudicator questionnaire in those instances the AIAC did not receive any answer from adjudicators; as well as
- (iv) all other matters pertaining to the 2018 fiscal year (i.e., matters, that are not contained in the selected set of 461 adjudications).

There is a clear indication for each sub-chapter on what basis the AIAC compiled each set of statistics. Furthermore, the questionnaires which were accessible online to the adjudicators and to the parties (or their representatives) of the selected 461 adjudications are attached at the end of this chapter.

The responses the AIAC received on the party questionnaire were not exhaustive. As such, the responses received may or may not be representative of the data of all parties that were involved in CIPAA adjudications or CIPAA-related proceedings (e.g. setting-aside proceedings, enforcement proceedings, etc.). Nevertheless, the data suggests useful insights that support the development and implementation of educational and training programmes designed to further strengthen the use and utility of CIPAA 2012. The data also gives useful insights as regards the areas where further improvements are possible.

Readers are cautioned that while the AIAC took all steps to verify the information provided by the participants of the party questionnaire as well as the adjudicator questionnaire, the AIAC cannot and does not guarantee complete correctness of the information contained herein.

Albert Einstein once said “[n]ot everything that can be counted counts, and not everything that counts can be counted.” As you will be able to see on the following pages, the AIAC undertook to count and analyse everything that counts. In future years, when compiling statistical information, the AIAC will endeavour to provide even more detailed information on as many cases as possible, ideally through even more automatised processes.

On a final note, compiling all the statistical information available now would not have been possible without the help of many adjudicators and parties, to which the AIAC is tremendously grateful. Because of their assistance, the CIPAA Report 2018 is the most comprehensive and most informative CIPAA Report of all times!
Thank you very much.

Yours sincerely,

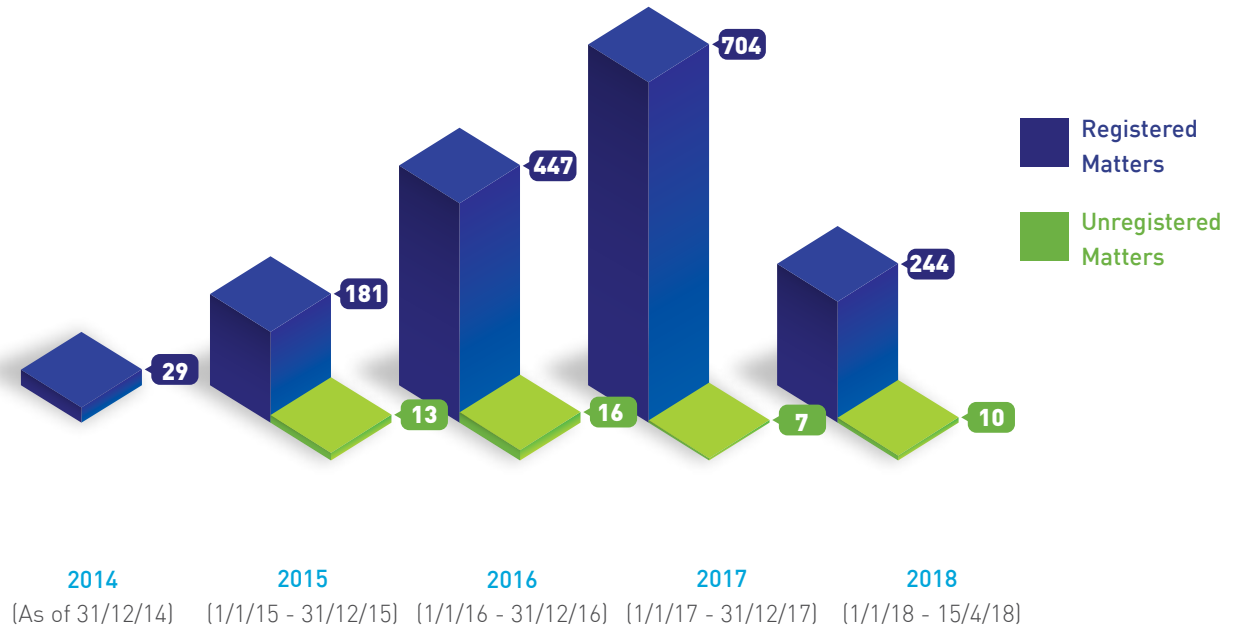


Datuk Professor Sundra Rajoo
Director of the Asian International Arbitration Centre (AIAC)

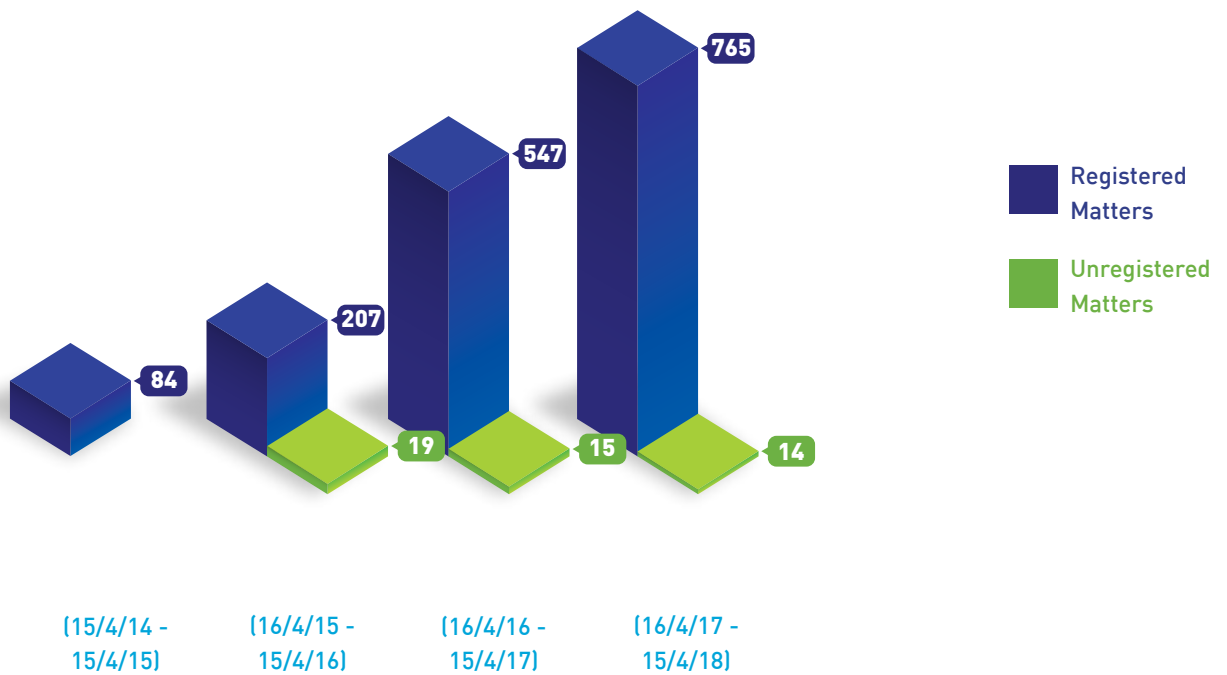
1. Information regarding new matters*

* [All statistics compiled based on the AIAC's internal analysis]

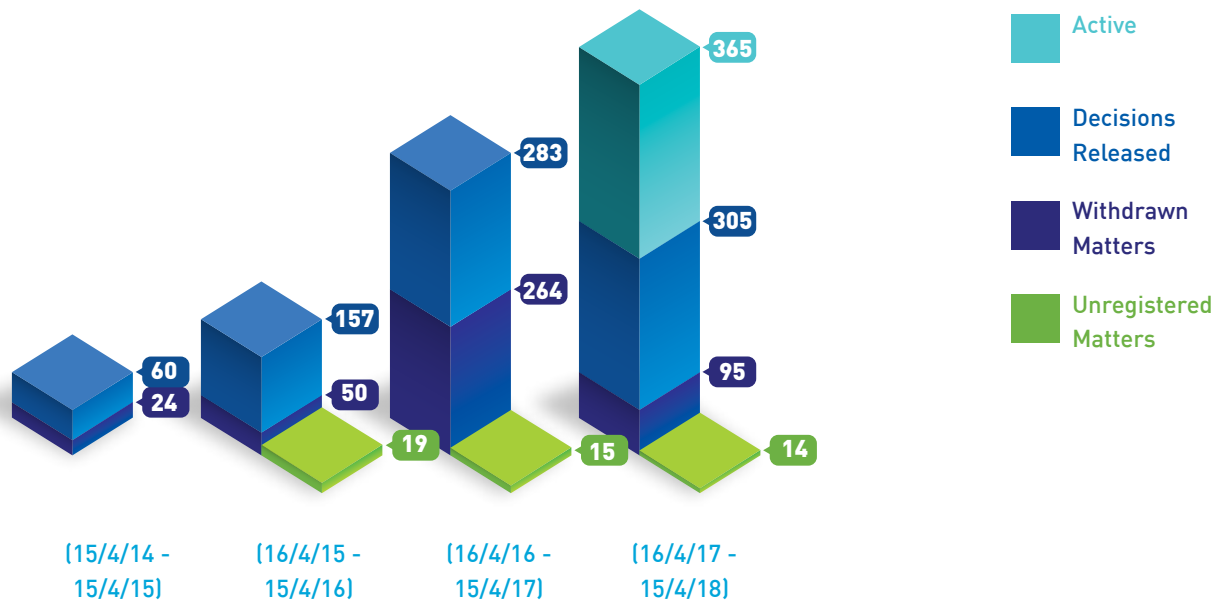
1.1. Registered and unregistered matters by calendar year (1st January to 31st December)



1.2. Registered and unregistered matters by fiscal year (16th April to 15th April)



1.3. Active matters – matters where a decision was released and matters withdrawn during the fiscal year



Analysis and comments by the AIAC

With 711 adjudication matters in the calendar year 2017, up from 463 in the year 2016, the AIAC set yet another record in the number of adjudication matters registered. The vast majority, 704 of these matters, was fully registered by the end of the year 2017, with only seven matters still pending registration. This is a clear indication that CIPAA works and that unpaid parties resort to the fast and uncomplicated adjudication-proceedings.

The trend of growth continues in the 2018 period relevant for the 2018 CIPAA Report:

If during the remainder of the year 2018 as many matters were referred to CIPAA Adjudication, by the end of the 2018, the cases reached would be

882,

which would also constitute a new record.

The 779 cases for the fiscal year, starting on 16 April of each calendar year and ending on 15 April of the following year, also constitute a new record.

However, the AIAC expects that the number of CIPAA matters will slow down in the coming years. This is because the AIAC is well-aware of overall changes in the industry as a result of the implementation of CIPAA. With the CIPAA now widely accepted as a cheap and efficient way to resolve disputes, the parties to agreements under which they need to pay other parties, generally show an increase in their paying morale. CIPAA is thus set to reach its objective.

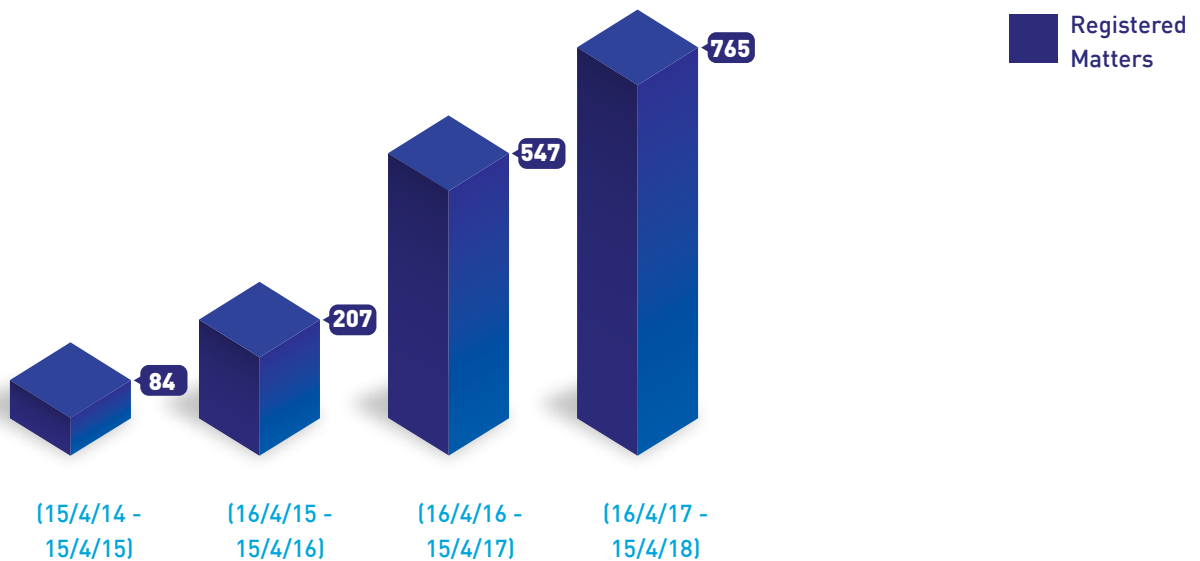
2. Information regarding registered matters*

* (All statistics compiled based on the AIAC's internal analysis)

2.1. Registered matters based upon calendar month

Month	Reg. Matters 2015 (As of 15/4/15 -31/12/15)	Reg. Matters 2016 (As of 15/04/16)	Reg. Matters 2016 (As of 16/4/16 -31/12/16)	Reg. Matters 2017 (As of 15/04/17)	Reg. Matters 2017 (As of 16/4/17 -31/12/17)	Reg. Matters 2018 (As of 15/04/18)	Total Reg. Matters (From 15/4/14 - 15/04/18)
Jan		13		28		97	150
Feb		19		48		46	124
Mar		27		70		77	202
Apr	1	22	11	35	27	24	124
May	12		34		60		106
Jun	7		29		53		90
Jul	15		40		50		107
Aug	9		42		77		131
Sep	10		33		65		111
Oct	25		48		64		144
Nov	31		75		63		173
Dec	16		54		62		141
Sub-total	126	81	366	181	521	244	1603
Total		207		547		765	

2.2. Registered matters based upon CIPAA fiscal year



Analysis and comments by the AIAC

January 2018

was the month with the highest number of cases registered,

97 registered cases to be exact.

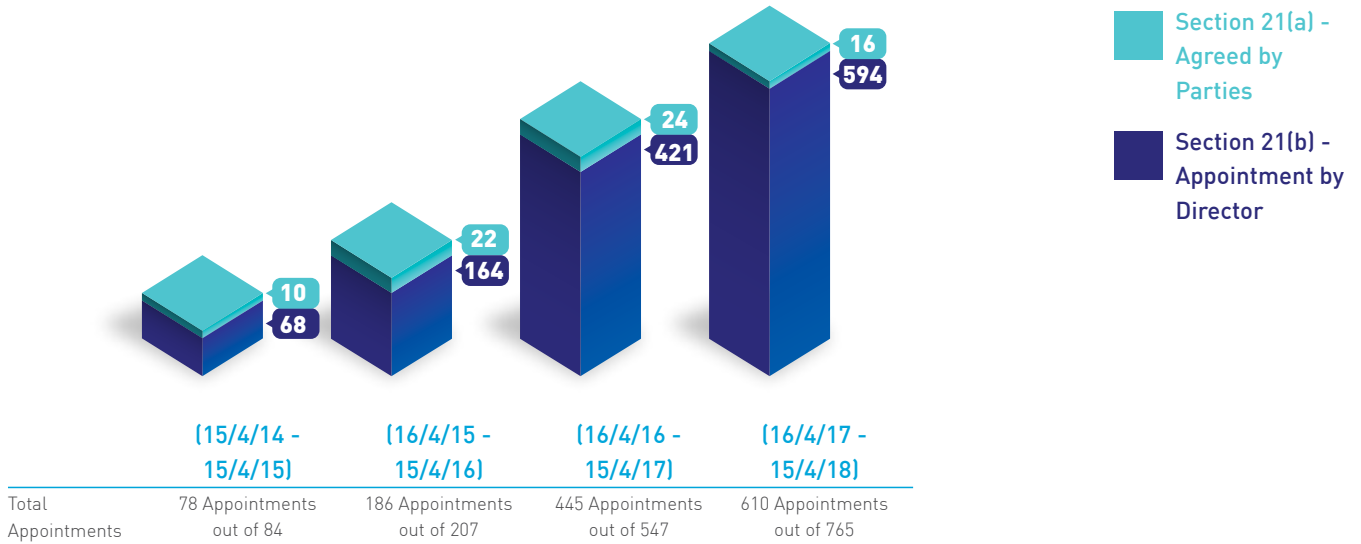
Generally speaking, March is the calendar month during which the AIAC records a high number of registered matters and March 2018 was no exception. The 77 matters registered are the second-highest number of matters registered in a single month since the commencement of CIPAA.

Quarter 4 of the fiscal year (January – March) and Quarter 3 of the fiscal year (October – December) have traditionally been the strongest months by the number of registered cases. The AIAC understands this to be the case as many unpaid parties would initially try to negotiate with the party that has failed to pay, but by the end of the calendar year or the beginning of the calendar year bring a claim if these negotiations are not fruitful.

3. Information regarding the appointment of adjudicators*

* [Statistics compiled based on the AIAC's internal analysis]

3.1. Appointments by the parties and appointments by the AIAC based on registered matters

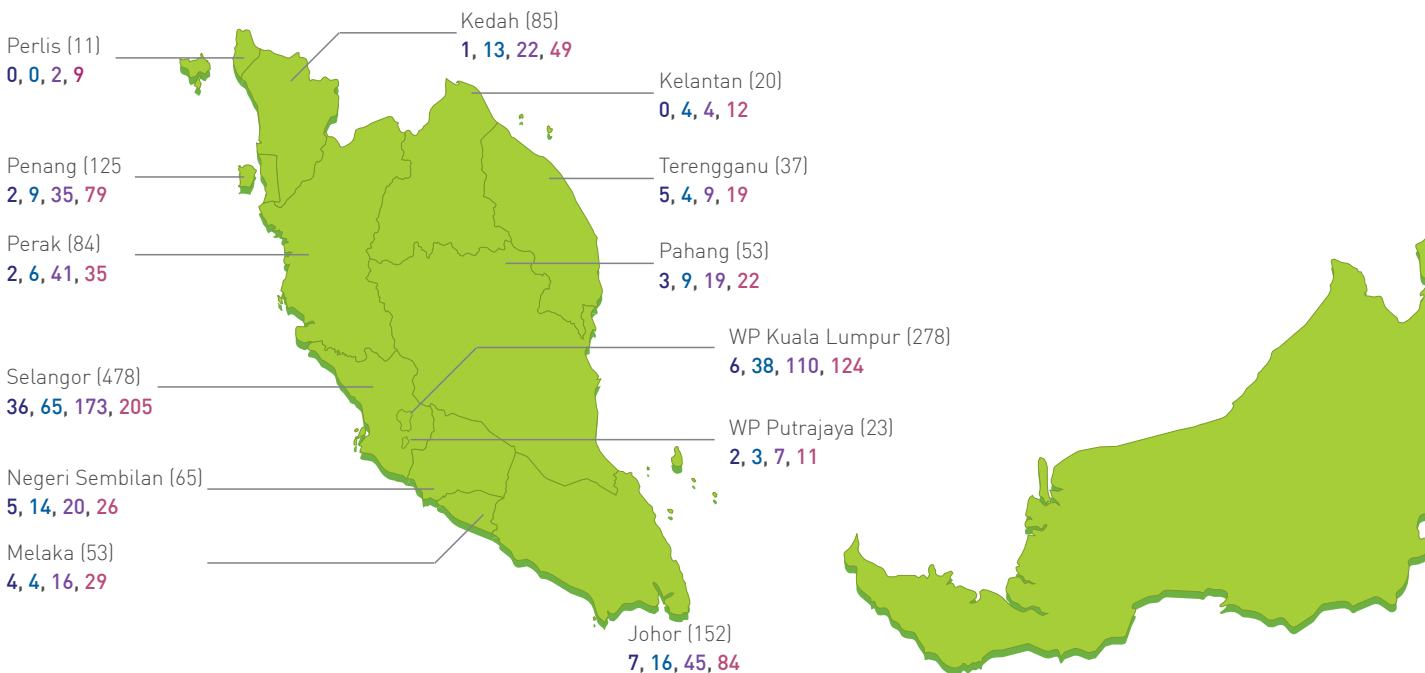


4. Information regarding registered matters based on the site location*

* [Statistics compiled based on the AIAC's internal analysis]

4.1. Site locations by States based on the fiscal year 2018

State [Total Matters from 15/4/14 - 15/4/18]
 [15/4/14 - 15/4/15], [16/4/15 - 15/4/16], [16/4/16 - 15/4/17], [16/4/17 - 15/4/18]



Analysis and comments by the AIAC

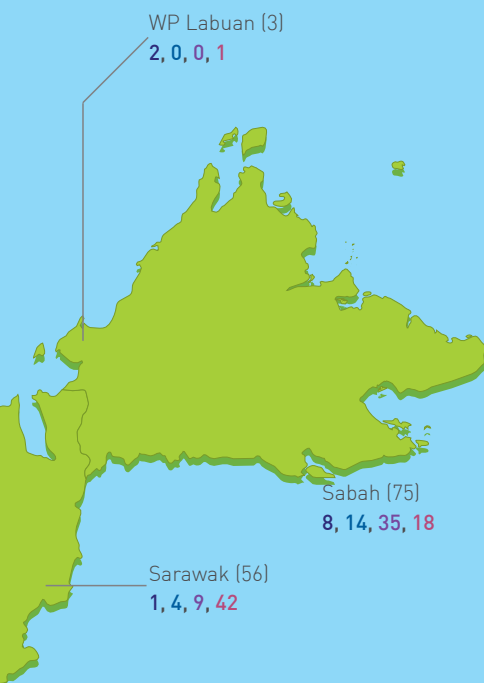
Since the enactment of the CIPAA, the parties have jointly appointed an adjudicator only in approximately 5% of all matters.

For the 2018 fiscal year, this number stood at only

around 2.6%

of all matters.

These numbers reflect the realities of disputes: When two or more parties are in a dispute, reaching an agreement on the identity of the adjudicator is often difficult. This will particularly be the case when the non-paying party does not even respond or participate in the adjudication proceedings.



Analysis and comments by the AIAC

With 328 out of 765 matters located in the State of Selangor and the Federal Territory of Kuala Lumpur, more than 42% of all registered matters have the site location in the Klang Valley. This is directly related to the large number of construction projects taking place in Selangor and the Federal Territory of Kuala Lumpur. It is noteworthy that during the first three fiscal years of CIPAA, this number was around the 50% mark. This indicates that over time, there has been an increase in the number of cases stemming from other States.

The most notable increase in the percentage of registered matters is in the State of Sarawak, which skyrocketed from only 9 matters in the 2017 fiscal year to 42 matters in the 2018 fiscal year (367% increase). The State of Perlis also showed a remarkable increase of 350%, with 9 matters now registered in comparison with the previously meagre two matters.

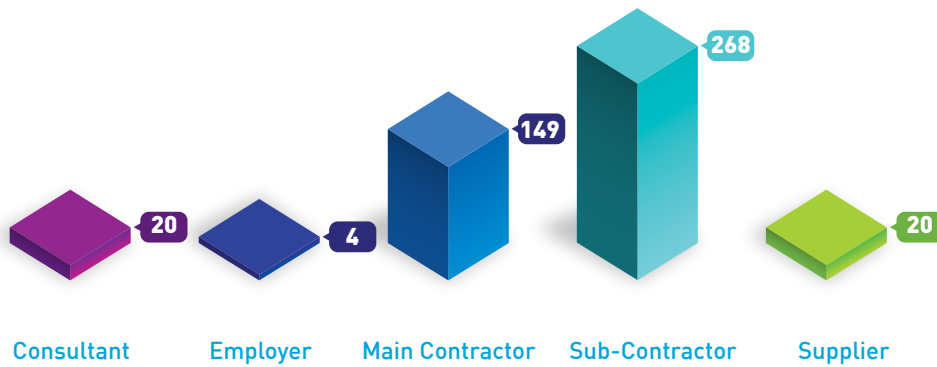
It is furthermore noteworthy that in the Klang Valley, due to the high number of matters already registered in the 2017 fiscal year, there was an increase of only approximately 16% in matters registered in the 2018 fiscal year. The AIAC anticipates that the growth rates – as well as overall growth – will further slowdown in the coming years.

The State of Sabah is the only State where there was a decrease in registered matters, from 35 during the 2017 fiscal year to 18 matters in the 2018 fiscal year. All other States recorded an increase in registered matters.

5. Information regarding Claimants acting in CIPAA Adjudications during the 2018 fiscal year

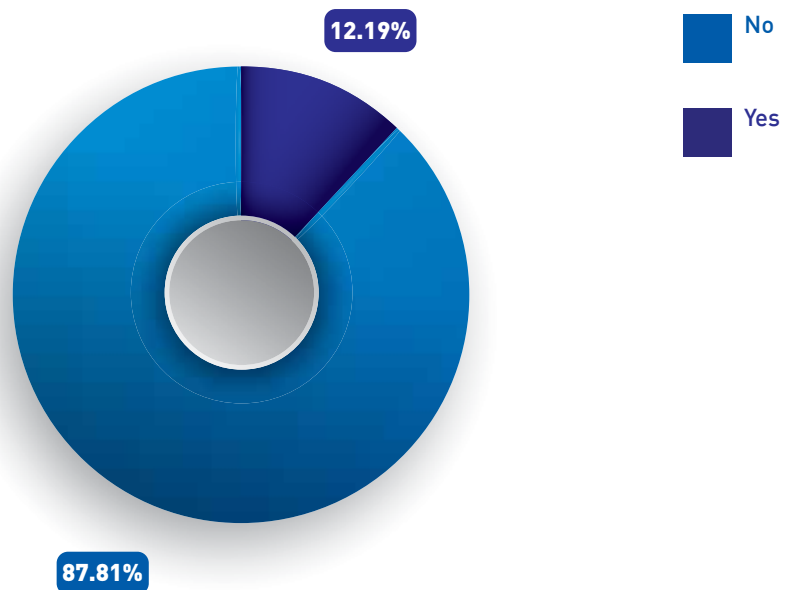
5.1. Claimants' profiles in CIPAA adjudications*

* (Statistics compiled based on the adjudicator questionnaire)



5.2. Information regarding the number of cases withdrawn*

* (Statistics compiled based on the AIAC's internal analysis)



Analysis and comments by the AIAC

CIPAA has always been a means for contractors, including sub-contractors, to obtain payment swiftly, as the first years of CIPAA have clearly shown.

Unsurprisingly, there was no change in the profile of the party seeking recovery of an amount outstanding (the “Claimant”) for the 2018 fiscal year, where over

90%

of all Claimants were Contractors – either Main Contractors, or Sub-contractors. This is similar to the figure of 88% during the 2017 fiscal year.

The remaining 10% of Claimants are split among Consultants and Suppliers, each accounting for over 4%, and Employers, who only make up less than 1% of all Claimants. The numbers for the 2018 fiscal year again confirm that the vast majority of all non-paid parties are main-contractors or sub-contractors.

For the abundance of clarity, when the AIAC collects statistics for Claimants’ profiles for the CIPAA Report, no differentiation is made between a sub-contractor to the main contractor and those sub-contractors, which are sub-contractors to other sub-contractors.

According to Section 17(1) of the CIPAA, a Claimant may at any time withdraw an adjudication claim by serving a notice of withdrawal in writing on the Respondent and the adjudicator. A Claimant thus has the power to withdraw the adjudication claim at any time, irrespective of whether the Respondent and/or the adjudicator consents to same. For the avoidance of doubt, a Respondent cannot withdraw an adjudication claim.

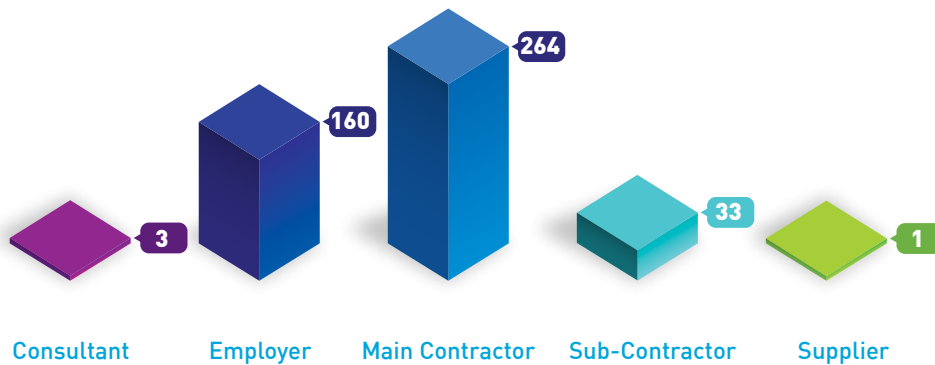
Withdrawal takes place for various reasons. The parties may settle the dispute meaning that there is no need to receive the adjudicator’s decision. The Claimant may also take a different approach as to its chances of winning than it took at the outset of the proceedings, for instance because the Respondent submitted very compelling evidence. Finally, there may be instances, where the Claimant simply uses the adjudication claim as a threat and in doing so, achieved the aim of its threat.

During the 2018 fiscal year, the withdrawal of cases only played a minor role. As such, only 12.19% of all cases were withdrawn – and 87.81% of all cases reached the adjudication decision stage.

6. Information regarding Respondents acting in CIPAA Adjudications during the 2018 fiscal year

6.1. Respondents' profiles in CIPAA adjudications*

* (Statistics compiled based on the adjudicator questionnaire)



Analysis and comments by the AIAC

The Respondents to CIPAA adjudication proceedings are predominantly Employers (the counterparties of Main Contractors) and Main Contractors (the counterparties of Sub-contractors). The proportion of Employers and Main Contractors as the Respondents to adjudication proceedings mimic those of Contractors being the Claimants to adjudication proceedings, as discussed in section 5 above.

Jointly, approximately

92%

of Respondents are made up of Employers and Main Contractors.

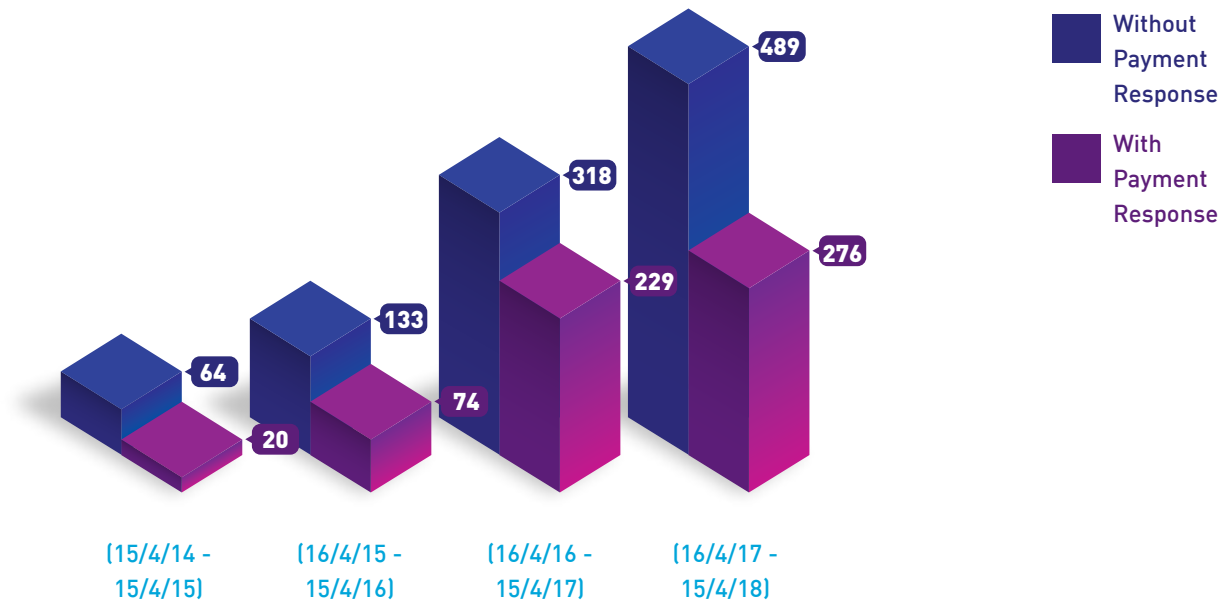
This is slightly larger than the share of Claimants who are Main or Sub-contractors.

Since Sub-contractors only make up around 7% of all Respondents, it is evident that the vast majority of all disputes between Contractors only (i.e. without the Employer being involved), are disputes between Sub-contractors as Claimants and Main Contractors as Respondents. There is only a minority of cases in which a Sub-contractor initiates an adjudication against another Sub-contractor.

With less than 1% combined, consultants and suppliers play a less frequent role as Respondents.

6.2. Respondents filing a payment response*

* [Statistics compiled based on the AIAC's internal analysis]



Analysis and comments by the AIAC

Filing a Payment Response is not mandatory under the CIPAA. It therefore is not surprising that a large number of Respondents never file a Payment Response. In fact, since the entry into force of the CIPAA, in every fiscal year there were more cases without a Payment Response than with one.

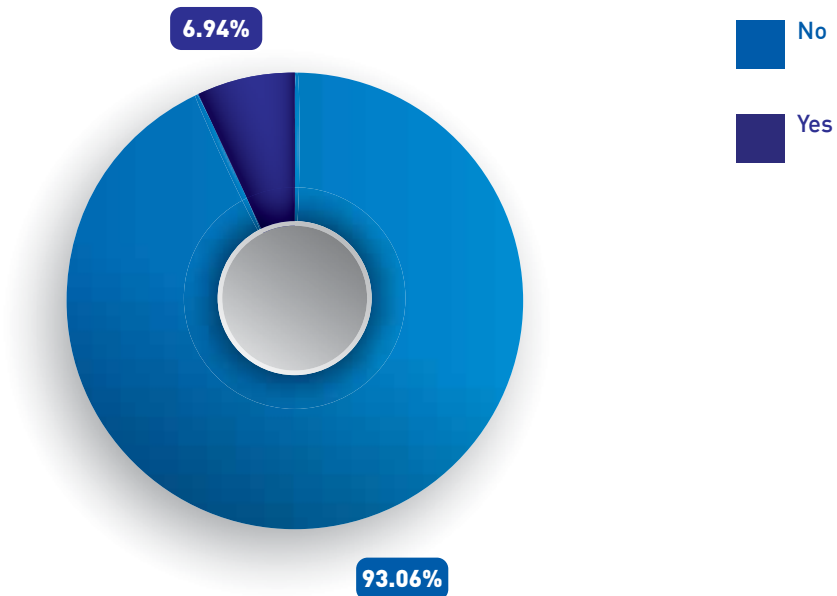
However, while in the 2015 fiscal year, fewer than 25% of all Respondents filed a Payment Response, this number has increased thereafter. It stood at 35.75% during the 2016 fiscal year and reached a record 41.86% during the fiscal year 2017. Although during the 2018 fiscal year, the number of Respondents filing a Payment Response decreased to 36.08%, this number is the second-highest since the CIPAA entered into force.

It remains to be seen to what extent the judgement by Federal Court in *View Esteem*, in which it was made clear that defences can be raised by a Respondent throughout the proceedings (and not just based on the defences submitted in the Payment Response) will have.

7. Information regarding oral hearings*

* (Statistics compiled based on the adjudicator questionnaire)

7.1. Adjudicated matters with and without an oral hearing (2018 fiscal year)



Analysis and comments by the AIAC

Having an oral hearing is by no means a must under the CIPAA.

In fact, the vast majority of adjudications under the CIPAA take place without any oral hearing.

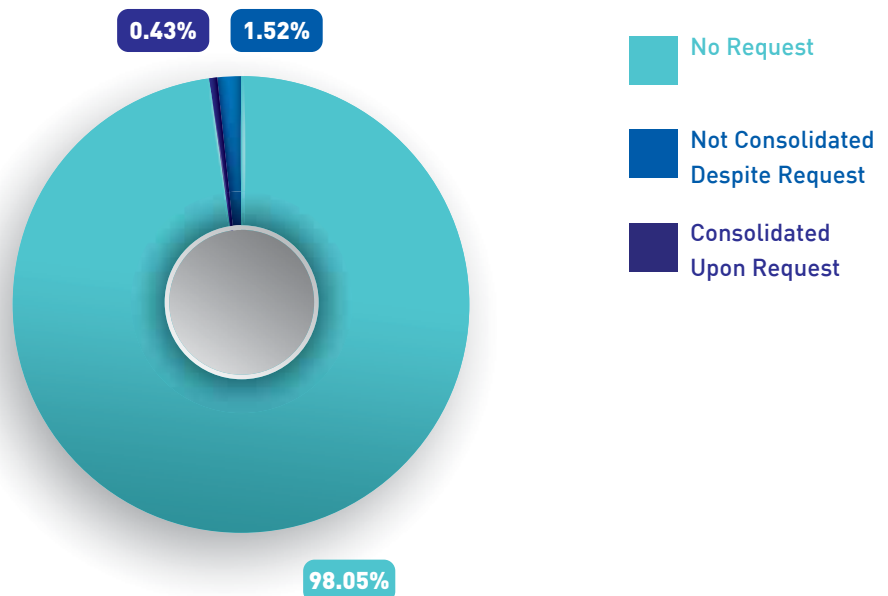
This is in line with the goal of the CIPAA to provide for an inexpensive and swift resolution of disputes. That said, an oral hearing may often be the better choice and even necessary, for instance when the dispute is of great complexity, or when there are witnesses to be examined.

In line with the overall goal of the CIPAA, during the 2018 fiscal year, over 93% of all adjudications that went to the decision stage were completed without an oral hearing. This confirms that the above-mentioned goal of the CIPAA is being met.

8. Information regarding the consolidation of two or more adjudications into a single one*

* (Statistics compiled based on the adjudicator questionnaire)

8.1. Consolidation requests in adjudicated matters (2018 fiscal year)



Analysis and comments by the AIAC

When there is more than one adjudication between the same parties arising out of the same construction contract, and all parties and the adjudicator agree, it is possible to consolidate all adjudications into a single proceeding. This offers the great advantage of enabling all matters to be dealt with in one proceeding before one adjudicator (or one adjudication panel). Such consolidation eliminates the necessity to plead related issues in several proceedings given that no party needs to “repeat” what it has already submitted in another case between the same parties. As a result, adjudicating all disputes in a single adjudication proceeding is usually much more efficient (and hence also cheaper) than doing so in several proceedings.

That being said, there is no “unilateral right to consolidation”. At the outset of the proceedings, before an adjudicator is appointed, the parties must agree. If the request for consolidation is filed after an adjudicator has been appointed, the latter must also agree. There may very well be instances where there are no efficiency gains in consolidating all disputes into one.

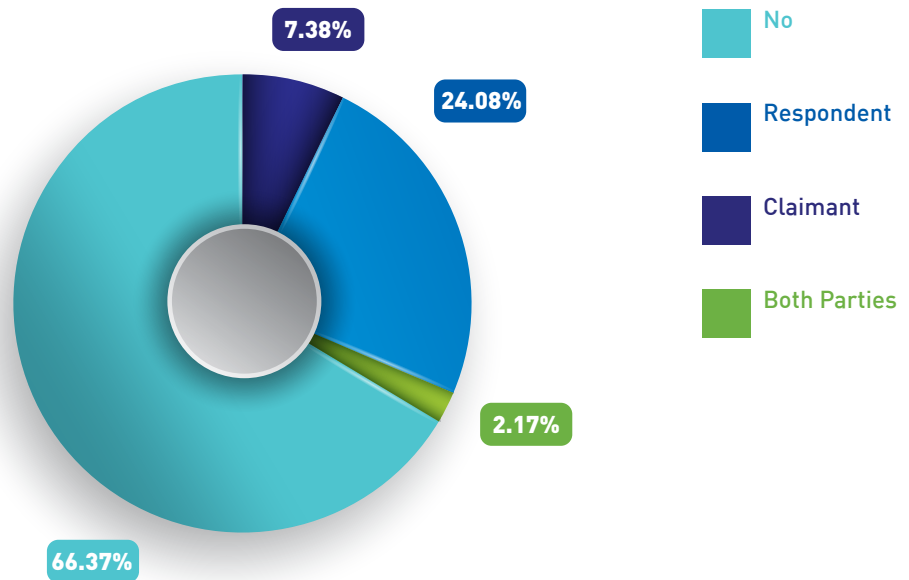
During the 2018 fiscal year, consolidation only played a very minor role. A request for consolidation was made in less than 2% of all matters.

In those instances where at least one party requested that two or more adjudications be consolidated, the adjudicator agreed to the request around 75% of the time (which in total is still only 1.5% of all CIPAA matters) and rejected the request around 25% of the time (approximately 0.5% of all matters).

9. Information regarding jurisdictional objections*

* (Statistics compiled based on the adjudicator questionnaire)

9.1. Jurisdictional objections in adjudicated matters (2018 fiscal year)



Analysis and comments by the AIAC

The CIPAA applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia. It will generally not apply to contracts entered into by a natural person for any construction work in respect of any building which is less than four storeys high, and which is wholly intended for that person's occupation (Sections 2 and 3 of the CIPAA). This means that the CIPAA has broad application and covers the majority of construction contracts in Malaysia.

However, this obviously does not mean that every single dispute arising out of a construction contract is subject to adjudication under the CIPAA. Additionally, even when an adjudicator does have the jurisdiction to hear a claim, a Respondent under CIPAA proceedings can generally only raise "passive objections" (i.e. set-off) and not claims of its own (i.e. counterclaims). If a Respondent also files a claim of its own, a Claimant could object.

The 2018 fiscal year shows that

jurisdictional objections

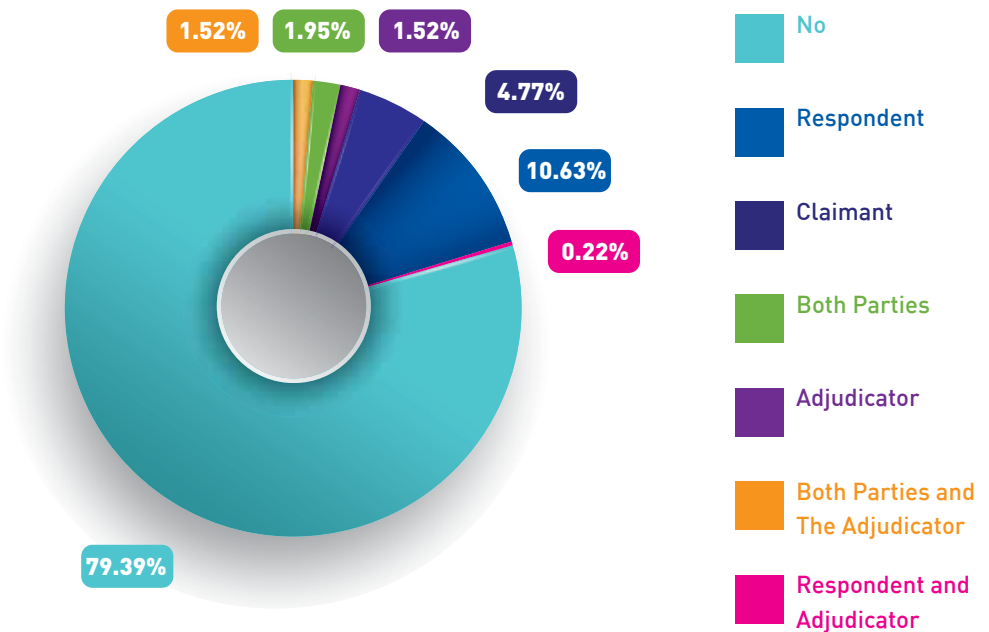
play a very important role in adjudications, since in more than one third of all matters analysed, at least one party raised a jurisdictional objection.

With over two thirds of all jurisdictional objections coming from Respondents, the "traditional" jurisdictional objections play the greatest role. However, the findings also indicate that approximately 21% of the jurisdictional objections came from Claimants. This shows that jurisdictional objections are by no means a defence only raised by Respondents. Finally, in around 6.5% of all matters with jurisdictional objections, both parties raised jurisdictional objections.

10. Information regarding extensions of time

* (Statistics compiled based on the adjudicator questionnaire)

10.1. Requests for extensions of time (2018 fiscal year)



Analysis and comments by the AIAC

Adjudication under the CIPAA works very well and this is evidenced by the fact that the vast majority of cases are completed within the time limits prescribed in the CIPAA.

In fact, in almost 80% of all matters, neither the parties nor the adjudicator(s) sought any extension of time. This means that in a little over 20% of all matters, an extension of time was sought.

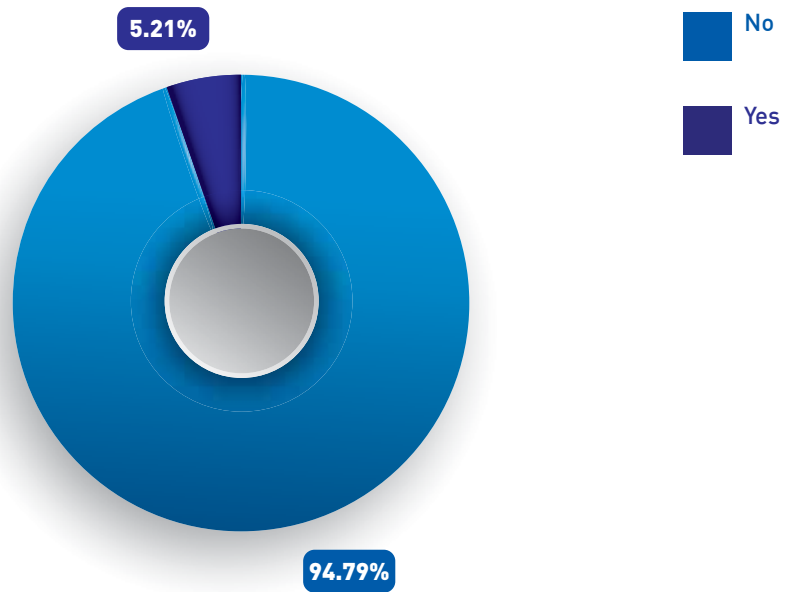
Our analysis shows that extensions of time in CIPAA adjudications are largely party-driven. Respondents in CIPAA adjudications seek an extension of time in over 51% of those matters where an extension is sought. Extensions sought by Claimants account for 23.16% of all extensions sought. In around 9.5% of all instances, both parties seek an extension of time. Thus, in approximately 85% of all instances, where an extension of time is sought, it is either a Claimant or a Respondent, which seeks an extension of time, or both of them.

At least one party is involved in most other requests for an extension: it is only in 7.37% of all instances that the adjudicator himself or herself seeks an extension of time. This may give the impression that 7.37% of all adjudicators are not capable of adhering to the strict time limits under CIPAA. Such an impression would be wrong. Although the AIAC did not undergo any further sub-categorisation of the reasons for when adjudicators sought an extension, the AIAC is well-aware that in the majority of cases when an adjudicator sought an extension of time, this was because the adjudicator had previously directed the parties to file additional submissions. Such direction would only be necessary if the earlier submissions filed by the parties were ambiguous, or failed or omitted to consider a matter relevant to the adjudication. Thus, a request by the adjudicator in such instances would ultimately be attributable to the parties' failure to file clear briefs from the beginning.

11. Information regarding settlement before the adjudication is terminated*

* (Statistics compiled based on the adjudicator questionnaire)

11.1. Settlements in adjudicated matters (2018 fiscal year)



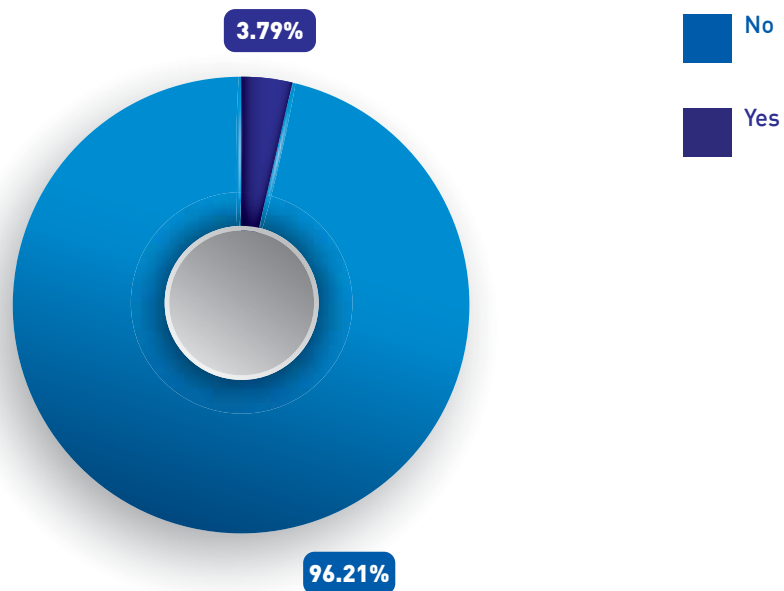
Analysis and comments by the AIAC

Settlement always remains as an option since the Claimant can withdraw the adjudication claim at any point in time (see above, section 5.2). During the 2018 fiscal year, 5.21% of all matters observed were settled in the course of the proceedings.

12. Information regarding CIPAA adjudications and the CIPAA (Exemption) Order 2014*

* (Statistics compiled based on the AIAC's internal analysis)

12.1. Contracts falling under the CIPAA (Exemption) Order 2014



Analysis and comments by the AIAC

According to the CIPAA (Exemption) Order 2014, exemptions apply to "Government construction contracts." Broadly speaking, when the government acts as the Respondent, applicable time limits are extended.

Additionally, general exemptions apply. When a government contract

- (i) is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;
- (ii) 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; or
- (iii) has a contract sum not exceeding twenty million Ringgit,

the CIPAA does not apply by default.

In the 2018 fiscal year, 3.79% of all CIPAA Adjudications were somehow exempted.

13. Information regarding the adjudicators under CIPAA*

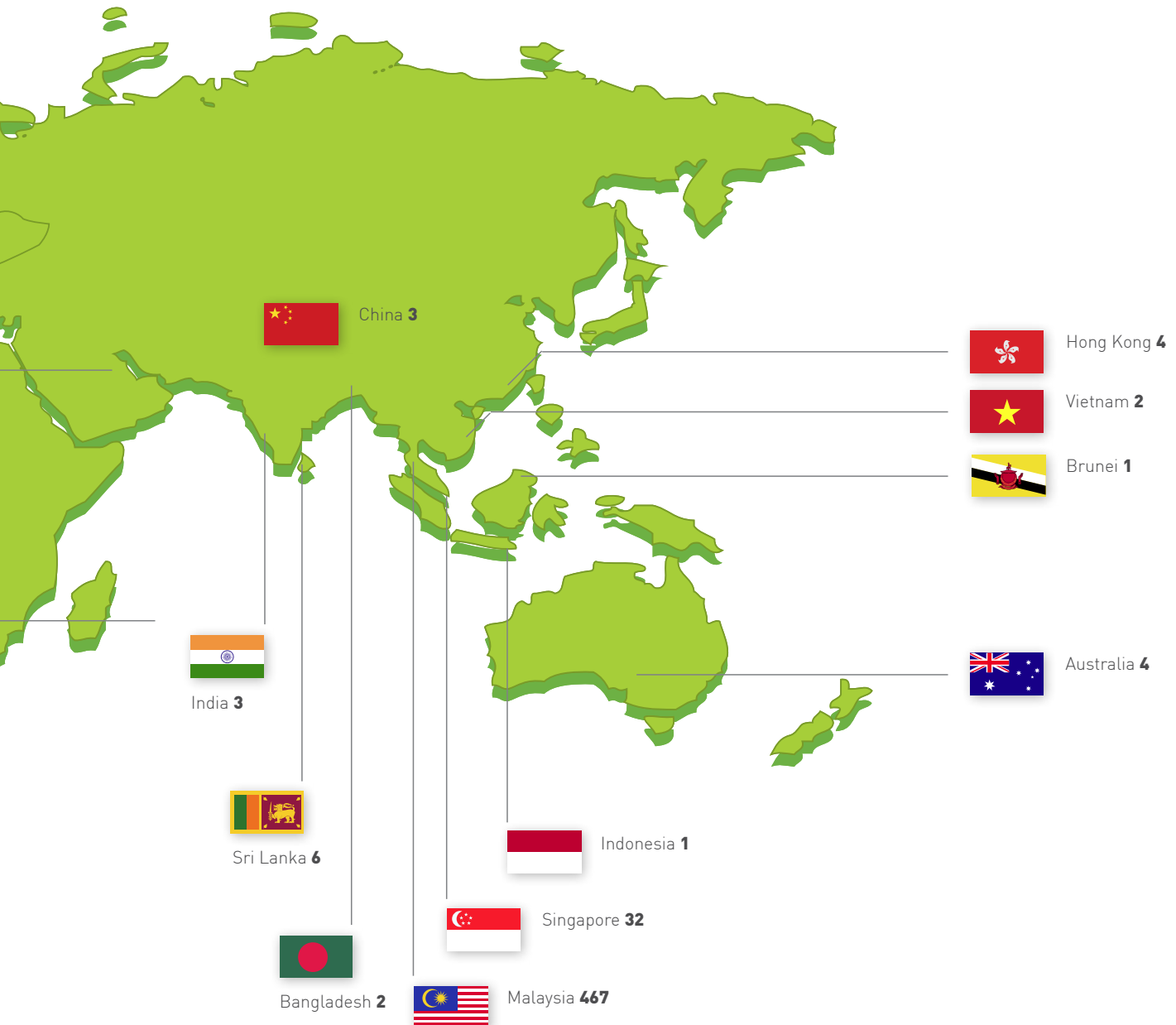
* [Statistics compiled based on the AIAC's internal analysis]

13.1. Adjudicators by place of residence worldwide

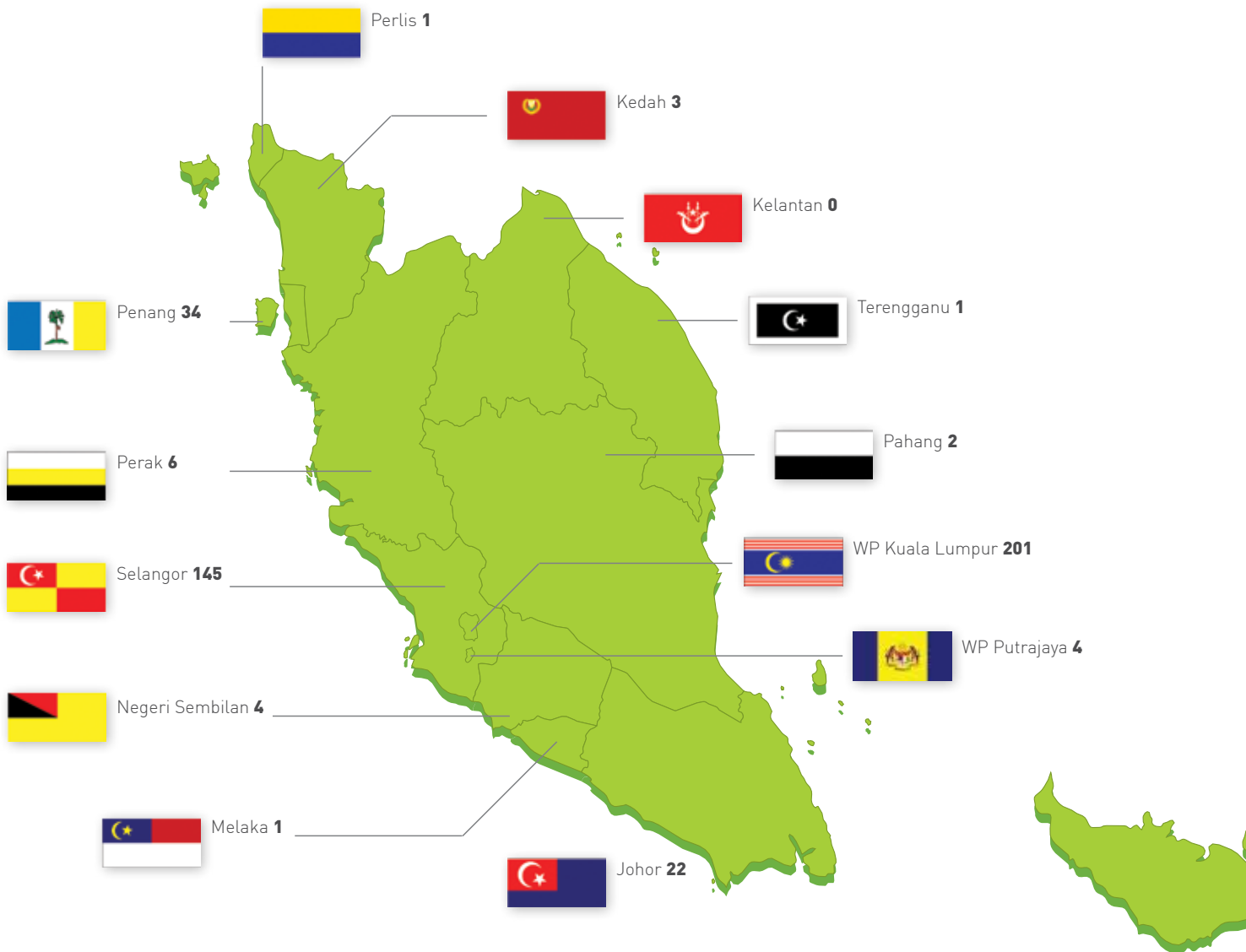


WITH
466

ADJUDICATORS EMPANELLED AS AT THE END OF THE 2018 FISCAL YEAR, THE VAST MAJORITY OF ADJUDICATORS HAS HIS OR HER PLACE OF RESIDENCE IN MALAYSIA



13.2. Adjudicators by place of residence (States) in Malaysia



Analysis and comments by the AIAC

With 466 adjudicators empanelled as at the end of the 2018 fiscal year, the vast majority of adjudicators has his or her place of residence in Malaysia. The AIAC regularly conducts its now well-established adjudicator certification programme and as a result, regularly adds new adjudicators to its roster of adjudicators. Therefore, there are now almost 25% more adjudicators from Malaysia empanelled than there were at the end of the 2017 fiscal year.

This is not to say, however, that adjudication under CIPAA is entirely left to adjudicators from Malaysia. A total of 75 foreigner adjudicators are empanelled with the AIAC and are usually relied upon when there is a foreign element to the adjudication, such as one party not being Malaysian, etc.



The largest number of foreign adjudicators are from Singapore, with 37 empanelled adjudicators. There are a total of 15 different countries in which the adjudicators have their place of residence, mainly in the Asia-Pacific region, but also in Africa (Mauritius), Europe (UK, Italy) and the Middle East (United Arab Emirates).

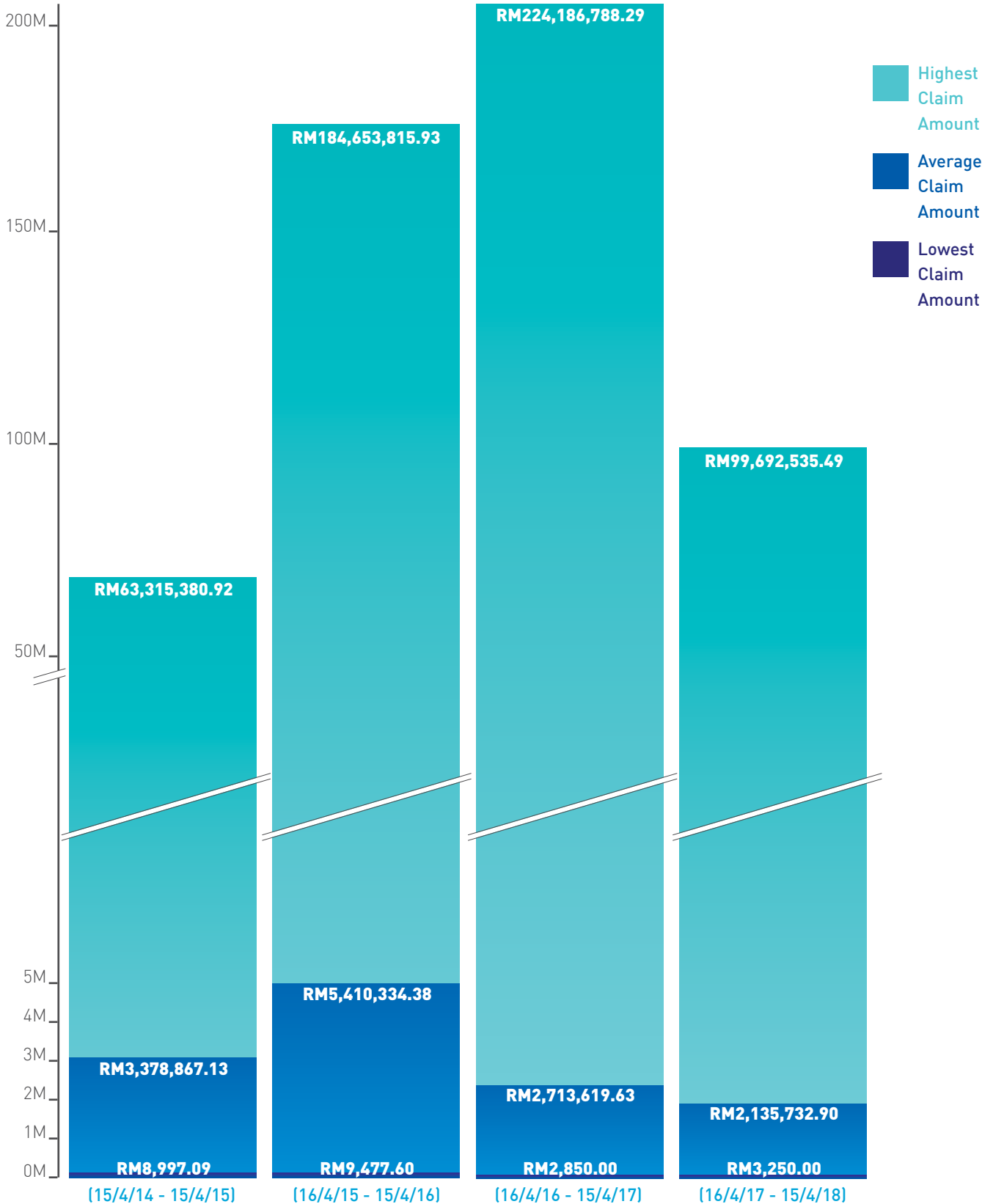
Since there are several foreign-national adjudicators, who have their place of residence in Malaysia or another country they are not a citizen of, there are a total of 18 nationalities of adjudicators. This includes, among others, an adjudicator from Austria, two from Canada, one from Ireland, and one from Thailand.

With respect to adjudicators in Malaysia, the vast majority are from the Klang Valley. Adjudicators from the Federal Territory of Kuala Lumpur and the State of Selangor form almost 75% of all Malaysian adjudicators empanelled with the AIAC. When requested to appoint an adjudicator, the AIAC endeavours to appoint an adjudicator geographically suited to the site location (which is also generally where the parties are from). This is usually possible, but not always, as there are several States with very few empanelled adjudicators or, in the case of the State of Kelantan, there is not even a single adjudicator empanelled with the AIAC. The AIAC will continue its efforts to maintain a highly diverse panel of adjudicators in the years to come.

14. Information regarding claimed amounts and awarded amounts*

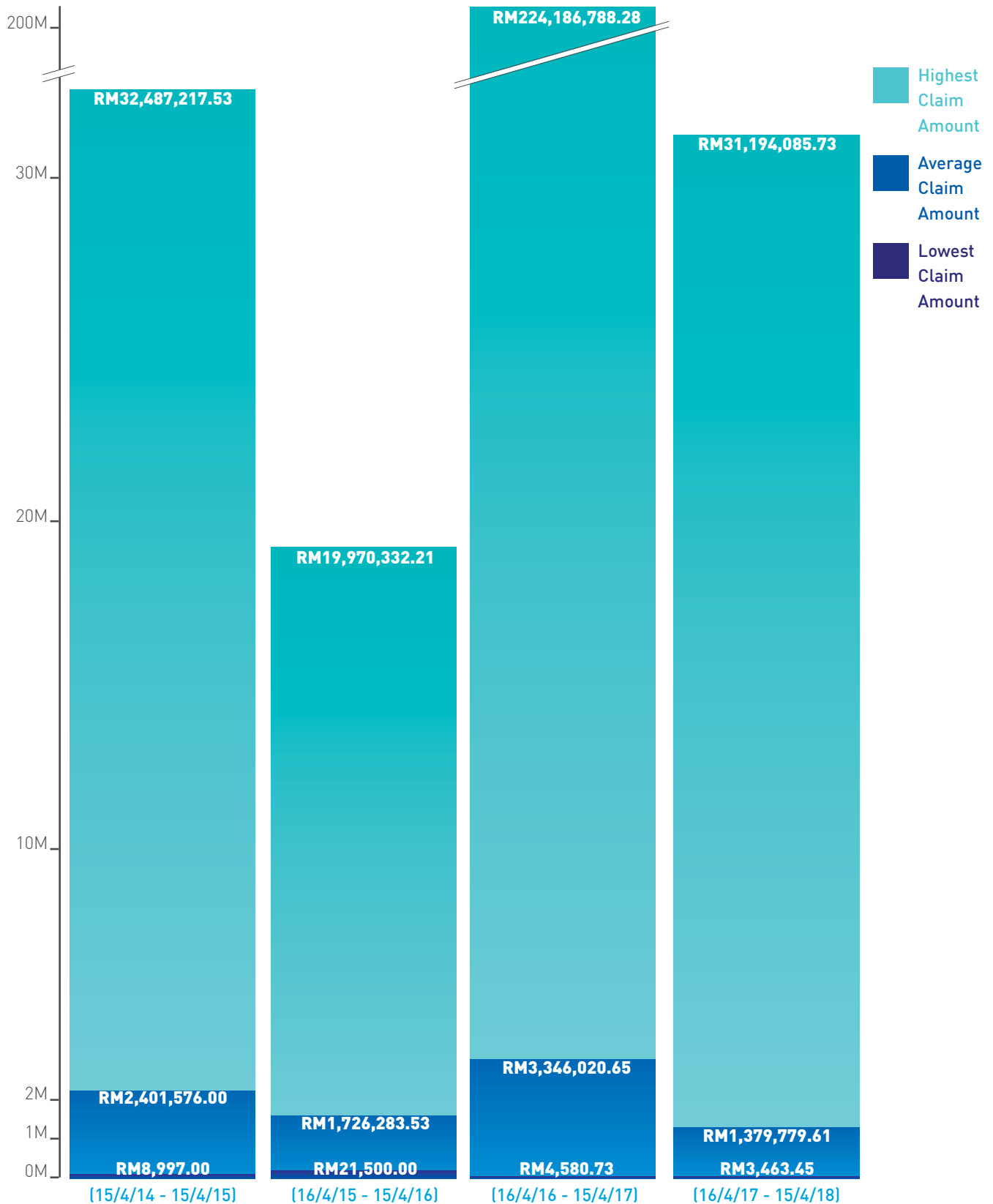
* [All statistics compiled based on the AIAC's internal analysis]

14.1. Claimed amounts per fiscal year: Total of all claims



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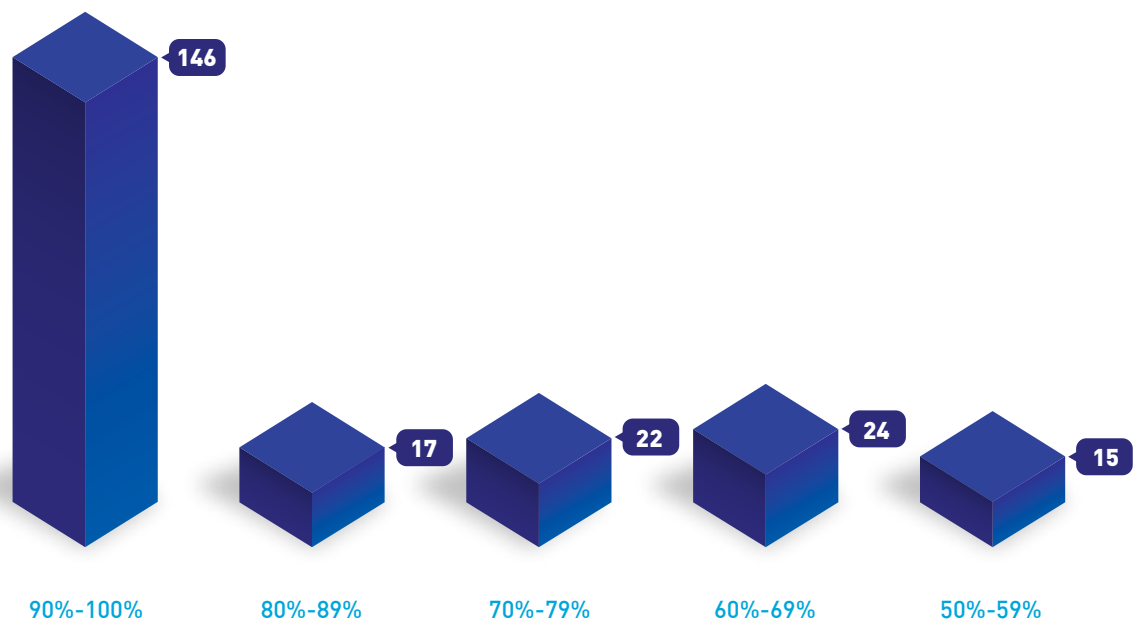
14.2. Amounts awarded by adjudicators per fiscal year



14.3. Matters by claimed amounts

Claimed Amount	(15/4/14 - 15/4/15)	(16/4/15 - 15/4/16)
Exceeding 15,000,000	5	14
10,000,001 to 15,000,000	5	4
5,000,001 to 10,000,000	3	19
3,300,001 to 5,000,000	4	14
2,800,001 to 3,300,000	2	7
2,300,001 to 2,800,000	1	1
1,800,001 to 2,300,000	1	6
1,300,001 to 1,800,000	4	12
800,001 to 1,300,000	6	13
300,001 to 800,000	17	48
150,001 to 300,000	10	22
Up to 150,000	26	47
Total	84	207

14.4. Amounts awarded in comparison to amounts originally claimed in terms of % of total claim

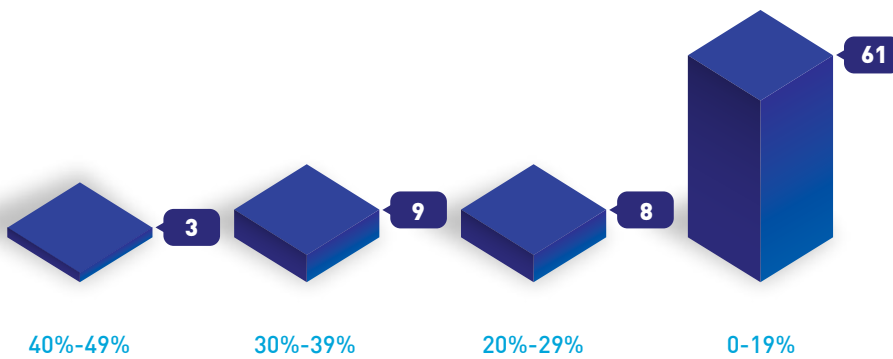


Analysis and comments by the AIAC

With an increase in the number of cases by around 39% for the 2018 fiscal year, it was unsurprising that the total claim amount also increased. The highest amount claimed during the 2018 fiscal year was “only” about RM100 million – and thus not even half as big as the RM224 million during the 2017 fiscal year.

This is one reason, why the average claim amount at RM2.1 million was the lowest for a fiscal year since the CIPAA entered into force. Another reason, in simple terms, is the fact that the CIPAA has achieved its objective. When in previous years parties were

	(16/4/16 - 15/4/17)	(16/4/17 - 15/4/18)	Total
	15	15	49
	8	20	37
	44	40	106
	33	38	89
	21	19	49
	10	27	39
	26	29	62
	32	42	90
	44	77	140
	135	161	361
	53	111	196
	126	186	385
	547	765	1603

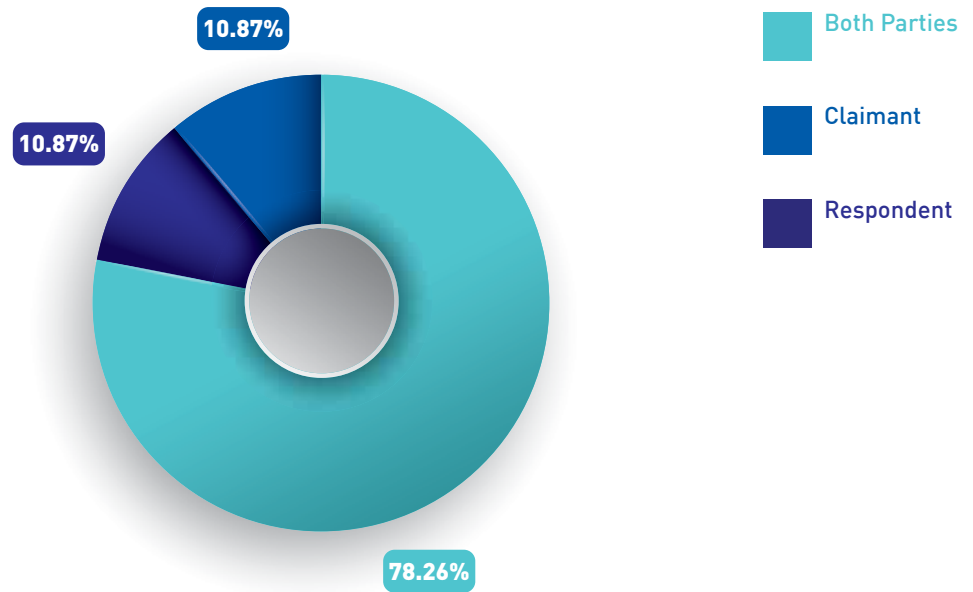


generally reluctant to file claims for smaller amounts – as can be seen from the average claim amounts – this has changed in recent years. Parties are now willing to file and pursue claims even when the amount in dispute is very small.

Granting “access to justice” by allowing the cheap and swift resolution of even small claims has always been one of the main goals of the CIPAA. The statistics the AIAC compiled for the fiscal year 2018 continue a trend that had already started in 2017, when the average claim amount was also much lower than in previous years and confirm the success of the CIPAA.

15. Information regarding parties' representation in adjudication proceedings*

* (Statistics compiled based on the party questionnaire)



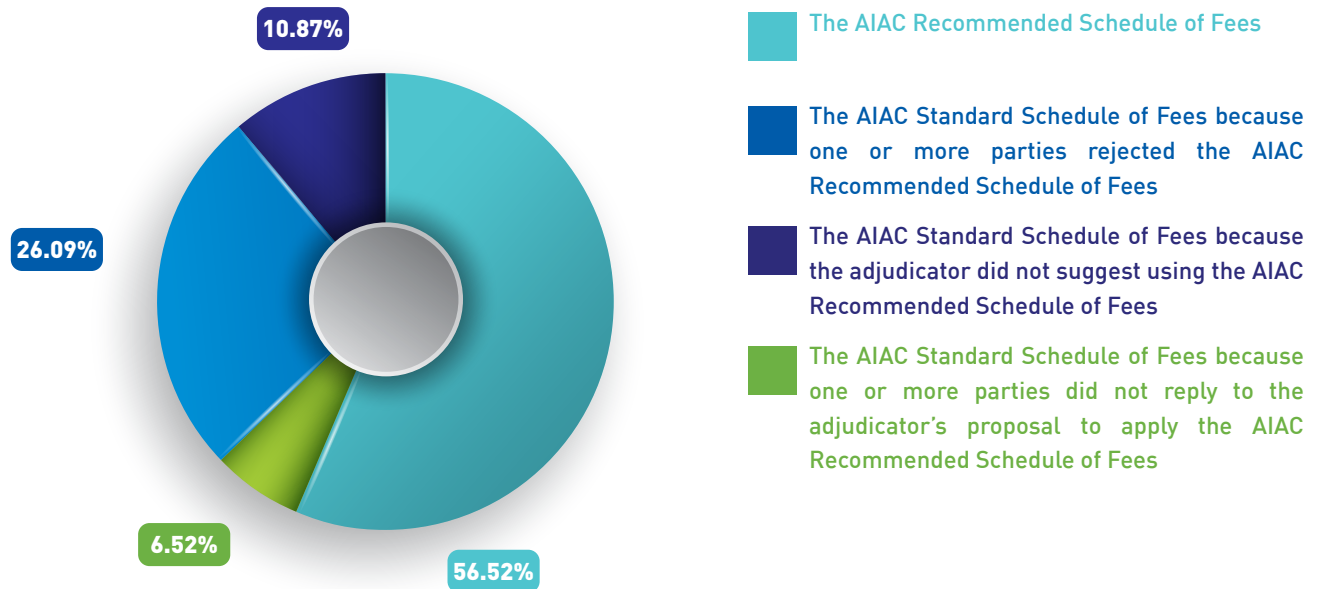
Analysis and comments by the AIAC

The CIPAA does not make it mandatory for parties to be legally or otherwise represented in adjudication proceedings. In spite of this, approximately 78% of the parties surveyed indicated that both parties had engaged a representative. In the remaining 22% of matters, a representative was only engaged by either the Claimant or the Respondent (meaning that the opposing party, whether the Claimant or Respondent, was self-represented).

This is consistent with the AIAC's observation over the years that more often than not, parties do seek some form of representation in adjudication proceedings. The data collected for the 2018 CIPAA Report does not suggest that a party's choice of representation has any bearing on the outcome of the adjudication proceedings.

16. Information regarding the schedule of fees applied in the adjudication proceedings*

* [Statistics compiled based on the party questionnaire]



Analysis and comments by the AIAC

Section 19(3) of the CIPAA states that the parties are jointly and severally liable to pay the adjudicator's fees and expenses and that the adjudicator may recover this sum as a debt due. Section 19 of the CIPAA also gives the parties and the adjudicator the autonomy to decide the fees to be paid to the adjudicator. In the absence of such agreement, the AIAC Standard Schedule of Fees as set out in CIPAA Regulations apply.

In addition to the AIAC Standard Schedule of Fees, the AIAC CIPAA Circular 02 sets out the AIAC Recommended Schedule of Fees for adjudicators. This provides an alternative to the AIAC Standard Schedule of Fees in light of the view that the schedule in the regulations might not be reasonable enough to attract qualified and experienced persons to act as adjudicators within tight time limits.

For the 2018 CIPAA Report, parties were asked to specify the schedule of fees applicable to their adjudication. 57% of the parties surveyed indicated that they adopted the AIAC Recommended Schedule of Fees. 7% indicated that the AIAC Standard Schedule of Fees was used because one or more of the parties did not reply to the adjudicator's proposal to apply the AIAC Recommended Schedule of Fees. A further 26% of the parties indicated that the AIAC Standard Schedule of Fees was used because one or more of the parties rejected the AIAC Recommended Schedule of Fees. The remaining 11% indicated that the AIAC Standard Schedule of Fees was used because the adjudicator did not suggest using the AIAC Recommended Schedule of Fees.

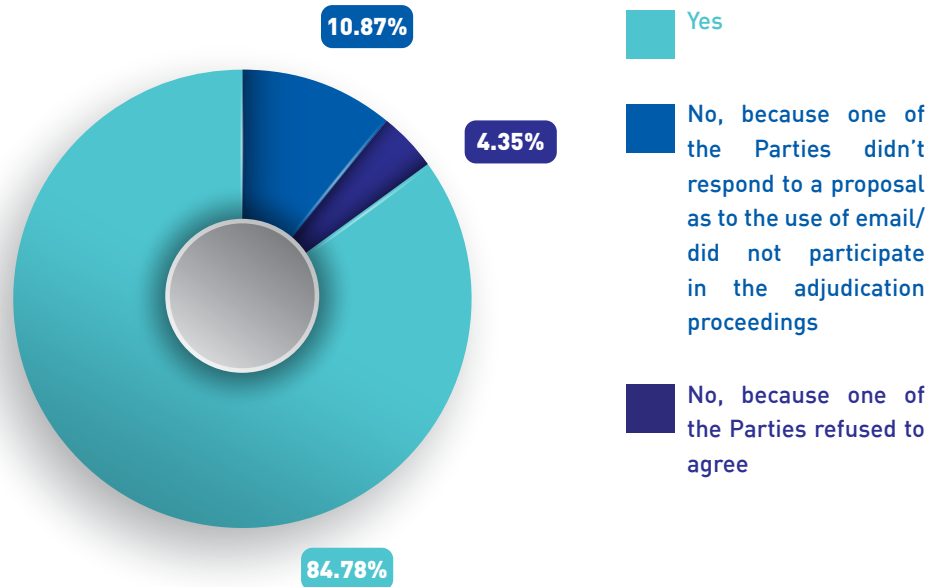
These results indicate that in the interest of retaining a qualified and experienced adjudicator, parties are generally willing to adopt the higher fees set out in the AIAC Recommended Schedule of Fees.

17. Information regarding the usage of electronic forms of communication*

* [Statistics compiled based on the party questionnaire]

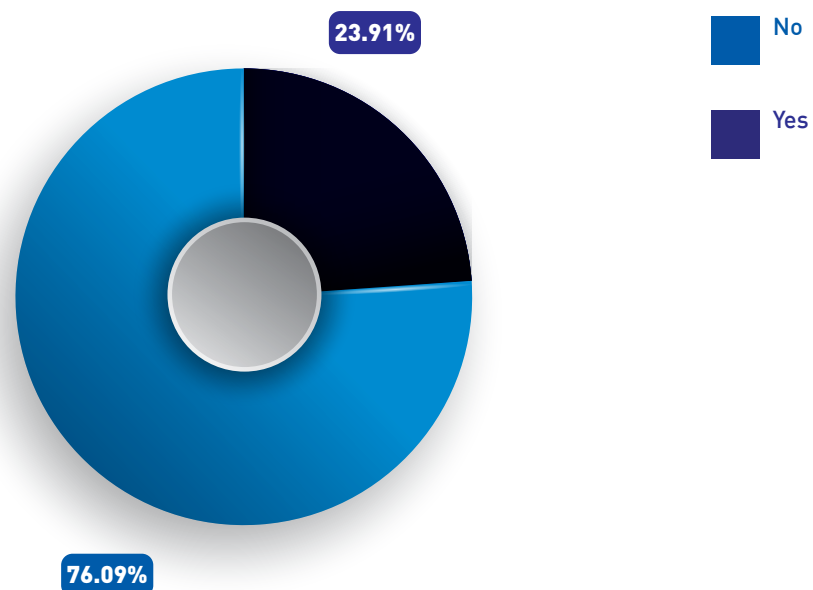
17.1. Information regarding the usage of emails as a mode of service –

Question asked to Parties: Did the Parties agree on service of a notice or any other document by email?



17.2. Information regarding the usage of online file sharing services during the adjudication –

Question asked to Parties: Have you used file sharing services such as OneDrive, DropBox, etc. to serve pleadings and supporting documents in adjudication proceedings?



Analysis and comments by the AIAC

Many of the provisions in the CIPAA require the passing of communications between the parties, e.g. the notice of adjudication and pleadings. Section 38 of the CIPAA sets out how notices and other documents may be served, where most of the modes of service imply the passing of a tangible object (e.g. a hardcopy document sent by registered post). The CIPAA does not explicitly permit the use of electronic communications between the parties. However, Section 38(d) of the CIPAA does permit parties to agree to an alternate mode of service. Electronic communications would be caught under this residual category.

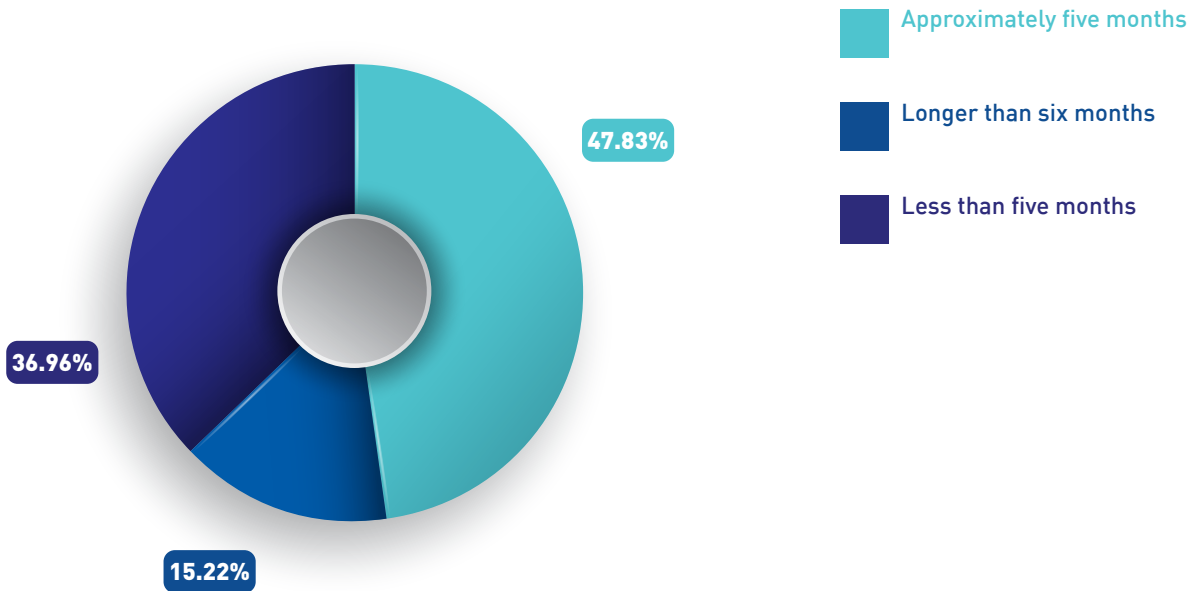
For the 2018 CIPAA Report, parties were asked whether they had agreed on the service of a notice or any other document by email. Approximately 85% of the responses indicated that the parties had used email as a mode of service. 11% indicated that email was not used because one of the parties did not respond to a proposal to use email, or because that party did not participate in the adjudication proceedings. The remaining 4% of responses indicated that email was not used because one of the parties had refused to agree to the use of same.

Parties were also asked whether they had used file sharing services, such as OneDrive and Drop Box, to serve pleadings and supporting documents in adjudication proceedings. Of the responses received, approximately 76% of parties indicated that they did not use such file sharing services. However, 24% of parties indicated that such file sharing services were utilised.

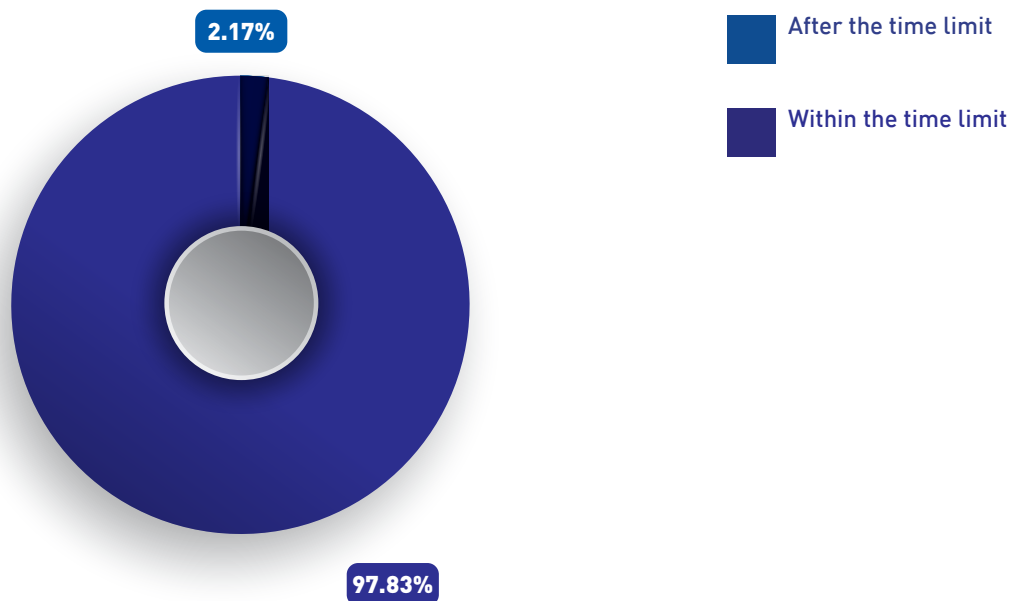
In this day and age, the use of electronic communications, such as emails, Drop Box and OneDrive, between parties is inevitable. It is also plausible that such means of communication are more effective than traditional methods (e.g. sending a document by post) given that the transmission and receipt of the correspondence is instantaneous and, more often than not, can be timestamped.

For similar efficiencies, the AIAC has fully digitalised the adjudication process. This is reflective of the fact that most parties to adjudication proceedings would want timely updates on the status and progress of their matters. Given that most, if not all, of the parties to the adjudication process would have access to the internet, the AIAC's full digitisation of the adjudication process enhances the underlying goal of the CIPAA to provide a time and cost-effective mechanism for the resolution of payment disputes in the construction industry.

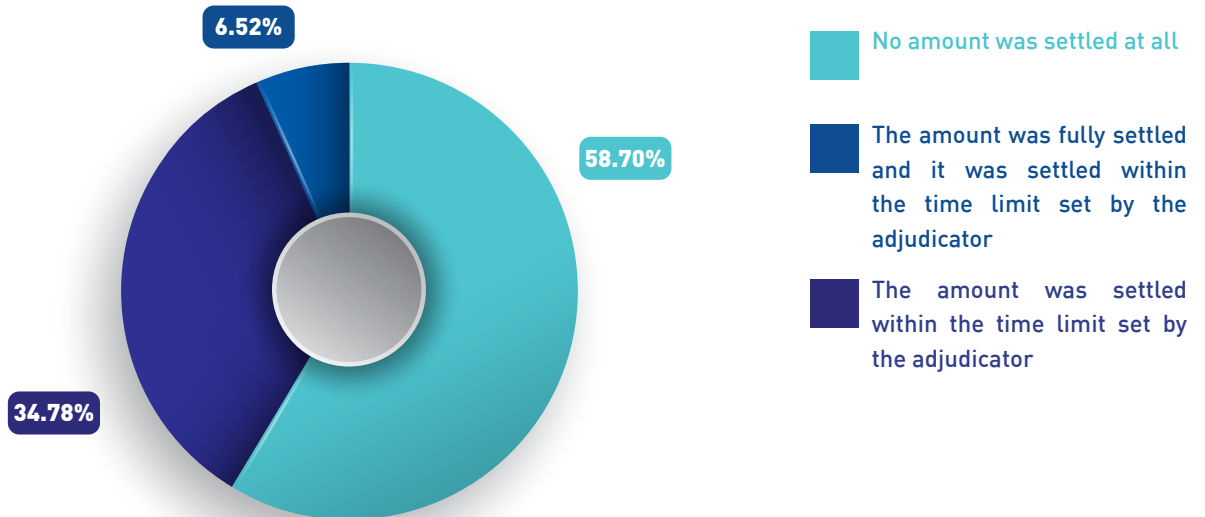
18. Information regarding the duration of adjudication proceedings from the payment claim until the adjudication decision is delivered



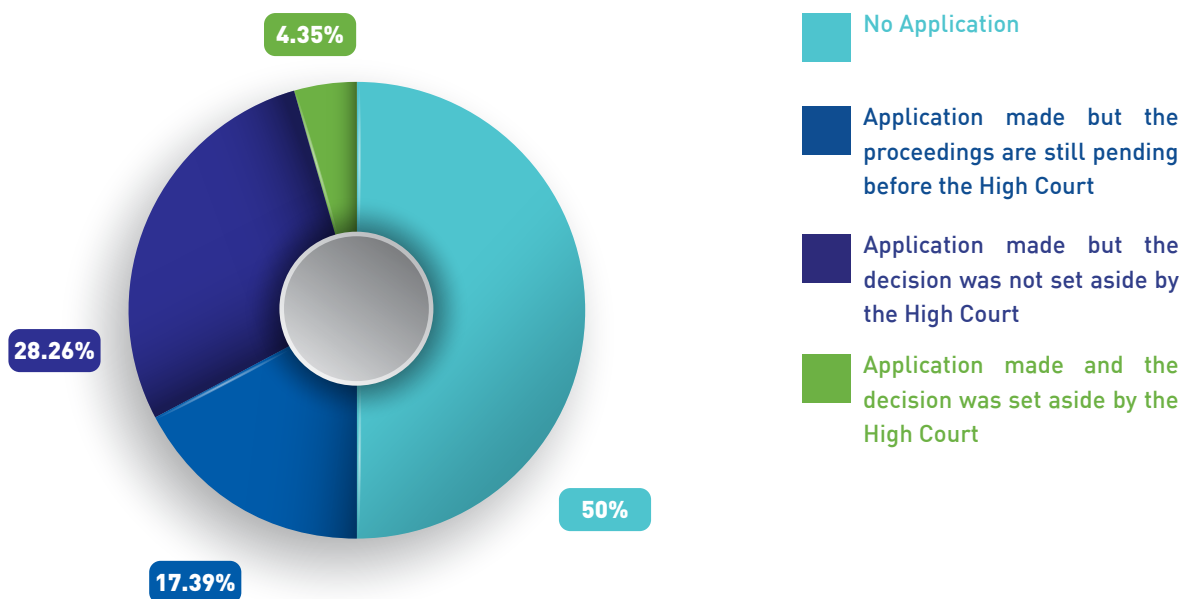
19. Information regarding the delivery of the adjudication decision within the time limit set forth in sec. 12(2) of the CIPAA 2012



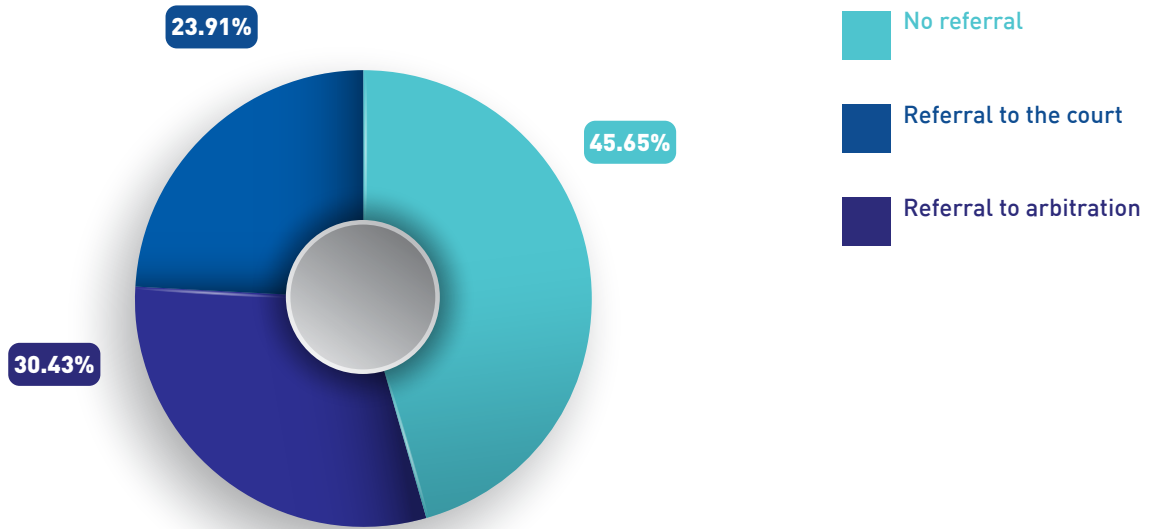
20. Information regarding compliance/non-compliance with an adjudicator's decision



21. Information regarding applications to the High Court to have the adjudication decision set aside



22. Information regarding the referral of the previously adjudicated dispute to arbitration or court to have the dispute finally decided





Appendix A – Adjudicator Questionnaire

1. **Please indicate your case number:**
E.g. ADJ-4444-2017
2. **Please indicate the Claimant's role in the underlying contract:**
 - Employer
 - Consultant
 - Main Contractor
 - Sub-Contractor
 - Supplier
3. **Please indicate the Respondent's role in the underlying contract:**
 - Employer
 - Consultant
 - Main Contractor
 - Sub-Contractor
 - Supplier
4. **Was there a request for consolidation, and if so, was it granted?**
 - Yes, and granted
 - Yes, but not granted
 - No request
5. **Did the contract fall under the CIPAA (Exemption) Order 2014?**
 - First Schedule a)
 - First Schedule b)
 - Second Schedule
 - No
6. **Please indicate whether a jurisdictional objection was raised, and if so, by which party.**
 - Claimant
 - Respondent
 - Both Parties
 - No
7. **Did the Claimant withdraw the claim?**
 - Yes
 - No
8. **Please indicate whether there was an oral hearing**
 - Yes
 - No
9. **Please indicate whether any request for an extension of time was sought, and if so, by whom.**
 - Claimant
 - Respondent
 - Both Parties
 - Adjudicator
 - Both Parties and the adjudicator
 - None
10. **Did the Parties settle the dispute before you rendered your decision?**
 - Yes
 - No

Appendix B – Party Questionnaire

1. Did any of the Parties retain a representative (e.g. a law firm, a consultant, etc.) in the adjudication proceedings?
 - Employer
 - Consultant
 - Main Contractor
2. Which schedule of fees was applied in the adjudication you were involved in (if there was more than one adjudication, please indicate which schedule of fees was used most often)?
 - The AIAC Recommended Schedule of Fees Consultant
 - The AIAC Standard Schedule of Fees because one or more parties rejected the AIAC Recommended Schedule of Fees
 - The AIAC Standard Schedule of Fees because the adjudicator did not suggest using the AIAC Recommended Schedule of Fees
 - The AIAC Standard Schedule of Fees because one or more parties did not reply to the adjudicator's proposal to apply the AIAC Recommended Schedule of Fees
3. Did the Respondent participate in the adjudication proceedings (if the Respondent did not participate in the adjudication proceedings, were you able to serve the documents upon it)?
 - Yes, the Respondent participated
 - No, the Respondent did not participate and it was impossible to serve the documents
 - No, the Respondent did not participate, but the documents were served upon the it
4. Did the Parties agree on service of a notice or any other document by email?
 - Yes
 - No, because one of the Parties refused to agree
 - No, because one of the Parties didn't respond to a proposal as to the use of email / did not participate in the adjudication proceedings
5. Have you used file sharing services such as OneDrive, DropBox, etc. to serve pleadings and supporting documents in adjudication proceedings?
 - Yes
 - No
6. What was the duration of the adjudication proceedings from the payment claim until the adjudication decision was delivered?
 - Less than five months
 - Approximately five months
 - Longer than six months
7. Did the adjudicator deliver the decision within the time limit set forth in sec. 12(2) of the CIPAA 2012?
 - Yes
 - No
8. Was the adjudicator's decision complied with?
 - Yes, the amount was fully settled and it was settled within the time limit set by the adjudicator
 - No, the amount was settled within the time limit set by the adjudicator
 - No, the amount was not settled in full, although some amounts were settled within the time limit set by the adjudicator
 - No amount was settled at all
9. Has any party applied to the High Court to have the adjudication decision set aside?
 - Yes, and the decision was set aside by the High Court
 - Yes, but the decision was not set aside by the High Court
 - Yes, but the proceedings are still pending before the High Court
 - No
10. Has any Party referred the previously adjudicated dispute to arbitration or court to have it finally decided?
 - Yes, to arbitration
 - Yes, to the court
 - No



PART III

THE AIAC ADMINISTRATIVE OBSERVATIONS



PART A - GENERAL

The sheer number of adjudication cases which the AIAC administered since the Act entered into force speaks a clear language: the CIPAA is a huge success. The imminent threat of a non-paid party initiating adjudication proceedings and the risk of the non-paying party to be ordered to pay after proceedings lasting for only a few months has contributed to shaping the construction industry in Malaysia over the last few years.

This section captures the key issues that have been observed by the AIAC, as the administrative authority, in the year 2017-2018 and highlights the solutions and best practices on how to avoid most common pitfalls in the adjudication process. Furthermore, this section covers the latest CIPAA-related case law that shapes the adjudication framework in Malaysia.

That being said, it is hoped that this year's CIPAA Report and this section, in particular, would serve as the point of reference for all parties involved and would assist them in navigating the Act and the adjudication proceedings as such.

1. Considerations regarding the collection of fees

Question: What steps should the adjudicator take in ensuring that all deposits will be collected in the adjudication proceedings?

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

- 1) *The parties and the adjudicator shall be free to agree on the terms of appointment of the adjudicator and the fees to be paid to the adjudicator.*
- 2) *If the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the AIAC's standard terms of appointment and fees for adjudicators shall apply.*
- 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 AIAC 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 AIAC.*
- 6) *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 the 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 AIAC under subsection (5).*

Observation: The parties are free to agree with the adjudicator, on the fees to be paid to the adjudicator (*cf.* sec. 19(1) of CIPAA). However, CIPAA sets forth the principle that payments must be made in advance. This can be drawn from sec. 19(4) of CIPAA, which sets forth that fees shall be contributed "*as an advance security.*" It can also be drawn from sec. 19(5) of CIPAA, which provides that "*the adjudicator may require full payment of the fees and expenses to be deposited*" before releasing the adjudication decision. Furthermore, according to sec. 19(6) of CIPAA, an adjudicator has the right not to release its decision "*due to the failure of the parties to deposit the full payment of the adjudicator's fees and expenses.*"

For the avoidance of doubt, sec. 19(6) of CIPAA does not grant an adjudicator the right to delay deciding the dispute. According to sec. 12(2) of CIPAA, unless there is an extension of time agreed between the parties (sec. 12(2)(c) of CIPAA) and an adjudicator, the adjudicator is bound by the time limits set forth in sec. 12(2)(a) and (b) of CIPAA.

It is the adjudicator's duty to ensure that payments are made in full. According to sec. 19(4) of CIPAA, "*[t]he parties shall contribute and deposit [...] the fees in equal share as directed by the adjudicator.*" (emphasis added) The AIAC's is bound by the adjudicator's direction as to the payment of the fees and expenses and can only remind the parties to an adjudication of their payment obligation.

In practice, adjudicators often neglect their duty to direct the parties to contribute and deposit the fees although the AIAC as the administrative authority sends a reminder to adjudicators at the outset of every adjudication. This reminder also includes a reference to the adjudicator's duty to collect expenses and/or Goods and Services Tax (GST) at the outset of the deposit collection period.

Best practice: An adjudicator should direct the parties at the outset of the adjudication proceedings to deposit with the AIAC his or her full fees and the AIAC's administrative fees. Ideally, an adjudicator would provide for such directions in his or her Notice of acceptance of the appointment to act as adjudicator (Form 6, which is downloadable at the AIAC's website).

It is helpful if the adjudicator advises the parties and the AIAC at the outset as to whether he is GST registered or not. An adjudicator, who is GST registered, should indicate so and state all relevant GST amounts in addition to the regular amounts for the adjudicator's fees.

The AIAC advises an adjudicator as to whether all directed amounts have been deposited prior to the time the adjudicator releases his or her adjudication decision. It is highly recommended that an adjudicator, at least three weeks prior to the moment he or she releases his or her adjudication decision, enquires with the AIAC as to the status of payments. An adjudicator must obtain a written confirmation of clearance of all deposits from the AIAC before he or she can release the adjudication decision.

2. Considerations regarding the use of online file-sharing platforms

Question: What steps should the adjudicator take if file-sharing platforms, such as Dropbox, etc. are used to exchange and serve documents?

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: Section 38 of CIPAA is, in principle, rather stringent and the sub-sections (a) through (c) are very

specific. However, section 38(d) of CIPAA provides for the possibility of the parties to agree that service of a notice or any other document may be effectuated "[b]y any other means as agreed in writing by the parties." It is noteworthy that the agreement by the parties needs to be evidenced in writing. Therefore, if the parties "informally" agreed on a different means of service, e.g. in a telephone discussion, such agreement would not constitute an agreement under CIPAA.

In almost 85% of all matters administered during the 2018 fiscal year, the parties and the adjudicator agreed that communication by email shall be a means of service (please see Section 17.1 above). Given the large number of cases, this can be regarded as the "standard" mode of communication of notices and of service, even though the Act itself does not specifically allow service by emails (that is, of course, unless the parties have agreed thereto in writing as per Section 38(3) of the CIPAA).

The use of Dropbox or other online file-sharing platforms is less common in comparison to the usage of emails. However, in close to 25% of all cases, the parties and the adjudicator benefitted from the various advantages that an online file-sharing platform such as Dropbox may offer (please see Section 17.2 above): it allows easy access to all relevant files, such as the adjudicator's directions or the parties' submissions throughout the proceedings and is particularly helpful in instances of very voluminous submissions, which could not easily be transmitted by email.

Best practice: With now over 18 years into the 21st century and a push for digitisation across industries, the AIAC recommends that parties and adjudicators agree on the usage of emails – at the outset of the proceedings and in writing. The same is applicable to the use of file-sharing platforms such as Dropbox.

However, adjudicators should not press parties to agree to the usage of Dropbox as it must still be considered a relatively uncommon form of service in legal proceedings. That being said, the AIAC as administrative authority notes that when the parties and the adjudicator used Dropbox in adjudication proceedings, there has generally not been any complaint. On the contrary, feedback the AIAC receives as the administrative authority on the usage of Dropbox and other file-sharing systems is generally very positive.

3. Considerations regarding non-responsive parties in adjudication proceedings

Question: How can an adjudicator deal with non-responsive parties?

Relevant provision: *n/a*

Observation: The AIAC as the administrative authority under CIPAA has witnessed two different types of non-responsive parties,

- (i) Non-paying parties, which as a matter of principle refuse to participate during [specific stages of] the proceedings; and
- (ii) Parties, which irrespective of their role as paying or non-paying party, simply do not respond to [all or selected] communication by the adjudicator.

CIPAA does not specifically address the question of how an adjudicator should proceed when one or more parties are not responsive. In principle, the adjudicator does not need the parties' responses to deliver an adjudication decision. In fact, according to section 12(1) of CIPAA, "[t]he adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25 of the Act." Additionally, under section 26(2) of CIPAA, if the adjudicator directs a party or all parties to the adjudication to act in a certain manner, but party or all parties fail to comply with that direction, "[t]he adjudicator may on the ground that there has been non-compliance in respect of the adjudication proceedings or document produced in the adjudication proceedings," (a) terminate the adjudication proceedings; (b) make any order as the adjudicator deems fit; or (c) allow an amendment to be made to the documents produced in the adjudication proceedings.

All three of these options equip the adjudicator with a wide range of measures, which should, however, be used carefully.

Best practices: As trivial as this may sound, in case one or more parties are not responsive, the adjudicator should first and foremost verify the parties' contact details.

Furthermore, the adjudicator should only communicate through the statutory (section 38(a) through (c) of CIPAA) or any other specifically agreed-upon channel (section 38(d) of CIPAA). The AIAC as the administrative authority has observed several instances of a non-responding party merely because the adjudicator communicated by email although the parties had previously not agreed

on such mode of communication. When an adjudicator communicates by email although there is no agreement under section 38(d) of CIPAA to do so, the adjudicator cannot proceed as per sec. 26(2) of CIPAA – this would amount to a procedural violation and risk that the adjudication decision is set aside by the High Court (section 15 of CIPAA).

In case the adjudicator and the parties agree on the use of emails as the mode of service, the adjudicator shall also instruct the parties to check their junk mail folder in their email program on a regular basis. It has happened several times that the non-responsiveness resulted simply from a failure to receive an email.

That being said, if the adjudicator is sure that there is no instance of emails being labelled as junk and that he or she has complied with section 38 of CIPAA, the adjudicator should instruct the parties that he or she has the powers as are set forth in section 26(2) of CIPAA. Additionally, an adjudicator should only proceed per section 26(2) of CIPAA after he or she has given the party(ies) in question a stern warning, making it clear that unless there is compliance (responsiveness), the adjudicator can proceed as per section 26(2) of CIPAA.

Although section 26(2) of CIPAA, and its sub-section (a), should only be used as a measure of last resort, the AIAC as the administrative authority is understanding of an adjudicator's decision to make use of these drastic measures when there is simply no compliance at all from both parties, e.g. as regards the deposit of fees with the AIAC.

4. Considerations regarding the computation of time limits

Question: What steps should the adjudicator take to ensure that time limits are computed correctly?

Relevant provision: *Section 4. Interpretation*

In this Act, unless the context otherwise requires—

[...]

"working day" means a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located. (emphasis in the original)

Observation: Time limits under CIPAA are generally set forth in terms of working days. This time limit can among others be found in

- (i) section 6(3) of CIPAA (payment response);
- (ii) section 9(1) of CIPAA (adjudication claim);
- (iii) section 10(1) of CIPAA (adjudication response);
- (iv) section 11(1) of CIPAA (adjudication reply);
- (v) section 12(2) of CIPAA (adjudication decision); and
- (vi) section 21(a) of CIPAA (appointment of adjudicator by the parties).

The point of reference for calculation of the relevant time limits is the project site location. Different States designate different days as weekends and public holidays.

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: <https://www.onestopmalaysia.com/>.

Please note, however, that there might be ad hoc public holidays (e.g. the polling day), that are not necessarily reflected on the above list. The AIAC as the administrative authority recommends that adjudicators check such holidays on a regular basis.

Best practice: The AIAC informs the adjudicators about the location of the project at the conflict check stage. The adjudicator should take very good note of the project site location and review official calendars at the outset of the adjudication to make sure that he or she is aware of (i) on what days the weekend falls at the location of the site; and (ii) what the public holidays are at the location of the site.

An adjudicator is also advised to remind the parties of the above at the outset of the adjudication. It is good practice to generally do so, especially if parties come from different States. This ensures that the adjudication proceedings run very smoothly and that there is no misunderstanding.

5. Considerations regarding withdrawal costs in adjudication proceedings

Question: Under what circumstances may a party withdraw the adjudication proceedings?

Relevant provision: Section 17. *Withdrawal and Recommencement of Adjudication Proceedings*

In this Act, unless the context otherwise requires—

- 1) *A claimant may at any time withdraw an adjudication*

claim by serving a notice of withdrawal in writing on the respondent and the adjudicator.

- 2) *The claimant shall bear the costs arising out of the withdrawal of the adjudication proceedings unless the adjudicator orders otherwise.*
- 3) *The claimant who has withdrawn the adjudication claim is free to recommence adjudication on the same subject matter by serving a new notice of adjudication in accordance with section 8.*
- 4) *If an adjudicator dies, resigns or is unable through illness or any other cause to complete the adjudication proceedings—*
 - a) *The adjudication proceedings come to an end and the parties are free to recommence adjudication proceedings afresh; or*
 - b) *The adjudication proceedings may be continued by a new adjudicator appointed by the parties and the adjudication proceedings shall continue as if there is no change of adjudicator*

Observation: Section 17 of the CIPAA makes it clear that only a Claimant may withdraw the adjudication proceedings. As a consequence, a Respondent cannot avoid the initiation of the adjudication proceedings.

A Claimant may withdraw the adjudication proceedings at any time as long as the Claimant serves the notice of withdrawal on the Respondent(s) and the adjudicator. It is noteworthy that after withdrawal, a Claimant “*is free to recommence adjudication on the same subject matter.*”

In practice, cases are regularly withdrawn for the following reasons:

- (i) the parties to the adjudication settle their dispute;
- (ii) the Claimant realises that he has more claims than the ones previously raised and as a new Payment Claim needs to be issued with no chances of consolidation (e.g., because the Respondent doesn't agree thereto), the Claimant finds it more practical to raise all claims in one single adjudication proceeding.

On very limited occasions, the Claimant withdraws the adjudication because there has been a procedural irregularity in the course of the adjudication proceedings (e.g. the adjudicator has not adhered to the requirements of service as per section 38 of CIPAA and nevertheless proceeded to take decisions as per sec. 26(2) of CIPAA for a party's alleged failure to follow the adjudicator's directions).

However, withdrawal comes at a price, the withdrawal costs. As is made clear in section 17(2) of CIPAA, in principal it falls upon the Claimant to bear the costs of withdrawal of the adjudication proceedings. This provision ensures that a Claimant doesn't withdraw the adjudication proceedings simply in hope to achieve a change in the person of the adjudicator.

Best practice: Save when the adjudicator decides otherwise (*cf.* section 17(2) of CIPAA), the Claimant shall bear the costs of the adjudication proceedings upon withdrawal. The withdrawal costs include a reasonable portion of the adjudicator's fees and expenses incurred by the adjudicator during the proceedings. However, the AIAC's administrative fees are paid in full even if the matter is withdrawn.

The AIAC as the administrative authority under CIPAA recommends that the adjudicator, in determining the withdrawal costs, refers to Regulation 7 of the CIPAA Regulations 2014, which define the costs of adjudication proceedings. The adjudicator's reasonable fees and expenses are determined by the Director of the AIAC. Therefore, in the event of withdrawal, the adjudicator shall write to the Director requesting for the Director's guidance, as is set forth under Rule 9(5A) of the AIAC Adjudication Rules & Procedure.

Upon the adjudicator's directions regarding the withdrawal costs and receipt of relevant invoices, the AIAC will proceed with the payment of fees to the adjudicator and retain the administrative fee. If the adjudicator has failed to direct the parties to make sufficient deposits, the AIAC will issue invoices for the parties for further deposits to be paid by the party which has been ordered to pay the withdrawal costs (usually the Claimant, as has been set forth above). This shows the importance of issuing directions to the parties to make payment at the outset of the adjudication. A failure to issue such directions may lead to a situation where the adjudicator's fees would not be compensated following the withdrawal of the matter.

6. Considerations regarding challenges to the appointment of an adjudicator under Section 23

Question: Can the AIAC remove an adjudicator upon a "challenge" (request to withdraw) by a party for the adjudicator's alleged lack of impartiality and independence or any other reason?

Relevant provision: *Section 24. Duties and Obligations of the Adjudicator*

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that—

- a) There is no conflict of interest in respect of his appointment;*
- b) He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;*
- c) He shall comply with the principles of natural justice; and*
- d) There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.*

Rule 7.2 of the Asian International Arbitration Centre Rules & Procedure

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.*

Observation: Although CIPAA provides for the four specific obligations mentioned above, there is no rule on what the procedure should be when an adjudicator is challenged by a party for an alleged lack of impartiality and independence, or any of the other grounds highlighted above. Above all, the AIAC is in no position to remove an adjudicator when there is a challenge.

Adjudicators take on an important function of the state by rendering adjudication decisions. Being "officers of the state" insofar as they decide on construction-related disputes, adjudicators have to take their duties and obligations, in particular as set forth in section 24 of CIPAA, very seriously. The obligation to make a declaration as is set forth in section 24 of CIPAA is one of the cornerstones of a functioning adjudication process.

An adjudicator is under an obligation to maintain the standards set forth in his or her declaration at the moment of acceptance of an appointment throughout the adjudication process; failure to do so is likely going to result in a challenge by one or more parties.

When a party requests an adjudicator to withdraw because of prejudice or bias, the adjudicator must carefully weigh the reasons provided by the party making such request and then take a decision.

Best practice: In case of a request to withdraw or “challenge” an adjudicator, the adjudicator should not lightly dismiss such request without giving it any consideration. An adjudicator should be aware of the judicial nature of his position as an adjudicator and, therefore apply very high standards as he or she would expect from an independent and impartial judge.

An adjudicator shall make sure that he or she meets all the requirements as set forth in the declaration at the outset of the adjudication, when accepting the appointment. This obligation continues to exist throughout the duration of the adjudication proceedings. Therefore, adjudicators, especially when working in a law firm, must make sure that systems allowing for the performance of a “conflict check” are in place, and that the parties to the adjudication and all related parties are properly entered.

7. Considerations regarding the enforcement of adjudication decisions before the High Court

Question: How does the AIAC as the administrative authority under CIPAA assist in the enforcement of adjudication decisions before the High Court?

Relevant provision: *Order 69A of the Courts of Judicature Act 1964 Subordinate Courts Rules Act 1955 Rules of Court (Amendment) 2018, Application for the enforcement of an adjudication decision (O.69A, r.5)*

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that—

- 1) *An application for permission to enforce an adjudication decision, either wholly or partly, in the same manner as a judgment or an order of the High Court under section 28 of the Act may be made by originating summons in Form 5.*
- 2) *The originating summons shall, in addition to the matters stated in subrule 2(1)-*
 - a) *state the name and the usual or last known place of business of the applicant and the respondent against whom it is sought to enforce the adjudication decision, respectively; and*
 - b) *state either the adjudication decision has not been*

complied with or the extent to which it has not been complied with at the date of the application.

- 3) *The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including exhibiting the original adjudication decision or a certified true copy and if the adjudication decision is in a language other than the national language or in English language, a translation of it in the English language, duly certified as a correct translation by a sworn translator.*

Observation: The AIAC as the administrative authority is not involved in court proceedings of any nature related to adjudication. However, on 1st March 2018 the Courts of Judicature Act 1964 Subordinate Courts Rules Act 1955 Rules of Court (Amendment) 2018 came into force. Starting from 1st March 2018, the AIAC provides the parties a certified true copy of the adjudication decision, upon a party’s request. The party requesting the certified true copy of the adjudication decision can submit such copy to the High Court instead of providing the original of the decision.

The procedure for requesting a certified true copy from the AIAC is set forth on the AIAC’s website.

Best practice: Parties are discouraged from requesting the AIAC to participate or assist in enforcement proceedings (or any court proceedings related to adjudication). The AIAC is merely the administrative authority and cannot participate in whatever function during enforcement and other adjudication-related court proceedings. For the avoidance of any doubt, the AIAC is in no position to support any party’s motion.

However, the AIAC could render a certified copy of the adjudication decision, upon a party’s request, which can then be submitted to the High Court. As mentioned above, the procedure for obtaining a certified true copy from the AIAC is provided for on the AIAC’s website.





PART B - CIPAA REPORT CASE SUMMARIES

SUMMARY OF CONSTRUCTION COURT CASES 2014-2017

The enactment of the CIPAA resulted in the establishment of two specialist Construction Courts in the High Court of Kuala Lumpur and the High Court of Shah Alam on 1st April 2013.

The purpose of these Construction Courts has been to ensure greater efficiency in the handling of construction disputes by having judges in the courts who have experience in and are familiar with the construction industry.

Since the commencement of proceedings in the Construction Courts in 2014 (upon the commencement of the CIPAA), there has been a continuous increase in the number of adjudication cases handled by the Construction Courts, in particular the Kuala Lumpur Construction Court.

2014 In 2014, there were only two adjudication cases registered in the Kuala Lumpur Construction Court. One concerned the jurisdiction of an adjudicator under Section 27 of the CIPAA, and the other concerned an application to set aside a decision pursuant to Section 15 of the CIPAA. Both cases were dismissed.

In 2015, a further 32 adjudication cases were registered in the Kuala Lumpur Construction Court.

2015

2016 However, 2016 saw a 515% increase in the number of cases registered in the Kuala Lumpur Construction Court. A total of 165 cases were registered in 2016. 79 of these cases were allowed, 46 were dismissed, 36 were withdrawn, and 4 cases were transferred to another forum.

In 2017, there was a further 36% increase in the number of cases registered in the Kuala Lumpur Construction Court with the total count amounting to 224 cases. Of these, 84 cases were allowed, 58 were dismissed, 71 were withdrawn, 4 were transferred to another forum and 7 cases are still pending.

2017

A review of the registered adjudication cases in 2016 and 2017 indicates that:

56.5% of the registered cases concerned applications under Section 28 of the CIPAA to enforce the adjudication decision;

32% of the registered cases concerned applications to set aside the adjudication decision pursuant to Section 15 of the CIPAA;

8% of the cases concerned applications to stay the adjudication decision pursuant to Section 16 of the CIPAA; and

3.5% of registered cases concerned the following miscellaneous matters:

- o one challenge of the jurisdiction of the adjudicator pursuant to Section 27 of the CIPAA;
- o six applications under Section 30 of the CIPAA for payment from the principal;
- o one declaration that the payment claim was invalid;
- o one declaration to refer the matter to arbitration and not adjudication;
- o one injunction for an invalid payment claim;
- o one declaration that the CIPAA did not apply to the dispute; and
- o one application to set aside an ex-parte order granted under Section 28(c) of the CIPAA.

2018

As of 28th February 2018, a total of 41 cases have been registered in the Kuala Lumpur Construction Court for the year 2018. Six of these cases have been allowed, one has been dismissed, two have been withdrawn, a further two have been transferred to another forum, and 30 cases are still pending. If the trend during the first two months of 2018 continued throughout the rest of the year, there would be over 240 cases and yet another increase from the previous year.

The number of cases heard by the Kuala Lumpur Construction Court is illustrative of the fact that Malaysia's jurisprudence on the CIPAA, and construction law in general, is increasing. The significance of the number of applications to enforce adjudication decisions that have been allowed by the Kuala Lumpur Construction Court is indicative that a culture of payment is starting to gain traction in Malaysia, and the CIPAA has been an effective mechanism for the resolution of payment disputes in Malaysia's construction industry.



**BAUER (MALAYSIA) SDN BHD V JACK-IN-PILE (M) SDN BHD
(CIVIL APPEAL NO: B-02(C)[A]-1187-06/2017)**

The Court of Appeal in this decision held that the CIPAA has prospective effect. This was contrary to the established position of the High Court in the decision of *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor* [2015] 5 CLJ 527 where it was held that the CIPAA has retrospective effect.

The respondent was awarded a sub-contract by the Appellant for the supply and installation of Spun Piles for a contract sum of RM1,850,000 ("the project").

The employer of the project was wound up in 2012.

The respondent's payment claims had stalled in light of the employer's winding-up, and this consequentially gave rise to payment disputes between the parties.

The respondent commenced adjudication proceedings against the appellant under the CIPAA in August 2016.

Clause 11.1 of the construction contract contained a conditional payment provision. Pursuant to Section 35 of the CIPAA, a conditional payment provision in a construction contract is void. The appellant contended that if Section 35 of the CIPAA did not apply, then there was no obligation to pay the respondent as it was undisputed that the employer had not yet paid the appellant. The respondent contended that since clause 11 of the construction contract had been outlawed by the CIPAA, the appellant could not seek cover under same.

The adjudicator found that Section 35 of the CIPAA applied and consequently ignored clause 11 of the construction contract. The adjudicator relied on the right of "progress payment" and held that the appellant was liable to the respondent for an amount of RM906,034 ("adjudication decision").

The appellant filed an application in the High Court to have the adjudication decision set aside under section 15 of the CIPAA on the grounds that the adjudicator acted in excess of jurisdiction. The respondent filed an application to enforce same under Section 28 of the CIPAA.

The High Court dismissed the application to set aside and enforced the adjudication decision. The High Court followed the judgment in *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor* [2015] 5 CLJ 527 and held that CIPAA applies retrospectively. This meant that Section 35 of the CIPAA applied and therefore clause 11 of the construction contract had been rendered void.

The matter was appealed to the Court of Appeal.

Decision

The Court of Appeal allowed the appellant's appeal and set aside the adjudication decision.

The question for the Court of Appeal was whether the adjudicator acted in excess of jurisdiction by ignoring clause 11 of the construction contract. Central to this issue was whether Section 35 of the CIPAA had retrospective effect.

The Court of Appeal held that CIPAA does not have retrospective effect. Rather, its effect is prospective.

With respect to the tools of statutory interpretation, the Court of Appeal held that unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. If the legislation is procedural in nature, the legislation must be given retrospective effect unless clear words in the same show the contrary.

The Court of Appeal held that the introduction of CIPAA meant that claimants now have an additional avenue to claim for their contractual fees. The CIPAA has given a new access to justice for claimants in the construction industry which means that it is in essence a legislation relating to a substantive right. It was further held that although there is a procedural regime in the CIPAA that dictates how claims are to be processed before the adjudicator, this procedural regime is only a by-product of the substantive right created by the CIPAA.

In relation to Section 35 of the CIPAA, the Court of Appeal held that it also relates to a substantive right of an individual since it affects the right of freedom to contract. This is because Section 35 of the CIPAA essentially takes away the right of the parties to have their payment regime regulated by a "pay when paid" mode.

In light of the above matters, the Court of Appeal held that since there are no clear words in the CIPAA that it is to apply retrospectively, the CIPAA is prospective in nature. This meant that as far as Section 35 was concerned, clause 11 of the construction contract remains afoot and valid, and consequently the adjudicator had acted in excess of jurisdiction.

CONLAY CONSTRUCTION SDN BHD V WAH LOON (M) SDN BHD [2017] MLJU 1065

The High Court in this matter clarified that as a matter of law, following an adjudication decision, the unsuccessful party in the adjudication proceedings, is entitled to commence litigation/ arbitration against the successful party, and to reclaim any monies paid pursuant to the adjudication decision, and to pursue or claim any other reliefs, including but not limited to, the issues raised in the course of adjudication proceedings.

This appeal concerned, *inter alia*, the application of the doctrine of *res judicata* in respect of an adjudication decision which had been sanctioned by way of an enforcement order by the High Court.

Two other entities namely, MIED Capital Sdn Bhd and Moflex (M) Sdn Bhd, were also parties to the dispute along with appellant and respondent.

MIED was the employer of a construction project. MIED issued a Letter of Award which was accepted by Moflex for the whole works. Moflex in turn issued a Letter of Award which was accepted by the appellant as the Principal Sub-Contractor for the project.

According to the plaintiff, before Moflex received the Letter of Award from MIED, Moflex had purportedly entered into a "Profit Sharing Agreement" with the appellant and respondent. The respondent was named by the appellant (on the nomination by Moflex) as the Specialist Sub-Contractor for Mechanical and Electrical Works. The superintending officer for the project was TMI- Nusantara Consultants (M) Sdn Bhd.

A dispute arose with regards to non-payment of a sum due to the defendant under the Final Certificate.

The adjudicator rendered a decision in favour of the defendant for payment of the balance sum. This was considered permissible by the High Court. The High Court also allowed the plaintiff's application for a partial stay of execution. Judgment monies were ordered to be deposited into a stakeholder's account pending disposal of the Sessions Court suit filed by the plaintiff. The judgment monies were released to the defendant after the Sessions Court struck out the plaintiff's suit. The matter was appealed to the High Court.

Decision

The High Court was of the view that the parties should have just proceeded to trial so that the defendant's entitlement to the sum and the profit sharing arrangement could be determined in suit before the Sessions Court.

The High Court observed that the decision of the Sessions Court to strike out the claim was contrary to the philosophy and scheme under the CIPAA, where the adjudication decision and the enforcement by the High Court are part of a statutory scheme to facilitate expeditious payments to contractors, etc. However, the dispute will only be finally decided upon after it has been properly determined either in arbitration or in a court action.

Further, the High Court held that the ruling by the Sessions Court in this regard ignored the fact that under Section 13(c) and Section 37(1) of the CIPAA, an adjudicator's decision is only binding when it is "finally decided by arbitration or the court". The fundamental error which occurred in the Sessions Court was the failure to realise that an adjudication decision under the CIPAA is only a decision which is interim or temporary in nature and is subject to a final determination by a court or an arbitral tribunal, if there are such proceedings between the parties. This is expressly provided for under Section 13(c) of the CIPAA wherein it is stated that an adjudication decision is binding unless the dispute is finally decided by arbitration or the court.

Therefore, the High Court held that the Sessions Court Judge had erred in ruling that the reliefs claimed for by the plaintiff could not be granted as that would be inconsistent with the High Court's Order in OS35 purportedly on the basis that it violated the principle of *res judicata*.

The plaintiff's appeal was allowed and the suit was reinstated. The High Court added emphasis on amending the statement of claim in lieu of striking out the suit.

**GUANGXI DEV & CAP SDN BHD V SYCAL BHD AND ANOTHER
CASE [2017] MLJU 878**

The High Court in this decision held that the act of an adjudicator in not allowing a hearing does not amount to a denial of natural justice.

The relevant issue before the High Court was a setting aside application pursuant to Section 15(b) of the CIPAA. That provision concerns an application to set aside an adjudication decision on the ground of a “denial of natural justice”.

The Plaintiff relied on this ground and argued that “not granting Plaintiff a hearing in the form of its 3 expert witnesses amounted to a denial of natural justice”.

The Plaintiff further stated that there had been a denial of natural justice in that the adjudicator had not taken into account clause 8(d) of Letter of Award. Clause 8(d) gave the respondent an absolute right to correct or rectify any errors or mistakes made in any previous progress payments, and an absolute right to omit or reduce the value of such work pertaining to the said errors or mistakes in the subsequent progress payments.

Decision

With regard to grant of a hearing in the form of its three expert witnesses, the High Court found that the adjudicator had considered the Plaintiff’s application and gave cogent reasons in rejecting it. The reason given by the adjudicator was a finding of fact and law and not a case where there had been a denial of natural justice in arriving at the decision.

The High Court further found that an adjudicator has the power to conduct hearing under Section 25(g) of the CIPAA, but that provision does not impose any obligation on the adjudicator to conduct same. Given that the adjudicator had considered her powers under Section 25 of the CIPAA in deciding the issue, the Court held that the act of the adjudicator in not calling for a hearing did not amount to a denial of natural justice. This was because there was no evidence that had the adjudicator heard the oral testimony of the witnesses, she would have arrived at a different conclusion and she would have delivered a decision in favour of the plaintiff (the respondent in the adjudication proceedings).

In relation to the second allegation of “not considering the clause 8(d) of the LA”, the Court held that the adjudicator had not erred in addressing the issue of clause 8 (d). The High Court canvassed the adjudicator’s decision and noted that the adjudication decision, at paragraph [91], stated that there was no evidence before the adjudicator that, at any point in time prior to the adjudication proceedings, the respondent had informed the claimant that the Payment Certificates issued by the architect were erroneous, and that the respondent would be exercising its rights under clause 8(d) of the Letter of Award.

As there had been no denial of natural justice in the adjudicator not allowing a hearing, the application was dismissed.

***HARMONY TEAMWORK CONSTRUCTION SDN BHD V VITAL
TALENT SDN BHD [2017] MLJU 546***

In this decision, the High Court held that a partial payment of an adjudicated sum paid by the respondent to the plaintiff/claimant should not be reflected or accounted for in an order made pursuant to an application under Section 28(1) of the CIPAA. However, such an adjustment should be made in an application for the enforcement of an adjudication decision pursuant to Section 28(3) of the CIPAA.

This High Court case considered an Originating Summons for an order to register and enforce the decision of the adjudicator made under the CIPAA.

The plaintiff was appointed by the defendant as its sub-contractor for the construction work. Upon completion of the work, disputes arose between the parties over the non-payment of a progress claim and release of retention monies under the sub-contract.

The plaintiff commenced adjudication proceedings and the adjudication decision was rendered in its favour. The defendant paid a portion of the sum awarded to the plaintiff. The plaintiff filed an application to recover the unpaid amount and to enforce the adjudication decision made in its favour.

The plaintiff contended that it could seek to register the adjudication decision as a court judgment on like terms since the defendant did not challenge the adjudication decision. The defendant however contended that the order must be for the reduced amount owing to the plaintiff to reflect and account for the partial payment made by the defendant to the plaintiff.

Decision

The High Court observed that the enforcement of an adjudication decision is a 2-stage process.

Firstly the successful party must make an application to the High Court for an order to enforce the adjudication decision pursuant to Section 28(1) of the CIPAA. Implicit therein, the application should include an order that judgment be entered in terms of the adjudication decision.

Secondly, the successful party may pursuant to Section 28(3) of the CIPAA enforce the judgment based on the modes of execution prescribed by the Rules of Court 2012 such as through writs of execution (Order 46), garnishee proceedings (Order 49), etc.

The High Court held that the order for the enforcement of an adjudication decision in part pursuant to Section 28(2) is only applicable where part of that adjudication decision has been set aside pursuant to Section 15 of the CIPAA by reason that it was improperly procured or otherwise adjusted.

Thus, the CIPAA and the Rules of Court 2012 were clear in that the plaintiff could not double recover or be unjustly enriched notwithstanding that an order would be made to register the adjudication decision as a judgment. Hence, the application was allowed.

MARTEGO SDN BHD V ARKITEK MEOR & CHEW SDN BHD AND ANOTHER APPEAL [2016] MLJU 1827

This decision sets out the majority judgment of the Court of Appeal in the *Martego* matter. The Court of Appeal, by 2:1 majority, held that interim and final accounts can form part of a Payment Claim. The Court of Appeal also held that an adjudication award is only of a “temporary finality” since the CIPAA allows parties to take their grievances to the High Court or an arbitral tribunal prior to, concurrent with, or even after the adjudication proceedings.

The Court of Appeal dealt with two appeals. The first appeal concerned the setting aside of the adjudication decision and the second appeal concerned the enforcement of the adjudication decision.

ARMC was engaged by Martego as the Project Architect. A dispute arose as to the amount of fees which ARMC was entitled to. The adjudicator decided in favour of AMRC. Martego being unhappy with the decision of the adjudicator applied to the High Court to set aside the same premised on Section 15 of the CIPAA. Martego’s application was dismissed. ARMC armed with the adjudicator’s decision applied to the High Court to enforce the same which was allowed by the High Court.

Martego contended that the adjudicator had acted in excess of jurisdiction in that the CIPAA had no application in respect of a claim for architectural fees, and that there had been a breach of natural justice in the process of adjudication. It also argued that ARMC was a firm of architects and as such it was bound by the Architects Act 1967 (AA) to recover its professional fees as there exists therein a procedural regime for recovery of such fees.

The issue before the Court of Appeal was whether it had the jurisdiction to deliberate on an issue not argued before the Adjudicator or the High Court, and also whether the architect’s professional fees could be characterized as an interim or final payment under the CIPAA.

Decision

With respect to Martego’s contentions of excess jurisdiction and breach of natural justice, the Court of Appeal upheld the decision of the learned judge of High Court.

The Court of Appeal held that it does not matter whether the payment claims are interim or final, or whether the claims are made after a unilateral or mutual termination. As long as they are payment claims relating to a construction contract as defined in section 4, the CIPAA applies.

The Court of Appeal dismissed both the appeals and held that the Court of Appeal’s power to set aside adjudicator’s decision is circumscribed by statute in Section 15 of the CIPAA and it is not a provision which allows the Courts to sit in an appellate jurisdiction.

The Court of Appeal further held that as long as the learned adjudicator had approached his task by adhering to the due process of his adjudication, the Courts would not interfere as the Courts are not allowed to look into the merits of parties’ case.

MARTEGO SDN BHD V ARKITEK MEOR & CHEW SDN BHD AND ANOTHER APPEAL [2017] MLJU 1382

This decision sets out the separate judgment of Hamid Sultan JCA in the Martego matter, where it was held that final accounts should not form part of a Payment Claim.

The Court of Appeal in this case dealt with two appeals related to one adjudication decision. The first appeal was to set aside the adjudication decision and the other appeal was to set aside the enforcement order.

Martego engaged the respondent, who were architects, as the Project Architect for the Project. The clear provision of the Architect Act and/or Architect Rules requires that a dispute as to fees of the architect must be referred to arbitration. Martego terminated the respondent's services before the completion of the contractual obligation of the respondent. The respondent accepted the termination and filed a claim under the CIPAA for professional fees and services rendered. The matter proceeded for adjudication and the adjudicator decided in favour of the respondent.

Martego contended that the adjudicator had acted in excess of jurisdiction and that there had been a breach of natural justice as the adjudicator had failed to hold an oral hearing despite three separate requests. The respondent contended that a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below.

The question for the Court of Appeal was whether the subject matter of the adjudication was based on an interim payment claim or a final claim, and whether statutory adjudication in other jurisdictions makes a distinction between final bills and interim bills.

Decision

It was held that it was not in dispute that the termination took place before the completion of the construction of the towers. If there has been no termination or unilateral termination, the claim would have been for an interim payment and the matter could be referred to adjudication pursuant to the CIPAA. If the contract had been terminated and accepted, then the claim of the respondent would relate to the final account or final payment and in consequence the CIPAA would not be applicable.

It was observed that the CIPAA was meant only to cover the contractual dispute and not the construction dispute. When it comes to final account or final payment, the commercial reality is for the parties to settle the construction dispute as a whole, at least at the stage of final payment. Further, it was observed that in view of sections 29 and 36 of the CIPAA, any reasonable tribunal apprised with the facts and law relating to construction claim, construction contract, construction dispute and construction law will come to a conclusion that the CIPAA is limited to progress claims. Thus, the court found merit in the appellant's submission.

The court consequently held that if the CIPAA, by decisions of courts, is made applicable to the final account or the final payment in relation to construction disputes, as opposed to the construction contract for an interim payment, it may lead to abuse of process.

Both the appeals were allowed in this decision for the reasons that the claim by the respondent was not related to the CIPAA and that the adjudicator would not have the jurisdiction to hear the dispute.

MIR VALVE SDN BHD V TH HEAVY ENGINEERING BHD AND OTHER CASES [2018] 7 MLJ 796

In this decision, the High Court reiterated that for a matter to come within a “construction contract” under the CIPAA, the contract must either be characterised as “construction work”, or it must fall within the scope of the procurement of equipment for construction work. The High Court held that the subject matter of the contract under consideration was caught by the latter category.

The claimant made an application to enforce two separate adjudication claims between the claimant and the respondent pursuant to the CIPAA. Both the adjudication claims were decided in favour of the claimant. No payment response was filed by the respondent in reply to the adjudication claims with the result that the respondent was deemed to have disputed the claimant’s claim under Section 6(4) of the CIPAA.

The respondent raised the issue that the adjudicators lacked the jurisdiction to hear the adjudication claims as the subject matter of the dispute did not relate to a “construction contract”.

The respondent filed two of the originating summons to set aside both the decisions pursuant to Sections 15(1)(b) and 15(1)(d) of the CIPAA on the grounds that both adjudicators had acted in excess of their jurisdiction.

The issues posed to the High Court were whether the work done by the claimant to convert a ship to a floating, production, storage and offloading (“FPSO”) vessel was “construction work” and whether this meant that the contract for the procurement of valves fell within the meaning of “construction contract” under the CIPAA.

Decision

The High Court held that for a “construction contract” under the CIPAA, the contract must either fall within the meaning of construction work or the procurement of equipment for construction work. Under the CIPAA, “construction work” covers any gas, oil and petrochemical work, meaning thereby if the structure is more of a ship or a vessel and if it nevertheless works for the gas, oil and petrochemical industry, then it would still satisfy the definition of construction work.

Emphasis was also laid on the functional purpose served by the conversion works and not the form of the structure with respect to its type of structure. The High Court considered that the conversion of the ship to a FPSO vessel was such that the ship no longer served the purpose of a ship but was transformed into a different purpose — that of the oil and gas industry.

Allowing the claimant’s application, the High Court held that since the ship was being converted, modified, altered and designed for the oil and gas industry, then it fell neatly and nicely under “construction work” being defined as such work done in any “gas, oil and petrochemical work”.

PCP CONSTRUCTION SDN BHD V LEAP MODULATION SDN BHD AND OTHER SUITS [2017] MLJU 905

The High Court in this matter partially set aside an adjudication decision on the basis that the adjudicator had wrongly and unduly diminished and restricted her jurisdiction to hear the respondent's set-off argument against a particular Payment Certificate. The High Court held that the respondent, having raised a defence of set-off, no matter how inelegant or imprecise as in failure to state the amount in the Payment Response, cannot be totally shut out by the adjudicator taking too restrictive a view of her jurisdiction and being unduly technical.

This case considered the setting aside of an adjudication decision under Section 15 of the CIPAA on the grounds of a breach of natural justice, or that the adjudicator had acted in excess of her jurisdiction.

The respondent argued that it had terminated the claimant's employment due to defaults and breaches by the claimant. It also contented that payment was not required under the contract until the completion of works and also until the completion and verification of the accounts. This was to occur within a reasonable time, and it was to be certified by an architect that there was an outstanding amount to the claimant after taking into account the costs of completing the remaining works.

The claimant, on the other hand, contested the application to set aside the adjudication decision since the adjudicator had neither failed to answer the question referred to her nor had she answered a question which was not referred to her. Further, the manner in which the adjudicator had conducted her task was fair.

The issue before the High Court was whether the adjudicator had rightly declined her jurisdiction to hear the set-off pleaded by the respondent in the adjudication proceedings, and whether the adjudicator could allow for payments to be made to the claimant for Interim Payment Certificates not paid yet at the point of determination in the contract.

Decision

The High Court held that the Payment Certificates relied on by the claimant were already due for payment. The respondent could not use the event of determination in the Contract to withhold payment. The adjudication decision was upheld in this respect.

With regard to the set-off of rectification cost and sum due from the claimant to the respondent, the High Court held that the Adjudicator wrongly and unduly diminished and restricted her jurisdiction. This was a breach of natural justice.

The High Court further held that if the decision properly addressed more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference would not undermine the validity and enforceability of that part of the decision which deals with the other(s).

Therefore, the High Court set aside that part of the adjudicator's decision which did not consider set-off in Payment Certificate due to claimant. The stay of adjudication decision was dismissed as there was no cogent evidence pointing towards the impecuniosity or insolvency of the claimant.

**SINWIRA BINA SDN BHD V PUTERI NUSANTARA SDN BHD
[2017] MLJU 1836**

In this decision, the High Court held that a conditional payment clause in a construction contract was ousted by virtue of Section 35 of the CIPAA.

The defendant was the main contractor for a project in Langkawi (the "Project").

The plaintiff was awarded a letter of award by the defendant to provide sub-contractor works for the Project.

Before the works could be completed by the plaintiff, the plaintiff ran into financial difficulties because it had not received payment for some of the partially completed works it had undertaken on the Project.

The plaintiff also had difficulties in proceeding and completing its scope of works because the defendant had failed to obtain a permit from the relevant authority to transport and deliver sand and rocks to the site (the "Permit").

The plaintiff had no alternative but to terminate the letter of award and to file an action against the defendant for outstanding payments.

The defendant relied on a "back-to-back" clause in the letter of award which provided that the Sub-Contract Sum would be paid to the plaintiff as a back-to-back payment as and when the payment was received by the defendant from a party known as the "Client". The clause also provided that in the event payment was not received from the Client, the defendant would not be liable to pay the plaintiff.

The defendant claimed that the claims made by the plaintiff were inconsistent with the Bill of Quantities and were not agreed upon by the parties. It was also submitted that the plaintiff did not comply and follow the terms of the contract documents in carrying out its works. The defendant denied that it was its duty and responsibility to obtain the Permit – this was the duty of the plaintiff.

Decision

The High Court allowed the plaintiff's claim for a sum of RM1,584,672.50.

The High Court held that the plaintiff had produced sufficient evidence to prove its claims on a balance of probabilities against the defendant.

The High Court held that the defendant could not rely on the back-to-back clause to defend the plaintiff's claim. It was considered that the letter of award fell within the definition of "construction contract" in Section 4 of the CIPAA. This was because the construction of the fringing reef and tidal gates involves construction of a "structure" or "wall" which falls within the definition of "construction work" in the CIPAA.

Section 35 of the CIPAA renders a conditional payment provision in a construction contract void. "Conditional payment provision" is defined in Section 35(2) of the CIPAA as the obligation of one party to pay another upon that party receiving a payment from a third party, or that the obligation of one party to pay another is conditional upon the availability of funds or the drawdown of that party's financing facilities. This meant that the back-to-back clause was void pursuant to Section 35 of the CIPAA.

The High Court also found that the plaintiff was not contractually obligated to obtain the Permit.

SQA BUILDERS SDN BHD V LUXOR HOLDINGS SDN BHD AND ANOTHER SUIT [2017] MLJU 833

The High Court in this decision reiterated the findings of the High Court and Court of Appeal in the View Esteem decision and held that an adjudicator does not have the jurisdiction to make findings on matters raised in an Adjudication Response, if the same issues were not raised in the Payment Claim or the Payment Response.

The question for the High Court was whether an adjudicator had jurisdiction to hear a defence raised for the first time in the Adjudication Response in circumstances where no Payment Response was served.

The respondent was the owner of Lot 1. The claimant was the contractor appointed to construct a six-storey office building and warehouse. The claimant commenced adjudication proceedings against the respondent for certain interim certificates.

The respondent raised its defence for the first time in the Adjudication Response. Its defence was that the works completed by the claimant were late and contained defects in workmanship. It raised a counterclaim and set-off for the first time in the Adjudication Response for defective works and liquidated and ascertained damages.

The adjudicator rendered the adjudication decision in favour of the claimant ("adjudication decision"). The adjudicator held that he had no jurisdiction to hear the respondent's set-off and counterclaim raised in the Adjudication Response since no Payment Response had been served. Hence, the said defence of set-off and counterclaim were rejected.

The claimant sought to enforce the adjudication decision under Section 28 of the CIPAA as the respondent had not effected payment within the 10 day timeframe stipulated in the adjudication decision. The respondent opposed the enforcement proceedings on the ground that the adjudication decision was invalid and that it should be set aside as the adjudicator had erred in law in failing to consider the counter claims and/or set-offs raised by the respondent in the adjudication proceedings.

Decision

The High Court enforced the adjudication decision and dismissed the respondent's application to set aside same.

The High Court noted that Section 27(2) of the CIPAA provides a mechanism by which parties may extend the jurisdiction of an adjudicator beyond matters raised, or to include matters not raised, in the Payment Claim and Payment Response, or in the absence of a Payment Response. The necessary requirement was that an agreement in writing needed to be made between the claimant and the respondent in the adjudication.

The High Court held that although the respondent raised the defence of counterclaim and set-off in its Adjudication Response, and the Claimant had objected to these matters in the Adjudication Reply on a without prejudice basis, this did not amount to an agreement in writing to extend the jurisdiction of the adjudicator. It was considered nonsensical to contend that if no Payment Response was served, the respondent, as the non-paying party, could be deemed to have disputed the whole of the Payment Claim under Section 6(4) of the CIPAA, and it could later canvass any defences in the Adjudication Response served.

The High Court held that even though leave had been granted for the Federal Court to hear the View Esteem matter, the decisions made by the High Court and the Court of Appeal in View Esteem were good law and this decision should follow the principles laid in those decisions. This meant that the adjudicator had not exceeded its jurisdiction in not determining the set-off and counterclaim raised in the respondent's Adjudication Response.

It was also held that the application to set aside the adjudication decision on the basis of breach of natural justice was devoid of merits. The respondent contended that there was a breach of natural justice in that there had been a failure to consider its set-off and counterclaim and there was also a failure to allow it to be heard on the question of the adjudicator's jurisdiction. The High Court reinforced that there was no automatic or inherent right for an oral hearing in an adjudication proceeding under the CIPAA. The respondent had been given every opportunity to file its Payment Response and Adjudication Response and the adjudicator had considered both parties' arguments and decided the case on the merits. The case was not such that the adjudicator had heard one party and not the other on a jurisdictional challenge; it was one where the matter having been raised by the claimant, the adjudicator inquired into his jurisdiction and decided accordingly. The High Court also held that the respondent's contention that the adjudication decision should be set aside for breach of Sections 6(4) and 26(1) of the CIPAA was without merit.

The High Court also held that there was no good reason why a Payment Claim that includes a final progress claim or certificate should be outside the jurisdiction of the adjudicator to decide.

With respect to the question of whether an adjudicator can decide on his own jurisdiction, the High Court held that whilst generally an adjudicator may not decide on his own jurisdiction, he may nevertheless inquire into it. The party challenging the adjudicator's jurisdiction, if aggrieved by the adjudicator's decision, would be at liberty to apply to set it aside under Section 15(d) of the CIPAA and the Court will decide the issue of the adjudicator's jurisdiction, or the lack of it, unfettered by any reasons given either way by the adjudicator.

**VIEW ESTEEM SDN BHD V BINA PURI HOLDINGS BHD [2018]
2 MLJ 22**

This is a landmark decision in that it is the first decision handed down by the Federal Court on the CIPAA. The Federal Court reversed the findings of the High Court and the Court of Appeal in the View Esteem decisions and held, inter alia, that an adjudicator does have the jurisdiction to consider matters raised in an Adjudication Response which had not been raised earlier in a Payment Response, so long as the matter relates to the Payment Claim.

A dispute had arisen between the parties over the non-payment of interim payment claims. The respondent had served a payment claim on the appellant and the appellant had not filed a payment response. The appellant contended that this meant it disputed the entirety of the amount claimed under the CIPAA. The respondent proceeded with adjudication proceedings against the appellant. The appellant filed an Adjudication Response disputing the respondent's claim stating that the interim claims claimed by the respondent were subject to adjustments. After considering all the arguments, the adjudicator made a decision in favour of the respondent ("adjudication decision").

Three applications were commenced with respect to the adjudication decision in the High Court. The first application was made by the appellant to challenge the jurisdiction of the adjudicator pursuant to the saving provision in Section 41 of the CIPAA. The second application was brought by the respondent to seek registration and enforcement of the adjudication decision as a judgment of the court pursuant to Section 28 of the CIPAA. The third application was made by the appellant to set aside/stay the award of the adjudication pursuant to Sections 15 & 16 of CIPAA.

The High Court dismissed both of the appellant's applications and allowed the respondent's application to enforce the adjudication decision. The Court of Appeal affirmed the three decisions of the High Court.

The matter was appealed to the Federal Court on the 8 questions of law broadly grouped into the categories of a jurisdictional challenge under Section 41 of the CIPAA, the alleged right of an adjudicator to exclude defences, and issues pertaining to setting aside decisions and/or granting stays.

Decision

The Federal Court allowed the appellant's appeal with costs and it set aside the orders made by the High Court and the Court of Appeal.

Jurisdictional Challenge under Section 41 of the CIPAA

The Federal Court held that a party can raise a jurisdictional challenge, with respect to the applicability of the CIPAA to a particular dispute, at any time and not only upon the conclusion of the adjudication.

A distinction was drawn between a case where the CIPAA did not apply at all, and a case where the CIPAA did apply but the adjudicator acted in excess of jurisdiction (as provided for in Section 15 of the CIPAA). The Federal Court held that the appellant was correct to not invoke Section 15 of the CIPAA because a party cannot, on the one hand, complain that the CIPAA did not apply at all, yet on the other hand invoke a provision of the CIPAA to seek relief.

The Federal Court also held that pursuant to Section 41 of the CIPAA, proceedings whether wholly or partly referred to court or arbitration prior to 15 April 2014, are excluded from the operation of the CIPAA. This principle applies irrespective of whether the prior court or arbitration proceedings were concluded or still pending upon the commencement of the CIPAA. This is because the Federal Court recognised that in the construction industry, progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate stand-alone compartments. In this case, it was found that Progress Claim No 28 is cumulative of earlier progress claims contained in Interim Certificates Nos 23 to 26R, in respect of which action had been commenced in court in 2013. Accordingly, Progress Claim No 28 was not referable to the CIPAA.

Right of an Adjudicator to Exclude the Defences of the Appellant

The Federal Court considered that the adjudicator had excluded three vital defences raised by the appellant, as the respondent in the adjudication process, on the grounds that they were not stated as reasons in the Payment Response, although pleaded in the Adjudication Response.

The Federal Court held that an adjudicator must consider matters raised in the Adjudication Response, even in the absence of such matters being raised in a Payment Response or in the absence of the filing of a Payment Response. The relevant nexus is that the matters raised in the Adjudication Response must relate to the matters raised in the Payment Claim.

The Federal Court opined that the two-stage process in the CIPAA (of issuing a Payment Claim and Payment Response, and later issuing an Adjudication Claim, Adjudication Response and Adjudication Reply) does not warrant giving reduced importance to adjudication pleadings, and a greater, if not overriding, significance to the initial documents under Sections 5 & 6 of the CIPAA.

Based on a consideration of Sections 6(4), 15, 24, 25, 26 and 27 of the CIPAA, the Federal Court held that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice.

Setting Aside/Granting Stays

It was noted that the High Court and the Court of Appeal had taken the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum (i.e. the granting of a stay is restricted to the financial status of the other party).

The Federal Court held that such a stringent test was not warranted under the CIPAA given that Section 16 of the CIPAA contains no such limiting requirement or intent. The correct approach under Section 16 of the CIPAA would be to evaluate each case on its merits. The High Court should not fetter its decision with a pre-determined test not found in the CIPAA, namely that the granting of a stay is determined on the financial capacity of the contractor to repay. This could be a factor guiding the High Court's decision, but it could not be the only factor.

The Federal Court also held that it was appropriate that an application for stay under Section 16 of the CIPAA to be filed together with an application to set aside an award under Section 15 of the CIPAA.





A photograph of a construction site under a blue sky with scattered white clouds. In the foreground, there are stacks of construction materials like bricks and pipes. A tall yellow tower crane stands prominently in the middle ground. To the left, a multi-story building is under construction, showing its concrete frame and some window openings. Another yellow crane is visible in the upper left corner.

PART IV

PROCESS IMPROVEMENT BY THE AIAC

THE AIAC STANDARD FORM OF CONSTRUCTION CONTRACTS: DIGGING AT THE ROOTS RATHER THAN HACKING AT THE LEAVES

One year has passed since the AIAC (the then KLRC) first introduced four standard forms of construction contracts (SFC): building construction main contracts (two types; one with and one without quantities); a sub-contract consistent with the main contract; and a contract for minor works.

The SFCs were inspired by the prevalent issues plaguing the Malaysian construction industry, aimed at filling the gaps of existing standard form building contracts in governing relationships, rights and duties of parties to a building construction project.

Following the success of the CIPAA, the SFCs assimilated the CIPAA provisions, thus clarifying the positions of the parties and assisting them in navigating the adjudication process.

To date, the SFCs have been downloaded more than

 **3,000 times**

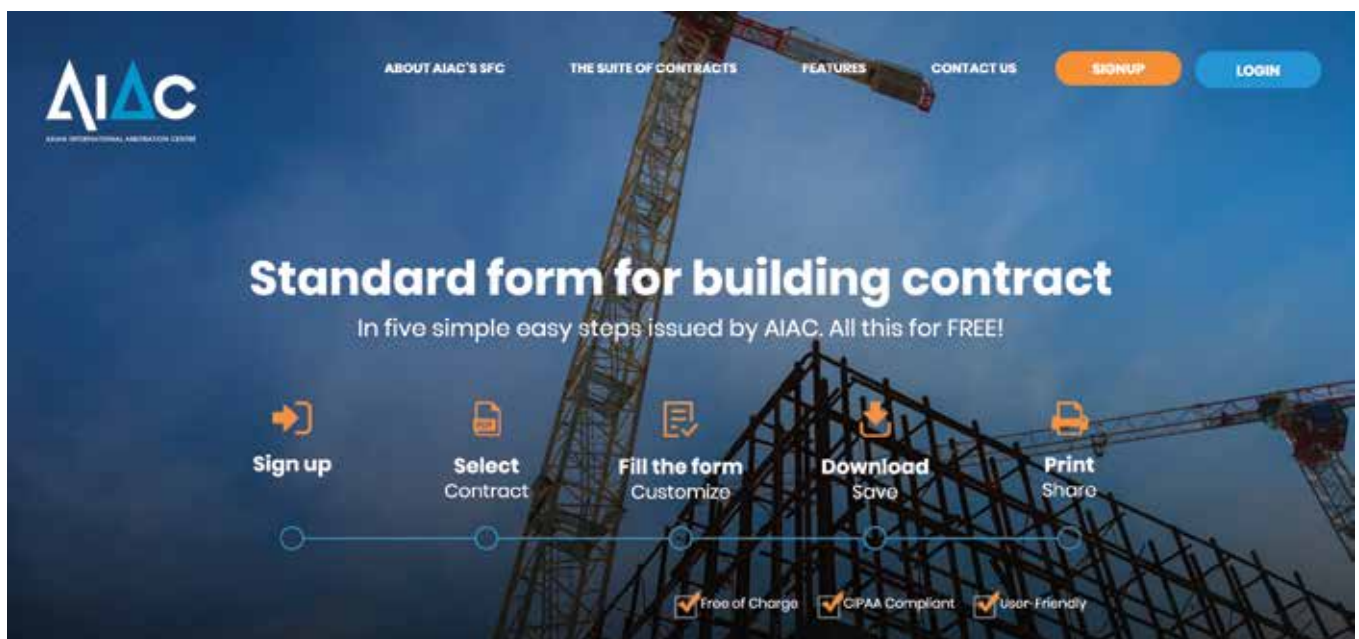
and fully customized for more than

 **60 projects**

by construction experts from Malaysia, India, the USA, Hong Kong and Singapore.

In 2018, the AIAC is planning to launch two more SFCs: AIAC's Design & Build SFC with a corresponding Design & Build Sub-Contract.

We are also in the process of internationalising our entire SFC suite to produce an Asian Construction SFC suitable for international construction projects with the advent of the Belt & Road Initiative, which has already seen and will see many more massive land and sea infrastructure projects connecting Asia and Africa with Europe.



CONTINUATION OF THE DIGITISATION OF ADJUDICATION PROCEEDINGS

Further to the indication in the 2017 CIPAA Report that the AIAC (the then KLRCA) “has endeavoured to digitis[e] all incoming and outgoing documents relating to all adjudication proceedings registered at the Centre, as part of its efforts to achieve a ‘paperless’ record keeping system,” the AIAC has now achieved that complete digitisation with respect to many aspects of adjudication proceedings. As of spring 2018, all newly registered cases are handled digitally with messages sent through our case management system (as opposed to sending emails manually), save for where communication in paper is obligatory under the CIPAA.

In line with its efforts to streamline all processes, the AIAC has also gone fully digital with respect to the compiling of the statistics for the 2018 CIPAA Report, where the AIAC created online questionnaires accessible only to adjudicators and parties in matters administered by the AIAC during the 2018 fiscal year. This fully digital and automatised process has allowed the AIAC to compile all necessary statistics in approximately 20% of the time needed to compile same in the 2017 fiscal year. This is in spite of the fact that the caseload increased by 217 cases or approximately 39% from the 2017 fiscal year to the 2018 fiscal year.

In continuous pursuit of further streamlining its processes, during the 2019 fiscal year, the AIAC will collect statistical data on all adjudications as soon as an adjudication ends (i.e., when the adjudicator renders the adjudication decision or when the adjudication is withdrawn). This will allow the AIAC to collect even more information on adjudications conducted under CIPAA and thus tweak internal processes to take into consideration the views and requests of parties and adjudicators. Likewise, in collecting information on adjudication proceedings on a rolling basis, the AIAC will be in a position to compile yet more comprehensive statistical information and thus provide more information to all users of adjudication.





PART V

CONCLUSION

CONCLUSION

Since the 2018 fiscal year elapsed in mid-April, we are already several weeks into the fifth year of the CIPAA. The CIPAA started with merely 84 cases in the first fiscal year (from mid-April 2014 through to mid-April 2015). It now stands at 779 cases for the 2018 fiscal year. This represents an increase by over 800%. The AIAC expects even further growth in the near future as the first months of the 2018 calendar year indicate yet another increase in case numbers. The success of the CIPAA makes the AIAC proud and encourages the AIAC to strive for greater improvements.

Speaking of improvements: it has been said that the digital revolution is far more significant than the invention of writing or even printing. The AIAC has not only understood that digital improvements are necessary, but it also embraces such improvements. As of spring 2018, all new adjudication matters will be managed digitally through our online case management system. We also digitally collected data for the 2018 CIPAA Report and will further improve the digital collection of data in the future. All of these improvements allow us to provide even better services to the users of adjudication.

As much as the automation and digitisation of processes is beneficial – or even necessary – we must not forget that processes and systems can only be as good as the person(s) who designed them, or provided for the input of the relevant data. This is why the AIAC is very grateful to the many adjudicators and the parties (and/or their party representatives), who contributed to the success of this year's CIPAA Report, by participating in our online questionnaires. Without their help, all efforts in digitisation would only reap half the rewards.

The CIPAA itself has been a huge reward for both the Malaysian construction industry and Malaysian society as a whole. Many of the claimants in the 779 adjudications of the 2018 fiscal year would not have had access to justice were it not for the CIPAA. And even if they had had access to justice, almost certainly, these cases would not have been resolved as of today; rather they would still be pending in the court system.

On a final note, the success of the Malaysian adjudication regime is also strongly linked to the Malaysian judiciary. Our judiciary has played an integral role by releasing adjudication-related judgments on many relevant provisions of the CIPAA.

The AIAC will strive for further improvements to make adjudication even more efficient. The AIAC will make sure that its continued training and awareness programmes, as well as the refinement of administrative processes, meet industry demands, thus consolidating the AIAC's legislative mandate under the CIPAA. This will ensure that Malaysia's adjudication system is on par with that of other countries around the world with similar systems.









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