A Study on Current Dynamics in Adjudication Implementation in Malaysian Construction through Law Cases Analysis

Ahmad Arzlee Hassan¹, Abdul ‘Izz Mohammad Kamil¹ and Ruth Lua Ejau¹
¹Faculty of Architecture, Planning & Surveying, 40450 Universiti Teknologi MARA, Shah Alam, Selangor MALAYSIA

Email: arzleehassan@gmail.com

Abstract. Adjudication is currently in its green age, where many lessons and experience are yet to be learnt. The implementation since its first introduction in 2012 has shown a progressive dynamic as it is widely applied, with many claims resolved, despite numerous being referred to arbitration and litigation. Challenges made against the adjudication decision under various bases and the court only allows for limited grounds for challenges. The paper aims to establish the valid approaches to challenge adjudication decision within the Construction Industry Payment and Adjudication (CIPA) Act 2012 implementation. The objectives include underlining the common problems occurring within the implementation through the behaviour of adjudication practice and studying the basis for challenges in adjudication decision. Law case analysis was carried out using thematic analysis by extracting court judgements from several law cases and categorizing them within a particular theme. Once the data with similar theme was filtered, deductive reasoning was used to extract the conclusion. Limited grounds for admissibility of challenges included a claim against adjudicator acting in excess of his given jurisdiction and/or adjudicator who is in breach of natural justice. Limited ground for challenges are important to ensure the relevance of the adjudication institution while maintaining the role of the judiciary in conserving the fairness and justice within its implementation.

1. Introduction

Adjudication implementation in Malaysia through the introduction of Construction Industry and Adjudication Act (CIPA Act) 2012 is currently still at its green age, where lessons are still being learnt and there are still much to gain in terms of experience regarding its execution. It is opined to be the solution for many payment problems happening in the industry. Azam and Beh is in the opinion that speedy and cheap recovery of payment is pinnacle [1][2].

Hence, an authorized enforcement channel such as adjudication is introduced. This supports the claim that Adjudication through CIPA Act 2012 is what the industry actually needs to resolve pending payment issues. The early years of its implementation have not revealed much of the subsequent problems. However, the recent developments prominently exhibit through the judgement of View Esteem V Bina Puri Holdings [2018] 1 CIDB - CLR 38 and other concurrent law cases have finally exposed the problems. It is detected that the same repetitive theme emerges through challenges against adjudicators’ decision in legislation.

Adjudication is becoming more and more prevalent these days. The awareness towards CIPA Acts 2012 and the rights the construction players have under the Act leads to numerous claims being referred
to adjudication under the Act. As it is important to shine lights on the proper procedural rules, it is as pertinent to acknowledge the rights of parties within the quasi-judicial adjudication proceedings and subsequent judicial proceeding, which comes within the rules. To avoid misleading claims, themes for challenges in the decision of adjudicators must be established.

1.1 Aim and Objectives
The study aims to establish the valid approaches to challenge adjudication decision within the CIPA Act 2012 implementation. Few objectives are highlighted in order to achieve this aim, i.e.;

a) To underline the common problems occurring within the implementation through the behaviour of adjudication practice.

b) To study the basis for challenges in adjudication decision.

1.2 Problem Statement
As reported in the Malaysian Reserve [3], the then Director of Asian International Arbitration Centre (AIAC) Datuk Professor Sundra Rajoo shared that AIAC records revealed a steady rise in the number of adjudication cases led year-on-year, with over 700 cases recorded in 2017 of up to RM1.38 billion worth of claims resolved through adjudication. The rise signified awareness towards the CIPA Act and the rights construction player has under them. With several drawbacks and comments as being fast, rough-and ready justice, temporarily binding and merely interim in nature adjudication is open to the vulnerability for challenges [4][5]. Seah observed that 54.35% of adjudication decisions are re-arbitrated or re-litigated, with almost half of the adjudication decisions were referred to the High Court for setting aside orders and some numbers were contributed by the question of jurisdictional issues [6]. Although the Act allows for such challenges to be made especially if there are; elements of fraud or bribery, when there are denial of natural justice, where adjudicator has not acted independently, or when he has acted in excess of his jurisdiction [4], which will subsequently set aside the adjudicators decision, some claims were dismissed for not being valid for challenges. To avoid inconsequential claim, which only cause parties to spend money for futile claims in court, a study to understand the ground for challenges against adjudication decision is highly pertinent.

2. CIPA Act 2012: The story so far

2.1 The Purpose of CIPA Act 2012 and Implementation
CIPAA 2012 and its statutory adjudication rules addresses effective, speedy and cheap dispute resolution to ensure better cash flow [7], through sensible payment regime provided by a speedy dispute resolution, i.e. statutory adjudication. Recovery for payment mechanism [6] is guaranteed for aggrieved claimant. Through its implementation over these past few years, adjudication managed to successfully secure parties’ payment for work done, eventually compels mandatory payment of an amount due to the contractor [8][9] and also ensures fairer risk allocations between the employers and the contractors. In addition, the confidential nature is attractive to parties who wish to resolve construction disputes quickly and quietly [4][5][6][7][8][9].

The loopholes and questions were only raised and detected after years of implementation. The occurrences of parties unhappy with the decision of adjudicators were as expected. Hence the allowance for challenges to be made in arbitration and litigation. However, it was a concern that court and arbitration might be treated as complain counters for unsatisfied aggrieved parties. It is clearly stated in the Act that only under certain limited grounds allow for challenges to be made. Some rules were vague in their definitions and court clarification was deemed required.

3. Methodology
Legal research is unpopular in the construction industry due to its nature being unfamiliar to the technical drawn industry. Maidin and Sulaiman and Quapp and Holshemacher agreed that although the construction (namely surveyors and also civil and structural engineers, in their research) have little
interest in legal researches and studies due to the terms, language, nature, the theoretical content and basically not prepared for the legal profession, the importance of legal research in construction cannot be dismissed as it is prominent to understand the contract-centric environment[10][11]. The knowledge may also circumvent parties from engaging into expensive legal lawsuit and issues. Hence, this research encompasses comprehensive legal research framework structured to give a better view from a construction perspective. Due to its applied legal research nature, doctrinal legal research was used for this research [12]. Legal doctrinal research examines principles and law obtained from known principles and established case law. The black letter research was used to analyse impact of a particular law on a community, in this research scope; the construction community. Cases related to adjudication were gathered and analysed to demonstrate the operation and efficacy of a particular law [13]. Therefore, all relevant cases enlisted are defined, categorized and analysed.

3.1 Law Case Analysis

Law cases relating to adjudication and implementation under CIPA Act 2012 were collected. These primary data was gathered from the CIDB Construction Law Report 2015 to 2017 [14][15][16]. Cases filtered and enlisted are as follows:

a) ACFM Engineering & Construction Sdn Bhd V Esstar Vision Sdn Bhd [2017] 1 CIDB-CLR 205
b) Bina Puri Construction Sdn Bhd V Hing Nyit Enterprise Sdn Bhd [2016] 1 CIDB-CLR 180-182
c) WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd & Other Case [2016] 1 CIDB-CLR 140
d) Innovative Engineering(M) Sdn Bhd V Nomad Engineering Sdn Bhd [2017] 1 CIDB-CLR 254
e) Naim Engineering Sdn Bhd & Anor v Pembinaan Kuantiti Sdn Bhd [2017] 1 CIDB-CLR 284
f) Ranchan Heavy Engineering Sdn Bhd V Pelabuhan Tanjung Pelepas Sdn Bhd [2017] 1 CIDB-CLR 284
g) Rimbunan Raya Sdn Bhd V Wong Brothers Building Construction [2017] 1 CIDB-CLR 151
h) View Esteem Sdn Bhd V Bina Puri Holdings Sdn Bhd [2018] 1 CIDB-CLR 38

Most of the above cases were tried in the High Court and Court of Appeal, with the exception of View Esteem V Bina Puri [2018], which was appealed in the Court of Appeal (reported CIDB-CLR 2016) and finally decided in the Federal Court of Malaysia (reported CIDB-CLR 2018). This turn of event has promoted the case to be the benchmark adjudication case.

3.2 Thematic Analysis

Thematic analysis was the qualitative analysis approach applied in this research. The qualitative analysis software Atlas.ti.8 was used to process the data. The themes were predetermined through a pattern revealed from the frequency of used terms extracted from the cases. Judgements from each of the cases were then individually dissected, labelled according to themes or codes, and linked to produce a diagram of network, which will be encrypted in the next stage of the research. A report was also produced enlisting judgement according to the theme preconceived at the earlier process. With the data thematically extracted and structured, deductive reasoning can be easily conducted.

3.3 Deductive reasoning

The structured data were analysed using deductive reasoning. The process includes defining the principle, identifying a factual event and lastly, making a relation between the two to determine whether the principle applies or otherwise [12]. The research mainly focused on the black letter law, thus the implementation and their effects through judgements were taken into consideration. Concluding the
observation involves deducing the facts from the judgement into several key focuses before arriving to a framework, which will eventually summarize the outcome. The research design is as follows:

**Figure 1. Law Cases Analysis Research Design**

### 3.4 Limitations

The law cases examined were limited to the ones captured in the CIDB Construction Law Report from 2015 to 2018. The timeline for the research were also not inclusive of cases being currently on trial or not being published in any law report yet. In addition, as adjudication being strictly private and confidential, adjudication claims not referred to litigation and resolved through either arbitration or other forms of quasi-judicial means were excluded from this analysis. However, arbitration awards and other decision from other alternative dispute resolution (ADR) were arbitrary and can be quite trivial to the outcome affecting adjudication provisions as only the court judgements were seen as precedence and impactful to the implementation of any particular rules.

### 4. Data Analysis

#### 4.1 The Outcome of an Adjudicator’s Decision

According to section 28 of the Act, a party satisfied with the decision of an adjudicator may have them enforced in High Court. Under section 26 (7), section 31 and section 15 also recognized that the court might also grant a stay of adjudication decision, if the decision is challenged in arbitration or the court through certain procedural rules. Hence dictate the permissibility of any challenges to an adjudication decision. This also signifies the non-finality of an adjudication jurisdiction. However, challenges to adjudication decision must adhere to the limited grounds admissible by the court and Act under section 15, which includes; the possible influenced by bribery or fraud, breach of natural justice, biased and partiality in the conduct and judgement, and lastly in such situation the adjudicator has exceeded his jurisdiction. It is observed from the law cases that the common themes used to challenge the decision are as follows:
a) The adjudicator has committed a breach of natural justice by being unfair and partial to either party
b) The adjudicator has exceeded his jurisdiction allowed in the claims and as sanctioned by the Act
c) Other reasons (such as non-existence of construction contract and challenge against the competency of the adjudicator)

4.2 The Grounds to Challenge the Adjudicator’s Decision

The data gathered from the judgements in each of the law cases were encoded and the following diagram was produced:

![Diagram of Common Cause of referral to Litigation]

**Figure 2.** Common Cause of reference to Litigation

It can be concluded that only the said challenges are permissible to set aside adjudication decisions and allowed for challenges in the court. Other challenges do not have enough ground for challenges and therefore were dismissed. The following Table 1 shows the main events relating to such admission;

| Grounds                       | Relevant Events                                                                 |
|-------------------------------|---------------------------------------------------------------------------------|
| Excess of jurisdiction        | • Adjudicator tried events not relating to payment disputes                     |
|                               | • Adjudicator addressed and decided on issues relating to other than disputed claims |
| Breach of natural justice     | • Adjudicator not giving enough space for either party to put forward their argument |
|                               | • Adjudicator communicated to a party without the knowledge of the other party |
|                               | • Being bias and partial                                                        |
| Others                        | • No known written contract between the parties                                |
|                               | • Adjudicator’s competency in question                                         |
|                               | • Bribery, fraud and other misconduct                                          |
5. Conclusion
The implementation of statutory adjudication since its introduction in 2012 has seen moving to a particular dynamic. They are used widely and the industry’s maturity on statutory adjudication is improving. Although it is well accepted, there were some drawbacks, which require support from a higher legal institution, i.e. the judiciary. Further exploration on the rules and their effect could only be made through judiciary. Lastly, as challenges are allowed, there are some checklists claimants need to adhere to before forwarding the challenges to courts to avoid treating the court like some complain counters and at the same time undermining the authority and integrity of the adjudication institution.

References
[1] Azman, M. N. A., Dzulkalnine, N., & Abd, Z. (2013). Payment Scenario In The Malaysian Construction Industry Prior To CIPAA. Law and Dispute Resolution, 56
[2] Beh, L. C. (2017). Construction Industry And Payment Adjudication Act (CIPAA 2012) - Messrs Ravindran. Retrieved September 27, 2018 from https://ravindran.com.my/construction-industry-and-payment-adjudication-act-cipaa-2012/
[3] Malaysian Reserve (2018). Construction Sector Sees A Higher Number Of Dispute Cases. Retrieved September 27, 2018 from https://themalaysianreserve.com/2018/04/25/construction-sector-sees-a-higher-number-of-dispute-cases/
[4] Mah, R. (2016). Construction Adjudication in Malaysia - Faster and Cheaper Dispute Resolution -. Retrieved September 27, 2018 from http://www.mahwengkwai.com/construction-adjudication-in-malaysia-faster-and-cheaper
[5] Paulraj, J.J (2016.). Adjudication Decisions Pursuant To The Construction Industry Payment And Adjudication Act 2012 (CIPAA 2012); Open To Abuse? TKP Law, Retrieved September 27, 2018, from http://www.tkplaw.co/articles_7.html
[6] Seah, K. (2018). CIPAA: Adjudication Leading the Way? Retrieved from https://themalaysianlawyer.com/2018/09/05/cipaa-adjudication-leading-the-way/
[7] Nasir, N. I. I. M., Ismail, Z., & Ng, N. K. M. F. (2018). Comparative Analysis On Construction Adjudication Systems Towards Effective Implementation Of Statutory Adjudication In Malaysia. Malaysian Journal of Civil Engineering, 30(2)
[8] Raji, B. A., Ali Mohamed, A. A., & Mohammed, N. S. (2017). Statutory Adjudication: A Global Trend For Resolution Of Payment Problems In Construction Industry. In International Conference on Dispute Resolution (p. 418). IIUM
[9] Choon, B. L. (2017). Construction Industry And Payment Adjudication Act (CIPAA 2012) - Messrs Ravindran. Retrieved 27 September 2018 from https://ravindran.com.my/construction-industry-and-payment-adjudication-act-cipaa-2012/
[10] Maidin, A. J., & Sulaiman, S. S. (2011). Importance of legal education for quantity surveying professionals: A proposal for developing a legal studies module for Malaysian system. Journal of Applied Sciences Research, 7(S1), 2249-2256.
[11] Quapp, Ulrike & Holschemacher, Klaus. (2014). The Importance of Construction Law Teaching in Civil and Structural Engineering Education, Conference Paper, Penza, Russia : Retrieved from https://www.researchgate.net/publication/280931761_The_Importance_of_Construction_Law_Teaching_in_Civil_and_Structural_Engineering_Education
[12] Chynoweth, P. (2008), Legal Research in Knight, A. & Ruddock, L (2008) ed.,Advance Research Method in the Building Environment, Oxford: Wiley & Blackwell Corbin, J. & Strauss, A. (2008) Basic of Qualitative Research 3rd Edition, California: Sage Publicatio
[13] McConville, M & Wing, HC (2007), Research Method for Law: Edinburgh University Pres
[14] Construction Industry Development Board. (2015). CIDB Construction Law Report (002344785-W).Kuala Lumpur, Malaysia: ARK Knowledge Solution.
[15] Construction Industry Development Board. (2016). *CIDB Construction Law Report*. Kuala Lumpur, Malaysia: ARK Knowledge Solution

[16] Construction Industry Payment and Adjudication Act (2012), *Law of Malaysia Act 746*, Percetakan Nasional Malaysia Berhad