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Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry

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Abstract. Construction Industry Payment and Adjudication Act (CIPAA) 2012 was introduced to ensure security of payment through statutory adjudication as the enforcement mechanism. The growing numbers of cases indicate growth in the implementation in numbers, experience and improvement. This paper aims to understand the rules and limited grounds to challenge an adjudication decision through exploration of the law and procedures. Doctrinal legal research was carried out to establish the black letter law extracted from the Act and law cases. Non-doctrinal research was carried out by observing the behaviour through law cases. There are very limited grounds to challenge an adjudication decision. This positive move ensures the relevance of statutory adjudication in the construction industry. Jurisdictional issues and natural justice must be defined to avoid rejection of the challenge. In light of the development in the *View Esteem* case, the players need to now find a midway, in which the statutory adjudication can still be fast and fairness can still be achieved.

1. Introduction

Payment has always been the main subject of dispute in many construction contracts. The significance of cash flow in ensuring the continuity of a project has elevated all issues relating to timely payment as matter of high importance. Construction Industry Payment and Adjudication Act (CIPAA) 2012 was introduced to address the issues of payment disputes through an enforcement mechanism, i.e. statutory adjudication. CIPAA 2012 provides for the recovery of payment upon the conclusion of the adjudication process at a relatively simpler, cheaper and faster process compared to arbitration and/or court proceedings (Azman et.al, 2013). These are all in the virtue of express provisions prescribed by the proposed Act itself. The fairer risk allocation through the mandatory payment of an amount due to the contractors has changed the payment culture in the construction industry (Beh, 2017).

Director of Asian International Arbitration Centre (AIAC), Datuk Professor Sundra Rajoo in a report by Malaysian Reserve (2018) shared AIAC data that the 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. Despite a negative indication that the construction industry is encumbered by large numbers of serious payment problems, the encouraging growth in numbers also signified awareness and trust towards this initiative.

1.1. Problem Statement

Although the Malaysian CIPAA 2012 is an adaptation of the UK's and other Commonwealth countries' adjudication model, unlike the UK Legislation, which provides for all matters in a dispute to be

referred to adjudication including disputes regarding matters such as interpretation of contract, quality of work or extension of time (Maritz, 2009), the Malaysian statutory adjudication only covers payment disputes. Beh (2017) in a report suggested that the Act allows little room for negotiation and the decision of an adjudicator is uniquely interim and temporary in nature. The adjudication decision, once delivered, is effectively binding unless set aside by the High Court, settled in writing between parties or finally decided in arbitration or court. It is designed to ensure that contractors receive the interim payment for work done in a progressive and timely manner, to ensure sufficient and continuous cash flow (Mah, 2016; Paulraj, 2016) during the construction period.

The allowance to commence litigation or arbitration proceedings after the completion of the project is to compensate on the 'rough and ready' justice provided. However, this allows for the aggrieved parties to challenge or set aside the decision of an adjudicator at the end of the day, as ways to seek retribution due to the possible mistake of the adjudicator in the first place. This is somewhat suggesting that the seemingly falling short rough justice would always need to be backed-up by arbitration or litigation. Thus, forcing the disputing parties to spend more money on dispute resolution.

1.1.1. Limits of Power of an Adjudicator

The power of an adjudicator is set out by section 25 of the Act. At the end of the process, an adjudicator can award finance costs and interest to any of the disputing parties behind the protective shield provided by section 34(2) of the Act, which gives immunity to the adjudicator from appearing in court over the adjudicated decision he has given. With the procedure being limited to financial disputes only, the extent of his power is observed to be sitting in the middle of the fine line between being arbitrary and structured, thus exposing to a questionable status to be controversially picked-up by litigation. Adjudication decisions can be set aside if there are elements of fraud or bribery, when there is a denial of natural justice, where adjudicator has not acted independently or when he has acted in excess of his jurisdiction (Mah, 2016). Nevertheless, the need to define the line is pinnacle in order to protect the adjudicator's professionalism and the rights of parties against injustice.

1.1.2. Challenging to the enforcement of the adjudicator's jurisdiction

The procedure of enforcement of adjudication decision and setting aside the decision in the event of the parties wishing to challenge the enforcement requires an in depth analysis. It is observed by Seah (2018) that 54.35% of adjudication decisions are re-arbitrated or re-litigated, with almost half of the adjudication decisions are referred to the High Court for a setting aside order and some numbers are contributed by the question of jurisdictional issues. This begs the question of the limited extent of grounds to which one party is allowed under the law to challenge the adjudicator's decision and jurisdiction. Hence, a definitive list for grounds to challenge adjudicated decisions is deemed indispensable.

1.2. Research Aim and Objectives

The research aims to understand the rules and limited grounds to challenge an adjudication decision under the CIPAA 2012. The objectives are 1) to explore the rules on enforcing and challenging the enforcement of an adjudication decision and, 2) to establish the grounds to challenge or set aside the decisions in litigation and arbitration

1.3. Research Methodology

The nature of this applied legal research calls for a suitable legal research to be applied; hence the doctrinal legal research and non-doctrinal research is conducted (Chynoweth, 2008). This type of research uses black letter law, fundamental legal principles and established case law as basis. Their impact on a specific community was studied through comparison. For that purpose, relevant cases law related to the implementation of adjudication were collected and examined to determine the operation and effectiveness of a particular law (McConville and Wing, 2007). The most recent CIDB Construction Law Report is used to refer all the related cases.

Non-doctrinal research focuses on the application and study about the law. By applying inductive reasoning, the compliance of the principles within a specific current is unveiled. The implementation and effects are mainly gathered from cases. However, opinion and insight from the particular community in which the law operates; in this research, the construction industry community, are excluded. That would be the limit of this research.

2. The Implementation of Construction Industry Payment and Adjudication Act (CIPAA) 2012 in Malaysia

2.1. Statutory Adjudication

The original purpose of CIPAA 2012 and its statutory adjudication rules aims to achieve an effective, speedy and cheap dispute resolution, allowing for a better cash flow (Nasir et.al, 2018), through timely payment provided by a speedy dispute resolving tools and a proper recovery for payment mechanism (Seah, 2018). For that to materialize, a mechanism with enough authority to enforce decision and ensure security of payment is critical, hence the introduction of adjudication. However, experience in other countries that also recognized such regime has shown that adjudication without the statutory force is not likely to be effective (Maritz, 2009). The only way to make sure that there is a real impact in implementing adjudication is by having a legislation that makes it a compulsory entity to be complied by all (Nasir et.al, 2018).

After few years through its implementation, adjudication is fairly acknowledged as a legal right for a party to claim after work done and eventually compels mandatory payment of an amount due to the contractor (Choon, 2017; Raji et.al, 2017). As they provide a fairer risk allocation between the employers and the contractors in addition to its confidential nature, it is attractive to parties who wish to resolve construction disputes quickly and quietly (Choon, 2007; Mah, 2016).

2.2. The Adjudicator

The role of an adjudicator is set out in section 25 of CIPAA 2012. In a nutshell, Gould (n.d.) summarized that the adjudicator has the power to 1) establish the procedures for the adjudication, 2) order disclosure and production of documents, 3) set deadlines, 4) draw upon his knowledge and expertise, 5) appoint independent experts (but only with the consent of the parties), 6) require that evidence be given on oath, and 7) review and revise certificates and other documents.

More often than not, an adjudicator decides a matter before him purely based on documentary evidence and only 6.94% of all matters were resolved through oral or inquisitorial hearings (Seah, 2018). Hence, it is dubbed as rough justice and rarely suitable for cases of high complexity.

2.3. Adhering to the Natural Justice

It is observed that over 50% of all the current adjudication decision is litigated or referred to arbitration. This high rate of re-litigation shows that adjudication is no longer an alternative form of dispute resolution (Seah, 2018). It is also an indication that there is a constant challenge towards disputed adjudication decision. Despite the non-intervention rule, an application to set aside an adjudication determination must be premised on issues relating to the jurisdiction of the adjudicator (Tan and Teo, 2014) such as excess of jurisdiction and violation of natural justice. However, many have misinterpreted the concept of natural justice leading to the non-admissibility of the challenge.

It is unquestionable that an adjudicator is the 'master of the proceedings' and is free to conduct the adjudication proceedings in the manner that he deems fit, so long as he complies with CIPAA, acts impartially and adheres to the rules of natural justice (Lim, 2018). According to Tan and Teo (2014), there are only two limbs to the concept of natural justice; a fair and impartial tribunal, and the right of each party to be heard. Therefore, only violations against these strict bases for valid jurisdictional challenge.

2.4. Enforcement, Challenging and Setting Aside Adjudicators Decision

Enforcement of the adjudicator's decision is critical to the success of adjudication (Maritz, 2009). Adjudication decision is on a "provisional interim basis", it is readily enforceable once delivered by the adjudicator (Choon, 2017). As it is so provided under section 28 of the Act, Gould (n.d) and Paulraj (2016) both agree that the winning party may pass the adjudication decision to be enforced as a High Court decision.

However if one of the party is unhappy with the adjudication decision, it can be set aside by the High Court but only when there are elements of fraud or bribery, when there is a denial of natural justice, when adjudicator has not acted independently or, when he has acted in excess of his jurisdiction (Mah, 2016). This allows for the natural justice to occur. Seemingly, the similar Singaporean adjudication act, Security of Payment Act (SOPA) 2006 allows for the decision to be reviewed before enforcement; a law which is absent in the Malaysian version. This is supposed to avoid any abrupt challenges to the court. Because of the absence of such rules in Malaysia, dissatisfaction among the parties triggers an immediate reference to the court.

3. Data Analysis and Findings

A study on the Malaysian statutory adjudication and payment legislation, CIPAA 2012 was carried out and the content was examined in pursuant to the black letter law research. Cases related to the implementation of CIPAA 2012 were also examined. The findings are as follows.

3.1. Adjudicator's Roles in CIPA Act 2012

The duties and roles of an Adjudicator are governed under section 25 of CIPAA. This can be summarized as i) to administer the structure, time and conduct of the procedure, ii) to control the production and transfer of all necessary documents within the proceedings, iii) to order and carry out investigation and necessary inquisitions, iv) to award cost and other action deemed essential to the proceeding, v) to deliver unbiased and impartial decisions. The Act also indicated under section 27(1) that his jurisdiction is limited to the matter referred to adjudication by parties in relation to the claim and response documents only. Acting outside this boundary would prompt a challenge under section 15 (d) where he is said to have acted beyond his jurisdiction.

3.1.1. Adjudicator's Decision

Parties satisfied with the decision may enforce the decision in High Court as sanctioned by section 28. However, section 26 (7) stated that if any of the party request the dispute to be determined by arbitration or litigation, the party may apply to the High court to stay the effect and enforcement of the adjudication decision pending the final determination as allowed in section 31 of the Act. A challenge to the adjudicator's decision is also allowed under section 15 of the Act. However, the procedural timeframe for the said provision is not mentioned.

3.1.2. Grounds to Challenge the Decision

Under section 15 of CIPAA, an aggrieved party may apply to the High Court to set aside a decision if;

- The decision of the adjudicator is influenced by bribery or fraud,
- the adjudicator's conduct during proceeding is in breach of natural justice,
- the adjudicator is biased and partial in his conduct and judgement
- the adjudicator has exceeded his jurisdiction

There is no mechanism by which an adjudicator's decision can be appealed as it is inherently binding only temporarily. Although the legal position is not entirely clear, it has been accepted that an error of law is not in itself sufficient to render an adjudicator's decision invalid.

3.2. Jurisdiction in Questions: Study of Law Cases

The following eight (8) cases were reviewed to explore the implementation of statutory adjudication and the question of adjudicators' jurisdictional issues:

1. *ACF Engineering & Construction Sdn Bhd V Esstar Vision Sdn Bhd [2016]* 1 CIDB-CLR 169
2. *Bina Puri Construction Sdn Bhd V Hing Nyit Enterprise Sdn Bhd [2016]* 1 CIDB-CLR 182
3. *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd & Other Case [2017]* 1 CIDB-CLR 140
4. *Innovative Engineering(M) Sdn Bhd V Nomad Engineering Sdn Bhd [2017]* 1 CIDB-CLR 254
5. *Naim Engineering Sdn Bhd & Anor v Pembinaan Kuantiti Sdn Bhd [2017]* 1 CIDB-CLR 284
6. *Ranchan Heavy Engineering Sdn Bhd V Pelabuhan Tanjung Pelepas Sdn Bhd [2017]* 1 CIDB-CLR 296
7. *Rimbunan Raya Sdn Bhd V Wong Brithers Buidling Construction [2017]* 1 CIDB-CLR 151
8. *View Esteem Sdn Bhd V Bina Puri Holdings Sdn Bhd [2017]* 8 AMR 167

Most the above cases are reported from the High Court, which has always been the battleground for challenges to adjudication decision. This is with the exception of *View Esteem V Bina Puri Holdings [2017]*, a Federal Court landmark case responsible for changing the course of adjudication in Malaysia. Issues addressed in these cases are summarized in the following sub topic.

3.2.1. Lesson Learnt

The followings are summary of all the decision made in the Court in relation to the allowed and rejected challenges against the adjudication decision. The Courts decisions are examined, categorized to their topics of concern and summarized.

i) *Appealing against adjudication decision*

Many of the challenges brought to the court were with the intention to appeal and review the adjudication decision. However, the court does not exercise appellate jurisdiction in regards to adjudication decision, as the High Court would not re-evaluate the adjudication decision. Thus, rehearing or retrial was never the correct approach.

ii) *The court is not a mere 'complain counter'*

Unhappy parties tend to see themselves as victims and responded with a challenge. Adjudicator is not biased just because the party is unhappy with the decision, as he has considered all evidence and arguments before accepting or rejecting them. The Courts agreed that this would not amount to biasness. A claim for breach of natural justice must be significant, decisive or of high importance to be put forward. Parties must be mindful that not every instance of denial of natural justice or complaint of unequal treatments warrants intervention of the court under section 15 of CIPAA.

iii) *Include all but limited to payment claims submitted to an adjudicator*

Fundamentally, according to section 27, all payment claims submitted to the adjudicator must be evaluated. This includes all additional claims recognized to be a mechanism that is part of the contract (such as variations). Adjudicating these additional claims cannot amount to excess of jurisdiction.

iv) *The question of violation of natural justice and excess of jurisdiction*

An adjudicator who fails to give enough opportunity for the other party to respond and made unilateral contacts with a party without the other knowing is considered as violating the natural justice. To adhere to natural justice, the adjudicator needs to i) be impartial, without bias or personal interest, and ii) give both parties fair opportunity to present their cases. An adjudicator must also be wise to determine the existence of a valid written construction contract before conducting a trial. An adjudicator can be found acting outside of his jurisdiction by delivering a decision for a contract that does not exist.

v) *Landmark case of View Esteem v Bina Puri*

Before *View Esteem*, adjudicators are allowed to reject response submitted outside of timeline. Since adjudication is concerned on fast delivery of decision, it is accepted that any action detrimental to the timeline of an adjudicator arriving to his decision to be dismissed. He would not be found to be in breach of natural justice then.

However, in the light of the judgments in *View Esteem* and in adherence to natural justice, all impending and additional response; despite its tardiness, must be considered. *View Esteem* also recognized that an existing concurrent proceeding (namely arbitration and litigation) may nullified the operation of CIPAA altogether in accordance to section 41 of the Act, which was never recognized previously.

4. Conclusion and Recommendations

There are very limited grounds to challenge an adjudication decision. This is a progressive move as it ensures the relevance of statutory adjudication as a dispute resolution tools and security of payment mechanism needed in the construction industry. Jurisdictional issues and natural justice must be defined to avoid rejection of a challenge. Although the decision in *View Esteem* may trigger distortion in the adjudication timeframe and subsequently upset the intended objective of this rough justice, it is a call to ensure that the implementations are just and fair to all. The players need to now find a midway, in which the statutory adjudication can still be fast and fairness can still be achieved.

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