

**CIPAA: TRACING THE DEVELOPMENT AND INVESTIGATING THE
EFFECTIVENESS OF STATUTORY ADJUDICATION IN MALAYSIA
CONSTRUCTION INDUSTRY**

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**A project report submitted in partial fulfilment of the
requirements for the award of Bachelor of Science
(Hons.) Quantity Surveying**

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May 2016

DECLARATION

I hereby declare that this project report is based on my original work except for citations and quotations which have been duly acknowledged. I also declare that it has not been previously and concurrently submitted for any other degree or award at UTAR or other institutions.

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Specially dedicated to
my beloved grandparents, mother and father

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ABSTRACT

Construction Industry Payment and Adjudication Act 2012 was enforced on year 2014, providing a mechanism to resolve payment disputes fairly, swiftly and cost effectively. The main four objectives of CIPAA is identified, which are fairness objective, speed objective, informality objective and cost effectiveness. A number of criteria have been devised for each main objective. A total of 38 qualified adjudicators participated in the survey, differentiated into two groups based on their type of profession. The respondents were required to evaluate the criteria against a 5 points likert scale. Descriptive Statistical Method and Mann-Whitney *U*-test is performed to identify trend and significance of views. Statistical Reports by KLRCA and case laws are referred in the discussion. It is confirm that the respondents generally agreed that the adjudication mechanism is effective against payment disputes or situations of payment defaults. The essence of the mechanism, the time need for the resolve of a payment dispute is without a doubt completed within the timeframe stipulated under the Act in accordance with the respondents' evaluation. The adjudication decisions is proved to fair thus far as most decisions remained uncontested and the adjudicator's fees is considered as reasonable when weight against the percentage on the amount disputed. However, the mechanism at this early stage is still very formal, providing that legal assistance or extensive knowledge on adjudication personnel may be required to make a successful adjudication claim. The assessment of effectiveness of statutory adjudication however is only subjected to the opinions of qualified adjudicators. Participation of parties that have been involved in adjudication proceedings will likely to produce a more accurate assessment on the effectiveness of the system. However, such participation may be difficult as adjudication proceedings are protected by confidentiality as stipulated under the Act.

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LIST OF SYMBOLS / ABBREVIATIONS

CIDB	Construction Industry Development Board
MPC	Malaysia Productivity Corporation
MBAM	Master Builders Association Malaysia
ADR	Alternative Dispute Resolution
PAM	Institute of Architects Malaysia
ISM	Institute of Surveyors Malaysia
BQSM	Board of Quantity Surveyors Malaysia
CIPAA	Construction Industry Payment and Adjudication Act
HGCRA	Housing Grants, Construction and Regeneration Act
KLRC	Kuala Lumpur Regional Centre for Arbitration

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CHAPTER 1

INTRODUCTION

1.1 Background

The statistics provided by Construction Industry Development Board (CIDB) revealed that Malaysia construction industry has accumulated to RM110 billion worth of projects which include earthworks, constructions, refurbishments and alterations of properties in the year 2013 (Bakhary, Adnan and Azmi, 2014). A journal published by Malaysia Productivity Corporation (MPC) shows that the construction industry has contributed a total of 3.9% to the country's total Gross Domestic Product, becoming a rather important stakeholder in the nation's economy.

Despite the significant contribution of the construction industry in the nation's economy, the construction industry is also known to have its own execrable payment cultures. Payment defaults such as late payment and non-payment are considered as a common and widespread problem that has its roots grown firm in the Malaysia construction industry. An on-time financing is crucial in the progress and completion of construction projects. Often, Contractors have to provide weeks or months of up-front financing before it received payment from the Clients. However, it is a common practice in the industry to delay the payment to the Contractors as long as possible in order to improve their short-term cash flow even though in most of the form of contracts, which clearly expressed the interval period of each interim payments. By delaying the payment, the Client could allocate the risk onto the Contractor and explicitly reducing their financial risks (Rahman, Kho and Wang,

2014). The common practice of sub-contracting works to sub-contractors further worsen payment problems as the risks shifted down the chain that often jeopardise construction projects in the form of non-completion and delay in project delivery. Such payment defaults, or rather business culture are starting to cripple the construction industry, resulting in a massive shrink in industry and creating a bad perception on the construction industry as a whole.

Alternative Dispute Resolutions (ADR) such as partnering, negotiation, arbitration and mediation are commonly used when there are disputes arise in the construction industry. In comparison with litigation, Alternate Dispute Resolutions are more favourable due to the fact that it consume less time, incur lower cost and most importantly, speedy determinations. Tanielian (2013) stated that negotiation and mediation is the first attempt as it involve effective communication between the parties to resolve any disputes in construction projects, and if the attempt fails, more likely binding dispute resolution is adopted. Tanielian (2013) argued that the best method for binding resolution is arbitration. The advantage of binding dispute resolution is that it may resolve the dispute in a long term manner, and in the case of negotiation and mediation, it may be affected by *lex loci* and *lex fori* and furthermore, likely to resolve the dispute in a medium term manner. Features of arbitration such as speed, confidentiality, efficiency outwits the choice for litigation, and most importantly the decision made by arbitrators are based on the contract choice of law whilst the court system may not only consider the contract choice of law. Even with attractive features built into the arbitration mechanism, one is never without it cons as the time needed to complete an arbitration session usually involves years. With the time factor in mind, arbitration is slowly losing its ground as the most popular alternative dispute resolution after the emergence of the anticipated adjudication mechanism in Malaysia.

In order to overcome the decaying payment default phenomenon, a legislative intervention was initiated by the government and debated the possible enactment of Construction Industry Payment and Adjudication Act (CIPAA) in the early 2003. The effort of the development of CIPAA was led by the Construction Industry Development Board (CIDB) after the board published a report on the decaying payment defaults present in the construction industry. CIDB, together with other

renowned construction associations such as Master Builders Association Malaysia (MBAM) and others parties obtained the government's consent in assisting the enactment of the legislation. The Act was gazetted after nine years of constant changes and delayed implementation due to the on-going Mass Rapid Transit concession infrastructure project.

The Construction Industry Payment and Adjudication Act 2012 (CIPAA) was published and came into order on 22nd June 2012 after it received the Royal Assent on 18th June 2012 and came in force on 15th April 2014. In the latter chapter, the author will discuss in detail the development and effectiveness of statutory adjudication on the construction industry in Malaysia.

1.2 Problem Statement

It is a difficult task to complete a construction project on schedule as construction projects are complex, dynamic, multiparty and uncertain in nature (Kartam, 1999) and because of it, disputes often arise during a construction project. In Malaysia, the number of claims and disputes are increasing in the construction industry and has rendered the industry vulnerable to adversarial relationship between parties. According to Zineldine (2006), monetary interests are often correlated with the majority of the disputes arose in the construction industry. Even if one is equipped with substantial understanding of contract financing and risk-allocation system, disputes will inevitably occur if claims are processed poorly.

In the Asian context of cash flow strategy, it is best to “collect early and pay late” (Davis, 1999). It is not uncommon for clients to withhold payment to the contractor as long as possible whilst the contractors want to get paid as early as possible. The occurrence of payment defaults or late payment causes not only massive delays on the project itself, but also have a negative impact on the livelihoods of the parties on the bottom of the pyramid specifically the sub-contractors. Late or non-payment can have a dire effect on the cash flow and it's a great concern in the industry. Any delays in cash flow can cause a significance on a

construction project, and cash flow problems caused by are responsible for insolvency of high level in the construction industry (Rahman, Kho and Wang, 2014).

The Construction Industry Payment and Adjudication Act (CIPAA) is a legislative intent to facilitate fair payment, in the best effort of justice, eliminate the conventional “pay when paid” payment culture in the industry, preventing voiding of terms which unfairly allows one party with stronger leverage at the time of the establishment of the contract to avoid payment (Chow, Lim and Oon, 2014). Adjudication can provide a swift and temporary process for cash-strapped contractors and sub-contractors to resolve their payment disputes.

Originated from United Kingdom’s Housing grants, Construction and Regeneration Act 1996, adjudication was introduced via the famous “Latham Report” as a dispute resolution mechanism is being adopted in various Commonwealth countries such as Australia, Singapore and Hong Kong. As CIPAA was only implemented a few years ago, the impact of such Act in Malaysia is minimal compare to other countries that have adopted adjudication in the late 90s. Experiences and determinations in United Kingdom, Hong Kong and Singapore show that the scheme has quite consistently, served the parties well with “rough and ready justice” (Chow, Lim and Oon, 2014). Astounding results have been obtained in our neighboring country, Singapore as 95% of the respondents accepted the rulings of the adjudication proceedings.

The current information and data available is insufficient to assess the effectiveness of the adjudication mechanism in Malaysia. Prior to the introduction of CIPAA, payment defaults and disputes were regular occurrence in Malaysia’s construction industry. The numbers of disputes between sub-contractors and contractors are increasing significantly day by day and this will inevitably affect the cash flow in industry one way or another. Adversarial relations between non-paying party and claimant will definitely affect the performance of the construction industry, leading to increasing cases of abandonment and delays in projects.

It has been two years since the implementation of CIPAA and it is necessary to determine the effectiveness of the system in resolving payment disputes.

1.3 Aims

- To review the development towards the implementation and investigate the effectiveness of statutory adjudication in the Malaysia construction industry.

1.4 Objectives

- To review the development towards the implementation of statutory adjudication in Malaysia
- To study the adjudication mechanism and proceedings prescribed under the Construction Industry Payment and Adjudication Act 2012.
- To appraise the effectiveness of the Construction Industry Payment and Adjudication Act 2012 against its prescribed aim

1.5 Significance of Study

In cases of delayed payment, net cash flows of contractors and sub-contractors become negative that have serious effect on construction projects. Often, clients would want to delay payments as long as possible in order to transfer some of the financing risk onto the contractors and sub-contractors (Rahman, Kho and Wang, 2014). With such strategy at their disposal without any effective legal mechanism that could prevent or punish such wrongdoers, late payment practices are becoming a sense of business culture in Malaysia, exposing the industry to bad perception and affecting the performance of the contractors.

With the introduction of Construction Industry Payment and Adjudication Act 2012, a glimpse of light seems to shine upon the construction industry that would likely to eliminate but rather reduce payment defaults in Malaysia, refreshing the business ethnics in the industry. However, the implementation of CIPAA is still in a very primal stage and its effectiveness may not have been evaluated, whether the mechanism will be a king maker of the industry or it has zero impact, even a path of downfall on the industry.

Anticipation of a worse economy condition is befalling the nation as devastating events such as the fall of crude oil prices and depreciation of Ringgit are hammering the construction industry. Cash flow problems caused by payment disputes will always be the first trait observable when pressures are being placed on the industry, whether the adjudication mechanism can overcome the payment disputes and cash flow problems are much needed to be investigated and assessed whether the mechanism works as it is intended to be.

1.6 Scope of Study

- Study and trace the development towards implementation of statutory adjudication in Malaysia.
- Study development of the Construction Industry Payment and Adjudication Act 2012 in Malaysia.
- Study in details the statutory adjudication proceedings and mechanism under the Construction Industry Payment and Adjudication Act 2012.
- Assess and appraise the effectiveness of CIPAA against qualified adjudicators in Malaysia based on methodologies used by other researchers in similar studies.

1.7 Limitation of Study

The limitations and constraints encountered during the course of the research are summarised as follow:

- 1) Development of statutory adjudication system in Malaysia are studied based on literature reviews of journals and books only, and the content may not cover information that were not published.
- 2) No definitive figures of adjudication proceedings can be obtained due to the confidentiality of the adjudication mechanism and hence, any figure of data obtained are conservative and be regarded with a degree of caution.
- 3) Questionnaires distributed only covered qualified and recognised adjudicators in the total construction industry.

1.8 Chapter Outline

The report composed of five chapters and generally summarised as below:

- Chapter 1 introduces the intention of study, which generally consists of background, problem statement, aims and objectives of study, significance of study, limitation and scope of study.
- Chapter 2 consists of the literature review for the study. The literature review covers the genesis of statutory adjudication and its development in the Malaysia regime. The adjudication proceedings and mechanism enforced under the local statute will be studied thoroughly with regards to its characteristics that would have an effect on its effectiveness.

- Chapter 3 explains the methods and means used for the study, consisting research design, questionnaire design and data analysis of primary and secondary data.
- Chapter 4 encompasses the analysis of the data obtained from the questionnaires and the statistical data obtained from KLRCA. Discussions are made to determine the implications of the data and based on the analysis, the appraisal of the effectiveness of statutory adjudication in Malaysia.
- Chapter 5 includes the conclusion for the research and recommendations for future research.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

The drawbacks of the alternative dispute resolutions such as mediation and arbitration have spurred the development of statutory adjudication in Malaysia. Features of arbitration such as confidentiality and binding rulings are not able to make up for the fact that the overall arbitration is time consuming and adversarial in nature. Due to the drawbacks mentioned, arbitration is lengthy and non-satisfactory to contractors, and would only commence after the completion of the construction works (Lim, 2015). Adjudication on the other hand, are able to provide a dispute resolution system that is much speedier and cost-effective compare to the favoured arbitration system in Malaysia.

As the *lex loci* of legal system is vary in different regimes, the adjudication mechanism are divided into two categories, which are statutory adjudication and contractual adjudication (Oon, 2003). Statutory adjudication utilised adjudication that is provided statutorily as an act and a precedent method of dispute resolution mechanism before arbitration and litigation. The rulings of statutory adjudication are only temporary binding the contractual parties on and Section 13(c) of the Construction Industry Payment and Adjudication Act 2012 affirms that if a dispute has been decided by an arbitrator on court, the temporary binding effect of the adjudication decision will be ceased (*Construction Industry Payment and Adjudication Act 2012*). Contractual adjudication works similar to statutory

adjudication, however, the adjudicator's power is enforced by the contract provisions between the two parties.

Since the introduction and implementation of statutory adjudication in Commonwealth countries such as Singapore, Hong Kong and Australia, the reviews of the system have been mostly positive in all regimes. Minor changes have been adopted in the adjudication system by different regimes to address issues that may be unique in a local context, however the primary objective of statutory adjudication is still the same, which is to overcome the myriad problems related to payment defaults that would ultimately cause the lack of cash flow in the construction industry (Teo, 2008).

2.2 The Genesis of Statutory Adjudication

The origin of statutory adjudication provided in CIPAA can be traced to the Latham Report of the United Kingdom published in 1994. From the 1970s onwards, the construction output growth in the United Kingdom has slowed down gradually after decades of the golden age of the UK construction industry (Chang, 2012). The profit margins of UK contractors were reduced to an alarming scale as supply of contractors were increased, each wanted to share the pie that the industry had to offer. During this time, private clients started to take part in construction activities and had a fair amount of share on the overall construction output. According to Chang (2012), private clients tended to pursue more heavily and aggressively on cost efficiency, hence a priority criterion on price was imposed on the contractors and suppliers selection process. Chang and Ive (2007) stated that the simplest way to achieve cost efficiency in construction project is to have the smallest amounts of total assets required per unit of turnover, which in a more common context, to have the other parties finance a higher proportion of their own total assets. To achieve the definition described by Chang and Ive (2007), that means that either the clients pay earlier or the contractors are being paid later, but it is more than obvious that the latter approach was taken much more frequently in the industry.

The common strategy of private sectors to issue payments later to the contractors induced an adversarial relationship between clients and contractors, the complete disappearance of trust aggravated the severity of disputes. This development prompted increasing numbers of clients to withhold payments to their contractors, indirectly forcing the contractor's hand in the resolution of disputes (Cahill and Puybaraud, 2003). The parties that had taken the worst hit from such practices were not the main contractors but the ones that are further down the chain in the construction projects, notably the sub-contractors because the main contractors often passed the pressure or the financial risk onto the sub-contractors by the provisions of "pay when paid" clauses in subcontract agreements. The persistence of this unhealthy payment practice was threatening the stability and resilience of the supply chain. Soon, it bred antagonism among the clients and contractors and resulting in pervasive grievances among those that are at the bottom of the supply chain, depressing the base of trust that is essential to the smooth progression of any construction projects, leaving its devastating effect on the construction industry in a long run.

An unexpected tightening of United Kingdom's monetary policy in 1988 resulted in the deterioration of the UK's economy, which eventually led to the compound of excessive price competition in the construction industry. In the midst of a deteriorating economy, the contractors exhibited tendency of tendering in low prices to secure works first and issued claims on variation orders later on in the construction phase to ensure profitability on the projects. The respective approach to "tender low, claim high" further vitiated the already low trust relationship between the contractual parties into a more adversarial, confrontational one (Cahill and Puybraud, 2003).

Against the brink of destruction of the United Kingdom's construction industry, Sir Michael Latham carried out his famous inquiries into the then-current practices of the UK construction industry emphasizing matters related to contractual arrangements and procurements and its relation to the performance of the stakeholders of the industry. The final report of Sir Latham, *Constructing the Team* latter on in the near future will act as a foundation on shaping up an agenda on resolving payment issues for the UK construction industry. Based on Sir Latham's

report, the Parliament of the United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) that enable deserving claimants to obtain payments quickly in terms of weeks rather than months or years, yet in a cost effective way.

Two of the most notable recommendations in the Latham Report were translated into the second part of the UK Act two years later. The first recommendation, 26.1 – 26.5 on p. 91 reflected in Section 108 of the UK Act, providing provisions for construction contractual parties the statutory rights of adjudication if there's any payment defaults arise during the construction phase. The second recommendation, with particular regard to the 'security of payment' led to 5 provisions to be translated into any construction contract under the UK Act. These provisions are that any construction contract should provide payment dates (Section 109 and 110) and, with conditional payment clauses to be rendered void (Section 113), the payee attains the rights for suspension of works (Section 112) in case of non-payment in the event of no withholding notice is served beforehand (Section 111) (Latham , 1994).

In the year 2005 and 2007, amendments were made to the HGCRA to improve the effectiveness of adjudication in the enforcement of on-time payments. These changes were aimed to make the adjudication process less costly, lightening the burden of the claimants by shifting a portion of the adjudicator's cost onto the respondent/payer and allowing the claimant to seek compensation that have incurred from the suspension of work. Other amendments were carried out to eradicate the loopholes of the Act such as the provision concerning the evasion of timely payment by banning 'pay when certified' clauses and further clarifying the utilisation of withholding notices consistent to natural justice.

2.3 The Development of Statutory Adjudication in Malaysia

The Adjudication of payment dispute based on Dispute Adjudication Board (DAB) before the Construction Industry Payment and Adjudication Act (CIPAA) only exists

in the contracts drafted in the FIDIC model. The adjudication system provided in DABs is contractual in nature, contrasting to CIPAA, which is supported by statutes entitlement. The despicable truth of the pre-CIPAA contracts in Malaysia did not envisaged adjudication provisions and some bespoke contracts did not contain the least provisions providing any types of dispute resolution and management process (Chow, Lium and Oon, 2014). Due to the decaying payment default phenomenon, statutory adjudication was enacted to assist cash flow problems in the industry, especially those who are bottom part of the industry hierarchy, mainly the sub-contractors.

The drafting of the Construction Industry Payment and Adjudication Act 2012 began as early as the year 2003. The purpose of the initial discussion held by CIDB (Construction Industry Development Board) in 2003 was to address the increasing payment defaults and payment disputes in Malaysia's construction industry, which impacted heavily on the cash flows of contractors and sub-contractors. Statutory adjudication, mechanism introduced in the United Kingdom's Housing Grant, Construction and Regeneration Act 1996 was contemplated as a solution to the payment problems in Malaysia, providing a cost and time effective solution for the contractors and sub-contractors (Ramuseren, 2014).

Forums and conferences with industry consultants were held by CIDB on the next two consecutive years, 2004 and 2005. The intention of the forums and conferences was to seek opinions from industry stakeholders on the possible effects if such system is to be implemented in the construction industry. Key personnel from Malaysia Institutes of Architects (PAM), Institution of Surveyors (ISM), Malaysia Bar Council, MBAM (Master Builder Association Malaysia) and Board of Quantity Surveyor (BQSM) were advised further on the possible implementation of statutory adjudication in Malaysia. Despite the most of the personnel from the construction industry supported the drafting and enactment of such statute, the Malaysia Bar Council had conservative opinions on the question, whether statutory adjudication is suitable for the local construction industry culture and doubt its effectiveness after implementation. One of the main concerns of the Malaysia Bar Council was that the introduction of statutory adjudication will undermine the arbitral process envisaged in the Arbitration Act 2005, affecting the efforts to the Government to make

Malaysia as arbitration destination (Ramuseren, 2014). Nonetheless, all of these personnel were mostly supportive of the system due to the success of its ability to quickly resolve payment disputes in other jurisdictions such as Australia and United Kingdom.

During the introduction of the Construction Industry Master Plan in year 2006, statutory adjudication became the key recommendations to improve the current status quo of the construction industry. In the year as early as 2006, only minority of consultants were known of how statutory adjudication works. Hence, awareness campaigns and roadshows were held to increase the awareness and knowledge regarding the statutory adjudication system, in addition to its application and advantages to the industry. The other ultimate goal of the roadshows and campaigns were to enhance the awareness of such system onto the public, wishing with the public's pressure and demand could the Government take action on drafting and enacting of such dispute resolution system (Ramuseren, 2014).

After a series of roadshow and awareness campaigns carried out and introduced in details, the demand of such system had increased to a mature point where it had caused the Government to start considering the drafting and enactment of statutory adjudication in Malaysia. In year 2008, the first cabinet paper introducing statutory adjudications was submitted to the Cabinet to allow for debate and comment. On 15th July 2009, Cabinet agreed that the statutory adjudication, now known as Construction Industry Payment and Adjudication Act to be enacted to resolved problems in construction industry (Ramuseren, 2014). A briefing to Attorney General on the paper was conducted and more consultations from the construction personnel was carried out. Advices provided by the personnel were considered and adopted when amendments to the original UK model were made to suit the system with local needs and culture. The first statutory draft was produced from Attorney General on March of 2011.

On August 2011, the CIPAA draft was amended from the Attorney General and further industry consultations were carried out later in October 2011. The final draft of statutory adjudication was finally produced on November 2011. In just a month

time, first reading of the bill in the Parliament was carried out on December 2011, following by the second reading on April 2012 and third reading on May 2012.

Malaysia, the latest country in adopting statutory adjudication, namely the Construction Industry Payment and Adjudication Act (CIPAA) passed the Parliament and came into operation on 15th April 2014. The most notable promoters of the enactment of this statute are the Construction Industry Development Board (CIDB) and Master Builders Association Malaysia (MBAM), convincing instrumentally the government that this piece of legislation will make a great leap in addressing the industry's cash flow problems since the early 2003 (Chow, Lim and Oon, 2014).

CIPAA provides a simple and yet efficient legal mechanism that allows a party who is owed payment under a construction contract to promptly obtain payment from the non-paying party, according to the assessment of the merits of claim by qualified and impartial industry expert, the "Adjudicator". The adjudication mechanism eliminates the pervasive and prevalent practice of conditional payment clauses such as pay when paid, pay if paid and back to back, reducing payment default by establishing a cheaper and speedier system of dispute resolution in the form of adjudication. Ultimately, the recovery of payment upon the decision of the adjudication process is promised, in addition to other remedies such as to suspend work or obtain payment from principal directly.

2.4 Overview of the Adjudication Process under the Malaysia Regime

2.4.1 Objectives of Construction Industry Payment and Adjudication Act 2012 (CIPAA)

The objectives of the Construction Industry Payment and Adjudication Act 2012 (Act 746) (CIPAA) is declared in the summary as to facilitate regular and timely payment, to provide a statutory mechanism for swift dispute resolution, to provide appropriate remedies for the recovery of payment in the construction industry (*Construction Industry Payment and Adjudication Act 2012*).

The objectives stipulated, aligned with policy considerations and utilisation of the Latham Report for legislative intervention in United Kingdom regarding payment disputes. The Act, much similar to Housing Grants, Construction and Regeneration Act 1996 (HGCRA) affords a process to compel prompt payment, construed adjudication as a speedy mechanism for resolving payment disputes, thus improving cash flow in the construction industry which is deemed as the lifeline of builders and contractors (Chow, Lim and Oon, 2014). The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is the appointed body in the administration of CIPAA.

2.4.2 Application of Statutory Adjudication under CIPAA

The contract to which the Act applies must satisfy three conditions, it has to be a construction contract defined under the Act; The contract is made in writing; and it relates construction works conducted wholly or partly within Malaysia (*Construction Industry Payment and Adjudication Act 2012*). Section 4 in CIPAA underlines and defines the construction works or consultancy activities that construed to the definition of the term “construction contract”. Section 2 expressly requires the contract to be made in black and white. The provision of Section 2 follows that the Act does not apply to oral contracts. This was the original position in the United Kingdom under Section 107 of the HGCRA (Chow, Lim and Oon, 2014). The main reason behind incorporation of such provision may due to that the burden is too heavy for the adjudicator to address arguments and evidence over the existence of oral terms given the already short timelines which the adjudicator has to operate (Chow, Lim and Oon, 2014).

The last condition for the application of CIPAA is the territorial reach of the said construction work is carried out. The intent may be to allow any contractor, sub-contractor and consultant carrying out construction work or consulting in Malaysia to avail himself of the scheme. The term partially applies so long as part of section of the work is carried out in Malaysia even where the work is contracted to form a larger project located in foreign land (Chow, Lim and Oon, 2014). Hence, a sub-

contractor who manufacture precast components for a project in Singapore would be entitled to apply adjudication under the Act.

2.4.3 Principal Processes of Adjudication under CIPAA

Three principal processes are stipulated in the construct of the Act. The first principle, which involves the Dispute Crystallisation Process, consists of the Payment Claim, Payment Response and the operation of Section 6(2) and 6(4). Section 6(4) provided that failure to respond a payment claim will be treated as he has disputed the entire payment claim (*Construction Industry Payment and Adjudication Act 2012*). Prior to the initiation of adjudication proceedings, Section 5(2) provided the pre-requisite condition of Dispute Crystallisation. Statutory adjudication cannot be initiated unless a dispute, specifically payment disputes is crystallised and become clear (Dancaster, 2008). This invokes the right of the unpaid party under Section 5(2) in CIPAA to initiate the adjudication mechanism (Chow, Lim and Oon, 2014). The Dispute Crystallisation Process is showed in the figure below by referring the payment procedures in PAM Form 2006.

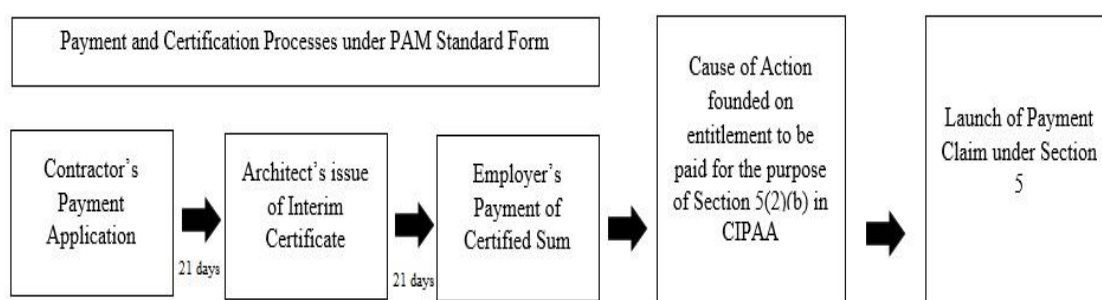


Figure 2.1: Dispute Crystallisation Process in PAM Form 2006

As shown in the Figure 2.1, failure of employer in making payment within the Period of Honouring Certificate will entitled the unpaid party to initiate the adjudication process and reclaim the payment he well deserved. However, Figure 2.1

is only subjected to the commonly used PAM Form 2006 and other forms of contract may visualise a different Dispute Crystallisation Process.

The second principle process, as provided in the Act begins when the adjudication process is initiated, proceeding to adjudication response and reply, and the hearing and inquiry by the adjudicator which at the end an adjudication decision is made based on assessment of merits with reference to rules of evidence (Chow, Lim and Oon, 2014). The third principle process is the appointment of adjudicator which must be done by the director of KLRCA upon the agreement of both parties after the Dispute Crystallisation Process.

2.5 Adjudication Proceedings under CIPAA

2.5.1 Adjudication Notice

A schematic overview of the adjudication process is shown in the figure below. The adjudication process begin with the service of adjudication notice stipulated under section 8(1) in CIPAA. The adjudication notice's clear intention is to notify the unpaid party, otherwise the respondent that claimant intends to apply for adjudication in order to enable the respondent to commence the preparation and argument of a specific payment dispute. Section 8(1) provided requirements that the notice must adhered to. The first and most important requirement would be that the notice must be made in writing and the content on the notice shall be sufficiently reflect the intent of the claimant to invoke the adjudication process. The second requirement is that the notice shall be delivered and served on the respondent. The onus is on the claimant to ensure that the notice is properly served. The method that meet the requirement of 'properly served' is provided in section 38 of the Act. The third requirement would to include particulars describing the dispute and the remedy sought. The onus is on the claimant to ensure the respondent understands the intention of the said notice with little doubt and the dispute it relates.

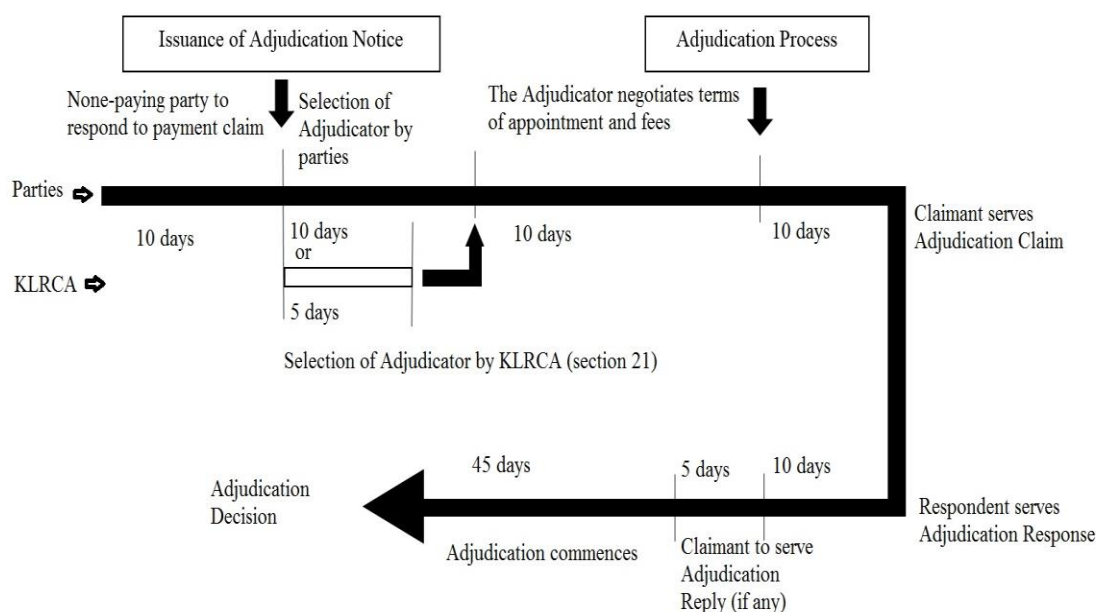


Figure 2.2: Overview of Adjudication Proceedings under CIPAA 2012

After the respondent has received the adjudication notice, the claimant shall apply for the appointment of an adjudicator in accordance to section 8(2) and section 21 (*Construction Industry Payment and Adjudication Act 2012*). A flawed notice that is not comply with requirements in section 8(1) or notice prematurely served would not have enough footing in triggering the adjudication process, and in such event accord the adjudicator the jurisdiction and powers necessary to discharge his duties. It is worth noted that in the case of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010), the claimant had failed to serve the adjudication notice within the 20-days period as stipulated under the *New South Wales Building and Construction Industry Security of Payment Act 1999*. It was held requirements of the Act in regards to the adjudication notice are jurisdictional and the transfer of such notice within the requisite period is a condition precedent for a valid application. Failure to do so, the notice and the adjudication determination granted in favour of the claimant was deemed invalid (Uher and Brand, 2005).

2.5.2 Adjudication Claim

Provisions in CIPAA assert that it is not compulsory that a party has to be represented by counsel in adjudication process. The claimant and respondent may, in his own opinion manage the dispute by himself or appoint legal advisors to represent him. Uher and Brand (2005) stated that legal advisors are employed to deal with complex adjudication proceedings in regime such as United Kingdom, Australia and Singapore. There is a growing number of legal advisors and quantity surveyors that were employed to deal with adjudication claims or counter claims.

The claimant must serve the adjudication claim within ten working days upon the receipt of the adjudicator's acceptance of appointment in accordance with the dispute under section 9(1). The appointment of adjudicator is rested either upon the claimant under section 22 or by the Director of KLRCA pursuant to section 23. The adjudication claim shall be served directly on the defaulting party or the respondent. Similar with adjudication notice, it is the onus of the claimant to ensure service of the adjudication claim.

Multiple key considerations must be made during the process of the drafting of the adjudication claim. While the dispute is framed by the payment claim and payment response, the adjudication claim is the principal document stating the claimant case for the purpose of the proceedings (Chow, Lim and Oon, 2014). In the virtue of section 27(1), the scope of matters that may be raised in the adjudication claim is limited to that set out in the payment claim (*Construction Industry Payment and Adjudication Act 2012*). Items or matters that are not advanced in the payment claim cannot be raised during the adjudication proceedings. In addition, the content of the payment dispute must be sufficiently robust and comprehensive in the expectation that adjudication hearing is relatively short and could only deal with crucial points of the case on each side.

Despite the fact that duration of adjudication is shorter than arbitration, it should not be thought that the volume of documents involved will be significantly reduced (Chow, Lim and Oon, 2014). The truncated hearing will place even more reliance on documentary evidence on the adjudicator than an arbitrator. It is

important for parties to ensure documents submitted as evidence are organised tidily, allowing the tribunal to locate relevant matters efficiently. In cases where the quantum in dispute is relatively modest, adjudicators may decide on the dispute on a ‘documents only’ basis resulting in a short hearing. The information of the adjudication claim must be able mention clearly the contractual premise on the said claim, and in most cases to matters such as method of valuation of work done, agreed unit rates of work and etcetera. Section 9(1) requires the claimant to provide the appointed adjudicator a copy of the adjudication claim. It need not to be done simultaneously but is has to be sent within the same period of 10 working days from the receipt of the acceptance of the appointment of adjudicators (*Construction Industry Payment and Adjudication Act 2012*).

2.5.3 Adjudication Response

Section 10(1) prescribed that the respondent shall answer the adjudication claim together with supporting document on the claimant (*Construction Industry Payment and Adjudication Act 2012*). This expression suggests the adjudication response has to respond to each allegation of fact and liability canvassed in the adjudication claim. In essence, the adjudication response the counterpart of the adjudication claim. Within 10 working days upon the receipt of the adjudication claim, the respondent must serve an adjudication response responding to the allegations in the adjudication claim. The particulars on the adjudication response must be not ambiguous and be able to answer specifically matters in the adjudication claim served (Chow, Lim and Oon, 2014).

Perhaps one of the major issues present in early implementation of statutory adjudication is the reluctance by the respondent in serving an adjudication response corresponding to an adjudication claim (Dancaster, 2008). Section 10(3) described that in the situation where the respondent has failed to serve any adjudication response within the period allowed under section 10(1), the claimant is entitled to proceed with the adjudication proceedings after the 10 working days expiry for the service of the adjudication response (*Construction industry Payment and*

Adjudication Act 2012). The Act itself does not underline any penalty on the respondent in the situation upon his failure to respond with an adjudication claim and hence by literal reading of the provisions, the respondent does not appear to be seriously disadvantaged during the adjudication process. Uher and Brand (2005) however stated that failure to serve adjudication response will, without doubt resulting in an adjudication decisions in favour of the claimant as the rules of evidence applies, which the respondent cannot provide in situation where he fails to serve an adjudication response.

2.5.4 Adjudication Reply

The provision for the claimant to serve an adjudication reply is perhaps one of the most unique features in CIPAA (Chow, Lim and Oon, 2014), Pioneer adjudication regime such as United Kingdom and Singapore does not provide a provision for an adjudication reply. Adjudication reply, as stipulated under section 11(1), may be served within 5 days from the receipt of adjudication response by the claimant. The adjudication reply is mandatory under section 11(1) as the claimant may choose whether to take advantage of this process. The adjudication reply should be confined to the points raised in the adjudication response that is sufficient to rebut arguments and points made in the adjudication response (Chow, Lim and Oon, 2014). The adjudication reply will not be permitted to raise a new ground or argument in the adjudication reply that is stray, by the opinion of the adjudicator on the matters mentioned in the adjudication claim.

In the event where the claimant elects to serve an adjudication reply, the date of service of the reply is significant because it replaces the date of service of the adjudication response as the date from which the 45 days period for adjudicator to decide the dispute commenced under section 12(2)(a) (*Construction Industry Payment and Adjudication Act 2012*). Section 12(3) provides that an adjudication decision delivered after the expiry of prescribed period is void and not enforceable. The other important consequences of late adjudication decision is that the adjudicator

will be denied of any claim for his fees and expenses under section 19(6) (*Construction Industry Payment and Adjudication Act 2012*).

2.6 Conduct of the Adjudication

2.6.1 Adjudicator's Discretionary Power

While no special legal or technical expressions are required, the result in the adjudication determination must not be a mere opinion or recommendation but a completion decision as held in the case of *Samuel v Cooper* (1835) 2 A & E752. The wording of the adjudication determinations must not leave the result of uncertainties and incapable of enforcement (Chow, Lim and Oon, 2014).

Under CIPAA section 12(1), the adjudicator is granted discretionary power on procedural matter. The provision provided that the adjudicator shall be the master of procedure for the adjudication and he may conduct the adjudication in any manner which he deems appropriate in dealing the matter present before him (*Construction Industry Payment and Adjudication Act 2012*). This latitude is further extended by the express provision that adjudication proceedings are not subject to the provisions of the Evidence Act 1950.

Nevertheless it should not be thought that the latitude granted is completely unfettered as it is subject to other provisions of the Act. For example, the adjudicator must ensure that proceedings enable the adjudication determination to be made within the timeline stipulated under section 12(2) and (3). Furthermore, section 24 requires him to act impartially, independently and in a timely manner without incurring unnecessary expenses and to comply with the rules of natural justice. The powers of the adjudicator set out in section 25 of the Act are extensive but these powers must be exercised within the ambit of the adjudication framework.

2.6.2 Burden of Proof and Utilisation of Rules of Evidence

The adjudicator is empowered to inquisitorially take the initiative to inquire into certain facts and law pursuant to section 25(i), the general principle remains that the burden of proof in establishing a fact or proposition is borne by the party alleging the fact or submitting the proposition (Chow, Lim and Oon, 2014). In the adjudication case of *SQ Pte Ltd v SR Pte Ltd* 2009 SCAJ 874, one of the items disputed was concerned on the rates to be used for the valuation of variations. The adjudicator refused to adopt the claimant's rates for variation works because the claimant has failed to demonstrate the basis for the rates. On the other hand, the respondent's rate was adopted instead as this was supported by evidence of rates used by other subcontractors in comparable work.

Nevertheless, section 12(9) provides that the adjudicator is not bound by the provisions of the Evidence Act 1950. This is consistent with the latitude conferred on the adjudicator to decide the procedural matters and evidence taking. Nonetheless, the adjudicator must ensure that the adoption of the approach in examination and analysis of evidence by him is adduced by the parties. The rules of natural justice applies and the adjudicator must ensure one side is not unfairly advantaged to the detriment of the other (Chow, Lim and Oon, 2014).

2.6.3 Application to the Law

It is expected that the adjudicator must apply the law in arriving at their determination. He is expected to determine the merits of a claim in accordance with the application provisions of the underlying contract as well as the consideration to the common laws (Uher and Brand, 2005). During the decision making process, the adjudicator has to consider applicable common law principles relating to the issue envisaging payment claims. In Malaysia, these issues normally cover aspects such as variations, liquidated damages and defects. The adjudicator should appreciate the legal framework created by the Act is one which has a statutory system operating alongside a contractual regime.

2.7 Temporary Finality of Adjudication Determination

The temporary binding effect of adjudication determination under section 13 is a common trend in all jurisdiction where similar regimes have been introduced. If the parties after the adjudication proceedings require a more calibrated determination of the dispute with requisite degree of finality, the parties may continue the dispute to arbitration or litigation. When CIPAA is compared with other legislation of this genre, adjudication is very much distinguishable from arbitration. Notwithstanding their common principles in both, the requirement for the tribunal to reach its decision impartially and to adhere the rules of justice (Chow, Lim and Oon, 2014). Perhaps the largest difference between the two is that statutory adjudication's legislative purpose is to provide a decision that has only interim effect whereby the other provide a finalised award that has almost the same jurisdiction as a high court decision.

The temporary binding nature of an adjudication determination suggests courts can afford to be more circumscribed in terms of reviewing the correctness of an adjudicator's determination compared to arbitration award. The courts in Malaysia however has still not adopted a clarified conception or legal position regarding the extent of restraints imposed on adjudication determination. Under the New South Wales jurisdiction, an adjudicator is entitled in the course of making his decision, to make mistakes of law so long that those mistakes do not cause the adjudicator to exercise a jurisdiction that he does not possess or decline to exercise jurisdiction that he possesses (Uher and Brand, 2005). There is an understandable anxiety by the courts in different regime, notably New South Wales and United Kingdom, in that attempt to provide a quick determination of a dispute, an adjudication process may not afford sufficient scope for the careful analysis of evidence and facts by the adjudicator (Uher and Brand, 2005). Section 13(c) affirms this principle that once dispute has been decided by an arbitrator or the courts.

2.8 Finality by Enforcement as Judgement or Order of the High Court

A successful claimant who is not paid the whole or any part of the adjudicated amount by the respondent in accordance with the adjudication determination may resort to the enforcement provisions under Part V section 28 of the Act (*Construction Industry Payment and Adjudication Act 2012*). The defaulting party may only challenge an adjudication decision under the grounds of section 15 and 24, in situation where the decision does not comply with natural justice (Chang, 2016) or an overextension of jurisdiction by the adjudicator (Teo, 2008).

In providing means for the adjudication decision to be enforced as a judgement from the High Court, section 28(1) of the Act discourses an uncertainty encountered with the HCGRA in the United Kingdom. When statutory adjudication came in force in 1996, there was some debate on how the adjudicator's decision may be enforced as the English Act itself does not state the adjudication decision may be enforced as a judgement of the High Court. Following *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999), the adjudication decision may only be enforced as a high court judgement when the claimant is able to show, inter alia, that the respondent in the adjudication has 'no real prospect of successfully defending the claim' and there is no compelling reason why the case should be disposed at trial (Dancaster, 2008). Ultimately, enforcement under section 28(1) is granted at the discretion of the High Court. The High Court may refuse to enforce a decision as judgement which in his view, has not made in accordance with the requirements of the Act or the decision itself offended the principles of natural justice (Dancaster, 2008).

2.9 Conclusion

By reviewing and studying the genesis and the adjudication mechanism provided under the CIPAA 2012, the ultimate purpose of the Act was to overcome payment disputes during the course of the contract and provide a means of recovery of payment by claimant. A detail study of the system in the local regime would allow a

more accurate assessments and to make aware the possible issues to be brought up during the course of this study.

CHAPTER 3

METHODOLOGY

3.1 Introduction

This purpose of this chapter is to obtain a comprehensive analysis based on the data collected in accordance with the objectives of the study. The chapter includes research definition, research design, questionnaire design and data analysis approach.

3.2 Definition of Research

According to Creswell (2008), research is a cumulative of steps to collect useful information that can enhance understanding with a subject or an issue through analysis of collected data. Research is also defined as a systemized effort to gain new knowledge (Kothari, 2004). Methodology, much similar to the definition of research, envisaged a wider scope. Methodology on the other hand, is an analysis of the principles of inquiry in a specific field. Methodology, different from method in research, encompasses the overall research strategy instead of just a range of tools and techniques. A well designed research strategy would propelled the research to a higher level of understanding and accuracy.

Vyhmesiter (2008) stated that research should not be a presentation of one's own perspective, instead it should be demanded with data, information and facts.

Hence, any research done must be based on real facts and well systemized research strategy in order to deliver a much better interpretation of research results.

3.3 Research Design

The common research strategy is reflected by on flexibility of which the objectives are questionable or not. Naoum (2007) categorized research strategy into two fundamental categories, which is quantitative analysis and qualitative analysis. However, only quantitative approach will be adopted in data and result analysing.

3.3.1 Quantitative Analysis

The method of collecting quantitative data generates statistics rather than meaning through the use of large-scale survey research, using methods such as questionnaires and structured interviews.

3.4 Desk Study

Secondary data will be collected with the desk study method because the data are gathered from other authors or sources (Naoum, 2007). Naoum (2007) pointed out that secondary data may be stored in descriptive format or in pure statistical format or even both.

3.5 Sample Selection

For the assessment of the effectiveness of a statutory mechanism, any respondent regardless of profession that possesses past experience or considerable amount of knowledge for that particular subject would be eligible in participating the survey.

Nevertheless, respondents that fit the traits described above would have been too difficult to identify as a huge amount of time is needed to locate the construction, consultancy and legal firms that had actually been through or dealt the adjudication process as the Act has just come into force in year 2014. In order to overcome the large sample size available, sample selection method was adopted in filtering out respondents that have qualifications recognized by the local adjudication administration authority, which is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia regime. Sample selection method was able to provide consistency in the minimum requirement of respondent that participated in the survey, which is a rather extensive knowledge on the subject matter. In addition, the sample selection method can provide a swift distribution of questionnaires to the targeted respondent as it eliminates the guesswork on whether a respondent has the experience or knowledge of statutory adjudication.

A panel list of adjudicators was obtained from KLRCA. The list consists a total number of 354 adjudicators throughout Malaysia. 103 numbers of adjudicators were excluded from the survey as they are based in other countries notably Singapore and India. The remaining 251 numbers of adjudicators were notified by email about the survey conducted and they were requested to participate the survey at their own discretion. 38 sets of questionnaires were returned after a period of three weeks. Despite their different type of profession, each person contained in the panel list acquired recognized qualification as an adjudicator that can be engaged to conduct adjudication proceedings.

3.6 Questionnaire Design

Several approaches had been adopted to review or assess the effectiveness of statutory adjudication in other regime such as by Yung and Rafferty (2015) in New South Wales. Despite the approaches utilized were different depending on the author of the literature, the basic principle of any approach is however consistent to its core when assessing the effectiveness of a statute or statutory mechanism. This basic principle is first to identify the core objective of the statute itself. The Construction

Industry Payment and Adjudication Act 2012 Act 746 describes itself as ‘an Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication (speed), to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters (fairness).

Four objectives can be derived from the statute’s main objective which is fairness and speed. In addition to the two, informality and cost effectiveness objective must also be assessed in order to accurately review the mechanism during practice. The inclusion of informality objective in the questionnaire was intended to review the rules and regulation governing the adjudication mechanism. Investigations must be carried out to identify whether these express procedural provisions would positively or negatively affect the adjudication proceedings in practice. The latter, cost effectiveness was included by the genesis of the Latham Report in the United Kingdom. One of the key features of statutory adjudication when it was first established in UK is its low cost compared to other alternative dispute resolution available during that time. The purpose of statutory adjudication is to relieve builders from financial struggle due to delay or default in payment and if the cost to invoke adjudication is higher, then the core purpose of the statute would be defeated.

The questionnaire is divided into 2 sections, Section A and Section B. The main objective of the first section, Section A of the questionnaire is to identify the respondent’s background. The first section of the questionnaire inquired the respondents on their Type of Profession, Name of Company/Organisation and Years of Experience.

The next section, Section B consists of four sub-sections, each inquiring the respondent’s opinion and rating on a particular objective, which further divide itself into several criteria and sub-criteria. The first question in Section B requires the respondent to assess statements regarding the fairness objective of statutory adjudication in Malaysia. Respondents are required to rate these statements on a Likert scale of 1 to 5. 1 being strongly disagree and 5 being strong agree.

Question 2 in Section B requires the respondents to rate statements and issues relating to the time period stipulated in statutory adjudication mechanism. The respondents must rate the statement based on their opinion with regards to the adherence of time frame provided in the Act in the real practice. The answers provided are in the form of a 1 to 5 likert scale. 1 being strongly disagree and 5 being strongly agree.

Question 3 in Section B requires the respondents to rate statements on the structure and system of the adjudication mechanism. A total of 7 statements are present in question 3, each to be answered in the form of a liker scale of 1 to 5. Question 3 mainly inquires on crucial information on the informality objective with regard to its facts and consequences of such in the real practice.

The final question in Section B requires the respondent to rate statements on the cost incurred during adjudication process. Additional allowance such as travel and accommodation fees provided under the Act is exclude from the scope of this survey. With this factor in mind, the only cost incurred would only be the adjudicator's fees. The respondents are required to rate the statements with a 1 to 5 likert scale which 1 being strongly disagree and 5 being strongly agree.

3.7 Data Analysis

Statistical tests will be carried out to analyse the result obtained from the returned questionnaire. The tests will be conducted with the use of predictive analytics software and in this case, IBM SPSS (Statistical Package for the Social Sciences) will be utilized to carry out all data analysis. First of all, the respondents will be divided into two categories in accordance with their type of profession, which is lawyers and construction professionals. The categorization of respondents will provide 2 variables for comparison purposes.

Mainly only two tests will be adopted to analyse the data obtained, Descriptive Statistics and Mann-Whitney *U*-test. Descriptive Statistics was used

result for its straightforward and simple approach in obtaining basic frequency readings such as mean and median, which can be translated into the general trend for each statement and generating a visible trend from the analysed. This method provides a broad view of the results obtained and will be either analysed the responses in percentages or will contain actual numbers (Naoum, 2007). The other tests to be performed is a non-parametric test which is known as Mann-Whitney *U*-test. Due to the fact that the dependent variables were ordinal and the variances were unequal, Mann-Whitney *U*-tests were performed (Morgan, Leech, Gloeckner and Barretto, 2011) compare ratings between the Types of Profession. The mentioned test will identify the asymptotic significance, which is common referred as *p*-value to provide significance level between Types of Profession.

3.8 Conclusion

The research will be utilising quantitative analysis method of Descriptive Statistic Method and Mann-Whitney *U*-test (non-parametric test) in assessing the four major objectives of the effectiveness of statutory adjudication based on statistics provided by questionnaires and statistical data obtained from KLRCA.

Literature review was conducted as one of the research methodology of the study. The tracing of development of CIPAA was done solely based on desk study method. Secondary data and primary data will be used together to assess the effectiveness of statutory adjudication in Malaysia.

CHAPTER 4

RESULTS AND DISCUSSION

4.1 Introduction

This chapter of the study is to include the interpretation, analysis and summary of the result obtained from the questionnaires survey. 38 sets of questionnaires were returned from the 250 questionnaires distributed. A holistic approach of research will be adopted as data are gathered from more than one sources. The questionnaire surveys will act as a primary source of data whilst the statistics obtained from KLRCA will be treated as a supporting secondary data.

The main objective of the questionnaire is to quantitatively measure the effectiveness of the adjudication mechanism to date by differentiating a general effectiveness factor to four different criteria, which are fairness, speed, informality and cost effectiveness from the perspective of both construction and legal industry professionals. The analysis is carried out based on the returned questionnaires and statistics from KLRCA using statistical analysing software SPSS from IBM.

4.2 Results

4.2.1 Respondents' Demographic and Types of Profession

This section is to assess the respondent's information including their profession and years of experience. All respondents are selected from the panel list of adjudicators provided by KLRCA. This means that all the respondents are sufficiently qualified and reputable on answering the questionnaire with high reliability. Despite all the respondents are qualified as adjudicators, the respondents however are further differentiated into lawyers and construction professionals due to the hypothesis that these two groups will provide different perspective and answers to the questions in the survey due to their extent of involvement in practical construction activities or merely law practitioners. Gender, years of experience and adjudication cases involve are irrelevant to the study as the latter imposes confidentiality, which details cannot be disclose to the public.

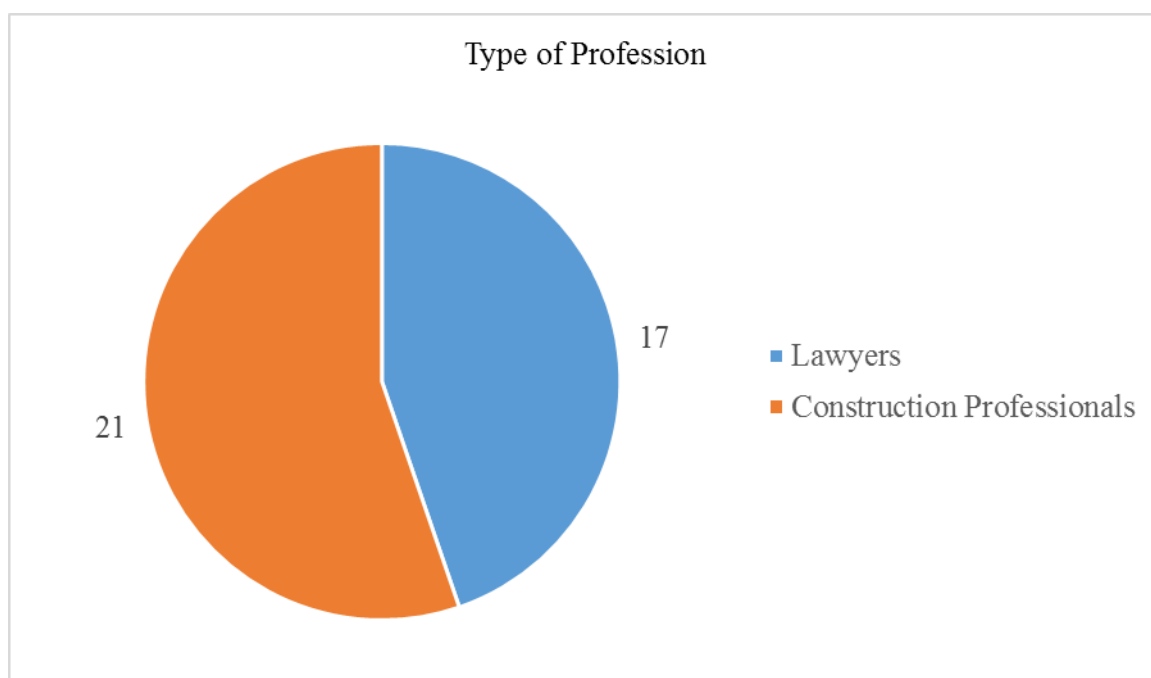


Figure 4.1: Respondents' Type of Profession

The pie chart above shows details on type of profession the returned questionnaires. The questionnaires were sent to respondents with adjudicator qualifications as listed out in the KLRCA panel list of adjudicators. A total of 38 sets of questionnaires were returned at the end of the survey. Despite all the respondents are qualified adjudicators, their type of professions are different, mainly lawyers (advocates and solicitors) and construction professionals (architects, engineers and quantity surveyors). Out of the 38 questionnaires, 17 of them (44%) were derived from lawyers with legal background whilst 21 respondents (56%) are construction professionals.

4.2.2 Type of Proceedings

Table 4.1: Type of Proceedings

Type of Proceedings	April to December 2014	January to June 2015	Total
Documents Only	27	61	88
Oral Hearing	2	9	11
Total registered matters	29	70	99

Table 4.1 shows the huge difference between the numbers of proceedings to date (12th June 2015) since the implementation of CIPAA 2012 that have adopted either documents only procedure or oral hearings as reported by KLRCA Conference Report (2015). The documents only procedure stood a staggering of 88% of the adjudication claims conducted, 88 out of the total 99 adjudication cases carried out until June 2015.

4.2.3 Status of Adjudication Decision Release

Table 4.2: Status of Adjudication Decision Released

Status of Adjudication Decision	2014 (April until December)	2015 (January until June)	Total
Void	0	0	0
Application to set aside	2	2	4
Uncontested	0	23	23
Total	2	25	27

The data in Table 4.2 shows out of the total 27 adjudication decisions registered until June 2015, 23 decisions remained uncontested whilst the other 4 was set aside. The percentage of adjudication decision remained uncontested constitute 85% (23 out of 27) whilst the decisions that were set aside stood only 15% (4 out of 27).

4.2.4 Fairness Objective

The primary data is assessed with SPSS using basically two tests, which is Descriptive Analysis and Mann-Whitney *U*-tests. Descriptive analysis will be carried out for the responses of both lawyers, construction professionals and an overall score for the combined responses disregarding their profession in order to acquire the respondents' general opinion of the sub-criteria. Mann-Whitney *U*-tests will be conducted to identify the significance of opinions among lawyers and construction professionals. A *p*-value of lower than 0.05 indicate there's a significant branching of opinions regarding a particular statement or criteria, which will be discussed in the latter section on the possible reasons behind the branching of opinions.

The fairness objective will be devised into 5 major criteria, namely Distribution of Adjudication Fees, Appointment of Adjudicator, Fairness in

Procedural Rights and Natural Justice, Impartiality of Adjudication and Finality of Adjudication Decision.

Figure 4.3 shows the mean, median and p-value for all the criteria in the fairness objective. Based on the rated criteria of Distribution of Adjudication Fees, the lawyers have clear opinions whilst construction professionals remains neutral on several issues in the fairness objective. Lawyers basically agreed that the doctrine of equal distribution of adjudication fees is always adhered to (mean/median 4.17/4.00) in addition to the opinion of this particular doctrine is fair to parties (mean/median 4.47/5.00), both claimant and respondents.

Construction professionals on the other hand, seems to be remain neutral on the adherence of equal distribution of adjudication fees (mean/median 3.42/4.00) and its fairness to both parties (mean/median 3.48/4.00). The responses from both groups of respondents are distinctive as reflected by Mann-Whitney *U*-tests, indicating low *p*-value of 0.04 and 0.03 respectively. An overall mean/median of 3.76/4.00 is obtained by tabulating combined ratings from both groups of respondents.

Moving on to the next criteria 'Appointment of Adjudicator', lawyers and construction professionals seems to be agreed that equal opportunity exists in both the selection (mean/median 4.11/4.00) and opposition of selected adjudicators (mean/median 4.00/4.00).

In the criteria of Procedural Rights and Natural Justice, both lawyers and construction professionals (mean/median 4.21/4.00) are generally agreed that the adjudication decisions are fair thus far. Both groups of respondents also agreed the fact that right to submit claims are equal among parties (mean/median 3.84/4.00) and enough time is provided to the adjudication respondents to react to an adjudication claim ((mean/median 3.63/4.00).

Table 4.3: Mean and Median Effectiveness Rating of Fairness Objective

Criteria	Sub-Criteria	Mean/ Median	Lawyers (n=17)	Construction Professionals (n=21)	Mann- Whitney U-tests (p- value)	Overall (n=38)
Distribution of Adjudication Fees	The Doctrine where the parties equally divide the adjudication fees is always adhered to.	Mean	4.17	3.42	0.036	3.76
		Median	4.00	4.00		4.00
Appointment of Adjudicator	Equal Shares of adjudication fees is fair.	Mean	4.47	3.48	0.026	3.92
		Median	5.00	4.00		4.00
	Equal opportunity in selecting mutually acceptable adjudicator	Mean	4.17	4.05	0.560	4.11
		Median	4.00	4.00		4.00
Fairness in Procedural Rights And Natural Justice	Equal opportunity to oppose unfavourable appointed adjudicator.	Mean	4.00	4.00	0.974	4.00
		Median	4.00	4.00		4.00
	Adjudication decisions are fair	Mean	4.29	4.16	0.560	4.21
		Median	4.00	4.00		4.00
Impartiality of adjudication	Right to process claim is equal among parties	Mean	3.71	3.95	0.426	3.84
		Median	4.00	4.00		4.00
	Respondents given enough time to respond.	Mean	3.76	3.52	0.456	3.63
		Median	4.00	4.00		4.00
Finality of Adjudication	Time provided by CIPAA is sufficient for fair decision.	Mean	4.53	3.33	0.000	3.87
		Median	5.00	3.00		4.00
Finality of Adjudication	Determinations are supported by High Court similar to UK.	Mean	3.88	3.52	0.114	3.68
		Median	4.00	4.00		4.00
	Adjudication decisions improve security of payment	Mean	4.29	4.16	0.560	4.21
		Median	4.00	4.00		4.00

A *p*-value of 0.00 is registered in the criteria of impartiality of adjudication, indicating a huge discrepancy among the opinions of respondents. When asked whether the time provided by CIPAA is sufficient for a fair decision, lawyer strongly agreed that the time stipulated is sufficient (mean/median 4.53/5.00) whilst construction professionals remains neutral or undecided on this particular statement (mean/median 3.33/3.00), showing that construction professionals remain sceptical on the current decision delivery period of the adjudication mechanism.

The next question requires the respondent to rate the Finality of Adjudication decision with two branching sub-criteria, which is the extent of support from High Court and the impact of adjudication decision to security of payment. Construction professionals and lawyers agreed that the decision determined by adjudications so far is supported by High Court similar to UK (mean/median 3.68/4.00). Both groups of respondents agreed that adjudication decision did improved security of payment in the construction industry (mean/median 4.21/4.00).

4.2.5 Speed Objective

The next main assessment for effectiveness is the speed objective. The first criteria is Aptness of Stipulated Timeframe. Surprisingly both groups of respondents both agree that respondents in adjudication proceedings respond within 10 days after a submission of an adjudication claim (mean/median 3.76/4.00). When asked whether the respondent can make a comprehensive decision within 45 days as stipulated in CIPAA, lawyers strongly agree (mean/median 4.35/5.00) that 45 days are sufficient whilst construction professionals were neutral to the statement with a rating as low as (mean/median 3.62/3.00), however, the *p*-value is not low enough to prove significance.

Lawyers and construction professionals both agree that the timeline stipulated in CIPAA, ensuring that adjudicators deliver decisions 45 days after adjudication response is strictly adhered to (mean/median 4.21/4.00). Both groups of respondents disagree that time extensions were granted for the delivery of decision (mean/median 1.81/2.00). Consistently, the likeliness of time extensions added to the adjudication process is somehow seldom as respondents disagree that time extensions are likely to be granted in the adjudication process (mean/median 1.74/2.00).

Next, the respondents were asked questions regarding the Recovery of Payment after the adjudication process. Both groups of respondents remain undecided or neutral when asked whether payments were recovered within the timeframe stipulated after adjudication decision. The respondents remain neutral on the statement where payment is recovered within the time frame provided by the adjudicator (mean/median 3.34/4.00).

Table 4.4: Mean and Median effectiveness Rating of Speed Objective

Criteria	Sub-Criteria	Mean/ Median	Lawyers (n=17)	Construction Professionals (n=21)	Mann-Whitney <i>U</i>-tests (<i>p</i>-value)	Overall (n=38)
Aptness of Stipulated Timeframe	Respondent respond within 10 days after adjudication claim	Mean	3.76	3.76	0.906	3.76
		Median	4.00	4.00		4.00
Adherence to stipulated timeframes	Comprehensive decisions can be made within 45 days.	Mean	4.35	3.62	0.059	3.95
		Median	5.00	3.00		4.00
Payment Recovery after Adjudication	Timeline stipulated in CIPAA (45 days) for decision delivery is strictly adhered to.	Mean	4.53	3.95	0.076	4.21
		Median	5.00	4.00		4.00
	Instances of time extensions for delivery of adjudication decision	Mean	1.65	1.95	0.093	1.81
		Median	2.00	2.00		2.00
	Likelihood of time extensions to be granted.	Mean	1.59	1.87	0.071	1.74
		Median	2.00	2.00		2.00
	Payment recovered within the timeframe stipulated after decision has been made.	Mean	3.53	3.19	0.344	3.34
		Median	4.00	4.00		4.00
Escalation of dispute to arbitration and litigation.	Payment is generally recovered after adjudication process.	Mean	3.71	3.62	0.635	3.66
		Median	4.00	4.00		4.00
		Mean	2.59	3.57	0.026	3.13
		Median	2.00	4.00		3.00
	Adjudication reduces overall duration of payment disputes.	Mean	4.47	4.13	0.113	4.28
		Median	4.00	4.00		4.00

However, both groups of respondents agree that payment is generally recovered after the adjudication process (mean/median 3.66/4.00). Lawyers disagree that adjudicated payment dispute are likely to be escalated to arbitration and litigation (mean/median 2.59/2.00). Construction professionals on the other hand believe that adjudicated payment disputes has an above average possibility of escalation to arbitration and litigation (mean/median 3.57/4.00). The p -value of 0.026 was registered by the Mann-Whitney U -tests indicate the major discrepancies in both groups of respondents' evaluations.

Last but not least, a general question was asked, whether adjudication reduces the overall duration of payment disputes. Opinions from both groups of respondents, without surprise provided an answer of agreement (mean/median 4.28/4.00), agreeing on the fact that adjudication did able to reduce duration of payment dispute.

4.2.6 Informality Objective

The informality objective is deprived of four main criteria, which is Adjudication Mechanism and Structure, Rules of Evidence, Necessity for Legal and Professional Assistance and Impact of Informality.

Both groups of respondents agree (mean/median 3.97/4.00) that the adjudication proceedings are strictly in accordance with the structure underlined by rules and regulations of CIPAA.

Next the rules of evidence for the assessment of merits during adjudication proceedings is mentioned in the sub-criteria. Both groups of respondents agree (mean/median 4.00/4.00) that adjudicators utilised rules of evidence during adjudication evaluation and decision making. Both groups of respondents are strongly agree (mean/median 4.34/4.00) that adjudicators are only required to consider the most relevant evidence provided by the parties during the adjudication process. Expert witnesses of professional testimonies are deemed as non-crucial (mean/median 1.41/1.00) in adjudication process.

The importance of legal and professional assistance is also mentioned in the informality objective's sub criteria. Both groups of respondents disagree (mean/median 2.47/2.00) that adjudication process can be managed by parties without legal assistance. Nevertheless, both groups of respondents agree positively (mean/median 4.42/4.00) that legal assistance is substantial in ensuring the success of an adjudication claim or counter claim.

In conclusion, the respondents disagree (mean/median 2.08/2.00) that informality will not impact on the accuracy of adjudication determinations as they see informality is crucial in ensuring an accurate adjudication determination in Malaysia.

Table 4.5: Mean and Median effectiveness Rating of Informality Objective

Criteria	Sub-Criteria	Mean/ Median	Lawyers (n=17)	Construction Professionals (n=21)	Mann-Whitney <i>U</i>-tests (<i>p</i>-value)	Overall (n=38)
Adjudication mechanism and structure	Structured process is adopted strictly compliance to rules and regulations of CIPAA.	Mean	4.24	3.86	0.074	3.97
		Median	4.00	4.00		4.00
Rules of Evidence	Utilisation of rules of evidence	Mean	4.18	3.86	0.086	4.00
		Median	4.00	4.00		4.00
	Adjudicators are required only to consider the most relevant evidence during the course of the adjudication process.	Mean	4.53	4.19	0.054	4.34
		Median	5.00	4.00		4.00
Necessity for legal and professional assistance	Adjudication process is manageable by parties without legal assistance.	Mean	2.35	2.57	0.638	2.47
		Median	2.00	2.00		2.00
	Expert witnesses or professional testimonies often required.	Mean	1.24	1.54	0.079	1.41
		Median	1.00	2.00		1.00
Legal assistance will increase the success rate of adjudication claim or counter claim.	Mean	4.47	4.38	0.502	4.42	
	Median	5.00	4.00		4.00	
Impact of Informality	Informality will not impact on the accuracy of adjudication determinations.	Mean	1.82	2.29	0.093	2.08
		Median	2.00	2.00		2.00

4.2.7 Cost Effectiveness

In order to assess the cost effectiveness of CIPAA, two criteria regarding cost effectiveness are brought out, namely Reasonableness of adjudication expenses and Amount claimable by adjudication.

Both groups of respondents disagree (mean/median 2.53/2.00) that adjudication fees prescribed in Regulation 6 is reasonable. When asked whether the training and qualification of adjudicators is adequate or not, both groups of respondents remained neutral (mean/median 3.08/3.00).

The adjudication amount, based on the responses from the respondents, indicated that the amount granted are usually lower than the actual adjudication amount claimed (mean/median 3.84/4.00).

Table 4.6: Mean and Median Effectiveness Rating of Cost Effectiveness

Criteria	Sub-Criteria	Mean/ Median	Lawyers (n=17)	Construction Professionals (n=21)	Mann-Whitney U-tests (p-value)	Overall (n=38)
Reasonableness of Adjudication Expenses	Adjudication fees prescribed in Regulation 6 based on amount claimed is reasonable.	Mean Median	2.59 2.00	2.48 2.00	0.817	2.53 2.00
	Training and qualification of adjudicators are adequate and competent in carrying out their tasks.	Mean Median	3.18 4.00	3.00 3.00	0.362	3.08 3.00
Amount Claimable by Adjudication	Amount granted usually lower than the actual adjudication amount claimed.	Mean	3.94	3.76	0.374	3.84
		Median	4.00	4.00		4.00

4.2.8 Number of Claims by Amount in Dispute

Table 4.7: Number of Claims by Amount in Disputes

Disputed Amount (RM)	Adjudication claims until	Percentage % (n=71)
	June 2015	
Up to 150,000	24	34
150,001 to 300,000	10	15
300,001 to 800,000	11	15
800,001 to 1,300,000	7	10
1,300,001 to 1,800,000	5	7
1,800,001 to 2,300,000	2	3
2,300,000 to 2,800,000	1	2
2,800,001 to 3,300,000	1	2
3,300,001 to 5,000,000	2	3
5,000,001 to 10,000,000	2	3
10,000,001 to 15,000,000	3	3
Over 15,000,000	3	3
Total	71	100

Table 4.7 shows most of the claims made is under the lowest bracket at 34%, which is below RM150,000. The category of RM150,001 to RM300,000 and RM300,001 to RM800,000 each constitute 15%. The third highest category is RM800,001 to RM1,300,000, consists of 10%. Five categories, RM1,800,001 to RM2,300,000, RM3,300,001 to RM5,000,000, RM5,000,001 to RM10,000,000, RM10,000,001 to RM15,000,000 and over RM15,000,000 each constitute of 3%. The least recorded disputed amount is RM2,300,000 to RM2,800,000 and RM2,800,001 to RM3,300,000 constitutes only 2% each, being the lowest among all the categories.

4.3 Discussion

4.3.1 Fairness Objective

4.3.1.1 Distribution of Adjudication Fees

Section 19(3) under the CIPAA 2012 provided that the parties involved in the adjudication proceedings must be jointly responsible and liable for the adjudicator's fees and expenses. There is a significant difference of opinions between the two groups of respondents on the fact that the parties involved in adjudication proceedings had thus far adhered to this provision, p -value=0.04. Lawyers agree that the doctrine on the equal distribution of fees is always adhered to whilst the construction professionals disagree otherwise. This is supported by the statistics reported by KLRCA (2015) where situations were encountered when one or both of the parties neglect the payment of adjudicator's fees and expenses but still continue to participate in the adjudication process.

In order to prevent the lack of payments to the adjudicators, section 19(6) provided that the adjudicator may, in his own decision not to deliver the adjudication decision. Despite there's a strict responsibility on the adjudicator's side to announce his decision within the 45 days' timeframe, the adjudicator may have the option to delay his decision or withdraw from the respective proceedings.

KLRCA (2015) reported that even in situations where the adjudicator is owed payment by one or both of the parties, the adjudicators chose to proceed with the decision and no cases of withdrawal is reported thus far and eventually, payment was made to the adjudicator in order to obtain the adjudication decision. Hence, it can be concluded the equal distribution of fees is adhered to thus far.

Two groups of respondents also have significant opinions in fairness on the equal share of adjudication fees, p -value=0.03, with construction professionals disagreeing the statement whilst the lawyers otherwise. The consideration to this

arrangement is in the onus that both parties have equal chances in proving their stances with evidences and witnesses during the adjudication process. This supported by Kennedy (2006), as he stated the process of adjudication where the adjudicator, having used his inquisitorial power granted to him by the statute to determine the facts and the law, may have decided wholly in favour of one party or the other, predominantly in favour of one or the other or it may be that the result is close to a 50-50 split in terms of the resultant decision.

However in real case scenarios, non-payment by one of the parties, mostly claimants as reported by KLRCA (2015) was due to the claimants do not possess the financial means to make such payment. This can be explained by the simple fact that the financial flow of the claimant was choked due to the non-payment by the respondent. Section 19(3) provided that the adjudicator may recovered such payment as a debt due, resolving the financial crisis that may have undertaken the claimant during the adjudication process.

4.3.1.2 Appointment of Adjudicator

Part III prescribed in detail the process and arrangement available for the appointment of adjudicators. The parties may select and appoint, with mutual agreement on the adjudicator that will be directing the adjudication process, or they may opt for a non-bias arrangement, which is the appointment of adjudicator by the Director of KLRCA. The respondents agree that the both parties, claimant and respondent has equal chances in deciding or opposing a nominated adjudicator candidate prior to the initiation of the proceeding. When indecisiveness occurs during the appointment process, the last resort would be the appointment by a neutral third party, the Director of KLRCA which without a doubt ensures fairness throughout the process.

4.3.1.3 Fairness in Procedural Rights and Natural Justice

Both groups of the respondents agree that the right to process claim is equal among parties. This is supported by the fact that statutory adjudication is incorporated into every construction contract that is in writing under section 2 regardless of conditions of contract and furthermore, statutory adjudication is retrospective in nature which allows parties to seek adjudication claim even though their contract was established before the operation of CIPAA 2012 in the year 2014 in situations of payment disputes.

Accordingly, the adjudicator is only entitled to assess the merit of an adjudication claim based on the evidence submitted to him by the parties. Failure to serve adjudication responses would jeopardise the evidence evaluation process and resulting a determination in favour of the claimant (Teo, 2008). In addition, the case of *Witham v Raminea Pty Ltd (201) WADC 1* that an adjudicator is obliged to consider an adjudication response made after the time prescribed. A very low agreement rating was spotted among the ratings by the respondents in terms of timeline stipulated under the Act for the respondents to serve adjudication response is sufficient (mean/median 3.63/4.00).

The result obtained is very much similar to the statistics reported by KLRCA (2015). One of the major issues after the enforcement of CIPAA is that some cases, the respondents failed to submit a response within the 10 days limit under section 6. However, these respondents wished to participate in the proceedings in later stage by submitting the adjudication response beyond the 10 days' timeframe. These are signs indicating that the 10 days responding period is nearly insufficient in some cases. However, in the rest of the proceedings respondents were able to serve the adjudication response within the time limit.

The respondents agree in a mutual manner that the adjudication decisions granted so far was fair to both parties. This is indicated by the increasing numbers of adjudication proceedings over the years, which directly construed to a rise in confidence of the public on the fairness of the adjudication determination (KLRCA, 2015).

4.3.1.4 Impartiality of Adjudication Decision

There is a significant difference between the evaluation of effectiveness on the Impartiality of Adjudication between the two groups of respondents, indicated by p -value as low as 0.00. Lawyers think the time provided by CIPAA is sufficient whilst construction professionals' opinion otherwise. Lim (2015) stated that likely more time is needed to assess the merits of claims in large and complex projects under the Singapore's Building and Construction Industry Security of Payment Act 2004.

With consideration to the above statement by Lim (2015), construction professionals may took into consideration on the extra amount of time needed in situations where the disputes are originated from rather complex and large projects, whereby lawyers in practice, would evaluate the provision by literal reading and leaning towards case laws available on the issue mentioned as it is provided under Section 12(3) that decision made beyond the timeframe specified is void and review of the case of *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* (2015).

In *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* (2015), it was held that delay of adjudication decisions will not render the decision void so long as it comply with the provisions under CIPAA 2012 and in this specific case, the delay was caused by a late payment by one of the parties to the adjudicator and the KLRCA withheld the adjudication decision on behalf of the adjudicator. In such situation, the courts will not dismiss the adjudication decision as it has a valid ground on delaying the adjudication decision under section 19(5) and 19(6) of CIPAA 2012 and the nature of the decision has not breach the principle of natural justice.

4.3.1.5 Finality of Adjudication Decision

Both groups of respondents agree with a low rating rate of (mean/median 3.68/4.00) the determinations are supported by the High Court. The low agreement ratings maybe due to the fewer case laws compare to case laws available for other alternative dispute resolution.

The first adjudication case that has been brought to courts, *Macob Civil Engineering Ltd v. Morrison Construction Ltd* (1999) made it clear that the English Court supported and would enforce adjudicators' decision. The defendant in *Macob* did not pay and contended that the decision was invalid and unenforceable because the decision was in breach of the rules of natural justice (Gould and Linneman, 2008). It was held by Hon. Mr. Justice Dyson that decision of an adjudicator is enforceable summarily regardless of any procedural irregularity, error, or breach of natural justice unless there's a serious breaches of natural justice. This has strengthen the finality of adjudication decisions in the common law.

In Malaysia, the case of *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* (2015) marks perhaps one of the first public support by the courts to adjudication decisions. The court held that as long as the decision made are in compliance with the provisions under CIPAA 2012, the decision is enforceable unless there's a serious breach of natural justice. Section 25 stated that adjudicator has the discretionary power to conduct the adjudication proceedings as he see fits and this clause will at the end, prevent the decision from being set aside by reasons such as procedural irregularity or error, much similar to the legal position of UK.

In a recent KLRCA adjudication proceeding, the respondent file an application for an injunction to the High Court pending the main application date which was to set aside the adjudication proceeding on the basis that CIPAA did not apply to the claimant's claim. The High Court granted ex parte injunction, suspending the adjudication while it made its decision on the main application. The granting of ex parte injunction thereby precariously sets a precedent for future injunctions to be granted on the same ex parte basis.

Upon hearing the parties' submissions, the High Court allowed the claimant's application to set aside the ex parte injunction and rejected the respondent's application for an interim injunction. The High Court also dismissed the respondent's application to set aside the adjudication proceeding in total. It was held that the respondent should allow the adjudication to proceed giving due regard the purpose of CIPAA 2012. These series of events showcases the significant role of the courts in supporting and recognising the purpose of CIPAA.

Both the respondents agree that adjudication decisions improve security of payment and according to KLRCA statistics, 85% of the adjudication decision was uncontested as shown in Table 4.2, proving the fact adjudication decision does improve security of payment.

4.3.2 Speed Objective

4.3.2.1 Aptness of Stipulated Timeframe

Both groups of respondents agree that the respondents involved in the adjudication proceedings responded within 10 days after adjudication claim. This is consistent with the statistics provided by KLRCA (2015) based on actual adjudication proceedings, implying only a minority of respondents failed to serve adjudication response within the time specified.

Mutual agreement is shown between the respondents on the opinion that comprehensive decisions can be made within 45 days after adjudication response or reply, whichever later. Situations where adjudicator applied for time extensions occurred but it remains in a very number of cases as reported by KLRCA (2015).

4.3.2.2 Adherence to Stipulated Timeframes

Consistent with the statements above, the respondents agree that adjudication decisions are delivered within the timeframe (45 days) stipulated in CIPAA 2012. Respondents disagree the likelihood of instances where time extensions for delivery of adjudication decision. The KLRCA report shows that adjudicators in only a few cases had applied for time extensions. Such requests have been seen to arise for varied reason.

The first one is when the submissions made by the parties are unclear and there is a need for further submissions to be made, requiring extra time to the process.

The second is when the parties requested for oral hearings. It is a general believe that adjudication being a summary procedure, does not contemplate oral hearings. When the parties request for oral hearings, due to the complexity of the matter, would render the adjudicator more time to assess the merits of claims between parties. The third is when the parties request for a site inspection, which is widely regarded as non-essential to the adjudication process. An arrangement for site visit consumes extra amount of time needed for claim assessment thus extending the time needed for decision delivery.

Excluding from the reasons stated above, likeliness of time extensions be minimal as both groups of respondents disagree that time extension will be granted to adjudicator without valid grounds.

4.3.2.3 Payment Recovery after Adjudication

Oddly, both groups of respondents remain neutral on the statement that payment recovered within the timeframe stipulated after decision is made. This may reflect the uncertainty by the adjudicators on whether or not the payment is recovered on time as CIPAA does not provide a timeframe for recovery of payment from the defaulting party. The timeframe whereby one party has to made payment to another party is solely depending on the decision made by the adjudicator.

A similar trait was observed in the study carried out by Lim (2015) as the adjudicated payment was made later than expected as the Building and Construction Industry Security of Payment Act 2004 does not provide a timeframe for recovery of payment. In the long run, with local case laws and supports by the courts stacking in the Singapore regime, the default party are more likely to made payment within a reasonable timeframe. This may be observed in Malaysia in the near future.

Respondents generally agree that payment is generally recovered after the adjudication proceedings. This is supported by the Table 4.2, which 85% of the

adjudication proceedings are uncontested and the defaulting party proceed to make payment.

A significant difference of opinion can be identified when the respondents were asked whether the adjudicated dispute will be escalated to arbitration and litigation, p -value=0.03. Lawyers disagree with this fact and confirm that adjudicated dispute will most of the time, remain uncontested (mean/median 2.59/2.00). Construction professionals on the other hand, remains neutral on the statement and are being sceptical on the issue of escalation of adjudicated dispute to arbitration and litigation (mean/median=3.57/4.00).

Generally, both groups of respondents agree that adjudication reduces overall duration of payment disputes which can be observed in other regimes such as UK and Singapore.

4.3.3 Informality Objective

4.3.3.1 Adjudication Mechanism and Structure

Both agree that the adjudication process carried out thus far is strictly compliance with the rules and regulations of CIPAA. Despite the approaches to be taken for the management of the adjudication proceedings is under the discretion of the adjudicator under section 25. It is noted that the adjudication process in terms of timeframe and service of adjudication notice, adjudication claim, adjudication response and adjudication reply cannot be altered and must be in accordance with the provisions provided under CIPAA 2012 (Chow, Lim and Oon, 2014).

4.3.3.2 Rules of Evidence

Both groups of respondent agree that during the assessment of merits of claim by the adjudicator, the adjudicator should utilise the rules of evidence submitted to him.

Despite under section 12(9), the Evidence Act 1950 shall not apply to adjudication proceedings, the approach of examination and analysis of evidence must observed the rules of natural justice. Hence in one way or another, the adjudicator tends to apply core rules of evidence during the assessment process and ensure that one side is not unfairly advantages to the detriment of another.

The adjudicator may opt for documents only procedures or carry out a full oral hearing between parties (Chow, Lim and Oon, 2014). Adjudicators are then assess and evaluate based on the facts and evidence provided and announce a decision that is consistent to the rules of natural justice.

With the domination of documents-only adjudication proceedings, the utilisation of rules of evidence is more important than ever as the adjudicators can only assess what is submitted to him in order to come out with a fair decision.

Respondents agree that adjudicators are only required to consider the most relevant evidence submitted to him as the adjudication process is a relatively short process and it would be tedious for the adjudicators to refer to other evidence that are not submitted to him (Chow, Lim and Oon, 2014).

4.3.3.3 Necessity for Legal and Professional Assistance

In terms of necessity for legal and professional assistance, the respondents both disagree that the adjudication process is manageable by parties without legal assistance. Uher and Brand (2005) stated that small sub-contractors may not possess the knowledge needed to invoke and manage the adjudication process and the financial capability in financing the adjudication process. The appointment of legal

assistance would incur extra costs for these small contractors which they might not possess.

Both groups of respondents disagree that expert witnesses or professional testimonies are often required in the adjudication proceedings. This is justified by the KLRCA report (2015) where almost 88% of the adjudication cases adopted the documents only procedure as shown in Table 4.1, and in the events of oral hearing, the time taken to make an adjudication decision by adjudicators may be longer as time extensions would have been applied by the adjudicators to assess complex oral evidences as reported by KLRCA (2015).

Respondents mutually agree that legal assistance will undoubtedly increase the success rate of a claim or counter-claim. In some instances, legal advisors may be appointed to manage and respond to the adjudication claim (Chow, Lim and Oon, 2014). These legal advisors have more experience on the adjudication proceedings and in some cases, be able to find valid ground to defend themselves from claims submitted by less experienced claimants or significantly decreasing the amount awarded at the end (Chow, Lim and Oon, 2014).

4.3.3.4 Impact of Informality

Mutual disagreement has been reached by the respondents when it comes to the statement of informality will not impact on the accuracy of adjudication determination as they think formality is crucial in the accuracy of the adjudication decision.

Lim (2015) stated that adjudication must be strictly adhered to in order to prevent the losing party, from challenging the accuracy of decision due to informalities in the aspect of service of claims and response and submission of documents and evidence. Hence, parties of the adjudication proceedings must adhere to the rules and regulations of CIPAA, such as submitting the crucial information within a specified time limit and responding to adjudicator's instructions when necessary.

4.3.4 Cost Effectiveness

4.3.4.1 Reasonableness of Adjudication Expenses

Surprisingly, both groups of respondents disagree on the adjudication fees prescribed in Regulation 6 is reasonable. Regulation 6 of the rules and regulations of CIPAA provided the amount payable to the adjudicator depending on the amount claimed by the claimant. With 34% of the disputed amount is RM150,000 and below, the prescribed fees to be paid to the adjudicator is RM2,760 as specified under Regulation 6 under the Act. Taking this as an example, the adjudicator fees (RM2,760) constitute a percentage of 1.84% of the amount disputed (RM150,000). According to Yung and Rafferty (2015), the adjudicator fees is considered as reasonable if the percentage of fees lied between 1-2 %. However, with due consideration to the additional cost required to appoint legal advisors to serve and respond to claims, the cost of adjudication may be higher. Hence with by only looking into prescribed adjudication fees, the adjudication fees without legal assistance is reasonable but if legal assistance is appointed, the result would be otherwise.

When compared to Singapore, the adjudication fees specified under CIPAA is far cheaper compare to Singapore's jurisdiction. Singapore's Act provided a calculations of fees in an hourly basis rather than a fixed sum in lower claim amounts, which constitute a much expensive adjudication expense (The Building and Construction Industry Security of Payment Act, 2006).

Respondents remains neutral on the statement providing that the training and qualification of adjudicator are adequate and competent in carrying out their tasks. No justification can be found in any literature but however, it may be due to the enforcement of the Act is still in its early stages and the qualified adjudicators are still inexperience in handling a more complex dispute.

4.3.4.2 Amount claimable by Adjudication

Respondents mutually agree that the amount granted to the successful claimant is usually lower than the actual adjudication amount. This situation is consistent with other jurisdiction such as New South Wales and Singapore. The statistics provided in Uher and Brand (2005)'s studies shown the adjudicated amount is often lower than the amount claimed. Lim (2015)'s statistic shown results likewise, supporting Uher and Brand's findings. A valid reason behind this trend was not stated in both studies but it might be the common habit of contractors to claim in excess, whereby even after rationalisation by adjudicator, the final adjudicated amount would be the one they expected.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter covers the conclusions with reference to the results obtained from the study and reference to the research objectives. Recommendations for similar study are included in this chapter, aiming to improve the accuracy of future studies with similar scope.

5.2 Conclusion

This study assesses the effectiveness of statutory adjudication in Malaysia with reference to the objective of the Construction Industry Payment and Adjudication Act 2012. The mechanism for statutory adjudication must be well built and practiced in order to effectively provide a cheap, swift, fair and informal method of dispute resolution which is able to improve cash flows in the construction industry, keeping the industry healthy.

The four objectives of the CIPAA 2012 were identified. Each objective consists of several major criteria and further branching into sub-criteria, each presenting important aspects of the mechanism. The questionnaires cover all four objectives and were rated by 38 respondents, which are all qualified and recognised adjudicators derived from panel lists of KLRCA. The respondents are divided into

two group based on the type of profession, lawyers and construction professionals. They were asked to evaluate the criteria against likert scale. Mann-Whitney *U*-tests were performed to identify the significance of opinions by respondents and Descriptive Statistical tests were carried out to identify the trend of respondents' evaluation on every sub-criteria. Annual statistics report by KLRCA and some case laws were also referred to.

It was found that the respondents are generally agreed that the statutory adjudication proceedings in Malaysia is fair. The first aspect that respondents disagree is the doctrine of equal share of adjudication is fair between parties. The lack of payment by the owing party may render the claimant incapable of paying the adjudicator's fees, jeopardizing the claimant's chances of obtaining adjudication decision as the adjudication decision will only be published until all payment are received by the adjudicator. Secondly, the respondents are still unassertive of the extent of support to be given to adjudication decisions by the High Court of Malaysia.

The essence of speed in a statutory mechanism is determined by its capability in delivering the final decision within the timeframe specified (Yung and Rafferty, 2015). The respondents agreed that each procedures such as adjudication responses and adjudication reply is served within the time prescribed under the Act. In addition, the respondents agree that time extensions for the delivery of decision is unlikely to happen. These aspects clearly represents the procedural timeframe is so far, strongly adhered to hence the mechanism itself has achieved the speed objective.

It was found that the respondents agree that there's a strong sense of formality in the adjudication proceedings. The respondents agree that informality will impact on the accuracy of the adjudication decision and legal or professionals' assistance will significantly increase the success rate of an adjudication claim or counter claim. The reason behind such evaluation may be due to the fact that the implementation of the Act is still in its early stage and any deviation from the procedures provided under the Act will provide a solid ground to challenge an adjudication decision in favour of the claimant by the respondent.

Most of the adjudication proceedings involved dispute amounts of RM150,000 or less. By referring to the adjudication fees provided under Regulation 6 of the Act, the adjudicator's fees is of 1-2% of the disputed amount, which according to Yung and Rafferty (2015) is within a reasonable range. If the disputed amount exceeded RM150,001, a fixed sum plus a fixed percentage on the disputed amount shall be payable to the adjudicator, making the percentage of adjudicator's fees higher in proportion to the higher disputed amount. Despite the respondents agree that often the amount awarded will always be lower than the claim made in the adjudication claim, this current fixation of fees will without a doubt, assist small contractors in the recovery of their payment. Hence, the mechanism is considered as a cost effective alternative dispute resolution method.

5.3 Recommendation

During the course of the study, several recommendations can be identified for further studies of similar topic, which are as followed

- The participation of respondents in this study is only limited to qualified and recognised adjudicators by KLRCA. To get a bigger picture on the effectiveness of the mechanism, the range of respondents should extend to the views of parties that have been involved in adjudication proceedings. However, the Act provided confidentiality during and after the course of adjudication proceedings, making it hard to identify the parties that had involved in actual adjudication proceedings.
- Most of the case law cited in this study is of originated from other jurisdiction of the common law, mainly from United Kingdom, Australia and Singapore where statutory adjudication has at least been implemented for more than 10 years and in its mature stage. Only a few Malaysia cases are cited due to the lack of case laws in Malaysia jurisdiction as the Act itself has only reached an age of 2 years after enforcement.

- Investigation on statutory adjudication in other regime can be carried out to identify possible issues that are likely to happen in the near future. The long period of implementation of statutory adjudication in other regime tends to bring about issues that have yet to be seen in Malaysia regime as the Act has just came into enforcement two years ago.

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APPENDICES

APPENDIX A: QUESTIONNAIRE