

RESOLVING  
INTERNATIONAL  
DISPUTES  
in GBA and  
ASEAN (Part II)  
Time: 14:00 – 17:40 (HKT)



## **Construction Adjudication - The Malaysian Experience**

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# CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012 (CIPAA)

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- CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012 (CIPAA)
  - “The Malaysian construction industry, like other construction industries in developing nations, has had a long history of lengthy payment times, which has caused many contractors to suffer from cash-flow problems and thus delaying projects.”
  - “The legislation provides for compulsory statutory adjudication and aims to facilitate cash flow in the industry. Parties will be able to obtain a quick interim decision with regards to progress payment disputes, thereby avoiding potential short-term cash-flow problems during project delivery.
- PURPOSE / OBJECTIVE OF CIPAA
  - *An act to facilitate regular and timely payment, to promote a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.*

# Application

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- This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government. (Section 2)
  - location of work
  - Parties
  - Contract
  - Type of works

# Non-application

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- Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

# Location of Work

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- In respect of **location of work**, the construction work must have been carried out wholly or partly within the Malaysian territory. Essentially, it would mean that a suspension bridge whereby its support beams are manufactured in Malaysia and installed in the territory of Hong Kong would be subjected to the CIPAA 2012

# Parties

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- contracting parties in a construction contract such as individuals, corporate bodies and statutory bodies are bound by the CIPAA. It is also provided under s 2 of the CIPAA 2012 that the Government of Malaysia is bound by the CIPAA 2012 for a construction contract entered into by them against any other party

# Contract

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- “construction contract” means a construction work contract or construction consultancy contract
- “construction consultancy contract” means a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services

# Construction Work

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- “construction work” means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:
  - a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
  - b) Any road, harbour works, railway, cableway, canal or aerodrome;
  - c) Any drainage, irrigation or river control work;
  - d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work;  
or
  - e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes—
    - i. Any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and
    - ii. Procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);



# CIPAA Features (1)

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- **Applies Prospectively Only – Jack-In Pile (M) Sdn Bhd V. Bauer (Malaysia) Sdn Bhd & Another Appeal** [2020] 1 CLJ 299 - the entire Act ought to be applied prospectively and does not apply to construction contracts entered into before the coming into operation of this Act i.e. 15.4.2014
- Wide enough to include final payment as the payment under final account is also for work done or services rendered - **Martego Sdn Bhd V Arkitek Meor & Chew Sdn Bhd & Another Appeal** [2019] 8 CLJ 433
- Adjudicator has no jurisdiction to adjudicate on a claim for loss of profit due to a breach of a construction contract as this would not fall within the Act - **Rosha Dynamic Sdn Bhd V Mohd Salehhodin Bin Sabiyee & Ors** [2021] MLJU 1222

## CIPAA Features (2)

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- Loss and expense were held claimable in statutory adjudication under CIPAA where
  - If the contract allows loss and expense to be added to the Contract Sum (provided it arises due to the principal's breach);
  - In some cases such as the present PWD 203A Standard Form of Contract, it can be claimed under the Final Account and hence claimable as additional costs incurred for work done

See

**Syarikat Bina Darul Aman Berhad & Anor V Government Of Malaysia** [2017] MLJU 63

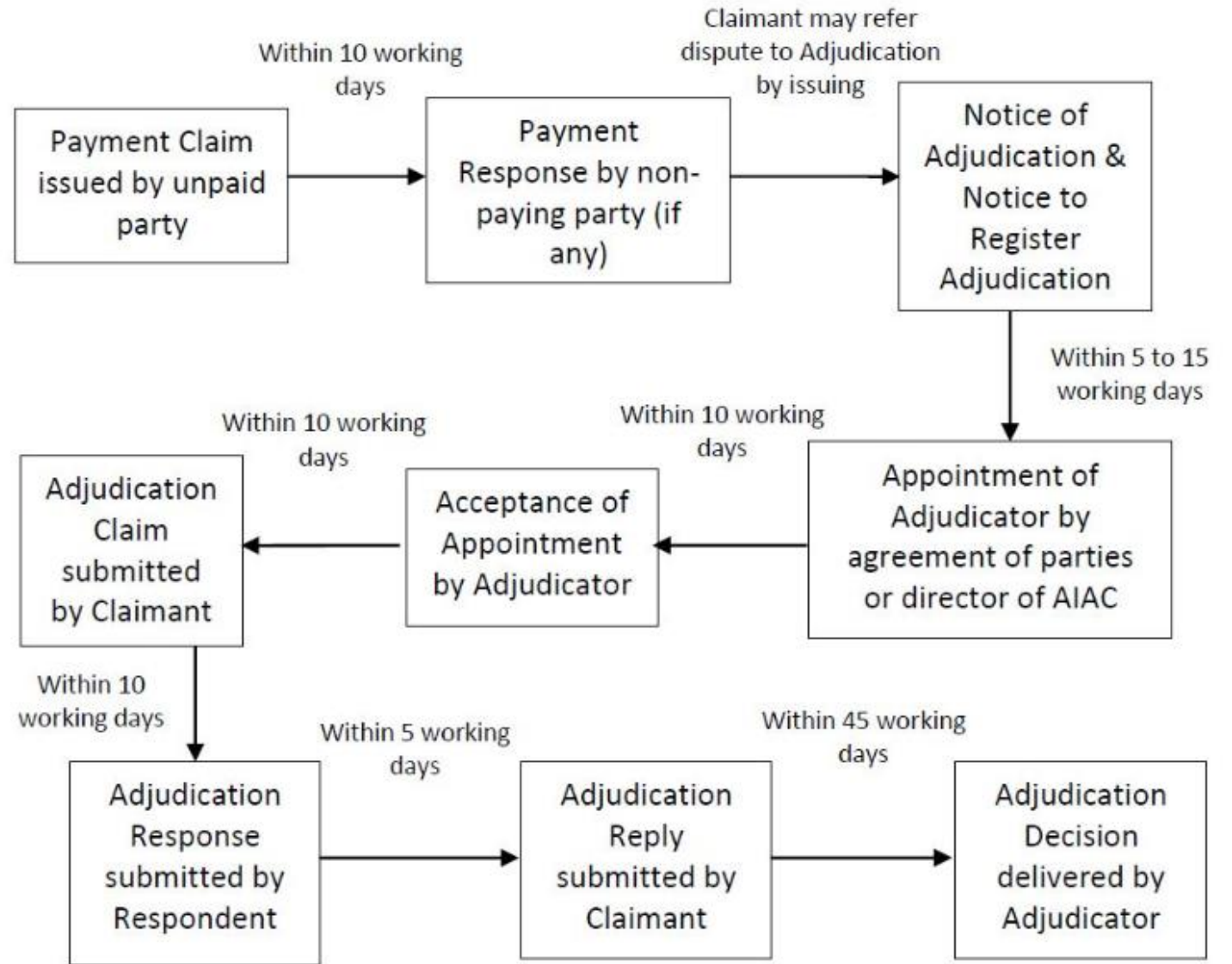
**SKS Pavillion Sdn Bhd V Tasoon Injection Pile Sdn Bhd** [2019] 9 MLJ 396

Adjudicator would not have the jurisdiction under CIPAA to adjudicate on a “loss and expenses” claim arising out of extensions of time as a claim for “loss and expenses” does not fall within the ambit of “Claims” as provided in the definition of “Payment” in Section 4 of CIPAA

See **Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases** [2021] MLJU 1889

# CIPAA Features (3)

## Process



# CIPAA Features (4)

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- **Payment Claim (Section 5)**
  - There must be a payment claim in writing fulfilling the following requirements upon which a payment claim is prima facie valid:
    - (a) the amount claimed and the due date for payment of the amount claimed;
    - (b) details to identify the cause of action, including the provision in the construction contract to which payment relates;
    - (c) description of the work or services to which payment relates; and
    - (d) a statement that the claim is made under the CIPAA
- **Payment Response (Section 6)**
  - A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.

# CIPAA Features (5)

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- Jurisdiction (Section 27)
  - Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.
- **View Esteem Sdn Bhd V. Bina Puri Holdings Bhd** [2019] 5 CLJ 479
  - An adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s. 6 of CIPAA or not. In the circumstances of this case, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason. The decision is made based on, inter alia, the following grounds:-
  - The Federal Court labelled the Adjudication Claim, Adjudication Response and Adjudication Reply as “adjudication pleadings”. If the Adjudication proceedings were to be limited only to the Payment Claim and Payment Response, it would question the necessity for adjudication pleadings

# Features (6)

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- Section 12(2) CIPAA – 45 days to deliver decision
  - CIPAA mandatorily requires an adjudicator to make an adjudication decision within the applicable prescribed periods set out in section 12(2) of CIPAA, which 45 working days after the Adjudication Reply, which cannot be unilaterally extended as this would inevitably delay the adjudication proceedings and is inconsistent with the purpose of the CIPAA, as section 25(p) of the CIPAA only applies to "any time limit imposed on the parties" under the CIPAA and not the adjudicators - **Utama Motor Workshop (S) Sdn Bhd v Besicon Engineering Works Sdn Bhd** [2022] 7 CLJ 313

# CIPAA Features (7)

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- Powers of the Adjudicator (Section 15 CIPAA)
  - The adjudicator shall have the powers to
    - Establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties
    - Order the discovery and production of documents;
    - Set deadlines for the production of documents;
    - Draw on his own knowledge and expertise;
    - Appoint independent experts to inquire and report on specific matters with the consent of the parties;
    - Call for meetings with the parties;
    - Conduct any hearing and limiting the hearing time;
    - Carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

# CIPAA Features (7) Continued

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- Powers of the Adjudicator (Section 15 CIPAA)
  - The adjudicator shall have the powers to:
    - Inquisitorially take the initiative to ascertain the facts and the law required for the decision;
    - Issue any direction as may be necessary or expedient;
    - Order interrogatories to be answered;
    - Order that any evidence be given on oath;
    - Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;
    - Decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter.
    - Award financing costs and interest; and
    - Extend any time limit imposed on the parties under this Act as reasonably required.



# CIPAA Features (8)

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- Effect of Adjudication Decision (Section 13)
  - The adjudication decision is binding unless—
    - a) It is set aside by the High Court on any of the grounds referred to in section 15;
    - b) The subject matter of the decision is settled by a written agreement between the parties; or
    - c) The dispute is finally decided by arbitration or the court.

# CIPAA Features (9)

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- Set Aside Adjudication Decision (Section 15)
  - An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
    - a) The adjudication decision was improperly procured through fraud or bribery;
    - b) There has been a denial of natural justice;
    - c) The adjudicator has not acted independently or impartially; or
    - d) The adjudicator has acted in excess of his jurisdiction.

Not the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The Court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of during the process. Such error of law relates to whether he had accorded procedural fairness to the parties: **ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal** [2016] MLJU 1776

# CIPAA Features (10)

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- Enforcement of Adjudication Decision as Judgment (Section 28)
  - A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
  - The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
  - The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

# CIPAA Features (11)

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- Direct Payment from Principal (Section 30)
  - 1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.
  - Conditions:
    - a) Non-Paying party has failed to pay the Unpaid Party the Adjudicated Sum;
    - b) Unpaid Party has issued the notice to the Principal to make direct payment of the Adjudicated Sum to the Unpaid Party; and
    - c) There are sums of money “*due or payable*” from the Principal to the Unpaid Party at the time of the receipt of the unpaid party’s notice by the principal (**Sub-section 5**)

**Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311**

# CIPAA Features (12)

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- Prohibition of Conditional Payment (Section 35)
  - Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.
  - For the purposes of this section, it is a conditional payment provision when:
    - a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or
    - b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party..

Section 35 Statutorily prohibits 'conditional payment' provisions in construction contracts that inhibit cash flow.

# THANK YOU

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KEVIN PRAKASH  
ADVOCATES & SOLICITORS