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LIMITATION OF CIPAA IMPLEMENTATION IN THE CONSTRUCTION INDUSTRY FROM CONTRACTOR'S PERSPECTIVE IN KLANG VALLEY

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Abstract

Construction Industry Payment and Adjudication Act (CIPAA) was introduced on 15 April 2014 to be used by the construction industry. Introduction of CIPAA is primarily to create a rapid and efficient mechanism for resolving disputes in construction contracts by implementing adjudicators' decisions and to provide a speedy and impartial solution to disputes arising in construction projects. However, it has been revealed that according to Asian International Arbitration Centre (AIAC), more than half adjudication cases are eventually being re-arbitrated and re-litigated, causing more delay in payment. This scenario creates an undesirable effect to the contracting parties involved in a construction project such as delay in the completion of the project, affecting the contractor's reputation and reducing the profit margin of the project. Therefore, the objectives of this paper includes identifying the significant factors that contribute to payment problems, discovering the current implementation of CIPAA in addressing payment problems and investigating the limitations of CIPAA in settling disputes in the construction industry. A quantitative method of research is conducted using questionnaires as a tool for data collection. All data will be analyzed using the average index and presented in rankings. The respondents are proposed to be selected among G7 contractors in Klang Valley using purposive sampling method. The expected outcomes of this study include understanding factors that lead to payment issues, discovering the implementation of CIPAA in payment disputes and understanding CIPAA 's limitations in settling payment disputes. The findings of the research that help to facilitate the improvement of dispute settlement in Malaysia through statutory adjudication.

Keywords: *construction payment; payment delays; construction industry payment and adjudication act (CIPAA).*

1.0 INTRODUCTION

As a developing nation, the construction industry is extremely imperative in fostering economic development to generate wealth and improve the quality of life in Malaysia. Although the contributions of the construction sector to economic growth is statistically small compared to other sectors such as service, manufacturing and agriculture, the importance of the construction sector towards Malaysia's economy cannot be overlooked. However, defaults in payment is prevalent among construction players and openly recognized as the main problem recurring from projects caused by a variety of causes. Therefore, in order to address the issue of payment defaults in the construction industry, the Malaysian government has introduced the Construction Industry Payment and Adjudication Act (CIPAA) to combat payment disputes statutorily through an enforcement mechanism.

Since CIPAA implementation in 2014, Seah (2018) observed that based on the Malayan Law Journal Unreported (MLJU), out of 54.35% of adjudication decisions are re-arbitrated or re-litigated. Almost half of this percentage, a total of 62 adjudication cases arising from

payment problems have been referred to the court as of February 2018. Despite a significant portion of the cases which is 75.8% of them being accepted by the court of their initial adjudication decision, the trend of adjudication cases being referred to the court is increasing. This is contrary to one of the main objectives of CIPAA's implementation set out in the Preamble which is to provide a mechanism for speedy dispute resolution through adjudication. An intervention by court lengthens the process of payment and hurts the cash flow in the construction industry which affects the project's success (Che Munaaim, 2012). Mazani et al. (2019) concluded that there is proof that CIPAA has been effective in resolving payment disputes occurring in the Malaysian construction industry since its implementation in 2014. However, it has also been noticed that the number of adjudication cases intervened by the court has exponentially increased indicating the presence of doubt among construction players towards the decisions made by adjudicators (Mazani et al., 2019). The concept will therefore be intended to identify the cause for construction player's doubts about the decisions made by adjudicators.

Mat Isa et al. (2015) found that late payment is one of the most critical problems in the construction industry as 51% of their respondents have experienced late payment. CIPAA implementation in 2014 is to enable swift dispute resolution and improve cash flow in the construction industry. Asian International Arbitration Centre (AIAC) reported that there is an increase of adjudication matters registered every year from 2014 to 2018. This indicates that construction players are becoming more aware of CIPAA and are using CIPAA for its intended use thus resolving payment disputes as fast as possible. However, several studies have noticed that there is a trend in the increase of adjudication cases being re-arbitrated or re-litigated. This scenario causes more delay in payment which defeats the purpose of CIPAA in the first place. This study will therefore be focused on investigating the limits of CIPAA implementation in the construction industry.

This paper focuses on the following specific objectives:

- i. To identify the significant factors that contribute to payment problems.
- ii. To discover the current implementation of CIPAA in addressing payment problems.
- iii. To investigate the limitations of CIPAA implementation in settling payment problems.

2.0 CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 (CIPAA)

2.1 Introduction to Construction Industry Payment and Adjudication Act 2012 (CIPAA)

The Construction Industry Payment and Adjudication Act 2012 (CIPAA) was recently gazetted as a speedy dispute resolution mechanism. The process is quick and relatively cheap, particularly in comparison to litigation and to those arbitrations that have somewhat unfortunately, for whatever reason, been allowed to become more time consuming and costly than they should have been.

The primary objective of the Act is to address cash flow problems in the construction industry. It removes the pervasive and prevalent practice of conditional payment (pay when paid pay if paid) and reduces payment default by establishing a cheaper and speedier system of dispute resolution in the form of adjudication. The Act also provides for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as a right to reduce the rate of work progress or to suspend work or even to secure direct payment from the principal (Azman et al., 2013).

2.2 Payment Scenario in the Malaysian Construction Industry Prior to CIPAA

There are a variety of causes to default in payment, namely cash flow issues due to insufficiencies in client's ability to manage, client's inefficient use of funds, lacking of capital to manage the project, client's lack of success in generating revenue in cases where the houses are not being sold at a rate that was targeted by the client and poor cash flow due to lack of

appropriate process application, delay in payment evaluation and delay in certification for the interim certificates and final payment certificate (Ye and Rahman, 2010). Therefore, CIPAA has gazetted an act in order to tackle the issues of payment in the construction industry.

2.3 Factors contributing to payment problems in Malaysian construction industry

Ye & Rahman (2010) found that there are eight factors that may lead to payment problems. Meanwhile Suhaidah Sahab & Ismail (2011) identified 12 factors that may lead to the late and non-payment in Malaysian construction industry which are derived from six researches conducted by various researchers. To add, Azman, Dzulkalnine, Kamar, Hamid, & Nawi (2013) identified 10 factors that may lead to the late and non-payment in Malaysian construction industry. The factors identified by the three researchers are summarised in the table below.

Table 1: Factors that contribute to payment problems extracted from Mazani et al. (2019).

Factors that contribute to payment problems	Suhaidah Sahab & Ismail (2011)	Azman et al. (2013)	Ye & Rahman, (2010)
Paymaster poor financial management	/	/	/
Paymaster withholding payment	/	/	/
Conflict among contracting parties	/	/	
Usage of pay when paid provision	/	/	
Culture and attitude	/	/	
Delay in certification	/	/	/
Disagreement on valuation of work done	/	/	
Inequality of contractual bargaining powers	/	/	
Pyramidal manner or contractual chain	/		
Dissatisfaction of litigation and arbitration	/		
Errors in submitting claims	/	/	
Short of current year's project		/	
Technical problems		/	
Paymaster's failure to generate income from sales of houses			/
Delay in releasing retention money			/
Delay in evaluation			/
Scarcity of capital to finance the project			/
Paymaster's ineffective utilization of funds			/

2.4 Implementation of CIPAA in Malaysian construction industry

CIPAA is introduced to ensure quick and inexpensive resolution to payment problems to improve cash flow in our construction industry (Nasir, Ismail and Ng, 2018), by ensuring on time payment was made possible with a quick and a proper payment recovery mechanism (Hassan et al., 2019). In order for it to be effective, the mechanism has to come with sufficient authority in order to enforce the decisions made and guarantee that security of payment is crucial, hence an adjudication act was gazetted.

Table 2: The implementation of CIPAA extracted from Hadi et al. (2018)

The implementation of CIPAA
CIPAA helps to ease cash flow of the contractors
Parties in dispute are able to remain confidential
CIPAA encourages professionalism and promotes integrity amongst construction parties
CIPAA provides Legal Remedy to Non-Payment
CIPAA enhances the value of human capital in the construction industry
CIPAA offers lower fees by having adjudication as a method of dispute resolution
CIPAA will improve delivery system by providing quicker dispute resolution

2.5 Limitations of CIPAA in Malaysian construction industry

CIPAA stated that the unpaid party will be permitted to proceed to adjudication for any payment issues which are inclusive of payment regarding variation works. Various guidelines have been made known to the public in order to promote compliance with CIPAA provisions. Despite this, there still exist limitations of CIPAA in managing issues regarding payment (Hassan et al., 2019).

First and foremost, under Section 15, Section 26 (7) and also Section 31 of CIPAA, courts have the ability to allow a stay of the adjudicator's decision in cases where the adjudicator's decision is doubted under various grounds.

The following is the situations where an adjudication decision can be dismissed;

- The influence of fraud or bribery in making the adjudication decision
- Natural justice being breached during the proceedings of adjudication
- The adjudication made were partial and biased towards one side of the parties involved
- Excess of jurisdiction by the adjudicator during the proceeding

This concludes that an adjudication jurisdiction is not final. Its non-finality may be open to abuse as parties may use CIPAA to eventually enter litigation by challenging the decision as an attempt to drag out the case (Hassan, Mohammad Kamil and Ejau, 2019). This puts a question on the actual authority and integrity of the adjudication institution as a better way of resolving disputes among construction players (Arzlee Hassan et al., 2019).

In addition to that, the grounds as mentioned above can also be considered as a limitation to CIPAA in settling payment issues. An adjudicator may be influenced with fraud or bribery in making his decisions which will lead to a partial and biased decision leaning towards only one side of the parties involved. An adjudicator may also act outside of his jurisdiction during the proceeding which will also lead to biased and partial decisions.

CIPAA's function in the construction industry is seen as mainly to decrease the amount of time the parties are involved in a dispute which is unfavourable as there will be wastage of resources being used to solve the dispute (Mohd and Ismail, 2014). Therefore, the biggest purpose of CIPAA is to minimize the impact on the construction project as compared to arbitration or litigation. However, despite that, CIPAA's effectiveness in handling payment disputes highly depends on the adjudicator's competency (Mohd and Ismail, 2014). An incompetent adjudicator will end up wasting resources from the parties involved which defeats the core idea of CIPAA itself.

3.0 SAMPLING AND DATA COLLECTION

The selection of the respondents is chosen among G7 contractors based in Klang Valley. The target respondents involve 268 contractors as listed on the CIDB website. The emails of each respondent are also obtained from the CIDB website. The sampling method used is by using purposive sampling. Purposive sampling is a non-probability sampling method used to collect data from groups of specific characteristics which in the case of this research, the G7 contractors from Klang Valley. The researcher has divided the collection of data in two levels. During Level 1, the researcher searched keywords such as "CIPAA", "payment delays" and "construction disputes" to gather data during the literature review stage. Meanwhile, during Level 2, the data is collected by distributing questionnaire forms to the respondents.

4.0 DATA ANALYSIS

The data that was collected from the distribution of questionnaires were analyzed and findings obtained from submission of questionnaires by the respondents regarding CIPAA among G7 contractors in Klang Valley are discussed. A set of questionnaires had been designed based on the literature review and distributed to the respondents. The questionnaires were distributed by attaching the link for the questionnaire form via email to G7 contractors in Klang Valley. The collected data from the questionnaire is analyzed and visualized in the form of charts and tables. The data that had been collected via questionnaire are analyzed for each of section A, section B, section C and section D.

Data analysis discusses the findings obtained from the questionnaire survey and the division of each section are as the following:

- Section A: Demographic of the respondents.
- Section B: Factors that contribute to payment disputes.
- Section C: The implementation of CIPAA in settling payment disputes.
- Section D: The limitations of CIPAA in settling payment disputes.

4.1 Response rate

Table 3: Factors that contribute to payment problems extracted from Mazani et al. (2019)

	Number of distributed questionnaire forms	Number of answered questionnaire forms	Percentage of response rate
Total	268	112	42%

Table 3 presented the percentage of response rate of the answered questionnaires. 112 questionnaire forms out of 268 questionnaire forms were answered which makes up for 42% of response rate. Overall, the percentage of response rate is considered as within the acceptable percentage and therefore viable to be used in this research study.

4.2 Section A: Basic information of the respondents

4.2.1 Profession in the construction industry.

In terms of profession in the construction industry, the majority of the respondents are among Quantity Surveyors at 76% while the rest are Project Managers at 20%, Site Supervisors at 2% and Engineers at 2%.

4.2.2 Years of involvement in the construction industry.

Table 4: Years of involvement in the construction industry

Years of involvement (years)	Frequency	Percentage (%)
1	7	6.3
2	8	7.1
3	9	8.0
4	16	17.9
5	14	12.5
6	6	5.4
7	15	13.4
8	6	5.4
9	5	4.6
10	9	8.0
11	8	7.1
12	5	4.6
13	3	2.7
14	1	0.9
Total	112	100

The highest number of respondents which is 16 respondents have 4 years of experience in the construction industry and constituted 18% from the total number of respondents. The second highest category of respondents consisting of 15 respondents (13%) are those with 7 years of experience.

The number of respondents with 5 years experience is also high which totals 14 respondents and contributed to 13% of the total respondents. The respondents with 4 years, 7 years and 5 years of experience make up for 44% of the total respondents. Meanwhile, the lowest number of respondents are those with 14 years of experience which makes up for 1% of the total number of respondents.

4.3.3 Number of times involved with CIPAA related matters.

Table 5: Number of times involved with CIPAA related matters

Number of times involved with CIPAA related matters	Frequency	Percentage (%)
1	53	47.3
2	32	28.6
3	15	13.4
4	7	6.3
5	3	2.7
6	2	1.8
Total	112	100

Based on Table 5 the highest number of respondents who have been involved with CIPAA related matters is 53 respondents at 1 time who make up for 47% of the total respondents followed by respondents with 2 times of involvement with CIPAA related matters at 32 respondents which contributed to 29% of the total respondents.

The respondents with 1 or 2 times involvement with CIPAA related matters make up for 76% of the total respondents. Meanwhile, the lowest number of respondents are those with 6 times of involvement with CIPAA related matters which makes up for 2% of the total number of respondents.

4.3 Section B: Factors contributing to payment disputes

Table 6: Factors contributing to payment problems

Ranking	Factors	Average index
1	Disagreement on the valuation of work done	4.29
2	Delay in valuation and certification of interim payment.	4.07
3	Conflict among parties involved.	4.05
4	Client's withholding of payment.	3.93
5	Local culture/attitude in making payment.	3.82
6	Technical problem.	3.77
7	Client's poor financial arrangement.	3.77

Table 6 shows the factors contributing to payment problems. The highest ranking factor is disagreement on the valuation of work done at 4.29. This is followed by the factor of delay in valuation and certification of interim payment at 4.07 and the factor of conflict among parties involved at 4.05. The fourth rank is for the factor of client's withholding of payment at 3.93. The factor of local culture/attitude in making payment is 3.82. Meanwhile the factor of client's poor financial management and the factor of technical problems are both the lowest at 3.77.

4.4 Section C: The implementation of CIPAA in settling payment disputes

Table 7: The implementation of CIPAA in settling payment disputes

Ranking	Implementations	Average index
1	CIPAA allows parties in dispute to remain confidential.	4.05
2	CIPAA helps improve the cash flow in the construction industry.	3.87
3	CIPAA offers lower fees by having adjudication as a method of dispute resolution	3.79
4	CIPAA ensures fairer risk allocation between the employers and the contractors	3.78
5	CIPAA allows for a swifter dispute resolution.	3.77
6	CIPAA provides legal remedy to non-payment	3.73

The table shows the implementation of CIPAA in settling payment disputes, the respondents believe CIPAA allows parties in dispute to remain confidential at 4.05. This is followed by CIPAA helps improve the cash flow in the construction industry at 3.79 and CIPAA offers lower fees by having adjudication as a method of dispute resolution at 3.78. The fourth rank is for CIPAA allows for a swifter dispute resolution at 3.77. Meanwhile, CIPAA provides legal remedy to non-payment is the lowest at 3.73.

4.5 Section D: The limitation of CIPAA in settling payment disputes

Table 8: The implementation of CIPAA in settling payment disputes

Ranking	Limitations	Average index
1	Non-finality of an adjudication jurisdiction.	4.39
2	Competency of the adjudicator.	4.31
3	Biased and partiality in the conduct and judgement	3.79
4	Excess of jurisdiction.	3.78
5	Breach of natural justice.	3.67

The highest rank is for non-finality of an adjudication jurisdiction at 4.39. This is followed by competency of the adjudicator at 4.31 and biased and partiality in the conduct and judgement at 3.79. The fourth rank is for CIPAA allows for a swifter dispute resolution at 3.78. Meanwhile, breach of nature is the lowest at 3.67.

5.0 CONCLUSIONS

It can be concluded that CIPAA allows parties in dispute to remain confidential, while helping to improve cash flow in the construction industry and offering lower fees with adjudication as a method of dispute resolution. The respondents believe that the introduction of CIPAA gives them confidentiality which is of great importance in order to preserve their good public image which is important for them to bid for future tenders.

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Saya yang menjalankan amanah,

SITI BASRIYAH SHAIK BAHARUDIN
Timbalan Ketua Pustakawan

nar

Setuju.

27.1.2023

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