

e-Proceeding

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ADJUDICATION AS A RESOLVER IN MITIGATING CONSTRUCTION PAYMENT ISSUES: A LITERATURE REVIEW

Syarifah Nur Nazihah Syed Jamalulil¹, Abdul Muhaimin Ab.Wahid², Nor Suzila Lop³, Mohammad Nasharudine Shuib⁴, Norazlin Mat Salleh⁵

^{1,2,3,4,5}Department of Quantity Surveying, Faculty of Architecture, Planning and Surveying, Universiti Teknologi MARA, Perak Branch, Seri Iskandar Campus, Seri Iskandar, 32610 Perak, Malaysia

Abstract

Construction industry has been a core contributor to the Malaysian economy. However, payment issues have remained controversial since they affect the entire delivery chain of the construction industry. This has caused difficulties in managing payments as it involves many parties with large amounts of money. To mitigate payment issues, Construction Industry Development Board (CIDB) with collaboration of Master Builder Association Malaysia (MBAM) and other stakeholders in the construction industry had proposed Adjudication as a resolver through the introduction of Construction Industry Payment and Adjudication Act 2012 (CIPAA). Therefore, the aim of this research is to address the practicality of Adjudication as resolver in the construction payment issues. Despite its practicality, it is relevant to investigate the current performance of adjudication through CIPAA 2012 in the Malaysian construction industry to determine its effectiveness. Therefore, current issues on performance of adjudication executed through CIPAA 2012 have been reviewed. This research posits that it is essential to highlight the practicality of Adjudication as resolver in payment issues for better improvement of construction industry cash flow in the future.

Keywords: *payment; adjudication; CIPAA; construction industry; practicality*

1.0 INTRODUCTION

Payment can be defined as the sum of money paid to contractors, consultants and suppliers after their works, service or materials has been successfully realized or accepted (Rahman & Ye, 2010). It was supported by Sin (2006) and Saad (2008) that payment always plays a significant point throughout the completion of the project. When certain parties do not pay the services on time, everyone in the construction value chain will suffer (Dzulkalnine, Anuar, and Kamar, 2013). As a result, it will contribute to the cause of disputes or miscommunication that can lead to the breakdown of relationships or even project failure.

Rationally, a poor image of the construction industry arising out of a number of weaknesses in the industry comes from poor paymasters. As stated by Jamalulil and Ismail (2014), payment is the most frequent type of construction dispute that has occurred in the Malaysian construction contract. Besides, previous study by Din (2014) declared that about 56.7% construction disputes arise from underpayment, late payment and non-payment. Typically, when there is a payment dispute, the parties in a construction contract will traditionally go to court or arbitration to resolve it. However, these traditional methods have inherent weaknesses in terms of cash flow of a construction project. Following that situation, Malaysia was seeking for an efficient and economical dispensation of justice and more suitable resolution techniques to deal with payment issues. Thus, the Construction Industry Development Board (CIDB) has advocated adjudication as a speedy and more economical solution regarding payment issues. It is vital to protect the interest of all the parties involved in the construction industry.

As such, for the purpose of this research, it will concentrate more on the current performance of adjudication to ensure its practicality as resolver in the construction payment issues.

2.0 ADJUDICATION

The word “adjudication” is derived from the verb “adjudicate” which has been defined in various numbers of dictionaries. In the Oxford Study Dictionary, it means “to act as judge in a court, tribunal, or completion”. As mentioned by Tan (2007), adjudication is a procedure whereby a contract, a summary interim decision making power in conjunction with dispute is vested in a third party individual. Meanwhile, Jaffe and McHugh (2007) defined adjudication as similar to arbitration, as a process in which the contracting parties agree on having a third party to make a potentially binding decision on the issue of entitlement or liability. Therefore, it is crucial to have an effective mechanism to offer such a quick, efficient and fair resolution when dispute arises between contracted parties.

It can be summarised that, adjudication is a technique of resolving disputes in construction contracts and is intended to be quicker and more cost effective than other dispute resolution methods. Besides that, it can provide a temporarily binding decision so that work may proceed unimpeded until it is finally determined by arbitration or litigation.

2.1 Overview of adjudication issues in Malaysian Construction Industry

Adjudication was introduced in the United Kingdom to provide a cost effective and speedy method of resolving disputes especially related with payment issues. The introduction of such methods has proved to be a success in that country for the past few years. This remarkable performance of adjudication in the UK also drew inspiration to other countries like Australia, New Zealand and Singapore to develop their own version of the statutory adjudication. In Malaysia, adjudication was introduced in Construction Industry Payment and Adjudication Act 2012 (CIPAA). As mentioned by Gould (2012), this act applies to all qualifying construction contracts made in writing after 22nd June 2012 including those entered into by the Government of Malaysia. It applies to all construction work, including consultancy agreements, but excludes buildings of less than four storey that are intended for occupation by a “natural person”.

Construction Industry Development Board (CIDB) Master Plan Framework (2006-2015) also mentioned that, the statutory adjudication is seen as the remedy for the sudden winding up by major contractors due to cash problems originated from non-payment issues. It was supported by Ismail (2010) that the adjudication is expected to resolve non-payment issues within a certain limit of time and to reduce financial difficulties of those involved. Adjudication can offer a faster procedure in resolving disputes among parties under the contract (Din & Ismail, 2014). However, since the adjudication decision is only binding but not final, it may lead the dissatisfied party to further refer such dispute to arbitration or court litigation (Fong, 2012). In Table 1, the below picture is the overall adjudication process timeline implemented through CIPAA 2012.

Table 1: Adjudication process timeline

Items	Section under CIPAA 2012	Time Limit
Payment claim (by unpaid party)	5	-
Payment response (by non-paying party)	6	10 days
<u>Issuance of notice of adjudication</u> <ul style="list-style-type: none"> • Appointment of adjudicator • Adjudicator negotiates terms and fees 	7 (2) and 8	10 days
<u>Adjudication process</u> <ul style="list-style-type: none"> • <i>Adjudication claim</i> (by claimant) 	9	10 days
<ul style="list-style-type: none"> • <i>Adjudication response</i> (by 	10	10 days

Items	Section under CIPAA 2012	Time Limit
respondent)		
• Adjudication reply (optional) (by claimant)	11	5 days
Adjudication Decision	12	45 days

(Sources: Yeo and Yong, 2018)

2.2 Construction Industry Payment and Adjudication Act (CIPAA) 2012

In general, CIPAA 2012 has a bright and potential role in eliminating payment issues between parties in the Malaysian construction industry (Ishak, Anuar & Alauddin, 2014). After going through a long journey, this act was gazetted on 22nd June 2012 and came into force on 15th April 2014. The objectives of this act are to facilitate regular and timely payment, provide a mechanism for speedy dispute resolution through adjudication, provide remedies for the recovery of payment in the construction industry, and provide for connected and incidental matters (Rajoo, 2014). In consequence, the enforcement of this act is the benchmark for the transformation of Malaysian construction justice.

3.0 CURRENT PERFORMANCE OF ADJUDICATION IN MALAYSIA THROUGH CIPAA 2012

The Asian International Arbitration Centre (AIAC) in CIPAA Conference 2018 with the theme of Sharing Solution on 7th May 2018 reported that the numbers of adjudication cases have grown substantially and it is expected to reach up to 882 at the end of year 2018. Lam (2018) also stated that the number of adjudication cases in Malaysia exceeded the number of construction arbitration cases commenced per year. Table 2 shows the adjudication application statistics for registered and unregistered matters from year 2014 until 2017. There is an increase in the numbers of adjudication registered matters. The highest numbers of registered matters were recorded in 2017 with 704 cases compared with 447 cases registered in 2016. This indicates that the introduction of adjudication through CIPAA 2012 effectively works and payment issues can be resolved as quickly as possible.

Table 2: The adjudication statistics

Years	Registered	Unregistered
2014	29	-
2015	181	13
2016	447	16
2017	704	7

(Sources: Asian International Arbitration Centre (AIAC) in CIPAA Conference 2018)

As depicted in Table 3 below, the majority of claimants were contractors either main contractors or sub-contractors. This data is consistent with the introduction of adjudication through CIPAA 2012 as a means for resolving the dispute especially related to payment issues. In other words, this statistic confirms that the vast majority of all non-paid parties are main contractors or sub-contractors. Besides that, this table also indicates that the highest respondents to CIPAA adjudications are Employers (the counterparties of Main Contractors) and Main Contractors (the counterparties of sub-contractors). As mentioned by Danuri, Munaaim, Rahman and Hanid (2008), employer's late payment to the contractors will also cause delay in payment to the sub-contractors or suppliers. This is in line with Tran and Carmichael (2012) in their research revealed that sub-contractors are often paid late by main contractors.

Table 3: Claimant and respondent’s profiles in CIPAA adjudication

Party involved	Nos. of claimants	Nos. of respondents
Consultant	20	3
Employer	4	160
Main Contractor	149	264
Subcontractor	268	33
Supplier	20	1

(Sources: Asian International Arbitration Centre (AIAC) in CIPAA Conference 2018)

However, the performance of adjudication in Malaysia has become a critical debate among Malaysian construction players. Singh (2018) in his research claimed that adjudication has apparently gone somewhat “off track”. He also argued that the initial purpose of adjudication is to reduce backlog of cases in Courts, however this expectation was not achieved. It was highlighted by Belden (2018) that the statistics have shown 54% of adjudication decisions are leading to arbitration or litigation. He also quoted that the high rate of re-litigation demonstrates that adjudication is no longer an alternative form of dispute resolution. This situation can be proven through sixty-two (62) adjudication cases that were selected from Malaysian Law Journal (MLJ) database starting from April 2014 until February 2018 as reported by Sahab and Ismail (2018). Table 4 indicates the number of adjudication decisions allowed and dismissed by the court

Table 4: Adjudication cases with intervention by the court.

Year	Court Decision			Total No. of Cases
	Allowed Adjudication Decision	Dismissed Adjudication Decision	Allowed and dismissed part of Adjudication Decision	
As of February 2018	5	1	1	7
2017	23	7	3	33
2016	11	0	1	12
2015	7	1	1	9
2014	1	0	0	1
Total No. of Cases				62

(Sources: Sahab and Ismail (2018))

On the other hand, despite having a high rate of cases ended up in arbitration or litigation, it could be held that the implementation of CIPAA 2012 is actually working. It can be proved through the statistics of adjudication claims ranging from RM3,000 to RM 224 million with an average claim of about RM2 million (Belden, 2018). This situation expresses the applicability of CIPAA to a wide range of claims, including small industry players. Besides that, as of March 2017, KLRCA has trained and accredited about 650 Adjudicators who are qualified to adjudicate disputes under CIPAA (Lam, 2018). This total number of adjudicators would cater for the increasing number of adjudication cases.

3.1 Discussion

This analysis is parallel with the objective of research which is to identify the current performance of adjudication through CIPAA 2012. Generally, the performance of this act displays positive and negative sides. From this analysis, it is found that there is an increase in the numbers of adjudication cases from year 2014 until 2018. This points out that construction players, especially contractors have more confidence to settle down their payment issues in adjudication than arbitration or litigation. Unfortunately, the adjudication process is now lengthened because the adjudicator’s decision is challenged by the losing party and needs to be re-arbitrated or re-litigated. Mainly, the quality of an adjudicator will become a key feature for the effective adjudication process. Thus, to ensure the practicality of adjudication as a resolver in mitigating construction payment issues, this act needs a lot of improvement so that its purpose may be achieved.

4.0 CONCLUSION

Malaysian has a long history on payment issues in the construction contract. This payment issue leads to the critical consequences to the late completion and abandonment of construction projects. As payment claims in the construction industry usually involve large amounts, there is an urgent need for construction parties to have their payment disputes resolved speedily and efficiently. This makes adjudication under CIPAA 2012 a commercially attractive option to those in the construction industry. However, the current performance of this act shows some weaknesses and needs a lot of improvement to ensure its practicality as a resolver in mitigating construction payment issues.

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Tarikh : 20 Januari 2023

Prof. Madya Dr. Nur Hisham Ibrahim
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Sekian, terima kasih.

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