

# CHAPTER 38

## STATUTORY ADJUDICATION UNDER CIPAA 2012\*

### Statutory Adjudication

Payment disputes in the construction industry has been something peculiar compared to many other industries. In the construction industry, it is common that payment is made progressively upon progress payment certificates. However, when an employer refuses to pay for whatsoever reason, this puts the contractor in a dilemma. This is because if the contractor stops or slows down work, the contractor may be found to be in breach if ultimately, it turns out that the employer has rightfully disputed the payment. At the same time, to go on with the work without payment pending time-consuming resolution of the dispute through courts with multiple layers of appeal or arbitration, could put the contractor in great financial distress. Not only that, the contractor may face the risk of continued default by the employer if he goes on to carry out the work.

To redress this dilemma, an alternative payment dispute resolution mechanism came to be introduced in a few countries, particularly to deal with interim payment disputes expeditiously. This form of resolution mechanism or adjudication was introduced in Malaysia

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via the Construction Industry Payment and Adjudication Act 2012 ('CIPAA').<sup>1</sup> Under this Act, the Asian International Arbitration Centre ('AIAC'), previously called the Kuala Lumpur Regional Arbitration Centre ('KLRCA'), was appointed as the administering body of adjudication. The process is very fast and likely to result in an award, called 'adjudication decision' in about four months. A tight timeline is provided under CIPAA and a failure to comply with the timeline will have consequences as serious as rendering any decision made thereafter void.<sup>2</sup> This is far speedier compared to courts or arbitration. Adjudication is also more industry-friendly compared to courts in the sense that the adjudicators may have an expertise in the field of dispute. They may be engineers, architects, surveyors, etc. They may also be lawyers. Whoever they are, they will be trained by the AIAC specifically for this purpose and certified before they can sit as an adjudicator. The process is only intended for speedy adjudication of construction industry payment disputes where either the amounts claimed for works or services rendered are not met in full or in part or where such payments are not regular or timely.<sup>3</sup>

CIPAA provides, *inter alia*, that an unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.<sup>4</sup> In *Ideal City Development Sdn Bhd v. PWC Bina Sdn Bhd & Other Appeals*,<sup>5</sup> the court stated:

Under s. 5(1), and consistent with the object and purpose of the CIPAA, a payment claim may only be made by an 'unpaid party'. The essential characteristic of the 'unpaid party' is the fact that it is a party

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1 Came into force 15 April 2014.

2 Construction Industry Payment and Adjudication Act 2012, s. 12(3).

3 In *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd and Other Case* [2017] 1 LNS 177, HC, it was stated *inter alia*, that if the claim on the face of it is not a payment claim or that the payment claim was not served or that it was not expressly stated as a claim made under the Construction Industry Payment and Adjudication Act 2012, then the High Court would be at liberty to set aside the adjudication decision on grounds of excess of jurisdiction.

4 Construction Industry Payment and Adjudication Act 2012, s. 5(1).

5 [2019] 2 CLJ 615, CA.

who claims that it has not been paid, whether wholly or partially, a sum under a construction contract. Such a claim could not be validly raised unless and until the timing for payment has lapsed and the obligation to pay, breached. Where the time period of the date due for payment has lapsed, the party who has not been paid is then the 'unpaid party'. This unpaid party may now properly make a payment claim.<sup>6</sup>

Added to the above, the benefit of adjudication is also that the decision could be enforced by a garnishee-like system. If the decision is secured by a sub-contractor against a main contractor, the decision may be presented to the employer for payment without even going through a process like a garnishee application.

They are similar to High Court proceedings in that, no monetary limit is set to the adjudicator's jurisdiction. Adjudication can be statutorily invoked, just like court proceedings, without the need for any consensus of parties, unlike arbitration. If there is an arbitration agreement, parties are generally bound by it to refer the dispute to arbitration as opposed to courts and if a party fails, the other party can obtain a statutory stay of any court proceedings. However, this is not so in the case of adjudication. Despite any arbitration agreement, a contractor is at liberty to commence adjudication proceedings. It must be noted that an adjudication proceeding is always by a contractor to claim payment from the employer (or main contractor). The respondent-employer cannot make any counterclaim in adjudication but can claim set-off as part of the defence.

However, an important difference between the court system and adjudication system is that an adjudicator's decision is binding but not final. This means the subject matter of the dispute in adjudication proceedings can be ventilated once again before the courts or arbitration (if there is an arbitration agreement). In fact, proceedings before an adjudicator and court or arbitral panel can proceed in parallel. In the case of adjudication, unlike court proceedings, a substantial fee needs to be paid to the adjudicator and AIAC as the administering body. In adjudication, unlike courts, parties may be represented by non-lawyers.

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<sup>6</sup> *Ibid* at [48], [50].

CIPAA governs every construction contract carried out wholly or partly within the country including a construction contract entered into by the Government.<sup>7</sup> However, there are certain construction contracts that are excluded from the scope of CIPAA, in which case disputes under such contracts have to be submitted to the court or, if there is an arbitration agreement, to the arbitral tribunal. CIPAA does not apply to construction contracts entered into by individuals in respect of any building construction of less than four storeys high and which is wholly intended for his occupation.<sup>8</sup> Therefore, if a contractor is engaged to construct a residential bungalow, he would not be able to rely on this Act to resolve the dispute involving the late payment or non-payment from the client. Again, when the construction contract is an oral contract or where the construction work is carried out wholly outside the territory of Malaysia, this Act cannot be invoked. A mining or a ship building contract would likewise not fall within the meaning of a 'construction contract' though a fair measure of construction work might be involved in such contracts. In *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd and Other Case*,<sup>9</sup> it was stated that:

... if a contract is not a construction contract, but a shipping or mining contract or a contract for legal fees with respect to advice given in construction contract, or that the contract is with respect to construction of a dwelling house for a natural person, then this Court will interfere if the Adjudicator got it wrong. It is a case where the Adjudicator has no jurisdiction to begin with. So too if the construction contract is carried out wholly outside Malaysia.<sup>10</sup>

Section 40(b) of CIPAA authorises the Minister to exempt any contract from the operation of this Act. At present, the only exemption order issued by the Minister in force is the Construction Industry Payment and Adjudication (Exemption) Order 2014. Under this, all Government

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7 Construction Industry Payment and Adjudication Act 2012, s. 2.

8 *Ibid* s. 3.

9 [2017] 1 LNS 177.

10 *Ibid* at [72].

construction contracts carried out urgently and without delay due to natural disasters, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances are exempted.<sup>11</sup> Other than this, in the case of all Government contracts for a value not exceeding RM20 million, certain provisions of CIPAA are modified, such as the time to lodge an adjudication reply by the respondent-Government, is not ten working days but 30 days.<sup>12</sup>

There is no appeal against an adjudicator's decision, but an application to stay or set aside can be made to the High Court on very limited grounds such as public policy. In practice, such challenges have been seldom successful.

Comparing adjudication with arbitration, both are akin to judicial process where the arbitral tribunal or adjudicator hears the parties and decides; the decision must be based on evidence and submission before the arbitral tribunal or adjudicator; and both the adjudication and arbitration proceedings are confidential. In both cases, there is no appeal, but an application to set aside may lie before the High Court on very limited grounds such as public policy. However, an arbitral award is both final and binding, but the adjudication decision is binding but not final. This means the subject matter of adjudication can be ventilated again before the court or arbitral tribunal. But the subject matter of an arbitration cannot be so ventilated again. Submission to arbitration is only by consensus of parties and the arbitral tribunal's jurisdiction is founded on the arbitration agreement between the parties. No such consensus is required in the case of adjudication and the adjudicator's jurisdiction is statutorily found. It must be noted that the conventional back-to-back payment agreements are made void by s. 35 of CIPAA.

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11 Construction Industry Payment and Adjudication (Exemption) Order 2014, First Schedule.

12 *Ibid* Second Schedule.

## Appointment Of Adjudicator

The adjudicator is an individual appointed to adjudicate a dispute under CIPAA<sup>13</sup> and he can be drawn from different professions like engineers, architects, lawyers and surveyors, among others.<sup>14</sup> The appointment of the adjudicator, from the AIAC panel of adjudicators, may be made by agreement of the parties.<sup>15</sup> Failing that, the appointment shall be made by the Director of AIAC.<sup>16</sup> When there is a request for the appointment, the Director of AIAC shall appoint an adjudicator within five working days upon receipt of a request and shall notify the parties and the adjudicator in writing.<sup>17</sup> If the appointment is by agreement of the parties, the claimant<sup>18</sup> shall notify the proposed adjudicator of his appointment

13 Construction Industry Payment and Adjudication Act 2012, s. 4.

14 See *Skyworld Development Sdn Bhd v. Zalam Corporation Sdn Bhd & Other Cases* [2019] 1 LNS 173, HC.

15 Construction Industry Payment and Adjudication Act 2012, s. 21(a).

16 *Ibid* s. 21(b). Sections 32 and 33 stipulate the functions of AIAC as the adjudication authority which includes setting competency standards and criteria of an adjudicator, and providing administrative support for the conduct of adjudication. Section 32 provides that the AIAC shall be the adjudication authority and shall be responsible for the following:

- (a) setting of competency standard and criteria of an adjudicator;
- (b) determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;
- (c) administrative support for the conduct of adjudication under this Act; and
- (d) any functions as may be required for the efficient conduct of adjudication under this Act.'

In carrying out its functions as above, the AIAC shall obtain policy directions from the Minister charged with the responsibility for legal affairs.

17 *Ibid* s. 23(1).

18 *Ibid* s. 4: "Claimant" means an aggrieved party in a construction contract who initiates adjudication proceedings.'

in writing together with a copy of the notice of adjudication.<sup>19</sup> The adjudicator appointed by the parties or by the Director of AIAC shall then propose and negotiate his terms of appointment including fees chargeable with the parties. The adjudicator shall within ten working days from the date he was notified of his appointment, indicate his acceptance and terms of his appointment.<sup>20</sup> If the adjudicator rejects his appointment or fails to indicate his acceptance of the appointment within the aforesaid period, the parties or the Director of AIAC may proceed to appoint another adjudicator in the same manner set out above.<sup>21</sup>

If the adjudicator accepts the appointment, he shall sign a declaration in writing in Form 6<sup>22</sup> confirming the following:

- (1) there is no conflict of interest in respect of his appointment;
- (2) he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;
- (3) he shall comply with the principles of natural justice; and
- (4) there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.<sup>23</sup>

In *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd and Other Case*,<sup>24</sup> it was noted, *inter alia*, that an adjudicator may decline the appointment for fear that the discharge of his duties might be compromised due to several reasons such as the potential conflict of interest, inability to act in a timely manner, and the existence of circumstances likely to give rise to justifiable doubts as to his impartiality

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19 *Ibid* s. 22(1).

20 *Ibid* ss. 22(2), 23(2).

21 *Ibid* ss. 22(3), 23(3).

22 AIAC Adjudication Rules & Procedure Schedule I.

23 Construction Industry Payment and Adjudication Act 2012, s. 24.

24 [2017] 1 LNS 177, HC.

and independence. Further, s. 17(4)(b) of CIPAA provides that if an adjudicator dies, resigns or is unable through illness or any other cause to complete the adjudication proceedings, the parties are free to recommence adjudication proceedings afresh or the adjudication proceedings may be continued by a new adjudicator appointed by the parties and the adjudication proceedings shall continue as if there is no change of adjudicator.

Section 19(1) of CIPAA provides that the parties and the adjudicator shall be free to agree on the adjudicator's terms of appointment and the fees to be paid to the adjudicator. In practice it is common for adjudicators to propose a fee according to the AIAC recommended fee scale<sup>25</sup> which is higher than the statutory scale.<sup>26</sup> If the parties and the adjudicator fail to agree on the fee, pursuant to s. 19(2), the AIAC's standard terms of appointment<sup>27</sup> and statutory fees for adjudicators shall apply. Section 19(3) provides that the parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses and the adjudicator may recover the fees and expenses due as a debt. Section 19(4) provides that the parties shall contribute and deposit with the Director of the AIAC a reasonable proportion of the fees in equal share as directed by the adjudicator in advance as security.

### **Adjudication Process**

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Where an employer (or any contractor standing above another, such as a main contractor standing above a sub-contractor and so forth) has failed or refused to pay the contractor (including sub-contractors standing below a main or another sub-contractor) for the work which the contractor (claimant) has done, he may serve a payment claim on the non-employer (respondent). This payment claim is similar to a letter

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25 AIAC CIPAA Circular 02 — Circular on AIAC's Recommended Schedule of Fees.

26 Construction Industry Payment and Adjudication Regulations 2014: Schedule.

27 AIAC Adjudication Rules & Procedure Schedule II.

of demand, but in the statutory format by reference to s. 5 of CIPAA. The claimant may adopt, as commonly the case, the format in Form 1 of Schedule I to the AIAC Adjudication Rules & Procedure ('Rules').

Thereafter, the respondent then has ten working days to tender his payment response to the claimant, under s. 6 of CIPAA. The respondent may adopt the form in Form 2 of the Rules, as commonly the case. The respondent may admit the claim and pay the claim, or he may dispute it fully or partly with reasons therefor. If no payment response is served, then it is deemed that the entire payment claim is disputed.

In the event the claim is disputed or no payment response is made within the time limit, then the claimant may commence the adjudication proceedings by serving a written notice of adjudication on the respondent, after the time limit.<sup>28</sup> A copy of this notice must be delivered to the Director of AIAC whereupon the claimant is charged an adjudication case registration fees (non-refundable) by AIAC to register the case.<sup>29</sup> Currently, it is RM250.<sup>30</sup> The claimant may adopt, which is usually the case, Form 3 of Schedule I to the Rules for this notice. The written notice must specify the nature, description of the dispute and the remedy sought together with supporting documents on the respondent. It must be noted that Limitation Act 1953 applies to adjudication claims and the relevant time is the time the notice of adjudication is served.

Then the process of appointment of the adjudicator, set out above, comes into play. The claimant must, within ten working days from receipt of acceptance of appointment by the adjudicator, serve a written adjudication claim on the respondent and the adjudicator, pursuant to s. 9 of CIPAA. The adjudication claim must state the nature and description of the dispute and the remedy sought together with any supporting documents on the respondent. The respondent has

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28 Construction Industry Payment and Adjudication Act 2012, ss. 7, 8.

29 AIAC Adjudication Rules & Procedure, r. 2.

30 Pursuant to AIAC Adjudication Rules & Procedure Schedule III sub-para 1.1.

ten working days to similarly serve his adjudication response, under s. 10 of CIPAA. Finally, the claimant has five working days to similarly serve his adjudication reply, if any, under s. 11 of CIPAA.

The adjudicator's power is specified in s. 25 of CIPAA:

- (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
- (b) order the discovery and production of documents;
- (c) set deadlines for the production of documents;
- (d) draw on his own knowledge and expertise;
- (e) appoint independent experts to inquire and report on specific matters with the consent of the parties;
- (f) call for meetings with the parties;
- (g) conduct any hearing and limiting the hearing time;
- (h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;
- (i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;
- (j) issue any direction as may be necessary or expedient;
- (k) order interrogatories to be answered;
- (l) order that any evidence be given on oath;
- (m) 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;
- (n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;
- (o) award financing costs and interest; and
- (p) extend any time limit imposed on the parties under this Act as reasonably required.

It is not mandatory for the adjudicator to exercise all of his powers provided under s. 25 of CIPAA. He may exercise any of the powers given to him from paras. 25(a) to (p) above either alone or in combination

with other powers. Section 12(1) of CIPAA provides that the adjudicator shall conduct the adjudication in the manner he considers appropriate within the powers provided under s. 25.<sup>31</sup> Section 12(9) provides that the Evidence Act 1950 shall not apply to adjudication proceedings under this Act. What is important is that the rules of natural justice must be observed in that the adjudicator must consider the evidence presented by both parties and their submissions made as natural justice does not mandate or require that the adjudicator must then arrive at a decision that favours a particular party.<sup>32</sup>

Section 12(2) provides that the adjudicator shall, subject to s. 19(5), decide the dispute and deliver the adjudication decision within:

- (a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
- (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
- (c) such further time as agreed to by the parties.

Section 12(3) provides that an adjudication decision which is not made within the aforesaid period is void.

In *Skyworld Development Sdn Bhd v. Zalam Corporation Sdn Bhd & Other Cases*,<sup>33</sup> the appellant had applied to set aside the adjudication decision primarily for breach of s. 12(3) of CIPAA with the result that the decision was void. Section 12(3) refers to s. 12(2)(a) that the adjudicator shall decide the dispute and deliver the decision within 45 working days from the service of the adjudication reply. If the adjudication decision is not delivered within the statutory specified period, s. 12(3) of CIPAA clearly provides that the adjudication decision shall be void.

31 See *ENRA Engineering and Fabrication Sdn Bhd v. Gemula Sdn Bhd & Another Case* [2019] 1 LNS 422, HC.

32 See *Rentak Segar Sdn Bhd v. Transmission Technology Sdn Bhd* [2018] 1 LNS 2130, HC.

33 [2019] 1 LNS 173 HC.

Section 13 of CIPAA provides that an adjudication decision is merely an interim decision on the merits of a dispute which is subject to any final decision on the dispute that may be decided in an arbitration or by a court of law. The above section provides:

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.<sup>37</sup>

The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.<sup>34</sup> The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.<sup>35</sup>

The adjudicator shall serve a copy of the adjudication decision including any corrected adjudication decision made under s. 12(7) of CIPAA on the parties and the Director of the AIAC.<sup>36</sup> Section 12(7) provides that the adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party. The enforcement of the adjudication decision shall not be affected in any way by a request for correction and any correction made is deemed to take effect from the date of the original adjudication decision.<sup>37</sup> The adjudication decision, and the interim relief it provides, is binding unless the dispute is finally decided by arbitration or the court.<sup>38</sup>

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34 Construction Industry Payment and Adjudication Act 2012, s. 12(4).

35 *Ibid.* s. 12(5).

36 *Ibid.* s. 12(6).

37 *Ibid.* s. 12(8).

38 See *Regal Form Sdn Bhd v. Bina Setul Sdn Bhd* [2018] 1 LNS 736, HC.

It may be added that either party may also apply to the High Court for a stay of the adjudication<sup>39</sup> where the granting of such a stay is within the discretion of the High Court. However, the High Court may order the adjudicated amount or part of it to be deposited with the Director of the AIAC pending the final determination of the case. Section 27(3) of CIPAA provides:

Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

It is also noteworthy that s. 20 of CIPAA provides that:

The adjudicator and any party to the dispute shall not disclose any statement, admission or document made or produced for the purposes of adjudication to another person except:

- (a) with the consent of the other party;
- (b) to the extent that the information is already in the public domain;
- (c) to the extent that disclosure is necessary for the purposes of the enforcement of the adjudication decision or any proceedings in arbitration or the court; or
- (d) to the extent that disclosure is required for any purpose under this Act or otherwise required in any written law.

### **Setting Aside Adjudication Decision**

The law gives the aggrieved party the option of filing an application to the High Court to set aside the adjudication decision. Section 15 of CIPAA has provided limited grounds on which the decision of the adjudicator may be set aside:

- (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.

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39 Construction Industry Payment and Adjudication Act 2012 s. 16.

The above section envisages an exhaustive list of grounds and the court has no jurisdiction to entertain any other ground.<sup>40</sup>

Further, since an application under s. 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits.<sup>41</sup> However, the adjudicator's decision may be contested for breach of natural justice for example, when the adjudicator fails to consider the defence to the claim or some fundamental element of the claim.<sup>42</sup> In *Leap Modulation Sdn Bhd v. PCP Construction Sdn Bhd*,<sup>43</sup> the Court of Appeal held *inter alia*, that the adjudicator had erred in not considering all defences raised and this amounted to a breach of natural justice.

Again, in *ENRA Engineering and Fabrication Sdn Bhd v. Gemula Sdn Bhd & Another Case*,<sup>44</sup> it was stated *inter alia*, that the allegation that the adjudicator had not acted independently or impartially must descend to some elements of particularity. In this case, the respondent applied to set aside the adjudication decision principally on the ground that the adjudicator had exceeded his jurisdiction, failed to exercise his powers independently and impartially and violated the rules of natural justice. Likewise, in *PUNJ Lloyd Sdn Bhd v. Ramo Industries Sdn Bhd & Anor and Another Case*,<sup>45</sup> the appellant applied to set aside the adjudication decision under s. 15(d) of CIPAA on the grounds that the adjudicator had no jurisdiction to adjudicate the dispute because there was no contract between the applicant and the respondent.

40 See *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229, CA.

41 See *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728, HC.

42 See *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Another Appeal* [2019] 1 LNS 723, CA. In *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2017] 1 LNS 1378, the Federal Court held *inter alia*, that the adjudicator was in breach of natural justice due to his failure to consider all defences raised by the respondent.

43 [2018] 1 LNS 816, CA.

44 [2019] 1 LNS 422, HC.

45 [2019] 6 CLJ 250, HC.

In the *PUNJ Lloyd's* case, it was stated *inter alia*, that in setting aside the application under s. 15 of CIPAA, the court has no business to interfere with findings of facts of an adjudicator unless it is a matter that goes to the jurisdiction of the adjudicator in which case the court is at liberty to consider the evidence afresh and unfettered by what the adjudicator had held. In *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd and Another Appeal*,<sup>46</sup> it was stated *inter alia*, that it cannot be 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. The court's function is simply to look at the manner at which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the disputants.

In *TYL Land and Development Sdn Bhd v. SIS Integrated Sdn Bhd & Other Case*,<sup>47</sup> the applicant applied to set aside the adjudication decision *inter alia*, on the ground that the adjudicator failed to consider and appreciate certain findings of fact. This court held that:

... for the scheme of Statutory Adjudication under CIPAA to work, parties must respect and honour the Decision made by the Adjudicator, though it may be less than perfect and a sort of rough justice where the refined version may be had only in litigation or arbitration.<sup>48</sup>

It is worthwhile noting that the term 'jurisdiction' under CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of CIPAA.<sup>49</sup> The word 'jurisdiction' is used in s. 15(d) (the adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an adjudication decision); s. 27(1) (with respect to an adjudicator's jurisdiction being limited to the matters raised in the payment claim and the payment response); s. 27(2) (with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response); and s. 28 (to oppose its enforcement).<sup>50</sup>

46 [2016] 1 LNS 1522, CA.

47 [2018] 1 LNS 145, HC.

48 *Ibid* at [87].

49 See *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479, FC.

50 See *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd and Other Case* [2017] 1 LNS 177, HC.

### Enforcing Adjudication Decision

Unless the option to set aside the adjudicator's decision under s. 15 of CIPAA, the respondent must comply with the decision. The application for the enforcement of the adjudicated decision is provided for in CIPAA.<sup>51</sup> This Act has given the successful party the right to apply to the High Court for an order to enforce the decision of the adjudicator. The High Court will treat the decision of such adjudicator as if it were its own judgment or order. The order of the court may be in respect of the whole or part of the adjudication decision and may make an order in respect of interest on the adjudicated amount payable. Once the order is granted, execution of the proceedings begins in accordance with the Rules of Court 2012. The procedure for making applications to the court under the CIPAA is provided in the newly introduced O. 69A of the ROC 2012.

In *Tan Eng Han Construction Sdn Bhd v. Sistem Duta Sdn Bhd*,<sup>52</sup> it was stated that the court will readily enforce the adjudication decision unless it can be shown that there has been non-compliance with the requirements of CIPAA, for example:

- (1) that the dispute is not one within the core or original jurisdiction of the adjudicator;
- (2) that the decision is a void decision under s. 12(3) of CIPAA being made outside the period specified in s. 12(2);
- (3) that the decision is not in writing and does not contain reasons for such decision under s. 12(4) of CIPAA; or
- (4) that the decision has not determined the adjudicated amount and the time and manner the adjudicated amount is payable.

Lastly, apart from enforcement by court order, a successful claimant may claim payment for the decision from the principal. In the case of an adjudication decision in favour of a sub-contractor against the main contractor, the principal will be the employer. The principal is statutorily obliged to make payment of the adjudication decision from any funds available on the account of the respondent (the main contractor in the example), under s. 30 of CIPAA. Another relief available to the successful claimant when the respondent does not pay is to slow down the progress of work or suspend work, under s. 29 of CIPAA.

<sup>51</sup> Construction Industry Payment and Adjudication Act 2012, s. 28.

<sup>52</sup> [2018] 1 LNS 428, HC.