

ADJUDICATOR DETERMINES OWN JURISDICTION:
A PREDICTION FOR THE PROPOSED CONSTRUCTION INDUSTRY PAYMENT
AND ADJUDICATION ACT

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AND ADJUDICATION ACT

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To my beloved parents,
Tuan Haji Mohd Yusop Hasan
Puan Hajjah Badariah Abdul Hamid

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ABSTRACT

Adjudication always been said as a cheaper and speedier dispute resolution mechanism which gives a party a statutory right to adjudication. Currently Malaysian construction industry is waiting for the Construction Industry Payment and Adjudication Act (CIPAA) to come into force. The experience from other countries relating to adjudication mainly on complex issues like jurisdiction of adjudicator must surely mean any new model should be an improvement over earlier statutes. Whilst the cases regarding adjudicator jurisdiction keep growing, the proposed CIPAA should be well prepared to face similar issues and one of it is on the adjudicator determines own jurisdiction. Accordingly, it is the objective of this research to determine the position of the proposed CIPAA in relation to the legal position on the issue of adjudicator determines own jurisdiction. This research focuses on the United Kingdom cases relating to this issue under the Housing Grants, Construction and Regeneration Act (HGCRA) 1996. From there, this research studies on the principle created on the issue of adjudicator determines own jurisdiction. Then, the proposed CIPAA be anticipated to look on its position on this issue. It is can be learnt that there is loophole in the provisions of the proposed CIPAA which can continue the jurisdictional challenge as been experience by the HGCRA 1996. Thus, it is essential for the proposed CIPAA to provide a concrete measures to prevent the similar issue arise.

ABSTRAK

Adjudikasi sering dikatakan sebagai satu penyelesaian pertelingkahan yang lebih cepat yang memberi hak kepada parti di sisi undang-undang. Kini, industri pembinaan Malaysia sedang menunggu Akta Bayaran dan Adjudikasi Industri Pembinaan (CIPAA) untuk dikuatkuasakan. Pengalaman negara lain berkaitan dengan adjudikasi terutama dalam isu-isu yang rumit seperti isu bidangkuasa adjudikator seharusnya membuatkan sebarang akta baru, lebih baik daripada akta yang sedia ada. Dalam pada peningkatan kes-kes yang melibatkan bidangkuasa adjudikator, terutamanya di United Kingdom, proposal CIPAA seharusnya bersiap sedia untuk menghadapi isu-isu yang sama dan salah satunya ialah isu berkenaan dengan adjudikator menentukan bidangkuasanya sendiri. Kajian ini memfokuskan kepada kes-kes di United Kingdom yang berkenaan dengan isu ini di bawah akta Housing Grants, Construction and Regeneration Act (HGCRA) 1996. Daripada situ kajian ini membincangkan keputusan mahkamah yang telah dibuat berkenaan dengan isu tersebut. Seterusnya kajian ini mengkaji proposal CIPAA untuk melihat posisinya terhadap isu ini. Adalah dipelajari bahawa ada ruang di dalam proposal CIPAA yang membolehkan berlakunya tentangan terhadap bidangkuasa adjudikator. Oleh itu, adalah penting bagi proposal CIPAA memberi satu tindakan yang baik untuk menghalang isu yang sama berlaku apabila ia dikuatkuasa di Negara ini.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
ACA	Association of Consultant Architects
All ER	All England Law Reports
BLR	Building Law Reports
CA	Court of Appeal
CIDB	Construction Industry Development Board
CILL	Construction Industry Law Letter 1983
CIPAA	Construction Industry Payment and Adjudication Act
Con LR	Construction Law Reports
Const LJ	Construction Law Journal
CVA	Company Voluntary Arrangement
DOM/1	Standard Form of Sub-Contract for Domestic Sub-Contractors
EG	Estate Gazette
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC	England & Wales High Court
HGCRA	Housing Grants, Construction and Regeneration Act
HHJ	His Honour Judge
HL	House of Lords
ICE	Institute of Civil Engineers
JCT	Joint Contracts Tribunal
LIR	Lloyd's Law Reports
NEC	New Engineering Contract

NSC	Nominated Sub Contractor
PAM	Pertubuhan Arkitek Malaysia
QB	Queen Bench
QC	Queen Council
RIBA	The Royal Institute of British Architects
TCC	Technology and Construction Court
TCLR	Trinity College Law Review
TeCSA	The Technology and Construction Solicitors' Association
VAT	Value Added Tax
WG 10	Working Group 10
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Background of study

The adversarial nature of construction industry contributes the occurrence of construction disputes.¹ This caused construction projects require the coordinated effort of a temporarily assembled project team comprised of professionals of different disciplines.² Nonetheless, project team members may pursue their own goals and needs, and maximize their own benefits.³ One of the main disputes in construction industry is on the payment.

Generally, the payment dispute is about non-payment and delay payment. This resulted to problems of cash flow which can severely affect the implementation of construction projects and thus the provision of the nation's infrastructure and built

¹ Sai, O. C., Tak, W. Y., Sau, F. Y. (2006) A Study of Styles and Outcomes in Construction dispute Negotiation. Journal of Construction Engineering and Management, Vol. 132, No. 8, August 2006, p.805.

² Ibid.

³ Ibid.

environment.⁴ Moreover, payment problem remains a chronic problem including the Malaysian construction industry and it affecting the entire delivery chain.⁵

There are not much effective cures available to stop or at least to minimize the payment problems in construction industry. Remedies such as suspension of work and direct payment cannot be properly and lawfully exercised unless there are express provisions in the contract and the disputes are resolved by an independent third party.⁶ Moreover, to be effective, the dispute resolution method has to be quick, cheap, and binding.⁷

Normally, most of the construction contracts provide disputes resolution in various methods and among the most common method use today in the construction industry are litigation, arbitration, adjudication and mediation. Litigation always is the last option for the disputing parties. Meanwhile arbitration also not be preferred anymore because of its similar problems with litigation as per Lord Denning said in the case of *Dawnay Ltd v FG Minter*⁸ stated that:

“There must be cash flow in the building trades. It is the very lifeblood of the enterprise...one of the greatest threats to cash flow is the incidences of disputes, resolving them by litigation are frequently lengthy and expensive. Arbitrator in construction industry is often as bad or worse”.

⁴ Construction Industry Development Board Malaysia (2008) A Report on The Proposal for a Malaysian Construction Industry Payment and Adjudication. (Edited by Sariah, A. K., Noridah, S., Nazir, M. N.) CIDB. Kuala Lumpur, p.2

⁵ Naseem, N. A. (2006) A “Construction Industry Payment And Adjudication Act: Reducing Payment-Default And Increasing Dispute Resolution Efficiency In Construction. Master Builders, 3rd Quarter, p.4.

⁶ Lim Chong Fong (2008) Update and Summary on the Proposed Construction Industry Payment and Adjudication Act. Master Builders, 3rd Quarter, p.66.

⁷ Ibid.

⁸ [1971] 2 All ER 1389.

Using these two methods, typically construction disputes now take two to five years, if not more, to be resolved and they cost tens or hundreds of thousands.⁹ As a result, without any practical solution, the unpaid party's cash flow is commonly affected and the physical development or construction work suffers. In contrast, adjudication is a statutorily enabled, cheaper, speedier, time-bound, contemporaneous, binding dispute resolution mechanism which gives a party a statutory right to adjudication.¹⁰

Following the Latham report in 1994 by Sir Michael Latham, the United Kingdom Government was influenced that primary legislation was required to give all parties to construction contracts a statutory right to have disputes resolved, in the first instance, by adjudication, which was to be a rapid and relatively inexpensive process in all cases.¹¹ This legislation, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996), is now be used in the United Kingdom. Under this act, parties to construction contracts are allowed to refer a dispute to adjudication at any time.¹² Other developed Commonwealth countries like Australia, New Zealand and Singapore also enacted Acts of Parliament for the construction industry as a solution to complement their general laws to regulate the adjudication such as:

1. Building and Construction Industry Security of Payment Act 1999 amended in 2002 (New South Wales, Australia)
2. Construction Contracts Act 2002 (New Zealand)
3. Building and Construction Industry Security of Payment Act 2002 (Victoria, Australia)
4. Building and Construction Industry Payments Act 2004 (Queensland, Australia)

⁹ Lim Chong Fong (2008), *loc.cit.*, p.66.

¹⁰ Construction Industry Development Board Malaysia (2008), *op.cit.*, p.8.

¹¹ Marthinus J Maritz (2009) *Adjudication of Disputes in the Construction Industry*. Innovate No. 3, p.78.

¹² Section 108(1) of the HGCRA 1996.

5. Construction Contracts (Security of Payment) Act 2004 (Northern Territory, Australia)
6. Construction Contracts Act 2004 (Western Australia)
7. Building and Construction Industry Security of Payment Act 2004 (Singapore)

Currently Malaysia Government through the Construction Industry Development Board Malaysia (CIDB) is working to develop the proposed Construction Industry Payment and Adjudication Act (CIPAA). The proposed CIPAA provides an aggrieved party a right to refer a dispute to adjudication and this kick off the adjudication process.¹³ As it is new in Malaysia, it is significant to look on what it got in providing solutions to the disputing parties based on the experience of other countries which enacted similar statutes like United Kingdom.

1.2 Problem statement

Whilst adjudication has been said as a statutorily enabled, cheaper, speedier and binding dispute decision, it should provide satisfaction especially to the referring party. However, there are many adjudicator's decision that be brought to court which shows that there are still grounds for the parties to challenge the decision. The possible grounds of challenge that may arise to the adjudicator's decision are:¹⁴

¹³ Construction Industry Development Board Malaysia (2008), op.cit., p.17.

¹⁴ Tan Sean Git (2007) Challenges to the Adjudicator's Decision. Master Dissertation. Universiti Teknologi Malaysia, p.85.

1. Jurisdictional Challenge.
2. Mistakes and Errors.
3. Breach of Natural Justice.
4. Concurrent Court Proceedings.
5. Inability to Repay or Insolvency.
6. Set-Off (other than in insolvency).

As far as this research is concern, the focus is on the jurisdictional challenge. The jurisdictional challenge here means the challenge to the jurisdiction of the adjudicator.

Previously, there was concern that imaginative defendants would be able to invent spurious arguments that would call into question the adjudicator's jurisdiction once the HGCRA 1996 come into force.¹⁵ It is almost the only way for a party to stop an adjudication proceeding by alleging that the adjudicator have no the jurisdiction to deal with the dispute.¹⁶ In the case of *Project Consultancy Group v The Trustees of the Gray Trust*¹⁷, the editors of the Building Law Reports stated that the possibility of challenging the jurisdiction of adjudicator are broad if not infinite. They stated that any arguable challenge to the jurisdiction of the adjudicator will secure that the decision of the adjudicator is summarily unenforceable.

Prior to this research, a preliminary analysis has been made on the cases to challenge the adjudicator's decision in United Kingdom courts shows that from 37 cases, 20 cases are regarding to the jurisdictional challenge. These cases basically questioned on whether the adjudicator has the jurisdiction to make the award. All the 37 cases are gained through United Kingdom Law Journal via Lexis Nexis website¹⁸. Therefore it is

¹⁵ HHJ Coulson, P. QC (2007) *Construction Adjudication*. Oxford University Press. New York, p.214.

¹⁶ Forbes, J. (2001). *Adjudication – The First 1,000 Days: A General Overview*. Paper presented at a joint meeting of the Society of Construction Law and the TCC Bar Association in London on 4th December 2001, p.7.

¹⁷ [1999] BLR 377.

¹⁸ Available at <http://www.lexisnexis.com/my>.

noteworthy to focus this research on jurisdictional challenge issue. The question now is on the issue that has led to this research.

In May 2001, the Construction Umbrella Bodies Adjudication Task Group was formed to work on the issues relating to adjudication which arose out of the first review of the HGCRA 1996 and the Scheme for Construction Contracts.¹⁹ This resulted to the publishing of the Guidance for Adjudicators in July 2002 and the Users' Guide to Adjudication in April 2003.²⁰ Subsequently on 29th April 2004 the Task Group was asked to act as the adjudication working group for the second review.²¹

For the second review, the Task Group published a report on the possible amendments to Part II of the HGCRA 1996 which intended to make the adjudication provisions work more satisfactorily.²² They had considered responses to a request for views on the operation of the adjudication provisions of the Act and Scheme from several bodies which includes among others, Chartered Institute of Building, Institution of Civil Engineers, Judges of the Technology and Construction Courts, Royal Institution of Chartered Surveyors and Technology and Construction Solicitors Association.²³

In the report, one of the suggestions provided by the Task Group regarding to the adjudication is on adjudicator determines his own jurisdiction. The Task Group suggested that an adjudicator should have the power to make a full and final decision on his own jurisdiction.²⁴ The Task Group stated that the HGCRA 1996 is silent on the point and the extent to which the adjudicator has power to rule on his own jurisdiction is therefore not

¹⁹ Latham, M. (2004) Review of part II of the housing grants construction and regeneration act 1996, p.30. Available at <http://www.berr.gov.uk/files/file30327.pdf>.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Wrzesien, T. and Nichols, S. (2006) Construction Act review: A missed opportunity?. Taylor Wessing. London, p.3.

clear.²⁵ There is evidence according to the Task Group that jurisdictional challenges by parties are increasing, and there have been a growing number of cases where the courts have refused to enforce decisions because of a lack of jurisdiction.²⁶

Furthermore the report mentioned that if an adjudicator is given the power under the contract, then their decision on the matter is final. In contrast if they have no such express power then any decision the adjudicator makes on jurisdiction is of interim effect only and can be opened up by the courts.²⁷ The problem is that challenges to jurisdiction in the courts can hinder the process and delay payment of monies which the adjudicator has ordered should be paid.²⁸ Therefore, a power to decide jurisdiction would thus not add to an adjudicators' burden but will save in the wholly unreasonable exercise of the power and would avoid much litigation.²⁹ With that, the Task Group suggested that the HGCRA 1996 should be amended to include an express provision conferring the adjudicator power on this matter.³⁰

Meanwhile, in Malaysian construction industry, prior to the submission of the proposed CIPAA by the CIDB to the Malaysian Cabinet, there was a delay due to the objections from the Malaysian Bar Council.³¹ Their objections mainly were on the right to statutory adjudication and the accredited adjudicators' matters.³² Following the objections, they suggested that, among others, that the adjudicator should not be empowered to determine his own jurisdiction.³³ They claimed that there is possibility of

²⁵ Latham, M. (2004) loc.cit., p.37.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Lim Chong Fong (2008), loc.cit., p.68.

³² Ibid.

³³ Ibid.

lack of expertise or experience of Quantity Surveyors to adjudicate upon substantial disputes.³⁴

Now there is a different view between what the Group Task suggested to the HGCRA 1996 and what the Malaysian Bar Council suggested on the proposed CIPAA. Although both situations happen in different countries and different legislations, but the issue is the same which is on the adjudicator's power to rule on his jurisdiction. The Task Group suggested that HGCRA 1996 should include the express provisions on this matter but the Malaysian Bar Council suggested that the proposed CIPAA should exclude it.

As far as the issue is concern, it is regarding to the adjudicator determines own jurisdiction. Therefore, it is noteworthy to find out the legal position on this issue. This research intends to look at the cases in the United Kingdom courts relating to this issue.

After that, this research wants to look at the current position of the proposed CIPAA on this issue. Whether the proposed CIPAA can provide solution for the similar issue should it happen in Malaysian construction industry when it come into force. Are there any provisions in the proposed CIPAA relating to this matter? Does the provisions in the proposed act adequate to solve similar issue? All this form the basis for this research which intends to identify the closest answers of it.

As adjudication is new in Malaysia and the proposed CIPAA still not come into force yet, it is important and necessary for us to understand and aware on the possible issue that might arise when the proposed CIPAA come into force. Therefore all the

³⁴ Naseem, N., A. and Kwan, H., H. (2007) Proposed Malaysian 'Construction Industry Payment and Adjudication Act' (CIPAA). Pasific Association of Quantity Surveyors Newsletter. Issue 12. December 2007. The Pasific Association of Quantity Surveyor, p.20.

parties range from contractors to the law maker can prepare and plan what action to be taken to overcome the possible issue.

1.3 Objective

To determine the position of the proposed Construction Industry Payment and Adjudication Act (CIPAA) in relation to the legal position on the issue of adjudicator determines own jurisdiction.

1.4 Scope of research

The scope of this research is on the adjudicator's jurisdiction. From there, this research narrowed down to the issue of adjudicator determines own jurisdiction. This research also focused on the proposed Construction Industry Payment and Adjudication Act. The main legislations used in this research's discussion are the Housing Grants, Construction and Regeneration Act 1996 and the proposed Construction Industry Payment and Adjudication Act.

1.5 Significance of research

As mentioned before, the only way for a party to stop an adjudication proceeding is by alleging that the adjudicator have no the jurisdiction to deal with the dispute. Any arguable challenge to the jurisdiction of the adjudicator will secure that the decision of the adjudicator is summarily unenforceable.

One of the issues relating to this matter is on the adjudicator determines own jurisdiction. Moreover, the wealth of experience from over 15,000 adjudications around the world, and over 400 court cases relating to adjudication mainly on peripheral issues like jurisdiction, must surely mean any new model should be an improvement over earlier Acts.³⁵

Significantly, it is noteworthy to anticipate the proposed CIPAA on this issue as to give an early prediction should this issue happen in Malaysia in the future. The proposed CIPAA which expected to govern the adjudication in Malaysia should provide solutions to the similar issues that have been experienced by other country like United Kingdom which already used adjudication as one of the dispute resolution in construction.

³⁵ Naseem, N., A. and Kwan, H., H. (2007) Proposed Malaysian 'Construction Industry Payment and Adjudication Act' (CIPAA). Pasific Association of Quantity Surveyors Newsletter. Issue 12. December 2007. The Pasific Association of Quantity Surveyor, p.20.

1.6 Research methodology

The methodology of this research is by way of literature review. Much has been written on the topic on adjudication and many books have been published on the adjudication under various jurisdictions. This study reviewed those writings especially the adjudication under the HGCRA 1996. This includes among others, the general overview of the statutory adjudication, process of adjudication and the adjudicator's jurisdiction.

This research also conducted literature review on the proposed CIPAA. Although not much have been written on this proposed act, this research able to get lots of information especially on the history and also the provisions of the proposed act. From there, this research looks into the position of the CIPAA on the adjudicator's jurisdiction.

Subsequently, this research analysed the relevant United Kingdom case law relating to adjudication. This is to seek the principles and decisions on adjudicator's jurisdiction by the courts mainly on the issue of adjudicator determine his own jurisdiction. Case law journals are readily available through the Lexis-Nexis database via the Internet.

After that, this research anticipated the proposed CIPAA to the similar cases that been analysed. This is to look into its approach and what it got to settle up the similar issue. From there, this research identified the current position of the proposed CIPAA on the issue of adjudicator determines own jurisdiction which also the main finding of this research. In the end of this research, some suggestions and recommendation be made on the proposed CIPAA based on the finding.

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