

CHALLENGES TO THE ADJUDICATOR'S DECISION

TAN SEAN GIT

UNIVERSITI TEKNOLOGI MALAYSIA

DEDICATION

This dissertation is dedicated specially to my beloved parents, sisters, Chin Yan, Ee Len, Xiao-Wei and fellow friends who always love me.

... Thank you for everything ...

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ABSTRACT

Statutory adjudication has been widely adopted in several commonwealth countries. Malaysia too is currently considering its own model on statutory adjudication. It is usually anticipated that the adjudicator's decision binds the parties unless one of the parties chooses to challenge it. However, it is difficult to find express provisions in the various legislations that spell out grounds for challenges to an adjudicator's decision. There have been, however, court decisions on whether adjudicators' decisions may or may not, as a matter of principle, be challenged. This research seeks to examine the possible grounds of challenges to the adjudicator's decision and to establish the extent of success of such challenges based on court decisions.

The analysis shows various grounds of challenges that are available to the aggrieved parties to resist enforcement of the adjudicator's decision. These have been categorised in six areas in this research. It is found that in considering whether there are valid grounds for the aggrieved party to challenge the decision, the courts do not generally look at the merits of the dispute; these are rarely discernible. However, the question remains: what is the jurisdiction and authority of the adjudicator? Not only must the adjudicator have jurisdiction to act; in conducting the proceedings he must also be unbiased and fair – he is to follow the “rules of natural justice”. The challenges to the enforcement may also be brought up on the grounds of concurrent court proceedings, insolvency, and set-off, but they are unlikely to succeed. The courts have in some instances adopted a more cautious approach to the enforcement of adjudication. However, the extent of success in which the grant and refusal of enforcement still depends on the merits of each case.

ABSTRAK

Perundangan adjudikasi telah diterima pakai oleh banyak negara commonwealth secara luasnya. Malaysia kini menimbang untuk mengungkap model perundangan adjudikasi tersendiri. Adala biasanya dijangkakan bahawa keputusan adjudikater adalah berjilid melainkan salah satu pihak memilih untuk mencabarnya. Bagaimanapun, adalah sukar melihat sesuatu peruntukan nyata dalam perundangan adjudikasi yang menjelaskan cabaran kepada keputusan adjudikater atas mana-mana musabab. Walaupun, sudahpun terdapat keputusan-keputusan yang dibuat oleh mahkamah dimana keputusan adjudikater perlu atau tidak harus, demi prinsip, boleh dicabar. Penyelidikan ini dijalankan untuk mengenalpasti sebab-musabab cabaran kepada keputusan adjudikater yang mungkin dan untuk menentukan takat kejayaan cabaran tersebut berdasarkan keputusan-keputusan mahkamah.

Analisis menunjukkan beberapa alasan cabaran yang boleh didapati untuk pihak-pihak yang terkilan untuk menentang penguatkuasaan untuk keputusan pengadil. Ini telah dikategorikan dalam enam alasan dalam penyelidikan ini. Didapati bahawa dalam mempertimbangkan sama ada terdapat realistik musabab bagi pihak yang terkilan untuk mencabar keputusan, mahkamah-mahkamah tidak akan melihat kebaikan perbalahan; ini adalah jarang sekali dapat dilihat. Akan tetapi, persoalan kekal: apakah bidang kuasa dan autoriti adjudikater? Bukan sahaja adjudikater mesti ada bidang kuasa untuk bertindak, dalam menjalankan prosiding dia juga perlu menjadi tidak berat sebelah dan adil – iaitu mengikut “kaedah-kaedah keadilan asasi”. Cabaran bagi penguatkuasaan juga boleh dibawa atas sebab-musabab seperti prosiding mahkamah serentak, ketakmampuan dan tolakan; akan tetapi cabaran berdasarkan sebab-musabab ini jarang dijayakan. Mahkamah-mahkamah telah dalam beberapa contoh mengambil pakai penekatan yang lebih berhati-hati bagi penguatkuasaan adjudikasi. Bagaimanapun, tahap kejayaan di mana keizinan dan keengganan penguatkuasaan masih bergantung merit sesuatu kes.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
Adj.L.R.	Adjudication Law Report
All ER	All England Law Reports
ANB	Adjudicator Nominating Bodies
BAILII	the British and Irish Legal Information Institute
BCISP Act	Building Construction Industry Security of Payment Act
BLR	Building Law Reports
CIDB	Construction Industry Development Board
CIPA Act	Construction Industry Payment and Adjudication Act
CILL	Construction Industry Law Letter 1983
Con LR	Construction Law Reports
CSIH	Court of Session, Inner House
DLR	Directors Law Reporter
EGLR	Estates Gazette Law Report
EWCA Civ	England & Wales Court of Appeal, Civil Division
EWHC	England & Wales High Court
FTLR	Financial Federal Trial Reports
HGCR Act	Housing Grants, Construction and Regeneration Act
HHJ	His Honour Judge
HL	House of Lords
ISM	Institution of Surveyors Malaysia
Lloyd's Rep	Lloyd's List Reports
NADR	Nationwide Academy of Dispute Resolution
NSWCA	New South Wales Court of Appeal

NSWSC	New South Wales Supreme Court
QB	Queen Bench
QC	Queen Council
SCLR	Scottish Civil Law Reports
S.J.L.B.	Solicitors Journal Law Brief
TCC	Technical and Construction Court
TECSA	Technology and Construction Solicitors' Association
UK	United Kingdom
WG 10	Working Group 10
WIR	West Indian Reports
WLR	Weekly Law Report
WR	Weekly Reporter

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CHAPTER 1

INTRODUCTION

1.1 Background Study

Adjudication is not new.¹ It goes back to the times of Brunel (Isambard Kingdom Brunel 1806-1859). It was used from the 1970's in United Kingdom construction sub-contracts² to deal with set-off and also demonstrated in the case of *Modern Engineering (Bistol) v Gilbert-Ash (Northern)*³. Adjudication has found its way into construction contract across the world via the introduction of the Housing Grant and Construction Regeneration Act (HGCR Act) 1996 pursuant to Sir Michael Latham reports "Construction the Team" of 1994 which reported the woes of the United Kingdom's construction industry.⁴ It has spread to other part of the world. Since then there are now similar Acts in Australia, New Zealand and Singapore. These includes:

¹ Riches, J.L. (2004). Adjudication – The New Way in Construction Disputes. Paper presented at the *International Construction Conference 2004* on 22nd- 23rd September 2004; 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.2.

² Including JCT subcontractor forms – NSC/C, DOM/1 and DOM/2, GC/Works/1 Edition 3, JCT 81 (with Contractor Design), NEC and the BPF System.

³ *Modern Engineering (Bistol) v Gilbert-Ash (Northern)* [1974] AC 689.

⁴ Dato' Syed Ahmad Idid. (2005). Appointing Bodies and Adjudication Rules and Procedures. Paper presented at the *International Forum: Construction Industry Payment Act and Adjudication* on 13th-14th September 2005.

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

Nevertheless, adjudication is still a concept whose potential has not been explored to its fullest within Malaysia.⁵ In the Malaysian construction industry, the common methods of settling construction disputes are through litigation and arbitration.⁶ In litigation, there are 46 cases related to construction dispute recorded from year 2002 to 2004.⁷ On the other hand, it is found that about 120 construction disputes have been referred to arbitration from 1995 to 2005.⁸ Unfortunately, there is widespread dissatisfaction in the industry with the both mechanisms.⁹ Litigation was expensive and slow. Arbitration has been labelled as ‘litigation in the private sphere’,¹⁰ ‘a pale imitation of high court procedure’,¹¹ and ‘timeless’,¹².

⁵ Ibid

⁶ Naseem, A. A. (2005) A “Construction Industry Payment and Adjudication Act” – Reducing Payment-default and Increasing Dispute Resolution Efficiency”. Paper presented at the *International Forum: Construction Industry Payment Act and Adjudication* on 13th-14th September

⁷ Malayan Law Journal, 2002; Malayan Law Journal, 2003; Malayan Law Journal, 2004.

⁸ An interview with the Accountant Executive of PAM Puan Roze Nasir. Quoted from Siti Nora Haryati A.H. (2006). *Statutory adjudication: Appropriate Procedures and Process for Incorporating into the Proposed Malaysian Construction Industry Payment and Adjudications Bill*. International Islamic University Malaysia: Unpublished Undergraduate Dissertation, p. 2.

⁹ Singh, H. (2003). *Engineering and Construction Contracts Management: Post-Commencement Administration*. Singapore: Lexis Nexis.

¹⁰ Uff, John. (1992). *A Pragmatic Approach to Arbitration, Legal Obligations in Construction*. King’s College, London.

¹¹ Quoted from passage by Harman, Martin. (1989). *Getting the Best from ICC Arbitration*. International and ICC Arbitration, King’s College, London.

¹² Uff, John (1992) *op cit* fn 10.

Lord Denning in his now famous for judgment in the Court of Appeal in *Dawnays v. F.G Minter*¹³ has this to criticizing the frustrating effects of a long-drawn construction disputes resolution process.

“Cash flow is the lifeblood of the construction industry.” and that “One of the greatest threats to cash flow is the incidences of disputes, resolving then by litigation is frequently lengthy and expensive. Arbitrator in the Construction industry is often as bad or worse.”

The perceived shortcomings of litigation and arbitration, with their concomitant rise in costs, delays, and adversarial relationships, therefore have encouraged the rapid growth of alternative dispute resolution process.¹⁴ Recent legal developments in Malaysia indicate that it is looking forward to placing itself in the proper position to make the transition towards a workable, efficient and institutionalized employment of alternative dispute resolution. The Malaysian government and members of the Malaysian legal fraternity have voiced support and initiated concrete steps towards greater usage of alternative dispute resolution, expressing their determination to not to be left behind and upgrade the justice system.¹⁵

Following that, in year 2000, CIDB promoted mediation to be condition precedent to arbitration in conjunction with the launch of CIDB 2000 Standard Form of Contract.¹⁶ However, mediation was not attracting much. A research revealed that 65% of accredited mediators under CIDB have not resolved any dispute.¹⁷ It is

¹³ *Dawnays v. F.G Minter* [1971] 1 WLR 1250.

¹⁴ Cheung, S.O. *et al.* (2002). Fundamentals of Alternative Dispute Resolution Process in Construction. *Journal of Construction Engineering and Management*, Vol. 128, No.5, 1 October.

¹⁵ Aida Othman, Introducing Alternative Dispute Resolution in Malaysia : Prospects and Challenges. *Malayan Law Journal* 2002: 2: ccxxiv – ccxlv; Certain Formalization of Dispute Resolution Methods Necessary, says Rais', Kuala Lumpur, 25 April 2000. URL: <[http:// www.bernama.com.my](http://www.bernama.com.my)>. Proposals to study and implement ADR had been made more than a decade earlier, for example, by Chief Justice Lee Hun Hoe, 'Alternative Methods of Dispute Settlement in Malaysia', in *Law, Justice and the Judiciary: Transnational Trends*, Kuala Lumpur, 1998, 229-237.

¹⁶ CIDB (2000). CIDB Promotes Mediation to Defuse Industry Disputes. *CIDB News*, Issue 2 September 2000, p. 5-6.

¹⁷ Sunaimi M. (2005). *The Adoption of Mediation as Alternative Dispute Resolution in the Construction Industry in Malaysia*. International Islamic University Malaysia: Unpublished Undergraduate Dissertation, B.Q.S.

submitted that among the reason of its failure as a dispute resolution is due to its non-binding characteristic.¹⁸

In responding to the shortcomings of payment regime and as an improvement to dispute resolution, there is a new wave and a new interest in statutory adjudication as the primary means of dealing with construction disputes in Malaysia. Following the steps of the precedent countries, where the right to refer a dispute arising from a construction contract is governed by statute in jurisdictions, Malaysia construction industry is also introducing statutory adjudication. Given the industry experiences on payment problem and taking heed of experiences of other countries, the industry working group (WG 10) led by the Institution of Surveyors Malaysia (ISM) is currently working earnestly to formulate the Malaysian Construction Industry Payment and Adjudication Act (CIPA Act).

The proposed CIPA Act is targeted to improve cash flow and to ensure that those have undertaken construction contracts do not put their private interests ahead of the nation. The Act is expected to play a crucial role in laying down the basic principles of the construction contracts and is expected to address the non-payment, late payment and other payment related issues in the construction industry. One of the provisions in the proposed Act is a speedy dispute resolution mechanism – adjudication.¹⁹

What is adjudication? Adjudication is effectively private temporary ‘Legal System’ agreed by the parties. It is somewhat of a misnomer.²⁰ Adjudication has been described as a procedure where, by contract, a summary interim decision-making power in respect of disputes is vested in a third-party individual (the adjudicator) who is usually not involved in the day-to-day performance or administration of the contract, and its neither an arbitrator nor connected with the

¹⁸ Ibid

¹⁹ Naseem, A.A. (2006). A “Construction Industry payment and Adjudication Act”. A proposed Bill presented at *Consultation Forum on Construction Industry Payment and Adjudication Bill*, Kuala Lumpur on 22 February 2006.

²⁰ Owen, G.P. (2003). *Adjudication under the Housing Grant, Construction & Regeneration Act 1996*. Dispute Resolution Forum for the Chartered Institute of Arbitrators Wales Branch.

state.²¹ It is considered to be a judicial process, albeit under the great time pressure and following non-judicial procedures.²²

In fact, there was much criticism of adjudication before the UK's Act came into force and this criticism continues. Ian Duncan Wallace has stated that he considers that the way in which the courts are enforcing adjudicators' decisions "constitutes a potential and one-sided denial of justice by Parliament to litigants at an interlocutory stage never previously seen in English law".²³ John Uff has stated that it was "difficult to perceived by what mandate such a radical piece of social engineering is to be forced upon the UK construction industry".²⁴

Nevertheless, the statistics from the Technical and Construction Court (TCC) are that something like 250-300 enforcement actions have resulted from adjudication. This means that there are around 4 – 5,000 situations where the parties have got to the point of settling their dispute through adjudication. Which is after all the point of adjudication.²⁵ TCC has developed procedures whereby proceeding to enforce adjudicators' decisions can be heard very quickly.²⁶ The system normally adopted by the courts is by summary judgment.²⁷

Latham recommended that the "award of the adjudicator should be implemented immediately" and that "any appeals to arbitration or the court should not be permitted to delay the implementation of the award, unless an immediate and exceptional issue arises for the courts..."²⁸ The leading case of *Macob Civil Engineering Ltd v Morrison Construction Ltd*²⁹ affirmed Latham's intentions and the provision of s108(3) of the HCGR Act with the result that adjudicators' decisions are

²¹ McGaw, M.C. (1991). Adjudicators, Experts and Keeping Out of Court. Paper presented at the *Conference of Current Development in Construction Law*, Centre for Construction Law and Management in September 1991. Cited by Riches, J.L. and Dancaster, C. (2004). *Construction Adjudication* 2nd Ed. Great Britain: Blackwell Publishing.

²² Hill, C. (2000). Silence in Court. *Building* 28 July 2000; Riches, J. L. and Dancaster, C. (2004) *op cit* fn 21, p. 14.

²³ Wallace, D.I (2000). HGCRA Adjudicators' Errors and Enforcement. *15 Const LJ* 3, p. 105.

²⁴ Uff, John (1998). *Statutory Adjudication Arrives*. Construction Law April 1998.

²⁵ Dancaster, C. (2001). *Adjudication Society Talk* on training and adjudicators' decisions at Layton Bristol office on 13 December 2001.

²⁶ Lloyd, H. (2005). The Role of the Court in Enforcing the Decisions of Adjudicators. *International Forum: Construction Industry Payment Act and Adjudication* on 13th-14th September 2005.

²⁷ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

²⁸ Recommendation 26.2 and 26.3 of the Latham Report.

²⁹ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

binding and enforceable until the underlying dispute is finally resolved by litigation, arbitration or agreement. Chadwick LJ in the Court of Appeal judgment in *the Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*³⁰ said:

"The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due ... can be enforced summarily."

Adjudicators' decisions have been variously described as "binding", "provisional", "temporarily final" and "in no way final", a judgment enforcing such a decision is inevitably hard to define.³¹ The Singapore Model is somewhat unique in having a "second bite" in adjudication on the same dispute through an appeal process – an adjudication review as conceived under the Singapore's Act³². The Malaysian proposal model is too considering to incorporate an "adjudicator appeal model" for various reasons³³, but these are not directly concerned with the subject matter of this study.

Save for adjudication review, the analogous area of law in respect of adjudicators' decisions is in the field of challenges to the adjudicator's decision. A challenge is not an appeal against the decision of the adjudicator, it would followed that the court in determining the case for a challenge does not have to theoretically revisit the matters dealt with by the adjudicator. This feature, therefore, distinguishes an adjudication review from a legal challenge against an adjudication determination.

There have been decisions made by the courts that adjudicators' decisions should or should not, as a matter of principle, be challenged. This research is intended to provide a better understanding on the enforcement of adjudicators' decisions to all the practitioners in the Malaysia construction industry. More importantly, focus is given to determine the nature and grounds of challenge to the adjudicator's decision. This paper is written based on a research on relevant

³⁰ *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, CA.

³¹ Harris, P. (2001). Questions Concerning Adjudication. *Con & Eng Law* 6.2(26).

³² Chow, Kok Fong (2005). *Security of Payment and Construction Adjudication*. Singapore: LexisNexis, p. 465-492. See also case of *Bloor Construction Ltd v Bowmer and Kirkland Ltd* [2000] BLR 314. Some industrial views in UK recommended "Slip Rule" to be incorporated in adjudication.

³³ Naseem, A. A. (2006). A "Construction Industry payment and Adjudication Act". Reducing Payment-default and Increasing Dispute Resolution Efficiency in Construction – Part II. *Master Builders Journal*, 4th Quarter 2006, 4-22.

decisions of the courts, where the courts have interpreted provisions in their legislations that could be used as a useful guide and a valuable point of reference.

1.2 Problem Statement

From the increasingly emerged experience in both the United Kingdom and Australia, the introduction of the security of payment regime, together with the accessibility to adjudication, has resulted in a 'significant downturn in construction arbitration and presumably in litigation too'.³⁴ The decline of arbitration and court cases numbers may be expected to continue.³⁵ On the other hand, the volume of work in relation to construction adjudication has risen to more that compensate for the reduction in arbitration work.³⁶ It is submitted that two years after the UK's Act coming into force, the number of adjudication shows a dramatic rise of 518%.³⁷ It has almost entirely eliminated arbitration as a means of dispute resolution.³⁸

It is readily apparent that, notwithstanding the overall reduction on case numbers, the TCC of United Kingdom has become heavily involved in supervising statutory adjudication.³⁹ Whereby over 170 reported cases and as many other unreported cases have already come before the TCC since the leading case of *Macob Civil Engineering Ltd v Morrison Construction Ltd*⁴⁰ concerning statutory adjudication came before courts.

³⁴ Williams, G. and Joyce, M. (2004). Adjudication – the Right Choice? *Arbitration*, p. 127.

³⁵ Gaitskell, R. (2005). *Adjudication: Its Effect on Other Forms of Dispute Resolution (The UK Experience)*. International Forum: Construction Industry Payment Act and Adjudication on 13th-14th September 2005.

³⁶ Chow, Kok Fong (2005). *Security of Payment and Construction Adjudication*. Singapore: LexisNexis, p. 537.

³⁷ Adjudication Reporting Centre (2005). *Adjudication Report No 3*, March 2001. Glasgow Caledonian University. URL: <<http://www.adjudication.gcal.ac.uk>>

³⁸ Riches, J.L. (2004). Adjudication – The New Way in Construction Disputes. *International Construction Conference 2004* on 22nd- 23rd September 2004.

³⁹ Lloyd, H. (2005). The Role of the Court in Enforcing the Decisions of Adjudicators. *International Forum: Construction Industry Payment Act and Adjudication* on 13th-14th September 2005.

⁴⁰ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

Riches and Dancaster submitted that most of these are simply about whether or not an adjudicator's decision should be enforced or challenged.⁴¹ These cases illustrate the continuing ingenuity and inventiveness of those on the receiving end of adverse adjudicators' decisions in seeking to find ways of challenging their validity.⁴² According to Timpson and Totterdill, the majority of reported cases dealing with adjudication have been concerned with enforcement of the adjudicators' decisions, and in particular attempts to avoid such requirement (mainly unsuccessful) by those who are required by those decisions.⁴³

Besides, on the Gaitskell⁴⁴ own enquiries indicate that adjudication has not disposed of many big cases. He pointed out that even though it is used on major projects, often on the basis of multiple references through the course of a dig job, after completion the parties still proceed to arbitration or litigation to challenge key elements of the adjudications' decisions.

The recent decision of the English Technology and Construction Court in the case of *Carillion Construction Ltd v Devonport Royal Dockyard*⁴⁵ reinforces that although an adjudicator's decision is an interim resolution, which is binding until the dispute is finally resolved by litigation, arbitration or agreement, it is only in very limited circumstances that an adjudicator's decision can successfully be challenged as being invalid. Chadwick LJ went on making a number of observations which should be heeded by all who may wish to challenge the validity of an adjudicator's decision:

"The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only

⁴¹ Riches, J. and Dancaster, C. (2004) *op cit* fn 21, p. 264.

⁴² O'Carroll, C. (2006). Construction Law in 2005. *Construction Law* January 2006 at Pinsent Masons. URL: <<http://www.pinsentmasons.com/media/971416772.htm>>

⁴³ Timpson, J. and Totterdill, B. (1999). *Adjudication for Architects and Engineers*. London: Thomas Telford Ltd, p. 185.

⁴⁴ Gaitskell, R. (2002). Snap-shot of Adjudication. *Engineering Management Journal*, April 2002, p. 59-61; Gaitskell, R. (2001). *Adjudication: A Wish List*. Paper based on a talk given to the Society of Construction Law in Edinburgh on 27th November 2001, p. 2.

⁴⁵ *Carillion Construction Ltd v Devonport Royal Dockyard* [2003] BLR 79.

be in rare circumstances that the courts will interfere with the decision of an adjudicator."

To what extent should the courts "interfere" with an adjudicator's decision? Or to what extent is the decision of the adjudicator open to challenged and, if so, by whom? What if the decision is erroneous? Is a party to be taken to have agreed to the adjudicator making a mistake? Can this be circumvented if an adjudicator makes a mistake of law in deciding that there was the requisite authority? How the adjudicator's decision be challenged on the grounds that he has exceeded his jurisdiction or breached the rules of natural justice? The New Zealand, NSW and Singapore legislation contains provisions for the application to challenge the adjudicator's decision. However, the Acts stops short of spelling out the grounds of challenge.⁴⁶

According to Patterson, what has not yet been determined by the courts is the extent to which a breach by an adjudicator of the rules of natural justice will take him outwith his jurisdiction and therefore make his decision subject to challenge.⁴⁷ Nevertheless, the Act make no provision for the adjudicator's decision to be accompanied by reasons.⁴⁸ In some circumstances the courts may infer from the absence of reasons that there are no good reasons for a decision.⁴⁹; and in committee the Minister stated that "it would be contrary to the principles of natural justice to come up with a decision without giving the reasons".⁵⁰ What reason should be given? Another way of expressing this question is: what grounds of challenge may arise?

It is submitted that much remains to be clarified about the operation of the adjudication act, while the major concern is the uncertainly of enforcement of adjudicators' decisions and the effect of those decisions on the subsequent

⁴⁶ WongPartnership (2004). *Annotated Guide to the Building and Construction Industry Security of Payment Act 2004*. Singapore: Sweet & Maxwell Asia, p. 110, 104.

⁴⁷ Patterson, L.A. (2002). The adjudicator's Jurisdiction - Chapter Six. In: Paterson, F.A. and Britton, P. *The Construction Act – Time for Review*. London: King's College London. p. 53-59.

⁴⁸ Although paragraph 22 of the Scheme of Construction Contract requires the adjudicator to give reasons if requested to do so by one of the parties. Also in recent, the court have expressed a predilection for reasons to be given in many fields.

⁴⁹ See *Padfield v Minister of Agriculture* [1968] AC 997.

⁵⁰ Timpson, J. and Totterdill, B. (1999) *op cit* fn 43, p. 225.

performance of the building contracts in which there has been an adjudication.⁵¹ Atkinson also pointed out that⁵²:

“Since the enactment of the Act the construction industry has been uncertain as to the exact legal status of an adjudicator's decision and how the court's will react to challenges to a decision.”

Construction adjudication is completely new, especially in Malaysia, and the only one of its kind.⁵³ Hence it is important and necessary for us to understand the circumstances, which are limited, that will be available to the parties in the adjudication proceeding to challenge the adjudicators' decisions. The issues all above appears to support the contention that existing case law regarding to the challenges of adjudicator's decision in relation to construction adjudication needs to be subjected to detailed investigation and substantial exploration. Those questions form the basis for this research which intends to identify the closest answers of it.

1.3 Objectives of Study

The primary objective of this study is to examine the grounds of challenge to the adjudicator's decision and to establish the extent of success of such challenges based on court decisions.

⁵¹ Ibid, p. 232.

⁵² Atkinson, D. (1999). *Adjudication: Macob Civil Engineering v Morrison Construction*. Daniel Atkinson Limited. URL: <http://www.atkinson-law.com/cases/CasesArticles/Cases/Article_84.htm>

⁵³ Riches, J. L. and Dancaster, C. (2004) *op cit* fn 21 , p. 19.

1.4 Scope and Limitation

It should be first emphasized that the observation made in this research are based on the information available to date. Although the first statutory adjudication was introduced in the United Kingdom back in 1996, and the very recently Singapore in 2004, Malaysia has never utilized this form of alternative dispute resolution, prior to the promulgation of the Construction Industry Payment and Adjudication Act (CIPA Act). There are also little research material and other literature on the practices of adjudication in Malaysia. There are in fact very limited usage and knowledge of adjudication in Malaysia. Thus, any possibility of lacking in knowledge on these aspects is acknowledged.

The Acts in the precedent regimes may well be referred to in this research are as follow:

1. Housing Grants, construction and Regeneration Act 1996 (United Kingdom);
2. Building and Construction Industry Security of Payment Act 1999 amended in 2002 (New South Wales, Australia);
3. Construction Contract Act 2002 (New Zealand); and
4. Building and Construction Industry Security of Payment Act 2004 (Singapore).

In considering the aspects of the legislation identified above, the United Kingdom Act will be consider first in the scope of the study, it having been the original act of this kind and coverage area is wider as compared to the others. Whereas due to the close geographical, political and historical relationship between Malaysia and Singapore, Singapore Act will often be referred to, as there are strong reason for Malaysia to have the similar nature of challenges in the near future.

Given the legalistic nature of this study, the approach adopted in this research is case-law based. However, there is no reported case in relation to adjudication in Malaysia to drawn from as statutory adjudication has not been practiced in our

country. Court cases related to the issue are therefore made to cases in other countries, particularly in United Kingdom and interchangeably in New South Wales as these jurisdictions are advance in practicing statutory adjudication.

Although highly relevant and equally important, restriction of time and length of the report does not warrant the author to discuss the intensity of other closely related matters such as:

- (a) Remedies of enforcement to the adjudicator's decision;
- (b) Adjudication review by the panel of adjudication (as conceived under the Singapore Building and Construction Industry Security of Payment); and
- (c) Application of Human right Act 1998 in adjudication.

1.5 Significance of Study

As mentioned before, Malaysian construction industry is proposing to the Government on the enactment of the Construction Industry Payment and Adjudication Act (CIPA Act). Once the Act is adopted, it will introduce a totally new regime of claims, adjudication and enforcement procedures in the event of disputes. These are all quite unfamiliar to the Malaysian construction industry. In the light of the tight timeframes and repercussions of the proposed Act, this study is beneficial for those who are concerned in the industry to familiar themselves on the subject of the new legislation, specifically in the subject of adjudicators' decisions. This study also intended to enhance the confidence of practitioners in the Malaysian construction industry on the use of adjudication.

At present, although the Act is still in the processing stage and the work is not fully done yet, but the working group and the drafting committee has worked earnestly to put in place a construction-specific statutory framework. It is hoped that

the grounds of challenges to adjudicator's decision examined will provide a detailed insight to the drafting committees of the Malaysian proposed CIPA Act. In turn, the proposed act can be drafted in such a way that challenges of adjudicator's decision are minimized, provides a better chance of getting finer justice and result in a greater probability of 'finally' closing out the dispute.

The result of this study would be a reference point to the parties involving in adjudication process. They will be more aware and clear of the success grounds in challenging adjudicator's decision; or understand the circumstances, which are limited, that will be available to the them in the adjudication proceeding to challenge the adjudicators' decisions. Otherwise, to seek to challenge the adjudicator's decision on the ground that is unlikely to succeed merely lead to a substantial waste of time and expense.

When it is considered that certain degree amount of adjudication decisions are still open to challenge in court, the finding represented by this research have a significant importance in considering the overall picture regarding compliance and efficacy of adjudication decisions and their enforcement as well as challenges.

1.6 Research Methodology

The methodology of this research is by way of literature review and case-law analysis.

As a major part of this research an extensive review of the relevant literature has been undertaken. This was carried out to ascertain the state of existing knowledge, thoughts and theories in relation to the construction statutory adjudication under the adjudication act of various jurisdiction. This research will review those regimes and their provisions on the subject of the challenges to the adjudicator's decision.

This research will also review the relevant decisions of the courts where the courts have interpreted provisions in their legislations. These draw inevitably from the rich vein of case law which had already developed in the United Kingdom (UK) and New South Wales (NSW). There is always inherent danger in reading too much into the propositions suggested by these authorities, not least because they must be examined against the differences in the wording of the respective statutory provisions.⁵⁴ Nevertheless, it is considered that several of these decisions are particularly instructive in affording a factual context against which to understand how the adjudicator's decision is being challenged. It could be used as a useful guide and a valuable point of reference.

Sources of secondary data being utilised consist of the Act in precedent regimes i.e. United Kingdom and Singapore, Latham Report (a report by Sir Michael Latham introducing the idea of adjudication as a means of ADR), write up, reference books, journal articles, seminar papers, websites and any related published work. Whilst source of primary data is obtained from case law journals which are readily available through the Lexis-Nexis database⁵⁵, NADR adjudication.co.uk database⁵⁶, Case-law NSW (New South Wales) database⁵⁷, and BAILII (the British and Irish Legal Information Institute) database⁵⁸ via the Internet. These sources are useful and essential for the purposes of this research.

1.7 Organisation to Thesis

This research covers six (6) segments as follows:

⁵⁴ However, the wording of UK Housing Grants, Construction and Regeneration Act (HGCR Act) 1996 will be focus.

⁵⁵ URL: <<https://www.lexisnexis.com/ap/auth/>>

⁵⁶ URL: <<http://www.adjudication.co.uk/>>

⁵⁷ URL: <<http://lawlink.nsw.gov.au.>>

⁵⁸ URL: <<http://www.bailii.org>>

1.7.1 Chapter 1: Introduction

This segment introduces the foci of the research. The origin, scene setting and development of adjudication is discussed. The objective undertaken for this research is presented in Chapter 1. It also presents the scope and limitation; significance of study; as well as the methodology and the outline of this research.

1.7.2 Chapter 2: Nature of Adjudication

Chapter Two will examine the nature of adjudication. This is an introductory chapter which intends to provide an overview and a general understanding of adjudication that will be useful to enhance the understanding when reading the following chapters. First, there will be definition of adjudication. It is then followed by the principle and procedure adopted in adjudication. The types of dispute referable to adjudication are also discussed. The last section deals with the jurisdiction, powers and duties of an adjudicator.

1.7.3 Chapter 3: The Adjudicator's Decision and Enforcement

This chapter explains the adjudicator's decision; includes the decision-making process, the content and form of decision and the effect of decision. The customary remedies for dealing with the enforcement of a contract are available to deal with enforcement of adjudicator's decision and these are discussed in the second section of this chapter.

1.7.4 Chapter 4: The Nature of Challenges to the Adjudicator's Decision

The features demonstrated in this chapter vividly distinguish the court appeal procedure and an adjudicator review from the legal challenge against an adjudicator's decision. In considering challenges, the right conferred on legislation to

challenge and payment made to court as securities for the challenge are also explored. Following that, this chapter addresses the approach of the court to challenge. The taxonomy to the ground of challenge is next considered in the following section and references are made to various case-laws which provide a useful platform in examining the grounds of challenge in the following chapter.

1.7.5 Chapter 5: The Grounds of Challenge to the Adjudicator's Decision

This chapter is the crux of the research. Based on the taxonomy to the grounds of challenge as demonstrated in Chapter 4, the grounds of challenge to the adjudicator's decision that may arise are critically examined herein in order to achieve the primary objective of this study.

1.7.6 Chapter 6: Conclusion and Recommendations

This chapter consolidating the research results and findings infers conclusions from this study. It also contains the problems encountered during the research as well as the recommendations and suggestions for future researches.