

**CIPAA : To infinity and beyond?  
(Adjudication : Faster, cheaper & better? or a  
meaningless remedy?)**

by

Dr. Sivasangaran Nadarajah

# EXTRACTS FROM CIPAA

## **Explanatory Statement to the Act**

An *Act to facilitate regular and timely payment*, to provide a *mechanism for speedy dispute resolution through adjudication*, to provide *remedies for the recovery of payment* in the construction industry and to provide for connected and incidental matters.

### **2. Application**

This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

### **3. Non-application**

This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

### **4. Interpretation**

... **“payment”** means a payment for work done or services rendered under the express terms of a construction contract; ...

### **5. Payment Claim**

1. An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract. (not include other claims – misrepresentation, termination etc.)
2. The payment claim shall be in writing and shall include—
  - a. The amount claimed and due date for payment of the amount claimed;
  - b. Details to identify the cause of action including the provision in the construction contract to which the payment relates;
  - c. Description of the work or services to which the payment relates; and
  - d. A statement that it is made under this Act.

### **6. Payment Response**

1. A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.
2. A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.
3. A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.
4. A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

### **12. Adjudication and Decision**

1. The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, Tun Salleh Abbas CJ

“‘A cause of action’ is a statement of facts alleging that a plaintiff’s right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant ‘in an action ... must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant’s act.’”

### **25. Powers of the Adjudicator**

The adjudicator shall have the powers to—

- (a) Establish the procedures in ... proceedings including limiting submissions ...;
- ... (d) Draw on his own knowledge and expertise;
- ... (i) Inquisitorially take the initiative to ascertain the facts and the law ...; ...

# JURISDICTION : INTRODUCTION

What is jurisdiction?

**CIPAA** does not define the word “jurisdiction”. Nor does the Interpretation Act.

“**jurisdiction** *n.* 1. The power of a court to hear and decide a case or make a certain order. (For the limits of jurisdiction of individual courts, see entries for those courts.) 2. ...”

**The Concise Dictionary of Law: Oxford Paperback reference**

“... "jurisdiction" merely means legal authority or power ...”

**Ketua Pengarah Kastam v Ho Kwan Seng [1977]**

It is the authority conferred to a third party to decide a dispute between the Parties.

This authority is obtained from: statute; agreement of the Parties or Law.

Which dictates the matter(s) to be resolved (i.e. the extent of what is to be resolved).

So, in an Adjudication conducted under **CIPAA**, “jurisdiction” describes the limit or extent of the dispute the Adjudicator is empowered to resolve.

This “jurisdiction” can be breached when the authority to resolve a dispute does not arise, as in two scenarios.

- (1) When the Adjudicator is not validly appointed (whether: the dispute was decided previously; the appointment did not meet all the requirements under **CIPAA** etc.).
  - ❖ In this situation the Adjudicator has no authority to resolve the dispute.
  - ❖ Thus the Adjudicator’s decision is invalid.
  - ❖ Courts will set aside or overturn such invalid decisions (as a whole) to an opposition raised against an application to enforce a decision.
- (2) When the Adjudicator does not resolve issues as tasked (by: (i) considering issues outside his ambit – i.e. the wrong questions; or (ii) not considering issues fixed in his ambit).
  - ❖ In this situation, the portion of the Adjudicator's decision which does not consider issues as set for the Adjudicator is invalid.
  - ❖ Then, to an opposition made against an application to enforce a decision which has such invalidity, results in two possibilities:
    - (a) If the decision can be severed, Courts might sever and set aside/overturn the invalid portion and enforce the remainder decision.
    - (b) If the decision cannot be severed, then the Courts might set aside/overturn the whole decision.

If “jurisdiction” is not breached and where the Adjudicator attempted to answer the issues put to him arising under a dispute, which answer is based only on the submissions received, what is trite and his finding of facts or law, then, regardless of any finding of fact, law or answer, being right or wrong (except for a wrong finding of jurisdiction), this decision is enforceable and is binding under **CIPAA** without a right to appeal against this decision.

Practically an Adjudicator may investigate his jurisdiction. But his decision in this investigation is not binding and irrelevant (see e.g. *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd* [2019], [27] & [28] – which noted that it is “... *useful only for his own investigative conclusion whether to continue to act in the adjudication proceedings upon jurisdictional challenge mounted by Giatreka. ...*”); perhaps except, unless otherwise agreed by the Parties, Kompetenz-Kompetenz does not apply in **CIPAA**. Accordingly a decision on the competence of his own jurisdiction can be challenged; and the position for no severance/severance of the decision applies as above.

# WHAT IS JURISDICTION FOR THE PURPOSES OF CIPAA?

**View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd**, Zulkefli bin Ahmad Makinuddin, PCA [2018] 2 MLJ 22 (FC) – [16]

*“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.”*

## **s.27 CIPAA. Jurisdiction of Adjudicator**

1. “Subject to subsection (2), the **adjudicator’s jurisdiction** in relation to any dispute is **limited to the matter referred to adjudication** by the parties **pursuant to sections 5 and 6**. →
2. The **parties** to adjudication may at any time by agreement in writing **extend the jurisdiction** of the adjudicator **to decide on any other matter not referred** to the adjudicator **pursuant to sections 5 and 6**.
3. Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed ...”

**Bina Puri v Hing Nyit Enterprise SB**. Ravinthran Paramaguru J [2014]

By s.27(1) CIPAA, ‘...**jurisdiction is limited to the dispute raised under section 5 and 6, i.e. the Payment Claim and Payment Response.**’

Here parties did not enlarge the jurisdiction under s.27(2) CIPAA.

Thus the ‘...Adjudicator cannot be faulted for holding that he had no jurisdiction to decide the counterclaim ... raised belatedly in the Adjudication Response’ In 17 & 23, p.8.

‘the Adjudication Decision is not tainted with “excess of jurisdiction”’ In 28, p.7.

**View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd**, Mary Lim J. [2015] MLJU 695 (HC) – [61] & [63]

*“27(2) which allows the parties to the adjudication to extend that jurisdiction by written agreement to matters beyond or outside ss 5 and 6. In the absence of such agreement, the Adjudicator’s jurisdiction does not extend to or include matters in the Adjudication Claim and the Adjudication Response or even Adjudication Reply found in ss 9, 10 and 11.” & “... the Adjudication Claim, the Adjudication Response and the Adjudication Reply are substantially formal manifestations of the dispute containing greater details of the claim, response or reply, as the case may be of that first Payment Claim and Payment Response.”*

**View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd**, Hamid Sultan Abu Backer JCA [2016] 6 MLJ 717 (CA) – [16]

*“... The dispute as borne out in the payment claim and response can only be referred to the adjudicator. ...”*

## **s.10 CIPAA. Adjudication Response**

1. “The respondent shall, ..., serve a written adjudication response which shall **answer the adjudication claim** together with any supporting document on the claimant.”

**View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd** (FC) – [41, 43, 45 & 56]

*“...untenable to reduce the Adjudication pleadings in ss.9-11 .... to mere “formal manifestations” of the dispute.” & “... the **Adjudication Response under s.10 ... requires the respondent to “answer the adjudication claim”**. ... in the nature of a legal response with ... **a real opportunity to defend ...**” & “... meaning the “nature and description of the dispute and the remedy” as claimed...” & “s.27(1) refers to the subject matter of the claim under s.5 (“cause of action”)*

# WHAT IS JURISDICTION FOR THE PURPOSES OF CIPAA?

**View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd**, Zulkefli bin Ahmad Makinuddin, PCA [2018] 2 MLJ 22 (FC) – [17 – 19 & 13]

“The learned judge (in Terminal Perintis Sdn. Bhd. v. Tan Ngee Hong Construction Sdn. Bhd. & Anor., Lee Swee Seng J. [2017] MLJU 242) also made note of the various types of jurisdictional complaints within CIPAA which may be categorized as core jurisdiction, competence jurisdiction and contingent jurisdiction. The **common feature in all of them is the presupposition that CIPAA applies** to determine if the adjudicator had kept within his jurisdiction.”

“... the jurisdictional complaint in the present case is that the CIPAA did not apply at all because of s 41, and not an ‘excess of jurisdiction’ under s 15, on the basis that CIPAA applied. **It is what is termed as an absolute lack of jurisdiction that may be taken up at any time.**”

“... appellant had rightly not invoked s 15 of the CIPAA ... in making its application to challenge jurisdiction because **it could not on the one hand complain that CIPAA did not apply to the case and yet on the other hand invoke a provision of CIPAA to seek relief.**” and “**Section 15 is predicated on the CIPAA applying** to the case and to an adjudication decision made under the CIPAA. ... to a complaint that the adjudicator had ‘acted in excess of his jurisdiction’ **presupposing the existence of the adjudicator’s jurisdiction under the CIPAA** in the first place.” (This line of argument of non-application of **CIPAA** was run in **Euroland & Development Sdn. Bhd. v Tack Yap Construction (M) Sdn. Bhd.**, Lee Swee Seng J. [2018])

Terminal Perintis Sdn. Bhd. v. Tan Ngee Hong Construction Sdn. Bhd. & Anor., Lee Swee Seng J. [2017] MLJU 242

## Core Jurisdiction

“... **question of whether the subject matter of the dispute is one which the Act has conferred on the Adjudicator**” (i.e. under a construction contract?)

“... 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, ... construction contract is carried out wholly outside Malaysia ...” or not a written contract (e.g. oral contract - **Euroland & Development Sdn. Bhd. v Tack Yap Construction (M) Sdn. Bhd.** [2018]) or “profit sharing” contract (which is not a “construction contract” as in **YTK Engineering Services SB v Towards Green SB** and other applications [2017])  
**“Court will interfere if the Adjudicator got it wrong. ... the Adjudicator has no jurisdiction to begin with.”**

## Competence Jurisdiction

“**If it is a question of the competence of the Adjudicator as in he has not been properly appointed**”

the purported Payment Claim: “... **is not on the face of it a Payment Claim ...**”; was not served; does not state it is “... **a claim made under CIPAA, ...**”;  
“...**if there is non-compliance with a basic and essential requirement of CIPAA with respect to a Payment Claim ..., then the Adjudication Proceedings and the Decision made would be a nullity.**”

In such cases “... **Court would be at liberty to set aside the Adjudication Decision on ground of excess of jurisdiction.**”

## Contingent Jurisdiction

“... **the dispute must be one falling within the matters raised in the Payment Claim and the Payment Response ...**” and a decision outside such matters **may be set aside by the Courts for having been made in excess of jurisdiction.** (And must have “... **already accrued when the Payment Response was served.**” - **Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd.**, Lee Swee Seng J. [2018])

“**contingent jurisdiction**” is the jurisdiction found from fulfilling the “... **the contingent condition of having referred to the matter in the Payment Claim under section 5 and the Payment Response under section 6 CIPAA.**” (per s27(1)) or extended under s27(2)); and “**core jurisdiction**” arises from CIPAA. (**Zana Bina Sdn. Bhd. v Cosmic Master Development Sdn. Bhd.**, Lee Swee Seng J. 24 Oct. [2016] [20] & [25]). Whether there is a “dispute” relates to “**contingent jurisdiction**” (**PWC Corporation Sdn. Bhd. v IREKA Engineering & Construction Sdn. Bhd.**, Lee Swee Seng J., (No.4) [2018] [42])

“**Competence Jurisdiction**” or “**Contingent Jurisdiction**” - “... party aggrieved by the Decision may apply to set aside it under section 15(b) and/or (d) ...” or to “... oppose the enforcement of the Decision under section 28(1) of the CIPAA ...”. “**Core Jurisdiction**” – in addition s15 or s28 challenge, may seek “... under the inherent jurisdiction of the Court for a declaration ...” (see **Euroland & Development Sdn. Bhd. v Tack Yap Construction (M) Sdn. Bhd.**, Lee Swee Seng J. ) But “... where there is no jurisdiction to begin with ..., the Court may even allow a determination to be made first before the Adjudication ...” (**PWC Corporation Sdn. Bhd. v IREKA Engineering & Construction Sdn. Bhd.**, Lee Swee Seng J., (No.4) [42])

## **YB Engineering Sdn Bhd & Anor v Standard Sofa Industries Sdn Bhd (CA) [28] (Grounds – 19 Dec. 2018)**

“... We endorsed the following observations made by Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 197:

*“An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by the party in its pleadings and give effect to an entirely new case which the party had not made out on its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts.”.*”

## **Ketua Pengarah Kastam v Ho Kwan Seng (FC) [1977] 2 MLJ 152**

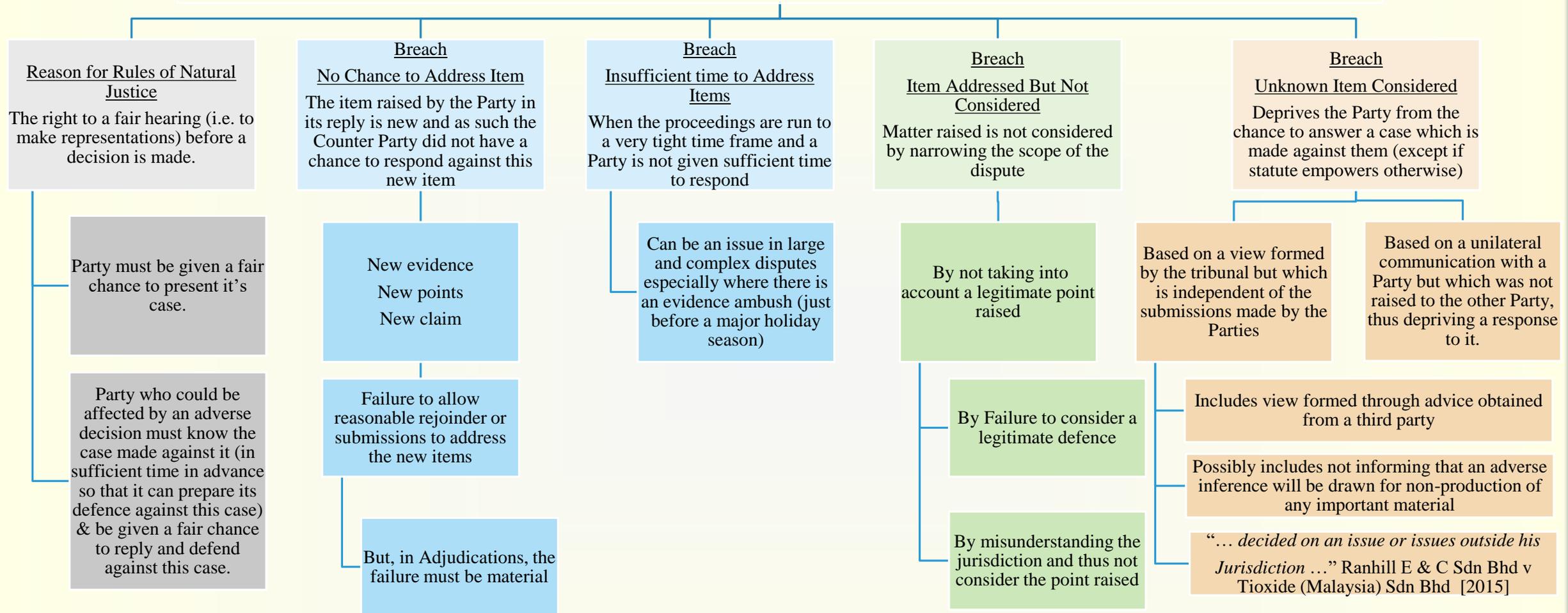
“... The essence of this and many other such cases is that *drastic statutory powers cannot be intended to be exercised unfairly*, and that *fairness demands at least the opportunity of a hearing*. ...”

“In my opinion, the *rule of natural justice that no man may be condemned unheard should apply to every case* where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "quasi-judicial", or "administrative" or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that "judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury" is too well-known to be side-stepped: see *Local Government Board v Arlidge* [1915] AC 120 138. In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount. ...”

“... I think that the senior officer of customs acted with complete fairness. He put it before the respondent in his letter of December 28, 1974 the information that led him to cancel the agency. ...”

# What is the rule of natural justice?

**Requires hearing both sides: i.e. Procedural Fairness at every step**



## 24. Duties and Obligations of the Adjudicator

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that— ...

(c) He shall comply with the principles of natural justice; and

(d) There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.

## 15. Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

... (b) There has been a denial of natural justice;

... (c) The adjudicator has not acted independently or impartially; ...

**View Esteem Sdn  
Bhd v Bina Puri  
Holdings (FC) [2017]**

- “No impediment for the Adjudicator to consider all the grounds of claim in an Adjudication Claim ... and all grounds of defence in an Adjudication Response ...” [59]
- “... the “duty and obligation of the adjudicator” ... in section 24(c) of CIPAA that “he shall comply with the principles of natural justice” would oblige him to consider all the defences raised ... in its adjudication response as a matter of fairness and impartiality.” [64]
- “... an Adjudicator who wrongly rules out considering a defence presented to him (i.e. in the Payment Response and Adjudication Response) would be in breach of natural justice...” [65]
- “... An Adjudicator is not excluded from considering all the defences raised ... in the Adjudication Response whether found in the first response under 6 of CIPAA or not...” [74]
- “...In the circumstances of this case, Adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.” [74]

**Wong Huat  
Construction Co. v  
Ireka Engineering &  
Construction Sdn Bhd  
[2017]**

- An order given in breach of the rules of natural justice is null and void. [44]
- Natural justice requires - parties should be heard; not determinations on all submissions. [97]

**An aggrieved Party  
may seek the  
following**

- Setting aside of the Adjudication Decision for “... denial of natural justice” under s.15(b)
- For a stay of the Adjudication Decision under s.16(1)(a)
- “The High Court may grant a stay of the Adjudication Decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any order as it thinks fit” per s.16(2)
- Challenge the application of the successful Party when it seeks to enforce the Adjudication Decision under s.28. But CIPAA is silent on such challenge; usual practice is that enforcement is not allowed by the successful setting aside (Yanjian Group Construction (M) Sdn. Bhd. v CMMC Sdn. Bhd. [2019]).

# BALFOUR BEATTY CONSTRUCTION LTD V. MAYOR & BURGESS LONDON

BOROUGH OF LAMBETH [2002] Adj LR 04/12 [29] – cited in

*View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 (CA) – [23]

ACFM Engineering & Construction Sdn. Bhd. v. Esstar Vision Sdn. Bhd. [2015] (HC) [52] & [53]

*Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining **whether a party has been treated fairly** or in determining whether the **adjudicator has acted impartially**, it is very necessary to bear in mind that the **point or issue** which is to be brought to the attention of the parties must be one of which **is either decisive or of considerable potential importance to the outcome** and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater however the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same.*

# CARILLION CONSTRUCTION LIMITED V DEVONPORT ROYAL DOCKYARD

LIMITED [2005] EWCA civ 1358 [85] – [87]– cited in

*View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd* [2016] 6 MLJ 717 (CA) – [23]

*ACFM Engineering & Construction Sdn. Bhd. v. Esstar Vision Sdn. Bhd.* [2015] (HC) [53]; [2016] (CA) [22]

*“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 be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which ... may, indeed aptly be described as simply scrabbling around to find some argument, however tenuous, to resist payment.*

*It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator’s reasons and identify points upon which to present a challenge under the labels of ‘excess of jurisdiction’ or ‘breach of natural justice’. It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognized that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. The need to have the ‘right’ answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. ...*

*In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator’s decision as correct (whether on the facts or in law), **he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator’s decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense as, we suspect, the costs incurred in the present case will demonstrate only too clearly.**”*

(emphasis added)

# What is breach of the rule of natural justice in CIPAA ?

Court only reviews the manner the adjudicator conducted the hearing and whether he committed an error of law (on procedural fairness – i.e. each step must be fair: not premising decision on his own assessment; not preventing tendering of evidence or making of submissions) *ACFM Engineering & Construction SB v. Esstar Vision SB & Another*. [2016]. Show how the “... Adjudicator breached the rules of natural justice had substantively affected its right to a fair hearing ...”: *Kerajaan Malaysia v Shimizu Corporation & 3 Ors* [2018]

Typical Grounds Raised  
*Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd* [2018]  
 paras[18 & 38 – 40]

*Binastra Ablebuild v JPS Holdings* [2017] [74] to [77]

“... when he failed to consider the Plaintiff’s counterclaim, deduction and/or set off ...”  
 (i.e. Party’s concerns)

“... when he considered issues not raised by the parties”  
 (i.e. non-issues)

“without giving parties an opportunity to comment ...”  
 (i.e. for input)

“... notwithstanding that these matters were NOT the legal basis which had been argued or put forward by either side.”

*an affected person has the right to prior notice*

If legitimate defences are overlooked when an erroneously restrictive view is taken of one’s jurisdiction. Adjudicator’s failure to address the question must be deliberate though. *Pilon Ltd v Breyer Group PLC* adopted in *PCP Construction Sdn. Bhd. v Leap Modulation Sdn. Bhd. (No.1)* [2017]

Not deciding due to wrong opinion that he lacks jurisdiction: *Syarikat Bina Darul Aman Berhad & Pembinaan Kerry Sdn. Bhd. v Government of Malaysia* [2017]. If a defence in the Adjudication Response is not considered: ***View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd*** [2018]

If defences are not considered though they are not explicitly framed: *PCP Construction Sdn. Bhd. v Leap Modulation Sdn. Bhd. (No.1)* [2017] *Leap Modulation Sdn. Bhd. v PCP Construction Sdn. Bhd.* [2018] *TYL Land & Development Sdn. Bhd. v Sis Integrated Sdn. Bhd.* [2018]

“... by an absence of any reasons given ...”: *Thermal Energy Construction Limited v AE & E Lentjes UK Limited* cited in *SQA Builders Sdn. Bhd. v Luxor Holdings Sdn. Bhd.* [2018]

“... did not have any opportunity to make submissions ... on his rejection or proposed rejection ...” challengeable if issue wasn’t properly raised: but he needn’t consult parties on his thinking unless it departs from evidence (which he is entitled to interpret) *SQA Builders v Luxor YRM* [2017]

of his own volition use ... (powers) to make good fundamental deficiencies in the material presented ... without first giving the other party an proper opportunity of dealing both with that intention and with the results: *Rimbunan Raya Sdn. Bhd v Wong Bros Building Construction Sdn. Bhd* Failure to inform of any unilateral conversation. *WRP Asia Pacific Sdn. Bhd. v NS Bluescope Lysaght Malaysia Sdn. Bhd.* [2015]

*an affected person has the opportunity to make representations before a decision is made*

Breach occurs

No breach

*affected person has the right to an unbiased tribunal*

An inadvertent failure to consider an odd issue or a Party “...brought about the adjudicator’s error by a misguided attempt to seek a tactical advantage.” *Pilon Ltd v Breyer Group PLC* adopted in *PCP Construction Sdn. Bhd. v Leap Modulation Sdn. Bhd. (No.1)* [2017]

If the correct law (s.27 - CIPAA) was employed to direct himself. *Bina Puri v Hing Nyit Enterprise Sdn. Bhd.* [2014]  
 Except references to a legal authority not referred by the Parties: *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd* [2018]

If an adjudicator declines to consider evidence – which on his analysis of the law – is irrelevant: *Binastra Ablebuild v JPS Holdings* [2017]  
 If weightage subscribed to the evidence does not tally with a Party’s expectation: *Martego Sdn. Bhd. v. Arkitek Meor & Chew Sdn. Bhd.*

Disagreement with a party on finding of facts (including weight) or law: *Gazzriz Sdn. Bhd. v Hasrat Gemilang Sdn. Bhd. & Anor* [2016]  
 Even if the Adjudicator failed to appreciate or misconstrued the evidence *Rimbunan Raya Sdn. Bhd v Wong Bros Building Construction Sdn. Bhd*

Nothing wrong in having referred to Maybank’s webpage to ascertain the BLR; but breach if the case was decided on a new basis (without giving parties an opportunity to comment)  
*Econpile (M) Sdn. Bhd. v. IRDK Ventures Sdn. Bhd. (No.2)*

Rejecting request to comment to submission in reply: *Ranchan Heavy Engineering Sdn. Bhd. v Pelabuhan Tanjung Pelepas Sdn. Bhd.* [2016]  
 In depriving raising of a jurisdictional challenge as the Adjudicator can proceed under s.27(3) : *Tidalmarine Engineering v Conlay Construction* [2017]

CANTILLON LTD V URVASCO LTD [2008] EWHC 282 (TCC) at para [57]\* ; \*\*

If Rules Of Natural Justice Is Breached

1) Establish Adjudicator failed to apply rules of natural justice

2) The breach must be material (judge will decide); i.e. failing to bring to the attention of the parties an important point (which is decisive to the outcome)

3) The breach occurs when a decision is made on a, factual or legal, basis not argued by either side or given a chance to adduce evidence.

4) If the point is argued and the other side does not come back on the point, then there is no breach

*“... A Respondent who does not avail itself of the opportunity to file the Payment Response and Adjudication Response cannot be heard to shout and scream that there had been a breach of natural justice ...” Gazziz case*

SEF CONSTRUCTION PTE LTD v SKOY CONNECTED PTE LTD [2010] 1 SLR 733 (HC)\*

Failure to discuss submissions (2 out of 4 jurisdictional issues) was not a breach of natural justice.

BROOKHOLLOW PTY LTD v R&R CONSULTANTS PTY LTD [2006] NSWSC 1\*

Courts must consider how the Adjudication was conducted. Omission may arise from error – not necessarily by lack of good faith.

1) Establish Adjudicator failed to determine a critical issue

2) This oversight is not fatal unless it arises from a failure to address the issues in good faith

3) If there were many issues, of which most were dealt with, it is possible that he did not believe the missed issue was determinative of the result.

4) Error in identifying or addressing issues, c/f from lacking good faith to do so, is not a ground to invalidate a decision.

Wong Huat Construction Co. v Ireka Engineering & Construction Sdn Bhd [2017]

- An order given in breach of the rules of natural justice is null and void. [para 44]

\*Wong Huat Construction Co. v Ireka Engineering & Construction Sdn Bhd [2017]; \*\* Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd [2018]

In relation to CIPAA

*“It ought to be recognised and accepted for what it is, without trying to draw parallels with the Rules of Court 2012 and over compartmentalising its provisions to fit into something which CIPAA was never intended for. In short, it should be allowed to be applied in the spirit for which it was created, and to do its work with all the stakeholders playing their respective roles.”*

Transmission Technology Sdn Bhd v PESB Engineering Sdn Bhd [2018] [37]

**Thank you.**

# Dr. S. Nadarajah

dr.s.nadarajah.snc@gmail.com

+603 7931 7777 / +6017 887 6309

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