

A Report on The Proposal for A Malaysian Construction Industry Payment and Adjudication Act

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December 2008



**Lembaga Pembangunan
Industri Pembinaan Malaysia**
CONSTRUCTION INDUSTRY DEVELOPMENT BOARD MALAYSIA



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The Construction Industry Development Board Malaysia (CIDB) is currently working together with the construction industry to develop the proposed Construction Industry Payment and Adjudication Act (CIPAA). This CIDB - Construction Industry collaboration started in 2003 following the recommendations of a construction industry working group on payment and related matters, WG10. WG10 is one of the ten working groups established by the Construction Industry Presidents' and CEOs' Roundtable Discussion to make recommendations on improving the construction industry. Similar initiatives were made in many other countries earlier. One of the outcomes around the world includes the famous 'Latham Report' in the UK – widely referred to by the construction industry worldwide. The Latham report triggered one of the most fundamental change in dispute resolution in the UK and many other jurisdictions through the recommendations for rapid adjudication.

One of the recommendations of WG10 is for the enactment of a Malaysian Construction Industry Payment and Adjudication Act (CIPAA). This recommendation has been translated into one of the recommendations in the Malaysian Construction Industry Master Plan (CIMP) 2006-2015. Now, over four years from the first initiative and after much efforts and follow-up deliberations, a preliminary draft bill on the proposed CIPAA is ready. The draft is currently being further refined.

A steering committee to oversee the development of the concepts for the CIPAA was established in 2005. The steering committee is now being widened to include even more government and private sector agencies. The widened steering committee can help in fine-tuning the proposals getting even wider consensus, with the primary aim of enhancing the overall performance and progress of the Malaysian construction industry – and as a consequence the national economy.

The publication of this report marks a major step in disseminating key up-to-date information on the proposed CIPAA. It outlines the objectives, the key milestones achieved, the benefits, salient features and the current status on the proposals.

THE IMPORTANCE OF PAYMENT IN THE CONSTRUCTION INDUSTRY

The total contribution by the construction industry to the nation's Gross Domestic Product is significant. The construction industry plays a very important role in generating wealth and improving the quality of life of the people through the provision of social and economic infrastructure like schools, hospital, houses, roads, airports, ports etc. It is linked to the whole spectrum of the economy and has a multiplier effect that enables other industries to prosper alongside.

Hence, it is vital to ensure that construction projects are effectively and efficiently implemented. Problems of cash flow due to issues on late, under and non-payment can severely affect the implementation of construction projects and thus the provision of the nation's infrastructure and built environment.

Payment in any industry is generally an issue of concern. In the construction industry, payment is an issue of *major* concern. This is because:

- (a) Unlike many other industries, construction projects are of long durations, involving multiple phases of construction works such as site works, substructure, superstructure, finishes, external works, utilities, mechanical and electrical services etc. Payment problems in a construction project can severely affect cash flow and as a consequence the timely performance and quality of the project.
- (b) The implementation of a construction project involves many parties from clients, developers, architects, engineers, quantity surveyors, contractors, sub-contractors, suppliers, skilled and unskilled workers etc. Problems in payment at the higher end of the hierarchy will lead to a serious knock-on cash flow problem down the chain of contracts.
- (c) Terms of payment are usually based on credit rather than payment upon delivery which means contractors need a bigger capital outlay to undertake construction works before progress payment is made. Likewise, it is also common practice that architects and other construction professionals render their services before progress payment is made. Once projects are completed, the infrastructure becomes a fixture to the ground disabling any party to recover non-payment by removing any part of the completed infrastructure. Parties in the construction industry have no other effective remedy to recover non-payment.

Cash flow is critical to the construction industry. Even Lord Denning famously said that cash flow is the life-blood of the construction industry. The ease of cash flow is an essential element in delivering a successful project. One of the key rationales for proposing the CIPAA is to facilitate cash flow.

On 28 August 2007, the Malaysian Construction Industry Master Plan (CIMP) was approved by the Cabinet Committee for Investment and Infrastructure, which was chaired by the Deputy Prime Minister of Malaysia. The CIMP outlines the 10-year strategic roadmap for the Malaysian Construction Industry to develop into a world-class, innovative and knowledgeable global solution provider. Outlined within the CIMP are the vision, mission, 8 critical success factors, 7 strategic thrusts and 21 strategic recommendations that will guide the development of the Malaysian construction industry through to 2015.

The CIMP proposed the enactment of an Act to address issues on non-payment, late payment, under payment and other related issues such as inefficiency in dispute resolution within the construction industry. The CIMP mentions that the resolution of disputes in the construction industry needs to be speedy and economical. One cannot have a world-class construction industry if an even mundane thing like payment is not being honoured in a timely manner or at all.

The proposed CIPAA will help in Strategic Thrust 2 of the CIMP, that is, to strengthen the construction industry image.

KEY MILESTONES LEADING TO THE PROPOSED CIPAA

In developing the proposed CIPAA, several key milestones were achieved over a span of more than 4 years involving key construction industry stakeholders.

President's and CEO's Roundtable Discussion

24 June 2003 and 15 June 2004, Legend Hotel Kuala Lumpur

At a roundtable discussion, in 2003, **payment** was identified as one of ten priority areas in the Malaysian construction industry. The discussion chaired by the Minister of Works involved leaders of major construction and development companies, professional institutions, trade organization, associations, government departments, and prominent individuals. Ten construction industry working groups were formed. The Working Group on Payment known as WG10 was led by the Institution of Surveyors Malaysia. The recommendation by WG10 to create a Malaysian 'Construction Industry Payment and Adjudication Act' was agreed in principle at the roundtable discussion which reconvened in June 2004. This provided WG10 with the impetus to move towards evolving the vision for an industry led enactment to resolve issues on payment and related matters. WG 10's 2015 vision is to get **everyone in the construction industry to pay all appropriate amounts due in a timely manner.**

National Forum on Payment

10 August 2004, Grand Seasons Hotel

The first major forum on payment was the National Forum on Payment, which was held in 2004. 300 participants attended the forum which deliberated the proposed enactment and endorsed recommendations on three matters namely on how to avoid payment problems, on how to establish an efficient method to resolve payment problems and on the preparation of proposals for long-term solutions such as adjudication.

International Forum on Construction Industry Payment and Adjudication Act

13-14 September 2005, Kuala Lumpur Convention Centre

The second major forum was the International Forum organised in September 2005, which brought together prominent speakers from the UK, Australia, New Zealand, and Singapore to share their experiences on the implementation of statutory provisions on payment in their respective construction industries. During this forum the Minister of Works, YB Dato' Seri S. Samy Vellu gave his stamp of approval for the establishment of such an Act for Malaysia. This was followed by the formation of a Steering Committee comprising representatives from MBAM, ACEM, TEEAM, TNB, IEM, ISM and Professional Consultants from legal, engineering and quantity surveying practices. The Steering Committee was tasked to identify key principles, concepts and framework for the proposed enactment on payment and adjudication for Malaysia.

KEY MILESTONES LEADING TO THE PROPOSED CIPAA

Consultation Forum with Industry

22 February 2006, Putra World Trade Centre

The third major forum was the Consultation Forum attended by about 400 representatives from the industry. The forum aimed to seek views and response on initial proposals on the provisions for regular and timely payment, introduction of adjudication as a speedy dispute resolution process, remedies for recovering payment, training requirement for adjudicators and other principles, concepts and framework for the proposed enactment on payment and adjudication. The forum **overwhelmingly** agreed on the enactment of a proposed payment and adjudication act with some refinement proposals and recommendations on the initial proposal.

Roundtable Consultative Forum with Captains of Industry

04 April 2006, Kuala Lumpur Convention Centre

The fourth major forum focused on soliciting feedback on the proposed enactment from heads and captains of industry from both the private and government institutions and agencies. It was attended by officials from Bank Negara, Local Government, Universities, various Ministries, Attorney General's Department, Bar Council, State Government Agencies, Professional Associations, Professional Statutory Boards, Trade Associations, Developers, Contractors, Contractor's Associations, Consultants, REHDA, Association of Banks and Arbitrators institute. This forum continued to give overwhelming support for the proposed enactment.

Special Meeting with the Secretary General of Ministry of Works

25 May 2007, Ministry of Works

This meeting served as the first formal meeting chaired by the Secretary General of the Ministry of Works, which aimed at gathering further views and comments from the government and private sector on the proposed enactment. Following this meeting, REHDA and the Bar Council submitted a formal memorandum to the Ministry of Works. CIDB had responded, in writing, to both REHDA and the Bar Council through the Ministry of Works to provide clarification on every issue raised in the respective memorandums.

OBJECTIVES OF THE PROPOSED CIPAA

The main objectives of the proposed CIPAA are:

- a) To facilitate regular and timely payments between parties to a construction contract;
- b) To provide a speedy dispute resolution mechanism; and
- c) To provide security and remedies for the recovery of payment

UNDERSTANDING THE PROPOSED CIPAA – 4 KEY FEATURES

The proposed CIPAA has 4 key features:

1st Key Feature - Outlawing the Practice of Pay-When-Paid and Conditional Payment from Construction Contracts

An increasingly prevalent practice in Malaysia is the inclusion of “pay-when-paid” and other types of “conditional payment” terms for payment in construction contracts between the contracting parties. It is time that the construction industry rids itself of this unhealthy practice as it can lead to abuse. But it is acknowledged that this starts to impinge a little on the concept of freedom to contract. All the other 8 similar legislations in the UK, New Zealand, Australia, and Singapore have seen fit to outlaw this practice.

With a *pay-when-paid* provision in a construction contract between say a main contractor and his subcontractor, the main contractor will only pay the subcontractor after the client has paid the main contractor.

An example of *conditional payment* in a construction contract between a developer and a main contractor could provide that the developer will only pay the main contractor when a designated number of houses or other properties have been sold.

All these mean that the contracting party at the receiving end (the party doing the work and who is to be paid) and who has no privity of contract with or choice of the party up the chain of contract could be abused.

The proposed CIPAA aims to prohibit the practice of pay-when-paid and conditional payment contractual provisions in all construction contracts. All work done and all services rendered must be paid upon the services being rendered. If there is default up the chain of contracts the parties must resolve it themselves and not pass that risk to third parties.

2nd Key Feature - Streamlining Payment Procedures for Construction Works

The proposed CIPAA aims to prevent uncertainties in payment among all parties to a construction contract.

a) The CIPAA proposes to provide for statutorily implied terms of progress payment **but only in the absence of express terms**. In other words, parties can still agree a wide range of payment terms but if the contract does not provide for it, then the default mechanism kicks in. Planned (even onerous) terms can be priced for by the party undertaking construction work. But unplanned deviations eg delayed payment beyond that stipulated in the contract terms causes disruption to construction projects.

UNDERSTANDING THE PROPOSED CIPAA – 4 KEY FEATURES

b) The CIPAA will provide a default mechanism that establishes a payment process and timeframes for contracts that do not stipulate appropriate payment terms.

c) The CIPAA will also provide procedures on responses following payment claims when there is payment default with or without express contractual terms on payment.

3rd Key Feature - Establishing a Cheaper, Speedier, Contemporaneous, Binding, Statutorily-Enabled Adjudication Mechanism

The proposed CIPAA aims to introduce a new mechanism for settling construction disputes through an interim but binding dispute resolution process called adjudication. Once disputes, which in most instances revolve around issues relating to payment, are swiftly, efficiently and effectively dealt with through adjudication, parties can focus in completing the construction works. Meanwhile no party needs to 'suffer in silence' till completion and to only then resolve their disputes in protracted arbitration or litigation – ***if they are still surviving***. The experience of many other jurisdictions has been that many (including many major companies) did not survive, resulting in Bills being rushed to Parliament – ***after*** bitter experiences. The proposal for the Malaysian CIPAA heeds the wise call to learn from others' mistakes and benefit from their experiences – both positive and negative experiences.

Under the proposed CIPAA, the proposed remedies, which will be covered under the 4th key feature, will only kick-in after a decision is made by an independent adjudicator through a fast and cheap dispute resolution mechanism called adjudication. The proposal provides that the adjudicator must decide on a dispute within 30 days.

The emphasis of adjudication is on speed but not finality. The adjudication process complements arbitration and court litigation processes which are both final. Though final, the award or judgment of disputes through arbitration and court litigation takes too long and is therefore not effective for construction disputes. The adjudication process is binding, unless and until it is differently and finally determined by arbitration or the court.

Adjudication is not a condition precedent to arbitration or court litigation and in that sense not mandatory. Adjudication is a statutorily enabled, cheaper, speedier, time-bound, contemporaneous, binding dispute resolution mechanism which gives a party a statutory right to adjudication. If one party decides to exercise its rights to adjudication, then and only then, the other party must respond and will be drawn into adjudication. If parties decide not to opt to exercise their right to adjudication, they may opt for arbitration (if they have an arbitration agreement) or litigation or any other dispute resolution method, such as mediation, if they so wish – without referring the dispute to adjudication at all.

UNDERSTANDING THE PROPOSED CIPAA – 4 KEY FEATURES

The proposal includes for the entire adjudication mechanism to be administered and managed by an Adjudication Control Authority (ACA) that will be established. The ACA will also be responsible to register, deregister, certify, and accredit adjudicators to ensure the delivery of quality decisions by adjudicators.

Parties to a construction contract and the contract administrators need not fear adjudication if they have been properly and diligently fulfilling their roles and discharging their responsibilities under the terms of the construction contract. The introduction of adjudication helps to create an independent right to enforce the rights of both parties to a construction contract giving 'justice for everyone', including those who have been 'suffering in silence'.

4th Key Feature - Providing Security and Remedies for the Recovery of Payment Following a Decision by the Adjudicator

This key feature of the proposed CIPAA will provide security and remedial provisions to recover payment not received, which are presently unavailable in the construction industry. In other words, the successful aggrieved party should be able to recover its past debts and damages as well as avoid incurring further future exposure.

Under the security provisions, a payment bond mechanism is being proposed at the apex level within the hierarchy of the construction project undertaken. This means that clients/developers/employers will be required to issue payment bond to main contractors to guarantee payment. The payment bond scheme will apply to only private sector projects. However, exemption may be given to qualified parties who fulfill appropriate exemption criteria. The recovery of payment is achieved through swift enforcement of the adjudicator's decision or to call on the payment bond where there is one provided at the apex payer level being the main source of funds. Additionally, the often-abused calls on **performance** bonds provided by the payee to the payer will also be curtailed until a dispute resolution process through adjudication had been undertaken.

Under the remedial provisions, 5 types of provisions are proposed:

- a) interest on late payment
- b) suspension of works
- c) direct payment from principal
- d) judgment debt recovery
- e) deregistration of business licenses

These provisions are effective measures to deter payment irregularities in the multi-layer contractual arrangements that exist between construction participants in a construction project. They also serve as a basis for taking action against irresponsible contracting parties.

BENEFITS OF THE PROPOSED CIPAA

The construction industry as a whole and the nation will benefit when there is efficient implementation of projects achieved through ease of cash flow and from a speedier and much more efficient dispute resolution mechanism.

Introduces Speedy, Time-bound, Cheaper, Binding & Contemporaneous Dispute Resolution

The main rationale behind the initiative to establish the CIPAA is to enable a speedy, time-bound, contemporaneous, cheap and binding dispute resolution mechanism by an independent, accredited adjudicator registered with an Adjudication Control Authority (ACA).

Provides Legal Remedy to Non-Payment

The legal remedy to non-payment in the form of provisions under the CIPAA, balances the rights of payee and payer.

Improves the Delivery System

Quicker and cheaper resolution of disputes through adjudication improves the delivery system and cuts down on wastage through inefficient dispute resolution methods – all of which are peripheral to the core business of construction.

Sustains Competitiveness of Parties

The easing of cash flow will help sustain competitiveness of all parties in implementing construction projects.

Enhances Industry Image & Professionalism and Enhances Human Capital & Integrity

It encourages professionalism and promotes integrity amongst contractors, construction professionals, and client organisations. This will also enhance the value of human capital in the construction industry.

Enhances Construction Quality

The ease of cash flow through timely payment will have a positive impact on the delivery of quality construction works when all parties can focus on providing their services effectively and efficiently.

SIMILAR ENACTMENTS IN OTHER COUNTRIES

Several countries including the UK, most states in Australia, New Zealand, and Singapore have now enacted Acts of Parliament to overcome problems on payment through the introduction of payment provisions and a speedy dispute resolution mechanism known as adjudication. We now have access to the experience of 8 jurisdictions, the first of which started over 9 years ago and over 15,000 adjudication cases since.

Some of these countries learnt the consequences of payment default the hard way – slow and sudden insolvencies and minor and major insolvencies. Some of these countries scrambled to get statutory provisions after a few major disasters. Malaysia too must not under-estimate the potential disastrous consequences of persistent payment default across the industry. At some levels the problems are serious. We cannot also deny that existing contractual arrangements and existing legislation has not prevented the problems.

When assessing the viability of the proposals for the CIPAA, CIDB together with key stakeholders in industry, studied and give due consideration to practices in these countries including studying the scheme for payment and resolution through adjudication which was claimed to be contemporaneous, speedy, time-bound, and an economical dispute resolution method. Both adverse and positive comments were looked at. Much of the feedback from lawyers including Queen's Counsel, construction professionals, and judges has been significantly positive. Some of the notable comments on reference to adjudication include it being referred to as a **'runaway success'** by a Queens Counsel and the suggestion by one of the most famous Technology and Construction Court judges (who specialises in construction cases) who said the frequent opting for adjudication as or as the basis for even the final settlement of their disputes was **'a perfectly sensible and commercial approach.'**

Malaysia is in a strong position to establish a more comprehensive and robust act having learnt from both the content and context of over 15,000 adjudications worldwide emanating from the following acts, the first of which came into force over 9 years ago and the latest over 2 1/2 years ago:

- a) Housing Grants, Construction and Regeneration Act 1996 (UK Act)
- b) Building and Construction Industry Security of Payment Act 1999 amended in 2002 (New South Wales, Australia)
- c) Building and Construction Industry Security of Payment Act 2002 (Victoria, Australia)
- d) The Construction Contracts Act 2002 (New Zealand)
- e) Building and Construction Industry Payments Act 2004 (Queensland, Australia)
- f) Construction Contracts Act 2004 (Western Australia)
- g) Construction Contracts (Security of Payment) Act 2004 (Northern Territory, Australia)
- h) Building and Construction Industry Security of Payment Act 2004 (Singapore)

STEERING COMMITTEE

The Steering Committee is being widened. With the added invitations sent recently the following organizations would be part of the Steering Committee:

1. Ministry of Finance Malaysia
2. Ministry of Works Malaysia
3. Attorney General's Department
4. Public Works Department
5. Board of Engineers Malaysia
6. Board of Architects Malaysia
7. Board of Quantity Surveyors Malaysia
8. Petronas Berhad
9. Telekom Malaysia Berhad
10. Tenaga Nasional Berhad
11. Pertubuhan Arkitek Malaysia (PAM)
12. The Institution of Surveyors, Malaysia (ISM)
13. The Institution of Engineers Malaysia (IEM)
14. Association of Consulting Engineers Malaysia (ACEM)
15. Real Estate And Housing Developers' Association Malaysia (REHDA)
16. Master Builders Association of Malaysia (MBAM)
17. Persatuan Kontraktor Melayu Malaysia (PKMM)
18. Persatuan Kontraktor India Malaysia (PKIM)
19. Malaysia Lift & Escalator Association (MALEA)
20. Malaysian Air-Conditioning & Refrigeration Association (MACRA)
21. Malaysian Fire Protection Association (MFPA)

CURRENT DEVELOPMENTS ON THE PROPOSED CIPAA

- a) The draft of the Cabinet Paper has been forwarded by CIDB to the Ministry of Works in September 2006 for submission to the cabinet and approval to develop the proposed CIPAA.
- b) The first preliminary draft of the proposed CIPAA was endorsed by the Steering Committee in March 2007. The draft will be further refined once the cabinet gives approval in principle to enact the proposed CIPAA.
- c) Invitations to widen the membership of the Steering Committee have been issued in October 2007. That brings the membership of the Steering Committee to 21 government and private agencies and institutions.
- d) The Ministry of Works will continue to gather feedback from relevant government and private institutions to support the submission of the cabinet paper for approval particularly in addressing the concerns raised by the Bar Council.
- e) CIDB has documented the earlier overwhelming industry support for the enactment of the proposed CIPAA in writing, from all the ***PRIMARY*** construction industry stakeholders meaning those who are directly involved in the construction industry.
- f) The Steering Committee meetings will reconvene to finalise the draft of the proposed CIPAA once the cabinet approves the enactment of the proposed CIPAA

FREQUENTLY ASKED QUESTIONS

QUESTION 1

Aren't other existing Acts in Malaysia adequate to address any payment problems that might exist in the construction industry?

ANSWER 1

Two acts that come immediately to mind are the Malaysian Contracts Act 1950 and the Arbitration Act 2005. Both these acts do not either by themselves or in practice specifically provide any of the three basic objectives of a typical construction industry payment and adjudication act namely:

- (i) a means of ensuring regular and timely provisions on payment for construction contracts,
- (ii) a mechanism for a quick, time-bound, contemporaneous, economical, and binding dispute resolution mechanism, or
- (iii) provisions for security and remedies for the recovery of payment for construction contracts

QUESTION 2

Who will be affected by the Act and who will read and use the Act?

ANSWER 2

The proposed CIPAA will apply to all parties involved in construction works, construction consultancy services and construction supplies in both government and private sector projects.

The primary users of the proposed CIPAA would include client organizations like the government and developers, contractors, sub-contractors, suppliers and construction professionals.

QUESTION 3

Is the proposed CIPAA intended to benefit only contractors?

ANSWER 3

Given the balanced provisions in the proposed CIPAA, all players in the construction industry stand to benefit from the proposed CIPAA. Most importantly it can lead to better practices, greater integrity, and greater efficiency.

Construction sector is unique in that services are usually rendered first before payment is fully made. Therefore, the act will provide these parties payment assurance for work done, services rendered or supplies made. When payment related issues are resolved efficiently, it would enable projects to be implemented more effectively. As such, the construction industry as a whole and the nation will benefit.

In this respect, the proposed CIPAA is similar to the UK and New Zealand models and is more balanced rather than the New South Wales and Singaporean models where only the payee (the party undertaking the work) can initiate an adjudication. Even the newer models in Australia such as Western Australia and Northern Territory have, in this respect, followed the more balanced approach.

QUESTION 4

Isn't the effort by the Government in making payments to contractors within 7 days, an indication of the Government's awareness towards the problems in payment and a solution?

ANSWER 4

Yes, it is an indication of the existence of the problem. Awareness alone is insufficient to resolve payment and payment-related issues. The government's initiative is intended to enhance the government's delivery process and it is commendable. But there remain the real payment related issues between main contractors and their subcontractors and sub-subcontractors and suppliers and the **entire value chain** in the construction project implementation particularly in the **private sector**. And based on strong feedback and support for the CIPAA from construction professionals, serious payment issues are rampant among construction professionals.

QUESTION 5

What could the consequences of the proposed Act be on client organisations?

ANSWER 5

No major implication on developers or other client organizations that have been discharging their obligations in a timely manner eg paying their consultants and contractors on time as provided in their contracts. With the proposed CIPAA, those who intend to default and do default may face the consequences of their breaches quicker than what industry has been accustomed to in the past.

In short, valid contractual rights can be enforced more easily and non-performers may be faced with the consequences of their actions or inactions more rapidly leading to the possibility of (healthily) weeding these non-performers out from the industry. Thus leading to a more effective construction industry, a more efficient one and better justice for all. At this stage there may still remain a few areas of concern to some. The provision of a mandatory scheme of payment bond, for example, may require some finer discussions with client organization representatives, contractor organizations, professional bodies, and banks.

QUESTION 6

What could the consequences of the proposed Act be on contractors?

FREQUENTLY ASKED QUESTIONS

ANSWER 6

No major implication on contractors who have been performing and discharging their obligations in a timely manner e.g. progressing with their contractual obligations up and down the chain of contracts including payment to subcontractors and suppliers. If they have been wronged in the past, they now will have a quick remedy from those who have 'wronged' them e.g. bad paymasters. The payment defaulters could face the consequences of their actions or inactions more quickly through adjudication. The Master Builders Association Malaysia (MBAM) and several other contractor and specialist subcontractor organizations have been **strongly supportive** of the initiative for CIPAA despite potential implications on some of their members – whether main contractors or subcontractors both large and smaller organisations. The potential negative implications would of course be on non-performers, which the contractor organizations would be happy not to have. Indeed there have been repeated requests from these trade organizations and construction professional bodies for the proposed CIPAA to be speeded up. Many of their members have lamented – we hope the Act comes out before it is 'too late'.

QUESTION 7

What could the consequences of the proposed Act be on construction consultants?

ANSWER 7

No major effect on construction consultants who have been discharging their duties professionally. As the proposal is for all disputes capable of being referred to adjudication, this will serve as a 'wake-up call' on any consultants who have been 'slacking' eg on those who do not assess and decide on claims for extensions of time in a timely manner, or who do not value and issue payment certificates including proper assessments of variations and loss and expense claims in a timely manner as provided in the contract, or those who delay final accounts unreasonably beyond the periods stipulated in the construction contracts, and those who may not discharge their professional appointments professionally eg their obligations under their terms of engagement with their clients. In short, in the long run, professional standards are more likely to be maintained or enhanced than breached. Seven out of the eight jurisdictions that have introduced such an Act have included construction professionals' consultancy contracts as part of the scheme. Even in New Zealand, the only country that has excluded construction professionals, there have now been suggestions for including construction professionals.

QUESTION 8

Is the intention of this Act to cover all disputes (such as those under the UK and New Zealand models) and not just restricted to disputes related to payment issues as legislated in the Australian states and Singapore?

ANSWER 8

Yes, in Malaysia, it is the intention that the proposed CIPAA will cover all disputes. The proposed CIPAA will emulate adjudication as legislated in the UK and New Zealand, which covers all disputes and not restricted to disputes on issues of payment only. Many disputes are invariably linked. Covering all issues will avoid many of the (peripheral) arguments put forward as seen in the cases that have surfaced in courts in other jurisdictions. Arguing in court on peripheral issues such as whether a dispute is a 'payment-only' or 'payment-related' or 'non-payment' issue will not benefit the construction industry – although it could 'benefit' the dispute resolution industry. The decision to include all disputes was endorsed during the consultation forum with industry and roundtable consultative forum with captains of industry held in February and April 2006.

There is also much confusion over the application of statutory adjudication to payment disputes only. In the legislation of the states of Australia and Singapore, the meaning is that the right to commence adjudication only accrues if the claimant is unpaid. Nevertheless the respondent is not precluded from raising any conceivable defence. In other words, the respondent is still at liberty to raise issues such as delay, defects, etc to justify non payment. The proposed CIPAA however gives the claimant the right to commence adjudication once any dispute arises, such as a dispute on extension of time, even before the claimant is unpaid (but which would be the natural consequence to the claimant in due course if the dispute on extension of time is not satisfactorily resolved). Hence the proposed CIPAA not being confined to only payment disputes is more pro-active.

QUESTION 9

"Why must adjudication be compulsory? Parties must have a choice of the dispute resolution process that they feel most comfortable with. The arbitration process has been around for years and it is still consensual. It has proved successful and nobody has suggested that it becomes mandatory. There is no rationale for this dispute resolution process to be mandatory." What would the response to these concerns be?

ANSWER 9

Adjudication is not a condition precedent to arbitration or court litigation and in that sense not mandatory. Adjudication is a statutorily enabled, cheaper, speedier, time-bound, contemporaneous, binding dispute resolution mechanism which gives a party a statutory right to adjudication. The proposed CIPAA provides an aggrieved party a right to refer a dispute to adjudication and this kicks off the adjudication process. If one party decides to exercise its rights to adjudication, then and only then, the other party must respond and will be drawn into adjudication. If parties decide not to opt to exercise their right to adjudication, they may opt for arbitration (if they have an arbitration agreement) or litigation or any other dispute resolution method, if they so wish. The proposed CIPAA does not prohibit parties from referring disputes to

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arbitration or court proceedings either **instead of** adjudication or **after** an adjudication. In a case where an adjudicator is adjudicating a dispute and the same dispute is referred to court or arbitration, the adjudication proceedings will be terminated if the dispute is settled by agreement between the parties in writing or decided in an arbitration or in the court. As stated earlier, a key intent for introducing adjudication is speed in dispensing all disputes so that parties can focus on progressing and completing the construction works.

The arbitration process is intended to dispense 'fine' justice and practice in the construction industries around the world, including Malaysia, has seen it take months and quite typically years. Construction contracts too recognize this and all the standard forms of construction contracts in Malaysia provide for arbitration on most disputes to be referred only **after the project is completed** or alleged to be completed or terminated. Many parties to a contract cannot financially sustain such delayed justice.

Because arbitration is usually protracted, many have lamented in Malaysia and many other countries, that it could sometimes be more expensive than even litigation. There have also been comments suggesting arbitration is more like 'litigation in private' because many arbitrations tend to follow many of the procedures used in court.

QUESTION 10

What are the remedies provided in the CIPAA in the event of payment disputes?

ANSWER 10

The CIPAA envisages that payment disputes, in particular on non certification and/ or payment of work done, material or goods supplied and services rendered be brought to adjudication for swift resolution. The adjudicator is empowered under the CIPAA to award interest or financing costs on the payment claim in the making of his adjudication decision on payment. If the adjudicated payment is then unpaid, the winning party has several optional remedies available to him.

Firstly, he may apply to the court to register and convert the adjudication decision as a court judgment. Upon registration, the adjudication decision can be enforced as a court judgment which include via writ of seizure and sale, garnishment proceedings and so on. It also carries judgment interest as provided by the rules of court. **Secondly**, he may suspend or reduce the rate of execution of work unless and until the adjudicated payment is paid. This remedy relieves him from further financial exposure in carrying on with the work or services. **Thirdly**, if the unpaid winning party is a sub contractor, he may apply to the principal of the defaulting contractor to pay the adjudicated payment to him directly to avoid the suspension or slowing down of the work. This direct payment is however not mandatory but optional on the part of the principal. **Fourthly**, if there is a payment bond provided, the unpaid

party may demand upon the bond. These remedies provided in the CIPAA can be exercised concurrently and are without prejudice to the winning party's other rights and remedies such as to terminate the contract.

Besides the remedies provided in the CIPAA, it is also proposed that the unpaid party may complain to the CIDB or the Comptroller of Housing to de-register the defaulting party's registration under their respective statute as the case may be.

QUESTION 11

How would the introduction of adjudication affect the rights to other existing dispute resolution mechanisms like mediation, arbitration or litigation?

ANSWER 11

Adjudication under the proposed Act is an **additional right** to a dispute resolution method conferred statutorily. It is not meant to be a dispute resolution method that is a *condition precedent* to other dispute resolution methods. The parties may choose to go for adjudication or to some other dispute resolution method. But if one of the parties invokes the adjudication provision, the other is drawn in too. The intention of adjudication is to provide a dispute resolution mechanism that is speedy, time-bound, economical, rights based, contemporaneous, and binding, even if temporarily binding. It is often called 'temporarily binding' because the same dispute may subsequently be referred to arbitration. Thus all the dispute resolution methods can co-exist, and complement each other.

QUESTION 12

Would the suggestion to convert the features of the proposed CIPAA into arbitration in the future amendment to the Arbitration Act 2005, for example imposing strict time limits of say 100-day arbitration procedures to deliver arbitral awards, be worth considering?

ANSWER 12

The 100-day arbitration procedures have been known for a while, but hardly used in Malaysia especially in construction disputes, as it is unrealistic to expect that traditional fine justice can be properly administered in the time frame. Since an arbitration award, unlike an adjudication decision, is final and has to be not only legally correct but also dispense 'fine' justice, the imposition of strict time limits could create a 'less-than-refined-justice'. It is recognised that strict time limits may produce 'rough' but speedy justice. It is hence paramount that this 'rough' justice procedure must be correctable by the traditional 'fine' justice procedure either through arbitration or litigation, if required by the parties. Adjudication is therefore the compromise of both the need to have a swift procedure but yet binding, albeit only temporarily. There is therefore the essential need to maintain traditional arbitration to complement but not to substitute adjudication.

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The experience (based on statistics) of other established jurisdictions such as the UK does appear to indicate the parties seem to, in most cases, accept the adjudicator's decision as a final decision and do not proceed to open up the same dispute in arbitration or the courts. This means the parties are happy to have the possible 'slight' element of 'roughness' but overriding need for speed in resolving disputes. Alternatively it could mean the adjudicators' decisions are not as 'rough' as originally envisaged.

After all even the judiciary is highly supportive when one of the most famous Technology and Construction Court judges (who specialises in construction cases) suggested the frequent opting for adjudication as or as the basis for even the final settlement of their disputes was ***'a perfectly sensible and commercial approach.'***

That shows remarkable altruism and respects the parties' wishes more than the self-interests of those who are involved in protracted and therefore lucrative benefits in other long-drawn dispute resolution processes at the expense of the parties and industry in general.

QUESTION 13

Are the procedures put in place suitable for complex claims which could revolve around complex questions of fact and law and which require mature consideration? Given the short time period within which to handle a claim, is the possibility of unjust, incorrect and aberrant decisions real?

ANSWER 13

A high level of requirements in standards in accrediting and registering adjudicators will address this concern. The probability of this happening appears remote if the very high level of standard requirements proposed are accepted and put in place. The standards proposed include standards at entry for accreditation and registration as well as renewing registration. As such we should not take this exception as the basis in developing the new proposed CIPAA. In any case, in a complex dispute there is the provision for sensible parties to agree to enlarge the time for the adjudication decision to be made.

It should be noted that the experience of other jurisdictions appears to indicate that with experienced adjudicators, increasingly complex disputes are being resolved under adjudication – a reflection of the attractiveness of adjudication as an alternative dispute resolution method. It should also be remembered that the universal Pareto principle usually applies to construction disputes too. Usually 20% of the issues cover 80% of the claims. Additionally a concentrated focused effort by all parties over a short time leads to a high level of efficiency.

QUESTION 14

Can parties be free to incorporate an ad hoc mechanism to adjudicate upon disputes on a case-to-case basis especially in contracts where progressive cash flow would feature heavily? This would provide some temporary finality to any concerns of cash flow problems and even provide a mechanism for payment to be held in escrow pending final determination in the Courts or arbitration.

ANSWER 14

It is not necessary to incorporate an ad hoc mechanism as the proposed mechanism is clear, simple, quick and encourages speedier resolution of disputes. Adjudication has 'temporary finality' in that the same dispute can be opened up in arbitration (in construction contracts usually this would be after completion or termination) or court. Ad hoc contractual mechanism is not practicable because it is usually the case that the payer dictates the terms of the contract to the detriment of the payee. And holding money in escrow and releasing it months or years later after protracted arbitration or litigation when the project is over provides security but not the practical necessity of actual cash flowing in the construction industry.

QUESTION 15

Do we have suitably qualified adjudicators?

ANSWER 15

Eventually, yes. The proposals include recommendations for adjudicators to be accredited and registered, based on very high standards, which will be established by the Adjudication Control Authority as empowered by the proposed CIPAA. Qualified and experienced professionals from the legal, judicial, architectural, engineering, quantity surveying or possibly even other professions like accounting or economics will not be precluded as adjudicators as long as they **meet the high standards of requirements**. No party in dispute would want someone deciding their fate if the decision maker did not have relevant **qualifications, experience, and expertise**. The adjudicator may appoint independent experts to inquire and report on specific matters with the consent of the parties. It will be proposed that CIPAA be enforceable about six months after the Act is gazetted. This is to allow time for the establishment of the Adjudication Control Authority (ACA) and the training and registration of accredited adjudicators.

QUESTION 16

It has been suggested that lawyers would not be allowed to act as adjudicators or represent parties to disputes referred to adjudication. Is that right?

ANSWER 16

No. It was **never** intended that any one specific profession should be prevented

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or favoured to be involved in adjudication. Some jurisdictions such as the New South Wales does prevent legal representation, but it was never intended that the proposed Act in Malaysia follows the New South Wales model in this or many other aspects. And whilst Pertubuhan Akitek Malaysia, who regularly appoint arbitrators for construction disputes and have suggested that legal representation be disallowed, this suggestion has not been accepted by the steering committee.

QUESTION 17

Adjudicators' decisions, which may contain sensitive and private information, may be in danger of being circulated to trade competitors. Are all adjudication decisions required to be sent to the Adjudication Control Authority (ACA)? While there is a stipulation that the adjudication is confidential what guarantee of confidentiality is there if the decisions are sent to the ACA.

ANSWER 17

Adjudicators are required to send only the **sanitized version** of the adjudicator's decision to the ACA. This will not contain the details of the parties and the project details in order to maintain confidentiality of the dispute. The submission of the sanitized version is to enrich the database and knowledge bank of the ACA and all accredited adjudicators to serve as a record of lessons learnt from the various decisions made on disputes and to enhance quality. A mechanism will be established to ensure the controlled use and reference of the databank of decisions. Decisions on whether or not to circulate can be made later. The Northern Territory, Queensland and the Singaporean adjudicators' determinations are published for the whole world to see.

QUESTION 18

There have been suggestions that introducing adjudication would lead to a reduction in arbitrations and construction litigation and correspondingly work for construction lawyers and arbitrators. Is this true?

ANSWER 18

Experience in the other jurisdictions does show a (sometimes significant) drop in arbitrations and construction cases in court. But industries have adapted to such changes well. Lawyers are far from being out of work.

Arbitrators, when sitting as arbitrators, provide a service – usually practicing alongside their base profession. Experience in other jurisdictions shows that many arbitrators have undergone good training to change their mindset and skills to become good adjudicators – delivering competent decisions within the short and strict timeframes, and thus keeping costs down. And they have learnt to take on only cases that they can focus on and deliver their decisions within the strict timeframes stipulated in the Act. Additionally they have learnt well and are professional enough not to take up

cases that they know they cannot deliver within the timeframe, either because they have other commitments or because the disputes referred to are so complex as to be impossible to be delivered within the few days or weeks that the Act stipulates. They do also advise the parties that such disputes might be better suited to be referred to arbitration or get the parties to agree to a longer timeframe than the minimum statutory period before committing to accept an appointment. The longer timeframe is permitted under all the Acts – ***provided the parties agree.***

Altruism is a pre-requisite trait of a professional. The client's and society's interest must come before self or own professional interest. Altruism distinguishes a profession from a 'mere' occupation. Altruism should be taken as a given among all adjudicators, arbitrators, construction and non-construction professionals.

QUESTION 19

With the proposed Act, will payment-default no longer be an issue in the construction industry?

ANSWER 19

No one can guarantee that with the proposed Act, payment defaults or other defaults will no longer be an issue. But based on the experience of other countries which enacted similar statutes and based on the proposals made for Malaysia, one should be able to conclude that the proposed Act will go a long way to help achieve WG 10's 2015 vision of getting ***everyone in the construction industry paying all appropriate amounts due in a timely manner.*** And it can be taken as a given that construction disputes will be resolved much quicker and the cost of referring a dispute is going to be much cheaper. In 2015, if the Construction Industry's master plan vision of the Malaysian construction industry being 'world class' is to be achieved, the industry must not still be discussing routine or mundane issues like non or delayed payment – Prompt payment must be taken to be given in a 'world class' construction industry. And inefficiency and wastage particularly when much good money is spent in protracted disputes lasting months and years has no room for a world class effective and efficient construction industry.

There may however be a price to be paid albeit a worthwhile price. The scheme of payment bonds to obtain some security of payment proposed could lead to a slight increase in costs during the construction process. But the potential increase must be weighed against the 'loss' to industry caused by RM billions in delayed and non-

payment and the consequences of inefficiencies in payment practice, contract administration, and present dispute resolution methods.

In New Zealand, there have been suggestions, albeit anecdotally, linking the Construction Contracts Act 2002 with the economic boom since and the significant reduction in company liquidations over the past few years.

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