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Statutory Adjudication vs Arbitration vs Civil Courts:
The Non-Defaulting Party's Perspective in the context
of a Construction Contract





In a construction project, the likelihood of a dispute arising between contracting parties is high. Common examples of such disputes include non-payment by the employer and defective works caused by the contractor.

In this respect, there are several avenues available to the contracting parties for the resolution of a dispute between them depending on the terms and conditions of the construction contract entered into between the parties.

In this article, we focus our attention to the resolution of disputes by way of statutory adjudication, arbitration and civil courts. With this article, we aim to provide you with the necessary factors or information to be considered when you are contemplating initiating an action pursuant to statutory adjudication, arbitration or civil courts against the defaulting party.

Statutory Adjudication under CIPAA

Statutory adjudication in Malaysia is governed by the Construction Industry Payment & Adjudication Act 2012 (“CIPAA”). Essentially, CIPAA was enacted as a way to alleviate payment problems that prevailed and stifled cash flow in the construction industry by providing a speedy mechanism for settling payment issues arising out of construction contracts through adjudication.¹

At the outset, it should be noted that statutory adjudication under CIPAA may be initiated concurrently with an action in arbitration or an action in the civil courts². Emphasis is placed on the word “or” as an action in arbitration cannot run concurrently with an action in the civil courts, which we will further touch upon hereinbelow.

Generally, statutory adjudication under CIPAA is best commenced against the party who has defaulted in making payment towards the non-defaulting party under a construction contract when the project is ongoing. As an example, say you are faced with a dispute where the employer or main contractor has not made any payment towards a payment certificate halfway through the construction project even though such payment was due and payable, then your best route forward to recover such payment would be via statutory adjudication commenced under CIPAA. This is because a decision rendered by an adjudicator in a statutory adjudication mechanism under CIPAA is of “*temporary finality*”³ and is aimed to provide “*rough justice*”⁴ to the non-defaulting party.

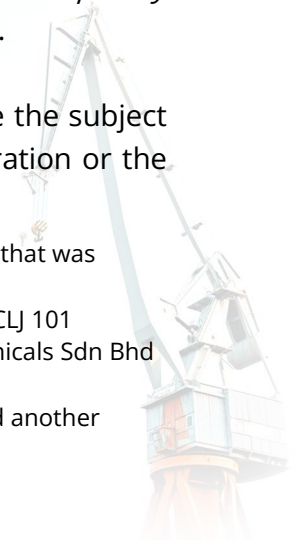
The decision of the adjudicator is said to be of “temporary finality” because the subject matter of the adjudicator’s decision can still be finally determined in arbitration or the

¹ Explanatory statement to the Construction Industry Payment Adjudication Bill (DR 22/2011) that was presented to Parliament

² Section 37(1) of CIPAA. See also *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2017] 1 CLJ 101

³ *Mary Lim J (as she then was) in Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd* and another case [2015] MLJU 1952

⁴ *Mohd Ivan Hussein JC in Transmission Technology Sdn Bhd v PESB Engineering Sdn Bhd* and another appeal [2018] MLJU 300





civil court. For ease of your understanding, the statement made by Mary Lim J (as she then was) would be helpful⁵:-

"[48] It is often said that Parliament in its wisdom has seen it fit to enact CIPAA 2012 in its present form. In recognising that adjudication only offers temporary finality to the resolution of the payment dispute and that the subject matter of the adjudication decision can still be finally determined in arbitration or the Court, Parliament has implicitly and firmly endorsed the principle of 'pay now talk later'. In other words, the parties pay now against the adjudication decision; and talk later at the arbitration to finally resolve the issue." (Emphasis added)

One of the most attractive trait of the statutory adjudication process is that it generally takes about 95 working days (or in other words, about 4 months) to complete and for a decision to be given by the adjudicator. As such, it is generally a much more faster dispute resolution mechanism compared to arbitration or the civil courts, which may take at least a year to complete.

In terms of costs, it can be safely said that the costs for statutory adjudication are significantly lower compared to the potential costs involved in initiating an action via arbitration. In this respect, the Asian International Arbitration Centre ("AIAC"), which is the designated adjudication authority and the party responsible for the administrative process of statutory adjudications in Malaysia, has published the 'AIAC Recommended Schedule of Fees' which sets out the recommended fees payable to the adjudicator depending on the amount in dispute.⁶

Further, there may be instances where the construction contract provides that any dispute resolution by way of arbitration be commenced only after the completion of the project⁷. In this scenario, when faced with a payment dispute while the project is still ongoing, the only legal proceeding then available to the non-defaulting party to recover payment is by way of statutory adjudication under CIPAA.

Arbitration or Civil Courts

Briefly, arbitration is a form of an alternative dispute resolution that is meant to provide parties with a forum to resolve disputes similar to that of the civil courts. As opposed to statutory adjudication where the decision rendered by the adjudicator is of "temporary finality" and "rough justice" (as discussed above), the decision rendered by an arbitrator (commonly known as arbitration award) is final and binding on the parties to the

⁵ Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case [2015] MLJU 1952

⁶ <https://www.aiac.world/Adjudication-Fee-Schedule>

⁷ See for example Clause 65.4 of the P.W.D Form 203A





arbitration⁸. In this respect, an arbitration award may not be appealed against but may be set aside only under very limited circumstances⁹.

The forum of arbitration will only be available if the parties in dispute have agreed or agrees to refer their dispute(s) to arbitration. This is commonly referred to as an 'arbitration agreement'. Generally, in the context of a construction contract, the contracting parties when preparing the contract would have agreed (or disagreed) on the inclusion of an arbitration agreement into their contract. It should be noted that, generally, once there is an arbitration agreement, the parties may not refer their disputes to the civil courts and must refer such disputes to arbitration¹⁰. As such, it would be prudent to consider all possible pros and cons of agreeing to the inclusion of an arbitration agreement into your construction contract.

One of the most attractive trait of the arbitration process is that parties will have the ability to choose an arbitrator with the appropriate expertise for the efficient and correct resolution of the dispute. For example, if the dispute involves matters of defective structural design, then parties may agree to appoint an arbitrator with a Civil & Structure engineering background. Further, arbitration proceedings are private and confidential and not open to the public unlike civil courts. The likelihood of negative publicity, for instance, is then greatly reduced.

However, the costs involved in commencing an action in the civil courts are lower compared to arbitration. The main cause for this is due to the fact that parties would have to appoint an arbitrator for the arbitration proceedings, whereas a judge would be assigned to your dispute if commenced in the civil courts. Further, the losing party in the civil courts will have the ability to appeal the judge's decision to a higher court. For example, if a party loses in the High Court, that party may appeal to the Court of Appeal.

Conclusion

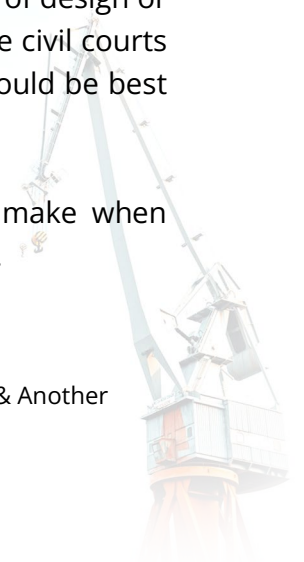
If you are faced with a situation of having to choose either between commencing statutory adjudication or arbitration/civil courts (perhaps for costs reasons), you would have to consider the subject matter of the dispute before deciding which to choose. As mentioned above, if the dispute relates to payment disputes then statutory adjudication would be the best route forward. However, if the dispute relates allegations of design or defective works, then arbitration (if there is an arbitration agreement) or the civil courts (if there is no arbitration agreement) would be the best route forward. It would be best to consult with your lawyer on the best strategy to adopt in this respect.

We hope the above will provide some insights on the consideration to make when contemplating initiating legal proceedings in the resolution of your disputes.

⁸ Section 36, Arbitration Act 2005

⁹ Section 37, Arbitration Act 2005. See also *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd & Another Case* [2016] 4 CLJ 927

¹⁰ Section 10, Arbitration Act 2005



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