



**DEVELOPING PRELIMINARY FRAMEWORKS FOR
CHALLENGING ADJUDICATION DECISIONS: A CASE STUDY OF
CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT
2012**

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Abstract

The Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) helps provide a speedy remedy to the cash flow of a project due to payment disputes during the construction phase by providing an interim binding decision through adjudication. However, the challenge for adjudication decisions in court have been continuously reported in the CIDB Construction Law Report (CCLR), thus could potentially defeat the whole speedy and cheaper concept promoted by CIPAA 2012. This paper aims to explore the extent to which the adjudicator's decision can be challenged under section 15 of CIPAA 2012. It presents the trends on challenges raised under section 15 of CIPAA 2012, and the frameworks for challenging adjudication decisions. Case study approach on CIPAA 2012 has been drawn upon the analysis of court cases reported in the CCLR spanning from 2015 to 2020. The frameworks encompassing 4 main issues under section 15(b), 4 main issues under section 15(d), and 1 main issue under each of sections 15(a) and 15(c). The findings offer the parties in adjudication, a necessary understanding of the pertinent issues and to re-evaluate their claims before coming to court in the event if they wish to challenge the adjudication decision.

Keywords: adjudication decision, challenge, section 15 of CIPAA 2012, CCLR

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INTRODUCTION

The Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) has been enacted in Malaysia, establishing a framework for statutory adjudication within the construction sector. Adjudication, as elucidated by Rajoo and Singh (2012), encompasses a process where an unbiased third party holds the authority to issue interim judgments on contractual disagreements among involved parties. Guided by the principle of "pay first, argue later," adjudication delivers an interim legally binding judgment, promptly alleviating payment concerns for affected stakeholders throughout the construction process (Che Haron & Arazmi, 2020; Yan, et al., 2023).

However, it is essential to acknowledge that adjudication, while offering temporary relief, may not always lead to the comprehensive resolution of disputes, as indicated by Mohd Bashah (2016). In the interim, unless the decision is overturned through an application to the High Court as stipulated in section 16 of CIPAA 2012, the parties are obligated to abide by the adjudication decision and fulfill the disputed payment. To have an adjudication decision set aside, the aggrieved party must initiate the process by applying to the High Court based on any of the grounds outlined in section 15 of CIPAA 2012. Subsequently, the challenging party is required to substantiate the existence of such circumstances as per the legislative framework, adhering to the general-civil standard of evidence, as expounded upon by Rahmat (2018) and the works of Rajoo and Singh (2012).

OVERVIEW OF CIPAA 2012

Due to the expedited nature of decisions under the CIPAA 2012, sometimes referred to as "rough justice", the outcomes of adjudication can occasionally leave the aggrieved party dissatisfied. This rapid resolution process, while designed for efficiency, can lead to discontentment with the decisions rendered. It was reported that a notable portion, specifically 54.3 percent, of adjudication rulings end up being brought to court or subjected to arbitration (Wong, 2018). Furthermore, a study conducted by Mazani et al. (2019) explored the trend of adjudication challenges brought before the courts between 2014 and 2018, drawing from The Malayan Law Journal Unreported Journal.

The literature review indicated a rising trend in the submission of adjudication challenges throughout these years. However, despite the increase in challenges, as depicted in Table 1 of the study, only a relatively small portion of cases, namely 15 out of 62 cases, successfully managed to contest and overturn the decisions made by adjudicators. This data suggests that despite the push for swift resolutions through adjudication, a considerable number of cases still find their way into litigation or arbitration proceedings, possibly due to the perceived

limitations of the "rough justice" nature of adjudication decisions. Hence, the rapid and binding nature of adjudication decisions mandated by CIPAA 2012 can lead to discontent among parties, prompting a significant percentage of decisions to be further contested in court or through arbitration (Mazani et al. 2019).

Table 1: Court’s ruling on challenge to adjudicator’s decision from 2014 to 2018
(Mazani et al. 2019).

Year	Ruling by The Court			
	Stay of Adjudication Decision	Dismissed Adjudication Decision	Partially Dismissed and Allowed Adjudication Decision	Total Cases
As of Feb 2018	5	1	1	7
2017	25	7	3	33
2016	11	0	1	12
2015	7	1	1	9
2014	1	0	0	1
Total no of cases				62

Specifically, challenges to set aside such decisions can be pursued under section 15(a) of CIPAA 2012 if it can be proven that the adjudicator engaged in fraudulent activities or bribery during the adjudication process, if there is evidence to demonstrate that the adjudicator failed to uphold the principles of natural justice during the adjudication proceedings as per section 15(b), if it can be established that the adjudicator exhibited bias or partiality in the conduct and judgment of the adjudication as stated in section 15(c), and if it can be demonstrated that the adjudicator went beyond their jurisdiction or authority as defined by the applicable laws and regulations under the provisions of section 15(d) of CIPAA 2012.

Realizing the significance of providing justice to an aggrieved party is fundamental to upholding fairness, this paper aims to explore the extent to which the adjudicator’s decision and jurisdiction can be challenged under section 15 of CIPAA 2012. This can be achieved through the following objectives; (i) to study the trends on challenges raised under Section 15 of CIPAA 2012, and (ii) to propose preliminary frameworks for challenging adjudication decisions under the respective sections 15 of CIPAA 2012.

METHODOLOGY

Case study research is a widely used methodology across various disciplines due to its ability to provide in-depth insights into complex phenomena within real-

world contexts (Creswell, 2009). The flexibility of case study research allows researchers to explore processes, experiences, and behaviors from multiple perspectives (Cope, 2015). Case study represents a methodological approach where researchers delve deeply into a program, event, activity, process, or individuals to gain thorough understanding. Case study also defines by specific timeframes and activities, and researchers gather detailed information through various data collection procedures over an extended period (Stake, 1995; Yin, 2014; Merriam, 1998; Baxter and Jack, 2008).

Document review is a valuable method for collecting data in case study research. It involves gathering information from existing documents such as policies, reports, and other written materials (Creswell and Poth, 1997). This method allows researchers to access a wide range of data without the constraints of time and space (Xie et al., 2022). Document review can be particularly useful when studying complex real-world situations, as it enables a systematic analysis of written content (Akan et al., 2023). Additionally, document review can provide background knowledge, descriptions, and data that may not be obtainable through other means due to various limitations (Xie et al., 2022). A case study approach can also indeed be utilized to develop a framework. Verma and Sinha (2002) employed a case study methodology to develop a framework explaining the role of resource interdependencies, technology interdependencies, and business unit pull in driving project performance. Furthermore, the process of developing a framework from a case study involves identifying pre-defined themes and categories that shape the data collection and analysis (Frempong et al., 2018).

Hence, a case study approach serves as a valuable research method to explore and provide comprehensive understanding on the challenges raised under section 15 of CIPAA 2012. Chynoweth (2008) has also suggested how qualitative research via case study approach could complement a research about law which concern about interdisciplinary methodology in legal research. This paper presents, a case study focuses on the specific sections of the CIPAA 2012. The methodological approach utilized in this case study, conducted between January 2022 and April 2022, relies on data collection via document review by analyzing a compilation of court cases documented in the CIDB Construction Law Report (CCLR) from 2015 to 2020 (CCLR, 2016; CCLR, 2017; CCLR, 2018; CCLR, 2019; CCLR, 2020; CCLR, 2021).

RESULTS AND DISCUSSION

The case study results and discussion are divided into the following two parts:

The trends on challenges raised under Section 15 of CIPAA 2012

Table 2 presents a comprehensive overview of 112 court cases associated with CIPAA 2012 that have been featured in the CIDB Construction Law Report. Among these cases, a specific subset of 53 cases has been meticulously examined for this paper. In essence, this study has selectively focused on these 53 cases to delve into the intricacies of challenges against adjudication decisions under section 15 of CIPAA 2012. The analysis of this subset aims to shed light on the various nuances and outcomes associated with disputes arising from adjudication decisions within the context of CIPAA.

Table 2: Number of reported court cases related to CIPAA 2012 from 2015-2020.

Year	Number of Adjudication Cases featured in CIDB Construction Law Report from 2015-2020	Number of Cases on Challenge to Adjudication Decision Under Section 15 of CIPAA
2015	8	4
2016	12	7
2017	25	17
2018	29	14
2019	31	9
2020	7	2
Total	112	53

Table 3 provides an insightful depiction of the patterns observed in challenges raised under section 15 of CIPAA 2012. This section encompasses four distinct grounds, each attributed to a specific set of circumstances: fraud and bribery, denial of natural justice, not acting independently or impartially, and acting in excess of jurisdiction. A comprehensive analysis of these trends reveals noteworthy insights. As gleaned from Table 3, it becomes evident that challenges primarily arising under section 15(d), which pertains to the excess of the adjudicator's jurisdiction, stand out as the most prevalent. This suggests that many instances involve disputes that hinge on whether the adjudicator had exceeded their jurisdiction, thereby warranting judicial review. Following closely, challenges stemming from section 15(b), related to the denial of natural justice, also emerge as significant in number. This trend indicates that disputes linked to procedural fairness and equitable treatment of parties during the adjudication process have captured considerable attention.

Table 3: Challenges raised under section 15 of CIPAA 2012

Challenges raised under Section 15 of CIPAA 2012	Year						Total
	2015	2016	2017	2018	2019	2020	
S15 (a) : Fraud and Bribery	-	1	1	-	1	-	3
S15 (b) : Denial of Natural Justice	4	5	13	10	5	-	37
S15 (c) : Not Acted Independently or Impartially	1	4	2	-	-	-	7
S15 (d) : Acted in Excess of Jurisdiction	2	5	14	13	8	2	44

Table 4 demonstrates a notable trend where the number of successful applicants who managed to challenge adjudication decisions remains remarkably low. In the broader context of the data collected, it is evident that out of the 53 challenges brought forth in relation to adjudication decisions, only a mere 10 cases resulted in success. This stands in stark contrast to the larger portion of challenges that ended up being unsuccessful. The data showcased in Table 4 underscores the considerable difficulty faced by parties attempting to overturn adjudication decisions through the legal process.

Table 4: Number of successful and unsuccessful challenges in court

Year	Number of Successful Challenge	Number of Unsuccessful Challenge
2015	1	3
2016	0	7
2017	5	12
2018	2	12
2019	2	7
2020	0	2
Total	10	43

Preliminary Frameworks for challenging adjudication decisions

In this case study, all 53 court cases were thoroughly analysed to formulate the preliminary frameworks addressing challenges in adjudication decisions. The ensuing discussion delves into the respective frameworks, aiming to offer a comprehensive understanding of the pertinent issues falling under the grounds outlined in section 15 of CIPAA 2012, where parties can endeavour to challenge

and overturn adjudicator's decisions. In this study, the framework development were guided by pre-defined themes and categories as suggested by Frempong et al. (2018), e.g., the respective section 15(a), 15(b), 15(c) and 15(d) of CIPAA 2012.

Section 15(a): Engage in Bribe or Fraudulent Activity

The case of *KPF Niaga Sdn Bhd v Vigour Builders Sdn Bhd and another* [2021] MLJU 229 demonstrated that the term "fraud" as used in section 15(a) of CIPAA does not explicitly mention that the fraud must be committed by the adjudicator or one of the disputing parties in the adjudication process. The case also highlights that deliberately withholding information by one of the parties during adjudication amounts to a deliberate act of deception and, consequently, fraud. The burden of evidence, however, is on the aggrieved party to show that the decision was obtained through bribery or fraud. Figure 1 below outlines the framework to successfully challenge the adjudicator's decision under section 15(a) of CIPAA 2012.

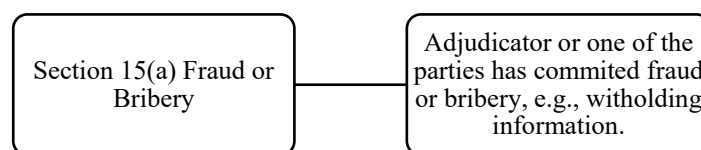


Figure 1: Framework outline for s.15(a); Fraud or bribery

Section 15(b): Denial of Natural Justice

Figure 2 depicts a range of issues raised in court to challenge adjudicator decisions under section 15(b), which relates to the breach of natural justice. It has been identified that about 4 common issues have been consistently brought to court under the grounds of section 15(b) as follows:

Payment claim/ payment response

This issue delves into the intricacies of payment claims and payment responses, shedding light on their relevance to section 15(b) of CIPAA 2012. It can be divided into two (2) separate subheadings which further clarify the issue, namely, failure to submit payment response and defective payment claim. For instance, the Federal Court in the case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 has decided that the adjudicator is now required to consider all defenses raised by the respondents, notwithstanding that the defense was not raised in the Payment Response or payment response was not filed by the respondent. If the adjudicator fails to do so, he or she can be said to have not acted in accordance with natural justice.

Adjudication notice

An adjudication notice is a formal communication issued by a court, tribunal, or other adjudicative body to inform parties involved in a legal proceeding about important matters related to the case. It typically includes essential information such as the date, time, and location of hearings, deadlines for submitting documents or evidence, and any specific instructions or requirements for the parties to follow. According to the case of *Ban Soon Aik Construction Sdn Bhd v Berjaya Land Development Sdn Bhd & Another Appeal* MLJU 1232, an adjudication notice can be invalid if the notice is not being served properly.

Unilateral communication

Unilateral communication, as discussed by Rajoo and Singh (2012), goes against one of the fundamental principles of natural justice, known as “audi alteram partem”. This principle dictates that in any judicial proceeding, each party involved should be given a fair opportunity to hear the arguments and evidence presented by the other side. Under the heading of unilateral communication, two sub-issues are highlighted, namely: 1) failure to consider expert reports or allow oral hearings, and 2) failure of the adjudicator to comment on material authorities. For instance, in the case of *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd & Another Case* [2019] 1 CLJ 592, to constitute a denial of natural justice, it would have to be both decisive and potentially important to established that a different decision would have been reached if the witnesses had been allowed to be heard orally. Further, the denial of an application to comment does not necessarily constitute a violation of natural justice. In the case of *First Commerce v Titan Vista* [2021] MLJU 376, the court ruled that the adjudicator has the discretion to seek further explanations or information regarding the matter referred to them, but they are not obligated to do so. It is ultimately the responsibility of the parties involved to present all relevant information and arguments during the adjudication process.

Right to be heard/ considered

In essence, the right to be heard or considered is a fundamental aspect of procedural fairness, and it plays a significant role in the context of challenging an adjudicator's jurisdiction under the CIPAA 2012. Under CIPAA 2012, there are various circumstances where the right to be heard may be implicated:

- a) Failure to hold an oral hearing: While CIPAA 2012 does not mandate oral hearings, the failure of an adjudicator to hold one could potentially infringe upon the parties' right to be heard, especially if it results in a denial of the opportunity to present their case verbally.
- b) Wrongful refusal by the adjudicator: If the adjudicator unjustly denies a party's request for an oral hearing or fails to adequately consider such a request, it could be grounds for challenging the adjudicator's jurisdiction.

- c) Failure to consider relevant case law: Adjudicators are expected to consider relevant legal precedents and case law when making decisions. If an adjudicator fails to do so, it may constitute a violation of the parties' right to be heard, particularly if the case law could have a material impact on the outcome of the adjudication.

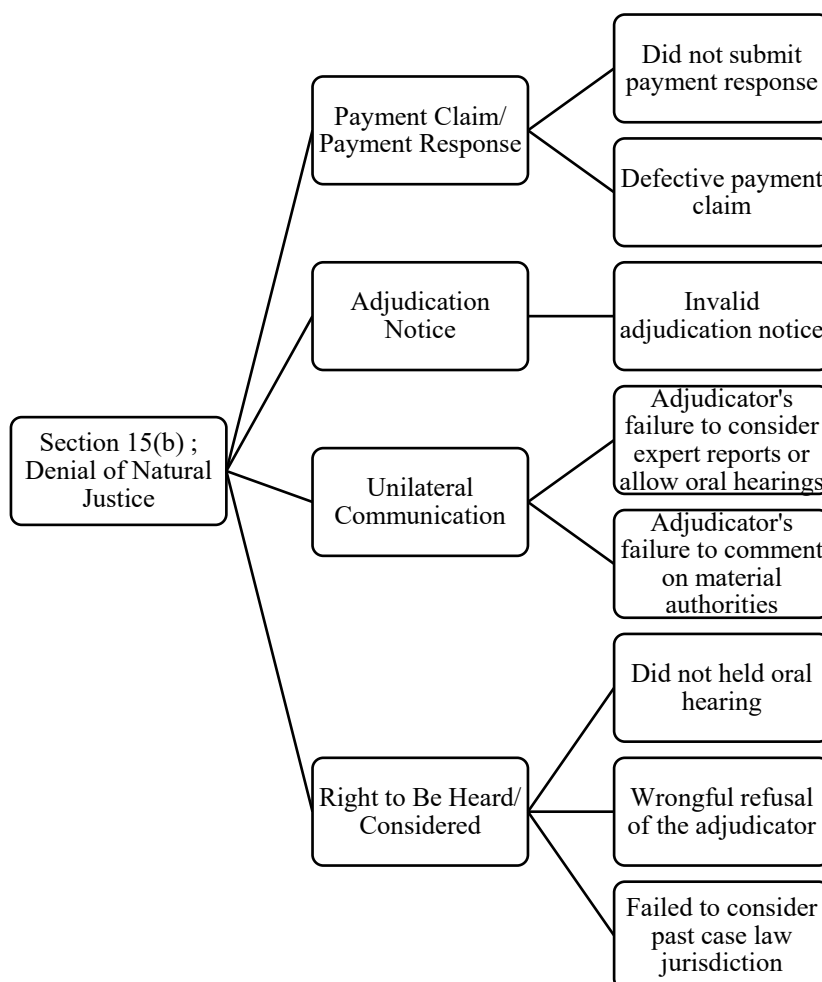


Figure 2: Framework outline for s.15(b); Denial of natural justice

Section 15(c): Adjudicator Has Not Been Impartially or Independent in His Judgment

The burden of proof lies with the party making the challenge, and they must provide factual evidence to support their claims that the adjudicator has failed to act independently and impartially. The case analysis shows that this usually include instances where the parties argued that the adjudicator has failed to consider relevant evidence or failed to provide the party with a fair chance to present their arguments. However, simply alleging a misconception about the independence or impartiality of the adjudicators is insufficient grounds for setting aside a judgment. As suggested by Zin and Nik Husain Fathi (2020), challenges based on this ground have been usually unsuccessful due to the high burden of proof required to establish a lack of independence or impartiality. Figure 3 below outlines the framework to successfully challenge the adjudicator’s decision under section 15(c) of CIPAA 2012.

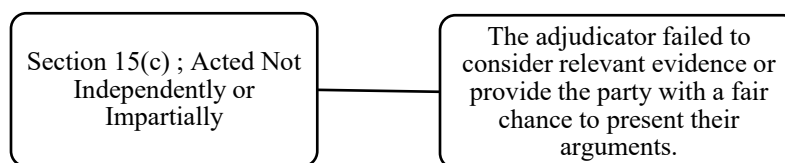


Figure 3: Framework outline for s.15 (c); Acted Not Independently or Impartially

Section 15(d): Excess of Jurisdiction

Apart from challenges under section 15(b) for denial of natural justice, challenges under section 15(d) for excess of jurisdiction is also one of the most popular challenges in adjudication. Section 25 of CIPAA 2012 grants the abovementioned powers, which appear to be broad, ranging from determining the method to be used and the scope of discovery and production of documents to ruling or declaring on any subject despite the lack of issuance of any certificate in such matter. 4 main issues have emerged from all of the court cases studied. Figure 4 outlines the framework to successfully challenge the adjudicator’s decision under section 15(d) of CIPAA 2012 spearhead by the 4 main issues.

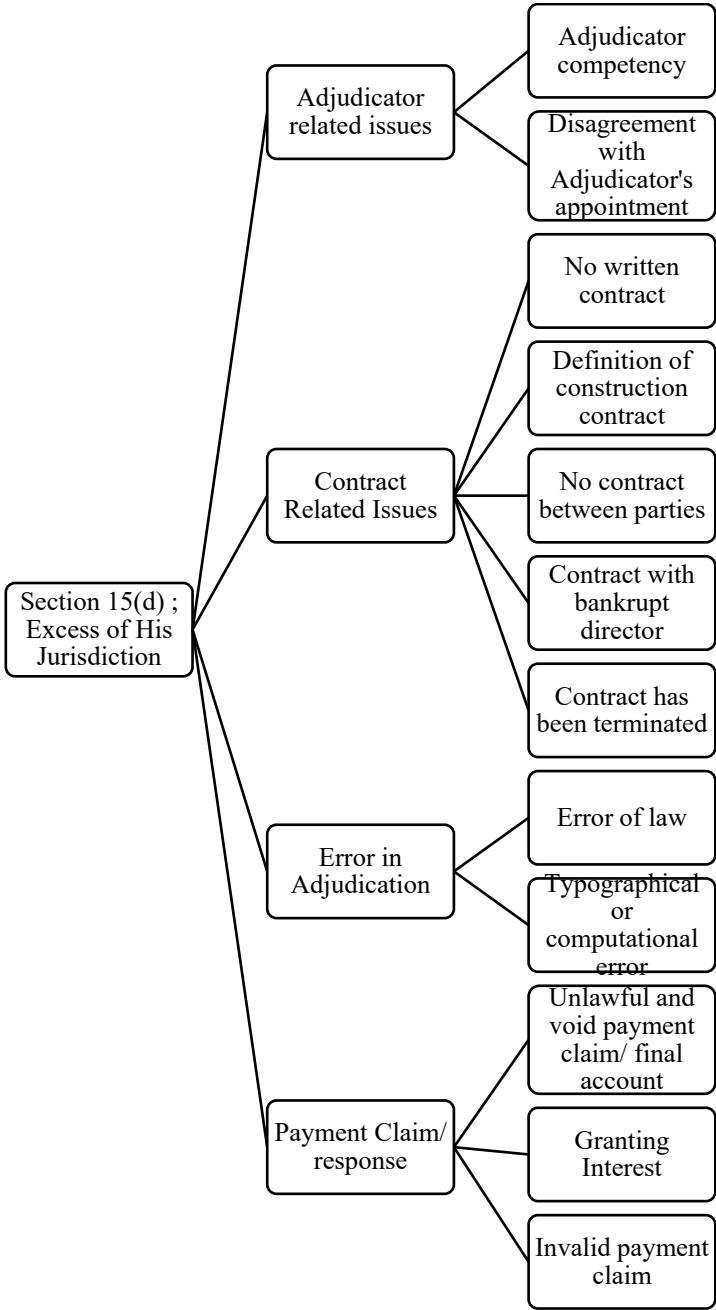


Figure 4: Framework outline for s. 15 (d); Excess of jurisdiction

Adjudicator related issues

One of the most popular issues brought to court under this section was regarding matters that related to the adjudicator itself. The issues were related to the adjudicator's competency and the appointment of the adjudicator. The court has recognised that the competency of the adjudicator are regulated by AIAC, via a structured training and courses. Therefore, asserting that an adjudicator had not met the standards and requirements as a qualified adjudicator is indeed a difficult task.

Contract related issues

The case study analysis demonstrates 5 contract related issues that are often brought to court to challenge the adjudicator decision under section 15(d) of CIPAA 2012. The related issues are: no written contract between parties, the contract entered is not a construction contract and thus does not fall under the ambit of CIPAA 2012, no contract between parties, the validity of the contract entered with the bankrupt director, and lastly does CIPAA 2012 still applies to contract that has been terminated. Overall, the issues involving contracts in relation to adjudication decision challenges generally cover the validity of the contract and determine whether the statutory adjudication applies to the contract.

Error in adjudication

To set aside adjudication based on there is an error of law in the adjudication decision, there is a need to prove that the adjudicator is on “frolic of his own” by his conduct through his wisdom and expertise. For instance, it was emerged from the case study that a flawlessly written decision, or requirement for the adjudicator to subscribe to any particular writing style or a mode of the plaintiff's preference were considered as irrelevant argument to justify the setting aside of the whole of the adjudication decision, as it did not affect the substance of the decision.

Payment claim/response

Payment claims and response are essential in the adjudication process, one of the reasons is due to the fact the scope of the adjudication would be determined from the issues that arise in the payment claim only (Zin and Nik Husain Fathi, 2020). Based on *SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd* [2019] 9 MLJ 396, an adjudicator could not cure an irregularity in a payment claim or decide a challenge on jurisdiction due to non-compliant payment claim, as the adjudicator did not have the competence or jurisdiction to do this in the absence of a payment claim that complies with section 5 of CIPAA 2012.

CONCLUSION

The Construction Industry Payment and Adjudication Act (CIPAA), 2012 aims to help provide immediate relief to a project's cash flow as a result of a payment dispute during the construction phase. The rough justice and interim binding nature of the adjudicator's decision in CIPAA 2012 have made the process of re-litigation or arbitration of adjudication proceedings under CIPAA 2012 more likely to happen. Respondents in the adjudication process appear to be at a disadvantage because to claimant is the one initiating the adjudication proceeding and the court's role in supporting adjudication decisions unless the reason to set aside is solid, implying that challenges will always be required, undermining the speedy and cheaper alternative promoted by CIPAA. Thus, frameworks for challenging adjudication decisions, is developed to offer the parties in adjudication, a necessary understanding of the pertinent issues related to section 15 of CIPAA 2012. The findings serve as re-evaluate their claims before coming to court, as well as to prevent parties from abusing section 15 of the CIPAA 2012. The preliminary framework also may serve as early reference for the disputant parties to re-evaluate their claims before coming to court in the event if they wish to challenge the adjudication decision. It is also acknowledged that the preliminary frameworks could further be enhanced through expert validation.

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