



**A LEGAL ANALYSIS OF STATUTORY
ADJUDICATION IN THE CONSTRUCTION INDUSTRY:
SPECIAL REFERENCE TO UK AND
MALAYSIAN ACTS
VOL. 1**

BY

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ABSTRACT

In the early 1990s, UK experienced a recession which led to massive job losses and insolvency of businesses, particularly in the construction sector. This state of affairs triggered the UK Government to enact the Housing Grants, Construction and Regeneration Act 1996 (Construction Act) and Part 1 of The Scheme for Construction Contracts (England and Wales) Regulations 1998 which came into force on 1 May 1998. This Act and its Scheme introduce a system to facilitate prompt payment to affected parties in the construction industry and a mechanism to resolve disputes speedily through statutory adjudication. Similar Acts soon emerged in Australia, New Zealand and Singapore to address acute cash flow problems in their industry. In Malaysia, an Act referred to as the Construction Industry Payment and Adjudication Act (CIPA Act) has been recently passed in May of 2012 to address the issues of payment and dispute settlement in the construction industry. This Act is expected to be in force early of 2013. During the drafting of its Act, Malaysia have the options to choose between the contrasting models from other jurisdictions, to learn from the mistakes made, and to pick and integrate the best practices under each model to produce a scheme acceptable by the participants in the construction industry. The CIPA Act 2012 is observed to be akin to the Construction Act in the UK. However, different from the UK Act which include issues other than payment, the CIPA 2012 confined the law to regulate payment issue and the introduction of statutory adjudication as a mechanism to resolve the issues. With reference to the UK Construction Act and equivalent Acts in other jurisdictions and legal principles derived from the UK precedents, this study intends to contribute and extend towards a basic cognizance and an appreciation of the concept of disputes and its causes and of the different forms of dispute resolution available for the construction industry, analyse the statutory adjudication mechanism in the UK Construction Act, in its Scheme, and in other legislation, derive the guiding principles from UK court decisions, and identify areas that have been and have not been addressed by the CIPA Act. It further intends to propose several mechanisms to ensure statutory adjudication meets its objective and to highlight other avenues available to resolve disputes. It is hope that this study will be able to lend some support and guidance to those who would be directly involved in the construction sector and will be able to assists policy makers to address the issues of concern that were not dealt by the CIPA Act in the event the Act undergoes a review on its efficacy in the future.

ملخص البحث

في السنوات الأولى من عام 1990، أدت الركود الاقتصادية العالية في بريطانيا إلى كثرة بطالة العمال وإفلاس مشاريع الاقتصادية والتجارية خاصة قطاع البناء فأحدثت لحكومة بريطانيا أن تنشأ قانونا جديدا عن حقوقية الملكية المنزلية والتحديد والبناء القانون 1996 (قانون البناء أو البناء) في القسم الأول من المخططات العقد البناءة (إنجلترا ووليس) النظامي 1998، مفعول تنفيذه من 1 مايو 1998. وقد قدم هذا القانون والعقد نظاما معيناً لتيسير عملية دفع وتسديد الدين لطرفي المشترك لتأثيره في قطاع صناعة المباني والبناء والتقنية لحل النزاعات بين المتنازعين بأقصى سرعة ممكنة عن طريق العدالة القانونية. وقد تتبع الاصدار الصيغة القانونية نفسها في استراليا ونيو زيلاند وسيغفورا لمعالجة مشكلات متشعبة في تدبير النقد في ذلك قطاع في بلادهم. فاصدر ماليزيا القانون المسمى ب"دفع قطاع البناء والقضاء القانوني" (CIPA Act) مقرر في مايو 2012 لمعالجة قضايا السداد و النزاع في هذا القطاع ويكون هذا القانون ساري مفعول في أول السنة القادمة 2013. وعندما تصيغ القانون فان ماليزيا لها خيار بين أن تأخذ النماذج المختلفة للاستفادة من اخطأهم وبين أن تلتقط من احسن الأمور من بين هذه النماذج وتدوينها بالتكامل والتي تلاقى قبولاً بين العاملين في قطاع البناء. ومن الملاحظة أن CIPA 2012 متشابهة بالقانون البنائية الموجودة في بريطانيا الا انه يختلف من القانون البريطاني في قضية ما عدا سداد الدفع وهو يحتوي التشريع لتدبير قضية السداد وبالإضافة الى طريقة قانونية في معالجتها. وتهدف هذه الدراسة الى اعطاء التوعية والافهام في التصور الخلافية واسبابها ومدىها واشكالها في معالجتها في قطاع البناء بالقانون البنائية الموجودة والقانون المتعلقة من غيرها في بريطانيا وقواعدها البنائية من قرارات القضايا المسبقة. وتهتم الدراسة بالتحليل الطريقة القانونية من قانون البنائية واشكالها وغيرها من التشريعات وتستخرج القواعد المعتمدة التي تعتمد المحاكم البريطانية عليها في اتخاذ قرارها. وتبين الدراسة العناصر في القانون البريطاني المتضمنة في القانون CIPA والتي لم تلجها فيه. وتحاول الدراسة أن تقترح عدة الطرق القانونية لتأكد العنصر القانونية التي توافق هدفها والقضاء الضوء في مجالات غيرها لحل المنازعات. وتتمنى الدراسة بانها قد تخدم الذين يعملون في مجال قطاع البناء بالارشاد والعون وبهذه الدراسة قد تساعد من عليهم المسؤولية لوضع سياسة في مجال قطاع البناء اذ لم يلتمسها قانون CIPA عندما يخضعها لاعادة النظر من حيث كفاءتها في مستقبل.

ABSTRAK

Pada awal tahun 1990an, negara UK mengalami kemelesetan yang membawa kepada kehilangan pekerjaan secara besar-besaran dan ketidaksolvenan perniagaan, terutamanya dalam sektor pembinaan. Keadaan ini mencetuskan Kerajaan UK untuk menggubal Akta “Housing Grants, Construction and Regeneration” 1996 (Akta Pembinaan) dan Bahagian 1 kepada ‘The Scheme for Construction Contracts (England and Wales) Regulations 1998” yang berkuat kuasa pada 1 Mei 1998. Akta dan Skim ini memperkenalkan satu sistem untuk memudahkan pembayaran segera kepada pihak-pihak yang terlibat dalam industri pembinaan dan satu mekanisme untuk menyelesaikan pertikaian dengan cepat melalui adjudikasi secara statutori. Tidak lama kemudian Akta yang sebanding muncul di Australia, New Zealand dan Singapura untuk menangani masalah aliran tunai yang meruncing dalam industri mereka. Di Malaysia, Akta yang disebut sebagai Akta Pembayaran dan Adjudikasi Industri Pembinaan (CIPA Akta) telah diluluskan baru-baru ini pada bulan Mei 2012 untuk menangani isu pembayaran dan penyelesaian pertikaian dalam industri pembinaan. Akta ini dijangka akan berkuat kuasa awal tahun 2013. Semasa menggubal Akta, Malaysia mempunyai pilihan di antara model-model yang berbeza daripada negara-negara lain, untuk mempelajari dari kesilapan yang dibuat, dan untuk memilih dan menyepadukan amalan terbaik di bawah setiap model bagi menghasilkan satu skim yang boleh diterima oleh para peserta di dalam pembinaan industri. CIPA 2012 diperhatikan sebagai menyerupai Akta Pembinaan di UK. Walau bagaimanapun, berbeza daripada Akta UK yang mengambilkira isu-isu selain pembayaran, perundangan di dalam CIPA 2012 dihadkan untuk mengawal selia isu pembayaran dan memperkenalkan adjudikasi sebagai mekanisme untuk menyelesaikan isu-isu tersebut. Dengan merujuk kepada Akta Pembinaan UK dan Akta-akta setara dalam bidang kuasa lain dan prinsip undang-undang yang berasaskan kehakiman di UK, kajian ini berhasrat untuk menyumbang kepada dan memperluaskan pengetahuan asas dan kesedaran terhadap konsep pertikaian dan penyebab-penyebabnya serta pelbagai bentuk penyelesaian pertikaian yang terdapat di dalam industri pembinaan; menganalisis mekanisme adjudikasi statutori dalam Akta Pembinaan UK, dalam Skimnya, dan dalam perundangan-perundangan lain; memperolehi prinsip-prinsip yang boleh dijadikan panduan dari keputusan-keputusan mahkamah di UK; dan mengenal pasti bidang-bidang yang telah dan belum ditangani oleh CIPA. Kajian ini selanjutnya berhasrat untuk mencadangkan beberapa mekanisme untuk memastikan adjudikasi statutori memenuhi objektifnya dan untuk mengetengahkan pendekatan-pendekatan lain yang tersedia ada bagi menyelesaikan pertikaian. Adalah menjadi harapan agar kajian ini mampu memberi sokongan dan bimbingan kepada mereka yang akan terlibat secara langsung dalam sektor pembinaan dan akan dapat membantu pengubal dasar untuk menghadapi isu-isu yang tidak ditangani oleh Akta CIPA sekiranya Akta ini menghadapi proses kajian semula mengenai keberkesannya di masa hadapan.

APPROVAL PAGE

The thesis of Rozina Mohd Zafian has been examined and is approved by the following:

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Rozina binti Mohd Zafian

Signature.....

Date

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LIST OF ABBREVIATIONS

All ER	All England Report
BLR	Building Law Report
CIArb	Chartered Institute of Arbitrators
CIC	Construction Industry Council
CIDB	Construction Industry Development Board
CIPA Act	Malaysian Construction Industry Payment and Adjudication Act
CIPA Bill	Malaysian Construction Industry Payment and Adjudication Bill
CLJ	Current Law Journal
COBRA	International construction research conference of the Royal Institution of Chartered Surveyors
Const. L.J	Construction Law Journal
CPR	Civil Procedure Rules
DOM	Domestic (in relation to the standard form of contract)
e.g.	for example
etc.	and so forth
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FIDIC	Fédération Internationale Des Ingénieurs-Conseils
HL	House of Lords
ibid.	in the same place
ICLR	International Construction Law Review
id.	the same below
IEM	Institution of Engineers Malaysia
ISM	Institution of Surveyors Malaysia
JCT	Joint Contracts Tribunal
KLRC	Kuala Lumpur Regional Centre for Arbitration
LAD	liquidated and ascertained damages
LJ	Lord Justice

LR	Law Report
MLJ	Malayan Law Journal
n.	footnote
NADR	National Academy for Dispute Resolution
NEC	New Engineering Contract
P. B. U. H.	Peace Be Upon Him
p./pp.	page/pages
PAM	Pertubuhan Arkitek Malaysia
para/paras	paragraph/paragraphs
QC	Queen Counsel
RIBA	Royal Institute of British Architects
RICS	Royal Institute of Surveyors
S. W. T.	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
S.L.T.	Scots Law Times
SGHC	Singapore High Court
SMM	Standard Method of Measurement
TCC	Technology and Construction Court
TeCSA	Technology and Construction Solicitors' Association
v.	versus, against
VAT	Value added tax
WG	Working Group
WL	Westlaw online database
WLR	Weekly Law Reports

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

In developed countries, the issues regarding cost of protracted litigation and arbitration has long been highlighted. The cost is not limited to finance, but also cost disputants' time and strains working relationship.

As projects become increasingly complex, disputes and differences in the construction industry are inevitable. Conflicts coupled with the need to ensure the development of the construction industry, a two-step process for resolving disputes at the project site was introduced.¹ The disputants would call upon the project architect or engineer to make an objective ruling on the issue. If that ruling did not resolve the problem, the parties could then refer the issue to a relatively informal ad hoc arbitration process whereby an arbitrator promptly holds a hearing and issues a binding decision. These two processes were designed to enable the parties to set aside their problems and move forward with the project.

Groton et.al.,² explains that although the combination of these traditional job site dispute resolution methods served the construction industry reasonably well for several generations, during the last 30 years they have ceased to be as effective as they once were. For a number of reasons, decisions of architect or engineer are no longer given the weight that have traditionally been accorded to them; and prompt, informal

¹ James P. Groton, Robert A Rubin and Bettina Quintas, "A comparison of dispute review boards and adjudication" [2001] *ICLR*, 18(2): 275.

² Ibid.

ad hoc arbitrations to resolve discrete disputes are no longer practised.³ Instead, arbitration has now gradually moved into proceedings involving post-project disputes which host a number of disputes accumulated during the course of construction. Such arbitration proceedings are now conducted in an atmosphere that increasingly resembles that of judicial proceedings.⁴ The decline of this traditional job site dispute resolution mechanism has developed into alternative ‘real-time’ methods for resolving disputes before they develop into larger conflict.⁵

In the construction industry, one of the major areas of conflict relates to payment. Although the success of a construction project depends upon an executable method statement as well as efficient and timely payment, late payment and non-payment are often problems that undermine the viability of many otherwise efficient and well run businesses.⁶ The impact of delayed payment, receipt of less payment or even non-payment would be felt most by smaller contractors down the construction chain.⁷ It can involve enormous amount of money, affect performances and ruin the image of the construction industry. Such a problem is not only felt in countries with a fast developing economy like Malaysia, but also in other developed countries. Cash flow is the very life blood of this enterprise.⁸

³ Id.

⁴ Id.

⁵ Id.

⁶ Niall Lawless, “Pay now, argue later,” <http://www.building.co.uk/pay-now-argue-later/301825_article> viewed on 11 April 2010.

⁷ Michael C Brand and Philip Davenport, “A proposal for a ‘Dual Scheme’ of statutory adjudication for the building and construction industry in Australia,” <http://www.rics.org/site/download_feed.aspx?fileID=7945&fileExtension=PDF> viewed 5 July 2011. Paper presented at the Construction, Building and Real Estate Research Conference (COBRA) of the RICS, Dauphine Université, Paris, 2-3 September 2010.

⁸ *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd (1973)* 1 BLR 73 (HL).