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BEST PRACTICES IN ENSURING NATURAL JUSTICE IN ADJUDICATION PROCEEDINGS

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Abstract

This study explores the interplay between natural justice principles and adjudication within the Malaysian construction industry, focusing on challenges under the Construction Industry Payment and Adjudication Act (CIPAA). It assesses the impact of CIPAA on natural justice through a review of case law from 2014 to 2017, highlighting 11 key cases where adherence to natural justice was questioned. The study proposes best practices, including Obtaining agreement from the claimant for the request to extension time by the respondent to enhance fairness and reduce legal disputes in adjudication.

Keywords: Natural justice, CIPAA, payment, adjudication, bias, adjudicator's powers.

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INTRODUCTION

The rapid expansion of Malaysia's construction industry, driven by the Economic Transformation Program (ETP), has propelled the nation into a phase of unprecedented growth accompanied by significant challenges. These challenges include speculative developments lacking sufficient financial backing, prolonged dispute resolution mechanisms, and imbalances in bargaining power among parties. Additionally, the industry's push for swift project approvals under the ETP has underscored the need for an efficient mechanism to resolve both payment disputes and broader issues like project delays.

The CIPAA came into force on 15 April 2014, since then it plays a pivotal role in reshaping dispute resolution within the construction sector. The CIPAA offers a streamlined process for submitting payment claims, but its significance extends beyond this. Under Section 25 the adjudicators have a range of powers to better control the overall adjudication proceedings including project delays. This provision is crucial for contractors facing unjust penalties due to delays beyond their control, which can cause severe cash flow issues. The CIPAA aiming for speedy resolution of payment related disputes, holding the relevant parties accountable and mitigating adverse financial impacts.

This paper explores the construction industry's evolution and the economic imperatives that have fuelled its growth. Against this backdrop, it examines Sections 15 and 25 of the CIPAA, highlighting their role in minimizing issues pertaining to natural justice in adjudication proceedings. Through analysis of decided case laws between 2014 and 2017, this study proposes potential best practices to strengthen natural justice within adjudication proceedings.

CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION 2012 (CIPAA)

The rapid expansion of Malaysia's construction industry, driven by the Economic Transformation Program (ETP), has led to remarkable growth alongside an increase in disputes (Prime Minister Office, 2023). In response, the CIPAA plays a crucial role in reshaping dispute resolution within the sector (Ratna, 2023).

Adjudication for Speedy Dispute Resolution

In the construction industry, adjudication serves as a mechanism to obtain a speedy and impartial decision on disputes arising from a project¹. The process ensures the resolution of payment disputes related to construction work in a timely and interim manner, facilitating cash flow (CIPAA, 2012). The judiciary recognizes the basic aim of the CIPAA, providing a statutory Adjudication mechanism to swiftly settle disputed interim certificates by CIPAA adjudicators (Section 12, CIPAA, 2012).

¹ *Bina Puri Construction Sdn Bhd v Hing Nyit style Enterprise Sdn Bhd MLRHU 192, 2015*

Legislative Framework and Enforceability

The CIPAA, enforced in 2014, introduces a legislative framework that appears clear and easily comprehensible to all stakeholders (Suriana , 2014). Adjudicators' decisions, though interim, are enforceable, as highlighted by Judge Mary Lim Thiam Suan J². Even in cases where errors exist, the Court of Appeal emphasizes the enforcement of adjudicators' decisions³. Notably, Section 37 of the Act maintains parties' rights to concurrently arbitrate or litigate under CIPAA, reinforcing its enforceability upon application to the High Court⁴.

Expedited Process and Timeframe

Part II of the CIPAA introduces a dispute resolution mechanism designed to last only 100 working days, emphasizing the expeditious nature of statutory adjudication. Section 12(2) imposes a 45 working days requirement for adjudicators to decide upon the completion of a reference, ensuring a swift resolution. However, the brief timeframe poses challenges for a detailed analysis, potentially impacting the reasoned fairness of decisions (McComb, 2014). This section establishes the legislative framework, emphasizing its significance in resolving disputes efficiently within the construction industry. The expedited nature of adjudication, coupled with enforceability mechanisms, underscores its role in ensuring timely and fair dispute resolution.

ADJUDICATION PROCESS UNDER CIPAA

Adjudication, designed as a streamlined alternative to protracted legal proceedings, plays a pivotal role in resolving disputes in the Malaysian construction industry, as acknowledged by the Judiciary. Administered by the Asian International Arbitration Center (AIAC), a statutory body designated under Part V of the CIPAA, the Adjudication process unfolds in a structured manner, as illustrated in Figure 1.

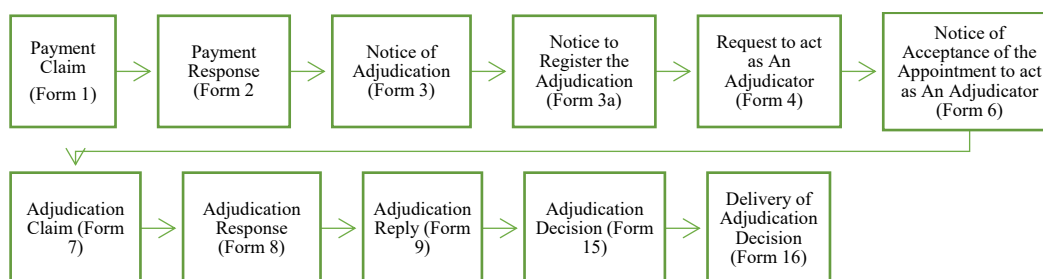


Figure 1: Adjudication process under CIPAA

² *View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2015] MLRHU 850, 2015*

³ *Bouygues (UK) Limited v. Dahl-Jensen [2000] BLR*

⁴ *Carillion Construction v Devonport Royal Dockyard Ltd [2005] BLR 310*

Initiation of Adjudication

Commencing an adjudication proceeding is a structured process involving the submission of crucial documents. The Issuance of Payment Claim (Form 1) and subsequent Payment Response (Form 2) from the non-paying party sets the stage. Simultaneously, the issuance of a notice to appoint an adjudicator officially registers the dispute, marking the initiation of the two-tier process.

Pre-Adjudication Decision

This pre-adjudication phase, critical in establishing jurisdiction, spans from the initiation of a payment claim to the issuance of a notice registering the adjudication. Sections 5 and 6 of the CIPAA are determinative during this stage, as affirmed by the High Court.

Post-Adjudication Process

Upon issuing a notice to the AIAC, the post-adjudication process begins with the AIAC overseeing the procedure. This phase encompasses critical steps, including the appointment of the adjudicator and the subsequent delivery of the adjudicator's decision. Despite meticulous procedural adherence monitored by the AIAC, concerns persist regarding the potential for decisions to be set aside. Prior to the enforcement of CIPAA, concerns centred on the emergence of a claim culture, raising questions about the efficacy of the adjudication process in fostering project conclusion (Fong, 2012).

Challenges and Set-Aside Grounds

The ultimate deliverance of an adjudication decision faces challenges outlined in Section 15 of the CIPAA. Aggrieved parties may seek to set aside the decision on grounds such as improper procurement through fraud and bribery, denial of natural justice, lack of independence or impartiality by the adjudicator, or the adjudicator exceeding jurisdiction. Navigating the adjudication process requires proactive measures to address these challenges, ensuring a robust and equitable dispute resolution mechanism within the construction industry.

NATURAL JUSTICE IN ADJUDICATION DECISION

Natural justice, constituting principles of procedural fairness, serves as a cornerstone to ensure fair and reasonable decision-making. Adjudication, often characterized as "*rough justice*," functions as a provisional alternative, swiftly resolving disputes to maintain cash flow⁵ in ongoing projects. While adjudicators

⁵ Lord Denning in his now famous judgment in the Court of Appeal in *Dawnays Ltd v Minter Ltd (1971) 1 WLR 1205*, had proclaimed a profound understatement that *cashflow, albeit without a doubt crucial in any contract, is actually the "lifeblood" that keeps the construction industry running, often ensuring the success of a project due to the cooperation provided between contractors and sub-contractors especially when cash flow is ample.*

share the broad duty of acting impartially (Section 108(2)(e), Construction Act 1996) in the United Kingdom, distinct from arbitrators, they are not bound by statutory duty to ensure fairness or adopt fair procedures, operating within tight timeframes.

Principles of Natural Justice

The principles of natural justice, encapsulated in two rules—the rule against bias and the rule of the right to a fair hearing⁶—are integral to maintaining public confidence in the legal system. Public trust is paramount, whether in courts or public decision-making bodies. Despite Section 25 of the CIPAA granting adjudicators extensive powers, their exercise must align with the CIPAA, ensuring impartiality, and adhering to the rules of natural justice. To further illustrate, consider our common complaint about fairness in daily conversation that:

- 1) Investigative and decision-making processes should be fair.
- 2) If a decision-making process is fair, similar consequences will result from similar actions by similar people.

Adjudicator's Powers and Natural Justice

While Section 25 delineates adjudicator powers, it is not a *carte blanche* license to disregard fair play. Adjudicators must exercise their powers judiciously, ensuring justice and fair play prevail. Inquisitorial powers should not compromise fairness, and any misapplication may lead to the set-aside of the adjudication decision (Jocelyn, 2018).

Appointment of Adjudicator and Natural Justice Issues

The appointment of an adjudicator, the inaugural step in adjudication, demands careful adherence to natural justice. Oversight here can lead to significant issues in enforcing adjudicators' decisions. Developments in 2021 highlighted the importance of natural justice in adjudication. For example, the court may refuse to enforce an adjudicator's decision due to a breach of natural justice, underscoring its relevance in adjudication proceedings. This is akin to laying a strong foundation for a building – foundational issues affect the entire structure.

⁶ Concerning to that, the Judge in *Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd And Another Case [2016] MLJU 1189* reminded that the principles of Natural Justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result. *As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with Natural Justice.* A party who is dissatisfied with the decision on its merits cannot use the principles of Natural Justice to have the decision set aside.

Adjudicator's Immunity and Compliance with Natural Justice

Section 34 of the CIPAA grants adjudicators immunity from legal action for acts done in good faith but mandates adherence to natural justice principles. This immunity ensures impartial decision-making free from legal repercussions. However, recent judgments affirm that breaches of natural justice can compromise this immunity. For example, in the 2022⁷ the court emphasized that while adjudicators are protected from legal action, they must still comply with natural justice principles. This case highlights the balance between adjudicator immunity and the need for procedural fairness.

Natural Justice in Fast-Track Adjudication

The fast-track nature of adjudication under the CIPAA, often dubbed "*rough justice*," prompts a critical question: Does this expedited process adequately enforce the rule of natural justice, a fundamental pillar of any civilized legal system? This question will be rigorously examined in subsequent sections, delving into the intricacies of balancing speed with the imperative of ensuring justice prevails. The Court of Appeal commented that there should be a limit to the requirements of natural justice in adjudication given that the procedure was designed to be speedy and that there is, therefore, an inbuilt unfairness in it⁸. The fact that it is open to an unsuccessful party to attempt to overturn an adjudicator's decision by litigation or arbitration also justified imposing such limits but only be in the case of serious breaches that the court would intervene and refuse to enforce the decision of an adjudicator (Boddy, 2024).

MATERIALS AND METHODS

This study employs a three-phase methodology to investigate natural justice in Malaysian construction adjudication:

Phase 1: Data Collection

- Sources: Malayan Law Journal, eLaw.my, CIDB Construction Law Report.
- Focus: Cases related to Section 15 of the CIPAA.

Phase 2: Case Analysis

- Focus: In-depth analysis of 11 significant cases from 2014 to 2017 where adjudication decisions were set aside.
- Technique: Qualitative descriptive analysis to uncover patterns and challenges in adhering to natural justice principles.

⁷ *Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [WA-24C-137-07/2022]

⁸ *Construction v Devonport Royal Dockyard* [2005] EWCA Civ 1358 and *Amec v Whitefriars* [2004] EWCA Civ 1418

- Selection Criteria: From an initial 29 cases, narrowed down to 11 based on their significance in addressing natural justice issues under Section 15(b) of the CIPAA. This period captures a critical snapshot of the construction industry's landscape, foundational for understanding key dynamics prior to potential post-2017 changes.

Qualitative Descriptive Technique

This phase employs a qualitative descriptive technique to examine court judgments, uncovering patterns, themes, and factors contributing to challenges and adherence to natural justice in adjudication decisions. The analysis focuses on the interplay between contractual interpretations, evidence considerations, and natural justice, providing a comprehensive understanding of the complexities involved. A meticulous analysis of cases set aside on adjudication decisions has been undertaken, utilizing the eLaw.my journal as a comprehensive repository of chronological court cases. The study's crux lies in Section 15 of the CIPAA, empowering aggrieved parties to seek the setting aside of adjudication decisions based on four specific grounds:

- a. *Fraud or bribery: Influencing the decision through fraudulent activities or bribery.*
- b. *Natural justice: Breach of natural justice principles during the adjudication process.*
- c. *Not acted impartially: Allegations of bias or lack of impartiality in the adjudicator's actions.*
- d. *Excess adjudicator's jurisdiction: Adjudicators overstepping their designated jurisdiction.*

The study thoroughly examines cases where adjudication decisions were set aside due to breach of natural justice. By scrutinizing judgments and outcomes, it sheds light on the nuances and challenges associated with each ground outlined in Section 15 of the CIPAA. Understanding the prevalence and implications of these set-aside cases is imperative for refining the adjudicatory process and upholding principles of fairness in construction disputes. Table 1 shows the total set aside cases from 2014 to 2017.

Table 1: Total set aside cases based on each CIPAA provisions.

	2014	2015	2016	2017	Total
Pecuniary Bias (Fraud or Bias) section 15 (a)	-	-	2	-	2
Natural Justice section 15 (b)	-	3	3	5	11
Not Acted Impartially	-	1	1	2	4
Excess Adjudicator's Jurisdiction	1	2	3	6	12
Total Cases	1	6	9	13	29

Source: AIAC 2019 Data and Author's Calculation

Phase 3: Synthesis of Findings

- **Evaluation:** Assess the study process and conclusions from the analysis of the 11 cases.
- **Focus:** Grounds for setting aside adjudication decisions include fraud or bribery, breach of natural justice, lack of impartiality, and excess jurisdiction.
- **Objective:** Provide insights into natural justice issues in adjudication, refining the process to uphold fairness principles.

This methodology aims to elucidate natural justice in adjudication, ensuring a fair and effective dispute resolution process within the Malaysian construction industry.

Table 2: Set aside issues focusing on natural justice as per section 15 (b) of the CIPAA provisions.

Set Aside	Description	Findings/Lesson Learned	Best Practices
ACFM ENGINEERING & CONSTRUCTION SDN. BHD. v ESSTAR VISION SDN. BHD. [2016] MLRAU 499	<p>Issues/ Grounds of Challenge</p> <p>The Appellant raised concerns about the Adjudicator favoring the Respondent without sufficient proof, challenging the transparency of the decision-making process and seeking a set aside under Section 15 of the Act.</p> <p>Court Decision</p> <ol style="list-style-type: none"> 1. The High Court dismissed the application, noting no evidence that prevented the Appellant from presenting their case. 2. The court found no indication of unfair treatment, as grievances were only raised after an unfavorable decision. 3. For a set aside on Natural Justice grounds, a material breach by the Adjudicator must be proven. 4. Despite the obligation to pay according to the Adjudication 	<ol style="list-style-type: none"> 1. The court emphasized that there must be triable issues and a material breach by the Adjudicator to set aside an Adjudication decision. 2. Setting parameters for the scope of Adjudication helps mitigate Natural Justice issues, providing clarity on the Adjudicator's jurisdiction. 3. The timeline for deciding disputes, when clearly outlined by the Adjudicator, contributes to a more transparent process. 	<ol style="list-style-type: none"> 1. Adjudicators should clearly define the parameters of the Adjudication, mitigating potential Natural Justice issues. 2. Parties, despite adverse decisions, have alternative avenues such as settling by agreement or resorting to legal/arbitration proceedings for further clarity.

Set Aside	Description	Findings/Lesson Learned	Best Practices
	decision, parties could settle the matter by written agreement or initiate legal/arbitration proceedings to clarify their claims.		
<i>VIEW ESTEEM SDN BHD v BINA PURI HOLDINGS BHD [2015] 2 MLJ 22</i>	<p>Issues/ Grounds of Challenge</p> <ol style="list-style-type: none"> 1. View Esteem (VE) sought to set aside the adjudication decision due to the exclusion of three additional matters raised in the adjudication response. 2. Allegation of denial of natural justice based on unequal treatment by the adjudicator regarding the acceptance of hearsay evidence. <p>Court Decision</p> <ol style="list-style-type: none"> 1. The Court disagreed, emphasizing that the three matters raised by VE in the adjudication response were not presented in the payment response. 2. The Court found no fault with the adjudication decision and dismissed VE's application under Section 15. 	<ol style="list-style-type: none"> 1. The adjudicator, understanding the limitations of jurisdiction, appropriately dismissed the request to set aside as the additional matters were raised late in the proceeding. 2. Despite the complexity and volume of documentation, the adjudicator methodically identified and evaluated issues, demonstrating a careful and measured approach to findings of fact. 	<ol style="list-style-type: none"> 1. Jurisdiction Awareness: Adjudicators should focus on issues explicitly mentioned in the payment claim and response. 2. Familiarity with the Act: Adjudicators must thoroughly understand the CIPAA provisions to handle disputes competently. 3. Procedural Fairness in Hearings: Ensure fairness in hearings and allow parties to address key conclusions drawn from the proceedings. If a substantial conclusion is drawn from matters discussed at a hearing, parties should be given an opportunity to address the basis of the adjudicator's conclusion, ensuring procedural fairness as held in <i>Ardmore Construction Ltd v Taylor Woodrow Ltd (2006) CILL 2309</i>
WRP ASIA PACIFIC SDN BHD V. NS BLUESCOPE LYSAGHT MALAYSIA SDN BHD [2015] MLRHU 1018 Item A – Natural Justice	<p>Issues/ Grounds of Challenge</p> <p>Alleged breach of Natural Justice as the plaintiff had no opportunity to respond to the defendant's adjudication reply, and unilateral communication between the Defendant and the adjudicator was asserted.</p> <p>Court Decision</p> <p>In this case, the adjudicator gravely misapprehended and wrongly applied his powers under the CIPAA, leading to the setting aside of the adjudication decision. The court emphasized that WRP did not file any payment response, and under subsection 6(4) of the CIPAA, WRP was deemed to have disputed the payment claim.</p>	<ol style="list-style-type: none"> 1. The adjudicator direct contact with the Defendant without informing the Plaintiff, and without offering the Plaintiff an opportunity to respond, constituted a breach of Natural Justice. 2. The adjudicator failure to inform the Plaintiff about the purpose of the contact and his unilateral approach were key factors contributing to the breach. <p>Natural Justice requires fairness, transparency, and the provision of equal opportunities for all parties to present their case.</p>	<ol style="list-style-type: none"> 1. Transparent Communication: Adjudicators should clearly state the purpose of their communication with any party. 2. Communication Protocols: Establish clear protocols at the start, ensuring all communications are copied to all parties and the Adjudicator. 3. Handling Direct Contacts: If contacted directly, Adjudicators should respond in writing or take notes and inform the other party promptly.
Item B: Inquisitorial Initiatives of the Adjudicator	<p>Issues/ Grounds of Challenge</p> <p>The adjudicator claimed to have taken inquisitorial initiatives to ascertain facts and law required for the decision,</p>	<ol style="list-style-type: none"> 1. While adjudicators have the power to take inquisitorial initiatives, there is a condition – when 	<ol style="list-style-type: none"> 1. Avoid One-on-One Calls: Adjudicators should avoid private phone conversations

Set Aside	Description	Findings/Lesson Learned	Best Practices
	<p>communicating with BlueScope for clarification regarding specific aspects of the Adjudication Reply.</p> <p>Court Decision The Adjudicator gravely misapprehended and wrongly applied his powers under the CIPAA. The court set aside the adjudication decision with no order as to costs.</p>	<p>communicating with one party, the adjudicator must make known the communication to the other party.</p> <ol style="list-style-type: none"> 2. Failure to disclose such communications and offer the other party an opportunity to respond constitutes a breach of Natural Justice. 3. Adjudicators must exercise caution when communicating with parties individually, ideally avoiding phone calls and insisting on written communication for transparency. 	<p>with parties to ensure fairness.</p> <ol style="list-style-type: none"> 2. Document and Disclose Calls: If unavoidable, adjudicators should document the call details and inform the other party promptly. 3. Limit Discussions: Adjudicators should only discuss administrative issues over the phone, not case details. 4. Duty of Care: Adjudicators must inform all parties of any communication and allow them to respond to maintain Natural Justice. 5. Opportunity to Comment: Adjudicators should give parties a chance to comment on any material or evidence considered in the decision-making process.
<p>INOVATIF ENGINEERING (M) SDN BHD v NOMAD ENGINEERING SDN BHD [2016] MLJU 1351</p> <p>Item A - Adjudicator's ruling on the late submission of the Adjudication Response.</p>	<p>Issues/ Grounds of Challenge The challenge was based on the denial of Natural Justice as the Adjudicator ruled not to consider the Adjudication Response, citing lateness.</p> <p>Court Decision The court rejected the argument of a denial of Natural Justice, asserting that the Adjudicator did not fail to exercise the discretion afforded by the CIPAA to extend the time limits for filing the Adjudication Response.</p>	<ol style="list-style-type: none"> 1. The aggrieved party must establish that the Adjudicator failed to apply the rules of Natural Justice, and such breaches must be more than peripheral but material. 2. Breaches of Natural Justice are material when the adjudicator fails to bring crucial points to the parties' attention, decisive or of considerable importance to the dispute resolution outcome. 3. The CIPAA emphasizes a fast and quick decision, and strict timelines are set for submissions. 4. If the plaintiff needs more time, they must apply to the adjudicator for an extension under Section 25(p) with reasonable grounds. 	<ol style="list-style-type: none"> 1. Adjudicators should exercise discretion judiciously, particularly regarding extensions, to avoid bias. 2. Seek an agreement from the claimant for the extension requested by the respondent to demonstrate impartiality. 3. Offer the same extension to the claimant when replying to the Adjudication Reply to maintain fairness in the process.

Set Aside	Description	Findings/Lesson Learned	Best Practices
Item B - Adjudicator advancing the decision date	<p>Issues/ Grounds of Challenge The challenge was based on the adjudicator advancing the decision date by two days, which the Respondent and Plaintiff argued prevented the adjudicator from considering their submission.</p> <p>Court Decision The court ruled that the advancement of the decision date by two days does not constitute a failure of Natural Justice. The adjudicator use of interrogatories to assist in understanding the case does not imply bias or a breach of Natural Justice.</p>	<ol style="list-style-type: none"> 1. The court found no merit in the argument that advancing the decision date by two days was a ground for alleging bias or Natural Justice failure. 2. The adjudicator use of interrogatories is a legitimate means to assist in understanding the case, and failure to address them does not constitute a breach of Natural Justice. 3. The strict timelines imposed by the CIPAA must be adhered to, and parties should be diligent in meeting the deadlines. 	<ol style="list-style-type: none"> 1. Parties should be aware of and adhere to the strict timelines imposed by the CIPAA. 2. The adjudicator can use interrogatories to seek clarification, and parties should respond to them promptly to ensure a fair adjudication process. 3. Adjudicators may consider including a simplified timeline chart in their decisions to enhance parties' understanding of the strict timelines imposed by the Act.
RANCHAN HEAVY ENGINEERING SDN BHD v PELABUHAN TANJUNG PELEPAS SDN BHD [2016] MLJU 1182	<p>Issues/ Grounds of Challenge The plaintiff alleged denial of Natural Justice as the adjudicator refused their right to be heard by not allowing them to comment on a material authority relied upon by the defendant.</p> <p>Court Decision The Court held that rejecting the plaintiff's request did not constitute a breach of Natural Justice. The adjudicator, in an email dated November 12, 2015, had set deadlines for written submissions and informed that the decision would be delivered by January 14, 2016. The plaintiff's request to comment on the defendant's authority after the submission deadline was rejected.</p>	<ol style="list-style-type: none"> 1. The rejection was based on maintaining equality between the parties, as both were given ample time to submit and respond to written submissions. Adjudication under the CIPAA aims for speedy dispute resolution, necessitating strict adherence to timelines. 2. Adjudicators must manage timelines effectively to deliver decisions within the stipulated time frames. 	<ol style="list-style-type: none"> 1. Parties should be aware of and comply with submission deadlines to facilitate efficient dispute resolution. 2. Adjudicators should maintain a fair and equal process, avoiding extensions that may impact the timely delivery of decisions.
Item A - Adjudicator's Rejection of Plaintiff's Request to Comment on Material Authority	<p>Issues/ Grounds of Challenge The plaintiff claimed denial of Natural Justice, asserting that the Adjudicator required urgent submissions on costs at the eleventh hour.</p> <p>Court Decision The Court found no merit in the plaintiff's allegation, emphasizing that the plaintiff had ample opportunity to address the quantum of costs. The adjudicator invited both parties to submit written submissions on costs by January 12, 2016, with the decision set for January 14, 2016. The plaintiff did not raise concerns about the</p>	<ol style="list-style-type: none"> 1. The plaintiff failed to utilize the opportunity provided and did not raise concerns about the timeline or cost submissions in a timely manner. 2. The adjudicator had previously informed both parties about the possibility of requesting responses to specific questions arising from the consideration of cause papers. 	<ol style="list-style-type: none"> 1. Adjudicators may consider creating acknowledgment notices for new requests/submissions, including a comment/request provision for clarity. 2. Awareness initiatives should be implemented regarding the procedural aspects of the CIPAA, especially emphasizing timelines at the beginning of adjudication proceedings.

Set Aside	Description	Findings/Lesson Learned	Best Practices
	tight deadline or the cost issue during this period.		
RIMBUNAN RAYA SDN BHD v WONG BROTHERS BUILDING CONSTRUCTI ON SDN BHD AND ANOTHER CASE [2016] MLJU 1189 <i>Item A - Double Claim between Penultimate and Final Certificate</i>	<p>Issues/ Grounds of Challenge The challenge revolves around the Adjudicator's finding that there was no double claim between the Penultimate Certificate and the Final Certificate.</p> <p>Court Decision The court dismissed the claim of a breach of Natural Justice, emphasizing that dissatisfaction with the decision does not imply a lack of impartiality or independence on the adjudicator part. The court affirmed that both parties had equal opportunities to present their cases, and the adjudicator considered additional documents and witness statements.</p>	<ol style="list-style-type: none"> 1. Giving a fair hearing to both parties is essential. 2. Proper documentation and evidence submission are crucial. 	<ol style="list-style-type: none"> 1. Giving a fair hearing to both parties upon request can assist the adjudicator in making a well-informed decision. 2. Some claim submissions may not be sufficient for the adjudicator to process, and while the adjudicator has the power to call for new evidence, time limits are crucial to ensure the Adjudication decision is not void. 3. Any grammatical, typographical, or arithmetic errors can be corrected later as per Section 26(2)(d). Courts recognize that Adjudication is a swift form of dispute resolution, which may provide a rough form of justice, especially in complex disputes.
<i>Item B - Payments under Variation Orders Without Respondent's Representatives' Signature</i>	<p>Issues/ Grounds of Challenge The challenge questions whether payments under Variation Orders are due without the signature of the respondent representatives.</p> <p>Court Decision The court held that the Adjudicator considered the Respondent's defense, which mainly revolved around the lack of document substantiation. The Adjudicator had provided ample opportunity for the Respondent to present its case. The court found no breach of Natural Justice, and the Adjudicator had given sufficient reasons for his decision.</p>	<ol style="list-style-type: none"> 1. Adequate consideration of defenses and proper justification of findings is crucial. 2. Parties should adhere to the timelines set during the adjudication process. 	<ol style="list-style-type: none"> 1. Giving a fair hearing to both parties upon request can assist the adjudicator in making a well-informed decision. 2. Requests for additional submissions beyond the initial timetable should be considered on an individual basis, taking into account the issues raised and the time left in the adjudication timetable.
<i>Item C - Maybank Base Lending Rate and Late Interest Payment</i>	<p>Issues/Grounds of Challenge: The challenge questions whether the Maybank Base Lending Rate is 6.85%, and if the late interest payment of 1% above that may be imposed on late payment.</p> <p>Court Decision: The court rejected the claim of a breach of Natural Justice, stating that the adjudicator decision on the Bank's Base Lending Rate falls within his jurisdiction. The court</p>	<ol style="list-style-type: none"> 1. Adjudicators should properly decide disputes, and the sufficiency of evidence lies within their purview. 2. The court emphasized the objective test for assessing an adjudicator's independence and impartiality. 	<ol style="list-style-type: none"> 1. Shortly after receiving the Referral, the adjudicator should consider whether he can properly decide the dispute, reviewing its nature, size, and complexity. 2. As an exception, some final account disputes may be so large and complex that they cannot be resolved properly

Set Aside	Description	Findings/Lesson Learned	Best Practices
	emphasized that even if the adjudicator made an error, it doesn't imply a lack of impartiality. The court found no breach of Natural Justice.		by adjudication. However, there are no cases where an adjudicator decision has not been enforced based on this.
GUANGXI DEV & CAP SDN BHD V SYCAL BHD AND ANOTHER CASE [2017] MLJU 878 <i>Item A - Rejection of Expert Witnesses</i>	<p>Issues/ Grounds of Challenge The Plaintiff contended that the Adjudicator breached the rules of Natural Justice by rejecting their application to call 3 expert witnesses to give evidence in the Adjudication proceedings.</p> <p>Court Decision The court dismissed the Plaintiff's application to set aside the adjudication decision, stating that there was no denial of Natural Justice in the adjudicator not allowing a hearing.</p>	<ol style="list-style-type: none"> The adjudicator considered the Plaintiff's application and provided cogent reasons for rejection. The adjudicator exercised powers under Section 25 of CIPAA to disallow and dismiss the request/application for expert witnesses. The adjudicator reserved the right to call for a meeting to clarify submissions or supporting documents if needed. 	<ol style="list-style-type: none"> Decide the case based on party representations unless impossible, providing an opportunity for comments on alternative bases. Ensure all actions are viewed as impartial by a fair-minded observer.
<i>Item B - Non-Consideration of Clause 8(d) of LA</i>	<p>Issues/ Grounds of Challenge The Plaintiff contended a denial of Natural Justice, claiming that the adjudicator did not take into account clause 8(d) of the Letter of Award (LA).</p> <p>Court Decision The court observed that the Adjudicator not considering clause 8(d) and not accepting a letter as a Payment Response did not constitute a denial of Natural Justice. The application to set aside the Adjudication decision was dismissed.</p>	<ol style="list-style-type: none"> Although clause 8(d) of the Letter of Award granted the Respondent the right to correct errors in progress payments, it was not applicable in this case. Lack of evidence suggesting prior communication from the Respondent to the Claimant about errors in Payment Certificates. 	<ol style="list-style-type: none"> Base the decision on party representations, allowing comments on alternative bases if necessary. Ensure actions are viewed as impartial by a fair-minded observer. Provide equal and effective opportunities for both parties to respond to pleadings. Encourage agreement on appropriate extensions for delivering the decision if needed.
VIEW ESTEEM SDN BHD v BINA PURI HOLDINGS BHD [2017] 2 MLRA 460	<p>Issues/ Grounds of Challenge The challenge was based on the claim that the adjudicator breached Natural Justice by excluding and refusing to consider certain defenses raised by the appellant.</p> <p>Court Decision The Court disagreed with the claim, emphasizing that the matters or responses brought up by the appellant in the adjudication response were not raised in the payment response.</p>	<ol style="list-style-type: none"> The adjudicator has an obligation to comply with the principles of Natural Justice, ensuring fairness and impartiality. Adjudicators should consider all defenses raised by the parties in the adjudication response for fairness. <p>The notice of adjudication typically focuses on the claim, and the responding party is entitled to defend against the claim with legitimate available defenses.</p>	<ol style="list-style-type: none"> Adjudicators should be diligent in considering all defenses raised by parties, as fairness and impartiality are crucial. Parties should be aware that the Notice of Adjudication may not explicitly cover all potential defenses, and adjudicators may need to address additional defenses raised in the Adjudication response.

Set Aside	Description	Findings/Lesson Learned	Best Practices
MARTEGO SDN BHD v ARKITEK MEOR & CHEW SDN BHD AND ANOTHER APPEAL [2017] MLJU 1827	<p>Issues/ Grounds of Challenge The challenge was based on the adjudicator's refusal of Martego's request to call for oral evidence to resolve a dispute.</p> <p>Court Decision The learned judge rejected this contention, stating that Martego's complaint was substantially a finding of facts rather than a breach of Natural Justice.</p>	<ol style="list-style-type: none"> 1. The CIPAA does not prescribe a specific method for the adjudication process. 2. The main requirement is to provide both parties with an opportunity to present their case, whether through written submissions or oral evidence. <p>The choice rests with the adjudicator to decide the process, if the documentation is sufficient for them to work with.</p>	<ol style="list-style-type: none"> 1. An adjudicator should allow parties to comment on any material or evidence, including knowledge or experience from any source, when making a decision. 2. Address the timetable for adjudication early in the process, considering the complexity of the issues and securing sufficient time if needed.
MILSONLAND DEVELOPMENT SDN BHD v MACRO RESOURCES SDN BHD AND ANOTHER APPEAL [2017] MLJU 169	<p>Issues/ Grounds of Challenge The challenge revolved around whether there was a breach of Natural Justice when the adjudicator disregarded the issue of delay and defects raised for the first time by the respondent in its adjudication response.</p> <p>Court Decision The court ruled that there was no breach of Natural Justice as, constrained by the clear provision of Section 27(1) the CIPAA, the adjudicator did not consider the issues of delay and defective works raised for the first time in the respondent's adjudication response.</p>	<ol style="list-style-type: none"> 1. The failure to file a payment response allows the non-responding party some security against a default judgment, as Section 6(4) deems the payment claim to be disputed. 2. In the absence of a payment response, the unpaid party (claimant in adjudication) is only required to prove the matters raised in the payment claim without meeting additional onus of proof. 	<ol style="list-style-type: none"> 1. Be familiar with the CIPAA to avoid disputes, especially if unfamiliar, contributing to Natural Justice. 2. Follow the adjudication procedure agreed upon in the contract. 3. Adopt procedures appropriate to the specific case. 4. Ensure all actions are viewed as impartial by a fair-minded observer.
ZANA BINA SDN BHD v COSMIC MASTER DEVELOPMENT SDN BHD AND ANOTHER CASE [2017] MLJU 146	<p>Issues/ Grounds of Challenge The challenge centered around whether there was a valid payment claim in compliance with the CIPAA before the adjudicator.</p> <p>Court Decision The Court found that the adjudicator did not exceed his jurisdiction, did not act impartially, or breach Natural Justice. The decision was reached based on the adjudicator's powers under Section 25(i) to inquisitorially ascertain facts and law and Section 25(n) to decide on matters even without a certificate issued.</p>	<ol style="list-style-type: none"> 1. The adjudicator has the power to inquisitorially inquire into the veracity of payment claims and objections. 2. The adjudicator may exercise powers to decide matters even without certificates, ensuring flexibility in decision-making. 3. The adjudicator may direct site inspections to gather information. 	<ol style="list-style-type: none"> 1. Ensure familiarity with the CIPAA to avoid disputes and contribute to Natural Justice. 2. Follow the adjudication procedure agreed upon in the contract. 3. Adopt procedures appropriate to the specific case. 4. Recognize that a Section 15 the CIPAA setting aside application does not disturb the adjudicator's findings or interpretations; corrections can be made in arbitration or litigation. 5. Consider the nature, size, and complexity of the dispute at the outset of the adjudication process.

FINDINGS

Upon scrutinizing various court judgments, it became evident that the setting aside of adjudicator decisions predominantly occurred under two primary circumstances:

a) Questioning Adjudicator Power (Section 25 of the Act)

- Parties often challenged adjudicator decisions by questioning the extent and exercise of powers under Section 25 of CIPAA.
- Disputes arose concerning the adjudicator's discretionary authority, particularly where powers granted under Section 25 were perceived to be overused or misapplied.

b) Non-Compliance with CIPAA Provisions

- A recurring trend involved disputes where adjudicator decisions were set aside due to non-compliance with CIPAA provisions.
- Concerns were frequently raised about the misinterpretation or misapplication of CIPAA provisions, leading to disagreements crucial to the adjudication process.

From these observations, a comprehensive Table 3 summarizing best practices in ensuring natural justice in adjudication proceedings has been formulated. Table 3 serves as a practical guide for stakeholders involved in adjudication processes.

Table 3: Best practices in ensuring natural justice in adjudication proceedings.

Item	Description	Cases	Proposed Best Practices
1	Setting Deadlines for Document Production (Section 25c):	<ol style="list-style-type: none"> 1. <i>Ranchan Heavy Engineering Sdn Bhd v Pelabuhan Tanjung Pelepas Sdn Bhd</i> [2016] MLJU 1182 2. <i>ACFM Engineering & Construction Sdn. Bhd. v Esstar Vision Sdn. Bhd.</i> 	<ol style="list-style-type: none"> 1. The adjudicator should create an acknowledgment notice for new submissions, encouraging parties to comply promptly. 2. Promote awareness of adjudication proceedings.
2	Call for meetings with the parties (Section 25 f)	<ol style="list-style-type: none"> 1. <i>WRP Asia Pacific Sdn Bhd v. Ns BlueScope Lysaght Malaysia Sdn Bhd</i> [2015] MLRHU 1018 	<ol style="list-style-type: none"> 1. Adjudicator's discretion on holding meetings, considering the case's nature. 2. Deciding the formality of meetings based on party preferences.
3	Conduct any hearing and limiting the hearing time (Section 25 g)	<ol style="list-style-type: none"> 1. <i>View Esteem Sdn Bhd v Bina Puri Holdings Bhd</i> [2015] 2 MLJ 22 2. <i>Guangxi Dev & Cap Sdn Bhd v Sycal Bhd And Another Case</i> [2017] MLJU 878 3. <i>Martego Sdn Bhd v</i> 4. <i>Arkitek Meor & Chew Sdn Bhd And Another Appeal</i> [2016] MLJU 1827 5. <i>WRP Asia Pacific Sdn Bhd v. Ns BlueScope Lysaght Malaysia Sdn Bhd</i> [2015] MLRHU 1018 	<ol style="list-style-type: none"> 1. Oral hearings are not essential in every case; fairness does not always require one. 2. Parties should be given an equal opportunity to address new findings. 3. Adjudicators should set a timetable for submissions, ensuring fairness.

4	Inquisitorially take the initiative to ascertain (Section 25 i)	1. <i>WRP Asia Pacific Sdn Bhd v. Ns BlueScope Lysaght Malaysia Sdn Bhd [2015] MLRHU 1018</i>	1. Adjudicators should avoid individual telephone conversations. 2. Encourage parties to copy all correspondence to ensure transparency. 3. Including correspondence created by him or his appointed advisors if he is attaching significance to it in reaching his decision.
5	Extend any time limit imposed on the parties (Section 25 p):	1. <i>Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and Another Case [2017] MLJU 146</i> 2. <i>Inovatif Engineering (M) Sdn Bhd v. Nomad Engineering Sdn Bhd [2016] MLJU 1351</i>	1. Adjudicator's discretion to seek agreement for time extension, ensuring fairness. 2. Agreements should be documented for proof of impartiality.
6	Adjudicator's Appreciation of Evidence (Section 15)	1. <i>ACFM Engineering & Construction Sdn. Bhd. v Esstar Vision Sdn. Bhd.</i> 2. <i>Rimbunan Raya Sdn Bhd V Wong Brothers Building Construction Sdn Bhd and Another Case [2016] MLJU 1189</i> 3. <i>Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd And Another Case [2017] MLJU 146</i>	1. Detailed reasons are not mandatory, but clarity is crucial. 2. Adjudicators should address each issue separately in the decision. 3. Adjudicators should avoid silly mistakes, ensuring accuracy.
7	Establishing Procedures and Limiting Document Submissions (Section 27(1))	1. <i>View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2017] 2 MLRA 460</i> 2. <i>Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd And Another Appeal [2017] MLJU 169</i>	1. Adjudicators can consider all defenses, even if not included in the initial payment response. 2. Flexibility for additional submissions, evaluated based on issues raised and remaining time.

SUMMARY OF FINDINGS AND CONCLUSION

The examination of challenges within CIPAA reveals a recurring theme centered on the pivotal role of Section 25 in shaping the powers of adjudicators. This section, while designed for procedural efficiency, must not compromise natural justice. Cases highlight that a narrow interpretation of jurisdiction can lead to fairness breaches⁹.

Setting aside adjudication decisions on natural justice grounds is challenging, as noted by (Rahmat, 2018). Success requires demonstrating the materiality of the breach, often due to an adjudicator's limited view of jurisdiction. Beyond these concerns, CIPAA, initially designed for expediency, faces complexities discouraging smaller industry players. The industry's perception of CIPAA is crucial. Unaddressed challenges might erode confidence in the adjudication process. Complexities and extended timelines may push stakeholders towards conventional court avenues, undermining the Act's original purpose.

⁹ *Ranchan Heavy Engineering Sdn Bhd v Pelabuhan Tanjung Pelepas Sdn Bhd [2016] MLJU 1182* and *ACFM Engineering & Construction Sdn. Bhd. v Esstar Vision Sdn. Bhd. [2016] MLRAU 499*

Balancing efficiency and fairness remain critical with court underline the need to maintain this equilibrium¹⁰. Reflecting on whether CIPAA serves as a fast and cost-effective mechanism, especially for smaller players, is essential. Considering feedback from industry stakeholders, including contractors, adjudicators, and legal professionals, is crucial. Their insights on practical experiences and challenges can inform potential reforms.

In conclusion, CIPAA is vital for addressing payment disputes. Ongoing scrutiny and refinement are imperative. Balancing efficiency and fairness, coupled with procedural clarity, is essential to preserve the Act's effectiveness. Reforms should address observed challenges and reflect the collective experiences and needs of construction industry stakeholders.

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¹⁰*WRP Asia Pacific Sdn Bhd v. NS BlueScope Lysaght Malaysia Sdn Bhd [2015] MLRHU 1018*

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