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# **Statutory Construction Adjudication: Analysis of the New Zealand and Malaysian Legislations**

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## **Abstract**

The construction industry contributes significantly to any country's economy. However, there remain two chronic problems. They are: (i) delayed or non-payment, and (ii) costly and protracted dispute resolution. The severity of these problems have led to several jurisdictions including the UK, New Zealand, Singapore, Malaysia, and Australia to legislate on payment provisions and introduce adjudication as a rapid dispute resolution method.

This research was done to analyse the effectiveness of adjudication provisions in legislation governing payment and adjudication focused on the New Zealand and Malaysian Acts. To achieve this aim, research objectives were formulated under 6 areas: (i) analysis of construction dispute resolution methods, (ii) key coverage and scope of the adjudication provisions in the Acts, (iii) clarity of legislative drafting and style, (iv) time taken to resolve disputes in adjudications, costs of adjudications, and quality of adjudicators' decisions, and (v) quality of adjudicators and their training, and (vi) an initiation of the development of a decision-making model for adjudication legislation. These objectives were achieved using a mixed method to analyse the key features and effectiveness of the adjudication provisions in these Acts. The mixed method comprised legal documentary analysis by examining primary and secondary legal sources (including legislation and case law), a quantitative approach (through questionnaires distributed to adjudicators in New Zealand), and a case study relating to the Malaysian Act.

The findings show that although all these Acts use the same term - adjudication, a deeper analysis shows some of the concepts and details are significantly different among jurisdictions. There appear to be two major models – the narrower New South Wales model that focuses on payment adopted by several other states in Australia and Singapore and the wider UK model adopted with modifications by New Zealand where all disputes may be resolved through adjudication.

The Acts in New Zealand and Malaysia have very similar objectives on dispute resolution, but a detailed analysis shows the details are different. The findings show there is incongruence between the objectives and the detailed provisions of the Malaysian Act. The Malaysian Act provides the longest adjudication durations and

the most elaborate adjudication processes including provisions for hearings, ordering discovery of documents, and even ordering evidence to be given on oath. However, despite the long durations, the Act takes the narrow path of only allowing adjudication for payment claims for work done or services rendered. Empirical evidence was also obtained from a questionnaire survey of adjudicators in New Zealand, which had a response rate of 73% of the total number of adjudicators listed on the then three adjudicator authorised nominating authorities in New Zealand. The main findings from the documentary analysis and the survey indicate that (i) the legislative drafting style of the New Zealand Act and some of the Australian Acts were written in modern plain language while others such as Singapore adopted the traditional style, (ii) the majority of adjudicators in New Zealand found the Act easy to understand, the actual time taken in adjudications were generally within the overall timeframes provided under the Act, and costs were well contained.

Case analysis shows a significant number of adjudicators' decisions that were referred to court were related to procedural matters. Although the proportion of adjudication decisions that were referred to court are relatively small at under 5%, if the quality of adjudicators were improved through enhanced training, there may be a possibility the number of cases being challenged in court could be lowered. A new task-based approach to developing adjudicator standards and testing and accrediting adjudicators was developed as a proof-of-concept. This approach was demonstrated using the Malaysian Act as a base and modified and adapted to apply to the New Zealand Act.

The findings also led to a development of a preliminary decision-making model on adjudication legislation. To demonstrate its potential application the model was applied to the Malaysian Act and the first court case on adjudication in Malaysia. Among the conclusions is that the decision-making model could be used by countries considering adjudication and those considering amending their existing payment and adjudication Acts. The model can help in making informed choices and direction on concepts for the Act being considered. Among the conclusions formed as a result of these findings was the recommendations to the Commonwealth Association of Legislative Counsel to produce a uniform drafting style guide for all Commonwealth countries. Consistency in drafting style can help avoid discrepancies in interpretation.

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## Abbreviations

ACT	Building and Construction Industry (Security of Payment) Act 2009, Australian Capital Territory, Australia
IoM Act	Construction Contracts Act 2004, Isle of Man
Ir Act	Construction Contracts Act 2013, Ireland
Malaysia Act	Construction Industry Payment and Adjudication Act 2012, Malaysia
NSW	New South Wales
NSW Act	Building and Construction Industry Security of Payment Act 1999, amended in 2002 and 2009, New South Wales, Australia
NT Act	Construction Contracts (Security of Payments) Act 2004, Northern Territory, Australia
NZ	New Zealand
NZ Act	Construction Contracts Act 2002, New Zealand
New NZ Bill	Construction Contracts Amendment Bill 2013 updated with Supplementary Order Paper No 52 dated 11 March 2015, New Zealand
New NZ Act	Construction Contracts Amendment Act 2015, New Zealand
Qld Act	Building and Construction Industry Payments Act 2004, Queensland, Australia
SA Act	Building and Construction Industry Security of Payment Act 2009, South Australia, Australia
Sg Act	Building and Construction Industry Security of Payment Act 2004, Singapore
Tas Act	Building and Construction Industry Security of Payment Act 2009, Tasmania, Australia
UK	United Kingdom
UK Act	Housing Grants, Construction and Regeneration Act, Part II being the relevant part, 1996, United Kingdom
New UK Act	Local Democracy, Economic Development and Construction Act, Part 8 being the relevant part, 2009, United Kingdom
Vic Act	Building and Construction Industry Security of Payment Act 2002, amended in 2006, Victoria, Australia
WA Act	Construction Contracts Act 2004, Western Australia, Australia



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- Building and Construction Industry Security of Payment Act 2009, Tasmania, Australia.
- Construction Contracts (Security of Payments) Act 2004, Northern Territory, Australia.
- Construction Contracts Act 2002, New Zealand
- Construction Contracts Amendment Act 2015, New Zealand
- Construction Contracts Act 2004, Isle of Man.
- Construction Contracts Act 2004, Western Australia, Australia.
- Construction Contracts Act 2013, Ireland.
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## **Chapter 1: Introduction and Literature Review**

### **1.1 Introduction**

This chapter provides a background to the research and outlines the research aim, research objectives, and the research method adopted followed by a chapter-by-chapter outline of the whole thesis.

This is followed by a literature review that covers the background to the construction industry and its significance to a country's economy with a focus on New Zealand and Malaysia. It then identifies the twin problems commonly found in the construction industry of (i) payment defaults in the construction industry and (ii) protracted and costly methods of resolving construction disputes using traditional methods.

Both these problems adversely and significantly affect the efficiency of the construction industry and are thus important areas to be studied. The repercussions are so serious that there are now 14 jurisdictions that have introduced legislation covering both these issues – payment in the construction industry and construction dispute resolution.

The chapter highlights how arbitration, which has been the traditional binding method of resolving construction disputes, fell out of favour because of delays and increasing costs associated with it. From a personal experience account on the shortfalls of arbitration and in search of alternatives, this chapter then identifies two dispute resolution methods available to the construction industry that are much quicker and cheaper. These are (i) structured construction mediation, which is a non-binding dispute resolution method and (ii) statutory adjudication, which is now a widely used binding dispute resolution method. Although binding, adjudicated disputes may be re-opened in arbitration.

The research shows that a holistic approach to construction dispute resolution with different dispute resolution methods complementing each other supported by a specialist construction court would serve the industry best.

The literature review done in this chapter covers the first objective, which is to review binding dispute resolution methods such as arbitration and adjudication as well as an amicable dispute resolution method - mediation.

Adjudication forms the core of this research and a basic review of adjudication is done and analysed in order to identify primary differences, gaps, and possible anomalies.

Chapter 2 follows with an analysis of adjudication models around the world including past research on adjudication and establishes details of key distinguishing features among legislations that is then used to develop the decision-making model for adjudication legislation in chapter 6.

## **1.2 Research aim**

This research was done to analyse alternative dispute resolution methods generally but with a focus on analysing the key features and effectiveness of the adjudication provisions in legislation governing payment and adjudication. It focuses on the 'hybrid' NZ and Malaysian models and develops a decision-making model for adjudication legislation for countries considering adjudication and those considering amending their existing Acts.

The literature review on construction dispute resolution generally and the differing models on adjudication in the various jurisdictions led to a range of questions which was subsequently restructured to form the formal research objectives:

- What is statutory adjudication and how does it differ in essence from other established and 'tried and tested' dispute resolution methods such as mediation, arbitration, and litigation?
- What are the key differences among the adjudication models adopted by the 14 jurisdictions that have introduced legislation affecting the construction industry?
- How effective have these Acts been in clearly communicating the objectives of the Acts?

- Proposals for the most recent jurisdiction considering such an Act – Malaysia, appears to suggest the NZ Act is the preferred (hybrid) model. The UK Act introduced amendments recently in 2009 after several years of deliberations. Most of the improvements are already found in the NZ Act. The question remains: How successful is the NZ Act? In the context of the boundaries of this thesis, specifically, how successful has the adjudication provision under the NZ Act been?
- In particular, how efficient has the adjudication provision under the NZ Act been? Efficiency of adjudication as a dispute resolution method could simply be measured in terms of duration of adjudications and the costs of adjudication. But the further question remains, how effective has adjudication been in dispensing justice? This may be determined by analysing cases on adjudication reported in court. And finally, are the standards of training for adjudicators adequate? Can they be improved?
- There are two clearly distinguishable models among the 14 jurisdictions. If both models serve different purposes and one cannot be singled out as the better of the two, is there a possibility of developing a decision-making model that would help future decision makers in other jurisdictions who are considering adjudication as a dispute resolution method? This brings back the overall aim of this research. The purpose behind the decision-making model is to offer the construction industry worldwide a model that could be used either when considering new legislation to govern construction payment practices and introduce adjudication, as well as for those jurisdictions that already have such legislation when considering amending their Acts.

In order to analyse the key features and effectiveness of the adjudication provisions and achieve the research aim of this research, these numerous questions were formulated into 6 structured research objectives as follows.

## **1.3 Research objectives**

The research objectives were formulated covering 6 areas:

### **1.3.1 Objective 1: Primary alternative dispute resolution methods in the construction industry**

To review primary alternative dispute resolution methods and analyse the key distinguishing features of mediation, arbitration, and adjudication. The rationale behind this is to help explain in what way adjudication is different from the more traditional and well established dispute resolution methods of arbitration and mediation.

### **1.3.2 Objective 2: Key scope of the adjudication provisions in various Acts**

To establish the key characteristics and scope that is covered under the adjudication provisions in the various Acts including any models and trends. This includes identifying similarities and differences in both concepts and in the details among the Acts. The findings from this objective would then form the core for the development of the decision-making model for adjudication legislation.

### **1.3.3 Objective 3: Clarity and style of legislative drafting**

To investigate the extent to which the Acts of Parliament comply with modern plain legal language drafting guidelines and the ease with which users can understand these statutes. This is among the key objectives in this research and is particularly important because (i) the primary users of these legislations including clients, contractors, subcontractors, suppliers, and consultants in the construction industry are considered lay users, as opposed to legal experts, and (ii) the unprecedented statutorily imposed timeframe is so short (typically stated in days) that parties are expected to expediently understand all provisions in the Acts and respond to provisions under these Acts very rapidly. This particular aspect of the research on clarity and style of legislative drafting covering payment and adjudication legislation has never been done by anyone before.

#### **1.3.4 Objective 4: Effectiveness of adjudication durations, costs, and adjudicators' decisions**

To investigate and establish timeframes provided in the Acts and actual time taken to resolve disputes in adjudications and establish the comparative effectiveness of adjudication as a speedy dispute resolution method. This will also include an investigation of the associated comparative cost effectiveness of adjudication and the effectiveness of the quality of adjudicators' decisions.

#### **1.3.5 Objective 5: Quality of adjudicators and their training**

To investigate the knowledge base expected of adjudicators and establish ways of enhancing the quality of adjudicators and their decisions.

#### **1.3.6 Objective 6: Development of a decision-making model for statutory adjudication and case study**

From the foregoing objectives, objective 6 is to initiate the development of a decision-making model for statutory adjudication that can help other jurisdictions considering introducing similar legislation and existing legislation considering amendments. The preliminary model guides potential decision makers in evaluating options that are available within the concepts and details of adjudication and leads to a preferred solution based on responses to a series of questions.

The preliminary model is then used as a partial case study against the Malaysian Construction Industry Payment and Adjudication Act 2012 that came into operation on 15 April 2014. The New Zealand Construction Contracts Amendment Act 2013 which was then scheduled for the third and final reading in Parliament in April 2015 was tested against the model. The model is also analysed against the first Malaysian court case on adjudication – which was delivered on 5 December 2014. The case studies help establish the potential benefit of developing a full and comprehensive model and to demonstrate the potential impact the decision-making model could have on policies adopted by other jurisdictions considering adjudication and those considering amending their existing Acts.

## **1.4 Research design and method**

### **1.4.1 Research method**

Research method is the way or ways in which a researcher uses the tools available to find the answers to the research questions and to establish the rationale for the answers.

This research was done using a mixed method comprising legal documentary analysis by examining primary and secondary legal sources (including primary legislation and case law), a quantitative approach (through questionnaires distributed to adjudicators in New Zealand), and case studies using the Malaysian Construction Industry Payment and Adjudication Act 2012 that came into operation on 15 April 2014 and the New Zealand Construction Contracts Amendment Bill 2013 that was then scheduled for the third and final reading in Parliament in April 2015. Mixed methods are well recognised and accepted by researchers. See for example Sekaran (Sekaran, 2006) and Hussey & Hussey (Hussey & Hussey, 1997). The case studies include a historical development of the Malaysian Act to better understand how or why the Malaysian Act took the form it has, as well as a brief analysis of the 131-page judgement on the first court case on adjudication in Malaysia delivered on 5 December 2014. The case study is discussed and some of the questions within the preliminary decision-making model are tested against the cases to see if applying the decision-making model developed in this research can help draw conclusions on whether it would have made a difference to the concepts that were adopted in the Malaysian Act and potentially, to the New Zealand Bill that was then before Parliament awaiting the third and final reading in April 2015.

This research uses more than one approach to investigate the research questions with the hope of getting better validation. Webb et al (Webb, 1966) suggest:

*‘Once a proposition has been confirmed by two or more independent measurement processes, the uncertainty of its interpretation is greatly reduced.’*

### **1.4.2 Primary legal sources – legislation and reported case law**

The method adopted in this research combines both quantitative and qualitative approaches. The primary approach comprised legal documentary analysis by

examining primary and secondary legal sources, including primary legislation and case law based on reported cases in multiple jurisdictions.

This was a qualitative approach that involved reading, analysing, and interpreting primary legislation in the various jurisdictions and reported legal case law. Data on case law covered cases reported in New Zealand and other jurisdictions including the United Kingdom, Singapore, New South Wales, Queensland, Victoria, Western Australia, Northern Territory, and Malaysia.

All legislation documents were obtained from each jurisdiction's government website. Many of the case law reports were available online. Some of the cases were also accessed through the membership sections of the Adjudication Society UK and Society of Construction Law, UK, New Zealand, and Malaysia.

Other research materials included books, papers, and journal articles (both hard-copies and electronic versions) on construction law, dispute resolution, adjudication, construction contracts, and other legal publications including law reports. The sources of books and journals include an extensive personal collection, university libraries at the University of Auckland, Massey University, virtual libraries, and other university libraries including the specialist library at the Centre of Construction Law and Management at Kings College London and libraries of local and international professional bodies and other organisations.

### **1.4.3 Quantitative questionnaire**

The qualitative survey was combined with questionnaire survey sent to the total population of adjudicators as listed on the authorized nominating authorities in New Zealand.

The quantitative approach was through a questionnaire sent to all adjudicators listed in New Zealand. There were then three 'Authorised Nominating Authorities' or ANAs under the New Zealand Construction Contracts Act 2002. They are the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Adjudicators Association of New Zealand (AANZ) and the Building Disputes Tribunal (BDT). The fourth ANA – the Royal Institution of Chartered Surveyors only commenced operation in New Zealand in December 2014.

The questionnaire was distributed to all adjudicators listed on AMINZ, AANZ, and BDT. The ANAs were supportive and helped distribute the questionnaire and encouraged their members to complete the questionnaire.

As some adjudicators are listed on more than one body, care was taken to avoid getting repeated questionnaires. Fifty-two out of the total population of 71 adjudicators responded to the questionnaire. That represents a relatively high response rate of 73%.

Statistical Package for the Social Sciences (SPSS) was used to analyse the data, which enabled generating basic frequency and cross tabulation results with the variables. As the entire population of the then adjudicators listed under the three authorized nominating authorities in New Zealand was approached and the response rate was high, there was little need to rely on any significant levels of inferences in analysing the results.

## **1.5 Thesis structure**

This thesis has seven chapters.

Chapter 1 (this chapter) gives a background to the research and outlines the research aim, research objectives, and the research method adopted, and covers objective 1.

A literature review is done that covers the background to the construction industry and its significance to a country's economy with a focus on New Zealand and Malaysia. It then identifies the twin problems commonly found in the construction industry of (i) payment defaults in the construction industry and (ii) protracted and costly methods of resolving construction disputes using traditional methods.

This then leads to identifying a couple of critical issues in the construction industry that needs addressing – payment problems and inefficient dispute resolution methods. The 3 key alternative dispute resolution (excluding litigation) methods of resolving disputes in the construction industry namely arbitration, mediation, and adjudication are compared and analysed.

Chapter 2 covers objective 2 and reviews literature on the various adjudication models with a focus on the UK, New Zealand, New South Wales, and Malaysian

Acts. Single jurisdiction research and those comparing multiple jurisdictions are identified and reviewed. Gaps are identified and justification of the research outlined. The conceptual differences among the various jurisdictions are identified and analysed. This ties back to research objective 1 and together they form the basis of the preliminary decision-making model developed in chapter 6.

Chapter 3 deals with research objective 3, which investigates legislative drafting style using the key primary legal resource in this research – the Acts of Parliament. It compares the various Acts of Parliament and critically analyses the drafting style measured against published legislative drafting style guidelines. It also empirically analyses and discusses the results from a survey done with adjudicators in New Zealand on their level of ease of understanding the Act. It identifies some drafting shortfalls in some of the Acts and recommends the adoption or development of drafting guidelines using existing published guidelines as a base.

Chapter 4 deals with research objective 4 on durations, costs, and quality of adjudications and the decisions made by adjudicators. It analyses durations provided in the Acts against empirical evidence on time and cost from a questionnaire survey done with adjudicators in New Zealand and with the most recent data made publicly available on adjudications in Malaysia. It also analyses court cases on adjudication and establishes major themes to identify the main areas of challenges to adjudicators' decisions.

Chapter 5 deals with research objective 5 on the quality of adjudicators. It compares and distinguishes the skills expected of arbitrators, mediators, and adjudicators. It focuses on and considers the quality expectations of adjudicators and training and prevailing standards. Adjudication is a very procedural process and there have been numerous challenges to adjudicators' decisions on procedural matters. A task-based adjudicator competency standard is proposed based on a new task-based approach. Other aspects of practice and procedure are also reviewed to enhance the quality of adjudicators' decisions.

Chapter 6 deals with objective 6, where a preliminary decision-making model for adjudication legislation is developed based on the analysis from the earlier chapters. The model can be used as a base when developing new legislation for other jurisdictions considering adjudication and for use when reviewing existing legislation

on adjudication. The model is then applied to a case study – the Malaysian Construction Industry Payment and Adjudication Act 2012, and shows that it can also be applied to the New Zealand Construction Contracts Amendment Act 2015 to establish if the use of the model might have made a difference to the concepts adopted in the Act or earlier Construction Contracts Amendment Bill 2013.

Chapter 7 is the conclusion chapter that brings the whole research together explaining how the objectives were achieved, the significance of the research and contribution to knowledge in the area of statutory adjudication and makes recommendations on areas for further research.

## 1.6 The significance of the construction industry to the economy

The construction industry is a significant contributor to most economies around the world (Chia, Skitmore, Runeson, & Bridge, 2014). Construction spending is known to have a ‘multiplier effect’ on spending throughout the economy. One dollar spent on a construction project typically has multiple knock on effects on the rest of the economy through a chain of economic activities.

Generally the construction industry’s contribution to Gross Domestic Product (GDP) in more developed countries tends to be higher than in developing countries. GDP is the market value of all officially recognised final goods and services produced within a country in a given time period. This is an important measure as the GDP per person of the population is often considered to be an indicator of a country’s standard of living. The figures on the construction contribution to GDP for two developed countries, the United Kingdom (UK) and New Zealand (NZ) and one for a developing country Malaysia are shown in Table 1:

**Table 1: Comparison of construction industry contribution to GDP**

Country	Development status	Construction industry’s contribution to GDP (%)
United Kingdom	Developed	6% - 12% for over a decade up to 2008
New Zealand	Developed	4.2% - 4.9% between 2000 and 2008
Malaysia	Developing	2.9% - 4.0% over the decade up to 2009

(Construction Industry Development Board Malaysia, (CIDB, 2010)

Issues relating to payment in the construction industry are important for a number of reasons including the sheer size of construction projects, the fact that the industry operates on credit, and is dependent on a multitude of contractors working in a heavily subcontracted environment.

While it has long been identified that issues relating to payment and expedient construction dispute resolution are important in developed countries such as the UK and New Zealand these issues are equally important in developing countries such as Malaysia particularly given the rate of development. Although the construction industry contribution to the economy in Malaysia is relatively smaller as a proportion when compared with developed countries, Malaysia has had significant growth in **new** construction projects as opposed to refurbishments. This is elaborated below to demonstrate the magnitude of size of projects envisaged over the years as Malaysia moves towards becoming a developed country. Any inefficiency caused by payment default or protracted dispute resolution can be damaging to the industry.

## **1.7 The Malaysian construction industry**

In 1991 Malaysia set itself out to be a fully developed nation by 2020. This is known throughout the country as 'Wawasan 2020' or in its English equivalent: 'Vision 2020'. It was a long-term 30-year vision. As part of the scheme to achieve this, construction work was used as a catalyst to spur economic activity. Malaysia clearly recognised the importance of the relationship between GDP and developed nation status and the multiplier effect. Even during the 1998 regional economic crisis, instead of cutting back on spending, the Malaysian government invested more money in infrastructure in order to boost the economy. With the recent global financial crisis, some countries such as the USA and Japan took a similar approach but to varying extents.

The Central Bank of Malaysia's Annual Report in 2008 (BNM, 2009) reads at 7: '*The Malaysian economy registered a growth of 4.6% in 2008, amidst the international financial turmoil and sharp deterioration in global economic environment*'.

There is a fair amount of international trade relating to construction work in Malaysia and any decline in the world economy would affect Malaysia. However, it appears from the Central Bank of Malaysia report that Malaysia managed to circumvent this inevitable decline with strong domestic demand through public spending and partly

as a consequence, private consumption. This helps explain the continued growth despite unfavourable economic conditions elsewhere in the world. The larger proportion of domestic demand lessened the impact of the global downturn on the Malaysian economy than would otherwise have been expected.

Notwithstanding all this, the global financial crisis of 2007-2010 did affect the annual growth target for Malaysia to achieve its Vision 2020. But the government has again chosen to be a major catalyst in accelerating infrastructure, property, and construction growth as it did in the late 90s. Apart from a number of major growth regions around the country including the Eastern corridor, Northern states, and specific ‘mega’ projects around the capital Kuala Lumpur there is the mammoth Iskandar Malaysia development in the South. This development covers an area of 2,217 square kilometres in the Southern state of Johor, which borders Singapore. This development is three times the size of Singapore. It is modelled after the Pearl River Delta Economic Zone in China (which by itself accounts for 9.9% of GDP).

The Iskandar Malaysia development targets a total of USD 100 billion in foreign and local investments. With the proximity and synergy with Singapore and other nations, so far, a good portion of this target has already been committed. All this trends towards the ultimate aim of achieving Vision 2020 for Malaysia.

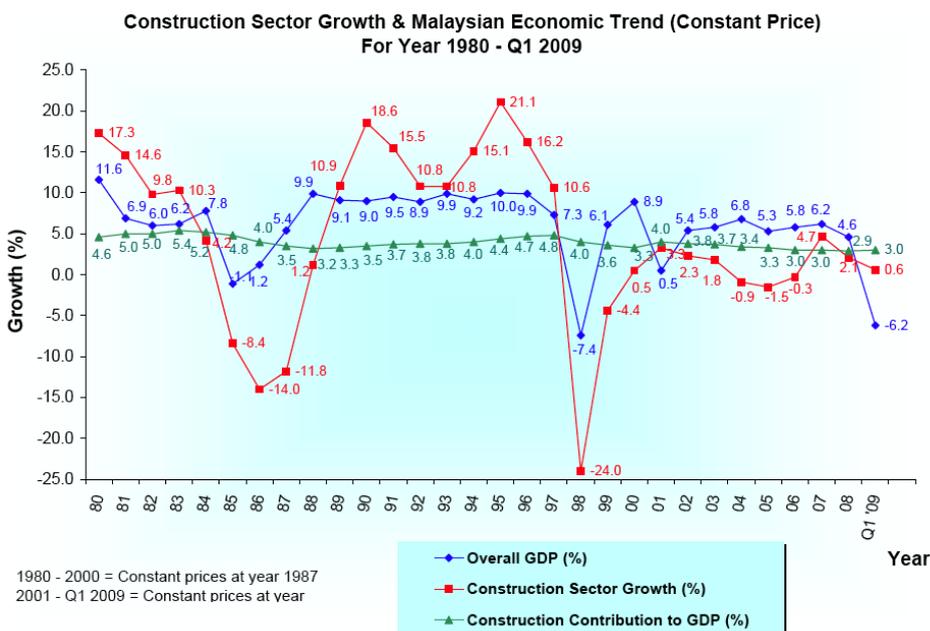


Figure 1: Construction Sector Growth & Malaysian Economic Trend (Constant Price) For Year 1980 – Q1 2009 (CIDB, 2010).

Figure 1 shows the construction contribution to GDP (CIDB, 2010). It can also be observed that there is a correlation between overall GDP and construction sector movements. Given the significant size and growing contribution of the construction industry to the economy in Malaysia, any problem that can affect the construction industry output and productivity requires attention – ideally before problems occur.

Two notable twin issues common to both developed and developing countries are issues relating to payment affecting cash flow and the associated problems of protracted and expensive dispute resolution processes.

## **1.8 Payment and cash flow issues in the construction industry**

*'There must be 'cash flow' in the building trade. It is the very lifeblood of the enterprise.'*

This is a well-known statement made by Lord Denning in the *Dawnays v Minter* case (*Dawnays Ltd v FG Minter* [1971] 2 All ER 1389, cited with approval in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, at 214 (HL) Lord Diplock) and is often quoted in the construction industry and by construction lawyers. Yet disrupted cash flow as a result of payment default remained a major, largely unresolved problem in the construction industry worldwide. Associated with this is the problem of protracted and costly methods of resolving construction disputes.

Experience from countries such as the United Kingdom, Australia, New Zealand, and Singapore shows cash flow disruption following non-payment can have a crippling effect on the construction industry.

### **1.8.1 United Kingdom**

In the United Kingdom, it was reported that 35,000 small businesses and companies became insolvent and almost half a million jobs were lost between 1989 and 1994. This and other damaging figures were reported in the now famous July 1994 report 'Constructing the Team' popularly known as the 'Latham Report' named after the committee chaired by Sir Michael Latham (Latham, 1994). Among the recommendations in the report were calls to make a procedure called 'adjudication' as the normal method of resolving construction disputes. Some of the

recommendations from the report were adopted and led to the subsequent enactment of the Housing Grants, Construction and Regeneration Act 1996 ("Housing Grants, Construction and Regeneration Act, Part II, 1996, United Kingdom,") in the United Kingdom. This was done despite strong objections by a number of well-known authorities in the areas of construction law and dispute resolution. They argued that introducing such legislation would contravene the highly valued concept of freedom of contract. It was considered by government that the ills of the industry were so severe that this unprecedented statutory intervention was considered necessary. The resulting Act, which was the first Act in the world to introduce the concept of adjudication backed by statute, came into effect on 1 May 1998. With the benefit of hindsight and despite some refinements required, adjudication has now been hailed as a 'runaway success' even by some of those who had strongly objected to its introduction earlier.

### **1.8.2 New Zealand**

In New Zealand, a number of major construction companies had gone into liquidation as a result of non-payment and cash flow disruptions at the turn of the century. Following rapid consultations, the government decided to introduce legislation relating to payment in the construction industry and to introduce statutory adjudication as a speedy dispute resolution method conceptually similar in some aspects to what was introduced in the UK.

The then Associate Minister of Economic Development, Hon Laila Harre announced this intention on 1 Feb 2001. Ironically, one of the largest single construction company collapses in New Zealand happened on the same day. Hartner Construction Ltd went into receivership on 1 Feb 2001. Following further consultation and refinement, the New Zealand Construction Contracts Act 2002 ("Construction Contracts Act 2002, New Zealand," 2002) was enacted and came into force on 1 April 2003. Given the nature and detailed provisions of the Act, this was considered to be fairly quick.

### **1.8.3 Malaysia**

Malaysia too has had its fair share of problems associated with non-payment and delayed payment in both the public sector and the private sector and for both construction work and construction professional services rendered. Surveys done by

the Master Builders Association Malaysia and by the Construction Industry Development Board Malaysia in conjunction with University Malaya confirm this widespread problem (CIDB, 2006). In amongst the rapid construction boom in Malaysia, it was only a question of time before something drastic would happen. Quiet collapses of small construction companies do not make headlines. It was obvious pro-active action had to be taken – ideally before a major company collapse. Somewhat similar in intentions of the industry group chaired by Sir Michael Latham in the UK, the Malaysian construction industry recognized the need to meet, discuss and have various issues identified and addressed with properly considered actions.

### **1.9 The Malaysian Construction Industry Masterplan and the Working Group on Payment (WG 10)**

The Malaysian Construction Industry Development Board took the initiative to facilitate a 'roundtable meeting' among all construction industry stakeholders chaired by the Minister of Works in June 2003. Following this, a construction industry committee was set up. The committee identified ten areas of priority. Ten working groups were then formed for each of the ten priority areas. The Working Group on payment and related matters, also known as WG 10, was chaired by a nominee of the Royal Institution of Surveyors Malaysia. Among the recommendations made by WG 10 was the creation of legislation to address the twin problems of payment and protracted and expensive dispute resolution methods.

While the construction industry overwhelmingly supported the proposals, there were major objections from some parties, most notably the Bar Council. Initially the objections were against the entire idea of any Act encroaching into the highly valued concept of 'freedom of contract' through providing statutory adjudication. Despite the generally positive experience from numerous other jurisdictions that had introduced similar legislation, it took nearly ten years of discussions, studies on other Acts, visits to other jurisdictions, debates, political interventions, organizing international conferences, numerous seminars, workshops and road shows, for an Act to finally come to fruition in the form of a compromised (with reasons explained below) Malaysian Construction Industry Payment and Adjudication Act 2012 ("Construction Industry Payment and Adjudication Act, Malaysia," 2012).

Malaysia had finally recognized the criticality of resolving payment issues in the construction industry and the need to introduce legislation to address the problems on payment and to introduce adjudication as a speedy and economical dispute resolution method as recommended by WG 10. The twin problems were finally being addressed:

- (i) Payment defaults leading to work being affected as a result of unplanned cash flow disruption, and
- (ii) Protracted and costly methods of resolving construction disputes through the two traditional methods of arbitration and litigation.

Although the Act was passed on 18 June 2012 and gazetted on 22 June 2012, there were further delays on the date for the Act to come into operation. The delay in commencement was the result of some parties within government wanting government projects to be exempted from the Act. But the construction industry, and this time, alongside the Bar Council, wanted the government to be included within the scope of the Act not least 'to provide leadership by example'. The eventual outcome was that the Act came into operation on 15 April 2014 but with an exemption order which provided for certain types of government projects (including defence construction projects) to be completely exempted from the Act and some types of projects to be exempted from the Act until 31 December 2015.

To ensure the Act could be implemented effectively by 15 April 2014 the Regulations associated with the Construction Industry Payment and Adjudication Act 2012 were published and the Kuala Lumpur Regional Centre for Arbitration (the body responsible for implementing the Act) commonly known as KLRCA, trained and empanelled over 300 adjudicators.

Numerous presentations and representations were also made to the government to try and resolve these issues in a more holistic manner. Apart from the introduction of adjudication, this included (i) the continued use of arbitration as the final and binding dispute resolution method – if any of the parties were dissatisfied with an adjudicator's decision and wanted final and 'fine' justice; (ii) encouraging the use of mediation as an amicable method of resolving disputes where possible, and (iii) to help support adjudication, the setting up of specialist construction courts.

The setting up of the construction court had the support of all stakeholders including the construction industry, the judiciary, government and the Bar Council. The only other jurisdiction around the world that had such precedence on a large scale was the United Kingdom, which started with the Official Referees over 100 years ago. Now known as the Technology and Construction Court, it is highly respected within the UK and beyond. Malaysia introduced two construction courts in 2014. Each court has had to deal with over 100 cases since.

As the findings in this and other research shows, adjudication is not a panacea or cure-all to the twin problems of payment defaults and costly and protracted dispute resolution. It is suggested that a ***holistic solution comprising adjudication, arbitration, mediation, and a specialist construction court will serve the industry better.***

Arbitration was historically considered a success for many years. But over the years increased costs and delays led to much criticism. Some questions arise out of this. Why could arbitration not provide the solution now provided by adjudication? In what way is statutory adjudication different? Might adjudication also fall out of favour over time? What about mediation? Being an amicable dispute resolution method, why might it not always be a better alternative to either arbitration or adjudication? In order to address these questions the features associated with construction arbitration and mediation and the distinguishing features of adjudication is now analysed and reviewed.

## **1.10 Traditional dispute resolution in the construction industry – arbitration**

*‘Justice delayed is justice denied.’*

This oft-quoted statement is one of the reasons why published standard construction contracts have traditionally provided for ***all*** disputes (not just disputes arising under but even disputes arising ***in connection*** with a construction contract such as negligence) to be resolved in arbitration.

The theoretical assumption is that arbitration is a quicker and more economical dispute resolution method than litigation. The arbitrator was typically someone with a technical background who would be well versed with construction and also

knowledgeable with the law and practice of arbitration. Historically this was the case, but over the years arbitration has become increasingly more expensive and now takes very long.

Where international arbitrations are concerned, Arbitral awards are also much easier to enforce through countries that have adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly known as the New York Convention. The Convention requires courts of those states to give effect to private agreements to arbitrate and to recognize and enforce international arbitration awards made in other contracting states. As of January 2015, 151 of the 193 United Nations Member States have adopted the New York Convention.

Despite all this, over the years, construction disputes (a significant proportion of which are disputes on payment issues) that were referred to arbitration were becoming increasingly expensive and time consuming. Debates then moved to discussions on which was worse – arbitration or litigation. Construction disputes typically took months or years to be resolved – whether in arbitration or litigation. But in arbitration, unlike litigation, the arbitrator and other costs including the hire of venue had to be paid by the parties.

The JCT contracts are the most commonly used standard forms of contracts in the UK. The most recent JCT contracts published in the UK (currently 2011) appear to tip the balance by removing the default arbitration clause as a standard provision. Instead, one has to now opt in to an arbitration clause. The default position now is, after decades, there are no arbitration clauses in the JCT contracts, unless the parties contractually opted in.

Arbitration is a private dispute resolution method where disputing parties agree to have an arbitrator hear their disputes and make a binding decision. The arbitrator's decision is called an 'award' and is made based on findings of facts and applying the appropriate laws. In other words it is a 'rights-based', binding, and final dispute resolution method.

A significant number of construction arbitrators have a technical background in some construction related area. However, given the elaborate and full due process of dispute resolution accorded to arbitration, there are also an increasing number of

legally qualified arbitrators with or without a technical background in a construction related area.

Unlike litigation, there is no legal requirement for either arbitrators or parties' representatives to be legally qualified. However, as arbitration was effectively supposed to dispense fine justice and is a rights based dispute resolution method, lawyers became increasingly involved in both representing parties to a dispute in arbitration as well as sitting as an arbitrator.

Historically and in theory the arbitration process is supposed to be much quicker and cheaper than resolving the dispute in court. In practice however, arbitration had become protracted and increasingly expensive. All the theoretical advantages of arbitration are not always present. With the involvement of more lawyers the process sometimes mimicked litigation with challenges on numerous procedural elements or legal technicalities. This has prompted some to even refer to arbitration as 'litigation in private'.

#### **1.10.1 'Leave no stones unturned' – Personal experience that triggered a search for better alternatives**

The researcher has had personal experience in arbitrations in various roles and in court as an expert witness or technical adviser. A key '*straw that broke the camel's back*' and triggered interest in a search for alternatives to arbitration (and subsequently this research) came about during an arbitration hearing between a client and contractor in front of a very well-known arbitrator. The researcher was a technical adviser working alongside the lawyers for the client in the arbitration.

During a protracted and laborious process going through every itemized phone call in numerous phone bills under a loss and expense claim under a construction contract at an arbitration hearing, the arbitrator suggested the parties consider having a separate session just among the parties to agree (to the extent possible) some of the detailed claim amounts. This would save time and cost including the arbitrator's fees and venue hire costs. After consulting the contractor during a break, the opposing counsel reported back: '***I have strict instructions from my client to leave no stones unturned.***' That effectively meant his client (the contractor) wanted to exercise every legal right to argue the case on every issue including minor issues. As counsel, he would of course have to abide by his client's instructions.

The hearing then continued in a similar manner for the subsequent few days with the witness being questioned in great detail. Among the lines of questioning included the need for, costs of, and other details of phone calls and the direct relevance of those calls to the alleged delays to the construction project. The questioning included the nature of and relevance of calls made late in the evening some months or years earlier based on documents extracted from a multitude of bundles of documents. It becomes near impossible to expect all witnesses to remember details of events that may have happened a long time ago.

And when referring to any exchange of documents or letters, if the parties did not agree to the existence of any of the documents, the maker of the document who signed it was subsequently be called up as a witness. If the witness had left the company or was now working for another employer in another part of the world, the witness was summoned – typically after an adjournment. This process carried on with subsequent successive witnesses – examination-in-chief, cross examination, and re-examination. This was all done in the name of dispensing the ‘finest’ justice, respecting the wishes of the parties, and ensuring justice was not only done but also seen to be done. These were all among the basic cornerstones and claimed benefits of the arbitral process and a fair rights-based justice system.

Although then paid as a consultant and acting as part of the dispute resolution team, the researcher was not convinced this protracted process served either of the (fee paying) disputing parties’ best interests. All this happened during the period when arbitration was the primary and most common binding alternative dispute resolution method adopted to resolve construction disputes. This was the basis of deciding ‘fine justice’ in arbitrations. The researcher was prompted to seek other more efficient ways of resolving construction disputes, which led to an investigation of other dispute resolution methods including mediation and statutory adjudication.

### **1.11 Amicable methods of resolving construction disputes – negotiation and structured mediation**

Over the years, where a final and binding decision was required, construction disputes were typically resolved through arbitration and litigation. However other amicable alternative methods continued to be used – most commonly negotiation and to a lesser extent mediation. Amicable dispute resolution methods can be used

at any time – even during and concurrently with other binding dispute resolution methods.

### **1.11.1 Negotiation**

Negotiation is sometimes also categorised as a ‘dispute resolution method’. Whether or not it is appropriate to classify it as a ‘dispute resolution method’ resolving disputes through amicable means like negotiation is beneficial as it tends to be much quicker, cheaper, and often preserves the parties’ relationship.

Given the totally open and flexible nature of negotiation, parties to a dispute do invariably – at least in the first instance - try to resolve their disputes through some form of negotiation. But negotiation is not always recognisable as a formal or clearly distinguished dispute resolution method. Negotiations are often done in an ad hoc manner – sometimes over a ‘cup of tea’. At other times it might take a more formal approach where the parties are given notice of what the disputes are and a meeting or series of negotiation meetings are agreed in advance.

The outcomes of negotiations are sometimes formally recorded as a supplementary contract but at other times they are merely given effect to by the parties or the person administering the contract. The ‘non-binding’ nature of negotiation remains its strength as the parties have full control over their dispute. But this ‘non-binding’ nature is also quoted as an inherent weakness of negotiation – which sometimes results in a stalemate – leaving the disputes unresolved. Negotiations that result in a settlement contract do however become binding. To help enhance the chances of negotiations resulting in a successful outcome, a catalyst may be introduced – enter the mediator.

### **1.11.2 Mediation**

The question on the role of mediation was asked earlier - being an amicable dispute resolution method, why might it not be a better alternative to either arbitration or adjudication?

As is intimated throughout this research, a holistic and structurally integrated approach to construction dispute resolution would best serve the construction industry. This encompasses a combination of dispute resolution methods including amicable dispute resolution methods. A key amicable dispute resolution method is

mediation. As mediation is an amicable and mutual dispute resolution method, it can be commenced and concluded at **any** time – even partway through another dispute resolution method such as arbitration, adjudication, or litigation. Mediation is however often not fully understood by potential users.

The practice of mediation is not new Abraham suggests (Abraham, 2006, pp. 1, 2), although mediation as a method of resolving disputes has been around for a very long time, it has come about as a structured formal dispute resolution method relatively recently.

In its most basic form, mediation may be defined simply as assisted negotiation. The parties negotiate their own settlement, but with the assistance of a neutral third party who helps them reach their own negotiated settlement. The recently enacted Malaysian Mediation Act 2012 ("Malaysian Mediation Act," 2012) that came into operation rapidly on 1 August 2012 defines mediation in a similar way. Section 3 defines mediation as a:

*‘voluntary process in which a mediator facilitates communication and negotiations between parties to assist the parties in reaching an agreement regarding a dispute.’*

The amicable nature of mediation provides the opportunity to keep the good relationship among the disputing parties. This is often quoted to be among the major advantages of mediation when compared with the traditional binding dispute resolution method – arbitration.

There may be variances in the mediation process - sometimes under different guises like ‘conciliation’, ‘facilitative mediation’ or ‘evaluative mediation’. Under the purist approach to mediation (sometimes called facilitative mediation), the mediator merely facilitates the process of negotiation between the disputing parties. The disputing parties retain full control of the **outcome** of the dispute and its settlement, and the mediator retains control of the mediation **process** – subject to the wishes of the parties.

Evaluative mediation on the other hand is where the mediator gives opinions on the matters in dispute. In its extreme form, with the parties’ agreement, some mediators

may even make binding decisions on the parties if the parties fail to reach an amicable settlement.

The different approaches of the mediation process are sometimes referred to as mediation 'models'. See for example models by Boulle, Goldblatt, and Green, (Boulle, 2008, pp. 35-39). The two models most commonly acknowledged are the facilitative or evaluative mediation models. In evaluative mediation the mediator has a more interventionist approach by giving opinions on the merits of the case. This process is sometimes (but not universally) also referred to as conciliation. In many cases the words mediation and conciliation are used interchangeably to mean the same thing. See for example Sussman in *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements* who suggests (Sussman, 2015, p. 1):

*'Conciliation and mediation are used interchangeably to refer to a process where a third person or persons assists the parties in achieving an amicable resolution.'*

#### **1.11.2.1 Mediation – the facilitative approach**

The facilitative mediation model expects the mediator to (only) facilitate the resolution of disputes between the parties. The facilitative mediator does not give opinions on the strength or weakness of any of the parties' cases. The parties make up their own minds and reach their own settlement. At the most, the mediator would challenge solutions proposed by the parties through 'reality-testing'.

Mediation purists often prefer the facilitative approach in order to ensure that the parties to a dispute continue to maintain full control of their own fate and maintain faith that the mediator remains totally impartial. This model has the benefit of the parties knowing that the mediator is totally impartial and the additional benefit that the mediator is also *seen to be fair* when dealing with the parties.

#### **1.11.2.2 Mediation – the evaluative approach**

On the other hand, an evaluative mediator evaluates and gives opinions on the strengths and weaknesses of the parties' cases, for example, see eg Riskin (Riskin, 1996) and Brooker (Brooker, 2007).

A key benefit of the evaluative model (and argument against the pure facilitative model) sometimes becomes evident when parties are stuck in their negotiations and look to the mediator for opinions or views on the merits of the dispute. A pure facilitative mediator will not offer any opinion on the merits of the disputes. The parties, possibly out of ignorance, may then start questioning on the usefulness of having the mediator. The parties may contend that the mediator was chosen on the basis of an impressive curriculum vitae which may have shown evidence of experience in the construction industry, and technical expertise in areas of construction law, construction contracts, and dispute resolution. Having been selected on the basis of technical expertise, parties that are new to mediation may question the justification of the refusal by mediators to give an opinion – especially if they were only asking for a non-binding opinion. They may question the necessity to engage and pay a highly technically qualified and experienced mediator to merely facilitate negotiations between the disputing parties.

### **1.11.2.3 Mediation – flexible approaches**

Mediation is a flexible process and can result in an extraordinarily wide range of outcomes. The final outcomes need not even be based on the facts and the law governing the contract or the disputes. The parties to the dispute can agree anything - that is lawful.

This flexible nature extends across all the mediation ‘models’. For example, even in the traditional facilitative model the mediation clauses do not normally prohibit the mediator from taking a more evaluative approach. For example the Malaysian Construction Industry Development Board (CIDB) actively introduced mediation in Malaysia focused on the construction industry and trained and accredited over 70 construction mediators in 2000. The approach taken at the training and mandated at the examinations to qualify as an accredited mediator was the facilitative model. Yet rule 10 of the CIDB Mediation Rules (CIDB, 2000) provides the mediator with flexibility to:

*‘conduct the mediation in such manner, as he or she sees fit, taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement of the dispute’.*

Notwithstanding any requirements during the training and assessment of mediators to be empanelled, this rule does not prohibit the mediator from giving an opinion. Any opinion should however be given to the parties in such manner that it does not result in one unhappy party abandoning the mediation. Taking this further, if the parties agree, the mediator may even be empowered to give a binding opinion or decision. This may well be consistent with the 'wishes of the parties' and 'the need for a speedy settlement of the dispute'.

Some contractual mediation rules offer a discretionary approach. For example, Rule 6 (vii) of the PAM Mediation Rule (PAM, 1998) allows the mediator to:

*'express views on the issues in the dispute and make such settlement proposals as he thinks fit.'*

Rule 7(4) of the Rules for Conciliation/Mediation of Kuala Lumpur Regional Centre for Arbitration (KLRCA, 2009) provides for intervention by the mediator (unfortunately and somewhat confusingly referred to as conciliator in the rules), but only following request or consent of both parties:

*At any stage of the conciliation proceedings the conciliator may at the request or with the consent of all parties make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by any reasons therefore [sic]. Such proposals shall be made in good faith to facilitate the conciliation process, and shall not be binding on the parties.*

These examples demonstrate the great flexibility of mediation and the potential benefits of mediation. The only problem remains with inconsistent use of terminology across jurisdictions. Whereas terminology in arbitration is well known and consistently used throughout more than 100 countries around the world, terminology surrounding mediation and conciliation is inconsistent.

#### **1.11.2.4 Terminology – mediation and conciliation**

In some countries, such as Malaysia, mediation is not generally distinguished from conciliation and the words mediation and conciliation are commonly used interchangeably. See for example the mediation / conciliation provisions under the auspices of the Kuala Lumpur Regional Centre for Arbitration (KLRCA). The KLRCA website publishes its own rules for mediation and calls them the 'Rules for

Conciliation/Mediation of Kuala Lumpur Regional Centre for Arbitration' (KLRCA, 2009). In referring to the rules, the KLRCA website (Kuala Lumpur Regional Centre for Arbitration, 2009b) states:

*In the Rules, the words "mediation" and "conciliation" are used interchangeably and reference to "conciliator" and "conciliation" shall include "mediator" and "mediation".*

Given the interchangeable use, in effect both a mediator and a conciliator could adopt the facilitative or evaluative approaches when mediating (or conciliating).

Although there is no confusion on conflicting definitions of mediation and conciliation within the Malaysian construction industry, there is limited understanding of the whole concept of mediation generally. The universal use of one word to mean one thing would make it less complicated when promoting mediation to the construction industry. The universally consistent use of the word arbitration is a good example to emulate, as is the use of the phrase statutory adjudication, which is discussed in later chapters.

#### **1.11.2.5 Mandatory contractual mediation**

As was stated earlier, mediation is not new but structured mediation is relatively new. In Malaysia, formal structured mediation was introduced to the construction industry in 2000. Despite active and strong encouragement of mediation in the Malaysian construction industry, primarily through the Construction Industry Development Board and construction professional bodies, there has been very little take up of mediation.

Arguably specifying mandatory mediation in construction contracts could be particularly useful for the development of construction mediation. Mediation requires a certain minimum number of cases beyond a critical mass for it to sustain and flourish. This has been achieved in some industries in more developed countries such as the United Kingdom, Australia and New Zealand. There is continued and ongoing use of mediation to resolve construction disputes in these countries.

Once the Malaysian construction industry and local courts familiarise themselves with the maturing developments in the practice of mediation, the courts could play a more pro-active role such as through court-mandated or court-annexed mediation. Such positive developments that encourage amicable resolution of disputes are in place in

the United Kingdom through the Civil Procedure Rules, the 50<sup>th</sup> update in force effective 1 October 2009 ("Civil Procedure Rule," 2009) and the corresponding Pre-Action Protocol for Construction and Engineering Disputes ("Pre-Action Protocol for Construction and Engineering Disputes," 2009).

The courts could encourage the development of mediation through awarding costs in litigation against unreasonable refusal to engage in alternative amicable dispute resolution methods. For example, if one party wins a court case, but had earlier unreasonably refused to even attempt mediation, costs or part of the costs could be awarded against that party, even though in the usual course of events costs may be awarded to the 'winner'.

In Malaysia the Mediation Act 2012 ("Malaysian Mediation Act," 2012, p. 19) is considered on balance a positive step towards promoting mediation. While the Act does not mandate mediation and falls short of boldly enhancing mediation practice by for example regulating mediation practice or standards of competency for mediators, it supports the mediation process in a number of ways including prohibiting a person from disclosing any mediation communication (Section 15), exempting a mediator from liability unless fraud or wilful misconduct is involved (Section 19), expressly providing that a settlement contract between the disputing parties is binding, and most notably that if court proceedings have been commenced in court, the settlement contract may be recorded as a consent judgement or judgement before the court (Section 14).

Mediation has great potential in playing a role in improving the efficiency of resolving construction disputes. The core nature of mediation requires parties' agreement, but mandatory mediation – if managed properly – can facilitate subsequent amicable, speedy, and economical resolution of construction disputes.

In order to encourage mediation, it may be considered worth including a mandated mediation process in construction contracts. Some may view mandatory mediation as an anomaly or being incongruent. The fundamental basis of mediation is that it leaves the parties with full control of their dispute and destiny to reach their own amicable settlement if they want to, which implies a strong assumption of voluntary right. Making mediation mandatory appears on the face of it to be inconsistent with this fundamental voluntary spirit of mediation.

There are however benefits in providing for mandatory mediation in a construction contract. Such mandatory process is included in the Building (Residential Consumer Rights and Remedies) Regulations 2014 in New Zealand. Many parties to construction contracts might not know what mediation is. If mediation is made mandatory prior to reference to other formal binding dispute resolution methods like arbitration, parties that have a dispute will be forced to take a 'step' or more in the mediation process. If the contract is appropriately drafted, and one of the parties proceeds to arbitration or litigation directly, the other party may even, if it wishes, obtain a stay (or a stop) of proceedings in arbitration or litigation, until mediation is commenced. Even if the parties do not then proceed to complete the mediation and come up with a settlement contract, at least they will have some appreciation of what mediation is and its potential. Settlement might be possible if the mediator explains the process to the parties very early on, possibly during their first meeting. A good mediator would be armed with all the 'tricks' or tools of the mediation trade, and may be able to progressively convince the parties to stay on in a mediation rather than abandoning it.

Hewitt suggests at p 19 (Hewitt, 2008):

*'The hard part is getting people to mediation. Once parties are in the room, mediators are very confident of making progress. If the process is right, compulsory mediation may be justified.'*

The mediator could, for example, highlight to the parties that in a mediation the parties remain in full control of their fate and are not bound to accept any offer from the other party. The mediator could contrast that with arbitration or litigation where others (the arbitrator or judge) take control of the right to make binding decisions - and the parties fates.

The parties may also be told arbitration or litigation typically takes much longer (months or years) to complete and is invariably more expensive. They also have greater potential of adversely affecting their own core business of construction or property development. Such persuasion may lead to the parties progressively taking further steps into the mediation process. With good techniques (including basic core techniques such as caucusing or calling for separate sessions or 'time-outs' or 're-phrasing'), the mediator may progressively be able to bring the parties to reach their

own amicable settlement, sometimes with innovative solutions. The process might take only hours or days at the most.

Parties who do not have any interest in settling would still have the right to get out of the mediation process soon after showing sufficient evidence of having attempted or taken a 'step' in mediation. There may be cost implications, but these are usually minimal. To minimise wasting money, parties who realise mediation was not going to work or realise that the other party was not serious or genuine in mediating, could end the process to minimise wasted expense.

Parties can then move on to arbitration or other binding dispute resolution methods. To help document such evidence of prematurely ending the mediation so that there are no delays from challenges that one of the parties has not taken enough 'steps' in a mediation, the mediation rules in the contract can be drafted to show clear stages in the mediation process.

The CIDB Mediation Rules, for example, provides four ways for a party to end a mediation. One of them, rule 13 (c), enables one party to end a mediation through simply a '*written notification by either party at any time to the other party and the mediator (if appointed) that the mediation is terminated*' (CIDB, 2000).

Negotiation and mediation are both classified as 'non-binding' dispute resolution methods. Like negotiation, mediation is an amicable dispute resolution method. There are great benefits of resolving disputes amicably. But it may well be that parties wanting to resolve their disputes want someone to just 'tell them who is right and who is wrong'. If the mediation does not result in an amicable settlement, parties can then proceed to other binding dispute resolution methods.

There may also be other reasons why parties must have a binding dispute resolution method (for example due to concerns over public accountability with disputes involving public funds such as government projects). The most common binding dispute resolution method adopted in the construction industry has traditionally been arbitration. As stated earlier, arbitration has had its fair share of criticism – of it being expensive and protracted. It is only more recently that statutory adjudication (the core subject matter of this research) has taken centre-stage in a number of jurisdictions.

As is found in this research – despite adjudication’s success, it is not a panacea or ‘cure-all’. A ‘one-size-fits-all’ might not be the best solution to the construction industry’s ills – certainly not for very large or complex disputes. This research shows the necessity to incorporate a combination of dispute resolution methods that complement each other. As the conclusion shows a combination of speedy adjudication with arbitration offered as a fine final justice with mediation opting in or out at any time under any of the processes may serve the industry well. In addition, to ensure an effective support system creating specialist construction courts will give the whole industry a complete dispute resolution system that is effective **and** efficient. Specialist judges familiar with the construction industry are more likely to dispense justice quicker and possibly more effectively.

## 1.12 Adjudication

### 1.12.1 Contractual adjudication

The word ‘adjudicate’ is not new and is not exclusively used in the context of construction dispute resolution. But adjudication as a statutorily enabled dispute resolution method to resolve disputes in the construction industry is relatively new. It was first legislated in the United Kingdom in 1996 ("Housing Grants, Construction and Regeneration Act, Part II, 1996, United Kingdom,"). It is important to explain the primary context within which it is used in this research.

The common word ‘adjudicate’ generally merely means to make a decision about a problem or dispute – any dispute in any industry. Thus for example, in New Zealand, disputes relating to tax matters get the benefit of an impartial review through the Adjudication Unit as provided under Part IVA of the Tax Administration Act 1994. This has been in effect since 1 October 1996.

Even within the construction industry resolving disputes through ‘adjudication’ is not new. For example the JCT domestic subcontracts published in the United Kingdom have had **contractual** adjudication provisions to resolve payment disputes for a very long time. More recently contractual adjudication was incorporated in the only standard terms of domestic subcontract published in Malaysia – the Model Terms of Construction Contract for Subcontract Works 2007 (CIDB, 2007). Contractual adjudication, like arbitration clauses in construction contracts, does not statutorily encroach on the parties’ freedom of contract. Contractual adjudication and arbitration

are both consensual. That means the parties must agree to have such contractual provisions in order for it to be applicable.

Statutory adjudication, the core subject matter of this research, is different.

### **1.12.2 Statutory adjudication**

Unlike contractual adjudication, statutory adjudication encroaches partly into the parties' freedom of contract. An Act of Parliament gives the parties a right to refer a construction dispute to a process of dispute resolution called adjudication. It must be noted that the context of this research focuses on adjudication relating to construction disputes under a construction contract. The word adjudication is also used in other contexts such as tax adjudications and weathertight adjudications. With statutory adjudication, it is not necessary to have a contractual agreement to incorporate adjudication as a dispute resolution method. Even in the case of the first such legislation in the United Kingdom which does not have all the adjudication procedures specified in the Act itself, the Act mandates parties to construction contracts to have an adjudication provision and other minimum stipulations in construction contracts failing which the Act provides for a default provisions under what is now known as the 'Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) England Regulations 2011' (Scheme). Wales and Northern Ireland have their own versions.

Other subsequent statutory adjudication models have mandatory provisions within the Acts themselves.

Statutory adjudication thus does encroach into freedom of contract, but has been accepted as necessary given the extent of problems of payment default in the construction industry and the failure of existing dispute resolution methods to rapidly and economically resolve disputes in the construction industry.

Statutory adjudication is a relatively new dispute resolution method introduced to resolve construction disputes. Although *contractual* adjudication in the construction industry is not new, adjudication mandated through legislation was first introduced in 1996 through the *Housing Grants, Construction and Regeneration Act 1996* in the United Kingdom. Only part 2 of the somewhat disguised Act is relevant. The Act came into force on 1 May 1998. Amendments were introduced in the House of Lords

in December 2008 and it now comes under the guise of the equally disguised new name of *Local Democracy, Economic Development and Construction (LDEDC) Act 2009* (new UK Act) ("Local Democracy, Economic Development and Construction (LDEDC) Act ", 2009). Only Part 8 is the relevant part.

Over the years since, there are now a total of 14 such Acts around the world. Since the UK Act was first introduced, thirteen other jurisdictions have embraced statutory adjudication.

These jurisdictions have all had payment issues in the construction industry. Given the serious nature of the issues, these 14 jurisdictions including the UK, NZ, and Malaysia have resorted to legislation to address these issues.

The New Zealand Construction Contracts Act 2002 (NZ Act) ("Construction Contracts Act 2002, New Zealand," 2002) came into effect in 2003. The Construction Contracts Amendment Bill ("Construction Contracts Amendment Bill," 2013) is now in the final stages following a Supplementary Order Paper (SOP) No 52 dated 11 March 2015 ("House of Representatives Supplementary Order Paper No 52, 11 March 2015," 2015), is expected to be come into effect some time in 2015 with some parts in 2016.

The Malaysian Construction Industry Payment and Adjudication Act 2012 (Malaysian Act) ("Construction Industry Payment and Adjudication Act, Malaysia," 2012) came into effect on 15 April 2014.

The dispute resolution process introduced in these legislations – adjudication - forms a core comparative study in this research.

Some other jurisdictions such as Bangladesh, Canada, Germany, Hong Kong, Mauritius, and South Africa have also had discussions on it. The statutory adjudication decision-making model developed as part of this research may be of particular interest and benefit to these and all other jurisdictions considering introducing adjudication or existing ones considering amending their existing Acts.

### **1.12.3 Statutory adjudication - key differences from arbitration**

Among the contentions and questions posed earlier were why arbitration could not provide the solution now provided by adjudication, in what ways adjudication is

different, and whether adjudication might offer a more sustainable solution that does not fall out of popularity over time.

There are many similarities between arbitration and adjudication, but there are also some crucial and fundamental differences.

Both arbitration and adjudication are similar in some ways. They:

- are binding dispute resolution methods,
- require the dispute resolver to make decisions based on the facts and law, and
- have outcomes that are enforced through legislation.

But there are very important and significant distinguishing features:

- Arbitration may only be resorted to if the parties have either pre-agreed to resolve a dispute in arbitration or agree to refer a dispute to arbitration after a dispute arises. Legislation on arbitration only helps enforce the process and the arbitrator's award.
- In contrast, adjudication is statutorily enabled without the pre-requisite for the parties to agree to refer a dispute to adjudication. The right to refer a dispute to adjudication arises through legislation either because the legislation mandates construction contracts to provide adjudication like in the United Kingdom (failing which the default 'Scheme' will apply) or the legislation itself provides a statutory right and process for parties to a construction contract to refer a dispute to adjudication. Legislations in Australia, New Zealand, Singapore, and Malaysia take the latter approach. None of these Acts allow the parties to a construction contract to contract out of the Act. In that sense, it is often said statutory adjudication is 'mandatory'. However, although statutorily enabled, adjudication is **not** a condition precedent to the parties' rights to refer to any other dispute resolution method provided in the contract. In fact no one is obliged to refer a dispute to adjudication at all. The Act merely provides a right to adjudication.
- Adjudication may be initiated at any time when a dispute arises.

A practical difference between construction arbitration and construction adjudication is that when considering construction contracts, typically standard terms of construction contracts in many commonwealth jurisdictions provide that most types of disputes may only be referred to arbitration after the project is completed or the contract ended. The arbitration provisions under the NZS 3910 is an exception though. Statutory adjudication on the other hand may be initiated at any time – during the course of work before a project is completed or after the project is completed.

All the 14 legislations on adjudication have mandatory short timeframes within which the adjudicator is to make a binding decision. These are typically stated in days (UK), ‘working days’ (NZ and Malaysia) and ‘business days’ in New South Wales (NSW). A failure to decide within the strict timeframe may be fatal to the whole adjudication process. This effectively means the adjudication decision becomes void. This is a notable and important distinguishing feature of adjudication compared to arbitration. There are no equivalent mandated timeframes under Arbitration Acts although institutional arbitration rules may impose such timeframes. Even if they do, they provide far more generous timeframes than those provided in the Acts governing adjudication and they do not typically make any delay beyond the stipulated timeframes fatal.

Like the arbitrator’s award, the adjudicator’s decision (in some jurisdictions called adjudicator’s determination) binds the parties but unlike arbitration where the decision (known as an ‘award’) is final and binding, all disputes referred to an adjudicator and decided by an adjudicator may subsequently be re-opened and heard and finally decided in an arbitration (if there is an agreement to arbitrate) or in court. In this sense, the adjudicator’s decision is sometimes said to be only ‘temporarily binding’. Throughout this thesis the simpler single meaning word ‘decision’ is used for convenience when referring to final output produced by an adjudicator to refer to all adjudicators’ output irrespective of which jurisdiction they are adjudicating under. Some jurisdictions refer to it as adjudicator’s determination.

Adjudication only covers ‘construction contracts’ as statutorily defined. The Acts also define the scope of disputes that may be adjudicated. For example, unlike the UK and NZ Acts which allow all types of disputes to be adjudicated, the NSW and the Singapore equivalent Acts allow only payment disputes to be adjudicated.

From the foregoing it is evident that there are significant differences between arbitration and adjudication.

The following is a summary and tabulated comparison among mediation, arbitration, and adjudication.

### **1.13 Mediation, arbitration, and adjudication – key features compared**

Table 2 compares the key features of mediation, arbitration, and adjudication within the construction industry. It includes an estimation of costs and time associated with the process for each, based on experience in the Malaysian construction industry. It is modified from an original table published by the researcher (Ameer Ali, 2006).

**Table 2: Table comparing key features of construction mediation, arbitration, and adjudication.**

Description	Mediation	Arbitration	Adjudication
<b>Basis of resolution of dispute</b>	Interest based; need not be based on facts, evidence, or law. Parties may agree anything (that is lawful)	Rights based; based on facts, evidence, and law	Rights based; based on facts, evidence, and law
<b>Typical tribunal cost in Malaysia in Malaysian Ringgit* (approximate equivalent in USD)</b>	RM 2,000 – 15,000 (USD 500 – 4,000)	50,000 – 300,000 (USD 14,000 – 85,000)	10,000 – 50,000 (USD 3,000 – 14,000)
<b>Duration**</b>	Typically overall duration of between 1 – 10 days	Typically 1 - 3 years	Typically <b>statutorily limited</b> to between 2 and 9 weeks. May be longer only if agreed by the parties
<b>Rights to the process and pre-conditions</b>	Mediation can be instituted at any time	May only resort to arbitration if there is an arbitration agreement	Legislation enables adjudication and which cannot be contracted out
<b>Timing</b>	Anytime	In construction contracts arbitration clauses usually provide that arbitrations on most disputes may only be started after completion or termination	By legislation – typically at any time
<b>Extent to which it may be binding and appealed</b>	Not binding at any time during the process. If a settlement contract is reached, it is binding	Typically final and binding. The arbitrator's award may be challenged in court only in very limited circumstances	Binding but the same issues may be reopened and finally decided in arbitration (if there is an arbitration agreement) or in court
<b>Scope of dispute covered</b>	Open to parties to decide scope	Depends on what the arbitration clause provides, but usually arbitration covers very wide range of issues	Some Acts cover only payment issues – others cover all disputes under the contract

\*Tribunal cost means the costs associated with the sitting tribunal eg the dispute resolver's fees and the cost of venue, if any. The amounts shown are only an indicative range.

\*\*Duration: This is an indication of the estimated range of time typically spent on construction disputes from the start of the process eg one party writing to the other stating there is a dispute and suggesting it be resolved through a formal dispute resolution method through to a binding decision or settlement contract.

## 1.14 Objections to statutory intervention to freedom of contract

When legislation to introduce adjudication was first proposed in the United Kingdom, this was strongly objected to by numerous well-known construction law experts. Such a move was cited to be unprecedented (Uff, 1997a).

Most notably some of the objections were compiled in a famous compilation of papers entitled: 'Contemporary Issues in Construction Law, Volume II, Construction Contract Reform: A plea for sanity' (Uff, 1997a). This was a collection of papers in opposition to the 1995-1997 Latham reform proposals. The foreword written by HH Judge Anthony Thornton QC states the authors constitute, collectively, 'the cream of construction lawyers'. The back cover of the book states that the book comprises a collection of papers from different sources 'whose unifying feature is their opposition to the 'Latham' reforms introduced in 1995 by the Conservative government and now adopted by the Labour government which came into office in May 1997'. It also suggests there appeared to be no opposition to the legislative reform proposals in parliament and that the papers 'were being offered as a focal point for those who continue to believe that the reforms are fundamentally flawed'.

The concept of 'freedom of contract' was among the basic pillars of the law of contract within the common law jurisdictions and held on to with great sanctity. Parties to a contract were free to agree anything (within the boundaries of the law) that they may choose to agree upon. The basic premise was the state was not to intervene with this fundamental freedom.

However the problems on payment default in the construction industry and delays and high costs of arbitrations were so chronic and acute that despite these objections, the parliament in the UK decided to legislate some aspects of payment practices in the construction industry. To complement this provision and to give it the necessary 'tooth' and backing, a statutorily provided system of time-limited rapid dispute resolution process called adjudication was introduced. All construction contracts were to have a certain minimum provision for disputes to be resolved through adjudication. Any contract that did not provide this would fall back on the default 'Scheme' provided under the Act by way of implied terms.

With the benefit of hindsight, this legislation has since been acclaimed to be a success in the United Kingdom. Some, including those among the authors of the original objection papers, have now acclaimed adjudication to be a success. Dr Robert Gaitskell refers to adjudication as a 'runaway success'. Another specialist Technology and Construction Court judge, Sir Vivian Ramsey, refers to adjudication as 'revolutionary'. Since the UK Act came into effect, legislation governing construction industry payment and adjudication has now also been introduced in 13 other jurisdictions.

After tens of thousands of adjudications in these various jurisdictions – there appears to be a serious decline in the number of construction arbitrations – although dissatisfied parties are usually permitted to re-open any adjudicated dispute in arbitration. Evidence from the Adjudication Society website ([www.adjudication.org](http://www.adjudication.org)) shows the number of court cases relating to statutory adjudication in these jurisdictions number less than 2,000 cases or less than 5% of the total adjudications.

In the main all these Acts have been acclaimed to be successful by getting most construction disputes resolved – and resolved in unprecedented short times typically measured in days or weeks compared to months or years in arbitration or litigation. This has prompted even leading authorities including QCs and Technology and Construction Court judges to opine that adjudication has been 'revolutionary' and is a 'runaway success'.

The most recent Act to be passed was in Malaysia after an initiative that started in 2003. Despite having the benefit of about a dozen other experiences from other jurisdictions with numerous claims of success and strong support from the construction industry, the Malaysian Bar Council voiced strong objections to introducing such legislation in Malaysia. The proposal by the construction industry under the leadership of the Construction Industry Development Board was eventually diluted following major compromises, and eventually passed as the Construction Industry Payment and Adjudication Act in 2012. After a further delay on the starting date for commencing operation, the Act finally came into operation on 15 April 2014.

### **1.15 Legislation governing payment practices and statutory adjudication in the construction industry**

As was stated earlier statutory adjudication was first introduced in the United Kingdom through the Housing Grants Construction and Regeneration Act 1996. It came into force in 1998. The Act mandated certain minimum payment provisions to be included in construction contracts and prohibited some payment practices such as 'pay when paid' clauses. To support this the Act mandated a statutory right for construction disputes to be referred to a quick dispute resolution process called 'adjudication.' The UK Act approach was to specify a certain minimum provision that must be provided in all construction contracts. If any of these minimum provisions were not provided in a construction contract, then a default 'Scheme' applied.

Soon after, in 1999, New South Wales introduced similar legislation – again to regulate payment practices and introduced a dispute resolution process called adjudication. The approach taken here was to provide everything in the Act itself instead of specifying certain provisions to be included in construction contracts and for the contracting parties to incorporate into their contracts, failing which those provisions will be implied in their contracts. Since then similar legislation has been introduced in all the remaining states and territories in Australia namely: Victoria, Queensland, South Australia, Tasmania, Australian Capital Territory, Western Australia, and Northern Territory. In addition, New Zealand, Singapore, Isle of Man, Ireland, and most recently Malaysia have all passed similar legislation.

### **1.16 Legislations with similar intentions but varying concepts and details**

Upon reading all these 14 Acts, on the face of it, they all appear to have similar intentions, primarily:

- (i) to provide legislation to improve payment practices under construction contracts, and
- (ii) to introduce adjudication as a quick dispute resolution method for resolving construction disputes.

However, a review of the Acts and commentators demonstrates, a deeper analysis of these Acts shows some differences that are quite significant – some conceptually

and in the details. Indeed, despite similar intentions and some similar terminology, some parts of the Acts are so different that it has prompted some writers to suggest some of the provisions in the different Acts are like 'chalk and cheese'. Ironically this was written in the context of comparing some of the Acts among different jurisdictions **within Australia**.

At the most basic level, there appear to be two different major models of adjudication among the 14 jurisdictions. The first is the UK/NZ model where **all disputes** may be referred to adjudication effectively making adjudication a 'dispute resolution' process. The other is the NSW model followed by several other jurisdictions including Victoria, Queensland, and Singapore. Under the NSW model, only **payment disputes** may be referred to adjudication, effectively making the process more akin to a traditional certification process as would be done by a contract administrator administering a construction contract.

Most commentators and the construction industry stakeholders under both models generally claim the Acts in their jurisdictions have been successful. Of particular and curious interest are the directions that newer legislations have taken after the first two divergent models came out namely the UK model in 1996 and the NSW model in 1999. Subsequent jurisdictions had the benefit of learning from the experiences of **both** these early models. When New Zealand introduced its Act in 2003 – it was evident it preferred the UK model (where all disputes may be referred to adjudication ie a wholesome dispute resolution process) with some added modifications generally claimed to be improvements. On the other hand, Singapore preferred the NSW model, where only payment disputes may be referred to adjudication – a process more akin to the traditional certification process.

Of particular interest and one which forms a key part of this research is one of the newest legislation - Malaysia - which limits disputes that may be adjudicated to only payment related disputes yet the process of adjudication provided in the Act is more akin to the wholesome dispute resolution process. The Act ("Construction Industry Payment and Adjudication Act, Malaysia," 2012) includes detailed provisions covering a wide range of issues including:

- the use of party representatives – section 8(3) provides: ‘*A party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party.*’
- exchange and discovery of documents – section 25(b) provides the adjudicator can: ‘*order the discovery and production of documents.*’
- submission of an adjudication claim (section 9), adjudication response (section 10), and adjudication reply (section 11)
- consolidation of adjudication proceedings if there are two or more adjudication proceedings in respect of the same matter (section 14)
- enabling the adjudicator to appoint independent experts to help with the dispute (section 25(e))
- allowing the call for meetings (section 25(f)) and conduct any hearing (section 25(g))
- allowing the adjudicator to inquisitorially take the initiative to ascertain the facts and the law required for making a decision (section 25(i))
- allowing interrogatories (section 25(k))
- the right to order the giving of evidence on oath (section 25(l))

and other elaborate processes found in a wholesome dispute resolution process such as arbitration.

Given these elaborate provisions on dispute resolution, it would appear the intent of the Malaysian Act was inclined towards an all dispute resolution system. This is further supported in the opening statement in the Malaysian Act, which reads:

*An Act to facilitate regular and timely payment, to **provide a mechanism for speedy dispute resolution through adjudication**, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.*

Compare this with section 3 of the NZ Act, which outlines the purpose of the NZ Act:

*'Section 3 Purpose*

*The purpose of this Act is to reform the law relating to construction contracts and, in particular, —*

- (a) to facilitate regular and timely payments between the parties to a construction contract; and*
- (b) to provide for the speedy resolution of disputes arising under a construction contract; and*
- (c) to provide remedies for the recovery of payments under a construction contract.'*

Despite the very similar overall objective of the Malaysian Act as the NZ Act, the Malaysian Act allow only payment disputes.

The curiosity on the rationale for choosing the preferred model, between Malaysia and what neighbouring Singapore did, claims of success under both varying types of models, and the somewhat anomalous mixed approach found in the Malaysian Act led to the development of the aims and objectives of this research.

Further, given the acclaimed success of adjudication across different model legislations, a question that may be asked is: 'Is adjudication a panacea or cure-all to the twin ills of non-payment and protracted and costly dispute resolution of construction disputes?' This 'revolutionary' dispute resolution method called adjudication presented in different ways through different legislations merits thorough research and analysis.

## **Chapter 2: Statutory Adjudication Models in Commonwealth Jurisdictions – Key Conceptual Similarities and Differences**

### **2.1 Chapter summary**

This chapter deals with research objective 2. It starts with a literature review specifically in the area of statutory adjudication. It considers other research done in the area relating to statutory adjudication and the uniqueness and justification of this research and what gaps it fills. The three significant and unique areas of this research are:

- (i) it compares the effectiveness of drafting style on adjudication legislation (chapter 3),
- (ii) it covers a study on the quality of adjudicators and their decisions (chapters 4 and 5), and
- (iii) it studies the key concepts in different jurisdictions (this chapter) in order to develop an adjudication legislation decision-making model (chapter 6) which is then tested on the Malaysian Act and could potentially also be tested on the New Zealand Amendment Bill.

This chapter then continues by identifying key conceptual characteristics of the adjudication models found in commonwealth jurisdictions to establish key common features and differences. While the term adjudication is used in all 14 jurisdictions, a detailed study shows there are significant differences among some of the Acts – both conceptually and in the details. A study of the Acts shows the following are the key distinguishing features. They are reviewed and analysed in detail on a comparative basis. These include:

- (i) the stated purposes of the Acts,
- (ii) whether the Acts govern written or oral contracts or both
- (iii) whether the Acts include construction consultancy contracts
- (iv) whether the Act cover all types of commercial and residential contracts

- (v) whether the Act covers all disputes or only payment disputes
- (vi) whether the Act contributes to a holistic approach to construction dispute resolution such as through providing for a pre-adjudication conference where the possibility of encouraging amicable resolution of the dispute may be introduced.

These features subsequently form the basis of the development of the adjudication decision-making model. The model is then tested on the Malaysian Act and the first court case on adjudication in Malaysia. It can also potentially be applied to test the New Zealand Amendment Bill to establish if there may be an impact on how they may have been different if the model had been applied.

## **2.2 Introduction of statutory adjudication legislation in commonwealth jurisdictions**

The United Kingdom (UK) *Housing Grants, Construction and Regeneration Act 1996* ("Housing Grants, Construction and Regeneration Act, Part II, 1996, United Kingdom,") was the first legislation that introduced statutorily enabled adjudication. The Act came into operation on 1 May 1998. Only Part II, which concerns payment and adjudication, is relevant to this research. This Act (or more accurately Part II of the Act) is referred to in this research as the 'UK Act'.

The UK Act has made a big impact on the way construction disputes are resolved in the UK since 1998. It has also impacted UK payment practices. Following on from that, it has also made a major impact around other commonwealth jurisdictions since. There are now a total of 14 commonwealth jurisdictions (taking England and Wales, Scotland, and Northern Ireland as one) that have introduced legislation governing payment and adjudication.

They are listed below with the abbreviation that is used throughout this thesis written in brackets:

### ***United Kingdom***

- Housing Grants, Construction and Regeneration Act 1996, United Kingdom, specifically Part II being the relevant part ("Housing Grants, Construction and Regeneration Act, Part II, 1996, United Kingdom,") (UK Act). This has since

been superseded by the Local Democracy, Economic Development and Construction Act 2009, Part 8 being the relevant part. ("Local Democracy, Economic Development and Construction (LDEDC) Act ", 2009) (new UK Act)

### **Australia**

- Building and Construction Industry Security of Payment Act 1999, amended in 2002 and 2009, New South Wales, Australia ("Building and Construction Industry Security of Payment Act 1999, amended in 2002 and 2009, New South Wales, Australia,") (NSW Act)
- Building and Construction Industry Security of Payment Act 2002, amended in 2006, Victoria, Australia ("Building and Construction Industry Security of Payment Act 2002, amended in 2006, Victoria, Australia,")(Vic Act)
- Building and Construction Industry Payments Act 2004, Queensland, Australia ("Building and Construction Industry Payments Act 2004, Queensland, Australia,")(Qld Act)
- Construction Contracts Act 2004, Western Australia ("Construction Contracts Act 2004, Western Australia, Australia,") (WA Act)
- Construction Contracts (Security of Payments) Act 2004, Northern Territory, Australia ("Construction Contracts (Security of Payments) Act 2004, Northern Territory, Australia,") (NT Act)
- Building and Construction Industry Security of Payment Act 2009, South Australia, Australia ("Building and Construction Industry Security of Payment Act 2009, South Australia, Australia,")(SA Act)
- Building and Construction Industry Security of Payment Act 2009, Tasmania, Australia ("Building and Construction Industry Security of Payment Act 2009, Tasmania, Australia,") (Tas Act)
- Building and Construction Industry (Security of Payment) Act 2009, Australian Capital Territory, Australia ("Building and Construction Industry (Security of Payment) Act 2009, Australian Capital Territory, Australia,") (ACT Act)

### ***New Zealand***

- Construction Contracts Act 2002, New Zealand ("Construction Contracts Act 2002, New Zealand," 2002) (NZ Act). Reviewed as the Construction Contracts Amendment Bill 2013 updated with Supplementary Order Paper No 52 dated 11 March 2015 (new NZ Bill) and now enacted as the Construction Contracts Amendment Act 2015. ("Construction Contracts Amendment Act, New Zealand," 2015)

### ***Isle of Man***

- Construction Contracts Act 2004, Isle of Man ("Construction Contracts Act 2004, Isle of Man,")(IoM Act)

### ***Singapore***

- Building and Construction Industry Security of Payment Act 2004, Singapore ("Building and Construction Industry Security of Payment Act 2004, Singapore,") (Sg Act)

### ***Malaysia***

- Construction Industry Payment and Adjudication Act 2012, Malaysia ("Construction Industry Payment and Adjudication Act, Malaysia," 2012, p. 38)( Malaysian Act)

### ***Ireland***

- Construction Contracts Act 2013 ("Construction Contracts Act 2013, Ireland,")(Ir Act)

## **2.3 Studies on statutory adjudication legislation and justification for this research**

### **2.3.1 Other research on adjudication**

There has been much research done on adjudication in individual jurisdictions such as the UK and some of the Australian states and territories, including some detailed analysis using extensive data in New South Wales. These include research relating to insolvency issues and adjudication (Ndekugri & Russell, 2005), attempts at defining disputes, (Chynoweth, Reid, & Ellis, 2007), specific strategies for avoiding construction adjudication by disputing the existence of a dispute (Ndekugri & Russell,

2006), the initial progress, and subsequent evolution of statutory adjudication in the UK (Kennedy, 2006), (Kennedy & Milligan, 2007), (Kennedy, 2008), predictions on adjudication (Dancaster, 2008), analysis of adjudication determinations in NSW (Uher & Brand, 2005), specific aspects of adjudication in NSW such as the claimants' views of how adjudication is performing in NSW (Uher & Brand, 2008), adjudication from a Singapore perspective (Teo, 2008), how jurisdictional challenges have been addressed (Tan, 2007), specific focus from the Western Australia perspective (Yung & Rafferty, 2015), key features that affect the operation of adjudication (Munaaaim & Capper, 2013) research looking the nature of payment problems and challenges in the New Zealand construction industry (Ramachandra & Rotimi, 2011), and even research in jurisdictions that had yet to introduce adjudication at the time of research such as South Africa (Maritz, 2007).

One of the most recent Acts to come into operation is the Malaysian Act. Understandably less research has been done on the Malaysian model given that the legislation was passed in 2012 and the Act only came into operation on 15 April 2014, although following early recommendations by the Working Group on Payment for such legislation in 2003, there subsequently existed earlier draft proposal Acts proposed by the Construction Industry Development Board dating back to as early as March early 2007. Among research done specifically on Malaysia includes research looking at enhancing security of payment in the Malaysian construction industry (Sahab & Ismail, 2011).

There is also some research on adjudication that has been done beyond a single jurisdiction. These include comparative studies across two or more jurisdictions eg Uher and Brand (Uher & Brand, 2007) who compare adjudication under NSW and NZ, comparisons between the UK and NSW approaches on adjudicator's decisions that contain errors (Coggins & Donohoe, 2012), a general international comparison of statutory adjudication (Gaitskell, 2007), and several researchers that have called for some form of harmonization or uniformity of some of these Acts, most notably harmonization within the various Australian jurisdictions. These include: (Coggins, Fenwick Elliott, & Bell, 2010) who analyse the East and West coast models within Australia and call for harmonization of the Australian Acts, response to and different approaches suggested by other researchers like (Davenport, 2010), and (McAdam, Brand, & Davenport, 2011) who also analyse various jurisdictions within Australia but

call for a 'dual scheme' model of statutory adjudication; and (Bell & Vella, 2010) who deal with the challenges faced from national uniformity within Australia.

## **2.3.2 Gaps identified and justification for this research**

### **2.3.2.1 Comparative study on effectiveness of drafting style on adjudication legislation**

No other research has been done on comparing the effectiveness of the drafting style of legislation on payment and adjudication. This area of research is considered important because:

- (i) all the Acts on payment and adjudication encroach into the basic concept of full freedom of contract and the provisions in the Acts cannot be contracted out. That means every person who deals with construction contracts (and in most cases construction consultancy contracts) would be affected by these Acts. They must be familiar with the Acts and should be able to read and easily understand the contents as it may affect them – whether or not the construction or consultancy contracts they are dealing with expressly refers to the Acts. In most of the jurisdictions the Acts provide statutory rights and obligations on those involved in construction and consultancy contracts even when the parties have entered into these contracts orally.
- (ii) the timeframe within which action must be taken in responding to a payment claim for construction work done or referral to adjudication is statutorily provided in these Acts. These timeframes are exceptionally short (typically quoted in days) when compared to claims or disputes that are referred to arbitration or litigation. While arbitration is a contractual right that arises only if there is an agreement to refer a dispute to arbitration, adjudication is a statutorily enabled right. One party can unilaterally refer a dispute to adjudication under the Acts. There is no need for any express provisions in the construction contract or consultancy contract. Such short time-frames mean the parties must be able to easily read and understand the various provisions in the Acts and respond to the provisions in the Acts expediently.

- (iii) unlike cases that are referred to court, all the Acts expect those affected by the Acts to be able to deal with and respond to provisions in the Acts without necessarily needing legal representation. Indeed, some of the Acts expressly prohibit legal representation during certain stages of the adjudication process eg when conducting an adjudication conference or meeting. Some of those affected by these provisions might have difficulty to read and understand legislation that would imply rights and obligations in their construction or consultancy contracts if the Acts were written in steeply traditional legalese – which may be unfamiliar to non lawyers.

As the majority of the users of the Acts including clients, contractors, subcontractors, construction professionals, and suppliers would not be legally qualified it is imperative that these Acts are written in modern plain language that is easily understood on first reading by these users. A study on the extent to which the Acts are written in modern plain language would therefore be of great help to users of these Acts (which covers much of the construction industry) and legislative drafters.

Furthermore, irrespective of whether the laudable ideal of harmonization or uniformity of the technical content, policy or approaches in the various Acts as proposed by various proponents is ever achieved, achieving commonality in drafting structure and style – a modern plain language style – would benefit users of the Acts. Those who would benefit from having Acts that have a common and consistent style in modern plain language include parties to construction and consultancy contracts, their advisers, dispute resolvers including adjudicators, arbitrators, and judges, and legislative drafters. Those involved in construction projects with parties or advisers from across different jurisdictions would also benefit from this. This could be the first and less controversial and less political step towards harmonization or uniformity. The starting point would be uniformity of language – ideally a plainer language. For example, uniformity could lead to the consistent use of the word ‘decision’ when referring to what the adjudicator finally decides at the end of an adjudication. At present among the 14 jurisdictions that have introduced adjudication, some use ‘decision’, others use ‘determination’. In arbitration, all arbitrators’ final decisions are referred to consistently around the world as an ‘award’.

There may remain the question of whether this would be practically acceptable. There is precedence in another related area in this aspect relating to drafting in modern plain language. When the Model Terms of Construction Contract for Subcontract Works (CIDB, 2007) was first drafted entirely in modern plain language, it had the unprecedented endorsement of all construction industry professional and trade organisations and relevant government authorities in Malaysia. One of the reasons for this was suggested to be because it was written in plain language, which all parties could understand and thus knew what their rights and obligations were (Ameer Ali, 2008b). If the obligations were clearly known in advance, the parties could price accordingly – even if some of the provisions might not be perfectly balanced. A second precedence was established when the Standard Terms of Construction Contract for Renovation and Small Projects (STCC-RSP 2015) (CIDB, 2014) was published in December 2014 by the Construction Industry Development Board Malaysia. This contract, which was the first in the world to attain the UK Plain Language Commission’s Clear English Standard accreditation, had the endorsement of government authorities, professional and trade organisations, and insurance industry representatives. Again the modern plain language approach meant the various stakeholders could clearly see the risks upon each party and could make compromises more easily.

### **2.3.2.2 Study on quality of adjudicators and their decisions**

One other key area covered in this research relates to the quality of adjudicators and their decisions.

As elaborated in chapter 1, arbitration and adjudication have some similarities. Arbitration has however suffered from deterioration in popularity partly because despite traditionally arbitrators coming from a technical background with knowledge of the law and practice of arbitration, it was increasingly taking longer and becoming more expensive over the years. This was partly because there is no legislation mandating limited timeframe for arbitrations. Some party representatives, typically lawyers, may also exploit this lack of restriction by using delay tactics. A key advantage of adjudication over arbitration is the fact that adjudication is statutorily time limited. Therefore, time and costs are generally contained. But this can be a double-edged sword for adjudication as the benefits of speed and lower costs can affect the quality of adjudicators’ decisions. Many of the challenges in court relating to

adjudications were on matters relating to jurisdiction issues or breaches of rules of natural justice, which are often associated with **procedural** rather than substantive issues. The quality of adjudicators and their decisions remain a challenge to be maintained – particularly given the strict and limited time imposed by statute.

This research reviews the training requirements of adjudicators under the Malaysian and New Zealand jurisdictions. All the training courses are currently done on the traditional content-based structure. Some of these courses do not cover the entire areas of competency that ought to be expected of an adjudicator. Adjudication is a rights-based dispute resolution method with statutorily imposed strict timeframes. Given the very nature of the adjudication process (which is very procedural) and the number of court cases relating to procedural breaches, this research proposes and starts to develop a task based competency standard model for adjudicators. A demonstration is then shown on how this base template can be modified and adapted for different jurisdictions. The sample selected to demonstrate this is the NZ Act. None of the training currently provided in any of the 14 jurisdictions adopts such a task-based approach to training adjudicators.

It is important that the quality of adjudicators and their decisions are maintained at a high level and continue to be enhanced to ensure adjudication does not deteriorate or fall into disrepute as has happened with arbitration.

### **2.3.2.3 Adjudication legislation decision-making model**

Although there have been studies developing dispute resolution frameworks eg (Ismail, 2010) there has not been any decision-making model developed specifically for deciding the approach to be taken when developing new legislation on adjudication or when amending an existing one. This is a third untapped area that was developed towards the conclusion of this research. The preliminary model was then applied to the Malaysian Construction Industry Payment and Adjudication Act 2012 as a case study. It was also shown that the model could also be applied to the then New Zealand Construction Contracts Amendment Bill 2013 (which was eventually passed as the Construction Contracts Amendment Act 2015). The tests can help to develop an even more detailed decision-making model. Testing can help ascertain to see if it might have made an impact and changed the direction of the Act or Bill.

## 2.4 Similar intent but different concepts and details

As alluded to earlier, legislations governing payment and adjudication appear to have similar intentions. This chapter now deals with a detailed study on some of the key areas within each Act to establish similarities and differences.

On the face of it, all the Acts appear to have similar intent – to facilitate cash flow within the construction industry and to introduce to the disputing parties a right to resolve their disputes expediently and economically through a process called adjudication.

But a detailed study of the Acts shows the details and even some of the concepts are different.

It is important to identify what these Acts *intend* to achieve and what the Acts *actually* provide in the details and actually achieve. These should be congruent. The decision-making model developed in this research can help ensure congruence between the intent and what is actually provided.

The primary way to establish what the Acts intend would be to look at the objectives or purposes of the Acts. But before that is done it is worth observing that unlike most of the newer Acts on payment and adjudication, the UK and IoM Acts do not contain all the details on the adjudication provisions within the Acts themselves. They only contain some limited sections mandating certain minimum provisions to be included in construction contracts – failing which a ‘Scheme for Construction Contracts Regulations’ will apply for example the Scheme for Construction Contracts (England and Wales) Regulations 1998 or the Scheme for Construction Contracts (Scotland) Regulations 1998. These are referred to as the ‘Scheme’ in this paper.

As a result of this approach taken in the drafting of the UK Act, numerous adjudication procedures were developed in the UK by various industry bodies. Whilst the assumption may have been that these procedures were developed to be clearer than the Scheme (Kennedy, 2008), they are also likely to have been developed as a result of competition among the various Adjudicator Nominating Bodies. The Adjudication Reporting Centre lists 22 Adjudicator Nominating Bodies in the UK in their latest report (Kennedy & Milligan, 2008). It can only be hoped and not assumed

that each of these bodies producing numerous adjudication procedures do develop procedures that are consistent with the original intent of the legislation.

Although multiple procedures may be useful to rigorously test out adjudication procedures and to compare them against the Scheme, it is at a cost to the industry. It is unfortunate that the suggestion by some from the industry to adopt the Scheme as a sole procedure during the last round of changes to the Act did not materialise in the new UK Act in 2009.

### **2.4.1 Purpose of the Act**

Having the purpose of an Act clearly outlined at the beginning of an Act is very useful for those new to the Act. Not all the Acts have a clearly outlined object or purpose spelt-out. A detailed study of them shows some are provided so broadly or generally effectively serving little purpose. It is also noted that although on the face of it some of them may appear similar, a detailed analysis shows the purposes of the Acts are sometimes different.

Another equally important reason why having a purpose of an Act clearly outlined is important is because the courts will interpret the entire provisions in the Act that promotes the purpose of the Act, as quoted by the learned judge in the first adjudication case in the Malaysian construction court: UDA Holdings Berhad v Bistraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (2014):

*‘a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object’.*

#### **2.4.1.1 The UK and IoM Acts**

The UK Act is a composite Act covering numerous and varied issues beyond payment and adjudication for the construction industry. The relevant part (part II) simply reads:

*‘An Act ... ; to amend the law relating to construction contracts ...’*

The IoM Act, which is similar to the UK Act, but drafted as a stand-alone act for only payment and adjudication, reads similarly:

*'AN ACT to amend the law relating to construction contracts.'*

Both of these are so general and hardly serve a useful purpose apart from hinting that the Acts affect construction contracts. Only a full study of the Act shows it mandates certain provisions to be included in construction contracts primarily relating to payment and introduces adjudication as a speedy dispute resolution method.

#### **2.4.1.2 Sg, NSW, and Vic Acts**

While some of the Acts state the intent in more generic terms, others provide some greater details:

The Sg Act reads:

*'An Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.'*

This is fairly useful in that it refers to payment for construction work and adds the provision for 'related goods and services'. This includes construction professional consultancy services. However what is missing is the reference to the whole idea of resolving construction disputes through adjudication. The phrase 'and for matters connected therewith' is far from clear it refers to a whole new dispute resolution method called adjudication. The phrase 'building and construction industry' appears to distinguish the two as separate 'industries'. But a full study of the Act shows they are not treated as two separate industries in the Act. And in practice they are also not treated as two separate industries. This makes the phrase at best redundant and possibly lead to arguments that a particular industry (eg engineering or civil engineering work) or dispute (eg dispute on an engineering matter or on a civil engineering matter) does not fall under the non-defined phrase 'building and construction'. There appears to be no reason to elongate construction industry into 'building and construction industry'. Even if this must be distinguished, it can be done through a definitions section of the word 'construction' to include 'building' and possibly even 'engineering' or 'civil engineering' work.

The Qld Act, also uses the arguably redundant title 'Building and Construction Industry Payments Act 2004' but fortunately does clarify that construction work includes building work in Section 10 (2):

*'Meaning of Construction Work:*

- (2) *To remove doubt, it is declared that **construction work** includes building work within the meaning of the Queensland Building and Construction Commission Act 1991.'*

Queensland has defined 'building work' in another Act – the Queensland Building and Construction Commission Act 1991. This may arguably be justified for the Act being entitled Building and Construction Industry Payments Act 2004. Although the Sg Act follows much of the NSW and Victorian models in technical content, the overall intent stated in the Act ends there and unlike the NSW and Vic Acts, is not elaborated further. The NSW and Vic Acts go further and after stating the overall intent, they provide more details on the objects of the Act, including how the objects are to be achieved. The NSW Act reads:

*'An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.'*

This overall intent is similarly worded as the Sg Act but it avoids reference to the phrase 'building and construction industry'. Like the Sg Act, related goods and services incorporates construction professional services. It then continues with the objects of the Act.

*'3 Object of Act*

- (1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
- (2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*

- (3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
- (a) *the making of a payment claim by the person claiming payment, and*
  - (b) *the provision of a payment schedule by the person by whom the payment is payable, and*
  - (c) *the referral of any disputed claim to an adjudicator for determination, and*
  - (d) *the payment of the progress payment so determined.*
- (4) *It is intended that this Act does not limit:*
- (a) *any other entitlement that a claimant may have under a construction contract, or*
  - (b) *any other remedy that a claimant may have for recovering any such other entitlement.'*

The overall purpose of an Act is useful but details of **how** an Act achieves some of these objectives are already detailed in the rest of the provisions of the Act. It may be argued there was little harm in summarising how the Act achieves this early on in the Act under the section heading "Object of Act". The NSW Act may be contrasted with the more succinct but clearly defined provisions found in the NT and NZ Acts.

### **2.4.1.3 NT Act**

The NT Act reads:

*'An Act to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts, and for related purposes.*

#### *3 Object and its achievement*

- (1) *The object of this Act is to promote security of payments under construction contracts.*
- (2) *The object of this Act is to be achieved by –*

- (a) *facilitating timely payments between the parties to construction contracts;*
- (b) *providing for the rapid resolution of payment disputes arising under construction contracts; and*
- (c) *providing mechanisms for the rapid recovery of payments under construction contracts.'*

The overall statement succinctly focuses on the twin target to 'secure payments' and for payment disputes to be referred to adjudication. If criticism were to be levied it would be that the overall statement and the first object of the Act may give a false notion or impression that the legislation deals with **security** of payment. It does not. The Act deals with facilitating timely payments and mechanisms for resolving payment disputes, and mechanisms for the rapid recovery of payments. **Security** of payment may only be brought about if for example a trust account scheme or payment bond scheme is introduced and mandated.

#### **2.4.1.4 NZ Act**

The NZ has a specific section in the Act outlining the purposes of the Act. Section 3 reads:

*'Section 3 Purpose*

*The purpose of this Act is to reform the law relating to construction contracts and, in particular,—*

- (a) *to facilitate regular and timely payments between the parties to a construction contract; and*
- (b) *to provide for the speedy resolution of disputes arising under a construction contract; and*
- (c) *to provide remedies for the recovery of payments under a construction contract.'*

Section 3 of the NZ Act outlining the purpose of the Act is exemplary.

The opening line makes it clear it reforms the law relating to construction contracts – which it does. There are a number of aspects affecting construction contracts that are reformed. These include the outlawing of ‘pay when paid’ provisions in construction contracts, and the statutory right to suspend works following non-payment.

The three subsections (a), (b), and (c) then clearly provide the primary purposes of the Act presented in a list style:

- (i) to facilitate regular and timely payments;
- (ii) to provide for the speedy resolution of disputes; and
- (iii) to provide remedies for the recovery of payments.

The provisions are both worded in clear plain language and presented in a list that is easily read and understood. It is well drafted, but which could be further improved by introducing and adding the word ‘adjudication’ under Section 3(b).

Consider the following equivalent, from the Malaysian Act:

*‘An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.’*

It is very similarly worded to the NZ Act and improves the second purpose in the NZ Act by adding the word ‘adjudication’. However it omits to mention it reforms the law relating to construction contracts, which it does. For example it now provides for progress payment to be included if not provided in construction contracts, it prohibits pay when paid provisions, it provides the right to suspend works following non-payment, and it even provides the right to direct payment to third parties if they are not paid.

The NZ Act however is presented much more clearly and can be easily found with its own section, heading, and written in a clearly presented manner using a list in the sub-section. Potential users can find out what the Act is about easily and quickly. This is particularly important because the short and strict timeframes for many of the processes found in the Act require those affected by it to be able to find and act on

the relevant provisions speedily. The presentation of the NZ Act is exemplary. All jurisdictions would benefit from following the clarity of drafting and presentation style.

#### 2.4.1.5 'Security' of payment

Consider the following, which is from an earlier draft version of the Malaysian Act:

*'An Act to facilitate regular and timely payment, provide a mechanism for speedy dispute resolution through adjudication and provide **security** and remedies for the recovery of payment in the construction industry.'* [Emphasis added]

The word '**security**' (for the recovery of payment) is omitted in the final version of the Malaysian Act. This is a sensible omission as the word 'security' (of payment) may misleadingly insinuate there was some provision in the Act for security of payment such as the provision for a mandatory scheme of payment to be made into a project trust account, or provisions for mandatory payment bonds. There are no such provisions. The same word 'security of payment' unfortunately also appears in the name of several Acts – mostly those that follow the NSW model including the Sg, Vic, and SA Acts.

New South Wales: *Building and Construction Industry **Security of Payment** Act 1999, amended in 2002 and 2009, New South Wales, Australia*

Singapore: *Building and Construction Industry **Security of Payment** Act 2004*

Victoria: *Building and Construction Industry **Security of Payment** Act 2002, amended in 2006*

South Australia: *Building and Construction Industry **Security of Payment** Act 2009*

Northern Territory: *Construction Contracts (**Security of Payments**) Act 2004*

Tasmania: *Building and Construction Industry **Security of Payment** Act 2009*

Australian Capital Territory: *Building and Construction Industry (**Security of Payment**) Act 2009*

It is so common that many commentators even refer to such legislation as ‘security of payment’ legislation. This gives the (fallacious) impression of there being actual security or guarantee of payment. Most of these Acts do not guarantee payment; they merely minimize the risk of non-payment.

#### **2.4.2 Coverage of Acts – written and oral contracts**

A primary distinguishing feature found among the Acts relates to whether an Act governs construction contracts that are entered into orally in addition to those in writing.

All the Acts include written contracts, oral contracts, and contracts that are partly written and partly oral except the UK Act, the Sg Act, and the Malaysian Act. The new UK Act has since been amended to incorporate oral contracts.

It is ironic that the Malaysian Act, which was only enacted in 2012, well after the new UK Act (2009) and all the other Acts, bucked the trend and chose not to incorporate oral contracts. Lessons ought to have been learnt from the long standing UK experience (and their rationale for amending their Act after more than a decade of experience) and experience in Singapore where among the issues raised in the very first adjudication involved the question of whether the contract in question was a contract in writing as defined in the Sg Act. Not surprisingly even the Kuala Lumpur Regional Centre for Arbitration (KLRCA) saw the necessity to issue a circular in March 2014 to clarify the meaning of written contracts. KLRCA Circular 03 dated 28 April 2014 attempts to clarify:

*The Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) came into operation on 15 April 2014. Section 2 of the Act provides that statutory adjudication regime shall apply to construction contracts made in writing. However, no definition or further elaboration is provided in the Act as to what ‘construction contract made in writing’ means.*

*Given the fact that there are various means by which a construction contract may be made, a clear guideline on the meaning of a ‘construction contract made in writing’ will ensure that parties to a construction contract are guided as to whether or not payment disputes arising under their contract can be referred to adjudication under the Act. Further, it will eliminate the need for the*

*adjudicator who may not be legally trained to grapple with the complexity of the issue of whether a construction contract is in writing.*

*As such the KLRCA is of the view that it would be expedient and/or necessary to provide clear guidance and definition as to what the phrase 'construction contract made in writing' mean, for giving full effect and the better carrying out of the provisions of the Act.*

It then carries on to attempt to define 'construction contract in writing':

**Construction Contract In Writing**

1. *There is a contract in writing:-*
  - a. *if the contract is made in writing (whether or not it is signed by the parties);*
  - b. *if the contract is made by exchange of communications in writing; or*
  - c. *if the contract is evidenced in writing.*
2. *Where parties agree otherwise than in writing by reference to terms which are in writing, they make a contract in writing.*
3. *A contract is evidenced in writing if a contract made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the contract.*

This appears to be a replica of what the original 1996 UK Act provides under section 107(2):

- (2) *There is an agreement in writing:-*
  - (a) *if the agreement is made in writing (whether or not it is signed by the parties);*
  - (b) *if the agreement is made by exchange of communications in writing; or*
  - (c) *if the agreement is evidenced in writing.*
- (3) *Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*

- (4) *An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.*

The KLRCA circular is identical to the provision in the old 1996 UK Act except for the word agreement, which is sensibly replaced with the word 'contract'. It may be argued that agreement forms only one of the essential ingredients to a legally binding contract. Contract is therefore a more accurate term to use.

It is unfortunate that while the UK Act repealed this section on written contracts in 2009 the Malaysian Act that was finally passed in Parliament in 2012 goes against this trend of incorporating oral contracts. The final Malaysian Act even goes against what was recommended by the Working Group on payment and adjudication in Malaysia (WG 10) as reflected in the earlier draft Malaysian Act under section 3(2) which quite simply provide:

*This act shall apply to every construction contract whether made in writing or otherwise.*

The leading case of RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd was reported as long ago as 2001 and 2002 in following the Court of Appeal decision exactly on this issue relating to oral contracts. There were several cases in the UK debating section 107 which led to the summation of the RJT case in three contradicting propositions in Carillion Construction Ltd v Devonport Royal Dockyard in 2005 as follows:

- (a) a contract is not evidenced in writing merely because there are documents which indicate the existence of a contract;
- (b) all the terms of the oral agreement must be evidenced in writing;
- (c) alternatively, as per Auld, LJ, the material terms of the agreement must be evidenced in writing.

Streams of cases then followed trying to reconcile these conflicting decisions. The current position is that these issues may no longer be relevant in the UK, as the entire section 107 has been repealed in the new UK Act. Malaysia ought to have taken heed.

Like in many other jurisdictions, the construction industry is structured in such manner that construction work is substantially subcontracted. For every main contract there are likely to be well over 10 or 20 subcontracts of varying nature. Sometimes these subcontracts and many small main contracts are entered into orally or at least partly orally. Even some relatively larger construction contracts with contract sums exceeding millions of Malaysian Ringgit are not reduced into writing. See for example the contract which was the subject matter of an oral contract in *Duta Tegas Sdn Bhd v Maju Holdings Sdn Bhd* [2009] 5 AMR 410. See also *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181 where HHJ Bowsher QC held at [32] that “the contracts between the parties, made orally in the first instance, are not deemed by statute to be contracts in writing” and thus the UK Act as it was then did not apply and therefore the adjudicator did not have jurisdiction.

In the absence of written contracts there would be no implied terms on progress payment and there would be no written arbitration clause. The only recourse to a binding dispute resolution method that then remains is litigation. Under these circumstances any legislation intent on resolving payment issues and to help resolve disputes expediently and economically through adjudication ought to include oral contracts and partly oral contracts.

There is no law mandating construction contracts to be in writing in Malaysia. It is only relatively recently that the only standard set of terms of contract for (domestic) subcontract work was published. A ‘domestic’ subcontract is defined as a subcontract that is entered into between the main contractor and a subcontractor selected by the main contractor. This is to be distinguished from a ‘nominated subcontractor’ who enters into a subcontract with the main contractor but who is selected or ‘nominated’ by the client or person who administers the contract. This standard domestic subcontract is called the Model Terms of Construction Contract for Subcontract Work 2007. Alongside this was the more recent publication of the Standard Terms of Construction Contract for Renovation and Small Projects (STCC-RSP 2015). There is no empirical evidence of the extent to which these contracts are being used in Malaysia. There is no law in Malaysia mandating any contract to be in writing.

The NZ Act has always included oral contracts. The encouraging situation in New Zealand is further enhanced through Section 362F of the Building Amendment Act

2013 which now mandates certain residential construction contracts (above \$30,000.00) to be in writing ("Building Amendment Act 2013, New Zealand,"):

***“362F Minimum requirements for residential building contract over certain value***

- (1) *This section applies to a residential building contract if the price for the building work is not less than the prescribed minimum price (if any).*
- (2) *A residential building contract to which this section applies must—*
  - (a) *be in writing; and*
  - (b) *be dated; and*
  - (c) *comply with regulations (if any) made under section 362G.*
- (3) *A building contractor must not enter into a residential building contract to which this section applies unless the requirements of subsection (2) have been complied with.*
- (4) *A person who contravenes subsection (3) by entering into an unwritten contract commits an infringement offence and is liable to a fine not exceeding \$2,000.’*

This provision helps enhance the possibility of greater certainty in the terms of construction contracts that are entered into by parties to a construction contract.

### **2.4.3 Professional construction consultancy services contracts**

All the Acts include professional construction consultancy services contracts within the scheme of the Act except the NZ Act. Typically this includes architectural, engineering, and quantity surveying services. Despite this inclusion most of the Acts are worded in different ways. See Table 3 for a comparison on how the Acts are worded to include professional construction consultancy services.

**Table 3: Comparison of definitions of consultancy services**

Act	Consultancy services
UK	<p>Section 104 (2):</p> <p>References in this Part to a construction contract include an agreement-</p> <p>(a) to do architectural, design, or surveying work, or</p> <p>(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.</p>
Sg	<p>Section 3 (1) definition of services:</p> <p>“Services” means –</p> <p>(a) the conduct of feasibility studies, planning services, the submission of applications or other documents to any relevant authority, site supervision services, professional engineering services, or architectural, design, surveying or quantity surveying services, in relation to construction work;</p> <p>(b) project management services in relation to construction work;</p> <p>(c) building, engineering, exterior or interior decoration or landscape advisory services in relation to construction work; or</p> <p>(d) the provision of labour to carry out construction work.</p>
Malaysian	<p>Section 4 under interpretation defines ‘construction consultancy contract’ to mean a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services.</p>
NZ	<p>Not included under the Construction Contracts Act 2002 but included in the Construction Contracts Amendment Bill 2013 that is in the final stages of Parliamentary reading in April 2015.</p>
Qld	<p>Sections 10 and 11 - architectural, design, surveying or quantity surveying services relating to construction work, engineering, interior or exterior decoration or landscape advisory services, or soil testing</p>
NSW	<p>S4 - architectural, design, surveying or quantity surveying services in relation to construction work, (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work.</p>
WA	<p>S5 - includes “surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services;</p> <p>but (ii) not including accounting, financial, or legal services.</p> <p>Preliminary services are covered under the Act regardless of whether or not the project actually proceeds</p>
SA	<p>S5 - including “architectural, design, land surveying, quantity surveying, engineering, building surveying or project management services in relation to building work or construction work, inspection, reporting, or advisory, services provided in respect of buildings, building systems and services, energy and sustainability systems and services, geotechnical, engineering, interior decoration, exterior decoration or landscape services provided in relation to building work or construction work”</p>

Uniquely the WA Act expressly excludes accounting, financial and legal services. These would also in any case be excluded under the other Acts. It could potentially be argued financial services might include financial and cost advisory services provided by quantity surveyors. However as quantity surveying services is expressly included separately, the context of the exclusion clearly does not refer to financial advisory services provided by quantity surveyors. The context would suggest it refers to financial services such as those offered by accountants or tax consultants.

The NT Act broadly includes 'on or off the site where construction work is being carried out, professional services that are related to the construction work.' This could lead to potential contentions that include banking, financial, and investment advisors, although this is unlikely to be the intention in the Act.

The Malaysian Act avoids ambiguity around which professionals are included by defining construction consultancy contract. It is defined as '*a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services.*'

NZ is the only Act to currently exclude consultancy work from its scope. However, the Construction Contracts Amendment Bill 2013 proposes to expand the NZ Acts coverage to include consultancy work.

There may be historical reasons for the NZ Act not to incorporate professional consultancy services.

If uniquely New Zealand construction professionals do not have payment issues and therefore there was no need to bring in the construction professionals within the ambit of the Act, bringing in in any case will at worst be redundant, but more likely benefit some. Among them, are construction professionals engaged by contractors under a design and build procurement method where the construction professionals are engaged by the contractor instead of the client. With the increasing use of design and build procurement methods, the likelihood of construction professionals preferring not to have 'pay-when-paid' clauses and getting the benefits of adjudication to resolve disputes will increase.

In addition, it is common for construction professionals to provide numerous services during the early stages of a potential construction project such as preparing feasibility studies and multiple sensitivity analyses or multiple concept drawings or multiple preliminary estimates. If the project does not proceed for any reason, the reluctance to pay for this 'redundant' service becomes obvious.

The inclusion of construction professionals can work both ways. With rapid adjudication, if the professionals fail to discharge their duties under their professional terms of engagement, the client too can take action under an adjudication. On balance, competent professionals who discharge their duties professionally would have nothing to fear. This is on the assumption that all adjudicators are competent. If in the rare occasion the worst happens and a construction professional fears being wronged by an 'incompetent' adjudicator – the professional needs to just remember - the adjudicator's decision or determination is binding but is not final. The same dispute can always be re-opened in arbitration (if there is an arbitration clause in the consultancy contract).

It is noted that the then Construction Contracts Amendment Bill 2013 and the final Construction Contracts Amendment Act 2015 expands the NZ Acts coverage to include consultancy work. Section 6 (1A) now reads:

*'Construction work includes—*

- (a) design or engineering work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (d) and (f):*
- (b) quantity surveying work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (g).'*

A key observation is that the definition appears to be limited to engineering, design, and quantity surveying services. Interior design services, landscape architecture, and specialist engineering services such as acoustics engineering or geotechnical engineering would presumably be included under (a). However there is nothing to suggest project management consultancy would be included. There seems no plausible reason for the definition not to include the related scope of professional services such as project management consultancy or construction management consultancy services.

#### 2.4.4 Residential and commercial construction contracts

Given that adjudication is a speedy and economical dispute resolution method, it would seem logical to provide as broad a coverage as possible. There has even been some thought of widening adjudication across other industries outside construction (Ameer Ali & Wilkinson, 2009b). However, some Acts do exclude contracts involving residential occupiers, supposedly so as not to impose the complexities of adjudication on them, as they are likely to have limited knowledge of construction contracts. The NZ Act, while covering residential construction, requires additional notices to be provided to residential occupiers. The Construction Contracts Amendment Bill 2013 and subsequent Construction Contracts Amendment Act 2015 removes the distinction between residential contracts and commercial contracts. There was overwhelming support for this removal as is evident from the majority of submissions made to the Commerce Select Committee when the Bill was first presented in 2013.

While the NZ Acts moves towards removing this distinction, the Malaysian Act, which has nearly identical objectives or purposes, and was only legislated in 2012, has in the Act a somewhat unusually worded exclusion. Section 3 of the Act reads:

*‘This Act **does not apply** to a construction contract entered into by a **natural person** for any construction work in respect of any building which is **less than four storeys high** and which is **wholly intended for his occupation.**’*

In reading and interpreting an Act one would in the first instance give the words as read their natural meaning. Natural person can be distinguished from a corporate or company. ‘Any building which is less than four storeys high’ is fairly wide. The rationale for excluding this wide range of buildings is curious. But when combining the ‘natural person’ and the remaining phrase ‘wholly intended for his occupation’, it starts to conjure that the drafters were possibly intending to exclude residential contracts. Not surprising some commentators have assumed this to be so. See for example Oon who in interpreting the provisions additionally makes reference to ‘residential’ occupation (Oon, 2013):

*Claims arising from a construction contract entered into by a natural person to construct a building intended for **residential** occupation which is less than four storeys high cannot be pursued under CIPAA.*

The word residential does not appear in the Act. But it has been interpreted as being so and added in - either because the commentator thought it was so obvious and that is how the Act would be construed or it might be an erroneous interpolation. If it were the former, it would have been useful for the commentator to explain the basis for the interpolation.

It could be argued that the exclusion could also apply in a case where a 'natural person' contracts to build a shop house or warehouse, which is 'wholly intended for his occupation'. It remains debatable whether 'occupation' could be equated to 'residing' or 'residing in a dwelling'. If contracts for dwellings or residential contracts were intended to be excluded the Act could have been worded more explicitly. Even the UK Act, which is not written in accordance with modern legal drafting guidelines, is more explicit:

Section 106 is headed: *'Provisions not applicable to contract with residential occupier.'* Section 106 (1) (a) reads:

*'106 (1) This Part does not apply-*

*(a) to a construction contract with a residential occupier (see below),'*

And section 106 (2) continues to clarify:

*'106(2) A construction contract with a **residential occupier** means a construction contract which principally relates to operations on a **dwelling** which one of the parties to the contract **occupies, or intends to occupy, as his residence.***

*In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose-*

*"dwelling-house" does not include a building containing a flat; and*

*"flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.'*

These provisions are from an Act dating back to 1996. The Malaysian Act came 16 years later. There was much that could have been learnt from other jurisdictions,

including the following clearly defined phrases from the NZ Act. Section 5 is the interpretation section, which includes two clear definitions:

*'residential construction contract means a contract for carrying out construction work in which one of the parties is the **residential occupier** of the premises that are the subject of the contract*

***residential occupier** means an individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract **wholly or mainly as a dwelling house**'*

The drafting style of the NZ Act is succinct and exemplary. The NZ Act was first published in 2002. The Malaysian Act was published 10 years later in 2012. The Malaysian Act could have emulated the drafting style and clarity of various provisions of the NZ Act. The overall purpose of the Malaysian Act is worded substantially similar to the NZ Act. The words are clear. But the Malaysian Act chose not to emulate the NZ Act on provisions relating to residential construction contracts. Instead, it introduced a provision that is ambiguous and which can give rise to arguments on interpretation as illustrated above.

#### **2.4.5 Adjudication of all disputes or only payment disputes?**

A primary difference among the various jurisdictions could be distinguished on the basis of what types of disputes may be referred to adjudication - only payment disputes or all disputes. This distinguishing feature is so fundamental that one commentator Philip Davenport suggests the conceptual differences between some of the models that cover payment only disputes like the NSW model and those that focus on resolving all disputes is akin to 'chalk and cheese' (Davenport, 2010). They sound similar but are conceptually very different.

The UK and NZ Acts allow all disputes to be referred to adjudication while the NSW models and its derivative models including the Vic, Qld, and Sg Acts permit only payment disputes to be referred to adjudication. The NSW model is different in more than just this aspect. The entire Act is less to do with resolving disputes, and more to do with setting up payment provisions to protect the party who has done work or provided the services. Only the party who has done the work or provided the services can refer a dispute to adjudication. Under the UK and NZ Acts either party can refer a

dispute to adjudication. Unlike the UK and NZ Acts, under the NSW Act the parties are not allowed to agree on who is to be the adjudicator. Instead, only the claimant can and must obtain a nomination from one of the Adjudicator Nominating Authorities (ANAs). As statistics on adjudication are published, it would not be surprising for the claimant to choose ANAs that have a trend indicating a better than average success rate for claimants rather than those that have a better respondent success rate. Given the limited scope the timeframe for the adjudicator to make the determination is also shorter at 10 days. The NSW Act disallows legal representation during a meeting. Not surprisingly, one commentator Philip Davenport associates the process as being akin to the certification process done by a contract administrator under a construction contract (Davenport, 2007).

The Malaysian Act has nearly identical purposes as the NZ Act and has elaborate adjudication provisions but limits what may be adjudicated to only payment related disputes. Section 7(1) of the Malaysian Act provides:

*An unpaid party or a non-paying party may refer a **dispute arising from a payment claim** made under section 5 to adjudication.* [Emphasis added]

The NZ Act allows both payment disputes and disputes on other rights and obligations of the parties under a construction contract. However, somewhat peculiarly, the enforceability provisions of each are different. Section 48 of the NZ Act reads:

**48 Adjudicator's determination: substance**

- (1) *If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine—*
- (a) *whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and*
  - (b) *any questions in dispute about the rights and obligations of the parties under that contract.*
- (2) *If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any*

*questions in dispute about the rights and obligations of the parties under that contract.*

Section 58 then differentiates the enforceability of the adjudicator's determination. Enforceability under section 48(1)(a) which relates to disputes where there is a liability for payment to be made is different from section 48(1)(b) and subsection (2), which deal with disputes about rights and obligations and where no money is payable or no money is claimed respectively. Section 58 reads:

58 *Enforceability of adjudicator's determination*

- (1) *An adjudicator's determination under section 48(1)(a) is enforceable in accordance with section 59.*
- (2) *An adjudicator's determination under section 48(1)(b) or (2) about the parties' rights and obligations under the construction contract is **not enforceable**.*
- (3) *However, section 61 applies if the determination referred to in subsection (2) is not complied with.*

Section 61 deals with the consequences of not complying with the adjudicator's determination. In effect, if a party does not comply with an adjudicator's determination under section 48(1)(b) or (2), the parties may bring court proceedings to enforce their rights. Section 61(2) however states that 'the court **must have regard to, but is not bound by**, the adjudicator's determination.'

The then Construction Contracts Amendment Bill 2013 and subsequent Construction Contracts Amendment Act 2015 repeal this section. In effect there is now no longer any difference between the enforceability of an adjudicator's determination involving a payment claim and one involving disputes about the rights and obligations of the parties. This makes provisions in the Act much simpler. This change had the support of the majority of those who submitted to the Commerce Select Committee.

***The role of the pre-adjudication conference within a holistic approach to construction dispute resolution***

Among all the Acts one aspect is observed to have been proposed and incorporated in a preliminary draft of the then proposed Malaysian Construction Industry Payment

and Adjudication Act in 2007 and the New Zealand Construction Contracts Amendment Bill 2013 when it was first presented in Parliament in 2013. They relate to the provision concerning the holding of a preliminary meeting also commonly known in adjudication as the 'pre-adjudication conference'. Unfortunately, this provision was subsequently removed in both jurisdictions, and has so far not appeared in any of the other legislations on payment and adjudication.

The closest towards some initiative to encourage the parties to attempt some resolution is provided in the Sg Act. Section 12 of the Sg Act provides a mandatory requirement that in certain instances a 'dispute settlement period' must have expired before the dispute can be referred to adjudication. If the claimant disputes the payment response or where the respondent does not provide a payment response at all, the claimant may refer the dispute to adjudication but only after the 'dispute settlement period' of 7 days after the date on which or the period within which the payment response is required. See sections 12(2) and 12(5) of the Sg Act. This however falls short, as it does not have any provision to proactively ensure adjudicators encourage the parties to attempt to resolve their dispute amicably, eg which may be done by mandating a pre-adjudication meeting.

As elaborated earlier and summarized in the conclusion, when considering dispute resolution in the construction industry – particularly when legislation is contemplated, it should be looked at holistically and not in isolation. Critically, it should not be looked at from the selfish perspective of only one party or a group of parties.

Arbitration and litigation are considered to dispense 'fine' justice and supported by legislation, but they tend to take too long and cost too much. They are thus not suited for resolving all construction disputes. Mediation is much cheaper and quicker but is considered to be a non-binding dispute resolution method and requires the parties to voluntarily agree to resolve their disputes amicably. It would also not suit all types of construction disputes and all circumstances.

Adjudication is relatively cheap and quick and provided through legislation, but its mandated short timeframe and legislative nature means the types of disputes that may be adjudicated may be limited, and given that legislation intends for it to be very quick it does not create a resolution that is both binding **and** final. Although successful in numerous jurisdictions it is not a panacea or 'cure-all'. Its quick

timeframe also means it may not be suited for some large and complex disputes. Adjudication is not a 'one-size-fits-all' dispute resolution method. Construction dispute resolution needs to be looked at holistically and a balance struck among the various dispute resolution methods including mediation, arbitration, adjudication, and the courts. Each has its place and complements each other depending on the nature and timing of a dispute.

With this background and in this context the proposal for having a pre-adjudication conference is now analysed in some detail and the rationale for it in the context of a holistic approach to construction dispute resolution. This is a very important area as it provides a well-oiled cog in the whole dispute resolution motion.

## **2.4.6 The pre-adjudication conference**

### **2.4.6.1 What is a pre-adjudication conference?**

The pre-adjudication conference is quite simply a meeting that is held at the early stages of the adjudication process. In arbitrations, a similar concept is typically called the preliminary meeting. The pre-adjudication conference can serve a very useful purpose for the adjudicator to, among other things, brief the parties on the procedures to be expected over the rest of the short adjudication process and the consequences of not complying with the strict timeframes. The adjudicator can also clarify and achieve a number of other things including:

- (i) Allow the adjudicator to acquaint with the parties and the nature of their dispute
- (ii) Resolve all issues relating to the appointment of the adjudicator and fees to be deposited
- (iii) Organise timetabling for the rest of the adjudication
- (iv) Consider the possibility of any consolidation of disputes
- (v) Afford parties an opportunity to amicably resolve their dispute themselves if they so wish **before** the adjudicator serves the notice of acceptance after which the adjudication clock with a strict timetable starts ticking.

Item (v) above would help serve the holistic dispute resolution approach where the parties are encouraged and given an opportunity to amicably resolve their disputes – whether through their own negotiation or through mediation. During the pre-adjudication conference, when the parties hear the briefing from the adjudicator on the onerous adjudication time provisions in the Act and possibly the deposit for fees to be paid, they may be inclined to settle amicably. If they settle, the adjudication will not continue. But the adjudicator – being a professional – would have acted professionally and served the best interest of the parties and society over self-interest. Altruism is a pre-requisite trait expected of all professionals.

#### **2.4.6.2 Voluntary pre-adjudication conference**

All pre-adjudication conferences that adjudicators may hold are currently done voluntarily. Some adjudicators do not charge for the pre-adjudication conference. A proposal for a pre-adjudication conference equivalent called ‘preliminary meeting’ was made during the early stages of proposals for similar legislation in Malaysia in a draft Act dated March 2007 prepared by the Construction Industry Development Board Malaysia. The proposal then was the discretionary provision:

17(2) The agreed or nominated adjudicator may hold a preliminary meeting with the parties after the service of the notice in sub section (1) to acquaint with the dispute and afford an opportunity to the parties to resolve the disputes amicably.

This draft was proposed by the Malaysian Construction Industry Development Board and the Construction Industry Working Group on Payment (WG 10). However, following initial total opposition to the whole concept of such legislation on payment and adjudication primarily by the Malaysian Bar Council, significant compromises were made. A much watered-down version was finally passed in Parliament limiting the types of disputes that may be adjudicated. The Act that was passed did not have any provision on this - mandatory pre-adjudication meeting or even voluntary pre-adjudication meeting. If the rationale for omitting this were to reduce any waste of time, it should be noted that the Malaysian Act has the longest timeframes among all 14 jurisdictions for the entire adjudication process. A little extra time added for a pre-adjudication meeting would not have significantly affected the overall timeframe, but it would have benefitted industry.

### 2.4.6.3 Mandatory pre-adjudication conference under the NZ Amendment Bill 2013 and suggested drafting improvements

The New Zealand Amendment Bill 2013 introduced a new provision mandating adjudicators to hold a pre-adjudication conference. This amendment is an encouraging development as it facilitates the possibility of the parties resolving their disputes amicably after the pre-adjudication conference and before the adjudicator serves the notice of acceptance. It is however unfortunate that the wording proposed in the amendment Bill had some errors leading to a miscomprehension by a number of people who then submitted objections to the Commerce Select Committee.

The new Section 36A subsection (1) in the Bill reads:

*An adjudicator must make arrangements for a pre-adjudication conference to be held within 2 working days **after serving the notice of acceptance on the parties**. [Emphasis added]*

There are a number of errors or improvements that could be made to this draft. Among the key purposes of the pre-adjudication conference are (i) to brief the parties on what to expect throughout the rest of the adjudication process, and (ii) to then give the parties the window of an opportunity to amicably resolve their dispute **BEFORE** the adjudicator serves the notice of acceptance that triggers the clock for the rest of the adjudication process.

There is little point in mandating such a meeting **after** the notice of acceptance has been served as it would significantly limit the opportunity to achieve these two objectives. The time already starts ticking for submitting the adjudication claim once the adjudicator serves the notice of acceptance. Section 36(1) provides:

*After an adjudicator has been appointed, the claimant **must, within 5 working days** of receiving the adjudicator's notice of acceptance, refer the dispute in writing (the adjudication claim) to the adjudicator. [Emphasis added]*

For maximum benefit, any briefing on procedures must be done **before** the adjudicator serves the notice of acceptance. It should be noted that there is no timeframe for the adjudicator's notice of acceptance to be served. There is therefore flexibility on when the pre-adjudication conference is held as opposed to the strict 2-day time limit as currently proposed. This flexible time period gives a window of an

opportunity for the parties to consider amicably settling their dispute, informing the adjudicator of their mutual settlement and avoid proceeding with the adjudication and incurring further costs. This serves the holistic approach to construction dispute resolution better.

A better-phrased provision would read:

*An adjudicator must make arrangements for **and hold** a pre-adjudication conference **before** serving the notice of acceptance on the parties.*

The two changes proposed are: (i) The pre-adjudication conference must be held **before** serving the notice of acceptance, and (ii) the addition of the words 'and hold'. Merely 'making arrangements' for a pre-adjudication conference might lead to arguments as to whether the adjudicator merely has to start the process or must actually hold a conference. This concern was raised at forums organized by the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) - one of the 4 authorized nominating authorities in New Zealand. The re-wording 'to make arrangements for **and hold** a pre-adjudication conference' avoids this potential argument.

Parties to an adjudication (including many who are new to adjudication) often don't realize the implications of the strict timeframe of the adjudication process – even if they have received standard notifications outlining the process. Legal demand letters with tight timeframes (sometimes even including legal cost for producing these unsolicited demands) are fairly commonly not attended to immediately. A tribunal (in this case an adjudicator) informing the parties on the details of the rapid and statutorily imposed process is far more effective. Statutorily imposed timeframes are not found in arbitration or litigation. Having a full briefing by the decision-making tribunal (the adjudicator) has the potential impact of awakening the parties to the possibility of rapidly settling the dispute amicably before the adjudicator serves the notice of acceptance over the subsequent few days.

The Honourable JJ Spigelman, Chief Justice of the Supreme Court of NSW once noted of court-annexed mediations: '**the shadow of the court promotes resolution**' (Spigelman, 2000). In a similar way, the shadow of the imminent strict and procedurally very tight timeframe of the adjudication process as briefed by the

adjudicator (and the requirement for deposits for the adjudicator's fees to be paid) can promote amicable resolution. Amicable resolution can be facilitated by

- (i) maintaining that there is no specified timeframe within which the notice of acceptance must be served by the adjudicator, and
- (ii) by having a pre-adjudication conference (whether mandatorily imposed or not) to brief the parties about the adjudication process and about alternative dispute resolution methods such as mediation.

While there is no similar parallel in any of the other jurisdictions apart from the early 2007 draft proposed Act in Malaysia and the New Zealand Amendment Bill as presented in 2013, there are parallel lessons from the United Kingdom that may be drawn from the court mandated 'Pre-Action Protocol for Construction and Engineering Dispute'. This has been a success and is targeted to **prevent disputes proceeding in litigation**. Among its stated objectives under clause 1.3(ii) are:

*'to enable parties to avoid litigation by agreeing a settlement of the claim **before commencement of proceedings**'*. [Emphasis added]

Its aims and related procedures are also clearly outlined under clause 2:

'The general aim of this Protocol is to ensure that **before** court proceedings commence:

.....

- (vi) the parties have met formally on at least one occasion with a view to:
  - defining and agreeing the issues between them; and
  - exploring possible ways by which the claim may be resolved;
- (vii) the parties are in a position where they may be able to settle cases early and fairly **without recourse to litigation**'. [Emphasis added]

Section 36A subsection (2) of the New Zealand bill also clarifies:

*'The purpose of the pre-adjudication conference is for the adjudicator to answer the parties' questions about the adjudication process'*.

Section 36A(2) would also be better to be re-worded:

*'The purpose of the pre-adjudication conference is for the adjudicator to **fully explain the adjudication process** and answer the parties' questions about the adjudication process'.*

This re-wording makes it an obligation on the adjudicator to pro-actively and fully explain the process rather than just re-actively respond to questions asked by the parties. The proposed additional words requiring the adjudicator to 'fully explain the adjudication process' and not just answer the parties' questions would also prevent a 'reluctant' adjudicator who calls for a pre-adjudication conference (if it is mandated) from doing nothing at the conference if the parties do not ask any questions. The adjudicator must genuinely attempt to address the true purposes and benefits of calling a pre-adjudication conference.

If the holistic approach including the encouragement of amicable settlement through negotiation or mediation is to be taken to the next level then section 36A(2) could be re-worded as:

*'The purpose of the pre-adjudication conference is for the adjudicator to fully explain the adjudication process, answer the parties' questions about the adjudication process, and encourage the parties to consider amicably resolving their disputes through other alternative means such as negotiation or mediation.'*

In objecting to this new proposal mandating a pre-adjudication conference, several submissions made to the Commerce Select Committee in NZ quoted among other reasons, unnecessary incurring of additional costs as the reason for the objections. Among the examples quoted on potential extra costs were parties' costs involved in flying in or driving long distances to attend the conference if they were from outstation. A rebutting response to this could be the re-drafting of another section of the Act: Section 42 - Powers of adjudicator in the CCA 2002. Subsection 42 (1) (f) reads:

*An adjudicator may –*

.....

*(f) call a conference of the parties;*

This could be re-worded to read:

*An adjudicator may –*

*.....*

*(f) call for and hold a conference of the parties in any manner the adjudicator thinks fit;*

This wider enabling provision would clarify and enable the adjudicator to adopt any method of holding a conference including a conference where everyone is physically present, a voice conference call, or video conference call using resources such as Skype or Adobe Connect. It could also prevent parties giving excuses for not attending due to un-availability of flights or other such excuses. Modern technology must be acknowledged as being an acceptable means of holding a conference.

These new proposals give the parties, especially a party to a residential construction contract who may not have faced a rapid and binding (even if temporary) dispute resolution process before, an opportunity to resolve the dispute amicably and by themselves – before the adjudicator serves the notice of acceptance and the tight timeframe process of adjudication starts running.

The rapid speed of adjudication often surprises the parties. No amount of prior written threats including threats of legal demands from lawyers has the same effect as the effect an adjudicator can have when telling the parties what is likely to happen over the next few days (not months).

The adjudicator's briefing during a mandatory pre-adjudication conference may be a catalyst for the parties to resolve their disputes amicably (eg through negotiation or mediation).

The parties would then realize, that once the adjudicator serves the (imminent) notice of acceptance on the parties, the strict timeframe starts and the parties give up control of their fate to the adjudicator. This gives them a very short window of opportunity to settle.

If the parties do settle amicably before the adjudicator issues a notice of acceptance, the parties benefit. They will neither incur the costs nor the time spent on the rest of the adjudication process. More importantly, it may be possible the parties may end up in a win-win situation following an amicable resolution of the dispute eg through negotiation or mediation. If this happens, there is one party that may appear to lose out in the short term - the adjudicator. The adjudicator only 'appears to lose out' because a true professional adjudicator would not feel so. An adjudicator is taken to be a professional. One of the essential pre-requisites of a professional is the quality of altruism - putting clients' and society's interest before self-interest. Such true professional adjudicators would not consider themselves to have 'lost out' in the long run because the parties have benefited. This must be an overriding consideration when considering a holistic approach to dispute resolution in the construction industry.

Returning to the issue of addressing costs, some adjudicators do not charge for pre-adjudication conferences. One adjudicator claims 30% of his cases are settled before he serves the notice of acceptance on the parties. This is also a practice that has in the past been adopted by some arbitrators – admittedly rarely. These meetings give the adjudicator (or arbitrator) the opportunity to also assess the suitability of the nature of the dispute to be decided on, and for the parties to decide whether they like (or dislike) the adjudicator's or arbitrator's style. However if the adjudicator is nominated by the authorized nominating authority the parties would not have this option if the adjudicator unless the adjudicator voluntarily agrees to these pre-appointment procedures.

Even if an adjudicator charges a fee for such holding the pre-adjudication conference, the cost must be looked at in the context of the 'bigger picture' including:

- (i) the overall potential benefit of an earlier amicable settlement by the parties – this may be a financial benefit (avoiding the time and costs of a continued adjudication) or non-financial benefit (amicable resolution more likely to preserve a good relationship) or both.
- (ii) the extra cost of having a pre-adjudication conference as a proportion of the total cost of the whole adjudication, if it went ahead.

Relatively, adjudication costs are significantly well contained when compared with arbitration and litigation. Costs of adjudication in Australia and some other jurisdictions may well be more contained if the scope of disputes and statutory durations permitted are much more limited.

In the scheme of all this, the extra cost of a pre-adjudication conference if the adjudicator charges for the conferences (whether held virtually or face-to-face) is well worth it when compared with the potential and actual benefit of having it. As mentioned earlier some adjudicators do not charge for the pre-adjudication conference.

If a proportion of disputes are settled before the notice of acceptance is served – the industry will be better served. This is likely given the experience of only one adjudicator in a scheme where a pre-adjudication conference is done voluntarily.

#### **2.4.6.4 Argument against the pre-adjudication conference: Potential transgression and breach of rules of natural justice**

Some may argue that an adjudicator may fall foul of the rules of natural justice or other rules associated with the adjudication process if the adjudicator gets overzealous eg in responding to merits of an issue raised by lawyers representing parties during the pre-adjudication conference. This risk is also inherent in arbitrations and the many other mixed-mode dispute resolution processes involving mediation such as med-arb and arb-med, such as a mediation which is turned into an arbitration mid-way if the parties agree to do so resulting in a binding award upon completion of a process that started as a mediation. Alternatively an arbitration may lead to parties agreeing to a mediation process where they eventually end up with a settlement contract instead of proceeding with the arbitration or possibly following a mediated settlement the parties may agree to the arbitrator writing up a consent award based on what the parties have agreed at the mediation. All these varied dispute resolution methods have been around for a long time in many jurisdictions. These require the adjudicator to be skilled and well trained in their area of practice. If acting as adjudicator and the parties were considering negotiation or mediation, a simple base and safe starting point could be not to volunteer to act as a mediator.

One other response to any outstanding concern associated with having a mandatory pre-adjudication conference is: nominating authorities and bodies must make sure

adjudicators are sufficiently trained before being admitted on their panel. And they must mandate continuing professional development (CPD). CPD must be mandatory for any professional – including adjudicators. A well-trained adjudicator should (and must) be able to handle any legal challenges and avoid over indulging into getting the parties to resolve their dispute amicably. This issue is covered in detail in Chapter 5 under the quality of the adjudicator.

No trained adjudicator should run afoul of the clear purposes of the Act and the law and practice of adjudication. There is enough case law to learn from others' mistakes – as would be expected of professionals.

The proposed changes in the Amendment Bill in NZ were an improvement on an already good Act on this issue and other issues. The UK and NZ Acts are similarly modelled in terms of coverage with a focus on both payment and adjudication of all disputes. When the UK amended its Act in 2009, a number of provisions in the NZ Act were adopted. It would be interesting to observe if during the next amendment of the UK Act some of these amendments in the New Zealand Construction Contracts Amendment Bill 2013 will be incorporated – including this far-sighted provision mandating the 'pre-adjudication conference'. It should not be difficult for the UK Act to adopt because there already is a parallel in the UK court mandated 'Pre-Action Protocol for Construction and Engineering Dispute'. It is however noted that as elaborated below, the eventual NZ Construction Contracts Amendment Act 2015 removed the provision for a mandatory pre-adjudication conference.

#### **2.4.6.5 New issue of concern - Supplementary Order Paper (SOP) No 52 dated 11 March 2015**

##### ***New provision mandating notice of acceptance to be served within 2 working days***

A Supplementary Order Paper No 52 (SOP 52) was published on 11 March 2015. This introduced some new changes. As these changes came long after all submissions to the Commerce Select Committee were considered, there never was rigorous debate on these new changes. The new change relates to the issuance of the adjudicator's notice of acceptance, which directly affects the practice associated with having a pre-adjudication conference analysed in detail above. In gist a new provision - section 35A(4) - was introduced in SOP 52 which mandated the

adjudicator to serve the notice of acceptance within 2 working days of the selected person receiving the request to act as adjudicator.

### ***The original position under the Construction Contracts Act 2002 (CCA 2002)***

The original CCA 2002 (section 35(1)) mandates adjudicators to **indicate** whether they were 'willing and able to act' within 2 working days. Their response within 2 working days may be 'yes, they were willing and able' or 'no'. If the answer is yes, they **then** had to serve the 'notice of acceptance' under section 35(2). No specific timeframe was specified for serving the notice of acceptance. It must be remembered that the adjudication clock starts ticking only upon issuance of the notice of acceptance. The claimant's submission of the adjudication claim under section 36(1) **must** then be made within 5 working days of receiving the adjudicator's notice of acceptance. These timeframes cannot be adjusted under the Act.

### ***Benefits of the original position under CCA 2002***

The unspecified flexible timeframe before the notice of acceptance is served under the current NZ Act enables adjudicators to do a number of things **before** rushing prematurely into issuing the notice of acceptance. These may include adjudicators wanting:

- (i) to resolve any conflict of interest issues under section 35(3). The Act does permit a person who has a conflict of interest to issue the notice of acceptance but **only if the parties confirm in writing or orally** under section 35(3) that they agree to the person acting as adjudicator. This may take a few days following explanation by the adjudicator on the nature of conflict of interest and the parties to agree, having heard the nature of the conflict of interest.
- (ii) the parties to consider the possibility of consolidating 2 or more adjudication proceedings that are pending as provided under section 40.
- (iii) to finalise the terms of engagement including the fees consensually with the parties rather than doing this after issuing the notice of acceptance and potentially resulting in an unpleasant stalemate situation. This would be consistent with the oft-preached good practice of agreeing all terms of a contract before entering into a contract.

- (iv) to obtain security for their fees. While the adjudicator can do this later by issuing a conditional notice of acceptance pending the provision of security, it goes against good practice of firming up all terms and security for fees before proceeding. Adjudicators may not want to find themselves in a situation where they are dealing with peripheral and distracting problems associated with their appointment or possibly even the effective date of their appointment.

As insinuated earlier, the need to pay the security of fees may also trigger the parties' motivation to settle their dispute amicably before the adjudication has officially commenced once the notice of acceptance is served. It was highlighted earlier, at the slight cost of adjudicators not having another case to adjudicate and fees that go with it, amicably settling a dispute benefits the industry. The wider interest of the profession and society ought to come before self-interest.

- (v) to conduct a pre-adjudication conference either in person, via videoconference eg Skype, or audio conference. Apart from clarifying some of the issues identified above, the parties may be briefed on the subsequent procedures and (tight) timeframes to be expected by everyone involved. Although standard letters or documentation may be sent or made available on websites, the impact of adjudication and its associated rapid timeframe often shocks parties into amicably resolving the disputes themselves.

***Problems with the new provision mandating notice of acceptance to be served within 2 working days***

The new amendment including the amended sections 35(2) and 35A(4) effectively merges the 'willing and able' indication with the notice of acceptance and all to be served within 2 working days of receiving the request to act as adjudicator.

The conflict of interest issues are now provided under the new section 35(3)(a) and (b). If there were a conflict of interest issue to be resolved this must now also be resolved within the 2 working days of receiving the request to act as adjudicator. From a practical perspective, this is highly unlikely to be achieved.

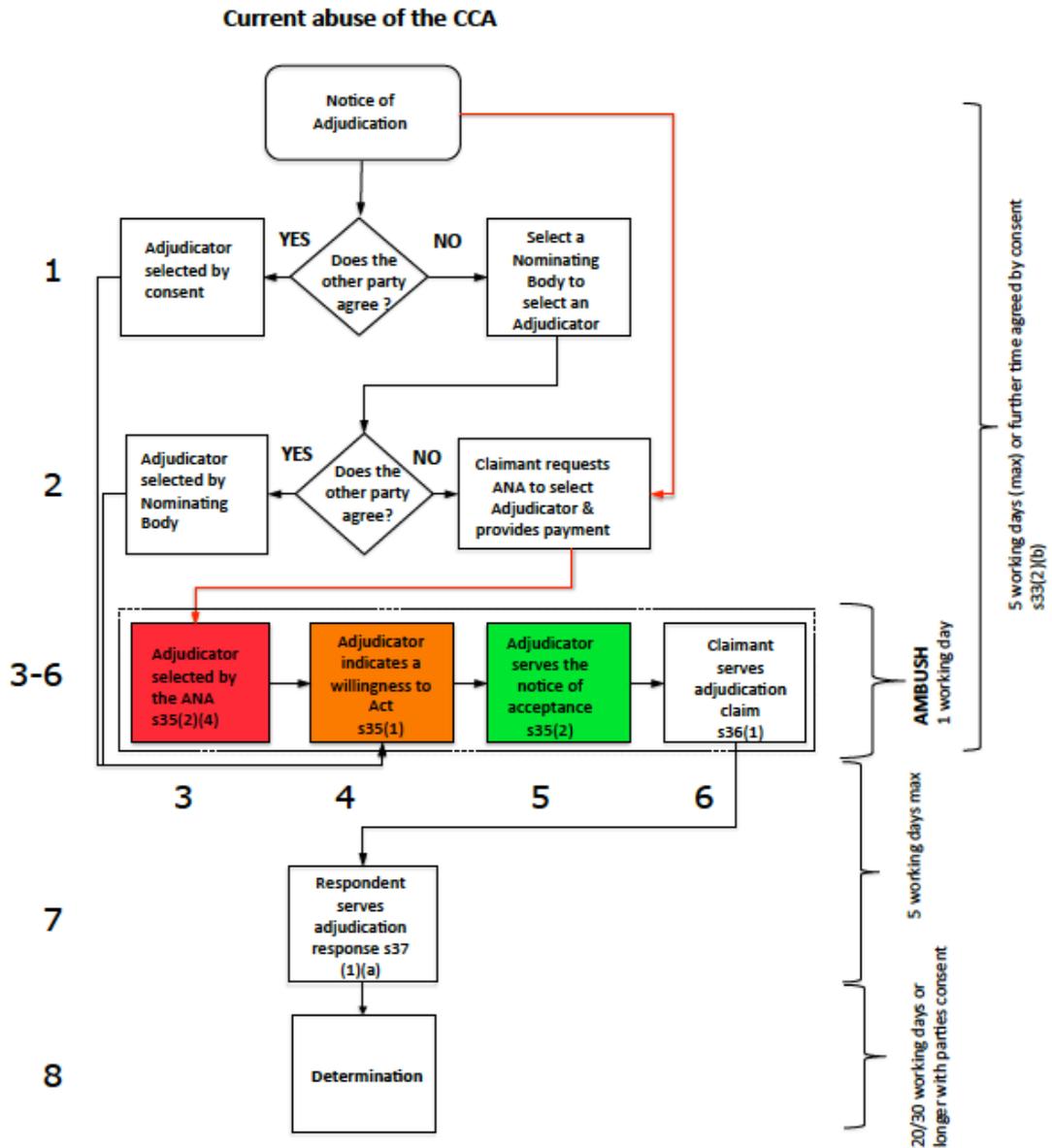
Mandating the adjudicator to serve a notice of acceptance within 2 working days of receiving the request to act as adjudicator and thus triggering the strict adjudication timeframes can cause many problems. The 2 working days between the adjudicator

receiving a request to act as adjudicator and the serving of notice of acceptance by the adjudicator may be seen to be exceptionally expedient but cannot be considered a benefit to the adjudication process given the significant problems it can create. Indeed, it can be abused.

### ***Ambush***

Adjudicators may rush through the process within the two days including serving the notice of acceptance together with their terms of engagement with fee levels that may be unreasonable to the parties. If the fee level is not acceptable by one or both parties, it may be possible they may even try and challenge the appointment of the adjudicator itself. At best, if there is no challenge, the adjudication will continue on but with a disgruntled adjudicator who may have to have the quoted hourly rate amended to something more reasonable as provided under section 57(1)(b) from an exorbitant rate that may originally have been quoted in the terms of engagement sent with the notice of acceptance.

See the flow chart below demonstrated by Geoff Bayley as evidence in one of the submissions to the Commerce Select Committee when debating on the then Construction Contracts Amendment Bill 2013 showing how 'ambush' might occur (Bayley, 2013). In an extreme case a number of documents are all served within the same day including the request to the authorised nominating authority to nominate an adjudicator, the adjudicator serves the 'willing and able' notice and the notice of acceptance at the same time, and the claimant who may have had plenty of head time also serves the adjudication claim on the same day.



**Figure 2: Procedures in appointing the adjudicator and potential ambush**

Activities 3, 4, 5, and 6 could potentially be done within one day. If this becomes a trend in future, the parties may start alleging they have been ‘ambushed’ not just by the claimant, but also by adjudicators with exorbitant fees quoted along with their notice of acceptance sent out within two working days of the adjudicator receiving the request to act as adjudicator.

The success of adjudication is reliant on both speed and it being an economical dispute resolution method. The whole process, including the behaviour of adjudicators, must also be seen to be fair. The parties must not get the impression adjudicators are out to make their primary livelihood out of adjudications. A few extra

days in the adjudication process will not destroy the industry's faith in adjudication - but one rogue adjudicator sending out exorbitant fees on the back of a mandated two working days requirement may destroy this faith. This becomes even more critical given the Building Amendment Act 2013 has now adopted the NZ Act as the avenue for resolving disputes under the former.

### ***Encouraging amicable resolution – international initiatives***

Having a process and procedures that enables amicable resolution of disputes would be consonant with the most current thinking worldwide. See for example the most recent development around the world on mediation and conciliation. In 2002 as quoted in Sussman (Sussman, 2015) the United Nations acknowledged that the use of conciliation and mediation *'results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.'*

Sussman suggests that although the use of conciliation and mediation has increased over the years it is still underutilised (Sussman, 2015). It is hoped that with mediation clauses in contracts, the European Union Mediation Directive, increasing use of court mandated mediation, and the influences of Far Eastern cultures emphasizing on harmony and amicable resolution, this can be improved. Sussman opines that one of the significant impediments to the growth of conciliation in international disputes is that settlement agreements following conciliation are more difficult to enforce across borders compared to arbitral awards. Arbitral awards are much easier to enforce through countries that have adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly known as the New York Convention. The Convention requires courts of those states to give effect to private agreements to arbitrate and to recognize and enforce international arbitration awards made in other contracting states. As of January 2015, 151 of the 193 United Nations Member States have adopted the New York Convention.

Now to promote international conciliation of international commercial disputes, the United States has proposed that the United Nation UNCITRAL Working Group II develop a multilateral convention for enforcement of mediated settlements.

These are all international initiatives towards encouraging amicable methods of resolving disputes. New Zealand has in the past produced an exemplary Act regulating construction payment and adjudication in a number of aspects. It must continue to enhance this leadership in looking at construction dispute resolution in a more holistic manner including amicable methods such as mediation.

***Final attempt to rectify concerns under section 35 – appeal to the Minister of Building and Housing***

Given the absence of an opportunity to submit the new concern on mandating the notice of acceptance to be served within 2 days through the Commerce Select Committee, and the then imminent third and final reading in Parliament in April 2015, these concerns were then communicated to the Minister of Building and Housing. Numerous other experts in the industry also wrote to the Minister. These include Geoff Bayley who was among those who was instrumental in bringing the original NZ Act to New Zealand, and three of the Authorised Nominating Authorities in New Zealand – the Arbitrators' and Mediator's Institute of New Zealand, Adjudicators Association of New Zealand, and Building Disputes Tribunal. As the Act was then due for the third and final reading in April 2015, a quick and simple remedy that was proposed to the Minister was to revert to the original provision in the CAA 2002 and remove this added new provision.

So far, the following was the gist of the response from the Ministry at end of March 2015:

*'The Minister has considered your views on the change to section 35 of the Construction Contracts Act that requires a 2-day deadline for adjudicators to serve a notice of acceptance on parties to a claim. Many of you have raised similar issues with this change. In summary:*

- (i) that this timeframe does not allow adequate time for adjudicators to confirm terms of engagement/security for fees or for conflicts of interest to be resolved*
- (ii) that a window within which parties could resolve disputes prior to the adjudication process officially commencing has been reduced*

*(iii) that adjudicators have less time to consider other matters – for example, consolidation of disputes.*

*Please be assured that these, and other matters raised in your individual correspondence, have been noted.*

*The Minister has also considered advice from the Ministry of Business, Innovation and Employment on the issues you raise. I am aware that the Ministry has been in touch with many of you to offer a detailed explanation regarding their interpretation of the current law and the reasons for the change.*

*After consideration of both views, the Minister has agreed with the Ministry's advice on this matter. As a consequence, he intends to proceed with the amendments to clarify the process of appointment of adjudicators via the Supplementary Order Paper **currently before the House.**' [Emphasis added]*

In short, the Minister in charge had at that time (as at 1 April 2015) rejected the arguments put forward in this part of the research ironically exactly 12 years to the date that the highly acclaimed original New Zealand Construction Contracts Act 2002 came into operation.

What was encouraging in the response was: the key concerns were well understood and summarized by the Minister's office. What was not is: no reason – logical, rationale, or even otherwise – was given for preferring the contrary.

It was however encouraging to note that in the final version of the Construction Contracts Amendment Act 2015 this serious shortfall was rectified by reverting to the original provisions in the Construction Contracts Act 2002 – thus avoiding a potentially problematic change.

## **Chapter 3: Analysis on Effectiveness of Adjudication Legislation Drafting Style**

### **3.1 Chapter summary**

This chapter deals with research objective 3. It investigates the extent to which the Acts of Parliament on construction industry payment and adjudication which have been introduced in 14 jurisdictions align with modern plain legal language drafting style guidelines and how easily and speedily users can understand these Acts. Some jurisdictions that adopt modern plain language style publish drafting guides on-line. Two examples are the New Zealand Parliamentary Drafting Guidelines and the New South Wales Parliamentary Drafting Guidelines. Among common modern drafting guidelines include the provisions to:

- (i) Use gender-neutral language
- (ii) Avoid using words that have multiple meanings
- (iii) Use words that are plain instead of complex words
- (iv) Write sentences that have an average of about 20 words per sentence
- (v) Write in active form and minimize passive sentence structures.

The golden rule of drafting is taken to be a given. Paraphrasing Aitken - always use one word to mean one thing consistently and always use a different word if intending another meaning (Aitken, 2004).

Objective 3 is among the primary objectives in this research and is particularly important because:

- (i) the primary users of legislation, specifically on payment and adjudication, including clients, contractors, subcontractors, suppliers, and consultants in the construction industry are considered not to be legal experts, and
- (ii) the statutorily imposed timeframe for adjudication is so short (typically stated in days) that when parties receive a notice under these Acts,

they are expected to expediently read, understand, and act based on the provisions in these Acts and respond very rapidly. The consequences of not complying in a timely manner can be fatal.

This aspect of the research on clarity and drafting style of legislation covering payment and adjudication legislation has, to the best knowledge of the researcher, never been done elsewhere.

A comparative study was done using documentary analysis of primary legislation comprising the 14 Acts of Parliament governing construction industry payment and adjudication.

Empirical evidence was also obtained from a questionnaire survey of adjudicators listed on the panel of the then three Authorised Nominating Authorities under the New Zealand Construction Contracts Act 2002.

The findings in this part of the research were then presented at the Commonwealth Association of Legislative Counsel's conference in Hong Kong in 2009 and their General Meeting with recommendations to produce a uniform drafting style guide for all Commonwealth countries.

The findings in this chapter leads on to the next two chapters that deal with the related issue of quality of adjudicators and their decisions.

### **3.2 Reading 'raw' legislation**

Hunt suggests members of the public would not generally be interested in reading 'raw legislation' (Hunt, 2002):

*'Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established.'*

Acts of Parliament spell out laws that must be complied with. They cover a wide range of areas. They may cover the conduct of how people do certain things. For example the New Zealand Building Act 2004 (PCO, 2004) and the New Zealand Building Amendment Act 2013 (PCO, 2013) govern the conduct of how people

design and build buildings. Some Acts outline what one should not do and might constitute a crime such as the New Zealand Crimes Act 1961.

Some Acts are aimed at individuals and the public at large and outline fundamental rights such as the New Zealand Bill of Rights Act 1990. This Act protects human rights and fundamental freedoms in New Zealand. Other Acts may be 'supplementary' to the public and used as 'an aid to interpretation of a contract' (Wilkinson & Scofield, 2010). It would be reasonable to expect those targeted at the public at large to be written in language that the public would understand easily whilst the latter must at least be understood by those who are involved in interpreting statutes such as lawyers and judges.

Most of these Acts of Parliament are targeted at specific groups of people who must read, understand, and comply with the provisions in the Acts. Judges, lawyers, law students, lawmakers, and parliamentary drafters are among the groups of people that are expected to read Acts of Parliament. Even Acts addressing fundamental individual human rights are unlikely to be read by the public at large on a regular basis, as issues on human rights are not normally raised by the public on a frequent basis. It is no wonder that Hunt suggests members of the public may not generally be interested in 'reading raw legislation'.

Not surprisingly, Acts of Parliament are not usually written as a 'working document' for non-legally qualified people. Thus traditionally, even if not easily understood by the lawmakers in government, many governments do pass Acts of Parliament that have been written in traditional language – sometimes archaic language that is steeped in tradition and unlikely to be easily understood by lay people. The assumption remains though that at the very least lawyers and judges understand them. In some jurisdictions, Acts of Parliament are written in more than one language. For example, in Canada statutes are written in English and French and in Malaysia statutes are written in English and the Malay Language. This caters for a wider target audience of the population, but may lead to further complication, particularly if the first draft in one language is written in traditional legal language or legalese. The added complication may include issues such as those relating to interpretation, translation, and questions on which takes priority.

While what Hunt (Hunt, 2002) says may be true of some or even many Acts of Parliament, there are some exceptions.

Among the exceptions include those which are the core subject matter of this research - legislation governing payment and adjudication targeted specifically at the construction industry.

### **3.3 The need to read 'raw' legislation**

Some Acts of Parliament serve a specific purpose and are directed at a specific group of people. They outline the law in specific areas and are very prescriptive. They are expected to be read and used more like a 'working document'. Notable examples of such legislation and core to this research are the Acts of Parliament governing construction industry payment and adjudication that have been introduced in 14 Commonwealth jurisdictions. These Acts are very prescriptive, are targeted specifically at those involved in construction projects, and affect some of the rights and obligations of parties to a construction contract. These people are expected to read the 'raw legislation', comply with all parts of it including some of the strict timeframes provided in these Acts, and suffer the consequences (which are also specified in these Acts) if they do not.

Such Acts must be written in a style that the targeted readers can understand easily and speedily – ideally on first or second reading. The timeframe within which some of the actions are required under these Acts – typically stated in days – and the serious consequences of not meeting some of these deadlines makes it particularly important that such Acts are written in language that is easily and rapidly understood by those affected by it.

### **3.4 Payment and adjudication legislation**

The New Zealand Construction Contracts Act 2002 ("Construction Contracts Act 2002, New Zealand," 2002) (NZ Act) is an example of an Act that is prescriptive in nature. It covers the conduct of commercial relationships – specifically targeted at those dealing with **construction** contracts. This Act, like similar legislation in 13 other jurisdictions found in the United Kingdom, Isle of Man, Ireland, all States and

Territories in Australia, Singapore, and Malaysia only targets those involved with construction contracts.

These Acts were considered 'novel' and earlier somewhat 'controversial' when compared to many other Acts of Parliament because some of their provisions encroach into and override the freedom traditionally given to parties to a contract. This encroachment goes against the well-enshrined common law concept under the law of contract that gives parties to a contract the right to agree anything they want, subject to it being legal. Uff, in expressing concerns over such legislation in the UK suggests such provisions were unprecedented (Uff, 1997a). Freedom of contract is a much-guarded concept that provides for parties to freely agree anything they want, provided it is not unlawful. For example, a Chinese railway construction company from China can agree with a New Zealand company or government to construct a major railway line across New Zealand from the North to South in exchange for cash or even in exchange for an agreed quantity of dairy milk supply for the next ten or twenty years.

Contrary to complete freedom of contract, there are specific provisions in the NZ Act (as there are in all the other jurisdictions that have introduced such similar Acts) that prohibit certain types of contractual provisions or provide a statutory right that cannot be contracted out. Two examples are: (i) 'pay when paid' clauses are prohibited in construction contracts and (ii) parties cannot contract out of the right to refer a construction dispute to the statutorily time bound dispute resolution process called adjudication. 'Pay when paid' clauses are clauses that stipulate that one party eg a head contractor will not have to pay another party to a construction contract eg a subcontractor until the head contractor has been paid for the work done by the client who engaged the head contractor.

Another somewhat unusual or 'novel' feature of the NZ Act (also found in most of the other similar Acts) is that the default provisions on procedures on payment or adjudication as a dispute resolution method are prescribed in detail and cannot be contracted out.

For example, section 20(3) headed 'Payment claims' of the NZ Act reads:

- (3) *If a payment claim is served on a residential occupier, it must be accompanied by-*
  - (a) *an outline of the process for responding to that claim; and*
  - (b) *an explanation of the consequences of-*
    - (i) *not responding to a payment claim; and*
    - (ii) *not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).*

Adding to these prescriptive burdens, some of the provisions eg provisions on some of the timeframes relating to the adjudication process are mandatory and are of a short duration - typically specified in days or working days. A failure to comply with these strict timeframes can be fatal to the disputants' claims or responses to claims or possibly even the whole adjudication process and the adjudicator's fees. For example section 57(5) provides:

*An adjudicator is not entitled to be paid any fees and expenses in connection with an adjudication if he or she fails to determine the dispute within the time allowed by section 46(2).*

All these features mean that parties to construction contracts are expected to read the Act, understand it, and act upon it **expediently** when dealing with a construction dispute. The parties affected by these legislations (whether contractors or subcontractors and in most jurisdictions also including suppliers of construction materials and construction professionals) are expected to embark upon or respond to the adjudication process **expediently**. The adjudication provision is a statutory right and cannot be contracted out. If one party to a construction contract refers a dispute against the other party to adjudication, both will be mandatorily drawn into the formal, rights based dispute resolution process of adjudication.

For example, if a contractor submits a payment claim to a client for work alleged to have been done and is not paid or is only partially paid with no satisfactory explanation on why the payment is not made in full in the form of a statutorily compliant payment schedule, the contractor can refer the dispute to adjudication

under section 25(1) of the NZ Act. If the client does not respond to the payment claim with a statutorily compliant payment schedule, the client becomes liable to pay the full claimed amount - see section 22 of the NZ Act. Following on from this the contractor can recover this amount as a debt due in any court and additionally the 'actual and reasonable costs of recovery' awarded against the client by the court - see section 23(2)(a) of the NZ Act. The contractor can also serve a notice on the client to suspend the construction work under section 23(2)(b) unless the contract is a residential contract under the original NZ Act as it was first enacted in 2002. A breach of any of these have serious consequences. Every party to a construction contract – whether lay, or technically or legally qualified, and whether experienced in construction or not – **must be able to read, understand, and act upon these provisions in the Act expeditiously**. Contrary to Hunt's view who questions if anyone would want to read 'raw' legislation (Hunt, 2002), everyone in the construction industry is expected to read and understand this 'raw' legislation – and read and act upon it expeditiously.

If the client does issue a payment response in the form of a statutorily compliant payment schedule, but contends with reasons why the contractor should not be paid, the matter can be referred to adjudication. Again the whole statutorily mandated process is laid down in detail in most of the Acts including the NZ Act. Under the NZ Act, upon an adjudicator serving a notice of acceptance to act as an adjudicator, the strict time-frame commences. Once the contractor (as a claimant) submits the adjudication claim, the client (called respondent in the dispute) has only five working days to respond strictly in accordance with the detailed statutory provisions specified in the Act - see section 37(1)(a) of the NZ Act. Within these five working days the respondent must read the whole claim, understand the claim, understand the legal implications of it, and respond to it. A failure to respond can lead to the entire claim from the contractor being payable and being enforced. Section 43(a) of the NZ Act clearly preserves the adjudicator's power under section 37 to determine a dispute if the respondent does not serve a timely response on the claimant.

### **3.5 Legal representation in adjudication**

Although adjudication is a rights-based process, the adjudication process in the Acts does not mandate lawyers to be involved. That is the case in all jurisdictions that

have enacted such similar legislation. See for example Cottam who suggests in relation to the UK Housing Grants, Construction and Regeneration Act 1996, that it is not necessary for parties to have to take legal advice before embarking upon an adjudication and to prepare their cases for the adjudicator (Cottam, 2002).

Some of the equivalent legislations, eg the New South Wales Act (section 21(4A)) and Queensland Act (section 25(5)) go further by prohibiting legal representation at meetings. Section 25(5) of the Queensland Act reads:

*'If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.'*

That means everyone affected must easily and quickly understand these Acts. Those affected include parties to the contract like the client (whether an experienced property developer or someone building a one-off building), contractor or builder, subcontractor, specialist contractor, and in some jurisdictions, suppliers of building materials. Others, who are also not expected to be legally qualified, but who are involved in the project would also be expected to read, understand, and act upon these Acts expediently. These include construction professionals such as construction project managers, engineers, quantity surveyors, and architects who may be acting in an advisory capacity to their clients.

Even third parties who may only have an interest in the land (such as the owner of a construction site) being developed under a construction contract between a developer and a contractor may also be affected. A contractor may, for example, seek under section 30(a) of the NZ Act a determination by the adjudicator for an owner of the land that is being developed but who is not a party to the construction contract to be jointly and severally liable with the developer of the project to make payment to the contractor. The contractor may also, under section 30(b), seek approval for the issue of a charging order in respect of the construction site except if the contract were a residential contract.

The provisions in the Act are very specific and if several criteria are met, do not give the adjudicator a discretion but instead mandate the adjudicator to approve the issue of a charging order on the construction site. See section 49(2)(a) of the NZ Act.

Those involved in the adjudication process such as adjudicators, claims consultants, expert advisers, and party advisers who may include lawyers must also be able to quickly and accurately understand both legal and technical provisions in the Act.

Finally, judges and arbitrators would also need to understand both the legal and technical provisions of the Act well.

It is difficult to accept Hunt's argument, questioning non legal experts wanting to read 'raw' legislation – particularly in the context of legislation on construction industry payment and adjudication. Tens of thousands of adjudications have been successfully conducted in 14 jurisdictions since 1998 involving many people associated with the construction industry who are non-legal experts. This is evident from numerous surveys done on adjudication such as the surveys done at Glasgow Caledonian University (Kennedy & Milligan, 2008).

This now leads to a key question:

***Can Acts of Parliament be written in 'lay' language and style, most commonly referred to as 'plain language' without losing the drafter's legal intent?***

In this context plain language may be defined as language that that is understood quickly and easily particularly by lay persons in addition to also being understood by technical experts, those legally qualified, those acting as adjudicators and judges who may be involved in challenges and enforcement of adjudicators' determinations. The underlying premise behind this question is of course that this must be achieved without losing the legal intent of the drafters of the Act.

The answer to this key question is yes, Acts of Parliament can be written in plain language or language that is understood by both legally qualified people and non-legally qualified people.

The next part of this chapter provides evidence to this conclusion followed by the key follow-on question, which effectively deals with objective 3 of this research - which is to investigate the extent to which the Acts of Parliament on payment and adjudication comply with modern plain language drafting guidelines and the ease with which users can understand these Acts. This is framed as a direct question:

***Are the Acts governing construction industry payment and adjudication in the 14 Commonwealth jurisdictions written in plain language?***

The documentary study and findings based on the original source documents – the Acts of Parliament - and analysis shows that the extent to which these Acts are written in plain language and comply with modern drafting guidelines vary widely among the 14 Commonwealth jurisdictions.

These findings and analyses were presented by the researcher at the Commonwealth Association of Legislative Counsel (CALC) conference in Hong Kong in April 2009, which was attended by 150 legislative drafters from Commonwealth jurisdictions.

The conference theme was: 'Whose law is it?' Among the questions that were expected to be considered as sub-themes were: 'How can drafters ensure that legislation is both ***effective and clear to all those who are affected by it***, whether as legislators or users?' The conference sub-theme went on to probe: 'Can those affected by a particular law find it ***[and understand it]*** easily?' [Emphasis and words in brackets added by this researcher].

As stated earlier there are now 14 Commonwealth jurisdictions that have introduced statutory adjudication affecting construction contracts. Several jurisdictions including New Zealand have had amendments to their Acts and other countries such as South Africa, Germany, and Hong Kong have had discussions on the need for such legislation with South Africa already advanced with its possible enactment of an Act. If the existing Acts have varying degrees of clarity and capability of being understood quickly and easily, there must be lessons that could be learnt by jurisdictions that are contemplating a similar Act and those contemplating amendments to their existing Acts.

As suggested earlier it is important to consider the ***users' perspective*** or those who are ***primarily affected by it***. All the 14 Acts address similar core issues - to regulate payment practice in the construction industry and introduce rapid statutory adjudication as a dispute resolution method in the construction industry. But the detailed technical provisions within these Acts differ. Some argue although the terminology may be similar, the intent and target beneficiaries of the legislation are

different (Davenport, 2007). Irrespective of who exactly the target primary audience is, they are generally not expected to be legally qualified.

Although these Acts address broadly similar issues, the drafting styles of these Acts are different. The drafting style affects the effectiveness of an Act. This chapter deals with the drafting style and how it affects the effectiveness of the Act to deliver Parliamentary intent **clearly** and **quickly**. The wider issues on the technical concepts within these Acts are covered in other parts of this research.

### 3.6 The ‘users’ of the Acts

Who uses these Acts? ‘Users’ may be classified as ‘primary’ and ‘secondary’ users. Primary users would include parties to construction contracts, their advisers whether legally qualified or not, and adjudicators. Secondary users include judges and legislative drafters. Judges may be called upon to enforce an adjudicator’s decision or determination or to deal with challenges to the adjudicator’s jurisdiction. Legislative drafters may be called upon to draft a new Act for another jurisdiction or be asked to amend an existing Act. Secondary users would use the Acts **much less frequently** than primary users. The timeframe within which secondary users have at their disposal to make decisions is also highly likely to be relatively much longer than the timeframe specified in these Acts for the primary users to comply – which are typically stated in days.

### 3.7 The Acts

Although there was strong support within the construction industry in the UK for legislation on payment and adjudication, there were also a fair number of concerns expressed by several top construction lawyers and experts. Their concerns were compiled in a book in 1997 famously just called ‘A Plea for Sanity’ (Uff, 1997b) It was a collection of papers opposing the reform proposals for the construction industry.

The *Housing Grants, Construction and Regeneration Act 1996* was nevertheless born and came into force on 1 May 1998. Only Part II, which concerns payment and adjudication, is relevant to this research. Part II of this Act is referred to in this research as the UK Act. The UK Act has made a big impact on the way construction disputes are resolved in the UK since 1998. It has also made a major impact around

other Commonwealth jurisdictions since. There are now 14 Acts of Parliament around the Commonwealth jurisdictions that deal with payment and adjudication of construction disputes. Although already listed in chapter 2, they are relisted here by jurisdiction for convenience, as they are subsequently referred to in some depth in this chapter:

### ***United Kingdom***

- Housing Grants, Construction and Regeneration Act 1996, United Kingdom, specifically Part II being the relevant part (UK Act). Part II has since been superseded by the Local Democracy, Economic Development and Construction Act 2009, Part 8 being the relevant part. (new UK Act)

### ***Australia***

- Building and Construction Industry Security of Payment Act 1999, amended in 2002 and 2009, New South Wales, Australia (NSW Act)
- Building and Construction Industry Security of Payment Act 2002, amended in 2006, Victoria, Australia (Vic Act)
- Building and Construction Industry Payments Act 2004, Queensland, Australia (Qld Act)
- Construction Contracts Act 2004, Western Australia (WA Act)
- Construction Contracts (Security of Payments) Act 2004, Northern Territory, Australia (NT Act)
- Building and Construction Industry Security of Payment Act 2009, South Australia, Australia (SA Act)
- Building and Construction Industry Security of Payment Act 2009, Tasmania, Australia (Tas Act)
- Building and Construction Industry (Security of Payment) Act 2009, Australian Capital Territory, Australia (ACT Act)

### ***New Zealand***

- Construction Contracts Act 2002, New Zealand (NZ Act). The amended Construction Contracts Amendment Act 2015 was born following a third reading of the Bill in Parliament and attaining Royal Assent in October 2015. (New NZ Act).

### ***Isle of Man***

- Construction Contracts Act 2004, Isle of Man (IoM Act)

### ***Singapore***

- Building and Construction Industry Security of Payment Act 2004, Singapore (Sg Act)

### ***Malaysia***

- Construction Industry Payment and Adjudication Act 2012, Malaysia (Malaysian Act)

### ***Ireland***

- Construction Contracts Act 2013 (Ir Act)

Throughout this research, these acts are referred to in abbreviated form as shown in parentheses above.

There have also been discussions in Hong Kong, South Africa, and Germany on whether a similar act should be introduced, with South Africa advancing to a draft being considered as at end of 2015.

#### **3.7.1 Successful legislation – from a technical viewpoint**

Despite earlier objections in the UK, after over 15 years, the UK Act is now generally considered to be successful.

The adjudication process has been hailed a '*runaway success*' by a QC (Gaitskell, 2005), who, over ten years earlier, questioned the justification for legislative interference that was inconsistent with the relative freedom of parties to negotiate their own contracts (Gaitskell, 1997). Although his view has changed, the current opinion has been expressed professionally.

Another comment made by the then Head of Technology and Construction Court UK – Sir Vivian Ramsey was:

*'It has revolutionized the way disputes are resolved in the construction industry'*  
(Ramsey, 2007).

It has also been suggested that introducing statutory adjudication has at least partly been the reason for the significant decline in the number of construction arbitrations and the reduced workload of cases in the technology and construction courts dealing directly with construction disputes in recent years (Gaitskell, 2005). Arbitrations and litigation of construction disputes have typically taken significantly longer than the statutorily mandated short time scale for adjudications. Whilst arbitration and litigation on construction disputes typically takes years and occasionally months, adjudication typically takes days or weeks (Ameer Ali, 2006). A reduction in disputes being resolved in protracted arbitration and litigation is a positive development.

The concepts introduced in the Acts, particularly the provisions relating to progress payments and the introduction of rapid adjudication to resolve construction disputes are a success not only in the UK but also other jurisdictions that have implemented it. None of the 14 jurisdictions have reported major adverse effects to the point of wanting to either repeal any of the Acts or to make major changes. At most some of the Acts had been criticised as being inadequate and in need of some amendments. The initial version of the NSW Act for example was criticized as not having enough bite and thus ineffective, but that criticism has since gone after the amendments in 2002.

Empirical evidence from a survey of adjudicators in New Zealand suggests the NZ Act has also been a success (Ameer Ali & Wilkinson, 2008).

These technical aspects of the various Acts are dealt with in other chapters of this research. This chapter focuses on the specific aspect relating to drafting style of the Acts.

### **3.7.2 Some of the legislative drafting style could be better**

As stated earlier, legislation on adjudication should focus on serving the primary users. If the primary users were better served, the secondary users (being qualified in law) would also be served. Ideally a primary user should be able to understand the

provisions in an Act on first reading or second at the most. That is the ideal that proponents of plain language including plain legal language strive to achieve. For example, the Plain Language Network's PlainTrain, a Plain Language Online Training Program (PLAIN, 2015) suggests:

*'Plain language matches the needs of the reader with your needs as a writer, resulting in effective and efficient communication. It is effective because the reader can understand the message. It is efficient because the reader can read and understand the message the first time.'*

Similar suggestions have been made by Butt (Butt, 2002; Butt & Castle, 2013)

If, because of the technical nature of some of the provisions of the Act, understanding the provisions on first reading is only a laudable but not always an achievable ideal, then the provisions ought to be understood on second reading – at the most.

Whether or not a particular style is more effective could be looked at and analysed using a theoretical framework then getting empirical evidence on writing style such as from a questionnaire. That approach could be the subject of another major research focused only on writing style. This thesis considers the wider issue of how effective the Acts are with the writing style being only **one** of the components – albeit an important component. The approach taken to analyse the effectiveness of the writing style of the Acts in this research is to do a documentary analysis using text from the Acts against drafting style guidelines – specifically legislative drafting style guidelines.

The writing style of a selection of provisions from the 14 Acts was compared. The analysis is done with the primary user in mind. Opinions from adjudicators in New Zealand using questionnaires were then analysed for validation.

### **3.8 Selection of issues on legislative drafting style**

Nine aspects of the provisions found in the 14 Acts were compared. These are all provisions relating to adjudication – which is a common element in all the Acts.

The reasons for choosing these provisions are outlined under each of the nine headings. The nine provisions are:

- (i) The title of the Act
- (ii) Structure of the Act
- (iii) Purpose of the Act - commonly referred to by Parliamentary drafters as the purposive section
- (iv) Definition of a construction contract
- (v) Terminology – plain or complex words and words with single or multiple meanings
  - The adjudicator’s ‘decision’ or ‘determination’
  - To ‘shall’ or not to ‘shall’?
- (vi) Communicating the adjudicator’s decision
- (vii) Sentence structure – average sentence length
- (viii) Sentence structure – using possessives through the apostrophe and active v passive sentence structures
- (ix) Gender-neutral drafting

### **3.8.1 The title of the Act**

All the 14 Acts cover payment issues in the construction industry and introduced adjudication as a statutory right for parties to construction contracts. The primary users of these Acts are typically parties that enter into a construction contract who are not legally qualified. For many years after an Act comes into force, the construction industry players who are the primary users may well still have to be educated on what the Act is about, what it contains, and how it might affect them. Research shows some are not aware of the existence of these Acts even long after the Acts have come into force. In New Zealand this was the case in some instances even after 13 years since the Act was introduced.

The very short timescales mandated in the Acts for responses to payment claims, and the short time scales within the adjudication process means it is vital that details of the Acts are communicated to the industry as widely as possible. Even after years in operation, it might still not have been communicated to every part of the industry,

and might take some parties by surprise – resulting in possible exploitation by those who are more familiar with the Acts.

It is probably partly for this reason that some of the Acts such as the NZ and UK Acts have specific provisions to exclude construction contracts for a residential occupier or have different provisions for such contracts. See for example section 106 of the UK Act:

*106 Provisions not applicable to contract with residential occupier*

- (1) *This Part does not apply—*
  - (a) *to a construction contract with a residential occupier (see below), or*
  - (b) *to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.*
- (2) *A construction contract with a residential occupier means a construction contract, which principally relates to operations on a dwelling, which one of the parties to the contract occupies, or intends to occupy, as his residence.*

*In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose—*

*“dwelling-house” does not include a building containing a flat; and*

*“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.*

The assumption here is that a one-off residential owner involved in a construction contract should not be expected to be burdened with the complex payment claims and payment response provisions and rapid adjudication as provided under the Act. Other Acts, in what appears to be making similar assumptions, have detailed mandatory requirements and warnings to be included in notices that are sent out by claimants. For example, section 20(3) headed ‘Payment claims’ of the NZ Act reads:

- (3) *If a payment claim is served on a residential occupier, it must be accompanied by-*

- (a) *an outline of the process for responding to that claim; and*
- (b) *an explanation of the consequences of-*
  - (i) *not responding to a payment claim; and*
  - (ii) *not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).*

If the title of the Act reflects and bears some resemblances to what the Act contains it will help parties that may be affected by it to take notice and become more familiar with it.

Contrast the following extracts from the titles of some of the Acts:

- *Housing Grants, Construction and Regeneration Act*
- *Local Democracy, Economic Development and Construction Act*
- *Building and Construction Industry Security of Payment Act*
- *Construction Contracts Act*
- *Building and Construction Industry Payments Act*
- *Construction Contracts (Security of Payment) Act*

Despite differing titles, they all deal with the common issues of **payment and adjudication** under construction contracts. Whilst they are different in details, they all basically:

- (i) attempt to regularize payment in the construction industry and prohibit some payment related provisions such as 'pay-when-paid' clauses;
- (ii) introduce statutory adjudication as a rapid and time-limited method of resolving disputes in the construction industry; and
- (iii) attempt, in various forms, but don't guarantee, to provide some form of security for payment.

Given these basic common features, the name of the Malaysian Act - 'Construction Industry Payment and Adjudication Act 2012' best reflects what all the 14 Acts are

about. An alternative effective name might be 'Construction Contracts (Payment and Adjudication) Act'.

There may of course be numerous reasons for these jurisdictions having the names they have chosen. It could be because of the need to get parliamentary time expediently. This might be achieved by adding on this legislative initiative to another Act that has already secured parliamentary time. This might result in a name that integrates various 'sub-Acts' into a single Act. An example is the Housing Grants, Construction and Regeneration Act, and the equally wide name Local Democracy, Economic Development and Construction Act.

The key point to be noted here is the Acts cover payment and adjudication in construction contracts. This has serious implications on the entire construction industry as it affects payment practices and dispute resolution practice. The core messages from the Act must be disseminated expediently and efficiently. The name makes an impact positively or negatively.

Some names might even be misleading, for example, the phrase 'security of payment' gives the impression that there is some form of security that is offered under these Acts, and yet most of them do not guarantee payment. In the absence of a mandated payment bond scheme they merely facilitate payment to be made.

#### **3.8.1.1 The UK Act – Housing Grants, Construction and Regeneration Act 1996**

There are historical reasons for merging various parts dealing with different issues within this Act. Only Part II headed 'Construction Contracts' is relevant here. As with all the other Acts, the most significant issues the Act covers relate to payment and adjudication. But these words are only mentioned as headings to the relevant sections.

Most people in the construction industry in the UK refer to this Act as just the '*Construction Act*'. It is not necessarily an accurate reflection of the full contents of the Act, but at least it is not a mouthful or misleading.

All this is now history with the changes introduced in the new UK Act. Following extensive formal consultations between 2005 and 2007, the Department for Business Enterprise & Regulatory Reform (BERR) produced a document in July 2008 titled:

'The draft Construction Contracts Bill'. It appears the BERR must have thought Construction Contracts Act is a better title for the Act. However, what was introduced in the House of Lords in December 2008 was '*Local Democracy, Economic Development and Construction Bill 2009*'. The Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (England) Order 2011 (SI 2011/1582) confirms the effective date for changes to Part II of the Housing Grants, Construction and Regeneration Act 1996 under Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (New UK Act) as 1 October 2011.

Part 8 headed 'Construction Contracts' comprising sections 133 to 139 is the relevant portion. It is assumed that statutory payment and adjudication provisions in the UK are sufficiently well known – so those that who might be affected by the Act will know of its existence and know where to find it, whatever title the provisions on payment and adjudication come under.

### 3.8.1.2 The NSW, Vic, and Sg Acts – Building and Construction Industry Security of Payment Act

The titles of these three Acts are identical. Their technical contents are also quite similar to each other when compared with some of the other Acts.

But in the context of plain language drafting, the following demands consideration:

1. Is it necessary to distinguish the **building** industry from the **construction** industry?
2. If it must, then do they have to be distinguished in the title of an Act? Or would this have been better dealt with through definitions within an Act?
3. If building and construction must be distinguished in the title itself, then what about the 'engineering industry'? These Acts do cover the engineering industry, which is in industry sometimes distinguished (rightly or wrongly) from the construction industry. See for example the '*NEC3 Engineering and Construction Contracts*' published in the UK.
4. If it is important that building and construction must be distinguished, then why do the contents of these Acts refer to only construction contracts

throughout and define construction contracts and construction work but not building contracts and building work?

5. Are these Acts only or even primarily about providing **security** of payment?

They do not guarantee security of payment. Might heading the title of an Act with the phrase 'security of payment' give the false impression that they do?

6. A big part of these Acts deal with adjudication. Yet the word adjudication does not appear in the title at all.

Some may see these questions or arguments as being pedantic, but as discussed earlier, given the serious implication of what these Acts provide and the short timeframes for responses, every part of these Acts – even the title – that helps those affected by them to access the Acts expediently matters.

### **3.8.1.3 The Qld Act – Building and Construction Industry Payments Act**

See the comments earlier on the necessity to distinguish the building and construction industries and the missing word adjudication. The absence of the word 'security' in the Qld Act is a welcome difference. Whatever the reason Queensland decided to omit reference to the word 'security' and differentiate the title of its Act from the NSW or Vic Acts, it avoids giving a potentially wrong impression.

### **3.8.1.4 The NZ, WA, and IoM Acts – Construction Contracts Act**

Distinguishing the title of their Acts totally from all the other jurisdictions, the title '*Construction Contracts Act*' was first passed as legislation in New Zealand in 2002. Whilst it does not completely reflect the primary contents of the act (which are payment and adjudication provisions in construction contracts), its brevity is refreshing. It is commonly referred to with the initialism 'CCA' in New Zealand.

### **3.8.1.5 The NT Act – Construction Contracts (Security of Payment) Act**

This Acts keeps the attractive brevity of 'Construction Contracts Act' but also make it clear that the act deals with payment issues. It is unfortunate that the word 'security' crept in. And it is unfortunate that the word adjudication is missing from the title of the

Act as is the case with all but one among the 14 Acts. The alternative name 'Construction Contracts (Payment and Adjudication) Act' would have captured the essence of the Act better.

#### **3.8.1.6 The Malaysian Act – 'Construction Industry Payment and Adjudication Act'**

When proposals for a similar act for Malaysia were first referred to as 'the proposed Construction Contracts Act' in 2003 and 2004, some from the industry objected to having such an Act. It was subsequently discovered those who objected had wrongly thought a Construction Contracts Act meant a single standard set of construction contract was going to be imposed on the Malaysian construction industry.

The Malaysian construction industry Working Group on Payment (WG 10) commonly referred to the title of the proposed Act as the '*Construction Contracts Act*' since its first formal recommendation in 2004. This was subsequently proposed to be '*Construction Industry Payment and Adjudication Act*' from 2005 (Ameer Ali, 2006). This name has been consistently used within the construction industry since 2005 through to the final version of the Act (CIDB, 2008). It is now also commonly referred to by the acronym CIPAA. This title reflects the primary contents of the Act (and all the other 13 Acts) more accurately. At some stage earlier an equally accurate alternative reflecting the key content of the Act was also considered - Construction Contracts (Payment and Adjudication) Act but not adopted. The preferred title better enables an acronym to be formed.

Before the Act was finalized and passed, there had been significant support from the construction industry and several cabinet Ministers, but there were also some objections – in particular from the Malaysian Bar council. They had listed over 40 reasons for objecting to the proposed Act. Some of the reasons for the objections were based on wrong assumptions or speculations and some were due to ignorance of the realities in the construction industry. Among the reasons for the objections was the questioning of whether payment was a problem in the construction industry. Some of the concerns expressed reflected their ignorance of the full contents of the other Acts on payment and adjudication in other jurisdictions and their successes. It was never established if some of their ignorance was because they did not fully study

all the other Acts that existed at that time or because the Acts were far too complex and could not be understood easily – especially if read cursorily.

Another reason for the objections has been speculated by many (including renowned construction lawyers in the UK) that there may be concern that introducing statutory adjudication might lead to reduced construction arbitration. If protracted construction arbitration or litigation is reduced – that will be better for the construction industry. Parties can then concentrate on their core business of development, construction, and consultancy in the built environment – instead of feeding the industry that is only peripheral to the construction industry – the dispute resolution industry.

### ***Future-proofing the title of an Act***

There is one further consideration that ought to be taken into account on the title of an Act. Given the relative success of adjudication in various jurisdictions, there are now suggestions that the adjudication model could be extended to other industries beyond the construction industry (Ameer Ali, 2005; Ramsey, 2007). If adjudication is introduced to other industries, it could be introduced:

- (i) by incorporating adjudication within existing Acts governing these other industries;
- (ii) through amendments to existing dispute resolution Acts such as the Arbitration Act or Mediation Act; or
- (iii) if adjudication is adopted widely enough, through a stand-alone Act like a new Adjudication Act similar to the Arbitration Act or Mediation Act.

The question remains: In anticipation of what might happen in the future, should the reference to ‘building’ or ‘construction’ industry even appear in the title of any proposed new Act?

### **3.8.2 Structure of the Act**

Unlike the other Acts on payment and adjudication, the UK and IoM Acts do not contain all the details on the adjudication provisions. The parts of the Acts governing these issues are very brief and only state that certain minimum provisions must be included in construction contracts – failing which a Scheme for Construction Contracts Regulations will apply; for example the Scheme for Construction Contracts

(England and Wales) Regulations 1998 or the Scheme for Construction Contracts (Scotland) Regulations 1998. These are referred to as the 'Scheme' in this thesis. Instead of a very short Act with a default 'Scheme' structure, all the other Acts incorporate most of the core details within the Acts themselves with some provisions that might require changes to be made relatively easily provided in what are typically called 'Regulations'.

As a result of this approach taken in the drafting of the UK Act, industry bodies were free to develop their own procedures for payment and adjudication as long as they fulfilled the few mandatory requirements in the Act. This led to numerous procedures being developed in the UK by various industry bodies. Whilst some may assume these varying procedures were developed to be clearer, better, or fairer than the Scheme (Kennedy, 2008), they are also likely to have been developed as a result of competition among the various Adjudicator Nominating Bodies. The Adjudication Reporting Centre at the Glasgow Caledonian University listed 22 Adjudicator Nominating Bodies in the UK in their 9<sup>th</sup> report published in 2009 (Kennedy & Milligan, 2008).

Whilst multiple procedures may be useful to rigorously test adjudication procedures and to compare them against the Scheme, it comes at a cost to the industry. Some in industry now opine the 2009 amended UK Act should have adopted the Scheme as a sole procedure and not merely as a default procedure. That opportunity was unfortunately not taken up. It is considered as a missed opportunity, but it can still be reconsidered in future.

### **3.8.3 Purpose of the Act**

Having the purpose of an Act clearly outlined at the beginning of an Act is very useful for new readers of the Act.

In construing the provisions of an Act it should be noted that the courts will take the following approach as quoted by the learned judge in the first adjudication case in the Malaysian construction court – the case of UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (2014):

*'a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object'.*

Not all the Acts have a clearly outlined object or purpose spelt-out.

The UK Act covers many different issues, the relevant part simply reads:

*'An Act ...; to amend the law relating to construction contracts ...'*

The IoM Act, which is similar to the UK Act, but drafted as a stand-alone Act for only payment and adjudication, reads similarly:

*'AN ACT to amend the law relating to construction contracts.'*

Some of the other Acts provide some generic intent:

The Sg Act for example provides:

*'An Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.'*

Although the Sg Act follows much of the NSW and Victorian models in technical content, it stops there and unlike the NSW and Vic Acts, does not elaborate further. The NSW and Vic Acts go further and after stating the overall intent, they provide more details on the objects of the Act, including how the objects are to be achieved. The NSW Act reads:

*An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.*

### 3 Object of Act

- (1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*

- (2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
- (3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
  - (a) *the making of a payment claim by the person claiming payment, and*
  - (b) *the provision of a payment schedule by the person by whom the payment is payable, and*
  - (c) *the referral of any disputed claim to an adjudicator for determination, and*
  - (d) *the payment of the progress payment so determined.*
- (4) *It is intended that this Act does not limit:*
  - (a) *any other entitlement that a claimant may have under a construction contract, or*
  - (b) *any other remedy that a claimant may have for recovering any such other entitlement.*

The overall purpose of an Act is useful but it need not elaborate on details of **how** an Act achieves some of these objectives. These are already detailed in the rest of the provisions of the Act. The NT and NZ Acts have more succinct provisions:

### **NT Act**

*An Act to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts, and for related purposes.*

#### **3 Object and its achievement**

- (1) *The object of this Act is to promote security of payments under construction contracts.*

- (2) *The object of this Act is to be achieved by –*
- (a) *facilitating timely payments between the parties to construction contracts;*
  - (b) *providing for the rapid resolution of payment disputes arising under construction contracts; and*
  - (c) *providing mechanisms for the rapid recovery of payments under construction contracts.*

### **NZ Act**

#### *Section 3 Purpose*

*The purpose of this Act is to reform the law relating to construction contracts and, in particular,—*

- (a) *to facilitate regular and timely payments between the parties to a construction contract; and*
- (b) *to provide for the speedy resolution of disputes arising under a construction contract; and*
- (c) *to provide remedies for the recovery of payments under a construction contract.*

Consider also the following, which is set out at the beginning of the Malaysian Act:

*An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.*

This is similarly worded to the NZ Act but the NZ Act is much clearer in its presentation. It is easier to find the purpose of the Act with its own section, heading and the use of listing to present the three primary purposes. The presentation of the NZ Act is preferable. Potential users who would typically refer to the contents page of an Act would be able to find out what the Act is about easily and quickly.

### 3.8.4 Definition of a construction contract

Here the normal legal meaning of the word 'contract' is considered against how the word 'contract' is used in some of the Acts.

In law, at least under commonwealth jurisdictions, a contract is formed when all ingredients necessary to form a legally binding contract are in place. Among these ingredients are:

- (i) **agreement** (sometimes split into the offer and acceptance stages to establish whether and when a contract might have come into place);
- (ii) consideration (or exchange of value); and
- (iii) intention to create a legally binding relationship (as opposed to a mere casual discussion that might have taken place).

There are other requirements too like capacity to contract, but which are beyond the scope of this thesis.

'Agreement' in law is **one** of several ingredients required to form a legally binding 'contract'. In this context, 'agreement' is not the same as 'contract'. Agreement precedes a contract. Or agreement is a subset or part of, or one of the ingredients of a contract.

Despite these legally well-established meanings, the word 'agreement' is sometimes loosely used in some of the Acts as a replacement for the word 'contract'. In other words the word agreement is used to mean a legally binding contract. As long as the word agreement (or any other word) is sufficiently defined in any particular context, and is used consistently in an Act, there should not be a problem. But if it is not defined, or not used consistently within an Act, at best, it may create confusion or ambiguity, and at worst, result in litigation. Agreement is often not defined in the Acts or in contracts. It is sometimes used instead of and to mean contract as defined in law.

Ideally the word contract should be used consistently throughout and if the word agreement is used it must only be used in a different context. For example: The parties may come to an agreement to extend the time to complete the adjudication. One must not use the word agreement to mean contract. Even more importantly, one

must not use contract and agreement interchangeably within a single legal document.

Now consider s 104(2) from the UK Act:

*References in this Part to a construction **contract** include an **agreement**—*

- (a) to do architectural, design, or surveying work, or*
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,*

Going strictly by the legal definition of contract and a (mere) agreement, was it intended that services under paragraphs (a) and (b) were to be included when there was a mere agreement or was a legally binding contract with agreement, consideration, and intention required? If only a mere agreement was intended in this UK Act, it would have been helpful to have a definition of agreement and not just a definition of construction contract.

Contrast that with the carefully and consistently drafted NT and NZ Acts:

S 5 of the NT Act reads:

*5 Construction contract*

*(1) A construction contract is a **contract** (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:*

- (a) to carry out construction work;*
- (b) to supply to the site where construction work is being carried out any goods that are related to construction work;*
- (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;*
- (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.*

*(2) In Part 3, a construction contract includes –*

- (a) a **contract** modified under section 13; and
- (b) a **contract** in which a provision is implied under Part 2, Division 2.

S 5 of the NZ Act defines construction contract, commercial construction contract, and residential construction contract carefully and consistently by referring to the word contract throughout and not (merely) agreement:

**commercial construction contract** means a **contract** for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the **contract**

**construction contract** -

- (a) means a commercial construction **contract** or a residential construction **contract**; and
- (b) includes any variation to the construction **contract**; but
- (c) does not include a lease or licence under which a party undertakes to fit out, alter, repair, or reinstate the leased or licensed premises unless the principal purpose of the lease or licence is the carrying out of construction work

**residential construction contract** means a **contract** for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the **contract**

The NZ and NT Acts use words that are internally consistent and consistent with words that are defined in law.

Colloquial use of the word agreement might be common in the UK, but it should be avoided in legislations to ensure greater clarity and consistency and to prevent potential argument.

### 3.8.5 Terminology – plain v complex words, single v multiple meaning words

This part deals with choice of words in the Acts using two examples. The choice between using the word ‘decision’ and ‘determination’ when referring to an

adjudicator's decision and the choice between the words 'shall' or 'must' when mandating something in the Acts.

Among the recommendations on choice of words by most modern legal drafters are:

- (a) Prefer plainer words to complex ones
- (b) Whenever possible, use a word that has a single meaning in preference to one that has multiple meanings
- (c) Take heed of the golden principle of drafting:

*'Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.'* (Aitken, 2004)

### **3.8.5.1 The adjudicator's decision or determination?**

The two primary issues dealt with in all these 14 Acts are payment and adjudication. Within the adjudication provisions, the critical outcome is the adjudicator's decision that the parties are expected to comply with.

In arbitration, the arbitrator's decision has universally been referred to as the arbitrator's award. This is consistently used throughout various jurisdictions and generally accepted in over 150 countries. With statutory adjudication however, the adjudicator's decisions are now referred to in the 14 Acts as either 'decision' or 'determination'.

A potential argument may be that the word determination is used when the adjudicator only makes decisions on payment disputes and decision is used for any other disputes. This argument is not tenable because some Acts that only allow adjudications on payment disputes (eg Qld Act) use decision, whilst others that allow all disputes to be adjudicated use determination (eg NZ Act).

Either decision or determination may be acceptable as long as it is properly defined, explained, and most importantly **used consistently** within an Act. If there is a choice, 'decision' is preferable. From a plain language perspective, here are some reasons why 'decision' is preferable over 'determination':

1. Decision is a shorter word.
2. Decision is a three-syllable word whereas determination is a five-syllable word.
3. Decision is a plainer, simpler, and more commonly used word and which is better understood than determination.
4. The word determination has several meanings, which goes against the golden rule of drafting explained earlier.

The word 'decision' has been used throughout this thesis to cover both decision and determination. All these might seem trivial but they all add up to making an entire Act easier to read and assist the primary user. They are also consistent with Russell's advice to Parliamentary drafters:

'The simplest English is the best for legislation ... Long words should be avoided.' [Attributed to Russell (Sir Alison), *Legislative Drafting and Forms*, (4<sup>th</sup> ed, 1938, Butterworth's), p 12 quoted in Aitken. (Aitken, 2004)]

This is also consistent with paragraph 3.12 under 'Words' in Chapter 3 of the New Zealand's Parliamentary Counsel's Office's in-house Drafting Manual headed '*Principles of Clear Drafting*' (PCO, 2015) which instructs:

*Use the simplest word that conveys the meaning.*

It is ironic that despite this encouraging approach in the drafting manual, and despite an otherwise relatively clearly written piece of legislation, the NZ Act uses determination instead of decision, which is adopted in other modern legislation like the Qld Act. See the tabulated comparison below.

Among the most important reason why decision is preferable to determination is because using a word that has one meaning is preferable to using a word that has multiple meanings. Decision means 'a conclusion or resolution reached after consideration'. Whereas determination has several meanings including:

1. Firmness of purpose
2. Cessation or termination such as commonly used in construction contracts for example 'determination of a contractor's employment'.
3. Deciding an outcome.

The New Collins Dictionary lists 8 meanings of determination.

Not all the Acts use only one word consistently throughout the Act. Among the Acts that use both words, not all of them consistently use decision or determination within a single Act. See Table 4 below:

**Table 4 Comparison of the use of the words decision and determination**

Act	Terminology used	Frequency of use	Terminology used	Frequency of use
UK Act	Decision	6 times in the Act, 22 times in the Scheme for Construction Contracts Regulations (England and Wales) and 25 times in the Scheme for Construction Contracts Regulations (Scotland)	Determination	Not used in the Act, used 3 times in the Scheme for Construction Contracts Regulations (England & Wales), not used in Scotland
NSW Act	Decision	5 times [used thrice in a different context in s28(2)(b), s32(3)(b); and used twice in s29(4) and s29(5)(a)]	Determination	13
Vic Act	Decision	4 times [used twice in a different context in the note to s45 and s47(3)(b); and used twice instead of determination in s45(5) and s45(6)(a)]	Determination	125
NZ Act	Decision	0	Determination	114
Qld Act	Decision	117	Determination	0
WA Act	Decision	24	Determination	63
IoM Act	Decision	6 times in the Act	Determination	Not used in the Act
NT Act	Decision	56	Determination	60
Sg Act	Decision	0	Determination	54
Malaysian Act	Decision	45	Determination	Twice but relating to other issue and not relating to the adjudication decision.

Table 4 shows the NZ and Sg Acts use determination consistently throughout, while the Qld Act uses decision consistently throughout.

There are some Acts that use mainly either decision or determination and a handful of the other – either in a loose sense or inadvertently instead of maintaining consistency.

What is unacceptable and can cause confusion is where both are used generously and with no particular consistent basis. The NT Act is particularly inconsistent. There does not seem to be consistency in the usage of the two words. In parts, they appear to be used interchangeably. This goes against the drafter's golden rule mentioned earlier:

*'Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.'*

### **3.8.5.2 To shall or not to shall?**

This should no longer be a question. Most of the modern drafting guidelines suggest shall should be avoided. There are good reasons for this suggestion. Among them:

1. Drafting using shall creates a distance or barrier between a lay user and the Act compared to other plainer words like must or may.
2. Shall has multiple meanings. 'Must' means 'must.' 'May' means 'may.' But 'shall' can mean 'must', 'may' or several other things such as those identified by Butt and Castle. These include: giving a direction, stating circumstances, negating a duty or discretion, expressing an intention, stating a condition precedent, or stating a condition subsequent (Butt & Castle, 2013). Garner warns when writing about the use of shall: A word that has multiple meanings, even shifting meanings in midsentence, *'runs afoul of several basic principles of good drafting'*. (Garner, 2001)
3. Shall can cause confusion when used inconsistently to mean must, may, or to indicate the future tense. Most legal documents including Acts of Parliaments that use shall use it inconsistently to mean different things.

4. When used to indicate an obligation, 'must' is more commonly understood than shall.
5. When used to indicate an entitlement or discretionary power, 'may' is clearer than 'shall be entitled to'.
6. When used to indicate the future tense like 'this Act shall apply to' (future), dropping the shall and its linked words shortens the phrase to 'this Act applies to' (present). The shorter phrase is clearer and does not sound as pompous.
7. How do the Acts on payment and adjudication fare against the suggestion to drop shall in drafting or at the very least to use shall consistently to mean only one thing?

For a start, Table 5 shows the statistics:

**Table 5: Comparison of the use of the words shall, must, and may**

<b>ACT</b>	<b>Number of times shall is used</b>	<b>Number of times must is used</b>	<b>Number of times may is used</b>
UK Act:	23 6 in the Scheme for Construction Contracts Regulations (England and Wales) and 66 in the Scheme for Construction Contracts Regulations (Scotland)	2 3 each in the Scheme for Construction Contracts Regulations (England and Wales) and (Scotland)	13 28 each in the Scheme for Construction Contracts Regulations (England and Wales) and (Scotland)
NSW Act	0	28	62
Vic Act	0	94	97
NZ Act	0	14	22
Qld Act	0	118	121
WA Act	0	42	40
IoM Act	24	2	12
NT Act	0	72	46
Sg Act	111	0	109
Malaysian Act	58	0	41 (excluding reference to the copyright notice)

Table 5 shows most of the jurisdictions have completely dropped using shall. Only the UK, IoM, and Sg Acts have opted to continue using it. It might be acceptable if shall is used consistently throughout each Act. But none of the three Acts use shall consistently in one manner. See the following illustrations that show the inconsistent use of shall within each Act:

### **The Sg Act**

S 4(1) of the Sg Act reads:

#### **Application of Act**

**4.** —(1) *Subject to subsection (2), **this Act shall apply** to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.*

Here shall is used to indicate the future tense. It could be dropped – making the text simpler. Instead of *'this Act shall apply'*, it can be re-written as *'this Act applies'*. The re-write retains the same meaning, is shorter, plainer, and does not sound as pompous.

S 24(2)(c) of the Sg Act reads:

*'if the respondent fails to show proof of payment in accordance with paragraph (b), the principal shall be entitled to pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.'*

Here shall is used to show entitlement. Replacing 'shall be entitled to' with 'may' shortens the sentence without losing the meaning. It helps the lay reader understand more easily.

Here is the complete s 24 from the Sg Act which shows how shall is used in multiple sense to indicate an obligation and as a discretionary entitlement all within one section. It also shows how on some occasions may is used to indicate discretionary entitlement instead of 'shall be entitled to'. **Consistent drafting helps maintain clarity in any document.** It is **some** comfort that s 24(2)(c) starts with 'if the respondent fails' instead of 'if the respondent shall fail'. And it is good to see 24(1)

start with 'Where a respondent fails to pay' instead of 'Where a respondent shall fail to pay'.

***Direct payment from principal***

**24.(1)** *Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the principal of the respondent **may** make payment of the amount outstanding, or any part thereof, in accordance with the procedure set out in subsection (2).*

(2) *The procedure by which the principal **may** make payment to the claimant **shall** be as follows:*

(a) *the principal **shall** serve a notice of payment on the claimant stating that direct payment **shall** be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner);*

(b) *the respondent **shall**, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and*

(c) *if the **respondent fails** to show proof of payment in accordance with paragraph (b), the principal **shall be entitled to** pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.*

The Sg Act has 111 'shalls'. They are not used consistently to mean one thing. They are used in different contexts to mean different things – often even within even one section of the Act. It is unfortunate that although the Sg Act derives much of the technical concepts from the NSW Act, it did not follow the NSW drafting style. This could be because of any one or more of the following reasons:

- (i) because of the need for consistency with the drafting style adopted across other Acts of Parliament in Singapore;

- (ii) because the policy is to adhere to traditional drafting style;
- (iii) because Parliamentary drafters in Singapore believe it is safer to draft in traditional style;
- (iv) because Parliamentary drafters in Singapore disagree with modern drafting style and think it is unsafe or inaccurate;
- (v) because Parliamentary drafters in Singapore are used to the traditional drafting style and would be able to draft the Act quicker and had pressure of time;
- (vi) because Parliamentary drafters in Singapore don't know about plain English drafting approaches or are not trained in plain English drafting or both;
- (vii) because Parliamentary drafters in Singapore don't have to time to develop newer skills in plain English drafting.

None of these reasons might be seen as justified to a user who suffers the consequences of complex drafting style. Whilst some of the reasons may be arguably justified by Parliamentary drafters in the short term, it is difficult to see how traditional drafting style will be sustained in the long term across any of the commonwealth jurisdictions. This is because there already exist an extensive wealth of experience in modern plain English drafting in many of the other commonwealth jurisdictions.

Other jurisdictions considering legislation on payment and adjudication such as South Africa, Germany, and Hong Kong would benefit much by drawing on the experiences on some of the more modern drafting styles already used by some of the jurisdictions. It is much more difficult to amend an Act already in force that is drafted in traditional style into plain language later.

### ***The UK Act***

Section 114 reads:

114     *The Scheme for Construction Contracts*

(1)     *The Minister **shall** by regulations make a scheme (“the Scheme for*

*Construction Contracts”)* containing provision about the matters referred to in the preceding provisions of this Part.

- (2) *Before making any regulations under this section the Minister **shall** consult such persons as he thinks fit.*

Shall is used to impose an obligation throughout the Act and the Scheme. Shall is also used in other senses. The question that perhaps only the drafters of the Act and what the original stakeholders of the Act might be able to answer what their intentions were and the courts who may provide a definitive answer is: Does the shall in s 114(2) mean the Minister **must** consult ‘such persons as he thinks fit’ before making any regulations or could it mean he **may** consult such persons? If the Minister has no choice but to consult, and if he prefers not to, then the choice of persons he thinks fit may well not be what other might think fit. From a practical perspective, the shall here should mean may. If that was what was intended, replacing the shall with may would make it clearer.

S 114 (3) reads:

- (3) *In this section “the Minister” **means**—*
- (a) *for England and Wales, the Secretary of State, and*
- (b) *for Scotland, the Lord Advocate.*

It is **some** comfort to note this was not drafted: ‘*In this section “the Minister” **shall mean—***’ The current draft without the shall is simpler than what might otherwise be drafted in the shall-laden style adopted in the rest of the Act.

From the Scheme for Construction Contracts Regulations (England and Wales):

*Citation, commencement, extent and interpretation*

1. - (1) *These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 and **shall come** into force at the end of the period of 8 weeks beginning with the day on which they are made (the “commencement date”).*

‘Shall come’ could be replaced with just ‘comes’.

11. (1) *The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator **shall be** entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties **shall be jointly and severally** liable for any sum which remains outstanding following the making of any determination on how the payment **shall be** apportioned.*

Here the three 'shall be's can be replaced with: 'is', 'are', and 'is' respectively.

If one wants to completely modernize, consideration should also be given to the suggestion by Butt and Castle to replace 'jointly and severally' with 'together and separately' or 'separately, together or in any combination'. (Butt & Castle, 2013) As they argue, if more than two parties are involved, there is the potential ambiguity that jointly and severally includes obligations together (X, Y, and Z) and separately by each (X or Y or Z), but not necessarily a combination of X and Y together, or X and Z together, or Y and Z together. 'Separately, together or in any combination' would remove the potential ambiguity.

(2) *Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties **shall not be** liable to pay the adjudicator's fees and expenses.*

The 'shall not be' here can be replaced with 'are not'.

### ***Powers of the adjudicator***

12. *The adjudicator **shall** –*

- (a) *act impartially in carrying out his duties and **shall** do so in accordance with any relevant terms of the contract and **shall** reach his decision in accordance with the applicable law in relation to the contract; and*
- (b) *avoid incurring unnecessary expense.*

Here all the 'shalls' are used to impose obligations. Replacing all the 'shalls' with must would make it clearer to the lay reader.

Following recent developments, there is hope that in future ‘to shall or not to shall’ will no longer be a question. The original bastion of traditional drafting – the UK – appears to be moving away from using shall. See the Drafting Techniques Group Paper 19 (final): March 2008 titled: ‘Shall’. (PC, 2008a)

Paragraph 6 provides a summary on the use of ‘shall’ on page 2:

- 6 *In summary, the Group believes that a suitable alternative to ‘shall’ exists in each of the contexts mentioned above. Generally, and on the basis of the discussion in this paper, it recommends that in these contexts the starting point should be that the use of the alternative concerned is to be preferred. That is what this paper is to be taken as meaning when in any particular context it recommends a presumption in favour of a particular alternative to ‘shall’. In the case of the last three contexts mentioned above, this paper recommends the use of the alternative concerned, and this reflects a corresponding recommendation (or provisional recommendation) in an existing Group paper.*

### **The Malaysian Act**

Whilst the Malaysian Act is relatively modern in its drafting style, 58 shalls still remained in the final version of the Act that was passed in 2012. Most of the shalls mean must, but not all. See the following examples:

Section 5(2): ‘The payment claim **shall** be in writing and shall include ...’. The shall here clearly means ‘must’.

Section 25: ‘The adjudicator **shall** have the powers to ...’. This effectively means ‘the adjudicator **has** powers to ...’.

Section 37(2): ‘... a reference to arbitration or the court in respect of a dispute which is being adjudicated **shall** not bring the adjudication proceedings to an end ...’. The shall not here effectively means ‘will not’.

Section 41: ‘Nothing in this Act **shall** affect any proceedings relating to any payment dispute ...’. The shall in ‘shall affect’ can be omitted and the phrase replaced with just ‘affects’.

The Malaysian Act, despite being a recently published Act, does not comply with the golden rule of drafting to ensure words are consistently used to mean only one thing highlighted by Piesse (Aitken, 2004) nor does it heed Professor Joseph Kimble's thoughts on using shall (Kimble, 2006):

*'Give shall the boot: use must instead.'*

Nearly all modern legal drafting experts recommend against the use of shall. See for example:(Adler, 2007; Cutts & Commission, 2000; Garner, Newman, & Jackson, 2002; Garner & Wright, 2002; Kimble, 2012; Mellinkoff, 2004; Mowat, 1998; Painter, 2009; Peters, 2004; Wydick, 2005)

If Malaysian parliamentary drafters still felt inclined to follow the old traditional UK drafting style because of traditional style in other existing legislation in Malaysia, they should take heed of paragraphs 7 and 8 of the UK's Drafting Techniques Group Paper 19 (final): March 2008 titled 'shall'. Even when amending an existing Act, the conclusion suggests shall should be avoided. The relevant paragraphs on page 2 of the paper read:

- 7 *This paper also looks at the issue of whether, in textually amending an Act that already uses 'shall', we should follow the usage of the Act.*
- 8 *The Group's conclusion is that, similarly, there should be a presumption in favour of alternatives which do not use 'shall' in textual amendments unless (a) they involve inserting text near existing provisions that use 'shall' in the same sense or (b) the use of an alternative would raise a real doubt that a different meaning was intended in an existing provision.*

There was no reason to retain 'shall' in the **new** Malaysian Act or any other new Act in any other jurisdiction.

It may take longer to draft an Act in plain language if drafters are not familiar with it modern legal drafting styles.

Take for example what is in the text of the '*Briefing Notes for the Attorney-General on the Role and Operations of the Parliamentary Counsel Office*' dated November 2008 published by the New Zealand Parliamentary Counsel Office (PCO, 2008). There are

many positive modernizing initiatives that David Noble, Chief Parliamentary Counsel of New Zealand, comments on in the executive summary of the report. On plain English drafting, he declares in the second paragraph on page one of his executive summary:

*The PCO employs a plain English approach to legislative drafting and exercises controls to ensure consistency of drafting for the statute book as a whole.*

The report itself also, under the heading 'Plain language drafting', clearly states the PCO's policy to draft legislation in a plain language drafting style. It goes on to suggest that although it agrees that it is generally accepted that people affected by legislation need to understand their rights and obligations under it, 'a drafter's ability to use plain language in drafting may be constrained in practice' by some external factors such as political issues, specialist legislation where some technical language may be unavoidable, when drafting New Zealand Treaty settlement legislation, and when there is '**pressure of time available for drafting.**' (PCO, 2008)

This insinuates that on some occasions, particularly if not totally familiar with plain language drafting, plain language drafting may take longer than traditional drafting.

In the case of the Malaysian Act, there were no reasons (or excuses) why it should not be in plain language. If necessary expertise could be sought from several other commonwealth jurisdictions that already have such expertise.

Here are five reasons why the Malaysian Act ought to have been drafted in plain language:

1. It took more than ten years since the working group on payment first made the recommendations for the proposed Malaysian Act (CIDB, 2008), and several years between when the then Minister of Works issued a press statement calling for such an Act to be expedited and the passing of the Act in 2012;
2. Through the initiatives of the Construction Industry Development Board Malaysia, there already existed a base draft Act written in relatively plain language;

3. There already exist several excellent models of plain English legislative drafting manuals in many jurisdictions including those found in Australia and New Zealand that could be used as a guide;
4. The construction industry strongly supports the initiatives in modernizing legal documents affecting the construction industry; and
5. Although Acts of Parliament may be in two languages, the bulk of communication in the construction industry in Malaysia in the private sector and nearly all private dispute resolution such as those done under arbitrations are conducted in English. Traditional drafting style will hinder many of the primary users of such an Act because English is usually not their mother-tongue or first language.

Malaysia has a vision of becoming a fully developed country by 2020. It is becoming increasingly clear that more developed countries have advanced in the area of communication (legislation included) – moving towards plain language. Plain language drafting is consistent with a mark of maturity and developments in more advanced countries.

### **3.8.6 Communicating the adjudicator's decision**

As stated earlier, among the unique provisions in all the Acts is the mandated fixed timescale within which an adjudicator must make a decision or determination. How such a decision or determination is communicated is thus important. A failure to do this within the timeframe makes the decision or determination void or unenforceable.

### **The Qld Act**

S 26(3) of the Qld Act provides clearly:

26 *Adjudicator's decision*

(3) *The adjudicator's decision must—*

(a) *be in writing; and*

(b) *include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.*

Putting aside s 26(3)(b) for now, '*The adjudicator's decision must be in writing*' as provided in s 26(3)(a) is short, easy to read, easy to understand, and plainly suggests the necessity for the adjudicator's decision to be in writing. It also adopts a gender-neutral drafting style. Contrast that with the following:

### **The Sg Act**

S 16(8) reads: '*The determination of an adjudicator on any adjudication application shall be in writing*'. Whilst this can be understood, it is longer, and uses words that have multiple meanings (determination and shall). It is written in passive style that is not as direct as the active style. It is also misplaced under section 16 headed 'Commencement of adjudication and adjudication procedures' instead of being placed under section 17 – 'Determination of adjudicator'. Placing content under appropriate headings helps users find what they are looking for more quickly.

### **The UK Act**

The Act itself only provides for the adjudicator's decision to be 'reached within 28 days' and that the decision is binding.

It is then left up to any of the adjudication rules and procedures to specify how such a decision is to be communicated. The default mechanism, the Scheme for Construction Contracts (England and Wales) (and the Scottish version) Regulations 1998, provides in s 19(3), Part I – Adjudication:

*As soon as possible after he has reached a decision, the adjudicator shall*

*deliver a copy of that decision to each of the parties to the contract.*

The Schemes do not expressly provide for the adjudicator's decision to be in writing. The requirement to be in writing is left to be implied given that a copy of the decision is to be delivered to each party to the contract. And although 'he' can also mean 'she' and possibly even 'it', it is not consistent with modern drafting style. See comments under 'gender-neutral drafting' later in this chapter.

### **The NZ Act**

The NZ Act starts off with possibilities for the adjudicator's determination to be in a 'prescribed form (if any)' failing which it 'must be in writing.' But unlike the other Acts, it curiously then negates all the mandated requirements in s 47(1) by providing in s 47(2):

*A failure to comply with subsection (1) does not affect the validity of an adjudicator's determination.*

This presumably means as long as a determination is made, it remains valid, even if the form is not complied with. By implication this means that the determination must still be communicated in writing – in some form or other. It would seem unrealistic for an oral determination to be held to be valid.

### **3.8.7 Sentence structure – average sentence length**

It is well known among those promoting plain language drafting that it helps the reader if the average words per sentence is kept low. Long sentences make it more difficult for the readers. Berry suggests (Berry, 2009):

*One of the major reasons why readers of legislative documents have difficulty in understanding them is that long and complex sentence structures overtax the cognitive capacity of the short-term memory.*

Given that most legislative drafters use sections, subsections, and paragraphs extensively, much of modern legislation nowadays does not suffer from excessively long sentences. Further, unlike in the past, punctuations are also used extensively.

But there creeps in the occasional provision that makes the mind wonder if the drafters really knew what they were expected to provide from the stakeholders of the Act. Even if the provision is technically complex, perhaps it may have been better for the drafters to revert to the stakeholders to ask them to simplify even the technical concepts they were intending in an Act.

Consider this example from the Sg Act:

*S 10(1) and (4) reads:*

*Payment claims*

10 (1) *A claimant may serve one payment claim in respect of a progress payment on —*

*(a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or*

*(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.*

*(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.*

Section 10(4)'s technical intent may not be as complex as it appears but it is written in a convoluted manner. It does not help that the section is drafted in a single 100-word sentence. It goes against most modern legal drafting guidelines. S 10(4) is difficult to understand on first reading. It may be difficult to understand even after several readings. Primary users might give up after a couple of attempts.

A re-draft should be able to provide greater clarity. If not, then perhaps in this

instance, Lord Donaldson MR's advice in the *Merkur Island Shipping Corp v Laughton* [1983] AC 570 at 595 case should be heeded:

*'When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed.'*

Whilst it is not necessary to adopt such a stand (of reviewing and modifying policy) on every occasion, it highlights one of the benefits of adopting plain language drafting – it promotes clarity of thought and reveals convoluted thoughts.

### **3.8.8 Sentence structure – using possessives through the apostrophe and active v passive sentence structures**

Using the apostrophe enables possessive drafting, which results in a shorter sentence. And generally sentences in the active voice are easier to read and understand than passive voice. Usually active sentences are shorter. Berry for example, when writing on reducing complexity of legislative drafting discusses the use of active and passive sentence structures then concludes (Berry, 2009):

*In sum, the research suggests that legislative counsel should, as a general rule, draft legislative documents in the active voice. Writing experts and research studies both support the general value of active sentences for understanding.*

Likewise, Iddid suggests: *'Apart from allowing for easier reading and comprehension, active voice creates more impact in the mental faculties of the readers and audience as well.'* (Iddid, 2008)

'Adjudicator's decision' or 'adjudicator's determination' or even 'adjudication determination' is shorter, easier and quicker to read, is more efficient and uses fewer words than 'decision of the adjudicator' or 'determination of the adjudicator'. Two words are better than four.

The Office of Parliamentary Counsel Australia's Plain English Manual Chapter 4, paragraph 79 instructs using examples:

*don't say "of the Minister", "of the Commissioner", "of the Corporation"*

say “*the Minister’s*”, “*the Commissioner’s*”, “*the Corporation’s*”.

Some Acts consistently use the possessive form. For example:

The NSW Act uses only ‘adjudicator’s determination’.

The Qld Act refers to only ‘adjudicator’s decision’.

The NZ Act refers to ‘adjudicator’s determination’ 19 times and on two occasions ‘adjudication determination’.

The NT Act also uses the possessive form using the apostrophe with two exceptions. The two exceptions are:

*S 48(3) ‘decision or determination of the adjudicator’.* Instead of ‘*adjudicator’s decision or determination’.*

And perhaps more acceptably:

*S 62(2): ‘ ... decision of the Registrar or appointed adjudicator.’* Instead of the somewhat cumbersome ‘*... Registrar’s or appointed adjudicator’s decision.’*

The WA Act generally uses the possessive apostrophe with the occasional decision or determination of the adjudicator.

UK Act: s 108(3) refers to ‘decision of the adjudicator’ twice but s 108(6) refers to the ‘adjudicator’s decision’. The Scheme for Construction Contracts Regulations (England and Wales) refers to ‘decision of the adjudicator’ in s 21 and s 23(2), although the heading just before s 20 reads ‘Adjudicator’s decision’.

The Sg Act combines ‘adjudication determination’ (21 times) with ‘determination of the adjudicator’ (twice - once each in s 2 and s 18(2)) and ‘adjudicator’s determination’ (four times). Such inconsistency could have been avoided through careful sentence re-structuring.

Contrast that with the Malaysian Act that has a total of 45 instances of ‘adjudication decision’ and never any ‘decision of the adjudicator’ or ‘adjudicator’s decision’. The word determination is used twice but not in the context of the adjudicator’s decision. The two uses are in a different context.

Section 16(1)(b) reads: ‘the subject matter of the adjudication decision is pending final **determination** by arbitration or the court’.

And section 32(b) deals with the Kuala Lumpur Regional Centre for Arbitration (KLRC) as the adjudication authority’s responsibilities that include: ‘**determination** of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator.’

Drafting using the possessive results in shorter sentences and makes reading easier. More importantly, drafting style within a document must be consistent. There is no reason not to achieve consistency in drafting style within any Act of Parliament.

### 3.8.9 Gender-neutral drafting

Gender-neutral drafting has been the practice in some jurisdictions for a long time.

Chapter 3 New Zealand’s Parliamentary Counsel’s Office’s in-house of the Drafting Manual headed ‘*Principles of Clear Drafting*’ suggests that they have been drafting in gender-neutral language for over 20 years (PCO, 2015). It is so deeply ingrained that although the New Zealand Interpretation Act 1924 provided for the masculine gender to include the feminine, the New Zealand Interpretation Act 1999 now provides this only for Acts passed earlier than 1 November 1999. Gender-neutral drafting is now taken to be the norm.

The other well established gender-neutral drafting approach is found in Chapter 4 paragraph 76 of the Office of Parliamentary Counsel Australia’s Plain English Manual.

*76. It’s Office policy to use gender-inclusive language. However, this can sometimes lead to cumbersome expressions like “he, she or it”, “him, her or it” and “his, her or its”. Try to avoid these by rearranging the sentence so as to do without the pronouns altogether.*

The UK, IoM, Sg and Malaysian Acts are not drafted in gender-neutral language. However it appears, parliamentary drafters in the UK may be reviewing their policy. See the Drafting Techniques Group Paper 23 (final): December 2008 headed ‘*Gender-neutral drafting techniques*’.(PC, 2008b)

The documents starts:

*'The Office of the Parliamentary Counsel has the following policy on gender-neutral drafting: Government Bills are to take a form which achieves gender-neutral drafting so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility. It is recognised that in practice a flexible approach to this change will need to be adopted (for example, in at least some of the cases where existing legislation is being amended) ...'*

There are various techniques to implement gender-neutral drafting. Among them include repeating the noun, redrafting by omitting the pronoun, drafting in plural, or even drafting in passive form. Whilst using both the masculine and feminine pronouns (he or she, his or her) is also classified as gender-neutral drafting, it is somewhat cumbersome. Thus whilst the WA, NSW, and Vic Acts do achieve gender-neutral drafting using 'he or she' and 'his or her' (but never 'she or he' or 'her or his'), other Acts (like the NZ, Qld, and NT Acts) produce a less cumbersome outcome using the other techniques of gender-neutral drafting.

### 3.8.10 Punctuation

There is little doubt that punctuation is important to reflect what the words mean. This piece demonstrates this with a touch of humour. *'The importance of punctuation in drafting'* is found on page 25 of the June 2000 issue of ***The Loophole***:

*An English professor wrote the words, 'a woman without her man is nothing' on the blackboard and directed the students to punctuate it correctly.*

*The men wrote: " A woman, without her man, is nothing. "*

*The women wrote: " A woman: without her, man is nothing. "*

*So punctuation is everything!*

*Anon*

Encouragingly, there appears to be a fair degree of consistency in punctuation style ***within*** each Act although there are differences ***among*** them. Differences among Acts are acceptable but inconsistencies within an Act would not be acceptable.

### 3.9 Empirical evidence – Findings of survey results on the NZ Act

A questionnaire was sent out to all adjudicators listed on the then three Authorised Nominating Authorities (ANAs) in New Zealand. A fourth ANA – The Royal Institution of Chartered Surveyors (RICS) came into operation in December 2014. Although considered low risk, the questionnaire was submitted to and had the prior approval of the University of Auckland ethics committee, which has strict ethics committee approval requirements. Among the many assurances given to participants to the questionnaire was that no name would be associated with any one specific response.

The total population of adjudicators listed on the three ANAs then was 71. Fifty-two adjudicators responded. Given the circumstances, the response rate of just over 73% is considered high. The data gathered is estimated to have captured over 80% of all adjudications held in New Zealand from when the Act came into force on 1 April 2003 given that many of the adjudicators who responded had done multiple adjudications. Given the high response rate out of the total population of adjudicators in New Zealand, there was no need to develop any inferential analysis. The results from the questionnaire indicate adjudication under the New Zealand Act is successfully achieving at least one of the stated objectives under Section 3 (b) of the Act: *‘to provide for the speedy resolution of disputes arising under a construction contract’*.

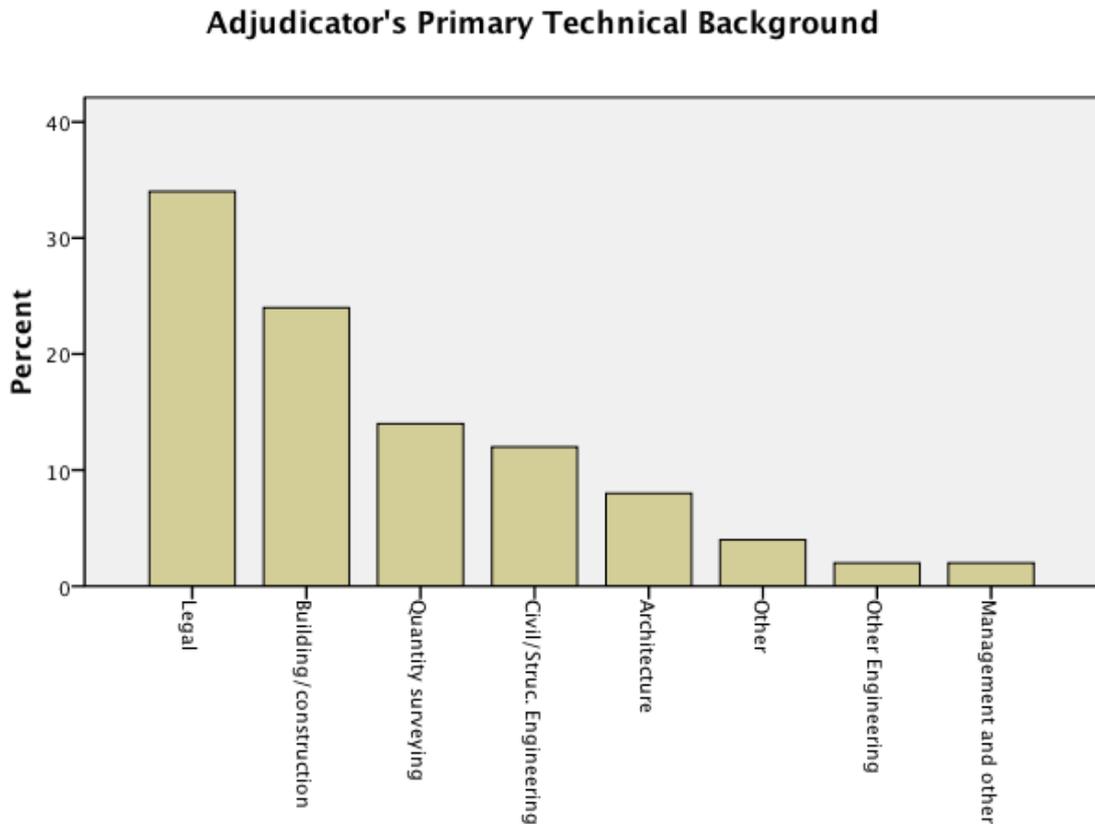
Part of the analysis is done in chapter 4, which considers the effectiveness of the adjudication process in terms of duration, costs, and quality of adjudicators’ determinations. The analysis covered in this chapter deals with adjudicators’ views of their ease of understanding the NZ Act together with some other related data to establish some correlation.

Whilst the questionnaire covered mainly details on the adjudication process, a few questions dealt with the adjudicators’ views on the effectiveness of the adjudication provisions of the NZ Act and their views on ease of understanding the NZ Act.

Here are the results and brief discussions:

#### 3.9.1 Adjudicators’ primary technical background

The adjudicators were asked what their *main* technical area was.

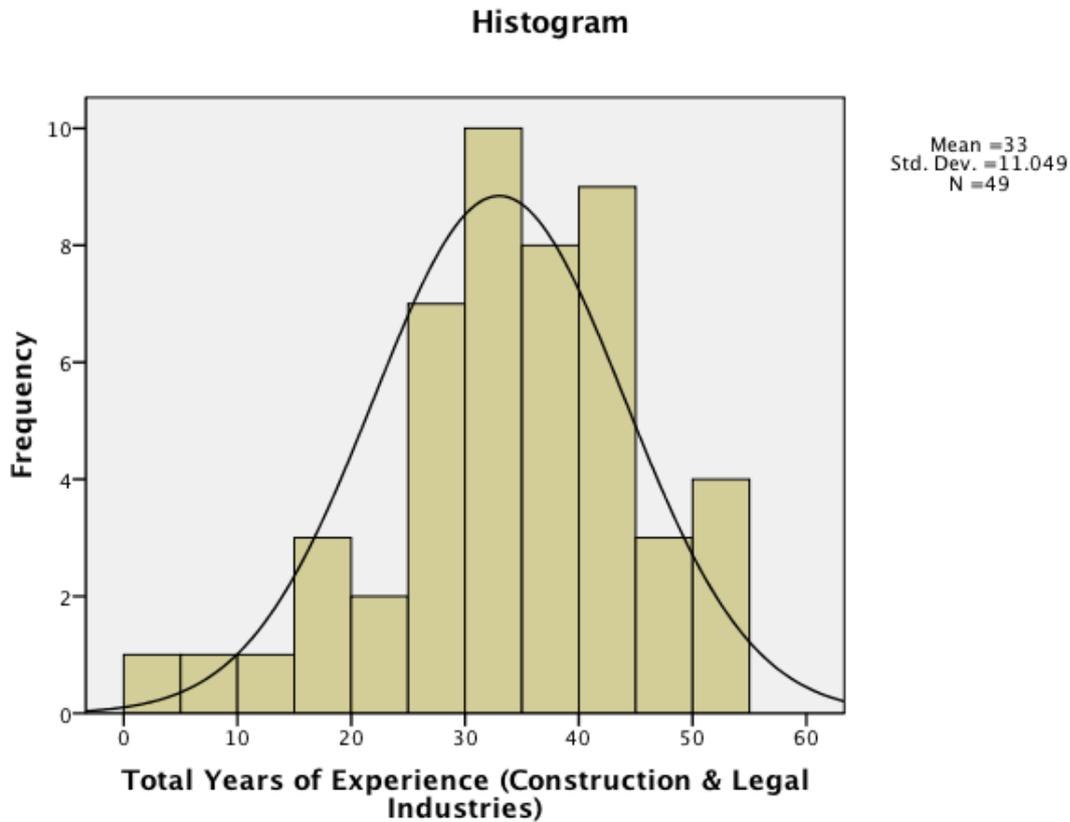


**Figure 3: Adjudicators' Primary Technical Background**

Figure 3 shows that at least a third had a legal background. Nearly all the rest had some construction related technical background.

### **3.9.2 Adjudicators' years of experience**

The adjudicators were asked to state the total number of years of experience they had, whether in the construction industry or in law.

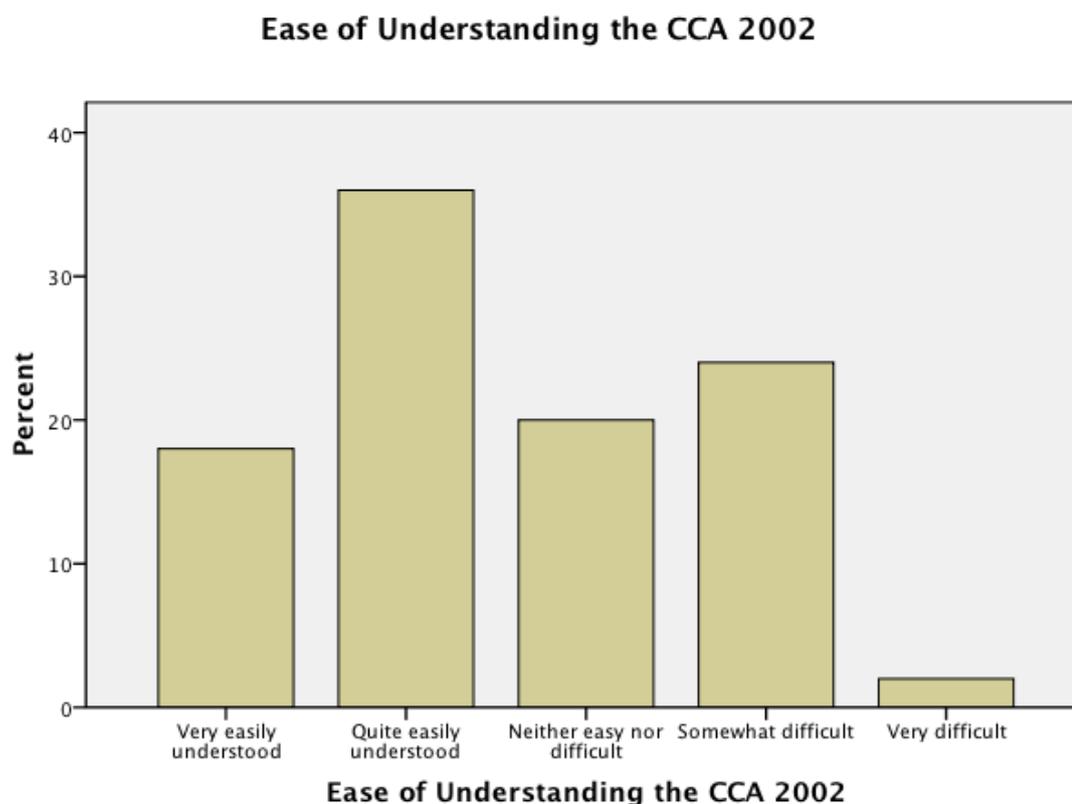


**Figure 4: Adjudicators' Total Years of Experience**

Figure 4 shows that the adjudicators are generally fairly experienced with the statistical mean at 33 years. Their areas of experience are either in law or construction or both.

### 3.9.3 Adjudicators' views on ease of understanding the NZ Act

The adjudicators were asked about their views on their ease of understanding of the NZ Act. They had a choice of classifying them as 'very easily understood', 'quite easily understood', 'neither easy nor difficult', 'somewhat difficult', and 'very difficult.' Figure 5 shows a summary of their responses presented in bar chart, followed by a table (Table 6) showing a breakdown in percentages:



**Figure 5: Adjudicators' Ease of Understanding**

**Table 6: Ease of Understanding The New Zealand Construction Contracts Act 2002**

Ease of understanding	Percentage (%)	Cumulative percentage (%)
Very easily understood	18.0	18.0
Quite easily understood	36.0	54.0
Neither easy nor difficult	20.0	74.0
Somewhat difficult	24.0	98.0
Very difficult	2.0	100.0

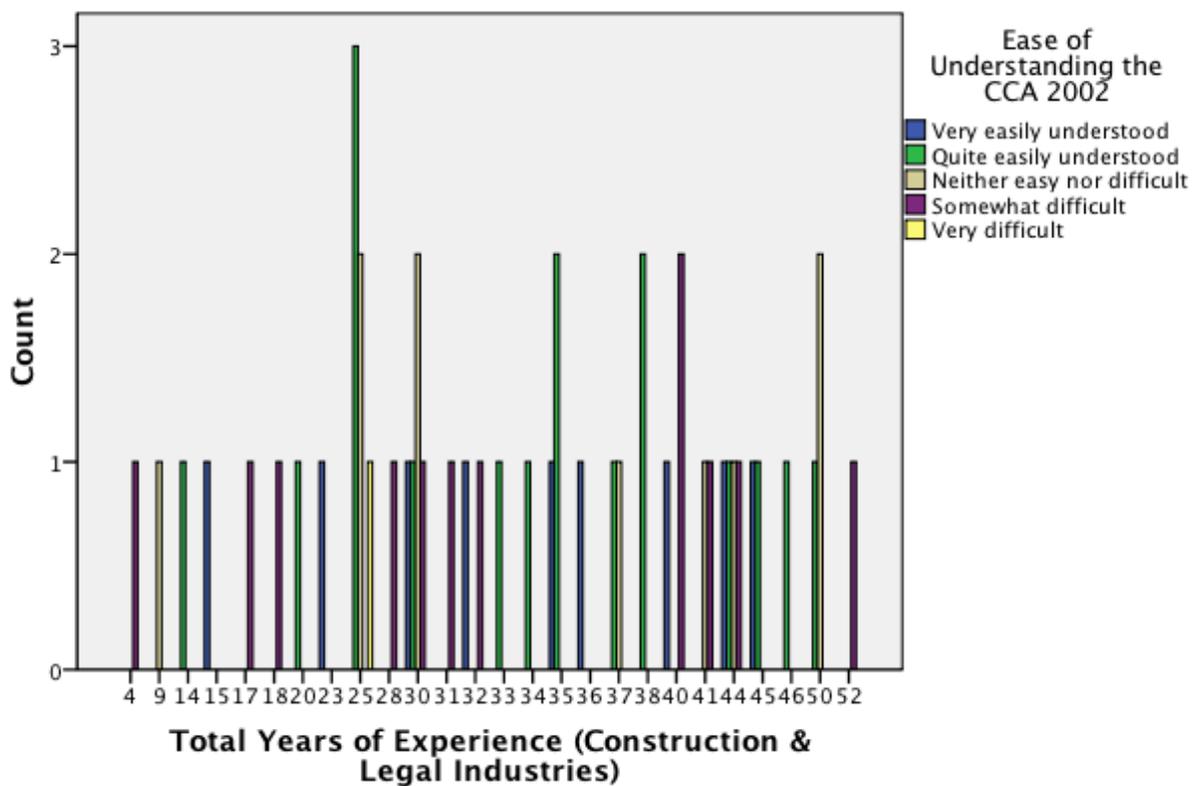
54% of the respondents thought the NZ Act was either very easily understood or quite easily understood. Twenty percent thought it was neither easy nor difficult. Together that adds up to 74%.

Although that is a significant proportion, it is still somewhat surprising that over a quarter (26%) thought the NZ Act was either somewhat difficult or very difficult. These are from the pool of adjudicators with a mean of 33 years of experience. And this is despite the NZ Act being generally drafted adopting plain English guidelines.

Further analysis was then done using statistical cross-tabulation was done to consider the relationship between:

- (i) the adjudicators' years of experience and their views on ease of understanding the NZ Act; and
- (ii) the adjudicators' primary background and their views on ease of understanding the NZ Act.

The results for the first (cross-tabulation between the adjudicators' years of experience and their views on ease of understanding the NZ Act) are shown in bar-chart format as Figure 6 below:

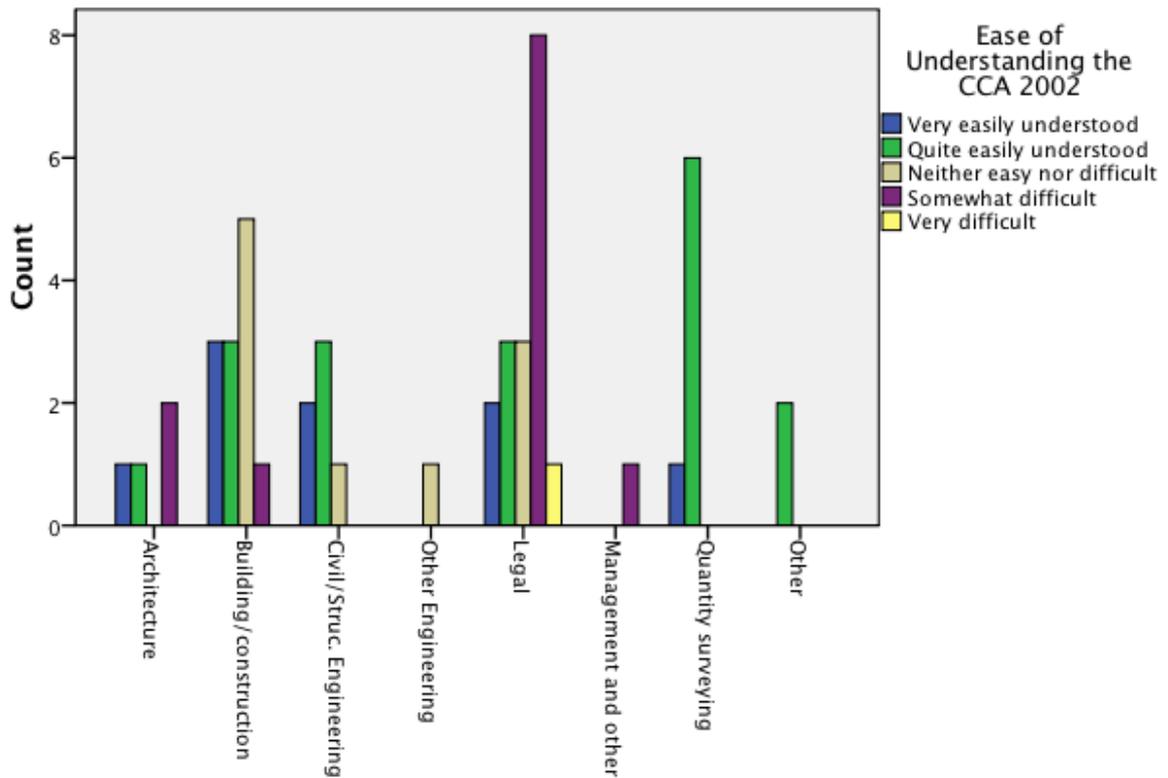


**Figure 6: Total Years of Experience and Ease of Understanding**

Figure 6 shows there does not appear to be any clear and consistent correlation between the number of years of experience the adjudicators had and their views on the ease of understanding the Act. So the years of experience had no significant effect on the level of understanding of the NZ Act.

Next the relationship between the adjudicators' primary area of background and their

views on ease of understanding the Act was analysed for correlation. Figure 7 shows the results in bar-chart format:



**Figure 7: Ease of Understanding Against Adjudicators' Technical Background**

Figure 7 shows some correlation between the adjudicators' technical background and their views on ease of understanding the Act. Of the total number of adjudicators who thought the NZ Act was 'somewhat difficult' or 'difficult', legally qualified adjudicators were more than twice the number compared to those with a technical background in construction related areas.

This appears to show that the NZ Act deals with fairly technical issues that some lawyers (presumably those with limited construction disputes background) find difficult to understand. More than 50% of lawyers that responded to the questionnaire found the Act either difficult or very difficult to understand. It also shows the Act deals with technical issues that adjudicators with a technical background in construction related areas are comfortable with. Nearly all those with construction, engineering, or quantity surveying background fell within the category of those who found the Act very easy, quite easy, or neither easy nor difficult to understand. A large part of the Act deals with payment issues. It is thus not

surprising that **all** the adjudicators with a background in quantity surveying found the Act either very easy to understand or quite easy to understand.

It would be interesting to find out if these same adjudicators with quantity surveying backgrounds and adjudicators within the Singapore jurisdiction would also have found the following provision on payment claims in the Sg Act 'very easily understood' or 'quite easily understood'. The drafting style of the 100-word sentence in s 10(4) appears complex.

### ***Payment claims***

**10.**—(1) *A claimant may serve one payment claim in respect of a progress payment on —*

- (a) *one or more other persons who, under the contract concerned, is or may be liable to make the payment; or*
- (b) *such other person as specified in or identified in accordance with the terms of the contract for this purpose.*

(2) *A payment claim shall be served —*

- (a) *at such time as specified in or determined in accordance with the terms of the contract; or*
- (b) *where the contract does not contain such provision, at such time as may be prescribed.*

(3) *A payment claim —*

- (a) *shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and*
- (b) *shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.*

**(4) *Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an***

**amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.**

Contrast that with the equivalent section on payment claims under the NZ Act:

20 *Payment claims*

(1) *A payee may serve a payment claim on the payer for each progress payment,-*

(a) *if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or*

(b) *if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).*

(2) *A payment claim must-*

(a) *be in writing; and*

(b) *contain sufficient details to identify the construction contract to which the progress payment relates; and*

(c) *identify the construction work and the relevant period to which the progress payment relates; and*

(d) *indicate a claimed amount and the due date for payment; and*

(e) *indicate the manner in which the payee calculated the claimed amount; and*

(f) *state that it is made under this Act.*

- (3) *If a payment claim is served on a residential occupier, it must be accompanied by-*
- (a) *an outline of the process for responding to that claim; and*
  - (b) *an explanation of the consequences of-*
    - (i) *not responding to a payment claim; and*
    - (ii) *not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).*
- (4) *The matters referred to in subsection (3)(a) and (b) must-*
- (a) *be in writing; and*
  - (b) *be in the prescribed form (if any).*

### **3.9.4 Improving the level of understanding of the NZ Act**

The Act is easily understood or quite easily understood by all quantity surveyors. But quantity surveyors only make up about 12% of the total adjudicators in New Zealand as shown in Figure 3. More than 50% of adjudicators in the legal field thought the NZ Act was either difficult or very difficult. Putting aside other questions relating to the *way the adjudicators have responded to the questionnaire*, for example, could it be that lawyers tend to answer more truthfully than construction technical professionals or that lawyers tend to be more conservative in their responses or that lawyers tend to 'read more into words in legislation than others', several questions remain:

1. Could the drafting of the NZ Act be improved further so that more adjudicators, irrespective of their technical background, could understand the Act either easily or quite easily?
2. If yes, would the amended current version of the Parliamentary Counsel's drafting guidelines result in an even more user-friendly Act than the current Act which was based on the then existing drafting manual?
3. As 26% of all qualified adjudicators and over 50% of adjudicators with legal background found the Act difficult or very difficult to understand, what

are the chances of a larger proportion of other **primary** users of the Act finding it difficult or very difficult? Other primary users here include typical parties involved in the adjudication process including contractors, subcontractors, developers, and their consultants involved in construction contracts.

4. As over 50% of adjudicators with a legal background found the Act either difficult or very difficult to understand, what are the chances others with legal background might also find the Act difficult or very difficult to understand. Others here include lawyers who are retained to advise the parties in dispute, other Parliamentary drafters whether within the Parliamentary Counsel Office of New Zealand or elsewhere, and very importantly, judges – who make judgments based on their understanding of the Act.
5. If a fair number these ‘first instance’ decision-making tribunal of adjudicators (who would have done some training on adjudication and the provisions of the Act) find the Act fairly difficult or difficult, could it be possible that some judges might also find it difficult to understand the Act?

Given the relatively clearer drafting style of the NZ Act compared to some of the other Acts such as the Sg Act, part of the overall solution to improve the level of understanding of the Act might lie in creating an enhanced system of training and accrediting adjudicators and possibly mandatory continuing professional development requirements. See for example the outline accreditation prerequisites suggested for the proposed Malaysian Act. (Ameer Ali & Wilkinson, 2009a) This aspect on quality of adjudicators and the training needs is considered in some detail in chapter 5 which also proposed the development of a task-based adjudicator competency training standard and assessment.

A simplistic approach to just exclude adjudicators with a legal background or exclude legal representation at adjudication conferences (meetings) like the exclusion of legal representation under the NSW, Vic, and Qld Acts during any adjudication conference might not do justice under a rights based dispute resolution method like adjudication and would not be accepted by all professionals.

Adjudication, (unlike mediation) is a rights-based dispute resolution method. Further, even though some of the Acts insist on the disputes being adjudicated 'informally', it is unjust to exclude any one profession from representing the parties to a dispute at a meeting or conference under a rights-based dispute resolution system such as adjudication. It would be unjust to single out and totally exclude any one profession. It would also create others such as multi-disciplinarians who may have qualifications in technical areas and law. Could they, in representing parties to a dispute, argue that only their technical background be considered and their legal qualification be ignored?

Some of the Acts like the NSW, Vic, and Qld Acts do not expressly provide for the adjudicator to act impartially or fairly. However, in a rights-based adjudication system, the duty to act impartially or fairly would be assumed. Most of the other Acts expressly provide for the adjudicator to act 'fairly' or 'impartially':

For example s 26 of the NT Act where the object of an adjudication of a payment dispute is stated to be '*to determine the dispute **fairly** and as rapidly, informally and inexpensively as possible*'. S 30 of the WA Act is worded similarly '*to determine the dispute **fairly** and as quickly, informally and inexpensively as possible*.' The only difference is the replacement of '*rapidly*' with '*quickly*.' See also s 16(3)(a) of the Sg Act requiring the adjudicator to '*act independently, impartially and in a timely manner*.'

S 108(2)(e) of the UK Act and s 5(2)(e) of the IoM Act which are identical read:

*The contract shall—*

(e) *impose a duty on the adjudicator to act impartially.*

The UK Schemes, both England and Wales version and the Scottish version also provide in s 12:

*The adjudicator shall -*

(a) *act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract.*

See also s 41(a) of the NZ Act and s 16(3)(a) of the Sg Act. The provisions in both acts are identical. They mandate the adjudicator to ‘*act independently, impartially, and in a timely manner*’.

Some make it clear the adjudicator must act according to the ‘principles of natural justice’:

*For example s 41(c) of the NZ Act and s 16(3)(c) of the Sg Act which both state the adjudicator is to ‘comply with the principles of natural justice.’*

The Malaysian Act provides all of those. Section 24 provides that the adjudicator must make a written declaration that:

- (a) there is **no conflict of interest** in respect of his appointment;
- (b) he shall act **independently, impartially** and in a timely manner and avoid incurring unnecessary expense;
- (c) he shall comply with the **principles of natural justice**; and

And it goes even further by providing in section 24(d) that:

‘there are no circumstances likely to give rise to **justifiable doubts** as to the adjudicator’s **impartiality** and **independence**.’

Even if the reason for excluding any one profession is that they tend to cause ‘unnecessary procedural problems or delays’, this cannot be assumed to always be the case, nor can it be assumed that other professionals are not capable of causing ‘unnecessary procedural problems or delays’.

The findings in this chapter point to **two** issues that must be considered seriously:

- (i) Payment and adjudication Acts must be drafted in language that is as plain as possible, without compromising on sensible legal content; and
- (ii) Serious attention must be given to the training of adjudicators. (Ameer Ali, 2007b) (Ameer Ali, 2007c) This is considered in depth in chapter 5.

### 3.10 Opposition to plain language drafting

Despite many developments moving towards plain language legislative drafting – particularly in developed countries – some critics of modern plain legal drafting suggest another approach. For example, Brian Hunt, from the Office of the Parliamentary Counsel in Ireland suggests:

*‘As I see it, the real answer to inaccessible legislation is good quality, plain language explanatory materials - making plain language in legislative drafting - just a laudable ideal.’* (Hunt, 2002)

Although he then implies it might be possible to simplify legislative drafting when writing for certain types of audience, he is firm about one assumption. He assumes that ordinary people don’t read legislation:

*‘If it were shown that legislation was widely read by ordinary citizens, I have no doubt that the style of drafting would be altered so as to take account of that audience. However, in discussing plain language in legislative drafting, I fear that we are effectively talking in the dark. Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established. In the absence of substantive evidence that such public interest in legislation exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed.’* (Hunt, 2002)

What Brian Hunt says **may** be true of **some** types of legislation, but it is **not true** of legislation that directly affects the public or a particular sector of the public such as legislation considered in this research that affects those in the construction industry.

Given that some of the Acts even prevent legal representation at adjudication conferences during an adjudication (for example the NSW, Qld, and Vic Acts) it may be assumed that lawyers might be working behind the scenes. Alternatively, the assumption is that users would be able to deal with provisions in the Acts themselves or with the help of advisers – whether legally qualified or not.

S 21(4A) of the NSW Act reads:

*If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.*

S 25(5) of the Qld Act reads:

*'If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.'*

S 22(5A) of the Vic Act reads:

*Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.*

On interpretation of Acts, Hunt also suggests:

*'When a person encounters a difficulty involving a statute, what is so wrong with him/her taking it to an expert in the field – a lawyer?'* (Hunt, 2002)

While Hunt's advice may be good advice when dealing with **some** Acts that are rarely referred to or used by lay people, the primary users of the 14 payment and adjudication acts referred to in this research are mainly non-lawyers. And given the relatively short time scales provided in most of these acts (typically stated in days), and the consequences of failing to meet these short time scales, a clear, highly readable and efficient provision in both technical content and language is essential.

It is for this reason that a plea was made by the researcher to the Commonwealth Association of Legislative Counsel (CALC) and parliamentary drafters referred to as a 'new plea for sanity' during the 15<sup>th</sup> CALC conference and during the CALC Annual General Meeting that followed.

### **3.11 A New 'Plea for Sanity'**

Since the mid-90s, the phrase 'A Plea for Sanity' was famously known within the construction industry when referring to the collection of papers from leading construction lawyers and experts opposing the reform proposals for the construction

industry including the reform through the then proposed UK Act. Their concerns were compiled in a book published in 1997 called: *Construction Contract Reform: A Plea For Sanity* (Uff, 1997a). Their plea was largely unheeded and parliamentary drafters pressed ahead and the UK Act was born.

Over a decade later, given that the introduction of the reforms (particularly the introduction of statutory adjudication) has been 'revolutionary' and a 'runaway success', the researcher suggested a ***new plea for sanity*** – a plea for legislation to be drafted in language that its primary users can easily understand – ideally on first reading. The suggestion was that heeding the plea will lead to greater efficiency in all commonwealth jurisdictions, and beyond. The exemplary parliamentary counsel office drafting guidelines from NSW and NZ were suggested as a good starting point for a uniform commonwealth set of drafting guidelines.

A paper (Ameer Ali & Wilkinson, 2009b) comparing the legislative drafting style of the then 9 Acts governing payment and adjudication was presented with the hope to persuade parliamentary drafters that modern plain language legislation can be achieved without compromising the effectiveness of legislative drafting. It emphasized that a plain language approach to legislative drafting for those Acts was particularly important given that the Act envisages the (mainly lay) users to act within absolute and short deadlines. The Acts, supported by case law, show that in many instances a failure on the timing requirements had been fatal to the whole process of statutory adjudication. Thus efficiency in understanding the provisions of the Act was essential.

Reference was also made to a similar plea that was made for construction contracts to be drafted in language that its primary users can better understand (Ameer Ali, 2008a) and (Ameer Ali, 2007a). The primary users of construction contracts are the parties to the contract and the construction professionals who act as contract administrators over the duration of the construction project – typically over months and often years.

Combining plain language construction contracts and legislation affecting the construction industry will help the construction industry focus on its core business instead of the peripheral dispute resolution industry. A challenge was then posed to CALC and its members.

### 3.12 A challenge for the Commonwealth Association of Legislative Counsel (CALC) and its members

There already existed drafting manuals emphasizing on modern drafting in several jurisdictions – including NSW and NZ. But there still remain many other jurisdictions that have continued drafting in traditional style. Part of the reason might be because they have little time to develop their own more modern drafting style manual.

Following the plea the challenge posed to CALC and its members was to:

***Develop a single set of agreed standardized core legislative drafting style guidelines.***

It was then also suggested that there could be variances attached to these core style guidelines that might be necessary for different jurisdictions. Some of the potential benefits of such standardization highlighted was the possibility of sharing drafting resources among members of the commonwealth jurisdictions. Benefits within the construction industry, include the potential for great efficiency that can be gained if new Acts on payment and adjudication drafted in other jurisdictions that were considering similar Acts to obtain assistance of drafters of the existing Acts. There could also be drafting specializations across commonwealth jurisdictions. The chances of legislation being passed to outlaw 'freon' coated bullets within the commonwealth may then well be reduced!

This breather titled '*Freon bullets – You must be joking?*' comes from page 70 of the June 2000 issue of *The Loophole*:

*Recently the Oklahoma legislature passed a Bill outlawing “freon” coated bullets. Perhaps they were worried about shooting a hole through the ozone layer! It seems that the members of the legislature were unaware that freon, being a gas, would tend to evaporate awfully quickly, if applied to a bullet! That is of course unless you happen to live in the Antarctic.*

*One John Stolz, a Texan, was working for the Oklahoma State Legislature at the time. He was also a member of a local gun club so presumably knew a lot about bullets. While working for that legislature’s legislative issues committee, he pointed out to some of the legislators that freon was a gas. However, by*

*then the Bill had gone through the committee. Apparently the drafter had confused freon and teflon! Despite having the error pointed out to them, a majority of the Oklahoma Legislature voted for the Bill and the Governor of the State signed it into law.*

Precedence from the construction industry, which is historically notorious for being fragmented, shows a plain language approach to construction contract drafting could bring the whole industry together. This was achieved twice through the drafting stages and final publication of two standard terms of construction contracts namely the Model Terms of Construction Contract for Subcontract Works 2007 and the Standard Terms of Construction Contract for Renovation and Small Projects (STCC-RSP 2015). They were both endorsed by various professional and trade organisations, government bodies and other interested stakeholders.

### **3.13 Chapter conclusion**

The comparative study of primary legislation of 14 Acts of Parliament governing construction industry payment and adjudication shows these Acts vary widely in drafting style. The Singapore Act is written in steeply traditional legal style. In contrast the New Zealand Act and some of the Acts in Australia, particularly those from the East Coast, are written in more modern plain language. The most recent Act – the Malaysian Act – uses some traditional words but is structured in a relatively easy to understand style.

The analysis of empirical evidence obtained from a questionnaire survey of adjudicators listed on the panel of the then three authorised nominating authorities under the New Zealand Construction Contracts Act 2002 suggests over half of them either found the Act very easy to understand or easy to understand. Together with those who found it neither easy nor difficult, they formed three quarters of the respondents. One particularly interesting finding is that those with a legal background formed the majority of those among the remaining quarter who found the Act difficult or somewhat difficult to understand. This may well be because of the somewhat technical nature of certain aspects of the Act that deals with payment issues.

Recommendations were made both at the Commonwealth Association of Legislative Counsel (CALC)'s conference and General Meeting in Hong Kong in 2009 for CALC

to develop a uniform drafting style guide for all Commonwealth countries. Consistency in drafting style can help avoid discrepancies in interpretation. It is understood that very recently such an initiative has been commenced on a limited scale.

The findings in this chapter leads on to the next two chapters that deal with the related issues of quality of adjudicators and their decisions.



## **Chapter 4: Effectiveness of Adjudication Durations, Costs, and Quality of Adjudicators' Decisions**

### **4.1 Chapter summary**

This chapter deals with research objective 2: To establish the comparative effectiveness of adjudication as a speedy, cost effective, and quality dispute resolution method. This will be done by investigating and establishing: (i) timeframes provided in the Acts and actual time taken to resolve disputes in adjudications, (ii) costs of adjudication, and (iii) quality of adjudicators' decisions.

### **4.2 Duration of adjudications**

All the 14 Acts on payment and adjudication statutorily provide time limits for the adjudication process. These statutorily mandated timeframes is a key distinguishing feature of adjudication when compared with arbitration. There is no statutory time limit for arbitrations. One of the major criticisms of arbitration has been delays associated with it. The relatively short statutorily mandated timeframe for adjudication might well be one of the key reasons why adjudication has been acclaimed to be a success. Disputes resolved in adjudication take days or weeks compared with arbitration, which typically takes months or years. Closely related to the limited timeframe are the costs of adjudication – which is also reviewed in this chapter. This chapter reviews the statutorily provided timeframes provided under the NZ and Malaysian Acts and the actual time taken based on empirical evidence. Empirical evidence is established based on a survey of adjudicators conducted in New Zealand and based on data provided by the Kuala Lumpur Regional Centre for Arbitration, which is the sole adjudication authority under the Malaysian Act.

### **4.3 Statutory timeframes**

When evaluating the timeframes provided under the Acts, a number of aspects must be considered. They include how days are defined under the different Acts, when the time starts running for the adjudicator to statutorily complete the adjudication decision, the actual duration provided under the Acts, and any extension that might be permissible under the Acts.

(i) Definition of days in the Acts.

These are all stated in days with some variants eg working days (NZ and Malaysian Acts) or business days (NSW).

In the UK days are defined in the Act. Section 116(3) provides these as calendar days, with the exception that if the period includes Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971 those days are excluded.

In New Zealand, Section 5 defines the working day for the purposes of the NZ Act. These exclude weekends and various public holidays and for the purposes of some sections of the Act the period between 25 December and 15 January.

And in Malaysia, section 4 of the Malaysian Act defines working day simply as meaning a calendar day but excluding weekends and public holidays applicable at the State or Federal Territory where the site is located.

The benefit of specifying the day as a 'working day' is that it is 'fairer' because it excludes weekends and holidays. This can help prevent 'ambush' where claimants might submit adjudication claims late afternoon before a weekend or before a long period of public holiday.

(ii) Actual duration and commencement of the period provided in the Acts.

The timeframe for the adjudicator to make the decision under the UK Act is between 28 and 42 days (section 108(2)(c) and (d)). This commences from the date of referral of the dispute to the adjudicator. Section 108(2)(c) requires the adjudicator *'to reach a decision **within 28 days of referral** or such longer period as is agreed by the parties after the dispute has been referred.'*

Section 108(2)(d) then allows the adjudicator to extend the period of 28 days to up to 42 days but only with the consent of the party by whom the dispute was referred. The parties may also extend beyond this date but only if the parties agree.

Under the NZ Act the timeframe provided is between 20 and 30 working days. Section 46(2) reads:

*An adjudicator must determine a dispute*

- (a) **within 20 working days** after the end of the period referred to in section 37(1) during which the respondent may serve on the adjudicator a written response to an adjudication claim; or
- (b) **within 30 working days** after the end of the period referred to in that section if the adjudicator considers that, even though the parties to the adjudication do not agree, further time for the determination of the dispute is reasonably required; or
- (c) *within any further time that the parties to the adjudication agree.*

Under the NZ Act the timeframe starts running after the exchange of adjudication claims and responses. This can make the overall period much longer than if it commenced from when the adjudicator was nominated. This can help prevent ambush by the claimant especially during the longer holiday periods. Like under the UK Act, the parties can agree a mutually longer period.

The Malaysian Act provides the longest duration among all 14 jurisdictions. Section 12(2) provides 45 working days that starts after the exchange of adjudication documents:

*Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within-*

- (a) **45 working days** from the service of the adjudication response or reply to the adjudication response, whichever is later;
- (b) 45 working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
- (c) *such further time as agreed to by the parties.*

Like under the UK and NZ Acts the parties can, under the Malaysian Act, agree to extend the time beyond the 45 working days.

These timeframes are all strict. For example section 12(3) of the Malaysian Act provides:

*An adjudication decision which is not made within the period specified in subsection (2) is void.*

#### **4.3.1 Empirical evidence of adjudication duration in New Zealand**

The UK, NZ and Malaysian Acts all provide for the possibility of the parties agreeing a longer timeframe than the default period provided in the Acts. The statutory timeframes clearly indicate a relatively short timeframe compared to arbitration durations and the durations typically taken in court.

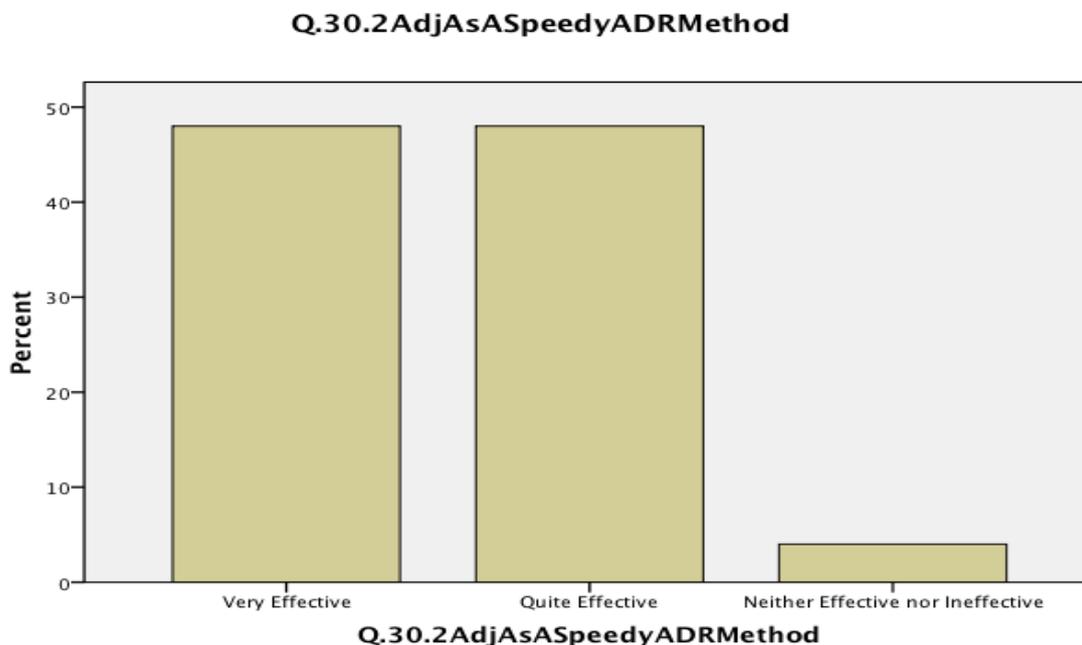
Having established the statutory default timeframes, it is important to establish based on empirical evidence how long the adjudications actually take in practice. The key question that needs to be asked related to the extent to which parties agree to extend the timeframe. This would help establish how effective the adjudication was in terms of durations.

A survey was done of adjudicators in New Zealand to obtain empirical evidence on actual durations of adjudications. A questionnaire was sent out to all adjudicators listed on the then three Authorised Nominating Authorities (ANAs) in New Zealand. A fourth ANA – The Royal Institution of Chartered Surveyors (RICS) came into operation in December 2014. Although considered low risk, the questionnaire was submitted to and had the prior approval of the University of Auckland ethics committee, which has strict ethics approval requirements. Among the many assurances given to participants to the questionnaire was that no name would be directly associated with any one specific response.

The total population of adjudicators listed on the three ANAs then was 71. Fifty-two adjudicators responded. Given the circumstances, the response rate of just over 73% is considered high. The data gathered is estimated to have captured over 80% of all adjudications held in New Zealand from when the Act came into force on 1 April 2003 given that several of the adjudicators who responded had done multiple adjudications. Given the high response rate out of the total population of adjudicators in New Zealand, there was no need to develop any inferential analysis. The results from the questionnaire indicate adjudication under the New Zealand Act is successfully achieving the stated objectives under Section 3 (b) of the Act: 'to provide for the speedy resolution of disputes arising under a construction contract'.

A few questions dealt with the adjudicator's views on the effectiveness of the adjudication provisions of the NZ Act in terms of duration of the adjudication process.

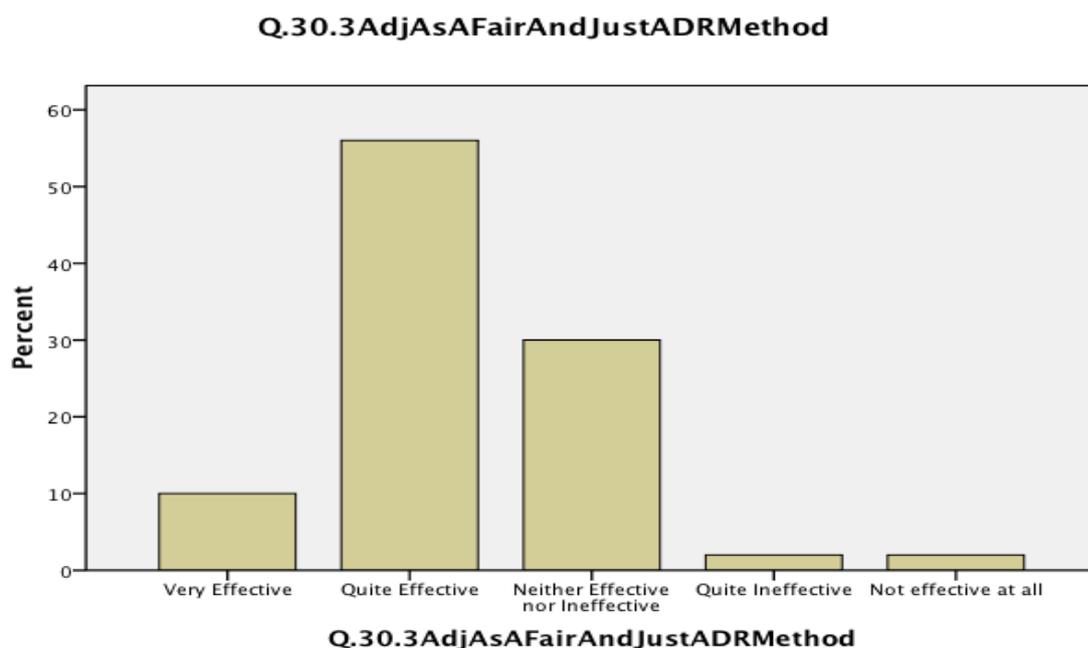
The following is the finding based on the responses received:



**Figure 8: Adjudication as a Speedy Dispute Resolution Method**

From the data in Figure 8, the analysis clearly shows there is clear evidence that an overwhelming majority of adjudicators think adjudication is a speedy alternative dispute resolution method. This corroborates with the fact that nearly all adjudications conducted by the adjudicators were completed within the statutory timeframe provided in the Act. There is some anecdotal evidence in recent time that some adjudications were being extended beyond the 30 working days following agreement by the parties. This is not verified by any formal survey that is publicly released or published. In any case the numbers appear to be very small.

With speed, the inevitable question remains, is fairness being compromised with speed? The following Figure 9 shows – at least in the view of adjudicators – that they do not, in the main, think fairness has been significantly compromised. 65% of the respondents thought adjudications were a fair and just dispute resolution process with a further 30% who were neutral about it. Only 5% of the respondents thought adjudications were either 'quite ineffective' or 'not effective at all' as far as it being 'fair and just' dispute resolution method.



**Figure 9: Adjudication as a Fair Dispute Resolution Method**

### 4.3.2 Empirical evidence of durations in Malaysia

The Malaysian Act came into operation on 15 April 2014. The KLRCA mandates all adjudicators to submit all decisions to them for monitoring purposes. Whilst the decisions are still kept confidential and have not been published in any form – identified or de-identified or ‘sanitised’ – some data and statistics were released on 11 April 2015. (KLRCA, 2015)

**Table 7: Number of Adjudication Cases in Malaysia (KLRCA, 2015)**

Description	2014 (between 15 April 2014 and 31 December 2014)	2015 (between 1 Jan 2015 and 10 April 2015)
Registered matter	29	53
Decision released	2	14
Withdrawn matters	3	9
<b>Ongoing (extended time agreed by the parties)</b>	<b>4</b>	<b>7</b>
Abandoned matters	0	1
Unregistered matters	0	2

Table 7 shows adjudication has picked up relatively rapidly particularly in 2015. This is likely to be as a result of the judicial pronouncement in the first case on adjudication in Malaysia in 2014 where the learned Justice Dato’ Mary Lim decided that in the absence of words to the contrary and taking into account the purposive

approach to interpreting legislation, the Malaysian Act applies **retrospectively** – at least in the fundamental two key aspects of when the construction contract is in writing and on matters relating to payment. The case was UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd which was heard together with another case ("UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd [operating under the name and style of Bisraya Construction - MRCB Engineering Consortium, an unincorporated joint venture] heard together with Capitol Avenue Development Sdn Bhd v Bauer (Malaysia) Sdn Bhd," 2014). The judgment was dated 5 December 2014. That means construction contracts that were entered into before the Act came into operation on 15 April 2015 were covered by the Act. The monthly figures also back up the suggestion that cases referred to adjudication rose significantly following this judgment. The number of adjudication cases registered at the KLRCA since the Act came into operation on 15 April 2014 was all 4 cases or fewer per month except in October 2014, which had 7. From December 2014 (after the judgment given on 5 December 2014) the number has risen upwards.

December 2014 – 9 cases

January 2015 – 12 cases

February 2015 – 11 cases

March 2015 – 28 cases

Between 1 and 10 April 2015 – 2 cases

The key data relevant to this part of the analysis on the duration of adjudication cases to note are:

The Malaysian Act has the longest duration among all 14 jurisdictions of 45 working days after the exchange of adjudication documents.

The NZ Act provides for 30 working days within which nearly all cases are contained.

The data from KLRCA shows 29 cases were registered in 2014 since April 2014, 2 decisions were released, 3 withdrawn and 4 cases were ongoing with the parties agreeing to extended time (KLRCA, 2015).

Likewise in the first 3 months of 2015, 53 cases were registered, 14 decisions were released, 9 withdrawn and 7 cases were ongoing with the parties agreeing to extended time.

On the face of it, the number of cases that were going beyond the statutory default timeframe, does not augur well for the trend in duration in Malaysia because:

- (i) The duration under the Malaysian Act is already the longest at 45 working days after the exchange of adjudication documents.
- (ii) The nature of disputes under the Malaysian Act is limited to disputes relating to payment for work done. Other jurisdictions with such limited scope for what may be adjudicated have much shorter timeframes. The NSW Act (section 21(3)) specifies a period within 10 business days after the adjudicator has accepted the adjudication application subject to the adjudicator having received the respondent's adjudication response. The Sg Act (section 17) specifies between 7 and 14 days (defined as any day excluding only public holidays) depending on certain circumstances after commencement of the adjudication. The UK and NZ Acts cover all disputes and have timeframes of up to 42 days or 30 working days respectively.

It could however be argued that during the relatively early days of adjudication in Malaysia, the parties, their advisers (whether legally qualified or not) and the adjudicators, on a panel that comprises nearly 50% lawyers numbering 148 out of the total of then 311 adjudicators (KLRCA, 2015) were being cautious and were agreeing to carefully consider all issues and not rush into the process.

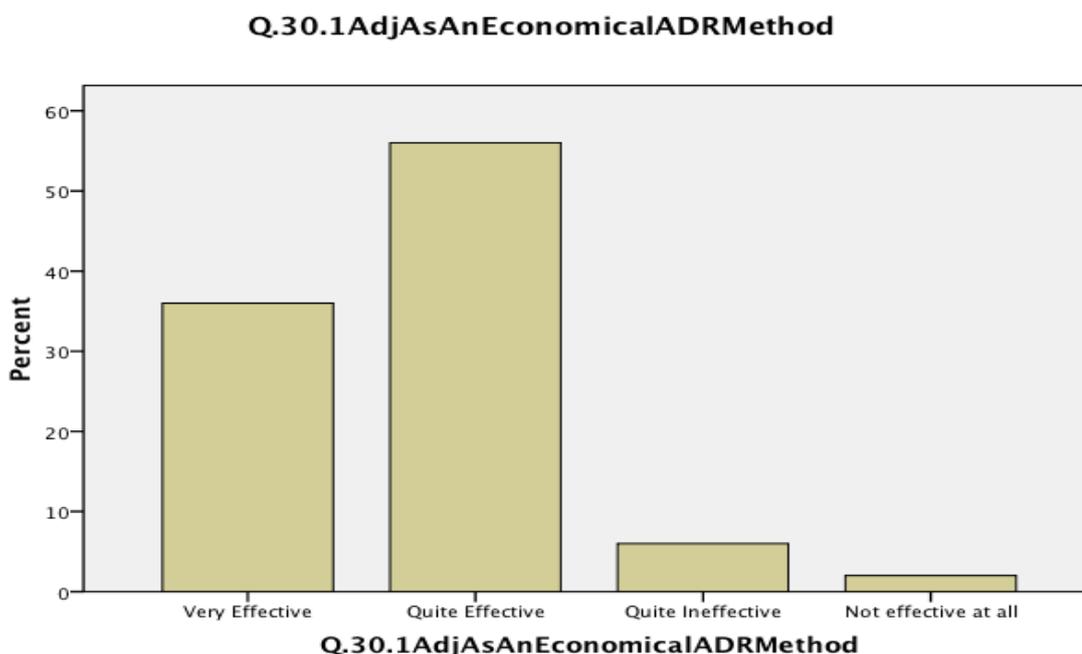
#### **4.4 Costs of adjudication**

Adjudication costs appear to be well-contained in most jurisdictions around the world. This is perhaps due to the strict timeframes statutorily imposed. These well-contained costs relate to adjudicator's fees. Other costs such as costs of venues are normally charged at actual rates. As adjudicators often charge on an hourly rate the limited time that they spend would invariably contain the costs.

#### 4.4.1 Adjudicators fees in New Zealand

However it is sometimes quoted by some that adjudication costs have increasingly crept up like what happened with arbitration over the years. This is however a rarity and an exception. The most quoted examples are from a couple of adjudication cases in the United Kingdom. Anecdotal evidence from New Zealand indicates there were the occasional adjudicators who charge a relatively high hourly rate as high as NZD 600.00 per hour. But this in the main must be a rarity. The empirical evidence from a survey of adjudicators in New Zealand shows the rates during the first decade since adjudication was introduced in New Zealand are contained within the band ranges NZD 50 – 100 per hour and NZD 350 – 400 per hour. The mode, or the most frequent band was NZD 200 – 250 per hour.

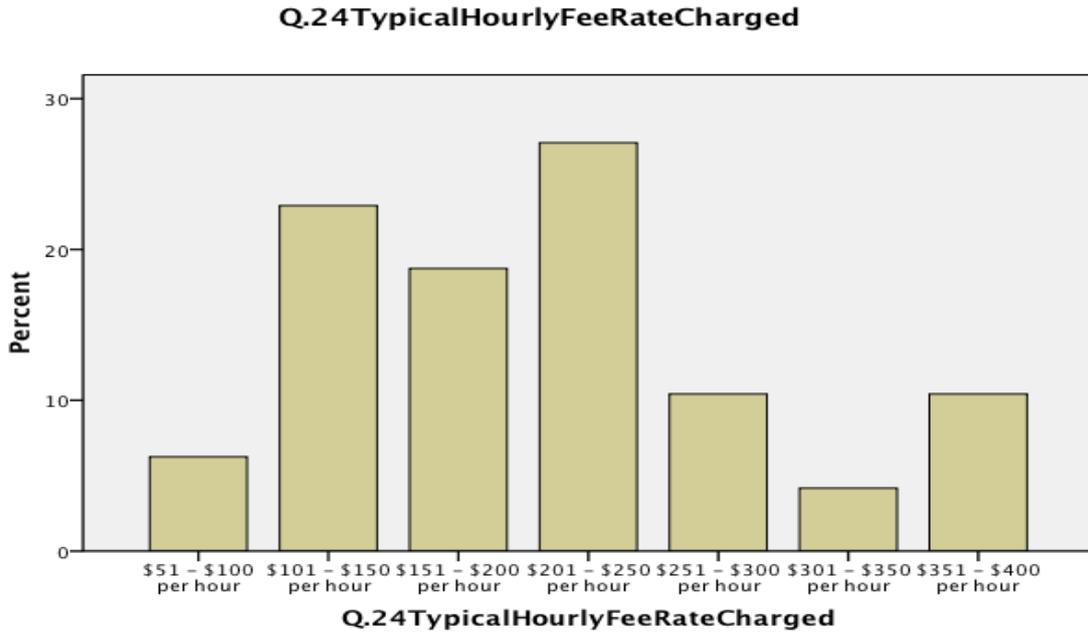
Figure 10 is a graphical representations of results from the survey done of adjudicators in New Zealand on questions relating to costs of adjudications.



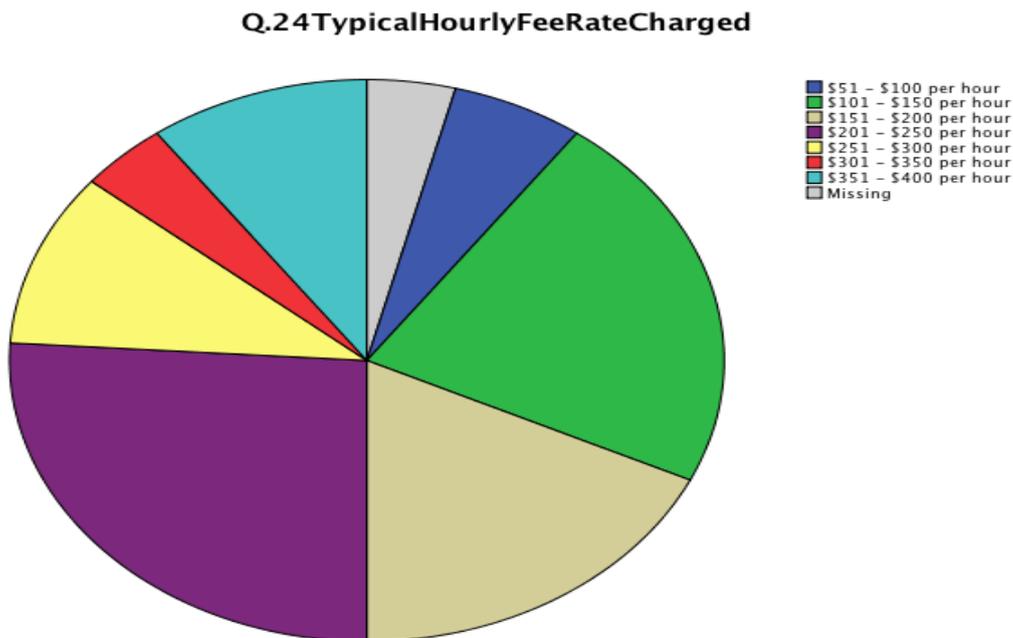
**Figure 10:Adjudicators' Views on Costs of Adjudication**

Figure 10 shows 90% of the adjudicators were of the view that adjudication was an economical dispute resolution method. They rated it as 'very effective' or 'quite effective'. Fewer than 10% thought it was 'quite ineffective' or 'not effective at all'.

To validate the opinions of the adjudicators the hourly rates charged were analysed. They are tabulated and presented graphically in Figures 11 and 12 below.



**Figure 11: Adjudicators' Hourly Rate Fees**

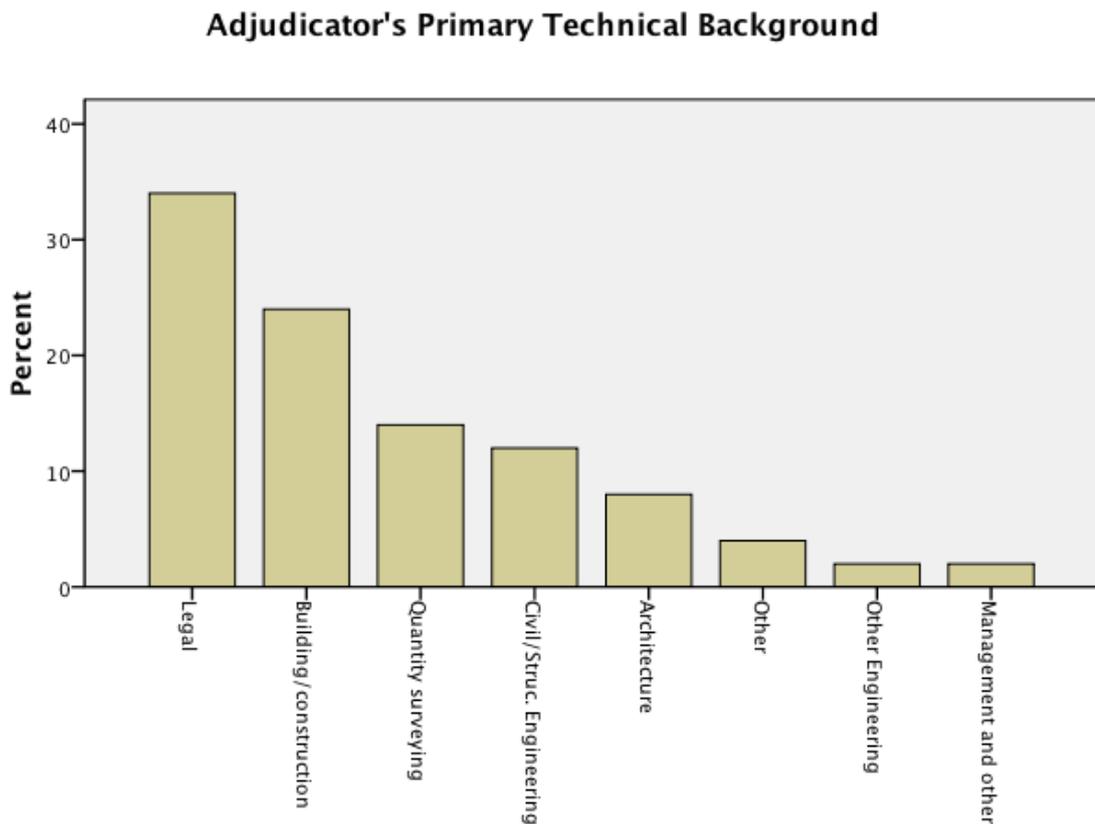


**Figure 12: Adjudicators' Hourly Rate Fees**

Figures 11 and 12 show the adjudicators' fees were contained within the band ranges NZD 50 – 100 per hour and NZD 350 – 400 per hour over the first decade since the NZ Act came into effect in 2003. Collectively, about 70% of adjudicators charged within the range of bands between NZD 100 and 250 per hour. The mode, or the most frequent band is NZD 200 – 250 per hour, which represents 28% of adjudicators. Anecdotal evidence from some of the submissions made to the Commerce Select Committee when debating the then Construction Contracts

Amendment Bill 2013 indicates many adjudicators were charging higher fees – some as high as NZD 600.00.

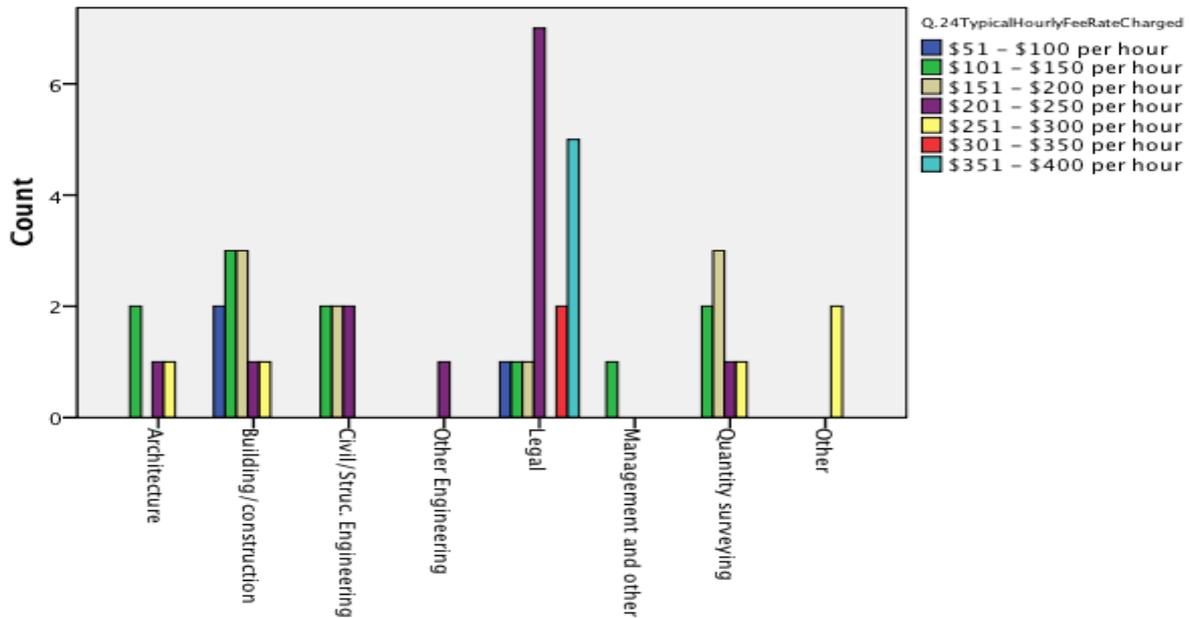
A further analysis was then done to establish the correlation between the adjudicators' backgrounds and the fee level they charged. The adjudicators' background is presented in Figure 13 below:



**Figure 13: Adjudicator's Primary Technical Background**

The adjudicators were asked what their main technical area was. The results presented in Figure 13 show that a third were legally qualified and had a primarily legal background. Nearly all the rest had some construction related technical background.

This was then correlated to the question of hourly fees they charged as adjudicators. The correlation between their technical background and the fees they charged is presented graphically in Table 14 below:



**Figure 14: Adjudicators' Background and Fees Correlation**

Figure 14 shows lawyers (who account for about 30% of total adjudicators) had the broadest range of fees charged. They ranged across the whole bands from NZD 50 – 100 per hour to the top band of NZD 351 – 400 per hour. None of the others with backgrounds in the other areas offered the full range of fees. A detailed scrutiny of the fees charged by lawyers however shows they were the single largest profession that charged the top end range of fees. They were the only group that charged fees in the ranges NZD 301 – 350 per hour and NZD 351 – 400 per hour. And they contributed most significantly to the mode range of NZD 200 – 250 per hour. Although lawyers covered the full range of fees, very few charged below the mode range of NZD 200 – 250 per hour. The other professions had a greater bias towards rates at or below the mode of NZD 200 – 250 per hour. All these quoted fees are exclusive of GST. As stated earlier, it is worth noting that evidence from some of the submissions made to the Commerce Select Committee when debating the then Construction Contracts Amendment Bill 2013 indicates some adjudicators with a legal background were charging higher fees – some as high as NZD 600.00.

#### 4.4.2 Adjudicators' fees in Malaysia

Adjudicators in Malaysia, like in New Zealand, are free to agree their terms of engagement, including fees, with the parties. See section 19(1) of the Malaysian Act.

There is however a default a default set of terms of engagement and fee level that the KLRCA provides under section 19(2) in cases where the parties have not agreed or cannot agree.

Section 19 reads:

- (1) *the parties and the adjudicator shall be free to agree on the terms of appointment of the adjudicator and the fees to be paid to the adjudicator.*
- (2) *if the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the KLRCA's standard terms of appointment and fees for adjudicators shall apply.*

The KLRCA has full details on data and statistics on adjudicators' fees. This is because all fees are managed and administered by the KLRCA. Like under the NZ Act, the Act provides for the adjudication decision to be withheld until the parties have made the full fee payment. Section 19(5) provides:

*Before releasing the adjudication decision to the parties, the adjudicator may require full payment of the fees and expenses to be deposited with the Director of the KLRCA.*

The first set of data released by the KLRCA was on 11 April 2015 based on all decisions made and released between when the Act came into operation on 15 April 2014 until 10 April 2015. Table 8 shows a summary of the adjudicators' fees:

**Table 8: Adjudicators' Fees – Malaysia (KLRCA, 2015)**

Adjudicators' fees	2014 (Based on 2 decisions released)	2015 (Based on 14 decisions released*)
Total Adjudicator Fees	RM 52,760.00	RM 483,001.36
Maximum Total Adjudicator Fees	RM 50,000.00	RM 89,112.98
Minimum Total Adjudicator Fees	RM 2,760.00	RM 1,000.00
Average Adjudicator Fees	RM 26,380.00	RM 34,500.10 **

\* The footnote indicates the figures for 2015 are based on '**five (14)**' decisions. This is presumably a genuine error and the correct figure is taken to be 14.

\*\* The average reported by the KLRCA is shown as RM 33,500.10, which is presumably a mathematical error.

These fees were then considered by correlating them to the adjudicated amounts. Based on data additionally provided on the adjudicated amounts, the fees were

correlated and computed as a percentage of the adjudicated amount in Table 9 below:

**Table 9: Adjudicators' Fees in Malaysia – Tabulated Computation**

Adjudicators' fees and (adjudicated amount in brackets)	2014 (Based on 2 decisions released)	Adjudicated amount (percentage of adjudicator's fees on adjudicated amount in brackets)	2015 (Based on 14 decisions released*)	Adjudicated amount (percentage of adjudicator's fees on adjudicated amount in brackets)
Total adjudicator fees and (total adjudicated amount in brackets)	RM 52,760.00	RM 9,289,900.67 (0.57%)	RM 483,001.36	RM 57,406,065.00 (0.84%)
Maximum total adjudicator fees and (maximum adjudicated amount in brackets)	RM 50,000.00	RM 9,252,363.17 (0.54%)	RM 89,112.98	RM 31,808,892.68 (0.28%)
Minimum total adjudicator fees (minimum adjudicated amount in brackets)	RM 2,760.00	RM 37,537.50 (7.35%)	RM 1,000.00	RM 27,121.12 (3.69%)
Average adjudicator fees (average adjudicated amount in brackets)	RM 26,380.00	RM 4,644,950.34 (0.57%)	RM 34,500.10 **	RM 3,613,439.38 (0.95%)

The figures in Table 9 were calculated based on the raw data reported by the KLRCA (KLRCA, 2015). While each absolute amount for adjudicators' fees might be a base starting point to consider how economical adjudication is, a more useful figure is the percentage of fees as a proportion of the adjudicated amount. These figures are shown in brackets in the third and fifth columns for 2014 and 2015 respectively. The percentages shown are contained within less than 1% of the adjudicated amount. This appears reasonable. When looked at overall – whether in total amounts for each year or taking the average amounts for each year, the fees are still contained within close to 0.6% to under 1%. There appears to be some element of consistency within this range across both years 2014 and 2015 although these figures are based on 2 adjudications and 14 adjudications respectively.

An even more accurate figure can be established when calculating percentages for the outer extreme ranges. But this is done using the assumption that the minimum adjudicator's fee corresponds to the minimum adjudicated amount, and the maximum adjudicators' fees are based on the maximum adjudicated amount. This assumption is likely to be accurate for 2014 as there were only two adjudication decisions released during that year.

Not surprisingly when taking the maximum fees and maximum adjudicated amounts the percentage fall to 0.54% and 0.28% for 2014 and 2015 respectively. As the amount in dispute increases the adjudicator's fees as a percentage can reasonably be expected to fall. On the other extreme when the adjudicated amount is small (about RM 37,000 or RM 27,000), even with the minimal adjudicators' fees of about RM 2,700 or RM 1,000, the percentage becomes over 3% and 7% respectively. This can be expected and in the context of the absolute amounts they appear to be within a reasonable range.

#### **4.5 Quality of adjudicators' decisions**

The subject of quality of adjudicators' decisions can be quite complex to analyse. This is because:

- (i) The adjudicators' decisions are confidential and not generally published or made available openly.
- (ii) As the adjudicators' decisions do not create legal precedents, they do not carry the burden of scrutiny in order to create precedents.
- (iii) The exact number of adjudication cases that move on to be reopened in an arbitration can never be ascertained for certain because both the arbitration and adjudication proceedings are confidential and not reported.

However, to a limited extent adjudicators' decisions that are referred to court can be analysed to establish themes and the extent of valid challenges to establish broad conclusions, which can also help prevent future similar occurrence. This part of the research does this case analysis across several jurisdictions across a number of cases reported in the past to establish a general theme of the nature of challenges associated with cases involving adjudication. Some of these cases were repeatedly

referred to in subsequent cases, indicating they dealt with themes that were recurring.

Court cases relating to statutory adjudication relating to the UK, Sg, NZ, NSW, Vic, and Qld were reviewed. In reviewing them recurring themes were identified. Once these themes were identified the cases were re-arranged according to the themes and presented in tabulated form below.

#### **4.5.1 Recurring themes**

The findings indicate among the themes, two were the most frequently recurring themes. They are:

- (i) challenges to the adjudicator's jurisdiction; for example not correctly identifying the scope within the Act and consequently making decisions on contracts that are not covered under the Act, not distinguishing the difference between a residential and commercial contract (under the current NZ Act) which have different procedures and implications, dealing with contracts involving construction work which is not included within the definition of 'construction operations' under the UK Act, timing of referral of cases when an Act is first introduced (eg under the Sg Act), allegations of no jurisdiction because a construction contract was not in writing (under the UK or Sg Act, and potentially in future under the Malaysian Act), validity of the format of a payment schedule and whether an email constitutes 'in writing'
- (ii) allegations of breach of natural justice such as not providing a party the right to be heard, not taking into account key documents, failing to disclose information to both parties, having and not disclosing previous relationship with one party, or communicating with one party without the presence of the other. This is further elaborated before a series of cases is tabulated under this heading.

#### **4.5.2 Success and challenges to adjudication decisions**

A significant number of adjudication cases that were referred to litigation were found to be upheld by the judges meaning only where there is an obvious case needing judicial intervention eg serious procedural irregularities that the adjudication decision is set aside.

This finding is further corroborated by other views, for example, Armes suggests (Armes, 2009):

*'Only a very few decisions are not enforced due to jurisdictional or procedural irregularities. This is the case even if the adjudicator has made an error in law. In fact provided the adjudicator has answered the right question it does not matter if he has arrived at the wrong answer, the decision will still be enforced.'*

From the review of case law, on balance, adjudication can be said to be a success overall as far as the quality of adjudicators' decisions is concerned. The number of adjudications around the world runs into tens of thousands of cases. The number of cases referred to court is under 2,000 (representing under 5% of total adjudications) and in among them many of the adjudicators' decisions were upheld. See also Ribbands (Ribbonands, 2015) who associates the success of adjudication with the court's policy to generally enforce adjudicators' decisions.

It is noted that many of the cases involved peripheral issues on enforcement, which is not a reflection of the quality of adjudicators' decision. The vast majority of adjudications appear to have been accepted as final by the parties and not challenged. Armes also suggests very few disputes proceed beyond adjudication and in most cases the parties live with the decision (Armes, 2009). Armes attributes one of the reasons for the success as the willingness of the courts to enforce an adjudicator's decision.

Other related research has come to similar conclusions on the overall success of adjudication eg Chartered Institute of Arbitrators (2011), who note that it has both reduced problems with delayed payment and reduced the workload of the courts.

### **4.5.3 Enhancing quality of adjudication**

As was stated earlier, many of the court cases relating to adjudication were in connection with procedural matters. These are matters that a well-trained adjudicator should be able to avoid by drawing from earlier experience or lessons from others. This could be done through mandatory continuing professional development. In connection with this, the next chapter (chapter 5) reviews the quality of adjudicators and the skill sets and training required of an adjudicator. A task-based adjudicator competency standard is proposed and considered in some detail. Chapter 6 takes

the further step of developing a decision-making model that takes all aspects of legislation into account such as the drafting style, concepts typically covered in these Acts, and training requirements to help other jurisdictions considering adjudication and those considering amending the existing Acts.

The adjudication cases that have been referred to court are now retabulated according to the thematic areas starting with the most common area, jurisdictions.

#### **4.5.4 Analysis and categorization of recurring themes from case law (court cases) on adjudication**

##### **4.5.4.1 Jurisdiction**

Table 10 is a selection of cases that have been identified under the category of challenges and issues relating to jurisdiction.

**Table 10: Cases on Jurisdictional Issues**

Case	Salient issue	Outcome	Comment
Lym International Pty Ltd v Marcolongo [2011] NSWCA	Damage to Marcolongo's building by removing supporting land. Lym International disagreed with the liability figure by the developer.	Adjudication ruled the case should be dismissed due to lack of jurisdiction of the developer's representative. Ruling upheld in court and court costs ordered to be paid by Lym International	Jurisdictional challenge upheld
Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd & Anor [2011] NSWSC	Where the contract was valid for the area where the work was taking place and thus, if the adjudicator had jurisdiction over the dispute.	The adjudicator said he did not have jurisdiction so the matter was referred to courts. Courts ruled the adjudicator was correct, in that he did not have jurisdiction.	Jurisdiction issue relating to adjudicator deciding he did not have jurisdiction.
Other related cases:			
Brian Leigh Smith v Coastivity Pty Ltd [2008] NSWSC 313			
Rubana Holdings Pty Ltd v 3D Commercial Interiors Pty Ltd [2008] NSWSC	Rubana claimed damages for defective incomplete works by 3D	Adjudication decided 3D was owed the full claim amount they were being denied. Court ruled adjudicator's determination be dissolved and stayed until a later date.	Court enforced stay.
Subsequent cases from above:			
Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd [2012] NSWSC			
Adelaide Bank Limited v BMG Poseidon Corp Pty Limited [2008] NSWSC			
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390			
Broad Construction Services (NSW) Pty Ltd v Michael Vadasz [2008] NSWSC	Payment claim for additional work due to engineers report being insufficient, claim rejected under ground of work provided was not instructed.	The adjudicator ruled the payment claim was valid as the payment schedule did not give reasons as to the nil value. Court ruled adjudicators determination void as was out of their jurisdiction.	Jurisdiction challenge upheld
Subsequent cases from above:			
James v Ash Electrical Services Pty Ltd [2009] NSWSC			
Tasman Capital Pty Ltd v Sinclair [2008] NSWCA			

*Chapter 4: Effectiveness of Adjudication Durations, Costs, and Adjudicators' Decisions*

<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Electra Air Conditioning BV v Seeley International Pty Ltd [2008] FCAFC			
Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited [2003] NSWSC	Provision of payment certificate for a payment claim submitted for work done.	The adjudicator decided the amount was due. Court ruled adjudicator's determination invalid due to jurisdictional errors.	Jurisdiction challenge upheld
Subsequent cases from above:			
Tailored Projects P/L v Jedfire P/L [2009] QSC			
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors [2010] QSC			
Taylor Projects Group Limited v Brick Dept Pty Limited & Ors [2005] NSWSC			
Brodyn v Davenport [2003] NSWSC			
Kane Constructions Pty Ltd v Cole Sopov & Ors. [2005] VSC	Payment claims withheld on works done on delayed works, works suspended.	Adjudication decided payments were being unfairly held, court ruling upheld adjudicator and said the adjudicator was correct to make the determination.	Jurisdiction challenge failed
Subsequent cases from above:			
Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd & 415 Brunswick Road Pty Ltd [2008] VCC			
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA			
Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd [2007] NSWSC			
Phoenix Project Development Pty Ltd v On Hing Pty Ltd [2006] QDC	Holding of payment for works completed with no reason.	Adjudicator decided full amount is payable, with interest. Appealed on grounds the adjudicator was out of his jurisdiction due to contractual issues. Court ruled determination upheld, appeal dismissed.	Jurisdictional challenge denied.
Subsequent cases from above:			
Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA			
Centre Road Pty Ltd v Velickov and Ors - VSC CED [2013] VSC			
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor [2012] QCA			
Brady Constructions Pty Ltd v Everest Project Developments Pty Ltd [2009] VSC			

Chapter 4: Effectiveness of Adjudication Durations, Costs, and Adjudicators' Decisions

Case	Salient issue	Outcome	Comment
Blackbird Energy P/L v Vanbeelen [2007] QCA	Payment for work done to rectify defects.	Adjudicator's determination stated payment is due. Upheld in court, appellant ordered to pay court costs.	Jurisdiction challenge denied
Subsequent cases from above:			
Pioneer Investments (Aust) Pty Ltd & Anor v Togito Pty Ltd [2011] QCA			
Blue Chip Development Corporation (Cairns) Pty Ltd v van Dieman [2009] FCA			
Northern Developments (Cumbria) Limited v J & J Nichol [2000] EWHC Technology 176 24 January, 2000 TCC HHJ Bowsher QC	Northern Developments complained of defective work on the part of their subcontractor Nichol, and refused to pay. Nichol proceeded with adjudication, northern developments treated this as a breach of contract. Northern Developments challenged enforcement of adjudicator's determination on grounds the adjudicator made an error of jurisdiction.	It was found that the adjudicator was within his jurisdiction when imposing the determination which was subsequently upheld.	Jurisdiction challenge denied
Cited within subsequent case			
Bovis Lend Lease Limited -v- Triangle Development Limited 2 November, 2002 TCC HHJ Thornton QC			
Suplant Ltd v Ballast Plc (T/A Ballast Construction South West) [2002] Adj LR 10/28 28 October, 2002 TCC (Liverpool) HHJ Mackay			
Levolux A.T. Limited -v- Ferson Contractors Limited 26 June, 2002 TCC HHJ Wilcox			
The Atlas Ceiling & Partition Company Limited v Crowngate Estates (Cheltenham) Limited 18 February, 2000 TCC HHJ Thornton Q.C.	The parties had a dispute which was referred to adjudication. One party disputed the determination of the adjudicator on the basis the HGCR Act was not yet in force.	It was held that the adjudicator had jurisdiction, and judgement was entered for the appropriate sum, as the contract was covered under the Act.	Jurisdiction

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Case	Salient issue	Outcome	Comment
Shimizu Europe Limited v Automajor Limited [2002] EWHC 1571 (TCC) 17 January, 2002 TCC HH Judge Seymour QC	Automajor, engaged Shimizu as a contractor. Later Shimizu gave notice of adjudication relating to a number of matters. Automajor paid a sum without prejudice relating to one of the matters. However, the adjudicator subsequently determined that he had no jurisdiction over the matter relating to the payment by Automajor. Automajor asked the adjudicator to correct the earlier payment. However, the adjudicator then subsequently made Automajor pay the remaining amount relating to the claim. Automajor disputed the adjudicator's jurisdiction	As Automajor had requested the adjudicator correct the early payment, he had elected to treat the whole matter as valid for adjudication. The determination of the adjudicator was held.	Jurisdiction
Cited within subsequent case			
PT Building Services Ltd v ROK Build Limited [2008] EWHC 3434 (TCC) 8 December, 2008 TCC Mr Justice Ramsey			
Tera Construction Ltd v Yuk Tong Lam [2005] EWHC 3306 (TCC) 25 November, 2005 TCC HHJ Clarke	The parties had entered into a contract surrounding the demolition of a house, and disputes arose. An award was granted by the adjudicator, however, one party contested the adjudicator's jurisdiction.	It was found that the adjudicator had not exceeded their jurisdiction, as they did not cover any matters that were outside the subject matter of the dispute.	Jurisdiction
Profile Projects Limited v Elmwood (Glasgow) Limited [2011] CSOH 64 8 April, 2011	The dispute arose from Profile Projects Ltd not being entitled to receive interim payments.	Elmwood Ltd argued that they didn't agree to instate Mr Nicolson as the Adjudicator for the dispute. The court ruled in favour of Elmwood Ltd.	Jurisdiction
Aedifice Partnership Limited v Mr Ashwin Shah [2010] EWHC 2106 (TCC) 10 August, 2010	Aedifice Partnership Ltd was sought to enforce that the adjudicator did have jurisdiction and that there was an effective construction contract in writing.	Mr Ashwin Shah sought to challenge the enforcement on the grounds that the Adjudicator had no jurisdiction. The court ruled in favour of Mr Ashwin Shah.	Jurisdiction "whether the adjudicator was given jurisdiction to decide his jurisdiction"

Case	Salient issue	Outcome	Comment
Fleming Builders Ltd v Mrs Jane Forrest or Hives and Mr William Forrest [2010] ScotCS CSIH_8 10 February, 2010	Pursuers was seeking to enforce a decision made by adjudicator over accounts payable.	Defenders claimed that there was no contract between the parties and for that reason the Adjudicator had no jurisdiction. The court ruled in favour of the pursuers.	Jurisdiction
Supablast (Nationwide) Limited v Story Rail Limited [2010] EWHC 56 (TCC) 21 January, 2010	Pursuers was seeking to enforce a decision made by adjudicator over accounts payable.	Story Rail Ltd sought to challenge the enforcement on the grounds that the Adjudicator had no jurisdiction. The court ruled in favour of Supablast.	Jurisdiction (were two separate Sub-Contracts)
Allied P&L Limited v Paradigm Housing Group Limited [2009] EWHC 2890 (TCC) 17 November, 2009	The claimant was seeking to enforce that there was a crystallised dispute and that adjudicator did have jurisdiction before and during the adjudication.	Defendant was seeking to challenge the enforcement on the grounds that the Adjudicator had no jurisdiction and whether or not the dispute was crystallised. The court ruled in favour of Claimant.	Jurisdiction
Camillin Denny Architects Limited v Adelaide Jones & Company Limited [2009] EWHC 2110 (TCC) 11 August, 2009	The issue arose as to whether or not AJ Ltd had been replaced with a other company by CDA Ltd. CDA Ltd was seeking to enforce a decision made by adjudicator over accounts payable and Adjudicators fees.	The court upheld the adjudicator's decision in favour of CDA Ltd.	Jurisdiction
HS Works Limited v Enterprise Managed Services Limited [2009] EWHC 729 (TCC) 8 April, 2009	In this case both parties were seeking validation of two separate adjudicator's decision in their favour.	The court rejected both claims because of lack of evidence.	Jurisdiction
OSC Building Services Ltd v Interior Dimensions Contracts Ltd [2009] EWHC 248 (TCC) 8 January, 2009	OSC Building Services Ltd was seeking to enforce a decision under CPR Part 24 made by a adjudicator.	The Defendant argued that there was "broadened dispute covering the valuation of OSC's final account and adjudicator failed to decide the dispute which had been referred to him on OSC's final account but instead decided the value of an interim payment application" the court ruled in favour of OSC Building Services.	Jurisdiction

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Euro Construction Scaffolding Limited v SLLB Construction Limited [2008] EWHC 3160 (TCC) 19 December, 2008	Claimant was seeking to enforce a decision made by adjudicator over accounts payable and that there was a valid contract. Therefore, the adjudicator had jurisdiction over the case.	The Defendant argued that there was no contract and therefore the adjudicator had no jurisdiction. The court upheld the adjudicator's decision.	Jurisdiction
Westwood Structural Services Limited v Blyth Wood Park Management Company Limited [2008] EWHC 3138 (TCC) 9 December, 2008	Claimant was seeking to enforce a determination made by adjudicator over accounts payable.	The Defendant argued about the claimant's employment under the contract. The court upheld the adjudicator decision in favour of Westwood Structural Services Ltd.	Jurisdiction
PT Building Services Ltd v ROK Build Limited [2008] EWHC 3434 (TCC) 8 December, 2008	Claimant was seeking to enforce a determination made by adjudicator over final account and interest.	The Defendant's argued against the adjudicator decision on these grounds "(a) Legal entity; (b) No written subcontract; (c) No crystallised dispute; (d) Wrong principles of nomination; (e) Submission of new information and (f) Invalid notice of adjudication and referral." The court upheld the adjudicator decision in favour of PTB Services Ltd.	Jurisdiction
Birmingham City Council v Paddison Construction Limited [2008] EWHC 2254 (TCC) 25 September, 2008	The claimant were seeking to claim that they were not responsible for the delay and are not liable for loss or expense that are claimed by the defendant.	The court upheld Adjudicator one decision which was in favour of Paddison Construction and disagreed with Adjudicator two.	Jurisdiction

Case	Salient issue	Outcome	Comment
Benfield Construction Limited v Trudson (Hatton) Limited [2008] EWHC 2333 (TCC) 17 September, 2008	The Claimant claim that practical completion had occurred on a since date and is seeking to enforce adjudicator 3 determination. The defendant is denied this claim of practical completion and seeks liquidated damages that was due to them by the determination of adjudicator's 1, 2.	The court ruled in favour of the defendant.	Jurisdiction
CSC Braehead Leisure Limited and Capital & Regional (Braehead) Limited v Laing O-Rourke Scotland Limited [2008] CSOH 119 19 August, 2008	The claimant were seeking to claim for defective work that they think has breach the contract of the parties.	The defendant argued that the final document is invalid and that the adjudicator did not exhaust the jurisdiction conferred upon him. The court ruled in favour of claimant.	Jurisdiction
Makers UK Limited v The Mayor and Burgesses of the London Borough of Camden [2008] EWHC 1836 (TCC) 25 July, 2008	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees.	The Defendant argued against the adjudicator's determination on the grounds that, he was bias in relation to him contacting the claimant before his appointment, that he was improperly appointed and thus has no jurisdiction. The court ruled in favour of the claimant.	Jurisdiction
Treasure & Son Limited v Martin Dawes [2007] EWHC 2420 (TCC) 25 October, 2007	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees under Part 24 of the Housing Grants Construction and Regeneration Act 1996 (HGCRA)	The Defendant argued against the adjudicator's determination on the grounds whether or not there was an "oral variation of the written construction contract and whether an adjudicator's decision has to be signed to be a valid decision". The court upheld the adjudicator's determination.	
Cited within subsequent case			
Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd and Another [2004] BLR 111, HHJ Lloyd QC			

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Case	Salient issue	Outcome	Comment
R.C. Pillar & Son v The Camber [2007] EWHC 1626 (TCC) 15 March, 2007	The claimant were seeking to enforce an adjudicator's determination about payment.	The Defendant argued against the adjudicator determination on the grounds that, there was no writing contract, it did not have IFC standard form of contract and that there was no dispute at the time of the adjudicator being appointed. The court upheld the adjudicator's determination.	Jurisdiction
Bennett (Electrical) Services Ltd v Inviron Limited [2007] EWHC 49 (TCC) 19 January, 2007	Bennett Electrical Services Ltd were seeking to enforce an adjudicator's determination about payment including VAT and interest.	The Defendant argued against the adjudicator determination on the grounds that, there was no writing contract within the means of section 107 of the Housing Grants Construction and Regeneration Act 1996 and therefore had no jurisdiction. The court did not uphold the adjudicator's determination.	Jurisdiction
Cited within subsequent case			
RJT Consulting Engineers Ltd v DM Engineering Ltd 2002 WLR 2344 CA			
Cubitt Building & Interiors Ltd -v- Fleetglade Ltd [2006] EWHC 3413 (TCC) 21 December, 2006	The claimant was seeking for a declaration that the adjudicator had the following, the necessary jurisdiction, was properly appointed and timing of the determination.	The Defendant argued against the adjudicator determination on the grounds of the timing of the adjudicator determination was out of time and therefore should be nullity. The court upheld the adjudicator's determination.	Jurisdiction
Cited within subsequent case			
Herschel Engineering Ltd v Breen Property Ltd [2000] BLR 272)			

Case	Salient issue	Outcome	Comment
Shin Khai Construction Pte Ltd v. FL Wong Construction Pte Ltd [2013] SGHCR 4	The Plaintiff was a contractor who had appointed the Defendant as a subcontractor. A dispute the was referred to adjudication after the Defendant submitted a payment claim with no response. A determination was made in favour of the Defendant. However, the Plaintiff reject this on the grounds that the Defendant did not proceed with adjudication within the stipulate timeframe in the Act.	The court found that the decision of the adjudicator should be set aside on the grounds that it was invalid, as the dispute was not referred to adjudication within the specified timeframe.	Jurisdiction
HEB Construction Ltd v Redhill Developments (NZ) Ltd, November 2009, Auckland DC, CIV-2009-044-001266	Redhill owners applied for review of the determination in respect of non-respondent owners and the adjudicator therefore was outside jurisdiction	Determination upheld	Jurisdiction
O'Connor Holdings Ltd v Ace Builders Construction Ltd, September 2004, North Shore DC, CIV-2004-084-24	No payment schedule provided and payment was awarded to the defendant. Disputing that the contract in dispute does not constitute a construction contract as it was for labour only and therefore the adjudicator was outside of jurisdiction	The court upheld determination as there was no reasonably arguable defence against the contract not being under the Act	Jurisdiction
Concrete Structures (NZ) Ltd v Michael D Palmer & Anor, Rotorua HC, CIV-2004-463-825	Concrete structures proceeded for judicial review to challenge the validity of the adjudicators decision	The court found errors in the determination and disregarded the adjudicators decision	Jurisdiction
Kalpana Patel v Pearson Group Ltd, March 2009, Wellington HC, CIV-2008-485-2571	The contract to which the dispute relates to is not a construction contract and therefore adjudicator is outside his jurisdiction	No breach of jurisdiction found and court upheld determination	Outside jurisdiction

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Canam Construction (1955) Ltd v Lahatte and Anor HC, October 2009, Auckland HC, CIV 2009-404-461	Adjudicator was only entitled to resolve a dispute arising under a construction contract. He was faced also with a claim in quantum merit as to which he had no jurisdiction. In making the contested aspect of his determination he did not identify on what basis in law he made it.	Court upheld the adjudicators decision	Jurisdiction
Nordot Engineering Services Limited -v- Siemens Plc 14 April, 2000 TCC HHJ Gilliland QC	Parties entered into a contract and disputes arose. The dispute was referred to adjudication, and a determination was made. One party objected and referred the matter to court, as they did not believe the contract was covered under the act, and therefore the adjudicators determination was invalid.	The determination of the adjudicator was upheld as it was deemed that the parties had agreed to be bound by the adjudication process, prior to commencing adjudication.	Jurisdictional objection
CN Associates (a firm) v Holbeton Limited [2011] EWHC 43 (TCC) 26 January, 2011	CN Associates was sought to enforce that the adjudicator did have jurisdiction and that there was an effective construction contract in writing.	The court upheld the Adjudicator decision and was in favour of CN Associates.	Reservation of jurisdiction

Table 11 includes cases relating to jurisdictional issues combined with other issues.

**Table 11: Cases on Jurisdictional Combined with Other Issues**

Case	Salient issue	Outcome	Comment
Leighton v Arogen [2012] NSWSC	Variation Claims on progress claim	Variation Claim was valid and payable in full. Adjudicators determination VOID due to jurisdiction errors, multiple orders made.	Award/jurisdiction
Clyde Bergemann v Varley Power [2011] NSWSC	Bergemann was not paying a progress payment submitted by Verley for work done	The adjudicator decided Varley was owed the full amount. Disputed by Bergemann under terms of jurisdiction and natural justice. Court ruling same outcome	Jurisdiction & natural justice
Subsequent cases from above:			
Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC			
Power Serve v Powerline's Clearing Group [2011] NSWSC			
Owners Strata Plan 61172 v Stratabuild Ltd [2011] NSWSC	Issues over payment claim and certificate being nil due to defects in work done.	Adjudicator decided full payment claim was payable and plaintiff was to pay adjudicators costs. The court ruled that the adjudicators determination is valid.	Jurisdiction & natural justice
John Cothliff Limited v Allen Build (North West) Limited 29 July, 1999 Liverpool County Court HHJ Marshall Evans QC	Cothliff had an award made in his favour and had asked for costs, of which he was granted 70% of his request. Matter was taken to court for enforcement, to determine if adjudicator had power to award costs.	The original determination was upheld and request for costs were enforced. Was found that the adjudicator has power to award costs, when it has been expressly sought in application before the adjudicator.	Jurisdiction, Costs
Lathom Construction Ltd v (1) Brian Cross (2) Anne Cross 29 October, 1999 TCC, Liverpool County Court HHJ Mackay	A dispute arose and an adjudicator was nominated. However, an compromise agreement was then reached between the parties. Shortly after Lathom issued further invoices which were disputed. Cross disputed the adjudicators jurisdiction.	It was found in this case the adjudicator did not have jurisdiction over the matter, as a dispute arising out of a compromise agreement could not be dealt with under the act.	Compromise agreement, Jurisdiction

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Homer Burgess Limited v Chirex (Annan) Limited [1999] ScotCS 264 10 November, 1999 Outer House, Court of Session Lord Macfadyen	Homer was contracted by Annan, and disputes arose. Annan was ordered to pay £284,046.98 by the adjudicator. Annan disputed the adjudicators jurisdiction, on the basis they did not believe the work was a 'construction operation'.	It was found that the work that was undertaken, was not a 'construction operation' and therefore the adjudicator had no jurisdiction over the matter.	construction operations, jurisdiction
Cited within subsequent case			
Hortimax Limited v Hedon Salads Limited 15 October, 2004 TCC, Salford HHJ Gilliland QC			
Fastrack Contractors Limited v (1) Morrison Construction Ltd (2) Impreglio UK Ltd [2000] EWHC Technology 177 4 January, 2000 TCC HHJ Thornton QC	Fastrack was subcontracted by Morrison as brickwork subcontractor. Delays occurred and Morrison engaged another party to progress Fastracks work. A dispute arose and the adjudicator awarded Fastrack £85,401.98. This was disputed on the grounds the conflict amounted to two separate disputes, over which the adjudicator did not have jurisdiction.	It was found the adjudicator had jurisdiction over the matters and the award of £85,405.98 to Fastrack was held.	Jurisdiction, Meaning of Dispute, Delay
Cited within subsequent case			
Collins (Contractors) Limited v Baltic Quay Management (1994) Limited [2004] EWCA Civ 1757 7 December, 2004 CA (Civ) Brooke LJ, Clarke LJ and Neuberger LJ			
Amec Civil Engineering Ltd v The Secretary of State for Transport [2004] EWHC 2339 (TCC) 11 October, 2004 TCC The Honourable Mr Justice Jackson			
Grovedeck Limited v Capital Demolition Limited [2000] EWHC Technology 139 24 February, 2000 TCC HHJ Bowsher QC			
John Mowlem & Company PLC v Hydra-Tight Ltd 6 June, 2000 TCC HHJ Richard Havery Q.C	The contract between the parties had provision for adjudication only after 4 weeks of attempts under "Notice of Dissatisfaction", and John Mowlem had been listed as nominated adjudicator on the standard subcontract. A dispute arose, and a different adjudicator was appointed. John Mowlem objected as he claimed it went against the provision in the contract.	The judge found that John Mowlem had the right to object, as they had the right to include a provision for appointment on its standard form, as provision was granted to challenge appointment on the basis of bias. Additionally, the judge found the provision for 4 weeks of "Notice of Dissatisfaction" breached the Act as it did not allow adjudication to be entered at "any time".	Declaration, Jurisdiction, Appointment of Adjudicator

Case	Salient issue	Outcome	Comment
Samuel Thomas Construction v J&B Developments 28 January, 2000 Exeter High Court HHJ Overend	J&B contracted with Samuel for the purpose of converting two barns into residential units. Samuel terminated all work, complaining of underpayment, and initiated adjudication. J&B resisted adjudication on the grounds the contract work consisted of residential occupier contract. Adjudicator awarded in favour of Samuel.	Adjudicators determination was challenged on grounds the adjudicator acted outside their jurisdiction, as the project was on a residential base (therefore the Act would not apply). However, the adjudicators determination was upheld, as it was not considered to be a residential project.	Jurisdiction, Residential occupier
F W Cook Limited v Shimizu (UK) Limited [2000] EWHC Technology 152 4 February, 2000 TCC HHJ Humphrey LLoyd QC	The parties entered into an oral subcontract for mechanical works. Disputes arose over Cooks final account. Cook gave letter to Shimizu for matter to be referred to adjudication. The adjudicator awarded in favour of Cook. Shimizu resisted this determination, as the original notice to adjudicate only specified some of the items to be resolved through adjudication, and therefore the adjudicator acted outside their jurisdiction.	It was found by the judge that the wording of the notice to adjudicate did in fact only refer to some of the items to be resolved through adjudication. This meant that only some of the sums that we directed to be paid by the adjudicator were within their jurisdiction.	Jurisdiction, Wording of Notice of Adjudication
Ken Griffin (t/a K&D Contractors) v Midas Homes Limited [2000] EWHC 182 (TCC) 21 July, 2000 TCC HHJ Humphrey LLoyd QC	Griffin gave notice of adjudication, which only referred to some previous letters. Midas objected to the jurisdiction of the adjudicator, as the notice of adjudication only referred to some of the matters that the adjudicator had addressed.	It was found that the original notice of adjudication had only noted some of the disputes between the parties. It was insufficiently clear, and therefore it was found that the adjudicator only had jurisdiction over the matters referred to in the notice of adjudication.	Notice of Adjudication, Jurisdiction
Shepherd Construction Limited v Mecright Limited 27 July, 2000 TCC HHJ Humphrey LLoyd QC	After both parties had reached a settlement agreement, one party referred the dispute to adjudication, without mention of the settlement agreement, claiming they entered into the settlement agreement under duress. The other party claimed the adjudicator was acting outside their jurisdiction, as a settlement agreement had already been reached.	The judge found that a dispute over the settlement agreement could not be considered a dispute under the original contract, even if it was voidable for duress. Therefore the adjudicator had no jurisdiction.	Settlement agreement, Jurisdiction

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Cited within subsequent case			
L Brown & Sons Limited -v- Crosby Homes (North West) Limited [2005] EWHC 3503 (TCC) 5 December, 2005 TCC Ramsey J			
Melville Dundas Limited v Hotel Corporation of Edinburgh Limited [2006] CSOH 136 7 September, 2006 Outer House, Court of Session Lord Drummond Young			
Able Construction (UK) Ltd v Forest Property Development Ltd [2009] EWHC 159 (TCC) 27 January, 2009 TCC Mr Justice Coulson			
ABB Power Construction Limited v Norwest Holst Engineering Limited [2000] EWHC Technology 68 1 August, 2000 TCC HHJ Humphrey LLOYD QC	Northwest was contracted by ABB to clad a number of boilers in a power station. A dispute arose and ABB claimed the contract was not a construction operation, and therefore was not covered under the Act.	The judge found that the contract was not for a construction operation, and therefore the Act did not apply, as the site was used primarily for power generation.	Construction operations, Jurisdiction
Cited within subsequent case			
Conor Engineering Limited v Les Constructions Industrielles de la Mediterranee SA [2004] EWHC 899 (TCC) 5 April, 2004 TCC Recorder David Blunt QC			
North Midland Construction Plc v AE & E Lentjes UK Limited (formerly Lentjes UK Limited formerly Lurgi (UK) Limited) [2009] EWHC 1371 (TCC) 18 June, 2009 TCC Mr Justice Ramsey			
Discaint Project Services Limited v Opecprime Development Limited 9 August, 2000 TCC HHJ Peter Bowsher Q.C.	Opecprime contracted with Discaint to undertake some steelwork. Disputes arose over payment, and letters drafted by an associated company in which Opecprime refused to pay. During the adjudication an employee from Discaint contacted the adjudicator, and discussed substantive issues relating to the case. The adjudicator then made a determination in Discaint's favour.	The judge did not enforce the determination of the adjudicator as there was a substantial risk of bias, even though it was found the original determination was correct. The judge determine the conversation amounted to a breach of natural justice.	Jurisdiction, Breach of Natural Justice
Cited within subsequent case			
Pring & St. Hill Limited -v- C J Hafner t/a Southern Erectors [2002] EWHC 1775 (TCC) 31 July, 2002 TCC HHJ Humphrey LLOYD QC			
Costain Limited v Strathclyde Builders Limited [2003] ScotCS 352 17 December, 2003 Outer House, Court of Session Opinion of Lord Drummond Young			

Case	Salient issue	Outcome	Comment
Balfour Beatty Construction Limited -v- The Mayor & Burgesses of the London Borough of Lambeth [2002] EWHC 597 (TCC) 12 April, 2002 TCC HHJ Humphrey LLoyd QC			
Holt Insulation Limited v Colt International Limited [2001] EWHC 451 (TCC) 12 January, 2001 TCC, Liverpool District Registry HHJ Mackay	Colt was a subcontractor to Holt. Colt had a dispute and was unsuccessful with adjudication, due to details within the terms of referral notice. However, Colt was later successful with a second adjudication. Holt disputed this, as they considered it to be essentially the same.	The judge found that there were two disputes, as the notice of referral were crucially different.	Same dispute, Jurisdiction
Cited within subsequent case			
Skanska Construction UK Limited v ERDC Group Limited (1) and John Hunter (2) [2002] ScotCS 307 28 November, 2002 Outer House, Court of Session Opinion of Lady Paton			
C&B Scene Concept Design Limited -v- Isobars Limited 20 June, 2001 TCC Mr Recorder R Moxon-Browne QC	A challenge was made to the adjudicators determination on the grounds that an error of law had been made.	It was found that an error of law did in fact occur, and the determination of the adjudicator was not enforced, as the adjudicator acted outside their jurisdiction.	Jurisdiction, error of law
Cited within subsequent case			
Carillion Construction Limited -v- Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 16 November, 2005 CA The Master of the Rolls, LJ Chadwick, & LJ Moore-Bick			
Rossco Civil Engineering Limited v Dwr Cymru Cyfyngedig [2004] All ER (D) 339 (Jul) 15 July, 2004 TCC Recorder Dermott O'Brien			

Case	Salient issue	Outcome	Comment
<p>Simons Construction Limited v Aardevarch Developments Limited [2003] EWHC 2474 (TCC) 29 October, 2003 TCC HHJ Richard Seymour QC</p>	<p>The parties had a dispute and were in the process of adjudication. One day from the deadline for the adjudicators determination, the adjudicator informed the parties the determination would be late. Aardvark agreed to an extension of time for the determination. Simons remained silent, and was later ordered to pay when the final determination was issued. Simons rejected this determination, claiming it was not valid as it was late.</p>	<p>The judge found that the determination was valid. Although the adjudication had gone over time, the adjudicator still had jurisdiction over the matters.</p>	<p>Jurisdiction, Late determination</p>
<p>BAL (1996) Ltd -v- Taylor Woodrow Construction Ltd 23 January, 2004 TCC HHJ Wilcox</p>	<p>During an adjudication, the adjudicator sought legal advice, consent was granted from both parties. However, the determination of the adjudicator did not disclose the legal advice that was given. BAL sought to enforce the determination of the adjudicator.</p>	<p>It was found that the adjudicator made a breach of natural justice by failing to disclose details of the legal advice. Therefore the determination of the adjudicator was not enforced.</p>	<p>Natural Justice, Jurisdiction</p>
<p>Branlow Limited v Den-Master Demolition Limited 26 February, 2004 Sheriff of Lothian and Borders at Linlithgow</p>	<p>One party referred the matter to court for enforcement. The other claimed that the parties did not have a written contract, therefore the Act did not apply and adjudication was invalid. They also claimed that letters between the parties was a prior verbal discussion and did not constitute a contract.</p>	<p>It was held that the letter correspondence between the parties contained enough information to determine the dispute was covered under the act. Therefore the adjudication was valid.</p>	<p>Contract in writing, Jurisdiction</p>
<p>Ken Biggs Contractors Ltd v Norman 4 August, 2004 TCC HHJ Havery QC</p>	<p>One party sought to enforce a determination made in their favour. The other party rejected this, as they claimed there was no construction contract with provision for adjudication.</p>	<p>In this case it was found the adjudicator had acted outside their jurisdiction, as a typographical error in the initial conversation between the parties indicated the parties had entered into a standard form of contract that did not exist.</p>	<p>Jurisdiction, formation of contract.</p>

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Case	Salient issue	Outcome	Comment
WHYTE AND MACKAY LIMITED (Pursuers) v. BLYTH & BLYTH CONSULTING ENGINEERS (Defenders) 9 April 2013	The pursuers state that the foundations are defective, thereby causing a high degree of settlement, with consequential damage to the building and associated offices	It is said that the adjudicator failed to give adequate reasons for the determination, and in any event, to enforce it would be incompatible with the defenders' rights under the European Convention on Human Rights and Fundamental Freedoms. Court upheld, in favour of pursuers	Compromise agreement, Jurisdiction
Cited within subsequent case			
McLaren Murdoch & Hamilton Ltd v The Abercrombie Motor Group Ltd 2003 SCLR 323.			
WSP Cel Ltd v Dalkia Utilities Services Plc [2012] EWHC 2428 (TCC) 28/08/2012	WSP seek payment of Final account for work done after the termination by Dalkia	The adjudicator did not have jurisdiction to deal with various claims within a claim for payment on termination made by way of a final account .Court ruled in favour of WSP	Compromise agreement, Jurisdiction
Herbosh-Kiere Marine Contractors Limited v Dover Harbour Board [2012] EWHC 84 (TCC) 26/01/2012	The dispute arose over work not being completed on time and final account. HKM Ltd seeked to enforce a payment of a final account that was awarded to them by a Adjudicator against DHB.	DHB argued that there was a breach of natural justice on the part of the Adjudicator. Court ruled in favour of DHB and found that the Adjudicator was out of his jurisdiction and breached the rule of natural justice.	Compromise agreement, Jurisdiction
Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail [2011] EWCA Civ 1617 21/12/2011	Lanes Group PLC sort after damages from Gallifors Try Rail because of wrongful termination.	Galliford Try Rail rejected the adjudicator decision on the bases that he had no jurisdiction and whether his judgement was nullity by reason of apparent bias. The court ruled in favour of Lanes.	Compromise agreement, Jurisdiction
Sprunt Limited v London Borough of Camden [2011] EWHC 3191 (TCC) 6/12/2011	The dispute arose over whether there was a written construction contract in regards to phase B. Adjudicator awarded Sprunt.	Camden disputed the Adjudicator decision on the grounds of he had no jurisdiction. The court ruled in favour of Sprunt.	Compromise agreement, Jurisdiction
Partner Projects Limited v Corinthian Nominees Limited [2011] EWHC 2989 (TCC) 23/11/2011	Partner Projects Ltd seeked to enforce a payment that was awarded to them by a Adjudicator against Corinthian Ltd.	Corinthian disputed the Adjudicator decision on the grounds of he had no jurisdiction. The court ruled in favour of PPL.	Compromise agreement, Jurisdiction

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Case	Salient issue	Outcome	Comment
Witney Town Council v Beam Construction (Cheltenham) Limited [2011] EWHC 2332 (TCC) 12 September, 2011	The dispute arose over work not being extension of time and final account. Beam Construction Ltd sought to enforce a payment of a final account that was awarded to them by a Adjudicator against Council.	The court ruled that the Adjudicator had jurisdiction and was in favour of Beam. Upheld the Adjudicator's decision.	Compromise agreement, Jurisdiction
Balfour Beatty Engineering Services (HY) Limited v Shepherd Construction Limited [2009] EWHC 2218 (TCC) 1 September, 2009	HYL Ltd was seeking to enforce a decision made by adjudicator over accounts payable .	SC Ltd argued that there was a breach of natural justice on the part of the Adjudicator. For the reason that he was biased. "expanded scope of the dispute as referred to adjudication". The court upheld the adjudicator decision.	Jurisdiction / Breach Natural Justice
Estor Limited v Multifit (UK) Limited [2009] EWHC 2108 (TCC) 12 August, 2009	Estor Ltd was seeking to claim that there was no construction contract between the two parties and therefor the Adjudicator had no jurisdiction.	Multifit UK Ltd was seeking to enforce a decision made by adjudicator, that there was a contract and that he had jurisdiction. The court ruled that the adjudicator's decision is enforceable but Multifit UK Ltd would have to paid a portion of the adjudicator fees.	Enforcement / Jurisdiction
Adonis Construction v O'Keefe Soil Remediation [2009] EWHC 2047 (TCC) 5 August, 2009	Adonis Construction was seeking to claim that the parties entered into a construction contract specific in " section107 of the Housing Grants, Construction and Regeneration Act 1996" and enforce the adjudicator's decision.	The defendant argued that there was no construction contract and therefore the adjudicator's decision is unenforceable. The court rejected the claim by AC and favour the defendant.	Enforcement/ Jurisdiction
Ringway Infrastructure Services Limited v Vauxhall Motors Limited [2007] EWHC 2421 (TCC) 23 October, 2007	Ringway Infrastructure Services Ltd were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees.	The Defendant argued against the adjudicator determination on the grounds whether or not the dispute had crystallised. The court upheld the adjudicator's determination.	Costs/ Jurisdiction
Cited within subsequent case			
Macob Civil Engineering Ltd –v- Morrison Construction Ltd [1999] BLR 93			
Bouygues (UK) Ltd –v- Dahl-Jensen (UK) Ltd [2000] BLR 522)			
Carillion Construction –v- Devonport Royal Dockyard [2005] BLR 310			

Case	Salient issue	Outcome	Comment
JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd [2012] SGHC 243	A dispute between the parties was referred to adjudication after a dispute regarding payment claims. The determination of the adjudicator was made, and one party applied to have the determination set aside on the grounds that the payment claim was a repeat claim.	The court found that the payment claim was in fact a repeat claim, which are expressly prohibited in the Act. Therefore the determination of the adjudicator was set aside.	Error of law, Jurisdiction
Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) [2013] 1 SLR 401	A contractor was engaged to undertake renovations on a residential dwelling. Disputes arose and the client terminated the contract. The contractor made a payment claim to the client, but did not state it was being made under the act. No response from the client. The contractor referred the matter to adjudication, No response from the client. The contractor was awarded payment by the adjudicator. The client objected on the grounds the payment claim did not state it was being made under the act.	The court determined that a payment claim did not have to expressly state that it is being made under the act for it to be valid. The adjudicator's determination was held.	Invalid payment claim, Jurisdiction
I Q Homes Ltd v Smith & Anor, July 2009, DC CHCH CIV-22009-009-001314	Smith & Anor are opposing the adjudicator determination under the Act, Part 4 that the contract was a residential construction contract and therefore they cannot enforce the adjudicators decision.	Found that the contract between parties was a Commercial construction contract and not a Residential contract and therefore the Part 4 of the Act does apply and the adjudicators decision was upheld	Compromise agreement, Jurisdiction



#### 4.5.4.2 Principles of natural justice

The principles of natural justice would apply to anyone who is acting in a judicial capacity. This would include arbitrators and adjudicators but not mediators as they don't make decisions on the disputes. This obligation would be implied. If an adjudicator has made a decision and subsequently the adjudicator is found to have been in breach of the obligation to comply with the rules of natural justice the adjudicator's decision would not be enforced.

The concept of 'natural justice' is formulated under two principles:

- (i) The '*nemo iudex in causa sua*' principle - no man may be a judge in his own cause or simply, the rule against bias, and
- (ii) The '*audi alteram partem*' principle - the right of each party to be heard or simply, the rule to 'hear the other side'.

An adjudication decision may be challenged on the ground that the adjudicator, in arriving at the decision, had breached the rules of natural justice. Some of the Acts expressly specify these obligations. Section 41 of the NZ Act for example provides:

*An adjudicator must*

- (a) *act independently, impartially, and in a timely manner; and*
- (b) *avoid incurring unnecessary expense; and*
- (c) ***comply with the principles of natural justice; and***
- (d) *disclose any conflict of interest to the parties to an adjudication; and*
- (e) *If paragraph (d) applies, resign from office unless those parties agree otherwise*

Similarly section 24 of the Malaysian Act provides:

*The adjudicator shall at the time of acceptance of appointment as an adjudicator make a declaration in writing that –*

- (a) *There is no conflict of interest in respect of his appointment*

- (b) *He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;*
- (c) ***He shall comply with the principles of natural justice; and***
- (d) *There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.*

This principle is very important. Apart from issues relating to jurisdictional challenges, most of the cases on adjudication referred to court deal with matters relating to alleged breach of natural justice. This is evidence in the following list of cases that have been retabulated and grouped under the thematic area of natural justice.

As often these cases deal with procedural mishaps it is suggested that a key to reducing the possibility the incidence of these types of cases is to enhance training of adjudicators. This is elaborated in chapter 5. Table 12 below is a selection of cases that deal with issues relating to allegations of breach of natural justice.

**Table 12: Cases on natural justice**

Case	Salient issue	Outcome	Comment
Paul Michael Pty Ltd v JA Westaway & Son [2011] NSWSC	Michael sues to recover damages from breach of contract for work done by Westway	Adjudication decided no damages arose and compensation being ordered would put Westaway out of business. Court ruling upheld this determination.	Natural justice
Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd [2011] NSWSC	Details of the original contract being changed throughout and some changes not being noted clearly, changing the final payment conditions.	Adjudicators determination that money was payable due to break of natural justice in changing the contract once work had begun. Judge dismissed appeal and ordered defendant to pay costs.	Natural Justice
Subsequent cases from above:			
Michael v State of New South Wales [2011] NSWSC			
Adrian Beard v Cargill Australia Ltd [2011] NSWSC			
Siteberg v Maples [2010] NSWSC	After a fallout following a long business relationship, money stopped getting paid for work done	Adjudication decided the plaintiff was owed the money and was not acting out of jealousy. Court upheld ruling	Natural justice
Subsequent cases from above:			
Agusta Industries v Niclad Constructions [2010] NSWSC			
Integral Energy Australia v Kinsley & Associates Pty Limited [2009] NSWSC	Plaintiff was owed money for work done which adjudicator awarded. Taken to court under jurisdiction adjudicator failed to provide reasons for determination.	Court ruled summons dismissed, money to be released to original defendant.	Natural justice
Subsequent cases from above:			
Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWca			
Hickson v Goodman Fielder Limited [2009] HCA			

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWSC	Payment claim not being certified for works claimed as done	Adjudicator decided claim was invalid, upheld in supreme court. Court of Appeal dismissed appeal therefore supreme court ruling held as valid.	Natural justice
Subsequent cases from above:			
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010)			
Transgrid v Siemens Ltd. [2004] NSWCA			
Fifty Property Investments Pty Ltd v O'Mara [2006] NSWSC			
Jemzone v Trytan [2002] NSWSC	Payment of a final payment claim being lessened due to work being incomplete.	Adjudication decided full amount was due and made order for it to be paid by a certain date. The full amount was not paid. Court set aside adjudicators determination.	Natural justice
Subsequent cases from above:			
De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd; Traffic Technologies Traffic Hire Pty Ltd v Build1 (Qld) Pty Ltd [2010] QSC			
Protectavale Pty Ltd v K2K Pty Ltd [2008] FCA 1248			
AMD formwork Pty Ltd v Yarraman Construction Group Pty Ltd. (2004) VC			
Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd (2007) Singapore HC			
Fernandes Constructions v Tahmoor Coal (trading as Centennial Coal) [2007] NSWSC			
Reiby Street v Winterton [2005] NSWSC	In relation to an adjudication over a payment claim, the claim was awarded but rebutted on ground the adjudicator was biased as had done a previous adjudication for the party.	The adjudicators determination was upheld as the information was known before a determination was made, therefore should have been to court immediately if they wished to rebut.	Natural Justice
Subsequent cases from above:			
Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 1) [2006] VSC			
Iste Probuild Pty Ltd v Blazevic Holdings Pty Ltd [2006] NSWSC			
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC			

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Case	Salient issue	Outcome	Comment
David Hurst Constructions Pty Ltd v Helen Durham [2008] NSWSC			
Shelford Engineering and Construction Pty Ltd -v- Rescom Constructions Pty Ltd [2005] VCC	Dispute over remains of a payment claim unpaid	Adjudicator decided whole claim was payable and half adjudicators fees to be paid. Was not acted upon, ruling upheld in court.	Natural Justice
Subsequent cases from above:			
Pty Ltd v Candetti Constructions Pty Ltd, [2010] SASC			
Hometeam Constructions Pty Ltd v McCauley [2005] NSWCA			
Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor [2009] VSC	Adjudication in relation to progress payment claim Whether adjudication determination void due to time requirements under the Act which may not have been followed in regards to the applications for the adjudication.	Adjudicators determination was upheld due to insufficient evidence to the contrary.	Natural Justice
Subsequent cases from above:			
Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [2010] VSC			
Grocon v Planit (No 2) [2009] VSC			
Thiess Pty Ltd & Anor v Zurich Specialties London Ltd & Anor [2009] NSWCA			
Floruit Holdings Pty Ltd & Anor v Sebastian Builders & Developers Pty Ltd [2009] NSWCA			
Grocon Constructors v Planit Cocciardi Joint Venture [2009] VSC	Issues over payment claim not being verified at all.	Adjudicator decided whole claim was payable. Second adjudication upheld so did court ruling	Natural Justice
Subsequent cases from above:			
Craig v The State of South Australia (1995) 184 CLR			
Chase Oyster Bar v Hamo Industries [2010] NSWCA			
Cardinal v Hanave (2010) NSWSC			
Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor [2009] VSC			

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Brady Constructions Pty Ltd v Everest Projects Developments [2009] VSC	Weather the previous determination over a payment was void due to lack of consideration.	Judge upheld ruling under conditions sufficient consideration had been granted.	Natural Justice
Subsequent cases from above:			
Gantley Pty Ltd v Phoenix International Group Pty (2012) VSC			
Phoenix International Group Pty v Resources Combined No 2 Pty Ltd (2009 VSCA)			
Ertech Pty v GFWA Contracting Pty Ltd (2010) WASC			
MCC Mining Pty Ltd v Theiss Pty Ltd (2010) WASAT			
Abel Point Marina (Whitsundays) P/L v Uher and Anor [2006] QSC	Payment of a payment claim	Adjudicator decided payment was due. Court ruled application for review be dismissed, full payment due, adjudicators determination upheld.	Natural justice
Subsequent cases from above:			
ACN 060 559 971 Pty Ltd v O'Brien & Anor [2007] QSC			
Hitachi Ltd v O'Donnell Griffin P/L & Ors; O'Donnell Griffin P/L v Hitachi Ltd & Ors [2008] QSC			
SMAV Pty Ltd v Westpac Australia Pty Ltd [2008] QSC			
Hyder Consulting Limited v Carillion Construction (UK) Limited [2011] EWHC 1810 (TCC) 13 July, 2011	Hyder Consulting Ltd sought to enforce a payment that was awarded to them by a Adjudicator against Carillion Ltd.	Carillion argued that there was a breach of natural justice on the part of the Adjudicator by failing to notify parties and calculating cost. The court ruled in favour of Hyder Consulting.	Natural Justice ( failing to notify parties and calculating cost)
Urang Commercial Limited v (1) Century Investments Limited (2) Eclipse Hotels (Luton) Limited [2011] EWHC 1561 (TCC) 17 June, 2011	Urang Commercial Ltd sought to enforce a payment that was awarded to them by a Adjudicator against Century Ltd and Eclipse Hotels.	Century Ltd and Eclipse Hotels argued that there was a breach of natural justice on the part of the Adjudicator. The court ruled in favour of Urang Commercial Ltd.	Natural Justice

Case	Salient issue	Outcome	Comment
SGL Carbon Fibres Limited v RBG Limited [2011] CSOH 62 31 March, 2011	SGL Carbon Fibres Ltd sought to enforce a payment that was awarded to them by a Adjudicator against RBG Ltd.	RGB Ltd argued that there was a breach of natural justice on the part of the Adjudicator. The court ruled in favour of SGL Carbon Fibres.	Natural Justice (Making factual determinations and failed to exhaust his jurisdiction)
Ellis Building Contractors Limited v Vincent Goldstein [2011] EWHC 269 (TCC) 18 February, 2011	Ellis Building Contractors Ltd sought to enforce a payment that was awarded to them by a Adjudicator against Vincent Goldstein.	Ellis Building Contractors Ltd argued that there was a breach of natural justice on the part of the Adjudicator. The court ruled in favour of Ellis Building Contractors Ltd.	Natural Justice
Lorraine Lee v Chartered Properties (Building) Limited [2010] EWHC 1540 (TCC) 25 June, 2010	Chartered Properties Ltd was seeking to enforce a decision made by adjudicator over accounts payable	Ms Lee argued that the adjudicator was not properly appointed and not within the requisite time period. The court favoured Ms Lee in both issues.	Breach of Natural Justice
AMEC Group Limited v Thames Water Utilities Limited [2010] EWHC 419 (TCC) 24 February, 2010	AMEC Group Ltd was seeking to enforce a decision made by adjudicator over accounts payable.	TWUL Ltd argued that there was a breach of natural justice on the part of the Adjudicator. The court ruled in favour of AMEC Group Ltd.	Natural Justice
Cynthia Jacques and Elise Jacques Grombach (trading as C&E Jacques Partnership) v Ensign Contractors Limited [2009] EWHC 3383 (TCC) 22 December, 2009	Claimant was seeking to enforce a decision made by adjudicator over accounts payable and Adjudicators fees.	Claimant argued that there was a breach of natural justice on the part of the Adjudicator. For the reason that he did not address the defendant issues and quality of evidence. The court ruled in favour of Claimant but with a 40% reduction.	Breach Natural Justice

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Case	Salient issue	Outcome	Comment
<p>Primus Build Ltd v Pompey Centre Ltd &amp; Anor [2009] EWHC 1487 (TCC) 16 June, 2009</p>	<p>the dispute first when to mediation and was not resolved. The case then when to adjudication were it award Primus Build Ltd. Primus Build Ltd was seeking to enforce a decision made by adjudicator over accounts payable.</p>	<p>Pompey Centre Ltd argued that there was a breach of natural justice on the part of the Adjudicator. For the reason that "possible consequences of invalid service" and defendant did not have the "opportunity to address". The court ruled against the adjudicator decision and in favour of Anor.</p>	<p>Breach of Natural Justice</p>
<p>Bovis Lend Lease Limited v The Trustees of the London Clinic [2009] EWHC 64 (TCC) 28 January, 2009</p>	<p>The claimant were claiming that there was a breach of natural justice by the adjudicator.</p>	<p>The Defendant's argued against the adjudicator's decision on the ground that the adjudicator misconstrued his jurisdiction by declining to consider a discrete ground of defence raised by the Defendant; The court ruled in favour of the defendant.</p>	<p>Breach of Natural Justice</p>
<p>Gipping Construction Limited v Eaves Limited [2008] EWHC 3134 (TCC) 11 December, 2008</p>	<p>The dispute arose from defects eaves on the bungalows, caused by Gipping Ltd. Claimant was seeking to enforce a decision made by adjudicator over accounts payable.</p>	<p>The Defendant argued that there was a breach of natural justice on the part of the Adjudicator. For the reason that he did not have an on-site inspection of the defects. The court upheld the adjudicator's decision.</p>	<p>Breach of Natural Justice</p>

Case	Salient issue	Outcome	Comment
Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd [2008] EWHC 3029 (TCC) 4 December, 2008	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and fees. Furthermore, they also were seeking to claim for interim certificate 29 payment with interest. The defendant were firstly seeking to stay the proceedings (in order for it to be subject to mediation). In addition, they were claiming for liquidated damages.	The Defendant's argued against the adjudicator determination on these grounds absence of a rejoinder, did not take into consideration the relevant points made in the secondary argument. The court upheld the adjudicator's determination.	Breach of Natural Justice
CJP Builders Limited v William Verry Limited [2008] EWHC 2025 (TCC) 15 August, 2008	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees.	The Defendant argued against the adjudicator determination on the grounds that he breach the rules of natural justice by decision to neglect the delayed response. The court did not uphold the educator's determination and ruled against CJP Builders Ltd.	Breach of Natural Justice
Cantillon Limited v Urvasco Limited [2008] EWHC 282 (TCC) 27 February, 2008	Cantillon Ltd were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees.	The Defendant argued against the adjudicator determination on the grounds that his "dealing with the prolongation costs relating to the 13 weeks" was a breach of natural justice. The court upheld the adjudicator's determination	
Cited within subsequent case			
Bouygues (UK) Ltd v Dahl- Jensen (UK) Ltd [2000] BLR 522)			

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Humes Building Contractors Limited v Charlotte Homes (Surrey) Limited TCC106/06 4 January, 2007	The dispute arose from the claimant being wrongfully terminated. Humes Building Contractors Ltd were seeking to enforce an adjudicator's determination about payment including VAT, interest and fees.		
Cited within subsequent case			
Balfour Beatty and Discaim Project Services Ltd [2000] BLR 402			
Humes Building Contractors Limited v Charlotte Homes (Surrey) Limited TCC106/06 4 January, 2007	The dispute arose from the claimant being wrongfully terminated. Humes Building Contractors Ltd were seeking to enforce an adjudicator's determination about payment including VAT, interest and fees.	The Defendant argued against the adjudicator determination on the grounds that he did not allow them to state their case and therefore was in breach of natural justice. The court upheld the adjudicator's determination.	Breach of Natural Justice
Cited within subsequent case			
Balfour Beatty and Discaim Project Services Ltd [2000] BLR 402			
Quietfield Limited -v- Vascroft Construction Limited [2006] EWCA Civ 1737 20 December, 2006	The claimant were seeking to enforce an adjudicator's determination about payment	The Defendant's argued against the adjudicator determination on these grounds absence of a rejoinder, did not take into consideration the relevant points made in the secondary argument. The court upheld the adjudicator's determination.	Breach of Natural Justice
Cited within subsequent case			
Macob Civil Engineering v Morrison Construction Ltd [1999] BLR 93			

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Case	Salient issue	Outcome	Comment
South West Contractors Limited -v- Birakos Enterprises Limited [2006] EWHC 2794 (TCC) 7 November, 2006	South West Contractors Ltd was seeking to enforce a determination under CPR Part 24 made by the second adjudicator.	The Defendant argued against the adjudicator determination on the ground of, failing to consider that ground of defence the adjudicator acted in breach of the rules of natural justice. The court upheld the adjudicator's determination.	Breach of Natural Justice
Cited within subsequent case			
Carillion Construction Ltd v Devonport Royal Dockyard (2005) 1 BLR 324 CA			
Redworth Construction Limited -v- Brookdale Healthcare Limited [2006] EWHC 1994 (TCC) 31 July, 2006	The claimant were seeking to enforce an adjudicator's determination about payment.	Brookdale Healthcare Ltd argued that there was a breach of natural justice on the part of the Adjudicator. For the reason that he did not address the defendant's issues and quality of evidence. The court did not uphold the adjudicator determination.	Breach of Natural Justice
Multiplex Constructions (UK) Limited -v- West India Quay Development Company (Eastern) Limited	Multiplex Constructions UK Ltd were seeking to enforce an adjudicator's determination about payment.	The defendant had no concrete evidence and were "simply scabbling around to find arguments". The court upheld the adjudicator's determination.	Breach of Natural Justice
Cited within subsequent case			
Carillion Construction v. Devenport Royal Dockyard Ltd [2006] BLR 15 at para 85.			
Ian Laywood & Gary Rees v Holmes Construction Wellington Ltd, October 2008, CA, CA83/2008	The adjudicator found that Willis Trust (Holmes Construction) was liable to pay Holmes \$1.3million which was not paid. Holmes applied to the DC for the adjudicators determination to be entered as judgment.	Laywood is appealing against the determination for breach of natural justice by failing to consider the ground advanced under s74(2) of the Act. CA found that no natural justice was breached any adjudicators decision was upheld	Breach of Natural Justice

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Auckland Waterproofing Ltd v TPS Consulting Ltd, November 2007, Auckland HC, CIV-2007-404-005890	TPS Consulting is appealing against the determination as the award only included the value of the payment claim and not the cost incurred by taking legal action to obtain the payment owing	The court set aside the determination and issued the appellant costs for both adjudication and litigation plus disbursements	Natural Justice
Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd, August 2011, CA, CA403/2011	Donovan then appealed the determination for arithmetical errors by the adjudicator	CA declined the application for leave to appeal and upheld the adjudicator's decision that Donovan is to pay Halls	Arithmetical errors by the adjudicator - Natural Justice
Horizon Investments Ltd v Parker Construction Management (NZ) Ltd & Barbara Hunt, March 2007, Wellington HC, CIV-2007-485-332	Challenges of determination are on lack of jurisdiction, breach of natural justice and irrationality. It further did not determine ultimate liability	Court acknowledged a breach of natural justice and the adjudicator's determination was set aside	Breach of natural Justice

**Table 13: Cases on Natural Justice Combined with Others**

Table 13 is a selection of cases issues relating to natural justice combined with other issues.

Case	Salient issue	Outcome	Comment
Macob Civil Engineering v Morrison Construction Limited [1999] EWHC Technology 254 12 February, 1999 TCC Dyson J	Morrison had not complied with original adjudicators determination as there had been a procedural error during the original adjudication, which Morrison contended amounted to a breach of Natural Justice.	The original determination was upheld and morrison was ordered to comply with the adjudicators order. Case outlines that determinations of adjudicator must be enforced while pending a final determination (through litigation, arbitration or agreement). The purpose of adjudication was to provide a speedy mechanism for resolving disputes, and any attempt to not comply with the adjudicators determination would undermine the process. A determination made in error is still a determination that must be enforced pending a final outcome.	Enforcement, natural justice, procedural error
Cited within subsequent case			
Outwing Construction Limited v H Randell and Son Limited [1999] EWHC Technology 248 15 March, 1999 TCC HHJ Humphrey LLoyd QC			
Allied London & Scottish Properties plc v Riverbrae Construction Limited[1999] ScotCS 224 12 July, 1999 Outer House, Court of Session Lord Kingarth			
Bouygues (UK) Limited v Dahl-Jensen (UK) Limited [1999] EWHC Technology 182 17 November, 1999 TCC Dyson J			
Barr Limited -v- Law Mining Limited [2001] ScotCS 152 15 June, 2001 Scotland, Court of Session, Inner House Lord Macfadyen			
Ritchie Brothers (Pwc) Ltd -v- David Philp (Commercials) Limited [2004] ScotCS 94 14 April, 2004 Outer House, Court of Session Opinion of Lord Eassie			
Galliford (UK) Limited t/a Galliford Northern v Markel Capital Limited 12 May, 2003 QBD Leeds District Registry HHJ Behrens			
Sherwood & Casson Limited -v- Mackenzie [1999] EWHC 274 (TCC) 30 November, 1999 TCC HHJ Thornton QC			

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<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Specialist Ceiling Services Northern Limited v ZVI Construction UK Limited 27 February, 2004 TCC Leeds HHJ SP Grenfell	One party sought enforcement of the adjudicators determination. The other claimed that the adjudication was biased as the adjudicator was submitted without prejudice material during the adjudication and did not resign.	In this case the original determination was enforced, as the adjudicator had brushed aside the without prejudice material. Therefore there was no breach of natural justice and the adjudication was valid.	Natural justice, bias
Pilon Limited v Breyer Group Plc [2010] EWHC 837 (TCC) 23 April, 2010	Pilon Ltd was seeking to enforce a decision made by adjudicator over accounts payable.	The court found that the Adjudicator had breach of natural justice and ruled in favour of Breyer Group.	Conduct of Adjudicator/ Breach of natural justice
Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd, August 2011, CA, CA403/2011	Donovan then appealed the determination for arithmetical errors by the adjudicator	CA decline the application for leave to appeal and upheld the adjudicators decision that Donovan is to pay Halls	Arithmetical errors by the adjudicator - Natural Justice

**Table 14: Cases on Enforcement**

Table 14 is a selection of cases issues relating to enforcement of adjudicators' decisions.

Case	Salient issue	Outcome	Comment
<b>Enforcement</b>			
Prime City Investments Pty Ltd v Paul Jones & Associates Pty Ltd anor [2013] NSWSC	Prime City Investments registers for an order setting aside debt owed to Paul Jones	Request for adjudication was denied by Paul Jones. Creditor's statutory demand set aside; proceedings otherwise dismissed.	Enforcement
AC Yule & Son Limited v Speedwell Roofing & Cladding Limited [2007] EWHC 1360 (TCC) 31 May, 2007	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees under CPR Part 24.	The Defendant argued against the adjudicator determination on the grounds that it was a nullity. The court upheld the adjudicator's determination.	Enforcement
Cited within subsequent case			
Balfour Beatty Construction Limited v. The London Borough of Lambeth [2002] EWHC 597 (TCC)			
C&B Scene (Concept Design) Ltd. v Isobars Ltd [2002] BLR 93			
Macob Civil Engineering Limited v. Morrison Construction Limited [1999] BLR 93			
A.R.T. Consultancy Limited v Navera Trading Limited [2007] EWHC 1375 (TCC) 31 May, 2007	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees.	The Defendant argued against the adjudicator determination on the grounds that there was no written contract and whether or not the parties agree to JCT Minor Works Form. The court stay the enforcement of the adjudicator's determination.	Enforcement
Enforcement and others			

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Case	Salient issue	Outcome	Comment
<p>A&amp;D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd 23 June, 1999 TCC HHJ Wilcox</p>	<p>A&amp;D was a subcontractor carrying out work for Pagehurst. A written subcontract was in place, but it did not include provision for adjudication. Dispute was referred to adjudication under the Act. Although Pagehurst contended adjudication was not appropriate, they did not immediately challenge adjudicators jurisdiction, and participated in the adjudication. They were later ordered to pay A&amp;D. They then challenged this determination.</p>	<p>The original determination was upheld, and Pagehurst was ordered to pay. This determination makes it clear that any objection to the adjudicator's jurisdiction must be made at the earliest possible stages, otherwise they will be assumed to have submitted to the process.</p>	<p>Enforcement, negligence, waiver by participation</p>
<p>Cited within subsequent case</p>			
<p>Project Consultancy Group v Trustees of the Gray Trust 16 July, 1999 TCC HJJ Dyson J</p>			
<p>Palmers Limited v ABB Power Construction Limited 6 August, 1999 TCC HHJ Thornton QC</p>	<p>ABB contracted Palmers to carry out scaffolding work. ABB contended Palmers was in breach, as they failed to supply enough personnel. There was a adjudication and it was subsequently referred to court as one party did not consider the contract to be a 'construction operation', and could not be referred to adjudication under the act.</p>	<p>The idea that the contract was not a 'construction operation' was dispelled, and it was established that it was a construction contract under the Act.</p>	<p>Enforcement, jurisdictional challenge</p>

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Case	Salient issue	Outcome	Comment
Harvey Shopfitters Limited -v- ADI Limited [2003] EWCA Civ 1757 13 November, 2003 Court of Appeal Dame Butler-Sloss, LJ Brooke, LJ Latham	The parties had a dispute if the contract between them was a lump sum, or on a quantum meruit basis. The adjudicator had found the parties had a lump sum contract. The contractor reject this and the matter was taken to court for enforcement.	The court found that the contract between the parties was on lump sum bases. Therefore the claim for quantum merit failed.	Adjudicator's determination, Enforcement
Willmott Dixon Housing Limited (Claimant) vs Newlon Housing Trust (Defendant) 17/01/2013	Willmott Dixon were entitled to be paid under the Contract for certain basement works. Willmott Dixon applied for payment for those works but no payment was made by Newlon.	Adjudicator held in his Decision that Newlon should pay Willmott Dixon the total sum. Court upheld in favour of Claimant.	Enforcement, negligence, waiver by participation
Cited within subsequent case			
PC Harrington Contractors Limited v Systech International Limited [2012] EWCA Civ 1371,			
Arcadis UK Limited (Claimant) VS May and Baker Limited (Defendant) 22/01/2013	Disputes arose between the parties in relation to entitlement to payment for both the Northern and Southern Boundary work done.	The court ruled that the Second Adjudication decision should be enforced and Arcadis is entitled to judgment for the full amount claimed	Enforcement, negligence, waiver by participation
Clark Electrical Ltd v JMD Developments (UK) Ltd [2012] EWHC 2627 28/08/2012	JMD had failed to make adequate and proper payments .The adjudicator awarded that JMD pay CEL the amount due	Whether the parties had made an ad hoc agreement to adjudicate. The Court found that there was no ad hoc agreement and over turned the adjudication decision.	Enforcement, negligence, waiver by participation

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Case	Salient issue	Outcome	Comment
<p>Beck Interiors Limited v UK Flooring Contractors Limited [2012] EWHC 1808 (TCC) 4/07/2012</p>	<p>The reason for the dispute arose from no carpet been lay down on the completion date by UKFCL. Adjudicator decided in favour of Beck and enforced that UKFCL pay the full amount due.</p>	<p>"The primary issue is whether the claim to liquidated damages either formed part of any crystallised dispute referable to adjudication at the time of the Notice of Adjudication or whether the substance and the timing of the 5 April letter relating to liquidated damages so altered the existing dispute relating to the Schedule of Incurred Costs that there was no dispute by the time that the Notice of Adjudication was served. Issues are therefore raised about how and when disputes can be crystallised". Court ordered UKFCL to pay half of Beck's costs.</p>	<p>Enforcement, negligence, waiver by participation</p>
<p>R and C Electrical Engineers Limited v Shaylor Construction [2012] EWHC 1254 (TCC) 15/05/2012</p>	<p>A dispute arose because of financial and other entitlements under the a sub-contract. R&amp;C seek to claim that time was at large, damages for delay and final account. Shaylor responded by making their own claim for damages as a result of delay and disagree with some of the claims for variations by R&amp;C.</p>	<p>Court up held that R&amp;C was entitled to claim that time was at large and final account be paid, but denied the claims for damages. The court denied both claims brought forward by Shaylor.</p>	<p>Enforcement, negligence, waiver by participation</p>
<p>Cited within subsequent case</p>			
<p>Panamena Europea Navigacion v Frederick Leyland [1947] AC 428.</p>			

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Case	Salient issue	Outcome	Comment
Specialist Insulation Limited against Pro-Duct (Fife) Limited [2012] ScotCS CSOH 10/05/2012	Specialist Insulation Ltd sought to enforce a payment that was awarded to them by a Adjudicator against over Pro-Duct Ltd.	Pro-Duct Ltd argued on the grounds that the adjudicator had no jurisdiction as there was no provision that stated dispute must be referred to adjudication. The court ruled in favour of the Defendant. "absolvitor"	Enforcement, negligence, waiver by participation
Working Environments Limited v Greencoat Construction Limited [2012] EWHC 1039 (TCC) 21/04/2012	"The dispute arose by the Respondent underpaying and deducting sums as set-off from interim payments"	Court awarded Working Environments Ltd to be paid the amount due to them.	Enforcement, negligence, waiver by participation
Berry Piling Systems Limited v Sheer Projects Limited [2012] EWHC 241 (TCC) 21/02/2012	Berry Piling Systems Ltd sought to enforce a payment that was awarded to them by a Adjudicator against Sheer Projects Ltd.	Sheer argued that there was a breach of natural justice on the part of the Adjudicator. Court awarded Berry's to be paid the amount due by Sheer.	Enforcement, negligence, waiver by participation
Workspace Management Limited v YJL London Limited [2009] EWHC 2017 (TCC) 28 July, 2009	HYL Ltd was seeking to enforce a decision made by arbitration over accounts payable.	The court upheld the Arbitration decision and was in favour of WSM Ltd.	Enforcement/Arbitration

**Table 15: Cases on Contracts in Writing**

Table 15 is a selection of cases issues relating to contracts in writing.

<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
Allen Wilson Shopfitters v Anthony Buckingham [2005] EWHC 1165 (TCC) 27 May, 2005 TCC HHJ Peter Coulson QC	One party refused to pay the adjudicators award on the grounds that there was no contract in writing, and the agreement was contrary to the Unfair Terms in the Consumer Contract Regulations 1999.	It was found there was a valid written contract between the parties, and the agreement did not fall foul of the Unfair Terms in Consumer Contract Regulations 1999. Therefore the adjudicators determination was void, as they had jurisdiction over the matter.	Contract in writing
Cain Electrical Limited v Richard Cox t/a Pennine Control Systems [2011] EWHC 2681 (TCC) 24 May, 2011	The dispute arose over whether there was an oral agreement in regards to ducts that had to be supplied. Adjudicator awarded Cain Electrical Ltd.	The court ruled that there was an oral agreement and in favour of Cain Electrical Ltd.	Contract in writing (Oral agreement)
Cited within subsequent case			
RJT Consulting Engineers Limited v DM Engineering [2002] 1 WLR 2344.			
Durham County Council v Jeremy Kendall (trading as HLB Architects) [2011] EWHC 780 31 March, 2011	Durham County Council Ltd sought to enforce that the contract was fully evidenced in writing and was awarded to them by a Adjudicator against HLB Architects.	The court upheld the Adjudicator decision and was in favour of Durham County Council.	Contract in writing
Irvin v Robertson [2010] EWHC 3723 21 December, 2010	Irvin was seeking to claim that the parties entered into a sub-contract specific in "section 104 of the Housing Grants, Construction and Regeneration Act 1996, and that such contract was in writing within section 107 of the Act".	The court found that there was no sub-contract and there was no agreement by the defendant for adjudication.	Contract in Writing

Case	Salient issue	Outcome	Comment
All Metal Roofing v Kamm Properties Limited [2010] EWHC 2670 (TCC) 7 October, 2010	The dispute arose over whether there was an oral agreement in regards to a purchase order.	The court ruled in favour of All Metal Roofing	Contract in Writing (Oral Agreement)
Nickleby FM Limited v Somerfield Stores Limited [2010] EWHC 1976 (TCC) 30 July, 2010	The dispute arose over whether there was an oral agreement in regards to management fee.	The court upheld the adjudicator's decision in favour of Nickleby FM Ltd.	Contract in Writing
Rok Building Limited v Bestwood Carpentry Limited [2010] EWHC 1409 (TCC) 17 June, 2010	Rok Building Ltd was seeking to claim that the parties entered into a construction contract specific in "the Housing Grants, Construction and Regeneration Act 1996".	The court decision in favour of Rok Building Ltd.	Contract in Writing
SG South Ltd v Swan Yard (Cirencester) Ltd [2010] EWHC 376 (TCC) 26 February, 2010	Swan Yard claiming that there was no construction contract between them and SG South Ltd.	The court ruled that there was a contract by the way of the Defendant accepting the Adjudication and were in favour of SG South.	Contract in Writing (was no actually contract).
Cited within subsequent case			
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358;			
T & T Fabrications Limited (A Firm) v Hubbard Architectural Metal Work Limited [2008] EWHC B7 (TCC) 21 April, 2008	The claimant were seeking to enforce an adjudicator's determination about payment including VAT, interest and adjudicator fees under Part 24 of the Housing Grants Construction and Regeneration Act 1996 (HGCRA)	The Defendant argued against the adjudicator determination on the grounds whether or not there is a adjudication scheme statutorily implied under the Housing Grant Act. The court ruled against the adjudicator's determination.	Contract in writing
Cited within subsequent case			
RJT Consulting Engineers Limited -v- DM Engineering (Northern Ireland) Limited [2002] 1 WLR 2344.			

**Table 16: Cases on Other Issues**

Table 16 is a selection of cases on other issues relating to adjudication challenges.

<b>Case</b>	<b>Salient issue</b>	<b>Outcome</b>	<b>Comment</b>
<b>Award</b>			
Nigro v EVS Group Pty Ltd [2012] NSWSC	Plaintiff owed money to defendant for services provided. Plaintiff tried to say contract was void, and claim money awarded to defendant should be paid back, with interest.	Adjudication ruled plaintiff owes Defendant \$44139.56, ruling upheld in court and court costs added to plaintiffs' costs.	Award
<b>Pre-Action Disclosure</b>			
PHD Modular Access Services Limited v Seele GmbH [2011] EWHC 2210 (TCC) 8/08/2011	PHD sought to claim on the grounds of "a declaration that the termination was wrongful, unlawful or otherwise unjustified".	The court ruled in favour of PHD Modular Access Services.	Pre-Action Disclosure
<b>Time limit</b>			
Jim Ennis Construction Limited v Premier Asphalt Limited [2009] EWHC 1906 (TCC) 24 July, 2009	The claimant is seeking to claim statute-barred under the Limitation Act 1980. (That the limitation period expired)	The court rejected the claim for statute-barred by limitation and ruled in favour of defendant.	Limitation Act 1980 (time limit)
<b>Non-payment</b>			
Ian Laywood & Gary Rees v Holmes Construction Wellington Ltd, November 2007, Auckland HC, CIV-2006-404-4152	Adjudicator determined that Respondent was liable to the appellant for 1.3million which the respondent were never paid. The appellant has taken the issue to court to get determination enforced by the courts.	The judge upheld the adjudicators decision and enforced the determination in award to the appellant	Non-payment. The determination was not carried through

Case	Salient issue	Outcome	Comment
Clearwater Construction Ltd Chow Group Ltd, December 2011, Wellington HC, CIV-2011-485-001320	Determination was awarded in favour of Clearwater however Chow Group did not pay and sought litigation to enforce the determination	the adjudicators determination was upheld and was to be payable immediately as a judgment debt.	Non-payment. The determination was not carried through
<b>Miscalculation of sums</b>			
BRC Ltd v Ratilal Patel, October 2011, Wellington HC, CIV-2011-485-1322	A miscalculation by the adjudicator incorrectly adding GST to an amount which was already GST inclusive. Patel appealed against the miscalculation and to set aside the bankruptcy notices issued against	The double charge of GST was deducted from the determination and the amounts due under the bankruptcy notices were amended	Miscalculation of sums (GST)
<b>Arrestment</b>			
Rentokil Ailsa Environmental Ltd v Eastend Civil Engineering Ltd 12 March, 1999 Lanark Sheriff Gilmour	Parties had entered into a number of contracts for engineering works. Rentokil discovered defects and refused to pay. Rentokil was ordered to pay by the adjudicator. Rentokil did not originally comply with determination. However, once enforcement proceedings were issued Rentokil paid the full amount and lodged arrestment notice (freeze money being subject to the dispute) over 13 other contracts. Eastend contended the arrestment was oppressive.	Held that protective measures could not be used. Allowing such preventive measures would act to "circumvent and negate" the adjudicators determination pending a final outcome.	Arrestment, Protective Measures
<b>Conflict of laws</b>			
Power Serve v Powerline's Clearing Group [2011] NSWSC	Provision of contract in order to enforce a progress claim payment	The adjudicator ruled the contract was valid and full claim was payable and this determination was upheld in court.	Conflict of Laws
Blazevic Holdings Pty Ltd v Warwick S Grave [2011] NSWSC	Plaintiff was owed money for work done at the defendant's dental surgery.	Adjudicator's determination was that money owed was to be paid. Judge ruled not enough evidence and for parties to seek alternative relief	Conflict of Laws

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Case	Salient issue	Outcome	Comment
Hawkins Construction v Mac's Industrial Pipework [2001] NSWSC	Payment of claims under an act which came in between a previous contract and a new one for works on the same project	The adjudication ruled that while the previous (first) contract was different the second contract must abide with the new act, therefore the payment claims were payable. Court upheld this determination.	Conflict of Laws
F K Gardner & Sons Pty Ltd v Dimin Pty Ltd [2006] QSC	Issue as to a payment claim that came in late and subsequently was not paid.	Adjudicator decided payment valid, court overruled saying adjudicators determination void and payment was only to be what was approved on the original schedule.	Conflict of laws/misinterpretation of a contract
Subsequent cases from above:			
Reed Constructions (Qld) Pty Ltd v Martinek Holdings Pty Ltd [2009] QSC			
Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd [2009] QSC			
Readiplumb Services Pty Ltd v MKM Constructions (Aust) Pty Ltd [2009]			
John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited & Ors [2012] QCA			
State of Qld v T & M Buckley P/L [2012] QSC			
Vertase F.L.I. Limited (Claimant) VS Squibb Group Limited (Defendant) 31/10/2012	The main issue was that Vertase claimed for loss and damages that they incurred by Squibb not completing their work on time.	The Adjudicator found that Vertase could not claimed for liquidated damages but instead agreed that Squibb was entitled to compensation. Vertase disputed again the decision. The court up held the Adjudicator decision	It was found to have being conflict of laws
Leander Construction Limited v Mullaley and Company Limited [2011] EWHC 3449 (TCC) 21/12/2011	The reason for the dispute arose from Mullalley's not paying Leander over two withholding notices. This was based on the grounds that Leander was obliged to carry out works to a set programme, but failed to do so.	Court ruled that Mulally is to paid the amount due to Leander. The reason for this was that Mulally couldn't demonstrate that there was "contract business efficacy".	Conflict of laws

Case	Salient issue	Outcome	Comment
(1) Walter Llewellyn & Sons Limited (2) Rok Building Limited v Excel Brickwork Limited [2010] EWHC 3415 (TCC) 22 December, 2010	"The Defendant applies for a stay of these proceedings under Section 9 of the Arbitration Act 1996 on the grounds that there is an arbitration agreement between the parties".	The court ruled against the stay of the proceedings and that Excel should pay costs to Walter Llewellyn & Sons/ Rok Building Limited.	Conflict of laws
<b>Injunction</b>			
Workplace Technologies Plc v E Squared Limited and Mr J L Riches 16 February, 2000 TCC HHJ David Wilcox Q.C.	Parties had a dispute that was referred to adjudication. The new Act came into force on 1 May 1998. Workplace argued that the contract was concluded before the Act came into force and the adjudicator therefore acted outside their jurisdiction.	Matter was referred to court to determine if the contract was made after 1 May 1998, and therefore the Housing Grants, Construction and Regeneration Act 1996 was in force.	Declaration, Injunction
R G Carter Limited v Edmund Nuttall Limited 21 June, 2000 TCC HHJ Thornton QC	Disputes arose between the parties as they disagreed about the contract documents that bound the parties. An adjudicator was appointed, however, one party objected as they claimed adjudication could not commence until the relevant contract documents had been established. Additionally, the contract included provision from mandatory mediation.	It was found that it was not necessary to have a contract in writing to undertake adjudication. The provision for mandatory mediation was held to be inconsistent with the statutory rights granted within the Act.	Injunction, Declaration, Named Adjudicator
Cited within subsequent case			
AWG Construction Services Ltd -v- Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC) 5 April, 2004 TCC HHJ Toulmin CMG QC			
R Durnell & Sons Limited v Kaduna Limited [2003] EWHC 517 (TCC) 19 March, 2003 TCC HHJ Seymour QC			
Hitec Power Protection BV v MCI Worldcom Limited 15 August, 2002 TCC HHJ Seymour QC			

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Case	Salient issue	Outcome	Comment
(1) Mentmore Towers Ltd (2) Good Start Ltd (3) Anglo Swiss Holdings Ltd v Packman Lucas Ltd [2010] EWHC 457 (TCC) 16 March, 2010	Packman Lucas Ltd seeks "for an injunction to restrain the Claimants from pursuing three adjudications"	The court ruled against Packman Lucas Ltd but at the same time ordered the Claimants to pay previous costs that were owing.	Injunction to restrain adjudication
Ericsson AB v EADS Defence and Security Systems Limited [2009] EWHC 2598 (TCC) 22 October, 2009	Claimant was seeking to prevent Defendant from terminating the agreement before the adjudication has run its course or until court.	Defendant was seeking to prevent Claimant from processing further in the adjudication and that any decision come from it would be invalid. The court ruled to rejected both applications for injunctions.	Injunction
Aceramais Holdings Limited v Hadleigh Partnerships Limited [2009] EWHC 1664 (TCC) 8 July, 2009	Aceramais Holding Ltd was seeking to claim that the parties did not enter into a construction contract specific in "section107 of the Housing Grants, Construction and Regeneration Act 1996" and therefore the adjudicator has no jurisdiction.	The adjudicator when ahead and decision that Aceramias owed HPL money. The court upheld the adjudicator's decision and stated that there was a contract.	Injunction
Workplace Technologies Plc v E Squared Limited and Mr J L Riches 16 February, 2000 TCC HHJ David Wilcox Q.C.	Parties had a dispute that was referred to adjudication. The new Act came into force on 1 May 1998. Workplace argued that the contract was concluded before the Act came into force and the adjudicator therefore acted outside their jurisdiction.	Matter was referred to court to determine if the contract was made after 1 May 1998, and therefore the Housing Grants, Construction and Regeneration Act 1996 was in force.	Declaration, Injunction

Case	Salient issue	Outcome	Comment
R G Carter Limited v Edmund Nuttall Limited 21 June, 2000 TCC HHJ Thornton QC	Disputes arose between the parties as they disagreed about the contract documents that bound the parties. An adjudicator was appointed, however, one party objected as they claimed adjudication could not commence until the relevant contract documents had been established. Additionally, the contract included provision from mandatory mediation.	It was found that it was not necessary to have a contract in writing to undertake adjudication. The provision for mandatory mediation was held to be inconsistent with the statutory rights granted within the Act.	Injunction, Declaration, Named Adjudicator
Cited within subsequent case			
AWG Construction Services Ltd -v- Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC) 5 April, 2004 TCC HHJ Toulmin CMG QC			
R Durnell & Sons Limited v Kaduna Limited [2003] EWHC 517 (TCC) 19 March, 2003 TCC HHJ Seymour QC			
Hitec Power Protection BV v MCI Worldcom Limited 15 August, 2002 TCC HHJ Seymour QC			
<b>Stay of execution</b>			
SG South Limited v (1) King's Head Cirencester LLP, (2) Corn Hall Arcade Limited [2009] EWHC 2645 (TCC) 29 October, 2009	The claimant was seeking to enforce two adjudicators' decisions in relation to a construction contract.	Defendant was seeking to impose a stay of execution on the bases that the claimant are nearly insolvent and that there were credible issues of fraud. The court ruled in favour of Claimant and rejected the stay of execution.	Credible issues of Fraud / Stay of execution
London Borough of Camden v Makers UK Limited [2009] EWHC 2944 (TCC) 9 October, 2009	Makers UK Ltd was seeking to enforce a decision made by adjudicator over accounts payable and Adjudicators fees.	Camden was seeking to claim insolvent against Markers UK Ltd. The court ruled in favour of Markers UK Ltd but also deem a stay of execution.	Stay of execution

<b>Challenge against adjudicator</b>			
Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC	Lack of payment for a progress claim	Plaintiff owes \$800,688.38 to defend and was awarded in adjudication. Court upheld the adjudicators determination	Challenge against adjudicator/conflict of laws
Machkevitch v Andrew Building Constructions [2012] NSWSC	Defendant went into liquidation owing the plaintiff a sum of money	In adjudication the defendant was ordered to pay the plaintiff, but not for the full amount claimed. Adjudicators determination overruled in court, original plaintiff to pay court fees.	Challenge against adjudicator/costs
Duynstee v Dickins [2011] NSWSC	Final payment for work done, disputed as to original vs final quality and scope of works.	First determination ruled payment was due and costs were to be covered by plaintiff. Ruling upheld in court and court costs added to amount to be paid.	Challenge against adjudicator/costs
<b>Costs</b>			
Bridgeway Construction Ltd v Tolent Construction Ltd 11 April, 2000 TCC, Liverpool District Registry HHJ Mackay	Parties subcontract included an amendment that the party who issues a notice to adjudicate is to bear all costs and expenses incurred by both parties, including legal and expert fees. Adjudicator awarded in favour of Bridgeway but did not grant them costs due to the amendment. Bridgeway resisted this, stating that amendment prevented the parties from pursuing remedies under the Act.	Judge found that the amendment was valid, and therefore Bridgeway were not entitled to costs.	Tolent Clause, Costs
Enterprise Managed Services Limited v Tony McFadden Utilities Limited [2010] EWHC 1506 (TCC) 23 June, 2010	The dispute arose of who is entitled to pay for costs arising out of the claim and hearing.	The court ruled that TMUL should pay 80% of litigation cost to Enterprise.	Costs

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Southern Electric v Mead Realisations [2009] EWHC 2947 (TCC) 4 November, 2009	Claimant was seeking to enforce a decision made by adjudicator over accounts payable and Adjudicators fees.	The court upheld the adjudicator decision.	Costs
Mr Martin Dawes v Treasure and Son Limited [2009] EWHC 1932 (TCC) 22 June, 2009	The claimant was seeking to appeal a decision giving against them by an arbitrator about how the arbitrator calculator the cost amount.	The court did not grant permission to appeal.	Costs
Able Construction (UK) Ltd v Forest Property Development Ltd [2009] EWHC 159 (TCC) 27 January, 2009	Able Construction UK Ltd was seeking to enforce a decision under CPR Part 24 made by a adjudicator.	The court ruled in favour of Able Construction UK Ltd. "Forest have no defence to this claim and have put Able to extensive costs in order to recover sums which Forest agreed to pay".	Costs
Gray & Sons Builders (Bedford) Limited -v- Essential Box Company Limited [2006] EWHC 2520 (TCC) 11 October, 2006	Gray & Sons Builders Ltd was seeking to enforce a determination made by the two adjudicators.	The defendant just did not want to pay up for their mistake. The court upheld the adjudicator's determination.	
Cited within subsequent case			
Carillion Construction Limited v Devonport Royal Dockyard Limited [2005] EWCA Civ 1358.			
Herschel Engineering Ltd v Breen Property Ltd [2000] BLR 272			
Management Solutions & Professional Consultants Limited -v- Bennett (Electrical) Services Limited [2006] EWHC 1720_2 (TCC) 23 August, 2006	The claimant were seeking to enforce an adjudicator's determination about payment.	The court upheld the adjudicator's determination	
Cited within subsequent case			
Johnsey Estates v Secretary of State for the Environment [2001] EWCA Civ 535			

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Systech International Limited v PC Harrington Contractors Limited [2011] EWHC 2722 (TCC) 27 October, 2011	The reason behind the dispute was about Adjudicator's fees being paid by PC harrington Contractor Ltd.	PC harrington Contractor Ltd disputed that the Adjudicator should not be paid on the grounds of him breaking the rules of natural justice. The court ruled in favour of Adjudicator (System International Ltd	Adjudicator's fees
Fenice Investments Inc v Jerram Falkus Construction Limited [2011] EWHC 1678 (TCC) 6 July, 2011	The reason behind the dispute was about Adjudicator's fees not being paid by Falkus Construction Ltd. Falkus Construction Ltd argued that the fees were excessive.	The court ruled in favour of Fenice Investments Inc.	Adjudicator's fees
<b>Insolvency</b>			
A Straume (UK) Limited v Bradlor Developments Ltd 7 April, 1999 Chancery Division HHJ Behrens	Parties entered into building works contract. Prior to the completion of the contract, Bradlor went into administration, and proceeded with adjudication against Straume for a large sum. At this point Straume issued its own notice to adjudicate. In this case the Insolvency Act 1986 specifically notes that when administration is in force, no 'other proceedings' could be brought against the company. Straume argued adjudication was not an 'other proceeding' as adjudication is equivalent to an expert valuer's determination.	It was held that the adjudication procedure was effectively a form of arbitration, and a leave of court was required when a party wants to adjudicate against another who is in administration.	Set-off, Administration, Insolvency
George Parke v The Fenton Gretton Partnership 2 August, 2000 High Court Justice, Chancery Division HHJ Boggis Q.C.	Parke contracted Fenton for building works. Fenton referred a dispute to adjudication, Parke did not pay the adjudicators decision. Fenton issued a statutory demand for payment. Parke referred the matter to court to have the statutory demand set aside.	Judge found that the adjudicators determination created a debt that could provide the basis for a statutory demand. However, in this case as the debtor had a counterclaim, the statutory demand was set off, on principle.	Statutory Demand, Insolvency

Straw Realisations (No 1) Ltd (formerly known as Haymills (Contractors) Ltd (in administration)) v Shaftsbury House (Developments) Ltd [2010] EWHC 2597 (TCC) 20 October, 2010	The claimant was seeking to enforce two adjudicator's decisions in favour of the Claimant.	The court ruled to stay the enforcement on both adjudication.	Insolvency
Gibraltar Residential Properties Ltd v Gibralcon 2004 SA [2010] EWHC 2595 (TCC) 19 October, 2010	The claimant was seeking to enforce two adjudicator's decisions in favour of the Claimant.	Gibralcon argued that the English court had no Jurisdiction because it was subject to insolvency proceedings in Spain. The court ruled that it has jurisdiction but can't seek to enforce its decision.	Insolvency
Integrated Building Services Engineering Consultants Limited trading as Operon v PIHL UK Limited [2010] CSOH 80 1 July, 2010	IBS Ltd was seeking to enforce three decision made by adjudicator over accounts payable	Pihl UK Ltd argued that it had the right to retention the balancing of accounts in bankruptcy. Court ruled that Defendant could invoke the principle of balancing accounts in bankruptcy and ruled against IBS's motion for summary decree.	Insolvency
Enterprise Managed Services Limited v Tony McFadden Utilities Limited [2009] EWHC 3222 (TCC) 2 December, 2009	The claimant was seeking to enforce 12 declarations against the defendant.	Utilities Ltd seeked to challenge the enforcement on the grounds that the Adjudicator had no jurisdiction. The court ruled in favour of Utilities Ltd.	Insolvency/Conduct of Adjudication
<b>Error of law</b>			
Tim Butler Contractors Limited v Merewood Homes Limited 12 April, 2000 TCC, Salford District Registry HHJ Gilliland QC	Butler made application for interim payment, Merewood paid. However, Merewood did not pay subsequent interim payments. Butler took matter to adjudication and won as the adjudicator found they were entitled to interim payments under the act. Merewood argued this was an error in law.	It was found this was not an error in law and the adjudicators determination was held.	Stage payments, Error of law

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O'Donnell Developments Limited v Build Ability Limited [2009] EWHC 3388 (TCC) 18 December, 2009	The claimant was seeking to enforce two adjudicator's decisions in favour of the Claimant.	Build Ability Ltd sought to challenge the enforcement on the grounds that the Adjudicator had no jurisdiction. The court ruled in favour of OOD Ltd.	Slip rule/ Jurisdiction "an adjudicator's decision will be enforced even if it contains an error of fact or law".
YCMS Limited (trading as Young Construction Management Services) v (1) Stephen Grabiner (2) Mariam Grabiner [2009] EWHC 127 (TCC) 31 January, 2009	YCMS Ltd was seeking to enforce a decision made by an adjudicator and the defendants were arguing against the decision.	The court upheld the adjudicator decision in favour of YCMS Ltd.	Slip rule/ Jurisdiction "an adjudicator's decision will be enforced even if it contains an error of fact or law".
Metalcraft Industries Ltd v Linda Christie, February 2007, Whangarei HC, CIV-2006-488-645	Determination was appealed on the grounds that there was an error made in finding that a letter was a valid payment schedule and that it did not meet the Acts requirements	The court found that there was an error and judgment was made against Ms Christie for payment, interest and court costs	Error which did not follow the governing law
Seating Systems Ltd v Kidson Construction Ltd, August 2012, Nelson HC, CIV-2012-442-000013	The issue is whether or not an email sent by Seating Systems is classed as a payment schedule under the act - adjudicator determined that it was. Determination disputed on grounds that determination did not follow the governing Act for what constitutes a valid payment schedule	No error was found to be made by the adjudicator and determination upheld. Costs and payment due within 15 days of judgment	Error which did not follow the governing law
George Developments Ltd v Canam Construction Ltd, April 2005, CA, CA244/04	Contract for demolition works. Disputed determination for that the award included payment for work completed outside of the period stated in the payment claim under dispute and therefore was an error of the Act	The judge found no error and upheld the adjudicator's decision and Canam was awarded payment, interest and cost	Error which did not follow the governing law

<p>Gary James Rees v Derek Sinclair Firth, December 2011, CA, CA328/2011</p>	<p>Rees failed to provide payment schedules and therefore required to pay Firth. The adjudicators determination was disputed on the grounds of non-jurisdictional errors by exercising incorrect principles and has taken irrelevant factored into account.</p>	<p>The court found no mis-jurisdiction and the adjudicators determination was upheld</p>	<p>Error in facts included - Jurisdiction</p>
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## Chapter 5: Quality of Adjudicators and their Training

### 5.1 Chapter summary

This chapter continues from the previous chapter in dealing with objective 5, which investigates the quality of adjudicators' decisions and reviews ways of enhancing the quality of adjudicators.

In line with the themes from earlier chapters of taking a holistic approach to resolving construction disputes, this chapter starts with a review of and contrasts the skills required of mediators, arbitrators, and adjudicators. The levels of skills required of the adjudicator is arguably at least as high as, if not higher than, what is required of arbitrators. This is particularly because of the added burden of the statutorily limited timeframe within which the adjudicator must work to. These skills may be grouped under three main areas:

- (i) knowledge of construction law, construction contracts, and construction practice,
- (ii) the law and practice of adjudication, and
- (iii) management, information and communication technology (ICT), ethics, and interpersonal skills including communication skills.

Current adjudication training standards in Malaysia and New Zealand are compared as evidenced by training provided by the adjudication nominating authorities in both jurisdictions. These are the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Building Disputes Tribunal (BDT), Adjudicators Association of New Zealand (AANZ), and the Royal Institution of Chartered Surveyors (RICS).

It is found that all of them provide training for potential adjudicators by covering the second area listed above – the area of law and practice of adjudication but not (i) or (iii). Only the KLRCA covers training and testing of areas (i) and (ii). The AANZ has very recently taken initiatives to recognise the more comprehensive training provided through the Massey University Master of Construction degree with a construction law specialisation that includes a paper on construction adjudication when admitting new

members. As adjudication is a rights based dispute resolution method, it is essential that all adjudicators know and are able to apply the principles of construction law, construction contracts, and have a good understanding of construction practice – in addition to the law and practice of adjudication. All the 4 Authorised Nominating Authorities (ANAs) in New Zealand have in the past taken the skills expected under (i) above to be provided by way of evidence of relevant experience from a CV. A certain minimum number of years' experience is expected, and in some cases additionally, membership of a professional body. The third area (iii) is left to adjudicators to develop skills in the area themselves. All the five training bodies adopt the traditional content-based approach based on a set of syllabus for training adjudicators.

This chapter then proposes:

- (i) a new task-based approach be taken to develop competency standards for adjudicators particularly when training in the very procedural area on the law and practice of adjudication. Task-based samples are developed to demonstrate how they may be further developed and incorporated in a full training programme for adjudicators. In addition, variances on how the base samples can be modified to cater for different jurisdictions are demonstrated.
- (ii) all training courses should additionally incorporate training or at least testing in the area of construction law, construction contracts, and construction practice.
- (iii) the appointment of the adjudicator should match the skills of the adjudicator to the type of dispute being referred to. It is proposed that legislation should expressly prohibit the pre-naming of adjudicators in construction contract in the manner such as that provided in the NZ Act. This is particularly important in adjudication given the demanding timeframe within which the adjudicator is to make decisions and the need to 'avoid incurring unnecessary expense' as stipulated in various Acts governing adjudication. Adjudicators who keep having to engage additional experts to help them in areas in which they have no expertise add to costs of the whole adjudication process.

These suggestions will help enhance the quality and competency of adjudicators. Costs will be contained and it may also prevent the repeated and similar challenges typically found in adjudication cases that end up in court.

## **5.2 Mediation, arbitration, and adjudication**

As was stated in the introduction, three notable structured methods of resolving disputes in the construction industry are mediation, arbitration, and adjudication. These are considered alternative dispute resolution methods - meaning alternative to litigation and are commonly referred to as 'ADR'. None of these methods are a panacea or a cure all on their own. While adjudication is now a common method of resolving construction disputes, all three, with the support of the court system - ideally a specialist construction court as proposed later, are necessary in order to have a complete and highly effective dispute resolution system for the construction industry.

## **5.3 Skills of dispute resolvers**

Many of the adjudicators who are practicing now come from a background with knowledge and skills in arbitration and possibly mediation or both. This is evident in several jurisdictions including New Zealand and Malaysia where during the early days of an Act being introduced, arbitrators on an existing panel of a dispute resolution body are empanelled as adjudicators with the only requirement being the attendance on a one or two-day training introducing the law and practice of adjudication.

In order to fully analyse the skills needed for an adjudicator and to establish if they may be different to the skills of the mediator or arbitrator, one has to start by reviewing the skills assumed to be possessed or expected of mediators and arbitrators.

The neutral person acting as the dispute resolver for each method requires qualifications, skills, and personal characteristics that may be different. The three types of dispute resolvers reviewed here are mediators, arbitrators, and adjudicators.

### **5.3.1 Skills of the mediator**

As mediation is not a rights based dispute resolution method, and the mediator does not make any binding decision, the mediator requires interpersonal skills and skills associated with the mediation **process** more than detailed legal or technical skills.

### **5.3.2 Skills of the arbitrator**

In contrast, arbitration is a rights-based dispute resolution method where the arbitrator makes a binding decision in an arbitrator's award. The arbitrator therefore requires legal and technical skills including skills in arbitration law and practice, construction law, and construction practice. The arbitrator also needs to be more decisive and directive rather than only rely on persuasive techniques or possess amicable characteristics associated with and required of the mediator.

## **5.4 Skills of the adjudicator**

Like arbitration, adjudication is also a rights-based dispute resolution method. But unlike arbitration, adjudicators are statutorily mandated to make rapid decisions - within timeframes typically stated in days. Despite this very short timeframe, the adjudicator is expected to make decisions based on the law, the contract, and the facts. In addition to legal and technical skills including skills in adjudication law and practice, construction law, construction contracts, and construction practice, a further set of skills are necessary for the adjudicator. The very short timeframe demands of the adjudicator the need to balance skills in technical areas, legal skills, interpersonal skills, and time management skills including more effective and efficient communication skills. An adjudicator's decision that is out of time – even by a day, may well be void – resulting in the adjudicator not being entitled to any fee. More importantly, the parties would have wasted their time, effort, and money during the now voided adjudication process they would have gone through.

Unlike the adjudication models based on the New South Wales model, which is focused on payment disputes, the adjudication models from the UK and New Zealand allow a wide range of types of disputes to be referred to adjudication. These include disputes relating to money, time, quality, and other breaches of contract including those relating to termination of the contract. The skills in the technical area of

construction law required of the adjudicator under these jurisdictions would therefore be even wider.

#### **5.4.1 Knowledge base and skills required of the dispute resolver**

More than 20 years ago, a letter on who would make the ideal project manager was published under the 'letters to the editor' column in a British construction magazine. The writer suggested that the ideal project manager ought to have a basic degree in architecture and a master's degree in construction management. The writer then went on to provide an explanation on his thoughts including the necessity for construction project managers to understand design and technology and the need to combine that with structured management education at post graduate level rather than relying on experience alone. The writer then signed off with his name followed by his qualifications - he had a degree in architecture and a master's degree in construction management! Even if the writer's views were justified or correct, there would be an inevitable perception by a reader (whether fairly or unfairly and whether correctly or incorrectly) that the writer was biased or might have some element of bias in forming his views.

This chapter provides broad based arguments from a general professional and academic viewpoint on users' expectations and attempts to avoid bias or the perception of bias by not focusing on the base background profession of the adjudicator.

The following now is a review of the knowledge base required for all 3 types of dispute resolvers – mediators, arbitrators, and adjudicators.

#### **5.4.2 Legal knowledge**

##### **5.4.2.1 Arbitration and adjudication**

As arbitration and adjudication are both rights-based the arbitrator and adjudicator must have a thorough understanding of the law relating to construction contracts and construction law. In addition they must have enough knowledge on practices in the construction industry.

The adjudicator is under a much more restricted timeframe to make a decision (typically days) compared to an arbitrator (which can run into months or even years).

But despite this, there is little need to distinguish the level of knowledge on construction contracts, construction law, or construction practice expected of the arbitrator and adjudicator.

Some may argue that attaining 'rough justice' would suffice in adjudication. But that cannot be justification for the adjudicator not knowing the legal principles of construction law or construction contracts. In any case, 'rough justice' is not what the parties to the dispute would expect – at least not if rough justice is equated to injustice or incorrect justice.

Whilst the adjudicator's decision may be made based on limited time and without the benefit of hearing full evidence relating to the project, the adjudicator's decision must still be based on all the facts and evidence presented, and the applicable laws. The adjudicator's decision must, at worst, be seen as attaining 'approximate' justice in the context of the limited time and shortened procedure adopted in adjudication. It cannot be equated to injustice or the process being seen to be any 'less fair' than an arbitrator's award.

Fast track arbitrations, chest-clock arbitrations (where the parties have time-limited opportunity to present and argue their cases) or the 100-day arbitration processes are not known or at least not acknowledged to be producing 'rough justice'. Even with these shortened procedures one would consider arbitration to be dispensing fine justice. Similarly, in court, judges sometimes instruct the disputing parties' lawyers to limit their hearing time or length of documents to be submitted. One would never associate this with the court producing 'rough justice' or injustice. Litigation is always assumed to be dispensing fair and fine justice. Likewise, one should not expect the time bound adjudication process to be generating injustice.

It should be noted that the adjudicator or arbitrator might answer the correct question incorrectly. If so, their decision or award would highly likely still be acceptable and unlikely to be set aside if challenged. The standards expected of **both** adjudicators and arbitrators should not be distinguished as far as applying principles of construction law are concerned. At the most, the courts would take into consideration the time available when applying the facts to a case. Thus for example in an adjudication involving many units of apartments, it may be possible that the measurement method adopted by an adjudicator for the quantity of tiling works

across many units may only be approximate. The applicable law, procedures, and rules of natural justice would be expected to be maintained as would in an arbitration.

As another example, both the adjudicator and arbitrator must know the law affecting the validity of their decisions when writing their decisions or awards. English judges have refused to enforce adjudicators' decisions on the grounds that the adjudicators had not fully considered **all** the issues and defences that were put forward. The adjudicator is expected to consider all issues and defence put forward – even if they are rejected **after due consideration**. What is essential is for due consideration to be given. Getting the 'correct' answer is secondary. Following the proper procedures is vital. See for example: *Quartzelec Limited v Honeywell Control Systems Limited*, *Thermal Energy Construction Limited v AE & E Lentjes UK Limited* and the judgment by Teare J on 6 April 2009 in the case of *Rupert Cordle (Town and Country) Limited v Vanessa Nicholson*.

At the same time adjudicators must be aware not to take the other extreme measure of considering issues beyond their jurisdiction or not giving parties sufficient opportunity to respond to a document - effectively failing to comply with the rules of natural justice. See Dobson J's judgment in *Spark It Up Ltd v Dimac Contractors Limited & James W Cornish* at the High Court of New Zealand on 12 June 2009.

#### **5.4.2.2 Mediation**

The outcome of a settlement following mediation need not be based on the parties' rights or what the law prescribes to be the rights and obligations of the parties. The outcome in mediation is interest based – not rights based. Parties may agree anything (that is lawful) irrespective of the facts of the case or the parties' legal rights and obligations.

In mediation there is far less law to deal with. There is the possibility that a mediator may either draft a settlement contract following agreement between the parties or may review a settlement contract made by the parties. In such instances, the mediator would be expected to have the ability to understand what constitutes a complete and legally binding contract. Settlement contracts are often done immediately upon the parties reaching settlement – not giving the mediator any time to seek legal advice drafting or reviewing the settlement contract. The settlement

contract is a legally binding contract that might subsequently be sued upon if either party reneges on it. But even so, they need not be complex.

If the mediator is to draft the settlement contract, this must be done such that it completely closes all the issues in dispute, it is an effective and legally binding contract and meets all the ingredients to form a legally binding contract, and is written in plain language such that the parties fully understand the contents so that they would be prepared to sign the contract. Such contracts should not contain redundant legalese such as whereas, hereinbefore, hereinafter, said, the said, and other convoluted drafting style such as provisos, multiple cross referencing, or introducing definitions creating legal fiction (eg using one word to include other completely unrelated word) or using conflicting conjunctions such as 'and/or'. A plain language settlement contract would mean the parties know what they are signing and have less chance of renegeing due to want of understanding or mis-understanding. For more on the importance of a plain language contract see the paper published by the Society of Construction Law in May 2008 (Ameer Ali, 2008b).

### **5.4.3 Technical knowledge**

#### **5.4.3.1 Mediation**

The mediator (particularly the purist facilitative mediator) ought to be an expert in the mediation **process** rather than an expert in a technical field or be a legal expert. The technical expertise, if possessed by a mediator, would however come in useful during 'reality testing'. This is when the mediator questions the extent to which solutions generated and proposed by the disputing parties are practically achievable.

#### **5.4.3.2 Arbitration and adjudication**

An arbitrator applies the facts and the law in making decisions and would have access to a complete hearing process to listen to the parties, witnesses, and even experts before deciding on the issues in dispute. The arbitrator will decide on the liability and establish the facts for example when quantifying an amount payable for variation works. The benefit of the arbitrator having sound technical knowledge would be savings in time and possibly costs, as experts may not be needed during the arbitration.

A similar process as in arbitration may apply in an adjudication, but there may or may not be a complete hearing or opportunity to robustly establish the full facts. In this respect adjudication differs from arbitration. There may not be enough time to gather expert reports to assist or educate a non-technical adjudicator. Whilst a non-technical adjudicator may get away with any decision (even a wrong one) as long as the due process is followed and the rules of natural justice are complied with, parties to the dispute are unlikely to be impressed with a technically wrong decision. It may thus be reasonable to argue that if the type of dispute raised were technical in nature, the adjudicator would be expected to have technical knowledge and not expect to rely on having external experts to help – at additional expense. Likewise, parties would not expect an adjudicator to keep obtaining legal advice or other expert advice at their expense if the adjudicator does not have sound knowledge of the law. They would expect the adjudicator to have a sound level of both technical **and** legal knowledge.

Empirical evidence from data gathered on adjudications in the United Kingdom and New Zealand shows most adjudications deal with disputes relating to technical areas rather than pure legal areas. For published data in the UK see the series of reports published by the Adjudication Reporting Centre at Glasgow Caledonian University. These findings show among the major technical issues raised in adjudications include issues relating to progress payment, valuation of variation work, disputes relating to claims for loss and expense, final accounts, retention sums, liquidated damages, delays and extensions of time, completion, quality of workmanship and materials, and arguable grounds for termination such as whether work was proceeding ‘regularly and diligently’. And among these issues, payment and other related financial issues consistently remain the primary area of dispute throughout the reporting period.

*‘ ... it is clear that the overwhelming subject in dispute is payment. The other issues, whilst important, pale into insignificance alongside the issue of payment.’*

Although payment issues were not noted to ‘*pale out other areas into insignificance*’ in subsequent reports, collectively, financial issues remained the most significant issues. Many of the adjudication legislations in the other jurisdictions such as New South Wales, Victoria, Queensland, Tasmania, South Australia, Singapore, and

Malaysia only permit payment related issues to be adjudicated. In these jurisdictions too, technical skills specifically in financial issues is a skill that would be of great importance.

#### **5.4.4 Management skills**

##### **5.4.4.1 Strict timeframes in adjudication**

There is one very important feature that distinguishes adjudication from mediation and arbitration. All provisions under the various Acts governing adjudication provide strict timeframes on the process which are imposed by legislation. Even taking into account the finer arguments of whether some of these timeframes are mandatory or 'merely' directory, the timeframes in the various Acts do not shift by more than a few days – at the most. The overall timeframe for adjudication is statutorily mandated in the Acts. Thus skills and tools dealing with managing time and the use of information communication and technology (ICT) for greater efficiency would be very useful, but care needs to be taken in order to comply with service of notice requirements. A failure to appreciate the strict time requirements can be fatal to the validity of an adjudicator's decision. A paramount skill expected of an adjudicator (and not necessarily of an arbitrator and mediator) is the ability to make decisions not only soundly but also *expediently*.

##### **5.4.4.2 The Pareto Principal**

The Pareto Principal is also known as the 80/20 rule or the law of the 'vital few'. Applying this to adjudication or other dispute resolution methods, it would mean that approximately 20% of the effort would produce 80% of results and about 20% of the issues raised would account for 80% of the disputes to be decided. For example, in a dispute on 100 items on variation work, it is likely that 20 of those items will account for 80% of the value of the variations. The 80 – 20 figures are not rigid but give a broad indication. In some instances it may be 70 – 30 or slightly different. Learning how to recognize the 20% of the vital key issues and then starting on these vital few first is the key to making the most effective use of the limited and strict time available in adjudication. The skill in recognizing what the 20% is comes from experience, but the understanding of the Pareto Principal can be learnt but rarely taught (or reminded of) during an adjudication or dispute resolution course. These and other management principals ought to be introduced in all training courses on adjudication.

#### 5.4.4.3 Parkinson's law

Parkinson's Law states that work expands so as to fill the time available for its completion. For example, if an adjudicator were given 28 days to make a decision, typically the adjudicator would fill up the time – often through to the tail end of the deadline for making the decision. And if no float had been allowed in the originally planned programme for the adjudication, and an unforeseen event occurs, either:

- (i) the decision will be delayed – resulting in the serious possibility of rendering the adjudicator's decision void; or
- (ii) the quality of the decision will be compromised – with no immediate recourse by the wronged party.

Parkinson's law is recognized and known to most construction professionals (although not necessarily by this name) and even applied within the construction industry models in planning and programming. An understanding of this and methods of coping with it are equally important in a strict time bound adjudication process.

#### 5.4.5 Use of information and communication technology (ICT)

##### 5.4.5.1 Uses during information search

In recent times, with the powerful features of search engines, information overload is considered a greater problem than getting information. Getting **relevant** information within a maze of information becomes critical particularly in a time-bound adjudication process.

In an adjudication, it is important to get **relevant** information speedily. There exist now basic programmes built into existing commonly used software to search for documents easily and quickly. Some search functions are faster than others. Searching through the 'spotlight' search function in Apple computers, for example, is near instantaneous. But searching by words alone may often still produce masses of documents not viewable as easily as a hard copy browse.

The Mac OS X operating system provides a browsable view of any document that is searched using words. One can 'flip' or browse (and read) the cover and even inner pages of any document in any format speedily (simulating a physical browse) – without even opening the application software such as MS Word or MS PowerPoint.

These are basic tools already built in the Mac operating system. There is not even a need to buy additional specialist software.

#### **5.4.5.2 Video or voice conferencing**

Whilst some jurisdictions governing adjudication adopt more of a 'documents-only' adjudication, others include the possibility of having meetings (see for example section 25(f) of the Malaysian Act) or conferences (see for example section 42(1)(f) of the NZ Act) or 'hearings' (see for example section 25(g) of the Malaysian Act). When such meetings are envisaged, it may be worth considering using video conferencing or voice conferencing. Skype (for Windows or Mac) now enables multi-party video or audio conferencing. Adobe Connect allows even more people to connect. The quality and reliability of connection on Adobe Connect remains fairly good even with up to 50 people. It is unlikely that there would be the need for more than a few parties in a typical construction adjudication. These modes of communication even allow the parties to share documents online.

All these communication modes are already available under current commonly available technology but under-used at present. These options should be explored further as time is truly '*of the essence*' in an adjudication. These ICT tools can help create greater efficiency and accuracy. The figures on conference calls usage in the Adjudication Reporting Centre's Report No 7, indicate about 5.8% (up to July 2004). It is estimated that overall, the current level of video or voice conference usage in adjudications is less than 10%.

#### **5.4.6 Interpersonal skills**

Good interpersonal skills are a vital pre-requisite in a mediator. As parties in a mediation may walk out of a mediation at any time, it is essential that the mediator has an extraordinarily high level of interpersonal skill. Such skills have the capacity to make or break a mediation.

The arbitrator on the other hand can rely on the powers provided under an Arbitration Act, the powers conferred in the arbitration agreement, and any applicable institutional rules. Many of these powers are wide ranging.

The adjudicator too has powers provided under the Acts, but given the tight timeframe under which the adjudicator works to, the adjudicator may need to

persuade the parties to agree on various issues including issues relating to timing. Issues relating to extending the statutorily imposed deadline require a high degree of interpersonal skills. If the adjudicator fails to get cooperation and an extension to the statutorily imposed deadline from the parties, the adjudicator may be faced with a very difficult dilemma. The adjudicator has to decide based on facts to be considered against the looming deadline whilst maintaining a balance between deciding correctly and complying with the rules of natural justice – not just being fair but also seen to be fair and giving the parties the chance to be heard and respond to additional documents that may be produced.

## **5.5 Tabulation of the dispute resolvers' skills**

Table 17 is a tabulation matching the features of the three processes with the skills expected of the three types of dispute resolvers – mediators, arbitrators and adjudicators.



**Table 17: Comparison of Skills Required of Mediators, Arbitrators, and Adjudicators**

<b>Description</b>	<b>Mediator</b>	<b>Arbitrator</b>	<b>Adjudicator</b>
Legal knowledge	Interest based, therefore knowledge of law required limited to specific issues such as mediator liability, document disclosure, and drafting of settlement contracts	Requires thorough knowledge of the law and practice of arbitration, construction law, construction contracts, and other related areas of law	Requires thorough knowledge of the law and practice of adjudication, construction law, construction contracts, and other related areas of law
Technical knowledge	It is not essential for the mediator to have a high degree of technical knowledge, although this may be useful when the mediator does 'reality testing' with the parties' options when they generate potential solutions.	The historical advantage of arbitration over litigation is that the arbitrator would understand technical issues more quickly than would a judge in court. But the refined process of arbitration (such as the use of expert witnesses and complete hearings) would still enable the non-technical arbitrator to dispense fine justice – albeit at a price and over a longer period.	The adjudicator would be expected to have a high degree of technical skills to be able to expediently make decisions on technical issues. Although the adjudicator could use experts, there is limited time given the statutorily short timeframe within which the decision is to be made. Financial skills would appear to be of significant importance given that the Acts governing adjudication either cover only payment disputes or the majority of disputes in the 'all-dispute' jurisdictions are on payment related issues.
Management skills	The mediator is supposed to be the master of the process of mediation whilst the parties retain control of the outcome. A mediator with good management skills would help dispose of the dispute expediently – keeping costs down. With good time and process management, the mediator may have read much about the case in advance and be able to help parties resolve disputes over hours or days at the most.	In the absence of rigid timeframes, the arbitrator would be expected to manage the entire process of arbitration to a reasonable time scale. What is reasonable would be dependent on the complexity of the case.	With the statutorily imposed short timeframe provided, the adjudicator would be expected to have very high time management skills. The short and quick timeframe also means the adjudicator may well be expected to operate with more efficient tools and to work to the nearest hour rather than days. Strict timeframes also mean cases should only be taken when there is a clear period in the adjudicator's schedule.

Description	Mediator	Arbitrator	Adjudicator
Interpersonal skills	As the parties can walk out of a mediation at any time, the mediator would be expected to have very high interpersonal skills to keep the parties around the table and continue negotiating until they reach an amicable resolution – ideally in the form of a settlement contract.	The arbitrator has powers provided under the Acts and those provided under the arbitration agreement or institutional rules. These wide ranging rules means the arbitrator can, if necessary, impose orders on the parties.	Although the adjudicator has powers drawn from the relevant Act, a high level of interpersonal skill will come in useful when dealing with situations where there are outstanding issues to be resolved towards the end of the statutory period which might require the adjudicator to have more time before a decision can properly be made. Consent from both parties would be needed. Good interpersonal skills will help secure this extension.

From the foregoing it is evident that the skills expected of the adjudicator are very high – particularly given the strict timeframes the adjudicator is expected work under. At the same time evidence from case law shows there are areas associated with adjudicators' decisions that could be improved to avoid adjudicators' decisions being challenged. If the quality of adjudicators and the quality of their decisions are to be raised, training programmes for adjudicators and standards need to be reviewed. Standards need to be enhanced to ensure adjudication continues to improve on its past success. Before the issue of standards and training is considered in this chapter, one other factor that can impact the quality of adjudicators' decisions is now considered – matching the nature of dispute to the selected adjudicator's skills or areas of expertise.

## 5.6 Matching adjudicators selected to the nature of dispute

### 5.6.1 Pre-naming adjudicators in construction contracts

One key practice area that adjudicator-nominating authorities should consider relates to the process of selecting the adjudicator when called upon to nominate an adjudicator. When the adjudicator nominating authorities nominate adjudicators they must nominate an appropriate person who has the relevant skills to **match the nature of dispute** to be resolved. It is at least partly for this reason and possibly also to prevent bias that in some jurisdictions eg the NZ Act prohibits the pre-naming of the adjudicator. Section 33(3) of the NZ Act on selection of adjudicator provides:

*33(3) An agreement about the choice of an adjudicator or a nominating body or an authorised nominating authority is **not binding** on the parties to the adjudication if that agreement was made (whether under the relevant construction contract or otherwise) **before the dispute between them arose.***  
[Emphasis added]

The obvious disadvantage of pre-naming is that the adjudicator named might not be suited to the actual dispute that may arise. For example, in a dispute related to payment and quantification of some detailed measured variation works, if the pre-named adjudicator only had a legal background, the adjudicator may well have to use an expert to help measure and quantify the variation work. This would be at additional expense – which could have been avoided if a more appropriate adjudicator that suited the nature of the dispute was selected. This can only happen if

the adjudicator is selected **after** a dispute has arisen – and not pre-named in the contract.

An earlier draft Act proposed before the Malaysian Act was passed in 2012 titled '*Preliminary Draft of the Proposed Construction Industry Payment And Adjudication Act*' dated 20 March 2007, had a similar prohibition – in fewer words. Section 15(4) read:

*15 (4) The parties to a construction contract can only agree to an adjudicator after a dispute has arisen.*

The final Malaysian Act that was passed in 2012 does not have this simple, clearly expressed provision. The manner in which adjudicators may be appointed under the Malaysian Act is specified, however there is no clear prohibition for the adjudicator to be pre-named in the contract. It would now be left open for parties to challenge the validity of such a provision in court in due course if an adjudicator was pre-named in a construction contract in Malaysia. This is an unfortunate omission in the Malaysian Act because the earlier draft clearly prohibited any pre-naming of the adjudicator. Pre-naming the adjudicator can lead to allegations of bias. The adjudicator might be seen to be favouring the 'friendly' party who drafted the contract and included the adjudicator's name as the pre-named adjudicator. The adjudicator may be seen to incline favourably towards the party that drafted the contract hoping to remain as a pre-named adjudicator in future projects.

### **5.6.2 Rotating adjudicators**

A related area of precaution that requires attention is the practice of rotating adjudicators when adjudication nominating authorities nominate adjudicators following a request for an adjudicator. Whilst rotating adjudicators may be seen as entirely transparent, the rotation should not be done strictly and automatically. There ought to be an element of check on both the suitability of the adjudicator to the nature of dispute and possibly a preliminary check on any potential conflicts of interest – although the conflict of interest check remains primarily the responsibility of the adjudicators. Some of the Acts would either disallow completely or would require the parties to agree notwithstanding the conflict before permitting such appointment.

Section 34(3) of the NZ Act for example provides conditionally:

*'A person–*

- (a) must disclose to the parties to the adjudication and, as the case may be, the nominating body or the authorised nominating authority, any conflict of interest (whether financial or otherwise): and*
- (b) **must not act as an adjudicator in that dispute unless all of the parties to the adjudication agree.*** [emphasis added]

Contrast that with the provision in section 24 of the Malaysian Act, which does not provide such flexibility.

*'24. Duties and obligations of the adjudicator*

*The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that–*

- (a) There is no conflict of interest in respect of his appointment;*
- (b) He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;*
- (c) He shall comply with the principles of natural justice; and*
- (d) There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.*

## **5.7 Current adjudicator's knowledge, competency standards, and testing methods**

### **5.7.1 Standards expected of adjudicators**

*'I would rather there was no adjudication in Malaysia than have incompetent adjudicators dispensing quick injustice.'*

This was the editor's extract and emphasis in large font of an article published in the RICS Construction Journal. (Ameer Ali, 2007c) There have been anecdotal laments within the construction industry on the deteriorating quality of arbitrators – in Malaysia, New Zealand, the UK, and elsewhere. Given that adjudicators are expected to dispense rights-based justice, and in a strict and short timeframe, the pre-requisites and training requirements for adjudicators would arguably be as high as or even higher than for other types of dispute resolvers.

Historically, most jurisdictions have focused the training on awareness of the Act and understanding basic procedures. What must be incorporated to produce well-rounded competent adjudicators is to ensure they have well-rounded knowledge and skills in all areas identified earlier that could be grouped as three broad areas:

- (i) knowledge of construction law, construction contracts, and construction practice,
- (ii) the law and practice of adjudication, and
- (iii) management, ICT, ethics, and interpersonal skills including communication skills.

During the early years when adjudication was first introduced in the UK, the various adjudicator nominating bodies in the UK, empanelled adjudicators without necessarily testing the potential adjudicators rigorously – certainly not in all three areas identified above. They were typically empanelled on the basis of having had experience or listed as arbitrators or possibly mediators coupled with attendance at an awareness training course on adjudication. Some appointing bodies required no testing at all.

Even in New Zealand, with the first group of adjudicators under the then only Authorised Nominating Authority (ANA), the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the requirement was generally attendance at a two-day course on adjudication. Coupled with a CV that presumably would indicate experience in the construction industry or construction dispute resolution, they were empanelled. A similar approach was taken with the first group of adjudicators in Malaysia. These are done to ensure there was an adequate pool of adjudicators when an Act is first introduced.

The scenario in New Zealand has changed since. The fourth and most recent ANA in New Zealand was the Royal Institution of Chartered Surveyors (RICS). In order for potential adjudicators to pass and attain the RICS Certificate in Adjudication before being considered for empanelment as an adjudicator, they had to undergo a two-day training course, do an open book exam, and submit an adjudicator's determination based on a real-life case study within 20 working days. This now sets a new higher-level benchmark for those wishing to qualify as an adjudicator in New Zealand.

However as is common elsewhere, the candidate's knowledge and skill levels in the areas of construction law, construction contracts, and construction practices are not vigorously tested. This is presumably assumed to be taken as a given based on the CVs the candidates submit, the required minimum relevant experience, and membership of an approved professional body. In order to subsequently be empanelled as an adjudicator on the RICS Dispute Resolution Adjudicator Panel, they had to additionally complete the RICS ethics test, which could be done online. Other pre-requisites were a minimum of 10 years of industry related experience, be a member of the RICS or an equivalent professional body, and the provision of 2 professional references.

It is suggested that in order to enhance the quality of adjudicators and their decisions and to help minimise the number of adjudication decisions that are reopened or reviewed, apart from the normal requirements of years of relevant experience, testing on ethics, and other requirements such as membership of professional bodies or references, consideration should be given to enhancing training courses and testing to include all three areas suggested earlier, namely:

- (i) knowledge of construction law, construction contracts, and construction practice,
- (ii) the law and practice of adjudication, and
- (iii) management, ICT, ethics, and interpersonal skills including communication skills.

### **5.7.2 Standards of adjudicators under the Malaysian Act**

The current Regulations under the Malaysian Act stipulates the following competency standard and criteria of the adjudicator:

*'Regulation 4:*

*The competency standard and criteria of an adjudicator are as follows:*

- (a) *the adjudicator has working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognized by the KLRCA;*

- (b) *the adjudicator is a holder of a Certificate in Adjudication from an institution recognized by the Minister;*
- (c) *the adjudicator is not an undischarged bankrupt; and*
- (d) *the adjudicator has not been convicted of any criminal offence within or outside Malaysia.'*

Compare this with the earlier recommendations made by the Working Group on Payment and Adjudication (WG 10) that made the recommendations for the Malaysian Act as a minimum standard:

- (i) *a minimum of 10 years of experience*
- (ii) *good knowledge in construction law and construction contracts*
- (iii) *good knowledge on practice and procedure of adjudication, acquired over a minimum of a five-day course including training in writing decisions*
- (iv) *a high level of ethics*
- (v) *high level management and communication skills*
- (vi) *pass written and oral tests on practice and procedures relating to adjudication, ethics, management, communication, and areas relating to construction law and contracts.*

It should be noted that (ii) and (iii) above has been incorporated within Regulation 4(b). The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is named as the adjudication authority under Part V of the Malaysian Act. It is the default appointing and administrative authority in Malaysia. The syllabus taught and tested for the Certificate in Adjudication currently offered by the KLRCA includes recommendations (ii) and (iii).

Several aspects of the current KLRCA Certificate in Adjudication training course are fairly comprehensive when compared with training requirements in many other jurisdictions. A key observation is that the training (and testing) covers both the law and practice of adjudication and the areas of construction law, construction contracts and construction practice. Among the requirements listed are:

- (i) *Attendance at a five-day training course that covers a syllabus comprising five units as follows. A brief description of each unit follows the title. This shows the extent of coverage of each area.*

*Unit 1: The application of statutory adjudication to the construction industry. Enables the participants to acquire knowledge and develop a better understanding of adjudication and effect of CIPAA on the construction industry.*

*Unit 2: Practice and procedure of adjudication under CIPAA. Enables the participants to acquire a deeper knowledge of the important provisions of CIPAA and understand the necessary requirements of the adjudication process.*

*Unit 3: Fundamentals of construction law. Introduces the participants to the Malaysian Legal System and provides the basic knowledge of construction law, which includes basic concepts of the law of Contract, Tort and Evidence.*

*Unit 4: The construction process. Introduces the participants to the basic knowledge of the construction process in particular procurement, processes and contractual arrangements.*

*Unit 5: Writing adjudication decisions. Enables the participants to acquire the skills necessary to write an adjudication decision in accordance with the provisions in CIPAA.*

- (ii) *The sitting and passing of an examination comprising two parts:*

- *A range of multiple choice or open ended questions on the entire syllabus outlined above, and*
- *The writing of an adjudicator's decision to be written within a two-hour time limit based on a case scenario provided.*

The passing of both these components entitle the candidate to the KLRCA Certificate in Adjudication qualification, which is pre-requisite (b) under Regulation 4 outlined above. This combined with a minimum working experience of at least 7 years in the

construction industry in Malaysia or other fields recognized by the KLRCA and the other requirements under Regulation 4 entitles the adjudicator to be empanelled on the KLRCA panel of adjudicators and act as adjudicator.

The KLRCA has chosen to not just rely on a CV and evidence of past experience to test a candidate's knowledge level in the areas of construction law, construction contracts and construction practice – even if they had other qualifications in these areas. The only exemptions were for a number of arbitrators who were already on the KLRCA panel of arbitrators when the Malaysian Act was introduced.

WG 10 had also made recommendations to maintain standards beyond accreditation including mandatory continuing professional development and the submission of 'de-identified' or 'sanitised' adjudicator's decisions with the confidential details removed. Adjudicators were to then be mandated to cross learn from numerous adjudication decisions written by a number of adjudicators. Concerns on confidentiality may be overcome by submitting 'de-identified' or 'sanitised' decisions. There is precedence on this from several jurisdictions from Australia and Singapore who publish the adjudicators' decisions on their websites. KLRCA mandates all adjudicators to submit their decisions to them. The KLRCA Adjudication Rules & Procedure (Revised as at 14<sup>th</sup> May 2014) are made under provisions of sections 32 and 33 of the Malaysian Act. Part A, Rule 9, sub-rule 7 dictates:

- 7     *Subject to Rule 9(8), any fees and expenses due to the adjudicator as deposited with the Director of the KLRCA shall –*
- '(a)   *be paid to the adjudicator:*
- (i)   *upon the Director of the KLRCA having received a copy of the notice of withdrawal of the adjudication claim served under Section 17(1) of the Act and the adjudicator's order for the costs payable pursuant to sub-rule 9(5A) above; or*
- (ii)   *upon the **Director of the KLRCA having received a copy of the adjudication decision** within the time specified under Section 12(2) of the Act and a written confirmation from the adjudicator that the requirements under Section 12(2) of the Act have been complied with;'*

The KLRCA Standard Terms of Appointment provides the same. Item 12, Schedule II, directs:

*'12 The adjudicator shall determine the matter and serve his decision to the parties within the time period stipulated in Section 12(2) of the Act. The decision shall be made in writing and shall, subject to the settlement of all outstanding fees and expenses, be **served on the parties and the Director of the KLRCA.**'*

As at end of March 2015, however there has not been any publication of adjudicators' decisions in any publicly available format.

As suggested earlier, an adjudicator must have knowledge and show evidence of competence in least three aspects:

- (i) knowledge of construction law, construction contracts, and construction practice,
- (ii) the law and practice of adjudication, and
- (iii) management, ICT, ethics, and interpersonal skills including communication skills.

Encouragingly, the KLRCA Certificate in Adjudication training content and the two assessment components – a test and written adjudicator's decision - cover both (i) and (ii). The current training does not however cover (iii), which would be left to adjudicators to develop such skills themselves. Overall the KLRCA Certificate in Adjudication could be considered to be the current 'gold standard' for training adjudicators in Malaysia.

### **5.7.3 Standards of adjudicators in New Zealand**

The current equivalent standard for adjudicators in New Zealand are the courses and assessments run or recognised by two of the Authorised Nominating Authorities (ANAs) – the Royal Institution of Chartered Surveyors (RICS) and the Adjudicators Association of New Zealand (AANZ). The other two earlier ANAs in New Zealand – Arbitrators' And Mediators' Institute of New Zealand (AMINZ) and Building Disputes Tribunal (BDT) had historically recognised past experience and qualifications in

arbitration coupled with some basic training or attendance at a one or two-day course on adjudication to be empanelled as adjudicators.

### **5.7.3.1 The Royal Institution of Chartered Surveyors (RICS) Dispute Resolution Services**

As outlined earlier, the RICS conduct a two-day course on adjudication combined with a multiple response test to be done over 2 hours followed by writing up a determination within 20 working days based on an actual case which has a de-identified set of documents. The pass mark percentage of 75% is considered high enough to maintain a high level of competency expected of potential adjudicators. Not surprisingly only 6 out of the first 15 candidates who undertook the first training course and test in October 2014 passed. Candidates who pass are awarded the RICS Certificate in Adjudication.

Candidates would also have to show evidence of relevant experience and pass an online ethics test before they are empanelled with the RICS Dispute Resolution Services as an adjudicator. The RICS training or testing only covers the law and practice of adjudication and does not specifically cover knowledge of construction law, construction contracts, and construction practice, or management, ICT, and interpersonal skills. The associated requirement to have a minimum number of 10 years of relevant experience, the submission of a CV and membership of a relevant professional body would presumably be taken to satisfy the requirements for knowledge and competence in construction law, construction contracts, and construction practice. As the training does not cover the soft skills associated with management, ICT or interpersonal skills, this would be left to adjudicators to develop such skills themselves.

### **5.7.3.2 Adjudicators Association of New Zealand (AANZ)**

The other ANA – the AANZ had much earlier recognised a fairly comprehensive five-day BRANZ conducted training course in adjudication. Now the AANZ recognises the only taught University paper or module on construction adjudication offered in New Zealand. The paper or module is offered as part of a Massey University Master of Construction degree programme with a Construction Law specialisation which includes also two construction law papers or modules referred to as paper nos 218.763 Construction Law 1 and 218.764 Construction Law 2, a paper in

Construction Project Management (paper no 218.730), a research project (paper no 218.810), and an elective which is strongly recommended to be Construction Commercial Management 2 (paper no 218.781).

The contents of the Construction Adjudication paper (referred to as paper 218.765) show the paper description and learning outcomes as follows:

Paper description:

*‘Statutory adjudication in Commonwealth jurisdictions with a focus on the law and practice of adjudication under the New Zealand Contracts Act 2002 and subsequent amendments including the adjudicator’s appointment, jurisdiction, duties, powers and adjudicator’s determination.’*

The learning outcome statement reads:

*‘Students who successfully complete this paper should be able to:*

*Summarise the benefits of resolving construction disputes through arbitration, mediation, and statutory adjudication.*

*Summarise the differences in adjudication concepts introduced in various commonwealth jurisdictions.*

*Summarise the law and practice of adjudication under the New Zealand Construction Contracts Act 2002 and subsequent amendments.*

*Implement the procedures relating to payment claims and responses under the New Zealand Construction Contracts Act 2002 and subsequent amendments.*

*Implement the procedures relating to statutory adjudication under the New Zealand Construction Contracts Act 2002 and subsequent amendments.*

*Present, critique, and defend issues relating to all the above topics.’*

The paper details show it is assessed based on 2 assignments worth 20% each and a 3-hour examination worth 60% with an overall minimum pass mark of 50%.

The papers are all 15-credit papers classed at level 700 with the research project worth 45 credits at level 800. These are all papers at postgraduate level. This is a

standard that would stand alongside any other postgraduate level academic paper but with an added practical component.

As a whole, this qualification covers the various aspects of knowledge and competence expected under (i) knowledge of construction law, construction contracts, and construction practice and (ii) the law and practice of adjudication. There is no clear specific evidence indicating that the third component - management, ICT, ethics, and interpersonal skills are covered by the degree. Communication skills are presumably incorporated within the course as provided under learning outcome 6 for the construction adjudication paper which reads: '*Present, critique, and defend issues relating to all the above topics.*' If any of these were not covered, then this would be left to the adjudicators to develop such skills themselves.

This AANZ / Massey University qualification and the RICS Certificate in Adjudication would be classed as the current 'gold standards' for training adjudicators in New Zealand.

## **5.8 A new approach - developing adjudicator training based on task-oriented competency standards**

It is evident that the skills and expertise required of the adjudicator is demanding. There is also enough evidence as shown earlier that there have been a few thousand court cases around the world relating to adjudication. Although in the context as a proportion of total adjudications that have been conducted which runs into tens of thousands, this represents a relatively small percentage, much could be learnt from this wealth of experience including what adjudicators should and should not do to avoid more cases on adjudication. Many of the challenges in court are as a result of procedural 'mishaps' – typically breaches of the rules of natural justice. The adjudication process is very procedural. Coupled with the statutorily mandated strict and short timeframes, the chances of breaching some of the procedures become higher.

### **5.8.1 The traditional content based approach**

In order to improve on this it is suggested that training of adjudicators, *particularly aspects relating to the law and practice of adjudication (which are very*

**procedural)** be enhanced beyond the traditional training methods. All the adjudicator training courses elaborated on earlier are based on traditional methods, which are derived from a content base. Typical standards expected of other professions too are content based. See for example the most recent review of the National Competency Standard In Architecture (NCSA) in 2014 undertaken by the Architects Accreditation Council of Australia. The New Zealand Registered Architects Board and the New Zealand Institute of Architects also treat this as a very important document because it forms the basis of competencies requires of architects in New Zealand and because of the Trans-Tasman Mutual Recognition Agreement there is reciprocal registration between Australia and New Zealand. New Zealand schools of architecture also use the NCSA as a basis for their curriculum development.

### **5.8.2 Development of a task-based competency model**

What is now proposed is the development of a task based competency model to establish standards for adjudicators – specifically in setting the standards and testing the competency area relating to the very procedural aspects on the law and practice of adjudication. The other two aspects of training expected of adjudicators namely skills in construction law, construction contracts and construction practice, and skill areas relating to management, ICT, and interpersonal skills can also be developed using this same approach. These areas are not as procedurally inclined and may be associated more with skill-sets rather than competency – which are about ability to do something. These areas could at least for now continue to be developed using the traditional content-based training model. Further research could be done to establish the benefits of adopting the task-based model proposed now for these other areas of skills sets.

The most efficient way to start developing an adjudicator competency standard would be to review existing task based competency standard models for other occupations and modify them to develop a new standard for adjudicators. The model used in this research is derived from the National Competency Standard (NCS) for Project Managers published by the Construction Industry Development Board Malaysia.

These task-based NCSs can be used as the basis to design complete training programmes and in the development of complete training modules for adjudicators – focused on the law and practice of adjudication areas. A couple of illustrative tasks

are developed to demonstrate this possibility in the context of the Malaysian Act. This model can be replicated and modified further to make it suitable for other legislations that have introduced adjudication as a dispute resolution method. This is demonstrated using the selected base tasks with highlights of what may need to be modified to suit the NZ Act. It can potentially also be modified and developed for other procedurally heavy dispute resolution methods such as arbitration and mediation, but that is beyond the scope of the current research.

The NCS defines a set of competencies expected of an occupation. It focuses on the competencies, knowledge and ability required of the occupation and outlines the duties, tasks and steps to be performed. It is practical in its approach.

The NCS comprises two components: (i) Job profile chart and (ii) Task profile.

### **5.8.3 Development of the job profile for the adjudicator**

The job profile chart consists of duties and associated with the duties a series of tasks. The duties and tasks are presented in a graphical form and comprise statements that are identified typically through a job analysis brainstorming session. These statements deal with **what** the adjudicator does.

Table 18 is an example of a job profile chart for a construction project manager published by the Construction Industry Development Board Malaysia. This job profile chart is used as a sample base to develop a job profile chart for an adjudicator.

Table 18: Job profile chart for a construction project manager

<b>ORGANISE PROJECT INITIATION</b>	Organise Project Charter/Memorandum	Prepare Project Brief and Project Strategy	Conduct Project Feasibility Study	Establish Project Organisational Strategy	Formulate Procurement Strategy	Complete Project Initiation Document		
<b>01</b>	01.01	01.02	01.03	01.04	01.05	01.06		
<b>DEVELOP PROJECT PLAN</b>	Establish Project Organisation Structure	Establish Project Monitoring and Control System	Prepare Risk Management Plan	Establish Project Budget	Procure Project Funding	Establish Information And Communication System	Administer Master Schedule	Document Master Execution Plan
<b>02</b>	02.01	02.02	02.03	02.04	02.05	02.06	02.07	02.08
<b>MANAGE HUMAN RESOURCE FUNCTION</b>	Plan Human Resource Requirement	Organise Project Team	Administer Interpersonal Conflict	Appraise Project Team Member	Reassign Project Team Member			
<b>03</b>	03.01	03.02	03.03	03.04	03.05			
<b>MANAGE PROJECT QUALITY, HEALTH, SAFETY AND ENVIRONMENT</b>	Establish Quality Plan	Establish Health, Safety and Environmental Plan	Implement Health, Safety and Environmental Plan	Monitor Health, Safety and Environmental Plan	Review Health, Safety and Environmental Plan			
<b>04</b>	04.01	04.02	04.03	04.04	04.05			
<b>MANAGE DESIGN DEVELOPMENT &amp; CONTRACT ADMINISTRATION</b>	Administer Design Process	Administer Authority Liaison	Monitor Tender Document	Administer Tendering Process	Establish Dispute Resolution Mechanism			
<b>05</b>	05.01	05.02	05.03	05.04	05.05			
<b>MANAGE PROJECT MONITORING AND CONTROLLING SYSTEM</b>	Monitor Work Progress	Monitor Project Cost	Administer Progress Reporting System	Administer Project Changes	Administer Dispute Resolution	Monitor Project Quality		
<b>06</b>	06.01	06.02	06.03	06.04	06.05	06.06		
<b>ADMINISTER PROJECT CLOSE-OUT</b>	Organise Handing Over Activities	Perform Contract Close-Out	Perform Post-Contract Evaluation	Perform Post-Mortem Review				
<b>07</b>	07.01	07.02	07.03	07.04				



Associated with the job profile chart are the task profiles. The task profile is a detailed presentation of each task shown in the job profile chart. The task profile would breakdown each of the tasks and would show **how** the tasks are done. It comprises:

- (i) Steps which outlines the sequence of how the task is done
- (ii) Enabling requirements or the knowledge and ability required to carry out the task.
- (iii) Materials which are needed to accomplish the task.
- (iv) Attitude or the appropriate behaviour and precautions required.
- (v) Performance standards – which is a set of performance criteria that must be carried out by using specific tools or materials to perform the task.

In developing an NCS, the occupation needs to be defined. In developing the NCS for the adjudicator, the tasks the adjudicator is expected to do have to be identified. In its simplest form, here is how an adjudicator may be defined for the purposes of developing an NCS for adjudicators:

An adjudicator is an independent person who is appointed to resolve disputes between parties to a construction contract. Once the occupation is defined, the job profile is identified and task profiles developed. They are linked together and described below followed by a graphical presentation.

The adjudicator would:

- (i) Organise the pre-adjudication activities and do the following: carry out conflict assessment, perform preliminary jurisdiction checks, administer the willingness to act notice, prepare the preliminary meeting checklist, and conduct the preliminary meeting.
- (ii) Organise the adjudicator's appointment by obtaining the security deposit, confirming the adjudication appointment, and managing the payment of fees.
- (iii) Organise the adjudication proceeding by preparing the adjudication timetable, administering the claimant's and respondent's documents,

administering any cross claim documents, and reviewing the adjudication timetable.

- (iv) Carry out dispute assessment by identifying the adjudication questions, analysing facts and issues, and conducting the adjudication hearing.
- (v) Draft the adjudication decision by carrying out an evaluation of the dispute, prepare written decision, communicate the adjudication decision, and perform post-decision management.

#### **5.8.4 Modifying the job profile for the adjudicator to suit other jurisdictions**

As stated earlier, the job profile chart, which comprises duties and tasks, are presented in a graphical form. Based on a preliminary analysis of what an adjudicator might do as found in an Act providing for adjudication such as the Malaysian Construction Industry Payment and Adjudication Act 2012 or the New Zealand Construction Contracts Act 2002 or the New Zealand Construction Contracts Amendment Act 2015 here is how a job profile chart for the adjudicator might start to take shape. The job profile chart (see Table 19) deals with **what** the adjudicator does after which the task profiles will be developed which deal with **how** the adjudicator executes each task.

Table 19: Job profile chart for adjudicator

DUTY		TASK									
<b>Pre-adjudicator appointment</b>	Carry out conflict assessment	Perform preliminary jurisdiction enquiry	Administer willingness notice	Organise preliminary meeting	Prepare preliminary meeting checklist	Conduct preliminary meeting					
	01	01.01	01.02	01.03	01.04	01.05	01.06				
<b>Adjudicator appointment</b>	Secure security deposit	Confirm adjudication appointment	Manage settlement fee								
	02	02.01	Confirm adjudication appointment	02.03							
<b>Organise adjudicator proceeding</b>	Prepare adjudication time table	Administer claimant's documents	Administer respondent's documents	Administer cross claim documents	Review adjudication time table						
	03	03.01	03.02	03.03	03.04	03.05					
<b>Carry out dispute assessment</b>	Identify adjudication questions	Analyse facts and issues	Conduct adjudication hearing								
	04	04.01	04.02	04.03							
<b>Perform adjudication decision</b>	Carry out dispute evaluation	Prepare written decision	Communicate adjudication decision	Perform post-decision management							
	05	05.01	05.02	05.03	05.04						



The job profile chart shown in Table 19 is an initial model that can be modified to suit the adjudication provisions under other jurisdictions. For example, while all the duties shown above (on the left most column) would be equally applicable to the NZ Act, some of the tasks and some of the terminology would differ.

For example, task 04.03 'Conduct Adjudication Hearing' is an activity anticipated under section 25(g) of the Malaysian Act. The terminology under the NZ Act is however different. When developing this task for NZ, this must be rephrased to 'Conduct Adjudication Conference (if applicable)' as provided under section 42(1)(f). The nature of both tasks may be similar or even the same. If so, the task profiles under 04.03 would be similar. Only the title and terminology would differ.

Apart from terminology, there may be other differences in the adjudication process among different jurisdictions. The job profile above anticipates tasks associated with a preliminary meeting being conducted. See the 3 tasks identified as task 01.04 (organise preliminary meeting), 01.05 (prepare preliminary meeting checklist), and 01.06 (conduct preliminary meeting).

The NZ Act does not, as a matter of course, expect or mandate adjudicators to conduct a preliminary meeting or distinguish it from the subsequent 'hearings' as provided under section 25(g) of the Malaysian Act. Section 42(1)(f) of the NZ Act merely **enables** the adjudicator to call a conference of the parties at any time, which the adjudicator can, if he or she chooses to. The adjudicator may call for a conference at any time including calling for a 'preliminary conference' or even a 'pre-adjudication conference'. Therefore, a competency standard developed under the NZ Act would either omit tasks 01.04, 01.05, and 01.06 or make it clear that these tasks are not mandatory tasks while at the same time making sure the terminology used is 'conference' instead of 'meeting' or 'hearing'.

#### **5.8.5 Amending the job profile chart to accommodate changes in legislation**

Interestingly when first presented in Parliament, the Construction Contracts Amendment Bill 2013 introduced the idea of a mandatory 'pre-adjudication conference'. Sections 36A provided:

(1) *'An adjudicator must make arrangements for a pre-adjudication conference to be held within 2 working days after serving the notice of acceptance on the parties.*

(2) *The purpose of the pre-adjudication conference is for the adjudicator to answer the parties' questions about the adjudication process'.*

With such a provision, all 3 tasks (to organise a preliminary meeting, to prepare the preliminary meeting checklist, and to conduct the preliminary meeting) would now be relevant and would be maintained – but with the change in terminology. Thus the tasks may be headed:

01.04: Organise pre-adjudication conference

01.05: Prepare pre-adjudication conference checklist

01.06: Conduct pre-adjudication conference

It is noted however that after the Bill was first presented in Parliament in 2013, a Supplementary Order Paper (SOP) no 52 was issued on 11 March 2015. This SOP showed the Bill was amended to exclude this provision that was originally introduced in the amendment Bill. The final reading was done later and the final Construction Contracts Amendment Act 2015 was passed months later. The key point in all this is - the adjudicator profile tasks can be modified easily to suit what is provided in the legislation.

### **5.8.6 Task profiles**

The following now illustrates (see Tables 20 and 21) a couple of sample task profiles to demonstrate what might be included in a task profile. While the job profile states **what** the adjudicator would do, the task profile shows **how** the adjudicator would undertake the tasks. There could be more than 20 task profiles for the job profile of the adjudicator. The sample task profile below demonstrates how a task profile may be developed for the adjudicator.

#### **5.8.6.1 Task profile titled: 'Perform preliminary jurisdiction enquiry' (Table 20)**

This first task profile is titled: 'Perform preliminary jurisdiction enquiry'. The amount of case law on adjudication indicates many of the cases that were referred to court dealt with challenges to the adjudicator's jurisdiction. This task profile was developed to

show the level of detail adjudicators need to know and the level of ability required to deal with to avoid their decisions being challenged in court due to lack of jurisdiction. This task profile is developed based on the Malaysian Act. It can be adapted to suit the job profile of the adjudicator developed for different jurisdictions.

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Table 20: Task profile: Perform preliminary jurisdiction enquiry

OCCUPATION: ADJUDICATOR			
DUTY NO:	01	DUTY	PRE-ADJUDICATOR APPOINTMENT
TASK NO:	01.02	TASK	PERFORM PRELIMINARY JURISDICTION ENQUIRY
LEVEL		<b>PERFORMANCE STANDARD:</b> Perform preliminary jurisdiction enquiry using materials such as the Construction Industry Payment and Adjudication Act 2012 (CIPAA), Contracts Act, Limitation Act and check so that the request to act has been received, the notice of adjudication requested, compliance with legal requirements checked, nature of disputes enquired, and that the disputes fall within the scope of legal requirements established.	
STEP		ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
1. Receive request to act as adjudicator		<b>Knowledge of:</b> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Adjudication procedures</li> <li>- Adjudication process</li> <li>- Nature of dispute between parties</li> <li>- Identities of parties</li> </ul> <b>Ability to:</b> <ul style="list-style-type: none"> <li>- Analyse the request</li> <li>- Understand the provisions of CIPAA</li> </ul> Identify validity of the request	<ul style="list-style-type: none"> <li>• CIPAA</li> <li>• Contracts Act</li> <li>• Limitation Act</li> </ul>
2. Request notice of adjudication		<b>Knowledge of:</b> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Limitation Act</li> <li>- Requirement of the notice made [s8(1)]</li> <li>- Notice contains sufficient details</li> </ul>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
3. Check compliance with legal requirements	<p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand the requirements of CIPAA</li> <li>- Understand the relevant provisions of CIPAA</li> <li>- Identify identities of parties in dispute</li> <li>- Understand relevant provision of the Limitation Act</li> <li>- Identify nature and type of disputes</li> <li>- Assess validity of notice</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Relevant provisions of the Limitation Act</li> <li>- Interpretation of legal provisions</li> </ul>	<ul style="list-style-type: none"> <li>• CIPAA</li> <li>• Contracts Act</li> <li>• Limitation Act</li> </ul>
4. Enquire whether there is a dispute	<p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Identify nature of dispute in the notification</li> <li>- Identify the work or services to which payment relates</li> <li>- Identify dispute comes within CIPAA</li> <li>- Identify the scope and application of CIPAA</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Scope and application of CIPAA</li> <li>- The nature of dispute</li> <li>- Identification of parties</li> <li>- What constitute a dispute</li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand relevant provisions and requirements of CIPAA</li> <li>- Understand scope and application of CIPAA</li> </ul>	<ul style="list-style-type: none"> <li>• CIPAA</li> <li>• Contract act</li> <li>• Limitation act</li> </ul> <ul style="list-style-type: none"> <li>• CIPAA</li> <li>• Contract Act</li> <li>• Limitation Act</li> <li>• Map</li> </ul>

<p>5. Establish dispute falls within scope of legal requirements</p>	<ul style="list-style-type: none"><li>- Apply what constitute a dispute</li><li>- Interpret what a dispute is</li><li>- Interpret the relevant provisions of CIPAA</li></ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"><li>- CIPAA</li><li>- Interpretation of legal provisions of CIPAA</li><li>- What constitute a dispute</li><li>- Nature and scope of dispute</li><li>- Geography of Malaysian territorial boundaries</li></ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"><li>- Identify disputes</li><li>- Understand relevant provisions of CIPAA</li><li>- Understand application of legal requirements</li><li>- Identify the territorial boundaries of Malaysia</li></ul>	
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This task profile can be adopted for other jurisdictions but would require some modification. For example, to adopt it for the NZ Act, all reference to CIPAA should read Construction Contracts Act 2002 (CCA) or currently Construction Contracts Amendment Act 2015, the notice requirement section under step 2 should read section 28(1) and (2) of the CCA instead of section 8(1) of CIPAA, and the reference to the ability to identify the territorial boundaries of Malaysia under step 5, should instead refer to the territorial boundaries of New Zealand.

This example shows the task profile can be easily adapted and modified to comply with the NZ Act. The extent of ease of modification would depend on the extent to which the provisions in an Act are different in other jurisdictions.

#### **5.8.6.2 Task profile titled: ‘Conduct preliminary meeting’**

A second task profile example is demonstrated below. This task profile is titled: ‘Conduct preliminary meeting’. This task profile was developed to show how a seemingly ‘simple’ task on conducting a preliminary meeting requires a wide knowledge base, competency, and skills to be mastered. Given the very different natures of amicable dispute resolution methods such as mediation (which may be mentioned during the preliminary meeting), it is critically important that the adjudicator is thoroughly well versed with the key concepts and details and the differences between the roles of a mediator as opposed to adjudicator. These would include understanding concepts such as the rules of natural justice and behaviour expectations to be maintained throughout an adjudication including during a preliminary meeting. The consequences of a failure to comply are very serious – potentially leading to a challenge of the adjudicator’s decision and it being declared to be void.



Table 21: Task profile: Conduct Preliminary Meeting

OCCUPATION: ADJUDICATOR			
DUTY NO:	01	DUTY:	PRE-ADJUDICATOR APPOINTMENT
TASK NO:	01.06	TASK:	CONDUCT PRELIMINARY MEETING
LEVEL		<b>PERFORMANCE STANDARD:</b> Conduct preliminary meeting using material such as CIPAA, Companies Act, Limitation Act, Contracts Act, Evidence Act, communication tools and pre-adjudication meeting checklist so that the adjudicator & parties are introduced, the adjudication process is explained, the parties are requested to consider alternatives to adjudication, amicable settlement between the parties is encouraged, all points in the checklist and other matters are addressed and dealt with, and attendance and meeting minutes are recorded.	
STEP		ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
1. Introduction of adjudicator		<b>Knowledge of:</b> <ul style="list-style-type: none"> <li>- Adjudication</li> <li>- Adjudication meeting protocol e.g. Impartiality Conflict of interest Rules of natural justice</li> <li>- Case law</li> <li>- Interpersonal skill</li> <li>- Personal background</li> </ul> <b>Ability to:</b> <ul style="list-style-type: none"> <li>- Organise meeting facilities</li> <li>- Exercise interpersonal skill</li> </ul>	<ul style="list-style-type: none"> <li>• Acts of Parliament including               <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Companies Act</li> <li>- Limitation Act</li> <li>- Contracts Act</li> <li>- Evidence Act</li> </ul> </li> <li>• Communication Tools</li> <li>• Pre-Adjudication meeting checklist</li> </ul>

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
2. Introduction of parties	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- Adjudication</li> <li>- Adjudication meeting protocol e.g. Impartiality Rules of natural justice</li> <li>- Contract law</li> <li>- Law of torts</li> <li>- Case law</li> <li>- Parties' background</li> <li>- Case background</li> <li>- Interpersonal skills</li> <li>- General nature of dispute</li> <li>- Communications tools eg Video conferencing, teleconferencing, and emails</li> </ul> <p><b>Ability to :</b></p> <ul style="list-style-type: none"> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Organise meeting facilities</li> <li>- Exercise interpersonal skill</li> <li>- Determine parties' background</li> <li>- Identify case background</li> <li>- Coordinate meeting location</li> <li>- Use communication tools</li> </ul>	
3. Explain adjudication processes	<p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Law and practices of adjudication</li> <li>- Adjudication meeting protocol eg Impartiality and rules of natural justice</li> <li>- Contract law</li> </ul>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
<p>4. Remind parties of alternatives to adjudication to be considered</p>	<ul style="list-style-type: none"> <li>- Law of torts</li> <li>- Case law</li> <li>- Interpersonal skills</li> <li>- General nature of dispute</li> <li>- Communications tools eg Video conferencing, teleconferencing, and emails</li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand the adjudication process</li> <li>- Apply adjudication procedure</li> <li>- Interpret adjudication provision in CIPAA</li> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Exercise interpersonal skill</li> <li>- Coordinate meeting location</li> <li>- Use communication tools</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- Contract law</li> <li>- Law of torts</li> <li>- Alternative dispute resolution methods such as               <ul style="list-style-type: none"> <li>a. Negotiation</li> <li>b. Mediation</li> <li>c. Arbitration</li> <li>d. Litigation</li> </ul> </li> <li>- Negotiation skills</li> <li>- Mediation process</li> <li>- Rules of natural justice eg Impartiality Rules of natural justice</li> <li>- Interpersonal Skills</li> </ul>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
<p>5. Encourage parties to consider settling amicably</p>	<p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand adjudication process</li> <li>- Understand the differences between alternative dispute resolution processes</li> <li>- Convey advantages and disadvantages of alternative dispute resolution processes</li> <li>- Interpret provisions in CIPAA</li> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Exercise interpersonal skill</li> <li>- Use communication tools</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Principles of impartiality</li> <li>- Contract law</li> <li>- Law of torts</li> <li>- Case law</li> <li>- Interpersonal skills</li> <li>- General nature of dispute</li> <li>- Communications tools eg Video conferencing, teleconferencing, and emails</li> <li>- Alternative dispute resolution methods such as                             <ul style="list-style-type: none"> <li>a. Negotiation</li> <li>b. Mediation</li> <li>c. Arbitration</li> <li>d. Litigation</li> </ul> </li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand adjudication process</li> </ul>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
6. Address all points in checklist	<ul style="list-style-type: none"> <li>- Understand alternative dispute resolution processes</li> <li>- Apply knowledge of adjudication process</li> <li>- Apply knowledge of alternative dispute resolution processes</li> <li>- Interpret adjudication provision in CIPAA</li> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Exercise interpersonal skill</li> <li>- Use communication tools</li> <li>- Understand the differences between alternative dispute resolution processes</li> <li>- Convey advantages and disadvantages of alternative dispute resolution processes</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- Pre-adjudication meeting checklist</li> <li>- Meeting checklist items</li> <li>- Security deposit and payment mechanism</li> <li>- Security deposit and payment procedure</li> <li>- Contract law</li> <li>- Law of torts</li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Review checklists items</li> <li>- Understand the consequences checklist responses</li> <li>- Determine relevant checklist point</li> <li>- Establish security deposit and payment mechanism</li> <li>- Establish security deposit and payment procedure</li> </ul>	
7. Deal with other matters	<p><b>Knowledge of:</b></p>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
<p>8. Record attendance and notes of meeting including time table and security of fee payment</p>	<ul style="list-style-type: none"> <li>- CIPAA</li> <li>- Interlocutory procedures</li> <li>- Law and practices of Adjudication</li> <li>- Adjudication meeting protocol</li> <li style="padding-left: 20px;">Eg Impartiality</li> <li style="padding-left: 40px;">Rules of natural justice</li> <li>- Adjudication procedure</li> <li>- Contract law</li> <li>- Law of torts</li> <li>- Case law</li> <li>- Interpersonal skills</li> <li>- General nature of dispute</li> <li>- Communications tools</li> <li style="padding-left: 20px;">eg Video conferencing, teleconferencing, and emails</li> <li>- Alternative dispute resolution methods</li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Manage interlocutory matters</li> <li>- Exercise interpersonal skill</li> <li>- Use communication tools</li> </ul> <p><b>Knowledge of:</b></p> <ul style="list-style-type: none"> <li>- Meeting procedure</li> <li>- Attendance records</li> <li>- CIPAA</li> <li>- Security deposit and payment mechanism</li> <li>- Security deposit and payment procedure</li> <li>- Meeting procedure</li> <li>- Minutes of meeting recording</li> <li>- Brief facts of the case</li> </ul>	

STEP	ENABLING REQUIREMENTS (Knowledge, Skill, and Attitude)	MATERIALS
	<ul style="list-style-type: none"> <li>- Terms of appointment and adjudicator fee</li> <li>- Contract law</li> <li>- Law of torts</li> <li>- Communication skills</li> <li>- Communication tools eg voice recorder</li> </ul> <p><b>Ability to:</b></p> <ul style="list-style-type: none"> <li>- Prepare attendance record</li> <li>- Understand contract law</li> <li>- Understand law of torts</li> <li>- Establish security deposit and payment procedure</li> <li>- Establish security deposit and payment mechanism</li> <li>- Understand security payments</li> <li>- Take notes of meeting</li> <li>- Use communication tools</li> </ul> <p><b>Attitude:</b></p> <ul style="list-style-type: none"> <li>- Meticulous</li> <li>- Fair</li> <li>- Persistent</li> <li>- Impartial</li> <li>- Empathic</li> <li>- Firm and decisive</li> <li>- Non-xenophobic</li> <li>- Non-discriminatory</li> </ul>	



Like the first task profile, this task profile can be modified and adopted for other jurisdictions. This task profile on conducting preliminary meetings appears to be a simple task. But when the task is broken down into steps, it becomes increasingly evident that each of the steps requires wide knowledge base, competency, and skill sets to be mastered.

It is important that the adjudicator has the appropriate knowledge, skills, and attitude when conducting preliminary meetings. It is particularly important that the adjudicator has a thorough understanding of numerous legal concepts such as the need to always be impartial and the meaning of 'rules of natural justice'. As case law illustrates many cases that end up in court are associated with issues relating to breach of natural justice. The adjudicator must not only be fair but also seen to be fair. And at this early stage of the adjudication process the adjudicator must be careful when dealing with steps such as steps 4 (remind parties of alternatives to adjudication to be considered) and 5 (encourage parties to consider settling amicably).

Adjudication is a rights-based dispute resolution process. In some other alternatives like mediation the adjudicator can meet the parties separately – commonly called caucus sessions. In adjudication or arbitration, such a meeting would be completely objectionable. Any breach of the rules of natural justice would lead to the adjudicator's decision becoming void (or arbitrator's award being set aside), effectively rendering the whole adjudication process redundant. It is vitally important that adjudicators have a full understanding of the whole process of adjudication.

It is suggested that given the rather procedural provisions provided in the Acts governing adjudication, this task based approach to develop standards and subsequent training and assessment be adopted as a model. This task-based approach could then be developed into a national competency standard for the adjudicator. As was elaborated earlier, the two key components that need to be developed are the job profile chart (what the adjudicator does) and the task profiles (how the adjudicator does the tasks). The next section shows how once this is developed, the course study materials and assessment methods can be developed to validate the learning by potential adjudicators and provide evidence of achieving the competency expected.

Once the job profile chart and the task profiles are done, the study materials need to be developed. These are generally called 'learning packages'. In order to demonstrate how they may look like Table 22 demonstrates one such learning package that follows on from Task 1.06: Conducting a pre-adjudication meeting that was developed and demonstrated earlier.

**Table 22: Competency Standard for Adjudicator: Learning Package No X – Pre-Adjudication Meeting**

<p><b>Competency Standard for Adjudicator:</b></p> <p><b>LEARNING PACKAGE No X - PRE-ADJUDICATION MEETING</b></p> <p><b>A Course title: Pre-adjudication meeting</b></p> <p><b>B Course description:</b></p> <p>This course enables participants to acquire knowledge and develop skills to conduct a pre-adjudication meeting. At the end of the course, participants will be able to:</p> <ul style="list-style-type: none"><li>(i) Understand meeting requirements</li><li>(ii) Conduct a pre-adjudication meeting</li><li>(iii) Record proceedings of the pre-adjudication meeting</li><li>(iv) Understand alternative dispute resolution processes</li><li>(v) Understand the advantages and disadvantages of other alternative dispute resolutions compared to adjudication</li></ul> <p><b>C Course objectives:</b></p> <p>Conduct a pre-adjudication meeting using the Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA), the Companies Act, the Limitation Act, the Contracts Act, the Evidence Act, communication tools and pre-adjudication meeting checklist so that the adjudicator &amp; parties are introduced, the adjudication process is explained, the parties are given the opportunity to consider alternatives to adjudication, settlement between the parties is encouraged to be considered, all points in the checklist and other issues raised are addressed, and attendance and the meeting minutes are recorded.</p>
--

<b>D Course content:</b>				
Task No: 01.06		Task: Conduct Pre-Adjudication Meeting		
TOPIC	THEORY	HRS	PRACTICAL	HRS
1. CIPAA	- Introduction - Appointment of adjudicator [sections 21, 22, 23 of CIPAA]	2.0	The trainee would have knowledge of the pre adjudication provisions under CIPAA and required to refer to the relevant sections of CIPAA.  The trainees participate in mock pre-adjudication meeting with role plays	16
2. Companies Act	- Introduction - Definition - Relevant section	0.5	The trainee would have knowledge and understanding of the Companies Act related to adjudication	
3. Limitation Act	- Introduction - Definition - Relevant section	0.5	The trainee would have knowledge and understanding of the Limitation Act related to adjudication	
4. Contracts Act	- Introduction - Definition - Relevant section	0.5	The trainee would have knowledge and understanding of the Contracts Act related to adjudication	
5. Evidence Act	- Introduction - Definition - Relevant section	0.5	The trainee would have knowledge and understanding of the Evidence Act related to adjudication	
6. Communication tool	- Introduction - Types of communication procedures - Ensure parties' names and addresses are correct	0.5	The trainee would have an understanding of the correct procedures to communicate in writing to the appropriate parties	
	Theory contact hours	4.50	Practical contact hours	16.00
	Assessment contact hours			2.00
	Total training hours			22.50
<b>E Selected references</b>				
Books:				
Lam Wai Loon and Ivan Y F Loo, Construction Adjudication in Malaysia				
Geoff Bayley and Tomas Kennedy-Grant, A Guide to the Construction Contracts Act 2002				
<b>F Tool and materials</b>				
CIPAA				
Companies Act				
Limitation Act				
Contracts Act				
Evidence Act				
Communication Tools				
Pre-adjudication meeting protocol				
Pre-adjudication meeting checklist				

Learning packages need to be developed to cover every task that has been identified and developed. Where appropriate, each learning package may be developed to cover multiple tasks. For example it would be appropriate and convenient to develop a single learning package for tasks 03.02: Administer claim document, 03.03: Administer response document, and 03.04: Administer cross-claim document. Much of the learning content for the three tasks is common.

## **5.9 Mandating collection of adjudicators' decisions for research**

Developing standards for adjudicators can help set and improve standards at entry level for those intending to practice as adjudicators. Those who are already practicing adjudicators can also benefit from continuing professional development. Most professional bodies mandate their members to continually upgrade their skills through continuing professional development. One of the ways adjudicators can do this is by sharing and learning from their peers.

As adjudication (like arbitration) is confidential in nature, adjudicators' decisions are not reported. Having adjudicators' decisions compiled and published (even in 'de-identified' or 'sanitised' form) can help adjudicators learn from and share their experiences with other adjudicators. As adjudicators' decisions, unlike court judgments, do not create precedence, the key areas that adjudicators can learn from other decisions are in the way adjudicators present their decisions, the way issues are analysed and the way adjudicators develop and present their decision-making processes.

There is precedence on adjudicators' decisions being published in several jurisdictions in Australia and Singapore. The adjudicators' decisions are openly published on the websites.

In Malaysia, as was stated earlier, WG 10 had made recommendations to maintain standards beyond accreditation including mandatory continuing professional development and the submission of 'de-identified' or 'sanitised' adjudicators' decisions with the confidential details removed. KLRCA, the body in charge of adjudication in Malaysia mandates all adjudicators to submit their decisions to them. This is provided under the KLRCA Adjudication Rules & Procedure (Revised as at 14<sup>th</sup> May 2014) Part A, Rule 9, sub-rule 7(a)(ii) which dictates that fees due to the

adjudicators will only be released upon '*the **Director of the KLRC** having received a copy of the adjudication decision within the time specified under Section 12(2) of the Act*'. However as at March 2015, there has not been any publication of adjudicators' decisions in any form.

In New Zealand, the Construction Contracts Amendment Act 2015 now provides under a new section 83:

*'83 Chief Executive may require adjudication information*

*(1) The chief executive may, for statistical or research purposes, require adjudicators, nominating authorities, or nominating bodies to provide any information (in their possession or under their control) regarding adjudications, including, for example, the number, nature, or outcome of adjudications initiated under this Act.*

*(2) A person must not disclose information under subsection (1) except—*

*(a) with the consent of the relevant party to the dispute and any identifiable person to whom it relates; or*

*(b) to the extent that the information is already in the public domain; or*

*(c) in statistical or summary form arranged in a manner that prevents any information disclosed from being identified by any person as relating to any particular person; or*

*(d) if the information is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify any particular person.'*

The amendment in the 2015 Act does not go as far as publishing adjudicators' decisions on the website as done in several jurisdictions in Australia or Singapore. But the enabling provision to gather data can nevertheless be beneficial to the construction industry in general and specific parties such as authorised nominating authorities, nominating bodies, adjudicators, experts, disputing parties, construction professionals, lawyers, government, researchers, and academics. Such data can be useful for a wide range of purposes including predicting trends on the take up of

adjudications and planning for the future. Some of these research findings have led to even discussions on the possibility of extending the adjudication model to non-construction disputes in jurisdictions that introduced adjudication for all disputes such as the United Kingdom and New Zealand.

At least on earlier attempt in New Zealand to obtain information through questionnaires for research purposes at postgraduate level was abandoned due to very poor response from adjudicators in New Zealand. This research was done without the benefit of the possibility of such collection of information on adjudication as provided in the new Amendment Act. It was fortunate that after a prolonged period of persistence a 73% response return rate was attained in response to the questionnaire sent to all adjudicators (52 out of the then 71 adjudicators as listed on ANAs). A number of useful initiatives have been recommended based on the findings using data from responses from adjudicators. These include developments on e-adjudication on a secure web-based platform that includes possibilities of serving all documents through the web and getting evidence of documents having been served and even viewed by identifying IP addresses of the parties on whom documents have been served. This has the tremendous benefit of reducing time and costs. This may however require a thorough investigation into any possible amendments that may be required under the current Act and associated regulations. The development of the task-based competency standards suggested in this chapter too could be refined with useful data gathered on a wider scale. The development of a decision-making model for adjudication could also be corroborated with a set of wider data across not just New Zealand but also from other jurisdictions.

Much more could be done if more complete data were gathered from adjudicators. This could include analysing the possibility of expanding the adjudication model under the NZ Act into other (non-construction) industries.

### **5.10 Chapter summary and conclusion on quality of adjudicators' decisions**

A key component to the continued and enhanced success of adjudication as a primary dispute resolution method for construction disputes is to enhance the quality of adjudicators. Past experience, including evidence from court cases associated with adjudication and challenges to adjudicators' decisions indicate the quality of

adjudicators must continually be enhanced. This should be done at both entry-level for those wanting to become adjudicators as well as those who are already practicing adjudicators. Mandatory continuing professional development would be the most convenient way to maintain or enhance standards of existing adjudicators. This is the most common way adopted by many other professions.

Not all jurisdictions have strict entry-level requirements that are rigorous enough to ensure a high level of quality of adjudicators. Most have a requirement for potential adjudicators to attend seminars on the practice and procedures associated with adjudication. Some have mandatory testing. Others have additional requirements for the submission of a written adjudicator's decision.

In most cases the training primarily focuses on the law, practice, and procedures of adjudication. Most of these courses do not incorporate training associated with construction law, construction contracts, or construction practice. These are often assumed to be a given based on evidence of relevant work experience provided in a CV or membership of a relevant professional body or both. Further, soft skills associated with management, ICT, ethics, and inter-personal skills including communication skills are typically left to adjudicators to develop on their own.

In all cases, the mode of training or delivery of courses is through the conventional content-based method. The conventional content-based method of training may be suitable for delivering knowledge on construction law, construction contracts, or construction practice. But it is suggested that training adjudicators and potential adjudicators using the task based competency training method better aligns with the procedural nature of the law and practice of adjudication.

The task based competency method defines a set of competencies expected of an occupation. It focuses on the competencies, knowledge, and ability required of the occupation (in this case the adjudicator) and outlines the duties, tasks and steps to be performed. It is practical in its approach. In order to do this a job profile chart must first be developed. This would outline the core duties. Task profiles are then developed under each duty. The task profiles would contain all the steps associated with each task. It is only **after** this is done that content is then developed through what is typically called 'learning packages' to suit each task or a group of tasks. The learning packages would include within them the hours required for delivering

content, modes of assessments, and the time required for them. This task and competency based method would be highly appropriate for training adjudicators particularly given that the adjudication process is very procedural and process based. Evidence based on case law (court cases) shows a significant number of adjudication related cases deal with matters relating to adjudication practice and procedure breaches, such as breaching the rules of natural justice, rather than the adjudicator getting the technical content wrong and the dispute subsequently being referred to court or arbitration.

Getting the technical content wrong is in most cases not a ground for challenges to an adjudicator's decision. But getting the procedures wrong can be fatal to the whole adjudication case. Getting the procedures right is something that can be learnt – ideally through the practical approach suggested in this chapter – adopting the adjudicator competency standard developed through the task based method.

## **Chapter 6: Decision-Making Model for Adjudication Legislation**

### **6.1 Chapter summary**

This chapter incorporates the findings from the earlier chapters, which contribute to the development of a preliminary decision-making model for adjudication legislation.

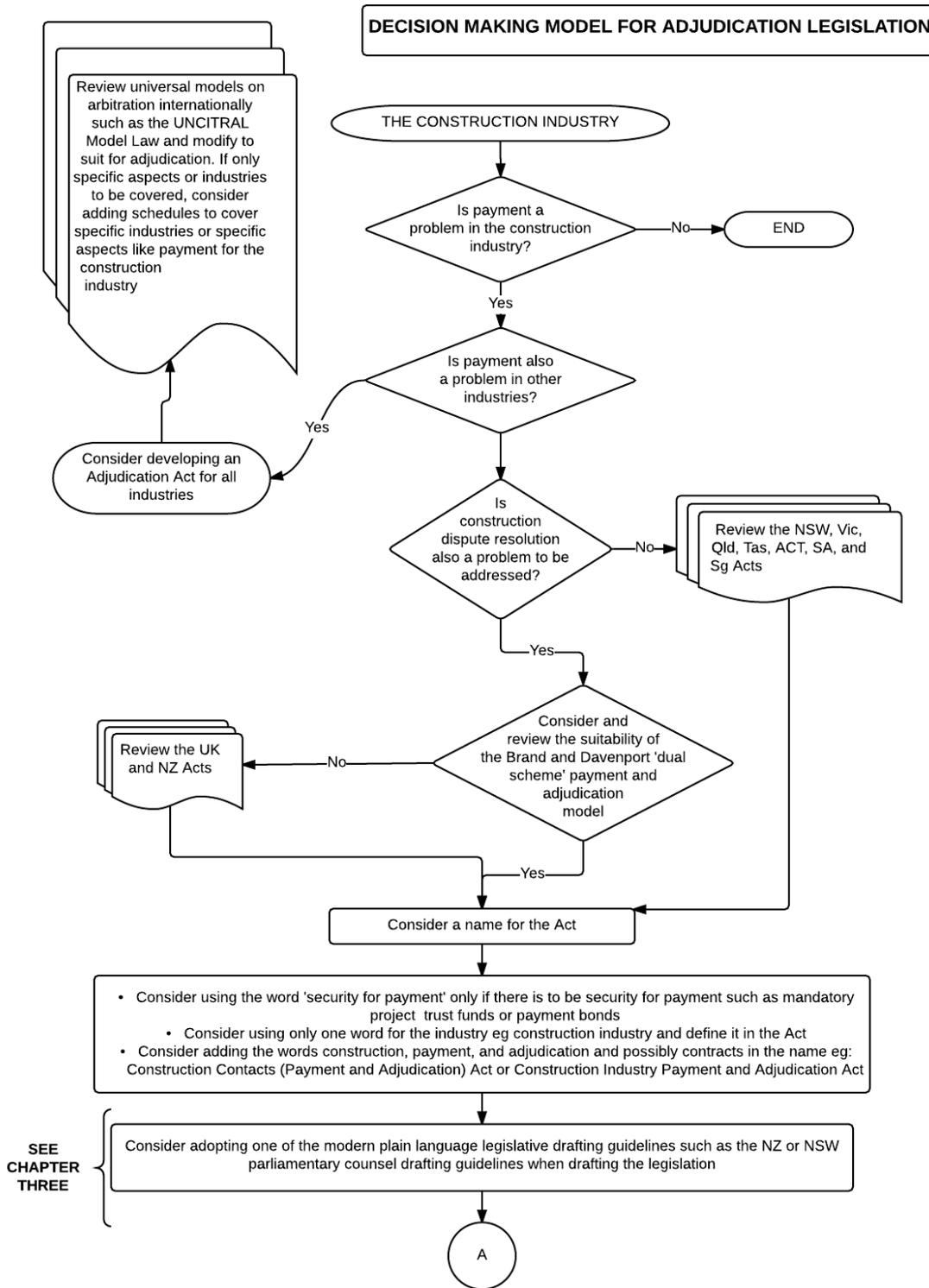
The preliminary model may be fully developed and used for jurisdictions considering introducing new legislation on payment in the construction industry and adjudication and to those who already have such legislation but who are considering amending it.

The model is made up of a series of questions or statements presented in a flow chart format. The person answering the questions or running through the statements may be referred to as the modeller. Depending on the answer given the modeller will be either referred to documents to be reviewed eg an existing legislation or model or given further direction towards the next question or statement.

Where a significant portion of the model is covered in the earlier chapters, the questions or statements make reference to the relevant chapter as a side note. The purpose of the flow chart is to demonstrate the development of the decision-making model. It can continue to be developed into a full model with much greater detail such as the areas listed at the end of the last page of the model. As presented, the preliminary model serves as a useful proof-of-concept tool for consideration when developing legislation on payment and adjudication or when amending existing legislation on payment and adjudication.

The model is presented as a flowchart in four continuous parts in Figures 15, 16, 17, and 18:

Figure 15: Decision-Making Model For Adjudication Legislation – Part 1 of 4



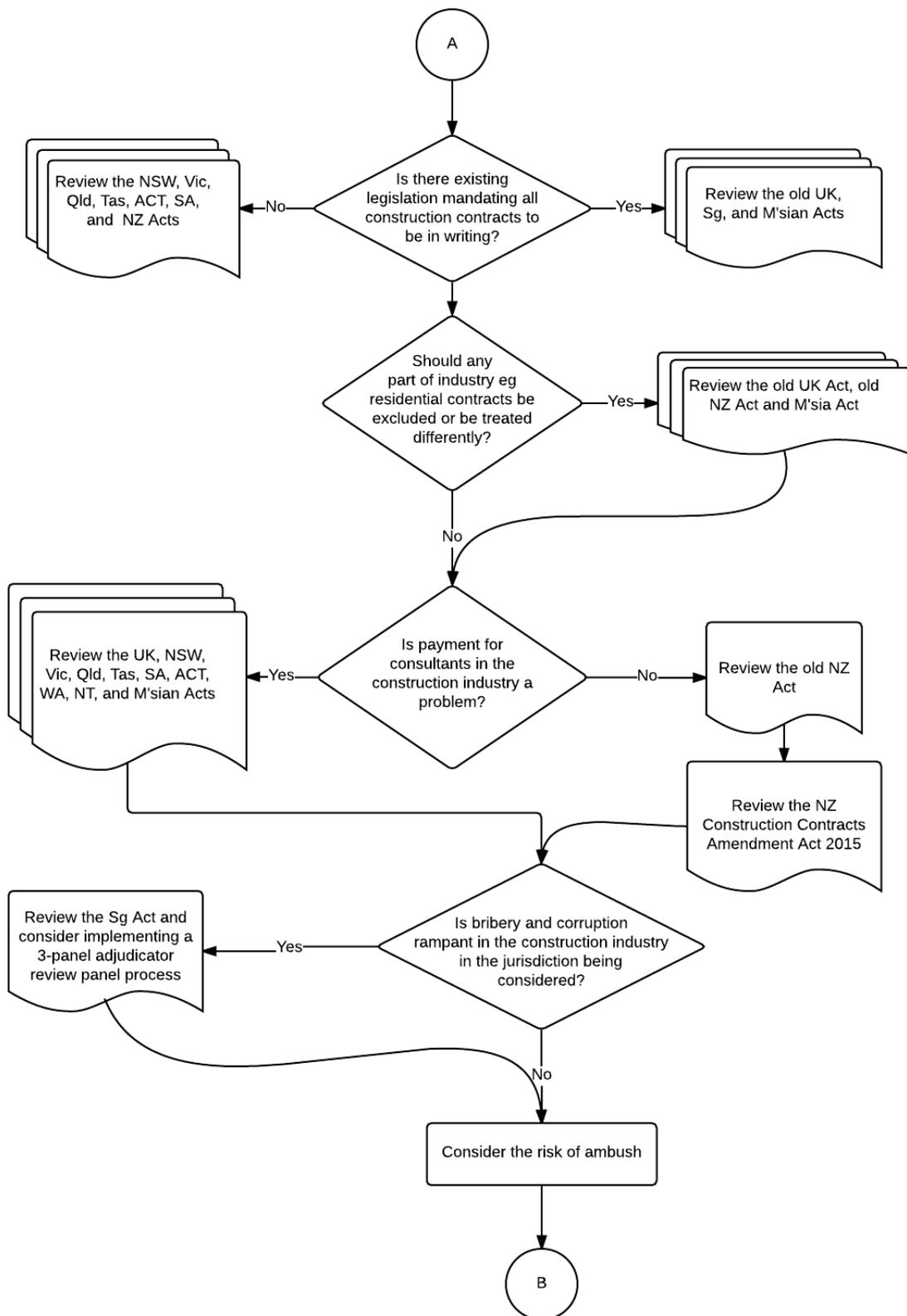


Figure 16: Decision-Making Model For Adjudication Legislation – Part 2 of 4

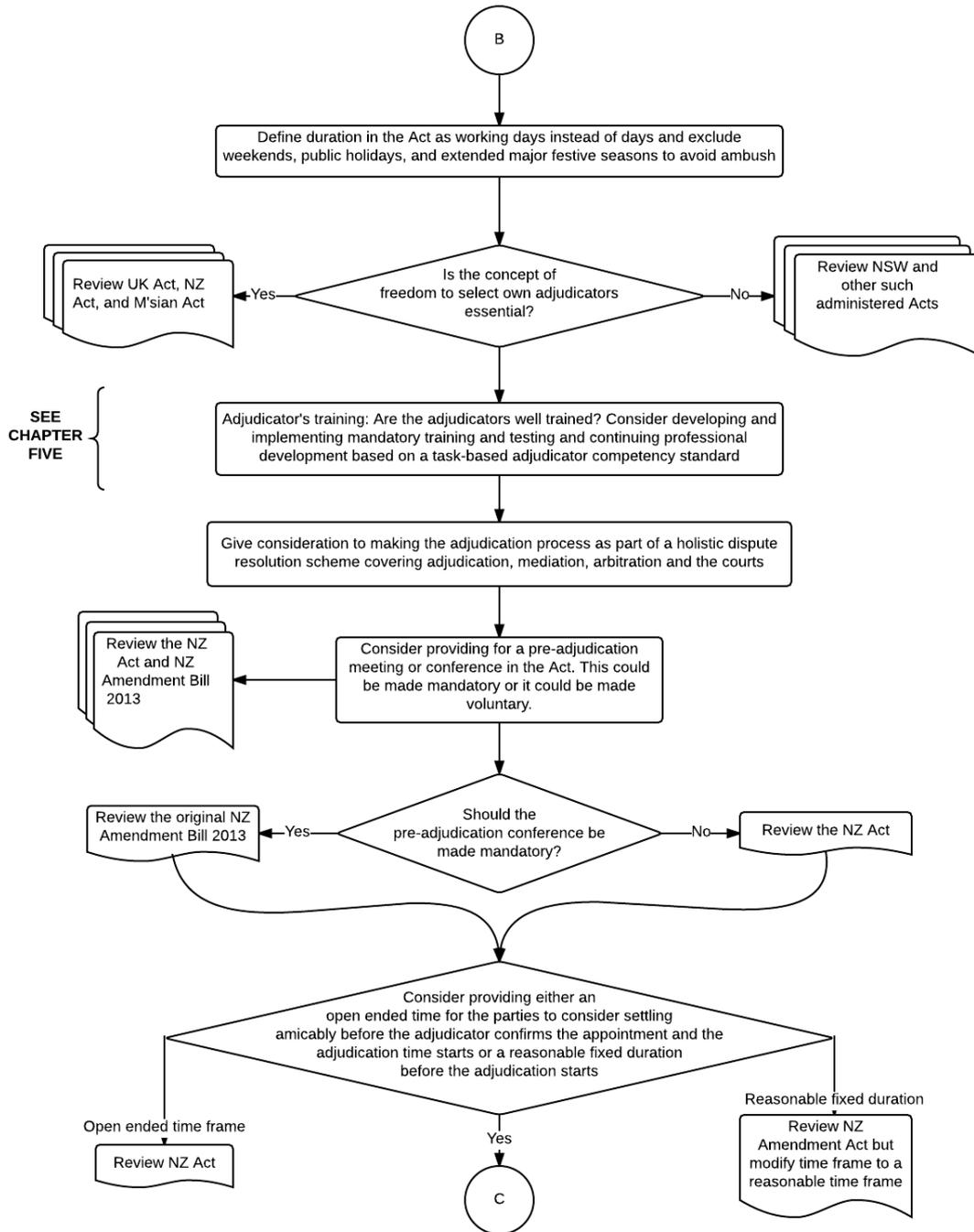
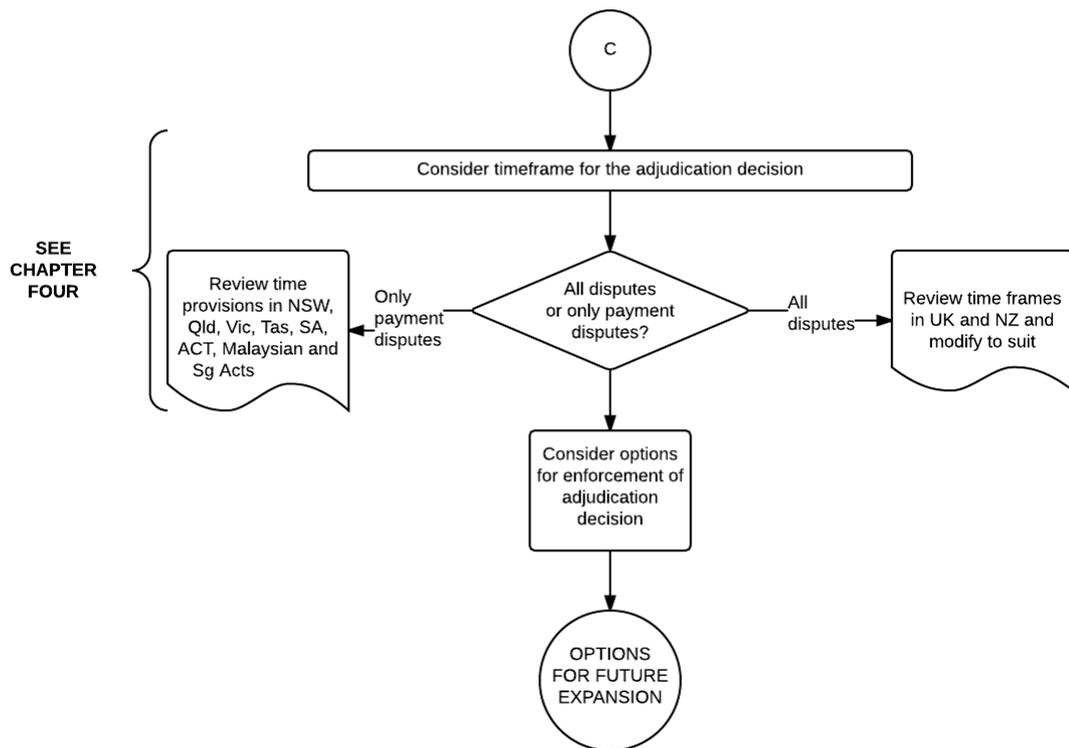


Figure 17: Decision-Making Model For Adjudication Legislation – Part 3 of 4



- Other additions to the preliminary model for consideration**
- Single adjudicator nominating authority v multiple
    - Documents-only small adjudications
  - Different adjudication timeframe options depending on value of claim
  - Who could refer a dispute to adjudication - only the payee or either party?
    - Prohibition of lawyer from representing parties
    - Use of experts - with or without the parties consent
      - Appointment of adjudicators by strict rotation
      - Pre-naming adjudicators in the contract
      - Co-adjudication (2 or more adjudicators)
  - Handling of administrative matters including adjudicators' fees by the adjudicator nominating authorities
    - Web-based information management systems
      - E-adjudication
  - Whether Act applies to contracts retrospectively or prospectively

**Figure 18: Decision-Making Model For Adjudication Legislation – Part 4 of 4**

The flowcharts in Figures 15, 16, 17, and 18 show the multiple directions any legislation can take depending on the preferred responses among the options chosen by the modeller.

This is now applied as a case study based on the development of the Malaysian Act. A contextual background of the Malaysian Act is first given vis a vis the NZ Act. It will then cover the history of the initiatives in Malaysia and include changes in direction

along the way over the nearly one decade it took for the Act to materialize in 2012 and a further couple of years before the Act came into effect in April 2014. It will also give some considered views on missed opportunities for the Act and what other jurisdictions could do to not miss on these valuable opportunities. The chapter ends looking briefly at the 131-page judgment of the first adjudication case in Malaysia - UDA Holdings Berhad v Bistraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (2014) - and how it might have been avoided together with the associated costs of several hundred thousand Malaysian Ringgit incurred during the case – using the decision-making model developed during this research.

## 6.2 The purposes of the Act, the word ‘security’ and name of the Act

The Malaysian Act (the Construction Industry Payment and Adjudication Act 2012) was created for the following purposes:

*‘An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.’*

Compare that with an earlier draft of the then proposed Act dated March 2007:

*‘An Act to facilitate regular and timely payment, provide a mechanism for speedy dispute resolution through adjudication and provide **security** and remedies for the recovery of payment in the construction industry.’*

The decision-making model makes reference to the use of the word ‘security’ in considering the name of the Act in part 1 of 4 on the first page of the model. The model suggests the word ‘security’ be avoided unless there is security being provided under the Act eg by way of payment bonds or retention held in mandated project trust accounts. The original version of the Act had a scheme of payment bonds and thus the word ‘security’ may be justified in its use. The final 2012 Act however omitted all references to payment bonds. Appropriately the word security was dropped. The amended version of the Act complies with the decision-making model and avoids the misleading insinuation that the Act provides security of payment. It does not.

An encouraging feature of the Malaysian Act, possibly the most encouraging feature, is the name of the Act. As the model recommends, the words construction, payment, and adjudication ought to appear in the title of the Act.

Now compare with the purpose of the NZ Act:

*'Section 3 Purpose*

*The purpose of this Act is to reform the law relating to construction contracts and, in particular,—*

*(a) to facilitate regular and timely payments between the parties to a construction contract; and*

*(b) to provide for the speedy resolution of disputes arising under a construction contract; and*

*(c) to provide remedies for the recovery of payments under a construction contract.'*

Sensibly the Act does not make reference to the word security.

The purposes of the Malaysian Act and the NZ Act are very similar. Logically the details of the Acts including the primary concepts would be expected to be similar. But they are not. As explained in the following historical development of the Malaysian Act, it will be evident from following the decision-making flowchart that the policy directions during the development phase of the Malaysian Act changed over the course of years.

### **6.3 The Malaysian early initiative - The Malaysian Construction Industry Master Plan 2015.**

Captains of the construction industry in Malaysia assembled at a round table meeting on 24 June 2003. This was led by the Construction Industry Development Board Malaysia (CIDB). The eventual Malaysian equivalent of 'Latham' was in the making. Ten areas of priority were identified and working groups formed. Not surprisingly, payment was one of them. Following nomination by the then Institution of Surveyors Malaysia (ISM) (now Royal Institution of Surveyors Malaysia - RISM), the meeting appointed the ISM as the chair of the working group on payment (WG 10).

In August 2007, the Deputy Prime Minister announced a Malaysian Construction Industry Masterplan 2015. The Malaysian construction industry had a vision '*to be world-class, innovative and a knowledgeable global solution provider.*'

#### **6.4 The WG 10 Vision**

WG 10 also has a vision which is 'everyone within the construction industry pays all appropriate amounts due in a timely manner.' Among the recommendations made was a proposal for new legislation - a 'Construction Industry Payment and Adjudication Act'. It suggested that a 'world-class' industry in 2015 ought not be arguing about basic issues such as delayed or non-payment or continue to have construction disputes that typically take years to resolve.

The WG 10's wish was for payment issues to be removed from the areas of priority by 2015. If payment is to be discussed in 2015, it should be on state-of-the-art issues such as instantaneous on-line payment or on-line valuation - not unproductive issues such as non-payment.

Then, many in the Malaysian construction industry (including construction professionals) complained about delayed payment and non-payment. For example an architectural practice in Malaysia was awarded RM 7.7m (over NZD 3 million) for professional fees by the Federal Court - ***but only after battling in court for over 17 years!*** Payment issues were a serious problem in Malaysia, but litigation was neither quick nor cheap, and arbitration *in practice*, was not much different.

#### **6.5 The then Proposed Construction Industry Payment and Adjudication Act (CIPAA) – initial steps**

A steering committee led by the CIDB was formed. The steering committee had 22 representatives across industry from both the private and public sectors. Numerous consultations, meetings, and forums were held since 2003. These included many open and closed sessions with industry within Malaysia, and discussions with experts from outside the country. One of the major events was the international conference on payment and adjudication held in Kuala Lumpur, Malaysia on 13 and 14 September 2005. A pool of 18 experts from the United Kingdom, Australia, New Zealand, Hong Kong, Singapore, and Malaysia spoke and gave their views on various issues relating to payment and adjudication. They sowed the seeds that

would eventually bear the fruits – 7 years later. The United Kingdom was represented by the then recently retired Judge Humphrey LLOYD QC, Dr Robert Gaitskell QC, Adam Constable, and Peter Kennedy. Encouraged by the presence of well-known experts from around the world, and the keen mood of participants, the Minister of Works enthusiastically announced to the press that a Bill as then recommended was being prepared and that he would like the proposed Bill to be in Parliament by March 2006.

Nearly two years later - in November 2007, a cabinet paper with an industry-version draft Bill was vetted by legal officers at the Ministry of Works and circulated to cabinet. The final Act was eventually gazetted in June 2012 – 5 years later, and as will be shown later, with numerous conceptual differences from the original proposal. The decision-making model did not exist then.

## **6.6 The proposals for the Malaysian Construction Industry Payment and Adjudication Act – options**

The options that were presented were (i) start from a zero-based approach (and effectively re-invent the wheel), or (ii) to review other models around the world. The preferred method was to choose to review other models around the world.

There appeared to be two major strands of models:

- (i) the wider UK and NZ models where ‘any’ construction dispute may be referred to adjudication; or
- (ii) the narrower, payment-only adjudication model started by NSW and followed by several other jurisdictions in Australia and Singapore.

WG 10 opted for the wider model – skewed more towards the New Zealand model.

There are also other cross variants within each main strand, for example, whether only written contracts were covered or if oral contracts were included and whether only the payee could initiate an adjudication or it was open to either party to initiate.

## **6.7 The then proposed Malaysian Act – major features**

What was originally proposed?

The proposals were fairly consistent with basic provisions in the UK, most states in Australia, New Zealand, and Singapore. But there were variances and some additions. Some of the variances and additions had been included partly as a result of 'learning from the experiences of others' and partly because of particular circumstances in Malaysia.

The proposal had 4 major features. These were:

- (i) Outlawing the practice of pay-when-paid, pay-if-paid, and conditional payment from construction contracts;
- (ii) Statutorily streamlining payment procedures for construction works through implied terms of progress payment **but only in the absence of express terms**, the rights of which were widely maintained;
- (iii) Introducing a statutory right to adjudication;
- (iv) Providing measures for security for payment and remedies for the recovery of payment - *but only following a decision by an adjudicator*. Security was proposed to be provided through a system of payment bonds - at head contract level. The common practice of calls on 'on-demand' performance bonds was also proposed to be made conditional on an adjudicator's decision.

The final Act that was passed was however a compromise Act. It included (i), (ii), and (iii), but did not include any of the 'security for payment' measures under (iv) above. Appropriately the Act did not make reference to 'security of payment'. If the decision-making model had been applied, it might have worked better – possibly by providing some security for payment – if that were considered necessary.

Several remedies were proposed but which generally could only be obtained *after an adjudicator's decision*. The remedies included:

- (a) a right to interest on late payment,
- (b) a right to suspend work and recover corresponding costs following rightful suspension,
- (c) a right for the principal to pay directly,

- (d) a right to judgment debt recovery, and
- (e) the possibility of deregistration of business licences of contractors.

All were incorporated in the final Malaysian Act except (e).

### 6.7.1 The name

What's in a name? Surprisingly, at the early stages - it meant a lot. Much earlier, there were anxious queries from developers who thought a '*construction contracts act*' meant there would be standard terms of construction contract imposed on the entire construction industry. Some developers were concerned. There was obviously much ignorance in the Malaysian construction industry then. None of the other jurisdictions had such mandatory provisions to impose a single set of standard terms of construction contract. The decision-making model would have identified this erroneous assumption and guided the readers to what the Act actually was attempting to introduce.

Some within the construction industry thought that a '*security of payment act*' like in New South Wales, Victoria, and Singapore would give the payee a secure guarantee that payment will actually be made. Queensland (probably partly to be different and partly not wanting to give too much hope of a guarantee of payment) dropped the reference to 'security' in its name – sensibly so.

Reference to '*construction industry payment*' then raised awareness among other industries, who started to ask: 'why only construction?' There are good reasons for covering the construction industry, but some argued that cash flow was also important 'to the village grocer'.

None of the Acts in other jurisdictions use the word '*adjudication*' in the title of the Act - yet adjudication is one of the key provisions in all the Acts. The word '*adjudication*' then stirred the Bar Council in Malaysia. Despite overwhelming support from industry on the proposals for the Act, the Bar Council wrote in raising over 40 issues about the proposed Act. The Bar Council in effect objected to the proposed Act.

Some of these concerns were without basis and some were speculations. Some other concerns were due to ignorance of what other statutes in the other jurisdictions

around the world contained. Some examples of these issues are dealt with later in this chapter.

The name becomes irrelevant when an Act is well established - as appears to be the case in the UK with its historical *Housing Grants, Construction and Regeneration Act 1996*. The Malaysian construction industry accepted the name '*Construction Industry Payment and Adjudication Act*' until it was finally passed in Parliament in 2012. The words payment, construction, and adjudication were all recommended in the decision-making model. This name complied with the model.

### **6.7.2 Conditional payment**

Just like all the other jurisdictions, the proposals outlawed provisions that make payment conditional upon receiving payment from a third party or 'pay-when-paid' and 'pay-if-paid' provisions. Additionally, other conditional payment provisions such as payment subject to availability of funds by the payer was also outlawed. This practice was quite common in Malaysia. Payment upon certification was not outlawed, but a failure to certify could be adjudicated.

### **6.7.3 Payment**

Parties remained free to agree any mode of payment - even a single payment at the end of the project. But if they fail to provide a payment mechanism, then the default mechanism for progress payment would be implemented. Unlike provisions under the Western Australian (s 10) and Northern Territory (s 13) models, which have an absolute time limit to payment and do not permit payment provisions beyond 50 days from when a payment claim is made, the proposed Malaysian Act and the final version gives the parties freedom to agree even onerous long periods for payment. The rationale is that by agreement, if the parties to a contract know of (even onerous) terms of contract, they can price for it. Whereas unexpected actions or inactions on the other hand, such as delayed payment or non-payment beyond what is contracted can cause disruption.

### **6.7.4 Written-only contracts and oral contracts**

All jurisdictions except the UK and Singapore covered written, oral, and partly written and partly oral contracts. The original proposals for the Malaysian Act covered written

contracts, oral contracts, and contracts that are partly written and partly oral. The UK amended Act now has widened out beyond written contracts to include oral contracts.

In Malaysia, the only standard terms of construction contract for 'domestic' subcontracts (where subcontractors are chosen by the contractor and not 'nominated' by the client) was only published for the first time in September 2006 (CIDB, 2007). But there remained a very large number of contracts, particularly subcontracts and sub-subcontracts that were entered into either entirely orally or not entirely in writing. Any Act wanting to alleviate the problems of payment and other problems in Malaysia would have missed out on a large portion of contracts if it covered only contracts in writing. It is these oral or partly oral and partly written contracts that would typically be excluded from arbitration too because there is unlikely to be a written arbitration agreement. It was argued by the WG 10 and the construction industry players that all these contracts would benefit from the proposed Act.

Further, it was agreed at the industry steering committee meetings that provisions that could give rise to *peripheral arguments* in court should, wherever possible, be avoided. These could include arguments attempting to preclude jurisdiction of an adjudicator on issues such as whether a contract:

- (i) was in writing or not, or
- (ii) was evidenced in writing or not, or
- (iii) was only partly in writing, or
- (iv) had **all** terms of the contract evidenced in writing or whether only '*material terms*' had to be in writing.

There had been *numerous* cases in the UK, which among other issues, dealt with the issue on written and oral contracts. Some of these are identified in the cases discussed in chapter 4. Even the very first adjudication in Singapore (the only other jurisdiction to insist on written contracts for coverage under the Act) and the very first issue to be determined was on the issue of whether there was a '*contract that is made in writing*'. The Case was named: AA Pte Ltd (Claimant) v AB Pte Ltd (Respondent) made on 9 December 2005.

The model suggests this be considered when contemplating developing an adjudication act.

### 6.7.5 Construction professionals

All jurisdictions extend the scope and include services provided by construction professionals - except as it stood earlier - New Zealand. This appears to be the result of strong lobby by the architects and engineers in New Zealand to be excluded from the Act. The 2013 Amendment Bill proposed in New Zealand and the subsequent Construction Contracts Amendment Act 2015 now include some construction professionals. The proposed Malaysian Act included construction professionals. There had been strong requests from construction professional bodies supporting the proposals and insisting that construction professionals be included within the scheme. Several construction professionals even suggested they needed the protection more than even contractors! In a survey done by CIDB in collaboration with one of the leading universities in Malaysia (University Malaya), construction professionals who returned the questionnaire and who had experienced payment problems had an *average* of RM 1.1 million (GBP 150,000) per consultant still overdue in private funded projects at the time of responding to the survey in early 2006. (CIDB, 2006)

Despite all this, the Malaysian Bar Council formally wrote expressing the contrary view *'there do not appear to be any pressing issues relating to payment'* for consultants. There was an oral suggestion by a senior lawyer earlier insinuating that it is 'unprecedented' or 'preposterous' for construction professionals to be included in such a scheme. When reduced to writing, one of the Bar Council's 'areas of concern' on covering construction professionals is a much more mellowed *'it is unclear why the Act applies to consultancy agreements, where there do not appear to be any pressing issues relating to payment'*. At the same time many other lawyers have asked that legal services relating to drafting construction contracts be **included** as part of the scheme! The final Act that was passed fortunately included construction professionals. The legal profession in Malaysia is probably now better informed that **all** jurisdictions (except New Zealand) cover construction professionals. Even the New Zealand position is also about to change through the NZ Amendment Bill.

### **6.7.6 Who is to be bound by the Act?**

The Malaysian Act was supposed to bind all parties including government. But there were some exceptions in the proposed Act. On the provisions relating to payment bonds for security for payment, government was to be exempted. The rationale being, whilst parties can still initiate adjudication against the government, the need for security for payment in the form of payment bond was not necessary as the government is highly unlikely to 'go into liquidation.' The final Act provides the possibility of exemptions by the Minister.

### **6.7.7 Who may be a claimant?**

The proposal was for any party to a construction contract - similar to the UK and NZ models. The NSW, Victorian, Queensland, and Singaporean models chose to allow only the party who undertakes the work (payee) to initiate an adjudication. This could turn the tables 180 degrees and was seen as 'unfair' by developers in Malaysia. By giving any party the right to refer a dispute to adjudication, it also addresses one of the concerns of the Bar Council who suggested: *'evidence now seems to suggest that the complaints relate to shoddy workmanship by contractors'* although it erroneously continued *'and not really payment issues.'*

The decision-making model would need to consider this.

### **6.7.8 Appointment of adjudicator**

The original proposal was for there to be freedom to appoint an adjudicator of the parties' choice. But all adjudicators adjudicating under the provisions of the Act were to mandatorily be an accredited adjudicator registered under the Adjudication Control Authority. It was also intended that ad-hoc registration be permitted on a case-by-case basis of adjudicators who are not already an accredited adjudicator but whom the parties have agreed should adjudicate their dispute. These ad-hoc registered adjudicators would still be bound by the code of ethics and other requirements by the Adjudication Control Authority such as the proposed requirement to submit required data on the adjudication. The final Act that was passed does not impose such strict conditions.

### 6.7.9 Pre-naming adjudicators

The proposal in the Act prevents the naming of the adjudicator before a dispute has arisen. This has two benefits:

- (i) It helps ensure the adjudicator appointed has the most appropriate skill suited to the nature of the dispute; and
- (ii) It avoids the party who controls the drafting of contract (usually the party who commissions the work or payer) naming an adjudicator whose decisions may in fact or appear to be biased in favour of the drafting party who may have future contracts to be let out. The entire process of selecting an adjudicator must be fair and also 'seen to be fair' – if adjudication is to be sold as a fair dispute resolution mechanism.

### 6.7.10 The number of nominating authorities

The original proposal called for only **one** nominating authority – tentatively called 'adjudication control authority'. This was to enable focused energies on training, accreditation, standards setting, and quality control of adjudication within the relatively 'small' Malaysian construction industry. The Act that was passed has provisions for the KLRCA as the adjudication authority.

### 6.7.11 The role of the nominating authority

It was proposed that the nominating authority neither has a deep involvement in the process of adjudication after it starts such as that in NSW nor a hands-off approach like in some of the other jurisdictions. The role is nevertheless fairly wide. Among the roles envisaged for the adjudicator nominating authority are:

- (i) to create awareness on the Act before and after it is enacted;
- (ii) to set up **one** set of adjudication rules;
- (iii) to develop standards required of adjudicators;
- (iv) to develop training modules on adjudication;
- (v) to provide training either within the adjudicator control authority or outsourced;
- (vi) to set up competence standards and tests for adjudicators;

- (vii) to accredit and register adjudicators;
- (viii) to monitor standards when renewing registration of accredited adjudicators;
- (ix) to establish post accreditation standards required in the form of mandatory continuing professional development;
- (x) to gather data and publish them for purposes of monitoring demand, standards, and improvements;
- (xi) to act as stakeholder of amounts paid pending a review of the adjudicators' decisions by an adjudication review tribunal.
- (xii) to set and to administer the collection of adjudicators' fees and expenses;

The last function would mean adjudicators themselves would not have to worry much about payment default of their own fees and thus need not themselves be governed by the Act (on non-payment) and to be able to file an adjudication for their own fees! In the UK, adjudicators are expected to be able to look after their own fees. Given the serious problems of delayed or non-payment of construction professional fees it might be best that adjudicators in Malaysia be relieved of this additional administrative burden. The final Act that was passed kept to these recommendations with the KLRCA as the adjudication authority.

The model for decision-making could also consider incorporating such provisions for the adjudicator nominating authority to manage adjudicators' fees.

#### **6.7.12 Adjudication rules**

One set of mandated rules was proposed. The experience of multiple rules such as that in the UK has been a worthwhile lesson for newer jurisdictions to take heed of. Multiple rules might appear beneficial in that they have led to a wealth of experience for industry. That experience includes feedback following court decisions on adjudication rules and act-complying clauses. It was thought best that in a construction industry such as in Malaysia which is much smaller than the UK construction industry, one set of rules would suffice. The final Act maintained one set of rules as statutorily provided.

### **6.7.13 The 'ideal' adjudicator**

'I would rather there were no adjudication in Malaysia than have incompetent adjudicators dispensing quick injustice.'

So read the editor's extract and emphasis in large font of what the researcher had written in the Construction Journal published by the Royal Institution of Chartered Surveyors (Ameer Ali, 2007c).

During the research, it was found that there was a commonly held view among eminent arbitrators that standards of arbitrations in Malaysia should improve.

Given that adjudicators were going to be dispensing swift justice, the pre-requisites and training requirements should (arguably) be higher.

The following was asked of industry to consider: 'If you were one of the parties to a dispute under a construction contract, would you be prepared to accept an adjudicator who has less than the following attributes determining the outcome of your dispute?'

- a minimum of 10 years of experience
- good knowledge in construction law and construction contracts
- good knowledge on practice and procedure of adjudication, possibly acquired over a minimum of a five-day course including training in writing decisions
- a high level of ethics
- high level management and communication skills
- has passed written and oral tests on practice and procedures relating to adjudication, ethics, management, communication, and areas relating to construction law and contracts.

Those were among the recommended pre-requisites contemplated for accreditation of adjudicators under the then proposed Act in Malaysia.

The current training and testing regime adopted by the KLRCA is of a fairly high standard – although it may not comprehensively cover all the attributes listed earlier.

The adjudicator training standards is discussed in depth in chapter 5 including a proposal for a task-based adjudicator competency standard and training to suit.

Maintaining standards for adjudicators must continue beyond accreditation possibly through post-accreditation requirements such as mandatory continuing professional development. All accredited adjudicators are to report all adjudications conducted (even if appointed by parties' consent) and the submission of 'sanitised' or 'de-identified' decisions to the adjudication control authority to aid continuing professional development. Adjudication determinations in Singapore, and Queensland and Northern Territory in Australia are published on the web. The KLRCA does mandate submission of decisions but have not published them on the web yet.

Such collection of data will be very useful for assessing demands, reviewing standards, assessing the effectiveness of legislation, and developing strategies for improvement.

#### **6.7.14 Statistics on adjudication**

Compiling data for statistical analysis is important for use by government, nominating authorities, professional institutions and trade organisations, adjudicators, and potential parties to construction contracts that may be affected by the Act. Historical cases can be analysed for trends of future demand, the effectiveness of an Act, and identification of areas for improvement. Both the original proposal and the final Act in Malaysia provide for reporting to be mandated - even when parties appoint an accredited adjudicator by agreement.

The reports generated by the Adjudication Reporting Centre at the Glasgow Caledonian University have been widely consulted and found to be useful by many, not just in the UK, but also in other jurisdictions.

Jurisdictions that do not mandate reporting rely on the willingness of industry to cooperate. It is easier to mandate adjudicators to provide relevant data from the inception of an Act, rather than later.

In New Zealand, the Construction Contracts Amendment Act 2015 now has such a requirement. At the time of gathering responses to questionnaires, Arbitrators' and Mediators' Institute of New Zealand (AMINZ), which is an authorised nominating

authority in New Zealand, helped by encouraging their panel adjudicators to respond to the questionnaire sent for purposes of this research.

International collaboration on sharing such data would also serve the development of adjudication well.

#### **6.7.15 Review of adjudicators' decisions**

At present only Singapore has a review process by a panel of three adjudicators. Initially there were no plans for a review process of the adjudicators' decisions in Malaysia. The steering committee subsequently decided to introduce a right to review adjudicators' decisions by a panel of three adjudicators. Any decision on payment by an initial adjudicator is to be lodged with the adjudication control authority that will hold such amount as stakeholder pending the review decision. The proposal was for a panel of three review adjudicators. The review was to be done within 14 days from appointment of the review tribunal or further time as may be agreed by the parties. On balance it was felt the added 'security' and comfort that parties to a dispute would get, and the check and balance of the adjudication process is worth the possible occasional slight delay of 14 days or so in getting a 'final' decision.

This issue is incorporated in the model on the second page with the question: 'Is bribery and corruption rampant in the construction industry in the jurisdiction?' If so, a review panel could help curb or control such incidences. Malaysia does not rank highly in the corruption index and yet this provision in the proposed Act was removed. The argument presumably being unnecessary additional cost or delay. In the context of the whole process an additional 14 days is considered to be negligible.

#### **6.7.16 Management and Information and Communication Technology (ICT)**

All provisions under the various Acts provide strict time periods for the process of adjudication. Even taking into account the finer arguments of whether some of these time periods are mandatory or 'merely' directory, the timeframe does not shift by more than a few days. Thus skills and tools dealing with managing time and the use of ICT for greater efficiency become critical. This and other management issues were considered in some detail in chapter 5 of this thesis.

There were early cases in Australia and New Zealand where experienced arbitrators sitting fresh as adjudicators missed deadlines or came close to missing deadlines

because they did not appreciate or realize the importance of the absolute time periods in adjudications as opposed to arbitrations.

#### **6.7.17 Video or voice conferencing**

Whilst most of the other jurisdictions appear to be adopting more of a 'documents-only' adjudication, with the occasional 'meeting' or 'conference' or 'interview' or 'hearing', the option for (limited) 'hearings' in some form are clearly enabled in both the proposed and final Acts in Malaysia and NZ. The use of ICT can help expedite the process and save costs associated with travelling.

#### **6.7.18 International Collaboration**

When Malaysia contemplated a '*Construction Industry Payment and Adjudication Act*' an international conference was organized in 2005. The sharing of experience among 18 experts from around the world was beneficial not only to Malaysia (even without then any legislation in place) but to others who had the benefit of knowing variants of the Acts and how other jurisdictions were coping with their own Acts. A regular international conference on adjudication could encourage common areas of cooperation such as the gathering and sharing of data, statistics, case law, demand for adjudication, training, standards, codes of ethics, adjudication procedures and techniques, e-adjudication, adjudicators acting across borders, and conceptual ideas for improvement within each jurisdiction. The possibility of 'exporting' adjudication to other countries and even other industries could also be explored.

### **6.8 Accessibility of statutory provisions on payment and adjudication**

There is a move around the world, particularly in Australia for legislation to be drafted in modern plain legal language. A major catalyst in Australia was the Victorian Law Reform Commission's report called *Plain English and the Law* (VictorianLawReform, 1987). The report made 15 recommendations and included a drafting manual. In New Zealand there were numerous reports including: *The Format of Legislation* Law Commission Report No 27 (December 1993); and *Legislation Manual, Structure and Style* Law Commission Report No 35 (1996), both published by the Law Commission in Wellington. In Canada the Justice Reform Committee of British Columbia issued a report called '*Access to Justice*' in 1988. Various other initiatives then followed

throughout Canada. In the UK *The Renton Report, The Preparation of Legislation* (1975) Cmnd 6053, Chapter VI, Appendix B, HMSO, London highlighted examples of convoluted drafting in British statutes and provoked major discussions. Some of the eventual outcomes include the UK's major tax law rewrite and the new and more modern Civil Procedure Rules 1998. It is particularly important for Acts governing payment and adjudication to be drafted in plain language because:

- (i) the parties who will be affected by the Act include lay persons; and
- (ii) the short and potentially fatal timeframe for the adjudication process means the provisions must be understood and be capable of being implemented rapidly.

At present, putting aside concepts found in the various Acts within the 14 jurisdictions, the New Zealand and Australian Acts are more modern in drafting style compared to the traditional drafting style of the UK Act or the Singaporean Act which are steeped in traditional drafting style. The New Zealand and the main Australian Acts are stripped of legalese. The redundant doublet 'null and void' is replaced with just 'void'. 'Must' is used to mean 'must' instead of 'shall' which has multiple meanings. And there are no conflicting 'conjunctions' such as 'an/or'.

Recommendations were made to the Malaysian Parliamentary drafters to adopt the more modern plain language approach to drafting when finalising the proposals for the Act in Malaysia. That would make it more accessible to those who are most likely going to be affected by the Act. The final version that was enacted was structured in relatively easy to use style but had some elements of traditional drafting style eg the use of 'shall'.

This is referenced in the model early on at end of Part 1 of 4 on the first page for the drafting to be based on modern legal drafting guidelines such as those published by the legislative drafting office of NZ or NSW.

## **6.9 Case study: First Malaysian court case relating to adjudication**

The very first Malaysian court case relating to adjudication was delivered on 5 December 2014. The case was UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd. ("UDA Holdings Berhad v Bisraya Construction

Sdn Bhd & MRCB Engineering Sdn Bhd [operating under the name and style of Bisraya Construction - MRCB Engineering Consortium, an unincorporated joint venture] heard together with Capitol Avenue Development Sdn Bhd v Bauer (Malaysia) Sdn Bhd," 2014)

Justice Dato' Mary Lim decided that in the absence of words to the contrary and taking into account the purposive approach to interpreting legislation, the Malaysian Act applies **retrospectively** – at least in the fundamental two key aspects of when the construction contract is in writing and on matters relating to payment. That means construction contracts that were entered into **before** the Act came into operation on 15 April 2015 were covered by the Act. This is in contrast to the express provisions within the NA Act.

Since that case there has been an increasing trend in adjudications being referred to adjudicators.

It is of interest that the original draft proposal by the industry had the following provision under the draft proposed regulations dated July 2010.

*Contracts excluded from application of the Act*

3. *Any construction contract which satisfies all of the following conditions shall be excluded from the application of the Act –*
  - (a) *the contract is made within a period of not exceeding three months from the date the Act comes into operation as notified by the Minister;*
  - (b) *the contract is a sub contract made under a head contract; and*
  - (c) *the head contract is made before the date the Act comes into operation as notified by the Minister.*

The current regulations under the final Malaysian Act **do not** have this provision. If this provision had been maintained in the final version of the regulations in the final Act, this first adjudication case would have either not been referred to court on this matter, or if it did, the judge would not need to have written a 131-page judgment or ask for extensive submissions from the lawyers on both sides in both the cases heard jointly – eventually deciding on balance that the Act applies retrospectively to all contracts. The amount of money saved would run into several hundred thousand

Malaysian Ringgit excluding the significant amount of total time spent by lawyers, the judge, court officials, the parties, and the witnesses.

And the case has now been appealed – adding more costs, further time, and possible uncertainty for now. If it were overturned, it would be interesting to observe if the current sudden increase in adjudication cases being referred tapers more steadily.

Most other jurisdictions make it clear about the starting date affecting construction contracts under the Act. See for example section 9 ‘When the Act applies: general’ of the NZ Act. Perhaps this provision on whether the Act applies to construction contracts retrospectively or prospectively too (which is now listed among the additional items to be considered at the end of part 4 of 4 on the last page of the model) ought to be added to the model to prevent future jurisdictions from omitting this important provision from their Act. Malaysia too ought to reintroduce the draft version of the regulations that had been there since July 2010.

In addition to what has been included in the current proof-of-concept model including the list at the end of the model on part 4 of 4 and what has been identified in this case study, the model could also be further developed and incorporate other aspects such as contract for supply of goods and even contracts for oil and gas sector work.

## **Chapter 7: Conclusion and Recommendations**

### **7.1 Chapter summary**

Starting with the brief statements on the background to the construction industry, this chapter reviews the research aim and objectives and how the objectives were achieved through the research. It then outlines the original contributions and significance of the research in the area of adjudication and its application around the world – for the 14 jurisdictions that have introduced statutory adjudication and those who might consider doing so.

The chapter concludes by identifying the limitations of this research and recommendations for possible areas for future research that will extend the current study.

### **7.2 Background**

The construction industry is a significant contributor to any country's economy. There however remain the two chronic problems relating to delayed or non-payment and costly protracted dispute resolution.

### **7.3 Objective 1: Primary alternative dispute resolution methods in the construction industry**

Objective 1 was to review primary alternative dispute resolution methods and analyse the key distinguishing features of mediation, arbitration, and adjudication. Table 23 summarises the key features of mediation, arbitration, and adjudication found from the analysis using the Malaysian construction industry as a base.

Table 23: Summary of key features of mediation, arbitration, and adjudication

Description	Mediation	Arbitration	Adjudication
<b>Basis of resolution of dispute</b>	Interest based; need not be based on facts, evidence, or law. Parties may agree anything (that is lawful)	Rights based; based on facts, evidence, and law	Rights based; based on facts, evidence, and law
<b>Typical tribunal cost in Malaysia in Malaysian Ringgit (approximate equivalent in USD)</b>	RM 2,000 – 15,000 (USD 500 – 4,000)	50,000 – 300,000 (USD 14,000 – 85,000)	10,000 – 50,000 (USD 3,000 – 14,000)
<b>Duration</b>	Typically overall duration of between 1 – 10 days	Typically 1 - 3 years	Typically <b>statutorily limited</b> to between 2 and 9 weeks. May be longer only if agreed by the parties
<b>Rights to the process and pre-conditions</b>	Mediation can be instituted at any time	May only resort to arbitration if there is a prior arbitration agreement or parties subsequently mutually agree	Legislation enables adjudication and which cannot be contracted out and which can be enforced against an unwilling party
<b>Timing</b>	Anytime	In construction contracts arbitration clauses usually provide that arbitrations on most disputes may only be started after completion or termination	By legislation – typically at any time
<b>Extent to which it may be binding and appealed</b>	Not binding at any time during the process. If a settlement contract is reached, it is binding	Typically final and binding. The arbitrator's award may be challenged in court only in very limited circumstances	Binding but the same issues may be reopened and finally decided in arbitration (if there is a prior arbitration agreement or by subsequent mutual agreement) or in the courts
<b>Scope of dispute covered</b>	Open to parties to decide scope	Depends on what the arbitration clause provides, but usually arbitration covers very wide range of issues	Some Acts cover only payment issues – others cover all disputes under the contract

The findings also show historically construction disputes were resolved through the alternative dispute resolution method of arbitration or litigation. Arbitration was supposed to be quicker and cheaper than going to court. Table 23 shows over the years this advantage has deteriorated.

While parties can still resort to amicable dispute resolution methods like mediation or negotiation, these require willingness by the parties. These non-binding methods of resolving disputes have significant advantages but not suited for all circumstances.

To overcome the problems on payment and fill a need for an efficient dispute resolution method, the system of statutorily enabled adjudication was enacted in the United Kingdom in 1996, then New South Wales, Australia in 1999, New Zealand in 2002 and Malaysia in 2012. There are now a total of 14 jurisdictions around the world that have introduced statutory adjudication in the construction industry.

These Acts were all developed with the primary aim to improve payment practices in the construction industry and introduced adjudication as a fast, economical dispute resolution method. Although conceptually appearing to be similar, closer examination shows the details and even some of the concepts vary – in some cases quite significantly. The Acts in New Zealand and Malaysia have very similar objectives, but a detailed analysis shows they are different in various aspects.

It was concluded that while the Acts in the 14 jurisdictions varied they were all effective in serving at least one of the purposes as outline in each Act – namely to expedite dispute resolution in the construction industry.

#### **7.4 Objective 2 (Key scope of the adjudication provisions in various Acts) and Objective 6 (Development of a Decision-Making Model and Case Study)**

Objective 2 was to establish the key characteristics and scope that is covered under the adjudication provisions in the various Acts including any models and trends.

A literature review was done at the beginning of Chapter 2 that dealt with objective 2 and considered other research done in the area relating to statutory adjudication. Gaps were identified and justification for this research was established.

Under this objective key distinguishing features were identified of different conceptual characteristics of the adjudication models found in commonwealth jurisdictions. While the term adjudication is used in all 14 jurisdictions, a detailed study showed there are significant differences among some of the Acts – both conceptually and in the details. The following distinguishing features are the key areas identified:

- (i) the stated purposes of the Acts,
- (ii) whether the Acts govern written or oral contracts or both
- (iii) whether the Acts include construction consultancy contracts
- (iv) whether the Acts cover all types of commercial and residential contracts
- (v) whether the Acts covers all disputes or only payment disputes
- (vi) whether the Acts contributes to a holistic approach to construction dispute resolution such as through providing for a pre-adjudication conference

There appeared two major streams or models – one led by the UK Act and the other by the NSW Act. The NZ Act modelled the UK Act, while the Malaysian Act stated its purposes similar to the NZ Act but restricted its application to the NSW model of only dealing with payment disputes. This and a number of other related areas indicated there was incongruence between the objectives of the Malaysian Act and the detailed provisions in the Act.

These features subsequently formed the basis of the development of the adjudication decision-making model in Chapter 6. The model guides potential decision-makers in evaluating options that are available within the concepts and details of adjudication and leads to a preferred solution based on responses to a series of questions.

The model was then tested on the Malaysian Act and the first court case on adjudication in Malaysia – UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (2014). It was also concluded that the same model could have been applied to the then New Zealand Amendment Bill to establish if there may be an impact on how they may have been different if the model had been applied.

It was also shown that the model could be of benefit to other countries considering such an Act. This was concluded after it was applied to the first court case in Malaysia on adjudication, the case of UDA Holdings Berhad v Bisraya Construction Sdn Bhd & MRCB Engineering Sdn Bhd (2014). It was evident the case could have been avoided and costs and time associated with it could have been avoided. It was shown that much of the 131-page judgement was on whether the Act applied retrospectively or prospectively. The judge held it was to apply retrospectively. If the

Act had incorporated express provisions to clarify this as in the NZ Act, this case could have been avoided. This is one of the questions posed in the decision-making model to be considered. If this question in the model had been considered the Malaysian Act would either have adopted the original provision in the early Malaysian draft Act or possibly considered the provisions in the NZ Act.

Meanwhile this dispute was subsequently referred to the Court of Appeal – leaving the position uncertain as at the beginning of April 2015. It was somewhat fortunate that the judgement was subsequently maintained and not overturned by the Court of Appeal.

### **7.5 Objective 3: Clarity and style of legislative drafting**

Objective 3 was to investigate the extent to which the Acts of Parliament comply with modern plain legal language drafting guidelines and the ease with which users can understand these statutes.

This is among the key objectives in this research and is particularly important because (i) the primary users of these legislations including clients, contractors, subcontractors, suppliers, and consultants in the construction industry are considered lay users, as opposed to legal experts, and (ii) the unprecedented statutorily imposed timeframe is so short (typically stated in days) that parties are expected to expediently understand all provisions in the Act and respond to provisions under these Acts very rapidly. This particular aspect of the research on clarity and style of legislative drafting covering payment and adjudication legislation has never been done by anyone – to the best of the researcher’s knowledge.

A comparative study was done using documentary analysis of primary legislation comprising the 14 Acts of Parliament governing construction industry payment and adjudication. The findings showed these Acts vary widely in drafting style. The Singapore Act is written in steeply traditional legal style. In contrast the New Zealand Act and some of the Acts in Australia particularly those from the East Coast are written in more modern plain language. The most recent Act – the Malaysian Act – uses some traditional words but is structured in an easy to understand style.

Empirical evidence was also obtained from a questionnaire survey of adjudicators listed on the panel of three authorised nominating authorities approved under the

New Zealand Construction Contracts Act 2002. The findings and analysis suggest over half of them either found the Act very easy to understand or easy to understand. Together with those who found them neither easy nor difficult, they formed three quarters of the respondents. One particular interesting finding is that among the remaining quarter that found the Act difficult or somewhat difficult to understand, those with a legal background formed the majority of this group.

The conclusion formed as a result of these findings led to the recommendations to the Commonwealth Association of Legislative Counsel to produce a uniform drafting style guide for all Commonwealth countries. Consistency in drafting style can help avoid discrepancies in interpretation. Very recently such an initiative has been commenced on a limited scale. It is hoped these will be developed to the next level across the whole commonwealth and possibly beyond.

## **7.6 Objective 4 (Effectiveness of adjudication durations, costs, and adjudicators' decisions) and Objective 5 (Quality of adjudicators and their training)**

Objective 4 was to investigate and establish timeframes provided in the Acts and actual time taken to resolve disputes in adjudications and establish the comparative effectiveness of adjudication as a speedy dispute resolution method and to investigate the associated comparative cost effectiveness of adjudication. And corresponding to the time, and cost, to investigate the effectiveness of the quality of adjudicators' decisions which leads to objective 5 in the next chapter which was to investigate the knowledge base expected of adjudicators' and establish ways of enhancing the quality of adjudicators and their decisions.

This will be done by investigating and establishing: (i) timeframes provided in the Acts and actual time taken to resolve disputes in adjudications, (ii) costs of adjudication, and (iii) quality of adjudicators' decisions through a thematic analysis of court cases.

The findings showed that the actual time taken in adjudications were generally within the overall timeframes mandated under the various Acts. Any deviation was based on the agreement of the parties and these were the exception rather than the norm. Consequently, as a result, given that most adjudicators charged on hourly rates, costs were also well contained. The New Zealand evidence was based on results

from a questionnaire while the Malaysian results were based on the first set of figures released for the first time by the Kuala Lumpur Regional Centre for Arbitration on 11 April 2015 (KLRCA, 2015).

This led on to the related objective 5. Among the key findings under the fifth objective are different types of skills required of the different dispute resolvers – arbitrators, mediators, and adjudicators. This is summarised in Table 23:



**Table 24: Summary of comparative skills required of mediators, arbitrators, and adjudicators**

Description	Mediator	Arbitrator	Adjudicator
Legal knowledge	Interest based, therefore knowledge of law required limited to specific issues such as mediator liability, document disclosure, and drafting of settlement contracts	Requires thorough knowledge of the law and practice of arbitration, construction law, construction contracts, and other related areas of law	Requires thorough knowledge of the law and practice of adjudication, construction law, construction contracts, and other related areas of law
Technical knowledge	It is not essential for the mediator to have a high degree of technical knowledge, although this may be useful when the mediator does 'reality testing' with the parties' options when they generate potential solutions.	The historical advantage of arbitration over litigation is that the arbitrator would understand technical issues more quickly than would a judge in court. But the refined process of arbitration (such as the use of expert witnesses and complete hearings) would still enable the non-technical arbitrator to dispense fine justice – albeit at a price and over a longer period.	The adjudicator would be expected to have a high degree of technical skills to be able to expediently make decisions on technical issues. Although the adjudicator could use experts, there is limited time given the statutorily short timeframe within which the decision is to be made. Financial skills would appear to be of significant importance given that the Acts governing adjudication either cover only payment disputes or the majority of disputes in the 'all-dispute' jurisdictions are on payment related issues.
Management skills	The mediator is supposed to be the master of the process of mediation whilst the parties retain control of the outcome. A mediator with good management skills would help dispose the dispute expediently – keeping costs down. With good time and process management, the mediator may have read much about the case in advance and be able to resolve disputes over hours or days at the most.	In the absence of rigid timeframes, the arbitrator would be expected to manage the entire process of arbitration to a reasonable time scale. What is reasonable would be dependent on the complexity of the case.	With the statutorily imposed short timeframe provided, the adjudicator would be expected to have very high time management skills. The short and quick timeframe also means the adjudicator may well be expected to operate with more efficient tools and to work to the nearest hour rather than days. Strict timeframes also mean cases should only be taken when there is a clear period in the adjudicator's schedule.

Description	Mediator	Arbitrator	Adjudicator
Interpersonal skills	As the parties can walk out of a mediation at any time, the mediator would be expected to have very high interpersonal skills to keep the parties around the table and continue negotiating until they reach an amicable resolution – ideally in the form of a settlement contract.	The arbitrator has powers provided under the Acts and those provided under the arbitration agreement or institutional rules. These wide-ranging rules mean the arbitrator can, if necessary, impose orders on the parties.	Although the adjudicator has powers drawn from the relevant Act, a high level of interpersonal skill will come in useful when dealing with situations where there are outstanding issues to be resolved towards the end of the statutory period which might require the adjudicator to have more time before a decision can properly be made. Consent from both parties would be needed. Good interpersonal skills will help secure this extension.

Most notably it was found that the skills required of adjudicators had additional components not necessarily required of the others. Unlike mediators, who are involved in an interest-based dispute resolution method, adjudication is a rights based method of resolving disputes. In addition, the strict and short timeframe provided statutorily means there is added pressure on the adjudicator to also have other skills such as time management skills and the need to have multi-disciplinary skills in construction law, construction practice, adjudication practice and procedures, and soft skill associated with communication and time managing skills.

On the quality of adjudicators, it is concluded that in the context of over tens of thousands of cases on adjudication there have been fewer than 2,000 cases in court relating to adjudication. This represents fewer than 5% of total cases. However the case analysis showed a fairly large proportion was associated with allegations of breaches of natural justice and jurisdictional challenges. As many of these were related to procedural matters, they could be avoided through training and enhancing quality of adjudicators.

A new task-based approach to developing adjudicator standards and testing and accrediting adjudicators was developed as a proof-of-concept. This approach was demonstrated using the Malaysian Act as a base and modified and adapted to apply to the New Zealand Act. This worked as well. It was also demonstrated that the task based learning approach could also apply to an existing Act, which was being revised. In this case it was applied to the New Zealand Construction Contracts Amendment Bill, which is currently in Parliament pending the third and final reading in April 2015.

## **7.7 Research significance and Contribution to Knowledge**

As elaborated earlier, the construction industry is a significant contributor to a nation's economy. However, the twin problems of payment defaults and protracted and costly dispute resolution methods are a hindrance to the successful contribution of the construction industry to the economy. Legislations in the 14 jurisdictions have all introduced adjudication in the construction industry, which have all generally been acclaimed to be working well. And yet both the concepts and details of these statutes appear to be different. Coupling that with the over 1,000 court cases relating to construction adjudication, if a workable decision-making model is developed, it could

help avoid disputes going to court, it may help those considering introducing new legislation in another jurisdiction or those considering amending an existing Act, and it could lead to greater efficiency in the construction industry.

The model that is developed is not only new but it enables foresight. For example it already asks the question and includes the possibility of adjudication being expanded to outside the construction industry. Hence one of the early questions asked in the model facilitates this possibility and suggests the possibility of considering a model 'Adjudication Act' rather than one focused only on the construction industry. The model is flexible enough and could be expanded to become more elaborate. But as a concept model it works – as evidenced when applied on the case study relating to the development of legislation in Malaysia.

The model also shows when applied to the first court case in Malaysia that had the model incorporated clear provisions for the start time from when construction contracts were entered into for them to be covered under the Act, the whole case could have been averted. In addition, several hundred thousand Malaysian Ringgit could have been saved. Model clauses for such a provision do already exist in other Acts and in the draft Regulations for the Malaysian Act that was not incorporated in the final version of the Act and Regulations that were passed and enacted.

Apart from the decision-making model that is developed, chapters 3 and 5 also identified and elaborated on two other important aspects of this research that are both significant and fill a gap that has not been researched in detail or at all by others before. These are:

- (i) The importance of ensuring these Acts are written in modern plain language drafting style because of the speed within which the parties must act or react to procedures provided in the Acts.
- (ii) The need for training that is comprehensive enough to cover all aspects of what is required of adjudicators. While the Acts are working well in terms of speed and costs being well contained, the quality of adjudicators could be improved. In particular, because of the procedural nature of adjudication, a task-based competency standard and training are proposed and

recommended to be developed and implemented across multiple jurisdictions.

## **7.8 Limitation of Research and Recommendations on Areas for Further Research**

The research covers issues relating to alternative dispute resolution methods arbitration, mediation and adjudication and the effectiveness of the adjudication models on legislative drafting style, speed, cost, and quality of adjudicators' decisions and their training. However it excludes several related areas identified below, which could form the basis for future research.

- (i) This research focused on the adjudication provisions within the Acts. Aspects relating to payment, which are also a major part of the Acts, are not considered in any detail. Considering the effectiveness of all the parts of the Acts in all jurisdictions would be far too wide for this thesis to form any in-depth conclusions. Research on the payment components of the Acts leading to the development of a payment legislation model similar to the one developed in this research may be worthy of further research.
- (ii) This research also excludes consideration of the effectiveness of one component typically covered by these Acts – the remedies for recovery of payment or security of payment provisions provided in these Acts. This is another major area in its own right and could be an area for further research.
- (iii) The research excluded the somewhat more subjective area of 'user satisfaction' of the adjudication process. Adjudication is confidential to the parties. Under some jurisdictions, the adjudicator appointing authorities play an active role in administering the adjudications and thus have access to details of the adjudication process and results. This would be very difficult to ascertain in New Zealand. The Privacy Act in New Zealand additionally makes it more difficult to access such information. And given that unlike court cases, which may be public or at least held in publicly known places (the courts), adjudication is private and can be held anywhere. In addition, adjudications may even be done entirely through exchange of documents without any meetings at all. It may be possible to determine user satisfaction from exit polls for court cases but these

comprise less than 5% of all adjudications. To conduct exit polls or interviews on a reasonable number of adjudication cases would be close to impossible due to the confidential and private nature of adjudication.

- (iv) The proof-of-concept illustration of the new task-based approach to developing adjudicator standards and the preliminary decision-making model as proposed in this research could both be independently developed into a full standards model to enhance adjudicator standards and for the decision-making model to be developed into a fully comprehensive model for use by jurisdictions considering developing legislating for payment and adjudication or by those jurisdictions considering amending their existing Acts.

Any of these areas are worthy of further research. This research hopes to have contributed to being a catalyst to the whole area relating to payment and adjudication in the construction industry.

## **Appendices**



## Appendix 1

Office of the Vice-Chancellor  
Ethics and Biological Safety Administration



**UNIVERSITY OF AUCKLAND  
HUMAN PARTICIPANTS ETHICS COMMITTEE**

Level 3, 76 Symonds Street  
Telephone: 64 9 373 7599  
Extension: 83711 / 87830  
Facsimile: 64 9 373 7432

21 August 2009

**MEMORANDUM TO:**

N. A. N. Ameer Ali / N.A.N. Ameer Ali  
Civil & Environmental Engineering

**Re: Application for Ethics Approval (Our Ref. 2007 / 327)**

The Committee met on 19-August-2009 and considered your request for change for your project titled "Questionnaire on adjudication under the New Zealand Construction Contracts Act 2002 (CCA 2002)".

The Committee has granted conditional approval for your request for change. This means that you need to make the required amendments or provide further documentation as per the list below. The changes should be HIGHLIGHTED and accompanied by a COVERING MEMO addressing each concern in our letter and sent by email to l.lon@auckland.ac.nz or r.kothari@auckland.ac.nz. You will receive an email response within five working days stating whether you can proceed with these changes. Please note that until you submit the amendments and receive the email confirmation, the changes have no ethics approval. Please provide only the documents that have the changes and QUOTE THE REFERENCE NO. IN ALL DOCUMENTATION.

1. In the Participant Information Sheet for interviews:
  - Please include the information of taping of interviews. It is stated in the memo that the applicant will tape the interview if it is necessary and if the participant gives permission.
  - Please explain or provide sufficient information about the interview process. In its current form, it only states the length of the interview. Please provide details about the following: it is optional to have the interview tape recorded; the tape can be turned off at any time; the participant can refuse to answer any questions.
  - There needs also to be a statement about confidentiality, that is, not telling others who participated in the interviews.
  - Consent Forms should be stored separately from the research data. Please include a statement about this.
  - Please explain the reason for the statement about signing the consent form before reports are sent out.
  
2. Consent form for interviews:
  - If prior consent is to be obtained about using the names of the participants (page 2 of the Participant Information Sheet), then this needs to be included in the consent form. Include a place where participants can agree / not agree to this.
  - Please explain the meaning of bullet point 2 : "keeping information anonymous to the extent allowed by law".
  - Fifth bullet point should state that participation in the study is voluntary (not filling in the consent form being voluntary).
  - Please add in statements about the interview to mirror those above in the Participant Information Sheet (having the option to be recorded and a place to indicate this; information about the tape recording process, etc ...)
  - Include a statement about the Consent Forms being stored separately from the data.
  - Bullet point six needs to provide a statement where participants can indicate if they want to / do not want to receive these reports.
  
3. Please check the anonymity and confidentiality statements in the Participant Information Sheet and Consent Form to ensure they are appropriate.

## Appendix 2



THE UNIVERSITY OF AUCKLAND  
NEW ZEALAND

DEPARTMENT OF CIVIL AND ENVIRONMENTAL ENGINEERING  
Faculty of Engineering

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20 Symonds Street,  
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Telephone 64 9 373 7599 ex88166  
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The University of Auckland  
Private Bag 92019  
Auckland, New Zealand

### QUESTIONNAIRE ON ADJUDICATION UNDER THE NEW ZEALAND CONSTRUCTION CONTRACTS ACT 2002 (CCA 2002) [Ref 2007 / 327]

#### Participant Information Sheet (PIS)

I invite you to participate in my research project. My name is Noushad Ali Naseem Ameer Ali, and I am a PhD candidate at the University of Auckland, under the supervision of Dr Suzanne Wilkinson, a full-time Associate Professor attached to the Department of Civil and Environmental Engineering, Faculty of Engineering, University of Auckland. Brief profiles of us both are attached as Appendix A.

This document provides basic information that enables you, a potential participant to this questionnaire, to make an informed decision on whether or not to volunteer to participate in completing this questionnaire. You may keep this 'Participant Information Sheet' for future reference.

You can withdraw at any time or withdraw your data up to 20 working days from when you submit this questionnaire, but this will only be possible where your identity information as a participant has been given.

#### **Purpose of questionnaire**

This questionnaire deals with adjudication specifically under the New Zealand Construction Contracts Act 2002 (CCA 2002). This research envisages two stages of questionnaires.

#### **First stage**

The questionnaire attached is the first stage and targets to achieve the following purpose:

*To compile key statistical data and generate reports on adjudication under the CCA 2002 since it came into force on 1 April 2003. The data will be used to generate reports, which will include analyses of trends in a range of areas relating to adjudication in New Zealand. This will include data on the numbers of adjudications, adjudicators and their skill base and geographical spread, practice and procedures that are adopted, subjects of disputes, parties and sums involved, durations, and costs of adjudications. These reports will be **published without specific reference or link to any one participant and his or her response to this questionnaire.***

This questionnaire is likely to take between 15 minutes and 40 minutes to complete - depending on the nature and extent of experience of the participants in adjudication and information kept and filed by the participant.

During the first stage, a reminder may be sent to participants asking them to submit the completed questionnaire. If you have responded, please ignore the reminder.

### **Second stage**

Only those indicating their willingness in the questionnaire to be involved in the second stage will be invited for the second stage. The second stage will involve more detailed focus group interview questions. Following the second stage, this research targets to analyse the effectiveness of adjudication under the CCA 2002 and make recommendations to industry and government for improvements.

#### **Who else has done these types of reports?**

There is currently no similar formal gathering of data for analysis and publication of reports as comprehensive as this proposed for New Zealand.

In the UK, Peter Kennedy and Janey Milligan have, through the Adjudication Reporting Centre at the Glasgow Caledonian University, been gathering data and preparing reports that analyse the trends in a range of areas. These reports are accessible at [www.adjudication.gcal.ac.uk](http://www.adjudication.gcal.ac.uk). Their reports are fairly comprehensive and have been widely consulted and found to be useful.

Some jurisdictions, such as Queensland and the Northern Territory in Australia, and Singapore, publish their adjudicators' decisions on the website. I am happy to provide the links to these websites to participants who are interested. In Malaysia, where a similar Act has been proposed, mandatory reporting by adjudicators has been recommended.

Future international collaboration is now being considered for the gathering of data via the web to allow comparisons of statutory adjudication trends and good practices in the various jurisdictions.

#### **Who is likely to benefit from this research?**

The questionnaire data and the subsequent reports can provide a useful set of data, statistics, and analyses that can benefit the construction industry, potential disputants, party advisers, adjudicators, the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) as the authorised nominating authority, other nominating bodies, and the government. It can provide a useful base for further analysis on the demand, success, development, and trends in adjudication in New Zealand.

#### **Who are the targeted participants to this questionnaire?**

The targeted participants to this questionnaire are those who have had experience in adjudication under the CCA 2002. There is a relatively small number in New Zealand and maximum participation will be a great help.

#### **How will it benefit the participants? (Or what is in it for the participants?)**

The time spent by the participants is appreciated. That can never be replaced. But here are some ways the participants' contribution will be useful to the participant and reciprocated by the researcher:

- It should give participants a sense of satisfaction contributing to initiatives to improve dispute resolution and payment practice within the construction industry. Altruism is a pre-requisite trait of a professional. All adjudicators are treated as professionals.
- Participants will get copies of useful summarised key data and reports associated with adjudication. This will be emailed to those who provide their contact details. Alternatively it may be posted to their contact address if so requested in writing.
- Additionally, participants who also contribute at the subsequent second stage focus group interview questions will get any updates, articles, conference papers and a summary of the research findings that may be produced by the researcher relating to construction adjudication. And for those giving consent for their names to be published during the second stage, a listing of acknowledgements will be made, **without attributing specific responses to individual participants** – *except if prior consent is specifically obtained.*

### Ethics, data storage, and anonymity

The University of Auckland has a strict policy for researchers and staff on ethics when dealing with questionnaires and gathering data from human participants. Approval from the University of Auckland Human Participants Ethics Committee (UAHPEC) is a pre-requisite **before this questionnaire is distributed to participants**.

The raw data gathered will be stored in a secure locked cabinet within the University of Auckland premises for six years from when the data is obtained. It will be destroyed using a shredder after that. This raw data will be kept to enable data to be analysed and reports produced.

This questionnaire may, if the participant wishes, be answered anonymously. If so, you do not need to sign the Consent Form (CF).

However, if you want to get a copy of reports or links to other information made available, you must provide the contact details, and you must sign the Consent Form (CF).

A key report envisaged to be produced in 2008 is 'Adjudication under the New Zealand Construction Contracts Act 2002 – The First Five Years'. The quality of the technical content would be dependent on the quality and number of responses to this questionnaire. So your cooperation to fill in this questionnaire with care is much appreciated.

### Contact details

Please post the questionnaire back to me, the PhD Researcher, at the address shown below within 20 working days of receiving it. If you have any questions, please call me or e-mail me. My contact details are below:

	PhD Researcher	Supervisor	Head of Department
Name	Mr Naseem Ameer Ali	Assoc Professor Dr Suzanne J Wilkinson	Professor Dr Bruce W Melville
Designation	PhD Researcher	Associate Professor	Professor of Civil Engineering, Head of Department
Address	c/o Dept of Civil & Env Engineering, Faculty of Engineering, The University of Auckland, Private Bag 92019, Auckland Mail Centre, Auckland 1142	c/o Dept of Civil & Env Engineering, Faculty of Engineering, The University of Auckland, Private Bag 92019, Auckland Mail Centre, Auckland 1142	c/o Dept of Civil & Env Engineering, Faculty of Engineering, The University of Auckland, Private Bag 92019, Auckland Mail Centre, Auckland 1142
Telephone		09 373 7599 ext 88184	09 373 7599 ext 88165
Mobile telephone	021 - 260 2520 If you don't get me, text a phone number for me to call you back		
E-mail	<a href="mailto:name003@ec.auckland.ac.nz">name003@ec.auckland.ac.nz</a> or <a href="mailto:naseem6864@yahoo.com">naseem6864@yahoo.com</a>	<a href="mailto:s.wilkinson@auckland.ac.nz">s.wilkinson@auckland.ac.nz</a>	<a href="mailto:b.melville@auckland.ac.nz">b.melville@auckland.ac.nz</a>

For any queries regarding ethical concerns you may contact the Chair, The University of Auckland Human Participants Ethics Committee, The University of Auckland, Office of the Vice Chancellor, Private Bag 92019, Auckland 1142. Telephone 09 373-7599 extn 87830.

APPROVED BY THE UNIVERSITY OF AUCKLAND HUMAN PARTICIPANTS ETHICS COMMITTEE for THREE years on 10 October 2007, Reference Number 2007 / 327



## APPENDIX A – BRIEF PROFILES OF (i) DOCTORAL RESEARCHER AND (ii) SUPERVISOR

### (i) BRIEF PROFILE OF DOCTORAL RESEARCHER

#### **Mr Noushad Ali Naseem Ameer Ali**

FCIArb, FCIQB, MRICS, ICECA, MAPM, PPISM, FISM, Reg QS, Accredited Mediator (CIDB, M'sia), BSc (Hons) QS (Reading), CDipAF, MSc Arch (UC London), MSc Construction Law & Arbitration (KC London) Chartered Quantity Surveyor (UK), Chartered Builder (UK), Registered Quantity Surveyor (M'sia), Accredited Mediator (M'sia)

Naseem has a Bachelor's degree in Quantity Surveying from the University of Reading, UK, a post-graduate Certified Diploma in Accounting and Finance awarded by ACCA, a Masters degree in Construction Law and Arbitration from King's College London and another Masters degree in Architecture from The Bartlett, University College London specializing in Building Economics and Management. He is a Chartered Quantity Surveyor (UK), Chartered Builder (UK), Registered Quantity Surveyor (Malaysia), and an Accredited Mediator on the panel of the Construction Industry Development Board (CIDB) Malaysia. He has also had training in adjudication in New Zealand and the United Kingdom.

He was the President of the Institution of Surveyors Malaysia for the session 2006/07. He has in the past served as Vice-Chairman of the Chartered Institute of Arbitrators Malaysia Branch and Vice-President of the Chartered Institute of Building Malaysia. Naseem has also served on the Master Builders Association Malaysia's Contracts & Practice committee and the Advocates and Solicitors' disciplinary committee in Malaysia for several years.

Naseem has over 20 years experience, primarily in the construction industry. He has worked in various capacities in Malaysia and the UK, including as quantity surveyor, senior lecturer in Leeds, director of a quantity surveying practice, and as executive director of the Malaysian operations of a couple of international project management and construction contracts consultancies of British origin – the Beard Dove and the High-Point Rendel Group of companies.

He has also been appointed (visiting) Adjunct Associate Professor to the MSc programme in Construction Contract Management at the Technological University of Malaysia where he delivers the occasional lecture. Much earlier, he initiated the development of the MSc programme in Construction Law and Arbitration at Leeds Metropolitan University, UK. He has presented at over 100 seminars and conferences in the UK, Malaysia, Indonesia, Japan, and New Zealand – in the areas of project management, construction contracts, and dispute resolution.

Some of Naseem's current research interests include modern methods of legal drafting of construction contracts and adjudication.

Naseem drafted the '*Model Terms Of Construction Contracts For Sub-Contract Works*', which was subsequently endorsed by 14 construction related bodies led by the Construction Industry Development Board Malaysia. It is drafted in generic modern plain language. It is drafted such that it may be used anywhere around the world – with minimal or no modifications. An earlier draft had encouraging comments from some of the top world authorities on modern legal drafting.

As Chair of the Construction Industry Working Group on Payment (WG 10) in Malaysia, he had earlier made formal recommendations for the introduction of the proposed '*Construction Industry Payment and Adjudication Act*' for Malaysia. Since then he was involved in the steering committee led by the Construction Industry Development Board in developing the concepts for the proposed Act and a preliminary draft Act. The model proposed draws much from the New Zealand Construction Contracts Act 2002.

Naseem is now doing a PhD in the area of adjudication at the University of Auckland.

### (ii) BRIEF PROFILE OF SUPERVISOR

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**PERSONAL INFORMATION**

**NAME:** Dr Suzanne Wilkinson

**WORK ADDRESS:** Department of Civil and Environmental Engineering, Faculty of Engineering, The University of Auckland

**EMAIL:** s.wilkinson@auckland.ac.nz

**CURRENT POSITION:** Associate Professor

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**EDUCATION:**

1990 Oxford Brookes University, BEng (Hons) Civil Engineering.

1994 Oxford Brookes University, PhD, Civil Engineering specializing in Construction Management.

1994 Oxford Brookes University, Post Graduate Certificate for Teaching in Higher Education.

2005 Massey University, Graduate Diploma in Business Studies – Dispute Resolution

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**RELEVANT RESEARCH PUBLICATIONS****Books**

WILKINSON, S., SCOFIELD, R.. *Management for the New Zealand Construction Industry*, Prentice Hall, Auckland, New Zealand, 306 pages, 2003

**Chapters in books**

WILKINSON S., Client Handling Models for Continuity of Service in Pryke and Smyth, Project Management Relationships, Blackwells Scientific, UK, 2005.

DE KRETZER, WILKINSON S, Management of Project-Generated Knowledge In A.S Kazi, Knowledge Management in the Construction Industry: A socio-technical perspective, Ideas Group, US., 2005 pp 1-18.

WILKINSON S., LEIFER, D., Human Resource Management, in Best. R., Langson, C., and De Valence, G., *Workplace Strategies and Facilities Management – Building in Value*, Oxford, Butterworth-Heinemann, 146-163, 2003.

WILKINSON, S. 'The New Zealand Standard Conditions of Contract'. In: Le Masurier, J., Heriord, H. (ed.) *The Contract in Successful Project Management*. Canterbury, The University of Canterbury, Centre for Advanced Engineering (CAE), 99-108, 2002.

**Refereed Journal Articles**

LOBO Y & WILKINSON S (2007), The Effects of Occupational Licensing on Skills Needs in the Building Industry: Evidence from New Zealand, *Australian Journal of Construction and Building*, Vol 6, No 2.

WILKINSON, S., GUPTA S. The applicability of the RIBA Plan of Work to the Design and Build Procurement System, *Construction Information Quarterly*, Vol 7, No1, 2005.

WILKINSON, S., SCOFIELD, R. 'Integrated Management Curriculum for Civil Engineers and Architects'. *Journal of Professional Issues in Engineering Education and Practice*, ASCE Vol 128, No 3, 125-130, 2002.

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## Appendix 3



THE UNIVERSITY OF AUCKLAND  
NEW ZEALAND

### DEPARTMENT OF CIVIL AND ENVIRONMENTAL ENGINEERING

Faculty of Engineering

Engineering Building  
20 Symonds Street,  
Auckland, New Zealand  
Telephone 64 9 373 7599 ext 88166  
Facsimile 64 9 373 7462  
[www.cee.auckland.ac.nz](http://www.cee.auckland.ac.nz)

The University of Auckland  
Private Bag 92019  
Auckland, New Zealand

### CONSENT FORM (CF) FROM PARTICIPANTS – TO BE STORED FOR 6 YEARS

#### Questionnaire on adjudication under the New Zealand Construction Contracts Act 2002 (CCA 2002)

#### Names of Doctoral Researcher and Supervisor

**Researcher:** Mr Noushad Ali Naseem Ameer Ali

**Supervisor:** Associate Professor Dr Suzanne Wilkinson

I agree to take part in this research and am doing so voluntarily. I have read the Participant Information Sheet (PIS). I understand the nature of the research, and why I have been selected. I have had the opportunity to ask questions and have had them answered to my full satisfaction.

I understand from the PIS:

- Who the primary researcher involved in gathering the data and doing the research is
- That all information I provide will be kept anonymous to the extent allowed by law
- The purposes of the questionnaire namely to gather data on adjudication under the New Zealand Construction Contracts Act 2002, to analyse the data, and produce reports that will be published – but without attributing any one identifiable participant to specific responses
- That this is stage one of a two stage questionnaire and that I do not have to take part in stage two, if I don't want to or if I am not invited
- That this questionnaire may take between 15 minutes and 40 minutes depending on my background and data that I readily have
- That I can choose to answer this questionnaire entirely anonymously. If so, I do not need to fill in this Consent Form
- That I can also choose to provide my contact details if I want to receive the summarised key data and reports associated with adjudication or other information mentioned in the PIS such as the report planned in 2008 – '*Adjudication under the New Zealand Construction Contracts Act 2002 – The First Five Years*'.
- That I can choose not to participate in the second stage questionnaire and interview but if I am willing and am invited, that I will get updates, articles, conference papers and a summary of the research findings that may be produced by the researcher relating to construction adjudication
- That the raw data gathered would be stored securely within the University of Auckland premises for six years from when the data is obtained. It will be destroyed using a shredder after that. This raw data will be kept to enable data to be analysed and reports produced.

- That I have the right to withdraw from participating in this project at any time within 20 working days from the date I submit this questionnaire

Possible participation at the second stage and response to focus group interview questions, if invited. Please tick either **one**.

[ ] Yes, I am willing to participate at the second stage, please contact me later

[ ] No, I am not willing to participate at the second stage

Signature: .....

Name: .....

Company / Business name: .....

.....

Correspondence address: .....

.....

.....

Telephone: .....

Mobile telephone: .....

Fax: .....

Email: .....

**APPROVED BY THE UNIVERSITY OF AUCKLAND HUMAN PARTICIPANTS ETHICS COMMITTEE  
for THREE years on 10 October 2007, Reference Number: 2007 / 327**

## Appendix 4

### QUESTIONNAIRE ON ADJUDICATION UNDER THE NEW ZEALAND CONSTRUCTION CONTRACTS ACT 2002 (CCA 2002) [Ref 2007 / 327]

#### GENERAL INSTRUCTIONS TO PARTICIPANTS

1. All the questions on adjudication relate to only statutory adjudication under the *New Zealand Construction Contracts Act 2002*. Please answer in this context.
2. If you cannot remember the exact answer please provide an approximate answer.
3. Tick (√) at the relevant spaces.
4. Where appropriate write: 'none' (or '0') or 'not applicable' (or 'NA').

#### **A** PARTICIPANT'S BACKGROUND

##### **Question 1: Participant's main background**

What is your *main* background? Choose **one** answer only.

- Architecture / Town Planning / Landscape architecture / Interior Designing
- Building / Construction
- Engineering - Civil / Structural
- Engineering - Electrical / Mechanical
- Engineering – Other eg transport, materials, chemical etc
- Legal
- Management and other backgrounds eg economics, business, accountancy, insurance, computing, banking etc
- Quantity Surveying
- Other; please state: .....

##### **Question 2: Participant's qualifications**

Please state your academic and professional qualifications:

.....

##### **Question 3: Participant's experience in industry**

How many years of experience after your base qualification do you have in the following? Please do not overlap (double count) your answers in 3.1 and 3.2.

- 3.1 Construction industry (if any): ..... years
- 3.2 Legal (if any): ..... years
- 3.3 Total (3.1) + (3.2) from above: ..... years

##### **Question 4: Participant's primary area of work**

Describe your current *primary* area of work. Choose **one** answer only.

- Consultancy / judicial capacity
- Contractor or subcontractor or supplier organisation
- Government or government owned companies
- Private client organisation such as developer or other companies
- Academia
- Others, please state: .....

**Question 5: Geographical location**

Which geographical location are you **primarily based in**? Choose **one** answer only.

- Northern part of North Island including the provinces of Northland, Auckland and Gisborne (Rugby zones of the Blues and the Chiefs)
- Southern part of North Island including the provinces of Taranaki, Hawkes Bay, and Wellington (Rugby zone of the Hurricanes)
- Northern part of South Island including the provinces of Nelson, Westland, Marlborough, and Canterbury (Rugby zone of the Crusaders)
- Southern part of South Island including the provinces of Otago, and Southland (Rugby zone of the Highlanders)
- Outside New Zealand

**Question 6: Base location**

Which town or city are you primarily based in? .....

**B PARTICIPANT'S TRAINING AND EXPERIENCE IN OTHER DISPUTE RESOLUTION METHODS**

**Question 7: Participant's experience in other dispute resolution methods**

- 7.1 In how many **arbitrations** have you acted as:
  - 7.1.1 Arbitrator? .....cases
  - 7.1.2 Party representative? .....cases
  - 7.1.3 Party in dispute? .....cases
  - 7.1.4 Expert witness? .....cases
  - 7.1.5 Witness of fact? .....cases
- 7.2 In how many **mediations** have you acted as:
  - 7.2.1 Mediator? .....cases
  - 7.2.2 Party representative? .....cases
  - 7.2.3 Party in dispute? .....cases
  - 7.2.4 Expert witness? .....cases
  - 7.2.5 Witness of fact? .....cases
- 7.3 In how many **court cases** have you acted as:
  - 7.3.1 Judge or similar judicial capacity? .....cases
  - 7.3.2 Party representative? .....cases
  - 7.3.3 Party in dispute? .....cases
  - 7.3.4 Expert witness? .....cases
  - 7.3.5 Witness of fact? .....cases

**C      PARTICIPANT'S TRAINING AND EXPERIENCE IN ADJUDICATION**

**Question 8: Participant's training in adjudication**

Have you had formal training in adjudication? You may choose more than one answer.

- No formal or informal training
- Have done self-study
- Did the AMINZ's (Arbitrators' and Mediators' Institute of New Zealand Inc) training course in adjudication
- Did the BRANZ Ltd training course in adjudication
- Did the Massey University course with option in adjudication
- Other training or courses, please state the courses or training and the course provider:  
.....  
.....

**Question 9: Membership of AMINZ**

Are you a member of AMINZ? Please choose one answer only.

- Yes
- No

If you answered 'No' please go straight to Question 11.

**Question 10: Panellist or listing on AMINZ**

Choose those that apply to you. You may tick more than one. If none apply, leave blank.

- I am on the AMINZ's list of adjudicators
- I am on the AMINZ's panel of arbitrators
- I am on the AMINZ's panel of mediators

**Question 11: Participant's experience in adjudication *outside the role of Adjudicator***

In how many adjudications under the CCA 2002 have you acted as:

- 11.1 Party representative? .....cases
- 11.2 Party in dispute? .....cases
- 11.3 Expert witness? .....cases
- 11.4 Witness of fact? .....cases

**Question 12: Appointments as adjudicator and determinations made**

It is possible that following appointment as adjudicator, the adjudicator does not eventually go on to conclude and make a 'determination' under the Act for various reasons. How many appointments have you had and how many determinations have you made under the following circumstances? If none, write 'none' or '0'.

No	Description	Year	Number of Appointments	Number of Determinations
12.1	Appointment as adjudicator and determinations made following nomination by the authorised nominating authority AMINZ	2003 2004 2005 2006 2007 2008		
12.2	Appointment as adjudicator and determinations made following nomination by another nominating body	2003 2004 2005 2006 2007 2008		
12.3	Appointment as adjudicator and determinations made following consensually agreed appointment by the parties	2003 2004 2005 2006 2007 2008		
12.4	Appointment as adjudicator and determinations made following being pre-named as adjudicator in a construction contract	2003 2004 2005 2006 2007 2008		

**Question 13: Reasons for pre-mature ending of adjudication**

Please state the number of adjudications that ended pre-maturely (before a determination is made) – if any. Choose the reason that most closely matches against the number of cases for that reason.

No	Reason for adjudication ending pre-maturely	Number of cases
13.1	The adjudicator decided to withdraw from the case after appointment	
13.2	The adjudication ended pre-maturely because, before the adjudicator's decision was made, (i) the dispute was decided in court	
	(ii) the dispute was decided in arbitration	
	(iii) the parties settled their disputes following mediation	
	(iv) the parties settled their disputes following negotiation	
	(v) the claimant withdrew the case	
	(vi) both parties agreed not to proceed with the adjudication	
13.3	Other: Please state the reason: (i) .....	
	(ii) .....	
	(iii) .....	

**D ADJUDICATION PRACTICE AND PROCEDURE**

The following questions relate to practice and procedures adopted by you when ***acting as an adjudicator***. If you have never been appointed as adjudicator, choose from the given answer options one that you are ***most likely to do*** if appointed as adjudicator, and write 'not applicable' (or 'NA') where you are to fill and write in an answer.

**Question 14: Site visit**

In how many cases, if any, did you visit the project site?

14.1 Visited the project site in ..... cases

14.2 Did ***not*** visit the project site in ..... cases

14.3 I have never sat as adjudicator, but am likely to visit the project site in ..... % of my cases.

**Question 15: Calling of conference**

In how many cases, if any, did you call for a conference at the beginning and during the course of the adjudication?

15.1 Called for conference only at the beginning: ..... cases.

15.2 Called for conference only during the course of an adjudication: ..... cases.

15.3 Called for conference at both the beginning and during the course of the adjudication: ..... cases.

15.4 I did not call for any conference in ..... cases.

15.5 I have never sat as adjudicator, but am likely to call for a conference in ..... % of my cases.

**Question 16: Questioning witnesses**

If you have conducted oral conferences; as an adjudicator, did **you** personally get involved in questioning the parties or witnesses?

16.1 I did get involved in the questioning in ..... cases

16.2 I did **not** get involved in the questioning in ..... cases

16.3 I have never sat as adjudicator, but am likely to get involved in the questioning in ..... % of my cases.

**Question 17: Party representation**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here: .....

In how many cases did the parties:

No	Description	Claimant	Respondent
17.1	Represent themselves?	..... cases	..... cases
17.2	Appoint technical (or lay) representatives to represent them?	..... cases	..... cases
17.3	Appoint lawyers to represent them?	..... cases	..... cases
17.4	Appoint both technical representatives and lawyers to represent them?	..... cases	..... cases

**Question 18: Use of expert evidence**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here: .....

In how many cases was expert evidence used during your adjudications?

18.1 ..... cases had expert evidence used

18.2 ..... cases did not have any expert evidence used

**Question 19: Areas of expertise of experts used**

If you have had experts being used in adjudications, please state in how many cases were each of the following areas of expertise used. If you have never sat as adjudicator, do not respond to the options but just write 'not applicable' or 'NA' here: .....

No	Area of expertise	Number of cases
1	Architectural design and quality issues	
2	Building / construction workmanship	
3	Engineering – civil / structural design and quality issues	
4	Engineering – mechanical / electrical design and quality issues	
5	Legal	
6	Planning / programming	
7	Quantification of extension of time	
8	Quantity surveying including quantification and financial issues like valuing variations, payments, and other financial claims	
9	Other areas of expertise; please specify below: (i) .....	
	(ii) .....	
	(iii) .....	
	(iv) .....	

**E DURATION OF ADJUDICATION, FEES, PARTIES, AND TYPES AND AMOUNT OF DISPUTES**

The questions under this section relate to only **adjudications that were completed** and determinations made by you **as an adjudicator**.

Reminder: The duration of 20 or 30 days provided in the Act starts from the end of the period when the responding party to the adjudication is to provide a written response to the adjudication claim.

If you have never sat as adjudicator, please go straight to question 24.

**Question 20: Duration of adjudication**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
.....

How many adjudicator determinations did you make:

20.1 Within the original stipulated time of 20 working days as provided in the Act?  
..... cases

20.2 Within the extended time of 30 working days as provided in the Act? .....  
cases

20.3 Beyond the original stipulated time following agreement between the parties to extend time beyond 30 working days? ..... cases

20.4 Beyond the deadlines provided in the Act or the deadline agreed by the parties?  
..... cases

**Question 21: Extended duration of adjudication**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
.....

If you have any experience of adjudications going beyond the statutorily provided time of 30 days following the parties' agreement to extend the time, how long did the adjudication take? State the number of cases under each category of time range.

- 31 - 40 days: ..... cases
- 41 - 50 days: ..... cases
- 51 - 60 days: ..... cases
- 61 - 70 days: ..... cases
- 71 - 80 days: ..... cases
- 81 - 90 days: ..... cases
- 91 - 100 days: ..... cases
- 101 days or more: ..... cases

**Question 22: Time spent by adjudicators on adjudications**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
.....

How long (actual net, chargeable time to the nearest hour) did you spend on each adjudication as an adjudicator? State the number of adjudications against each range of time spent shown.

- 10 hours or less ..... cases

- 11 - 20 hours ..... cases
- 21 - 30 hours ..... cases
- 31 - 40 hours ..... cases
- 41 - 50 hours ..... cases
- 51 - 60 hours ..... cases
- 61 - 70 hours ..... cases
- 71 - 80 hours ..... cases
- 81 - 90 hours ..... cases
- 91 - 100 hours ..... cases
- 101 - 110 hours ..... cases
- 111 - 120 hours ..... cases
- 121 - 130 hours ..... cases
- 131 - 140 hours ..... cases
- 141 - 150 hours ..... cases
- 151 hours or more ..... cases

**Question 23: Adjudicators' fee levels**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
 .....

How do you charge fees as an adjudicator? State the number of adjudications for each method of fees charged:

- 23.1 On an hourly rate basis: ..... cases
- 23.2 On a lump sum basis: ..... cases
- 23.3 As a percentage of the claimed or disputed amount: ..... cases
- 23.4 Some other method including a combination of the above. Please specify method then state number of adjudications where this method of charging fees was adopted:

Method of fees charged: .....  
 .....  
 Number of adjudications: ..... cases

**Question 24: Adjudicators' hourly fee rates**

What is your **typical** hourly fee rate charged? All rounded to the nearest NZD excluding GST. Choose and tick (✓) **one** only.

- [ ] Up to 50 per hour
- [ ] 51 - 100 per hour
- [ ] 101 - 150 per hour
- [ ] 151 - 200 per hour
- [ ] 201 - 250 per hour
- [ ] 251 - 300 per hour
- [ ] 301 - 350 per hour
- [ ] 351 - 400 per hour
- [ ] 401 - 450 per hour
- [ ] 451 - 500 per hour
- [ ] 501 or more per hour

**Question 25: Reasonableness of the statutory period for adjudication**

What is your view of the duration of the current statutory periods of 20 working days and the extended 30 working days? Choose and tick (✓) **one** only.

- [ ] The current statutory period of 20 – 30 working days is appropriate
- [ ] A statutory period of 30 – 40 working days would be more appropriate
- [ ] A statutory period of 40 – 50 working days would be more appropriate
- [ ] A statutory period of 50 – 60 working days would be more appropriate
- [ ] A statutory period of more than 60 working days would be more appropriate

**Question 26: Parties in dispute**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here: ..... and go straight to **question 30**.

Who are the parties in dispute? State the number of adjudications you have had under each of the following parties.

No.	Parties in dispute		Number of cases
	Claimant	Respondent	
1	Principal / client / employer	Head / main contractor	
2	Head / main contractor	Principal / client / employer	
3	Head / main contractor	Nominated* subcontractor	
4	Nominated* subcontractor	Head / main contractor	
5	Head / main contractor	Domestic** subcontractor	
6	Domestic** subcontractor	Head / main contractor	
7	Head / main contractor	Supplier of prefabricated customised components	
8	Supplier of prefabricated customised components	Head / main contractor	
9	Subcontractor	Sub-subcontractor	
10	Sub-subcontractor	Subcontractor	
11	Others, including more than two parties, please state parties:  (i) .....  (ii) .....  (iii) .....	.....  .....  .....	

\* a nominated subcontractor is a contractor chosen or nominated by the principal/client/employer or the contract administrator but who contracts directly with the head/main contractor.

\*\* a domestic subcontractor is a contractor chosen by, and who contracts directly with, the head/main contractor.

**Question 27: Outcome of adjudication**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
 .....

What was the outcome of the cases?

- 27.1 Claimant 'won' outright in ..... cases
- 27.2 Respondent 'won' outright in ..... cases
- 27.3 Split determination but on balance claimant 'won' in ..... cases
- 27.4 Split determination but on balance respondent 'won' in ..... cases
- 27.5 Split determination equally between claimant and respondent in ..... cases

**Question 28: Types of disputes commonly referred to adjudication**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
 .....

How frequently are the following types of disputes referred to in an adjudication? Write in the appropriate number between 0 – 10 under each type of dispute described.

- 0 = Never had in any of my adjudications
- 1 = In about 10% of the cases
- 2 = In about 20% of the cases
- 3 = In about 30% of the cases
- 4 = In about 40% of the cases
- 5 = In about 50% of the cases
- 6 = In about 60% of the cases
- 7 = In about 70% of the cases
- 8 = In about 80% of the cases
- 9 = In about 90% of the cases
- 10 = Always, in all my adjudications

- [ ] Disputes on progress payment
- [ ] Disputes on final accounts
- [ ] Disputes on release of retention sum
- [ ] Disputes on variation work rates and amounts
- [ ] Disputes on quantification and measurement of work including variation work
- [ ] Disputes on loss and expense claims
- [ ] Disputes on other financial damages claims
- [ ] Disputes on extension of time claims
- [ ] Disputes on liquidated damages
- [ ] Disputes relating to defects or poor quality of materials or workmanship
- [ ] Disputes relating to completion certificates or making good defects certification
- [ ] Disputes on termination of contract
- [ ] Other types of disputes. Please specify: .....

**Question 29: Amounts commonly disputed**

Write 'not applicable' or 'NA' to this question if you have never sat as adjudicator here:  
 .....

What are the amounts commonly claimed or disputed? All amounts are stated in NZD to the nearest dollar. State the number of cases that fall within each category of range of values of disputes. Do not mark those ranges that you have not dealt with.

- Up to 10,000: ..... cases
- 10,001 - 50,000: ..... cases
- 50,001 - 100,000: ..... cases
- 100,001 - 150,000: ..... cases
- 150,001 - 200,000: ..... cases
- 200,001 - 250,000: ..... cases
- 250,001 - 300,000: ..... cases
- 300,001 - 350,000: ..... cases
- 350,001 - 400,000: ..... cases
- 400,001 - 450,000: ..... cases
- 450,001 - 500,000: ..... cases
- 500,001 - 1,000,000: ..... cases
- 1,000,001 and above: ..... cases

**F GENERAL QUESTIONS**

**Question 30: Effectiveness of the CCA 2002**

What do you think of the effectiveness of the adjudication provisions under the CCA 2002 under the following: Choose and tick (✓) only one answer for each question.

30.1 The introduction of an **economical** dispute resolution method:

- Very effective
- Quite effective
- Neither effective nor ineffective
- Quite ineffective
- Not effective at all

30.2 The introduction of a **speedy** dispute resolution method:

- Very effective
- Quite effective
- Neither effective nor ineffective
- Quite ineffective
- Not effective at all

30.3 The introduction of a **fair and just** dispute resolution method:

- Very effective
- Quite effective
- Neither effective nor ineffective
- Quite ineffective
- Not effective at all

30.4 The provisions in terms of **ease of understanding** the language used and the procedures under the CCA 2002:

- Very easily understood
- Quite easily understood
- Neither easy nor difficult

- Somewhat difficult to understand
- Very difficult to understand

**Question 31: Demographic - Gender**

- Male
- Female

**Question 32: Stage two questionnaire - willingness to participate at the second stage**

I am prepared to participate at the second stage and respond to focus group interview questions, if invited:

- Yes, please contact me later
- No, please do not contact me

**Question 33: Comments or suggestions for improving the CCA 2002. [If any]**

.....

.....

.....

-----

**This part of the questionnaire is optional.**

If you wish to remain anonymous, do not fill in this page. But if you want a copy of the research summary, you must fill in this page and the Consent Form (CF) attached.

**Personal details:**

Name: .....

Company / Business name: .....

.....

Correspondence address: .....

.....

.....

.....

Telephone: .....

Mobile telephone: .....

Fax: .....

Email: .....

Please **post** the completed questionnaire to:

**Attn: PhD Researcher Mr Naseem Ameer Ali**  
**Supervisor: Assoc Prof Dr Suzanne Wilkinson**  
c/o Dept of Civil & Env Engineering,  
Faculty of Engineering,  
The University of Auckland,  
Private Bag 92019,  
Auckland Mail Centre, Auckland 1142,  
New Zealand

Alternatively you may **send** the completed questionnaire to:

**Attn: PhD Researcher Mr Naseem Ameer Ali [Mobile: 021 - 260 2520]**  
**Supervisor: Assoc Prof Dr Suzanne Wilkinson**  
c/o Dept of Civil & Env Engineering,  
Faculty of Engineering,  
School of Engineering, The University of Auckland,  
20 Symonds Street,  
Auckland,  
New Zealand

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