Judicial review of adjudication under CIPAA — an Australian perspective on the obligation of an adjudicator to comply with the principles of natural justice

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Introduction

Under the new Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA), parties to construction contracts will be subject to compulsory statutory adjudication.1 “The policy of (CIPAA) is ‘pay first, argue later’ in order to facilitate payment and cash flow in the construction industry”.2 CIPAA, and the various Australian models of security of payment legislation, as well as the New Zealand, Singapore, UK and other Commonwealth models3 seek to achieve similar objects, through similar (though often varied and distinct) legislative means.

The legislation was intended to provide a relatively quick and inexpensive process4 for the recovery of progress payments by persons who carry out work, or supply goods or services in the construction industry. The statutory regime was designed to operate on an interim basis which may be adjusted or even reversed in further or other proceedings in a court, or arbitral tribunal or other form of dispute resolution under the contract.5

For a party aggrieved by an adjudicator’s decision, absent an express right of recourse to the courts, the party must rely on “internal” review by way of review adjudication (if provided for under the legislation),6 resisting the enforcement of the adjudication decision (if available)7 and judicial review (unless excluded).

In Malaysia, unlike most other jurisdictions, an aggrieved party to adjudication proceedings is given express recourse to apply to the High Court to seek to set aside an adjudication decision on one or more of the grounds set out in s 15(a)–(d) of the CIPAA.8 Given this express right, it remains to be seen whether Malaysian courts will be willing to admit a separate right to seek judicial review (under O 53 of the Rules of Court 2012), or to resist enforcement of adjudication decisions (under s 28 of the CIPAA).

Subject to the distinct nature of CIPAA and its differences with the Australian and other Commonwealth statutory adjudication models, the Australian experience over the past decade or more may provide guidance to Malaysian courts and practitioners in interpreting and applying the Malaysian legislation, specifically in the context of judicial review of adjudication decisions.

Judicial review in the Australian context

Under the Australian legislation (except for limited rights under the WA and NT legislation), there is no express right of recourse to the courts for an aggrieved party. In this context, there are several important factors suggesting that full judicial review should not be available.9

Despite the interim nature of adjudication and its “pay now argue later” philosophy, it has been held in Australia that judicial review of an adjudication determination is available:10

(a) by certiorari11 on all of the grounds available under the writ, including for jurisdictional error, or error on the face of the record and such relief is not excluded either expressly or by implication;12
(b) where the basic and essential requirements of the Act for a valid determination are not met (which may be equated with jurisdictional error);
(c) if it is not a bona fide attempt to exercise power under the Act;13 and
(d) where there has been a substantial denial of the standard of procedural fairness which is required under the Act (which is also a jurisdictional error).

The obligations of an adjudicator under CIPAA to comply with natural justice

An adjudicator under CIPAA has a duty to comply with the principles of natural justice.14 Under the Malaysian Act, at the time of acceptance of appointment, an adjudicator must make a written declaration that “there is no conflict of interest in respect of his appointment”.15 that “he shall act independently, impartially and in a
timely manner and avoid incurring unnecessary expense’,16 “he shall comply with the principles of natural justice”17 and “there are no circumstances likely to give rise to justifiable doubts as to the adjudicator’s impartiality and independence”.18

Under the CIPAA, where there has been a denial of natural justice, or the adjudicator has not acted independently or impartially, an aggrieved party has an express right to apply to the High Court to set aside an adjudication decision.19 There may be a further right to resist enforcement under s 28 of the CIPAA on the same grounds that would give a right to relief by way of judicial review (that the adjudicator exceeded his jurisdiction or failed to comply with the rules of natural justice),20 and ordinary judicial review may also be available.

What are the principles of natural justice which apply to statutory adjudications in Australia?

While, unlike CIPAA, there is no express reference to the principles of natural justice in any of the Australian Acts,21 it has been held by courts around Australia that an adjudicator is under a duty to comply with the principles of natural justice,22 taking into account the purpose and provisions of the various Australian Acts. While this is the case, the particular content of the rules that will apply is derived from the context of the legislative regime, including the expedition in which the determination must be made.23 A failure to accord natural justice will result in the adjudication determination being a nullity24 provided that the failure is material or substantial in the sense that it would make a difference to the outcome.25

What is the content of the requirement to afford natural justice in adjudication proceedings?

There are many examples of the requirement to afford natural justice in an adjudication context26 which are illustrative of the “measure” required:

a) if an adjudicator is contemplating making a determination on a different basis from how the case was conducted, he or she must inform the parties of that prospect so that they have an opportunity to address any new issue, and a failure to do so will ordinarily result in a denial of procedural fairness;27

b) if an adjudicator does not read the parties’ submissions at all,28 or does not consider the adjudication response,29 or when the adjudicator fails to mention a critical issue;30

c) a party is not permitted to add new claims, adduce new evidence or arise new arguments when the other side has no opportunity to respond;31

d) the adjudicator has no jurisdiction to reach a decision that was not responsive to the issues referred in the adjudication or decide matters that were not referred,32 or was on a basis which was not advanced by either party,33 or on the basis of evidence that was not before the parties;34 and

e) the adjudicator may draw on the adjudicator’s own knowledge and expertise, but must notify the parties of this intention and give them equal opportunity to comment and a failure to do so will be a breach of natural justice.35

What are the consequences of a finding that the principles of natural justice have been contravened?

If the principles of natural justice are contravened in a particular adjudication, the court may find that the adjudication determination is invalid, and make a declaration of invalidity, or grant relief in the nature of certiorari to quash the adjudication determination. The court may also remit the matter back to the adjudicator to be determined in accordance with law.36 The court may refuse relief on the basis that the denial of natural justice could not possibly have made a difference to the outcome,37 or the party asserting a denial of natural justice had created the confusion which resulted in the alleged unfairness.38

Conclusion

With the recent commencement of CIPAA, practitioners, stakeholders, and interested observers will need to wait to see to what extent Malaysian courts are prepared to intervene in the adjudication process, what principles and tests will be applied in relation to setting aside, judicial review, and/or refusal of enforcement, of adjudication decisions, and how this will work for the operation of CIPAA. Given the commonalities between the various models of security of payment legislation and subject to their respective differences, it is to be expected (or at least hoped) that a distinct regional/Commonwealth jurisprudence will emerge which will assist practitioners and stakeholders across the region. The next step … harmonisation?39

A more detailed version of this paper was originally published in (2014) 1(2) Malaysian Society of Adjudicators Newsletter at 9.
Footnotes
1. KLRCA Adjudication Training Programme Training Manual Units 1 and 2 p 5, which is also the principle underlying the Australian Acts, see Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd (2009) 26 VR 112; [2009] VSC 156; BC200903118 (Vickery J) at [44] (Hickory) citing Multiplex Constructions Pty Ltd v Lauckeys [2003] NSWSC 1140; BC200307373 at [96], Above.


5. See for example, Building and Construction Industry Security of Payment Act 2002 (Vic), s 47(2)–(3); Pearl Hill, above n 4, at [16]–[17].


7. See for example, Cantillon Ltd v Urvasco Ltd [2008] All ER (D) 406 (Feb); [2008] BLR 250; (2008) 117 Con LR 1; [2008] EWHC 282 (TCC), at [55].

8. Also the case in Singapore, see Building and Construction Industry Security of Payment Act 2004 (Singapore), s 27(5).

9. Some of these are referred to in the first two paragraphs of the introduction to this article.

10. See Maxstra Constructions Pty Ltd v Gilbert (t/s J Gilbert Concrete) [2013] VSC 243; BC201302374 per Vickery J at [15] (Maxstra) which, subject to the differences in legislation between the Australian states and territories, may be taken to apply Australia wide mutatis mutandis.

11. P Vickery, above n 3, at [61].

12. The relief is sought under the local rules of court in each jurisdiction that are equivalent to O 53 of the Malaysian Rules of Court 2012; See, P Vickery, above n 3, at [50] citing Hickory, above n 1 and Grocon (No 2), above n 4; Metacorp Australia Pty Ltd v Anlaco Construction Group Pty Ltd (No 2) (2010) 30 VR 141; [2010] VSC 255; BC201004054 (Metacorp); Maxstra, above n 10, at [15]. In NSW since Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; (2010) 272 ALR 750; [2010] NSWCA 190; BC201007088, certiorari is available to set aside an adjudicator’s determination on the ground of jurisdictional error (overturning Brodyn Pty Ltd v Time Cost and Quality v Davenport (2004) 61 NSWLR 421; (2005) 21 BCL 289; [2004] NSWCA 394; BC200407256 (Brodyn)) largely applying Grocon (No 2). The situation is similar in other states.

13. Above, Brodyn part of which decision was applied by Vickery J in Hickory, above n 1; and Grocon (No 2), above n 4, at [166]; and Maxstra, above n 10, at [15].

14. CIPA, s 24(c).


16. CIPA, s 24(b).

17. CIPA, s 24(c).
18. CIPAA, s 24(d).
19. CIPAA, s 15(b), (c).
20. Which is the case in the UK, eg Cantillon Ltd v Urvasco Ltd, above n 7, at [55]. For the Singapore position, see n 8 above.
22. For example, Brodyn, above n 12, at [55]; Reiby Street Pty Ltd v Winterton Constructions Pty Ltd (2006) 22 BCL 426; [2005] NSWSC 545; BC200504115 per Macready A SJ at [22] (Reiby Street); Metacorp, above n 12.
23. Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168; BC201001439 at [142], [147](McDougall J); Maxstra NSW Pty Ltd v Blacklabel Services Pty Ltd [2013] NSWSC 406; BC201302022 (Rothman J) at [79]; also see Grocon (No 2), above n 4, at [143].
24. Built Environments Pty Ltd v Tali Engineering Pty Ltd [2013] SASC 84; BC201310115 at [128]; James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd [2011] QSC 145; BC201103827 at [45]; Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd [2013] TASSC 3; BC201309016 at [26]; MRCN Pty Ltd (t/a Westforce Constructions) v ABB Australia Pty Ltd [2014] WASAT 59; BC201404538 at [48].
29. Reiby Street, above n 22.
30. Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1; BC200600155 at [57]–[58].
32. Principle referred to in McAlpine PPS Pipeline Systems.
34. See Hyder Consulting (UK) Ltd v Carillion Construction Ltd [2011] EWHC 1810 (TCC); see Metacorp, above n 12; See also TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd (2006) 22 BCL 39; [2004] NSWSC 1216; BC200408622 at [26]–[31].
36. Metacorp, above n 12.
37. Eg Watpac, above n 23, at [147].
38. Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd [2007] NSWSC 46; BC200700488 at [53].
39. See J Coggins, RF Elliott, M Bell, above n 3.