

Construction Industry Payment and Adjudication Act, 2012

CIPAA

Messrs. Azam Lim & Pang

*This Act came into force on
15 April 2014.*

(It has prospective and not retrospective effect)

Objective of CIPAA

To provide and facilitate speedy and timely payment to help and ease cashflow issue.

To provide a cost-effective dispute resolution process for payment disputes in the construction industry.

APPLICABILITY

All construction contracts with written agreements to carry out projects in Malaysia, wholly or partly, whether the contract with the government or a private party.

NON- APPLICABILITY

Any construction contract in respect of any building less than four storeys high entered into by a natural person which is wholly intended for his occupation.

When to refer to CIPAA

When there is a dispute arising out of construction contract on the following issues:-

- Non-payment;
- Under-payment;
- Non-certification; or
- Under-certification

Who can claim under CIPAA

Main Contractor

• **Sub-Contractor**

Supplier

Professional Services

eg: Engineers, Architects, QS,
Project Managers, etc.

Section 5 of CIPAA

Payment Claim

- 1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
- 2) The payment claim shall be in writing and shall include—
 - a) The amount claimed and due date for payment of the amount claimed;
 - b) Details to identify the cause of action including the provision in the construction contract to which the payment relates;
 - c) Description of the work or services to which the payment relates; and
 - d) A statement that it is made under this Act.

Section 6 of CIPAA

Payment Response

- 1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.
- 2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.
- 3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.
- 4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

Section 7 of CIPAA

Right to Refer Dispute to Adjudication

- 1) An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.
- 2) The right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under subsection 6(3).
- 3) A dispute referred to adjudication under this Act is subject to the Limitation Act 1953 [Act 254], Sabah Limitation Ordinance [Cap. 72] or Sarawak Limitation Ordinance [Cap. 49] as the case may be.

Section 8 of CIPAA

Initiation of Adjudication

- 1) A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.
- 2) Upon receipt by the respondent of the notice of adjudication, an adjudicator shall be appointed in the manner described in section 21.
- 3) A party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party.

Section 9 of CIPAA

Adjudication Claim

- 1) The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.
- 2) The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1).

Section 10 of CIPAA

Adjudication Response

- 1) The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.
- 2) The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).
- 3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1).

Section 11 of CIPAA

Adjudication Reply

- 1) The claimant may, within five working days from the receipt of the adjudication response, serve a written reply to the adjudication response together with any supporting document on the respondent.
- 2) The claimant shall provide the adjudicator with a copy of the adjudication reply together with any supporting document within the time specified under subsection (1).

Section 12 of CIPAA

Adjudication and Decision

- 1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.
- 2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within— a) Forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later; b) Forty-five 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.
- 3) An adjudication decision which is not made within the period specified in subsection (2) is void.
- 4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.
- 5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.
- 6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.
- 7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.
- 8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7) and any correction made is deemed take effect from the date of the original adjudication decision.
- 9) The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act.

Section 13 of CIPAA

Effect of Adjudication Decision

The adjudication decision is binding unless—

- a) It is set aside by the High Court on any of the grounds referred to in section 15;
- b) The subject matter of the decision is settled by a written agreement between the parties; or
- c) The dispute is finally decided by arbitration or the court

Section 21 of CIPAA

Appointment of Adjudicator

An adjudicator may be appointed in the following manner:

- a) By agreement of the parties in dispute within ten working days from the service of the notice of adjudication by the claimant; or
- b) By the Director of the KLRCA-
 - i) Upon the request of either party in dispute if there is no agreement of the parties under paragraph (a); or
 - ii) Upon the request of the parties in dispute.

Section 25 of CIPAA

Powers of the Adjudicator

The adjudicator shall have the powers to—

- a) Establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
- b) Order the discovery and production of documents;
- c) Set deadlines for the production of documents;
- d) Draw on his own knowledge and expertise;
- e) Appoint independent experts to inquire and report on specific matters with the consent of the parties;
- f) Call for meetings with the parties;
- g) Conduct any hearing and limiting the hearing time;
- h) Carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;
- i) Inquisitorially take the initiative to ascertain the facts and the law required for the decision;
- j) Issue any direction as may be necessary or expedient;
- k) Order interrogatories to be answered;
- l) Order that any evidence be given on oath;
- m) Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;
- n) Decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter.
- o) Award financing costs and interest; and
- p) Extend any time limit imposed on the parties under this Act as reasonably required

Section 28 of CIPAA

Enforcement of adjudication decision as judgment

- 1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
- 2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
- 3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

Stages and Parties

Stage 1

CLAIM

Parties:

1. Unpaid Party
2. Non-Paying Party

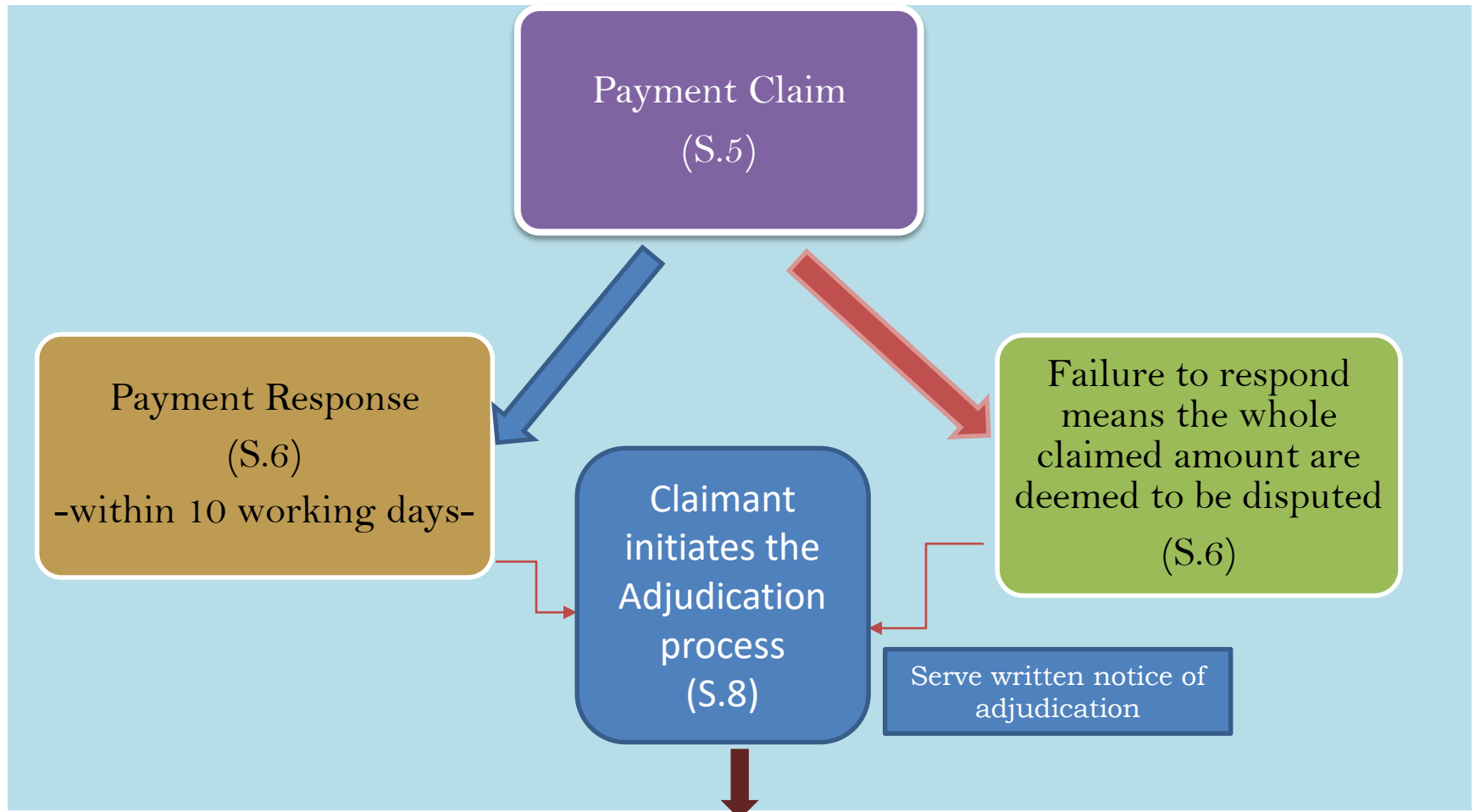
Stage 2

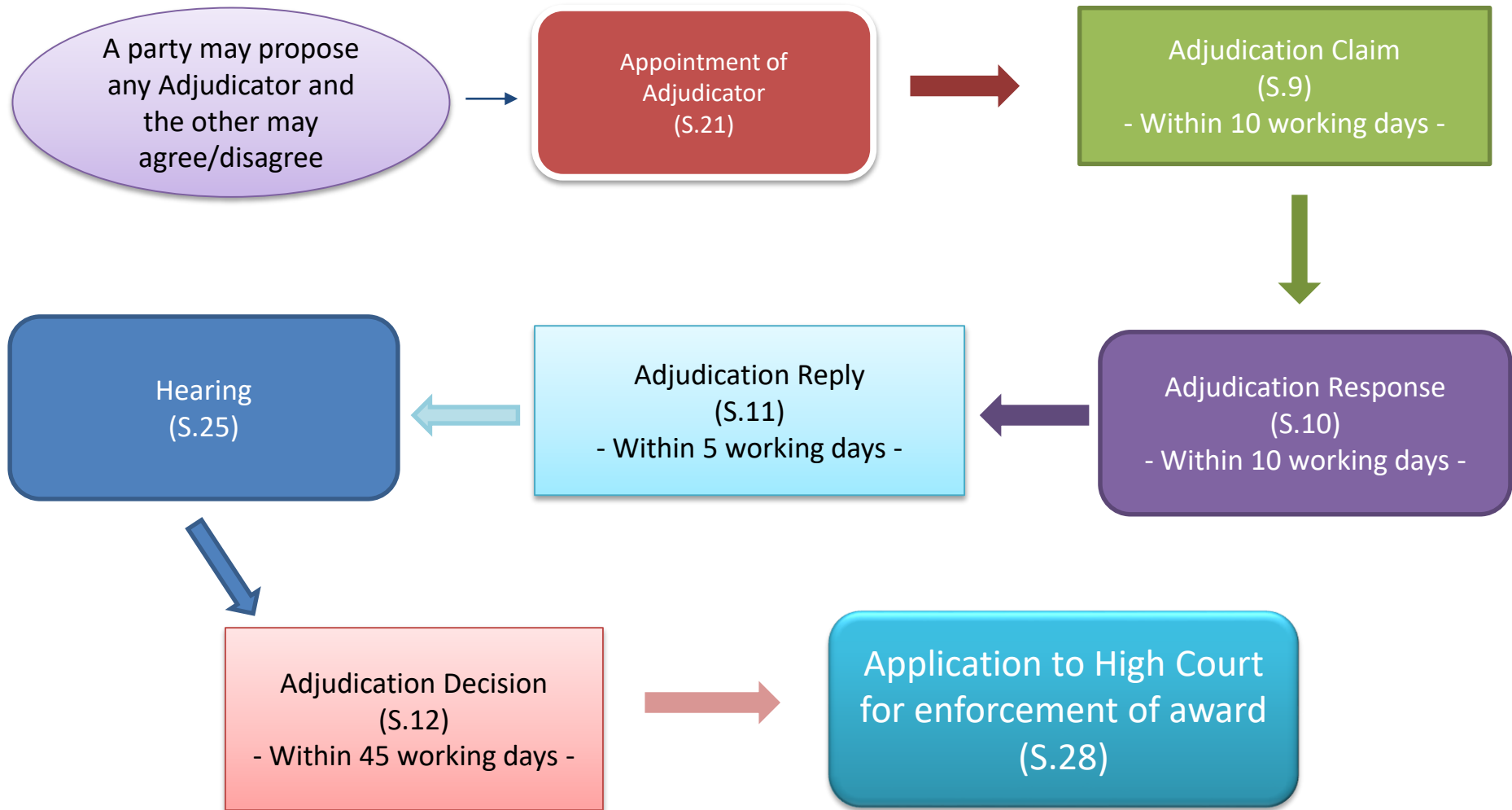
ADJUDICATION

Parties:

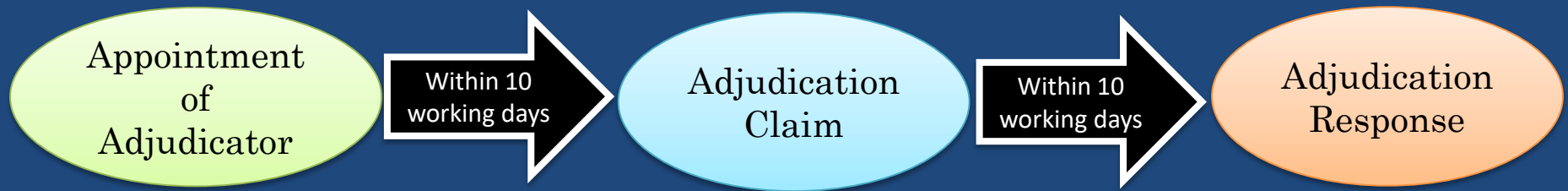
1. Claimant
2. Respondent

Adjudication Procedure





Summary of Process



FORMS

The Adjudication Decision

It is
BINDING
unless

It is Set Aside

**The dispute is finally decided
by arbitration or court**

**The matter has been settled
between the parties**

Post-Adjudication Decision

If the claim is allowed, the Respondent must pay unless the Decision is stayed or set aside.

The Respondent may
apply to High Court

```
graph LR; A[The Respondent may apply to High Court] --- B[To SET ASIDE the Adjudication Decision (S.15)]; A --- C[For a STAY of the Adjudication Decision (S.16)];
```

To SET ASIDE the
Adjudication Decision
(S.15)

For a STAY of the
Adjudication Decision
(S.16)

**The decision was
procured through fraud
or bribery**

**There is denial of
natural justice**

**Grounds For Setting Aside the Adjudication Decision
(S.15)**

**The Adjudicator did
not act independently
or impartially**

**The Adjudicator acted
in excess of his
jurisdiction**

If the Claimant and/or the Respondent is/are not satisfied with the Adjudication Decision, the parties can refer the matter to arbitration or court upon conclusion of the construction contract or termination thereof.

Advantages to the Claimant

Fast

Around 90 days

High
Success
Rate

More than 88% in 2018

No Payment
to
Respondent

The Respondent may raise a counterclaim / cross-claim to zeroise the CIPAA claim only. The Respondent can't obtain a positive award against the Claimant notwithstanding the counterclaim / cross-claim amount is higher.

Pay Now,
Argue Later

Decision is binding and enforceable. No appeal. Losing Party must pay first in accordance with the Adjudication Decision. Can only argue later by way of court or arbitration proceeding.

Conditional Payment
Clauses are Void &
Unenforceable

Conditional payment clauses are void, despite their presence in the agreement. Eg: pay-when-paid, pay-if-paid, back-to-back payment. Not applicable as a defence under CIPAA claim.

FEES FOR THE SERVICES OF AN ADJUDICATOR

Item	Amount In Dispute (RM)	Fees (RM)
1.	50,000 and below	2,760
2.	50,001 to 150,000	5,760
3.	150,001 to 300,000	7,087 + 2.7% of excess over 150,000
4.	300,001 to 800,000	11,137 + 1.08% of excess over 300,000
5.	800,001 to 1,300,000	16,537 + 1.08% of excess over 800,000
6.	1,300,001 to 1,800,000	21,937 + 1.2826% of excess over 1,300,000
7.	1,800,001 to 2,300,000	28,350 + 0.3374% of excess over 1,800,000
8.	2,300,001 to 2,800,000	30,037 + 0.3376% of excess over 2,300,000
9.	2,800,001 to 3,300,000	31,725 + 1.4714% of excess over 2,800,000
10.	3,300,001 to 5,000,000	39,082 + 0.54% of excess over 3,300,000
11.	5,000,001 and above	50,000

Notes:

The fees for the services of an adjudicator in Part I shall include all taxes as may be imposed by the Government on the fees earned by an adjudicator.