IN THE COURT OF APPEAL OF MALAYSIA

Coram: David Wong, JCA; Hamid Sultan Abu Backer, JCA; Rhodzariah Bujang, JCA

Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and Another Appeal

Citation: [2018] MYCA 203 **Suit Number:** Rayuan Sivil Nos. W-02(C)(A)–505-03/2017 & W-02(C)(A)-506-03/2017

Date of Judgment: 03 July 2018

Alternative Dispute Resolution – Adjudication – Construction Industry Payment and Adjudication Act 2012

Alternative Dispute Resolution – Adjudication – Whether an adjudicator excluded from considering defences not raised in the Payment Response but raised in the Adjudication Response under section 10 of the Construction Industry Payment and Adjudication Act 2012 – Whether the failure of an adjudicator to consider such defences, if the adjudicator is not excluded from considering such defences, would amount to a breach of natural justice

Alternative Dispute Resolution – Adjudication – Whether the Federal Court decision in View Esteem Sdn Bhd v Bina Puri Holdings Berhad applies in the instant case – Whether the instant case could be distinguished – Applicability of the doctrine of stare decisis – Whether the award of the adjudicator should be set aside

JUDGMENT

Introduction:

[1] There are two appeals before us. **Appeal W-02(C)(A)-505-03/2017 (Appeal 505)** relates to the decision of the High Court where the learned Judge dismissed the Appellant's/ Plaintiff's application to set aside the learned Adjudicator's decision where a sum of RM1,579,334.75 was awarded to the Respondent.

[2] The learned Judge also allowed the enforcement application of the learned Adjudicator's award of RM1,579,334.75 and **Appeal W-02(A)-506-03/2017 (Appeal 506)** concerns the aforesaid decision.

[3] We heard the appeals together and had reserved our decision. We have since further considered submissions from respective counsel and now give our decision and grounds.

Background facts:

[4] The Respondent was appointed by the Appellant as the main contractor for a contract sum of RM65 million in respect of a project known as "Proposed Construction of 1 Commercial Block of 29 storeys consisting of: (i) 22 floors of office units (473) and 1 floor of facilities, (ii) 5 podium floors of car parks, (iii) 2 floors of basement car parks, (iv) 1 floor for mechanical on Lot 41096, Jalan Aman Damai, Mukim Petaling, Kuala Lumpur".

[5] The Respondent, being the unpaid party, made a claim under the CIPPA 2012 for payment under interim certificate No 17R and No 18 for the sum of RM1,821,680.60. As required by CIPPA 2012, the Respondent served on the Appellant, being the non-paying party, a Payment Claim on 22.1.2016.

[6] In response, the Appellant filed its Payment Response which in the words of the learned Judge is a document "not drafted elegantly in legal language" but in substance denied the claim of the Respondent on the ground that it was entitled to compensation from the Respondent's default in executing the construction contract in that works were not properly done resulting in remedial works to complete the same. No details of the amount incurred for the remedial works by the Appellant were set out in the Payment Response.

[7] Notice of adjudication was served by the Respondent on the Appellant on 13.6.2016 seeking payment under interim certificate No 17R and 18 amounting to RM1,930,981.43 (inclusive of GST). The learned Adjudicator was then appointed on 29.8.2016.

[8] The Respondent on 26.9.2016 served the Adjudication Claim with supporting documents, details of which are set out in the learned Adjudicator's grounds (refer to pages 8-11 of Common Core Bundle).

[9] In response, the Appellant filed its Adjudication Response with supporting documents, details of which are also set out in the learned Adjudicator's grounds (refer to page 11-20 Common Core Bundle). From the Adjudication Response, one can distil that there are basically two grounds of defence and they are:

1. The Appellant is entitled to set off the amount claimed by the Respondent with the following amounts:

(a) Outstanding amount of RM351,646.68 certified under interim Certificate No 19.

(b) Structural defects investigation and audit cost of RM161,839.50.

(c) Additional costs of completion of RM6,860,842.45.

(d) Associated costs amounting to RM1,624,841.11.

2. Premised on clause 25.4(iv) of the contract documents, as the Appellant had terminated the contract no payment is due until the completion of works and until the completion and verification of the accounts within a reasonable time by the Architect certifying that there are outstanding amount to the claimant (in this case the Respondent) after taking into account the costs of completing the remaining works.

[10] Before the learned Adjudicator, she had to resolve the issue of whether she had the jurisdiction to deal with the claims of set off by the Appellant as set out in the adjudication response when these set off were not specifically pleaded in the payment response. This was how she dealt with it as can be seen in the following paragraphs in her grounds:

(a) paragraph 42:

"At the outset, I am mindful that my jurisdiction as an adjudicator under CIPAA as provided in section 27(1) of CIPAA, is limited to the matters referred to adjudication by the parties pursuant to sections 5 and 6 of CIPAA. On the extent and construction of section 27(1) and therefore the matters that I have jurisdiction of, I look to the learned High Court Judge's judgment in ***View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2017] 1 CLJ 677; [2015] MLJU 695*** *for guidance. That firstly, the parties are bound by their pleadings under the rules of procedure in civil litigation; in adjudication, those pleadings are to be found in the Payment Claim and Payment Response, and not the Adjudication Claim, Adjudication Response or the Adjudication Reply. That secondly, because adjudication is intended to provide a speedy resolution of the payment dispute, the adjudicator cannot be expected to deal with issues, legal and/or factual, which may still be evolving or in the making as the adjudicator sits down to determine the dispute."*

(b) paragraph 64:

"As is clear from Justice Mary Lim's judgment (as she then was) in the cases of ***View Esteem and WRP Asia Pacific****, my jurisdiction as adjudication are restricted to the matters found in the sections 5 and 6; that the adjudication takes jurisdiction from the payment claim and payment response, not from the adjudication claim, response or reply. This is materially significant and important as this brings to bear the whole scheme of CIPAA; that the adjudication proceedings is to deal with or resolve a payment dispute. My sole task as an adjudicator is to resolve the dispute between the parties arising from the payment claim and payment response. As Justice Mary Lim said in her judgment in WRP Asia Pacific's case, my sole task is to resolve the dispute for the reasons already made known between the parties and nothing else..."*

(c) paragraph 66:

"Whilst I could appreciate this, section 27(1) of CIPAA and the cases are clear on my role as an adjudicator. My jurisdiction is limited to the matters as raised in the Payment Claim and Payment Response. To be more specific, my role as an adjudicator is to resolve the dispute for the reasons already made known between the parties and nothing else. I am therefore bound by

section 27(1) of the CIPAA and given that the matters claimed by the Respondent as a setoff/ deduction have not been raised in its Payment Response, I am not able to consider the set off..."

[11] The learned Adjudicator however saw the injustice if she were not to deal with the set off amount of RM351,646.68 certified under interim Certificate No 19. She then took the "for the sake of completeness approach" by saying that if she were allowed to deal with the aforesaid set off, she would have allowed it.

High Court:

[12] The learned Judge in the very first paragraph of his judgment sets out the crucial issue by determination for him and that was simply whether the learned Adjudicator had rightly declined jurisdiction to hear the set-off pleaded by the non-paying party and the related issue as to whether the Court may allow part of the set-off that should have been heard by the learned Adjudicator and so reduce the adjudicated sum accordingly.

[13] The learned Judge agreed with the learned Adjudicator in regard to the three items of claim for structural defects investigation and audit costs, additional costs of completion and associated costs on the ground that those claims were not properly pleaded as set off.

[14] However, in regard to the claim of RM351,646.68 from the interim certificate no 19 against payment of Payment Certificate Nos 17R and 18, the learned Judge disagreed with the learned Adjudicator and in our view for good reason. It is undisputed that Interim Certificate 19 was issued on 19.1.2016 before the service of the Payment Claim by the Respondent on 22.1.2016. Hence the learned Judge was correct to say that even if the Respondent had missed that, it should have been completely candid and disclosed it in its adjudication claim as Certificate 19 is a follow-up and continuing from Certificate 18.

[15] The learned Judge in his own words put it this way:

[69] *As I had pointed out, it is not quite correct to say that the set-off and deduction had not been pleaded at least where the negative certification of the Architect in Certificate No. 19 is concerned that comes up under the rubric of the "compensation that the Respondent was seeking for all losses caused by the Claimant..." The actual words of "set off or cross claim" need not have to be used; only the reasons for disputing the claim.*

[70] *I would therefore hold that the adjudicator had wrongly and unduly diminished and restricted her jurisdiction to hear the set off in Certificate No. 19 certified by the Architect…*

...

[81] *I am therefore constrained to find that there was nevertheless a breach of natural justice when the Adjudicator failed to exercise and assume jurisdiction to hear and allow the set off of rectification costs pleaded in the Payment Response and more precisely referred to in the Adjudication Response in Payment Certificate 19 being a negative Certificate.*

[16] Premised on the above, the learned Judge then severed that part of the award of the learned Adjudicator and allowed the set off amount of RM351,646.68 from the adjudicated sum of RM1,930,981.43 resulting in a reduced amount of RM1,579,334.75.

Our grounds of decision:

[17] Subsequent to the decision of the learned Judge, the Federal Court delivered its first Judgment on CIPAA 2012 on 6.11.2017 in the case of **View Esteem Sdn Bhd v Bina Puri Holdings Berhad** (2017) 1 LNS 1378 where the following Questions of law were considered:

"(1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ["CIPAA"] can be made any time by way of application or whether such an application can only be made upon the application to set aside an Adjudication Award under section 15 of the CIPAA;

(2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or Arbitration prior to the coming into force of the CIPAA;

(3) Whether section 6(4) of the CIPAA allows a responding party to raise matters not raised in Payment Response under section 6(2) of the CIPAA during the filing of the Adjudication Response under section 10(1) of the CIPAA;

(4) If the answer to question (3) above is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

(5) Whether the adjudicator has the power under section 26 of the CIPAA to remedy any non-compliance with section 6(2) of the CIPAA;

(6) If the answer to question (5) is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

(7) Whether an application for stay or partial stay on terms under section 16 of the CIPAA can be granted to remedy an injustice caused by a breach of natural justice or errors arising in an adjudication award; and

(8) Whether an application for a stay under section 16 of the CIPAA can be made concurrently with an application to set aside an award under section 15 of the CIPAA or whether an application for a stay under section 16 of the CIPAA can only be made after an application to set aside an award under section 15 of the CIPAA is made."

[18] Of relevance to this appeal is how the Federal Court had dealt with the question of whether an

Adjudicator was excluded from considering defences not raised in the Payment Response but raised in the Adjudication Response under section 10 **CIPAA 2012** and if no whether such failure to consider those defences would amount to a breach of natural justice.

[19] The Federal Court in no uncertain terms opined that an Adjudicator is fully entitled to consider defences not raised in the Payment Response but raised in the Adjudication Response and the rationale is this:

> ***[38]*** *The Adjudicator justified the right to exclude for consideration three defences as they were not stated as reasons in the first payment response under section 6 of CIPAA, though pleaded in the Adjudication Response before him under section 10 of CIPAA. The Adjudicator had evidently excluded the defences, relying on section 27(1) of CIPAA, as a matter of jurisdiction. Section 27(1) reads as follows:*
>
> ***"Jurisdiction of adjudicator***
>
> *27(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6."*
>
> **…**
>
> ***[43]*** *It should also be noted that while the Payment Response under section 6(2) of CIPAA requires the non-paying party to merely state "amount disputed and the reasons for the dispute" the Adjudication Response under section 10 of CIPAA on the other hand requires the respondent to "answer the adjudication claim". The latter, is in our view is in the nature of a legal response with the obligation to "answer" imposed by a statute, to mean a real opportunity to defend a claim, and not something illusory.*
>
> ***[44]*** *It should be noted that on the claimant's side, the Adjudication Claim under section 9(1) of CIPAA requires the unpaid party to state "the nature and description of the dispute and the remedy sought" whereas the preceding Payment Claim under section 5 of CIPAA merely requires him to state the amount claimed and the contract involved sufficient to "identify the cause of action."*
>
> ***[45]*** *It needs to be emphasised here that the Adjudication Response under section 10(1) of CIPAA requires the non-paying party to "answer the adjudication claim" meaning the "nature and description of the dispute and the remedy" as claimed by the claimant in its Adjudication Claim. It is also significant to note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as "the claimant", and the non-paying party as "the respondent", by which terms they are thereafter respectively referred to. It comes about after the "initiation of adjudication" under section 8 of CIPAA where an adjudicator is appointed signifying the start of the adjudication process. The adjudication pleadings under section 9 to 11 of CIPAA comes after this and before the adjudication hearing begins under section 12 of CIPAA.*
>
> ***[46]*** *We are of the considered view that the scheme of the two stage process under CIPAA does*

not warrant giving a reduced importance to the Adjudication pleadings and a greater, if not overriding, significance given to the initial documents under sections 5 and 6 of CIPAA.

...

[74] *For the reasons above stated it is our considered view that an Adjudicator is not excluded from considering all the defences raised by a respondent in the Adjudication Response whether found in the first response under section 6 of CIPAA or not. In the circumstances of this case, the Adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.*

[20] Naturally learned counsel for the Appellant submits that the Federal Court decision in **View Esteem** (supra) is applicable to the present appeal. To recapitulate, the factual matrix is that the learned Adjudicator had applied section 27(1) of **CIPAA 2012** to exclude the four items for consideration. That was what was done by the learned Adjudicator in the **View Esteem** case as well. What they did and the reasons for their actions, we concede, were proper and correct as the law as it stood then was to apply the plain meaning of the words in section 27(1) of **CIPAA 2012**.

[21] Learned counsel for the Respondent however submitted that in this case there has not been any breach of natural justice and even if there were, the breach was not so material which would warrant the Court to set aside the adjudication award. Learned counsel then took the Court through the positions in this country, Singapore, England and Australia.

[22] The Singapore position is encapsulated in the case of **Metropole Pte Ltd v Designshop Pte Ltd** [2017] SGHC 45, where the Singapore High Court made the following observations at paragraph 67-

(a) That an arbitration and adjudication is different in the sense that an arbitrator's award has full finality whereas adjudicator's determination has only temporary finality;

(b) The fact that an adjudicator's determination has temporary finality would mean that there is a less reason for Court to intervene in adjudication in an application to set aside adjudication for breach of natural justice as parties have occasion in future to have that dispute resolved with full finality and in compliance with rules of natural justice;

(c) That there is even less reason for the court to intervene if the breach of natural justice is immaterial to the outcome of the adjudication or has occasioned aggrieved party no prejudice; and

(d) In view that the adjudicator's breach of the audi alteram partem rule was not sufficiently material so as to cause any prejudice whatsoever. It is therefore insufficient to warrant setting aside the adjudication determination.

The English position is reflected in the case of **Primus Buld Limited v Pompey Centre Limited & Slidesilver Limited** [2009] EWHC 1487 (Tab 8 RBA), where **Coulson J** held that-

"[29] Generally speaking, the rules of natural justice apply to adjudication, but they cannot always be fully applied, given the short timetable and 'the crude methodology' sometimes involved: see ***Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597****. Any alleged breach must be examined critically (****Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2005] BLR 1****) and must be material or of significance to the decision actually made by the adjudicator: see* ***Kier Regional Ltd (It/a Wallis) v City & General (Holborn) Ltd [2006] EWHC 848 TCC*** *and* ***Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 TCC****. In other words, if there has been a breach of natural justice, but it cannot be demonstrated that it goes to the heart of the adjudicator's decision, it will not affect the enforcement of that decision."*

[23] The position of the Australian Courts is no different and this can be seen in the case of **Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd** [2010] NSWSC 168, where the Supreme Court of New South Wales said as follows-

"[141] Hodgson JA discussed natural justice, in the scheme of the Act, in Brodyn at 441-442 [55]. His Honour said in that paragraph that an adjudication determination will be void if, among other things, "there is a substantial denial of the measure of natural justice that the Act requires to be given".

[142] Any entitlement to natural justice must accommodate the scheme of the Act, including the extremely compressed timetable provided for the submission of payment schedules, adjudication applications, and adjudication responses; and the limited time (subject to the consent of the parties, which they may give or withhold at their will) for an adjudicator to determine an application. It must also accommodate the fact that, in many cases, claimants and respondents will prepare their documents themselves, and will not avail themselves of legal advice in doing so.

...

[145] I see no reason to depart from those views; and neither party submitted that I should. In particular, I think, my insistence on materiality is consistent with the reference by Hodgson JA in Brodyn to "substantial denial ... of natural justice."

[146] In this context, Gleeson CJ said in Re Minister for Immigration and Multicultural Affairs; ***Ex parte Lam (2003) 214 CLR 1 at 13-14 [37]*** *that fairness is not abstract but practical. His Honour said that "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". To like effect, Kirby J said in Minister for immigration* ***and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 291*** *that the court should not undertake the task of "combing through the words of the decision-maker with a fine appellate tooth-comb [sic], against the prospect that a verbal slip will be found warranting" the intervention of the court.*

[147] I accept, however, that the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context)

there was nothing that could have been put on the pint in question. But it remains the case, I think, that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point."

[24] The Malaysian position adopts the English position as is reflected from the learned and much respected Judgments of Mary Lim J (now JCA) and Lee Swee Seng J, the first and present custodian of the Kuala Lumpur Construction Court.

[25] Premised on the above, learned counsel submitted that the learned Adjudicator was correct in refusing to adjudicate the three items of claim of set off as those claims were then still evolving and could and more properly be pursued in arbitration or litigation. Further it was also submitted that in view of the timeline prescribed by CIPAA 2012 for completion of an adjudication, it would not be possible for the learned Adjudicator to finish the adjudication within the statutory timeline. Reliance was made to the learned High Court Judge's judgment in **View Esteem** (supra) where Mary Lim J (now JCA) said as follows:

"[64] Because adjudication is intended to provide a speedy resolution Originating Summons that payment dispute within the time lines found in section 12, where an adjudication decision rendered outside the prescribed time lines is void unless extended by the written consent of the parties, the Adjudicator cannot be expected to deal with issues, legal and/or factual, which may still be evolving or in the making as the Adjudicator sits down to determine the dispute. Unrestricted arguments may unnecessarily prolong or even protract adjudication proceedings rendering the whole process impractical, inefficient or unwieldy. There should be certainty in the issues or matters that any party is expected to face in the adjudication proceedings so that the rules of fair play can be readily met. That cannot possibly be achieved if issues or matters are still or yet to be identified."

[26] We have no doubt that the learned Adjudicator had applied the law as it existed then when she refused jurisdiction to hear the three items of set off in question. Hence, we could not fault her for what she did. We are also not in doubt that the prevailing practice in the adjudication industry was as practiced by the learned Adjudicator. The rationale behind CIPPA 2012 is simply to have a regime for speedy and accessible justice to ensure cash flow in our vital construction industry. Hence, we find in CIPPA 2012 numerous provisions crafted in a manner to facilitate the Adjudicator to deliver justice in a speedy and economic manner. This is prevalent and reflected in section 15 of **CIPPA 2012** which provides only four grounds upon which one can set aside an award of an Adjudicator.

[27] Taking into consideration of the underlying purpose of CIPPA 2012 and the fact that adjudication awards are of a "temporary finality" in nature, we see some merit in the position taken by the Respondent that the Appellant had not suffered material and permanent prejudice by the learned Adjudicator's refusal to examine the three items of set off as the same could have been resolved in litigation as well as in arbitration as allowed by section 37 of **CIPPA 2012**.

[28] That said and whatever our views may be, the concept of stare decisis applies here. We, as the Court of Appeal, are bound by the decision of the Apex Court of the land. The proposition distilled

from the Federal Court decision in **View Esteem** (supra) is simply that a failure by an Adjudicator to consider defenses, though not set out in the Payment Response, but in the Adjudication Response, amounted to a breach of natural justice which would dictate that the award of the Adjudicator be set aside.

[29] There is no two ways about it here. The concept of stare decisis is applicable to the case at hand as the factual matrix there in our view is the same as here and could not be distinguished in anyway. We are thus bound by it, irrespective what our view may be.

Conclusion

[30] It appears that the Federal Court had taken a more robust stand in its supervisory role in CIPPA 2012 cases bordering on the role of an appellate Court as one might put it. This is reflected in their view on the principles applicable in an application for stay of an adjudication award. Prior to the Federal Court's pronouncement, the approach of the Courts had been restrictive in that granting stay is given only in exceptional and special circumstances which is restricted by the test of the financial capacity of the winning party at the adjudication process to repay the sum awarded in the event the adjudication award is set aside. The Federal Court rejected the restrictive approach and opined that the Court should be given some degree of flexibility in stay application *"where there are clear errors, or to meet the justice of the individual case"*. The Federal Court's departure from the restrictive approach as practiced in other jurisdictions as in Australia, England and Singapore is rationalized on the fact that in these jurisdictions, the adjudication legislative regime contains review and challenges to the Adjudicator's decision which must be exhausted before any application is made to the Courts, but which CIPPA 2012 does not have. Hence in those jurisdictions, applications for stay of the adjudications awards are rarely granted.

[31] Finally, we reiterate that the importance of the doctrine of stare decisis must not be overlooked. As Benjamin Cardozo in his treatise, **The Nature of Judicial Process (New Haven and London: Yale University Press 1021)** at page 9-50, says:

> *"It will not do to decide the same questions one way between one set of litigants and the opposite way between another. 'If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look at the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.' Adherence to precedent must then be the rule rather than an exception if litigants are to have faith in the even-handed administration of justice in the Courts."*

[32] For reasons stated above, we allow the appeals with no order as to cost. We consequently, we also set aside the orders of the High Court and that of the Adjudicator. We further order that the deposits be refunded.

Dated: 3rd July 2018

Sgd

DAVID WONG DAK WAH
Judge
Court of Appeal Malaysia

Sgd

RHODZARIAH BINTI BUJANG
Judge
Court of Appeal Malaysia

JUDGMENT OF DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER

[1] The appeals are related to three Originating Summons (O.S.) by parties to an adjudication decision pursuant to **Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012)**. The O.S. are for the following purposes, namely:

(a) enforcement of adjudication decision (O.S. No. 170);

(b) to stay the adjudication decision pending the disposal of the application to set aside as well as the arbitration proceedings between the parties (O.S. No. 8); and

(c) to set aside the adjudication decision itself (O.S. No. 9).

Public Interest, Constitutional Oath and 'Constitutional Soul'

[2] (a) This judgment involves an issue of public interest related to access to justice, a point which was not canvased by parties. It is incumbent of a judge to take upon himself to address issues related to public interest. It is often at times referred to *obiter* or *en passant* statements the jurisprudence of which I will deal with shortly.

(b) In addition, the judge by his oath of office is obliged as well as empowered to issue prerogative directions inclusive of '*suo motto*' orders to relevant authorities where some evidence is available demonstrating the rule of law or the constitutional framework has been compromised or likely to have been compromised. [See Additional Powers of Court, **CJA 1964**]. This prerogative directions or *suo motto* orders are rarely given by Malaysian judges but common in India to preserve the integrity of the rule of law itself. In the controversial case of **Teoh Beng Hock**, the Court of Appeal gave prerogative directions in addition to the orders made. [See **Teoh Meng Kee v Public Prosecution** [2014] 7 CLJ 1034]. On prerogative directions the court observed:

"Under the Federal Constitution, the courts have no powers to compel the learned Attorney General to institute proceeding against the culprits save to give 'prerogative directions' which is

> vested in the courts. The Federal Constitution only provides sanctions when order or directions or 'prerogative directions' are not obeyed."

And the prerogative direction read as follows:

> "In consequence I will allow the appeal and direct the Inspector General of Police and Attorney General's Chambers to do the needful to commence investigation under the CPC and prefer appropriate charges as they deem fit."

(c) In **Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor** [2008] 8 MLJ 12, the court explained the scope of prerogative directions and its importance as follows:

> "That does not mean that the constitution has not given powers to court to arrest any form of injustice, by issuing prerogative orders or direction to arrest any form of injustice occasioned by executive or law enforcement agencies. Thus, within the constitutional framework there is a balance; it is only a matter of the court to, where necessary, move to arrest the wrong and advance the remedy to be held to the oath of office of His Majesty's judges, which is a legitimate expectation of the public within the spirit and intent of the Federal Constitution."

(d) It must also be pointed out that if order of court and/or prerogative directions are not complied by the authorities, it may lead to committal proceedings and such authority is preserved under Article 126 of the **Federal Constitution** itself. It is a pity that Article 126 has never been considered by our apex court though there were many opportunities to do so and very recently in the several decisions of **Indira Ghandhi**'s case where ultimately the Federal Court made some orders which till to date, had not been acted upon by the authorities. The said Article 126 reads as follows:

> "Power to punish for contempt
>
> 126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

(e) Wilful disobedience of order of court by civil servants and/or constitutional functionaries, may ultimately end up in they losing their jobs and/or pension rights, etc.

(f) It must not be forgotten that a judge has been provided with a 'constitutional soul'. It comes to 'live' from the date the judge takes the oath of office to preserve, protect and defend the Constitution. The 'constitutional soul' remains until retirement. To make the constitutional soul meaningful and rewarding to the public as well as nation, prerogative orders which should have been placed in the Federal Constitution itself have been preserved by virtue of 'Additional Power of the Court' in CJA 1964. Notwithstanding whether that power is in the Constitution or not, the supreme power to ensure the court's orders and directions are complied with, that power is preserved in Article 126 of the Constitution. As I have said earlier, in one of the judgment that 'constitutional soul' is necessary to ensure a nation which was once perceived to be an oasis is not turned into a desert or for that matter insolvent. Indeed, it is the judges duty to ensure the rule of law is maintained in all aspects and if done so an oasis will remain as an oasis, at all times as seen in many countries of the commonwealth family,

in particular England, Australia, New Zealand, Canada, etc. where our jurisprudence originates.

Preliminaries

[3] The appeal before us were primarily based on natural justice point in that the adjudicator had failed to take into consideration some items related to set-off.

[4] The learned trial judge found no merit in the appellant's case. However, His Lordship took upon himself to reduce a part of the claim in the adjudication decision, to reflect a just and equitable adjudication decision. The learned judge allowed enforcement and dismissed the other two O.S.

[5] The majority members of the coram had taken the view that the natural justice point has merits in reliance of the recent Federal Court decision in **View Esteem Sdn Bhd v Bina Puri Holding Berhad** [2017] 1 LNS 1378 and allowed the appeal, thereby setting aside the enforcement order made by the learned trial judge.

[6] I have had the benefit of reading the articulate judgment on facts and law of my learned brother, David Wong Dak Wah JCA. I take the view that there was indeed no breach of natural justice sufficient in law as well as within the scheme of CIPAA 2012 to intervene in the adjudication decision. In addition, I take the view that within the scheme of CIPAA 2012, there is no provision for the court to make any adjustment to the adjudication decision as the jurisdiction under the Act is placed in the hands of arbitrator and/or by way of litigation unless there is a formal application pursuant to section 28(2) of **CIPAA 2012**. My judgment must be read together with the judgment of the learned High Court judge as well as the majority judgment of this court, to appreciate the nuance in the legal jurisprudence.

[7] The facts and principle of law related to CIPAA 2012 scheme is very straight forward. However, some issues and complexity have arisen in consequence of convoluted writings of some authors and decisions of courts trying to accommodate legal principles based on cases outside our jurisdiction, where their statutory law is not *pari materia* to our law. In addition, the problem is compounded in the administration of CIPAA 2012 by KLRCA (AALCO) which is a foreign governmental organization and was established in 1978 under the auspicious of the Asian-African Legal Consultative Organisation (AALCO). Currently, KLRCA (AALCO) is operating under the name of Asian International Arbitration Centre (AIAC). The agreements between Malaysian Government and AALCO are found in the website. I have taken the liberty to reproduce the relevant agreements executed in 1981 and 1989; 2013 and 2018, with some space modification as well as deletion of signatories. The said four agreements read as follows:

(a) 1981 and 1989 Agreement

AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMITTEE RELATING TO THE REGIONAL CENTRE FOR ARBITRATION IN KUALA LUMPUR (signed in 1981)

WHEREAS the Asian-African Legal Consultative Committee (hereinafter referred to as the A.A.L.C.C) at its Eighteenth Session in Baghdad (Iraq) held in February, 1977 had decided upon the establishment of regional centres for commercial arbitration with one centre to be located in Asia,

AND HAVING REGARD to the Exchange of Letters effected between the A.A.L.C.C. and the Government of Malaysia (hereinafter referred to as "the Government") an 3rd March 1978 and 14th March 1978 respectively, whereby the Government agreed in principle to the establishment of a regional centre for commercial arbitration in Kuala Lumpur and had further agreed to provide the facilities for the establishment and functioning of such a center,

AND the Government and the A.A.L.C.C are now desirous of concluding an agreement for the purposes of the continued operation of the centre and the provision of facilities,

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. OBJECTIVES

The objects of establishing the Centre are as follows:

(a) To act as a co-ordinating agency in the Asian-African Legal Consultative Committee's (A.A.L.C.C.'s) disputes Settlement system;

(b) to promote the growth and effective functioning of national arbitration institutions;

(c) to promote the wider use and application of the UNCITRAL Arbitration Rules of 1976 within the Asian and Pacific region;

(d) to provide facilities for ad hoc arbitrations as well as arbitrations held under the auspices of the Centre and other arbitral institutions and the rendering of assistance in the enforcement of arbitral awards.

2. FUNCTIONS

The functions of the Centre are, inter alia:-

(i) to promote international commercial arbitration in the region served by it including provision of facilities for holding of arbitration proceedings at the Centre;

(ii) to co-ordinate and assist the activities of existing arbitral institutions in the region;

(iii) to render assistance in the conduct of ad hoc arbitrations, particularly those held under the UNCITRAL Rules;

(iv) to assist in the enforcement of arbitral awards;

(v) to provide for arbitration under its own auspices; and

(vi) to carry out the functions envisaged in the agreement with the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.).

3. ADMINISTRATION OF THE CENTRE

The Centre shall be administered by a Director under the supervision of the Secretary-General of the A.A.L.C.C.

4. DIRECTOR, DEPUTY DIRECTOR AND STAFF

(a) The Director, who shall be a national of Malaysia, shall be appointed by the Government of Malaysia after consultations with the Secretary-General of the A.A.L.C.C. and shall be assisted by a Deputy Director, Adviser or Consultant an staff.

(b) The Deputy Director, Adviser of Consultant shall be a national of a Member State of the A.A.L.C.C., other than Malaysia, to be appointed by the Secretary-General after consultation with the Government of Malaysia.

(c) The Director, after consultations with the Secretary-General of the A.A.L.C.C., shall appoint three professional/ administrative staff, namely:- one Research Associate, one Executive Secretary/ Public Relations Officer, and one Administrative/ Financial Officer.

(d) All members of the junior staff including:- 1 stenographer, 2 clerks/ typists, 2 office boys, 1 gardener, 1 driver; shall be appointed by the Director.

5. OBLIGATIONS OF THE GOVERNMENT OF MALAYSIA

(i) The Government of Malaysia shall provide the following:- (a) an annual grant towards the operating costs of the Centre, (b) adequate office furniture, equipment, stationery, telephones, telex, etc., (c) an office car, (d) quarters/ chalet for the Deputy Director, Adviser or Consultant.

(ii) The existing building with all its fittings shall be the premises of the Centre buy shall remain as the property of the Government. All necessary repairs to the building shall be carried out by the Government.

(iii) The costs of seminars and conferences to be conducted under the auspices of the Centre shall be subject to the approval of the Government.

6. OBLIGATIONS OF A.A.L.C.C.

(i) The A.A.L.C.C. shall make appropriate arrangements concerning the salaries and allowances of the Deputy Directors, Adviser or Consultant.

(ii) The A.A.L.C.C. shall arrange to pay all expenses for conferences and seminars held outside

Malaysia.

(iii) Expenses for promotional work relating to the Centre, in addition to that carried out by the Centre itself, shall be borne by the A.A.L.C.C.,

7. INDEPENDENCE OF THE CENTRE

(a) The Government of Malaysia shall guarantee that the Centre shall function independently.

(b) The Centre shall enjoy such privileges and immunities as may be necessary for the purposes of executing its functions including immunity from judicial processes, inviolability of premises and its archives.

8. SETTLEMENT OF DISPUTES

Any matter or dispute arising between the Government of Malaysia and the A.A.L.C.C. regarding the Centre shall be resolved by negotiation.

9. DURATION OF AGREEMENT

(i) The Agreement shall remain in force for a period of three years with effect from the date of the signing of this Agreement.

(ii) Either party may request the revision and modification of this agreement after a period of one year.

IN WITNESS WHEREOF the Undersigned duly appointed representatives of the A.A.L.C.C. and the Government respectively have on behalf of the Parties signed the Agreement at Kuala Lumpur this 29th day of July, 1981.

HEADQUARTER'S AGREEMENT FOR KUALA LUMPUR CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION (signed in 1989)

WHEREAS a Regional Centre for Arbitration under the auspices of the Asian-African Legal Consultative Committee (hereinafter referred to as the 'Committee') in cooperation with and with the assistance of the Government of Malaysia (hereinafter referred to as the 'Host Government') was established in Kuala Lumpur in March 1978 for an initial period of three years, pursuant to an agreement concluded by exchange of letters between the Committee and the host Government on terms and conditions set out in the aforesaid Agreement;

WHEREAS at the expiry of the initial period of three years another agreement was concluded between the Committee and the host Government on the 29th day of July 1981 together with a Memorandum of Understanding for the continued operation of the Centre for a further period of three years;

WHEREAS pursuant to the aforesaid agreement dated 29th July 1981, the host Government had

provided suitable premises for the purpose of the Centre together with furniture and fittings and made an annual grant of Malaysian Dollar 448,300 for a period of three years in addition to a nonrecurring grant of Malaysian Dollar 50,700 for equipment;

WHEREAS the Centre has continued to operate since August 1984 on the basis of certain understandings consequent upon discussions relating to the matter at the Committee's Kathmandu (February 1985) and Arusha (February 1986) Sessions, namely, that-

(a) The Government of Malaysia would continue to make available the existing building with all its fittings for the premises of the Centre;

(b) The operational costs of the Centre would be met out of the savings from the Government grants for the years 1981 and 1984 together with accumulated interest;

(c) The AALCC will make a modest contribution from its regular budget towards the expenses of the Centre beginning with the year 1986;

AND WHEREAS it is deemed appropriate to formalise the matter for the continued functioning of the Centre for a further period of three years with effect from 1st January 1989.

IT IS HEREBY AGREED AS FOLLOWS:-

ARTICLE I

OBJECTIVES

The objects of establishing the Centre are as follows

(a) To act as a coordinating agency in the Asian-African Legal Consultative Committee's (A.A.L.C.C.'s) disputes settlement system;

(b) To promote the growth and effective functioning of national arbitration institutions;

(c) To promote the wider use and application of the UNCITRAL Arbitration Rules of 1976 within the Asian and Pacific region; and

(d) To provide facilities for ad hoc arbitrations as well as arbitrations held under the auspices of the Centre and other arbitral institutions and the rendering of assistance in the enforcement of arbitral awards.

ARTICLE II

FUNCTIONS OF THE CENTRE

The functions of the Centre are, inter alia-

(a) To promote international commercial arbitration in the region served by it including provision

of facilities for holding of arbitration proceedings at the Centre;

(b) To co-ordinate and assist the activities of existing arbitral institutions in the region;

(c) To render assistance in the conduct of ad hoc arbitrations, particularly those held under the UNCITRAL Rules;

(d) To assist in the enforcement of arbitral awards;

(e) To provide for arbitration under its own auspices; and

(f) To carry out the functions envisaged in the agreement with the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.).

ARTICLE III

JURIDICAL PERSONALITY

The Centre shall possess juridical personality and shall have the capacity to contract and dispose of immovable and movable property, and to institute legal proceedings in its name, in accordance with the relevant provisions of the Malaysian Law.

ARTICLE IV

ADMINISTRATION OF THE CENTRE

1. The Centre shall be administered by a Director under the supervision of the Secretary-General of the A.A.L.C.C. The Director of the Centre, who shall be a national of Malaysia, shall be appointed by the Secretary-General of the Committee for a period of three years in consultation with the host Government;

2. The Director shall be assisted by a Deputy Director to be appointed by the Secretary-General after consultations with the Director. The Deputy Director should as far as possible be a national of Malaysia. Should the Deputy Director be a national of any other member States of the A.A.L.C.C. the appointment shall be made after consultations with the Government of Malaysia.

3. The Director after consultations with the Secretary-General of the A.A.L.C.C. shall appoint not more than three professional or administrative staff, which shall include a financial officer;

4. The Director shall appoint members of the junior staff comprising the following 1 stenographer, 2 clerks/ typists, 2 office boys, 1 gardener, 1 driver; Until such time as appointments have been made in respect of the categories of staff enumerated in this paragraph the existing staff of the Centre shall continue to be employed.

5. (a) The host Government shall contribute an annual grant for a period of three years with effect from the 1st January 1989;

(b) The annual grant shall be used for the purposes of the functioning of the Centre including the following:-

(i) for the operating costs of the Centre; (ii) for the purchase of adequate office furniture, equipment, stationary, telephone, telex etc.; (iii) the costs of seminars and conferences which are to be conducted in Malaysia under the auspices of the Centre.

6. The annual accounts of the Centre shall be audited by a competent authority nominated by the host Government and the audited report shall be transmitted by the Director to the Secretary-General of the Committee and the appropriate department of the host Government.

7. The Director of the Centre shall prepare a programme of work for consideration of the Secretary-General of the Committee which shall be finalised after consultations with the host Government.

8. The Director of the Centre shall prepare detailed budgetary estimates for the expenditure to be incurred by the Centre for the years 1989 and 1990 and 1991 for approval of the Secretary-General of the Committee in consultation with the host Government.

9. The Secretary-General shall from time to time formulate guidelines and send necessary instructions to the Director of the Centre regarding its activities and the Director shall send a quarterly report to the Secretary-General concerning the discharge of the Centre's functions.

10. (a) With a view to creating wider interest and involvement of the countries served by the Centre, the Secretary-General may constitute an advisory body to advice on the activities of the Centre. (b) The Advisory Committee shall elect a Chairman and shall meet as often as necessary but not less than six times in a year. The reports and minutes of the Advisory Committee shall be transmitted to the Secretary-General of the A.A.L.C.C. and the host Government.

ARTICLE V

INTERPRETATION

This Agreement shall be interpreted in the light of its primary objective of enabling the Centre to fully and efficiently discharge its duties and fulfill its purposes and functions.

ARTICLE VI

SUPPLEMENTARY AGREEMENTS

The Government of Malaysia and the Committee may enter into such supplementary agreements as may be necessary to fulfill the purposes of the agreement.

ARTICLE VII

ENTRY INTO FORCE

This Agreement shall come into force upon the completion of the legal procedures applicable in Malaysia. This Agreement is prepared in two originals in English Language both texts being equally authentic.

In Witness Whereof the Respective Representatives have signed the Agreement this 10th day of August 1989.

(b) 2013 Agreement

AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION RELATING TO THE REGIONAL CENTRE FOR ARBITRATION IN KUALA LUMPUR

WHEREAS a Regional Centre for Arbitration (hereinafter referred to as the 'Centre') under the auspices of the Asian-African Legal Consultative Organization (hereinafter referred to as the 'Organization') in co-operation with and with the assistance of the Government of Malaysia (hereinafter referred to as the 'Host Government') was established in Kuala Lumpur in March 1978 for an initial period of three years, pursuant to an Agreement concluded by an Exchange of Letter dated 3 March 1978 between the Organization and the Host Government on terms and conditions set out in the aforesaid Agreement;

WHEREAS on the expiry of the initial period of three years another Agreement was concluded between the Organization and the Host Government on 29 July 1981 together with a Memorandum of Understanding for the continued operation of the Centre for a further period of three years;

WHEREAS on the expiry of the said Agreement the Centre continued to operate from 1984 to 1988 on the basis of the said Agreement and the operational costs were met out of savings from the Host Government grants and the Host Government continued to make available the existing building with all its fittings for the premises of the Centre;

WHEREAS it was deemed appropriate to provide for the continued functioning of the Centre for a further three years for which an Agreement between the Host Government and the Organization was concluded on 10 August 1989 and the Host Government agreed to resume its annual contributions for the Centre for a period of three years with effect from 1 January 1989 and to allocate new premises for the Centre;

WHEREAS following consultations between the Host Government and the Organization it was deemed appropriate to formalize the continued functioning of the Centre for a further period of five years with effect from 1 January 1992;

WHEREAS on the expiry of the said Agreement the Centre continued to operate on the basis of the abovementioned Agreements and the Host Government continued to make annual contributions to the Centre and make available the said premises for the Centre; WHEREAS due

recognition is given to the fact that over the years the Centre has achieved international recognition as an independent and neutral arbitral institution;

AND WHEREAS on completion of the five-year terms of the Centre for two tenures ending on 31 December 2011, the Host Government and the Organization deem it appropriate to formalize the continued functioning of the Centre for a further period of five years with effect from 1 January 2012.

IT IS HEREBY AGREED as follows:

ARTICLE I

INDEPENDENCE OF THE CENTRE

1. The Centre has been named as Kuala Lumpur Regional Centre for Arbitration (hereinafter referred to as KLRCA).

2. The Centre shall continue to function under the auspices of the Organization only and on the basis of co-operation, mutual understanding and goodwill.

3. The Host Government shall respect the independent functioning of the Centre.

ARTICLE II

JURIDICAL PERSONALITY

The Centre shall possess juridical personality and shall have the capacity to contract and dispose of immovable and movable property and to institute legal proceedings in its name in accordance with the relevant provisions of the Malaysian Law.

ARTICLE III

PRIVILEGES AND IMMUNITIES OF THE CENTRE AND PROFESSIONAL STAFF

1. The Centre shall enjoy such privileges and immunities as may be necessary for the purpose of executing its functions including immunity from suit and legal process.

2. The Host Government shall take the necessary steps to ensure that the premises of the Centre, its property, assets and archives and all documents belonging to it or held by it shall be inviolable.

3. The Host Government shall take the necessary steps to ensure that: (i) the Centre be exempted from customs duties in respect of equipment used by it for its official purposes; and (ii) the Centre, its assets, funds, income and other property whether owned or occupied shall be exempted from tax.

4. Foreign professional staff of the Centre shall be immune from legal process in respect of words

spoken or written and all acts performed by them in their official capacity.

5. Foreign professional staff of the Centre shall be exempted from taxation on the salaries and emoluments paid to them by the Centre.

6. The Director of the Centre, if he is a citizen of Malaysia, shall be entitled to such privileges and immunities as determined by the Minister pursuant to Act 485.

ARTICLE IV

ADMINISTRATION OF THE CENTRE

1. The Centre shall be administered by a Director who shall be a national of Malaysia and shall be appointed by the Host Government in consultation with the Secretary-General of the Organization.

2. The Host Government shall continue to make available-a suitable premise for the Centre and to make an annual grant for the purposes of the functioning of the Centre including the following: (i) Operating costs of the Centre; (ii) Purchase of office furniture, equipment, stationery, telephones, faxes, etc; (iii) Costs of seminars and conferences which are to be conducted in Malaysia under the auspices of the Centre.

3. The Director shall send annual reports on the activities to the Secretary-General of the Organization and the appropriate department of the Host Government.

ARTICLE V

INTERPRETATION

This Agreement shall be interpreted in the light of its primary objective of enabling the Centre to fully and efficiently discharge its duties and fulfill its purposes and functions as an independent arbitral institution of an international character.

ARTICLE VI

SUPPLEMENTARY AGREEMENTS

The Government of Malaysia and the Organization may enter into such supplementary agreement(s) as may be necessary to fulfill the purposes of the Agreement.

ARTICLE VII

CONFIDENTIALITY

1. Each Party shall undertake to observe the confidentiality and secrecy of documents, information and other data received or supplied to the other Party during the period of the implementation of this Agreement or any other agreements made pursuant to this Agreement.

2. Both Parties agree that the provisions of this Article shall continue to be binding between the Parties notwithstanding the termination of this Agreement.

ARTICLE VIII

SUSPENSION

Each Party reserves the right for reasons of national security, national interest, public order or public health to suspend temporarily, either in whole or in part, the implementation of this Agreement which suspension shall take effect immediately after notification has been given to the other Party through diplomatic channels.

ARTICLE IX

SETTLEMENT OF DISPUTES

Any difference or dispute between the Parties concerning the interpretation and/or implementation and/or application of any of the provisions of this Agreement shall be settled amicably though mutual consultation and/or negotiations between the Parties, without reference to any third party or international tribunal.

ARTICLE X

ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall come into force on the date of signing and shall remain in force for a period of five (5) years.

2. Thereafter, it shall be automatically extended for a further period of five (5) years.

3. Notwithstanding anything in this Article, either Party may terminate this Agreement by notifying the other Party of its intention to terminate this Agreement by a notice in writing through diplomatic channels, at least six (6) months prior to its intention to do so.

ARTICLE XI

REVISION, MODIFICATION AND AMENDMENT

1. Either Party may request in writing a revision, modification or amendment of all or any part of this Agreement.

2. Any revision, modification or amendment agreed to by the Parties shall be reduced into writing and shall form part of this Agreement.

3. Such revision, modification or amendment shall come into force on such date as may be determined by the Parties.

4. Any revision, modification or amendment shall not prejudice the rights and obligations arising from or based on this Agreement before or up to the date of such revision, modification or amendment.

IN WITNESS WHEREOF the undersigned being duly authorized thereto by their respective authorities, have signed this Agreement on...

DONE at KUALA LUMPUR on this 26th day of MARCH the year 2013 in two (2) originals in English Language, both texts being equally authentic.

(c) 2018 Agreement

SUPPLEMENTARY AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE ASIAN AFRICAN LEGAL CONSULTATIVE ORGANIZATION RELATING TO THE REGIONAL CENTRE FOR ARBITRATION IN KUALA LUMPUR

THIS SUPPLEMENTARY AGREEMENT is made on this 7th day of February 2018 BETWEEN THE GOVERNMENT OF MALAYSIA (hereinafter referred to as the "Host Government") of the one part; AND THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (hereinafter referred to as the "Organization") of the other part. (The Host Government and the Organization may individually be referred to as "the party" or collectively as "the Parties").

WHEREAS:

A. The Parties entered into an Agreement between the Government of Malaysia and the Asian-African Legal Consultative Organization Relating to the Regional Centre for Arbitration in Kuala Lumpur on 26 March 2013 (hereinafter referred to as "the Principal Agreement");

B. The duration of the Principal Agreement is five (5) years commencing from the signing date of the Principal Agreement i.e. 26 March 2013 until 25 March 2018 and thereafter automatically extended for another five (5) years from 26 March 2018 to 25 March 2023 pursuant to Article X of the Principal Agreement;

C. Pursuant to Article 1 of the Principal Agreement, the Regional Centre for Arbitration (hereinafter referred to as "the Centre") has been named as Kuala Lumpur Regional Centre for Arbitration (hereinafter referred to as "the KLRCA");

D. The Parties are desirous to enter into this Supplementary Agreement to amend the Principal Agreement subject to the terms and conditions hereinafter contained.

NOW IT IS HEREBY AGREED AS FOLLOWS:

ARTICLE I

SUPPLEMENTARY AGREEMENT

1. This Supplementary Agreement is supplemental to and shall be read and construed as an integral part of the Principal Agreement.

2. Save and subject to the following clauses and variations in this Supplementary Agreement and such other alterations, if any, as may be necessary to make the Principal Agreement consistent with this Supplementary Agreement, the Principal Agreement and this Supplementary Agreement shall be read and construed and be enforceable as if the terms of this Supplementary Agreement were inserted therein by way of addition or substitution as the case may be.

3. All the clauses of the Principal Agreement shall remain the same and be in full force and effect as between the Parties hereto.

4. In the event of any conflict or inconsistency between the provisions of the Principal Agreement and this Supplementary Agreement, the provisions of this Supplementary Agreement shall prevail to the extent of such inconsistency.

5. The Principal Agreement and this Supplementary Agreement shall contain the entire understanding between the Parties made thereto with respect to the subject matter hereof and shall supersede all prior agreements, understandings, inducements, representations or conditions, express or implied, oral or written.

ARTICLE II

INTERPRETATION

In this Supplementary Agreement, unless the context otherwise requires:

(a) words and expressions defined in the Principal Agreement shall have the same meaning when used herein or referred to in this Supplementary Agreement, save as and for any word or expression that is specifically defined in this Supplementary Agreement; and

(b) references to clauses and appendices shall, unless otherwise expressly provided, be construed as references to clauses and appendices of this Supplementary Agreement.

ARTICLE III

AMENDMENT OF ARTICLE 1 OF THE PRINCIPAL AGREEMENT

Article 1 of the Principal Agreement is amended by substituting for paragraph 1 the following paragraph:

"1. The Centre has been named as the Asian International Arbitration Centre (Malaysia) (hereinafter referred to as "the AIAC")."

ARTICLE V

TIME

Time whenever mentioned herein shall be of essence for the purposes of any provision of this Supplementary Agreement.

ARTICLE VI

ENTRY INTO FORCE

This Supplementary Agreement shall enter into force upon signature by the Parties.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Parties, have signed this Supplementary Agreement on this 7th day of February 2018.

[8] Whether the agreements themselves can give AALCO or KLRCA any form of corporate or juridical entity status in Malaysia without a supporting legislation is questionable. However, in essence, the four agreements will show that the Malaysian government have agreed to facilitate the operation of AALCO in Malaysia by providing funds, grants, privileges, etc. without preserving any right to receive income. In addition, the whole administration of AALCO in principle is placed in the hands of the Director of AALCO. Having said that, the **Arbitration Act 2005 (AA 2005)** and CIPAA 2012 over and above what has been agreed in the four agreements, allows KLRCA (AALCO) to manage arbitration as well as CIPAA disputes with statutory recognition directly and/or indirectly to collect fees, etc. with no provisions for accountability, transparency and good governance. Indeed, it is an unusual arrangement to allow a foreign body to collect toll from Malaysians in the administration of justice and a jurist need not be trained in 'Scotland Yard' to make such observations.

[9] KLRCA (AALCO) which is a foreign governmental organization is intentionally or ignorantly given the monopoly to administer matters related to arbitration as well as CIPAA 2012. This foreign governmental organisation directly and/or indirectly has been given the privilege to be involved in the administration of justice in domestic arbitration as well as CIPAA 2012. The Director of this foreign organization is also given absolute privilege to facilitate arbitration as well as CIPAA 2012 and in that process directly or indirectly is able to collect revenue in the form of fees, certification, appointment of arbitrators, adjudicators, etc. with no form of statutory safe-guards in the relevant Acts themselves to sustain accountability, transparency and good governance. This foreign governmental organisation which administer issues related to interim payments have now for commercial reasons unilaterally extended the scope to include also final payment. This foreign governmental organisation was also directly and/or indirectly instrumental in formulating the Arbitration Act 2005 (AA 2005) and/or its amendments as well as CIPAA 2012. In that process, the relevant Acts have been formulated to benefit the foreign governmental organization thereby compromising the administration of justice in Malaysia. I have dealt with some of my concern in my judgment in the case of **Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd** [2018] MLJU 1382.

[10] If CIPAA 2012 regime is not focused on right of claimant to interim payments only, then

convoluted jurisprudence will arise. For example, in the instant case, the respondent started with a claim for interim payments but the appellant took the opportunity to terminate the contract and made claims as set-off, of items which the appellant could only do in a final claim. Thus, the issue of set-off became a crucial issue to advocate breach of natural justice. When interim and final payments are mixed up, naturally it is good for the adjudicator as well as KLRCA (AALCO) as it may enable them to earn the extra fees. These unjust state of affairs itself have arisen in consequence of KLRCA (AALCO) advocating that CIPAA 2012 applies to final payment. CIPAA 2012 when administered for commercial reasons and that too without appropriate regulatory control by stakeholders of justice in this country, will impinge on access to justice. In addition, it will lead to injustice as in this case as the adjudicator's decision has been set aside. Time and money spent for parties, etc. has gone to waste. In consequence of the injustice resulted to the claimant in this case, it is pertinent for stakeholders to probe whether KLRCA (AALCO) is involved in the administration of justice in this country or is it a commercial organisation given monopoly under Arbitration Act 2005 (AA 2005) as well as CIPAA 2012 for its own commercial gain? What has a foreign governmental organisation to do with access to justice as well as administration of justice in Malaysia? And many more issues related to tax payers money, etc. whether it has been properly disbursed, accounted for and the spending audited by the Auditor General and whether the spendings were frugal?

'Obiter' and '*en passant'* statements

[11] (a) It must be noted that judges in Malaysia take an oath to preserve, protect and defend the Constitution. In essence, they are the custodian of rule of law as well as the Constitution. Judges, by their oath and also as part of their common law obligations, are obliged to expose any shortcoming in the legislative framework or conduct of Governmental organization or its agencies, etc. inclusive of purported scandals and corrupt practices. The only caveat is that they must refrain from making statements of private individual who has no nexus to public interest issues. In **Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin** [2007] 4 CLJ 725, His Lordship Richard Malanjum CJSS observed that "We are aware that judges are entitled to express their opinion and observations including criticism in a given case".

(b) Usually judges over the years of experience will have acquired the knowledge and jurisprudence to see an injustice related to public interest which are not picked up by parties or counsel or even legislature or executives. [See **Cartledge v E Jopling & Sons Ltd** [1963] 1 All E.R.]. It rests upon the judge to deal with such issues in an objective manner and usually such observations are often referred to *obiter dicta* or '*en passant*' statements [See **Municipality No. 2 v New Orleans Cotton Press** 18 L.R. 122; **K: a judicial officer AIR** [2001] SC 972; **Bahai v Rashidian & Anor** [1985] 3 All ER 385]. These statements help to trigger the relevant stakeholders of justice including the Attorney General and the Bar Council to take note of the problems and act upon it with great deference. At times, it may be quite difficult for the judge to make observations which will directly or indirectly involve persons, institutions or agencies, etc. the judge is acquainted with. Failure by judges to positively identify the problem and make suitable suggestions will impinge on virtues related to Oath of Office as well as accountability, transparency and good governance and at times silence may promote corrupt practices, etc. It all depends on the facts and circumstances of the case as well as

public interest involved in the statements that the judge makes.

(c) *Obiter* statements as well as '*en passant*' statements have been in existence from time immemorial and it is not meant to 'villify' any person or body or even the past government. *En passant* statements are quite common in India and is rarely pronounced in Malaysia. The dissenting judgment of the Court of Appeal in the case of **Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho** [2016] 1 CLJ 911, had anchored the jurisprudence on constitutional oath as well as the '*en passant*' statements. It was helpful to appreciate the nature of the problem. That judgment had moved the apex court's conscience to instill the jurisprudence related to Constitutional Supremacy, a fact all practitioners of law will now attest to. [See **Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals** [2018] 3 CLJ 145 (FC)].

(d) Any attempt by any parties to silence the judge directly or indirectly in his views and/or in writing his judgments or in doing his duty will amount to judicial interference. Even any suggestions to tow the line of judges' policy of apex court by fellow judges will also amount to judicial interference. Thus, a judge has to stand with his views and write judgment within the confinements of judicial propriety. The judge takes an individual oath and not collective oath and in consequence is not obliged to subscribe to apex fallacy (if any). It is no easy task and in consequence public must ensure the best are appointed and also handsomely rewarded with appropriate pension scheme so that judges need not look towards post-retirement benefits from the Government and/or politicians. A weak judiciary will promote corruption and the net effect may lead to insolvency of the state and that will affect the ordinary public in particular the poor, needy as well as the oppressed the most. To arrest that *at limine*, prime investment must be made on judges as well as the supporting agencies.

[12] In the context of the above jurisprudence, this judgment and '*en passant*' statements in the end, inclusive of prerogative directions, must be read objectively to appreciate the problem as well as breach of rule of law and the Federal Constitution.

Brief Facts

[13] The respondent initiated a claim for interim payment. The appellant in payment response inadequately claimed compensation for breach of contract and damages for remedial work which principally will be related to final accounts. This issue was further expanded in the adjudication response of the appellant. The appellant was seeking a set off in relation to the claim related to payment certificates No. 17R and 18. The set off was related to:

(i) outstanding amount of RM351,646.68 certified under interim certificate No. 19;

(ii) structured defects investigation and audit costs of RM161,839.50;

(iii) additional costs of completion- RM6,860,842.45;

(iv) assorted costs amounting to RM1,624,84.11.

[14] The learned trial judge had set out the position of the appellant (who was the respondent in the

High Court) as well as the adjudication decision as follows:

> "[21] The Respondent further contended that as they had terminated the Claimant's employment due to defaults and breaches by the Claimant, the payments under Certificates 17R and 18 need not be paid under clause 25.4(iv) of the COC until the completion of works and until the completion and verification of the accounts within a reasonable time by the Architect certifying that there are outstanding amount to the Claimant after taking into account the costs of completing the remaining works. On 6.12.2016, the Adjudicator delivered an adjudication decision in favour of the Claimant as follows:
>
> (a) the Respondent shall pay to the Claimant a sum of RM1,930,981.43 as the Adjudicated Sum within 14 days hereof;
>
> (b) the Respondent do pay the interest at the rate of 5% per annum on the adjudicated sum of RM1,930,981.43 from 6.12.2016 until the date of full payment;
>
> (c) the Respondent shall pay to the Claimant within 14 days hereof the following payment:
>
> (i) Adjudicator's fees (excluding GST) and KLRCA's administration fee amounting to RM19,423.36;
>
> (ii) GST on the Adjudicator's fees of RM 1,923.11;
>
> (iii) KLRCA registration fee of RM250.00;
>
> (iv) KLRCA adjudicator appointment fee of RM400.00;
>
> (v) Adjudicator's expenses of RM627.18.
>
> (d) the Respondent shall pay to the Claimant the sum of RM 10,000.00 as the costs allowed to the Claimant within 14 days from the date hereof."

[15] The appellant had relied on clause 25.4 (iv) which is related to final account, to withhold payment of certificates No. 17R and 18. The learned adjudicator had ruled that the appellant cannot withhold payment for interim certificates Nos. 17R and 18 on these grounds.

[16] The adjudicator took the position that the negative certificate 19 which is in favour of the appellant cannot be a subject matter of set-off in this adjudication process on the grounds the adjudicator had no jurisdiction. However, the adjudicator went to say a set off should be granted if the adjudicator had the jurisdiction. The learned trial judge went to expound the jurisprudence to justify interference in the adjudicator's decision when the CIPAA 2012 regime did not vest any power or jurisdiction for the court to do so except as provided in section 15 as well as section 28(2) of the Act, that too there must be an application before the court to do so. The learned judge reduced the sum of RM351,646.68 from the sum awarded in the adjudicator's decision.

[17] In the Court of appeal, it was argued whether the learned adjudicator's decision not to deal with

all the defence of the adjudication, as well as set-off, amounts to breach of natural justice. For this purpose, the Memorandum of appeal of the appellant *inter alia* read as follows:

> "1. The Learned Judge erred in fact and/or in law in holding that the Respondent has successfully proved their averments in its application on a balance of probabilities.
>
> 2. The Learned Judge erred in fact and/or in law when the Learned Judge failed to hold that Clause 25.4(iv) of the Contract entered between the Appellant and the Respondent is not enforceable although it is clearly an agreement between the Appellant and the Respondent that the Appellant is not required to make any further payment to the Respondent after the Respondent was terminated from the Contract.
>
> 3. The Learned Judge erred in fact and/or in law when the Learned Judge holds that the Appellant was not allowed to set off the additional costs incurred by the Appellant under the Contract due to the reason that the Adjudicator does not have jurisdiction to set off the same because the issue was not raised in the Appellant's Payment Response.
>
> 4. The Learned Judge erred in fact and/or in law when the Learned Judge enforced part of the Adjudication Award made by the Adjudicator on 27.12.2016 ("the Award") although the Learned Judge found that there is denial of natural justice in the Award.
>
> 5. The Learned Judge erred in fact and/or in law when the Learned Judge failed to consider that Section 15 of Construction Industry Payment and Adjudication Act 2012 does not provide any jurisdiction to set aside only part of an adjudication award and hence, the Learned Judge erred when he enforced part of the Award which is not set aside.
>
> 6. In relation thereto, the Learned Judge also erred in fact and/or in law when the Learned Judge failed to consider the facts that enforcement of part of the Award tantamount to replacement of the original Award with a new High Court decision.
>
> 7. This Memorandum of Appeal is filed without the benefit of the High Court's grounds of Judgment and therefore, the Appellants reserve its rights to add and/or vary this Memorandum of Appeal when the said grounds is given by the High Court."

Jurisprudence related to Natural Justice and the Federal Court's Decision in the case of View Esteem

[18] It is important to note that one must not be carried away by the Federal Court's decision in **View Esteem** to say that breach of natural justice warrants an adjudication decision to be set aside without considering the gravity of the breach as well as the element of prejudice. The Federal Court's decision *inter alia* held:

> "[74] For the reasons above stated it is our considered view that an Adjudicator is not excluded from considering all the defences raised by a respondent in the Adjudication Response whether found in the first response under section 6 of CIPAA or not. In the circumstances of this case, the

> Adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason."

[19] Issues related to natural justice and its breach is always fact centric. The Federal Court was cautious in saying 'in the circumstance of the case', but unfortunately, did not elaborate on what circumstances a breach of natural justice will occur, as it is well settled that all forms of breach of natural justice will not warrant intervention of the court. Thus, the Federal Court's decision cannot be taken to be a judicial principle which can be applied to all cases where breach of natural justice is complaint of. It all depends on the facts and circumstances and judicial literature in the subject. It is also well settled that it is not the function of the Federal Court to pronounce the law against settled principles. To appreciate what this well settled principles are, in relations to natural justice, the jurisprudence need to be explored. It can be done in a paragraph, a page, in a book, etc. That reflects the strength in the jurisprudence related to natural justice. I will now summarise them briefly for both substantive as well as procedural law, to address the issues in hand only.

Natural Justice

[20] (a) The phrase 'natural justice' is an abstract term and in consequence has been defined by various authors in different ways. The learned author Paul Jackson (1977) states that in this century, as in the past judges and others have used the phrase natural justice in a way which implies the existence of moral principles of self-evident and unarguable truth. Further, the author asserts that 'natural justice', used in this way, is another name for natural law although devoid of some of the religious and philosophical gestures and implications of that concept. In a crux, the concept of natural justice, in the arena of administration of justice refers to ascertained principles of law and practice which is founded in equity to uphold justice.

(b) In **Voinet v Barret** (1985) 55 LJ QB 39, Lord Esher M.R. defined natural justice as "the natural sense of what is right and wrong". In the wide sense, the concept of natural justice has been used in cases involving the right of the Crown to destroy property in wartime (See **Burmah Oil v Lord Advocate** (1965) AC 75). The concept of "equity and good conscience" is an off shoot of natural justice, widely adopted during the British rule, where the local legal system was seen to be repugnant to the British concept of civilised behavior. (See **Liyanage v R** (1967) 1 AC 259). The concept of natural justice is said to be principles of substantive justice. Thus, there cannot be "technical breach of the rules of natural justice since that concept relates to matters of substance, not technicalities". There are a number of exceptions. Diplock L.J. was of the view that the "technical rules of evidence" lie outside the scope of natural justice.

(c) In **Hounslow L.B.C. v Twickenham Garden Developments** (1971) Ch. 233, Megarry J was of the view that the principles of natural justice are of wide application and great importance but they must be confined within proper limits and not allowed to run wild. Natural justice is equated with fair play in action or the duty to act fairly. In **Russell v Duke of Workfolk** (1949) 1 All ER, Lord Denning L.J. opined that contractual terms, which exclude natural justice, were probably contrary to public policy.

(d) Further, judges and jurists in defining the parameters of the rules of natural justice have often said that:

(i) The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke, 'the rules of natural justice' so as to avoid the consequence (See Lord Denning in M.R **ex. p. Mughal** (1974) Q.B).

(ii) The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens (See **Mclnnes v Onslow Fane** (1978) All E.R., 211).

(iii) The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straightjacket of cast-iron formula. Historically "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth." (See *Paul Jackson, Penumbra of Natura Justice*, Calcutta: Eastern Law House, 1977, at 1). In course of time, judges nurtured in the traditions of British Jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience." (Per Justice R.S Sakaria in **Swadeshi Cotton Mills v Union of India AIR** 1981 SC 818). Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". Natural justice was considered as that part of natural law, which relates to the administration of justice.

(iv) The right to natural justice should be as firm as the right to personal liberty. This vital part of the rule of law has now achieved something like the status of a fundamental right (H.W.R Wade, "*Administrative Law*", 7th Edition, Oxford, Clarendon Press, 1994).

(v) The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define (per Sir Raymon Evershed M.R.- **Abbot v Sullivan** (1952) 1 KB 189).

(vi) In general, the essential principles of natural justice are that; (i) the person whose rights are to be affected must be given notice of the case or the charges which he is to meet; (ii) he must be given an opportunity to make representation and to explain the allegations made against him and to have his say in the matter; and (iii) the authority conducting the proceedings must not be biased and should act in good faith (See Viscount Haldane- **Local Government Bound v Arlidge** (1915) AC 120, sets out the parameters of the principles of natural justice).

(vii) It had been judicially noticed that natural justice "is no unruly horse, no lurking land mine, nor a judicial cure-all". If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential procedural propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of (Per Justice R. Krishna Iyer J. in **The Chairman Board of Mining Examinations Chief Inspector of Mines v Ramjee AIR** 1977 SC 965).

(viii) Natural justice is not a static concept. It is part of a judicial vocabulary. It is recognised as a guiding factor in administration of justice and forms the constitutional basis for judicial scrutiny.

The principles of natural justice may have to yield to the "demands of necessity" where the "jurisdiction is exclusive and there is no legal provision for calling a substitute" (See **Mary Teresa Dias v The Honourable Acting Chief Justice AIR** 1985 Ker 245).

(ix) The concept of natural justice is a magnificent thoroughbred on which the administration of justice gallops forward towards its proclaimed and destined goal of "Justice, social, economic and political". This thoroughbred must not be allowed to turn into a wild and unruly horse (See **Stvayir Singh v Union of India AIR** 1986 SC 555).

[21] From all the above cases and principles, the gravity of breach as well as element of prejudice is an important test to seek the intervention of the court.

[22] I have read the appeal records and able submission of the parties. I take the view that the appeal must be dismissed *inter alia* for the reasons stated below:

(i) The complaint of natural justice is an unruly horse in the administration of justice and the courts are slow in buying the argument;

(ii) To succeed in a complaint on natural justice, the complainant must demonstrate the gravity of breach is such that he has no other redress save as to seek relief from the court;

(iii) The scheme of CIPAA 2012 is such that, one of the main grounds to set aside the decision in adjudication is for breach of natural justice, that too the claimant must have improperly procured the adjudication decision. Section 15 of **CIPAA 2012** says:

“15. Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

a) The adjudication decision was improperly procured through fraud or bribery;

b) There has been a denial of natural justice;

c) The adjudicator has not acted independently or impartially; or

d) The adjudicator has acted in excess of his jurisdiction.”

(iv) The heading to the section has not been placed by Parliament in vain. It is meant to put to test the conduct of the claimant and not the adjudicator. It is a pity, this jurisprudence which is very striking before the eyes was not explored by the Federal Court in the case of **View Esteem**. In actual fact, the heading shift the traditional complaint of breach of natural justice related to the adjudicator to the claimant. The burden is on the claimant to ensure the adjudication process is not in breach of natural justice. If this nuance is not appreciated in the right perspective by the courts itself, then the CIPAA 2012 scheme is bound to be a failure. In addition, being a compulsory

adjudication scheme, it will cause material injustice to the claimant. It is also disheartening to note that authors and article writers in this area of jurisprudence have failed to appreciate the nuance in the CIPAA 2012 scheme.

(v) In addition, the scheme related to CIPAA 2012 is to ensure quick payment of interim payments in construction dispute. Thus, it gives the adjudicator the right to summarily determine the claim with option for the parties subsequently to settle the dispute by arbitration or litigation. It must be a quick decision as well as a just decision and courts are expected to lean towards upholding the decision unless there is a violent breach of natural justice which the claimant had condoned before the adjudicator for a decision to be made in favour of him. If the courts are going to disturb the summary process in a liberal fashion, then the CIPAA 2012 will have no utility save that it will place added costs to the parties only.

(vi) Further, the scheme to some extent, allows the adjudicator to be the master of the procedure as well as the subject matter of the claim. For example, if the parties want to have an oral hearing or wants to put 100 witnesses, he can restrict them or refuse to do so. This decision-making process is left to the integrity of persons appointed as adjudicators by KLRCA (AALCO). If the integrity is found to be lacking, then they have to be removed which is a different process in itself. In relation to the subject matter, the adjudicator will not be in breach as long as it is a contractual claim related to interim payments. It is up to the adjudicator to decide whether to entertain them or only a part. As long as the decision is not made arbitrarily, it will not breach the rules of natural justice as the adjudication decision is not final. If this nuance is also not appreciated by courts, it will only cause injustice to the claimant who by statute is forced to seek justice through the scheme.

(vii) In my view, the failure of the adjudicator to take into consideration of all claims is not a breach of natural justice but more so is a procedural decision not to entertain a claim at that stage and not merely refusing a claim equivalent to a striking out. In addition, the appellant will not suffer prejudice at all as the CIPAA scheme gives him a venue to ventilate his grievance as opposed to being concerned about *res judicata* principles, etc. In not entertaining a claim which arises in consequence of contractual dispute in writing and where the decision is not final then it cannot be said to be a breach of natural justice and/or jurisdictional issue. Courts attempting to split hairs on this point does not promote a summary process at all.

(viii) The learned High Court judge had exercised his powers under section 28(2) to reduce the adjudication sum. However, there was no application or prayer for the reduction of the said sum under section 28(2). Section 28 reads as follows:

> "28. (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."

(ix) CIPAA 2012, technically allows a party to set aside the adjudication claim or to make an application under section 28(2) to vary the amount.

(x) In my view, I do not think it is a proper exercise of judicial power by the learned trial judge on the facts of this case, to intervene in the decision of the learned adjudicator and reduce the said sum. It should have been left to be taken up in the arbitration proceedings and/or litigation. That will accord with the spirit and intent for CIPAA scheme. In any event, as the majority have set aside the adjudication's decision, I do not think it is necessary to deal with this issue any further.

[23] For reasons stated above, I will dismiss both the appeals with costs and *en passant* state as follows:

(a) Arbitration is based on party autonomy concept. Any person or organisation incorporated in Malaysia can facilitate arbitration regime and provide its scheme and fees for arbitrator, arbitration proceedings, etc. All that is legitimate. However, the Government cannot provide such autonomous organisation a form of statutory recognition to collect fees and or any form of revenue without adhering to Government protocols and restrictions on how the money will be spent. In essence, such revenue collected cannot be used for the benefit of autonomous organisation to be dealt with in the organisation's own discretion. **UNCITRAL Model Law 1985** also does not make provision for the existence of autonomous organisation to collect a sort of statutory revenue in relation to international arbitration. The Arbitration Act 2005 as well as CIPAA 2012 places KLRCA (AALCO) in a privileged position to collect a sort of statutory revenue and unaccounted spending on it. As a matter of public interest, it is important to point out that it breaches the rule of law.

(b) It is perfectly within the rule of law for KLRCA (AALCO) to operate independently in Malaysia. However, it will be against the rule of law as well as the Federal Constitution to provide monopoly to a foreign governmental organisation to be involved in access to and/or administration of justice.

(c) It will be within the rule of law for the Government to facilitate the operation of KLRCA (AALCO) but in that process it cannot provide monopoly to directly and/or indirectly collect revenue without accountability. Facilitate means the Government can provide a building and space even worth RM100 million without collecting rental and also substantial amounts in aid, provided it is transparent and the Auditor General and other agencies are fully cognizance of it as well as the purpose of its spending. However, it will be a breach of rule of law to allow such autonomous governmental organisation as well as foreign organisation to collect revenue by a monopoly provided in AA 2005 as well as CIPAA 2012.

(d) It must be noted that access to justice for Malaysian is to be provided by the judiciary or other statutory tribunals. What is KLRCA (AALCO)? Is it part of the judiciary or statutory tribunal or is

it just a commercial organisation formed to facilitate arbitration? It must be emphasized that the activities of KLRCA (AALCO) is basically commercial in nature. Commercial organization if allowed to take part in access to justice that too through a statutory regime, it may corrupt or have corrupted the system itself. It can be done in many ways and I need not elaborate here. However, it is important for relevant agencies to investigate and ensure access to administration of justice has not been compromised. If it is found not to be a juridical entity under the Malaysian law, further steps must be taken to arrest the mischief (if any). It must be asserted here that no person or body by legislative favours or governmental agreements can be made 'too big for their boots'. Such a scheme will violate the rule of law as well as the Federal Constitution.

(e) When it comes to access to justice and collection of revenue, it must be regulated in all aspects and Finance Ministry as well as Auditor General, as well as other governmental agencies, must be seen to have control over the funds collected through a statutory regime and likewise the money collected is spent, according to the usual guidelines of the Government in all aspects.

(f) KLRCA (AALCO) appears to be instrumental in formulating the AA 2005 as well as CIPAA 2012. By a statutory regime, it collects various fees as well as for certification to become arbitrator as well as adjudicator. When it relates to international arbitration, access to justice may not be an issue as it is a party autonomy concept. When it comes to domestic arbitration or adjudication, access to justice is in issue. The fees and costs regime must be in line with the courts system and cannot be based on commercial rates as access to justice is a 'fundamental guarantee' under the Federal Constitution. If it is compromised, it will breach articles 5 and 8 of the **Federal Constitution**.

(g) AA 2005 as well as CIPAA 2012 concentrates the sole power on the Director of KLRCA (AALCO), with no statutory control within the Act or on the Director. The issues and concern related to accountability, transparency and good governance is not also entrenched in these Acts. Further, how the money collected by a statutory regime is spent is also not known. For example, the judges' salary or magistrates' salary is an open secret. However, the Directors role, fee structure, terms of appointment as well as a period of appointment, qualification as well as selection process as well as how monies are spent, etc. are also not known.

(h) The position in India in issues related to arbitration and appointment of arbitrator is vested by the Arbitration Act to the Chief Justice who also controls the fee structure. This is a necessity to ensure integrity in any form of civilized system related to access to justice. Similarly, the Arbitration Act in Singapore give a direct participation to the Chief Justice of Singapore in the appointment of the relevant person in relation to their Arbitration Act. In addition, when it comes to interim payments related to construction industry disputes, the Minister is in full control of the scheme. Singapore's Arbitration Institution such as SIAC as well as institution responsible to administer construction industry dispute is formed by the Singaporeans for the benefit of the Singaporeans. By no stretch of imagination, one can say KLRCA (AALCO) is formed by the Malaysians and for the benefit of the Malaysians. In my view, it is a serious case of statutory as well as constitutional abuse.

(i) In the instant case, the injustice to the parties is very patent. First, the parties are caught by compulsory adjudication principally facilitated by KLRCA (AALCO). Having made compulsory, they are punished severely with fees and costs in a matter which does not bring finality. KLRCA (AALCO) collects substantial fees. For example in this case, KLRCA (AALCO) gets the following sum:

(i)	Registration fees	- RM 250.00
(ii)	Adjudication appointment fee	- RM 400.00
(iii)	The claimant must pay 10% of the adjudication fee	- RM 1,942.34
(iv)	The respondent must pay 10%	- RM 1,942.34
	Amount	- RM 4,534.68

[24] That is to say, KLRCA (AALCO) just for facilitating adjudication collects the sum of RM4,534.68. In addition, the parties still have to pay the adjudicator a sum of RM19,423.36 plus GST on fees amounting to RM1,923.11, as well as its own solicitors' fees and costs. In short, these are not the amounts which need to be paid for purpose of access to justice within the framework of our Constitution. If the legislation allows adjudication claim to be filed in court, the claimant will need only spent less than RM500.00 for filing fees, thereby saving a total sum of RM25,000.00 at the least. The irony is, after having paid KLRCA (AALCO) as well as the adjudicators fees, GST and the lawyers' fees, the decision becomes unenforceable. In my view, there is a serious breach of rule of law. The stakeholder of justice must take serious steps under the new Government to investigate the role of KLRCA (AALCO) viz-a-viz access to justice. If the revenue collected through statutory support is not properly spent or accounted for, then in my view it will be a fit and proper case for organisations involved in integrity of institutions as well as well as institutions related to investigation to look into all present and past transactions of KLRCA (AALCO). This is necessary to ensure the rule of law has been followed and/or to take right steps to salvage the damage in relation to access to justice as well as administration of justice in Malaysia.

[25] In my considered view, this is a fit and proper case to direct my registrar to forward a copy of the judgment to the Malaysia Anti-Corruption Commission as well as the Inspector General of Police to study the judgment and take immediate action as they deem fit.

I hereby order so.

Dated: 3 July 2018

sgd

DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER
Judge

Court of Appeal
Malaysia.

COUNSEL

For the Appellant: Alan Wong, With him Andrew Heong & Roger Leong, Messrs Zain Megat & Murad

For the Respondent: Phang Soon Mun, Chew Chuh Wei, Messrs Han & Partners

LEGISLATION REFERRED TO:

Construction Industry Payment and Adjudication Act 2012, Sections 10, 15, 27(1), 28, 28(2), 37

Federal Constitution, Articles 5, 8, 126

JUDGMENTS REFERRED TO:

Abbot v Sullivan (1952) 1 KB 189

Bahai v Rashidian & Anor [1985] 3 All ER 385

Burmah Oil v Lord Advocate (1965) AC 75

Cartledge v E Jopling & Sons Ltd [1963] 1 All E.R.

Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor [2008] 8 MLJ 12

Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] 3 CLJ 145 (FC)

Liyanage v R (1967) 1 AC 259

Local Government Bound v Arlidge (1915) AC 120

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd [2018] MLJU 1382

Mary Teresa Dias v The Honourable Acting Chief Justice AIR 1985 Ker 245

Mclnnes v Onslow Fane (1978) All E.R., 211

Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin [2007] 4 CLJ 725

Metropole Pte Ltd v Designshop Pte Ltd [2017] SGHC 45

Municipality No. 2 v New Orleans Cotton Press 18 L.R. 122

Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho [2016] 1 CLJ 911

Primus Buld Limited v Pompey Centre Limited & Slidesilver Limited [2009] EWHC 1487

Russell v Duke of Workfolk (1949) 1 All ER

Stvayir Singh v Union of India AIR 1986 SC 555

Swadeshi Cotton Mills v Union of India AIR 1981 SC 818

Teoh Meng Kee v Public Prosecution [2014] 7 CLJ 1034

The Chairman Board of Mining Examinations Chief Inspector of Mines v Ramjee AIR 1977 SC 965

View Esteem Sdn Bhd v Bina Puri Holdings Berhad (2017) 1 LNS 1378

Voinet v Barret (1985) 55 LJ QB 39

Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168