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Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-134–08 OF 2019
LIM CHONG FONG J
23 JANUARY 2020

C *Constitutional Law — Legislation — Construction Industry Payment and Adjudication Act 2012 ('the Act') — Whether the Act's statutory adjudication scheme is unconstitutional — Whether the Act violated arts 8(1) and 121 of the Federal Constitution — Whether the Act usurps the powers of the courts — Whether OS had been rendered academic when adjudicator handed down his* D *decision and discharged his responsibilities under the Act — Whether OS came within narrow public law exception — Whether discrimination based on classification allowed under art 8 of Federal Constitution — Whether charging of fees and expenses by adjudicator and administrative fees by AIAC was unconstitutional — Whether plaintiff's challenge on appointment of second* E *defendant by virtue of purported invalid appointment of third defendant as director of the AIAC had merit — Whether second to fourth defendants immune from being sued by plaintiff*

Mega Sasa Sdn Bhd ('the plaintiff'), a private limited company involved in the F construction business, appointed Kinta Bakti Sdn Bhd ('the first defendant') as a subcontractor to carry out earthworks and geotechnical works in respect of a project. When payment disputes arose between them, in connection with the project, the first defendant, initiated adjudication proceedings against the plaintiff under the Construction Industry Payment and Adjudication Act 2012 G ('the Act'). Vinayak Pradhan ('the third defendant'), the director of Asian International Arbitration Centre ('AIAC'), appointed Soh Lieh Seng ('the second defendant') as the adjudicator to hear the dispute between the parties. The plaintiff filed an originating summons ('OS') seeking, inter alia, a declaration that the appointment of the second defendant as adjudicator was H invalid. The plaintiff co-joined the AIAC, the Minister of Works and Kerajaan Malaysia as defendants to the OS application. It was the plaintiff's case that the Act violated arts 8(1) and 121 of the Federal Constitution. The plaintiff argued that the Act, which required the mandatory participation of the plaintiff as soon as when the first defendant initiated the adjudication proceedings I violated art 8(1) of the Federal Constitution. It was the plaintiff's contention that the parties were not equal before the law because under the Act the first defendant could compel the plaintiff to submit to adjudication proceedings at its option. The plaintiff also submitted that the scheme of statutory adjudication under the Act usurps the powers of the courts, as provided by art

121 of the Federal Constitution and that this resulted in a violation of art 121. The defendants in gist replied that the plaintiff's contentions were flawed and that although the adjudication proceedings may have the trappings of a court in determining disputes, statutory adjudication is not a court of law, ultra vires, or in violation of art 121 of the Federal Constitution. In response, the second defendant filed a notice of application to strike out the OS against him on grounds that it was made frivolously, vexatiously and in abuse of process because the plaintiff's challenge against the validity of appointment of the third defendant ought instead to be made against the relevant Ministers of the Government of Malaysia and would also frustrate and delay the disposal of the adjudication proceedings. The third and fourth defendants also filed a notice of application for the declarations sought against them to be struck out and for them to cease to be parties to the OS on the grounds that they were immune to proceedings pursuant to s 34 of the Act. The court ordered the adjudication proceedings to continue to disposal notwithstanding the challenges made by the plaintiff in the OS, and for the OS to be heard thereafter. Consequently, after the second defendant made and delivered his decision under the adjudication proceedings (the decision), the court proceeded with the instant hearing of the OS application and the other interconnected applications. At the hearing the second defendant led the submission that the OS had been rendered academic because he had already handed down his decision and discharged his responsibilities under s 27(3) of the Act. The second defendant thus submitted that it would be a futile exercise for the court to deliberate on the prayers sought by in the plaintiff in the OS, in particular the order that the second defendant's appointment be declared null and void. Instead the second defendant submitted that the plaintiff's proper recourse was to now apply to set aside the decision pursuant to s 15 of the Act. However, the plaintiff maintained that the OS should be determined for otherwise it would be prejudiced by having to take the inconsistent and untenable stance of applying to set aside the decision under the Act, when it was its contention that the Act is itself unconstitutional.

Held dismissing the OS with costs of RM20,000 to the first defendant, RM50,000 to the second defendant, RM50,000 to the third and fourth defendants collectively and RM20,000 to the fifth to seventh defendants collectively:

(1) Although the necessity of making a determination on the pleas raised by the plaintiff in the OS could be perceived academic, because of the prior making of the decision, the pleas had raised unprecedented public law issues, particularly on the constitutionality of the Construction Industry Payment and Adjudication Act 2012 ('the Act'). This issue entailed interpreting the statute vis a vis the Federal Constitution, which is a neat discrete point of law, without involving disputed facts. Moreover, judicial notice was taken of the fact that there were presently many on-going as

well as newly constituted adjudication proceedings under the Act. In the circumstances, the present OS came within the narrow public law exception and ought to be determined notwithstanding that it was academic (see paras 30–33).

(2) Article 8 of the Federal Constitution contemplates lawful discrimination based on classification provided it is reasonable or permissible. In other words, there is no absolute equality. Moreover, there is a distinction between judicial power and judicial function as far as art 121 of the Federal Constitution is concerned. A body that exercises judicial function is not a court clothed with judicial power under art 121 albeit both undertake adjudicative tasks. Thus, in considering the plaintiff's contention that the Act violated art 8(1) of the Federal Constitution and is hence void, it is necessary to determine whether the statute is discriminatory on persons subjected to the Act, and if so, whether that is reasonable or permissible. First and foremost, it is plain that the Act does not affect everyone but only disputants pursuant to a construction contract, as defined in the Act. It is only discriminatory in this sense. The principle underlying art 8 is that a law must operate alike on all persons under like circumstances. Since discrimination based on classification was allowed, it had to be investigated whether the classification and its consequential effects were reasonable or permissible. The Act is a salutary piece of legislation brought in by Parliament to address and redress the prevailing weaknesses in the Malaysian construction industry, particularly on construction financing and payments. The Act therefore intelligently discriminates and subjects this class of disputants in construction contracts to the exclusion of everyone else and this class of disputants plainly has a rational relation to the object of the Act. Upon undertaking a meticulous review of the provisions on adjudication proceedings in the Act, it was also clear that the disputants were treated equally and in the same way, in that, they had the right to choose and agree to an independent and impartial adjudicator or having one appointed by the AIAC; they were subject to the same scale of adjudicator's fees and AIAC administrative fees; they were subject to the same rules of procedure in the adjudication proceedings; they were subject to the same legal rights and remedies; and they were subject to the same potential outcomes of the entire adjudication proceedings. Moreover, there was also an avenue of challenge as provided in s 15 of the Act in respect of any improperly procured decision. In the circumstances, the Act was neither discriminatory nor in violation of art 8(1) of the Federal Constitution (see paras 41–47 & 50–53).

(3) The plaintiff's challenge that the adjudication proceedings under the Act is a usurpation of the judicial powers of the court and thus a violation of art 121 of the Federal Constitution is misplaced, because it is trite that judicial function is not synonymous with judicial power of the

Federation. Only judicial power is vested upon the courts and hence the monopoly of the courts. Statutory adjudication under the Act is a judicial function similar to that granted to the Tribunal for homebuyer claims or other inferior tribunals. Further, adjudication proceedings under the Act though binding are not final, as provided in s 13(c) of the Act. In other words, it is open for the disputants to have the same dispute finally determined in court without attracting the doctrine of res judicata and issue estoppel notwithstanding the dispute had gone through adjudication proceedings under the Act (see paras 56–57).

(4) There is no merit in the plaintiff's submission that the charging of fees and expenses by the adjudicator and administrative fees by the AIAC unconstitutional. The Act did not discriminate between the parties to the adjudication proceedings in terms of adjudication fees and expenses. These expenses were not discriminatory because the ultimate costs payable in respect of the adjudicator's fees and expenses as well as AIAC administrative was dependent upon the relative merits of the disputants' case since costs follow the event in adjudication proceedings. This was reasonable as only the losing party was penalised. It was no different from any other legal proceedings whether in the courts or other inferior tribunals. Further, the imposition of adjudicator's fees and expenses and AIAC administrative fees is not unconstitutional because it was for services rendered which was permissible. The issue on illegality of the imposition of the AIAC administrative fees ultra vires the Act was a public law issue that ought to be pursued by way of judicial review (see paras 60–63 & 65).

(5) The host country agreement, which is an international treaty in substance, has been obliquely effected and put into operation through legislation by the deployment of the AIAC (formerly KLRCA) as the appointing authority of arbitrators and Adjudication Authority under the Arbitration Act 2005 and the Construction Industry Payment and Adjudication Act 2012 respectively. This is because the setting up and implementation of the AIAC is the sole object of the Host Country Agreement. As such, there was no need for a specific statute to create the AIAC in terms of the Host Country Agreement. In challenging the appointment of the third defendant as the director of the AIAC, the plaintiff is effectively inviting this court to adjudicate on the on-going dispute between the Asian African Legal Consultative Organisation ('AALCO') and the Government of Malaysia as to whether the procedure, as agreed in article IV of the Host Country Agreement, has been complied with. However, a domestic/municipal court did not have jurisdiction to adjudicate or enforce rights arising out of transactions in an international treaty. In any case, it would be wrong to make a decision that may bind AALCO which is not a party in these proceedings. Thus, the plaintiff's challenge on the appointment of the second defendant by

virtue of the purported invalid appointment of the third defendant as director of the AIAC is unmeritorious (see paras 72–75 & 79).

(6) Based on the affidavit evidence adduced by the plaintiff, there was no act or omission done in bad faith by the second defendant in the discharge of his duties. Even if the third defendant had invalidly appointed the second defendant, it did not amount to an act of bad faith by the second defendant. The second to fourth defendants were immune from being sued by the plaintiff in this OS by virtue of s 34 of the Act and s 4 of the International Organisations (Privileges and Immunities) Act 1992. It was also found that the immunity was not confined to ordinary causes of action in suits but also extended to declaratory reliefs as sought in the present case (see paras 81–82 & 85).

[Bahasa Malaysia summary

Mega Sasa Sdn Bhd ('plaintif'), sebuah syarikat persendirian berhad terlibat dengan perniagaan pembinaan, telah melantik Kinta Bakti Sdn Bhd ('defendan pertama') sebagai subkontraktor untuk menjalankan kerja tanah dan kerja geoteknikal berkenaan satu projek. Apabila pertikaian mengenai bayaran timbul antara mereka, berkaitan projek itu, defendan pertama, telah memulakan prosiding adjudikasi terhadap plaintif di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta tersebut'). Vinayak Pradhan ('defendan ketiga'), pengarah Pusat Timbangtara Antarabangsa Asia ('AIAC'), telah melantik Soh Lieh Seng ('defendan kedua') sebagai pengadil untuk mendengar pertikaian antara pihak-pihak. Plaintif telah memfailkan saman pemula ('SP') memohon, antara lain, satu deklarasi bahawa pelantikan defendan kedua sebagai pengasil adalah tidak sah. Plaintif telah bergabung bersama AIAC, Menteri Kerja Raya dan Kerajaan Malaysia sebagai defendan-defendan kepada permohonan SP tersebut. Ia adalah kes plaintif bahawa Akta tersebut telah melanggar perkara-perkara 8(1) dan 121 Perlembagaan Persekutuan. Plaintif berhujah bahawa Akta tersebut, yang menghendaki penglibatan mandatori plaintif sejurus selepas defendan pertama memulakan prosiding adjudikasi melanggar perkara 8(1) Perlembagaan Persekutuan. Ia adalah hujah plaintif bahawa pihak-pihak tidak sama di hadapan undang-undang kerana di bawah Akta tersebut defendan pertama boleh memaksa plaintif menyerah kepada prosiding adjudikasi atas pilihannya. Plaintif juga berhujah bahawa skima adjudikasi statutori di bawah Akta tersebut merampas kuasa mahkamah, sebagaimana diperuntukkan oleh perkara 121 Perlembagaan Persekutuan dan bahawa ini adalah akibat pelanggaran perkara 121. Defendan-defendan dengan jelas menjawab bahawa hujah plaintif telah cacat dan bahawa meskipun prosiding adjudikasi mungkin kehilangan pegangan mahkamah dalam menentukan pertikaian, adjudikasi statutori bukan mahkamah undang-undang, ultra vires, atau melanggar perkara 121 Perlembagaan Persekutuan. Sebagai tindak balas, defendan kedua telah memfailkan satu notis permohonan untuk membatalkan SP tersebut

terhadapnya atas alasan bahawa ia telah dibuat secara remeh, menyusahkan dan menyalahi proses kerana cabaran plaintif terhadap kesahan pelantikan defendan ketiga patut sebaliknya dibuat terhadap Menteri-Menteri Kerajaan Malaysia yang berkaitan dan juga akan melemahkan dan melewatkan penyelesaian prosiding adjudikasi. Defendan-defendan ketiga dan keempat juga telah memfailkan satu notis permohonan deklarasi yang dipohon terhadap mereka untuk dibatalkan dan untuk mereka berhenti menjadi pihak-pihak kepada SP tersebut atas alasan bahawa mereka kebal terhadap prosiding menurut s 34 Akta tersebut. Mahkamah memerintahkan prosiding adjudikasi diteruskan untuk penyelesaian walau apa pun cabaran dibuat oleh plaintif dalam SP tersebut dan agar SP tersebut didengar selepas itu. Berikutan itu, selepas defendan kedua telah membuat dan menyampaikan keputusannya di bawah prosiding penghkaiman (keputusan), mahkamah meneruskan dengan perbicaraan ini berhubung permohonan SP tersebut dan permohonan berkaitan yang lain. Semasa perbicaraan defendan kedua mengemukakan hujah bahawa SP tersebut telah menjadi akademik kerana dia telahpun menyampaikan keputusannya dan melepaskan tanggungjawabnya di bawah s 27(3) Akta tersebut. Defendan kedua oleh itu telah berhujah bahaw aia adalah amalan yang sia-sia untuk mahkamah membincangkan permohonan yang dipohon oleh plaintif dalam SP tersebut, terutamanya perintah bahawa pelantikan defendan kedua diisytiharkan terbatal dan tidak sah. Sebaliknya defendan kedua berhujah bahawa jalan yang betul untuk palintif kini adalah memohon untuk mengetepikan keputusan menurut s 15 Akta tersebut. Walau bagaimanapun, plaintif menegaskan bahawa SP tersebut patut ditentukan jika tidak ia akan menjadi prejudia kerana membuat pendirian yang tidak dapat dipertahankan dan tidak konsisiten kerana memohon untuk mengetepikan keputusan itu di bawah Akta tersebut, walhal ia adalah hujahnya bahawa Akta tersebut dengan sendiri adalah tidak berperlembagaan.

Diputuskan menolak SP tersebut dengan kos RM20,000 kepada defendan pertama, RM50,000 kepada defendan keda, RM50,000 kepada defendan-defendan ketiga dan keempat secara kolektif dan RM20,000 kepada defendan-defendan kelima hingga ketujuh secara kolektif:

(1) Walaupun keperluan membuat satu penentuan berhubung pli yang ditimbulkan oleh plaintif dalam SP tersebut boleh dianggap sebagai akademik, kerana dibuat sebelum keputusan, pli itu telah menimbulkan isu-isu undang-undang awam yang belum pernah terjadi sebelum ini, khususnya berhubung perlembagaan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta tersebut'). Isu ini memerlukan penafsiran statut vis s vis Perlembagaan Persekutuan, yang merupakan undang-undang yang jelas, tanpa melibatkan fakta yang dipertikaikan. Lebih-lebih lagi, notis kehakiman diambil dari fakta bahawa terdapat banyak proses adjudikasi yang sedang berjalan dan juga yang baru dibentuk di bawah Akta tersebut. Dalam keadaan ini, SP ini terjatuh

bawah pengecualian undang-undang awam yang sempit dan patut ditentukan walaupun akademik (lihat perenggan 30–33).

(2) Perkara 8 Perlembagaan Persekutuan mempertimbangkan diskriminasi yang sah berdasarkan klasifikasi dengan syarat ia adalah munasabah atau dibenarkan. Dalam erti kata lain, tiada persamaan mutlak. Selain itu, terdapat perbezaan antara kuasa kehakiman dan fungsi kehakiman dalam hal perkara 121 Perlembagaan Persekutuan. Suatu badan yang menjalankan fungsi kehakiman bukanlah mahkamah yang mempunyai kuasaan kehakiman di bawah perkara 121 walaupun kedua-duanya melakukan tugas pengadilan. Oleh itu, dengan mempertimbangkan hujah plaintif bahawa Akta tersebut telah melanggar perkara 8(1) Perlembagaan Persekutuan dan justeru itu tidak sah, adalah perlu untuk menentukan sama ada statut itu mendiskriminasi orang yang tertakluk kepada Akta tersebut, dan jika demikian, sama ada ia adalah munasabah atau dibenarkan. Pertama dan paling penting, ia adalah jelas bahawa Akta tersebut tidak menjejaskan semua orang, melainkan hanya pihak yang mempunyai pertikaian berdasarkan kontrak pembinaan, sepertimana ditafsirkan dalam Akta tersebut. Ini hanya diskriminatif dalam pengertian ini. Prinsip yang menjadi asas perkara 8 adalah bahawa suatu undang-undang perlu beroperasi sama pada semua orang dalam keadaan yang sama. Oleh kerana diskriminasi berdasarkan klasifikasi dibenarkan, ia harus disiasat sama ada klasifikasi dan kesannya munasabah atau dibenarkan. Akta tersebut merupakan undang-undang yang bermanfaat digubal oleh Parlimen untuk mengatasi dan memperbaiki kelemahan yang berlaku dalam industri pembinaan Malaysia, terutama mengenai pembiayaan dan pembayaran pembinaan. Oleh itu, Akta ini secara bijak membeza-bezakan dan menjadikan kelas pertikaian ini dalam kontrak pembinaan dengan mengecualikan orang lain dan kelas pertikaian ini jelas mempunyai hubungan yang rasional dengan objektif Akta tersebut. Setelah melakukan semakan yang teliti terhadap peruntukan mengenai prosiding adjudikasi dalam Akta tersebut, ia adalah jelas juga bahawa pihak-pihak yang mempunyai pertikaian diberi layanan sama dan dengan cara yang sama, yang mana, mereka memiliki hak untuk memilih dan menyetujui pengadil yang bebas dan tidak memihak atau yang dilantik oleh AIAC; mereka tertakluk kepada skala fi pengadilan dan fi pentadbiran AIAC yang sama; mereka tertakluk kepada peraturan prosedur yang sama dalam prosiding adjudikasi; mereka tertakluk kepada hak dan remedi perundangan yang sama; dan mereka tertakluk kepada kemungkinan hasil yang sama dari keseluruhan prosiding adjudikasi. Selain itu, terdapat juga pilihan cabaran sepertimana diperuntukkan dalam s 15 Akta tersebut berkenaan dengan keputusan yang diperoleh secara tidak wajar. Dalam keadaan itu, Akta tersebut tidak mendiskriminasi atau melanggar perkara 8(1) Perlembagaan Persekutuan (lihat perenggan 41–47 & 50–53).

(3) Cabaran plaintif bahawa prosiding adjudikasi di bawah Akta tersebut adalah rampasan kuasa kehakiman mahkamah dan dengan itu satu pelanggaran perkara 121 Perlembagaan Persekutuan adalah tidak betul, kerana ia adalah tetap bahawa fungsi kehakiman tidak sama dengan kuasa kehakiman Persekutuan. Kuasa kehakiman hanya diberikan kepada mahkamah dan oleh itu adalah monopoli mahkamah. Adjudikasi statutori di bawah Akta tersebut adalah fungsi kehakiman yang serupa dengan yang diberikan kepada Tribunal untuk Tuntutan Pembeli Rumah atau tribunal rendah yang lain. Selanjutnya, prosiding adjudikasi di bawah Akta tersebut walaupun mengikat adalah tidak muktamad, sepertimana diperuntukkan dalam s 13(c) Akta tersebut. Dalam erti kata lain, ia adalah terbuka bagi pihak-pihak dalam pertikaian tersebut untuk mempunyai pertikaian sama yang akhirnya ditentukan di mahkamah tanpa memerlukan doktrin res judicata dan mengeluarkan estopel walaupun pertikaian tersebut telah melalui prosiding adjudikasi di bawah Akta tersebut (lihat perenggan 56–57).

(4) Tiada merit dalam hujah peliantif bahawa fi caj dan perbelanjaan oleh pengadil dan fi pentadbiran oleh AIAC adalah tidak berperlembagaan. Akta tersebut tidak mendiskriminasikan antara pihak-pihak kepada pprosiding adjudikasi itu berkenaan terma di dan perbelanjaan adjudikasi. Perbelanjaan tersebut tidak bersifat diskriminasi kerana kos akhir yang kena dibayar berkaitan fi dan perbelanjaan pengadil dan juga pentadbiran AIAC adalah bergantung kepada merit berkaitan kes mereka ydalam pertikaian kerana kos adalah berdasarkan kejadian dalam prosiding adjudikasi. Ini adalah munasabah kerana hanay pihak yang kalah akan dihukum. Ia tiada perbezaan daripada mana-mana prosising undang-undang lain sama ada dalam mahkamah atau tribunak rendah yang lain. Selanjutnya, pengenaan fi dan perbelanjaan pengadil dan fi pentadbiran AIAC bukannya tidak berperlembagaan kerana ia adalah untuk perkhidmatan diberikan yang dibenarkan. Isu mengenai penyalahan pengenaan fi pentadbiran AIAC ultra vires Akta tersebut adalah isu undang-undang awam yang patut ditangani melalui semakan kehakiman (lihat perenggan 60–63 & 65).

(5) Hos Perjanjian Negara, yang merupakan satu perjanjian antarabangsa pada dasarnya, telah secara tidak langsung dilaksanakan dan dimasukkan ke dalam operasi melalui perundangan oleh penempatan AIAC (dahulunya KLRCA) sebagai pihak berkuasa pelantikan penimbang tara dan Lembaga Adjudikasi di bawah Akta Timbang Tara 2005 dan AktaPembayaran dan Adjudikasi Industri Pembinaan 2012 masing-masingnya. Ini adalah kerana penubuhan dan pelaksanaan AIAC adalah satu-satunya tujuan Perjanjian Tuan RUmah Negara itu. Dengan itu, tiada keperluan untuk statut yang spesifik untuk membentuk AIAC berdasarkan Perjanjian Tuan Rumah Negara. Dalam mencabar pelantikan defendan ketiga sebagai pengarah AIAC, plaintif secara

berkesan mepelawa mahkamah ini untuk mengadili pertikaian yang sedang berjaan antara Asian African Legal Consultative Organisation ('AALCO') dan Kerajaan Malaysia berhubung sama ada prosedur, sepertimana dipersetujui dalam Artikel IV Perjanjian Tuan Rumah Negara,, telah dipatuhi. Walau bagaimanapun, mahkamah dalam negeri/perbandaran tidak mempunyai bidang kuasa untuk mengadili atau menguatkuasakan hak yang timbul daripada transaksi dalam suatu perjanjian antarabangsa. Dalam apa keadaan, ia adalah salah untuk membuat keputusan yang mungkin mengikat AALCO yang bukan pihak dalam prosiding tersebut. Oleh itu, cabaran plaintif berhubung pelantikan defendan kedua menurut kononnya pelantikan tidak sah defendan ketiga sebagai pengarah AIACA adalah tidak bermerit (lihat perenggan 72–75 & 79).

(6) Berdasarkan keterangan affidavit yang dikemukakan oleh plaintif, tiada tindakan atau peninggalan dengan niat jahat oleh defendan kedua dalam melaksanakan kewajipannya. Jika pun defendan ketiga secara tidak sah telah melantik defendna kedua, ia tidak merupkan suatu tindakan berniat jahat oeh defendan kedua. Defendan-defendan kedua hingga keempat telah kebal daripada disaman oleh plaintif dalam SP ini menurut s 34 Akta tersebut dan s 4 Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992. Ia juga didapati bahawa kekebalan itu tidak terbatas kepada kausa tindakan biasa dalam saman tetapi juga dilanjutkan kepada relief deklarasi sepertimana dipohon dalam kes ini (lihat perenggan 81–82 & 85).]

Cases referred to

A & A Equity Sdn Bhd v Transnational Insurance Brokers (M) Sdn Bhd & Ors [2006] 7 MLJ 268, HC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Ahmad Rashdi bin Amran v Bank Negara Malaysia [2015] 9 MLJ 520, HC (refd)

AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318, CA (refd)

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, FC (refd)

AG of Commonwealth for Australia v R and Boilermakers' Society of Australia [1957] AC 288 (refd)

Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, pencelah) and another case [2018] MLJU 1288; [2018] 10 CLJ 129, FC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995]

1 MLJ 457; [1995] 4 CLJ 127, CA (refd)
Dato' Jaffar bin Mohd Ali v Jastera Berhad [1999] MLJU 575; [2000] 8 CLJ 106, HC (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)
Don John Francis Douglas Liyanage and others v The Queen [1967] 1 AC 259, PC (refd)
Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications [1995] 3 MLJ 665, HC (refd)
Government of the Federation of Malaysia v Haji Ghani Gilong [1993] 1 MLJ 359; [1993] 2 CLJ 120, HC (refd)
Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766, FC (refd)
Islamic Financial Services Board v Marlin Fairol Mohd Faroque & Anor [2010] 4 ILR 23 (refd)
JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)
Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173; [2013] 6 CLJ 849, CA (consd)
Lei Lin Thai v PP [2016] 9 MLJ 631; [2016] 7 CLJ 222, HC (refd)
Liang Mong Kuan v CM Yi Jia Sdn Bhd [2015] 1 LNS 1228, HC (refd)
Maclaine Watson & Co Ltd v Department of Trade and Industry (and related appeals); Maclaine Watson & Co Ltd v International Tin Council [1990] LRC (Const) 193, HL (refd)
Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309, FC (refd)
Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46; [2010] 6 CLJ 172, CA (refd)
Malaysia Airports (Sepang) Sdn Bhd & Anor v Federal Express Brokerage Sdn Bhd & Ors (Attorney General Malaysia, intervener) [2013] 6 MLJ 774, FC (refd)
Marathaei d/o Sangulullai (suing on behalf of the estate of Thangayah Aupulley) & Anor Syarikat JG Containers (M) Sdn Bhd & Anor [2003] 2 MLJ 337, CA (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2019] MLJU 742; [2019] 8 CLJ 433, FC (refd)
Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors [2019] MLJU 1043; [2019] AMEJ 1058, HC (refd)
Muslifah binti Zulkifli & Ors v Institute Sukan Negara KLHC WA-12ANCVC-60–03 of 2018 (unreported), (refd)
One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors [2019] MLJU 540; [2019] 1 LNS 904, HC (folld)
Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd and another case [2017] MLJU 377, HC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)

PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
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Regional Centre For Arbitration v Ooi Beng Choo & Anor (No 2) [1998] 7 MLJ 193; [1999] 7 CLJ 443, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 AMR 123, FC (refd)
Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolka & Ors 1958 AIR 538, SC (refd)
Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negara, Malaysia & Ors [2020] 7 MLJ 42; [2019] 8 CLJ 422, HC (refd)
Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd [2018] 7 MLJ 659; [2018] 1 CLJ 536, HC (refd)

Legislation referred to

Arbitration Act 2005
Construction Industry Payment and Adjudication Act 2012 ss 12(2), 13(c), 15, 15(d), 18(1), 19, 19(3), (4), 27(3), 32, 32(d), 33, 34, 34(1), 39, 40
Construction Industry Payment and Adjudication Regulations 2014 regs 6, 8
Federal Constitution arts 4, 4(1), 8, 8(1), 121
Housing Development (Control and Licensing) Act 1966
International Organisations (Privileges and Immunities) Act 1992 s 3(1)
Interpretation Acts 1948 and 1967 ss 7, 41, 93
Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 regs 3, 3A, 3A(2)
Rules of Court 2012 O 1A, O 2, O 7 r 2 (1A), O 18 r 19(3)

Arun Kasi (T Gunaseelan and R Kairnan with him) (Arun Kasi & Co) for the plaintiff.
James Ding Tze Wen (Ling Jia Wen with him) (CH Tay & Partners) for the first defendant.
Muhammad Faisal Moideen (Maximilian Tai Kim Sen and Wan Nur Addibah Adnan with him) (Moideen & Max) for the second defendant.
Foo Joon Liang (Celine Chelladurai, Tan Wei Li and Kang Mei Yee with him) (Celine & Oommen) for the third and fourth defendants.
Alice Loke Yee Ching (Attorney General's Chambers) for the fifth, sixth and seventh defendants.
Balbir Singh amicus curiae for Bar Council Malaysia.
Wilfred Abraham amicus curiae for Malaysian Society of Adjudicators.
Choon Hong Leng amicus curiae for Chartered Institue of Arbitrators (Malaysia Branch), Malaysian Institute of Arbitrators and Society of Construction Law Malaysia.

Lim Chong Fong J:

INTRODUCTION

[1] This is an application principally for a declaration to avoid the appointment of the adjudicator pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The plaintiff is a private limited company involved in the construction business.

[3] The first defendant is also a private limited company involved in the construction business.

[4] The second defendant is an individual and empanelled in the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), now Asian International Arbitration Centre ('AIAC') panel of adjudicators.

[5] The third defendant is an individual and presently the director of the AIAC.

[6] The fourth defendant is a body jointly constituted pursuant to a host country agreement made between the Government of Malaysia and the Asian African Legal Consultative Committee, now the Asian African Legal Consultative Organisation ('AALCO').

[7] The fifth defendant is the Minister of Works assigned with responsibilities under ss 33, 39 and 40 of the CIPAA.

[8] The sixth defendant is the Minister assigned with responsibilities under ss 33 of the CIPAA.

[9] The seventh defendant is the Government of the Federation of Malaysia.

[10] The fifth to seventh defendants were added as parties upon the plaintiff's application which was allowed by me on 30 October 2019.

PRELIMINARY AND SALIENT BACKGROUND FACTS

[11] Pursuant to a construction contract, the plaintiff appointed the first defendant as a sub contractor to carry out earthworks and geotechnical works

in respect of a project described as Naiktaraf Laluan FT60 dari Damar Laut ke Changkat Jering (Pakej 1: Ch 0 – Ch 10400) ('project').

[12] There were payment disputes that arose between them in connection with the project.

[13] As a result, the first defendant initiated adjudication proceedings against the plaintiff under the CIPAA and the third defendant, by a letter dated 5 July 2019, appointed the second defendant as the adjudicator.

[14] Consequently, the plaintiff on 5 August 2019 instituted this originating summons ('OS') praying as follows:

Surface-level declarations

1. It be declared that the purported appointment of the 2nd Defendants as the adjudicator by a document dated 04/07/2019 ('Appointment of Adjudicator') in the matter of adjudication proceedings conducted under Asian International Arbitration Centre ('AIAC') Ref. No. AIAC/D/ADJ-2516-2019 between the 1st Defendant and the Plaintiff ('Adjudication Proceedings') is null and avoid.

2. It be declared that Direction No. 1 and No 6, both issued by the 2nd Defendant to the 1st Defendant and the Plaintiff dated 16/07/2019, are null and void.

3. It be declared that the invoice issued by the AIAC to the Plaintiff dated 23/07/2019 is null and void.

Root-level declarations

4. It be declared that ss 18(1), 19(3) and 19(4) of Construction Industry Payment and Adjudication Act 2012 ('CIPA Act 2012') are invalid for contravention of Art 8(1) of the Federal Constitution ('FC') to the extent that the said sections:

a) impose liability on the respondent in an adjudication proceedings ('respondent') for 'fees of the adjudicator';

b) render the respondent liable to deposit a proportion of the said fees with the Director of the AIAC;

c) make such fees recoverable from the respondent through an award costs.

5. be declared that Rule 9(2) of the self-proclaimed rules of AIAC known as 'AIAC Adjudication Rules & Procedure' ('AIAC Rules') is invalid for being made without legal authority in s 32 of the CIPA Act 2012 and for contravening Art 8(1) of the FC to the extent that the said rule imposes:

a) liability on the respondent to deposit a portion of 'fees and expenses' referred to in Rule 9(2)(a);

b) liability on any party to pay the 'administrative fee' referred to in Rule 9(2)(b) of the AIAC Rules.

6. It be declared that Schedule III (Administrative Fee Schedule) of the AIAC Rules is invalid for being made without legal authority in s 32 of the CIPA Act 2012 and

for contravening Art 8(1) of the FC.

Ancillary prayers

7. Costs be paid only by any Defendant who contests this application.

8. Such addition, subtraction and modification to the Declarations sought above as deemed fit by this Hon Court.

9. Such further and other relief as this Hon Court may deem fit.

The grounds of this application are as stated in the Affidavit in Support filed together with this Application and are:

Prayer 1

(A) The CIPA Act 2012, in ss 21(2) and 23(1), confers the power of appointing adjudicators on the 'Director' of the AIAC.

(B) The AIAC is not constituted by any statute, but it is constituted by an agreement ('Constituting Agreement') made between the Government of Malaysia ('Government') and Asian African Legal Consultative Organization ('AALCO')

(C) Accordingly, the references in the CIPA Act 2012 to the 'Director' is to a Director appointed according to the Constituting Agreement.

(D) Pursuant to the terms of the Constituting Agreement, a Director is a person appointed as such by the government in consultation with AALCO.

(E) The 3rd Defendant was purportedly appointed by the Government in November 2018 as an 'Acting Director' to steer the transition as a stop gap measure and subsequently as the 'Director' but the said subsequent appointment without consultation with AALCO, as required by the Constituting Agreement.

(F) Accordingly, the purported subsequent appointment of the 3rd Defendant as the director to discharge the functions of the 'Director' is invalid for failure to consult AALCO.

(G) Hence, the 3rd Defendant, not having been duly constituted as the 'Director', has no authority to appoint any adjudicator as the 'Director' (under ss 21(2) and 23(1) of CIPA Act 2012).

(H) In the premises, the appointment of the 2nd Defendant as adjudicator made by the 3rd Defendant on 04/07/2019 is invalid.

Prayers 2 and 3

(I) The grounds for the Prayers 2 and 3 are that:

a) the invalidity of the Direction No. 1, the Form 6 and the AIAC Invoice follows the invalidity of appointment of adjudicator canvassed in Prayer 1.

b) Additional grounds as stated below in respect of Prayers 4, 5 and 6.

Prayers 4, 5 and 6

(J) The grounds for the substantive reliefs asked for in the Prayers 4, 5 and 6 are stated within the reliefs themselves, which primarily are:

a) Any 'compulsory' imposition of fee burden on the respondent, more than he would bear had the claimant instituted court proceedings, is void for putting him on an unequal footing and impinging on access to justice,

thereby being unconstitutional (Art 8(1) and 4(1) of the FC).

b) The AIAC Rules, self-made by the AIAC conferring on itself the authority to levy 'administrative fees' on the parties, is null and void for being outside the scope of the authority conferred on the AIAC by s 32 of the CIPA Act 2012.

[15] The second defendant, in response on 20 August 2019, filed a notice of application (encl 13) to strike out the OS against him on grounds that it was made frivolously, vexatiously and in abuse of process because the plaintiff's challenge against the validity of appointment of the third defendant ought instead to be made against the relevant Ministers of the Government of Malaysia and would also frustrate and delay the disposal of the adjudication proceedings.

[16] Moreover, the third and fourth defendant on 30 August 2019 also filed a notice of application (encl 16) for declarations that they be struck out and cease to be parties as well as that the court is without jurisdiction on grounds that they are immune pursuant to s 34 of the CIPAA and the International Organisations (Privileges and Immunities) Act 1992.

[17] I have on 26 August 2019 refused the plaintiff's application for an ad interim injunction as reported in *Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors* [2019] MLJU 1043; [2019] AMEJ 1058 and the adjudication proceedings were, in consequence, allowed to continue to disposal notwithstanding the challenges made by the plaintiff in this OS. Accordingly, the second defendant must decide and deliver his adjudication decision by 29 November 2019 pursuant to s 12(2) of the CIPAA.

[18] After several case managements, I directed that the aforesaid striking out applications of the second to fourth defendants and the OS should all be heard and determined together because they prima facie involve intertwined difficult substantive issues. It would be expedient to do so instead of having them heard separately in advance of the OS, particularly since the OS has to be disposed of quickly before 29 November 2019.

[19] The affidavits that were filed for purposes of the OS are as follows:

(a) plaintiff's affidavit in support affirmed by Hj Azahar bin Ahmad dated 4 August 2019;

(b) plaintiff's supplementary affidavit affirmed by Hj Azahar bin Ahmad dated 15 August 2019;

(c) first defendant's affidavit in reply affirmed by Jannatun Naim Faizal bin Zulkifli dated 15 August 2019;

(d) second defendant's affidavit in reply affirmed by Soh Lieh Sieng dated 29 August 2019;

(e) third and fourth defendants' affidavit in reply affirmed by Vinayak Prabhakar Pradhan dated 20 September 2019;

(f) plaintiff's consolidated affidavit affirmed by Mohd Fauzi bin Abdul Kadir dated 23 September 2019;

(g) plaintiff's further affidavit in support affirmed by Mohd Fauzi bin Abdul Kadir dated 1 October 2019.

(h) AALCO's affidavit affirmed by Prof Dr Kennedy Gastorn dated 7 October 2019;

(i) third and fourth defendants' affidavit in reply (2) affirmed by Vinayak Prabhakar Pradhan dated 21 October 2019;

(j) AALCO's affidavit (2) affirmed by Prof Dr Kennedy Gastorn dated 6 November 2019;

(k) third and fourth defendants' affidavit in reply (3) affirmed by Vinayak Prabhakar Pradhan dated 6 November 2019; and

(l) fifth to seventh defendants' affidavit affirmed by Joanne Tan Xin Ying dated 6 November 2019.

[20] The affidavits that were filed for the purposes of the second defendant's application to strike out the OS (encl 13) are as follows:

(a) second defendant's affidavit in support affirmed by Soh Lieh Sieng dated 19 August 2019;

(b) second defendant's affidavit in reply affirmed by Soh Lieh Sieng dated 27 September 2019; and

(c) plaintiff's further affidavit in support affirmed by Mohd Fauzi bin Abdul Kadir dated 1 October 2019.

[21] The affidavits that were filed for the purposes of the third and fourth defendants' application for declarations that they be struck out and cease to be parties as well as that the court is without jurisdiction (encl 16) are as follows:

(a) third and fourth defendants' affidavit in support affirmed by Vinayak Prabhakar Pradhan dated 30 August 2019;

(b) seventh defendant's affidavit affirmed by Tommy Thomas dated 3 September 2019;

(c) plaintiff's further affidavit in support affirmed by Mohd Fauzi bin Abdul Kadir dated 1 October 2019; and

A (d) third and fourth defendants' affidavit in reply affirmed by Vinayak Prabhakar Pradhan dated 8 October 2019.

[22] I have on 13 November 2019 dismissed the plaintiff's application to cross examine the attorney general Tommy Thomas on his averments in the B seventh defendant's affidavit dated 3 September 2019 (encl 26).

[23] On 19 November 2019, the second defendant made and delivered his decision under the adjudication proceedings ('decision').

C **[24]** The hearing of the OS and the other aforesaid interconnected applications finally came before me for hearing on 25 November 2019. After having read the written submissions and hearing oral arguments of counsel for the parties as well as the amicus curiaes, I adjourned my decision to deliberate on the arguments advanced by them.

D **[25]** Now having done so, I furnish below my decision together with its supporting grounds.

E CONTENTIONS AND FINDINGS

[26] From the submissions of the parties, I discern the following five principal broad issues that require determination in respect of the OS, encl 13 and encl 16:

F (i) OS rendered academic by the decision;

(ii) unconstitutionality of the CIPAA statutory adjudication scheme;

(iii) unconstitutionality and illegality of adjudicator's fees and expenses and AIAC administrative fees chargeable for adjudication proceedings;

G (iv) invalidity of third defendant's AIAC directorship; and

(v) immunity of the second to fourth defendants.

I will deal with each of them *seriatim*.

H That notwithstanding, the third and fourth defendants contended at the outset that issue (iii) has not been stated in the intitulement of the OS; hence inconsistent with the plaintiff's case. This issue should in consequence be discarded in breach of O 7 r 2 (1A) of the Rules of Court 2012 following the Court of Appeal case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari* I *bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 and *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172 generally and the case of *Liang Mong Kuan v CM Yi Jia Sdn Bhd* [2015] 1 LNS 1228 specifically. I have reviewed the intitulement of the OS and find that the reference to the CIPAA therein is broadly couched and thus wide enough to

encompass issue (iii) as well. In any event, I am of the view that any inadequacy here can be cured by O 1A and/or 2 of the Rules of Court 2012 because I do not think that the third and fourth defendants were put in a disadvantaged position or prejudiced by being unable to deal with the issue.

OS IS ACADEMIC

[27] The second defendant led the submission that the OS had been rendered academic because he had already handed down his decision on 19 November 2019 and discharged his responsibilities under s 27(3) of the CIPAA. It would thus be a futile exercise for this court to deliberate on the plaintiff's prayers sought in the OS, inter alia, to declare that the second defendant's appointment is null and void.

[28] Consequently according to the second defendant, the plaintiff's proper recourse is to now apply to set aside the decision pursuant to s 15 of the CIPAA which reads:

> 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.

but not to challenge or set aside the decision under the present OS. The second defendant alluded to the case of *Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd* [2018] 7 MLJ 659; [2018] 1 CLJ 536 that the setting aside of the decision pursuant to s 15(d) of the CIPAA is capable of restoring the plaintiff's position as if the adjudication proceedings had not taken place.

[29] The plaintiff basically retorted that the OS must be determined as the plaintiff would otherwise be prejudiced by having to take an inconsistent and untenable stance of applying to set aside the decision under the CIPAA but the plaintiff contends that the statute is itself unconstitutional. In addition, the plaintiff contended that the second defendant rushed into making his decision to frustrate the plaintiff's OS.

[30] In the Federal Court case of *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766, Zulkefli CJ (Malaya) (later PCA) held as follows:

[27] We shall now deal with question (2) posed in this appeal. We are of the view if question (1) is answered in the affirmative and the plaintiff's right to recovery of damages barred by limitation, the declarations sought for by the plaintiff would be futile. The grant of declaration is in the discretion of the court. The court will not act in vain and grant declarations that are of no utility or in regard to matters which are no longer 'live issue' or has become academic. In support of this proposition we would refer to the following passage of the judgment of *Wan Adnan J (as he then was) in Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307 at p 308 as follows:

> The power of the court to make a declaratory judgment is discretionary. The Court will not make a declaratory judgment when the question raised is purely academic. The Court should not be required 'to answer academic question's — *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417. Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, that is relieve him of any liability or disadvantage or difficulty: *Thome Rural District Council v Bunting* [1972] 1 All ER 439.

[31] In the recent Federal Court case of *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, pencelah) and another case* [2018] MLJU 1288; [2018] 10 CLJ 129, the court held as follows with emphasis added by me:

> The Constitutional Questions Rendered Academic
>
> [48] The cluster of questions posed in this motion relates to points of law which, at the time they were raised, bristled with issues of public law importance. In *R v Secretary of State for the Home Department ex p Salem* the court said at para [10] that: 'to send them away empty handed on an issue of such importance seemed to be not only churlish but also in breach of the overriding objective which illuminates all civil practice today.' In the same vein, the general view seems to be that there is no rule of law or practice that the court would not proceed with an appeal because of a change in circumstance as a result of which the issues between the parties were no longer of general public importance'. (See The UK White Book 9A-77 Section 19).
>
> [49] But what of the general rule?
>
> The general principle is that the court does not answer academic questions. The leading case is *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 at 113–114, per Viscount Simon LC:
>
> > The difficulty is that the terms thus put on the appellant by the Court of Appeal are such as make it a matter of complete indifference to the respondents whether the appellant wins or loses; the respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possess to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the Respondent in any way. If the House undertook to do so, it would not be deciding an existing lis

between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without any way affecting the position between the parties.

[50] In *Ainsbury v Millington* [1987] 1 All ER 929 at 930–931, Lord Bridge of Harwich similarly held:

In this instant case neither party can have any interest at all in the outcome of the appeal. Their joint tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the Judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental feature of our Judicial System that the court decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no disputes to be resolved. Different considerations may arise in relation to what are collect 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case. The instant case does not fall within either of those categories. Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.

[51] The position is well-established in Malaysia (see for instance *Datuk Syed Kechik Syed Mohamed & Anor v The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 MLJ 257; [1999] 1 CLJ 325). The meaning of 'academic' was explained in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 at [7], per Augustine Paul FCJ:

The test therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.

[52] The general position applies equally to constitutional questions ...

...

[58] *The authorities indicate that in such a case, the court has a narrow discretion to proceed, for it is to be exercised with caution.*

Public Law Exception

[59] *One limited exception to the general rule is in relation to questions of public law*. In *R v Secretary of State for the Home Department ex p Salem* [1999] AC 450 at 456, Lord Slynn of Hadley held:

... in a cause where there is an issue involving a public authority as to a question of public law, their Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which directly affect the rights and obligations of the parties inter se. However the discretion to hear disputes must be exercised with caution, and academic appeals should not be heard 'in the public interest for doing so.

[60] *By way of example, features of academic cases suitable for determination include: (a) discrete point of statutory construction (b) a situation where it does not involve*

detailed considerations of fact and (c) a situation where there is a large number of similar cases which need to be resolved.

[32] Although the necessity of making a determination on the pleas of the plaintiff in the OS can be perceived or considered academic because of the prior making of the decision, I am nevertheless satisfied that the pleas raised unprecedented public law issues particularly on the constitutionality of the CIPAA statute. It entails interpreting the statute vis a vis the Federal Constitution which is a neat discrete point of law without involving disputed facts. Moreover, I take judicial notice that there are presently many adjudication proceedings which are on-going as well as continually instituted under the CIPAA.

[33] In the circumstances, I find and hold that this OS came within the narrow public law exception and thus ought still to be determined notwithstanding that it is academic.

UNCONSTITUTIONALITY OF THE CIPAA STATUTORY ADJUDICATION SCHEME

[34] The plaintiff submitted that the CIPAA violated both arts 8(1) and 121 of the Federal Constitution. They read as follows:

> 8 Equality
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.
>
> (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
>
> (5) This Article does not invalidate or prohibit —
>
> (a) any provision regulating personal law;
>
> (b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;
>
> (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of

land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

121 Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Consequently, the CIPAA statute is void for offending art 4(1) of the Federal Constitution. Article 4 provides:

4 Supreme law of the Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that —

(a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

A

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

B

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

C

[35] According to the plaintiff, art 8(1) of the Federal Constitution is violated because the plaintiff has been unfairly subjected to adjudication proceedings under the CIPAA by the first defendant. The adjudication proceedings, which produce a legally binding and enforceable result, is however non-consensual unlike arbitration proceedings under the Arbitration Act 2005, where there is a prior agreement to have their disputes and differences arbitrated. It is, in other words, mandatory upon the plaintiff to participate in the adjudication proceedings if and when initiated by the first defendant. Moreover, the plaintiff has to incur substantial costs including adjudicator's fees whilst participating in the adjudication proceedings. Consequently, the plaintiff and the first defendant are not equal before the law because the CIPAA afforded the first defendant at its option to compel the plaintiff to submit to adjudication proceedings.

D

E

F

[36] Furthermore, the plaintiff contended that by art 121 of the Federal Constitution, it is only the courts that can make judicial decisions which bind the plaintiff. The scheme of statutory adjudication under the CIPAA usurps the powers of the courts. Article 121 is thus violated and the aforesaid scheme is unconstitutional. In this respect, the plaintiff relied on the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 where Zakaria Yatim J (later FCJ) held as follows on judicial power:

G

> Under our constitution the words 'judicial power of the Federation' have been defined to mean 'that the court has the power to adjudicate in civil and criminal matters which are brought before the court'.

H

On appeal, Abdoolcader SCJ held as follows:

> Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties.

I

The plaintiff further relied on foreign cases of *AG of Commonwealth for Australia v R and Boilermakers' Society of Australia* [1957] AC 288, *Don John Francis Douglas Liyanage and others v The Queen* [1967] 1 AC 259 and the recent Federal Court case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah*

Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 AMR 123 on the principle and need for separation of powers. A

[37] The defendants in gist replied that the plaintiff's contentions are flawed. All disputants in construction contracts belong to the same class of persons or bodies who are subject to equal treatment and protection under the CIPAA scheme of adjudication proceedings. There is therefore no violation of art 8(1) of the Federal Constitution. In addition, there is the distinct difference between judicial power and judicial function. Although the adjudication proceedings may have the trappings of a court in determining disputes, statutory adjudication is not a court of law ultra vires or in violation of art 121 of the Federal Constitution. B C

[38] Generally, it was held by Suffian LP in the Federal Court case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 as follows with emphasis added by me: D

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> *Under our Constitution written law may be invalid on one of these grounds*: E
>
> 1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74*; or* F
>
> 2) *in the case of both Federal and State written law, because it is inconsistent with the Constitution, see* article 4(1); or
>
> 3) in the case of State written law, because it is inconsistent with Federal law, article 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds. G
>
> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual. H
>
> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

[39] Furthermore in the Federal Court case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, Suffian LP held as follows on the interpretation of art 8 of the Federal Constitution with emphasis added by me: I

> As a legal concept it is easy to state, but difficult to apply — because, first, equality can only apply among equals and in real life there is little equality and, secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale

A without regard to the realities of life. While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong. Thus few quarrel with the law prescribing different criteria of criminal and civil liability for infants as compared to adults, or with the law for the protection of women and children against men, for the protection of tenants against landlords and of borrowers against moneylenders, for the imposition of higher rates of quit rent on rubber estates compared to rice fields and on higher rates of income tax on millionaires compared to clerks ...

The sharp division of opinion among Indian judges will excuse our selecting only those principles with which we agree, irrespective of whether they are majority or minority opinions, certainly at this early stage of the development of this branch of the law, leaving the future to be determined and shaped in the light of particular cases that come up before us.

Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:

1. *The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere*.

2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.

3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in clause (4) and 'practice' in clause (5)(b) of Article 8.

4. The prohibition applies to both substantive and procedural law.

5. *Article 8 itself envisages that there may be lawful discrimination based on classification* — thus Muslims as opposed to non-Muslims (para. (b) of clause (5) of Article 8); aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153).

6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

...

7. *In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification*, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia* AIR 1958 SC 538, provided that:

(i) *the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and*

(ii) *the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is*

necessary is that there must be a nexus between the basis of classification and the object of the law in question.

...

As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. *Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law*. (Minority judgment in NI Caterers AIR 1967 SC 1581 and judgment in M Chhagganlal AIR 1974 SC 2009. We think that we should follow the same principle.

9. *In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.* (Per Sastri CJ in *Anwar Ali* AIR 1952 SC 75.

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganlal* AIR 1974 SC 2009.

...

Article 8 would become the delight of legal casuistry and be shorn of its real purpose if we indulged in weaving gossamer webs and started a meticulous hunt for minor differences in procedure, and our approach to it must be informed by a sense of perspective and proportion, avoiding a dogmatic and finical approach.

[40] In the Federal Court case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 AMR 123, Zainun Ali FCJ held as follows on the interpretation of art 121 of the Federal Constitution with emphasis added by me:

[50] Section 40D of the Act thus imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decisions differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. The legislative intent is clear and unambiguous. As highlighted by the Court of Appeal in *Jitender Singh Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan & Another Appeal* [2012] 1 MLJ 56; [2012] 2 CLJ 165 a High Court Judge cannot come to a valuation different from that of the assessors, or if different, from either one of them.

[51] Wherefore now stands the judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision.

A [52] Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is 'judicial power'?

B [53] *Before discussing the dialectics of judicial power, a brief outline on the exigencies of judicial function would be helpful. Other than the civil courts, bodies such as the Industrial Court, the Special Commissioner of Income Tax, as well as other inferior tribunals, perform a function which is judicial or quasi-judicial in nature. They can grant orders such as certiorari, mandamus etc. Thus, it is recognised that judicial functions (as opposed to judicial powers) are not the monopoly of the Judiciary. These* C *inferior tribunals are necessary and they exist to lend weight to their specialist skills in issues which come up before them. The adjudicators of these inferior tribunals are, for the most part, lay persons and so their adjudicative powers are confined to their relevant spheres*.

D [54] *One has to hold this up against the position of adjudicators in the superior courts. The key question should be: Who can exercise judicial powers, ie, decision-making powers, in the civil courts (as opposed to tribunals such as the Industrial Court)? The answer is obvious. Only judges as appointed under* art 122B of the Federal Constitution and no other, can exercise decision making powers in our courts — for the definition of 'court' in the Act is the High Court.

E [55] At this juncture, one might question the validity of the jury system which once became part and parcel of our judicial system. A jury, acting under the directions of a judge, is the final tribunal to determine the facts of the case and to decide, either unanimously or by majority, whether the accused is guilty of the alleged offence. The jury system is firmly entrenched in the English common law. It was imported F into the Straits Settlements by the Charters of Justice. Article 4(1) of the Federal Constitution declares that any law passed after Merdeka Day must not be inconsistent with the provisions in the Federal Constitution. Thus the jury system, being a pre-Merdeka law, was saved by art 4(1) of the Federal Constitution *until it was abolished in 1995.*

G ...

[71] An astute observation on 'judicial power' was made by Eusoffe Abdoolcader SCJ in the majority judgment of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550; [1987] CLJ Rep 284, where His Lordship said that:

H > *... Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties ...*

[72] It is acknowledged that it would be virtually impossible to formulate a completely exhaustive conceptual definition of that term (judicial power), whether inclusive or otherwise.

I Subsequently, in the recent Federal Court case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561, Mohamed Zawawi Salleh FCJ held as follows with emphasis added by me:

[289] It is, therefore, clear that the doctrine of separation of powers is not rigid, fixed or static but continues to evolve. The traditional notion that there are separate and distinct roles for the executive, legislative, and judicial branches of government which should remain inviolate has changed over time to reflect their growing interrelationship to facilitate the efficient operation of government.

[290] *In Malaysia today there are several statutory adjudicatory bodies that have decision-making powers in disputes between parties like the Special Commissioners of Income Tax or the Labour Tribunals under the Employment Act 1955, the Industrial Court established under s 21 of the Industrial Relations Act 1967, the Customs Appeal Tribunal (CAT) established under the Customs Act 1967 or the Competition Appeal Tribunal established under s 44 of the Competition Act 2010. They are adorned with similar trappings as a court but are not strictly 'courts' within the meaning of art 121 of the FC.*

[291] In *Shell Company of Australia, Limited v Federal Commissioner of Taxation* [1931] AC 275*, cited by learned counsel for the second intervener in his argument, a similar point was considered by the Privy Council on the issue whether the Board of Review of Taxation in Australia was a body exercising judicial power of the state. The Privy Council observed thus:*

> *The authorities are clear to show that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power.*

[292] The Privy Council further focused on certain characteristic features of a court: a tribunal will not become a court merely because it gives a final decision, examines witnesses on oath, contending party is heard, decisions affecting rights of subjects are rendered by it, or decision is appealable to ordinary courts. Even whilst acting judicially, a tribunal may retain its characteristics as an administrative body as distinguished from a court. Applying the aforesaid tests, [2019] 3 MLJ 561 at 652 the Privy Council ruled that the board of review established under the Income Tax Act 1922–25 of Australia was not a court but only an administrative tribunal empowered by law to review decisions of the Commissioner of Income Tax who was not a judicial authority. The Privy Council goes on to say 'an administrative tribunal may act judicially but still remain an administrative tribunal as distinguished from a court, strictly so called. Mere externals do not make a direction ... by an ad hoc tribunal an exercise by a court of judicial power' (at p 508) (see also *Associated Cement Companies Ltd v PN Sharma And Another* 1965 AIR 1595; *Durga Shankar Mehta v Thakur Raghuraj Singh And Others* 1954 AIR 520; *Kihoto Hollohan v Zachillhu and others* AIR 1993 SC 412; *Virindar Kumar Satyawadi v The State of Punjab* AIR 1956 SC 153; *State of Gujarat Revenue Tribunal Bar Association* 2012 10 SCC 353).

JUDICIAL POWER

[293] *The phrase 'judicial power' is difficult to define. In R v Davison* [1954] ALR 877; (1954) 90 CLR 353*, Dixon CT and Mc Tiernan J observed 'many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive'. Rather than attempt to define phrase 'judicial power', it is more appropriate to examine its characteristics or attributes.*

[294] A perusal of the Australian decisions in *Huddart Parker & Co Pty Ltd &*

Appleton v Moorehead (1909) 8 CLR 330; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185, *R v Davison* (1954) ALR 877; (1954) 90 CLR 353, *Palmer v Ayres (in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)) and others* (2017) 341 ALR 18; [2017] HCA 5, cited by learned counsel for the respondent in her argument reveal common, though not exclusive, characteristics of judicial power:

(a) exercising adjudicative functions;

(b) finality in resolving the whole dispute; and

(c) enforceability of its own decision.

[41] Put simply, I therefore discern that art 8 of the Federal Constitution contemplates lawful discrimination based on classification provided it is reasonable or permissible. In other words, there is no absolute equality. Moreover, there is a distinction between judicial power and judicial function as far as art 121 of the Federal Constitution is concerned. A body that exercises judicial function is not a court clothed with judicial power under art 121 albeit both undertake adjudicative tasks.

[42] Thus as to the plaintiff's contention that the CIPAA statute violated art 8(1) of the Federal Constitution and is hence void, it is necessary to determine whether the statute is discriminatory on persons subjected to the CIPAA, and if so, whether that is reasonable or permissible.

[43] First and foremost, it is plain that the CIPAA does not affect everyone but only disputants pursuant to a construction contract, as defined in the CIPAA. It is only discriminatory in this sense.

[44] However since discrimination based on classification may be allowed, it has to be investigated whether the classification and its consequential effects are reasonable or permissible.

[45] In this respect, it has been held by Suffian LP in the Federal Court case of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 as follows with emphasis added by me:

> The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v State of West Bengal* AIR 1953 SC 404 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide

different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. *All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.*

[46] It follows that it is permissible and reasonable to create a class which comprises of disputants to a construction contract, as set out by the CIPAA, provided a disputant is treated in the same manner as another disputant.

[47] Although the reasonableness of the classification may be within the purview of Parliament, this court is nonetheless also entitled to examine it.

[48] In the Indian Supreme Court case of *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolka & Ors* 1958 AIR 538 which was adopted in *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications* [1995] 3 MLJ 665 and later by the Federal Court in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309, SR Das SCJ held as follows:

In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

[49] In this respect, the Federal Court has recently in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742; [2019] 8 CLJ 433 appreciated and recognised the objects of the CIPAA. Mohd Zawawi Salleh FCJ held as follows with emphasis added by me:

[46] At the risk of repetition, we say that the raison d'être of CIPAA 2012 regime lie in facilitating and providing remedies for the recovery of payment in the construction industry. *CIPAA 2012, brings three major changes to the construction industry in Malaysia*:

(a) *a 'right to progress payment', unless otherwise agreed to by the parties*;

(b) *a speedy resolution through adjudication for construction disputes relating to payment for works carried out under the construction contract*; and

(c) *a determination which has temporary finality. A party, which executes*

construction work and which is unpaid in whole or in part, under the construction contract may serve a payment claim on non-paying party to the construction contract.

[47] From the Preamble, it is clear that CIPAA 2012 is 'An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'.

[48] The Explanatory Statement to CIPAA Bill 2011 states as follows:

... EXPLANATORY STATEMENT

The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to *facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution* through adjudication. The purpose of the proposed Act *is to alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry*. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits conditional payment terms that inhibit cash flow. The act also seeks to provide remedies for the recovery of payment upon the conclusion of adjudication. (emphasis added)

(See: Explanatory Statement of CIPAA Bill 2011)

[49] The speech by the Deputy Minister during the second reading of the Bill to introduce CIPAA 2012 in Dewan Rakyat on 2 April 2012 revealed that the raison d'être of CIPAA 2012 is to resolve the payment problem and facilitate regular and timely payment, provide for speedy dispute resolution through adjudication:

12. Tuan Yang di-Pertua, industri pembinaan mempunyai potensi yang tinggi untuk terus berkembang. Antara cabaran yang perlu ditangani bagi mencapai aspirasi ini ialah isu pembayaran yang melibatkan pihak-pihak dalam rantaian pembinaan termasuk kontraktor utama, subkontraktor, sub-subkontraktor, para perunding dan pembekal-pembekal bahan-bahan. Sekiranya masalah pembayaran ini tidak ditangani dengan berkesan, ia boleh menjejaskan aliran tunai dan seterusnya menyebabkan kelewatan menyiapkan projek, kemerosotan kualiti kerja, peningkatan kos dan dalam kes-kes kritikal, kontrak akan ditamatkan ...

Pendek kata, tempoh masa yang lama dan kos prosiding yang tinggi adalah merupakan antara faktor utama yang mengekang pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah atau timbangtara. Justeru itu, kerajaan amat prihatin dengan isu pembayaran dalam industri pembinaan dan telah menggubal Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 bagi membantu pihak-pihak yang terlibat untuk menyelesaikan pertikaian pembayaran dengan mudah, murah dan cepat. Rang undang-undang ini diwujudkan selepas diadakan beberapa siri perbincangan dan dialog bersama agensi kerajaan, penggiat industri, pihak-pihak yang berkepentingan atau stake holders dan badan profesional yang berkaitan.

...

Pertikaian yang boleh dirujuk kepada adjudikasi adalah berkaitan dengan

pembayaran bagi kerja siap atau perkhidmatan yang dibekalkan, yang sepatutnya dibayar di bawah terma-terma nyata kontrak dalam kontrak pembinaan. Ia termasuklah bayaran interim mengikut kemajuan kerja. Prosiding adjudikasi boleh dimulakan sebaik sahaja timbul pertikaian pembayaran sama ada semasa projek pembinaan sedang dijalankan atau selepas projek disiapkan ... (emphasis added)

(See the Deputy Minister's Policy Speech in Dewan Rakyat and the summary of the speech by *Mary Lim J (as she then was) in Uda Holdings v Bisraya Construction Sdn Bhd & Anor and Another Case* [2015] 5 CLJ 527).

[50] *It can be clearly discerned from the Deputy Minister's speech that CIPAA 2012 is enacted by the Parliament to provide an easily accessible, faster and cheaper resolution forum ie, the adjudication. The following characteristics of CIPAA 2012 is in tandem with the said intent:*

(a) *it involves tight time constraints. The deadline for each step is fixed and the timeline for each stage is relatively short to ensure that the disputes are resolved rapidly and quickly;*

(b) *it involves a significant degree of informality;*

(c) *it gives adjudicator's determination a degree of conclusiveness;*

(d) *it involves rights which are interim only. The rights and liabilities under the Act do not affect other entitlement a person may have under a construction contract or any other remedy a person may have for recovering such entitlement;*

(e) *the standard adjudicator's fee is introduced and the charges are cheaper than arbitration. Low-cost decision making is a core object of the scheme in the Act; and*

(f) *the grounds on which the court can rely upon to set aside the adjudicator's determination are limited. The court primary duty must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator.*

[51] *It is clear, therefore, that the issue of cash flow is the primary objective of CIPAA 2012 as it is deemed to be the life-blood of the construction industry. This position has been recognised by our courts.*

[50] It is a salutary piece of legislation brought in by Parliament to address and redress the prevailing weaknesses in the Malaysian construction industry, particularly on construction financing and payments. The CIPAA therefore intelligently discriminates and subjects this class of disputants in construction contracts to the exclusion of everyone else. This class of disputants plainly has a rational relation to the object of the CIPAA.

[51] Be that as it may, I have further undertaken a meticulous review of the provisions on adjudication proceedings in the CIPAA. My conclusion is that the disputants are treated equally and in the same way, in that:

(a) they have the right to choose and agree to an independent and impartial adjudicator, failing which an independent and impartial adjudicator would be appointed by the AIAC;

(b) they are subject to the same scale of adjudicator's fees and AIAC administrative fees;

(c) they are subject to the same rules of procedure in the adjudication proceedings;

(d) they are subject to the same legal rights and remedies; and

(e) they are subject to the same potential outcomes of the entire adjudication proceedings.

[52] Moreover, there is also an avenue of challenge as provided in s 15 of the CIPAA in respect of any improperly procured decision. Although it is not an appeal, it is nevertheless subjected to limited supervision by the High Court.

[53] In the circumstances, I therefore find and hold that the CIPAA is not discriminatory in violation of art 8(1) of the Federal Constitution. There is a strong presumption of constitutionality of a statute as held by the Court of Appeal in *Marathaei d/o Sangulullai (suing on behalf of the estate of Thangayah Aupulley) & Anor Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 MLJ 337 and the burden is placed upon the challenger to demonstrate otherwise. In that case, Gopal Sri Ram JCA (later FCJ) held as follows with emphasis added by me:

> Dicey's doctrine of the rule of law has influenced many Commonwealth constitutions. It has been expressly incorporated into almost all of them. Malaysia is no exception. The doctrine of the rule of law is housed in the equality provision in art 8(1) of our Constitution. Hence, translating Lord Steyn's dictum in *Pierson v Secretary of State for the Home Department* into Malaysian terms, it is unconstitutional for our Parliament to enact a law or authorize the enactment of any subsidiary written law that conflicts with art 8(1).
>
> *Hence, the primary approach of a court to all written law is to act upon the presumption that Parliament does not intend an unfair or unjust result, that is to say, that it accords with the rule of law in* art 8(1). This is a presumption of ancient repute that finds its origins in the context of retrospective legislation. But it is of wider amplitude and of general application. Raja Azlan Shah J (as he then was) referred to it in *Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 at p 31. Lord Mustill reaffirmed it in *'The Boucraa'* [1994] 1 All ER 20 at pp 29–30. *It is a strong presumption. But it is rebuttable. And only when it is rebutted does the constitutionality of the particular written law become an issue. This is merely another way of saying, in the context of the constitutional validity of a statute, that there is a strong presumption in favor of constitutionality* (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116).

(See also *Lei Lin Thai v Public Prosecutor* [2016] 9 MLJ 631; [2016] 7 CLJ 222).

[54] The crux of the plaintiff's challenge centred on mandatory participation in adjudication proceedings which would incur substantial costs. In my opinion, this is per se not inequality as contemplated by art 8(1) of the Federal Constitution. That notwithstanding, the plaintiff's challenge is also misplaced because the adjudication proceedings under the CIPAA is merely another statutory dispute resolution process. An unpaid disputant may wish to utilise adjudication proceedings to claim payment from the non-paying disputant because it is a relatively quicker process. It is however not mandatory but optional for the unpaid disputant to resort to adjudication proceedings. As for the non-paying disputant, it is also not mandatory if that disputant does not wish to defend the unpaid disputant's claim. The adjudication proceedings would therefore be conducted ex parte but the non-paying disputant assumes the risk of facing an adverse adjudication outcome ultimately. Otherwise, the non-paying disputant has to defend the unpaid disputant's claim in the usual manner and this is no different from any other inferior statutory tribunals, such as the Tribunal for homebuyer claims established under the Housing Development (Control and Licensing) Act 1966. Nonetheless and just as in any other dispute resolution process, the ultimate outcome is dependent on the relative merits of each disputant's case. The costs incurable for adjudication is further pegged on success as provided in s 18(1) of the CIPAA.

[55] In the premises, I am unable to fathom that the disputants in adjudication proceedings under CIPAA, particularly non-paying disputants such as the plaintiff in this case would be unequally treated before the law to warrant a challenge pursuant to art 8(1) of the Federal Constitution.

[56] Turning to the plaintiff's challenge that the adjudication proceedings under the CIPAA is a usurpation of the judicial powers of the court and thus a violation of art 121 of the Federal Constitution, I again find and hold that the plaintiff's challenge is misplaced because it is trite that judicial function is not synonymous with judicial power of the Federation. Only judicial power is vested upon the courts and hence the monopoly of the courts. Statutory adjudication under the CIPAA is however a judicial function just like in the aforesaid Tribunal for homebuyer claims or other inferior tribunals cited by the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* and *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)*. It is not a replacement of the courts envisaged in art 121 of the Federal Constitution.

[57] Moreover, it is the courts that make final judgments and orders which are correctable on appeal by the appellate courts. There is however the critical differentiation here in that adjudication proceedings under the CIPAA is only binding but not final, as provided in s 13(c) of the CIPAA. In other words, it is open for the disputants to have the same dispute finally determined in court without attracting the doctrine of res judicata and issue estoppel notwithstanding the dispute had gone through adjudication proceedings under the CIPAA.

UNCONSTITUTIONALITY AND ILLEGALITY OF ADJUDICATOR'S FEES AND EXPENSES AND AIAC ADMINISTRATIVE FEES

[58] The plaintiff also contended that the charging of adjudicator's fees and expenses as well as the AIAC administrative fees in CIPAA adjudication proceedings is unconstitutional because it violated art 8 and hence art 4(1) of the Federal Constitution. According to the plaintiff, the quantum of the aforesaid fees and expenses are hefty and they have to be mandatorily paid by the parties to participate in the adjudication proceedings. They impinge upon the plaintiff's right of access to justice and put the plaintiff in an unequal footing. Moreover, the plaintiff contended that the CIPAA statute did not expressly provide for the AIAC to charge administrative fees. Thus the AIAC Adjudication Rules and Procedure that have been used, inter alia, to justify the charging of the administrative fees in r 9(2) is unlawful.

[59] The defendants again denied the same and counter contended that the adjudicator's fees and expenses as well as the AIAC administrative fees are constitutional and within the empowering provisions in ss 19(3) and 19(4) as well as ss 32, 33 and 39 of the CIPAA respectively.

[60] As to the alleged unconstitutionality of the charging of fees and expenses of the adjudicator and AIAC administrative fees under the CIPAA scheme vis-a-vis arts 4(1) and 8(1) of the Federal Constitution read together, I reiterate my findings in para [54] above. Put simply, the CIPAA does not discriminate between the parties to the adjudication proceedings in terms of adjudication fees and expenses. It is not discriminatory because the ultimate costs payable in respect of the adjudicator's fees and expenses as well as AIAC administrative is dependent upon the relative merits of the disputants' case since costs follow the event in adjudication proceedings. This is reasonable as only the losing party is penalised. It is no different from any other legal proceedings whether in the courts or other inferior tribunals. In my view, the ultimate costs of pursuing statutory adjudication being more expensive than court actions or inferior tribunal proceedings is irrelevant in this context and circumstances. It is not a question of access to justice as so coined by the plaintiff which is merely a red herring.

[61] Furthermore and of close connection, I find and hold that the charging of adjudicator's fees and expenses as well as AIAC administrative fee as provided in the CIPAA is in principle also not unconstitutional as a tax or revenue. It is for services rendered which is permissible following the Federal Court case of *Malaysia Airports (Sepang) Sdn Bhd & Anor v Federal Express Brokerage Sdn Bhd & Ors (Attorney General Malaysia, intervener)* [2013] 6 MLJ 774.

(See also *Queanbeyan City Council v Actew Corporation Ltd and another* (2009) 258 ALR 692).

[62] I observed that the plaintiff did not mount a challenge that the adjudicator's fees and expenses are charged illegally. This is plainly because the charging of the adjudicator's fees and expenses are provided in ss 19 and 32(d) of the CIPAA as supplemented by regs 6 and 8 of the Construction Industry Payment and Adjudication Regulations 2014 and augmented by r 9 of the AIAC Adjudication Rules and Procedures. From the affidavit evidence before me, it is also clear that the necessary consultative processes required pursuant to ss 33 and 39 of the CIPAA have been complied with. In *Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd and another case* [2017] MLJU 377, Lee Swee Seng J (now JCA) held as follows on the rationale of the provisions in respect of the adjudicator's fees and expenses with emphasis added by me:

> [33] As pointed out the consent of the Respondent to the Adjudication is not necessary, for otherwise all that a non-paying party needs to do is to refuse to consent and the whole scheme of statutory adjudication under CIPAA would be frustrated. As for the non-agreement on fees, section 19(2) CIPAA provides that if the parties and the Adjudicator fail to agree on the terms of appointment and the fees of the Adjudicator, the KLRCA's standard terms of appointment and fees for Adjudicators shall apply.
>
> [34] *It makes tremendous sense for the KLRCA, as the Adjudication Authority under CIPAA as provided for in section 32 thereof to be responsible under section 32(b) for the determination of the standard terms of appointment of an Adjudicator and fees for the services of an Adjudicator. This the KLRCA had done with the Schedule under Regulation 6 of the Construction Industry Payment & Adjudication Regulations 2014 which is the KLRCA's Standard Fees for Services and Expenses of Adjudicator.*
>
> [35] The KLRCA Standard Terms of Appointment is found in Schedule II of the KLRCA Adjudication Rules & Procedure.
>
> [36] It does away with the hassle of haggling over terms of appointment and fees and the abuse that may come with it in the non-paying party's reluctance to participate in the Adjudication proceedings by refusing to agree on the terms of appointment of the Adjudicator or his fees or both. Bearing in mind that the Adjudicator appointed by KLRCA has only 10 working days to indicate his acceptance and terms of his appointment, the default Standard Terms of Appointment and Standard Fees make a lot of sense, saving time and energy as in a protracted negotiation over terms and fees of the Adjudicator, not to mention the possible embarrassment that may ensue when a decision maker has to be involved in negotiating his fees with the parties. There is thus absolutely no merits in the

allegations of learned counsel for the Respondent that there was a breach of section 23(2) CIPAA in that there was no negotiation on his terms of appointment nor his fees.

[63] However, the plaintiff made a specific challenge that the AIAC has not been empowered by the CIPAA to charge administrative fees pursuant to r 9(2)(b) of the AIAC Adjudication Rules and Procedure; hence the AIAC's administrative fees are charged illegally. This is basically because this particular rule and procedure is ultra vires of the statute. It follows that the plaintiff is hence aggrieved when he was required by the AIAC, to wit, the fourth defendant to pay the plaintiff's share of the administrative fee to participate in the adjudication proceedings with the first defendant.

[64] In the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, James Foong FCJ held as follows with emphasis added by me:

> [62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. *If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process*. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O 53 RHC to proceed in another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

[65] In my opinion, the nature and substance of the plaintiff's challenge on the illegality of r 9(2)(b) of the AIAC Rules and Procedure is a public law issue. Consequently, the plaintiff's challenge ought to be commenced by way of judicial review just as how it was done in *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors* [2019] MLJU 540; [2019] 1 LNS 904.

[66] In the premises, it is both inappropriate and unnecessary for me to determine this issue of illegality as advanced by the plaintiff.

VALIDITY OF AIAC DIRECTORSHIP

[67] The plaintiff contended that the third defendant signed the second defendant's letter of appointment dated 5 July 2019 as director of the AIAC, the fourth defendant. However, the third defendant was purportedly appointed as director of the AIAC by the Government of Malaysia, the seventh defendant, without consultation with AALCO. As a result, the appointment of the third defendant is invalid and accordingly the appointment of the second defendant is also invalid.

[68] The defendants denied the same and retorted that the third defendant's appointment as the director had been properly and validly made at all material times. It follows that the second defendant's appointment as the adjudicator had also been properly and validly made. In any event, the third and fourth defendants pointed out that the plaintiff had challenged the appointment of the third defendant as director of the AIAC but acknowledged that the third defendant was initially appointed as the acting director of the AIAC jointly by the Government of Malaysia and AALCO.

[69] It is provided as follows in articles IV(1) and IX of the agreement dated 20 March 2013 ('host country agreement') as supplemented by a supplementary agreement dated 7 February 2018 between AALCO and the Government of Malaysia:

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

[70] From the correspondences and communications made between the Government of Malaysia and the Secretary General of AALCO that were exhibited in the affidavit evidence before me, it seems that the dispute on the appointment of the third defendant as director of the AIAC is that he was appointed in May 2019 by the Government of Malaysia without the consultation of the Secretary General of AALCO. The attorney general who represented the Government of Malaysia flatly denied the same.

[71] In the Court of Appeal case of *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318 that was later affirmed by the Federal Court in *Bato*

Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, Zawawi Salleh JCA (now FCJ) held as follows with emphasis added by me:

> [41] *The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the executive possesses the treaty-making capacity while the power to give effect domestically rests with parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by parliament.*
>
> [42] The Federal Constitution of Malaysia contains no express provision with regards to the status of international law, or indeed any mention of international law at all. It does, however, contain certain provisions dealing with treaty-making capacity in Malaysia.
>
> [43] The combined effect of art 74(1) and the Federal List in Ninth Schedule to the Constitution is that the Federal Parliament has exclusive power to make laws relating to external affairs and relations with other countries (including through treaties, agreements and conventions), as well as the power to implement treaties, agreements and conventions. With regard to the executive power of the federation, art 39 provides that it shall be vested in the Yang di-Pertuan Agong and exercisable by him or by the Cabinet or by any Minister authorised by the Cabinet. Since art 80 ensures that the executive authority of the federation extends to all matters with respect to which parliament may make laws, this means that the cabinet or its authorised minister is effectively vested with the power to do all acts necessary for negotiating, making, signing and ratifying treaties and other agreements entered into with other countries.
>
> [44] When it comes to giving effect to treaty provisions in domestic law, however, it remains the case that for a treaty to be operative in Malaysia, legislation passed by Parliament is a must. This is despite suggestions that there may be some treaties which could be implemented locally without any necessity for the introduction of a statute (see Heliliah bt Haji Yusof, *Internal Application of International Law in Malaysia and Singapore*, [1969] Singapore Law Review, 62–71 at p 65). In other words, even though the executive has ratified a treaty and the treaty binds the government under international law, it has no legal effect domestically unless the Legislature passes a law to give effect to that treaty.

[72] In my view, the host country agreement which is an international treaty in substance has been obliquely effected and put into operation through legislation by the deployment of the AIAC (formerly KLRCA) as the appointing authority of arbitrators and adjudication authority under the Arbitration Act 2005 and CIPAA respectively. This is because the setting up and implementation of the AIAC is the sole object of the host country agreement. There is, in my view, no need for a specific statute to create the AIAC in terms of the host country agreement although that may be ideal and preferable.

[73] In challenging the appointment of the third defendant as the director of the AIAC, the plaintiff is effectively inviting this court to adjudicate on the on-going dispute between AALCO and the Government of Malaysia as to

whether the procedure, as agreed in article IV of the host country agreement, has been complied with. I am however of the view that it is neither competent nor desirable for this court to do so because by article IX of the host country agreement; the parties are to consult and negotiate to resolve the disputes amicably between themselves without the intervention of any external third body including this court. Besides that, AALCO is also not a party here. It is wrong for this court to make a decision that may bind AALCO which is not a party in these proceedings. In *Dato' Jaffar bin Mohd Ali v Jastera Berhad* [1999] MLJU 575; [2000] 8 CLJ 106, Low Hop Bing J (later JCA) held as follows:

> Our Courts do not function as busy bodies and it has never been the business of our Courts to give an order in favour or against any person or persons who are non-parties or strangers to the case before our Courts.

Moreover, it was held in the House of Lords case of *Maclaine Watson & Co Ltd v Department of Trade and Industry (and related appeals); Maclaine Watson & Co Ltd v International Tin Council* [1990] LRC (Const) 193 that a domestic/municipal court does not have jurisdiction to adjudicate or enforce rights arising out of transactions in an international treaty.

[74] Be that as it may, it is provided as follows in s 41 of the Interpretation Acts 1948 and 1967:

> 41 Powers of certain bodies not affected by vacancy etc.
>
> A board, commission, committee or similar body (whether corporate or unincorporate) established by or under a written law may act notwithstanding any vacancy in its membership; and its proceedings shall not be invalidated by —
>
> (a) any defect afterwards discovered in the appointment or qualification of a person purporting to be a member; or
>
> (b) any minor irregularity in the convening or conduct of a meeting; or
>
> (c) the presence or participation of a person not entitled to be present or participate.

[75] It has been held as follows by Augustine Paul FCJ as follows in the Federal Court case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 with emphasis added by me:

> [22] Our conclusion raises the critical question of the validity of the awards handed down by the respondent while officiating as a Chairman of the Industrial Court. *As far as the legality of his acts is concerned, it matters not how his appointment was made. It is sufficient if he is clothed with the insignia of the office and exercises its powers and functions. His official acts are recognised as valid on grounds of public policy and for the protection of those having official business to transact … The doctrine is now well established that 'the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de*

jure' (Pulin Behari v King Emperor (1912) 15 Cal LJ 517 at p 574). As one of us had occasion to point out earlier 'the doctrine is founded on good sense, sound policy and practical experience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office de facto are not so easily undone and may have lasting repercussions and confusing sequels if attempted to be undone. Hence the de facto doctrine' (vide *Immedisetti Ramkrishnaiah Sons v State of Andhra Pradesh* AIR 1976 Andh Pra 193).

In *Pulin Behari v King Emperor*, Sri Asutosh Mookerjee J, noticed that in England the de facto doctrine was recognised from the earliest times. The first of the reported cases where the doctrine received judicial recognition was the case of Abbe of Fontaine decided in 1431. Sir Ashutosh Mookerjee noticed that even by 1431 the de facto doctrine appeared to be quite well known and, after 1431, the doctrine was again and again reiterated by English Judges.

In Milward v Thatcher (1787) 2 TR 81 at p 87, Buller J said:

> The question whether the judges below be properly judges or not, can never be determined, it is sufficient if they be judges de facto. Suppose a person were even criminally convicted in a Court of Record, and the Recorder of such Court were not duly elected, the conviction would still be good in law, he being the judge de facto.

...

In *PS Menon v State of Kerala* (AIR 1970 Ker 165 at p 170) a Full Bench of the Kerala High Court consisting of P Govindan Nair, KK Mathew and TS Krishnamoorthy Iyer JJ said about the de facto doctrine:

> This doctrine was engrafted as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers de jure they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid.

In the judgment under appeal, Kuppuswami and Muktadar JJ observed:

> Logically speaking if a person who has no authority to do so functions as a Judge and disposes of a case the judgment rendered by him ought to be considered as void and illegal, but in view of the considerable inconvenience which would be caused to the public in holding as void judgments rendered by judges and other public officers whose title to the office may be found to be defective at a later date, Courts in a number of countries have, from ancient times evolved a principle of law that under certain conditions, the acts of a Judge or officer not legally competent may acquire validity.

A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was

clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he may be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

[23] *This rule of public policy is encapsulated in Interpretation Act 1967 s 41(a) of the which provides that the proceedings of a board, commission, committee or similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member. The legal position is therefore clear. Even though the appointment of the respondent is invalid the awards handed down by him were done so in his capacity as a Chairman of the Industrial Court and are not a nullity on grounds of public policy. They remain valid. It is absolutely necessary for us to make this clarification in order to prevent a High Court from declaring a judgment of the Court of Appeal or the Federal Court based on an award of the respondent as illegal and thereby being of no binding effect in total disregard and blissful ignorance of the doctrine of stare decisis. Such a pronouncement on an order made by the Court of Appeal or the Federal Court may be varied, if the need arises, only at the appropriate appellate level. It must be stressed that where the order was made by the Federal Court it may be varied only by the Federal Court itself and not even by the Court of Appeal. Any deviation from this salutary and well-entrenched rule will give rise to judicial chaos and anarchy thereby endangering and undermining the constitutional and democratic framework of our cherished society.*

[76] In the circumstances, it is immaterial even if the appointment of the third defendant is challenged by the plaintiff and subsequently invalidated pursuant to article IX of the host country agreement.

[77] That notwithstanding, it has not been disputed by the plaintiff, based on the correspondences and communications between AALCO and Government of Malaysia tendered in the affidavit evidence before me, that the third defendant is the acting director of the AIAC at the material time he appointed the second defendant as the adjudicator. This has been expressly recognised by the Secretary General of AALCO in his letter dated 10 July 2019 written to the third defendant. I have also ascertained from the parties that the acting directorship of the third defendant has never been expressly revoked or terminated in any way. In other words, the third defendant was then still the

acting director, even if he was not the director of the AIAC because of the conflict between AALCO and the Government of Malaysia over his directorship. It is provided in ss 7 and 93 of the Interpretation Acts 1948 and 1967 as follows:

> 7 Reference to office-holder includes acting holder, etc.
>
> A reference to the holder of any public or other office (including a reference in an appointment made pursuant to section 50) is a reference to the person for the time being lawfully holding, acting in or exercising the functions of that office.
>
> 93 Construction of provisions as to exercise of the powers and duties
>
> (1) Where a written law confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> (2) Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him.

[78] In the case of *Government of the Federation of Malaysia v Haji Ghani Gilong* [1993] 1 MLJ 359; [1993] 2 CLJ 120, Syed Ahmad Idid J held as follows with emphasis added by me:

> Does An Official In 'Acting' Capacity Have The Full Authority?
>
> *Is an 'acting' official within the ambit of the Act and can he/she sign valid certificate under s 142(1) of the Income Tax Act?* Section 142(1) mentions 'certificate signed by the Director-General' and s 142(2) states 'statement purporting to be signed by the Director-General of an authorised officer ...'. It is only just and proper that Courts construe words in statutes such as the Income Tax Act which is penal in nature within the rule of strict construction. Section 136, Delegation of Director-General's functions, makes it clear that the Deputy Director-General, the Assistant Director-General the Senior Assistant and Assistant Director may exercise the functions of the Director-General except those restricted specifically. By s 134, the 'care and management of the tax' is placed with the Director-General of Inland Revenue and his staff are set out therein including 'such other officers as may be necessary and expedient for the administration of the Act' (s 134(2)(c)). Those 'such other officers' are, for all intents and purposes, vested with the full powers to act, to issue certificates and to compound offences. What about those in acting positions or capacity? Encik Bazain only quoted s 136. In law, there may be occasions when the answers or amplification may lie outside the Act. So indeed, both Counsel were not helpful on this aspect. *Actually the answer stares at us from Interpretation Acts of 1948 and 1967, ss 7 (Consolidated and Revised 1989) which states that a reference to the holder of any public office ... is a reference to the person for the time being lawfully holding, ACTING in or exercising the functions of that office. See also s 93(2) of the same Acts. In this respect 'function' includes power and duty. On that authority, I rule that the certificate is valid.*

[79] Premised on the above, I find and hold that the plaintiff's challenge on the appointment of the second defendant by virtue of the purported invalid appointment of the third defendant as director of the AIAC is unmeritorious.

IMMUNITY OF THE SECOND TO FOURTH DEFENDANTS

[80] The second defendant claimed immunity from being sued by the plaintiff in this OS by virtue of s 34(1) of the CIPAA which reads:

> 34 Immunity of adjudicator and KLRCA
>
> (1) No action or suit shall be instituted or maintained in any court against an adjudicator or the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.
>
> (2) An adjudicator who has adjudicated a dispute under this Act cannot be compelled to give evidence in any arbitration or court proceedings in connection with the dispute that he has adjudicated.

[81] From the affidavit evidence adduced by the plaintiff, I am unable to see any act or omission done in bad faith by the second defendant in his discharge of his duties. The onus is plainly on the plaintiff to do so following the analogous cases of *A & A Equity Sdn Bhd v Transnational Insurance Brokers (M) Sdn Bhd & Ors* [2006] 7 MLJ 268, *Ahmad Rashdi bin Amran v Bank Negara Malaysia* [2015] 9 MLJ 520 and *Muslifah binti Zulkifli & Ors v Institute Sukan Negara* KLHC WA-12ANCVC-60–03 of 2018 (unreported). Even assuming the third defendant has invalidly appointed the second defendant, I hold that it did not amount to an act of bad faith by the second defendant.

[82] In addition, the Third and fourth defendants claimed immunity from being sued by the plaintiff in this OS by virtue of s 34 of the CIPAA as well as s 3(1) of the International Organisations (Privileges and Immunities) Act 1992 ('the IOPIA'). It is provided as follows in the latter:

> 4 Privileges and immunities of certain international organizations and persons
>
> (1) Subject to this section, and to subsections 11(3), 11(4) and 11(5), the Minister may by regulations either with or without restrictions or to the extent or subject to the conditions prescribed in such regulations —
>
> (a) confer upon an international organization —
>
> (i) juridical personality and such legal capacities as are necessary for the exercise of the powers and the performance of the functions of the organization; and
>
> (ii) all or any of the privileges and immunities specified in the First Schedule;
>
> (b) confer —
>
> (i) upon a person who is, or is performing the duties of, a high officer

A all or any of the privileges and immunities specified in Part I of the Second Schedule; and

(ii) upon a person who has ceased to be, or perform the duties of, a high officer the immunities specified in Part II of the Second Schedule;

B (c) confer —

(i) upon a person who is accredited to, or is in attendance at an international conference convened by, an international organization as a representative of —
(A) a country other than Malaysia;
C (B) another international organization; or
(C) an overseas organization,
all or any of the privileges and immunities specified in Part I of the Third Schedule;

D (ii) upon a person who has ceased to be accredited to such an organization, or has attended such a conference, as such a representative the immunities specified in Part II of the Third Schedule;

(d) confer —

E (i) upon a person (not being a high officer) who holds an office in an international organization all or any of the privileges and immunities specified in Part I of the Fourth Schedule; and

(ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule; and
F

(e) confer —

(i) upon a person who is serving on a committee, or is participating in the work, of an international organization or is performing, whether alone or jointly with other persons, a mission on behalf of such an organization all or any of the privileges and immunities G specified in Part I of the Fifth Schedule; and

(ii) upon a person who has served on such a committee or participated in such work or has performed such a mission the immunities specified in Part II of the Fifth Schedule.
H

(2) The Minister may make regulations for the purpose of this section which may be of general application or may relate to —

(a) particular international organizations;

I (b) particular officers or classes of officers;

(c) particular conferences, committees or missions or classes of conferences, committees or missions; or

(d) representatives of particular countries or of particular international organizations or of particular overseas organizations.

(3) Where by the regulations any privileges or immunities are conferred upon a person who is accredited to, or is in attendance at an international conference convened by, an international organization as a representative of —

(a) a country other than Malaysia;

(b) another international organization; or

(c) an overseas organization,

that person is entitled to the same privileges and immunities while travelling to a place for the purpose of presenting his credentials or of attending the conference or while returning from a place after ceasing to be so accredited or after attending the conference.

(4) Where by the regulations any privileges or immunities are conferred upon a person who is serving on a committee, or participating in the work, of an international organization or who is performing, whether alone or jointly with other persons, a mission on behalf of such an organization, that person is entitled to the same privileges and immunities while travelling to a place for the purpose of serving on the committee or participating in that work or performing the mission or while returning from a place after serving on the committee or participating in the work or performing the mission.

(5) Subject to subsection (6), where by the regulations or by subsection (3) any privileges or immunities are conferred upon a person who is, or has been, a person accredited to, or in attendance at an international conference convened by, an international organization as a representative of —

(a) a country other than Malaysia;

(b) another international organization; or

(c) an overseas organization,

a person who is, or has been during any period, a member of the official staff of the first-mentioned person is entitled, in respect of that period, to the same privileges and immunities.

(6) Except as the Minister may otherwise provide by regulations, a person who is or has been a representative of —

(a) a country other than Malaysia;

(b) an international organization; or

(c) an overseas organization,

or a member of the official staff of such a representative during the period when he is or was a Malaysian citizen is not entitled under this section or the regulations to any privileges or immunities, except in respect of acts and things done in his capacity as such a representative or member.

(7) A high officer or an officer of an international organization who is a Malaysian citizen is not entitled under this section to any of the privileges or immunities in the Second and Fourth Schedules respectively, except in respect of acts and things done in his capacity as such an officer.

Consequently, the Minister has by Government *Gazette* PU (A) 120 made the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 and amended in 2011. It is provided as follows in regs 3 and 3A:

> 3 Privileges and immunities of the Centre
>
> *The Centre shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and shall also have the privileges and immunities specified in the First Schedule to the Act.*
>
> 3A Privileges and immunities of the High Officer
>
> (1) A High Officer, if he is not a citizen of Malaysia, shall have the privileges and immunities as specified in Part 1 of the Second Schedule to the Act.
>
> (2) A High Officer, if he is a citizen of Malaysia, shall only be entitled to the privileges and immunities in respect of acts and things done in his capacity as the High Officer.
>
> (3) A former High Officer shall have the immunities specified in Part II of the Second Schedule to the Act.

[83] In *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors*, Nordin Hassan J held as follows in respect of the immunity of AIAC with emphasis added by me:

> [25] *The applicant contention that the immunities under the First Schedule only applies when the AIAC function as an international arbitral institution and not when it function as an adjudication authority under CIPAA 2012, I find, devoid of any merits. There is no qualification attached to the immunities and privileges conferred to AIAC under Act 485 and the First Schedule to the Act. To accept the applicant's contention would tantamount to adding words to the statute which is against the legislature's intend.*
>
> [26] The wordings of paragraph 1 of the First Schedule to Act 485 is plain and unambiguous and the court's duty is to give its effect as explained in the Federal Court case of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; [2012] 4 CLJ 445 in the following words:
>
> > [48] A statute is the written will of the Legislature. It is the fundamental rule of interpretation of a statute that should be expounded according to the intent of Parliament. Courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense.
>
> [27] Likewise in the Federal Court case of *Public Prosecutor v Sihabudin & Anor* [1980] 2 MLJ 273; [1981] CLJ Rep 82, where it states:
>
> > The words of Lord Diplock in an authority cited by my Lord President, Duport Steels Ltd v Sirs, seem to me to be practicularly apt, for 'the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where

> the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

[84] I share Justice Nordin's views and find that it is plain by s 4 of the IOPIA read together with reg 3 of the regulations made thereunder that the fourth defendant enjoyed immunity from being sued by the plaintiff in this OS. Likewise, the third defendant enjoyed immunity by s 4 of the IOPIA read together with reg 3A of the regulations made thereunder because he is a high officer. In this regard, I find and hold that the third defendant met the stipulation prescribed in reg 3A(2) and is at all material times exercising his duties under the CIPAA when appointing the second defendant. The immunity in my view is not confined to ordinary causes of action in suits but also extends to declaratory reliefs as sought here.

[85] Additionally, I find and hold that the third defendant as well as the fourth defendant also enjoyed immunity under s 34 of the CIPAA by reason of the plaintiff's failure to show any evidence of bad faith on their part.

[86] For completeness, I have to deal with the striking out applications (encls 13 and 16) filed by the second defendant as well as the third and fourth defendant which are premised mainly on their defence of immunity as dealt with in paras [78]–[83] above. As contended by them, the OS can be summarily disposed off on this point of law pursuant to O 18 r 19(3) of the Rules of Court 2012 following *Islamic Financial Services Board v Marlin Fairol Mohd Faroque & Anor* [2010] 4 ILR 23 but which is of course denied by the plaintiff.

[87] In my opinion, the law on immunity conferred under the CIPAA as well as IOPIA are not as trite compared to, say, the law on res judicata or limitation of action where striking out applications are often determined and allowed. As far as s 34 of the CIPAA is concerned, there is previously only the reported case of *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors* which is now pending appeal in the Court of Appeal. In respect of s 3 of the IOIPA, there is also only this same *One Amerin Residence* case and the cases of *Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negara, Malaysia & Ors* [2020] 7 MLJ 42; [2019] 8 CLJ 422 and the *Regional Centre For Arbitration v Ooi Beng Choo & Anor (No 2)* [1998] 7 MLJ 193; [1999] 7 CLJ 443. In the former case, it was remitted by the Court of Appeal for reconsideration by the High Court and in the latter case, this issue of immunity was not determined by the High Court but remitted to the industrial court to be heard together in the trial involving the substantive employment law issues. The law on immunity here is thus still fluid and unsettled.

[88] I am mindful that it was held in the Court of Appeal case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173; [2013] 6 CLJ 849 that the principles in summary judgment applications apply similarly to striking out applications. Hence, striking out is not appropriate in cases that involve arguable issues of law.

[89] As to the issue of immunity here, I am of the view that it is a complex and arguable issue of law and this is sufficient to hold that this is not a plain and obvious case that warrants striking out without hearing full arguments in the OS. That notwithstanding, I am further of the view that due to the nature of the other issues raised by the plaintiff, particularly issues (ii) and (iii) listed in para [26] above, there is a reason and necessity to hear the OS especially with the participation of the third and fourth defendants in defence of these issues because they are issues of public importance in light of the widespread usage of the CIPAA by construction industry disputants nowadays. Hence the applications in encls 13 and 16 respectively are hereby both disallowed but with no order as to costs.

SUMMARY AND CONCLUSION

[90] My findings on the broad issues may be summarised as follows:

(a) this OS is not academic;

(b) the CIPAA statutory adjudication scheme is not unconstitutional in violation of arts 4, 8 and 121 of the Federal Constitution;

(c) the imposition of adjudicator's fees and expenses and AIAC administrative fees is not unconstitutional in violation of art 4 and 8 of the Federal Constitution;

(d) the issue on illegality of the imposition of the AIAC administrative fees ultra vires the CIPAA ought to be pursued by way of judicial review;

(e) the third defendant validly appointed the second defendant as the adjudicator in the adjudication proceedings but the issue of the third defendant's appointment as director of the AIAC ought to be pursued based strictly on the provision on dispute resolution in the host country agreement between AALCO and Government of Malaysia; and

(f) the second to fourth defendants are immune from being sued by the plaintiff in this OS by virtue of s 34 of the CIPAA and s 4 of the IOIPA.

[91] For the foregoing reasons, the OS is hereby dismissed with costs of RM20,000 to the first defendant, RM50,000 to the second defendant, RM50,000 to the third and fourth defendants collectively and RM20,000 to

the fifth to seventh defendants collectively subject to 4% allocatur save for the fifth to seventh defendant who are exempted. A

Order accordingly.

Reported by Kohila Nesan B

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