

# Architect, see you in Court!

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Presented by

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## **What is an adjudication?**

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- **An interim measure to resolve contractual disputes under a written construction contract**
- **Complements other modes of dispute resolution (e.g. litigation, arbitration)**
- **Manages disputes**
- **Decision within a short period**



## What is an adjudication?

- **Summary and informal – “rough justice”**
- **A radical change to litigation / arbitration?**
  - **Can you say yes / no to adjudication?**
  - **Does it resolve and end the contract?**
  - **Do you argue your claim / defence?**
  - **Do you get a full hearing?**

## CIPAA 2012

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### Applies to:

**"every construction contract** made in writing relating to **construction work** carried out **wholly or partly** within the territory of Malaysia **including a construction contract entered into by the Government"** - s.2, CIPAA

"construction contract" - means a "construction work contract or construction consultancy contract"  
need the contract be in writing?

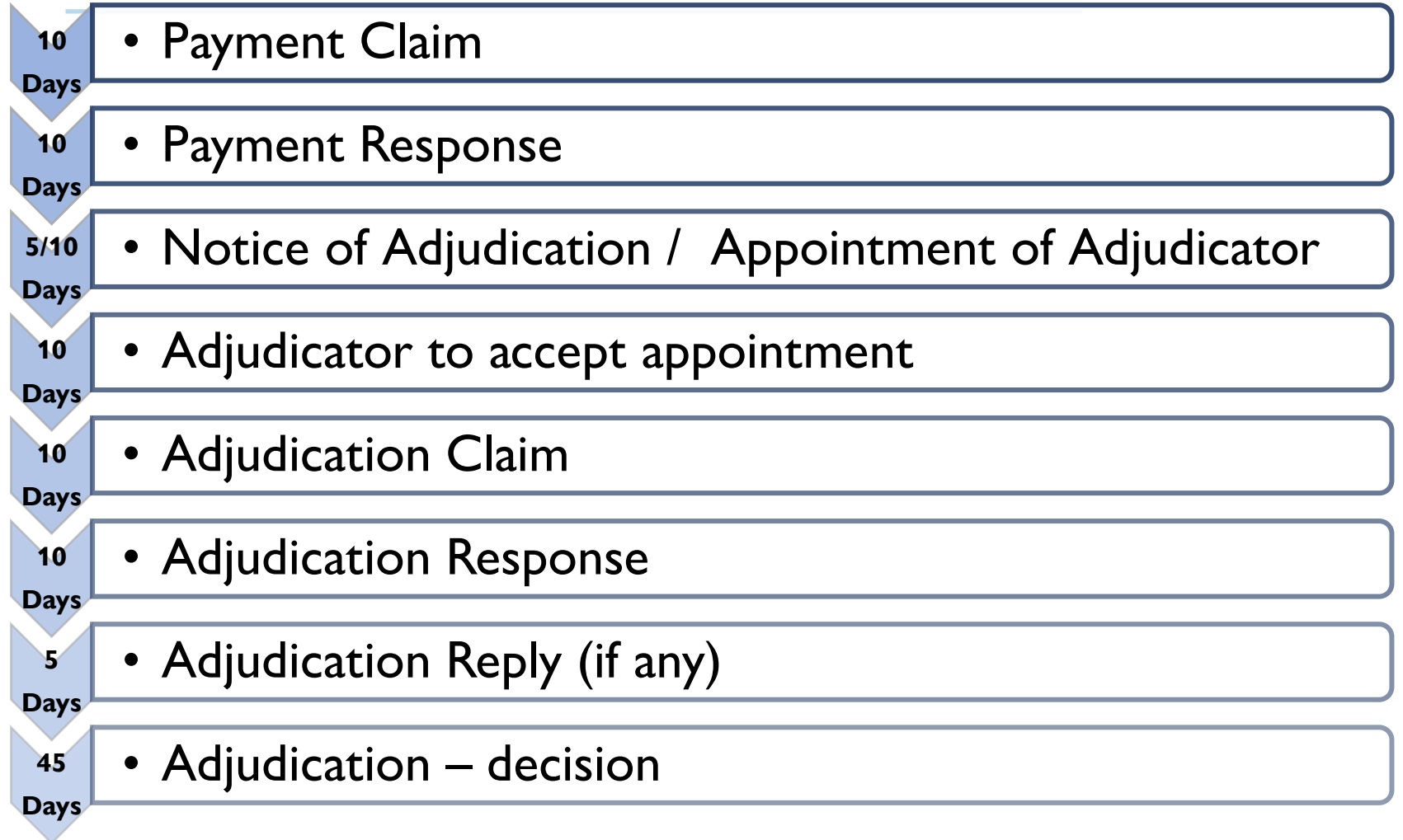
## CIPAA 2012

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"*construction consultancy contract*" defined:

*"means a contract to carry out **consultancy services** in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and **project management services**" - s.4, CIPAA*

## Speed – CIPAA Timelines





## **An Adjudication Decision is Interim in Effect**

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### **s.13, CIPAA:**

#### **“The adjudication decision is binding unless-**

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



## **Limited grounds to challenge an Adjudication Decision**

### **s.15 – Four grounds to challenge:**

- (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.

### **s.12(4) – requirement for reasons**





## **Better than a Court Judgment**

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**s.29, CIPAA – suspend performance or reduce the rate of progress of performance**

**s.30, CIPAA – direct payment from principal**



## Salient Key Features:

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- **CIPAA does not apply to contracts pre-15.042014 [Jack-in-Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd & Anor Appeal [2020] 1 CLJ 299]**
- **Direct payment is possible even when main contractor is wound up [CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2020] 1 CLJ 75]**
- **Applies to Final Accounts [Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd [2019] 8 CLJ 433]**



## Salient Key Features:

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- **Can be the basis of a Winding-Up Petition, without a judgment [Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 CLJ 499; ASM Development (KL) Sdn Bhd v Econpile Sdn Bhd (HC) [2020] MLJU 282]**
- **Conditional payment arrangements outlawed – e.g. Clause 25.4(d) PAM Conditions [Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd [2016] 5 CLJ 882]**



# Key Points for Consultants

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- **Objectively certify**
- **Be prepared for a surprise!**
- **Contemporaneous documentation and record-keeping**
- **What Defences are available to the Employer?**
  - Set-off for defective works
  - Liquidated damages for delay
    - What does the consultant need to do??

# Liability to the Main Contractor



## L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 LNS 1321 High Court

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### Background

- Engineer had recommended a deduction of RM750,000 from an interim certificate due to the contractor, as estimated rectification costs for work defectively done
- Architect issued Interim Cert 19, less RM750,0000
- Contractor sued Architect for negligence



**L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1  
LNS 1321  
High Court**

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**At the Sessions Court**

- Sessions Court found that:
  - there was a duty of care owed by the Architect to the main contractor
  - Architect breached that duty of care by under certifying Interim Cert 19 by RM750,000
  - Awarded damages of RM750,000 against Architect!



## L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 LNS 1321 High Court

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### At the High Court

- High Court analysed caselaw in the Commonwealth

*“It is not reasonable to impose a duty of care on the Defendant in light of the factual matrix in this case since this would cut across, and be inconsistent with, the structure of relationships as governed by the contracts entered into between the Employer and the Plaintiff; and between the Employer and the Defendant.”*

- The presence of an arbitration clause allows the contractor to challenge the certification.
  - Adjudication Decision is interim





## L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 LNS 1321 High Court

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- Exceptions – where contractor may sue the consultant:
  - Where there is fraud or collusion with the employer
  - Where the consultant deliberately misapplies the contract [*John Mowlem & Co pls v Eagle Start Insurance Co Ltd (1992) 62 BLR 126*]
  - For negligent mis-statements [*Day v Ost (1972) 2 NZLR 385*]

# **s.7A, Architects Act 1967**



**Weststar Construction Sdn Bhd v Prisma Athira Architect  
[2017] 9 CLJ 575  
High Court**

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## **Background**

- Architect sued the employer for engineering consultancy fees
- **Whether Architect can sue, not being registered under the Registration of Engineers' Act 1967**
- Sessions Court allowed claim
- High Court upheld on appeal



**Weststar Construction Sdn Bhd v Prisma Athira Architect  
[2017] 9 CLJ 575  
High Court**

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**Architect Rules 1996 (Third Schedule – Conditions of Engagement of an Architect):**

*“(3) The Architect shall be remunerated solely by fees payable by the client for architectural consultancy services provided by him.”*

**Section 7(1)(c) Registration of Engineers Act 1967:**

*“No person shall unless he is a Professional Engineer:  
...be entitled to recover in any court any fee, charge, remuneration or other form of consideration for any professional engineering services rendered”*

[see also s.7A, Architects Act 1967]



## Weststar Construction Sdn Bhd v Prisma Athira Architect [2017] 9 CLJ 575 High Court

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### High Court:

*“[43] In most standard form construction contracts the superintending officer (S.O.) may be the architect and the burden would be on him to instruct the engineer and to coordinate the engineer's work as provided in r. 4 above. It is not a case of subordinating the professional engineers to the architects but rather that there is a need to have a person to be the S.O. for the project. The architect is certainly not taking over the work of the professional engineers but merely invoicing on the engineer's behalf the share of his fees.”*

*“[52] I think one must be careful not to miss the point: the architect here is not providing the services of engineering consultant but the professional engineers in IISB. The architect is merely invoicing the employer for the fees of the professional engineers in that it is merely collecting the engineering services fees on behalf of the engineering firm or body corporate as in this case. The engineering company cannot bill or sue for its fees against the employer because it has no privity of contract with the employer but with the architect.”*

# Fraudulent Architect's Certificates



# Chin Ivan v H P Construction & Engineering Pte Ltd

[2015] 3 SLR 124, Singapore Court of Appeal

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## Background

- The appellant employed the respondent for a building project through a contract.
- The respondent claimed for two Architect's certificates for the project and were entitled to enforce its right to payment of the sums certified in any valid Architect's certificate.
- The appellant resisted the claim; alleged that the certificates were procured by fraud on the part of the respondent.
- The appellant sought a stay of proceedings for the matter to be referred to arbitration.



# Chin Ivan v H P Construction & Engineering Pte Ltd (Cont')

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## High Court

- The High Court judge found - part of the certificates were tainted by fraud.
- The Judge ordered - partial stay of proceedings and allowed the respondent to proceed with that portion of its claim which was not affected by fraud.
- The appellant appealed against the Judge's decision.





# Chin Ivan v H P Construction & Engineering Pte Ltd (cont')

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## Singapore Court of Appeal

- The certificates lost their temporary finality.
- Deciding on the “**opening up**” of the certificates must be **left to substantive final determinative arbitration or court action.**
- The certificates **cannot be enforced in any part.**

# Wrongful Architect's Certificates



# Ser Kim Koi v GTMS Construction Pte Ltd

## [2016] 3 SLR 51, Singapore Court of Appeal

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### Background

- Architect wrongfully issued the completion certificate.
- No explanation or reasons why he thought the works were ready for occupation.
- Architect failed to certify the release of the retention sum.
- Wrongly issued interim certificates.



# Ser Kim Koi v GTMS Construction Pte Ltd (cont')

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## Decision

- The disputed certificates lost their temporary finality.
- Deciding on the “opening up” of the certificates must be left to substantive final determinative arbitration or court action.
- The certificates cannot be enforced in any part.

# Thank you!

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