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Contents

CRITICAL OBSERVATION IN THE INCEPTION, GROWTH, AND RECENT DEVELOPMENT OF ADJUDICATION IN THE MALAYSIAN CONSTRUCTION INDUSTRY: AN ADJUDICATOR'S PERSPECTIVE.

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Ar David, a dual qualified architect and law, submerged himself in the intricacies of human relations in project management, dispute resolutions as neutrals, counsels and expert while delivering and carving the urban spaces, as chartered architect and green professional while contributing to the societies as an academician, critiques and council members of professional bodies. He can be reached via email: <davidyekarchitect@gmail.com> and via his website <davidyek.com>.

Abstract

This article aims at investigating the inception; growth; and recent development of the role of adjudication in the Malaysian construction industry, from a perspective of an adjudicator. It commences with the issue, whether the creation of the Construction Court and Construction Industry Payment Adjudication Act 2012 ('CIPAA') resolved the construction industry's conundrum? Looking at its inception phase, the industrial stakeholders with Construction Industry Development Board ('CIDB') as the forerunner since 2003, has championed the course, only to be 'derailed' by the Bar Council ('BC') with its 'hypothetical doubts' as to the viability of the CIBD's version of CIPAA. Together with the AIAC, the BC lobbied the AC's Chamber to implement the AIAC's version of the CIPAA legislation, leaving a 'bitter after-taste' to the CIDB's earlier efforts, now begging the question, how CIPAA fares in its growth stage? Next, pondering at the astronomical growth of CIPAA with 89% success rate, 4-years into implementation of CIPAA, it has since evolved into 'mini trials', 'document only arbitration' or even 'fast track or expedited arbitration'. In a nutshell, the findings of *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd*[2] hereinafter ('*View Esteem*'), reverses a body of jurisprudence developed in those 4 years making

[1] BScHBP(Hons), BArch(USM), LLM, RIBA, APAM, Parch, AIPDM, GREAP, MFireE, FCABE, CBuildE, FCIArb, FAIADR, FMIArb, FHKICAdj, AAE.
[2] [2019] 5 CLJ 479; [2017] 1 LNS 1378.

CIPAA complicated, inefficient and lost its focus. This follow by the peeling into the current state of the CIPAA, to draw upon the correct definition of the problem such as complication; monopoly; and over legalistic, generating the 'push effect' for the construction stakeholders away from CIPAA. Notwithstanding the pro-adjudication approach taken by the court. Hoping for solutions that will almost surface within, in the turbulence of the 'ocean of legal-entanglement', stakeholders are forced to look back to the 'star' for guidance and to salvage the 'compass' that had been so conveniently casted away, to guide the CIPAA vessel to its next destination of glory if any, in the following area of structural, procedural and institutional reform, begging the question, what can really be done?

Introduction

Abraham observed that backlog of construction dispute to be resolved by the Malaysian courts were staggering snail-paced and costly albeit the lacked of official statistic.[3] As reported by Balogun, over 300,000 construction disputes are pending in courts (2006-2008).[4] This alarming situation as argued by Varghese, is similar to India.[5] The World Bank went as far as to find a solution to mitigate this.[6] One way, as suggested by CIDB[7] is 'to emulate TCC courts[8] of the UK'[9], by having Malaysian's own Construction Courts and such was materialised in 2014, 2-years after CIPAA[10] was conceived to resolve construction dispute, in a rough justice manner.[11] However, does the creation of the Construction Court and CIPAA resolved the construction industry's conundrum?

The Inception

[3] Zhen, 'A specialised Construction Court, finally?', (4 Mar 2013), <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/a-specialised-construction-court-finally>, accessed 16 Feb 2022.

[4] Balogun and others, 'Adjudication and arbitration as a technique in resolving construction industry disputes: A literature review', (2017), ACSEE.

[5] Varghese, 'Transforming India as a Centre for International Arbitration: Recommendation for Reforming the Arbitration Law of India' (LLM, RGU, 2018), p11.

[6] World Bank, 'Malaysia: Court Backlog and Delay Reduction Program, A Progress Report', (Aug 2011), <https://openknowledge.worldbank.org/bitstream/handle/10986/16791/632630Malaysia0Court0Backlog.pdf?sequence=1&isAllowed=y>, accessed 16 Feb 2022.

[7] Construction Industry Development Board ('CIDB').

[8] The Technology and Construction Court ("TCC") is a specialist court, which deals principally with technology and construction disputes.

[9] Technology and Construction Court, <https://www.gov.uk/courts-tribunals/technology-and-construction-court>, accessed 16 Feb 2022.

[10] Construction Industry Payment and Adjudication Act 2012 ('CIPAA').

[11] Edge Prop, 'First two Construction Courts Launched', (15 Apr 2014), <https://www.edgeprop.my/content/first-two-construction-courts-launched>, accessed 16 Feb 2022.

In reality, NO. According to CIDB, before the conceived idea of statutory adjudication, as promoted by Lim, has been 'pursued by the Asian International Arbitration Centre ('AIAC')'[12] in the form of CIPAA,[13] there were 'fears' casted upon by the Bar Council ('BC'), as argued by Ali, inevitably forced CIDB to provide for solutions to these 19-questions[14] hereinafter, ('hypothetical doubts'), pointing to BC, being not a party to the steering committee at that time[15], and such one may presume as to why such doubts had been casted. In attempt to pursue such undertakings by the CIDB, as early as 2003[16], Ali argued that such doubts, which were hypothetical, can be overcome as the positive effects of CIDB's version of CIPAA to the construction industry, override these 'hypothetical doubts'[17] that Lam finds them 'unsuitable for a number of reasons'[18]. Lam further argued, the CIDB's draft included 'a definition of construction contract of a dispute which could have had the effect of having a hillside collapse like Highland Towers being referred to the Adjudicator for a decision in a matter of weeks'; also 'subjecting the individual house owner to an adjudication process, ignoring that it is the house owner who generally complains'; and most importantly, 'CIDB is in control of registering and appointing adjudicators'. [19] How true were these doubts? Critically, Lam pointed, under the aegis of the AG's[20] chamber and together with the AIAC, the improved formulation of CIPAA was materialised in 2012, enforced in 2014[21] and the rest, were said to be history, leaving a 'bitter after-taste' to the CIDB's earlier efforts since 2003.[22] At this juncture, in responding to Lam's observation and many others in the BC, Ali and Sr. Lim Chong Fong [as he was known then, now a HC Judge] via the CIDB 'took the bull by the horns', by providing the solutions, condensed from the 19 to these 16, as the followings[23]:

Hypothetical	CIDB's Solutions and Recommendations

[12] Balogun [n 4]: citing Ali, 'CIPAA: Reducing Payment-Default and Increasing Dispute Resolution Efficiency in Construction', (2006), CIDB-WG10.
[13] Lim and others, 'Adjudication of Construction Dispute in Malaysia', (Lexis Nexis, 2014)
[14] Ali and Lim, 'A Report on the Proposal for A Malaysian Construction Industry Payment and Adjudication Act: CIPAA' (Dec 2008), CIDB, p.14-23.
[15] Ali [n14], p.12.
[16] Ali [n14], p.4-5.
[17] Ali, 'A Construction Industry Payment and Adjudication Act: Reducing Payment-Default and Increasing Dispute Resolution Efficiency in Construction' (2006) MBAM Journal, part 1 and 2, p.4-22.
[18] Lam and Loo, 'The Statutory Framework and Features of the CIPAA Act 2012' (2018 Sweet and Maxwell), P.13, [1.036].
[19] Lam [n18], p.13.
[20] Attorney General ('AG')
[21] CIPAA 2012, s.1(2); Federal Government Gazette PU(B)124, 14 Apr 2014.
[22] Lam [n18], p.13.
[23] Ali [n17], p.4-22.

Doubts	
Any existing law adequately address payment problems?	Malaysian Contracts Act 1950 and the Arbitration Act 2005, but these are not specific for ensuring regular and timely payment; mechanism for a quick, time-bound, contemporaneous, economical, and binding dispute resolution; and provisions for security of payment.
Who will be affected by the Act and its impact to contractors, government, client, construction consultants?	CIPAA will apply to all parties involved in construction, consultancy and supplies in both government and private sectors. Primary users are client, contractors, sub-contractors, suppliers and consultants. No major implication on client. With CIPAA, defaulters may face consequences of their breaches quicker; valid contractual rights be enforced easily and weeding out nonperformers leading to better justice for all. Provision of mandatory payment bond, may require some finer discussions. No major implication on contractors. They now will have a quick remedy for payment through Adjudication via MBAM [24] and other specialist organisations. No major effect on consultants. The proposal is for all disputes capable of being referred to adjudication, promoting assessment of certification in a timely manner.
Is the proposed CIPAA intended to benefit only contractors?	Stakeholders in the construction industry stand to benefit that lead to better practices, greater integrity, and greater efficiency. CIPAA provides payment assurance for work, services or supplies made, enable projects to be implemented effectively.
Isn't the effort in making payments to contractors within 7 days?	Awareness alone is insufficient as there remain the real payment issues within the entire value chain particularly in the private sector where serious payment issues are rampant among construction professionals.
Is the intention of this Act to cover all	Yes, it is the intention to cover all disputes and not restricted to disputes on payment. Limiting dispute on 'payment-related' will not benefit the construction industry, although it 'benefit' the dispute resolution industry.

[24] The Master Builders Association Malaysia ('MBAM')

disputes?	

Why must adjudication be compulsory?	Adjudication is not a condition precedent, thus not mandatory. CIPAA is statutorily enabled. CIPAA does not prohibit parties from referring disputes to arbitration or litigation. Key intent is for 'rough justice' opposed to 'fine justice' that take months/years. Arbitration is only feasible after project completion or terminated. Parties cannot sustain prolonged justice and protracted arbitration could be more expensive than litigation.
What are the remedies provided in CIPAA for payment disputes?	CIPAA envisages on non-certification for work-done, material supplied and services rendered in swift adjudication. Adjudicator is empowered to award interest or costs. If adjudicated sum remains unpaid, the winning party has (1) register the Decision as court judgment and enforced; (2) suspend work; (3) for a sub-contractor, direct payment by principal, which is non-mandatory; or (4) unpaid party may cash-out the bond. These remedies are concurrently exercised and without prejudice to other rights and remedies; include complain to the respective boards.
How would CIPAA affect the rights to other existing ADR or litigation?	CIPAA provides additional right statutorily, not condition precedent to other ADR methods; which can go concurrently. Where adjudication invoked, the other is drawn into; where it is 'temporarily binding' and may subsequently be referred to arbitration. All other ADR methods co-exist; complementing each other.
Would CIPAA be taken as 100-day arbitration procedures?	100-day arbitration/expedited-arbitration is hardly used for construction disputes; unrealistic to expect 'fine justice'. Where arbitration award is final; it has to be legally correct to dispense 'fine justice'. Strict time only allows 'rough but speedy justice'; only to be correctable by 'fine justice' through arbitration/litigation; compromised only for speed.
CIPAA suitable for complex claims, given the short time?	Requirement in high standards for adjudicators will address this concern. For complex dispute, provision to enlarge time for making the decision; where, 20% of the issues cover 80% of the claims. A concentrated focused effort by all parties over a short time leads to a high level of efficiency.
Can ad hoc	Not necessary to incorporate ad hoc mechanism; where

mechanism be incorporated?	CIPAA is 'temporary finality'; and such mechanism is not practicable, such as holding money in escrow and releasing it months or years later; not helping in cash flow.
Do we have suitably qualified adjudicators?	Eventually, yes; include recommendations for accredited adjudicators by the ACA [25]. Qualified professionals from lawyers, judges, architects, engineers, QS and others are not precluded; if required, experts can be appointed. CIPAA geared for enforcement in 6-months after gazetted, allowing time to establish the ACA, to train and register adjudicators.
Should lawyers be excluded entirely in CIPAA?	No, whilst PAM, have suggested that legal representation be disallowed, this suggestion has not been accepted by the steering committee.
Will sensitive and private information be disclosed?	Only sanitized version of the Decision be sent to the ACA; without any details of parties and project to maintain confidentiality; for enriching database and knowledge bank of the ACA; to serve as a record of lessons learnt; in enhancing quality; by ensuring the controlled use and reference of the databank. Decisions for circulation of the Decisions be made later.
Will adjudication lead to reduction in work for lawyers and arbitrators?	Other jurisdictions show reduction in arbitrations/litigation. Lawyers are far from being out of work. Many arbitrators retrained to be adjudicators; delivering Decisions speedily; keeping costs down and take on only cases that they can focus on; where client's interest come before self. Altruism distinguishes a profession from; taken as a given among all adjudicators, arbitrators, construction and non-construction professionals.
Will payment-default no longer an issue?	No guarantee. CIPAA will go a long way to help achieve payment in a timely manner; where disputes will be resolved quicker and cheaper; mirrored the Construction Industry's masterplan being 'world-class'; inefficiency and wastage particularly slow phase disputes has no room for the construction industry. Additional costs incurred for bonds in obtaining security of payment that outweigh the risks of non-payment.

[25] Adjudication Control Authority

Since 2014, there has been an astronomical increase in CIPAA adjudications related feedstock of cases in courts[26], as compare to the other forms of ADR[27], surpassing even arbitration. It now begs the question, how CIPAA fares in its growth stage?

The Growth

AIAC (2016) statistic showed, CIPAA has since grown to be an extremely successful for Claimant to retrieve its unpaid sum with 89% success rate.[28] Such landmark success rate eventually turning the acronym 'CIPAA' into a verb such as, 'I will CIPAA you'. It has come a point, as rightly observed by Chan, 'one may even be discouraged upon receiving the Payment Claim' to even serve its Response.[29] What if a party refuse to participate? What are the consequences of failing to participate in an adjudication?[30] Simple as these questions maybe, in Chan's observation, it is potentially a 'trap' for setting aside under s.15 of CIPAA for a 'novice adjudicator'.[31]

Setting aside appears to be the norm lately, although within a narrow ambit. The early case law as in *Wong Huat Construction v Ireka Engineering & Construction*[32], it was held that 'setting aside' restores all parties to their original positions and parties are free to adjudicate, shortfall of foreseeing complication whether can a Decision be severed, as to only enforce the enforceable part? *Naza Engineering v SSL Dev*[33], held that court has no power to set aside a part of the Decision, relying on *BM City v Merger Insight*[34]. Finding in contrast in *JEKS Engineering v PALI PTP*[35], the court has power to severe any part of the Decision.

[26] Lam, 'Latest Development in CIPAA and Adjudication Law', (20 Nov 2021), L2-series: reported 2018-2021, +200 cases reported and 2020 alone, +100 cases reported, far exceeded arbitration case report; AIAC Annual Report 2019-2020: Oct 2021, 200 reported cases in the HC; 2020, 100 reported cases in the HC; 537 cases registered with the AIAC.
[27] Alternative Dispute Resolution ('ADR').
[28] Cheang, 'A Study of the Effectiveness of the Malaysian CIPA Act vis-à-vis the Impact of Oversea Construction Payment Legislation on their Respective Construction Industries' (BSc.QS, 2017, UTAR), p.36: citing KLRCA Annual Report (2016).
[29] Chan, 'CIPAA update – A case of creeping complexities?', (3 Jul 2019), <https://www.cipaamalaysia.com/blog/cipaa-update-a-case-of-creeping-complexities>, accessed 1 Nov 2022.
[30] Ali [n17], p.4-22.
[31] Chan, 'Test for Bias Against an Adjudicator', (9 Aug 2021), <https://www.cipaamalaysia.com/blog/test-for-bias-against-an-adjudicator>, accessed 1 Nov 2022.
[32] [2018] 1 CLJ 536.
[33] [2020] 9 MLJ 499
[34] [2016] MLJU 1567.
[35] [2021] 9 MLJ

What is taken to be settled are, one, court could not set aside Decision on grounds of mistake in facts and/or in law; the court will not re-evaluate the evidence; and any reasons, brief as they may be, is taken as the adjudicator's justification.

Revisiting Chan's earlier assertion, these traps potentially evolved into 'guerrilla tactics'[36] as in (1) application to extend time for submission citing not having to receive client's instruction, failing which, counsel will resign; (2) adjudicator risks breaching natural justice by not allowing parties to ventilate the next course of action, by proceeding ex-parte; and (3) totally ignore CIPAA entirely, to deal later, claiming fraudulent, although such has been given the strictest proof.[37]

After 4-years into its success story, the Federal Court's ('FC') decision in *View Esteem v Bina Puri Holdings*[38] ('*View Esteem*') throw the 'pendulum of success' into 'disarray', allowing matters raised beyond the Payment Response to be adjudicated.[39] In Foo's observation, such decision, 'reverses a body of jurisprudence developed in those 4 years, as well as the general understanding and practice of the industry'.[40] Such findings accentuate, whether the procedures put in place suitable for complex claims, which could revolve around complex questions of fact and law, which is now a reality.[41]

Similarly, adjudicators are forced to decide on 'Final Account', a subject aptly for litigation or arbitration.[42] In *Martego v Arkitek Meor & Chew*[43] ('*Martego*'), CIPAA applies to matter pertaining to 'final claims' where the term 'progress payment', as interpreted by the courts, was wide enough to include the 'final payment', so long there are payment claims relating to construction contract. The same ought to be said, Payment Claim are revisable and it does not bound by the amount set out in the Payment Claim.[44] Apparently, courts would not have understood the concerns, 'given the short time period within which to handle a

[36] ADJ-4341-2022; ADJ-4374-2022
[37] *Rosha Dynamic Sdn Bhd v Mohd Salehhodin bin Sabiyee & Ors and other cases* [2021] MLJU 1222
[38] [2017] 1 LNS 1378.
[39] Foo, 'CIPAA Adjudication: What has Changed since View Esteem Sdn Bhd v Bina Puri Holdings Bhd' (27 Sep 2018), <https://www.ganlaw.my/embrace-the-storms-of-the-movement-control-order-mco-2/>, accessed 1 Nov 2022.
[40] Ibid.
[41] Ali [n14], p.20: Question 13.
[42] Ali [n14], p.17: Question 9.
[43] [2017] 1 CLJ 101: The Federal Court in its grounds of judgment dated 1 August 2019 in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* decided on important points of law on adjudication and final payments under a construction contract. https://themalaysianlawyer.com/2019/08/13/case-update-federal-court-decides-on-final-payments-adjudication/
[44] *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd* and other cases [2021] MLJU 1889

claim, is the possibility of unjust, incorrect and aberrant decisions real?'[45] Both CIDB and the AIAC only contemplated, 'interim payment issues' not 'final account', but findings in *Martego* accentuated Lam's concern, 'the effect of having a hillside collapse like Highland Towers being referred to the Adjudicator for a decision in a matter of weeks'.[46]

Also, 'it has been suggested by PAM[47], but was not accepted that lawyers would not be allowed to act as adjudicators or represents parties to disputes referred to adjudication'.[48] As Harban observed, with involvement of lawyers, CIPAA has evolved into 'something else' being 'complicated and overly legalistic'. Harban pointed out, 'CIPAA was meant to assist lay persons so that they can be self-represented nevertheless, this has been complicated with the direct involvement of legal practitioners'[49], eventually led to various complications that in Foo argued, 'reverses a body of jurisprudence developed in those 4 years, as well as the general understanding and practice of the industry'.[50] As apparent, these 'legal charade', dressed up as the questions of law, i.e. Retrospective versus prospective[51]; Non-certified payment[52]; Winding up conundrum[53]; Singular versus Multiple Contract[54] and of many more others[55]. Common procedural matter such as 'notice deemed served', became an unsettled affairs, i.e. proof of mailing is not the proof of receiving following *Yap Ke Huat v Pembangunan Warisan Murni Sejahtera*[56], notice cannot be deemed served with AR-Registered,

[45] Ali [n14], p.20: Question 13.
[46] Lam [n18], p.13.
[47] Pertubuhan Arkitek Malaysia [Malaysia Institute of Architects] ('PAM').
[48] Ali [n14], p.21: Question 16.
[49] The Malaysian Lawyer, 'CIPAA: Adjudication Leading the Way?', <https://themalaysianlawyer.com/2018/09/05/cipaa-adjudication-leading-the-way/>, accessed 1 Nov 2022: cited the Malaysian Law Conference 2018.
[50] Foo [n 39].
[51] *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2020] 1 CLJ 299: FC puts an end to this long-haul debate, by holding that CIPAA to be applied 'Prospectively'.
[52] *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*. [2015] 8 CLJ 728: In the absence of certification, the non-paying party cannot deprive the unpaid party from availing the adjudication process.
[53] *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [*2019*] MLJU 49: it was held by the **Court of Appeal**, that a successful *claimant* in *adjudication need not* have the *adjudication decision registered* before issuing a **statutory notice of '***winding up***'; finding in contras,** *ASM Development* (KL) Sdn Bhd *v Econpile* (M) Sdn Bhd (Case No. WA-24NCC-363-07/*2019*): High Court granted an injunction restraining 'winding up'.
[54] *Ireka Engineering* & Construction Sdn Bhd *v PWC Corporation Sdn Bhd* [2020] 1 MLJ 311: the term contract in CIPAA refers to 'singular' contract and not 'contracts'; finding in contrast, *Punj Lloyd Sdn Bhd v Ramo Industries Sdn Bhd & Anor and another case* [2019] 11 MLJ 574: contract by reference is a singular contract.
[55] Yek, 'My SOPL: Security of Payment Legislation in the Malaysian Construction Industry, My Observation', (15 Aug 2019), <http://www.davidyek.com/adr/my-sopl-security-of-payment-legislation-in-the-malaysian-construction-industry-my-observation>, accessed 1 Nov 2022.
[56] [2008]4CLJ175.

also in *Goh Teng Whoo v Ample Objectives*[57], AR-Registered does not conclusively mean, the recipient has received the same. AR-Registered continues to be interpreted as service are 'presumed', until the contrary is proven.[58] These are legal complexities that baffled lay 'technical adjudicator'.

CIDB initially has a wider view to include 'all disputes and not just restricted to disputes related to payment issues'[59]. Lam argued, by such, CIDB's proposal will include 'subjecting the individual house owner to an adjudication process, ignoring that it is the house owner who generally complains'.[60] This subsequently, led to the dilemma for PAM, as contained within its Standard Form of Building Contract ('SFBC'), a provision for 'contractual adjudication'[61] which initially a multi-tier arbitration clause which Rajoo pointed, is a misnomer against statutory mandated adjudication, CIPAA.[62] Such conundrum potentially left a lacuna, as in s.3 of CIPAA: Non-Application, whether such cl.36 of PAM SFBC 2018 will also be construed as 'contracting out' of CIPAA, based on the doctrine of 'free to contract'? In *Ranhill E&C Sdn Bhd v Tioxide (Malaysia) Sdn Bhd*[63], it was held that the terms of CIPAA as a legislation prohibits the parties from contracting out of its application, notwithstanding that there is no express term within the Act. Any forms of contractual arrangement for dispute resolution would not exclude the application of CIPAA. Thus, the issues in relation with s.3 of CIPAA: Non-Application, has no other avenue for recourse, beside arbitration and litigation. The current state of CIPAA being compulsory, in essence, deviated from the original intend of CIDB when it attempts to address, 'if parties decide not to opt to exercise their rights to adjudication, they may opt for other dispute resolution', to include adjudication by contract.[64]

Further, non-application of CIPAA, eventually led to 'split-hair' arguments as to whether, 'lost and expense' ('L&E'); 'liquidated damages' ('LD'); and 'extension of time' ('EOT'), fall within the jurisdiction of CIPAA? These issues are not entirely payment issues, per se. In *Syarikat Bina Darul Aman v Government of Malaysia*[65], it was held that adjudicator must decide on L&E claims as such

[57] Civil Appeal:02(i)-35-04/2019(W).
[58] Interpretation Acts 1948 and 1967,s.12; see also <http://www.davidyek.com/adr/serving-of-notice-and-documents-in-cipaa-adjudication-where-is-the-norm-now>, accessed 1 Nov 2022.
[59] Ali [n14], p.16: Question 8.
[60] Lam [n18], p.13.
[61] PAM Form 2018, cl.36: Adjudication.
[62] Rajoo and others, 'The PAM 2006 Standard Form of Building Contract', (LexisNexis,2010), p.828:citing *Dean v Prince* (1954) 1Ch409.
[63] [2015] *1 LNS 1435.*
[64] Ali [n14], p.17: Question 9.
[65] [*2017*] MLJU 2381

claims came within the ambit of CIPAA. These claims were due to the delay in completion of works and therefore payable as part of the amount claimable for the additional costs incurred for work. However, not all L&E claims are within the purview of CIPAA, i.e. claim for special damages. Then again, this matter is truly unsettled, if the L&E is not a provision of the contract, it cannot be awarded by the Adjudicator.[66] In another case, the High Court ('HC') held L&E is not a 'payment', thus not allowable in s.4, CIPAA[67]. In yet, another case, notice requirement is only apply to loss that is 'beyond reasonably contemplated'.[68]

Despite these hypothetical doubts, 4-years into implementation of CIPAA, Harban argued, 'CIPAA being complicated with the direct involvement of legal practitioners, now lengthened because the decision is subjected to appeal all the way to the FC. Due to the complexity and lengthy processes, smaller industry players are no longer benefiting from the adjudication process; these players are intimidated by the complicated process; making adjudication having little difference compared to litigation or arbitration'.[69] In a nutshell, CIPAA is complicated, inefficient and lost its focus.[70] It has since evolved into 'mini trials', 'document only arbitration' or even 'fast track arbitration', for instance, holding to the principle in *View Esteem*, Respondent has the right to 'throw in the kitchen sink'[71] at any point in time during the progress of CIPAA, eventually leading to submission of voluminous 'expert reports' and seek for hearings to be held, which in *MRCB Builders v Wazam Ventures*[72], such was not allowed but in *Guang Xi Development v Sycal*[73], failure to allow for a hearing in adjudication is contravening natural justice.

Beside these 'legal confusions', CIPAA in its inception, as identified by CIDB is to 'apply to all parties in the construction works, consultancy services and construction supplies in both government and private sectors'.[74] It is not only benefitting the contractors as 'CIPAA can lead to better practices, greater integrity and efficiency'.[75] In reality, the unfolding events as prescribed by Harban

[66] *Kuasatek (M) Sdn Bhd v HCM Engineering Sdn. Bhd and other appeals* [2018] MLJU 1919
[67] *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889
[68] *Sunissa Sdn Bhd v Kerajaan Malaysia & Anor* [2020] MLJU 283
[69] The Malaysian Lawyer [n 49].
[70] The Malaysian Lawyer [n 49].
[71] Try everything you can in order to do something or to solve a problem, <https://languagecaster.com/football-cliche-throw-the-kitchen-sink>, accessed 1 Nov 2022.
[72] [2020] 1 LNS 145
[73] [2018] MLJU 1542
[74] Ali [n14], p.14: Question 2.
[75] Ali [n14], p.14: Question 3.

as CIPAA is complicated, inefficient and lost its focus[76], brought with it 'adverse consequences to the contractor and consultant'.[77] Now, CIPAA remains as seen as 'toothless tiger' or 'winning on paper' under such consideration. Foremost, as Chan asserted, not many aware that CIPAA is a 2-stage approach to successfully mount a claim, where (1) a favourable decision must be obtained; and (2) such decision is enforced in the HC.[78] Such 2-stage effects are not only 'unaffordable' it goes against the fundamental principle of CIPAA for 'cheap rough justice'. BC's hypothetical doubts of what are the remedies provided in CIPAA in the event of payment disputes'[79], is irrelevant, as 'application to the courts, to obtain the writs of seizure and sale; garnishing proceedings and so on' are expensive endeavours and rightly, CIDB pointed out that 'lawyers are far from being out of work' in the attempt to contemplate is 'CIPAA will lead to a reduction in arbitrations and litigations and corresponding work for the lawyers'.[80] Whether with CIPAA, 'will payment-default no longer be an issue'? The textbook answer, 'no one can guarantee payment defaults will no longer be an issue' remains relevant.[81] Thus, the next rationale question is why? Perhaps, revisiting Lam's contention, as to how relevant are these hypothetical doubts against the unfolding events post 2014, which is no longer hypothetical?

The Recent Development

CIPAA is a going concerns and it is going to stay for another decade or so. Holding to Harban's assertion, CIPAA is complicated, inefficient and lost its focus[82], it is no longer a 'affordable', 'fast and furious' access to 'rough justice'. These 'rough justice' of 'pay first, argue later', as Justice Lee Swee Seng pointed out, is now, 'fine justice' of 'argue, argue more and pay much, much later'.[83] J. Lee quick to make reference to Steve Jobs's, quote, 'if you define the problem correctly, you almost have the solution' as a way forward for CIPAA. So, what the problem is?

(1) Complication:

[76] The Malaysian Lawyer [n 49].
[77] Ali [n14], p.16: Question 7; p.15: Question 6.
[78] Chan [n 29].
[79] Ali [n14], p.18: Question 10.
[80] Ali [n14], p.22: Question 18.
[81] Ali [n14], p.23: Question 19.
[82] The Malaysian Lawyer [n 49].
[83] COA J. Lee Swee Seng's opening remark on 'CIPAA conference in Asia ADR Week 2022', AIAC Kuala Lumpur; see also <https://www.linkedin.com/posts/asian-international-arbitration-centre_asiaadrweek2022-aadrweek2022-aiaccompassus-activity-6984378475428159489-jjZi/>, accessed 1 Nov 2022.

In appointing adjudicator, as in *Zana Bina v Cosmic Master Development*[84], it was held that party who participated fully in an adjudication proceeding without raising any objection as to the validity of the adjudicator's appointment during the proceeding was estopped from raising the objection subsequently in its setting aside application. Yet, the dust is not yet settled, as the issue arises whether the parties must first attempt to agree on an adjudicator before a request for nomination from the Director of AIAC? Short answer, no.[85]

In suing the consultant architect, arising from a recoupment of a failed CIPAA adjudication in *Leap Modulation v PCP Construction* [86], the losing party commence another proceeding suing the architect in *L3 Architects v PCP Construction*[87], citing the classic common law case of *Sutcliffe v Thackrah*[88]. This set in motion the precedent that consultants are 'immune' from being sued by contractors as unlike in Sutcliffe, there is no privity of contract between the contractor and the architect, and thus there is no proximity as to the architect to render its duty of care.

In understanding technical term, such as 'storey' to also include basement, as in *Tan Sri Dato' Yap Suan Chee v CLT Contract*[89] the meaning of storey was referred to the Uniform Building By-laws 1984 to also include basement, thus not necessarily floor above ground. Similarly, the term 'occupation' must be given the widest interpretation to include residential or commercial as in *Liew Piang Voon v WLT Project Management* [90].

(2) Monopoly:

On the absent of the Director to appoint adjudicator, there has been a vacuum in the Directorship of the AIAC[91] when the former AIAC-Director was charged for alleged Criminal Breach of Trust ('CBT'), leading to his resignation.[92] In this case

[84] [*2017*] MLJU 146
[85] *KLIA Associates Sdn Bhd v Mudajaya Corporation Berhad* [2020] 1 LNS 1253
[86] [2018] *MLJU* 772.
[87] [2020] MLJU 972
[88] [1974] AC 727
[89] [2021] MLJU 1964
[90] [2020] 1 LNS 1105
[91] Borneo Post,'Urgent need to appoint AIAC director–SLS', (7 Jul 2020) <https://www.theborneopost.com/2020/07/07/urgent-need-to-appoint-aiac-director-sls/>,accessed 15 Dec 2021.
[92] Edge,'AIAC director resigns over MACC investigation', (22 Nov 2018), <https://www.theedgemarkets.com/article/aiac-director-resigns-over-macc-investigation>, accessed 20Dec2021.

of *Sundra Rajoo v Minister of Foreign Affairs*[93], Rajoo has since been acquitted due to his immunity[94] having being defended by AALCO on the basis of 'exterritorial'[95], 'functional necessities'[96] and 'representative'[97].[98] However Rajoo's case[99] demonstrated the conundrum faced by the Malaysian government, as argued by Thomas, such an immunity has placed the former AIAC-Director, above the law even above the Ruler.[100] But such impasse has left a dent in AIAC, being the sole appointing body for CIPAA adjudication, thus as Lam's concerned, 'CIDB is in control of registering and appointing adjudicators'[101], is in actual fact has no implication whatsoever, as it is irrational to actually vested upon a single appointing body for such a noble task.

On the AIAC's locus standi, as more cases move up to the court, as in *Leap Modulation v PCP Construction*[102], the court has gone as far as to interject the manner and efficacy of CIPAA in dispensing 'rough justice' and to the nature of AIAC being a 'foreign entity' with very little or no 'check and balance' self-regulation, had a monopoly grip on the dispensation of justice in Malaysia, no matter how 'rough' it is.[103] The AIAC has since taken the same matter to the Federal Court to have this portion of the judgement expunged.[104] The fate of CIPAA, while having put 'off tangent' from its initial purposes with more and more inconsistent and unpredictable judgements from the court, was plagued by alleged corruptions resulted in the former Director of the AIAC being replaced, based on the detailed insider content of just a 'poison-penned' letter.[105]

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[93] [2021]Civil Appeal: 01(f)-38-12-2020(W), at 112.
[94] Rajoo [n 93].
[95] Temporary premises of a sovereign in a foreign jurisdiction were perceived to be an extension of the territory of the sending State.
[96] Immunities as being necessary for the mission to perform its functions.
[97] Mission personifies the sending State.
[98] AALCO, 'Immunity of State Officials From Foreign Criminal Jurisdiction', (10 Apr 2012), IMLE <https://www.aalco.int/Background%20Paper%20ILC%2010%20April%202012.pdf>, accessed 27 Dec 2021.
[99] Rajoo [n 93].
[100] Malaysiakini,'Thomas: Legal immunity puts ex-AIAC director above rulers',(6Nov2021) <https://www.malaysiakini.com/news/598081>,accessed 27Dec2021;Thomas,'My Story:Justice in the Wilderness'(GerakBudaya,2021)pp391-399.
[101] Lam [n18], p.13.
[102] [2018] *MLJU* 772
[103] <https://www.malaysiakini.com/news/465089>, accessed 1 Nov 2022.
[104] Ibid.
[105] "AIAC director resigns over MACC investigation", Edge Markets, <https://www.theedgemarkets.com/article/aiac-director-resigns-over-macc-investigation>, accessed 1 Nov 2022.

On the Director's locus standi, in *Mega Sasa v Kinta Bakti*[106], the plaintiff seeks to set aside the adjudication decision on ground that the adjudicator's appointment was not valid for the reason that the appointing director of the AIAC has no locus standi in view that his position as the Director of AIAC is not legitimate in accordance to the Asian African Legal Consultative Organisation ('AALCO') Host Country Agreement. However, the HC held that CIPAA does not violate Article 8(1) Federal Constitution. It also rejected the challenge, that CIPAA is a 'usurpation of the judicial power of the court' in violation of Article 121 Federal Constitution, reason being CIPAA is a judicial function and not a replacement of the courts' judicial power. It further affirmed that the acting director had the power and duty to appoint the adjudicator, regardless if his position as the 'director' has yet to be finalized.

(3) Over Legalistic:

On answering the right question wrongly and the other way around. Courts are not concerned with merits or correctness of the decision.[107] This include, erroneous assessment of documentary evidence.[108] Therefore, Adjudicators are not bound by the disputes referred to them in the exact way as pleaded by the parties, especially with regard to the remedies sought.[109] However, the recent *JKP v Anas Construction*[110] holds that adjudicator must only and narrowly look at the actual contractual provision pleaded by the parties and not stray away with its own finding, even if in his opinion there are other contractual provisions that are more aptly relevant to the claim, as provided as evidence, failing which contravening natural justice. Similarly, the adjudicator must not in his own effort, investigate onto the validity of the evidence presented although CIPAA allows for inquisitorial proceeding as demonstrated in *Cescon Engineers v Pesat Bumi*[111]. The sum of these account for answering the wrong question rightly, thus where is the 'fine line'? Similarly, there were risks where 'expert construction adjudicator' not schooled in law, 'make new contract provision' for the parties, without even realising it[112], thus how to draw the line of committing a 'mistake in law' and yet not fatal?

[106] [2020] 4 CLJ 201; also see *Prestij Mega Construction v Estate of Vinayak Pradhan* BA-24C-13-02/2020 and BA-24C-25-03/2020
[107] *Maju Holdings* Sdn Bhd *v Spring Energy* Sdn Bhd [2021] 8 MLJ 275; *Acoustic & Lighting System v Les Engineering*
[108] *Ong Teik Beng* (t/a MJV Construction) *v Wow Hotel* Sdn Bhd [2022] 8 MLJ 10
[109] *First Commerce v Titan Vista* [2021] MLJU 376.
[110] [2022] MLJU 2124
[111] [2022] 9 MLJ 79
[112] *Perbadanan Perwira Harta Malaysia v Kuntum Melor Sdn Bhd and another case* [2021] MLJU 1593

On being the 'legal playground', CIPAA originally intended to be 'fast and furious' dispensation of justice by construction expert to construction stakeholders, but it has since morph into a 'legal arena' as 'mini arbitration', 'mini trail', 'document only arbitration' or even 'fast track arbitration', as J. Lee implied, it is 'fine justice' now. AIAC (2021) latest statistic shows, CIPAA from its humble beginning of 29 cases (2014), peaked to 816 cases (2019) and then dropped to 530 (2021), indicated the downhill movement of CIPAA, as Harban observed to be unaffordable, complex and ineffective [113], where majority of the parties' representatives are law firms.[114] There may be truth, as Ali argued, 'lawyers (experience) can be helpful in addressing issues in construction arbitrations or mediations while some may be unhelpful as insinuated by PAM and the NSW Act'.[115] Ali suggested that 'training for robust adjudicator with high standard is needed', yet the question is can such be outsourced instead of being monopoly by a single authority? More aptly, unhelpful lawyers are promoting robust 'guerrilla tactics' in taking a 'second bite of the cherry', post adjudication response, by seeking for a hearing to present the 'questions of law' previously not canvass, citing *View Esteem* and 'hold ransom' of the adjudicator citing *Guang Xi Development v Sycal*[116], failure to allow for a hearing in adjudication is contravening natural justice. In another adjudication case [117], a party representative represented by a law firm, requesting the adjudicator to ascertain the quantum of work done without even providing the site progress report or reliable consultant's certification and attempt to set aside the Decision, citing the adjudicator failed to prompt the party as to what documents required.[118] This, again a classic example of lawyers, not technically trained, baffled by the technical construction requirements and norms.

On being a robust defender, another kind of 'guerrilla tactics' employed as robust defence is the systematic use of Statutory Declaration ('SD') in lieu of 'real concrete evidence', as Premaraj observed, 'to be the weakest form of evidence'[119] mirrored one being observed in *Cempaka Majumas v Ecoprasinos Engineering*[120], where the court finds, the adjudicator has the power not to take

[113] The Malaysian Lawyer [n 49].
[114] AIAC Annual Report 2021-2022.
[115] Ali [n17], p.17: cited Geoff Bayley's experience in New Zealand adjudication.
[116] [2018] MLJU 1542
[117] AIAC/D/ADJ-4341-2022
[118] HST Engineers v PauYuan Sdn Bhd [2022], unreported.
[119] Premaraj, 'CIPAA Webinar series on Practical Tips and Must-Have Records for Employers to Succeed in CIPAA' (16 Jun 2022), <https://www.linkedin.com/posts/belden-advocates-%26-solicitors_welcome-you-are-invited-to-join-a-webinar-activity-6933256995030351872-yBrg?>, accessed 1 Nov 2022.
[120] [2019] (BTU-24C-2-7-2018).

into consideration of the SD. Such tactics has through time, evolved to even launching a 'police report' citing the possibility of fraud, to compel the adjudicator that he has no jurisdiction to preside over the matter involving criminality, which is again, unfounded as the 'presumption of innocent' is the underlying doctrine of natural justice.[121]

On being territoriality, in the case of *Tekun Cemerlang v Vinci Construction Grands Projects*[122], West Malaysia lawyers are prohibited to represent disputants in CIPAA Adjudication where the seats are in Borneo.[123] The repercussions spark suggestion that unlike arbitration, statutory adjudication has no seat.[124] Such opinion rely on the provision of CIPAA[125]. It would have been 'less complicated' if lawyers are not involved, as rightly demonstrated in *Cempaka Majumas*[126] where the court held the position of a 'Claim Consultant' as party representative did not contravene s.8 of the Sarawak Advocates Ordinance.

On over complying with timeline, sheer confusion as to the meaning of 'Working Day' previously construed as where the site is located, instead the HC held that the 'Working Day' for the delivery of the Adjudicator's Decision must be construed as the 'working day' of where the Adjudicator's office is located.[127] This area of law is unsettled. As to the definition of "Date" in s.5(2)CIPAA must necessarily mean "a calendar date or a statement by which the due (calendar) date for payment is capable of being identified" and not simply, "immediate" for "instantly", "promptly", "forthwith", "at once" or "straight away".[128] On another matter, commencement of adjudication is upon appointment of adjudicator as compared to serving of the notice of adjudication.[129] The issue is made murkier when it is textbook provision that CIPAA has a strict timeline compliance, i.e. in *Skyworld Development v Zalam Corporation*[130] a day late ultimately rendered the Decision void, but in another case, adjudicator must not act fast to quickly dismiss the adjudication response if it is served even a day late, citing *View Esteem*. Whereas

[121] ADJ-4210-2022
[122] [2021] 11 MLJ 50
[123] s.15, Advocates Ordinance ("**AO**"). The finding of the HC is in contrast with the provision of CIPAA (Section 8(3) of the CIPAA provides that parties to an adjudication proceeding "*may represent himself or be represented by any representative appointed by the party".*
[124] Chaw G, "Statutory Adjudication in Malaysia and 'Sabah Proceeding': A Paradox", [2021], 3 MLJ, p.10: the concept of a 'seat', which is part of the legal framework of arbitration law, does not exist in the law and practice of adjudication.
[125] ss 13, 15 and 16 CIPAA 2012
[126] [2019] (BTU-24C-2-7-2018).
[127] *Encorp Iskandar Development Sdn Bhd v. Konsortium Ipmines Merz Sdn Bhd* [2020] 1 LNS 1129
[128] *Perbadanan Perwira Harta Malaysia v Kuntum Melor Sdn Bhd and another case* [2021] MLJU 1593
[129] *Granstep Development* Sdn Bhd *v Tan Chong Heng & Ors* [2020] MLJU 2364
[130] [2019] 1 LNS 173

in *Utama Motor Workshop v Besicon Engineering Works*[131], the 'hair splitting' argument of term "make" is distinguishable from the word to "deliver" and to "release", as the court held that when an adjudicator "makes" an adjudication decision is a question of fact and very much depends on the date stated on the first and last pages of the adjudication decision.[132] This applied to some instances where the site in question is 'outstation' and via AR-Registered Post, no one from the other side has attempted to receive the Hard-copy Decision, yet the manner of serving notices hold. Yet another case, in *Itramas Technology v Savelite Engineering*[133], the court held that there was actual bias by the Adjudicator for failing to give effect to the MCO[134], thus the question whether it is important to stick to the strict timeline of CIPAA or to allow for 'reasonable' flexibility?

On being 'flip-flopped', in *MIR Valve v TH Heavy Engineering*[135], it is held that 'ship building' contract is excluded from CIPAA within the meaning of "construction work". The similar judgment is held for *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd* [2017], where a shipping contract or a mining contract does not fall within the meaning of "construction work" under s.4, CIPAA. But, in a platform-anchored into the land, is adjudicate-able[136], where interestingly J. Lim Chong Fong, then held, as observed by Sandrasegaran and another, 'he was (1) not bound by his own prior views [inclusive of the quoted passage in *Mir Valve* which he was referred to]; and (2) capable of adjudging the case impartially despite the aforesaid'.[137]

The issues and concerns raise here as the recent developments, are not exhaustive, as CIPAA has enter into its 'volatile zone', plagued with multitude of problems that at any one time, the construction stakeholders including the legal fraternity will dispose-off CIPAA for litigation and or arbitration, not discounting the birth of 'expert determination' on the Malaysian soil, where it is currently at its infancy, as cited by Rajoo, is 'without any legal-baggage', straight forward without a need for 'reasoned decision', even more 'faster and more furious' and legally

[131] [2022] 7 CLJ 313
[132] *Celtex Supreme Sdn Bhd v Mega Bina Garisan Sdn Bhd* [2021] 1 LNS 630
[133] [2021] MLJU 1382
[134] Movement Control Order ('MCO'): measures taken under the Prevention and Control of Infectious Diseases Regulations 2020 [PU(A)91/2020]
[135] [2017] AMEJ 0538
[136] *E.A Technique v Malaysia Marine and Heavy Engineering* [2020] WA-24C-96-06/2019
[137] *Sandrasegaran and other, 'E.A Technique (M) Berhad ("EAT") v. Malaysia Marine and Heavy Engineering Sdn Bhd ("MMHE")'*, (18 Jul 2020), <https://mohanadass.com/publications/articles/ea-technique-m-berhad-eat-v-malaysia-marine-and-heavy-engineering-sdn-bhd-mmhe.html>, accessed 1 Nov 2022.

binding.[138] The trend of CIPAA, as observed by COA J. Lee Swee Seng, at the KL HC seeking to be set aside and or enforced, under s.28, CIPAA, as of 30 Sep 2022, allowed (58%), disallowed (11%) and discontinuation (22%); while seeking to be set aside and or enforced, under s.15, CIPAA, as of 30 Sep 2022, are allowed (11%), disallowed (50%) and discontinuation (32%); and set aside and or enforced, under s.16, CIPAA, as of 30 Sep 2022, are allowed (4%), disallowed (35%) and discontinuation (38%),showing a pro-adjudication approach taken by the court.[139] Perhaps it is also timely to revisit CIDB's Initial Proposal, for a solution in structural, procedural and institutional reform of CIPAA.

Conclusion

This discourse starts by asking, does the creation of the Construction Court and CIPAA resolved the construction industry's conundrum? The discussion thus commence with looking at the 'roller coaster' of long hauled 'gestation' since 2003 to make CIPAA a reality in 2014, where the implemented version was not as envisioned by the construction stakeholders but by the legal fraternity with the AIAC, all that came about from the 'hypothetical doubts'. Further discussion pointed to the growth stage that witnessed the 'disjointed' comprehension of this piece of jurisprudence as 'design intended' by the AIAC with that of another version as interpreted by the upper courts, notably precedent set in *View Esteem*, changing the course of CIPAA into 'disarray'. This follow by peeling into the current state of the CIPAA 'affairs' coupled with 'incidental events within AIAC' and the effects of the pandemic, to draw upon the 'correct definition of the problem and with hope, the solution will almost surface within' as predicted by Steve Job. So, what the problem is, but of (1) Complication; (2) Monopoly; and (3) Over Legalistic, generating the 'push effect' of the construction stakeholders away from CIPAA notwithstanding the pro-adjudication approach taken by the court. With the amount of stockpile of cases in court, as compared to the other forms of ADR, it is testimony of the amount of curial intervention invested into CIPAA. So, does the creation of the Construction Court and CIPAA resolved the construction industry's conundrum? Obviously, NOT. Now, in the turbulence of the waves in the ocean of law, we are forced to look back to the 'star' for guidance and seek the 'compass' that we had so conveniently cast away, to guide the CIPAA vessel to its next destination of glory in the following area of structural, procedural and institutional reform, asking the question, what can be done? Not

[138] Rajoo and others,'Standard Form of Building Contract Compared'(LexisNexis,2022),p456: cited FIDIC RB2017, sub cl.3.7.5, prescribed the Officer's decision, in form is 'expert determination', similarly to PWD203A.
[139] Lee [n 83].

exhaustive as this may be, the followings are the area we could improve on:

(1) Structural Reform

On triangulated relationship[140], among curial intervention, the disputing party and the adjudicator, it is important for the court to wholly submerged into the core objectives of CIPAA, identified as the 4 key features in the CIDB's version[141], where the interpretation of the Act takes into the perspective of 'rough justice' and not 'fine justice', in the hope that the decision as in the *View Esteem* be reversed. Having considered that, the issue on res-judicata[142], as in 'procedural res-judicata' must be eliminated as CIPAA is only temporary finality, but in *Samsung C & T Corporation v Bauer*[143], the doctrine applies to where the portion of the claims that had been adjudicated must not be re-adjudicate.[144] Similarly so, this doctrine apply to presentation of documents, previously not presented.[145] Similarly, technical issues best resolved by technical people, excluding lawyers if the other party is not represented by lawyer[146] and adjudicators are technical professionals that need to be legally trained.[147] In that manner, over legalistic issues as mounted in *Integral Acres v BCEG International*[148] would not have surfaced in the first instance. Coupled with this, there should be decentralisation of training and appointing of adjudicator via the various institution of the construction stakeholders[149], also to include publishing of the sanitised version of the Decision, to add to the feedstock of knowledge in adjudication[150].

(2) Procedural Reform

On streamlining and shortening of the procedure and time of delivery of Decision, mirrored the draft SOPL (Hong Kong)[151], both the Payment Claim or Response,

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[140] Mirrored the findings of Pryles, 'Limits to Party Autonomy in Arbitral Procedure,' (2007), 24 AJA, pp.327–339.
[141] Ali [n14], p.7-10.
[142] *Macly Equity* Sdn Bhd *v Prestij Mega*. *Construction* Sdn Bhd [2021] MLJU 537
[143] [2019] MLJU 1690
[144] *PJ Midtown Development Sdn Bhd v Pembinaan Mitrajaya Sdn Bhd and another summons* [2020] MLJU 1432
[145] *Puncak Niaga Construction Sdn Bhd v Mersing Construction &. Engineering Sdn Bhd* and *other cases* [*2021*] *MLJU 1824*
[146] Ali [n14], p.21: Question 16.
[147] Ali [n14], p.21: Question 15.
[148] [2021] MLJU 1889
[149] Ali [n14], p.21: Answer15.
[150] Ali [n14], p.21: Answer17.
[151] Yang, 'Hong Kong's Contractual Security of Payment (SOP) Regime for Public Works Contracts', (2021), <https://www.lexology.com/library/detail.aspx?g=e948ad6b-fa58-4fcb-a8fe-4ae811406024>, accessed 1

are considered the Adjudication Claim and Response as there is only Claim, Response and Reply with no further ad hoc mechanism required.[152] The current curial discouragement of hearings[153] and rejoinders[154] coupled with a simple yet 'bullet proof' approach to making the decision[155] in CIPAA must be maintained, i.e. suffice to say, '[incline] to agree/disagree or persuaded/not persuaded' as reasons, as court held finding of facts cannot be challenged[156].

On putting a limit for adjudication. CIPAA must not be a 'forum convenience' to contemplate complex issues such as 'final account'[157] and should well deal with all matters interim in nature[158], bar from adjudication upon issuance of certificate of substantive completion or practical completion, leaving the rest for arbitration or litigation. There should also be a cap value of dispute as Harban argued, the current adjudicator's fee enshrined in Act are downright discouraging[159] and only a dispute reaching a certain threshold can be adjudicated and such also include properties owned by a single individual or for its own dwelling at any storey[160]. Similarly so, the Act should allow the creation of an stakeholder's account where the disputed sum must be mandatory deposited prior to adjudication[161], as this will once and for all encouraged 'pay first argue later'[162], hopefully achieving the objective that payment default is a matter of the past[163]. Learning from the pandemic, email communication must be mandated and any timeline, be best taken to be flexible within the 100-days framework[164]. Where permitted, contractual adjudication must be allowed as in the construct of the DRS/DRA[165], in line with the other ADR mechanism and in other word, this Act can be contracted out provided party has pre-agreed to any forms of contractual adjudication[166].

Nov 2022.
[152] Ali [n14], p.21 Question 14.
[153] MRCB [n 72].
[154] *Ireka Engineering & Construction* Sdn Bhd *v*. *Tri Pacific Engineering* Sdn Bhd *and another* [2020] MLJU 548
[155] *Dekinjaya Builder* Sdn Bhd *v Chong Lek Engineering Works Sdn Bhd and another case* [2020] MLJU 2455
[156] *Mei He Development Sdn Bhd v Eosh Industries Sdn Bhd* [2021] MLJU 519
[157] Ali [n14], p.20 Question 13.
[158] Ali [n14], p.18 Question 10; p.17-18 Answer 9.
[159] Harban, 'CIPAA conference in Asia ADR Week 2022', AIAC Kuala Lumpur.
[160] Ali [n14], p.16 Question 8.
[161] Ali [n14], p.21 Answer 14.
[162] Ali [n14], p.14 Answer 3; p.15 Answer 5; p.16 Answer 7.
[163] Ali [n14], p.23 Answer 19.
[164] Ali [n14], p.19 Answer 12.
[165] Dispute Resolution Board (DRB)/ Dispute Resolution Advisor (DRA)
[166] Ali [n14], p.19 Answer 11; p.22 Answer 18.

(3) Institutional Reform

On institutional intervention, AIAC could maintained its role, instead of overseeing the training, appointing and administering CIPAA adjudication, to making policy and monitoring the other allied institutions that have contracted out with such role of the training, appointing and administering CIPAA adjudication, while constantly provide a seamless platform with the judiciary to iron out any 'wrinkles' in the interpretation of the Act, while collecting annual prescription from the outsourced institutions. The inclusion policies will mutually benefitted construction stakeholder institutions and not looked upon as a 'legal playground' befitting only the legal fraternity. Such is glaring when the AIAC has stopped providing information pertaining to the professional background of adjudicators empanelled with the AIAC, in 2016 indicated lawyer (177); Engineer (59); Architect (11); QS (51); and Others (65), indicating an imbalance participation of technical people in adjudication.[167]

These arguments and proposals, as put forward, are not exhaustive as all kinds of issues are now, pushed back to the court for decisions, aptly taken as the 'knowledge gap' or limitation for this critical observation; also not limited to the fact and caveat that this is not a legal advice and the views made in this articles are of the personal view of the author, made for academic purposes without commercial value, based on published materials.

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[167] Cheah, 'Adjudication', (1 Aug 2019), Joint Courses on Alternative Dispute Resolution for Practitioners by IEM + MIArb + RISM + PAM, p.24.

MEDIATION IN INDIA: A HISTORICAL PERSPECTIVE OF ITS DEVELOPMENT

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ABSTRACT

Mediation as a mode of dispute resolution in India has a long history which dates back to the ancient civilization and the Vedic period. From the ancient Indus Valley civilization to modern India, the role of mediation in resolving disputes has been of prime importance in the justice delivery system. Although, India lacks a standalone legislation for mediation as of now, various other legislations spanning across different domains of law catered for mediation to play a dominant role and enabled it to grow and create its own space as a preferred mode of ADR. The newly drafted Mediation Bill, 2021 is all set to be made into a law by the Indian Parliament which will have an exclusive part dealing with International Mediation apart from its domestic part which deals with enforceability of mediated settlement agreements. Further, India is one of the first countries to sign the Singapore Convention, however, it is yet to be ratified. The new Mediation law is expected to pave the way for ratification of the Convention. This article is an attempt to give the readers a full circle of development of mediation from the ancient times to modern India which traversed through various legislations and practices of mediation.

INTRODUCTION

"*Peace is not the absence of conflict, but the ability to cope with it*"
- *Mahatma Gandhi*

The concept of conflicts dates back to the onset of human civilization. Ever since human beings started forming a 'society-living' culture from its primitive and nomadic life, the differences in opinion, exchange of ideas and contentions, whether trivial or significant were bound to arise. Such differences, might grow into conflicts if not resolved at the beginning itself. Thus, ancient societies formulated some kind rules to facilitate resolution of their differences.

Over a period of time, mediation as a mode of justice delivery system has proved its mettle at the grass root level, which acted as 'a common man's conflict resolution body'. The growth of trade and commerce beyond regions and States, were bound to trigger more conflicts. Businessmen or traders normally did not have the time to go to courts for availing efficacious remedy for each and every dispute that took place in the course of their business. They preferred to settle it amicably to preserve their business interest however they found it difficult to resolve the dispute themselves. Accordingly, they sought the help of an expert or an eminent person of their choice to mediate between the parties and with the help of such mediator most of the disputes were resolved. This kind of settlement had no backing of official courts, but were mostly prevalent in the business communities from time immemorial. Thus, mediation as a mode of dispute resolution is not new to India, it has traversed through the ancient times to the regimes of Kings/Emperors, Mughals, and British Rulers to the present legal system.

MEDIATION DURING ANCIENT CIVILIZATIONS

India is one among the prominent ancient civilizations in the world. The Indus *Valley Civilization* dates back to 3000-1500 BC[168] and is considered as the greatest of all other ancient civilizations. The Indus Valley being a vibrant and progressive ancient civilization, used seals, inscriptions, symbols, signs and icons as their mode of communication. They were engaged in trade with the Mesopotamians, another ancient civilization that existed during that time period, found in the present-day Iraq and Kuwait. Although, the existence of their mode of communication is not disputed, researchers had faced multiple issues when deciphering the seals and inscriptions of the Indus civilization, thus preventing us from getting credible information on the language used by them. Additionally, due

[168] B.K Thappar & M. Rafique Mughal, 'The Indus Valley (3000-1500 BC)' in A.H Dani & J.P Mohen (eds), *History of Humanity* (Volume II, UNESCO, Routledge 1996).

to the primitive form of language used at that time which were not deciphered adequately and the lack of any writing on the same, cogent evidences of methods of settlement of differences used by the people of the Valley are not available. However, it can be deduced that they might have used a primitive form of consensual mediation to sort out any differences or disputes amicably as they had continued to trade with other civilizations as well. The prosperous Indus civilization finally met its end as it was wiped out by climate change, either by drying up of the Sarawati River or due to a devastating flood which is still a disputed issue among many scholars.

Another major civilization which came into existence in ancient India after the decline of Indus Valley Civilization is the Vedic civilization. It came into existence during the Vedic period which is believed to be between 1500 to 800 BCE[169]. The Vedic period is known for the advent of *Vedas* (treasure of knowledge of various subjects), the oldest scriptures of Hinduism.

One of the earliest treatises that mentioned mediation as per the Hindu Law was the "Brihadaranyaka Upanishad[170]" Further, Sage Yajnavalkya, a great scholar, laid out that there were three types of popular courts[171] OR tribunals during the Vedic period, which were-

(i) **'*Kulas*'**- Dealt with disputes between members of the family, community, tribes, castes or races

(ii)**'*Srenis*'**- Forum for people engaged in the same business or profession, for example, a corporation of artisans following the same businesses resolved their disputes through this medium.

(iii)**'*Puga*' –** A similar association of traders in any branch of commerce. It acted as the local courts for such traders.

[169] Stanley A Wolpert and others, 'India', *Encyclopedia Britannica*, <https://www.britannica.com/place/India>,accessed 18 Nov 2022.
[170] Swami Krishnananda, *Brihadaranyaka Upanishad*, <https://www.swami-krishnananda.org/brhad_00.html, accessed 18 Nov 2022 >.
[171] *Mediation Training Manual of India*, Mediation and Conciliation Project Committee, Supreme Court of India, <https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf >, accessed 18 Nov 2022.

Further, during the days of Yagnavalkya**,** there was an unprecedented growth and progress in trade, industry and commerce[172]. Indian merchants are believed to have sailed the seven seas for trade, thus paving the path for a strong International Commerce.

Furthermore, another scholar propounded that certain questions or disputes should be determined by a *parishad*[173] which literally translates to an association or an assembly of learned men. Such associations were given powers to resolve disputes based on the principles of *justice, equity and good conscience*. Such methods or mechanism of dispute resolution were given complete autonomy in the matters of local and village administration affecting traders, bankers and artisans. The modern ADR mechanism finds its roots and origin in such ancient customary law in India.

MEDIATION DURING RULE OF EMPIRES

The Mauryan Empire which existed from 321 BCE to 185 BCE was founded by Chandragupta Maurya. Under this empire, the king was considered the head of the law and the topmost authority to met out justice. However, roots of mediation can be found during the regime of Mauryan Empire, as the citizens at the local level had organized courts to decide certain matters which were aided by a village council[174]. Such courts acted as the local courts and only serious matters were referred to Provincial Courts or King's Court.

The Gupta Dynasty, existed from 4th century to 6th century (approximately from 419 BCE to 467 BCE). During the Gupta Dynasty, the village assembly was considered as first court of instance at the bottom of hierarchy. Councils were appointed to hear and dispose cases brought by the concerned parties to the village assembly and the same was considered as the first point of justice[175]. Further, the Empire had additional councils designed for adjudication of matters

[172] ibid
[173] ibid
[174] Iram Majid, *Mediation Theory to Practice* (1st edn, Thomson Reuters Legal 2022) 3.
[175] Gupta Empire and Administrative System', (*The Indian History).* <http://theindianhistory.org/Gupta/gupta-empire-administration-and-administrative-system.html#:~:text=Gupta%20Empire's%20Judicial%20System&text=At%20the%20lowest%20level%20of,matters%20that%20came%20before%20them >accessed 18 Nov 2022.

which were not settled amicably. Additionally, the Gupta Dynasty followed the same principles of Mauryan Empire regarding the King being the highest court of appeal and supreme authority of law.

Mughal Empire which existed from 1556 AD to 1707 AD has no recorded codified law. Mostly the judges followed *Quranic* injunctions or precepts or interpretations of the Holy Law by eminent jurists or the *qanoons* or ordinances declared by the emperor. However, villagers mainly resolved their disputes in the village courts themselves and appealed to the caste courts or *panchayats* for arbitration or mediation by an impartial person of repute[176].

All aforesaid empires encapsulated early ADR methods in resolving disputes in India. These types of ADR methods coupled with similar forms of courts continued to take deep roots in India till the beginning of British rule through their proxy East India Company.

MEDIATION IN PRE-INDEPENDENT INDIA

All types of ADR forms such as mediation, conciliation and arbitration are of ancient origin compared to the present day adversarial common law system. During the pre-British Rule in India, the *Mahajans*[177], a community of prudent businessmen who were highly respected and impartial in their approach were engaged to resolve disputes. They resolved disputes that arose between merchants through mediation in western part of India, which is the present-day Gujarat State. Such form of mediation was usually adopted by an association of merchants and it was subject to strict rules, for example, if any of the members of the association does not resort to mediation headed by the *Mahajans* before approaching the Courts to settle their disputes, such members would be removed from the association. This indicates the mandatory nature of mediation during that period which was supplemented with the imposition of sanction on the defaulting member. The *Mahajans* utilised a combination of Mediation and Arbitration, which the western world presently terms as Med-Arb type of ADR mechanism. This practice was adopted by various rulers and kingdoms as well.

[176] Majid (n 7) 4.
[177] *Mediation Training Manual of India*, Mediation and Conciliation Project Committee, Supreme Court of India, <https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf >, accessed 18 Nov 2022.

Thus, mediation as a mode of dispute settlement enabled parties to reach an amicable settlement while maintaining their relationship and as such it passed the test of time.

MEDIATION DURING BRITISH RULE

The East India Company (EIC) slowly tightened its grip of power in India by taking advantage of rulers who differed on various issues among themselves. By 1753, India was almost converted into a British colony and the British style of courts were established. The British ignored the indigenous adjudication system in vogue and modelled their courts in tune with the British courts of that period. There used to be conflicts in British values, which required a clear-cut decision on the matter and whereas the Indian values encouraged the parties to work out their differences in an amicable manner and reach some form of compromise whereby they could maintain their relationship.

Earlier, many disputes were solved by a group of wise men of the community known as "*Panchayat"* and its members were known as *"panchas"***.** The decision taken by them were binding on the concerned parties. With the introduction of The Bengal Regulation Act of 1772, 1780 and 1781, the *panchayat* system was not abolished, however, parties could additionally seek recourse by submitting their disputes to arbitration and the award passed by the arbitral tribunal was deemed to be the decree of the Court. While the 1781 Regulation Act permitted the parties to refer their disputes before a neutral person mutually consented by them for deliberations, this was normally undertaken by recommendation of a Judge. The British system of courts gradually became the primary justice delivery system in India during the British rule which lasted over 200 years.

In 1935, Government of India Act was passed by parliament of United Kingdom. A federal form of government for the whole of India was proposed with autonomous character for the provinces. It paved the way for a Federal Court which decided disputes between the provinces.

Further, the first Indian Arbitration Act was enacted in 1899 based on the English Arbitration Act of 1889. This was the first substantive law in India on arbitration. Civil Justice Committee had recommended several changes to the arbitration law in 1925, which laid the path for enactment of Arbitration Act 1940 that replaced the 1899 Act. This new act consolidated and amalgamated all the advancements made in the field of ADR in British India.

MEDIATION LEGISLATIONS IN INDIA

Lok Adalat – the concept of people's Court

Lok Adalat or the people's court was first started in March 1982 in Gujarat, a western state of India and it slowly spread across the country. Lok Adalat has since become a statutory organization under the Legal Services Authority Act, 1987. This Act was created with the objective to give legal sanctity for alternative dispute resolution mechanisms (such as mediation, negotiation, conciliation and arbitration) to be used in India in a more organized manner and to settle all disputes/grievances pending at *panchayat* level or at pre-litigation level at lower Courts. Significantly, this Act mandates to provide free legal assistance to the weaker sections of the society so that justice is not denied.

Amendment of CPC and insertion of section 89 and aftermaths

Section 89 of the Civil Procedure Code ("Code"), 1908, and its corresponding rules were inserted into the Code via the Code of Civil Procedure (Amendment) Act,1999 which came into force on 1/7/2002. The insertion of this section gave an obligatory character to mediation wherein parties were actively encouraged to resort to alternative dispute resolution mechanisms provided elements of settlement existed in the dispute. The Law Commission of India's 129th Report[178] along with the Report of the Arrears Committee[179] (popularly known as Malimath Committee) provided an impetus for insertion of Section 89 via the Amendment Act of 1999.

Under Section 89 of the Code, if the court is of the opinion that there exist "*elements of a settlement*", which may be acceptable to parties involved, the court has the discretion to draft terms of a settlement and submit the same to the parties for their observations. Upon such observations made, the Court redrafts the settlement and may refer the dispute to arbitration, conciliation, judicial settlement including Lok Adalat or mediation. The aforesaid section incorporated the principles and modes of alternative dispute resolution mechanism which are encouraged by judiciary when a scope for settlement exists without having to go for trial. This enables the courts to reduce its backlog of cases, helps parties in significantly reducing the costs involved and saves time for both courts and parties. Further, Section 89(2) stipulates various rules to be followed while

[178] Law Commission, 'Urban Litigation Mediation as Alternative to Adjudication', (Law Com No 129, 1988).
[179] Justice V.S Malimath, Justice P.D Desai and Justice A.S Anand, 'Report of The Arrears Committee' (1989-1990).

resorting to the alternate dispute resolution mechanisms including Arbitration & Conciliation Act 1996 for Arbitration, Legal Services Authority Act, 1987 for judicial settlement including Lok Adalat and compromise to be effectuated by the Court between parties in case of mediation, as per the rules prescribed.

The Family Courts Act, 1984

As per Section 9 of the Family Courts Act, 1984, every suit or proceedings filed in the Family Court of the first instance, an endeavor shall be made by such Courts to provide assistance and to persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings in accordance with the rules made by concerned High Courts and follow such procedure as it may deem fit. Even while continuing the proceedings, if it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court has the discretion to adjourn the proceedings for such period as it thinks fit to enable the parties to make attempts to reach a settlement.

Conciliation under the Arbitration and Conciliation Act, 1996 (A&C Act)

Though the word 'mediation' is not used in the A&C Act, sections 61-81 deals with the procedure to be followed in the case of conciliation under Part III of the A&C Act. The term conciliation and mediation are often used interchangeably in India as there is no specific mediation Act in place. However, conciliation is a process whereby a third party helps the parties in a dispute to reach a solution by an agreement whereas in a mediation, the mediator only facilitates discussion between the parties to reach an amicable settlement and does not offer his opinion on the dispute. The third party so appointed is called the conciliator. The conciliator may give his opinion about the dispute and helps the parties reach a settlement agreement. It is a sort of compromise agreement.

The Redressal of Public Grievances Rules, 1998

The Redressal of Public Grievances Rules,1988 were formulated in terms of provisions contained in the Insurance Act, 1938. These rules are applied to insurance companies engaged in the business of general insurance and life insurance business. The Central Government may exempt such insurance companies which have an existing redressal grievances mechanism. Under the rules, one or more Ombudsman is appointed to hear the grievances/complaints raised by the insured against the insurance company. The Ombudsman acts as

a counsellor or mediator in matters which are referred to him for resolution. Any decision made by the Ombudsman with the consent of both the parties shall be final and binding.

Provision of Mediation in Companies Act, 2013

Section 442 of the Companies Act, 2013 envisages that the Central Government shall maintain a panel of experts as mediators and conciliators for the purpose of mediation between the parties during the pendency of proceedings before the Central Government or Tribunal or Appellate Tribunal. Any of the parties at any time during the proceedings may apply to the Central Government or Tribunal or Appellate Tribunal for referring the matter to the panel of experts of mediators and conciliators and accordingly such authority shall appoint the mediators. To facilitate this, the Ministry of Corporate Affairs, Government of India, has formulated a comprehensive rule called the *Companies (Mediation and Conciliation) Rules, 2016* which lays down the entire gamut of procedure, appointment, qualification and conduct of mediation under the Act. The Rules does not mandate the mediators to apply the *Indian Evidence Act, 1872* or *the Code of Civil Procedure, 1908* while considering the matter which is referred to them. They are to be guided by the principles of *fairness and natural justice,* have regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute in question.

Provision of ADR in Consumer Protection Act, 2019

The *Consumer Protection Act, 2019* (**CPA Act**) provides provisions for mediation in consumer dispute resolution mechanism. Sub section (1) of Section 37 of the CPA Act stipulates that during the first hearing after admission of a complaint or at any later stage, if it appears to the District Consumer Dispute Redressal Commission (**DCDRC**), that there exist elements for a settlement which may be acceptable to the parties, it may direct the parties to give in writing within five days, consent to have their dispute settled by mediation. Within five days of receipt of such consent from the parties, the DCDRC shall refer the matter for mediation in accordance with the provisions contained in the CPA Act. In case such matter is not settled by mediation, the DCDRC shall proceed with such complaint in terms of Section 38 of the CPA Act.

The CPA Act further envisages establishment of Consumer Mediation Cells in terms of Section 74 at District, State and National levels by separate notification by the respective States or Central Government as the case may be, and shall

maintain such list of empanelled mediators, list of cases handled through such mediation cell and record of its proceedings. When a settlement is reached between the parties with respect to all of the issues involved in the consumer disputes or with respect to only some of the issues, the terms of such agreement shall be reduced to writing accordingly, and signed by the parties to such dispute or their authorized representative. Then the mediator shall prepare a settlement report and forward the signed agreement along with such report to the concerned Commission.

Further, as per Section 81, the DCDRC or State Consumer Dispute Redressal Commission or the National Consumer Dispute Redressal Commission as the case may be, shall within seven days of the receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly. In case, no agreement is reached between the parties within the specified time or the mediator is of the opinion that settlement is not possible, he shall prepare his report accordingly and submit the same to the concerned Commission in terms of Section 80 (3) of the CPA Act. On receipt of such report the Commission shall continue to hear all the issues involved in such consumer dispute as per section 81 (3).

Additionally, to regulate the smooth functioning of the mediation cells attached to the Commission, the Central Government has framed rules named the *Consumer Protection (Mediation) Rules, 2020.*

The Micro, Small and Medium Enterprises Development Act, 2006 (**MSME Act**).

All the recent legislations in India had the touch of ADR in one or the other form keeping in mind the burgeoning back log of cases in various Courts. The process of conciliation or mediation is made mandatory by the new legislations before a party approaches the Civil Court or proceeds with Arbitration.

Section 18 of the MSME Act mandates that any dispute relating to an amount due under Section 17, shall initially be referred to the Micro and Small Enterprises Facilitation Council (**MSMEF Council).** On receipt of such reference, the MSMEF Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services for conducting conciliation under the provisions of A&C Act. In case such conciliation is not successful and stands terminated without any settlement between the parties, the MSMEF Council shall either itself take up the dispute for

arbitration or refer it to any institution or center. Further, the MSMEF Council shall have jurisdiction to act as an Arbitrator or Conciliator where a dispute exists between a supplier located within its jurisdiction and a buyer located elsewhere in India.

The Real Estate (Regulation and Development) Act 2016 (**RERA**)

Conciliation and Mediation Forums are set up under section 32 (g) of the RERA Act. Such Conciliation and Mediation Forums consist of members of resident associations, RERA Authorities, developer's association and a member from the respective development or industry authority. Every State is empowered to make RERA rules to facilitate speedy resolution of grievances of developers and allottees. The complaints filed before RERA is first considered by the Conciliation and Mediation Forum within 60 days from the date of filing. The states of *Uttar Pradesh* [180] and *Maharashtra* [181] are in the forefront of resolving disputes/grievances of the parties through these Conciliation and Mediation Forums. The resolution of disputes takes place quickly through these Forums and substantially cut down the cost and time of litigation. The Conciliation Forum acts as Mediator between aggrieved parties such as home owners, developers or real estate agents and quick resolution happens before the complaint is formally taken by the RERA Authority for adjudication.

The Commercial Courts Act, 2015 (as amended in 2018)

The Commercial Courts Act, 2015 (CC Act) was passed in India with the sole aim to fast track all commercial disputes by designated Courts rather than filing the same in the regular courts. This has boosted the confidence of both domestic and foreign investors in venturing into commercial activities in Indian markets. Certain shortcomings of this Act were cured through an Amendment carried out in 2018. Section 12A of the CC Act mandates that pre-institution of mediation is to be held in case of commercial suit of specified value, if the subject suit does not contain any urgent interim relief. In a recent landmark judgement by the Supreme Court of India **(SCI)** in the matter of *Patil Automation Private Limited v*

[180] 'UP RERA Registers 125 New Projects in the First Half of 2022', *The Economic Times,* (18 July 2022) <https://economictimes.indiatimes.com/industry/services/property-/-cstruction/up-rera-registers-125-new-projects-in-the-first-half-of-2022/articleshow/92960328.cms?from=mdr> accessed 18 Nov 2022.

[181] Parth Welankar, 'Maharashtra leads nation in implementation of RERA", *Hindustan Times*, (Pune, 04 May 2019) < https://www.hindustantimes.com/pune-news/maharashtra-leads-nation-in-implementation-of-rera/story-hc8e2YG1iqp1mQtDXJAcqK.html> accessed 18 Nov 2022.

Raheja Engineers Private Limited (2022 SCC OnLine SC 1028), an issue was raised whether the pre-institution of mediation under section 12A of the Commercial Act is mandatory. The SCI held in affirmative, cementing the intention of the legislature. The Apex court placed considerable emphasis on the text of the provision which states *"a suit which does not contemplate any urgent interim relief under the Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with the applicable rules".* Further, the Apex court declined to consider section 12A as a mere procedural provision and observed that **"***since settlement under section 12A of the Act is accorded the status of an award under Arbitration & Conciliation Act, 1996, it unerringly points to the object of the legislature to make pre-litigation mediation compulsory***".** This landmark judgment further strengthened the wings of mediation to fly high.

International Convention on Mediation – Singapore Convention

The United Nations Convention on International Settlement Agreements resulting from Mediation is also known as the Singapore Convention of mediation.[182]
Though the Singapore Convention came into force wef. 12 September 2020, the road ahead for its smooth transition into an effective enforcement mechanism is way far. Many domestic legal systems are still not familiar with mediation and as such it has no statutory backing in such States. The Convention gives greater flexibility and autonomy to the contracting States to make its rules and procedure for enforcement of mediated settlement agreement. This may lead to a great deal of uncertainty in the effective application of the Convention in all jurisdictions where domestic law relating to mediation ever existed.
India became one of the first group of signatories to the Convention, however, it is yet to ratify the Convention. The main stumbling block is that of the enforceability of the mediated settlement without having a domestic law which is modelled on the Singapore Convention. For enforcement of any such settlement agreement, a party who holds such agreement has to approach the local court which is having jurisdiction to do so. Any inconsistency or lack of provision in the domestic law shall create issues in the understanding of the domestic Court. Hence, the need of the hour is to make a comprehensive legislation on mediation consistent with the Singapore Convention at the first instance. Towards this step,

[182] 'United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")', (*United Nations*, 20 Dec 2018) https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements accessed 18 Nov 2022.

India has drafted a Mediation Bill 2021.

The Mediation Bill, 2021

We have so far discussed about the historical evolution of mediation from ancient India to the current scenario touching upon the development of ADR mechanisms particularly mediation in almost all branches of major laws which are in force. So far, mediation is used by the courts as an integrated part of its justice delivery system. However, private mediation is scarce as there is no mechanism for efficacious enforcement of mediated settlement. With the signing of Singapore Convention, India felt the need for a comprehensive legislation on mediation both on its domestic and international front, in order to effectively use mediation as an alternative mode of settlement to reduce its burgeoning backlog of around 47 million litigations[183]across various Courts in the Country.

The Supreme Court of India has set up a Mediation and Conciliation Project Committee **(MCPC)** in 2005 for encouraging amicable resolution of disputes pending in the Courts in accordance with section 89 of the Code of Civil Procedure. The MCPC has initiated court integrated mediation process which has proved to be successful. The MCPC also initiated various mediation training programs for lawyers and referral/awareness program for judges. Gradually, mediation has become a tried and tested method of ADR for conflict resolution. The new Bill aims to promote, encourage and facilitate mediation, especially institutional mediation to resolve disputes commercial or otherwise. It proposes mandatory mediation before initiating litigation while safeguarding the rights of the parties to approach directly to courts if urgent relief is required. The mediation process shall be confidential and immunity is provided against its disclosures in certain cases. Further, the mediated settlement agreement **(MSA)** will be legally enforceable by registering with the State/District/Taluk legal authorities within 90 days to record authentication of the settlement. The Bill also proposes to establish a Mediation Council of India (MCI) and also provisions for community mediation.

This Bill was presented in the upper house of the Parliament during December 2021 and subsequently it was referred to a Parliament Standing Committee (**PSC)** for review and suggest changes or improvement.

[183] Sumeda, 'The Clogged State of the Indian Judiciary', *The Hindu,* (10 May 2022) < https://www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief-justiceundertrials/article65378182.ece > accessed 18 Nov 2022.

Recommendations of PSC[184]

- To modify the wordings suitably in the Bill to include non-commercial disputes of Government under the ambit of the bill with a view to reduce the pendency of litigation in the Courts.
- India has not yet ratified the Singapore Convention; hence, the section of International Mediation in the Bill has to be suitably drafted to incorporate provisions of Singapore Convention without any ambiguity as and when the Convention is ratified by India.
- The clauses containing "*pre-litigation mediation*" and the "*court annexed mediation*" has to be rearranged to have more clarity. Further the committee also recommended that the compulsory "*pre-litigation mediation*" may cause delay in the process of litigation and this provision may be introduced in a phased manner rather than to incorporate it in one-go.
- The time limit to complete the mediation process to be reduced to 90 days with a maximum of further extension of 60 days instead of 180 days as proposed in the Bill.
- To revisit the procedure for drawing MSA, non-settlement report and registration of MSA at enforcement authorities.
- PSC recommends detailed procedure for online mediation in the Bill as the Covid-19 pandemic has already opened the gateway for such online dispute resolution.
- PSC affirms the clause of community mediation of disputes which affects peace, harmony and tranquility in the society. Such mediators to be named as Community Mediators and "*non-enforceability*" part of such community mediation has to be deleted so that it serves the purpose of inclusion of such community mediation in the Bill.

The Mediation Bill, 2021 is expected to be placed in the Parliament with suitable amendment for consideration of both the houses. Once the Bill is passed and notified, India will have a comprehensive piece of legislation for Mediation.

CONCLUSION

The evolution of mediation in India has been a long journey from the ancient

[184] Rajya Sabha Secretariat, 'Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice', Press Release <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/Press_ReleaseFile/18/164/543P_2022_7_11.pdf > accessed 18 Nov 2022.

civilization to the modern India. India has always believed in peaceful settlement of disputes so is the case with in its legal system. However, the adversarial mode of legal system practiced in India has, over the period of time, resulted in piling up of cases in the Courts across the country. The various pieces of legislation and the concerted efforts of the Courts especially the Apex court could not alleviate the ever-increasing litigation as the litigants felt that adversarial mode is more suited to their needs, as they need not deal with their adversary directly. They felt that their rights are well protected and safe when the Courts give judgment after hearing both the parties. This mind-set of litigants prevented any big breakthrough in resorting to mediation. Litigants always felt that going for mediation means they had to give up their rights and thus they would be exposing their weak side of the case.

Lok Adalat (the People's Court) and its efficient functioning across the country has helped in reversing this image of litigants. Gradually, momentum has risen to refer disputes to ADR mechanisms, especially mediation. Parties are slowly coming around and understanding the concept of gaining everything in mediation including a quick, cordial, win-win and binding resolution, if not permanently, but for a considerable period of time. It is imperative that the current Institutions whether it is affiliated to Government or private, reinvigorate their efforts of providing awareness program to the litigants to resort to mediation as first choice of settlement of their disputes. This has to come from the grass root level especially from the *panchayat* or *taluk* level so that the message is clearly ingrained in the minds of the people. At the same time, lawyers especially trial lawyers are to be sensitized to the need of mediation to cut down the backlog of cases in the country. Their concern of losing opportunities to represent their clients has to be addressed properly.

When the proposed Mediation Bill is passed by the Parliament, India is expected to have a Mediation Council and recognized institutions under it to promote and encourage mediation. There will be lots of opportunities to the trained Mediators and private institutions engaged in ADR particularly mediation. The main hurdle regarding enforceability of MSA is taken care of by the Mediation Bill. However, the road is not so smooth, as the new law has to be passed in the coming session of the Parliament, obtain the assent of the President and notified in gazettes before any provisions of the Bill takes effect. The establishment of Mediation Council of India which takes shape into a nodal agency to oversee the mediation institutions, qualification of mediators and their training is time consuming and until such time, the present arrangement of court annexed mediation has to continue.

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THE BENEFITS OF MEDIATION AND ARBITRATION IN RESOLVING MEDICAL DISPUTES

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Introduction

The number of claims on medical disputes is on the rise in many countries including Malaysia. Even though comprehensive annual statistics on medical negligence claims are not available in Malaysia, since such data are not systematically collected in this country, the increase could be seen in premiums paid by doctors for protection against malpractice suits.[185] The number of complaints received by the Medico Legal Department of the Ministry of Health also revealed that the number of complaints received in 2011 rose from the previous year, with a total of 1,394 complaints.[186] Furthermore, according to Datuk Seri Dr. Dzulkefly Ahmad, the former Malaysian Health Minister, the increased number of medical malpractice cases in both government and private hospitals has now become a serious concern in this country.

Medical disputes can occur for a number of reasons. In most instances, such disputes arise out of medical negligence committed by doctors or medical practitioners such as misleading treatment cases including the failure to perform and deliver the obligations with care to their patients. Normally, some of those affected will lodge a complaint to the Health Ministry and the Malaysian Medical Council (MMC), and the parties in this issue will either choose to go through litigation or any alternative dispute resolution (ADR) method to settle such disputes. Moreover, ADR in the medical field is increasingly popular across the globe.[187] Hence, this paper aims to discuss the factors that can make ADR more

[185] Radhakrishnan S. (2003). *Medical Negligence Cases up in Malaysia. Asia Africa Intelligence Wire.* Global Journal of Health Science, 6(4), 76–83.
[186] MOH Annual Report 2011.
[187] Romany, S. (2017). *Why mediation and arbitration offer a better route to solving medical disputes*. Retrieved December 30, 2020, from https://theconversation.com/why-mediation-and-arbitration-offer-a-better-route-to-solving-medical-disputes-83986

advantageous for medical disputes than litigation. This paper starts by explaining the challenges of using litigation in handling medical negligence claims and further investigates how ADR methods, specifically Mediation and Arbitration could help tackle all of these challenges in litigation in settling the medical disputes.

The Challenges of Using Litigation for Medical Disputes

Traditionally, litigation by using the tort system has been selected as the most frequent alternative used to settle disputes in the medical area.[188] The main reason behind victims preferring litigation to settle the disputes is that it will help the claimant gain the financial reward.[189] Nevertheless, there are several challenges of using litigation in solving such cases. Firstly, medical negligence cases are mostly handled under civil law in Malaysia. In other words, since there is no specific law in Malaysia against medical malpractice, the tort system or civil law is used to deal with medical negligence.[190] Furthermore, the burden of proof in medical malpractice cases rests with the plaintiffs to establish malpractice occurred by a preponderance of the evidence. Thus, in order to attain the claim, plaintiffs must provide enough proof of the elements of medical negligence, including that the plaintiff and defendant had a provider-patient relationship. Next, the plaintiff must prove that their injuries or deteriorating condition were caused by the provider's subpar care, which fell below the expected standard of care. Last but not least, the plaintiff must also demonstrate that the negligent care caused quantifiable damages for him or her.[191] However, a study found that it is complicated for the plaintiff in cases like medical negligence to fulfil the formalities prescribed in the Law of Tort.[192] According to Tun Salleh Abbas FJ in his judgement in the case of Kow Nan Seng v. Nagamah & Ors at the Federal Court, the medical negligence statute is sufficiently clear; however, its implementation is challenging.[193] In other words, the medical law is clear but the establishment and the use of medical negligence law is the hardest part, especially in proving the element of 'causation' in tort law. For instance, in the case of a surgery, a patient can develop some known complications and accept the risks associated

[188] Ali, M. M. (2000). *Medical Negligence: New Issues and Their Resolution*. 3 MLJ
[189] ibid
[190] Ismail, Z. (2014). Medical *Negligence: Current Position of Malaysia and Bangladesh.* World Journal of Environmental Biosciences. 8(3). 18-21.
[191]Ibid.
[192] Maizatul, F. M. M. (2016). *Medical Negligence Dispute in Malaysia: Choosing Mediation as the Best Constructive Approach to Address the Paradoxes in Medical Negligence Claims*. European Journal of Interdisciplinary Studies 2(2), 201.
[193] [1982] 1 M.L.J. 128

with the procedure, which can still occur even when the surgery is performed within the standard of care. Therefore, it is hard to prove within a reasonable degree of medical certainty that a bad surgical outcome was "caused" by the negligence of the surgeon, and this is why many medical malpractice lawsuits are summarily dismissed by courts as being meritless nuisance suits. Evidence from the United States also confirms that over 60% of lawsuits for medical malpractice are summarily denied as having no validity.[194]

Furthermore, medical litigation does not only require a huge investment of money but also time for an uncertain verdict. To put it simply, litigation in medical negligence cases can take years to resolve. For instance, one of the reported cases involving Dr. Chin Yoon Hiap v Ng Eu Khoon & Ors took 16 years to solve.[195] Meanwhile, another case has been revealed to take almost 24 years to finally reach the end of the case.[196] In addition, medical professionals must also risk irreparable damage to their reputation once they are involved in such commenced litigation. Although one is innocent until proven guilty, research has shown that a medical negligence claim undermines a doctor's credibility and implies faulty judgement even if the doctor is found not guilty at the end of the trial.[197] Simply put, by bringing legal action, the patient attacks the doctor's credibility, implying poor judgement and treatment. Thus, self-esteem and status as a successful practitioner may be jeopardised overnight.

Moreover, some studies reported that the majority of victims in medical disputes want an honest explanation for what went wrong, an apology, reassurance that the same accident will not happen again in the future, and in some instances, compensation.[198] Nevertheless, an outcome of a litigation cannot meet the demands of the victims in this case. As mentioned earlier, litigation incurs expenditure and takes a long time to conclude; therefore, often it is unlikely to lead to an amicable, early, or satisfactory resolution for many.

Due to the fact that the conventional litigation has its own limitations, ADR has now become another forum of choice for medical or healthcare disputes.[199] ADR

[194] David, H. S. & Sonny, B. (2012). *Medical malpractice reform: the role of alternative dispute resolution*. Clinical Orthopaedics and Related Research, 470(5), 1370–1378.
[195] [1998] 1 MLJ 57
[196] Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 CLJ 229.
[197] ibid
[198] Milton, L. (n.d). *Mediation in medical dispute.* The Federation of Private Medical Practitioners Associations. Retrieved December 28, 2020, from http://fpmpam.org/about.html (accessed 22 December 2020)
[199] Katherine, B. (2011). *Why ADR not Litigation for Healthcare Dispute*. Dispute Resolution

approaches have increasingly been applied to help resolve disputes in the medical sector as well as improving healthcare satisfaction.[200] Many have agreed that an alternative dispute resolution is a worthy option for resolving disputes in the medical industry.[201] Evidently, several countries have launched some programs that purportedly use ADR to resolve medical disputes.[202] Furthermore, there are numerous benefits associated with using ADR methods to resolve medical disputes in terms of time, costs, and disclosure. The benefits of ADR methods, specifically in the context of meditation and arbitration in medical disputes will be explained in the next section.

The Use of Mediation in Medical Disputes

According to the Bar Council Malaysian Mediation Centre, mediation is a voluntary process whereby the disputing parties come together with the assistance of a neutral third party known as the mediator, systematically identifying disputed issues in order to develop options and alternatives, as well as reaching a consensual settlement that both parties agree with.[203] This approach has been commonly used worldwide, especially in resolving family and commercial disputes. In addition, the use of mediation in medical malpractice disputes was first introduced in the US in the mid-1980s.[204]

This method is believed to be the right choice if both parties want to settle the claim in good faith as it is not an examination or cross-examination under oath but rather an opportunity to talk and discuss.[205] In particular, this method allows all the parties to voice out their concerns. For example, doctors are welcomed to express disappointment at being sued when they are not at fault and explain the toll this takes on their ability to care for other patients, while the patients can also express their viewpoints on the matter. Besides, mediators are not the makers of

Journal 66(3)

[200] Wang, M., Liu, G.G., Zhao, H. et al. (2020). *The role of mediation in solving medical disputes in China*. BMC Health Survey Research 20(1), 225. doi: 10.1186/s12913-020-5044-7.

[201] ibid

[202] Scott, F. (2015). *Helping the Medicine Go Down: How of Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*. OHIO State Journal on Dispute Resolution 14 (3)

[203] Bar Council Malaysian Mediation Centre.

[204] Hickson, G. B., Pichert, J. W., Federspiel, C. F., & Clayton, E.W. (1997) *Development of an early identification and response model of malpractice prevention*. Law and contemporary problems 60(7), 29. doi:10.2307/1191993

[205]Jacqueline, N. H. (2012) *Mediation: The New Arbitration.* Harvard Negotiation Law Review. 17(61).

the decision, but rather the parties. In other words, the mediators cannot implement a settlement because there is no resolution until the parties agree to resolve the claim.

In the UK, for instance, the medical negligence mediation pilot programme was started as a result of an increase in the frequency of medical malpractice and the size of claims.[206] The purpose of the pilot programme was to determine whether mediation could raise customer satisfaction with claims management. By the end of the third year of the plan, settlement had been reached in 11 of the 12 cases that had been mediated. The cases involved a variety of medical specialties, and they were resolved in an average of seven hours. Even though one case was settled for £80,000, the average settlement was just over £34,000. According to Linda Mulcahy, the Professor of Socio-Legal Studies at University of Oxford UK, the official assessment of the plan and the report, mediation in cases involving medical negligence had a lot of potential.[207]

Apart from that, mediation shall guarantee the confidentiality of the parties. All documents, discussions, and the results of mediation are fully confidential until the conditions of the settlement have been decided by all parties.[208] Hence, this method is especially suitable for the healthcare professionals and their institutions who care about professional image and reputations, or the patients who refuse the social stigma attached to their disease or suffering.

Furthermore, the informal climate in meditation contributes to the capacity to be innovative in remedies. Due to the fact that there is no winner or loser in mediation, a solution that both parties are pleased with is formed. Each party is free to develop their own solutions and is not required to follow the available legal remedies.[209] In other words, while litigation can only lead to monetary awards, mediation may lead to solutions such as the implementation of future safety protocols or expressions of sympathy from the physician, which the patient may find more satisfying. As described by an experienced American medical negligence mediator, Prof Henry Lerm, this approach presents a "therapeutic resolution" of the conflict, giving parties an opportunity to clarify or obtain an explanation, apologize or forgive, and have relationships closed and restored. Moreover, studies have indicated that the primary reason a patient sues a

[206]ibid
[207]Linda, M. (2000). Mediating Medical Negligence Claim. *Amicus Curiae - Journal of the Institute of Advanced Legal Studies and its Society for Advanced Legal Studies*. 30.
[208]ibid
[209] Kehakiman.gov.

physician in certain cases is not to demand compensation, but to identify what went wrong.[210] For instance, in one case of medical malpractice trial, the plaintiff admits that money was not the number one reason for suing, but rather an apology and information about why the adverse event occurred.[211] Thus, the mediation method can help the parties achieve their real motives since mediated settlements require agreement by both parties. To put it simply, this method enables the parties to present explanatory rather than defensive narratives, which leads to the greatest durability and satisfaction of all parties.[212]

Apart from that, mediated cases are highly time-efficient.[213] The procedure is often quick and relatively inexpensive. According to a survey, mediation takes only 1 to 3 days on average, with cases ending between 85 and 165 days from start to finish.[214] On the contrary, litigation usually takes a long time to conclude. In Malaysia, the entire medical negligence litigation process takes an average of at least 15 years and can take up to 25 years from the date of the incident to the end of the case.[215] Moreover, the cost for meditation is generally minimal compared to a court ligation, which requires a discovery, pre-hearing hearings, and the final litigation that may take years to resolve. On the other hand, most mediation sessions last at most a few hours to a day or two. Besides, surveyed attorneys reported that their average preparation time for trials is 36 hours compared to mediation time with only 2.5 hours.[216]

In short, mediation is considered a quicker solution than litigation and is less complex. Compared to the time required for litigation, mediation does not take long to settle and it also costs less financial burden. Parties will save a considerable amount of attorney's fees, legal costs, and other expenditures by settling conflicts early in mediation. This approach does not only allow the parties to speak up and be heard, but it is also confidential and any discussion during mediation will not be disclosed. Thus, the parties should not have to worry about their image or reputation. Unlike litigation, mediation enables the parties to

[210] Pandit, M.S., & Pandit, S. (2009) *Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense – A Legal Perspective.* Indian J Urol 25(3). 372.
[211] Szmania, S. J., Johnson, A. M., & Mulligan, M. (2008) *Alternative dispute resolution in medical malpractice: a survey of emerging trends and practices*. Conflict Resolution Quarterly. 26(1), 71–96. doi: 10.1002/crq.224.
[212] Metzloff, T. B. (1992) *Alternative dispute resolution strategies in medical malpractice*. Alaska Law Review. 9, 429–457.
[213] ibid
[214] ibid.
[215] Foo Fio Na v Hospital Assunta &Ano [1999] 6MLJ
[216] ibid.

control the outcome and the mediation decisions and terms for the solution are made and agreed upon by the parties. Finally, resolution during mediation is completely voluntary; thus, if the settlement is not reached, the parties always have a chance to bring up to the litigation process to settle the issue.

The Use of Arbitration in Medical Disputes

Aside from mediation, arbitration has long been proposed as a way of unclogging overloaded court dockets to settle medical malpractice disputes.[217] Arbitration is a private process where the disputing parties agree that one or several individuals can make a decision about the dispute after hearing arguments and seeing all evidence. This approach is quite similar to court proceedings, which requires all parties to make opening statements and present all evidence to the arbitrator. However, instead of a judge or jury, the final decision of the case is made by a privately retained individual or an arbitrator. Furthermore, unlike court trials, arbitration can only take place if both parties have agreed to resolve their disputes through this approach.

There are several advantages of this approach in resolving medical disputes. Firstly, it is widely accepted that arbitration is easier and more successful than litigation.[218] Compared to trials, arbitration can usually be completed more quickly and is less formal. Given the limited resources required to resolve disputes, this significantly decreases the time taken to conclude an arbitration proceeding. Evidently, the Federal Mediation and Conciliation Services through their research found that the average time from filing to the decision was about 475 days in an arbitrated case, while a similar case took from 18 months to three years to wend its way through the courts.[219] Furthermore, in a trial, jurors must first be educated in the basics necessary to understand the medical issues as this process alone can take weeks of expensive trial time under the most ideal conditions. Nevertheless, in arbitration, an arbitrator is chosen among the experts of the issue. For example in a medical negligence case, an arbitrator may be chosen among the medical experts. Thus, an experienced and competent arbitrator does not need to be informed about science, but rather about the facts of the issue. Hence, this highly saves more time.

Furthermore, arbitration also offers confidentiality to the dispute parties since it

[217] James W. R. (1994) *ADR Relieves Pain of Health Care Disputes*. Disp. Resol. J. 14, 15
[218] Russo, L. A. (2006). *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*. Hofstra Law Review. 35(1)

does not take place in an open court and the records of such trials are generally not open to the public, aside from such exceptions. Thus, making information unavailable to the public about the resolution and settlement of legal malpractice lawsuits provides an extra layer of secrecy to the arbitration process, and this allows the parties to preserve their public image. Last but not least, another important feature of arbitration that is unlike litigation is that it offers flexibility. Arbitration hearings can typically be arranged around the needs and availability of those involved, including weekends and evenings, unlike trials that must be worked on in overcrowded court schedules.

In short, the above are only some of the main advantages associated with arbitration. Although the pace and efficacy of the court process in Malaysia have greatly improved over the past few years, arbitration is still seen as an attractive way to settle medical disputes, especially where confidentiality is of paramount importance and specialist expertise is needed.

Conclusion

To sum up, this paper argues that medical disputes are better resolved through alternative dispute resolution mechanisms as opposed to litigation, which is deemed ineffective in ensuring equal and sufficient oversight and justice for victims in medical disputes. Other than expensive, litigating a medical negligence dispute can also take years to settle. Besides, parties can be left despondent, emotionally drained, and financially ruined at times.

Therefore, ADR methods could help tackle such limitations in litigation. Particularly, mediation and arbitration have become common instruments of choice to settle medical malpractice claims these days, and they are also less challenging than litigation. Several advantages should be highlighted on the use of mediation and arbitration to settle conflicts over medical malpractice. These two approaches are not only able to speed up dispute resolutions for both parties, but also preserve the confidentiality of the parties involved, which is not available in litigation.

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