



CONSTRUCTION DISPUTE RESOLUTION

Kee Meng Fai,
Partner of Belden Advocates and Solicitors



Overview

W

- 1. Overview of Construction Dispute Resolution**
- 2. Documents, documents and documents!**
- 3. Variation**
- 4. Set-Offs**
- 5. LAD**
- 6. Extension of Time**
- 7. Termination**

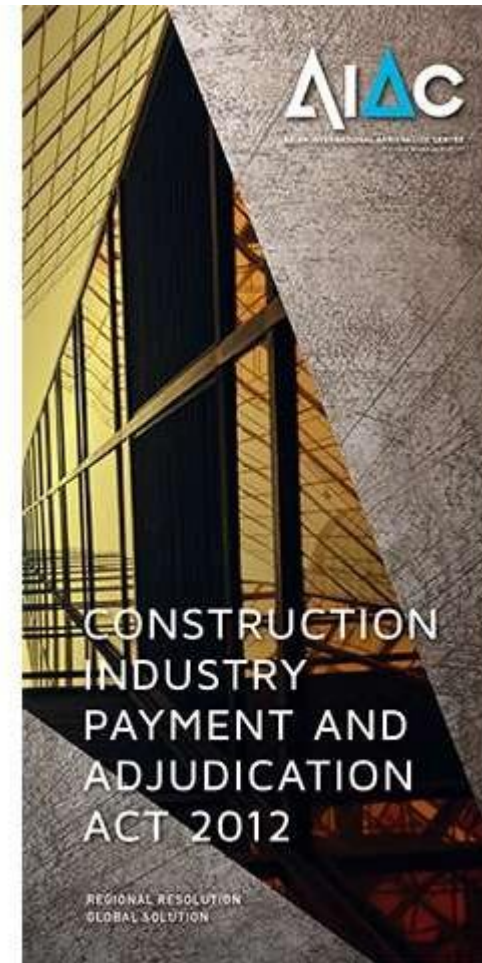
Types of Dispute Resolution



Court



Arbitration



Adjudication

PAM Adjudication Rules
(2010 Edition)

PAM
Adjudication

Construction Courts

- There are 2 specialised construction courts in Malaysia:
 - Kuala Lumpur
 - Shah Alam
- The usual court process takes around **9 – 15 months** to conclude.



Arbitratio n

- Arbitration in Malaysia is oftenly conducted in the Asian International Arbitration Centre (AIAC).
- Matters brought to arbitration usually involves experts on complex issues.
- The usual arbitration process takes around **12-24 months** to conclude.



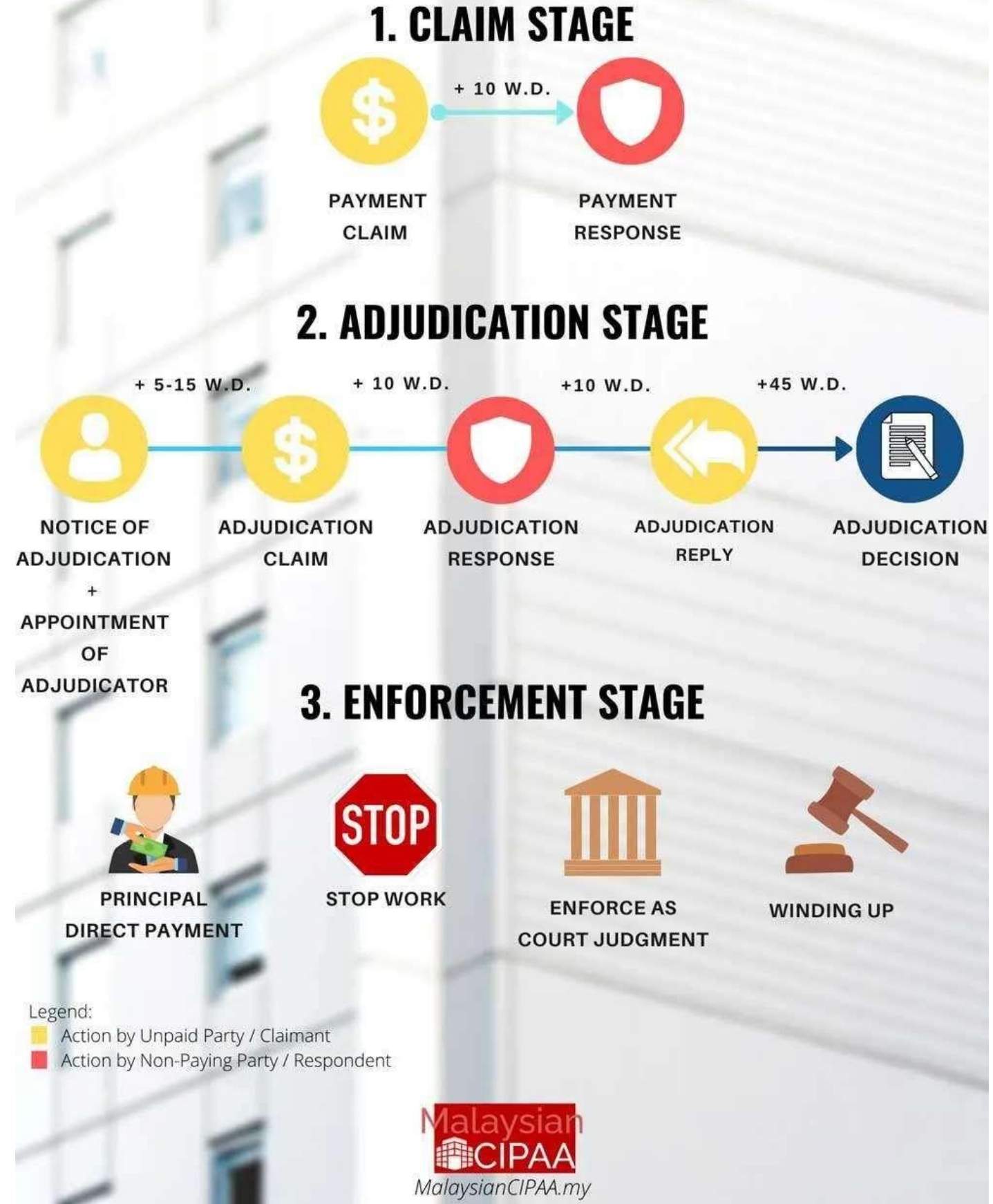
Adjudication under CIPAA 2012

Preamble to the Act:

“An act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry

- CIPAA encapsulates the core principle of **Pay now, argue later.**
- A typical period for the process of CIPAA to run is **90 days.**
- What more CIPAA proceedings and arbitration can be done **simultaneously!**

CIPAA 2012 PROCESS FLOWCHART



Source:

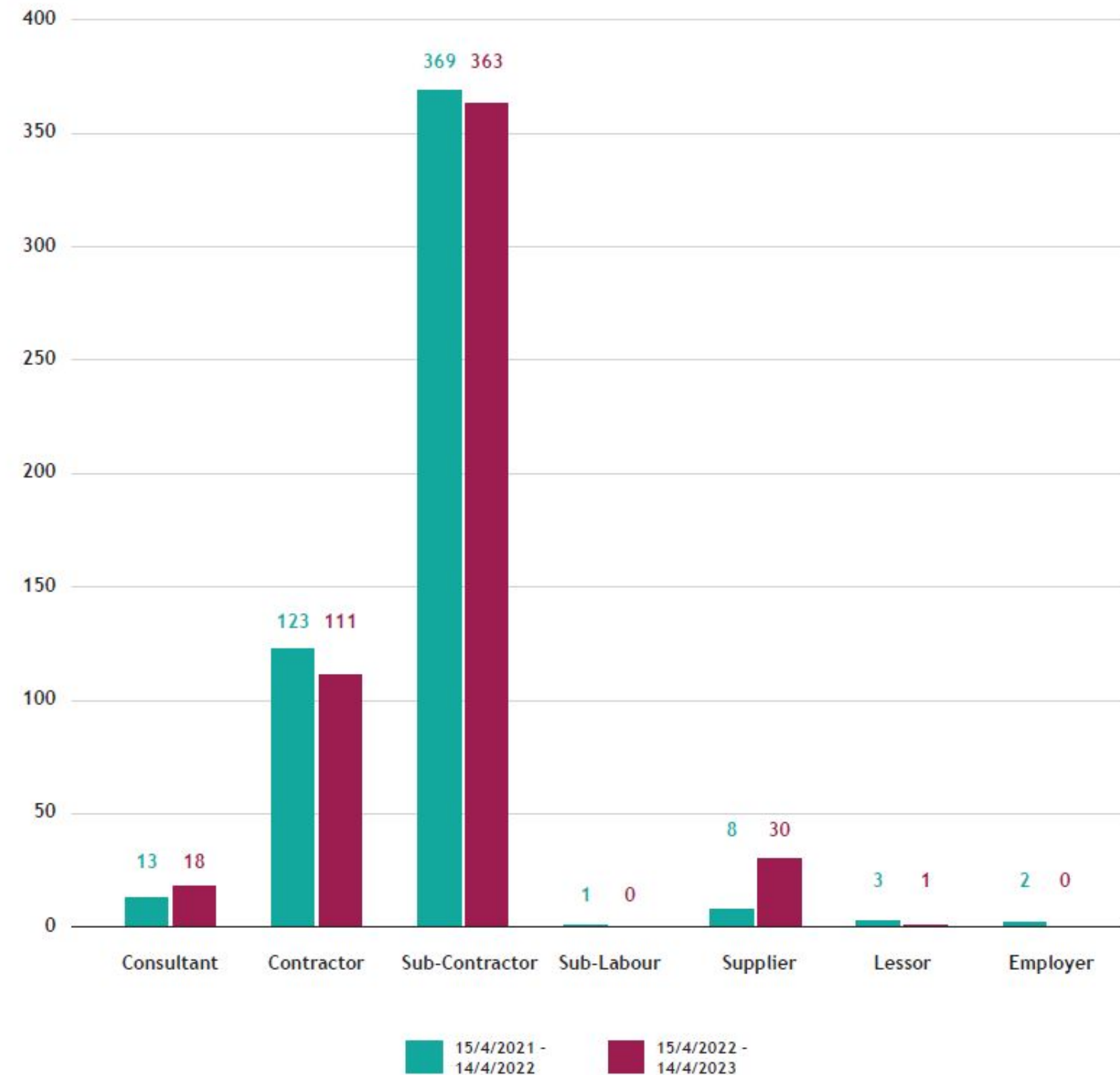
<https://www.malaysiancipaa.my/cipaa-general-information/procedure-for-cipaa-adjudication-proceeding/>

CIPAA Statistics

In both fiscal years, the majority of the Claimant's consist of **Sub-Contractors, comprising 69%** of the total during the term in 15/4/22 – 14/4/2023.

5. Claimant Statistics

5.1 Claimant Statistics by Claimant's Profile

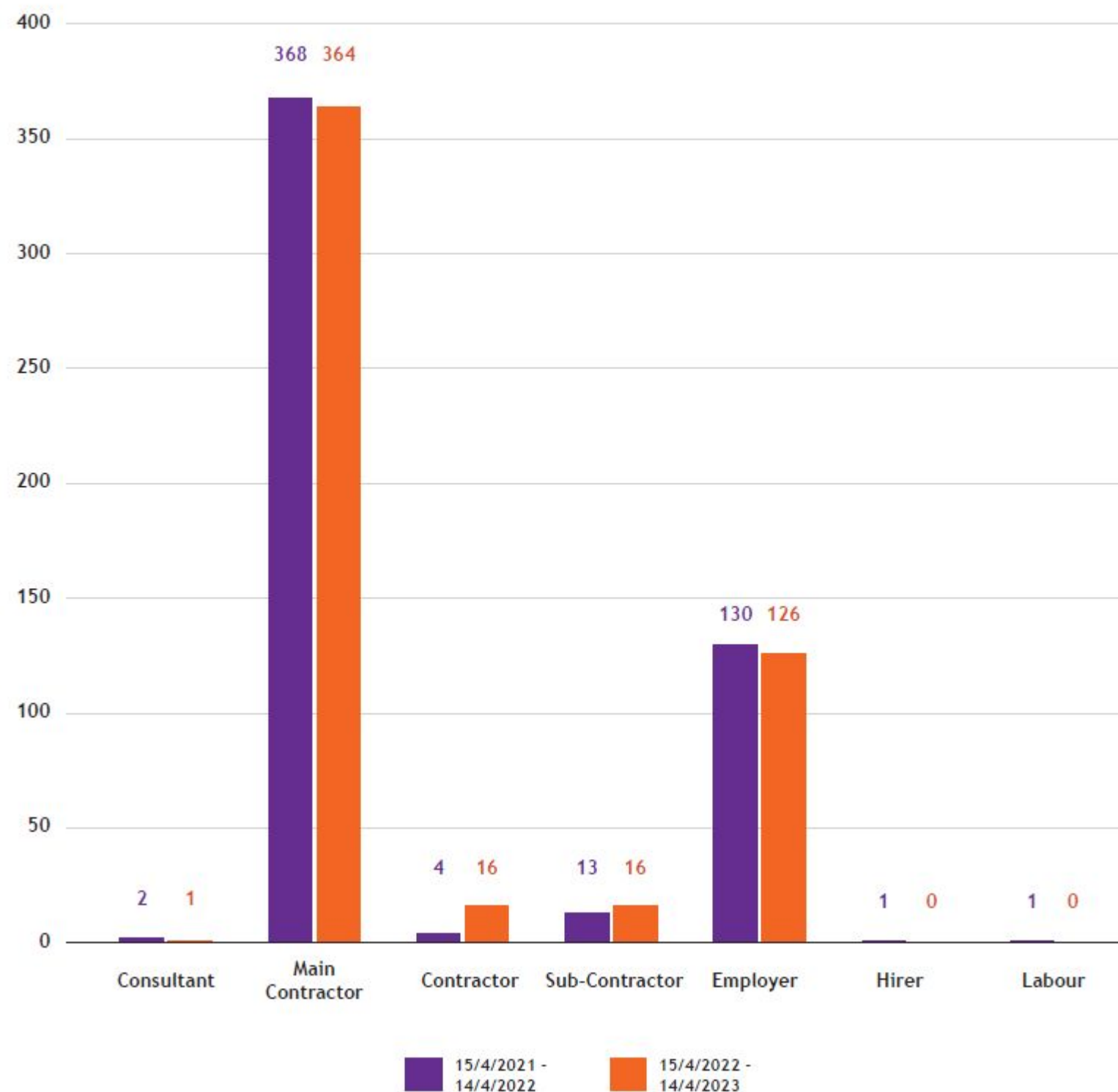


You are at risk!

The Employers and Main Contractors top the charts being the majority of Respondents in CIPAA cases with the composition of 70% being Main Contractors followed by Employers at 24% during the term 15/4/2022 – 14/4/2023.

6. Respondent Statistics

6.1 Respondent Statistics by Respondent's Profile



Common areas arising from construction dispute resolution

- Extension of time;
- Variation Orders;
- Defects;
- Termination;
- Set-off and/or Deductions; and
- Etc.



Why do you matter?



- As will be further elaborated, every person in the team will play a crucial role in **documentation**.
- Every person on board should play their role properly to ensure the uniformity and streamlining of information.
- In addition, everyone and anyone of you can be a **witness!**
- Court/Arbitration can issue a **subpoena** to compel a person to attend Court/Arbitration as a witness.

Importance of proper Documentation



Case by case analysis provides that the party with proper documentations is more likely to succeed in the claim!

Case Study:

- 1. Tindok Besar Estate Sdn Bhd v Tinjar Co**
- 2. Pearson Hardman Industries (M) Sdn Bhd v MES Technoservice Malaysia**
- 3. Soo Lian Yee v China Railway Engineering Corporation (M) Sdn Bhd & Anor**
- 4. Bluedream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd and another case [2021] 11 MLJ 641**

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229

Principle: When oral evidence openly clashes with contemporaneous documentary evidence, the courts generally prefer to rely on documentary evidence.

- The issue arising from the case is whether the agreement is invalid on grounds of illegality, fraud and misrepresentation.
- The court held that the allegations of fraud and misrepresentation against the appellant could not be sustained.
- There was a clash between the evidence given by the respondent's witness and the contemporaneous documentary evidence. Court admitted the documentary evidence.
- **"...For myself, I would rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection from them... Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstance of the case."**

Pearson Hardman Industries (M) Sdn Bhd v MES Technoservice Malaysia Sdn Bhd [2021] 1 LNS 2197

Principle: Your documents must be properly substantiated.

- Defendant issued a Notice of Termination dated 1.10.2019 which was absence of any justification.
- Subsequently, 10 days after the issuance of the Notice of Termination, the Defendant issued a Letter of Termination dated 11.10.2019 wherein the justification for such termination was provided.
- The issue that arose which notice of termination was the one that had terminated the contractual relationship between the parties.
- The High Court held that the Notice of Termination dated 1.10.2019 was effectively the notice that terminated the contractual relationship but further held it was **unlawful** due to the absence of any justification.

Pearson Hardman Industries (M) Sdn Bhd v MES Technoservice Malaysia Sdn Bhd [2021] 1 LNS 2197

- The Defendant may have good reasons to terminate the Plaintiff's contract, but those reasons did not come into play because the Defendant was careless in their first correspondence.

Bluedream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd and another [2021] MLJ 641

Principle: New Evidence after Adjudication not to be admitted

- The Applicants sought to adduce new evidence (which was never adduced before the Adjudicator) in the setting aside application.
- The High Court dismissed the said application by concluding that the Adjudicator did **not** exceed his jurisdiction and dismissed the introduction of the new evidence.
- The High Court dismissed as there is no reasonable explanation on why the said new evidence is not tendered during the adjudication proceedings, it may cast doubt on the weight of the new evidence and the bona fides of the applicant in adducing this new evidence.

Soo Lian Yee v China Railway Engineering Corporation (M) Sdn Bhd & Anor

Principle: Burden of Proof rest on the party claiming

- The respondents were JV partners in a railway rehabilitation project in Sabah. They appointed the appellant as the subcontractor for the Project. The appellant claimed for balance of unpaid work including retention sum. The respondent counterclaimed for LAD arising from the delay.
- Court of Appeal dismissed the respondent's claim for LAD as they had failed to prove the entitlement.
- “[27] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence”

Evidence at Court

- **Only contracts/ letters/memo/memorandum?**
- **What if the contract is unsigned?**
- **What about Whatsapp, Telegram and SMS?**
- **How about Teams/Zoom meetings?**

Contractual Documents not signed by Parties fatal?

- Circumstances also may arise where the contractual documents are not signed by either or one of the Parties to the contract and one party seemingly seeks to enforce its terms.
- The question that arises is whether an unsigned contract fatal? To simplify, it may be!
- In **Heller Factoring (M) Sdn Bhd v Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 5**, the Court of Appeal held that a contract can be enforced despite it being signed by one party if there is evidence that the other party had elected to be bound by the contract.
- Similarly, in **Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal [2014] 1 MLRA 558**, the Court of Appeal found that an unsigned contract involving the sale of properties was valid despite the failure of parties to sign the agreement as the Appellants in the case had paid the 10% of the purchase price.

WhatsApp Chats: Evidence in Court

- Yes, WhatsApp conversations are admissible in Court.
- Print-outs of WhatsApp messages are 'documents', which are produced by a computer, falling within the broad meaning of 'document' under Section 3 of the Evidence Act 1950.
- Normally used are screenshots of the WhatsApp chats. What about voicenotes?
- Alternatively, exported WhatsApp chats (which is done through the application's settings) which will create a plain text file in your computer.

WhatsApp Chats: How is it disputed? – Screenshot

- Does not have the date-stamp
- No proof of identity – only displays the name in your contact book



WhatsApp Chats: How is it disputed Chats

- Risk of fabrication and editing the messages – it is a plain text file
- No proof of identity – only display the name in contact book

```
26/01/2020, 4:19 pm - Messages and calls are end-to-end encrypted. No one outside of t
24/01/2020, 8:25 pm - [Name] created group "CODERS"
26/01/2020, 4:19 pm - You joined using this group's invite link
26/01/2020, 4:38 pm - [Name] joined using this group's invite link
26/01/2020, 4:39 pm - [Name] joined using this group's invite link
26/01/2020, 5:01 pm - [Name] joined using this group's invite link
26/01/2020, 5:06 pm - [Name] joined using this group's invite link
26/01/2020, 5:23 pm - [Name] joined using this group's invite link
26/01/2020, 5:25 pm - [Name] joined using this group's invite link
26/01/2020, 5:29 pm - [Name] joined using this group's invite link
26/01/2020, 5:40 pm - [Name] joined using this group's invite link
26/01/2020, 5:49 pm - [Name] joined using this group's invite link
26/01/2020, 6:32 pm - [Name] joined using this group's invite link
26/01/2020, 7:01 pm - [Name] joined using this group's invite link
26/01/2020, 7:06 pm - [Name] joined using this group's invite link
26/01/2020, 7:41 pm - [Name] joined using this group's invite link
26/01/2020, 8:21 pm - [Name] joined using this group's invite link
26/01/2020, 9:52 pm - [Name] joined using this group's invite link
27/01/2020, 12:05 am - [Name] joined using this group's invite link
```

WhatsApp Chats: Other Concerns

- **Problems**
 - Tampering with the WhatsApp chats
 - Old messages are lost due to reformatting of the phone
 - Old phones are discarded or damaged
 - Irrelevant messages may be included in the evidence
 - Judges might not admit WhatsApp messages as evidence in Court
 - **Nazaruddin Mohd Shariff @ Masari & Ors v Samsyem Saam & Ors [2016] 1 LNS 1434:-**
 - the High Court found it was “wholly unsafe at this stage of the proceedings to rely on WhatsApp messages as conclusive evidence”
 - **Mohamad Azhar Abdul Halim v Naza Motor Trading Sdn Bhd [2017] 1 ILJU 8 (Industrial Court)**
 - The Court rejected the screenshot as it does not show the Claimant’s name, date of WhatsApp message, Claimant’s hand phone number or Claimant’s profile picture

Capturing Online Conversations as Evidence.

- How to tender it as an evidence in the

Court?

- Section 90 (A) of the Evidence Act 1950
 - Examples of online conversation: WhatsApp, Telegram, Line, etc.
 - The documents (screenshot of WhatsApp messages) can be admitted as an evidence by producing a certificate (signed by a person who screenshot the WhatsApp or the owner of the phone) or it may be proved by calling a witness

**Must every maker of a document testify
in Court?**

What does 'Without Prejudice' mean

- 'Without prejudice' is a privilege against disclosure whereby any admission made in the course of negotiation is protected and prevented from being used as evidence before a court as it is viewed as a **genuine attempt to settle** an existing dispute between parties.
- **Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17**
 - Letters written "without prejudice" are inadmissible in evidence of the negotiations attempted.
 - In order to enlarge the scope of negotiations and encourage parties to settle disputes.

When do we use it?

- Settlement Negotiations & Contractual Disputes
 - To protect rights and interests while exploring potential settlement resolutions or
- Effect – anything said in without prejudice communication cannot be used against you

Address
Advocates & Solicitors

WITHOUT PREJUDICE

Attn :

Dear Sirs,

RE : HIGH COURT OF MALAYA AT.....
APPEAL NO:
..... V

We refer to the above matter.

We have received instructions to negotiate a settlement with your client. On a **strictly without prejudice basis** our client is willing to offer a global settlement of RM..... (which includes interests and costs), as full and final settlement.

In view that your good firm is currently in possession of RM....., which our client deposited with you, via UOB Cheque No. to hold as stakeholders for all parties involved in this matter. We propose that your good firm deduct RM..... from that amount and return the balance to our client.

We look forward to your reply, and trust you will convince your client to settle this matter.

Yours faithfully,

c.c. client

Agency: Employees are agents of the Employer

Section 135 of the Contracts Act 1950

“Agent” and “principal”

135. An “agent” is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal”.

Agency: Employees are agents of the Employer

Section 139 and 140 of the Contracts Act 1950

Agent's authority may be expressed or implied

139. The authority of an agent may be expressed or implied.

Definitions of express and implied authority

140. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Agency: Consequences?

- Actions of employees can bind the employer
 - Employers could be vicariously liable for the employee's acts
 - ***GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin Mohamed Amir [2022] 10 CLJ 669 (FC)***
 - The Courts will consider several factors when deciding on the issue of liability:-
 - (i) the intentional wrong must be committed by the employee in the course of employment;
 - (ii) there must be connection between the wrongful act and the nature of the employment;
 - (iii) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and
 - (iv) the risk is created by the employer, owing to the features of the business.

Agency: Examples?

- **Negligence**
 - An Employer could be held liable for an employee's negligent actions that result in harm if the employee was acting within the scope of their employment.
- **Product or Service Liability**
 - An Employer might be held accountable for faulty services rendered by the employee.
- **Contractual Breaches**
 - If an employee enters into a contract on behalf of the Company and breaches it, the Employer could be held liable for the breach and any resulting damages.

Legalities in Writing - Authorised Signatories

- Section 64 of the Companies Act 2016

Company contracts

64. (1) A contract may be made—
- (a) by a company, in writing under its common seal;
 - (b) on behalf of a company, by a person acting under its authority, express or implied; or
 - (c) on behalf of a company, orally, by any person acting under its authority, express or implied.
- (2) Any formalities required by law in the case of a contract made by an individual shall apply, unless the context otherwise requires, to a contract made by or on behalf of a company.

Authorised Signatories: Two Main Forms of Authority

- **Actual vs Apparent Authority**
- **Actual Authority**
 - Legal relationship between principal and agent created by a consensual agreement to which they alone are parties.
 - Clearest form of authority
- **Apparent Authority**
 - Where the employee has created the appearance of authority in where it has caused the other contracting party to reasonably believe that the employee has the actual authority to do so

Authorised Signatories: How to Validly

Execute a Document on behalf of a

Company

- Section 66 of the Companies Act 2016

Execution of Documents

...

- (2) A document is validly executed by a company if it is signed on behalf of the company—
 - (a) by at least two authorized officers, one of whom shall be a director; or
 - (b) in the case of a sole director, by that director in the presence of a witness who attests the signature.
- (3) A document signed in accordance with subsection (2) shall have the same effect as if the document is executed under the common seal of the company.
- (5) For the purposes of this section, “authorized officer” means— (a) a director of the company; (b) a secretary of the company; or (c) any other person, approved by the Board.

Authorised Signatories: Can it be denied?

- If the signatures were genuine (and not forged), then the Company is estopped from denying the authority of the person.
 - *Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor [2014] 3 MLJ 672*
- Hence, the loss will still fall upon the Company as the signatures are enforceable
- However, the Company can prevent this from happening by taking corrective steps to demonstrate that the agent signing the contract did not actually have the authority.
 - i.e., putting the person dealing with the Company on inquiry.
- Failure to do so will cause the Company to be bound by such contract and will be estopped from denying to it.
 - *Australian High Court decision of Northside Developments Pty Ltd v Registrar-General and Other [1990] 2 ACSR 161*

The Importance of Document Signatures

- A signature is a confirmation of identity and intent, legally binding parties to document terms.
- **Reasons for Signatures:** Evidence of intent, legal enforceability, record keeping.
- **Types of Signatures:** Handwritten and electronic (modern technology).
- **Benefits:** Ensures agreements' validity and prevents disputes.
- Can you sign on behalf?
- What happens if you sign it without reading the contents?

Role of Witnesses in Document Signing

- Witnesses observe signings and attest to their authenticity.
- Reasons for Witnesses: Verification, fraud deterrence, impartiality.
- Witness must be impartial, legal age, mental competence.
- Witnessing Process: Observation, identification, signing by the witness.

Variations

What are variations?

Definition of Variation

- 11.0 Variations, Provisional And Prime Cost Sums**
- 11.1** The term “Variation” means the alteration or modification of the design, quality or quantity of the Works including:
- 11.1(a) the addition, omission or substitution of any work;
 - 11.1(b) the alteration of the kind or standard of any materials and goods to be used in the Works;
 - 11.1(c) the removal from the Site of any work executed or materials and goods brought thereon by the Contractor for the purposes of the Works other than work, materials and goods which are not in accordance with the Contract; and
 - 11.1(d) any changes to the provisions in the Contract with regards to:
 - 11.1(d)(i) any limitation of working hours;
 - 11.1(d)(ii) working space;
 - 11.1(d)(iii) access to or utilisation of any specific part of the Site; and
 - 11.1(d)(iv) the execution and completion of the work in any specific order,
- but shall exclude any changes intended to rectify any negligence, omission, default and/or breach of contract by the Contractor and such changes shall be executed by the Contractor entirely at his own cost.

Common issues with variations

- Whether the work constitutes as a variation under the contract
- Disputes as to the applicable rate of a variation

What Constitutes a valid Variation?

- 11.2 The Architect may issue an AI ordering a Variation or sanctioning any Variation made by the Contractor. No Variation ordered by the Architect or subsequently sanctioned by him shall vitiate the Contract. Pending the valuation of the Variations, the Contractor shall carry out with due diligence and expedition all Variations so instructed.

Generally, variations under the PAM 2006 Contract are given in the form of an AI issued by the Architect.

Are variations instructed by the Employer or its other consultants or variations instructed during site meetings valid variations?

Q: Are variations instructed by the Employer or its other consultants or variations instructed during site meetings valid variations?

To play this quiz
Scan QR code and enter instantly!
1. Use any device to open



Game Code **785899**

The answer is YES!!

In **Sykt Pembinaan Anggerik Sdn Bhd v Malaysia Airports Holdings Bhd [2022] 9 MLJ 391**, the Court held:

“[163] ...This court agrees with the plaintiff that where a variation is approved or instructed at a management meeting or site meeting chaired by the SO or the SO’s representative at the meeting or is approved or authorised by a letter or document of a consultant or a project staff delegated or authorised by the SO, it constituted sufficient authorisation of the variation work binding upon the defendant in the circumstances of this project.”

Oral Instructions

Are instructions to carry out variation works that are given orally valid?
(assuming the Contractor is able to prove the existence of such
oral instruction)

To be
discussed...

Valuation of Variation

- 11.6(a) where work is of a similar character to, is executed under similar conditions as, and does not significantly change the quantity of work as set out in the Contract Documents, the rates and prices in the Contract Documents shall determine the valuation;
- 11.6(b) where work is of a similar character to work as set out in the Contract Documents but is not executed under similar conditions or is executed under similar conditions but there is a significant change in the quantity of work carried out, the rates and prices in the Contract Documents shall be the basis for determining the valuation which shall include a fair adjustment in the rates to take into account such difference;
- 11.6(c) where work is not of a similar character to work as set out in the Contract Documents, the valuation shall be at fair market rates and prices determined by the Quantity Surveyor;

Contract Rates

Pro-Rated Rates

Market
Value

Valuation of Variation

- 11.6(d) where work cannot be properly measured and valued in accordance with Clause 11.6(a), (b) or (c), the Contractor shall be allowed:
- 11.6(d)(i) the daywork rates in the Contract Documents; or
 - 11.6(d)(ii) where there are no such daywork rates in the Contract Documents, at the actual cost to the Contractor of his materials, additional construction plant and scaffolding, transport and labour for the work concerned, plus fifteen (15) percent, which percentage shall include for the use of all tools, standing plant, standing scaffolding, supervision, overheads and profit.
- In either case, vouchers specifying the time spent daily upon the work, the workers' names, materials, additional construction plant, scaffolding and transport used shall be signed by the Site Agent and verified by the Site Staff and shall be delivered to the Architect and Quantity Surveyor at weekly intervals with the final records delivered not later than fourteen (14) Days after the work has been completed;
- 11.6(e) the rates and prices in the Contract Documents shall determine the valuation of items omitted. If omissions substantially vary the conditions under which any remaining items of work are carried out, the prices of such remaining items shall be valued under Clause 11.6(a), (b) or (c); and
- 11.6(f) in respect of Provisional Quantity, the quantities stated in the Contract Documents shall be re-measured by the Quantity Surveyor based on the actual quantities executed. The rates and prices in the Contract Documents shall determine their valuations.

Daywork rates

Cost + P&A

Documents involved

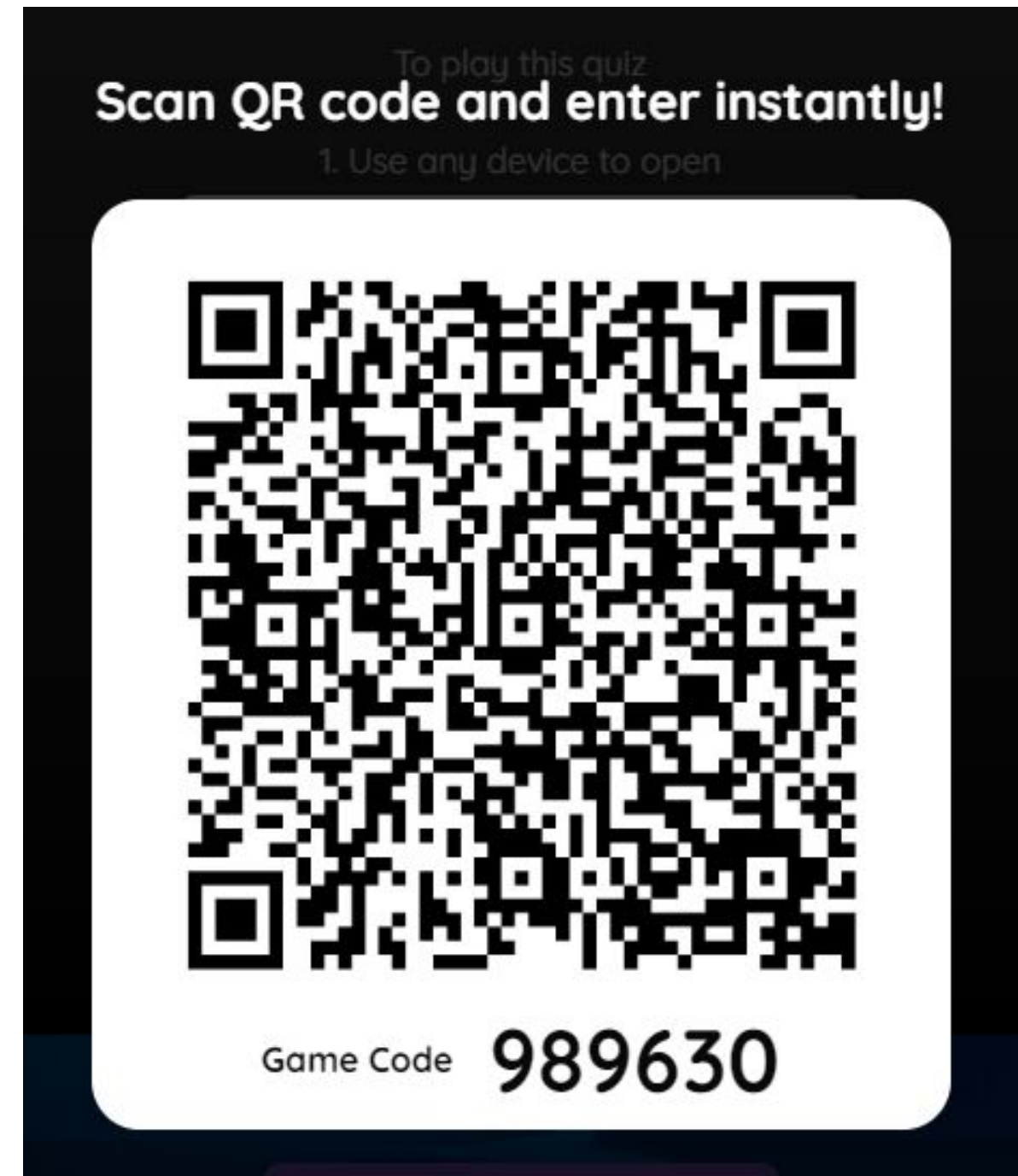
- Joint Measurement Sheets
- RFIs
- Fee quotes from suppliers / subcons
- Labour timesheets
- Punchcard records
- Payment Vouchers
- Invoices
- Delivery Orders

Fee quotes by Contractors

Consider the following situation:

- Architect issues a Variation to the Contractor
- Contractor provided a fee quotation for carrying out the variation works
- Architect / Employer did not respond to the Contractor on the fee quote
- Contractor proceeded to carry out and completed the variation works
- Contractor now is claiming for the variation works based on its fee quotation
- Employer contends that the fee quotation was never agreed
- Question: Is the Employer bound by the fee quotation?

**Q: Is the Employer Bound
by the Fee Quotation?**



The answer is YES!!

In **Nowran Begam Mohamed Saliff v Nantha Kumar Devar Sangaran & Anor** [2016] 7 CLJ 760, the Court held:

- If the Employer was not agreeable to the terms of the fee quotation, then it ought to have rejected the variation works.
- The Employer's conduct in knowing the existence of the fee quotation and not raising any objections to it, but conversely allowing the Contractor to carry out and complete the works amounts to an acceptance to the Contractor's fee quotation
- Therefore the Employer cannot now challenge that the Contractor's fee quotation is unreasonable

SET-OFF

What is Set-Off?

Construction and Law in Singapore and Malaysia (2nd Edition)

“Set-off is a defence by means of which a defendant can resist a claim on the grounds that the plaintiff owes the defendant some money – for example under a counterclaim. In construction contracts, it typically means that the client would resist a contractor’s claims for payment on the ground that the client could resist a contractor’s claims for payment on the ground that the contractor owes money in respect of some breach of contract, such as delay or defective construction.”

Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela’s Medical Centre Sdn Bhd [1995] 2 MLJ 57

- principle of *expressio unius*
- where there is express mention of some things, others of the same class not mentioned will be excluded

Set-Off under PAM

Set-off by
Employer

30.4

The Employer shall be entitled to set-off all cost incurred and loss and expense where it expressly provided under Clauses 2.4, 4.4, 5.1, 6.5(e), 6.7, 14.4, 15.3(b) 15.3(c), 15.4, 15.5, 19.5 and 20.A.3. No set-off under this clause may be made unless:

Clause 2.4 – failure to comply with AI

Clause 4.4 – failure to pay fees, levies and charges

Clause 5.1 – failure to carry out setting-out

Clause 6.5(e) & 6.7 – works not in accordance with the Contract

Clause 14.4 – warranty of goods and materials

Clause 15.3(b) & Clause 15.3(c) – failure to comply with undertaking

Clause 15.4 – Schedule of Defect within 14 days after DLP

Clause 15.5– failure to make good defects during DLP

Clause 19.5 & 20.A.3 – failure to place insurance with the insurance companies approved by the Employer

What documents are required for set-off?

30.4(a) the Architect or Quantity Surveyor (on behalf of the Employer) has submitted to the Contractor complete details of their assessment of such set-off; and

30.4(b) the Employer or the Architect on his behalf has given the Contractor a written notice delivered by hand or by registered post, specifying his intention to set-off the amount and the grounds on which such set-off is made. Unless expressly stated elsewhere, such written notice shall be given not later than twenty eight (28) Days before any set-off is deducted from any payment by the Employer.

- i. Complete details of Architect / QS's assessment
- ii. Written notice to the Contractor 28 days before deduction
 - 1. Intention to set-off
 - 2. Grounds on such set-off

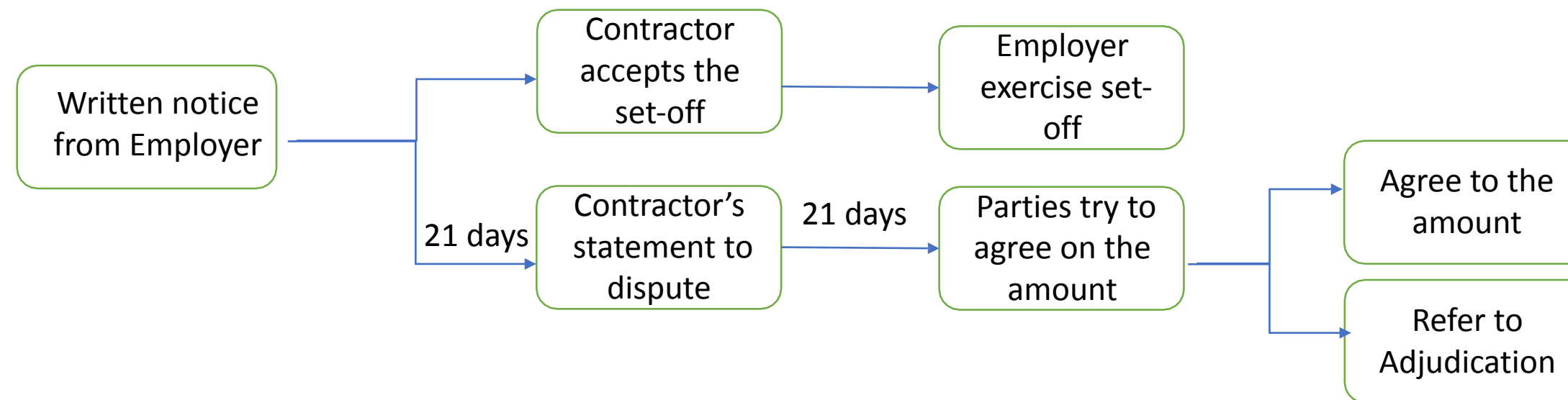
Where can the set-off be deducted from?

Any set-off by the Employer shall be recoverable from the Contractor as a debt or from any monies due or to become due to the Contractor under the Contract and/or from the Performance Bond.

- i. As a debt
- ii. Monies due or to become due to the Contractor
 - 1. Does this include the retention sum?
- iii. Performance Bond

When can Employer exercise set-off?

If the Contractor after receipt of the written notice from the Employer or the Architect on his behalf, disputes the amount of set-off, the Contractor shall within twenty one (21) Days of receipt of such written notice, send to the Employer delivered by hand or by registered post a statement setting out the reasons and particulars for such disagreement. If the parties are unable to agree on the amount of set-off within a further twenty one (21) Days after the receipt of the Contractor's response, either party may refer the dispute to adjudication under Clause 34.1. The Employer shall not be entitled to exercise any set-off unless the amount has been agreed by the Contractor or the adjudicator has issued his decision.



LIQUIDATED DAMAGES (LAD)

What is LAD?

Chow Kok Fong in Construction Contracts Dictionary

“Liquidated damages are said to be a genuine pre-estimate of the loss which is likely to flow from any breach of contract and will, if the breach is proved, be upheld and enforced by the courts as the quantum of damages to be paid by the defaulting party.”

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15

- In determining what amounts to ‘reasonable compensation’ under Section 75 of the Contracts Act, the concepts of ‘legitimate interest’ and ‘proportionality’ as enunciated in Cavendish are relevant;
- The initial onus lies on the party seeking to enforce a damages clause to adduce evidence that:
 - Firstly, there was a breach of contract; and
 - Secondly, the contract contains a clause specifying a sum to be paid upon breach.
- Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven; and
- If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.

LAD under

RAM

| | | |
|---|-------------|---|
| | 22.0 | Damages For Non-Completion |
| Liquidated Damages and Certificate of Non-Completion | 22.1 | <p>If the Contractor fails to complete the Works by the Completion Date, and the Architect is of the opinion that the same ought reasonably so to have been completed, the Architect shall issue a Certificate of Non-Completion. Upon the issuance of the Certificate of Non-Completion, the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the Appendix as Liquidated Damages for the period from the Completion Date to the date of Practical Completion. The Employer may recover such sum as a debt or may deduct such sum from any monies due or to become due to the Contractor under the Contract or the Employer may recover such sum from the Performance Bond. The Employer shall inform the Contractor in writing of such deduction or such debt due from the Contractor. The imposition of Liquidated Damages by the Employer shall not be taken into account by the Architect in the issuance of payment certificates and Final Certificate, and is not subject to the set-off procedures under Clause 30.4 and adjudication.</p> |
| Agreed Liquidated Damages amount | 22.2 | <p>The Liquidated Damages stated in the Appendix is a genuine pre-estimate of the loss and/or damage which the Employer will suffer in the event that the Contractor is in breach of Clauses 21.0 and 22.0. The parties agree that by entering into the Contract, the Contractor shall pay to the Employer the said amount, if the same becomes due without the need for the Employer to prove his loss and/or damage unless the contrary is proven by the Contractor.</p> |

Where can the LAD be deducted from?

- i. As a debt
 - ii. Monies due or to become due to the Contractor
 - 1. Does this include the retention sum?
 - iii. Performance Bond
-
- ✓ The Employer shall inform the contractor in writing of such deduction
 - × The imposition of LAD shall not be taken into account in the issuance of payment certificates and Final Certificates,
 - × The imposition of LAD is not subject to the set-off procedures under Clause 30.4 and adjudication.

“ought reasonably to have been completed”

- **Ir Harbans Singh KS in Engineering and Construction Contract Management: Commencement and Administration**

“it is a necessary pre-requisite for the contract administrator to establish that:

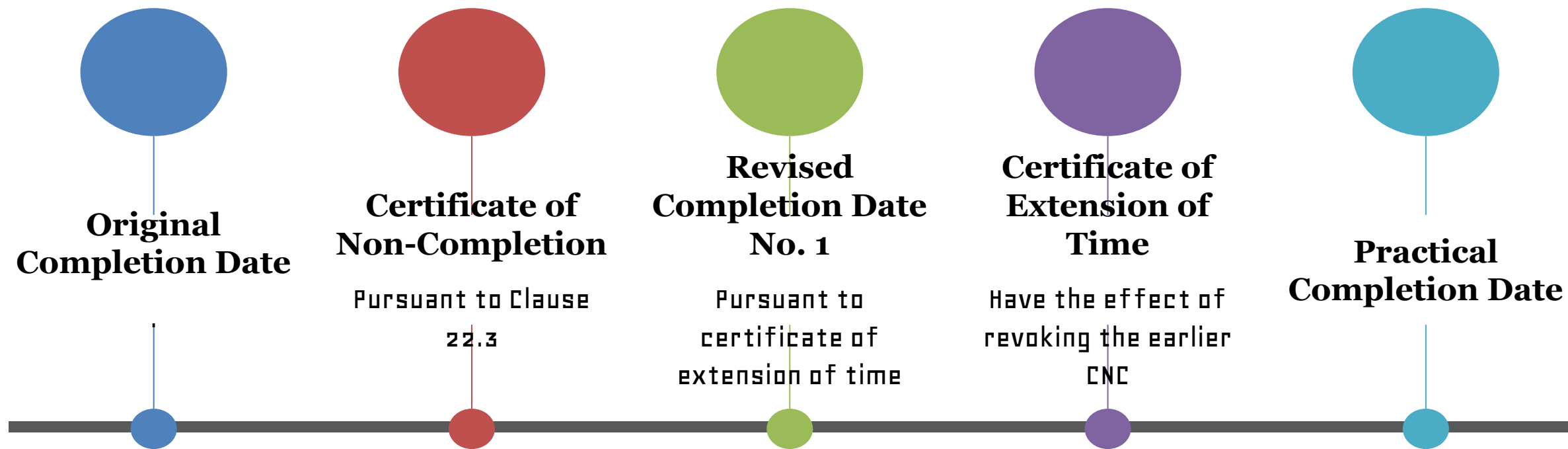
- ✓ *all extensions of time for which the contractor is entitled under the contract have been properly evaluated and issued to the contractor;*
- ✓ *the contractor, based on the available facts and prevailing circumstances, is not entitled at the material time to further extensions of time ...”*

- **Definition of practical completion under Clause 15.1**

The Works are Practically Completed when:

- 15.1(a) in the opinion of the Architect, the Employer can have full use of the Works for their intended purposes, notwithstanding that there may be works and defects of a minor nature still to be executed and the Contractor has given to the Architect a written undertaking to make good and to complete such works and defects within a reasonable time specified by the Architect; and
- 15.1(b) other requirements expressly stated in the Contract Documents as a pre-requisite for the issuance of the Certificate of Practical Completion have been complied with.

Where can the LAD be deducted from?



- i. **As a debt**
- ii. **Monies due or to become due to the Contractor**
 1. Does this include the retention sum?
- iii. **Performance Bond**

- ✓ The imposition shall be upon the issuance of Certificate of Non-Completion
- ✓ The Employer shall inform the contractor in writing of such deduction
- × The imposition of LAD shall not be taken into account in the issuance of payment certificates and Final Certificates
- × The imposition of LAD is not subject to the set-off procedures under Clause 30.4 and adjudication.

Extension of Time (EOT)

EOT under PAM

| | | |
|---|-------------|---|
| | 23.0 | Extension Of Time |
| Submission of notice and particulars for extension of time | 23.1 | <p>If the Contractor is of the opinion that the completion of the Works is or will be delayed beyond the Completion Date by any of the Relevant Events stated in Clause 23.8, he may apply for an extension of time provided always that:</p> <p>23.1(a) the Contractor shall give written notice to the Architect his intention to claim for such extension of time together with an initial estimate of the extension of time he may require supported with all particulars of the cause of delay. Such notice must be given within twenty eight (28) Days from the date of the AI, CAI or the commencement of the Relevant Event, whichever is earlier. The giving of such written notice shall be a condition precedent to an entitlement of extension of time; and</p> <p>23.1(b) within twenty eight (28) Days of the end of the cause of delay, the Contractor shall send to the Architect his final claim for extension of time duly supported with all particulars to enable the Architect to assess any extension of time to be granted. If the Contractor fails to submit such particulars within the stated time (or within such longer period as may be agreed in writing by the Architect), it shall be deemed that the Contractor has assessed that such Relevant Event will not delay the completion of the Works beyond the Completion Date.</p> |

Notice Requirement = Condition Precedent?

- **KL Eco City Sdn Bhd v Tuk Sin Engineering & Construction Sdn Bhd & Anor [2020] MLJU 2457 at paras [43] and [44]**

The High Court held that the Clause 23.1(a) of the PAM Form 2006 is a **mandatory condition precedent** to any grant of extension of time for completion of the works. In that case, the contractor's failure to give written notice to the architect of its intention to claim for extension of time within the prescribed 28 days was held to be fatal to the contractor's entitlement to any EOT.

Can the architect waive the condition precedent?

- KL Eco City Sdn Bhd v Tuk Sin Engineering & Construction Sdn Bhd & Anor [2020] MLJU 2457 at paras [43] and [44]

The answer is no. In KL Eco City, the High Court held at para [46] that an architect as an agent of the employer does not have the ostensible authority to waive the contractual rights of the employer in respect of condition precedent. However, the situation may be different if the employer expressly confer actual authority to the architect to waive the contractual provision.

Waiver or estoppel may however apply if it is the employer who had waived the contractual requirements.

What documents are required for EOT?

- i. **Work programme**
 - Before work begins should produce an accurate baseline programme
 - The programme should be continually updated and revised to reflect the contemporaneous project conditions
 - Critical path to show the actual impact period
- ii. **Documents to show the events and issues**
 - Photos
 - Weekly or monthly reports
 - Minutes of meetings
 - Site diary
- iii. **Mitigation plans / details of actions taken by the contractor to minimize delays**

Termination

1

Termination under PAM

| | | |
|-------------------------------|-------------|--|
| | 25.0 | Determination Of Contractor's Employment By Employer |
| Defaults by Contractor | 25.1 | The Employer may determine the employment of the Contractor if the Contractor defaults in any of the following: <ul style="list-style-type: none">25.1(a) if without reasonable cause, he fails to commence the Works in accordance with the Contract;25.1(b) if without reasonable cause, he wholly or substantially suspends the carrying out of the Works before completion;25.1(c) if he fails to proceed regularly and/or diligently with the Works;25.1(d) if he persistently refuses or neglects to comply with an AI;25.1(e) if he fails to comply with the provisions in Clause 17.0; or25.1(f) if he has abandoned the Works. |

Case Study : Kerajaan Malaysia v Ven Coal Resources Sdn Bhd [2014] 11 MLJ 218

Facts: -

- The Original Completion date under the Contract was **26 October 2009**.
- Contractor given EOT of **90 days** due to unusual escalation in the price of building materials for project which extended completion date to **24 January 2010**.
- The contractor's request for EOT was dismissed by the SO and the employer proceeded to issue notice of default on **10 July 2018** on the grounds that the Defendant had breached the contract by its failure to proceed regularly and diligently with the works.

Case Study : Kerajaan Malaysia v Ven Coal Resources Sdn Bhd [2014] 11 MLJ 218

- Employer's argument:
 - Based on the contractor's history of delay and failure to proceed diligently with the works on the project, the contractor was unlikely to finish the works by the completion date of 24 January 2010.
 - Employer used the failure of the contractor to abide by his work programme as a yardstick to establish default.

Is the Determination lawful?

- Determination was held unlawful!

- Failure of SO to improperly grant an EOT – time for completion is set at large.
 - Work programme could not be relied on, as consideration must be taken in light of the employer's VO to justify EOT.
- “[51] Delay alone did not amount to repudiation **unless coupled with an intention not to complete the project which was not the case here.**”
- **Employer needs to keep proper records and documentations!**
 - Photographs of the slow progress/abandoned work site
 - Records of manpower that are on site;
 - Planned progress against the actual progress on site;
 - Status of the incomplete and/or defective works;
 - Measurement of works done; and
 - Records of materials/ machineries that are on site.

Question & Answer Session

**The
End**