

**STATUTORY ADJUDICATION IN MALAYSIA AND
'SABAH PROCEEDING': A PARADOX?¹ — A
COMMENTARY ON TEKUN CEMERLANG SDN BHD V
VINCI CONSTRUCTION GRANDS PROJETS SDN BHD
[2021] 11 MLJ 50**

by

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INTRODUCTION

In *Tekun Cemerlang Sdn Bhd v Vinci Construction Grands Projets Sdn Bhd*³ ('Tekun Cemerlang'), the High Court decided that a lawyer who is not authorised to practise as an advocate in Sabah cannot be appointed to represent a party in an adjudication if that adjudication satisfies certain elements connected to Sabah. In this case, the term 'Sabah proceeding' was used to describe such an adjudication.⁴ The decision restricts parties' choice of representatives and changes how the industry had previously understood the phrase 'any representative' in s 8(3) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA').⁵ This article looks at how the chimera of a 'Sabah proceeding' was endorsed in *Tekun Cemerlang*, although CIPAA does not recognise such a concept.

This article begins by setting out the basic features of CIPAA in connection with the parties' right to appoint any representative, followed by what it means

1 This essay arose from a presentation delivered by the author at the Asia ADR Week 2021 organised by the Asian International Arbitration Centre (AIAC) where various aspects of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) were discussed.

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3 *Tekun Cemerlang Sdn Bhd v Vinci Construction Grands Projets Sdn Bhd* [2021] 11 MLJ 50.

4 [2021] 11 MLJ 50 [57]–[58].

5 (Act 746).

to practice in Sabah under the Advocates Ordinance⁶ (‘the Ordinance’). It will then discuss the *Tekun Cemerlang* decision and its ramifications for the Asian International Adjudication Centre (‘AIAC’) as the appointing authority and users of adjudication in Malaysia, in particular adjudications which qualify as ‘Sabah proceedings’.

This article argues that: (1) in an adjudication, ‘Sabah proceeding’ is a misconception because CIPAA does not divide the locality of the dispute arising from construction contract and construction work within the sovereign state of Malaysia; (2) statutory adjudication is not a regulated function under the Ordinance; (3) CIPAA is not an instrument to police unauthorised practice under the Ordinance; and (4) the decision gives rise to legal and practical challenges for the AIAC and parties to adjudications which qualify as ‘Sabah proceedings’.

This article concludes that overprotection of the legal profession through the regulatory space stifles the professional development of adjudication and dispute resolution practitioners in the state. Any effort to protect the advocates in the state must consider the inextricable relationship between law and economics and the importance of preserving an environment conducive to economic activities.

THE LEGAL FRAMEWORK OF CIPAA AND THE RIGHT TO ‘ANY REPRESENTATIVE’

CIPAA introduced a statutory right for parties to a construction contract in Malaysia to refer their payment disputes to adjudication. The legislation puts into effect a speedier and summary means of resolving payment disputes in the construction industry. Statutory adjudication is designed to produce a cash-flow remedy during the progress of a construction project. The process aims to resolve the problem that previously beset the construction industry of lengthy arbitrations or court litigation, keeping one party out of its money while funding expensive legal costs to recover that money. Many contractors and construction companies in Malaysia could not afford this costly and cumbersome process to recover payment or contractual entitlements. The policy of adjudication is ‘pay first, argue later’.

The features of CIPAA include the following:

6 (Sabah Cap. 2)

- (1) it creates a statutory right to adjudicate payment disputes that the parties cannot contract out of;
- (2) a party to a construction contract has the right to refer a payment dispute to adjudication whilst the works are ongoing and without terminating the contract;
- (3) it creates a mechanism for resolving payment disputes in construction contracts on an interim basis;
- (4) adjudicators' decisions carry temporary finality and are binding on the parties until legal proceedings, arbitration or settlement finally determine the payment dispute; and
- (5) it provides a speedy and cost-effective means of resolving payment disputes; it takes approximately 100 days between the issuance of payment claim to the respondent and the adjudication decision.

For CIPAA to apply, there are four cumulative requirements:⁷

- (1) There is a 'construction contract', which may be a 'construction work contract' or a 'construction consultancy contract'.⁸
- (2) The construction contract is 'made in writing'. An expansive and generous interpretation is given to the requirement that the contract must be in writing.⁹
- (3) The construction contract relates to 'construction work', which is exhaustively defined.¹⁰
- (4) The construction work is 'carried out wholly or partly within the territory in Malaysia'. The execution of the construction work need not be done entirely in Malaysia; it is sufficient if there is evidence of some carrying out of the works within Malaysia's territory.¹¹

Section 8(3) CIPAA provides that 'a party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party'. The term 'any representative' is unqualified and unambiguous. Before

7 Construction Industry Payment and Adjudication Act 2012 (Act 746) s 2; Wong Kian Kheong J in *Uzma Engineering Sdn. Bhd. v Khan Co. Ltd. and another summons* [2020] MLJU 1272 [22](1).

8 Defined in Construction Industry Payment and Adjudication Act 2012 s 4.

9 Lee Swee Seng J in *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case* [2017] MLJU 146 [56].

10 Wong Kian Kheong J in *Uzma Engineering Sdn. Bhd. v Khan Co. Ltd. and another summons* [2020] MLJU 1272 [22](4).

11 Mary Lim J (now FCJ) in *Mudajaya Corporation Berhad v Leighton Contractors (M) Sdn Bhd* [2015] 10 MLJ 745 [22].

Tekun Cemerlang, the construction industry understood the ordinary meaning¹² of s 8(3) CIPAA to mean that anyone can be appointed to represent either a claimant or a respondent in an adjudication.¹³ In practice, parties would appoint lawyers, quantity surveyors, engineers, architects and claim consultants as representatives, depending on the expertise required.

THE LEGAL FRAMEWORK OF THE ADVOCATES ORDINANCE AND THE RIGHT TO PRACTICE IN SABAH

Under s 8(1) of the Ordinance, advocates¹⁴ admitted under s 6 and enrolled under s 7 have 'the exclusive right to practice in Sabah' and to appear in all levels of the courts in Sabah¹⁵ as well as the Court of Appeal and the Federal Court of Malaysia in cases emanating from Sabah¹⁶ provided the advocates hold a s 9 practising certificate.

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- 12 *Zulkefli FCJ in Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173, [48]: 'A statute is the written will of the Legislature. It is the fundamental rule of interpretation of a statute that it should be expounded according to the intent of Parliament. Courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense. Statutes generally have the power to change the established common law but the common law cannot overrule or change statutes. Judges must normally apply statutes, even if they are contrary to established common law. The task of a judge is to interpret and apply the statute — they cannot disregard it or declare it to be 'unconstitutional'. In an article titled 'The Constitutionalisation of Public Law' published in May 1999, the Rt Hon Lord Steyn, Lord of Appeal in Ordinary said: Parliament has the sovereign legal power to legislate as it thinks fit. The courts will give effect to the clearly expressed will of Parliament. The courts have said so on countless occasions. On the other hand, it is of fundamental constitutional importance that the courts must interpret and apply legislation on the assumption that Parliament does not write on a blank sheet'; *Vernon Ong FCJ in Tebin Mostapa v Hulba-Danyal Balia & Anor* [2020] 1 LNS 661 [30]: 'Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'.
- 13 *Lam Wai Loon, Ivan YF Loo, Construction Adjudication in Malaysia* (2nd edn), Sweet & Maxwell 2018) para [22.045]: 'The parties can be represented by any representative of their choice. The representative can be a lawyer, architect, engineer, quantity surveyor or claims consultant. The suitability of a representative would depend on the type of dispute involved in the adjudication.'
- 14 'Advocate' is defined in Advocates Ordinance s 2(1) as 'a person admitted and enrolled as an advocate under this Ordinance.'
- 15 Federal Constitution of Malaysia s 121(1).
- 16 Federal Constitution of Malaysia s 121(1B) and (2).

Under s 2 of the Ordinance, the expression ‘to practise in Sabah’ means to perform in Sabah:

- (a) any of the functions which in England may be performed by a member of the Bar as such;
- (b) any of the functions which in England may be performed by a solicitor of the Supreme Court of Judicature as such; or
- (c) any of the functions authorised under this Ordinance.

Section 15(1) of the Ordinance stipulates that ‘no person shall practise as an advocate or do any act as an advocate unless his name is on the roll and he has a valid certificate to practise authorizing him to do the act’. Section 15(2) refers to a person who does not fulfil these requirements as an ‘unauthorized person’.

Section 16(1) of the Ordinance makes it an offence for an unauthorised person to perform certain functions:

16 (1) Any unauthorized person who —

- (a) acts as an advocate or agent for suitors, or who as such advocate sues out any writ or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person or in his own name in any of the courts of Sabah, or draws or prepares any instrument relating to any proceedings in any of the courts of Sabah;
- (b) wilfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified to act as, an advocate, or that he is recognised by law as so qualified;
- (c) either directly or indirectly for or in expectation of any fee, gain or reward, draws or prepares any instrument relating to immovable or movable property;
- (d) appears before the Industrial Court, Arbitration Tribunal, Court Martial or the Disciplinary Board set up pursuant to this Ordinance in a case or matter arising from Sabah;
- (e) either directly or indirectly for or in expectation of any fee, gain or reward, draws or prepares any instrument relating to immovable property and any memorandum or other documents for the purposes of registration under the Land Ordinance [Sabah Cap. 68] or any other written law relating to registration of documents or makes any application or lodges any document for registration under the said Land Ordinance or any other written law relating to registration of documents at the Central Land Office or at any District Land Office;
- (f) on behalf of a claimant or person alleging himself to have a claim to a legal right, writes, publishes or sends a letter or notice threatening legal proceedings other than a letter or notice that the matter will be handed to an advocate for legal proceedings;

- (g) takes instructions or draws or prepares any document for the purposes of applying for or opposing a grant of probate or letter of administration; or
- (h) solicits the right to negotiate, or negotiates in any way for the settlement of, or settles any claim arising out of personal injury or death and founded upon a legal right or otherwise,

commits an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.¹⁷

The upshot of all the above is that only lawyers who have been admitted and enrolled under the Ordinance, and who hold a practising certificate, are authorised to perform the functions set out under s 16(1) of the Ordinance and any other functions which in England may be performed by a member of the bar or a solicitor.

THE FACTS IN TEKUN CEMERLANG

Vinci Construction Grands Projets Sdn Bhd¹⁸ ('the Claimant') filed an adjudication claim against Tekun Cemerlang Sdn Bhd¹⁹ ('the Respondent') for outstanding progress claims arising from the development of resort villas along the white beaches in Sabah.

A legal firm based in West Malaysia was appointed to represent the Claimant. As the Claimant's representative, it served a payment claim upon the Respondent. Upon filing the Notice of Adjudication by the Claimant's representative, the Director of AIAC appointed an adjudicator based in Sabah. The adjudicator accepted her appointment and gave directions to the parties. Accordingly, the Claimant's representative served an adjudication claim upon the Respondent.

The Respondent applied to the High Court in Sabah to stay the adjudication proceedings because: (1) the adjudication was a 'Sabah proceeding';²⁰ (2) the Claimant's representative in the adjudication was an 'unauthorized person' under the Ordinance and could not act in a 'Sabah

17 [2021] 11 MLJ 50 [26].

18 Vinci Construction Grands Projet Sdn Bhd was the Claimant in the adjudication and the Defendant before the High Court.

19 Tekun Cemerlang Sdn Bhd was the Respondent in the adjudication and the Plaintiff before the High Court.

20 [2021] 11 MLJ 50 [11].

proceeding²¹; and (3) it was unconstitutional and illegal for the Claimant's representative to act in a 'Sabah proceeding'.²²

The Respondent used the expression 'Sabah proceeding' to describe a proceeding in which an 'unauthorized person' under the Ordinance could not act. The Respondent argued that the adjudication was a 'Sabah proceeding' because the following four elements were present:

- (a) the contract between the Claimant and the Respondent was made in Sabah;
- (b) the project works were carried out in Sabah;
- (c) the appointed adjudicator was in Sabah; and
- (d) the matters were within the territorial jurisdiction of the High Court of Sabah & Sarawak at Kota Kinabalu. In this article, these four elements will be referred to as the 'Sabah elements'.

Ordinarily, the court would intervene in an adjudication proceeding only in limited circumstances or 'in clear-cut cases when core jurisdiction is absent'.²³ Lim Chong Fong J said: 'The permissible court interventions including challenges on jurisdiction have been expressly prescribed in the statute and these challenges are only available after the adjudication decision has been made'.²⁴ Such restrictive intervention is consistent with the CIPAA regime of speedy disposal of payment disputes with temporary finality.²⁵

However, the High Court agreed with the Respondent and stayed the adjudication proceedings. The High Court decided that by acting as the Claimant's representative, the West Malaysian lawyers were 'practising as advocates in Sabah' within the meaning of s 2 of the Ordinance. The High

21 [2021] 11 MLJ 50 [12]–[13]

22 [2021] 11 MLJ 50 [14]–[15].

23 Lim Chong Fong J in *Liew Piang Voon v WLT Project Management Sdn Bhd* [2020] MLJU 1431 [22]: 'Despite my initial reluctance to entertain the Plaintiff's application here, I am, after due consideration, satisfied that the problem in issue concerns core jurisdiction and has been brought by the Plaintiff early before statutory adjudication has been even instituted; see also *Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd* [2018] 1 LNS 896. Nonetheless, I hasten to add that future applications of similar nature should only be entertained in clear-cut cases where core jurisdiction is absent'.

24 Lim Chong Fong J in *Liew Piang Voon v WLT Project Management Sdn Bhd* [2020] MLJU 1431 [20] referring to *Multazam Development Sdn Bhd v Felda Global Ventures Plantations (M) Sdn Bhd* [2019] 1 LNS 335,; [2020] 6 AMR 258; *Macly Equity Sdn Bhd v Prestij Mega Construction Sdn Bhd* [2021] MLJU 537 [23]. Construction Industry Payment and Adjudication Act 2012 s 16.

25 Mary Lim Thiam Suan J (now FCJ) in *Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case* [2015] MLJU 1952 [37] and [46].

Court also decided that representation in the adjudication fell within s 16(1)(a), (b), and (c) of the Ordinance²⁶ and therefore was a function an 'unauthorized person' cannot perform. Being neither admitted nor enrolled under the Ordinance, the Claimant's representative was an unauthorised person for purposes of s 16(1) of the Ordinance. The High Court then concluded that a stay of the adjudication proceeding was 'the only effective way' 'to enforce the prohibition under the Ordinance (Sabah Cap. 2)' against the Claimant's representative.²⁷ The High Court also held that the payment claim, notice of adjudication and adjudication claim, having been filed by an 'unauthorized person', were invalid²⁸ and hence, the adjudicator had no jurisdiction.²⁹

It should also be noted that the High Court had incorrectly quoted the source of its power to stay the adjudication proceedings;³⁰ such power lies in the court's inherent jurisdiction under O 92 r 4 Rules of Court 2012, which is exercised sparingly.³¹ The Claimant in *Tekun Cemerlang* did not appeal against the High Court's decision. The decision in *Tekun Cemerlang* has ramifications for AIAC as the appointing authority and the parties in adjudications that qualify as 'Sabah proceedings'.

This article will next examine the legal reasoning of the *Tekun Cemerlang* decision.

26 Advocates Ordinance s 16(1) 'Any unauthorized person who — (a) acts as an advocate or agent for suitors, or who as such advocate sues out any writ or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person or in his own name in any of the courts of Sabah, or draws or prepares any instrument relating to any proceedings in any of the courts of Sabah; wilfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified to act as, an advocate, or that he is recognised by law as so qualified; (c) either directly or indirectly for or in expectation of any fee, gain or reward, draws or prepares any instrument relating to immovable or movable property ...'.

27 [2021] 11 MLJ 50 [89]–[90].

28 [2021] 11 MLJ 50 [80].

29 [2021] 11 MLJ 50 [82].

30 [2021] 11 MLJ 50 [10]. The application to stay the adjudication proceedings was made under Courts of Judicature Act 1964 (Act 91) ss 25 and 35 which do not confer the High Court the power to stay an adjudication proceeding commenced under the Construction Industry Payment and Adjudication Act 2012.

31 Lim Chong Fong J in *Liew Piang Voon v WLT Project Management Sdn Bhd* [2020] MLJU 1431 [20]–[22]; *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] 1 LNS 177.

(1) CIPAA does not divide the sovereign territory of Malaysia

In coming to its decision that the Claimant's representative was 'practising as advocates in Sabah', the High Court referred to the 'Sabah elements' and found that 'all the elements necessary, if not substantially to be put forth to sustain the [Claimant's] claims in the adjudication proceedings [were] in or occurred in Sabah'.³²

However, there is no legal basis for distinguishing an adjudication that qualifies as a 'Sabah proceeding' because the 'Sabah elements' are present and an adjudication that does not. There are three reasons.

First, CIPAA does not recognise the 'Sabah elements' as articulated by the High Court. CIPAA does not divide the nature of the dispute arising from construction contract or construction work into Malaya, Sabah and Sarawak. Section 2 CIPAA requires that the construction contract relates to construction work carried out, wholly or partly, 'within the territory of Malaysia'. The words 'within the territory of Malaysia' refer to:

- (a) the sovereign territory of Malaysia, including its land territory and its internal waters, and extends to the 'territorial sea' defined in the Territorial Sea Act 2012;³³
- (b) the continental shelf of Malaysia under s 5(1)(a) of the Continental Shelf Act 1966;³⁴ and
- (c) the whole of the continental shelf and the exclusive economic zone beyond the territorial sea of Malaysia according to s 42(1) of the Exclusive Economic Zone Act 1984.³⁵

The unequivocal language of s 2 CIPAA means adjudication in Malaysia is not territorial by state. Provided there is some connection with Malaysia, the project's locality in Sabah, Sarawak, or any state in Malaya is not a factor for AIAC when considering the appointment of an adjudicator and does not go to the core jurisdiction of an adjudicator. An adjudicator will have jurisdiction over matters raised in the payment claim and the payment response.³⁶

32 [2021] 11 MLJ 50 [57]–[58].

33 (Act 750).

34 (Act 66).

35 (Act 311). Lam Wai Loon, Ivan YF Loo, *Construction Adjudication in Malaysia* (2nd edn), Sweet & Maxwell, 2018) [2.084].

36 Construction Industry Payment and Adjudication Act 2012 ss 5 and 6.

Second, 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. There is no basis to import the legal concept of a 'seat' in arbitration into the law and practice of adjudication. Under CIPAA, the High Court in Malaya and the High Court in Sabah & Sarawak has the jurisdiction to hear post-adjudication decision proceedings.³⁷ However, this has no bearing on whether representation in adjudication is a regulated function under the Ordinance.

Third, adjudication is not a regulated function under the Ordinance. The Ordinance does not state that an adjudication becomes a regulated function because the 'Sabah elements' are present. The Ordinance does not recognise the concept of a 'Sabah proceeding' or the 'Sabah elements' to determine whether a function is a regulated function.

Therefore, the premise of the decision to prohibit a qualified lawyer from West Malaysia from representing the Claimant in the adjudication was flawed, and the decision was without legal basis.

(2) Statutory adjudication is not a regulated function under the Advocates Ordinance

The High Court in *Tekun Cemerlang* adopted the Federal Court's approach in *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal*.³⁸ The Federal Court read s 2(1)(a) and (b) together with the first limb of s 8(1) of the Ordinance to find that Sabah advocates have exclusive right to represent a party in arbitration proceedings in Sabah.³⁹ The Federal Court held that foreign lawyers who are not advocates within the meaning of the Ordinance are prohibited from representing parties to arbitration proceedings in Sabah.⁴⁰

The Federal Court's decision came before the Advocates Ordinance (Amendment) Act ('the amending Act') which came into force on 1 July 2017. Before the amending Act, Part VIII and s 16(1)(d) to (h) did not exist in the Ordinance. In 2017, the amending Act introduced the new Part VIII and s

37 Construction Industry Payment and Adjudication Act 2012 ss 13, 15 and 16.

38 *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal* [2017] 2 MLJ 141.

39 *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal* [2017] 2 MLJ 141 [34]-[35].

40 *Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal* [2017] 2 MLJ 141 [35].

16(1)(d) to (h) to the Ordinance. Section 16(1)(d) included ‘Industrial Court, Arbitration Tribunal, Court Martial or the Disciplinary Board’ as regulated activities under the Ordinance.

This article argues that the extension of the Federal Court’s approach to representation in adjudication is misplaced for three reasons.⁴¹

First, s 16(1) of the Ordinance does not include representation in adjudication as an ‘unauthorized’ act. The language used in s 16(1) of the Ordinance suggests that it is intended to be exhaustive. Section 16(1) expressly names various forums for dispute resolutions, including ‘courts of Sabah, Industrial Court, Arbitration Tribunal and Court Martial’. Applying the rules of interpretation *expressio unius est exclusio alterius*⁴² — the expression of one thing in a piece of legislation is the exclusion of the other — the omission of adjudication from such a deliberate list must mean that representation in adjudication is not intended to be a regulated function under s 16(1) of the Ordinance.

Second, it is true that the definition of the right ‘to practice in Sabah’ under s 2 of the Ordinance includes the right to perform in Sabah any of the functions which in England may only be performed by a member of the Bar or a solicitor. However, reliance on these two limbs in the definition would require expert evidence whether representation in an adjudication is a function that may only be performed by a member of the Bar or a solicitor in England. In the absence

41 [2021] 11 MLJ 50 [35]-[46].

42 *Iszuree bin Ibrahim v Majlis Mesyurat Kerajaan Negeri Pulau Pinang & Ors and another case* [2016] MLJU 06 referred to Eusofee Abdoolcader J. (as he then was) in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204:

[33] As can be seen from the above passages referred to, the issue was whether there was a right under the Land Acquisition Act 1960 to a right to a hearing in respect of the decision by the State Authority to acquire the land. Eusofee Abdoolcader J (as he then was) sitting in the High Court held that although there was an express provision in the particular Act under consideration for the right to an inquiry and hearing in respect of quantum of compensation, the right with regard to hearing of the acquisition of the land itself was not provided for. On this basis his Lordship opined that this would attract the application of the maxim ‘expressio unius est exclusio alterius’ which has been used to exclude natural justice.

[34] This maxim ‘expressio unius est exclusio alterius’ means ‘Express mention of one thing implies the exclusion of another’. Broom in his ‘Legal Maxims’ says that no maxim of the law is of more application; and it is never more applicable than in the construction and interpretation of statutes. (Broom Leg Max) Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, viz., that the thing shall not be done otherwise’.

of expert evidence, the High Court had no basis to rely on these two limbs in s 2 definition 'to practice in Sabah' to conclude that adjudication is a regulated function under the Ordinance.

Third, the concept of a 'seat' is central to the legal framework of arbitration law. However, this legal concept does not exist in the law and practice of adjudication. There are substantive differences in the laws and legal principles governing the two dispute resolution regimes beyond this article's scope.

For these reasons, this article argues that the High Court should have taken a literal approach to finding that statutory adjudication is not a regulated function under the Advocates Ordinance. 'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense'.⁴³

(3) CIPAA as an instrument to police unauthorized practice under the Ordinance aborts the purpose and objective of CIPAA

The High Court took an overly patriarchal approach in its interpretation of ss 2 and 16(1) of the Ordinance when it held that a stay of the adjudication proceeding was 'the only effective way' 'to enforce the prohibition under the Advocates Ordinance (Sabah Cap. 2)' against the Claimant's representative in an adjudication connected to Sabah.⁴⁴

In the absence of ambiguity, the phrase 'any representative' under s 8(3) CIPAA should be given its natural and ordinary meaning. The natural and ordinary meaning of the phrase does not exclude lawyers who are not authorised to practise as advocates in Sabah. The omission of adjudication from s 16 of the Ordinance supports such an interpretation.

This article argues that CIPAA is not an instrument to police unauthorised practice under the Ordinance. The right to practice in Sabah under the Ordinance is personal to the advocate. Even if the Claimant's representative was not authorised under the Ordinance to represent the Claimant, the High Court should have made an order restraining the representative from acting in the adjudication but allowed the proceedings to continue with the Claimant either as self-represented or to appoint an eligible representative. Such an order would protect the adjudication process and be consistent with the approach for

43 *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173 [47]; Tindal C.J. in *Sussex Peerage Case* (1844) 11 CI & Fin 85 (refd).

44 [2021] 11 MLJ 50 [89]-[90].

rough justice. On the contrary, the stay order allowed the Respondent to avoid an adjudication decision. Such outcome is inconsistent with the purpose and objects⁴⁵ underlying CIPAA, ie, a summary process designed ‘to provide an effective and economical mechanism to alleviate the cash flow issues prevailing in the construction industry’.⁴⁶

Both the courts and guardians of the state’s bar should stop the chase for the chimera of a Sabah proceeding or a Sarawak proceeding from adjudication in the sovereign territory of Malaysia and disentangle themselves from this unhelpful label. This misconception has created some legal and practical challenges.

(4) The legal and practical challenges following *Tekun Cemerlang*

A consequence of the *Tekun Cemerlang* decision is that an adjudication proceeding with ‘Sabah elements’ could be frustrated or aborted because a party’s representative is not authorised to practise in Sabah. The decision thus presents challenges for the AIAC and users of adjudication.

First, to what extent would AIAC be required to screen an adjudication to ascertain whether the ‘Sabah elements’ are present? If the ‘Sabah elements’ are present in an adjudication, would the adjudication cease to be a ‘Sabah proceeding’ if the AIAC appoints a non-Sabah based adjudicator instead? Whilst AIAC has made substantial efforts to creating diversity in the pool of adjudicators, the decision in *Tekun Cemerlang* could deter AIAC from appointing an adjudicator from Sabah. Such a consequence would be unfortunate for the growth and development of adjudicators in Sabah.

Second, if an adjudication qualifies as a ‘Sabah proceeding’, to what extent would AIAC be obliged to screen the qualifications of the parties’ representatives before appointing an adjudicator? Where AIAC appoints an adjudicator from Sabah, would the adjudicator be obliged to scrutinize the eligibility of the parties’ representatives? A sitting adjudicator may not have the means and resources to perform such due diligence within the timeline allowed to perform his or her role as adjudicator. Under CIPAA, an adjudicator does not have the duty to screen the qualifications of the parties’ representatives.⁴⁷

45 Interpretations Act 1948 and 1967 (Act 388) s 17A.

46 Zawawi Salleh FCJ in the Federal Court case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2018] 4 MLJ 496 [41].

47 Construction Industry Payment and Adjudication Act 2012 s 24.

The eligibility of a party's representative should not be regarded as a matter that goes to the 'core jurisdiction' of an adjudicator.⁴⁸

Third, a respondent could frustrate an adjudication that qualifies as a 'Sabah proceeding' by appointing a non-Sabah lawyer as its representative. In practice, an adjudicator aims to render an enforceable adjudication decision. In the context of a 'Sabah proceeding', the *Tekun Cemerlang* decision seems to require an adjudicator to ensure that, if the parties' representatives are lawyers, they are authorised to practise in Sabah. Although s 25 CIPAA confers wide powers upon the adjudicator,⁴⁹ these powers must be exercised subject to the scope of the adjudicator's jurisdiction, which is limited to the matters raised in the payment claim and the payment response.⁵⁰ Suppose the respondent's representative is a lawyer authorised to practice in Sarawak or West Malaysia but not in Sabah. In that case, it is doubtful if the adjudicator would have the power to require the respondent to change its representative since it is not a

48 Lim Chong Fong J in *Liew Piang Voon v WLT Project Management Sdn Bhd* [2020] MLJU 1431 [21]–[22]: 'That notwithstanding, the Court has in certain cases involving jurisdiction of the adjudicator entertained the parties who have sought declarations and injunctions to halt and terminate the adjudication proceedings; see *Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors* [2019] 1 LNS 1366; [2020] 4 CLJ 201. The attractiveness of early court intervention is to avoid abortive costs incurable if the adjudication is eventually found to be a nullity for want of jurisdiction. Nevertheless, this sort of court intervention must be very sparingly entertained; otherwise it will encourage the opening of floodgates to frustrate or defeat the utility of statutory adjudication as a swift interim remedy to ease the case flow of a deserving unpaid party to a construction dispute. In my view, the safeguard can be meaningfully achieved if the permissible court intervention is perhaps limited to challenges on core jurisdiction as defined in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] 1 LNS 177. [22] Despite my initial reluctance to entertain the Plaintiff's application here, I am, after due consideration, satisfied that the problem in issue concerns core jurisdiction and has been brought by the Plaintiff early before statutory adjudication has been even instituted; see also *Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd* [2018] 1 LNS 896. Nonetheless, I hasten to add that future applications of similar nature should only be entertained in clear-cut cases where core jurisdiction is absent.'; *Maclay Equity Sdn Bhd v Prestij Mega Construction Sdn Bhd* [2021] MLJU 537 [26]–[27].

49 Mary Lim J (now JCA) in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* [2015] MLJU 1125 [94]: 'these powers relate substantially to administrative and procedural matters that will better promote the more efficient conduct of adjudication and adjudication proceedings'.

50 *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 [58]: 'In contrast to jurisdiction, the 'powers' of the adjudicator are listed in ss 25 and 26 of the CIPAA under the specific heading of 'Powers of the Adjudicator'. It follows that an adjudicator may exercise all or any of the powers under ss 25 and 26 of the CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss 5 and 6 of the CIPAA'.

matter that goes to the core jurisdiction of the adjudicator.⁵¹ Further, it is also not clear whether the decision in *Tekun Cemerlang* applies only to practising lawyers who are not admitted to practice in Sabah or whether it extends to in-house lawyers or former practitioners who have ceased to practise and do not hold current practising certificates?

CONCLUSION

The ‘Sabah proceeding’ concept in statutory adjudication in Malaysia may seem alluring, but it is ultimately deficient. The term ‘any representative’ under s 8(3) CIPAA is unqualified and should be given its natural and ordinary meaning. It may be desirable to provide statutory clarification that representation in an adjudication is not a function regulated under the Ordinance.

The preceding discussion encapsulates that over-regulatory is made at the costs of stakeholders’ confidence in the adjudication process involving ‘Sabah elements’, which directly correlates with the professional growth of adjudication and dispute resolution practitioners in the state. Any reforms aimed at mitigating these practical challenges would require continuous and transparent engagement between AIAC and the respective bodies to recalibrate the practice of the AIAC as the administrative body for CIPAA, the guardians of the state legal profession and the adjudication practitioners to take account of evolving realities. The recalibration is necessary to ensure that best practices are adopted, which is vital to restore investors’ confidence, attract foreign capital into the state, and that Sabah is well-positioned to support the commercial needs of businesses and investors in the construction industry.

Until there is a change in the applicable laws or the legal position is clarified by another forum, there are practical considerations for adjudication users, particularly where the construction contract and work involve contracting parties transcending East and West Malaysia. Unless a claimant is prepared to face a similar challenge in *Tekun Cemerlang*, future claimants should be mindful of their choice of representatives in adjudications in which the ‘Sabah

51 Lee Swee Seng J (now JCA) in *Binastra Ablebuild Sdn Bhd v JPS Holdings Sdn Bhd & another case* [2018] 8 MLJ 190 [88]: ‘It is doubtful if an adjudicator has the power to extend the time for service of a payment response as this was a matter to be complied with and served before his appointment as an adjudicator. His power to extend time under s 26 of the CIPAA must be over matters in which he has the jurisdiction under s 27 of the CIPAA . If he has no jurisdiction over a matter because no payment response was filed, he cannot have the power to extend time to enable him to have jurisdiction over such a matter’.

elements' are present. Ultimately, CIPAA would serve its purpose for stakeholders in the industry to recover payments for work done and services rendered if a claim is strategically and diligently prepared.