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Part I

CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012

LAWS OF MALAYSIA
ACT 746

CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT 2012

An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

ENACTED by the Parliament of Malaysia as follows:

PART I
PRELIMINARY

1. Short title and commencement

1) This Act may be cited as the Construction Industry Payment and Adjudication Act 2012.

2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

2. Application

This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

3. Non-application

This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

4. Interpretation

In this Act, unless the context otherwise requires—

"adjudication decision" means the decision made by an adjudicator under subsection 12(2);

"adjudication proceedings" means the process of adjudication under this Act;

"adjudicator" means an individual appointed to adjudicate a dispute under this Act;

"claimant" means an aggrieved party in a construction contract who initiates adjudication proceedings;

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

"construction contract" means a construction work contract or construction consultancy contract;

"construction work" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

b) Any road, harbour works, railway, cableway, canal or aerodrome;

c) Any drainage, irrigation or river control work;

d) Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

and includes—

a) Any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

b) Procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

"construction work contract" means a contract to carry out construction work;

"contract administrator" means an architect, engineer superintending officer or other person howsoever designated who administers a construction contract;

"Government" means the Federal Government or the State Government;

"High Court" means the High Court in Malaya or the High Court in Sabah and Sarawak, as the case may require;

"AIAC" means the Asian International Arbitration Centre;

"Minister" means the Minister charged with the responsibility for works;

"non-paying party" means a party against whom a payment claim is made pursuant to a construction contract;

"payment" means a payment for work done or services rendered under the express terms of a construction contract;

"principal" means a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts;

"respondent" means the person on whom the notice of adjudication and adjudication claim has been served;

"site" means the place where the construction work is affixed whether on-shore or off-shore;

"unpaid party" means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

"working day" means a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located.

PART II
ADJUDICATION OF PAYMENT DISPUTES

5. Payment Claim

1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

2) The payment claim shall be in writing and shall include—

   a) The amount claimed and due date for payment of the amount claimed;

   b) Details to identify the cause of action including the provision in the construction contract to which the payment relates;

   c) Description of the work or services to which the payment relates; and

   d) A statement that it is made under this Act.

6. Payment Response

1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.

2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.

3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.

4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

7. Right to Refer Dispute to Adjudication

1) An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.

2) The right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under subsection 6(3).

3) A dispute referred to adjudication under this Act is subject to the Limitation Act 1953 *[Act 254]*, Sabah Limitation Ordinance *[Cap. 72]* or Sarawak Limitation Ordinance *[Cap. 49]* as the case may be.

8. Initiation of Adjudication

1) A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.

2) Upon receipt by the respondent of the notice of adjudication, an adjudicator shall be appointed in the manner described in section 21.

3) A party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party.

9. Adjudication Claim

1) The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.

2) The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1).

10. Adjudication Response

1) The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.

2) The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).

3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1).

11. Adjudication Reply

1) The claimant may, within five working days from the receipt of the adjudication response, serve a written reply to the adjudication response together with any supporting document on the respondent.

2) The claimant shall provide the adjudicator with a copy of the adjudication reply together with any supporting document within the time specified under subsection (1).

12. Adjudication and Decision

1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.

2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within—

   a) Forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;

   b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or

   c) Such further time as agreed to by the parties.

3) An adjudication decision which is not made within the period specified in subsection (2) is void.

4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.

6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the AIAC.

7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7) and any correction made is deemed take effect from the date of the original adjudication decision.

9) The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act.

13. Effect of Adjudication Decision

The adjudication decision is binding unless—

a) It is set aside by the High Court on any of the grounds referred to in section 15;

b) The subject matter of the decision is settled by a written agreement between the parties; or

c) The dispute is finally decided by arbitration or the court.

14. Consolidation of Adjudication Proceedings

If two or more adjudication proceedings in respect of the same subject matter are being adjudicated before the same adjudicator, the adjudicator may, with the consent of all the parties to the adjudication proceedings, consolidate and adjudicate the matters in the same proceedings.

15. Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

a) The adjudication decision was improperly procured through fraud or bribery;

b) There has been a denial of natural justice;

c) The adjudicator has not acted independently or impartially; or

d) The adjudicator has acted in excess of his jurisdiction.

16. Stay of Adjudication Decision

1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

   a) An application to set aside the adjudication decision under section 15 has been made; or

   b) The subject matter of the adjudication decision is pending final determination by arbitration or the court.

2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the AIAC or make any other order as it thinks fit.

17. Withdrawal and Recommencement of Adjudication Proceedings

1) A claimant may at any time withdraw an adjudication claim by serving a notice of withdrawal in writing on the respondent and the adjudicator.

2) The claimant shall bear the costs arising out of the withdrawal of the adjudication proceedings unless the adjudicator orders otherwise.

3) The claimant who has withdrawn the adjudication claim is free to recommence adjudication on the same subject matter by serving a new notice of adjudication in accordance with section 8.

4) If an adjudicator dies, resigns or is unable through illness or any other cause to complete the adjudication proceedings—

   a) The adjudication proceedings come to an end and the parties are free to recommence adjudication proceedings afresh; or

   b) The adjudication proceedings may be continued by a new adjudicator appointed by the parties and the adjudication proceedings shall continue as if there is no change of adjudicator.

18. Costs of Adjudication Proceedings

1) The adjudicator in making the adjudication decision in relation to costs of the adjudication proceedings shall order the costs to follow the event and shall fix the quantum of costs to be paid.

2) Subsection (1) shall prevail over any agreement made by the parties prior to the commencement of the adjudication proceedings by which one party agrees to pay the other party's costs or bear the adjudicator's fees and expenses.

19. Adjudicator's Fees and Expenses, etc.

1) The parties and the adjudicator shall be free to a gree on the terms of appointment of the adjudicator and the fees to be paid to the adjudicator.

2) If the parties and the adjudicator fail to agree on the terms of appointment and the fees of the adjudicator, the AIAC's standard terms of appointment and fees for adjudicators shall apply.

3) The parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses and the adjudicator may recover the fees and expenses due as a debt.

4) The parties shall contribute and deposit with the Director of the AIAC a reasonable proportion of the fees in equal share as directed by the adjudicator in advance as security.

5) Before releasing the adjudication decision to the parties, the adjudicator may require full payment of the fees and expenses to be deposited with the Director of the AIAC.

6) An adjudicator is not entitled to any fees or expenses relating to the adjudication if the adjudicator fails to decide the dispute within the period specified under subsection 12(2) except when the delay in the delivery of the decision is due to the failure of the parties to deposit the full payment of the adjudicator's fees and expenses with the Director of the AIAC under subsection (5).

20. Confidentiality of Adjudication

The adjudicator and any party to the dispute shall not disclose any statement, admission or document made or produced for the purposes of adjudication to another person except—

a) With the consent of the other party;

b) To the extent that the information is already in the public domain;

c) To the extent that disclosure is necessary for the purposes of the enforcement of the adjudication decision or any proceedings in arbitration or the court; or

d) To the extent that disclosure is required for any purpose under this Act or otherwise required in any written law.

PART III
ADJUDICATOR

21. Appointment of Adjudicator

An adjudicator may be appointed in the following manner:

a) By agreement of the parties in dispute within ten working days from the service of the notice of adjudication by the claimant; or

b) By the Director of the AIAC-

i) Upon the request of either party in dispute if there is no agreement of the parties under paragraph (a); or

ii) Upon the request of the parties in dispute.

22. Appointment of Adjudicator by Parties

1) The claimant shall notify the adjudicator to be appointed under paragraph 21(a) in writing and provide him with a copy of the notice of adjudication.

2) The adjudicator shall propose and negotiate his terms of appointment including fees chargeable with the parties and shall within ten working days from the date he was notified of his appointment, indicate his acceptance and terms of his appointment.

3) If the adjudicator rejects his appointment or fails to indicate his acceptance of the appointment within the period specified in subsection (2), the parties may proceed to appoint another adjudicator in the manner provided under section 21.

23. Appointment of Adjudicator by Director of the AIAC

1) The Director of the AIAC shall appoint an adjudicator under paragraph 21(b) within five working days upon receipt of a request and shall notify the parties and the adjudicator in writing.

2) The adjudicator shall propose and negotiate his terms of appointment including fees chargeable with the parties and shall within ten working days from the date he was notified of his appointment, indicate his acceptance and terms of his appointment.

3) If the adjudicator rejects his appointment or fails to indicate his acceptance of the appointment within the period specified in subsection (2)-

   a) The parties may agree to appoint another adjudicator in the manner provided under paragraph 21(a); or

   b) The Director of the AIAC may proceed to appoint another adjudicator in the manner provided under paragraph 21(b).

24. Duties and Obligations of the Adjudicator

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that—

a) There is no conflict of interest in respect of his appointment;

b) He shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;

c) He shall comply with the principles of natural justice; and

d) There are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.

25. Powers of the Adjudicator

The adjudicator shall have the powers to—

a) Establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;

b) Order the discovery and production of documents;

c) Set deadlines for the production of documents;

d) Draw on his own knowledge and expertise;

e) Appoint independent experts to inquire and report on specific matters with the consent of the parties;

f) Call for meetings with the parties;

g) Conduct any hearing and limiting the hearing time;

h) Carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

i) Inquisitorially take the initiative to ascertain the facts and the law required for the decision;

j) Issue any direction as may be necessary or expedient;

k) Order interrogatories to be answered;

l) Order that any evidence be given on oath;

m) Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

n) Decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter.

o) Award financing costs and interest; and

p) Extend any time limit imposed on the parties under this Act as reasonably required.

26. Power of Adjudicator Not Affected by Non-compliance

1) Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of time limit, form or content or in any other respect shall be treated as an irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or adjudication decision.

2) The adjudicator may on the ground that there has been non-compliance in respect of the adjudication proceedings or document produced in the adjudication proceedings—

   a) Set aside either wholly or partly the adjudication proceedings;

   b) Make any order dealing with the adjudication proceedings as the adjudicator deems fit; or

   c) Allow amendment to be made to the document produced in the adjudication proceedings.

27. Jurisdiction of Adjudicator

1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

PART IV
ENFORCEMENT OF ADJUDICATION DECISION

28. Enforcement of adjudication decision as judgment

1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

29. Suspension or Reduction of Rate of Progress of Performance

1) A party may suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after receipt of the adjudicated decision under subsection 12(6).

2) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall give written notice of intention to suspend performance or reduce the rate of progress of performance to the other party if the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice.

3) The party intending to suspend the performance or reduce the rate of progress of performance under subsection (1) shall have the right to suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract upon the expiry of fourteen calendar days of the service of the notice given under subsection (2).

4) The party who exercises his right under subsection (3) —

   a) Is not in breach of contract;

   b) Is entitled to a fair and reasonable extension of time to complete his obligations under the contract;

c) Is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party; and

d) Shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to subsection 37(1).

30. Direct Payment from Principal

1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

31. Concurrent Exercise of Remedies

1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.

2) The remedies provided by this Act are without prejudice to other rights and remedies available in the construction contract or any written law, including any penalty provided under any written law.

PART V
ADJUDICATION AUTHORITY

32. Functions of AIAC

The AIAC shall be the adjudication authority and shall be responsible for the following:

a) Setting of competency standard and criteria of an adjudicator;

b) Determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;

c) Administrative support for the conduct of adjudication under this Act; and

d) Any functions as may be required for the efficient conduct of adjudication under this Act.

33. Policy Directions

1) In carrying out its functions under section 32, the AIAC shall obtain policy directions from the Minister charged with the responsibility for legal affairs.

2) The Minister charged with the responsibility for legal affairs shall consult the Minister before making any policy directions on the functions of the AIAC under section 32.

PART VI
GENERAL

34. Immunity of Adjudicator and AIAC

1) No action or suit shall be instituted or maintained in any court against an adjudicator or the AIAC or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.

2) An adjudicator who has adjudicated a dispute under this Act cannot be compelled to give evidence in any arbitration or court proceedings in connection with the dispute that he has adjudicated.

35. Prohibition of Conditional Payment

1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

2) For the purposes of this section, it is a conditional payment provision when:

   a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or

   b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

36. Default Provisions in the Absence of Terms of Payment

1) Unless otherwise agreed by the parties, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value' calculated by reference to—

   a) The contract price for the construction work or construction consultancy services;

   b) Any other rate specified in the construction contract;

   c) Any variation agreed to by the parties to the construction contract by which the contract price or any other rate specified in the construction contract is to be adjusted; and

   d) The estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more reasonable.

2) In the absence of any of the matters referred to in paragraphs (1)(a) to (d), reference shall be made to:

   a) The fees prescribed by the relevant regulatory board under any written law; or

   b) If there are no prescribed fees referred to in paragraph (a), the fair and reasonable prices or rates prevailing in the construction industry at the time of the carrying out of the construction work or the construction consultancy services.

3) The frequency of progress payment is:

   a) Monthly, for construction work and construction consultancy services; and

   b) Upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.

4) The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice.

37. Relationship Between Adjudication and Other Dispute Resolution Process

1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.

3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

PART VII
MISCELLANEOUS

38. Service of Notices and Documents

Service of a notice or any other document under this Act shall be effected on the party to be served—

a) By delivering the notice or document personally to the party;

b) By leaving the notice or document at the usual place of business of the party during the normal business hours of that party;

c) By sending the notice or document to the usual or last-known place of business of the party by registered post; or

d) By any other means as agreed in writing by the parties.

39. Regulations

The Minister may, upon considering the recommendation of the AIAC, make regulations as may be expedient or necessary for giving full effect or the better carrying out of the provisions of this Act.