

# **Alternative Dispute Resolution in the Malaysian Construction Industry**

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## **Abstract**

In Malaysia, ADR is seen as an alternative to litigation in resolving contractual disputes as it is perceived to be cost saving, more private and able to avoid ill-will or animosity as it sometimes does, in litigation. In the Malaysian construction industry, the present practice of ADR is focused mainly on arbitration. However, with the revised standard forms for construction contract, proposals for the Mediation Act and the Adjudication and Payment Act, there is a strong indication that ADR will be a common feature in resolving construction disputes in Malaysia. This paper intends to highlight the application of ADR in construction contracts with reference to three main standard forms contract, which are referred to in Malaysia; the PWD 203A (2007 edition), the PAM 2006 and the CIDB Standard Form of Contract for Building Works 2000. The main objective of this paper is to analyze existing provisions in the three standard form contracts and to evaluate their significance in resolving disputes between parties of construction contracts.

**Keywords:** alternative dispute resolution, construction industry, Malaysia

# **1. Background of the construction industry in Malaysia**

## **1.1 Introduction**

The Malaysian construction industry constitutes an important element of the Malaysian economy. This industry generates wealth and improves the quality of life of the people through the provision of social and economic infrastructure like schools, hospital, houses, roads, airports, ports, bridges, dams etc. (CIDB, 2008). The industry has generated some 800,000 jobs opportunities and creates a multiplier effect to industries such as manufacturing, financing and professional services. Thus, it acts as a catalyst for and has multiplier effects to the economy (CIDB, 2007).

Although it accounts for only 2.5% of the gross domestic product (GDP) in 2007, BERNAMA (2009) reported that the construction industry is expected to grow to 3.5% in 2009 despite the economic slowdown. The construction industry in other parts of the world has also provided ample opportunities for Malaysian contractors to flourish. Since 1986 a total of 386 overseas projects valued at RM22 billion have been completed. Furthermore, with the current trend, CIDB (2007) envisaged that the long term sustainability intended by the implementation of the Malaysian Construction Industry Master Plan will result in the construction industry contributing 5% to the country's GDP by 2015.

## **1.2 The construction industry master plan (CIMP)**

The Malaysian construction industry is fast growing and in light of this, it is vital that the industry works towards strengthening its foundation to face present and future challenges in the global arena. This concern prompted a roundtable discussion to be held in 2003 and 2004 which identified and recommended priorities and directions to improve the future of the Malaysian construction industry. The outcome was to entrust the Malaysian Construction Industry Development Board (CIDB), an arm of the Malaysian government set up through legislation, to coordinate the various measures recommended by the roundtable (CIDB, 2007).

Subsequently CIDB proceeded to establish ten working groups. The proposals were consolidated and further enhanced by the working groups into a ten-year strategic roadmap for the Malaysian construction industry, known as the Construction Industry Master Plan (CIMP) ranging from the period 2006-2015 (CIDB, 2007).

In 2007, the CIMP received approval by the cabinet committee for Investment and Infrastructure. This strategic roadmap is intended to develop the Malaysian construction industry into a sector that is world-class, innovative and knowledgeable global social provider. It is also intended to ensure that the construction industry is well positioned to support the nation's overall economic growth and to meet various challenges (CIDB, 2007).

The mindset of the human capital that drives the industry must be revolutionised to accept the dynamic of the transformation process that would be brought about by the CIMP. It is believed that the CIMP will trigger a paradigm shift in the Malaysian construction industry, having firstly arrested some the prevalent weaknesses currently prevalent in the construction community (CIDB, 2007).

In order to achieve the overall strategic direction, amongst others, the CIMP has charted seven strategic thrusts. The second thrust which is relevant to the discussion in this paper involves strengthening the construction industry image. The CIMP mentions that the resolution of disputes within the construction industry needs to be speedy and economical. In relation to this, one of the recommendations in the aforementioned thrust is to introduce a “Construction Industry Payment and Adjudication Act” to resolve disputes.

## **2. Construction disputes**

The construction industry is known for its conflict, with its characteristics mix of complex contractual relationships, huge sums of money at stake, highly complex projects and remorseless time pressure, as much as its spectacular construction and civil engineering projects (Holtham et al., 1999; Mackie et al., 2000). It also has a reputation as a tough and aggressive world in which the weakest and even at times some of the strongest will go the wall (Mackie et al., 2000). Disputes result not only from destructive or unhealthy conflict, but also when claims are not amicably settled (Kumaraswamy, 1998). Hence, a construction project is considered by many a dispute waiting to happen (Patterson & Seabolt, 2001).

Construction disputes itself, typically comprises both technical and legal dimensions, the former being the dominant issue in disputes. For this reason, litigation may not be the most appropriate forum for dealing with these types of disputes (Cheung, 2006). The dissatisfaction with the traditional dispute resolution mechanisms which can no longer successfully cope with the growing needs and challenges of the present construction environment has invoked the industry to look towards other alternative methods (Pêna-Mora et al., 2003). Alternative dispute resolution (ADR) is a generic description used to identify a wide range of resolution process that aims to resolve disputes speedily and cost efficiently (Cheung, 2006).

Disputes within the construction industry are inevitably related to time, money and quality. Disputes that are not resolved promptly, in all probability, would incur a considerable escalation in expenses which are hard or impossible to quantify. According to Cheung (2006) the visible expenses anticipated include the legal representatives, expert witnesses, and the cost of the dispute resolution proceedings itself. Amongst the less visible costs would be the company resources assigned to the dispute and lost business opportunities, while the intangible costs are identified as detriment to good working relationships and potential value lost due to inefficient dispute resolution process.

### **3. Alternative dispute resolution**

Over the last few decades the perceived shortcomings of litigation and also arbitration have resulted in attempts to find other quick means to resolve construction disputes. Mackie et al. (2000) observe that ADR was first developed in the United States in early 1980s as a result of dissatisfaction with the delays, costs and inadequacies of the litigation process. However, it only began to receive consideration in the late 1980s and early 1990s. Since then, its development as a process to resolve civil disputes relatively inexpensive and quickly has gained momentum and is now widely practiced in the construction industries in many countries, especially in Canada, United Kingdom and Australia (Mackie et al., 2000; Holtham et al., 1999). The acronym ADR has also been defined as Additional Dispute Resolution and Assisted Dispute Resolution. With time, it also stands for Appropriate Dispute Resolution and Amicable Dispute Resolution to reflect these desired outcomes (Mackie et al., 2000; Cheung, 2006).

The realisation of ADR as a process that complements both litigation and arbitration has meant that the processes are constantly expanding to include new techniques which offer no limits to the types of dispute resolution processes that can be utilised. The main attraction of ADR is often the consensual process, but this also means that it will not be successful unless the parties each have a genuine desire to reach a settlement (Holtham et al., 1999). Even though the most common ADR methods do not provide assurance of a resolution, in practice most of these methods lead to a final settlement (Mackie et al., 2000). The key to a settlement process is that the parties and those assisting in the process understand and agree to the same process.

The reasons for resorting to ADR include time savings, less costly discovery, more effective case management, confidentiality, and facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute, preservation of ongoing party relations, savings in trial expenses, and providing qualified neutral experts to hear complex matters (Treacy, 1995). Traditionally, arbitration being the forum sought in the construction industry (Battersby, 2003).

The ADR processes differ in their formality and placement of decision-making power. Some methods are non-binding and allow the parties to have control at all times over the outcome of the dispute, participate in the development of an agreeable settlement in the presence of a neutral third party and withdraw from the process at any point. (Pêna-Mora et al., 2003). Other methods may become binding where all powers lies with the neutral third party which is mandatory and have a formal structure that require strict adherence to the rules and implementation (Uff, 2005a).

ADR methods include arbitration, mediation, conciliation, early neutral evaluation, expert determination and mini trial as well as other hybrid methods such as med-arbitration and dispute adjudication/review board. Brown and Marriot (1999) have identified eighteen main dispute resolution methods ranging from processes which offer the least control, which is litigation, to those that offer the greatest control, that is, negotiation.

Although there is no one exclusive ADR for the construction industry, apart from arbitration, which is the most widely form of alternative dispute resolution mechanism in the construction industry, other spectrums of ADR include negotiation, mediation, and conciliation as well as other hybrid methods such as med-arbitration, adjudication, mini-trial, expert determination or appraisal, court-annexed ADR and dispute review board. The array of dispute resolution methods has advantages and disadvantages and despite having similar objectives, the processes involved are significantly different from one method to the other (Battersby, 2003). In relation to this, Kumaraswamy (1998) views that there is a need for advice to tailor an appropriate mechanism to resolve a given dispute in a particular circumstance, as it may result in an unresolved dispute. Moreover, due to the divergence in construction disputes, the right process should be adapted to the type of problem so as to provide a solution that suits the varied nature and size of dispute in issue, with the object of saving time and costs (Mackie et al., 2000 and Battersby, 2003).

Arbitration is generally seen as a more flexible procedure than litigation but this may be so in theory but not in practice (Holtham et al., 1999). The poor image of arbitration is attributable to its temptation to imitate traditional court procedure (Jones, 2006). In arbitration, the parties have the opportunity to choose an arbitrator with relevant expertise, but non-lawyers see the process as having been hijacked by lawyers who have imposed litigation style practice on what was originally tended to be quick and simple means of resolving disputes (Holtham et al., 1999). Amongst the advantages of arbitration is the privacy and confidentiality afforded to the parties. The parties also have the freedom to determine an arbitrator or appropriate appointing body to ensure that he or she has relevant expertise and experience. They are free to choose their own rules, with great procedural and substantive flexibility, but the flexibility of the process can create uncertainty among the parties (Holtham et al., 1999). There are very limited grounds of appeal against an arbitration award.<sup>1</sup> Hence, depending on the circumstances of a dispute, Battersby (2003) views that arbitration can be very quick and cost effective as a means of resolving dispute. On the other hand, it can also be very time consuming, cumbersome, expensive and adversarial which contributed to it earning the name litigation in the private sector.<sup>2</sup>

Litigation and arbitration are about winning and losing, while mediation creates a non-adversarial condition in order to reach a win-win solution. The mediator functions to assist the parties in dispute to generate options and foster an understanding of their respective positions and to manage emotions (Battersby, 2003). Although the mediator controls the process, he/she does not impose any resolution or opinion on the merits of the case, promoting a win/win situation, leaving the parties themselves to control the outcome (Mistelis, 2001). In England, a mediator is also known as conciliator and the term is used interchangeably (Battersby, 2003).

The process of mediation is flexible, private and confidential with the legal rights of the parties protected when no agreement has been reached (Mistelis, 2001). Its concept is a totally different

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<sup>1</sup> Sections 15(5) and 18(10) of the Malaysian Arbitration Act 2005.

<sup>2</sup> See the judgment in *Northern Regional Health Authority v Derek Crouch Construction Company Limited* [1984] 1 QB 644, at 70 where Sir John Donaldson MR stated that “Arbitration is usually no more and no less than litigation in the private sector.”

process from arbitration in all respects saves only for the parties' agreement to utilise the process as an alternative to litigation and the objective of privacy (Battersby, 2003). It is non-binding and involves a neutral third party that does not make decisions. It is contended that mediation and adjudication is included in a contract not as a replacement for arbitration but only as a means of avoiding arbitration (Battersby, 2003). Mediation is faster and more cost effective than arbitration. It also avoids the risk of win-loss situation. When goodwill exists between the parties, mediation being non-adversarial helps to promote amicable settlements and preserves business relationships. The parties to mediation retain control over their positions and can walk away from mediation or take time to reconsider the situation (Battersby, 2003).

Although mediation of construction disputes highly resembles other mediation, Patterson and Seabolt (2001) highlight some peculiarities which merit consideration. Normally a mediator chosen to deal with a construction dispute is likely to possess substantial knowledge and experience in the construction industry, thus saving time and expenses for the parties. As construction disputes are document-sensitive, the mediator will most probably be called upon to facilitate the amicable exchange of documents. The mediator may require a longer time for presentations from and caucuses with parties as it may involve multiple parties and complex issues. The mediator may also be required to render advisory opinion on matters if the parties agree to this approach.

Meanwhile, in adjudication, the adjudicator acts as a third neutral party who is appointed to resolve a dispute within a certain time limit. The decision of the adjudicator is binding but not necessarily final as it could later be reviewed by either arbitration, court proceedings or by settlement agreement between the parties. In large international contracts, adjudication is usually referred to as dispute adjudication board or dispute review board which may consists of one or more adjudicators (Natkunasingam & Sabaratnam, 1998). In the UK, certain standard forms of contract have encouraged adjudication as an alternative dispute resolution earlier on, but its scope has now been greatly extended by an underpinning Act that provides that any party to a contract is entitled to adjudication.

#### **4. ADR in Malaysian construction contracts**

Notwithstanding the wide adoption of ADR within the construction industry, the geographical differences attributed to cultural factors, maturity of the industry and prevalent legal systems in force influences the use of ADR practices. Furthermore, participation in ADR techniques remains largely voluntary, and the legal implication arising from them remain uncharted (Cheung, 2006).

In Malaysia, the most common alternative dispute resolution methods incorporated in Malaysian construction contracts are arbitration and mediation (Lim and Xavier, 2002). At present, Malaysia is seeking for an efficient and economical dispensation of justice and a more suitable dispute resolution technique to deal with current and future challenges in the construction industry. In line with the Malaysian CIMP, CIDB is advocating statutory adjudication as a suitable dispute resolution in the construction industry.

There are various standard forms of construction contract, which the parties can refer, adopt or incorporate in Malaysia. For the public sector, the main reference is normally the PWD 203 form, whilst for the private sector; the PAM standard form contract and the CIDB Building Works contract. For the purpose of this article, discussion on the contractual terms relating to ADR shall be made to the latest version of these three forms; the PWD 203 A (Rev. 2007), the PAM (Rev.2006) and the CIDB Building Works 2000 Edition.

## 4.1 Arbitration

While the court is the main forum for resolution of construction dispute, arbitration is a well established part of the construction industry (Natkunasingam and Sabaratnam, 1998; Oon, 2003). In Malaysia, arbitration is governed by the Arbitration Act 2005, which repeals and replaces the Arbitration Act 1952. It is applicable to all arbitration proceedings commencing after 15 March 2006. This much awaited Act has addressed some of the perceived and actual failures of the arbitration process in the previous Act (Premaraj, 2007). It is based on the United Nations Commission International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“the Model Law”) which member states are free to modify for use in their domestic arbitral regime (Rajoo & Davidson, 2007). 63 countries worldwide have adopted this model, including the common law state of New Zealand, which the Malaysian Act structure closely resembles (Rajoo & Davidson, 2007).

The Malaysian courts have been actively involved in dealing with challenges in arbitration. In *Menang Development (M) Sdn Bhd v Pembinaan K& H Sdn Bhd & Anor*,<sup>3</sup> the plaintiff were house developers who appointed the defendant as a contractor for their project. The plaintiff challenged the architect certificate and applied for appointment of an arbitrator. The High Court held that challenge of the architect certificate was not bona fide but nevertheless, the plaintiff were not prevented from having the alleged defects and related claims to be arbitrated on as it is their contractual right.

In *Usahasama SPNB –LTAT Sdn Bhd v Borneo Synergy (M) Sdn Bhd*,<sup>4</sup> the plaintiff appointed a company, PPHM as its main contractor. The defendant was the subcontractor of PPHM. In the course of performance of the work, PPHM purported to withdraw from the main contract and recommended for the piling work to be continued by the defendant. Subsequently, a deed of assignment was signed between the plaintiff and defendant and acknowledged by the plaintiff. Later a dispute arose between the plaintiff and defendant relating to payment for the work done. The defendant issued an arbitration notice pursuant to clause 54 of the main contract. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) appointed an arbitrator who later exercised his discretion and passed an award in favour of the defendant. The plaintiff took a court action contending that the appointment of the arbitrator is not valid and to set aside the award.

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<sup>3</sup> [1993] 3 CLJ 41.

<sup>4</sup> [2009] 7 CLJ 779

The court held that there was a clear intention between the parties that they are bound by separate contract, which was based on terms of the main contract when PPHM withdrew from the main contract. Evidence showed that the plaintiff and defendant had conducted themselves as if terms of the main contract bind upon their relationship. Owing to the fact that there existed a contract between the plaintiff and defendant based on terms of the main contract, it follows that clause 54 of the P.W.D, which was a part of the main contract was a term of the contract between the plaintiff and the defendant. As such, the arbitrator has discretion to decide on the arbitration proceedings.

In the latest version of the standard forms, clauses on arbitration are found in clause 65 of PWD 203A (Rev. 2007),<sup>5</sup> clause 34 of PAM 2006<sup>6</sup> and clause 47 of CIDB Building Works 2000 Edition.<sup>7</sup> In all these standard forms, it could be seen that arbitration is adopted as the final form of dispute resolution and has produced a de facto universality of arbitration as the normal method of settling disputes (Rajoo, 2008). Some of the various issues on disputes that have been referred to arbitration have been identified by Rajoo (2008) as follows:

- Termination of the contract due to failure by contractor/sub-contractor to proceed diligently and competently on site, or the contractor/sub-contractor ceased working, or repudiation of contract by employer.
- Non-payment of variation claims, progress payment claims, extension of time claims, liquidated and ascertained charges against contractor/sub-contractor, validity of final account and certificate.
- Changes in design, defective materials, poor quality of workmanship, delay and extension of time due to local authorities' requirements, and negligence and nuisance.

## **4.2 Mediation**

Although the modern or formal mediation is yet to mark in the dispute resolution process in Malaysia, the promotion of mediation in a number of industries have demonstrated that mediation is increasingly advancing into the society (Natkunasingam & Sabaratnam, 1998 and Lim, 2004). In the construction industry, although mediation is relatively new, it is gaining recognition which is evidenced by the incorporation of mediation terms as a first tier of dispute resolution in a number of the Malaysian construction contracts (Lim & Xavier, 2002 and Ismail et al., 2009). Parties to a construction contract are encouraged to attempt to settle their disputes amicably by mediation prior to referral to other dispute resolution prescribed in the contract. In the standard forms contracts, the mediation terms were first introduced in clause 35 of the PAM 1998. It was gradually introduced in

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<sup>5</sup> Clause 65. See Appendix A.

<sup>6</sup> Clause 34. See Appendix B.

<sup>7</sup> Clause 47. See Appendix C.



clause 47.2 of the CIDB Standard Form of Contract for Building Works 2000 Edition<sup>8</sup> and in clause 35 of the latest PAM 2006.<sup>9</sup> There is no mediation clause in the PWD forms.

A research conducted on five major Malaysian agencies that have provided dispute resolution services between 2000 and 2008, demonstrates that mediation cases are very low compared to arbitration cases. In one agency, less than 1% of mediation cases was on construction, while in another agency, none of its more than 500 cases came before a mediator (Ismail et al., 2009). Another research to establish how construction disputes are conceived by practicing quantity surveyors in Malaysia showed that 23.1% and 21.4% of disputes were settled through negotiation and contractual adjudication respectively (Mohd Isa et al., 2009). The study also reveals the following reasons on why mediation was not widely used within the Malaysian construction industry:

- Most problems can be resolved through direct-negotiation with the disputants without any involvement from others. The involvement of a third party can make disputes become more complicated or even worse
- Not widely known in Malaysia since it is a new approach
- Not exposed to any mediation procedure since no major disputes have yet arisen which need settlement through mediation
- Differential in value of work if substantial will be added or omitted progressively and this must be agreed by both parties
- The main contractor will offer alternative works or projects as replacement if the sub-contractor suffers losses
- Not agreed or initiated by both parties
- Unaware

It is suggested that the future of mediation in this country lies in the promotion of the benefits of mediation and the availability of structured mediation training to ensure that mediation skills are properly acquired (Natkunasingan & Sabaratnam, 1998). It is hoped that the much-awaited judicial reforms in Malaysia which includes the proposal to set up a mediation system under a Mediation Act which would not only require parties to mediate prior to filing in court, but also assist in clearing the backlog of civil cases. It was agreed that a court-mandated mediation system should be set-up, as mediation did not work well if it is outside the court system (Zaman, 2009).

### **4.3 Adjudication**

Adjudication is regarded as the nearest process to arbitration.<sup>10</sup> It is similar to arbitration in that it is a judicial process in which the adjudicator determines the parties' respective rights and obligations

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<sup>8</sup> Clauses 47.2 and 47.3 of CIDB Standard Form of Building Contract (2000 Edition). See Appendix C

<sup>9</sup> Clause 35. See Appendix B.

under the contract on the basis of evidence presented by the parties (Battersby, 2003). The principal advantage of adjudication over arbitration is that it is much simpler as it is intended to be a quick process similar to mediation, and relatively cheap. In contrast with mediation, adjudication results in a decision which is temporarily binding until finally determined by litigation, arbitration or settlement agreement between the parties. Adjudication is not a condition precedent to arbitration or court. It is statutorily enabled which entitles a party to exercise their rights to invoke adjudication; otherwise the parties may opt for other dispute resolution.

In summary, adjudication can be described as a procedure of referring a dispute to a third neutral party, an adjudicator, who must be appointed within seven days. Once a dispute has been referred to the adjudicator, the adjudicator must act impartially and may take the initiative to ascertain the facts and the law. The adjudicator must fulfil his/her obligation to reach a decision within twenty-eight days of referral and may extend the period of making decision by up to fourteen days with the consent of the referring party or any further extension agreed by the parties. This process aims to determine a dispute on a temporary basis to enable work to proceed unimpeded and with less likelihood of serious injustice being caused (Cottam, 1998). Even if the decision is not accepted by one of the parties, the parties are obliged to implement the adjudicator's decision. The decision is binding unless and until the dispute is finally resolved by legal proceeding, arbitration, settlement agreement or both parties accept the decision as finally determining the dispute.

In the UK, under the Housing Grants, Construction and Regeneration (HGCR) Act 1996 statutory adjudication was introduced as a procedure to resolve disputes in the construction industry. The legislation is an attempt to provide a "quick-fix" solution based on the assumption that the construction industry is willing to accept "rough justice" at the adjudication stage during the currency of the project, provided that serious challenges are brought through arbitration or litigation only after practical completion (Chan et al., 2005).

In Malaysia, the use of adjudication to resolve disputes is rare (Natkunasingam & Sabaratnam, 1998). In the PAM (Rev. 2006) adjudication and arbitration are put under the same clause.<sup>11</sup>

The latest development relating to adjudication is the CIDB initiative with the backup of the construction industry which has recommended statutory adjudication through the proposed Construction Industry Payment and Adjudication Act (CIPAA). Besides providing a speedy dispute resolution mechanism for the construction industry, the other key features of the proposed CIPAA are to outlaw the practice of pay-when paid and conditional payment, to facilitate regular and timely payment, and provide security and remedies for the recovery of payment (CIDB, 2008).

Briefly, the basic adjudication procedures prescribed by the proposed CIPAA is outline as follows:

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<sup>10</sup> HHJ Lloyd QC in *Glencot Development v Ben Barrett* (2001) BLR 207, at paragraph 19 and in *Balfour Beatty v London Borough of Lambeth* (2002) BLR 288, at paragraph 29.

<sup>11</sup> Clause 35. See Appendix B

- When a dispute<sup>12</sup> arises the claimant to the dispute initiates the proceedings by serving a notice of adjudication<sup>13</sup> on the respondent.<sup>14</sup>
- Upon the service of the notice, the claimant may agree with the respondent on an adjudicator.<sup>15</sup> The party can only agree to an adjudicator after a dispute has arisen.<sup>16</sup> If the agreed adjudicator is not an accredited adjudicator, the claimant shall write and obtain authorisation of the Adjudication Control Authority (ACA)<sup>17</sup> before requesting the agreed person to act as adjudicator. If the ACA do not authorise the agreed person to act as adjudicator, or if the parties fail to agree on an adjudicator, the claimant shall write to the ACA to nominate an adjudicator.<sup>18</sup> In both of the above situations, the ACA shall respond in writing within seven working days from the receipt of the claimant's application.<sup>19</sup>
- The agreed or nominated adjudicator shall within three working days from the written request of the claimant to act as adjudicator serve a written notice stating that he/she is willing and able to act as adjudicator. The notice shall also state the proposed terms of appointment and fees (if it differs from those published in the regulations), contain a declaration that there is no conflict of interest, and contain any disclosure that may prejudice the adjudicator.<sup>20</sup>
- Upon service of the above notice, the agreed or nominated adjudicator may hold a preliminary meeting with the parties to acquaint with the dispute and afford an opportunity to the parties to resolve the dispute amicably.<sup>21</sup>
- The agreed or nominated adjudicator shall within five working days from the service of the above notice serve on the parties a written notice of acceptance of appointment.<sup>22</sup> This notice confirms the appointment of the adjudicator based on the terms of appointment and fees.<sup>23</sup> The adjudicator may direct the parties to contribute and deposit in equal share a reasonable portion of the fees as security to be deposited with the ACA.<sup>24</sup>
- The claimant shall serve on the adjudicator and the respondent the adjudication claim and supporting documentations within 10 working days (or any further time agreed by the parties

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<sup>12</sup> Section 12(1) of the proposed Construction Industry Payment and Adjudication Act (CIPAA) stipulates that a party to a construction contract has the right at any time to refer to adjudication any dispute or disputes arising under or in connection with the construction contract including withholding of certificate and non payment of payment claim made under the Act. Section 12(2) provides that the right to refer is not jeopardised even if the dispute is the subject of proceedings in court, arbitration or other dispute resolution process.

<sup>13</sup> Section 14(2) stipulates that the notice of adjudication shall state the nature and a brief description of the dispute or disputes, state the remedy sought and state that it is made under the Act.

<sup>14</sup> Section 14(1) of the proposed CIPAA.

<sup>15</sup> Section 15(1) of the proposed CIPAA.

<sup>16</sup> Section 15(4) of the proposed CIPAA.

<sup>17</sup> Section 2 of the proposed CIPAA specifies that an Adjudication Control Authority means the body prescribed by the Minister to administer adjudication for the purposes of the Act.

<sup>18</sup> Sections 15(2) and (3) of the proposed CIPAA.

<sup>19</sup> Sections 15(2) and (3) of the proposed CIPAA.

<sup>20</sup> Section 17(1) of the proposed CIPAA.

<sup>21</sup> Section 17(3) of the proposed CIPAA.

<sup>22</sup> Section 17(4) of the proposed CIPAA.

<sup>23</sup> Ibid.

<sup>24</sup> Section 31(3) of the proposed CIPAA.

or which the adjudicator may reasonably allow) from the receipt of the notice of acceptance of appointment of adjudicator.<sup>25</sup>

- The respondent shall serve on the adjudicator and the claimant a written adjudication response<sup>26</sup> within ten working days from the receipt of the adjudication claim (or any further time agreed by the parties or which the adjudicator may reasonably allow).<sup>27</sup>
- The claimant shall serve on the adjudicator and the respondent a written reply within five working days from the receipt of the adjudication response.<sup>28</sup>
- The adjudicator is empowered to establish the procedure including limiting the submission, require further submissions and set deadlines for submission of documents from by the parties.<sup>29</sup> The adjudicator may use own specialist knowledge, appoint independent experts with the consent of the parties, call for meetings and conduct any hearing, carry out inspection of the site, work, material or goods relating to the dispute including opening up of work done.<sup>30</sup> He/she may also open up, review and revise any certificate, decision, instruction, opinion or valuation of the parties or contract administrator, and decide on any matter although no certificate has been issued in respect of the matter.<sup>31</sup> The adjudicator is also empowered to inquisitorially take the initiative in ascertaining the facts and the law required for the decision, issue such directions as may be necessary, order the interrogatories to be answered, and order that any evidence to be given on oath or affirmation.<sup>32</sup>
- After taking into consideration all matters found by and brought before the adjudicator in the proceedings, the adjudicator shall decide the dispute within forty two working days from the service of the adjudication response, or reply to the adjudication response (if any), or from the time prescribed for the service of the adjudication response if none has been served, or such further time as agreed by the parties.<sup>33</sup>
- The decision shall be in writing, containing reasons unless dispense with by the parties.<sup>34</sup> The adjudicator shall determine the adjudicated amount (if any) to be paid by one party to the other, the date on which it is to be paid, and other matters in dispute on rights and obligations of the parties.<sup>35</sup> The adjudicator is also empowered to award financing costs and interest.<sup>36</sup> The adjudicator may require full payment of the fees and expenses to be deposited with the ACA before releasing the decision to the parties.<sup>37</sup>

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<sup>25</sup> Section 18 of the proposed CIPAA.

<sup>26</sup> Section 19(2) provides that the the adjudication response shall answer the adjudication and may include cross claim and supporting documents by the respondent provided the cross claim was included in the payment response where the claimant has previously served a payment claim under the Act.

<sup>27</sup> Section 19(1) of the proposed CIPAA.

<sup>28</sup> Section 19(4) of the proposed CIPAA.

<sup>29</sup> Sections 24(a) to (c) of the proposed CIPAA.

<sup>30</sup> Sections 24(d) to (h) of the proposed CIPAA.

<sup>31</sup> Sections 24(m) and (n) of the proposed CIPAA.

<sup>32</sup> Sections 24(i) to (l) of the proposed CIPAA.

<sup>33</sup> Sections 26(1) and (2) of the proposed CIPAA.

<sup>34</sup> Section 26(3) of the proposed CIPAA.

<sup>35</sup> Section 26(4) of the proposed CIPAA.

<sup>36</sup> Section 24(o) of the proposed CIPAA.

<sup>37</sup> Section 31(d) of the proposed CIPAA.

- If a party is dissatisfied with the decision of the adjudicator, the aggrieved party may within seven working days from the receipt of the adjudication decision make a written application accompanied with other relevant documents, to the ACA with a copy to the other party for a review of the adjudication decision.<sup>38</sup>
- The party applying for a review shall with the application, deposit with the ACA the adjudication review fee and the adjudicated amount (if any) payable to the party as ordered in the adjudication decision, as stakeholder pending the determination of the adjudication review.<sup>39</sup>
- The ACA shall appoint a panel of three adjudicators within seven working days from the receipt of the application for review of the adjudication decision and the payment of the adjudication review fee and the adjudicated amount (if applicable) and notify the parties of the appointment in writing.<sup>40</sup>
- The review adjudicators are provided the same powers as that of the original adjudicator. They may confirm, set aside or vary the adjudication decision as they consider appropriate.<sup>41</sup>
- The review adjudicators shall determine the review within fourteen working days from the appointment by the ACA or such further time as agreed to by the parties.<sup>42</sup> The determination shall be decided by a majority decision.<sup>43</sup>
- The adjudication decision or the adjudication review determination is binding unless set aside by the High Court,<sup>44</sup> the subject matter of the decision is settled by agreement between the parties, or the dispute is finally decided by arbitration or the court.<sup>45</sup>
- If a party refuses to pay the adjudicated amount, the unpaid party may apply to the court to enforce the adjudication as a court judgment,<sup>46</sup> suspend performance or reduce the rate of performance,<sup>47</sup> or make a written request to the principal to pay the outstanding adjudicated amount.<sup>48</sup>

Under the proposed CIPAA, adjudication is not a condition precedent to arbitration, litigation, or other dispute resolution mechanism. It is an entitlement which is statutorily provided in the event a party wishes to invoke adjudication. Once adjudication is initiated, the other party is drawn into it (CIDB, 2008). However, the parties are not prevented from resorting to another dispute resolution process, regardless of whether or not the proceedings take place concurrently with the adjudication

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<sup>38</sup> Sections 27(1) and (2) of the proposed CIPAA.

<sup>39</sup> Section 27(3) of the proposed CIPAA.

<sup>40</sup> Section 27(4) of the proposed CIPAA.

<sup>41</sup> Sections 28(2) and (3) of the proposed CIPAA.

<sup>42</sup> Section 28(1) of the proposed CIPAA.

<sup>43</sup> Section 28(3) of the proposed CIPAA.

<sup>44</sup> Section 34 (of the proposed CIPAA provides that the aggrieved party may apply to the High Court to set aside the decision if the decision was improperly procured through fraud, bribery, denial of natural justice, or the adjudicator acted in excess of jurisdiction.

<sup>45</sup> Section 13(4) of the proposed CIPAA.

<sup>46</sup> Section 36(1) of the proposed CIPAA.

<sup>47</sup> Section 37(1) of the proposed CIPAA.

<sup>48</sup> Section 38(1) of the proposed CIPAA.

proceedings.<sup>49</sup> Other dispute resolution mechanisms can co-exist, and complement each other. Similar to the Malaysian Arbitration Act 2005, the proposed Act is also strongly influenced by the New Zealand Construction Contracts Act 2002. At present, this proposed Act is awaiting approval to be tabled before the Malaysian Parliament.

The proposed CIPAA is not without disapproval and Ameer Ali (2007) dealt with several of the concerns. One of the point of interest raised by the Malaysian Bar was that the proposed Act would exclude certain competent professionals from being selected as adjudicators. In relation to this, it was clarified that there was no attempt in the proposed Act to exclude or include any particular group of professionals from either representing the parties or to be selected as adjudicators. The Bar also questioned whether payments and claims were really an issue as there was no empirical evidence to support that there cash flow problem in the industry. In answer to this, the regular surveys conducted by the Master Builders Association Malaysia and also a survey carried out by University of Malaya has confirmed the existence of the issue. Another concern is the possibility of statutory adjudication leading to a reduction in construction arbitration. If this occurs, then it should be better for the construction industry since parties could move on to complete their projects.

Other points that were raised included the possibility of „ambush“ where the claimant can spend a long time preparing their case while only allowing the respondent a limited time to respond (SCL, 2008). The other aspect is whether adjudication is suitable for complex issues in dispute especially if it is further substantiated with massive documentation, which an adjudicator have to decide within a restricted time. Another concern is on the availability of suitable competent adjudicators who are able to determine the dispute within the prescribed time frame (Premaraj, undated).

## **5. Observation**

Malaysia without doubt needs to head towards reforming the applicable laws as well as exploring efficient and economical ways to dispense justice in the construction industries. At present, the Malaysian government has undertaken several reform measures to improve the arbitration process (AGC, 2008). The measures include amendments to the Arbitration Act 2005 as well as upgrading the role of the KLRCA ((Lim, 2009). The courts in Malaysia have acknowledged the importance of ADR, particularly mediation. Pursuant to this, a Mediation Act is also reported to be in the pipeline which is proposed to provide for a court mandated mediation system that would help clear the backlog of civil cases (BERNAMA, 2008). There is yet to be a proposed model available for public viewing. The introduction of the statutory adjudication in Malaysia through the proposed CIPAA is also seen to be an innovative step for Malaysia. When both the proposed Mediation Act and CIPAA come into force, it would be of interest to gauge the approach of the construction industry participants towards these Acts. The Malaysian Bar Council has also undertaken an initiative to improve construction litigation by proposing to set up a specialised construction court modelled after the Technology and Construction Court (TCC) of the UK (Lim, 2009). This court would provide expertise, efficient system and affordable justice that are able to deal with all construction cases

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<sup>49</sup> Section 13(1) of the proposed CIPAA.

commenced in court as well as appeals and applications arising from arbitration and the imminent adjudication. With all the initiatives and proposals by respective agencies, there is a high possibility that soon ADR shall be a common feature/ method in resolving construction disputes in Malaysia.

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## **Appendix A**

### **PWD (203 A) 2007**

#### **65. ARBITRATION**

- 65.1 If any dispute or difference shall arise between the Government and the Contractor out of or in connection with the contract, then parties shall refer such matter, dispute or difference to the officer named in Appendix for a decision.
- 65.2 The officer named in Appendix's decision shall be in writing and shall subject to clause 65.4 hereof, be binding on the Parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.
- 65.3 If the Parties-
- (a) Fails to receive a decision from the officer named in the Appendix within forty-five (45) days after being requested to do so; or
  - (b) Is dissatisfied with any decision of the officer named in the Appendix,
- then such dispute or difference shall be referred to arbitration within forty-five (45) days to an arbitrator to be agreed between the Parties and failing such agreement, to be appointed by the Director of the Regional Centre for arbitration in Kuala Lumpur on the application of either Party hereto. Such arbitration shall be heard at the Kuala Lumpur Regional Centre for Arbitration and shall be conducted in accordance with the rules for arbitration of the Kuala Lumpur Regional Centre for Arbitration using the facilities and the system available at the Centre.
- 65.4 Such reference, except on any difference or dispute under clause 52 hereof shall not be

commenced until after the completion or alleged completion of the Works or determination or alleged determination of the Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of the Government and the Contractor.

- 65.5 In the event that such consent has been obtained in accordance with clause 65.4, the reference of any matter, dispute or difference to arbitration pursuant to this clause and/or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Contract.
- 65.6 In any arbitration proceedings conducted pursuant to clause 65.3, the Parties may make any counter claim in relation to any dispute or difference arising from the Contract.
- 65.7 Upon every or any such reference the costs of such incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof, or direct the amount to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same be borne, award and paid.
- 65.8 The award of the Arbitrator shall be final and binding on the Parties.
- 65.9 In the event of the death of the arbitrator or his unwillingness or inability to act, then the Government and the Contractor upon agreement shall appoint another person to act as the arbitrator, and in the event the Government and the Contractor fail to agree on the appointment Of an arbitrator, an arbitrator shall be appointed by the Director of the Regional Centre for Arbitration in Kuala Lumpur.
- 65.10 In this clause, "reference" shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 2005.
- 65.11 The arbitration shall be governed by the Arbitration Act 2005 and the laws of Malaysia.

## **Appendix B**

### **PAM 2006**

#### **30.0 Certificates and Payment**

30.1 ...

30.4 The Employer shall be entitled to set-off all cost incurred and loss and expense where it is 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:

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.

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.

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 or 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.

30.5 ...

#### **34.0 Adjudication And Arbitration**

34.1 Reference to adjudication is a condition precedent to arbitration for disputes under Clause 30.4. The parties by written agreement are free to refer any other disputes to adjudication. Any dispute under Clause 30.4 after the date of Practical Completion shall be referred to arbitration under Clause 34.5.

34.2 Where a party requires a dispute or difference under Clause 34.1 to be referred to adjudication, such disputes or differences shall be referred to an adjudicator to be agreed between the parties. If after the expiration of twenty one (21) Days from the date of the written notice to concur on the appointment of the adjudicator, there is a failure to agree on the appointment, the party initiating the adjudication shall apply to the President of Pertubuhan Akitek Malaysia to appoint an adjudicator, and such adjudicator so appointed shall be deemed to be appointed with the agreement and consent of the parties to the Contract

34.3 Upon appointment, the adjudicator shall initiate the adjudication in accordance with the current edition of the PAM Adjudication Rules or any modification or revision to such rules.

34.4 If a party disputes the adjudicator's decision, he shall nevertheless be bound by the adjudicator's decision until Practical Completion but shall give a written notice to the other party to refer the dispute which was the subject of the adjudication to arbitration within six (6) Weeks from the date of the adjudicator's decision. The adjudicator's decision shall be final and binding on the parties if the dispute on the adjudicator's decision is not referred to arbitration within the stipulated time. The parties may settle any dispute with the adjudicator's decision by written agreement between the parties or by arbitration under Clause 34.5.

34.5 In the event that any dispute or difference arises between the Employer and Contractor, either during the progress or after completion or abandonment of the Works regarding:

34.5(a) any matter of whatsoever nature arising under or in connection with the Contract;

34.5(b) any matter left by the Contract to the discretion of the Architect;

34.5(c) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to;

- 34.5(d) the rights and liabilities of the parties under Clause 25.0,26.0,31.0 or 32.0; or
- 34.5(e) the unreasonable withholding of consent or agreement by the Employer or Contractor,
- then such disputes or differences shall be referred to arbitration.
- 34.6 Upon the disputes or differences having arisen then:
- 34.6(a) any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties; and
- 34.6(b) if after the expiration of twenty one (21) Days from the date of the written notice to concur on the appointment of the arbitrator, there is a failure to agree on the appointment, the party initiating the arbitration shall apply to the President of Pertubuhan Akitek Malaysia to appoint an arbitrator, and such arbitrator so appointed shall be deemed to be appointed with the agreement and consent of the parties to the Contract.
- 34.7 Upon appointment, the arbitrator shall initiate the arbitration proceedings in accordance with the provisions of the Arbitration Act 2005 or any statutory modification or re-enactment to the Act and the PAM Arbitration Rules or any modification or revision to such rules.
- 34.8 The arbitrator shall without prejudice to the generality of his powers, have power:
- 34.8(a) to rectify the Contract so that it accurately reflects the true agreement made by the Employer and Contractor;
- 34.8(b) to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties;
- 34.8(c) to ascertain and award any sum, which ought to have been the subject of or included in any certificate;
- 34.8(d) to open up, review and revise any certificate, opinion, decision, requirement, or notice;
- 34.8(e) to determine all matters in dispute submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given;
- 34.8(f) to award interest from such dates at such rates and with such rests as he thinks fit
- 34.8(f)(i) on the whole or part of any amount awarded by him in respect of any period up to the date of the award;

34.8(f)(ii) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment; and

34.8(g) to award interest from the date of the award (or any later date) until payment, at such rates and with such rests as he thinks fit on the outstanding amount of any award.

34.9 Where any dispute arises between the Employer and Contractor and the dispute relates to the works of a Nominated Sub-Contractor and arises out of or is connected with the same dispute between the Contractor and such Nominated Sub-Contractor, the Employer and Contractor shall use their best endeavour to appoint the same arbitrator to hear the dispute under Clause 293 of the PAM Sub-Contract 2006.

34.10 Unless with the written agreement of the Employer and Contractor, such arbitration proceedings shall not commence until after Practical Completion or alleged Practical Completion of the Works or determination or alleged determination of the Contractor's employment under the Contract or abandonment of the Works except on:

34.10(a) the question of whether or not the issuance of an instruction is empowered by these Conditions;

34.10(b) any dispute or difference under Clauses 31.0 and 32.0;

34.10(c) whether or not a certificate has been improperly withheld or not in accordance with these Conditions; or

34.10(d) whether or not a payment to which the Contractor may claim to be entitled has been properly withheld in accordance with these Conditions.

34.11 The award of such arbitrator shall be final and binding on the parties.

### **35.0 Mediation**

35.1 Notwithstanding Clause 34.0 of these Conditions, upon the written agreement of both the Employer and Contractor, the parties may refer any dispute for mediation. If the parties fail to agree on a mediator after twenty one (21) Days from the date of the written agreement to refer the dispute to mediation, any party can apply to the President of Pertubuhan Akitek Malaysia to appoint a mediator. Upon appointment, the mediator shall initiate the mediation in accordance with the PAM Mediation Rules or any modification or revision to such rules.

35.2 Prior reference of the dispute to mediation under Clause 35.1 shall not be a condition precedent for its reference to adjudication or arbitration by either the Contractor or the Employer, nor shall any of their rights to refer the dispute to adjudication or arbitration under Clause 34.0 of these Conditions be in any way prejudiced or affected by this clause.

# **Appendix C**

## **CIDB Standard Form of Contract for Building Works 2000**

### **47 SETTLEMENT OF DISPUTES**

#### **47.1 Reference to the Superintending Officer**

- (a) Subject to Clause 43.2 and Clause 47.4, if a dispute or difference of whatsoever kind shall arise between the Employer or the Superintending Officer and the Contractor in connection with or arising out of the Contract or, whether during the execution of the Works or after their completion and whether before or after any determination of the Contractor's employment, including any dispute or difference as to any opinion, instruction, determination, decision, certificate or valuation of the Superintending Officer, it shall in the first place be referred by either party to the Superintending Officer for his decision. Such reference shall state that it is made pursuant to this Clause 47.1 and a copy shall be sent to the other party to the Contract.
- (b) No later than the expiry of 30 Days after the date upon which the Superintending Officer has received such reference, the Superintending Officer shall give his decision in writing to the Employer and to the Contractor which shall be final and binding on the parties to the Contract unless, as hereinafter provided, either party requires that the decision should be referred to mediation under Clause 47.2
- (c) Unless the Contract has already been repudiated or the employment of the Contractor determined or the execution of the Works completed, the Contractor shall, in case of any reference, continue to proceed with the Works in accordance with his obligations under the Contract and the Contractor and the Employer shall give effect forthwith to every decision of the Superintending Officer unless and until the same shall be revised by mediation under Clause 47.2 or an arbitrator under Clause 47.3 (or as may be otherwise ordered by a tribunal of competent jurisdiction).

#### **47.2 Reference to Mediation**

- (a) If the Superintending Officer fails to give his decision by the expiry of the 30-Day period following the date on which the Superintending Officer received the reference to him of any dispute or difference, or if either party be dissatisfied with any decision of the Superintending Officer pursuant to Clause 47.1 (such dissatisfaction shall be deemed a dispute), then the Employer or the Contractor may within a further 90 Days after the expiration of the said 30 Day period or 90 Days after receiving the Superintending Officer's decision, as the case may be, give notice to the other party with a copy to the Superintending Officer of his intention to refer the dispute or difference to mediation (hereinafter referred to as the "Request for Mediation").
- (b) Upon service of a Request for Mediation the dispute or difference shall be subjected to mediation between the parties in accordance with the CIDB Mediation Rules. Provided however if the Request for Mediation is served after the expiration of the 90 Day time limit stipulated by sub-clause 47.2(a) the recipient shall not be obliged to participate in a mediation and the mediation shall not proceed further without the recipient's written consent.
- (c) Upon the dispute or difference being resolved in mediation, such resolution shall be recorded in a settlement agreement and the parties shall give effect to this agreement accordingly. A copy of the

settlement agreement shall be given to Superintending Officer who shall take notice of the same and where applicable give effect to the terms of the settlement agreement in discharging his duties and authorities under the Contract.

- (d) It shall be a condition precedent to the commencement of arbitration proceedings under Clause 47.3 that the issues arising in the dispute or difference shall have been the subject of a reference to mediation in accordance with Clause 47.2. If the parties fail to achieve any settlement at the mediation then upon the termination of the mediation pursuant to the CIDB Mediation Rules, either party may refer the dispute or difference to arbitration and the final decision of an arbitrator under Clause 47.3.

#### **47.3 Reference to Arbitration**

- (a) Subject to sub-clause 47.2(c), the Employer or the Contractor may within 14 Days after the termination of the mediation, give notice to the other party with a copy to the Superintending Officer of his intention to refer the dispute or difference to arbitration (hereinafter referred to the "Notice of Arbitration") and the final decision of an arbitrator. The arbitrator may be agreed upon by the parties and where the parties fail to agree within 14 Days of the Notice of Arbitration then either party may request the Appointer of Arbitrator named in the Appendix to appoint an arbitrator.
- (b) Subject to Clause 47.4, arbitration proceedings shall not, without the other party's consent in writing, be initiated before the Date of Practical Completion of the Works or alleged Date of Practical Completion (or if there is more than one such Date of Practical Completion, the latest) or the determination or alleged determination of the Contractor's employment under the Contract except on the question of:
  - (i) whether or not the issue of an instruction is empowered by the Contract; or
  - (ii) whether or not a payment has been improperly withheld; or
  - (iii) whether a payment is not in accordance with the Contract; or
  - (iv) whether either party has withheld or delayed consent where such consent is not to be unreasonably withheld or delayed.
- (c) The Notice of Arbitration under this Clause 47.3 shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1952 or any amendment or re-enactment of the said Act.
- (d) The arbitrator shall have power to –
  - (i) open up, review and revise any certificate, opinion, decision, requisition or notice; and
  - (ii) determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with sub-clause 47.3(a) in the same manner as if no such certificate, opinion, decision, requisition or notice had been given; and
  - (iii) award damages including interest or financing charges for the period before and after the date of the award at such rate as he may in his discretion consider to be appropriate.

- (e) Upon every or any such reference the costs incidental to the arbitration and award shall be the discretion of the arbitrator who may determine the amount of costs, or direct the amount to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid.
- (f) The award of the arbitrator shall be final and binding on the parties.
- (g) In the event of:
  - (i) death of the arbitrator; or
  - (ii) refusal or incapability of the arbitrator to act; or
  - (iii) removal of the arbitrator by the court or by mutual agreement of the parties;the parties shall mutually agree on a replacement. If the parties fail to agree on a replacement within 14 Days of any of the said events then either party may request the Appointer of Arbitrator named in the Appendix to appoint such replacement.
- (h) The place of arbitration shall be in the place named in the Appendix.

#### **47.4 Settlement of Dispute in the Event of Determination**

Notwithstanding Clause 47.1, if the dispute or difference concerns the determination of the employment of the Contractor or the termination, repudiation or abandonment of the Contract by either party, such dispute or difference shall not be referred to the Superintending Officer for decision pursuant to Clause 47.1 but shall be referred to mediation and if not so resolved pursuant to Clause 47.2 then to arbitration in accordance with Clause 47.3.