



“Statutory Adjudication For The Construction Industry – Its Role And Effectiveness In National Dispute Resolution”

Keynote Speaker: Foo Joon Liang

Moderators: Samuel Wong

Date: 22 June 2021

Time: 5:30pm – 7:00pm (HKT)

Moderator & Speaker



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Council Member, Construction and
Adjudication Committee Chair,
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Partner,
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1. Introducing CIPAA

Pre-CIPAA



**Delayed
Payments**

**Non-
Certification**

**Liquidated
Damages**

**Pay-When-
Paid Clauses**

**Court or
Arbitration**

Construction Industry Payment And Adjudication Act 2012

15 April 2014



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



& to provide for
connected and
incidental matters



2. Key Concepts

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- **Application & Scope**
 - **Existence with other (A)DR**
 - **Timelines**
 - **Jurisdiction**
 - **Powers of Adjudicator**
 - **Adjudication Decision**
 - **Enforcement**
 - **Setting Aside**
 - **Stay**
- 

2. Key Concepts: Application & Scope

Application



A Construction Contract

Made in Writing

Relates to Construction Work

Carried out wholly / partly in
Malaysia

Scope (Construction Work)

Construction, Extension, Installation, Repair,
Maintenance, Renewal, Removal, Renovation,
Alteration, Dismantling, Demolition



Wholly /
Partly above
/ below
ground

Drainage /
Irrigation /
River control

Bridge /
Dam /
Pipeline /
Tunnel /
Reclamation

Procure
construction
materials /
equipment /
workers

Road /
Railway type

Electrical /
Mechanical /
Oil / Gas /
Telecoms

Integral /
Preparatory
/ Temporary

Scope (Payment)



Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224 FC

- ✓ **Payment for work done – be it interim / final**
- ✓ **Professional fees – Architect**

Scope (Payment)



BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd and another case [2016] MLJU 1567 HC

“[89] Clearly an LAD claim is a damages claim which would not fit into the definition of a “payment claim” that is susceptible to adjudication under CIPAA. It is undeniably and indisputably a claim for damages for breach of contract in failure of the contractor to complete on time by the completion date and it has to be pursued by way of arbitration or litigation and not an adjudication under CIPAA”

Non-Applicability / Exemptions to CIPAA



- Cannot contract out
- Natural Persons
- Less than 4 storeys high
- Wholly intended for natural persons' occupation
- Section 40 Exemptions
 - Government construction contract
 - Urgently and without delay due to natural disaster / unforeseen circumstances
 - Relates to National Security / Security related facilities

2. Key Concepts: Co-Existence with Court / Arbitration

Co-Existence with Court / Arbitration



Section 37 CIPAA

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

Co-Existence with Court / Arbitration

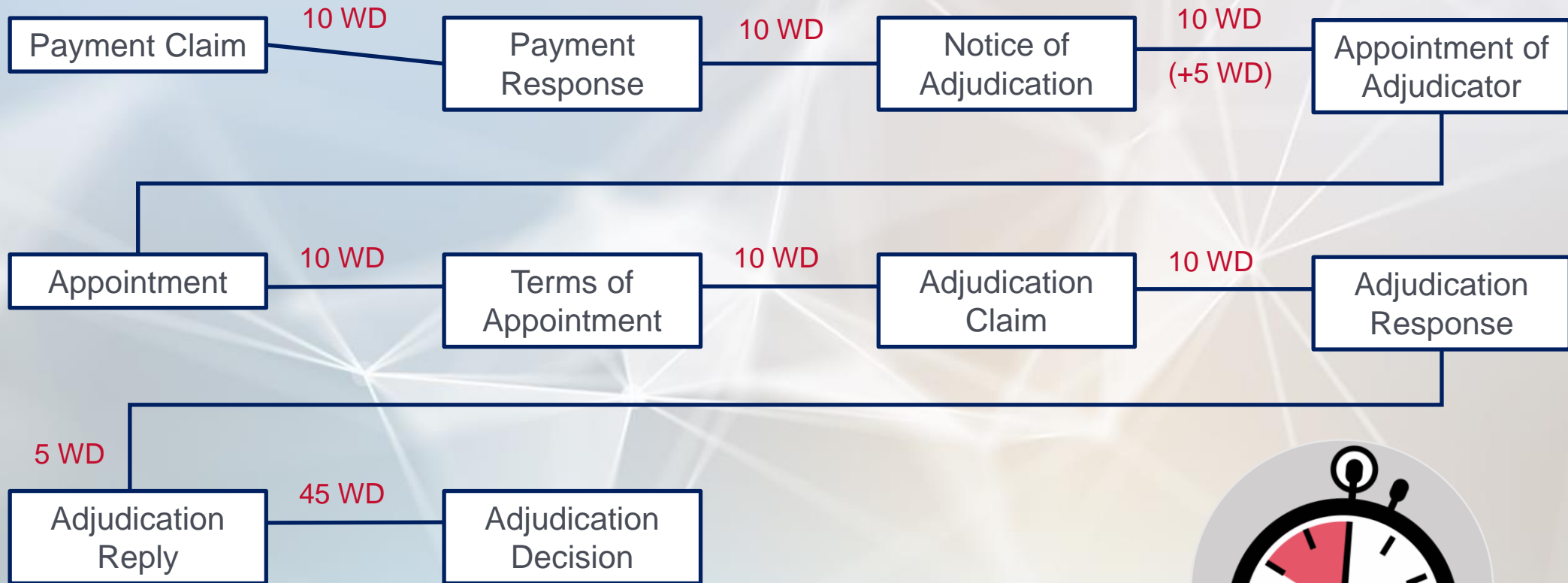


***Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020]
6 MLJ 224 FC***

“[78] ... adjudication is a mandatory procedure under the CIPAA 2012 and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate.”

2. Key Concepts: The Adjudication Timeline

The Adjudication Timeline



2. Key Concepts: Jurisdiction

Jurisdiction



View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22 FC

The jurisdiction referred to in s27(1) CIPAA is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract.

An adjudicator may exercise all or any of the powers under ss 25 / 26 CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss 5 and 6 CIPAA.

Jurisdiction Comparison

Singapore

- S.15(3) Building and Construction Industry Security of Payment Act 2006
- A jurisdictional provision entitling the adjudicator to disregard grounds not originally stated by the respondent in his payment response.

Australia

- S.20(2B) of the New South Wales Building and Construction Industry Security of Payment Act 1999
- Entitling the adjudicator to prevent the respondent from relying on reasons not stated in the initial response

Malaysia

- S.27(1) CIPAA
- Jurisdiction \neq Power
- An adjudicator was not excluded from considering all the defences raised by a respondent in the Adjudication Response whether found in the Payment Response or not.
- Where an adjudicator had failed to do so, he was said to be in breach of natural justice.

2. Key Concepts: Powers of the Adjudicator

Powers of the Adjudicator



(a) **Establish** the procedures

(b) Order the **discovery** of documents

(c) Set **deadlines** for the production of documents

(d) Draw on his **own knowledge and expertise**

(e) **Appoint** independent experts

(f) Call for **meetings**

(g) Conduct any **hearing** and **limiting** the hearing time

(h) Carry out **inspection** of the site, work, material or goods

(i) Take the **initiative** to ascertain the facts and the law

(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**

(n) **Decide** on any matter even **if no certificate** has been issued

(o) Award financing **costs and interest**

(p) **Extend** any time limit imposed on the parties

2. Key Concepts: Adjudication Decision

Adjudication Decision



Made In Writing

Shall Contain Reasons

- If none, it would be void and unenforceable

Contents

- Sum Awarded, Costs, Time & Manner for Payment

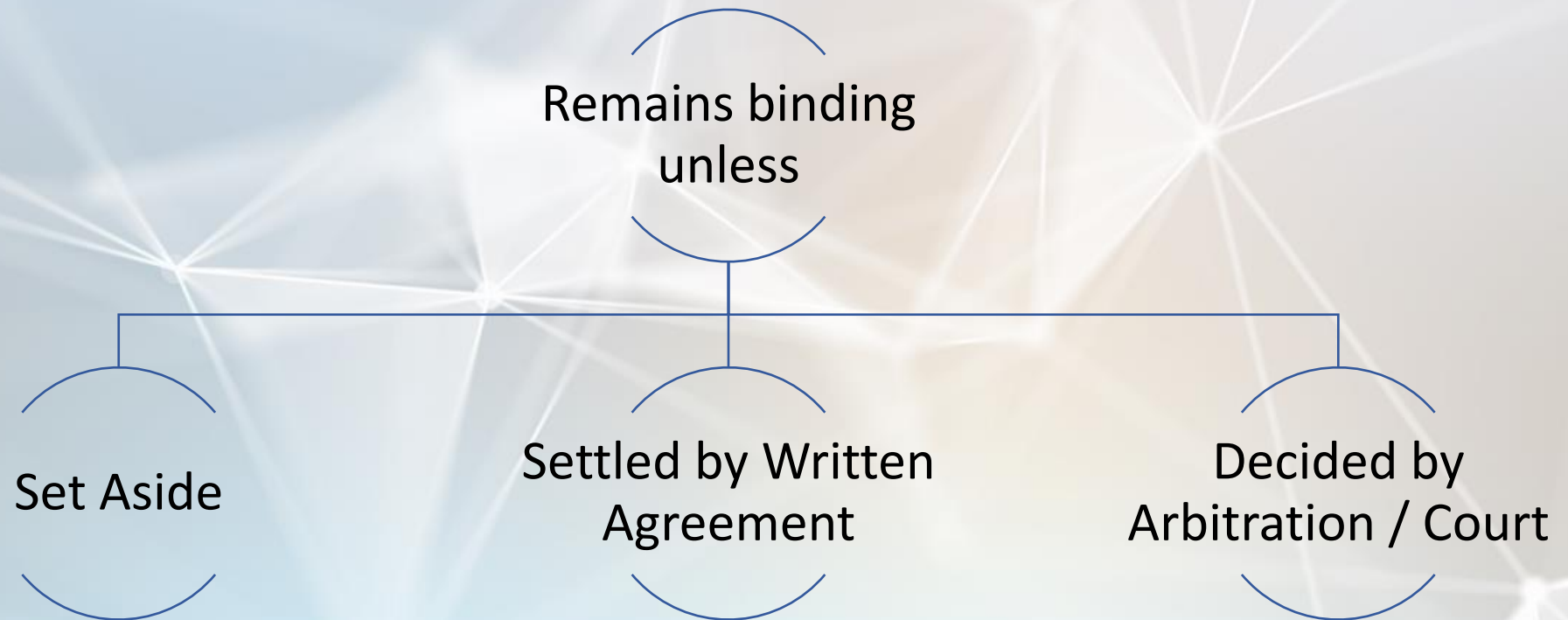
Service

- S.38 CIPAA

Correction

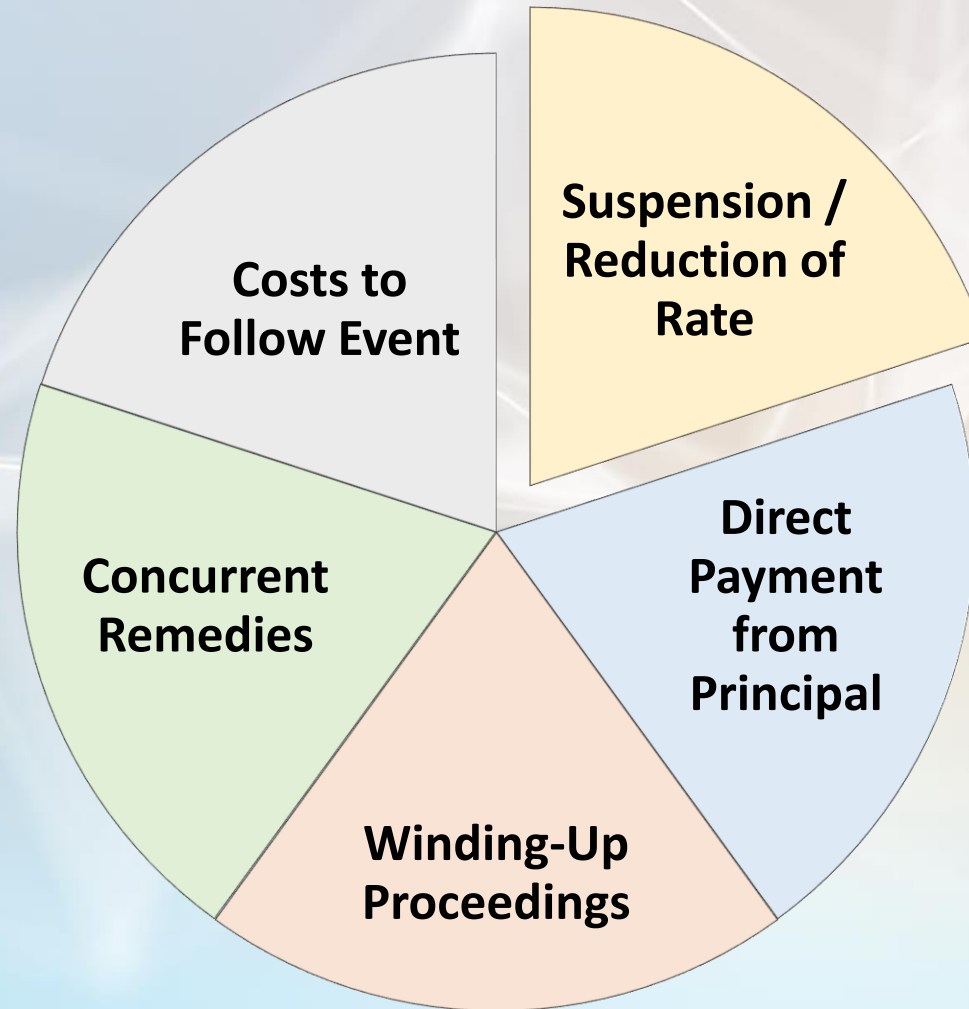
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Adjudication Decision



2. Key Concepts: Enforcement

Enforcement



2. Key Concepts: Setting Aside

Challenging an Adjudication Decision



ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd & Another [2016] 1 LNS 1522 CA

“[63] Hence, the “need to have the “right” answer has been subordinated to the need to have an answer quickly.” The adjudicator does not have to get the “correct” or “right” answer. What the adjudicator must do is to give an answer within the time prescribed. That answer is good for the interim period until the parties either accept that answer as settling the dispute; or until an arbitration award or a Court judgment finally decides the matter. Pending that finality, the adjudication answer or decision is binding and must be complied with.”

Setting Aside



Fraud /
Bribery

Breach of
Natural
Justice

Not acted
independently /
impartially

Excess of
Jurisdiction

Breach of Natural Justice



- Adjudicator failed to entertain a request by the respondent to respond to new issues raised by the claimant in an Adjudication Reply, and had made a finding without inviting parties to submit on that those new issues
- Adjudicator refused a party the opportunity to address submissions and lengthy footnotes to those submissions which were akin to a submission
- Adjudicator allowed the claimant to breach directions issued for limitation on the number of pages

Before 15.04.2014?



Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal) **[2020] 1 CLJ 299 FC**

“... The provisions of the CIPAA undoubtedly affect the substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the respondent besides being an essential component of the rule of law. Consequently, the entire Act ought to be applied prospectively. ...”

Prospective or Retrospective?



Singapore

*'... on or after
(the
commencement
of this Act)'*

UK

Or

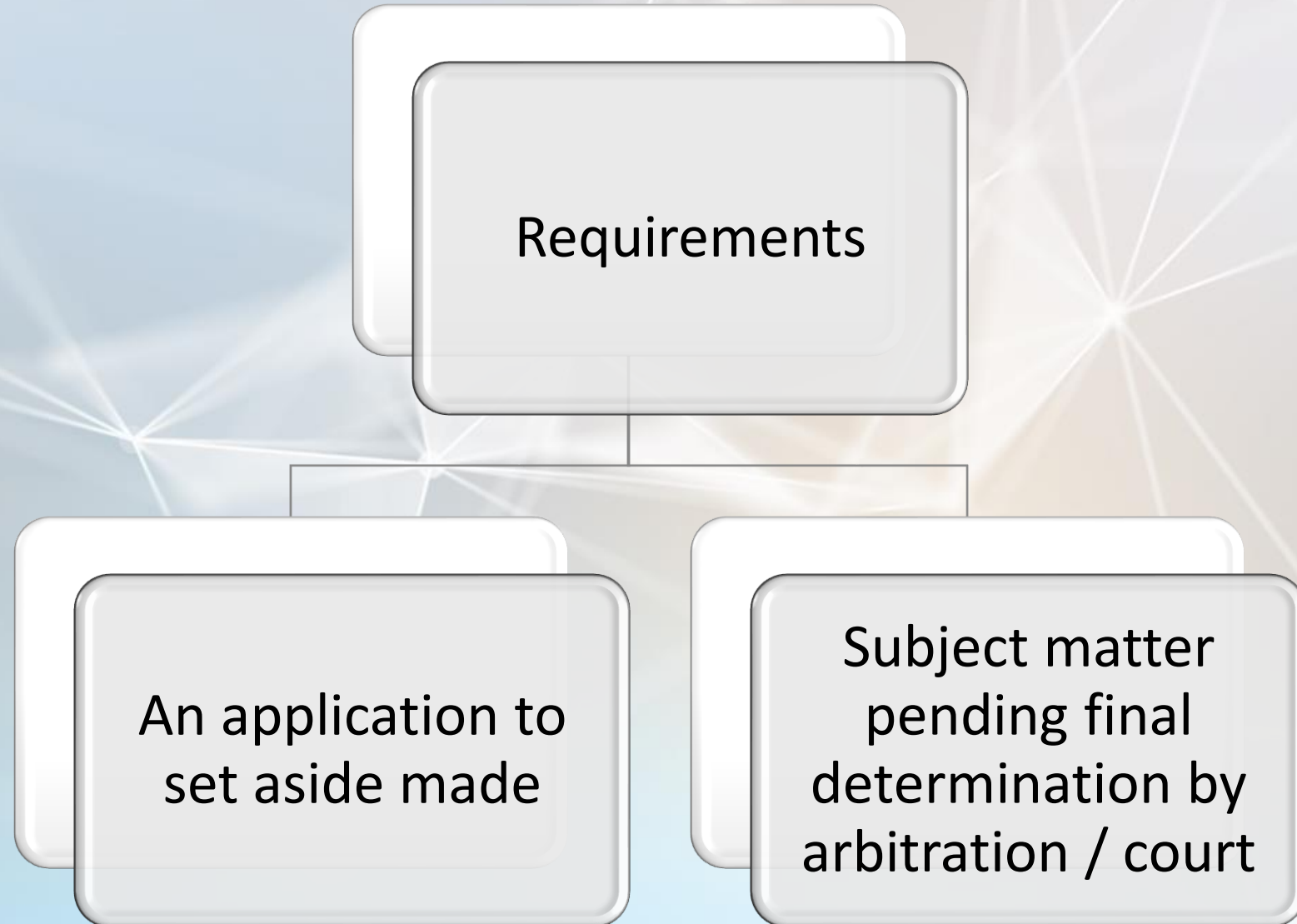
New South Wales

*'does not apply
to ... before the
commencement
...'*

New Zealand

2. Key Concepts: Stay

Stay



Test for Stay



View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22

“[82] We are in agreement with the contention of the appellant that a more liberal reading of s.16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so.”

Test for Stay



Panzana Enterprise Sdn Bhd v MKP Builders Sdn Bhd [2020] 1 LNS 666

Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

- i. the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschell);
or*
- ii. The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals)."*

Test for Stay



Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd [2020] MLJU 1162

“[17] Clear error has not been defined. Obviously, it is fact sensitive depending on the circumstances of each case as to how the adjudicator reasoned his findings in the adjudication decision. In my view, the error must be so grave that it pricks my conscience if I left it unrectified. In a way, it is subjectively objective.”

Q&A



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