"Statutory Adjudication for the Construction Industry -- Its Role and Effectiveness in National Dispute Resolution"

Tuesday, 22 June 2021

MODERATOR: So dear friends and colleagues, I am the moderator of today's Hong Kong IA seminar. And our webinar today has a topic which is called the "Statutory adjudication for the construction industry -- its role and effectiveness in national dispute resolution".

And today, we are very honoured to have our keynote speaker, Mr Foo Joon Liang. He is a fellow member of the Chartered Institute of Arbitrators and a fellow member of the Hong Kong Institute of Arbitrators, and he is very experienced in construction adjudication in the Malaysia and Singapore context.

Before I will give a very brief introduction to our speaker, I wish to address three very simple housekeeping rules. The first is that I wish to inform you again that today's webinar will be recorded. And the second housekeeping rule is that the Law Society's CPD points are right now being applied for, and we will email you all, in case you are lawyers, that when we have received a confirmation from the Law Society of Hong Kong. And the

third housekeeping rule is that our webinar today will commence about 5.35 to about 6.30 or about 6.35. And after that, we will have about 20 to 25 minutes of Q&A session. And if you have any questions, you can just type in your chat box as Q&A. And we will try to respond to you by our speaker or, if necessary, by myself.

And then I'm very pleased to introduce our keynote speaker -- and shall we go to the next slide -- whose name is Foo Joon Liang, and he is a fellow member of CIA, a fellow member of SIA, and a fellow member of Hong Kong IA. Mr Liang is a partner of Gan Partnership which he has cofounded in 2001. And Mr Foo Joon Liang is presently the immediate past chairman of the Malaysian Branch of CIA and a committee member of ICC Malaysia Arbitration Committee. He sits on the panels of arbitrators and adjudicators of the Asian International Arbitration Centre, the AIAC, and the Securities Industry Dispute Resolution Centre, SIDRC's, Panel of Mediators and Adjudicators. And he is one of the first 10 Malaysian appointees to the panel of arbitrators of the Hainan International Arbitration Court. He is listed as a Future Leader in Construction by Who's Who Legal for three consecutive years. And his ability in dispute resolution and construction have also received well-noted testaments on the Legal 500 Asia Pacific 2021 and benchmark

litigation applications. He has over 20 years of experience in active dispute resolution practice in arbitration, in litigation and adjudication. He regularly appears as counsel in arbitration at all levels of Malaysian courts.

And I am very glad to have an opportunity to introduce Foo Joon Liang as our fellow member and our distinguished speaker today, and I just wish to give our time to our keynote speaker today.

And I will end right here.

FOO JOON LIANG: Thank you, Wilson.

MODERATOR: Yeah.

FOO JOON LIANG: Good evening, everyone. Thank you for having me. I hope you are all keeping well in this period of time. Unfortunately for us in Malaysia, we are on a full lockdown, so I'm running from home and I don't have my good colleague to run the slides for me. So please bear with me if the slides don't correspond with what I'm saying.

As Wilson has said, I think we can take questions right at the end. There's a Q&A session, and you can key your questions into the Q&A box. What I'm going to do today is introduce the Malaysian regime to you for statutory adjudication. I understand that in Hong Kong, it is a work in progress. Hong Kong is looking towards statutory

adjudication much like most of the commonwealth countries. And so what I'd like to do is to share the experiences that we have had. We started statutory adjudication in 2014. Our legislation was passed in 2012, but came into force in 2014. So give or take seven years. We've had seven years of experience.

In the region, we are behind Singapore, of course, Australia and the UK in terms of experience. But we have had our fair share of cases. So I will take you to some of the key concepts of our statutory adjudication in Malaysia, how it compares with some of the other countries like Singapore, Australia and even the UK.

And then I will take you through some of our court decisions which will show you that in one or two instances, we have decided to be different from the rest of the world.

So without spending more time on the introduction, let me jump straight into it. I am mindful that not all of you listening in are lawyers, so I will skip a lot of the legal jargon. But I will talk more about the practical aspects of CIPAA. So the first point.

CIPAA is short for the Construction Industry Payment and Adjudication Act. It is what we call our legislation in our country. In a lot of other countries, it's called a Security of Payment Act. But there are really two

aspects to it, and I should have given you the long title of CIPAA. It is the Construction Industry Payment. So that's the first aspect. And second is adjudication. And that's an important aspect, because a lot -- I think a lot of practitioners in our industry, including -- I think I say with a degree of respect, some of our courts don't appreciate there are two aspects to this act. One is in respect of payment provisions; the other is in respect of statutory adjudication. All right. And the significance of that you will see when I talk about some of our cases later on.

Now, before statutory adjudication was introduced in our country -- and I suspect this will be common to a lot of countries. You might be facing it now. These are the typical problems that we faced pre-CIPAA. The first was, of course, delay in payment in our construction industry. Like most of the world, we've got standard form construction contracts. FIDIC is not so common. It is used by international contractors in our -- when they build on our shores. But we largely go by two or three standard forms. I won't bore you with the details. But essentially, the standard forms provide for mechanism of valuation of work done, certification of their work, and payment of their work. It's usually in a cycle of 30 days or 60 days. But I think

I can comfortably say, as with the rest of the world, it is generally not followed.

The problem then arises as to what the remedy is for the party claiming payment. The remedy is usually twofold. One is to run to court. Of course, if you've got an arbitration agreement, you are caught with that. And some of our standard form construction contracts are still quite archaic. They only allow a party to commence arbitration after the project is completed, even if there is a termination midway.

So the problem with the contractor is that he won't be able to seek a remedy. And even if he was entitled to go to court or arbitration, he will be stuck in a process that will typically take -- when I started practice 20 years, it would take anything between three to 15 years for court proceedings. It's now caught up. You are looking at 9, 12, maybe 15 months for a complicated matter. But because us practitioners have had to give priority to court, arbitrations tend to take a backseat. So arbitration proceedings for a typical construction dispute would take you easily a year. And I would say conservatively 18 months, 2 years. So for a person who has not been paid and who is supposed to be paid every month, even if it's a year or 18 months waiting for a payment, it is one month too many.

So it doesn't work.

Now, the second problem is that a lot of employers hide behind the fact that a certification has not been issued. Obviously, the consultants -- and I say this -- I may be generalising. A lot of consultants are beholden to their employers. Or even lesser so, a lot of consultants don't abide by the contractual mechanism. They don't certify when they are supposed to. And when they certify, they're not particularly meticulous in the certification. So a second layer of a problem.

Then you have the employer hitting the contractor with liquidated damages, for example. Particularly when it's not a very equally worded contract, you find that the employer has got very wide powers to impose liquidated damages. So for months on end, the contractor does not get paid.

Then you have the big problem in our industry, pay-when-paid clauses. And I see that it's quite comforting that in the rest of the world, you have this problem as well. So the sub-contractor is only paid when the main contract is paid.

Now, in our Malaysian scene, construction scene, it's a huge issue. Because as you go further down the line, you've got your labour contractors, for example, who live

literally from hand to mouth. And these are the people quite often employing foreign labour, and typically when there is nonpayment by the main contractor, the problem starts further down with your sub-sub-sub-contractors. They don't get paid. And if they don't get paid today, they can't work tomorrow. That is simply the problem. With that problem, you have people walking off site, because the sub-contractor is nobody without all his labour -- his labour force. Without his suppliers, without his sub-sub-contractors. And so you get abandoned projects.

So this is what CIPAA was intended to police. Pay-when-paid clauses is one of the key provisions that are addressed within CIPAA, and I will come to that.

Finally, the problem, or the inherent problem, with courts and arbitration. It just took too long. Not only in Malaysia, but everywhere else around the world. The recognition is that for a construction project to be sustainable, you hear about how its -- cash flow is the lifeblood of the construction industry. So with two months nonpayment, three months nonpayment, typically parties cannot wait to go to a full-blown dispute resolution process. Hence, CIPAA.

Now, very quickly, the purpose of our act. And now you see it on the top of the screen: the Construction

Industry Payment and Adjudication Act 2012. First of course is to facilitate regular and timely payment. The second is to provide a mechanism for speedy dispute resolution through adjudication. The third, of course, is to provide remedies for the recovery of payment in the construction industry. And this is interesting, because the remedies available to an adjudication decision goes beyond the remedies available to a court judgment, for example, and certainly an arbitration award. And, finally, broadly, to provide for connected and incidental matters.

Now I will add to this. From our experience -- and this was what we anticipated before CIPAA came into force as well. Statutory adjudication, to some extent, manages the problem on site. Because, for example, if the second progress payment is not paid and the contractor takes it to adjudication, two or three months down the road, or at least four months down the road, he gets paid. That problem is resolved. Then assuming progress payment is -- he's not paid, he goes on and he starts another adjudication. And he's paid, and there's the adjudication decision. Now, adjudication decisions are meant to be rough and ready. It's not meant to count as nuts and bolts. So it isn't going to be an exact science. The adjudicator is going to give a ballpark figure. All right?

But what you will find at the end of the day, at the end of the project is that the disparity between what the contractor wants to be paid and is owed, and what the employer is prepared to pay is not as large. Because along the way, you've had adjudication decisions. And so when they get the smaller, and particularly with the legal costs that you face in Hong Kong, that the temptation to take it to a full-blown arbitration at the end may not be there. And that's the experience that we have to some extent here as well.

All right? So CIPAA -- or, statutory adjudication does manage the construction disputes as we go along.

Now, some key concepts.

These are the items that I will be looking at. The application and scope. Existence of other alternative dispute resolutions forum. Timelines. Jurisdiction. Powers of the adjudicator. What the adjudication decision entails. Enforcement. Setting aside and a stay. I will spend a little bit more time on a few of these, but perhaps not all of them.

Now, application and scope I think will differ from jurisdiction to jurisdiction. In Malaysia, CIPAA is very widely worded. So the carve-outs or the exceptions are very narrow. It obviously applies to a construction

contract, and the contract has to be made in writing. And it relates to construction work. Construction work is given a very, very wide interpretation under our legislation. So it covers almost everything you see on a construction site. And recent arguments have been on offshore barges, whether it covers work on oil and gas platforms and so on.

But the leaning of the court is that it does. It's going to be a fairly uphill argument to take it out of CIPAA. It also covers consultants' fees -- so it covers consultancy agreements under -- construction consultancy agreement. So we've acted for consultants, architects, engineers who sue for their fees. And the current legal position is CIPAA allows for that. All right? And within our legislation, as well, the project has to be carried out wholly or partly in Malaysia.

Now, there are -- these are some examples of the scope. I take it that the slides will be given to you after this, so I will not spend too much time on this.

Now, I mention that the current legal position is quite settled that it applies to consultants, and this is a decision of our federal court last year. I think it was decided in 2019. The report came out in 2020. But effectively it says that a consultant can sue for its fees.

Now, another interesting feature is this. When CIPAA was new, there was a lot of argument about whether statutory adjudication applies to interim payments only or do they apply to final payments. And you see the logic of it, because if the purpose of statutory adjudication is to allow cash flow within the construction project, once a project is finished and your final account is out, clearly the cash flow is yesterday's problem. Parties can take it to arbitration. So that was the thinking. But that thinking didn't go into the express wording of our CIPAA. Neither did it go into discussions in parliament when this was being debated.

So when the courts looked at the express wording of our act, as well as the parliamentary debates, the on-site records, it was quite obvious to the court that CIPAA would have to apply also to final accounts. One of our High Court judges had a different outlook to this, because he held in the course of his judgment that one particular contractor is not only involved in one project. If you hold this contractor on his final accounts in project A, it might well affect project B, C and D. And therefore cash flow in the construction industry is affected as well.

So there is a rationale to it. I don't necessarily see that point, but this is the current position. So if

you are going to legislate something in Hong Kong, this is something you should care about. All right?

Now, more legal cases. This is just one of many cases to say that CIPAA statutory adjudication is only meant for a claim for work done. So if a party has been terminated, damages -- for example, loss of reputation, loss of future profit, loss of earnings, loss of opportunity, liquidated damages for delay -- these are all beyond the purview of CIPAA. You can't launch a claim in statutory adjudication for these. If you are resisting a claim, you can use these as a setoff, but you can't recover on these items. So this is one of many cases that say that.

Now, some initial concepts of CIPAA as well. You cannot contract out of it. Now, if you look at some other jurisdictions, like Singapore, for example -- I had a quick look just now -- there is a provision that says you can't contract out of it. Our legal position is very clear as well. You can't contract out of it, because in Malaysia, it's considered as a piece of social legislation, and CIPAA has been seen as a piece of social legislation. I don't understand why, but it's been categorised as one. Therefore, you cannot contract out of it. So clever drafting by lawyers. Express wording to say that you waive all rights in statutory adjudication, even if both parties

are giants in the construction industry, you cannot get out of it. All right? So statutory adjudication is compulsory.

The second would be that -- the second exception that I should mention is that it doesn't apply to construction projects for natural persons, for buildings less than four storeys high. And it comes with the next item which is intended for natural person's occupation. So recently there was a case where I think a two-storey building house, which was obviously a residential property, was being renovated for the purposes of a kindergarten, somebody else to use as a kindergarten. The court held that, you know, the exception didn't apply and, therefore, CIPAA did because it was not for that person's occupation. Okay? We've also had some statutory exemptions in the early days of CIPAA, because I think like everwhere else, our government is still the biggest employer. So there was some anxiety as far as the government was concerned as to how they would be hit. With payment claims in adjudication, they tried to carve something out. There were initial exceptions at the early days of CIPAA as far as I'm aware, those have largely expired. So the government is caught as well, if that's a learning point for the Hong Kong industry.

Now, coexistence with court and arbitration. There is an express provision in CIPAA, as well, that a dispute in respect of payment under a construction contract may be deferred concurrently to adjudication, arbitration or the court. And because of this preservation, we've had situations where arbitration or court proceedings have been taking too long. One party just jumps into an adjudication. Or an adjudication is getting protracted; one party commences an arbitration. That's entirely within their right. Of course from a practical standpoint, once you've gone quite far down the road in arbitration or court, how that affects the evidence in the adjudication, that is something the parties have got to consider, all right?

Now, Martego is a case that we've looked at earlier. This makes a point that is mandatory. So the point that I made to you earlier, you can't contract out of CIPAA.

Now, what is the timeline like under our Malaysian statutory adjudication regime? I'd like to say that we're a little bit more relaxed than our neighbors. So, for example, in Singapore, from your last document, you have 14 days for the adjudication decision. But if it's -- if the contractual documents or the adjudication is brought pursuant to contractual documents, then I think it's seven days under the Singaporean regime. We give a very generous

45 days. You will see that at the bottom of your screen.

Now, the process is -- and I'll spend a couple of minutes on this. We start with what we call a payment claim. This is nothing more than a letter of demand or notice of arbitration, an equivalent, if you like. So the payment claim has got -- there are some statutory requirements for the payment claim. You obviously need to identify the parties. You need to identify the contract. You need to identify the payment provisions within the contract. The timeline for payment and, of course, how much you are asking for. All right?

Then you have the next stage, which is the payment response. "10 WD" stands for 10 working days. So if you take a two-day weekend, you are typically looking at two weeks. So within 10 working days, the respondent has got to put in their placement response.

Now, our act says one thing, our courts say something else. I will come to that in the next section. Basically, the intent of the wording of our act -- the express wording of our act is that a payment response is required; failing which, the defences that you can have as a responding party is very, very limited. You are essentially put to proving the claimant to its claim. Okay? Our highest court has of course said that it is nonsense. Basically, as the

respondent, with or without the payment response, you can say whatever you like. And I'll come to that in a moment. It's a sore point for me because I was on the losing end.

Now, once a payment response comes in, or assuming no payment response comes in, within 10 working days, the claimant is entitled to lodge his notice of adjudication. This is of course on the assumption that the respondent says "I'm not going to pay", or "I'm not going to pay you in full". So the note of adjudication is issued, and then starts the process of the appointment of the adjudicator. So broadly speaking, there are two routes. One is where both parties agree to the adjudicator. The second is where both parties don't agree, and our arbitration, our Asian International Arbitration Centre, AIAC, is tasked with the appointment role under CIPAA. So they will have to make an appointment. It's either 10 working days or 10 plus 5 working days, depending on which route is taken.

So now you've got the adjudicator identified. Of course conflict checks and so on will have to be gone through. The adjudicator has then got to come up with its terms of engagement. Now, under our regime, we've got regulations which stipulate the fee scale. We've got two fee scales. One is the standard fee scale, and the other is the proposed fee scale which is a little bit higher. Of course nothing

stops the adjudicator from coming up with its own term of these engagement. But ultimately, the parties will have to agree. But our regime also provides that if the parties don't agree, then the standard fee scale applies and the standard terms apply. That must necessarily be the case, because on and off you will have uncooperative respondent who will not respond. So you have this fallback position. There are standard terms and a standard fee scale.

Then an appointment happens. Once the appointment of the adjudicator is firmed up -- we are now on the second row -- there are 10 working days for the terms of the appointment to be firmed up. And all this is monitored by AIAC. And within 10 working days of that terms of appointment being firmed up, the adjudication claim has got to now be issued. Now, under our regime, the adjudication claim is where now you attach all your supporting documents.

So if I'm going to use an analogy to court proceedings, and this is admittedly a very bad analogy, the payment claim is your statement of claim. The adjudication claim is now your witness statement or your affidavit attaching all your supporting document. So the adjudication claim is an important step, because this is where you've got to back up your claim with supporting documents.

Now, within 10 working days from that, your

adjudication response has got to come in. All right? And this is also an important step, and this is akin to the witness statement stage where your respondent has got to support his defences with all the supporting documents, the evidence that he requires, as well as his submission of legal authorities. So if he's going to rely on liquidated damages, for example, what his entitlement, what the law says has the entitlement to liquidated damages, all that has got to go into the adjudication response. And within five working days from that, the claimant will have to respond with his adjudication reply. All right?

Now, it's important to note that under our regime, the adjudication reply is the last document the party has got a right to put in. So as far as the respondent is concerned, his final right of reply is in the adjudication response. For the claimant, his final right of reply is in the adjudication reply.

Now, that said, the adjudicator has got wide powers to direct further submissions, oral submissions, witness statements, examination of witnesses and so on. So there are very broad powers. We will come to the powers of adjudicator hereafter. Now, typically if you are the respondent, and it happens in your local scene as well, the respondent will ask for further submissions. And the

typical reason given -- and sometimes I will give the word "excuse" -- is that the adjudication reply comes up as something that is new, that is not stated in the adjudication claim.

Now this is where, as adjudicator, one will have to look at this quite critically to see whether what's in the adjudication reply was merely a reply, or is it a new fact.

Some of us have the habit of just talking about our claim in the adjudication claim and not addressing the arguments the defence has. And that is where, in your adjudication reply, we will obviously say something new and produce new documents. And the adjudicator will invariably be asked to allow further submissions, examination of the witnesses and so on and so forth. This is where the adjudicator has got to make a decision. Then, within 45 days of the adjudication reply, he has got to come up with his adjudication decision. And this is a mandatory date. If within 45 days, he doesn't come up with that adjudication decision, the entire adjudication process becomes void. All right?

If his adjudication decision comes out on the 46th day, it becomes void as well. The entire process becomes useless. It has happened before. Because in Malaysia, we've got different states, and we've got states sometimes

with public holidays that other states don't enjoy. When you talk about working days, obviously it's a computation of the non-public holidays and the non-weekends. Sometimes adjudicators have messed up computing public holidays, or they have wrongly taken into account the public holidays of their own state and not the state of where the project is. And that is where they run out of time.

Typically it's a 1-, 2-day problem where they are out of time. I hope it's the same with you guys in Hong Kong as well. In Malaysia, we like to leave things to the last minute. So it happens quite often. I'm guilty as well, though so far I'm happy to say I've not run foul of the 45 days. So now you see this regime. It's largely the same around most countries adopting statutory adjudication. The wording of the act is of course slightly different. But what I'd like to impress upon you, even looking at this chart is this: it's very important by the time you reach the adjudication claim stage that the scope of the dispute, what is claimed, what is defended, is already clearly identified and ring-fenced. Because if you don't, you will find that the claimant is making up his claim as he goes along in the adjudication claim. For the respondent to respond within 10 working days becomes very difficult.

And if that is difficult, it's even more difficult if

the respondent keeps his defences close to his heart up until the adjudication response stage and throws 10 bundles of documents with hundreds of pages in the adjudication response at you, the claimant, at the adjudication response stage. Because you will only have five working days to reply to those very valid and very cogent defences and those 10 boxes of documents.

So CIPAA, as it is worded, in my respectful view, avoids that. Because CIPAA says very clearly that what can be raised in the adjudication is limited to what is said in the payment claim and what is said in the payment response. Those are the express wordings of CIPAA. If you would like the boring details, you can email me after this and I will send you the sections.

I like to think that I read quite well, and so your act says exactly that. You are limited to what is in the payment claim and what is in the payment response. Our federal court in the next decision you will see -- and I won't change the slide just yet. Our federal court says that I misread it. Our federal court says that whilst the claimant is limited to what is in the payment claim, the respondent is not limited to what is in the payment response. He can raise anything, whether or not he put in a payment response.

This is a complete departure or difference from what Singapore has, what Australia has, what the UK has. So when presented with all these other territories, our federal court said that these other territories are different because the acts specifically say that in the adjudication response you cannot raise what is not in the payment response. Okay?

Whereas our act doesn't say that. Our act just says that in your adjudication, you are -- the jurisdiction is limited to what is in the payment response. Our federal court thinks that that means something different. So in the wisdom of our federal court, really, I could -- if I'm the responding party, in my payment response, I could in theory say "I'm not paying you, Mr Claimant, because I don't like the way you look" and send you a smiley. That's all I need to say in my payment response.

Come the adjudication response, I will dump 10 boxes of documents on you with a very cogent adjudication response which my claims consultant -- because I'm the employer, I'm rich, I'm wealthy. My claims consultant would have worded it. And my lawyers would have littered it with authorities to say why I don't have to pay you. I dump it on you at the adjudication response stage. You've got five working days to respond to all of that. All

right?

Our federal court goes on to say that they don't see any unfairness in all of that. But that's our legal position now. You can keep -- if you are a responding party, you can keep everything close to heart until the adjudication response. So if you're wording your Hong Kong regime now, I would urge you to be mindful of this potential problem and have clear wording to avoid that problem. It is very important that the jurisdiction and the scope of your adjudication must be ring-fenced even before your adjudicator is appointed.

Now, this is the decision of the federal court that I mentioned. View Esteem v Bina Puri. So very, very briefly, we acted for Bina Puri. View Esteem was the developer. Incidentally, the ultimate shareholder of View Esteem, if I recall correctly, is a person who originated from Hong Kong. But that's just a side fact. What happened was that there were payment disputes. We brought a claim. And a payment response was submitted.

Now, the payment response said everything except for the three most important defences that they wanted to raise. So when the adjudication started and when the adjudication response was issued, these three defences came up. I can't remember what the three defences were, but they were fairly

valid defences.

Those three defences were raised. We took a jurisdictional argument to say that under section 27(1) of CIPAA if you have not raised it in your payment response, you forever hold your peace. Adjudicator agreed. High Court agreed. Court of Appeal agreed. Federal court said that we were wrong. Federal court said that the respondent is entitled to keep everything that they want to say to the adjudication response. And so, when our adjudicator refused to entertain the three defences that they wanted to raise, which they didn't raise in the payment claim, federal court said that the adjudicator was in breach of natural justice for not entertaining defences that had been raised. So the entire adjudication process was invalidated. The adjudication decision was set aside. View Esteem continues to be the law today.

So when the federal court -- we took it one step thereafter. In our Malaysian regime, we can seek a review of View Esteem. The entire industry was quite aghast with the decision in View Esteem. I, of course, received many phone calls to ask, "What the hell did you argue? How did this happen?" And a few parties as well in parallel federal court proceedings tried to revisit this. So if I was speaking to you, say, three years ago, four years ago

in 2017, even in early 2018, I would have said, "Say everything that you want to say in your payment response, because if View Esteem is wrong, it is likely to be overturned". All right? And the last thing you want is you taking the View Esteem position, keeping everything close to your chest, and thereafter View Esteem is reversed, and you can't say anything in your adjudication response. I was proven wrong, obviously. View Esteem has been upheld, and it continues to be the law today. I think nothing short of a legislative intervention for CIPAA to be amended will this position be corrected.

So something that the Hong Kong legislation might want to take into consideration.

Now, I briefly mention this. Now, in Singapore, there is a provision under the equivalent, the Security of Payment Act, SOPA, that says a jurisdictional provision -- that has a jurisdictional provision entitling the adjudicator to disregard grounds not originally presented in the payment response. This is the same as in Australia.

So in Singapore and in various states of Australia, I've just given you the New South Wales legislation. But it's the same throughout the other states of Australia. If you don't raise it in your -- their equivalent of the

payment response, you forever hold your peace.

Of course, in Malaysia, we've worded our legislation a little bit differently. We worded it as a jurisdictional position. So if you don't raise it, the adjudicator does not have jurisdiction. But as I've said, without sounding like a broken record, federal court read that differently.

Now, powers of the adjudicator. I have listed out what our act says. This is in section 25 of our act. So it's very, very wide. It is basically inquisitorial. Like Hong Kong, we are used to the adversarial process, but the adjudicator's role is inquisitorial. And from experience, I will tell you that it is the adjudicator's -- or, the adjudicators who take an inquisitorial stance are the ones who are the most effective as the adjudicator. Right? Because your typical court processes for allowing a party to say its piece, to have the last word, that doesn't work in an adjudication. Even in a regime like ours that allows 45 days, if your legislation is looking at a shorter period, all the more it doesn't work.

So of late, there is a high court decision where one of the adjudicators went further. He did his own investigation. And if I remember correctly, he took

a drive to the site, he had a look at the site, and he then confronted parties with what he saw. Court said that's well within his very wide powers. Okay?

So if you look at the screen you can -- if you look at items like F, calling for meetings. D, applying his own knowledge and expertise. G, conducting hearing and limiting hearing time. L, order that any evidence be given on oath. These are very wide powers which I think should be there. But what is important is that when the courts look at whether the adjudicator did exercise his power or not, the court has got to recognise the main purpose of adjudication, which is to reach a decision, a quick decision. That is of paramount importance. And I think literature around the world will tell you that that is more important than reaching the right decision.

And I'm a believer of that. Because, really, if you look at statutory adjudication, it's a substitution of what your superintending officer or your certifying officer was supposed to do on site. You are only in adjudication because your architect or your engineer or whoever is certifying has not done his job. And of course the employer has not paid. If the certifier has done his job, part of the problem will not be there.

Now, when your certifier does his job on site, let me

ask you this question. Does he look at legal authorities. Does he count the nuts and bolts? Or does he take a percentage? Or does he take a broadbrush approach, a rough-and-ready approach? Right? Everybody will have their complaints about over-certification, under-certification. But ultimately, when there is certification, the project goes on.

The problem can be dealt with at the end of the day. So if you don't hold your certifier to that kind of a standard to have an exact position or a position that is on the dot, why do you hold your adjudicator to that standard? Right? For as long as he arrives at a decision, and the decision goes through the proper procedural safeguards, then you've got the decision. Save for very limited grounds to challenge the decision, life goes on. You pay. Employer may overpay. On the next payment, he may underpay. But ultimately, cash flow goes on.

So when the courts look at whether the adjudicator rightly or wrongly exercises these powers, they have got to be mindful that the adjudicator has very limited time and he is not tasked to come up with a right decision. He's tasked to come up with the best decision possible given the limitations.

Now, adjudication decision. Now, this is again

common in a lot of countries which have adopted statutory adjudication. It must obviously be made in writing, and it must contain reasons. Now, this second factor, containing reasons, is also the subject of quite a bit of legal arguments.

Now, if you look at Australia, for example. The Australian courts in most of its states have taken a very robust position. It is not sufficient that there is some rambling in the adjudication decision. It is not a reason to say "I'm allowing this claim for 3 million, because the sun is shining today". The reasons have got to make sense, and the legal tests, as expounded by the Australian courts is that the parties must understand the thinking process of the adjudicator.

Now, I say this because in a lot of adjudication decisions that we see, and I shudder to think that adjudicators are emboldened by the protection they get under CIPAA. The decision-making -- or the decisions or the reasonings in the decision are very scanty and a lot of times don't make sense at all times.

I've tried challenging it. I've had a matter where there were five expert reports before the adjudicator. Oral arguments, lengthy expert reports -- and this is not on quantum. Not on your typical construction problems.

Not on counting the nuts and bolts. Not even on extensions of time. This was on very, very technical engineering issues concerning the collapse of a bridge. Incidentally, one of the reports came from a very highly respected engineer from Hong Kong. So very technical arguments. The adjudication decision on that point was a two-liner. There was one component missing from the bridge. Adjudicator says, "This is a departure from the drawings. On a balance of probabilities, I find that this is a breach of your contract. On a balance of probabilities, I find that this missing component resulted in the collapse of the bridge". And the entire adjudication collapsed because of that two-liner.

Now, I took it to court. Of course cost that was awarded against my client was 240,000. That is a sum that we don't even get in a long, drawn battle in court. I took it to court. I applied to set it aside. The question I was asked is this: Mr Foo, one line is a decision; 10 pages is a decision. The court is not here to second-guess. I presented the authorities from Australia, the robust position taken in Australia, but I think for policy reasons, our court did not want to second-guess decisions of our adjudicators. So unlike in Australia, we take a fairly relaxed approach to the requirement for reasons. As long

as there are reasons, it is complied with. I don't know whether this is something that can be legislated around. I think this is just one of the areas that can't be dealt with in legislation but needs to be addressed by case law. Guidance needs to be given by our courts. As far as contents of costs, it must state the amount that is awarded, cost, time, manner for payment.

Now, one of the mandatory requirements of our act as well is time for payment. Very often adjudicators mix this up. The award is very complete, very well reasoned. But like court judgments, like arbitration awards, typically you don't state payment within 14 days. The fact that the adjudication decision is out, much like an award, like a judgment of court, the moment it's sealed, signed and delivered, it's due for payment.

Our act, however, requires that the time for payment shall be stated. Parties have taken it to court for challenge. Thankfully, our courts have been quite sensible about it. Even in the absence of a time for payment, the adjudication decisions have been upheld.

Now, service is another provision that is worth considering, particularly in this time and age. Now, under our act -- electronic service is not recognised. It's still by the traditional physical mode of service, either,

if I recall correctly, registered post or by hand.

Now, in this time of COVID lockdown, it becomes -- this inadequacy -- or, how shall I say? This impracticality of physical service becomes more acute. Everything comes to a standstill, because the respondents are not going to agree to an electronic service. And the policy (unclear words) cannot proceed. So that's something that you want to look at as well.

Like other legislation, other statutory adjudication regimes as well, ours provides for correction of typographical and computational errors. And any correction will, of course, date -- relate backwards to the date of the original adjudication decision. Otherwise, it might be out of time. That's quite a typical, non-controversial provision.

Now, what happens to the adjudication decision? Again, like the rest of the statutory adjudication countries, it's temporarily binding. So it's binding up until it's set aside or it's settled by the settlement agreement between parties, or, finally, it is decided by arbitration or court. So if you don't take it to arbitration or court thereafter, your adjudication decision is effectively binding permanently, all right?

Key concepts in adjudication. Now, other concepts.

Enforcement. Now, I did start by saying that enforcement of an adjudication decision is actually quite beneficial, because there are two things you can do with an adjudication decision you can't with an arbitration award or a court judgment. Now, the first is from the little piece of the pie chart that is taken out -- suspension and reduction of rate. As most of you in the construction industry will know, standard form construction contracts may allow for a suspension of work or a reduction of progress if there is nonpayment on a certified sum. Okay? But if the consultant or the SO does not certify, you are stuck. So if you are armed with an adjudication decision, you are entitled to suspend your works even in the absence of a contractual provision.

Now, it goes on to say -- our act goes on to say that suspension is not a breach of contract. All right? So it is a very useful tool. From my experience in the construction industry, nothing is more effective, especially if you are the main contract, sitting on site, refusing to budge, refusing to move your machinery, blocking the entire site and refusing to work. All right? You're effectively bringing the employer to its knees. The employer can go to court for all sorts of injunctive measures. I have my doubts as to whether they are entitled

to it. But even if they are entitled to it, it's seven days wasted, give or take. Or if periods like this, even longer. So very, very effective. We have used it quite often. And at the very least, it brings a very uncooperative employer or payer to the discussion table. All right? It gives the claimant, the subcontractor or the main contractor, that much needed cash flow.

The other very useful tool under our act is what you see below that: direct payment from the principal. All right? Direct payment has been the subject of quite a bit of court judgments. We've been quite fortunate in arguing the direct payment provisions.

Now, if you look at the -- okay, it's not there. The direct payment provision, it basically means -- let's use this example. I'm the subcontractor, and I've got an adjudication decision against the main contractor. The main contractor does not want to pay. Now, I'm entitled to then send a notice to the employer to say that I've got an adjudication decision, main contractor has not paid me, I am now giving a notice that you shall pay me.

Now starting point, we know from very basic principles that I've got no cause of action against the employer in terms of contract or in any other causes of action. CIPAA creates that independent cause of action that allows me to

file a suit against the employer where none could have been filed elsewhere. A prerequisite is that I need an adjudication decision that is unsatisfied. And the second thing I need is to show that the employer either owes or will owe money to the main contractor. So that's a very useful tool.

Now, the previous literature on this direct payment required that there is actually a sum due and owing from the employer to the main contractor. So he's effectively just making direct payment to you or what he owes the main contractor. But in a recent matter that we argued, that has not been appealed. Our High Court has said that it is -- it also applies to monies that will become due. So if there is a sum that will become due from the employer to the main contractor, although not yet due, it can also be the subject of a direct payment application.

Again, in a construction project where your employer and the main contractor are detached, and when the employer has got no interest in the main contractor, it also proves to be useful, because the employer loses nothing. He is either -- he pays the main contractor or he pays the subcontractor. In this instance, he's obliged by law to pay the subcontractor.

In a number of matters that we did, of course the

employer and the main contractor are one and the same. It's basically a related company or company within the group. They use a different company as a main contractor, as a filter mechanism. Courts have also frowned upon that. The courts have basically put the burden on the employer to prove that nothing is due. So that really requires a show -- literally a full and frank disclosure by the employer as to how much is due and owing to the main contractor. It's not sufficient for the employer to simply say nothing is due. The burden is basically shifted to the employer to prove that nothing is due.

Now, other issues that are typical to our -- or not typical, really -- that are features of our CIPAA is this: challenges. What challenges can you make to an adjudication decision? The point that I made earlier about having a right decision -- or, having a quick decision being in priority over a right decision is made in this case. Hence, the need to have the right answer has been subordinated to the need to have an answer quickly. And although this is a decision of our second highest court, our Court of Appeal, it's been cited and adopted by our highest court as well. So this is the law as far as the Malaysian courts are concerned.

When you recognise this as a standing point, then the

deficiencies in the adjudicator's processes, such as not calling for oral hearing, not allowing further submissions, not allowing further documents. That has got to be seen in light of this priority. So if the adjudicator does not allow further or protracted submissions, it is because he needs to come to a decision quickly. He cannot be faulted. Likewise, he cannot be faulted if he does not want oral hearing, examination and so on.

These are the four areas for a challenge on the adjudication decision, and we are limited to these four. Fraud and bribery. I can easily say that in our last six or seven years, reported decisions on fraud and bribery, one or two, no successes. You can appreciate how difficult it is to prove fraud and bribery.

Now, breach of natural justice is by far the most often used because it's the most -- it's the most fluid, and it's the easiest category to bring ourselves under. So when the adjudicator does not consider a defence or does not consider an argument or does not consider a document that is produced, an argument of a breach of natural justice is brought. So our courts have also recognised that you can't expect the same trappings of a full-blown litigation in court in an adjudication. There are limitations and, therefore, you can't say that because you were not given

the right to call a witness, you were not given the right to argue until you turn blue in the face, that there has been a breach of natural justice. That doesn't fly.

And if you look at the decisions of our English courts, our Singaporean courts, they have been very robust as well. You are given that one chance to put it in your adjudication response. If you don't put it in there, don't complain that you have not had the opportunity to put your argument in full, because there is no automatic right thereafter to any further submissions.

Now, the next round is where the adjudication has not acted independently or impartially. Also very difficult because most of us count to 10 before we write or react. So as irritated as we are with one of the parties, even in the instance where we're not paid our fees, we are to harangue parties for our fees, we generally don't let that show in our adjudication decision.

So very difficult to show partiality or lack of independence. Of course, sometimes when people don't control themselves -- we have had situations where that biasness or that lack of partiality has been shown. But also it's relatively rare.

The final area is an excess of jurisdiction. That is quite common because adjudicators very often lose sight,

particularly on a very complex dispute or a very lengthy dispute. They lose sight of what was the original jurisdiction. You recall me saying that the complainants -- or, the jurisdiction of the claim is limited to what is in the claimant's claim. Now, we have had instances where the payment claim asked for a 1,000 ringgit. And in the adjudication claim, that figure is enlarged to 1,500 ringgit. Because for some reason or another, they found more evidence. An adjudicator misses the fact or forgets that the original jurisdiction was only to the limit of 1,000 ringgit -- and we are not talking about interest here, it is a crystallised figure.

So arguably, he's beyond his jurisdiction on the balance of 500. So the long and short of it is that a breach of natural justice, your second circle, and the last circle, excess of jurisdiction, are most-often-used grounds to challenge. And if our statistics are anything to go by, challenges to adjudication decisions typically -- I have not seen the statistics for this year, but I think you are looking at a 10 to 15 per cent success rate.

So of all the challenges that are brought, only 10 to 15 per cent are set aside, and that is already a very optimistic figure.

This is some explanation and illustrations of what

amounts to a breach of natural justice. Now, the next I wanted to deal with, which is admittedly a deficiency of our act, is that we don't specify in our act when the act will come into force.

So the very first case that went up to the High Court on CIPAA right in early 2014 was a case that went into whether CIPAA was retrospective. Because you can appreciate that when the act came into force in 2014, the contracts that were in dispute at that juncture were all before 2014. So arguments were taken as to whether CIPAA applied to contracts prior to 2014. The answer in those days, in early 2014, was: yes, it does. It was upheld by the Court of Appeal. And subsequent decisions of the federal court referred to that High Court decision. It was written by one of our highly respected judges who was then a High Court judge. So it was upheld. So the understanding of the industry and the application until 2020, from 2014, was that CIPAA was retrospective in its effect. It applied to contracts that were entered into even prior to CIPAA coming into force.

Now, Bauer turned that on its head. Bauer said that CIPAA is not retrospective. This came out in 2020, so this is the law as of today. Now, the problem with that is that a whole load of life issues or life challenges or life

adjudication decisions that were pending as of 2020 immediately took on an absolute defence that was never alive. That is this: that it was not caught by CIPAA and, therefore, the adjudicator had no jurisdiction.

Now, Bauer was not -- was the case about the pay when paid provision. Now, you recall I started by emphasising our act. Like most other acts, it deals with two aspects: introducing statutory adjudication; and, secondly, it deals with payment provisions. It introduces prohibitions against conditional payments like pay when paid provisions. It also introduces default provisions for timelines for payment.

Now, the default provision and the prohibition against pay when paid provisions obviously will affect the contracting right of parties. You will rewrite contracts that have been signed. So I understand if that is prospective only. But there is another part of CIPAA which is the introduction of statutory adjudication. Much like the introduction of specialist courts, tribunals, those do not affect the right or take away a right of a party. And those can be retrospective. But that's not how our court saw it. The court saw CIPAA as being one legislation. So it's whether you're retrospective or you're prospective. And so this case says that it's prospective, and that's

where we are at today.

Now, the problem can be avoided. If like the acts in Singapore, UK, South Wales and New Zealand, there is a commencement date. So I think in Singapore, it expressly says that it will start on a particular January date in 2005. In the UK, the Housing Grants, Construction and Regeneration Act provides for a starting date as well, as does the Australian -- the acts in the Australian various states, if I recall correctly. So if you are having that, avoid a lot of headache by having a start date for -- or, a cutoff date for when CIPAA applies or CIPAA does not apply. It saves a lot of legal fees.

Stay. Now, assuming a stay has been granted -- sorry, an adjudication decision has been delivered, what are the circumstances in which a court will stay an adjudication decision? Now, again prior to the decision of View Esteem, because View Esteem also covered stay application -- stay, the law was quite settled. We followed a Court of Appeal decision in Singapore called WY Steel which was very well written and very well reasoned. And it basically says this: an adjudication decision is temporary in nature. It's meant to allow cash flow. So if an adjudication decision is made, the party must pay on it. The only exception -- it's no longer a special circumstance; it's

an exceptional circumstance as this. And the only exceptional circumstance that a Court of Appeal could think of as did the other cases, the other court decisions of the commonwealth was this: if you succeed in an arbitration or court thereafter, or you succeed in setting aside the adjudication decision, there is a real risk that you will not be paid back. Because the contractor will either fold and run away with the money or the contractor is not good for the money.

So very sensible. You allow the cash flow first, as you would on the construction site, and the court will only stop that and grant a stay if there is a risk that that contractor will fall and you will not get your money back for that reconciliation process at the end.

We followed that for many years up until View Esteem. Here, we have again View Esteem. And the federal court said that you could also grant a stay if there were clear errors or if it met the -- or, to meet the justice of the individual case. Now, the lawyers amongst you listening to this will know that this is as good as not having a test. Because everything is a clear error, if you are arguing a matter. It's very subjective. And if you are going to argue about clear errors, you are effectively inviting revisit on the merits of the adjudication.

Now, in our regime, the adjudication process takes, give or take, three or four calendar months. It's worded based on working days, but the entire process, depending on the number of weekends and public holidays, three or four working months. A court challenge can also take up to three or four months. So effectively, you have doubled that time period. It becomes ineffective. So if you were to ask me today whether the regime is as effective as it is meant to be, I have my reservations. To the claimant, if you are successful, your money is not there because the test for a stay has been worded so widely. In the practice of our courts today, the moment there's a challenge, there's a setting-aside, pending the hearing of the setting-aside application, a stay is granted. So immediately, you lose four months.

Now, if I could withstand -- if I, as a contractor, had a cash flow that could withstand four months of CIPAA adjudication, I would have to then stretch myself to last another four months in court, and that's excluding the appeals process. View Esteem had gone on, I think, for close to two or three years in court. Of course, along the way, we were paid until the decision of the federal court, and then we had to pay it all back.

So I am a believer that a test for a stay should be

as it is enunciated in Singapore and in the rest of the world. It should be stricter and very limited. Not in the way that it's worded here. To be fair to our courts, subsequent to View Esteem, a lot of our courts have tried to contain the extent to which a stay is granted, the extent to which a clear error can be found. But again, these are only decisions of the high court.

So Panzana is one example. This sets up the test, but if you look at the next, Maju Holdings, the court actually goes so far as to say that the error must be so grave that it pricks my conscience if I left it unrectified. So this is an example of how the courts have tried to obtain the clear error test. But again, my problem is that what pricks my conscience is going to be quite different from what pricks your conscience. And what pricks the conscience of someone who has been on the side of the employer will certainly be quite different from someone who was been on the side of the contractor.

So again, very subjective. It lends no certainty. So I've -- in my position as a party representative, I have had claimants, contractors who have come to me to say, "Look, with all these decisions, what is the point of going to statutory adjudication? Because I will get jammed up in court". I don't have an answer to that. So if that

is -- that is our experience. It's something that you might want to take away and try to legislate around.

All right, I've spilled over by 13 minutes. We had a Q&A session. I will shut the slides, if I can, so that we can have a better view of everybody else.

MODERATOR: Well, thank you very much from our distinguished speaker and his excellent sharing. I thought there are a number of Q&As right here. Would Joon Liang, you skip through the questions and you may share your expert views.

FOO JOON LIANG: Sure. What I will do is I will read out these questions, and I will try to -- I don't know whether you can see them, but I will try to address them. The first is from Ben, it says this:

"I note with interest, the longer period for the process which addresses the major quick and (unclear words) to the process by the English courts --"

Sorry, that's not a question. I think you are right. During this entire process, it's got to be quick. And if by being quick, it has got to be rougher and dirty, so be it. Because that's what you have on site. Next point:

"The minimalist reasoning could be encompassed by a careful drafting. This drafting should make clear which evidence was accepted and why. This would go some way to inform the parties. Also a power to remit to the

adjudicator for further reasons."

I entirely agree with you, Ben. You see, acting as a party representative, when I'm on the losing side, and I act quite a bit for developers. And the leaning so far is that if you bring a claim to CIPAA, it's just a question of how much you are likely to succeed. The leaning is that -- the weight always leans in favour of the claimant. So I find myself having to explain to my developer clients very often why.

By now, a lot of them are very understanding, because they don't hear it from me; the literature is out there. It's more contractor- or claimant-friendly CIPAA. And that's the reality. "So it will help me a lot if you would say, as the adjudicator, why I lost". You know, I recognise a lot of times that my paperwork isn't brilliant. I've not met the contractual deadlines to issue my notices of set-off. I have not highlighted your defaults. I've not issued NCRs. I've not issued your engineer's instructions, architect's instructions. If you so much as say that in the adjudication decision and say that that's why I lost and that's why you don't believe there's a defect, for example, I can tell that to the claimant. But if you say that on the balance of probabilities, I believe the claimant and I disbelieve the

respondent, I'm sorry, but that's not a reason. And that is -- that does no favours to adjudication as a concept, because people will also not believe in adjudication.

You are speaking -- and I'm speaking from the perspective of an employer who has got no excuse. If he's brought to adjudication, he's got to defend it. Well, what happens if the claimant loses? Because I've also seen adjudication decisions where the claim is dismissed, or a substantial portion of the claim is rejected with no cogent reasons. How do you expect the claimant to swallow that?

So reasons are important. And I think we should hold the adjudicators to a higher standard. If they are not capable of expressing their reasons coherently, then I'm sorry that they shouldn't adjudicate.

And I think our adjudication body, our AIAC, believes in that as well. They try very hard to constantly have updates and to educate the adjudicators on the panel to increase the standard. And I accept -- I don't for a -- I don't say that I write very well, as well. I try my best. And so does an engineer, because his day job is not to write adjudication decisions. It may be disconnected. You may need to read between the lines, or you may need to connect paragraph 1 to paragraph 35 or what have you. But if it's in there, I can make something out

of it. What I can't agree with is the two-liners. That completely does a disservice. So I agree with your point on that again, Ben.

The next point is -- the next observations, I think, is from Ben. If you wish, there is a draft model law on adjudication to be found -- yeah. Thank you for that.

I Googled some sites. I saw some of it. And I see in Hong Kong as well, you guys have been pretty active on the adjudication front, I think in anticipation of the act coming into force which has been a work in progress for a while. But certainly, there isn't a shortage of literature out there. So to understand how other countries have done it, I would encourage you to look at the Singaporean and Australian decisions, because I think they draw a good balance and they are quite robust about it. Because no arguments about natural justice, arguments about not having enough time. The courts have said it very well. Look, you understand what problem you have. You understand what problem the act or the statutory adjudication creates for you. So you make sure that you equip yourself to deal with it because you are not alone in it.

And you know, to digress, there were two attacks on CIPAA statutory adjudication from the constitutional law viewpoint. One of the parties' respondent argued that

CIPAA was unconstitutional, because you are forcing me into a dispute resolution process. I've got no choice. And in Malaysia, where you've got a federal constitution that basically places dispute resolution or determination of disputes to our courts, the argument was that this was -- vesting this power with adjudicators is a contravention of our federal constitution. So that's quite interesting.

The High Court agreed with us. Incidentally, it was a relatively high-profile matter, because they sued the adjudication centre and they sued the --

MODERATOR: The AIAC.

FOO JOON LIANG: The AIAC, and they sued -- they basically sued the whole wide world. They sued the then-director as well as office bearer, and they sued the adjudicator. So we acted for the AIAC and the director in two matters.

MODERATOR: Is it by means of judicial review or what?

FOO JOON LIANG: So there were three. One is by way of judicial review. It's pending in the Court of Appeal, so I can't talk about that.

MODERATOR: Oh, I see.

FOO JOON LIANG: But in the other two, it was brought by way of an in personam action, a writ action.

MODERATOR: A writ action.

FOO JOON LIANG: (Unclear words) summons, sorry. So you are correct, Wilson. One of the points is that if you are challenging that process, how he appointed the adjudicator and how -- whether CIPAA is constitutional, the correct way is to take it by way of judicial review. We did not. But the court went further to say that in any event, CIPAA is only -- or, statutory adjudication is only of temporary finality. It does not take away the function or the powers of the court. The court still oversees the entire process and has jurisdiction over the adjudication decision. So that challenge was rejected. There was an appeal, but I think for commercial reasons, they withdrew the appeal. So a very well-reasoned decision of the judge who incidentally was one of the key persons behind the introduction of CIPAA, statutory adjudication, when he was a -- before he was elevated to the bench.

Okay. There's another question that has come up by Lee & Partners:

"What are the factors attributing to the success of adopting statutory adjudication under the context of Singapore, which Hong Kong may make reference for the impending legislation?"

Okay. I must say that my knowledge of the Singapore regime, of course, is limited to what I gather from my

research. I don't practice in Singapore. But I think the starting point is to understand the context in which adjudication operates. It is not a full and final remedy. It is temporary. It is to allow cash flow. So you must respect the fact that natural justice, as you understand it in court, the full-blown court process is not going to be observed in the context of an adjudication. So in that sense, you must be realistic.

Unfortunately, speaking from the Malaysian perspective, the judges who hear it, understand it from their viewpoint of how court processes need to be. So when you look at View Esteem, the case that I was talking about and to some extent complaining about, they drew an analogy to court pleadings and court processes, which I think, as I've said when I used the analogy. It's a very poor analogy. The only reason why you have statutory adjudication is because court process, arbitrations are not sufficiently equipped or are not designed for a quick resolution in the way that adjudication is. So Singapore decisions that I read recognise that. And recognising that, they take a very robust approach as to number 1, the timelines. The timelines are there. Come hell or high water, you observe the timelines. If you miss the timelines, you've got no excuse. Because the whole world is in on it with you. And

asking for extensions of time is rare. Singapore, there's this famous -- I think they call it the one-hour case or something like that.

MODERATOR: Yes.

FOO JOON LIANG: Where it was one hour later. I don't know whether I can say happily in Malaysia we are more relaxed, depending on which side you are on. But I can understand that approach. You need to be robust, and the message must be there. Otherwise, if one hour is all right, what is five hours? How about half a day? How about one day, you know?

Because in Singapore, you are looking at 14 days to turnaround. We are looking at 45 days. So arguably, a little bit more time here and there is not a big problem. So I think the strictness in time -- and next is the court's supervision over adjudication decisions. They need to maintain the quality. Adjudicators need to know that if I write an adjudication decision that is insufficient, it will be torn apart in court. I've got to do my homework. That has got to be recognised. And I think once you recognise that and adjudicators recognise that, the whole system will come together. The stakeholders -- the biggest part of the -- you will always have respondents. You will always have delinquents who don't want to pay. Otherwise, us lawyers will not have work to do.

So you can't rely on them to fall in line. You've got to rely on the adjudicators to fall in line, to toe the line, so that everybody else -- because if there's an adjudicator who can crack the whip and insist that a respondent follow suit. But I'm not saying that it's only the respondent who is always guilty. It's also the claimant. You know, why do you launch an adjudication when you are not ready with your documents? Then you ask for extensions of time.

So in answer to that question, I hope I have answered your question. I think it's a strictness of the approach and maintaining the standards of the adjudication decision that is very important.

There are no other questions.

MODERATOR: So can I ask a final question to our distinguished speaker:

"If you wish to share, what do you consider is the major difference between the statutory adjudication approach of Malaysia in comparison with, say, Singapore or Australia?"

FOO JOON LIANG: Okay. Leaving aside what I've just mentioned earlier, number 1 is the timelines. Okay? Generally, in terms of responding to documents, it's not much different. But that final step for the adjudication decision to come up, I think we are by far the most generous. We give 45 working days. That is a really long time. Singapore, as

I've said, it's between seven or 14 days.

MODERATOR: Yes.

FOO JOON LIANG: And I can tell you from my experience as an adjudicator, there is never enough time. Because you always wait to the last minute. If the papers came in today, I sat down today, I will have enough time, even if it's seven days. So that's one.

But I think the other aspect is this: in Singapore, the regime is tied into the construction contract as well. So the progress claim is -- or, can be taken as the first step, the payment claim. So if your construction contract provides for a response to your progress claim, that is then taken as a claimant response.

So when there is nonpayment of that, when a notice of adjudication comes out, or they call it a reference to adjudication, immediately you start at the second half of what we have. We start at a payment claim. Then a payment response, then we issue the notice of adjudication. All that is already outside your contractual structure. Even the payment claim is outside the contractual structure. It comes after non-payment.

MODERATOR: It comes after, yes.

FOO JOON LIANG: Whereas under the Singapore regime, the payment claim can be taken as part of your contractual

structure, if your contract provides for it. So by the time you issue your -- or, you refer it to adjudication, you already are at the beginning of your adjudication. There are only two documents thereafter, which is your adjudication claim -- or, the equipment of an adjudication claim and the adjudication response.

And they are then very rigid. Whatever was not raised in your claimant response under the contract, you can -- the adjudicator cannot consider this, even if you raise it in an adjudication response. So then you can imagine within the 14 days or the seven days that an adjudication decision has got to be delivered, the issues are very streamlined, very narrow, and there's very little argument. It's almost like you sitting as a superintending officer making a certification.

So I think there's much to say about that kind of process, expediting it. The first stage, particularly now with our federal court decision saying that really is not very important; it's the second stage that is important. If you are looking at the way to go about it, perhaps not a two-stage structure or one-stage structure. Particularly, if you go by a standard form contract which already requires your process claim to go up.

MODERATOR: Okay. Thanks. Thank you so much. So if there

are no further questions from the audience, shall we all give a big hand to our speaker?

FOO JOON LIANG: Thank you.

MODERATOR: Yes. And our institute is so thankful to your speech, and we will invite you for further collaborations and networks in the future.

FOO JOON LIANG: It would be my pleasure, Wilson.

MODERATOR: Okay.

FOO JOON LIANG: Can I just thank my colleague who is Dardin Kashar (phonetic) who came up with the brilliant slides. Thanks, everybody.

MODERATOR: Yes. Thanks.

FOO JOON LIANG: Bye.

MODERATOR: Bye-bye.

[End of audio]