

**THE COMPATIBILITY OF DISPUTE RESOLUTION  
MECHANISMS WITH NATIONAL CULTURE IN THE  
CONSTRUCTION INDUSTRY – A CASE STUDY OF  
THE MALAYSIAN STATUTORY ADJUDICATION  
REGIME**

**FARRAH AZWANEE BINTI AMINUDDIN**

**Ph.D. Thesis**

**2019**

THE COMPATIBILITY OF DISPUTE RESOLUTION  
MECHANISMS WITH NATIONAL CULTURE IN THE  
CONSTRUCTION INDUSTRY – A CASE STUDY OF THE  
MALAYSIAN STATUTORY ADJUDICATION REGIME

FARRAH AZWANEE BINTI AMINUDDIN

School of the Built Environment  
The University of Salford  
Salford, UK

Submitted in Partial Fulfilment of the Requirements of the  
Degree of Doctor of Philosophy  
2019

## TABLE OF CONTENTS

<b>List of Tables</b> .....	v
<b>List of Figures</b> .....	vi
<b>Acknowledgments</b> .....	vii
<b>Declaration</b> .....	viii
<b>Abbreviations</b> .....	ix
<b>Abstract</b> .....	x
<b>CHAPTER 1: BACKGROUND OF THE STUDY</b> .....	1
1.1 Introduction .....	2
1.2 Background .....	2
1.2.1 The Importance of Cash Flow in Construction Projects .....	3
1.2.2 What is Construction Adjudication? .....	4
1.3 Research Justifications .....	5
1.3.1 The Western versus Eastern Cultures in Dispute Resolution .....	5
1.3.2 The Malaysian Cultural Values in Dispute Resolution .....	7
1.3.3 National Culture .....	10
1.3.4 The Influence of National Culture on Dispute Resolution .....	12
1.3.5 The Influence of National Culture on the Implementation of Statutory Adjudication in Malaysia .....	13
1.4 Research Aim and Objectives .....	15
1.5 Rationale for Adopting Single Case Study through Qualitative Approach .....	16
1.6 Thesis Structure .....	17
1.7 Summary .....	19
<b>CHAPTER 2: THE DEVELOPMENT OF ADJUDICATION ACTS IN THE COMMONWEALTH COUNTRIES AND MALAYSIA</b> .....	21
2.1 Introduction .....	22
2.2 The United Kingdom Adjudication Acts .....	23
2.3 The New South Wales Adjudication Act .....	25
2.4 The New Zealand Adjudication Act .....	26
2.5 The Singapore Adjudication Act .....	28
2.6 The Malaysia Adjudication Act .....	30
2.6.1 Preliminary Matters .....	31
2.6.2 Pre-Referral Stage .....	36
2.6.3 Adjudication Proceedings .....	43
2.6.4 Powers, Duties and Jurisdictions of the Adjudicator .....	54
2.6.5 Enforcement of the Adjudication Decision .....	60
2.6.6 CIPAA as of 2019: Relevant Case Law .....	64
2.7 Summary .....	66

<b>CHAPTER 3: THEORETICAL BACKGROUND OF THE STUDY .....</b>	<b>68</b>
3.1 Introduction .....	69
3.2 Theoretical Background of Dispute Resolution Process .....	69
3.2.1 Dispute System Design (DSD) .....	70
3.2.2 Multistep Dispute Resolution (MDR) .....	75
3.3 Theories and Dimensions of the National Culture .....	85
3.3.1 Hofstede .....	88
3.3.2 Trompenaars and Turner .....	92
3.3.3 The GLOBE Study .....	95
3.4 Summary .....	97
<b>CHAPTER 4: MORE COMPLEX ISSUES IDENTIFIED FROM THE LITERATURE .....</b>	<b>100</b>
4.1 Introduction .....	101
4.2 Dispute Resolution Process .....	101
4.2.1 Reflection on the Application of DSD and its Implication on National Culture and Dispute Resolution .....	101
4.2.2 Reflection on the application of MDR and its Implications on National Culture and Dispute Resolution .....	102
4.3 Theories and Dimensions of the National Culture .....	106
4.3.1 Criticism against Hofstede’s Model .....	107
4.3.2 Criticism against Trompenaars’ and Turner’s Model .....	110
4.3.3 Criticism against GLOBE’s Model .....	112
4.4 Summary .....	113
<b>CHAPTER 5: THE RESEARCH PROPOSITIONS AND THE CONCEPTUAL FRAMEWORK OF THE STUDY .....</b>	<b>115</b>
5.1 Introduction .....	116
5.2 Hofstede’s Predictive Behaviour of National Culture: The Method and Strengths .....	116
5.3 The Compatibility of Dispute Resolution Mechanisms in the Construction Industry of the Malaysian Society: The Research Propositions .....	119
5.3.1 Individualism/Collectivism .....	123
5.3.2 Masculinity/Femininity .....	130
5.3.3 Power Distance .....	137
5.3.4 Uncertainty Avoidance .....	141
5.4 The Conceptual Framework of the Study .....	144
5.5 Summary .....	148
<b>CHAPTER 6: RESEARCH METHODOLOGY .....</b>	<b>150</b>
6.1 Introduction .....	151
6.2 Research Philosophy .....	152
6.2.1 Ontological Position .....	152
6.2.2 Epistemological Position .....	154
6.2.3 Axiological Position .....	157

6.3	Methodological Choices .....	159
6.4	Research Strategy .....	163
6.5	Methods for Data Collection .....	166
6.5.1	Semi-Structured Interviews .....	166
6.5.2	Data Collection Activities .....	173
6.6	Methods for Data Analysis .....	180
6.6.1	Thematic Analysis .....	181
6.6.2	Pattern Matching Analysis .....	191
6.6.3	Explanation Building .....	195
6.7	Summary .....	197
<b>CHAPTER 7: THEMATIC ANALYSIS .....</b>		<b>199</b>
7.1	Introduction .....	200
7.2	Thematic Analysis .....	200
7.3	Theme 1: Group Aspect .....	204
7.3.1	Interpersonal Factor .....	205
7.3.2	Intergroup Relations .....	212
7.3.3	Intragroup Dynamics .....	222
7.4	Theme 2: Conflict Management .....	225
7.4.1	Aggressive... ..	226
7.4.2	Passive .....	231
7.4.3	Solution-oriented .....	233
7.4.4	Conflict Strategies .....	235
7.5	Theme 3: Hierarchy and Power .....	238
7.5.1	Superior's Authority .....	238
7.5.2	Superior-subordinate Relationship .....	243
7.6	Theme 4: Circumvent Uncertainties .....	245
7.6.1	Contractor's Perspectives .....	247
7.6.2	Employer's Perspectives .....	253
7.6.3	Shared Struggles and Dilemma .....	255
7.7	Theme 5: Security of Payment and Adjudication Regime .....	260
7.7.1	Industry's Responses .....	261
7.7.2	Challenges .....	265
7.7.3	Adjudicator .....	269
7.8	Theme 6: Construction Contract Management .....	273
7.8.1	Dispute Resolution Clause .....	275
7.8.2	Dispute Settlement Phase .....	275
7.8.3	Contractual Claims .....	278
7.9	Summary .....	282
<b>CHAPTER 8: PATTERN MATCHING AND EXPLANATION BUILDING .....</b>		<b>284</b>
8.1	Introduction .....	285
8.2	Summary of the Thematic Analysis Findings .....	285
8.2.1	Theme 1: Group Aspect .....	285
8.2.2	Theme 2: Conflict Management .....	293

8.2.3	Theme 3: Hierarchy and Power .....	296
8.2.4	Theme 4: Circumvent Uncertainties .....	300
8.2.5	Theme 5: Security of Payment Regime and Adjudication .....	305
8.2.6	Theme 6: Construction Contract Management .....	308
8.3	Drawing Interpretations on the Ontological Position .....	311
8.3.1	Individualism/Collectivism .....	312
8.3.2	Masculinity/Femininity .....	324
8.3.3	Power Distance .....	331
8.3.4	Uncertainty Avoidance .....	340
8.4	Summary .....	344
<b>CHAPTER 9: CONCLUSION .....</b>		<b>346</b>
9.1	Introduction .....	347
9.2	Brief Outline of the Study .....	347
9.3	Main Findings of the Study .....	349
9.4	Revisiting the Aim and Objectives of the Study .....	351
9.4.1	Objective 1 .....	352
9.4.2	Objective 2 .....	352
9.4.3	Objective 3 .....	353
9.5	Contribution to the Body of Knowledge and Policy .....	353
9.6	Research Limitations .....	357
9.7	Directions for Further Research .....	358
9.8	Summary .....	359
<b>References .....</b>		<b>360</b>
<b>Appendix A: Ethical Approval .....</b>		<b>373</b>
<b>Appendix B: Participant Information Sheets .....</b>		<b>374</b>
<b>Appendix C: Participant Invitation Letter .....</b>		<b>377</b>
<b>Appendix D: Consent Form for Interview Participants .....</b>		<b>379</b>
<b>Appendix E: Interview Guide .....</b>		<b>380</b>
<b>Appendix F: Interview Transcription for Thematic Analysis .....</b>		<b>383</b>
<b>Appendix G: Construction Industry Payment and Adjudication Act (CIPAA) ...</b>		<b>414</b>

## LIST OF TABLES

- Table 1: Hofstede's national culture dimensions
- Table 2: Universalism vs particularism (rules versus relationships)
- Table 3: Individualism vs communitarianism (individual versus group)
- Table 4: Specific vs diffuse (how far people get involved)
- Table 5: Neutral vs emotional (how people express emotions)
- Table 6: Achievement vs ascription (how people view status)
- Table 7: Sequential time vs synchronous time (How people manage time)
- Table 8: Internal direction vs outer direction (how people relate to their environment)
- Table 9: The GLOBE's national culture
- Table 10: The connection between truths and facts in ontological continuum
- Table 11: Epistemology continuum, their characteristic and linking between the epistemology and ontology
- Table 12: Axiology continuum, their characteristics and linking between axiology, epistemology and ontology
- Table 13: Differences between qualitative and quantitative research
- Table 14: Definition and background of five qualitative approaches
- Table 15: Summary of participants' professional background in construction adjudication
- Table 16: Purposive sampling of this study
- Table 17: Data collection tools used in this study
- Table 18: Field issues
- Table 19: Sample of comparisons for the initial codes between interview 1 and interview 2
- Table 20: Summary of findings

## LIST OF FIGURES

- Figure 1 Dispute Crystallisation Process
- Figure 2 Moving from a distressed to an effective dispute resolution system
- Figure 3 The dispute resolution continuum adopted in the MDR
- Figure 4: The different levels of culture
- Figure 5: Country cluster according to GLOBE
- Figure 6: The locus of adjudication within the adversary spectrum of dispute resolution method adopted in the MDR
- Figure 7: National culture score comparison between Malaysia and the UK
- Figure 8 Conceptual Framework of the Study
- Figure 9: Data collection circle
- Figure 10: Sample of interview transcript
- Figure 11: Memo on observations recorded using comment field in Microsoft Word
- Figure 12: Reviewing respondent's narrative
- Figure 13: Open coding for interview 1
- Figure 14 Open coding for interview 2
- Figure 15: Pattern matching analysis framework
- Figure 16: Full pattern matching in qualitative research
- Figure 17: The logic of pattern matching and its application in case study design
- Figure 18: Theme 1 – Group aspect
- Figure 19: Theme 2 – Conflict management
- Figure 20: Theme 3 – Hierarchy and power
- Figure 21: Theme 4 – Circumvent uncertainties
- Figure 22: Theme 5 – Security of payment and adjudication regime
- Figure 23: Theme 6 – Construction contract management



## ACKNOWLEDGEMENTS

Praise be to Allah the Almighty God of the Universe from whom I came and belong, for guiding me to this path of self-discovery and humbling experience.

I would like to express my heartfelt gratitude and utmost appreciation to my supervisor, Dr. Paul Chynoweth. I have been very lucky to be working under his supervision by having a good working relationship with him. I am forever indebted for his enthusiasm and willingness to spend a quality time in reading my work and giving a timely and constructive feedbacks on my study. The knowledge that I have gained from him will not only benefit this thesis but will stay with me for many years.

My special thanks are due to the Government of Malaysia and Universiti Teknologi Malaysia (UTM) for the opportunity to pursue my PhD at the University of Salford, United Kingdom. I am also grateful to all ever-helpful research administration staff, academic staff and support staff of the SoBE at the University of Salford who have given me invaluable assistance and support during my time at the university.

I am eternally grateful some important individuals at the Faculty of Built Environment and Survey, Universiti of Teknologi Malaysia for making this journey possible. Many thanks to Assoc. Prof. Dr. Nur Emma binti Mustaffa, Prof. Dr. Roslan Amirudin, Assoc. Prof. Sr. Dr. Fadhlin binti Abdullah, Assoc. Prof. Sr. Dr. Maizon Hashim, and Assoc. Prof. Sr. Dr. Kherun Nita bte Ali for their relentless support and understanding, who have taught me courage, faith and perseverance in life.

I am especially thankful to my family - Ayah, Umi, Awin, and Uya, for their constant love and encouragement from afar throughout my study. Heartfelt thanks to all my dear friends especially to Siti Nora Haryati, Zafira Nadia, Tirat Jaraskumjonkul, and Tg. Izzan' Badariah who were always only a phone call away, thank you for the wonderful support and for their generous help. Special thanks to Thomas Collier for being part of this wonderful journey, the fond affection and the constant reassurance that things will work out and to let life happen.

Confidentiality issue prevents me from mentioning the names of fifteen interviewees who participate in this research. I would like to thank them for the generosity of their time and interest in this study. Lastly, my appreciation goes to those who contributed directly and indirectly for the production of the thesis to become possible.

## DECLARATION

This thesis is submitted under the University of Salford rules and regulations for the award of a PhD degree by research. The researcher declares that no portion of the work referred to in this thesis has been submitted in support of an application for an award of qualification of any degree at any other university or institution of learning under my name or any other individuals.

.....

Farrah Azwanee binti Aminuddin

## ABBREVIATIONS

ADR	Alternative Dispute Resolution
AIAC	Asian International Arbitration Centre
ANA	Authorized Nominating Authority
ANB	Authorised Nominating Body
ASFE	Association of Soil and Foundation Engineers
BCISOP	Building and Construction Industry Security of Payment
CIDB	Construction Industry Development Board
CIPAA	Construction Industry Payment and Adjudication Act
CIRC	Construction Industry Review Committee
CVERSUS	Chinese Value Survey
DSD	Dispute System Design
GBA	Geo-Professional Business Association
GLC	Government-linked Company
GLIC	Government-linked Investment Company
GLOBE	Global Leadership and Organisational Behaviour Effectiveness Program
HGCRA	Housing Grants, Construction and Regeneration Act 1996
IDV	Individualism/collectivism
IVR	Indulgence/restraint
JKR	Jabatan Kerja Raya
LDEDC	Local Democracy, Economic Development and Construction Act 2009
LTO	Long-term/short-term orientation
MAS	Masculinity/femininity
MBAM	Masters Builders Association Malaysia
MSA	Malaysia Society of Adjudicator
MDR	Multi Dispute Resolution
NSW	New South Wales
NZ	New Zealand
PDI	Power distance
PWD	Public Work Department
SCI	Social Citation Index
SOP	Security of Payment
UAI	Uncertainty avoidance
UK	United Kingdom
UM	Universiti Malaya
USA	United States of America

## ABSTRACT

In 2012, Malaysia became one of the many countries worldwide to introduce statutory adjudication into its construction industry. As with other countries, the purpose of the legislation – contained in the Construction Industry Payment and Adjudication Act 2012 (CIPAA), was to ensure that construction payment disputes were resolved in an efficient and timely manner, thereby easing the problem of cash flow within the industry. Until that time - with the single exception of Singapore, with its unique history and commercial status within the region, no other Asian country had taken this step. Essentially statutory adjudication was being entirely confined to the construction industries of the Western, English-speaking world.

The introduction of statutory adjudication - an adversarial form of dispute resolution, in Malaysia that is associated with very different traditions of cultural interaction, therefore raises a potential question of cultural incompatibility between the method of dispute resolution and the national culture of the society in which it is implemented. National culture refers to a set of beliefs, values, norms, and behaviour shared collectively by the population of a nation. Historically, it has played a significant role in shaping approaches to dispute resolution in national settings.

The purpose of this research is therefore to assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society. It takes the recent introduction of adjudication in Malaysia as a single qualitative case study of this wider phenomenon. The research establishes a set of propositions based on the pattern of Malaysia's national culture in four distinctive dimensions derived from Hofstede's national culture model - namely *individualism/collectivism*, *masculinity/femininity*, *power distance* and *uncertainty avoidance*. The research utilises the four propositions by conceptually relating each of the dimensions to the key principles of dispute resolution process.

The research draws data by 15 semi-structured interviews from various key stakeholders within the Malaysian construction industry. Through thematic analysis, data were coded and categorized to support the inquiry. Patterns emerging from the data were then compared against each of the propositions. Findings of the study suggest that adjudication is appropriate and fitting to the national culture of the Malaysian construction industry, thus invalidating initial assumptions about its incompatibility with Malaysian national culture.

The research contributes to knowledge by presenting an in-depth case study of a single adversarial dispute resolution mechanism in a single Malaysia to understand how cultural values can influence the process of resolving construction industry disputes through the lens of national culture. Its findings also foster a better understanding of national culture amongst policy makers when preparing to implement internationally-inspired legislative changes in local settings.

# **CHAPTER 1**

## **Background of the Study**

## 1.1 Introduction

This chapter discusses the background of the study and justifies the rationale for the research. Following this, the research aim and objectives are established. This chapter also briefly describes the methodology adopted with descriptive outline of the structure of the thesis.

## 1.2 Background

In an ideal construction project, there would be perfect communication, perfect understanding and perfect harmony between parties engaged in the decision-making process (Cheung, 2014). However, in reality, these factors are susceptible to disagreement, differing interests, and misunderstanding that will, unless managed and resolved, further escalate into disputes. Conflict is endemic in the construction industry (Uff, 1997). It is adversarial with various areas of conflicts and disputation that emerge out of mutual blaming, not commonly without just cause (Akintan & Morledge, 2013). The severity of this phenomenon has the potential to turn an otherwise successful project into an unsuccessful one. Construction activity is a complicated process involving many disciplines with differing skills (Kangari, 1995). Hence, problems are bound to arise in the undertaking of a complex task of work due to widely differing values and goals among project participants (Taher, 2012).

There is a pressing demand for initiatives to help maintain the industry's positive and impressive growth. Unwanted situations such as late and non-payment are explicitly recognised as a rampant, common and boundless problem in the construction industry and persist in one project after another regardless whether it is a public or private construction contract (Munaaaim et al., 2012). A wave of debates has emerged among scholars and industry professionals towards the practice of payment default (Alaghbari et al., 2007; Sambasivan & Soon, 2007; Ramanchandra et al., 2011; Mbachu, 2011).

Conflict was initially conceptualised as a unidimensional construct with cooperation and aggression designated as the both ends of a continuum. Blake and Mouton (1970) later modified this unidimensional approach and identified two basic underlying dimensions of conflict: 1) cooperation – the extent to which a person attempts to satisfy the concern of the other party in the conflict situation; and 2) aggression – the extent to which one satisfies their own concerns in the conflict situation. Rahim (1986) labelled these dimensions as *concern for others* – cooperation, and *concern for self* – aggression.

Thomas (1992) conceptualised conflict as a bi-dimensional construct representing strategic intentions of conflicting parties. Phrased in terms of strategic intentions, the basic dimensions of aggression and cooperation represent attempt at satisfying its own and satisfying other's concern in varying conflict situations. Individuals indicating a preference for aggression conflict management styles are likely to be focusing more on satisfying their own needs and goals compared to individuals preferring cooperative conflict management styles. The latter would demonstrate a greater concern for satisfying others' needs and goals in conflict situations (Purohit & Simmers, 2006).

### ***1.2.1 The Importance of Cash Flow in Construction Projects***

Cash is evident to be of crucial importance as construction company resources. Lord Denning (1971) even regarded payment and cash flow are the very lifeblood of the enterprise. Therefore, regular payment is vital throughout the whole duration of the construction contract (Ali, 2008). Russell (1991) claims that an excess of 60% of construction contractors failures are due to economic factors. Since the implementation of construction project involves many parties ranging from clients, developers, consultants, contractors, sub-contractors and suppliers, payment problem will severely affect cash flow, timely performance and quality of the project (Langdon & Seah Consultancy, 2003).

It is a common practice for some clients and large-scale contractors to shift some financial risk to other parties further down the chain to the subcontractor. However, this system was manipulated by some irresponsible parties in the higher hierarchy who wrongfully delay and undervalue payments due to parties in a lower chain (Yung & Rafferty, 2015). This way, the financial burden is transferred to parties who may not have sufficient capital assets or readily available credit to cover delays (Chung, 2013).

Moreover, payment term is commonly based on credit rather than cash on delivery, which means that a contractor needs a significant capital outlay to undertake works before progress payment is made (Munaaim, 2012). Once the project is completed, the infrastructure becomes a fixture to the ground and disabling the unpaid parties to recover non-payment by removing any part of the completed infrastructure. They have no effective remedies to recover non-payment. Payees in the construction chain will be affected due to delayed or non-payment regardless of whether it is their fault or not. For the larger contractors, this could mean

exhausting inconvenience, but for the smaller scale subcontractors, this could lead to insolvency.

The Malaysian government, recognising the importance of cash flow in construction projects, has decided to introduce the Construction Industry Payment and Adjudication Act 2012 (CIPAA) and it represents a significant development in the construction industry. It is hoped by the government and all stakeholders of the construction industry that improvements to cash flow and payment disputes within the construction industry will result in fewer numbers of delays and abandoned projects, as well as better quality of completed projects.

### ***1.2.2 What is Construction Adjudication?***

Adjudication as a legal term is the act of giving a judicial ruling such as a judgment or decree. The requirement of a full adjudication process includes notice to all interested parties and an opportunity for the parties to present their evidence and arguments. Its primary objective is to reach a reasonable settlement of the dispute at hand. A decision is rendered by an impartial, usually a judge, jury or administrative tribunal.

Statutory adjudication was first introduced by the Housing Grants, Construction and Regeneration Act (HGRCA) 1996. It applies to parties to a “construction contract”, who cannot contract out of it. It is a 28-day procedure, often described as a “pay first, argue later” mechanism for resolving disputes in the construction industry and is designed to protect cash flow during construction.

According to CIPAA, the purpose of the Act is 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.

In construction, adjudication is an entire process. Like arbitration, the concept of adjudication is similar where the arbitrator in carrying out his function, deals with all the procedural in arbitration, as well as deciding upon the dispute. An adjudicator does the same. This matter gives rise to the question of how adjudication differs from arbitration and this is readily answered by considering two points (Dancaster, 2008).

Firstly, construction adjudication is not a final process. It produces a decision that is temporarily binding until disputes are resolved, and the decisions are overturned by arbitration, litigation, or agreement. With the conduct by the principles of natural justice, regardless of the



correctness of the decision, the courts will usually enforce the decision of the adjudication if one or both parties do not abide by it.

Secondly, adjudication is quick. The law requires all construction contracts to include such a provision that it cannot be avoided, it is readily available and no restriction as to when the process can be invoked. A reluctant party has no way of avoiding the process, and even if he does not take part in the proceeding, he will face the enforceable decision. This way, the timeline of an adjudication process is concise.

Thus, construction adjudication is regarded as a 'rough and ready' dispute resolution process available to almost all parties to a written or evidenced in a written construction contract. Its primary aim is to provide an interim solution to a dispute to maintain cash flow through the supply chain.

However, Ndekugri and Russell (2006) found a remarkable and undesirable feature of adjudication practice is found to be the high incidence of litigation on the issue of what amounts to a dispute. In the litigation, parties have challenged purported reference to adjudication on the grounds that there was no dispute at the relevant time. Similarly, parties have sought to prevent enforcement of adjudicators' decision on the grounds that, without a dispute, the adjudicators had no jurisdiction to make decisions binding on the parties.

### **1.3 Research Justifications**

There are five key drivers that are the underlying basis for the motivations of the research. The motivations include: 1) the Western versus Eastern cultures in dispute resolution; 2) the Malaysian cultural values in dispute resolution; 3) national culture; 4) the influence of national culture on dispute resolution; and 5) the influence of national culture on adversarial statutory adjudication in Malaysia. Each of the key motivations drivers is discussed in the following subsections.

#### ***1.3.1 The Western versus Eastern Cultures in Dispute Resolution***

Many studies have investigated the so-called "East-West differences" by comparing the U.S. managers to a matched group in an Asian society. Two patterns of findings have been observed repeatedly, albeit the precise cultural boundaries on these differences are not well

understood. First, compared to American managers, Asian managers rely on a style of avoiding explicit discussion of the conflict. Secondly, compared to their Asian counterparts, American managers are more inclined towards a style of assertively competing with the other person to see who can convince the other of their preferred resolution of the conflict. Although many researchers have speculated that these behavioural differences reflect underlying differences in cultural values (Bond & Hwang, 1986; Kirkbride, Tang & Westwood 1991), this has not been rigorously investigated.

Hofstede indicated that collectivism/individualism was the major construct between the Eastern and Western societies. In general, Asian people measure high on collectivism as they emphasise cooperation, interdependence, and harmony (Wong et al., 2010). They are more concerned with the consequences of their behaviours on their in-group members and are more likely to sacrifice personal interest for the attainment of collective interest (Hofstede, 1984; Chan & Goto, 2003). In contrast to collectivistic behaviour, the cultural characteristic of the individualist is having a higher sense of personal identity, striving to be one's true self, have an internal locus of control and principled moral reasoning (Waterman, 1984). As a result, there are fundamental differences between a society's cultural background that determine their perception and reaction to dispute, as well as the coping mechanism employed by project parties in a construction contract. Conflict styles that are considered as adversarial in non-Western societies may not be perceived similarly in Western societies and vice versa. Management of conflict and dispute resolution process between two cultures can also differ. This is due to the differing perspective on the comfortability of a society to adopt certain styles that are not suitable to be applied to the society.

In their study investigating ethnic differences between the Korean and American employees, Lee and Rogan (1991) found that in organisational conflict management behaviours, Koreans are an extensive user of solution-oriented strategies, while Americans prefer to use either confrontational and control strategies in dealing with organisational conflicts. Moreover, findings also indicate that Koreans are more sensitive in exercising power when facing conflicts with subordinates in the organisation.

In a different study, Morris et al. (1998) found that a problem in joint ventures between American and Asian firms is that cultural differences impede the smooth resolution of conflicts between managers. In a survey of young managers in the U.S., China, Philippines, and India, they found support for two hypotheses about cultural difference in conflict management style and cultural values that account for these differences. First, Chinese managers rely more on an

avoiding style because of their relatively high value on conformity and tradition. Meanwhile, the U.S. managers rely more on a competing style because of their relatively high value on individual achievement.

Interestingly, Cai and Fink (2002) in a study investigating the fundamental beliefs regarding cross-cultural differences in conflict styles involving graduate students from 31 different countries residing in the U.S. found that assumptions regarding the relationship between culture and conflict style preferences may not be true. Individualists do not differ from collectivists in their preferences for the dominating style. This finding strengthens the study's verdict that the interpretation of conflict styles across culture is more complex than we believed.

Bonta (1996) found that people in most of these societies do not view conflict as normal and productive, as the Westerners often do. It is also deduced that many peaceful societies depend on community meetings as a technique to help settle disputes, while Western societies settle conflicts by relying on formal court trials to determine guilt or innocence.

From the review of literature above, it is evident that a further complexity exists in the form of values in mind, which is further reflected on behavioural differences in dispute resolution process that is heavily dependent on the cultural characteristics of the user. The more complex the dispute on the table, the more interaction with individuals and organisations are needed to resolve it, the more likely the influence of culture would be. Thus, the generality of the previous findings demands further scientific inquiry.

### ***1.3.2 The Malaysian Cultural Values in Dispute Resolution***

Malaysia is a multiracial country in which the major ethnic groups, namely Malays, Chinese and Indians, interact harmoniously in their everyday living. Each of these ethnic groups maintains their separate ethnic identities and continues practising their distinct cultures in their customs, behaviour, language, norms, values, and beliefs (Rashid & Ho, 2003). Abdullah (2001) observed that Malaysia has often been described as a minefield of cultural sensitivities due to its diverse racial and ethnic composition. Malaysians work in apparent harmony and unity brought about by a few unifying factors, the most important of which are values that have stood the test of time. As the examination of the work-related values of the Malaysians as a society, traditional Malaysian worldview emphasises hierarchy, emotional restraint and indirect communication to save face and maintain harmony in daily life.

The construction industry in Malaysia is organised by hierarchically linked contractual chain whereby independent organisations such as the main contractor, specialist consultants, sub-contractors and suppliers possess different set of skills and knowledge are brought together through competitive bidding selections (Yong, 2011). The complicated web of relationship within the construction project teams provides a conducive environment for the emergence of adversarial attitudes and fragmentation of the industry (CIDB Malaysia, 2009; Mohammad et al., 2014). Thus, adversarial attitudes among the construction industry players are seen as one contributing factor to many of the industry's problems.

Malaysia is a plural, but primarily segregated society and its shareholding structure reflects this feature. An examination as to cultural preferences of dispute resolution should take this into account. Scholars have made some generalisations as to conflict mediation in Eastern societies, but no specific studies have been made about stakeholders' dispute in resolution in Malaysian companies (Augsburger, 1992; Lederach, 1995 & Karim, 1990). However, Wall and Callister (1999) indicated the plausibility that the Malaysian Chinese would be more receptive to assertive mediation, while the Malays would be more comfortable with an informal listening, opinion gathering and discussion approach.

It was also said that the Chinese have a general aversion towards the judicial system a forum for dispute settlement, which is historical baggage from the period they were discouraged from seeking settlement by way of litigation. Therefore, the existing social institution played a far more active role to help resolve disputes (Goh, 2016). Hooker (2002) noted that in pre-independence Malaya, no commercial disputes were ever brought to the provincial courts for adjudication based on Chinese customs. Culture and history may well be the cause of this, even today, from the frequency of shareholders' litigation, it would appear that there is still an aversion towards the formal judicial system to solve disputes.

The above evidence suggests that in resolving a dispute, the Malaysian society tends to incline towards amicable settlement outside of formal dispute resolution method. However, following the rapid change of construction dispute landscape and the increasing complexity of construction projects in a developing country like Malaysia, to what extent is this practice still true to the local construction industry?

In the hike towards industrialisation, Malaysians are now required to adapt to and assimilate new values, particularly at the workplace. These foreign values have their origins in the various waves of change which include, among others, Westernisation, Globalisation and Islamisation. As Malaysians respond to the call of the global workplace, some of the different

work-related values such as competitiveness and assertiveness challenge some of the existing ways of getting things done, which may initially be discomforting, especially when those values were not instilled at an early age.

Abdullah (1995) drew some examples of how the feelings of discomfort can occur at the workplace. First is when humans adopt a new set of values without going through the process of conscious choice. An example is when an individual works for a company and is required to adopt a set of 'foreign' values which are in conflict with those of his or her culture. Giving face-to-face feedback can be a discomforting experience as it goes against the concept of face saving. Secondly, when s/he is unclear about the values and underlying assumptions of his or her own ethnic group, there is a tendency for that person to take their culture for granted in socialising among its ethnicity. For example, a Malaysian who has been exposed to foreign cultures at an early age may not have been clear about their own cultural values. They will tend to use foreign assumptions to look at local practices. The practice of openly challenging the viewpoints of one's superiors can be seen as improper and inappropriate.

Abdullah (1996) identified five cultural values of Malaysia. Merriam and Mohamad (2000) interpreted the values as follows. First, Malaysia is a collectivistic society; identity is determined by the collectivity or group to which one belongs, not by individual characteristics. Secondly, Malaysians are hierarchical in that power and wealth are distributed unequally; this inequality manifests itself in respect for the elders and is considered normal as manifested in the way homage is paid to those who are senior in age and position. Thirdly, Malaysians are relationship-oriented. Their lives are embedded in a complex web of ties to family, village, country and social group, where mutual and reciprocal obligations are clearly understood and acted upon. Fourthly, face, or maintaining a person's dignity by not embarrassing or humiliating him in front of other is key to preserving social harmony personal relationships. Fifthly, Malaysians are religious. Happiness comes from suppressing self-interest for the good of others or discovering it from within oneself through prayers and meditations.

While liberal values such as freedom of expression, achievement orientation, secularism, monochromic time orientation and competition are some of the values Asma (1995) associated with most business cultures, Malaysians are still found to be equally inclined to value harmonious relationships, a collective orientation, religion and a community spirit in their daily lives. Therefore, in describing a culture and its contrasted values, researchers need to understand how these values influence daily activities on both the personal and cultural levels.

### 1.3.3 *National Culture*

Recent trends, such as globalisation of business, increased diversity in the workforce and increasing international alliances and mergers, highlight the need to examine conflict within an international context (Adler, 1983; Hofstede, 1997; Maddox, 1993). Scholars warned against the unquestioning adoption, dissemination, and application of Western management theories throughout the world (Adler, 1998; Hofstede, 2001). Owing to this, researchers are increasingly examining organisational phenomena such as dispute resolution within a cultural setting either theoretically or empirically. Existing studies suggest that cultural differences exist in the interpretation of dispute, its management, and the resolution strategies adopted by individual and societies from different countries (Anakwe et al., 1999; Epie, 2002; Gire & Carment, 2001; Xie et al., 1998)

Culture as a concept is complicated to define. Authors who have written on this topic in some ways deal with the definition of culture differently. Hofstede (1984) defined culture as *the collective mental programming of the people in an environment* (p. 5). Culture is not a characteristic of individuals, but it encompasses many people who were conditioned by the same education and life experience. Hence, in a more practical term, culture refers to the collective mental programming that the people of a group, tribe, a geographical region, or even a nation, have in common, and the programming is different from one to another.

Every national culture describes distinct beliefs - what is true, values - what is important, and norms - what is appropriate, that are deeply embedded in people's mind and demonstrated in their behaviours accordingly (Trompenaars, 2004). Cultural beliefs, values, and norms are the three central ingredients that drive social group members in both the choice of strategies or appropriate social action (Shank & Abelson, 1977) and the interpretation of the situation and the behaviours of others (Fiske & Taylor, 1991).

The concept of national culture has suffered from vagueness, and there has been little consensus on what represents the national culture. Since culture is an intangible concept, a growing stream of cross-culture research described the necessity to develop a means of making it more concrete. Thus, scholars identify and categorise culture in the form of a structure called *culture dimensions*. We can use these categories to differentiate one culture from another. The term national culture dimensions have been defined initially as categories that organise data culturally (Hoft, 2003). It has been used to map cultural differences regarding values and practices embraced by an organisation (Ankrah & Langford, 2005; Liu et al., 2006). The notion of national culture dimensions originated in a cross-cultural communication research by Hall et

al. in the 1950s. Since then, several frameworks and dimensions of national culture have been established.

Hofstede's theoretical framework of national culture has been utilised in various areas of the field to map out the comparison and to represent independent preferences for one state of affairs over another that distinguish countries (rather than individuals) from each other. Hofstede's theoretical framework of national cultures values has been applied to various areas of differences of the concepts of self, personality and identity, which in turn explain variations in conflict resolution strategy. The increasing amount of study in industry-specific and culture-specific themes indicates the importance of understanding culture in the alternative dispute resolution arena. However, there is an extreme dearth of literature sources on the discussion of the Hofstede's theoretical framework of national culture within the context of the relations between the many Asian countries like Malaysia and dispute resolution.

The score obtained by Malaysia on each dimension of Hofstede's national culture values out of 120 scores obtained from Geert Hofstede's website is discussed in this paragraph. Malaysia scores very high on power distance dimension – 100 score, meaning that the society accepts a hierarchical order in which everybody has a place, and it needs no further justification, and the ideal boss is a kind autocrat. Challenges to leadership are not well-received. With a score of 26, Malaysia is a very collectivistic society. Loyalty in a collectivist culture is vital and overrides most other societal rules and regulations. Such a society fosters strong relationships where everyone takes responsibility for fellow members of his or her group. Although scoring 50, Malaysia still can be considered a masculine society which is a success-driven society. Conflicts are resolved by fighting them out. Malaysia scores 36 in uncertainty avoidance dimension and thus, has a low preference for avoiding uncertainty. Low uncertainty avoidance index societies maintain a more relaxed attitude in which practice counts more than principles and deviance from the norm is more easily tolerated. Rules should be no more than are necessary and if they are ambiguous and do not work, they should be abolished or changed.

Attempts have been made to predict what conflict styles suit a specific culture of society. For example, collectivism/individualism has been vastly utilised by researchers in explaining differences in the interpersonal behaviour in conflict management field. Findings from the literature found that individualist society tends to normalise the adoption of more adversarial nature in resolving disputes while collectivist society tends to be more comfortable in employing a less confrontational method of resolving disputes. The strategies for resolving disputes are comparable can be regarded to their worldviews of peacefulness and the medium

they employ to reinforce those worldviews do distinguish them from other groups of societies. Numbers of conventional notions about national culture and dispute resolution that are asserted by the Western world can be questioned in light of the success of the Eastern societies in peacefully resolving conflicts.

#### ***1.3.4 The Influence of National Culture on Dispute Resolution***

In recent years, there has been recognition of a relationship between dispute resolution with the national culture. As discussed below, there is a substantial body of literature relating to national culture theories within the construction industry especially in the field of organisational management. Indeed, construction organisations need to have a full appreciation of the influence that national culture has on their functioning in conflict for dispute resolution measures to be effective and worthwhile. Studies have also demonstrated the influence of national culture on conflict behaviours (Swierczek, 1994; Morris et al., 1998; Tsai & Chi, 2009; Gad et al., 2011). The studies found significantly contrasting patterns that have repeatedly been observed of how international construction professionals behave differently in their styles of managing conflict and resolving disputes.

Hence, the dispute resolution process is greatly influenced by cultural characteristics. Disputes and conflicts occurring within the framework of culture's institutions need the particular culture to provide a context of their resolutions (Tsai & Chi, 2009) that best suit their way of life. Studies have also shown that the preferable strategies for resolving disputes are affected by the three central cultural ingredients. The beliefs, norms and value system can influence the members of the community to behave and act in a particular way considered acceptable by other members of the group (Rashid & Ho, 2003), but may be unsuitable and unacceptable for members from another group.

*Culture, the collective programming of the mind which distinguishes one group from another* (Hofstede, 1980, p. 25) sets out the underlying values and norms for a society. Hofstede's (2001) concept of culture consists of six cultural dimensions – *individualism/collectivism, masculinity/femininity, uncertainty avoidance, high-term/short-term orientation, power distance, and indulgence/restrained*. This study argues that organisations prefer the conflict styles that fit their cultural values. The concept of culture fit has been used in the literature as a basis to understand why management practices are more efficient with respect to user's work-related outcomes if these practices fit the cultural values



of the individuals (Lacchman et al., 1994; Newman & Nollen, 1996). Adopting this logic, the study expects individuals to prefer conflict styles that allow them to react in a way that it is consistent with their cultural values and therewith within the respective cultural norms.

According to Gunkel et al. (2014), if individuals do not act on the shared expectation of their culture and related preferred practices and cultural standards, these individuals may feel uncomfortable. Thus, the literature suggests that individuals in general will prefer conflict styles that are consistent with their cultural values. Prior researches that have focused on a related topic stream, namely communication styles in intercultural interaction, support this view as these studies show that in intercultural interactions, individuals do not adapt the style of the other party but rather tend to represent their own culture and culturally dominant behaviour (Laurent, 1983; Pekerti & Thomas, 2003). Individuals in intercultural interaction are motivated to display preference and behaviours that are consistent with their culture.

### ***1.3.5 The Influence of National Culture on the Implementation of Statutory Adjudication in Malaysia***

Scholars have increasingly recognised the important role that cultural values have in shaping dispute resolution. As a result, a core question for the field of dispute resolution is becoming the degree to which the cultural values of the people within a society lead certain form of dispute resolution to be more or less effective in maintaining social order by resolving disputes.

A growing trend on well-publicised concerns that no assumption is made that the Western model is etic and generalisable to all cultures. Malaysia is a newcomer, being the second country in East Asia after Singapore to enforce statutory adjudication at its national level. Moreover, the distinctive feature of adjudication that bases on adversarial method of dispute resolution raise a question on cultural “suitability” and “preferability” by the Malaysian construction players to adopt adjudication as a desirable method of resolving dispute. Is the adjudication system, primarily developed in Western culture, culturally applicable elsewhere?

Findings from the literature imply that adjudication will less likely achieve the same level of satisfaction as practised elsewhere. The presumption is based on the belief that adjudication may only help to improve the payment default in the industry, but it may go against the custom of the local industry players. Malaysia is a complex mix of different races and

ethnicities all working and living together. This mix has produced a very distinctive local working culture which needs to be understood before implementing a new system.

Firstly, the working culture in Malaysia is very much different from the Western societies. Owing to the shared working-values of Malaysians, as a hierarchically-oriented country, the industry runs based on autonomy and where decisions of the people in the industry are dictated by political and social influences.

Also, as a basically group-oriented approach, people like to feel being part of a team and expect individual aspirations to be sublimated to the group needs. Leaders should foster this intergroup cooperation rather than setting up intergroup competitiveness, which will lead to lack of harmony and therefore unhappiness.

Hence, if adjudication is to be implemented in Malaysia, a closer look must be placed upon the local custom of the people in the industry. In Malaysia, the Act is relatively new, but if observed from the cultural perspective, entailed concern is worth to be placed on the possibility for the cultural mismatch on implementation of adjudication to its appropriateness in Malaysia.

Malaysia's exposure to the Western ways has resulted in adopting the Western management and technology in many other aspects. Mendoza (1991, p. 156) opined that "*when we in Asia adopted Western management technology, we swallowed it, the whole hog. We bought it lock, stock and barrel, its principles, its legal underpinning, its underlying assumptions; no exceptions, no return no refunds. We have spent the last four decades trying to fit into the well-rounded Asian souls and sensibilities into the square hole of the Western mind. So, it has been a clumsy fit.*"

These are some of the abundant views suggesting that Asian countries like Malaysia faces difficulties in the adoption of foreign practices; to a certain extent, they seem to be incompatible to the local environments. At the same time, these also reflect the need to engineer its practices. One of the basic challenges that managers in a developing country face is to find and identify those parts of their tradition, history and culture that can be used as management building blocks.

Familiarisation with foreign legal system increases opportunities to borrow ideas from them. However, what is the likelihood of compatibility of applying these ideas and what will be the social cost? The very core issue addressed in this thesis is the degree to which cultural values influenced the viability of dispute resolution mechanism in the construction industry of

the Malaysian society. Using this scholarship, this study argues that cultural differences present formidable barriers that should not be ignored in analysing emulation of legislation.

This research is conducted as part of the pursuit to question the appropriateness and relevance of many Western concepts, methods, and assumptions of getting things done before Malaysia adopts them. What works in the Western world may not thrive so well in an Eastern soil. The research is a response to Asma's (2006) calls to challenge our own peers who may have a 'quasi-Western mindset' to ensure that any management theories and practices from abroad are being translated and contextually interpreted into local terms. Critical examinations are essential of the theories, concepts and techniques based on the underlying assumptions and values of how things are done in Malaysia. This research then intends to provide an exemplary case study on the compatibility of an adversarial dispute resolution mechanism through Malaysian-based example from the national culture lens.

#### **1.4 Research Aim and Objectives**

Arriving at the justification of the study as above, the aim and objectives of the research are stated as below:

##### Research Aim:

*To assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society.*

##### Research Objectives

- 1) *To identify and understand the concept of national culture;*
- 2) *To identify and understand the key principles of dispute resolution process;*
- 3) *To assess the influence of national culture on the compatibility of an adversarial method of dispute resolution in the construction industry of the Malaysian society.*

## **1.5 Rationale for Adopting Single Case Study through Qualitative Approach**

To achieve the aim of the study, a qualitative inquiry single case study of the Malaysian adjudication regime is adopted to investigate and understand the appropriateness for the implementation of a Western-style statutory adjudication regime in the Malaysian construction industry setting. Applying the similar analogy in experimenting, this study treats the Malaysian adjudication regime as an individual case like a laboratory investigator selecting the topic of a new experiment. Under this mode, the study aims to achieve analytical generalisation in which it utilises previously developed theory to be used as a template to compare the empirical result of the case study to generalise a particular set of results to a broader theory (Yin, 1994). On a wider view, the study strives to establish broader analytic generalisation on the compatibility of dispute resolution mechanism within society from the cultural perspective.

The study therefore aims to assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society. The recent implementation of adjudication in Malaysia takes to be the single qualitative case study of this wider phenomenon. The adoption of qualitative approach is seen to be one of the strengths in conducting this study as it allows the researcher to understand the context or setting of the participant through visiting this context and gathering information personally (Creswell, 2013a). For this purpose, this study is interested in the type of research path that Brinberg and McGrath (1983) identified as a theoretical path leading to a product of tested propositions. Thus, this study focuses on the conceptual domain and which cases are instrumental to its theoretical contribution.

The study focuses on the individual level such as on small groups of people, in this case, construction players. In macro-studies, the issue of which stance does a researcher adhere to becomes immediately important (Fontaine and Richardson, 2003). For example, Ratner (1997) argued strongly that too many cross-cultural studies are influenced by logical positivism. Positivists assume that concepts can be operationalised in such a way that they will be properly understood by respondents from a different culture. He is very critical of this approach, arguing that it only allows a limited understanding of human behaviour and does not allow an in-depth alternative of the role of culture. Ratner (1997) strongly urged the use of qualitative research methods in order to understand the depth of cross-cultural studies. Yet, whether one advocates an emic or an etic approach, individual level of theories offers new insights.

This study chose to adopt the qualitative approach. Many studies on national culture within the field of the construction industry that exclusively deal with the issue on hand through

the adoption of a quantitative method or mix method tend to ignore the meaning or erroneously present relevant circumstances as judgment. Due to the very complex nature of this study that involves social elements, behaviours and attitude at an individual level that formed as part of the society, qualitative study is perceived as the best option to be part of the research approach to achieve the aim of the study. Furthermore, this is a subject where the researcher has little control, and it is not sufficient to translate this issue entirely in the form of statistical data. Because it is a study closely related to humans, it is vital to emphasise that humans are different from physical phenomena because they create meanings. The purpose of this study is to create new, richer understandings and interpretations of social worlds in the context of dispute resolution field.

## **1.6 Thesis Structure**

This thesis comprises nine chapters with the structure taking the following format:

➤ **Chapter 1: Introduction**

This chapter serves as the introduction to the study. It covers the background, research aim and objectives, rationale of the study and potential contribution of the knowledge of the research. The research approach and the structure of the research are also outlined.

➤ **Chapter 2: The Development of Adjudication Acts in the Commonwealth Countries and Malaysia**

This chapter describes the historical development of many adjudication Acts predominantly in the Commonwealth countries. It also includes some discussion on the development of adjudication acts in the UK, Australian states of New South Wales, New Zealand and Singapore. The chapter serves as background for available adjudication models prior to the introduction of its own model in Malaysia. This chapter also presents a background description on the application of CIPAA.

➤ Chapter 3: Theoretical Background of the Study

This chapter provides the literature appraisal about the research topic that serves as the theoretical framework of the study. This chapter presents a discussion on the key principles of dispute resolution process. This chapter also identifies the concept of national culture by discussing some of the landmark theoretical bodies of national culture.

➤ Chapter 4: More Complex Issues of the Study

This chapter is an extension of discussion on the theories, model and concept of national culture and dispute resolution identified in the previous Chapter 3. This chapter serves to discover the unusually complex and multidimensional issues identified from the literature. The chapter discusses its limitations and gaps that exist in the literature.

➤ Chapter 5: The Research Propositions and The Conceptual Framework of the Study

This chapter presents the conceptual framework that maps out the concepts and theories that were discussed previously in Chapter 3 and Chapter 4 that inform the theoretical components of this study and its relationship among them. The framework will be the primary vehicle to investigate the influence of national culture on dispute resolution from the unique perspective of statutory adjudication. This chapter also presents the research propositions that will be observed and assessed.

➤ Chapter 6: Research Methodology

This chapter explains the methodology adopted in this study. It highlights the philosophical stance the study has adopted, provides justification for the qualitative approach and demonstrates its suitability in achieving the research aim. The chapter also discusses the practical data collection activities and the data analysis method.

➤ Chapter 7: Thematic Analysis

This chapter presents the research data analysis gathered from the empirical using thematic approach. This chapter discusses the emergent themes. This chapter incorporates participants' voices in the form of direct quotes and excerpts that enabled the researcher to capture the respondent's experience, opinions and perceptions using their own words.

➤ Chapter 8: Pattern Matching and Explanation Building

This chapter summarises the key findings from the thematic analysis conducted in the previous Chapter 7. This chapter presents some of the notable findings emerging from the analysis. The findings will then be interpreted in the process of explanation building phase later in the chapter.

➤ Chapter 9: Conclusion

This chapter concludes the thesis by highlighting the key findings and explains how and to what extent the author has met the research objective. The chapter also demonstrates the originality and contributions of the research to the body of knowledge, methodology and practice. Finally, this closing chapter discusses the research limitations and suggests areas of further study in the field of national culture and dispute resolution.

## **1.7 Summary**

This chapter highlights the introduction of the theoretical background in literature and critical justifications to conduct this study. Literature shows that cultural factors are significant in the viability of particular dispute resolution methods. It shows that culture is not a character of individuals, but rather a character of a group of people that are subject to the same experience in an environment. Cultural variables are found to be useful to predict some aspect of conflict resolution practices. From the literature, it is found that adversarial methods were preferable by individualist society compared to a collectivist society that tends to incline towards adopting a less adversarial method in resolving a dispute. Hence, this study is set to discover this premise empirically.

The study aims to achieve an understanding of the influence of national culture on the dispute resolution. The study is to assess the compatibility for the implementation of an adversarial method of dispute resolution in the construction industry from the critical lens of national culture in the Malaysian society.

To achieve this aim, the study chooses to adopt a qualitative approach to as its research approach. The introduction of the Malaysian statutory adjudication regime will be treated as a single case study to assess the influence of national culture on the compatibility of it with dispute resolution mechanism in the construction industry within the context of culture-specific of Malaysia. A semi-structured interview will be used as the research tool to gather the primary data of the study. The study targets purposive samplings of respondents who have first-hand experience dealing with the process of adjudication in Malaysia.



# **CHAPTER 2**

## **The Development of Adjudication Acts in the Commonwealth Countries and Malaysia**

## 2.1 Introduction

Considering that the phenomenon of payment dispute in construction is rampant and often complex, it is crucial to resolve the matter promptly. A number of Western countries have adopted adjudication as a statutory legislation to resolve cash flow-related problems and improve the efficiency of dispute resolution in the construction industry. Such legislation was considered necessary to protect parties who are susceptible to cash flow problems, especially contractors, subcontractors, consultants and suppliers who are normally payees in this industry. The employment of an industry-specific legislation called security of payment that reportedly has improved the payment practices significantly in their respective countries. To date, 16 countries have enacted the legislation to address concerns regarding payment and to provide a quick dispute resolution mechanism

A common thread between these legislations is the mechanism enabling security of payment through statutory adjudication within the industry. New South Wales (NSW) Government (1996) Green Paper defined security of payment as a generic term to describe the entitlement of subcontractors, consultants or suppliers in the contractual chain to receive payment due under the terms of their contract from the party higher in the chain, an entitlement which is often compromised by delayed, reduced or non-payment, and that can occur irrespective of the solvency status of the various parties.

The United Kingdom (UK) is the first country in the world to enact this legislation under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). It is one of the most important pieces of legislation the construction industry has ever obliged to understand. The introduction of adjudication is a revolutionary step taken to introduce a mandatory regime, which, with some categories of exceptions, will apply to all construction contracts. Adjudication was enacted as a medium of improving payment practice in the UK. It is a statutory right that is enforced unilaterally at any time during construction contract and provides a quick resolution and usually inexpensive alternative compared to arbitration and litigation.

Not long after the “runaway success” of adjudication in the UK, similar legislation has been introduced in commonwealth countries such as Australian states of Queensland, NSW, Victoria and Western Australia, as well as New Zealand and Ireland. Now with the globalisation as the background, Western civilisations especially the Anglo-Saxons, holding the influential position, is exerting its influence on every part of the world, including the East Asia. The pace of implementing adjudication is growing substantially. This way, there is a common platform for the discussion in the East Asian countries to adopt the same idea of introducing a quick and

rough justice for payment problems in their construction industry. The legislation is also contemplated in Hong Kong, Malaysia, and Thailand.

This chapter presents the historical development of some of the adjudication acts in some of the Commonwealth countries. It also includes some discussion on the development of adjudication acts in the UK, Australian state of NSW, New Zealand and Singapore. The chapter serves as background the available adjudication models prior to the introduction of its own model in Malaysia.

## **2.2 The United Kingdom Adjudication Acts**

The HGCR Act was introduced partly in response to a joint Government and Industry review into procurement and contractual arrangements in the UK, conducted by Sir Michael Latham, entitled *Constructing the Team*, published in July 1994. This report identified several problems in relation to security of payment in the construction industry, including conditional, late or non-payments as well as excessive costs and delays when these cases were subsequently taken to arbitration or litigation. The report highlighted the damaging impact that these problems were having on the construction industry and subsequently the UK economy as a whole. Payment problems and delays invariably impacted subcontractors further down the supply chain and increased the risk of insolvency in some of these companies. Striking figures published in the Latham Report estimate that in the five years prior to the report being published between 1989 to 1994, the total number of construction companies closed due to insolvency totalled 35,000, with almost half a million jobs lost as a result of these insolvencies.

The report recognised that the problems identified in the construction industry were not solely attributable for this amount of insolvencies, with other factors also at play, specifically the economic recession of the early 1990's hitting the construction industry particularly hard. However, the report identified that the problems inherent within the UK construction industry tend to worsen when economic hardship is present in the wider UK economy. The Latham report also recognised that these issues were not solely attributable to the UK construction industry but are also impacted by various other international construction industries.

A number of recommendations from the Latham Report were later incorporated into the HGCR Act in order to improve payment and dispute resolution practices so that the adjudication processes were quicker and more efficient, resulting in improved cash flow throughout the industry and lower costs in cases of arbitration. The two main aims of the HGCR Act were first,

to improve payment practices in the construction industry and secondly, to improve the efficiency of dispute resolution in the construction industry.

To best meet these objectives, The Scheme for Construction Contracts (England and Wales) Regulations 1998 was established to impose mandatory provisions on construction contracts which, when not met by the parties to the contract, is to be replaced with implied terms by the scheme under section 108 of the Act. This applies to all contracts for ‘construction operations’ and is therefore broad in scope. The implementation of implied terms varies depending on if the failure to meet the mandatory provisions is in relation to non-payment or adjudication procedures. If the non-compliant section of the contract is in relation to non-payment, only the relevant section relating to payment will be substituted with the implied terms; however, if the non-compliance relates to adjudication, all sections in the contract relating to contractual adjudication are substituted with the implied terms.

This demonstrates that the HGCR Act operates on a much wider spectrum in relation to matters of adjudication than it does in relation to payments, reflecting the UK governments attempts to address wider problems of dispute resolution within the construction industry rather than focusing solely on issues of security of payment (SOP). The Act also states that if a contract contains a conditional payment clause (such as ‘pay when paid’ clauses), then that clause will not be binding and will be replaced by the implied terms of the scheme, a demonstration of the government’s attempts to improve payment practices within the construction industry.

The Local Democracy, Economic Development and Construction Act 2009 (LDEDC Act) was subsequently introduced in 2009 in order to further streamline procedures and improve the guidance provided by the HGCR Act. The LDEDC Act, which was introduced in 2011, changed the way construction contracts are entered into and in particular, introduced an amended regime for payment scheme and adjudication as well as its remedy.

Some of the key changes to adjudication is that the LDEDC Act removed the requirement for contracts to be in writing and therefore lawful contracts include those that are partly in writing or wholly oral. These changes are significant as it allows parties to go to adjudication even when they have not had their contract formalised in writing. Additionally, the LDEDC Act also introduced a statutory slip rule to enable the adjudicator to correct a clerical or typographical error. This means that construction contracts will have to contain a provision allowing the adjudicator to correct such errors by accident or omission.

### **2.3 The New South Wales Adjudication Act**

The government of NSW also commissioned its own NSW Government (1996) Green Paper into security of payment as an effort to identify measures to raise performance levels within the construction industry in NSW with a forecasted peak in activity in 1998/1999. The report identified multiple problems in the NSW construction industry in relation to problems stemming from poor ethical conduct, deficient management skills, weak financial backing and an adversarial culture which exists throughout the industry.

Although the report could not state that these problems were uniquely prevalent in the construction industry, it did produce data stating that losses from head contractor insolvency in the construction sector averaged approximately 0.4-0.5% of total Government expenditure, which was much higher than the losses of approximately 0.15% from head contractor insolvencies on all NSW financed projects in the two years leading up to July 1996. Furthermore, the report recognised that despite existing remedies being already available in law for security of payment disputes, some subcontractors failed to take action due to high costs, time delays and risks of victimisation in relation to future work if deciding to litigate.

The report stated that the “fundamental principles” behind any Government commitment must be that the cost of the solution is less than the cost of the problem and any new initiatives address the cause of the problem, not its effects. In response to this, the NSW government decided to take a different approach to that seen in the UK given that the common practice of construction contracts in NSW contain provisions for expert determination. This can be used as an effective and cheaper way to resolve disputes when compared to litigation or arbitration, with a neutral third party arbitrating over the relevant dispute. Therefore, the more substantial problems faced by NSW contractors and sub-contractors would generally result from the slow operation of the debt-recovery procedures in place, which would require a drawn-out court procedure, exposing companies to the risk of insolvency whilst enduring a lengthy wait to resolve their cash flow problems.

Under the Building and Construction Industry Security of Payment (BCISOP) Act, an affected party can apply for a progress payment without having to litigate by submitting a payment claim to the paying party identifying the work and the amount due. The paying party must then pay the sum within 10 business days, otherwise prepare for adjudication by providing a full payment schedule including any and all reasons for withholding payment. If the paying party does not submit a reason for withholding payment at this stage, they cannot later rely on said reason at adjudication. If the paying party fails to respond within 10 business days, then

the compulsory adjudication process will take place, with independent adjudicators appointed by an Authorized Nominating Authority (ANA) providing a decision within 10 days. This can be filed as a judgement debt and therefore be subject to the same enforcement action as a court judgement; however, the process of submitting the decision at court as a debt could further delay payment and therefore be detrimental to an affected party's cash flow. The affected party can also take further steps such as suspension of their services.

Given the above, the scope of the BCISOP Act is narrower in scope than the UK Acts and focuses on improving cash flow and payment practice. Although the Act covers many parties in the construction industry, including 'any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract' (Section 3(1) BCISOP Act), it does not seek to reform the wider construction industry but focuses on its aim of delivering speedy progress payments.

## **2.4 The New Zealand Adjudication Act**

The Construction Contracts Act 2002 (The NZ Act) was introduced in New Zealand to address problems with the payment chain between developers, contractors and sub-contractors that caused many companies to go insolvent. The reasons for the introduction of the NZ Act and its key aims are considered in a Discussion Document published in 2010 by the New Zealand Department of Building and Housing which highlights the three main purposes of the NZ Act. First, it is to facilitate regular and timely payments between the parties to a construction contract. Secondly, to provide for the speedy resolution of disputes arising under a construction contract. Finally, to provide remedies for the recovery of payments under a construction contract.

Given that the NZ Act was introduced a few years later than both the UK and NSW Acts, legislators were able to consider the models of the UK and NSW, their effectiveness in law and practice, and then fit them to their own needs. The result is a system of arbitration which takes inspiration from both the UK and NSW models.

The scope of the NZ Act is narrower than both the NSW and UK Acts, as it only covers commercial construction contracts and does not cover parties which provide goods and services as part of the construction supply chain. However, one interesting feature of the NZ Act is that an adjudicator may also decide that the owner of the site may be jointly liable with the paying party to pay any adjudicated amount and the adjudicator may apply a charging order to the

construction site itself. This could result in the employer of the site applying pressure to the paying party to pay the adjudicated amount or may make the payment themselves in order to prevent losing ownership of the construction site in any subsequent enforcement action.

For those contracts which are covered under the scope of the NZ Act, the adjudication procedure is mandatorily imposed on all disputes which arise, providing a uniform solution to the dispute. This contrasts to the position in the UK where injured parties may seek to litigate rather than resort to adjudication depending on the circumstances of their grievance. The procedure for instigating adjudication in the NZ Act is similar to that in NSW in that once the paying party receives a payment claim form, the affected party must respond within a set period of time. While in NSW the paying party must respond within 10 business days, in NZ they have 20 business days to respond.

There are also provisions in the NZ Act for the response period to be specified as longer than 20 days so long as this is contained within the contract. The adjudicator can be chosen either by agreement between the parties or by an Authorised Nominating Body (ANB) and holds additional powers to the UK and NSW systems with the authority to demand documents, appoint experts to report on issues and request the parties to do anything deemed reasonable to helping the adjudicator reach a decision. The NZ Act also finds a balance between the UK and NSW Acts by allowing a 20-day period for an adjudicator to reach a decision, compared to 10 for NSW and 28 for the UK.

If the paying party does not pay the amount decided in adjudication by the relevant date, the affected party must then enter the adjudication decision at court as a judgement of a debt due, which could cause an additional delay to payment when compared to the UK and NSW systems. The affected party may also suspend their services as in both the UK and NSW Acts.

The NZ Act clearly takes inspiration from the UK Act in banning pay-when-paid clauses in construction contracts and providing implied contract terms for payment provisions; however, these provisions only apply to ‘commercial construction contracts’ but not ‘residential construction contracts’, a distinction that could be difficult to interpret. Similar to the UK Act, the NZ Act allows for adjudication to cover disputes involving any rights and obligations under contract or any payment dispute between the parties to the contract. However, the NZ Act then mirrors the NSW Act by only enforcing the decision of an adjudicator when it concerns payment disputes in relation to commercial construction contracts and not when it concerns any other contractual obligations or residential construction contracts. This limited enforceability

of decisions by the adjudicator means payment disputes are likely to be the main category of dispute referred to the adjudicators.

## **2.5 The Singapore Adjudication Act**

The Building and Construction Industry Security of Payment Act 2004 (The SG Act) was introduced in Singapore to ‘improve cash-flow by helping to speed up payment in the building and construction industry.’ The SG Act applies only to written contracts, is limited to work done or supplies provided to a site based in Singapore and does not apply to contracts for work on ‘residential properties’ in circumstances where there is no need to submit a Building Plan prior to work commencing, a differentiation similar to that in the NZ Act. It also distinguishes between Construction Contracts and Supply Contracts, providing different Adjudication procedures for each.

The SG Act requires a supplier of goods or services to provide a payment claim to the paying party according to the timetable agreed to in the contract or agreed mutually in writing. If this is not specified in the contract, the claimant may make payment claims at their own discretion, up to a maximum of one month. A paying party under a construction contract is then required to respond according to the timetable stipulated in the contract (limited to a maximum 21 days after receiving the payment notice by the SG Act); if this is not stipulated in the contract, they must respond within seven days. The response must stipulate how much the paying party intends to provide to the affected party, even if this amount is zero and indicate any and all reasons for withholding payments.

A paying party under a supply contract is not required to provide any response to the payment notice unless they are intending to withhold some or all of the payment, in which case they must provide the reasons at this point or be unable to rely upon them later at adjudication. The paying party must then make payment by the due date stated in the contract, which is limited under the SG Act to a maximum of 35 days after the payment response for construction contracts (14 if no date is provided in the contract) and a maximum of 60 days after the payment notice is served for supply contracts (30 if no date is provided in the contract). These time limits on payment terms of contracts are a clear demonstration of the Singapore Government’s intent to speed up payments in the industry.

If no response is provided to the payment notice or if the affected party disputes the response they receive, they are unable to initiate adjudication until after a seven-day period has



passed, known as ‘the dispute settlement period’, during this time they can attempt to seek clarification or achieve a settlement with the other party. Under construction contracts, an affected party may initiate adjudication if: a) the claimant accepts the payment response provided by the respondent and has provided the tax invoice (if applicable) to the respondent. The respondent fails to pay the claimant the whole or any part of the response amount by the payment due date; b) the respondent does not respond to the claimant with a payment response by the payment response due date and this dispute remains unresolved at the end of the dispute settlement period; or c) the claimant disputes the response amount proposed by the respondent in the payment response and this dispute remains unresolved at the end of the dispute settlement period.

The affected party must apply to the ANB within seven days of the payment due date passing or the last date of the dispute settlement period and the ANB will then appoint an adjudicator to oversee the dispute. If the affected party does not notify the ANB within seven days, they have no further rights to adjudication. The paying party then has seven days to submit a response to the ANB as the adjudication begins immediately after this seven-day response period has passed. The adjudicator then has up to seven days to make a decision in situations where the affected party agreed to the payment response provided, but payment was subsequently withheld or where the paying party has not responded to either the claimant or the ANB. All other cases will be decided within 14 days unless the adjudicator requests additional time and both parties agree, which could prove useful in more complex cases. The paying party must then pay the amount decided by the adjudicator within seven days of the decision unless a later date is specified by the adjudicator. If payment is delayed, the affected party may suspend work or exercise a lien over goods provided. In a process like that in NSW, the affected party may also file the adjudication decision as a judgement debt at court.

The affected party may lodge a review of the adjudication decision with the ANB if the following conditions are met: a) the paying party had previously served a payment response to the affected party; b) the adjudicated amount exceeds the amount specified in the payment response by at least S\$100,000; c) the adjudication relates to a construction contract; d) the review application is submitted within seven days of the adjudication decision being served on the paying party; e) the paying party has paid the amount decided in adjudication prior to the review application being submitted. The ANB will then appoint a new adjudicator within seven days of receiving the review and make a decision within 14 days of the adjudicator being appointed. If the decision at the review differs from the original decision, the party required to

make a payment (or repayment) must do so within seven days of being served with the new decision.

The Singaporean Government subsequently passed the Building and Construction Industry Security of Payment (Amendment) Act 2018 with the aim of firstly, expanding and clarifying the scope of the SG Act including allowing claims for more types of contracts and claims relating to now-terminated contracts; secondly, enhancing requirements on handling of payment claims, and third, improving the adjudication processes including allowing affected parties to also apply for review of the adjudication decision and allowing adjudicators to apply some leniency if applications are incomplete.

The SG Act appears to be effective in meeting the Government's stated aim of speeding up payments in the industry by applying maximum time limits to several key stages of the payment and adjudication process. The SG Act follows the example set by the UK Act by rendering pay-when-paid clauses unenforceable in law and introducing adjudication as a dispute resolution process alongside the existing solutions offered in Singapore such as court hearings or arbitration. Despite these comparisons to the UK Act, the SG Act is predominantly modelled on the NSW Act as it applies only to payment disputes and provides similar processes of adjudication and enforcement. There are also some unique features of the SG Act including the limiting of claims to work conducted in Singapore, the ability to review decisions and the principle (usually the site owner) being able to make a payment to the affected party and then recover the sum from the paying party at a later date in order to enable suspended work or supply to continue swiftly.

## **2.6 The Malaysia Adjudication Act**

An empirical investigation conducted by Masters Builders Association Malaysia (MBAM) with Construction Industry Development Board (CIDB) and University Malaya (UM) in 2006 on payment problems show payment delays and payment defaults are serious. It also extends the findings to predict an estimate of late and non-payment amount based on a sample of industry player on the amount of unpaid work from the year 2000 and 2006. Roughly, the projected estimated figures are billions of Ringgits. The survey has confirmed the harsh reality of payment default to be a major problem and to be the biggest barrier from improvement and changes to a modernisation of the industry (Ali & Fong, 2006).

The Malaysian Government has long recognised problems facing parties to construction contracts in securing regular and timely payment that impacts the cash flow of project implementation. In ensuring the impressive growth of the industry, Malaysia has extended its purview to look to the Western world to seek better ways to tackle the default system of dispute resolution for payment problems within the construction industry that were not working well. According to the CIDB, under those circumstances, the landscape of the Malaysian construction industry does need altering for the better. Hence, CIDB has been mandated to shoulder the task in drafting Malaysia's legislation of the CIPAA development. By looking at the law itself, the aim of CIPAA provides:

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

Asian International Arbitration Centre (AIAC) defines adjudication as a summary procedure of legislation intervention for dispute resolution under a construction contract. It allows the party who is owed monies (the claimant) under a construction contract to have the disputes resolved with the non-paying party (the respondent) in a quick and cost-effective manner. Disputes, which refer to adjudication under the CIPAA, relate to payment for work done and services rendered under the express terms of a construction contract. Adjudication is a mandatory statutory process that does not require an agreement between the parties of the contract, and it prevails over any contractual agreement to the contrary between the parties.

The CIPAA follows the implementation of adjudication as a fast-track dispute resolution method for dispute in the construction industry. In the United Kingdom, adjudication has proved to be a popular means of resolving disputes. Internationally, adjudication is also used in countries such as Singapore, various states of Australia and New Zealand. Aspired by the global phenomenon, the CIPAA is introduced as a hybrid of the adjudication systems used elsewhere in the world, including the UK model. It was created for the same purpose as in the United Kingdom, which is to provide a cash flow remedy during project using a quick and more cost-effective remedy than arbitration and litigation for parties in dispute.

### **2.6.1 Preliminary Matters**

In the case of civil litigation, there are many things to be considered and addressed before an actual lawsuit can be claimed. Lawsuits are officially levied when the plaintiff files

the appropriate documentation with a particular court's clerk office. However, there are preliminary matters that need to be considered in order to have lawsuits appropriately prepared. The preliminary matters that will be discussed in this study will be the Act application and its non-application.

a) *Application of the CIPAA*

Section 2 explicitly states that the Act applies to every construction contract made in writing relating to construction work carried out in Malaysia wholly or partly including the contract entered by the Government. The definition of 'construction contract' includes both a contract for carrying out 'construction consultancy contract' as well as a 'construction work contract'.

i) Construction contract

While the definition 'construction consultancy contract' mentions the usual consultancy services such as architectural, engineering, surveying, surveying and the like, it is clear that this list is not intended to be exhaustive. Fong et al. (2014) opines that the test to be applied to this definition is that to determine whether the service is capable of being described as having been performed 'in relation to construction work'. Thus, the definition would exclude, for example, financing services provided for the construction firm and architectural services carried out as part of a study to consider the viability of a proposed project.

The term 'construction work' is widely defined but it is suggested that the term is to be referred to essentially synonymous with the definition set out by the *Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994*, in which it may be broken down into three parts.

The first part is the opening preamble of the definition, whereby the Act makes it clear that the term applies not only to new construction work but also extends to any extension, renovation, alteration, or any demolition of the categories of work set out in the second part of the definition.

The second part of the definition may be usefully considered under its constituent that covers first, 'any building, erection, edifice, structure ...' whereby the definition is enough to cover most categories of buildings. However, the descriptions 'any road, harbour works,

railway, cableway, canal or aerodrome ...' and 'any drainage, irrigation or river control work ...' are very specific hence it can be deduced that civil engineering work is only confined to these categories only.

The description 'any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work ...' would extend the term 'construction work' to building services, utilities and oil and gas works. Finally, the description 'any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work ...' can possibly be read to embrace only the civil engineering work specified.

ii) Contract in writing

Section 2 requires the contract must be made in writing. It is since the Act does not apply to contract that is formed orally. This position is particularly important as it is thought to be too much to ask for an adjudicator to address the issue and evidence over the existence of oral terms considering the already limited timelines within an adjudicator has to operate (Fong et al., 2014).

A contract in writing does not require however that the formal contract documents have to be signed. If there is a clearly worded letter of intent of award from which the terms of the contract may be ascertained, the court will hold that there is a contract in writing for the purpose of the Act (Fong et al., 2014).

iii) Territorial reach

The territorial application of the Act is determined essentially by the location where the construction work is carried out. The intention is to allow any consultant, contractor or sub-contractor that carries out construction or consulting work in Malaysia to avail himself of the Act (Fong et al., 2014)

However, on a literal reading of Section 2, the Act applies not only if the work is carried out in Malaysia, but it also applies even where the contracted work is to form part of a larger project outside Malaysia (Fong et al., 2014). For example, a Malaysian contractor who fabricates a structure for a project in Qatar would, according to this reading, be entitled to apply for adjudication under the Act, and this is definitely an example of the issue of extra-

territoriality of the CIPAA. However, it has been suggested that the original intention was to confine the application of the Act which is sited in Malaysia.

iv) Application to the Government

Section 2 states that the Act applies to the Government, in which under Section 4, the term ‘government’ refers to both the Federal Government of Malaysia and State Government. This express reference to the Federal or State Government is particularly necessary as Section 64 of the *Interpretation Acts 1948 and 1967*, a statute only binds the Federal and State Government only when expressly stated in the statute or the application of the statute must arise by necessary implication. Although the CIPAA is silent on this point, it is considered that its province would extend to local authorities which have been statutorily constituted as corporate bodies pursuant to the *Local Government Act 1976* (Fong et al., 2014).

b) *Non-application of the CIPAA*

Section 4 of the Act explicitly states that it does not apply to construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

There are sound policy considerations to exempt small and simple contracts from the operation of the statutory regime. This is due to the fact that the processes prescribed by the Act are technically demanding and, unless a person is reasonably conversant with contract administration matters in connection with construction work, important steps may be overlooked which subsequently may prejudice the party’s position in adjudication (Fong et al., 2014).

In bigger project, the contract processes are supervised by consultant such as quantity surveyors who are expected to be thoroughly familiar with the statutory processes and timelines which form an important part of the adjudication regime. Contrast to a smaller, many of these matters have to be attended to by the parties themselves who may not be sufficiently familiar or conversant with the operation of the statutory regime.

About the same exemption policy consideration, Section 3 of the CIPAA, three conditions have to be satisfied to bring a construction contract within this exemption. Firstly,

the contract is entered by a 'natural person'. As explained above, the exemption relates to buildings which are intended by the owner as a residence and it is sufficient on this reading that id one of the parties is a natural person.

Secondly, the exemption applies to a building which does not exceed four storeys high, and there are salient points that can be noted here: First, it is uncertain as to whether the basement of a building will be treated as a 'storey' for the purpose of this exemption. Second, there is no upper bound as to the value of the contract. Third, the upper bound is also not determined to refer to the floor space or height as long as it is not more than four storeys (Fong et al., 2014).

Third, the building must be intended for the occupation of the natural person who is party to the contract. Unlike Section 106 of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996, the exemption in Section 3 does not express 'a construction contract with a residential occupier'. Section 106(2) of the HGCRA reads 'a construction contract with residential occupier means a construction contract which principal relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence' (Fong et al., 2014).

Nevertheless, it is considered that in the context of the legislation, the term 'occupation' as used in Section 3 of the CIPAA is capable of being understood to mean that the building is to be used for the purpose of residence. In addition, the section also prescribes that the building must be 'wholly intended' for the occupation of the owner. The exemption would therefore not apply to a large mixed-use facility not exceeding four storeys and the owner occupies only a part of the building as his residence (Fong, et al., 2014).

In conclusion, the condition that the building is intended for owner occupation should be reasonably proved during the stage of construction and at least until the final accounts are completed and agreed between the parties of the contract. The settlement of the account releases the application of the Act in relation to that particular contract. Thus, a contract for a building which would otherwise fall within the description of an exempted building would be caught by the Act if upon completion a part of the building is leased to other party while the contractor is still on site and final accounts have not been settled (Fong et al., 2014).

## 2.6.2 Pre-Referral Stage

The Explanatory Statement states that the provisions deal with ‘the procedures on the adjudication of payment disputes’. This section considers Section 5 and Section 6 where it provides for the payment and claim and the payment response. Both, the payment claim and the payment response frame the scope of the adjudication. Subsequently, Section 7 prescribes the conditions under which the right to refer is clear and will be important to the decision to refer a matter to adjudication.

### a) *Payment claim*

Section 5 highlights the crystallisation of the dispute and the right to refer the dispute to adjudication. This process is called ‘dispute crystallisation process’. However, because it appears that the payment claim and the payment response commence before the adjudication proceedings, it is unclear whether any formal flaw in the payment claim invalidates the adjudication claim for the purpose of the Act.

### i) Entitlement to serve a payment claim

Section 5(1) vests on an unpaid party the right to serve a payment claim. By the virtue of Section 4, a payment claim may be understood as a claim for work done rendered under the express terms of a construction contract. It is considered that the description ‘express terms of a construction contract’ suggests that the entitlement to be paid must appear on the express terms but the form of payment may not need to be stated expressly. Thus section 5(1) will exclude claims founded on implied terms (Fong et al., 2014).

In Malaysia, where the terms of the contract incorporate the conditions in a standard form of contract such as the PAM Standard Form of Building Contract or the PWD Form of Contract, the contractor’s entitlement to be paid arises generally from the issuance of an interim certificate pursuant to the certification according to the payment terms of the contract.

Where the quantum amount is disputed, the Act is likely to be invoked where the contractor disputes the certified amount stated in the payment certificate. Disputes in payment certificate may arise in two forms: First, the claimed amount sought by the unpaid party differs from the amount certified by the employer’s appointed certifier. Second, on the date for payment following the issue of the payment certificate, the unpaid party has not been paid the



claimed amount in full. The dispute thus, being confined to the difference between the amount which has been paid and the amount sought by the unpaid party.

However, dispute can also arise in the situation where the contractor has executed the work but for some reason no payment certificate was issued. The certifier may have overlooked the payment application or unable to perform the certifying function. In these situations, it is considered that, on the wording of the CIPAA, the entitlement to be paid arises on the date when the certifier should have issued the relevant interim certificate pursuant to the timeline prescribed in the terms of the contract but failed to do so.

Where a contract does not provide for payment certification machinery as found in the standard forms, the contract may provide for a contractor to be paid to upon the service of an invoice by the contract for work executed up to the end of a period. Similarly, a contract may dictate progress payments to be determined by reference to the stage of the works. In this case, the contractor's entitlement to be paid and hence to make a payment claim may be expected to arise from a payment certificate issued upon the completion of a stage of work (Fong et al., 2014).

ii) Final payment claim

Although the CIPAA is silent on this point, the wording of Section 5(1) suggests that the term 'payment claim' does not only refer to progress payment but also extends to a claim for a one-off payment such as a final payment made on the basis of the final accounts of a contract.

b) *Payment response*

Section 6 sets out the course of action which the non-paying party is obliged to undertake in response to a payment claim made under the Act. The provisions are drafted to define the differences between the parties at the end of the exchange between the payment claim and the payment response. As with the payment claim, it does not appear that any flaw in the payment response affects the validity of the adjudication response in the next proceedings (Fong et al., 2014).

The payment response is a statement of the non-paying party made in response to a payment claim issued by the unpaid party. Pursuant to Section 27(1), the jurisdiction of the adjudicator is framed by the payment claim and the payment response. It follows that in the absence of the payment response, the scope of the adjudication proceedings falls to be defined only by the payment claim (Fong et al., 2014).

Thus, if the non-paying party did not issue a payment response to assert its entitlement to set-off the amount claimed for defects or if the non-paying party did not issue a payment response to assert its entitlement to set off the amount claimed for defects or if he issues a payment response but the payment response fails to raise this defence, this would effectively preclude the adjudicator from considering the defence in the next proceedings.

i) Payment response where a claim is admitted

Section 6(1) applied where the non-paying party ‘admits to the payment claim’. The non-paying party is required to serve a payment response ‘together with the whole amount claimed or any amount as admitted by him’. The expression ‘admits to the payment claim’ may be understood to mean either an admission to part or the whole of the amount claimed, in which this may include certain or all of the facts as alleged as well as part of the liability for the payment asserted in the claim. The specific reference ‘to the payment claim’ suggests that on the wording of Section 6(1), any admission made is relevant only in respect of the subject payment claim and in the context of the statutory adjudication process. Thus, any such admission may not necessarily bind the non-paying party for all purposes, in particular any potential formal trial arising from the matter (Fong et al., 2014).

Where the non-paying party admits to the amount claimed, the question arises now is to whether this suggests that the amount claimed is to be paid by the non-paying party to the unpaid party together with the payment response. The better view is that it does not because the payment of the claimed amount is a separate process. However, once the non-paying party admits the payment claim, he shall then be responsible to accept the liability for the amount claimed or at least to the extent of the amount which has been admitted (Fong et al., 2014).

In addition, another issue could also arise from the second part of the Section 6(1) in which, the subsection refers to the payment response stating, ‘any amount admitted (by the party making the payment response)’. If this is read as admission of a part of the payment claim, it would amount to the amount claimed which had not expressly admitted, and thus It might be thought

that this situation should be dealt with under section 6(2). Consequently, the result would be that, in a situation where the admission does not apply to the whole of the amount claimed, a dispute would have arisen notwithstanding that the payment response is made purportedly pursuant to Section 6(1) (Fong et al., 2014).

ii) Payment response where a claim is disputed

Section 6(2) applies where the non-paying party disputes the amount claimed, ‘either wholly or partly’. Unlike the response in Section 6(1), it is expressly provided that the payment response issued under section 6(2) has to be made in writing as the stipulation that a payment response has to be made in writing seems trite given the highly prescribed processes which characterized the statutory regime (Fong et al., 2014).

The payment response is also required to state the amount disputed and the reason for the dispute. However, the subsection does not specify the level of detail to which the reason for the dispute should be stated. In practice, the respondent may be expected to show the broad computational basis of the amount disputed, and if the case happens frequently, the respondent may rely on the consultant’s valuation and certification, and hence the payment certificate may be incorporated to the payment response. If the non-paying party considers that he is entitled to set-off the amount claimed or is entitled to counterclaim for liquidated damages or back charges, it is expected that these should be specified together with sufficient particulars (Fong et al., 2014).

In the case of where the payment response did not state any reason for disputing the payment claim, Section 6(2) of the CIPAA does not expressly preclude the non-paying party, in such situation, from canvassing his full case before the adjudicator. However, in this situation, the unpaid party and the claimant may resort to Section 27(1) of the Act. This subsection provides that ‘the adjudicator’s jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to Section 5 and 6. Section 27(1) thus imposes on the adjudicator the followings.

First, the adjudication is obliged to consider any matter raised in the payment claim (made pursuant to Section 5 and the payment response made pursuant to Section 6. Conversely, he is not to consider and has no power to consider any matter which has not been raised.

Consequently, the statement of reasons in a payment response goes beyond simply establishing the credibility of the respondent's case before the adjudicator. It also defines the matters which the adjudicator may consider. The example has already been given that if a set-off may not raise in a payment response, the party relying on the set-off may not raise it in adjudication except with the agreement of the parties (Section 27(1) and (2)). Hence, a failure to raise a defence or a basis for contesting the claimed amount precludes that defence being considered in the proceedings. Moreover, the adjudicator has no power to allow for this correction of this defect in pleading because both the payment claim and the payment response are served before his appointment (Fong et al., 2014).

The adjudication response affords the respondent an opportunity to elaborate on the reasons and the particulars furnished in the payment response. However, by virtue of Section 27(1) it may not raise any matter which has not been stated in the payment response.

iii) Crystallisation of the dispute

Section 6(4) deals with the situation where a payment response has not been issued under either Section 6(1) or 6(2) within the ten-day period. It allows the unpaid party to proceed on the basis that a dispute has crystallized and it entitles him to refer the matter to adjudication. This is an important provision of the Act because in the absence of dispute, there is no basis for commencing the adjudication proceedings.

The effect of Section 6(4) is that under the CIPAA, unlike the situation in the UK, there will be very few occasions when a dispute would not be considered to have crystallized. The only possible situation contemplated is where the position stated in the payment claim is formulated in ambiguous terms which appear to be inconsistent with the legislative intent of the Act (Fong et al., 2014).

c) *Right to refer dispute to adjudication*

Section 7 of the CIPAA states that: 1) An unpaid party or a non-claiming party may refer dispute arising from a payment claim made under Section 5 to adjudication; 2) the right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under Section 6(3); and 3) a dispute referred to adjudication

under this Act is subject to the Limitation Act 1953, Sabah Limitation Ordinance or Sarawak Limitation Ordinance as the case may be.

i) Conditions for reference to adjudication

Section 7(1) lays down the conditions for the referral of a dispute to adjudication. The conditions for the reference are the existence of a dispute between the parties and the dispute relates to the payment claim made under Section 5.

The crystallisation of dispute, as noted earlier, necessarily requires an unpaid party to serve a payment claim. The non-paying party is obliged to issue a payment response pursuant to Section 6(1) or 6(2). A dispute is crystallized if the non-paying party serves a payment response under Section 6(2) or the non-paying party fails to serve a payment response within ten days from the receipt of the payment claim.

In addition, Section 7(1) also appears to confer the right to refer a dispute to adjudication on both the unpaid party and the non-paying party. From one perspective, this suggests that an employer or (in the case of a dispute arising from a subcontract) a main contractor may in certain situations be cast as a claimant, and the subsection appears to provide a recourse for the employer (or main contractor) to claim sums which are due to him from the contractor (or main contractor) to claim sums which are due to him from the contractor (or subcontractor) under the contract. While this proposition is clearly arguable it is suggested that the scope of matters in respect of which a dispute may be referred to by a party such as the employer (or main contractor) is quite limited (Fong et al., 2014). This is because Section 4 defines ‘payment’ to mean ‘a payment for work has been done or services rendered under the express terms of a construction contract’.

Thus, an important premise to find a payment claim under the regime is that work has been done or services have been rendered. On this basis, it is considered that the only kind of payment which the owner as a non-paying party may recover in his position as a claimant would be confined to back charges, materials supplied to the contractor such as defect rectification. While counterclaims for liquidated damages or diminution in value of the works on account of defects may be raised as a defence to a payment claim, they do not allow a premise for affording a claim given that these matters do not fall within the meaning of the term ‘payment’ as defined in Section 4.

ii) One referral to adjudication

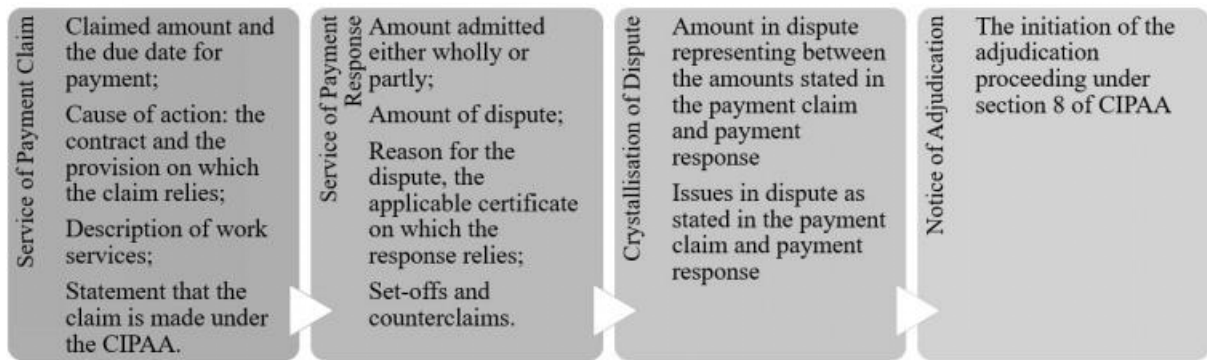
It is noted that Section 7(1) provides for the referral of a dispute arising from a ‘payment claim made under Section 5 ...’. Reading it plainly, this suggests that each payment claim confers only one entitlement to make an adjudication referral on the unpaid party. Section 27 confers that an unpaid party is effectively precluded from making a second adjudication referral on the same dispute arising from a particular payment claim. As a result, the respondent may be expected to challenge a referral on the basis that the payment claim on which the referral was founded did not comply with Section 5. Thus, if a cause of action has not properly crystallized, the respondent may argue that the referral was in the circumstances premature and any adjudication application founded on such referral should be dismissed (Fong et al., 2014).

iii) Timing of reference

Besides the crystallisation of the dispute, Section 7(2) also stipulates the earliest date on which the reference may be made. The unpaid party must allow the ten-day period for the making of the payment response to run its course before making the reference. Since the ten-day period is expressed as a minimum period for the making of the reference, this is not a time limit which an adjudicator can amend by virtue of his power under Section 25. If the adjudication reference is made prematurely – that is before the full minimum period runs its course; this will not be retrospectively cured, and thus resulting in the adjudication proceedings to be null (Fong et al., 2014).

iv) Dispute crystallisation process

The process up to the stage prior to the crystallisation of the dispute does not form part of the adjudication proceedings but the completion of this process constitutes the preconditions entitling the claimant to serve the notice of adjudication. The position under CIPAA is to some extent similar to that under the HGCRA in that the statutory adjudication process has to be founded on the existence of a dispute. The process is summarized in Figure 1 beginning with the payment claim following the crystallisation of the cause of action.



**Figure 1: Dispute Crystallisation Process**

Source: Fong, C. K., Fong, L. C., & Kheng, O. C. (2014). *Adjudication of Construction Payment Disputes in Malaysia: Navigating the Construction Industry Payment and Adjudication Act*. LexisNexis Malaysia Sdn Bhd

### 2.6.3 Adjudication Proceedings

The Explanatory Statement states that the provisions deal with the procedures on the adjudication of payment disputes. Upon completion on the exchange of payment claim and payment response, if it ought to be the dispute is crystallised, the initiation of adjudication automatically begins. This section considers Section 8 that deals with the process of the initiation of adjudication. Section 9, 10, and 11 set out the adjudication claim, its response and reply, meanwhile Section 12 and 13 prescribe the adjudication and decision its effects to the parties.

a) *Initiation of adjudication*

i) Notice of adjudication

The adjudication proceedings begin with the service of the notice of adjudication under Section 8(1). The parties who served the notice are designated as the claimant. The claimant can be either the unpaid party or the non-paying party. The party against whom the adjudication notice is served becomes the respondent for the purpose of the proceedings.

The notice of adjudication is intended to notify the respondent that the claimant intends to apply for adjudication in order to enable the respondent to prepare for his case. This is a

consistent law and it is a crucial step and consequently the statutorily prescribed requirements must be scrupulously complied.

Section 8(1) prescribes several requirements which the notice must comply. First and foremost, the notice must be in writing, but the Act does not prescribe a particular form for the notice. It may be sufficient that as long as the intent of the notice readily appears on its face. The Act also does not expressly state the notice has to be signed but it is a good practice to arrange for the notice to be signed.

Secondly, the notice must be served on the respondent and the responsibility lies on the claimant to ensure that the notice is properly served. It may be served on the respondent in one of the modes as prescribed in Section 38 of the Act. It is imperative to note that if the contractor is the claimant, he cannot serve the notice for adjudication on the architect, engineer, superintending officer or contract administrator appointed to supervise the project unless the employer has previously authorized such a person to receive a notice for this purpose (Fong et al., 2016).

Thirdly, the subsection requires that the notice contains describing the dispute and the remedy sought. It is considered that this constitutes a broad description of the required in the notice and the claimant should hold the responsibility to ensure that the notice of adjudication is sufficiently clear in order to ensure that the respondent is left with little doubts as to the intent and the particular dispute it relates to.

ii) Triggering appointment of adjudicator

Upon the receiving of the adjudication notice by the respondent, Section 8(2) provides for the claimant to apply for the appointment of the adjudicator according to Section 21. A notice which is flawed because it does not comply with the requirements in Section 8(1) or is otherwise served prematurely cannot in principle trigger the adjudication proceedings under the Act and hence accord the adjudicator the jurisdiction and powers necessary to discharge his duties.



iii) Representation in the proceedings

Section 8(3) affirms that there is no requirement that a party has to be represented by counsel in adjudication proceedings. He may either handle the matter himself or arrange for any person – including a claim consultant or a construction professional – to represent him. Experience in the UK, Australia and Singapore suggests that counsels are typically employed in complex matter where the amount in dispute is substantial or where jurisdictional issues may be involved. There are a growing number of quantity surveyors and claim consultants who have taken to represent parties in adjudication in these jurisdictions (Fong et al., 2014).

b) *Adjudication claim*

i) Service of the adjudication claim

Section 9(1) provides that the claimant has ten working days from the receipt of the adjudicator's acceptance of his appointment to serve the adjudication claim in respect of the dispute. An adjudicator may be appointed by agreement of the parties pursuant to Section 22 or by the Director of AIAC Section 23.

The adjudication claim is served directly to the respondent. As with the adjudication notice, the responsibility is on the claimant to ensure service of the adjudication claim. There is no prescribed form for the adjudication claim but Section 9(1) provides that the adjudication claim has to: 1) be in writing; 2) contain the nature and description of the dispute and the remedy sought; and 3) be accompanied by supporting documents.

ii) Contents of the adjudication claim

The wording of Section 9(1) describing the contents of the adjudication claim follows closely that of Section 8(1) in describing the contents of the notice of adjudication. This appears to suggest that the level of details and the particulars furnished in both of these documents are probably similar although the claimant may, in a suitable situation, choose to elaborate some of the particulars furnished earlier.

While the dispute is framed by the payment claim and the payment response, the adjudication claim is the principal document stating the claimant's case for the purpose of the proceedings. The adjudication claim is issued before the appointment of the adjudicator and,

consequently in drafting the claims, several considerations may be usefully borne in mind (Fong et al., 2014).

Firstly, by virtue of Section 27(1), the scope of matters which may be raised in the adjudication claim is limited to that set out in the payment claim. The claimant may not raise any item which has not been previously advanced in the payment claim.

Secondly, the pressures of time and cost necessarily compel an adjudicator to be relatively economical in determining the length of the hearing and in defining the issues and the principal areas of inquiry very early in the proceedings. In the circumstances, compared with pleadings in court proceedings or the statement of case in arbitration, the adjudication claim may be expected to have a stronger influence on the approach taken by the tribunal in the analysis of that matter. In particular it should be robust and comprehensive in the expectation that the adjudication hearing is often relatively short and can only deal with the key points of the case on each side (Fong et al., 2014).

iii) Copy to the adjudicator

Section 9(2) requires the claimant to provide the adjudicator with a copy of the adjudication claim which he has served to the respondent under Section 9(1). There is no requirement for this copy to be served simultaneously but it must be served within the same period of ten working days from the claimant's receipt of the acceptance of the adjudicator's appointment.

iv) Extension of the date of service

In a suitable circumstance, a claimant may apply to the adjudicator pursuant to Section 25 to extend the date for the service of the adjudication claim. In deciding this application, the adjudicator has to satisfy himself that this would not cause undue prejudice to the respondent.

c) *Adjudication response*

Adjudication response is the counterpart of the adjudication claim. Its contents depend to a large extent on the matter set out in the payment response and the adjudication claim.

i) Service of adjudication response

The right to serve an adjudication response accrues only on the receipt of the adjudication claim. Section 10(1) prescribes that a respondent is entitled to serve an adjudication response within ten working days from the receipt of the adjudication claim.

The significance of the date of service of the adjudication response is that it may serve as the date from which the 45-day period for the adjudicator to decide the dispute begins to run (Section 12(2) (a)).

Apart from prescribing these, the Act is otherwise silent on the particulars which have to be furnished in the adjudication response. For the same reasons that an adjudication claim has to be robust and sufficiently documented, an adjudication response should contain sufficient particulars to ensure that there is no ambiguity that it is served in response to the particular adjudication claim.

Fong et al. (2014) stated that it is good practice that the adjudication response should: 1) identify clearly the adjudication claim to which it relates; 2) indicate whether it agrees with the particulars of the contract as stated in the adjudication claim; 3) contain narrative which presents the respondent's case according to the results of the analysis undertaken; 4) draw the adjudicator's attention to any defect of procedure, compliance or jurisdictional issue with the adjudication claim; and 5) contain any additional extracts of contract documents, evidential material, expert reports and information which the respondent considers to be relevant to his case, organised properly into a clearly designated bundle.

ii) Answering the adjudication claim

The expression 'answer the adjudication claim' suggests that the adjudication response has to respond to each allegation of fact and liability stated in the adjudication claim. Thus, where the adjudication claim alleges that a variation has been ordered, the adjudication claim has to state whether this is disputed or admitted. If it is admitted, the adjudication must know the extent of any residual liability for payment. Where the claimant has advanced an argument on certain supposed facts, again the adjudication response has to state whether this is disputed or agreed and, in the case of the latter, the extent of the agreement (Fong et al., 2014).

The adjudication response may allege either that there are no circumstances which give rise to the claimant's entitlement to be paid or the respondent may accept that he is liable to pay

the whole or part of the claim. Provided that the payment response has been served pursuant to Section 6 of the Act, the adjudication response may assert that the sum payable is reduced by reason of counterclaim or set-off which has accrued.

A counterclaim is a claim made by the respondent which asserts an independent cause of action against the claimant. An employer's counterclaim for liquidated damages against a contractor in respect of delay is an example of a counterclaim. More common instances where set-offs have been invoked in adjudication responses include defects, materials and resources supplied and advance payments.

iii) Analysis of the adjudication claim

Fong et al., (2014) stated that upon receipt of an adjudication claim, the analysis which a respondent may be expected to undertake has to deal with three groups of issues: First, the jurisdictional and compliance issues which relates to the validity of either the payment claim or the adjudication application. Second, the aspect of the analysis in examining the contractual premise of the claim, a subject which falls under the province of the general law and turns substantially on the terms of the underlying contract. Third, the quantum of the claimed amount, the basis on which it has been computed by the claimant and whether this should be reduced or eliminated on account of the respondent's counterclaims.

d) *Adjudication reply*

i) Scope of adjudication reply

The provision for the claimant to serve an adjudication reply is one of the unique features of the CIPAA. None of the regimes in the UK or Singapore provide the opportunity for an adjudication reply. It therefore introduces some tactical considerations which are specific to the regime in Malaysia.

Section 11(1) prescribes that the claimant is not obliged but may serve an adjudication reply within five days from the receipt of the adjudication response. The claimant has to decide whether or not to take advantage of Section 11(1) but if he chooses to do so, it is considered that the reply should be confined to the points raised in the adjudication response. Thus, the reply may rebut arguments and points made in the adjudication response, however, the claimant

is not permitted to raise a new ground or argument supporting the claim in the adjudication reply.

The question arises as to whether any inference should be drawn in the event that the claimant decides not to serve an adjudication reply. It is suggested that the better opinion is that nothing should turn on the claimant's decision one way or the other provided that the points that is raised in the adjudication response is addressed at some stage of the adjudication proceedings.

e) *Adjudication and decision*

i) Meaning of 'adjudication'

Until the introduction of legislation providing adjudication, the term 'adjudication' used to describe a mode of processes by which tribunals – including courts, seek to try and determine a dispute judicially. In statutory adjudication legislation, the term is used in a more specific sense, although the CIPAA has not defined the term.

Although there are common principles in both the requirement for the tribunal to reach its decision impartially and to observe the rules of natural justice, adjudication is clearly distinguishable from arbitration. Different policy considerations apply to statutory adjudication given that legislative purpose is to provide a decision that has only interim effect.

The temporary binding nature of adjudication decision also suggests that the courts can afford to be more restricted and circumscribed in reviewing the correctness of an adjudicator's determination than of a arbitration award. There is the understandable anxiety that in the attempt to provide to provide a quick determination of a dispute, an adjudication process may not have sufficient scope for the careful analysis of evidence and facts.

One of the reasons why statutory adjudication has gained the rapid success in most jurisdictions where it has been introduced is the support given by the judiciary. The courts in these jurisdictions have recognised the value and the public service of a scheme which is designed to provide an economical and quick resolution of disputes which would otherwise follow the more grinding pace of adjudication. This is obviously the legislative purpose of CIPAA, and it will be interesting to see how the Malaysian courts will approach these matters in practice.

ii) Nature of an adjudication decision

Section 12 consists of a detailed set of provisions which deal with the ultimate result for the adjudication proceedings – the delivery of the adjudication decision. It has been noted that the concept of statutory adjudication as introduced by the CIPAA owes its genesis to the Latham Report (Fong et al., 2014). As proposed in the Report, adjudication is a process that provides quick decision of a dispute on a ‘provisional interim basis’, a decision which is intended to be enforceable pending the final determination of disputes by arbitration or litigation. It is meant to be less formal than arbitration with the adjudicator taking a somewhat inquisitorial role. Nevertheless, an adjudicator must declare his decision in clear and unambiguous terms.

The English courts considered that, a policy, losing parties in adjudication should not be offered any encouragement ‘to scabble around to find some argument, however tenuous, to resist payment (Arcadis UK Ltd v May and Baker Ltd [2013] EWHC 87 TCC). The English Court of Appeal recognised the reality that most adjudicators are not chosen for their expertise as lawyers but who are obliged to reach a decision on complex issues of law and hence the task of an adjudicator is not to act as judge.

While no special legal or technical expressions required, the result in the determination must not be a mere opinion or recommendation. Equally important, it must be a complete decision, and nothing must be left over to be decided in respect of the dispute so that terms of the decision may be effectively enforced (Fong et al., 2014).

Crucially, the result of an adjudicator’s decision must be the result of the adjudicator’s deliberation and determination and not that of some third party. However, he may rely on matters reported by an independent expert appointed to assist him during the course of the proceedings. However, he must arrive at any decision made on the basis of these inputs on his own.

iii) Conduct of the adjudication

Section 12(10) affirms the general principle that the adjudicator is the master of the procedure for the adjudication. The adjudicator may conduct the adjudication in any manner which he ‘considers appropriate’ for dealing with the matter before him. This latitude is further extended by the express provision that adjudication proceedings are not subject to provisions of the Evidence Act 1950 (Fong et al., 2014).

Nevertheless, it should not be thought that this latitude is completely unrestricted. It is subject to the other provisions of the Act, for example, he has to ensure that the proceedings enable the adjudication decision to be made within the prescribed time period: subsections 12(2) and (3). Section 24 requires him to act independently, impartially and in a timely manner without incurring unnecessary expense and to comply with the rules of natural justice. His powers as set out in section 25 of the Act are extensive but they must be exercised within this general framework (Fong et al., 2014).

While an adjudicator is empowered to inquisitorially take the initiative to inquire certain facts and law pursuant to Section 25(i), the general principle remains that the burden of proof in establishing a fact or proposition is borne by the party alleging the fact or submitting the proposition.

The adjudicator is expected to apply the law in arriving at their determination. Thus, an adjudicator should, therefore, determine the merits of a claim in accordance with the applicable terms of underlying contract as well as the parties' respective common law and statutory rights and obligations. In addition, besides giving effect to the term of the contract, an adjudicator has to consider applicable common law principles relating to the issues canvassed in payment claims. The adjudicator will appreciate, in particular, that the legal framework created by the Act is one which has a statutory system operating alongside contractual regime.

iv) Period for delivering the adjudication decision

Section 12(2) prescribes the period which the adjudicator has to deliver the adjudication decision. By reading sections 12(2), 12(4) 12(5) and 12(6), the term 'deliver' means the issue of the written adjudication decision is in accordance with the Act and the service of the adjudication decision on the parties. The period allowed for this purpose is 45 days. The period begins to run depending on the situation as described in section 12(2)a, 12(2)b, and 12(2)c.

v) Matters to be determined

Section 12(5) provides that the adjudicator has to determine two matters. First and foremost, he has to determine the adjudicated amount, in which the amount follows the adjudicator's examination of the cases submitted by both sides. Upon analysis, the adjudicator

should reach a finding on liability based on the analysis of the law and evidence as provided and determine the quantum to be awarded.

Secondly, the adjudicator also is required to determine the ‘time and manner the adjudicated amount is payable’. This issue turns on the terms of the underlying contract. Thus, according to Fong et al., (2014), where the contract provides for a period for payment to be made, the adjudicator should give effect of such term to the extent possible in the circumstances before him.

*f) Effects of adjudication decision*

Section 13 provides that, an adjudication decision shall be binding on the parties to the adjudication. This is even applicable where the adjudication decision contains erroneous findings in law or facts. However, it is binding only in a temporary sense.

*i) Temporary binding effect*

The temporary binding effect of adjudication determinations is a common thread in all jurisdictions where similar regimes have been introduced. The underlying intent of the temporariness is that after affording parties an opportunity to present their grievances and positions before an independent party, a quick but substantially objective and fair decision is delivered to enable the parties to continue with the work under the contract. In addition, a more calibrated determination of the dispute with the requisite degree of finality can be determined in arbitration or the court when the works are completed.

*ii) Temporary finality compared with a payment certificate*

Regarding this, a question which may arise is the extent to which the temporarily finality of an adjudication decision is comparable with the temporary finality, which is ascribed by the authorities to a payment certificate issued as part of the certification process provided in a construction contract.



In adjudication under CIPAA, section 28 provides specifically for an adjudication to be enforced by an application to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

However, according to Fong et al., (2014), a successful claimant in adjudication may avail himself to other remedies under CIPAA which are not available to a party who relies only on a progress payment certificate. Thus, it suffices to note for the present that these remedies include the right to suspend or reduce the rate of progress of performance pursuant to section 29 and, in the case of a successful claimant who is a subcontractor, the procedure under section 30 to request the principal to make direct payment of the adjudicated amount to the claimant.

iii) Setting aside of adjudication decision

Section 13(a) of the Act affirms that an adjudication decision ceases to bind parties where, on the application of one of the parties, the High Court agrees to set it aside. Parties may apply to set aside an adjudication decision on any grounds provided in section 15. An application to set aside an adjudication decision in essence asserts that the adjudication decision is invalid, is there is an issue which denies the decision of a tribunal its purported effect. This could be the absence of a crucial jurisdictional fact that entitles the court to quash the decision. Alternatively, an adjudication decision may be set aside on the ground that it was inappropriately procured or that the adjudicator has failed to observe the principles of natural justice.

iv) Settlement of the dispute by the parties

Section 13(b) provides that parties may settle by agreement the matter which is the subject of the adjudication and the effect of the adjudication may be subsumed by the written settlement agreement.

Additionally, parties are entitled at any stage of the proceedings to settle the dispute or differences between them. There will also be instances where, following the delivery of the adjudication decision, a successful party may consider it commercially advantageous to settle the matter on a more certain basis. This will be readily appreciated when it is borne in mind that an adjudication decision is temporarily binding until the matter is decided in arbitration or the courts.

## **2.6.4 Powers, Duties and Jurisdictions of the Adjudicator**

### *a) Duties and obligations of the adjudicator*

Section 24 states the importance for the adjudicator to be impartial and independent that complies with the principles of natural justice. The importance of these requirements is that each of them constitutes a ground on which an aggrieved party may apply to the High Court under section 15 to set aside the adjudication decision.

### *i) Conflict of interest*

Section 24(a) affirms that adjudicator has no financial or other interest in either of the parties or in outcome of the dispute referred for his determination. The award of an adjudicator who is in a conflict of interest situation is susceptible to challenge. An adjudicator who are not able to be independent in this sense with respect to a particular dispute should exempt himself from accepting the appointment.

However, CIPAA does not specify the situations where a person may be in conflict if he is appointed an adjudication of a matter. A person should not accept appointment as an adjudicator if he has an interest directly or indirectly with the outcome of the adjudication. Thus, a person who has an interest with any parties to the underlying construction contract of the adjudication is in conflict that the dispute may concern him directly.

An issue may arise in practice is whereby an adjudicator satisfied himself that he was not in conflict at the initiation of the adjudication, but during the course of the proceeding, a conflict situation emerges. In arbitration, it is possible for arbitrator to resign if a conflict situation subsequently emerges because the lost time and momentum could be recovered. However, in adjudication this is not readily possible because of the relatively short timeline.

The resignation by adjudication could also cause serious consequences. It is because a resignation in the midstream of proceedings inevitably prejudices one party. Additionally, it is considered that in such a situation that the adjudicator may be denied his fees because he has not completed his work. These difficulties are not entirely avoidable, but the disruption will be minimised if the earlier issue of conflict is discovered.

ii) Independence and impartiality

The independence of an adjudicator can be viewed at two levels. At the first level of the requirement is that the adjudicator must adjudicate independently. He must not be influenced by any person in the exercise of his judgment on the finding of the facts and the application of the law to the subject dispute. Although the CIPAA provides that an adjudicator may appoint an expert advisor to report on specific issues, the decision reached on any finding must ultimately be that of the adjudicator alone.

Subsequently in the second level, an adjudicator exercising his powers under the CIPAA must act within the ambit of powers conferred by statute. Traditionally, the courts have taken a strict view that the persons exercising such statutory functions are to observe the principles of fairness akin to any judicial body deciding on a dispute.

The term ‘impartial’ imports relevantly the idea that a tribunal should not display any bias towards one party or the other. This issue has surfaced in several Malaysian decisions on the conduct of judges. In ascertaining the effect of bias which is enough to challenge the impartiality of a tribunal, the test is to determine whether the bias presents a ‘real danger’ or ‘real possibility’ that the conduct of the proceedings would not be seen as impartial.

iii) Compliance with principles of natural justice

Section 24(c) affirms that the adjudicator has to comply with the principles of basic natural justice in which the concept of ‘natural justice’ can be traced to its roots in common law. The first limb requires the adjudicator to act fairly and impartially as between the parties. Thus, it would be inappropriate for an adjudicator to confer separately with party on an issue even if it is shown that the conversation did not affect the result of the adjudication. This limb encompasses the duty of the adjudicator to conduct himself impartially and to maintain his independence with respect to his determination.

The second limb is the right for the parties to be heard. Each party is to be afforded with a reasonable opportunity of putting his case before the tribunal. However, both limbs do not encapsulate the full extent of requirements of natural justice as laid down under common law. Complaints based on breach of natural justice tend to be largely formulated on one or both limbs.

The CIPAA affirms that the principles of procedural fairness are not to be diluted for the purposes of the adjudication process. According to Fong et al., (2014), the principles of natural justice applied to an adjudication, may not require a party to be aware of the case that it has to meet in the fullest sense since adjudication may be inquisitorial or investigative rather than adversarial. That does not however mean that each party need not be confronted with the main points relevant to the dispute and the decision.

A breach of natural justice is considered material where the adjudicator fails to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon and the issue is one which is either decisive or of considerable potential importance to the outcome of the dispute resolution and is not peripheral or irrelevant.

*b) Powers of the adjudicator*

Unlike the position in the UK, where the powers of an adjudicator are in principle conferred by the terms of an adjudication agreement, whether express or implied, the scope of an adjudicator's powers under the CIPAA derives from the statute and is found in section 25. These statutory powers are subject to the general principles set out in section 24 which the adjudicator is to act independently and impartially, in a timely manner, and avoid incurring unnecessarily.

*i) Procedures for the adjudication proceedings*

Section 25(a) provides that an adjudicator may establish the procedures for the conduct of the adjudication proceedings. This general power is subject to the other provisions of the Act, particularly to the rules of natural justice and the obligations to avoid additional incurring expense. Nevertheless, Fong et al., (2014) opined that the latitude of the adjudicator's power to determine the procedures and conduct of the adjudication is extensive, whereby he may issue such directions as may be necessary or expedient for the conduct of the adjudication.

This position is arguably wider than the situation of an adjudicator under the default regime in the UK. Although given the contractual nature of that regime, parties may agree to extend the ambit of the adjudicator's powers within a certain limit, and in the absence of such agreement, an adjudicator under the HGCRA is obliged to follow the adjudication rules stipulated by the terms of the underlying contract.

Additionally, where the matter is complex and involves voluminous submissions, the adjudicator has to ensure that proper directions are issued to manage the amount of evidence and submissions in relation to the time he has to determine the matter. Provided the process is managed fairly as between the parties, the court has accepted that adjudicators may not be able to necessarily analyse each item in detail.

ii) Discovery and production of documents

The provision under section 25(b) is for the adjudicator to order discovery and the production of documents is particularly useful. However, discovery can take a very long time and expensive. Given the short time table within which adjudication proceedings have to be concluded, the adjudicator should bear in mind these implications in making these orders. In making his directions on this matter, he must also consider the complexity of the dispute and the quantum of the sum in dispute and ensure that the time and costs incurred should not be disproportionate to these considerations. It will be rare that an adjudicator should consider it necessary to order discovery to the same extent as would an arbitrator or judge.

iii) Drawing on his own knowledge and expertise

Section 25(d) provides expressly for an adjudicator to apply his knowledge and expertise in analysing the submissions and evidence before him. This is generally expected in adjudication. In fact, it would impoverish the process if an adjudicator is to be prevented from applying the very technical expertise and knowledge which qualifies him for his appointment.

It is suggested that by allowing an adjudicator to take the initiative with, for example, the inspection of certain aspect of the case, it may enable the proceedings to focus on the issue of the dispute more quickly and reduce the incidence of evidence which are of doubtful or little relevance to the dispute. Additionally, it may be canvassed that, within the context of the tight time constraints within which a determination must be made, this must be surely consistent with the intention of the legislature.

iv) Appointment of independent experts

Construction dispute frequently involves highly technical issues. Section 25(e) anticipates that there will be situations where an adjudicator may find it necessary to call for expert to inquire or report on specific issues. However, he must frame the terms of such instruction carefully and ensure that he does not conclude his own finding on any issue which has not been advanced by any of the parties.

v) Meeting with the parties

An adjudicator may call for meetings with the parties pursuant to section 25(f). Meetings may be called to hear procedural submissions, particularly discovery, or to issue directions for the efficient conduct of the proceedings. This power would also extend to meetings to enable experts of the parties to meet to agree on issues and to provide a joint statement.

vi) Conduct of the hearing

Section 25(g) affirms that in the conduct of the hearing, an adjudicator has the discretion to set down the length of the hearing. In determining this, the adjudicator may be expected to consider the period for the delivery of the adjudication decision provided under section 12(2). In a complex case and where the quantum in dispute justifies a longer period to enable a fuller analysis of that matter, an adjudicator may seek an extension to this pursuant to section 12(2)(c).

vii) Inquisitorial role

Section 25(i) provides for an adjudicator to take an inquisitorial role in inquiring into the facts that the law required for the decision. This is consistent with the position taken by a line of authorities since the inception of HGCRA in the UK. Fong et al. (2014) opined that, this is necessary in order to enable the proceedings to be conducted within the very demanding periods permitted for the adjudicator to arrive at his decision.

viii) Issue of directions

It is considered that the provision in section 25(j) for the adjudicator to issue ‘any direction as may be necessary or expedient’ does not add anything more to the powers already vested in the adjudicator. For example, it might be thought that this power is readily read into the power of adjudicator to determine the procedures for the adjudication proceedings, to call for meetings with the parties and to conduct hearing. In issuing these directions, the adjudicator may be expected to bear in mind the period for the delivery of the adjudication decision as provided under section 12(2).

c) *Jurisdiction of adjudication*

i) Meaning of jurisdiction

In terms of an adjudicator’s competence to hear, it is settled that an adjudicator’s jurisdiction derives from his appointment. That appointment is governed by the statutory provisions of the CIPAA which requires that a dispute has already arisen between parties to the subject construction contract. The jurisdiction of an adjudicator therefore means the competence of a tribunal to hear a matter.

ii) Jurisdictional issues to be determined

Even though the CIPAA usefully removed many of the jurisdictional issues which would otherwise have to be considered by the adjudicator, certain important jurisdictional matters remain, and the most important of which are the appointment of adjudicator, payment claim, class of contracts to which the Act applies, contract in writing, and limitation period.

Accordingly, the adjudicator should begin by satisfying himself to the validity of his appointment. Subsequently he should address the remaining four issues that relate critically to the validity of the adjudication claim as these issues determine whether an adjudicator can proceed to hear the merits of the case. After analysing the submission of the parties on these points, and if he considers he has no jurisdiction to hear the matter, he shall not proceed to decide on the merit of the case.

## **2.6.5 Enforcement of the Adjudication Decision**

### *a) Enforcement of adjudication decision as judgment*

Section 28 affirms for the enforcement of an adjudication decision in the High Court. In this section, it states that a party who wishes to resist enforcement is likely to raise objections on the grounds set out in section 15 which provides for the grounds of setting aside on matters of jurisdiction and the failure of an adjudicator to act independently or impartially and to observe the principles of natural justice.

Section 24 will also be pertinent because it underscores the adjudicator's duty to ensure that there is no conflict and the adjudicator has to conduct himself independently and impartially in addition to comply with the principles of natural justice. Hence, section 28 has to be construed together with this provision.

### *i) General scheme of enforcement*

A successful claimant who is not paid the whole or any part of the adjudicated amount by the respondent in accordance with the terms of the adjudication decision may resort to the enforcement provisions set out under Part V of the Act. In addition, section 31 provides for the claimant to pursue one or more remedies concurrently.

### *ii) Application to set aside*

The Malaysian court has set a high threshold to attend setting aside applications. An adjudication decision may be expected to be enforced even if it contains errors of procedure, fact or law. It should be only in rare circumstances that the court re-examines the basis for the adjudicator's findings and it is settled that the courts will not inquire into the merits of the dispute.

If there has been a breach of natural justice or where an adjudicator has flagrantly exceeded his jurisdiction, enforcement of the adjudication decision should be refused. However, the court is conscious that these grounds of challenge have been known to be contrived and that it is important that the court should not detract the regime from providing a solution to a dispute quickly and efficiently.



iii) Application for a stay

The grounds for a respondent to apply for a stay of an adjudicator's decision are set out in section 16(1) of the CIPAA. The court may grant a stay where it is shown that, an application has already been made to set aside adjudication pursuant to section 15, and the matter to which the adjudication relates is pending final determination by arbitration or the court.

c) *Suspension or reduction of rate of progress of performance*

The right of the unpaid party to suspend work was an important feature of the regime as conceived by the Latham report. Sir Michael Latham intended that it should not be confined merely to cases where the employer is unable or refuses to pay but that it should also include situations where 'the architect or engineer fails to issue a payment certificate on time without good cause'.

He was also clear, however, that, the suspension should only be available 'if the adjudicator has first been involved and has issued a decision, which the employer has then failed to honour with immediate effect. Although this point is not elaborated in the report, it was considered that it was necessary to ensure the liability to pay has been fairly determined by an independent third party and is not precipitated by the claim posture arising from the excesses of an excessively opportunistic claimant.

i) Conferment of right to suspend or reduce rate of work

The general position in common law is that in the absence of an express term to the contrary, the aggrieved party is not entitled to suspend the performance of work under a contract on the basis that the other party fails to discharge its obligation to pay sums which have been duly certified or which are otherwise due to the aggrieved party.

Although it is conceivable that a sustained failure on the part of the party to discharge its obligation to pay may in certain situations constitute repudiation, until this point is reached, an aggrieved contractor has to continue carrying out the work. To circumvent this position under the general law, the legislation in the UK and elsewhere has accepted the case made by the Latham report for a successful claimant who is not paid the amount determined in his favour to suspend work until such time when adjudicated amount is paid.

The same policy consideration underpins section 29(1) of the CIPAA which provides that such a claimant may elect to suspend the carrying out construction work or reduce the rate of performance on the contract. By expressly conferring this right under the Act, the claimant has to do no more than to follow the procedure prescribed and does not have to revisit the merit of the adjudication decision.

ii) Crystallisation of right to suspend or reduce rate of performance

Section 29(3) provides that the right to suspend work or reduce the rate of progress of performance under section 29(1) takes effect upon the expiry of the 14-day period as stipulated in section 29(2) and no further notice is required under the CIPAA. However, in order to ensure that there should be no misconstruction of the intention of the claimant, it may be useful to serve a notice declaring the commencement of suspension or reduction of the rate of progress of performance.

iii) Legal operation of the suspension or reduction in progress

The significance of section 29(4) may be understood against the right of the parties under common law. Under common law, in the absence of any express term in the contract to the effect, a contractor is not entitled to suspend work merely because the certifier has under-certified or otherwise rejected a payment claim. The proper resource is for the contractor to apply to the certifier to review the certification and make the correction in a subsequent certificate.

Section 29(4)(a) thus precludes the respondent, the principal or owner from alleging that the claimant has committed a breach of contract following the exercise of the recourse under section 29(3). The act of suspending or reducing the rate of progress of work is not therefore to be considered repudiatory and the contract continues to be in force.

To deal with issues relating to liability for liquidated damages, section 29(4)(b) provides that any delay caused by the suspension or reduction in the rate of progress arising from the claimant's exercise of his right under section 29(3) shall be the subject of 'a fair and reasonable extension of time'. The certifier may be expected to give effect to this statutory provision but even if the certifier refuses to act in accordance with the provision, the extension of time would still take effect.

Section 29(4)(c) confers on the claimant a right to be compensated for loss and expense as a result of the lack of the sanction in section 29(3). In the event that the claimant is paid the outstanding portion of the adjudicated amount, section 29(4)(d) requires the claimant to resume the carrying out of the works. The claimant is obliged to resume work within ten working days from the receipt of the outstanding payment. The purpose of the scheme under section 29 is to secure the payment of the adjudicated amount. The period of ten working days should be sufficient in most cases to allow the claimant to mobilise his resources properly.

*d) Direct payment from principal*

Section 30 provides a further recourse for the recovery of the adjudicated amount. It applies to a successful claimant in adjudication and the process is activated by a written request made by the claimant pursuant to section 30(1). As defined in section 4, the term ‘principal’ refers to the party whose contracts with a non-paying party for work or service rendered in a tier of contract which is higher up the contractual chain than that of the contract between the unpaid and the non-paying party.

*i) Case for direct payment*

An owner, within his capacity as a principal, may be expected to invoke the provisions of section 30 where the work undertaken by the claimant is critical for the completion of the project and there is a strong likelihood that the respondent may be financially stringent.

*ii) Exercise of right by the principal*

A principal who wishes to accede to make direct payment under section 30(1) has to ensure that a number of conditions are in place before exercising the right to make direct payment.

First and foremost, there is no provision for the principal to take the initiative. The principal may only pay direct if a written request is first served by the claimant pursuant to section 30(1). Second, section 30(1) presupposes that the adjudication decision which determines that the claimant is entitled to the adjudicated amount has been properly made.

Third, section 30(1) implicitly requires the respondent to have failed to pay the whole or any part of the adjudicated amount to the claimant by the date of payment stated in the contract.

Fourth, the procedure prescribed under section 30(2) must be followed. The principal has to serve a notice of payment on the respondent requiring him to show proof of payment. Finally, section 30(3) provides that the principal can only make the direct payment if at the end of the period of ten working days, the respondent fails to show proof that the outstanding portion of the adjudicated amount has been paid to the claimant.

## **2.6.6 CIPAA as of 2019: Relevant Case Law**

This section presents a discussion to look at the way in which statutory adjudication has altered the landscape of construction dispute resolution. It has been five years since CIPAA came into force. CIPAA has brought in significant changes to the laws relating to the construction industry. However, like other newly enforced legislation, CIPAA too is facing teething issues and several issues arose since it came into force. Hence, this section will discuss some of the prominent case law which has set on foot a wave of decisions which sparked much debate.

### *a) Conditional payment clause*

CIPAA provides a new regime in which an unpaid party can claim for payment for work done or services rendered under the express terms of a written construction contract. CIPAA was introduced with the objective to provide a speedy procedure for the temporary resolution of payment disputes in construction contracts. With such an objective in mind, CIPAA has invalidated the conditional payment clause in the construction contract in adjudication brought under CIPAA, mainly to ease cash flow issue in the construction industry.

Section 35(1) provides that any conditional payment provision in a construction contract in relation to payment is void. Section 35(2) however provides that it is conditional provision when the obligation of one party to make payment is conditional upon that party having received payment from a third party, or the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of the party. However, a question arises: is 'conditional payment' therefore to be restricted to the two instances described in section 35(2)?

In *Econpile (M) Sdn Bhd vs IRDK Ventures Sdn Bhd* [2017] MLJ 732, the High Court held that for the purpose of section 35, ‘conditional payment’ is not restricted to the two instances described in section 35(2). In addition, the high court also held that a more expansive interpretation has to be adopted because in describing the two instances, the Parliament did not use the expression ‘conditional payment means’ or ‘conditional payment includes’ but rather, the Parliament had chosen to state a general principle first in section 35(1) and has couched it to be all-encompassing by using the expression “any conditional payment provision”.

In this regard, the High Court held that clause 25.4(d) of the PAM Standard Form of contract tantamount to a conditional payment clause within the ambit of section 35 CIPAA. Section 35 CIPAA effectively takes away the contractual right of the paying party to pay only upon the satisfaction of certain conditions and replaced the same with a default payment provision under section 36 of the CIPAA.

*b) When conditional payment clause is void*

In view of the operation of section 35 and section 36, question arises as to whether conditional payment provision in a construction contract is still valid. The High Court in the case of *Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd* [2017] held that conditional payment clause is only void for the purposes of adjudication. The learned judge held that if Parliament had wanted the prohibition to be of general application in the construction industry, it would have amended the Contracts Act 1950 and not confine and restrict its operation to statutory Adjudication under CIPAA.

The decision of the case appears to suggest that the contracting parties’ right to agree on conditional payment is not voided or taken away but rather suspended when the matter is adjudicated under CIPAA. This is consistent with section 13 which provides that the adjudication decision only has temporary finality effect. The parties can still rely on the conditional payment clause when the dispute is referred to arbitration or the court for final determination.

c) *CIPAA applies prospectively not retrospectively*

The High Court in *Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor* [2015] held that CIPAA applies retrospectively. The Court of Appeal subsequently affirmed the High Court's decision. However, in the recent case of *Bauer (Malaysia) Sdn Bhd v Jack in Pile (M) Sdn Bhd*, the High Court took a different approach. The Court of Appeal held that CIPAA only has prospective effect.

In the recent case, after CIPAA came into force, Jack in Pile Sdn Bhd commenced adjudication proceeding against Bauer (Malaysia) Sdn Bhd for payment for work completed. The Court of Appeal set aside the adjudicator's decision and allowed a 'pay when paid' clause in a construction contract to remain valid on the basis that section 35 which outlaw the 'pay when paid' clauses did not apply. In allowing the appeal, the Court of Appeal held that where a law affects substantive rights, the law looks forward, not back.

Therefore, any legislation affecting rights must be given a prospective effect. Since CIPAA is not a 'procedural legislation' and there were no clear words in the legislation which expressly states that CIPAA applies retrospectively, there was no hesitation on the Court of Appeal's part to conclude that CIPAA is prospective in nature. CIPAA therefore had no application on construction contract that existed between parties before it came into force on 15 April 2014.

## **2.7 Summary**

Prior to the CIPAA coming into force in Malaysia, multiple common law jurisdictions had previously introduced legislation specifically designed to provide statutory rights to improve SOP practices in the construction industry. This legislation was intended to supplement those rights already provided to both parties under contract law and provide necessary remedies by utilising an adjudication procedure.

The UK was the first country to introduce legislation of this kind with the passing of the HGCR Act in 1996. This act has subsequently been superseded by the Local, Democracy, Economic, Development and Construction LDEDC Act 2009, which sought to improve the rules and procedures initially introduced by the HGCR Act. The HGCR Act was followed shortly afterwards by the Australian legal jurisdiction of NSW introducing the BCISOP Act 1999.

The HGCR Act and the BCISOP Act are seen as the forerunners of SOP legislation and despite a difference in how they operate, several other legal jurisdictions have taken inspiration from one or both of these systems when implementing their own SOP legislation with the intent of improving payment practices in the construction industry. Examples of other jurisdictions implementing their own SOP legislation include New Zealand with the Construction Contract Act 2002, Singapore with the Building and Construction Security of Payment Act 2004 and Malaysia with the Construction Industry Payment and Adjudication Act 2012.

The one main divide between the UK and NSW procedures is that the UK operates with an adjudication scheme separate to its payment scheme, meaning that adjudication can be initialised in relation to any dispute resulting from a construction contract, not just payment disputes. Additionally, the focus of the UK system is to utilise adjudication to speedily settle a dispute within the construction industry and improve industry best practice. In contrast to this, the NSW system only allows for adjudication in relation to a payment dispute, with a focus on speedily settling any payment obligations and adjudication seen as secondary to this aim.

Malaysia has now followed the pursuit and taken heed of the experience of other jurisdictions by enacting the CIPAA. As it stands, Malaysia is the latest addition within the Commonwealth to introduce through the various security of payment legislation regimes from other jurisdictions. However, with culture as a background, this research questions the appropriateness of many foreign models before Malaysia adopts them.

# **CHAPTER 3**

## **Theoretical Background of the Study**



### **3.1 Introduction**

This chapter presents the theoretical background of some of the key concepts relevant to this study. This chapter will examine to identify additional research required to the research aim in order to ensure that the current study is essential and can contribute to existing knowledge. Although not much research or information is available to explain the state of transferability of Western dispute resolution technique into Eastern countries, it does not mean the research is conducted without any theoretical guidance. Theoretical exploration through reviewing some of the relevant literature has provided the researcher with a context to draw upon, although variables related to culture in dispute resolution were mainly unsubstantiated by empirical research. It also helps to stimulate question for interviews, determining the direction of the study and enables the researcher to make critical comparison during the analytical process.

The first part of this chapter is a discussion on some of the prominent theories of conflict management and dispute resolution process. The section also introduces key significant viewpoints in resolving disputes. It also set forth basic principles of dispute systems design. An attempt made to relate the application of the system is also discussed, linked and interpreted alongside the discussion on the national culture and the practice of adjudication.

The second part of the literature chapter is to identify and explore the concept of national culture. This part aims to explore critically the many, sometimes competing, ways in which the idea of culture has been theorised. It first sets out the definition of culture, after which it also discusses the dominant theory of national culture together with other opposing and rivalry theories. The focus of the research lies in the understanding and interpretation of the differing behaviour of the social group derived from national culture dimensions that are indicated as relevant to norms of conflict management and dispute resolution within the construction industry.

### **3.2 Theoretical Background of Dispute Resolution Process**

This section focuses on the dominant theories employed to understand dispute resolution process. The theories serve as an analytical tool for understanding and explaining various connections between human behaviour on dispute resolution process in the construction industry.

Although research on dispute resolution is considered relatively young (Deutsch et al., 2011), the following subsections do not intend to summarise the work done so far in the vast field. Rather, it aims to enrich the field by presenting the theoretical underpinnings that guide the understanding of the fundamentals of the social psychological process involved in dispute resolution in the perspective of cultural context. None of the theories, however, is adequate to deal by itself with the complexities involved in any specific or types of conflict. However, as indicated by Deutsch et al. (2011), the need to synthesise the knowledge from many theories and research studies is like making a mosaic of many theoretical ideas of the kind presented rather than relying on any single one.

### ***3.2.1 Dispute System Design (DSD)***

According to Maiese (2004), the nature of the process used to resolve a dispute depends on the way in which the conflict is framed. Dispute resolution procedures associated with the different ways of framing conflict that involve transactions of costs and possible benefits. Such cost can be associated as time, money, emotion, and energy devoted to resolve the dispute as well as lost opportunity. Benefits may include the parties' mutual satisfaction with the results, the good long-term effects on the parties' relationship and the production of positive lasting results.

The concept was first developed and introduced by William Ury, Jeanne Brett and Steven Goldberg in 1993. The system involves the design of systems or mechanisms which are used as a routine to handle similar and repeated dispute. The mechanism is particularly useful for organisations that have similar problems occurring repeatedly – for example disputes between co-workers over work allocations and assignment, disputes between workers and management over compensation, working performance and working conditions.

In *Getting Dispute Resolved*, Ury 1988 introduced Dispute System Design (DSD) presenting three approaches to dispute resolution. Firstly, parties can reconcile their interests, be it core concerns, needs, desires, goals and fears that underlie their positions. Secondly, parties can attempt to resolve dispute based on power by either imposing cost on the other side or threatening to do so. Thirdly, opposing parties may try to resolve issues by determining who is legally or morally right. Each side argues that they are correct, right and fair. If opponents are unable to convince each other of their rightness, they may take the dispute for a judge to decide.

DSD process is primarily conducted in the way of negotiation. Not all negotiations focus on reconciling interest. Maise (2004) stated that some negotiations focus on determining who is right, such as when lawyers argue on who has the greater merit. Others focus on who is more powerful, such as when parties exchange threats or counter-treats. Negotiation is not uncommon to involve a mix of all three approaches. This is to satisfy interest, putting some discussion on rights, and sometimes slight references to power.

a) *Three approaches in DSD*

The first approach promoted by DSD is reconciling interest. Interests are needs, desires, goals, fears, and concerns – things that one cares about and wants in a conflict situation. Focusing on interests can help parties to uncover hidden problems and allow them to identify which issues are of the biggest concern to them (Maiese, 2012). The most common procedure for doing this is interest-based negotiation, whose focus is primarily on interest. Reaching a settlement through negotiation is described as a way in which parties communicate with one another in order to arrange their affairs, establish common grounds and reconcile areas of disagreement (Brown and Marriot, 1999). Another way of doing this is by mediation, in which a third party acts as mediator to assist the disputants in reaching settlement. Although it is the most preferred approach, reconciling is not an easy task. It involves probing for deep-seated concerns, devising creative solutions and making trade-offs and concessions where interests are opposed (Ury et al., 1993).

The second approach in DSD system is by the way of determining who is more powerful. Within the context of negotiation, power is described as linked to the increased coercion of those with less power and potentially unethical behaviour on the part of high-powered negotiators (Tenbrunsel & Messik, 2001; Tjosvold et al., 1984). Ury et al., 1993 defined power as the ability to coerce someone to do something he would not otherwise do. The concept of *bargaining power* in contract law provides that a party with more bargaining power gets a better deal than a party with less (Barnhizer, 2005).

In relationships of mutual dependence, such as between stakeholders in construction contract, if a client needs the contractor's work more than contractors need the client's pay, the client is more dependent and hence less powerful. If it is easier for the client to oppress the contractor, for example in the way of withholding the progress payment than it is easier for

the contractor to exercise his right to receive the payment, then the client is less dependent and therefore more powerful.

The final approach of DSD is adjudicating who is right. Maiese (2004) described rights as independent standards of fairness or legitimacy that are either socially recognised or formally established in law or contract. The nature of the process used to resolve a dispute depends on the way in which the conflict is framed. For instance, because reaching agreement based on rights is often challenging, parties will turn to a third entity to determine who is right. Common right-based procedures are such as adjudication and arbitration. In this way, disputants present arguments and evidence to a third party who will decide on a binding decision.

However, Maiese (2004) opined that there are cases where determining rights or power is necessary. This happens when a party is unwilling to negotiate. A right procedure may be needed to draw boundary within which a resolution may be sought. When and how effectively to use right- and power-based negotiation is a strategic decision that needs to be based on an analysis of the specific dispute situation (Lytle et al., 1999). Lytle et al. (1999) further underlined that a good way to implement either rights or power strategies is to follow this sequence: State the specific, detailed credible threat (right or power-based) that harms the other side's underlying interest; and the specific, detailed positive consequence that will follow if the demand is met by the deadline.

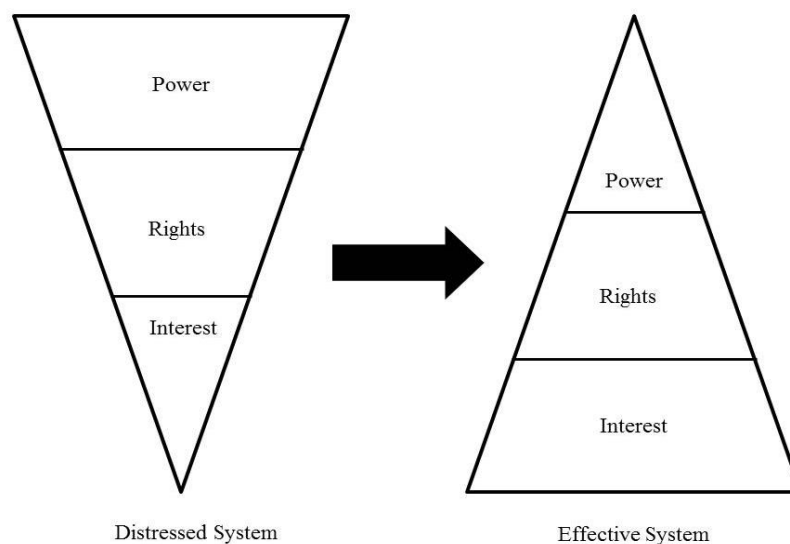
Ury et al. (1993) encouraged disputants to opt for reconciling interests because interest-based negotiation outcomes are more satisfying than those who focus on power or asserting their rights. Furthermore, Brahm and Ouellet (2003) opined that it is healthy for several reasons. Reconciling interest costs less, lessens the strain on relationships, results in fewer subsequent and repeated disputes, and results in mutually satisfactory solutions, while the other two approaches are win-lose. When emphasis is placed on losing and winning, relationship is likely to become more adversarial.

Ury et al. (1993) suggested that the process of determining who is right or has more power results in a competition between parties over who will prevail. This claim is generally supported by research reporting that the higher the frequencies of arguments, personal attacks and threats, the more likely the undesirable outcome will be. In contrast to reconciling their interest, dispute resolution that put focus on who is right or more powerful usually imposes costs on one or both parties. This is because different and opposing rights are at stake in a

particular case, often causing in difficulties for the parties to reach an agreement, especially when the outcome determines who gets what.

Thus, a focus-shift on right or power can sometimes accomplish what interest-based negotiation cannot. Problems arise when right-based and power-based procedures are sought when they are not necessary. An effective dispute resolution system can be viewed as a pyramid. Figure 2 shows a distressed conflict management system before it was improved towards a healthy dispute management system that resolves most disputes at the interest level, fewer at the rights level and fewest through power options. Comparatively, several disputes are resolved through reconciling interests, while many are resolved through determining rights and power. The challenge for a dispute resolution designer is to turn the pyramid right side up. It is to design a system that promotes the reconciling interests but also provide low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interest alone.

Thus, not all disputes should be resolved by reconciling interest. The employment of rights-based and power-based procedure may be useful in resolving what interest-based insufficient to achieve. However, the problem is that rights and power procedure are often used when they are not necessary and what should be the last resort often becomes the first route.



**Figure 2: Moving from a distressed to an effective dispute resolution system**

Source: Ury, W. L., Brett, J., & Goldberg, S. (1993). *Getting disputes resolved* (p. 1988). Cambridge, MA: PON Books, p. 10

b) *Six system principles in DSD*

The second heuristic derived from the effective dispute resolution system is to incorporate six design principles for new dispute-resolution systems. The six principles summarised by Brahm and Ouellet (2003) are as follows:

i) Put focus on interests;

This means any dispute resolution should start with a process where the parties try to solve the problem using interest-based bargaining such as direct negotiation or mediation. This is the best way to reach an agreement that satisfies everyone only when this does not work do one move on to right-based processes, such as arbitration or power-based processes such as elections.

ii) Provide low-cost rights and power backups;

Arbitration, voting and protests are low-cost alternatives to rights and power contests. Although they are cost more than negotiation, they are still less costly than adjudication or violent force.

iii) Build in “loop-backs” to negotiation;

Right-based and power-based strategies for resolving disputes seldom need to be played out to the end. Rather, as soon as it is clear who is going to “win”, parties can return, where the author calls the term as “loop-back” to negotiate to develop a solution which best meets their needs and rights. A common example of “loop-back” process is when parties settle a lawsuit out of court. As soon as it becomes clear who is likely to win, it is advantageous for both sides to avoid the costs, time that will be taken, and uncertainty of further litigation, and negotiate a solution to their dispute.

iv) Build a consultation before, feedback after;

Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information.

- v) Arrange procedures in a low-to-high-cost sequence;

Dispute resolution systems typically have a series of steps. If one has a grievance or a conflict with another person or an organisation, try to solve it on your own at first instance, and then seek the help of a lawyer and so on. Ury et al. (1993) advised that by arranging dispute-resolution procedures in a low-to-high-cost sequence, one can reduce the probability of rapid escalation, which is an added benefit of reducing enmity and increasing faith in the ability of the system to resolve simple disputes.

- vi) Provide necessary motivation, skills, and resources;

People are creatures of habit, and this is the greatest limit to broad-based systemic change. While there may be active resistance from some groups to new dispute-resolution systems, the greater problem is spreading the skills, knowledge and habits that reinforce the new system. It is unavoidable on the elites in the conflict, and third party interveners, to provide the resources and time necessary to generate cooperation with the new system.

To conclude, these six design principles constitute a practical method for cutting the costs and achieving potential gains of conflict. Importantly, the disputing parties should be active participants in all phases of the process to reduce the costs of handling disputes and to produce more satisfying and durable resolutions.

### ***3.2.2 Multistep Dispute Resolution (MDR)***

The complex, interactive, and lengthy process of designing and building makes disputes almost unavoidable in the construction process (McManamy, 1994). Multistep Dispute Resolution (MDR) is produced and specifically employed in the construction industry as an appropriate step in resolving disputes within a construction project. The unique experience that construction professionals bring their expertise to a particular project is highly personal. The continuity of this practice team is an important success factor, yet the composition of the project team differs from project to project and commonly changes during the course of a project, especially for projects of complexity and duration. The objective of MDR is to identify and solve problems as they arise at the lowest possible organisational level and preferably using informal and amicable job-site negotiations (Bachner, 1995).

Historically, for many years, the construction industry has depended on the traditional approach such as contract provision and the reliance on project superintending officer to cope with construction conflicts. This method has its functions in the relational aspects of the construction process to preserve relationship during the course of the project, and the importance to avoid delays in project completion. The parties also accepted that a prompt response to disagreement can avoid more severe conflict later on during the course of the project. Besides that, this approach is based on a consensual belief among the industry members that the contract administrator is in the best position to determine whether an asserted variation is valid based on the intent of his own design (Stipanowich, 1998a).

a) *Weaknesses of the traditional methods*

Dissatisfactions with the traditional approaches are well-documented in the literature. This section will discuss this, as an early step to apprehend the insufficiency, lacking, and weaknesses of the traditional methods in dispute resolution that eventually leads to a transformation within the industry to opt for an improved way.

Over the last few decades, the industry has witnessed a development of new delivery systems and technologies. The industry also undergoes increased competition, more complex relationships, and new solicitation of law. This shift has exposed insufficiency inherent in the two-step traditional method. The contract administrator appointed will be variously called architect, engineer, and superintendent. The architect as a design professional, in his quasi-adjudicatory role, is conventionally the first arbiter of the project disputes. If the client and his contractors have disagreements over obligations of the parties, the architect is the personnel to interpret the contract requirements (Coulson, 1983).

The architect's decision on his role as disputes referee has substantial financial impact on the construction parties. For example, if the architect decides the contractor is entitled to extra compensation or time, the employer may be at risk of facing large cost increases and time additions that exceeds his budget and stipulated time of the project completion. Comparably, if the architect concludes in favour of the owner, the contractor may be denied reasonable extra compensation or time. In either case, the losing party may habitually perceive the architect as biased by arguing the certification matter and decision-making is made by the person who is appointed by the employer. Cheeks (2003) opined that such



allegations create an appearance of conflict-of-interest, if not conflict-in-part, on the role of the design professionals.

Since the contract administrator has been the employee of the project employer, the administrator is required to act as the agent of the owner and has been obliged to promote the owner's interest. Nevertheless, when performing an issue-resolution role, the contract administrator is required to act fairly, independently, justly and with skill towards all parties (Perini Corporation v. Commonwealth [1969]). However, Jones (2006) considered that although this traditional regime has worked for many years, because of the integrity and professionalism possessed by the contract administrator to preserve the system, experience shows that when the administrator is employed by one of the contracting parties, the perception of neutrality is difficult to maintain. Thus, given the drawbacks of the traditional structure, it is clearly not an effective method for the effective early resolution of issues.

The courts provide the typical setting for the traditional mode of dispute resolution, namely litigation. Although litigation procedure has improved its access to justice by reducing the cost of litigation, reduce the complexity of the rules, modernise terminology and remove unnecessary distinctions, practices and procedures, the system is still found to be too expensive, too slow, too rigid, too adversarial, too uncertain and incomprehensible to most litigants. Litigation is adversarial in nature and the objective is not really to search for the truth but only sufficient factual and opinion evidence to meet the objective of winning the case (Turner & Turner, 2002).

Although litigation is particularly useful in situations where there is a pressure to achieve a conclusive and enforceable award, which is achieving finality in securing the relief or remedy wanted and effective in producing a decision that is final and binding (Singh, 2003), scholars such as Ramus et al. (1996) and Ashworth (2001) opined that litigation is more concerned with deciding a winner and a loser to the dispute rather than establishing a compromise solution. Furthermore, this method is often expensive and may take years to be resolved due to its lengthy process. Not to mention, the public exposure of the process may give an unpleasant implication to the credibility of the disputing parties in business.

Similarly, courtroom type motion practice often discourages the speed of resolution as promised by arbitration. The disputing parties who expect time and cost savings by reducing or eliminating discovery, are often frustrated by long, inefficient hearings, punctuated by more delays for document exchanges or evaluative investigation. Furthermore, many arbitrators are reluctant to prevent cumulative evidence or issue actionable order before

heading to full-blown hearings (Cheeks, 1996). Furthermore, it is common that arbitration clause precludes consolidation of all parties' interest into a single proceeding. Cheeks (2013) observed this phenomenon in cases in which the party was required to pursue his remedies in separate concurrent proceedings involving the same nucleus of facts and issue. Stipanowich (1998a) also added that this situation becomes worse when the court supports this movement and refused to consolidate them into a single proceeding. Such diverged process often produces inconsistent results.

Conflict is inevitable to the construction process, making the best laid plans cannot be promised to anticipate all of the contingencies that are possible, such as adjustment to the design, external events like material shortages or labour stoppages that cannot be predicted, and also misunderstandings as part of human transactions. The industry meltdown is regarded as stimulus for needed change. The movement towards this change begins when geotechnical engineering became virtually uninsurable in the late 1960 due to its claims rate and loss history (ASFE, 1995). The Association of Soil and Foundation Engineers (ASFE, now known as Geoprofessional Business Association (GBA), created the construction industry's first new alternative dispute resolution (ADR) method since the 1870s and successfully transformed it into one of the most insurable professions by the late 1980s.

Since 1980, the construction industry has broadly applied this success by expanding the available ADR options, moving towards prevention and quick, efficient on-site resolutions of dispute (Mix, 1996) ranging from settlement masters, early neutral evaluation and the various forms of mediation and arbitration (Bachner, 1995). By 1998, the industry recognised that no single technique is sufficient, forecasting the coming multistep approach (Cheeks, 2003) by which project participant can select a combination of methods that will suit their needs (Bachner, 1995). By 1998, loss prevention, dispute avoidance and prompt third party were widely used by the entire construction industry (Stipanowich, 1998b).

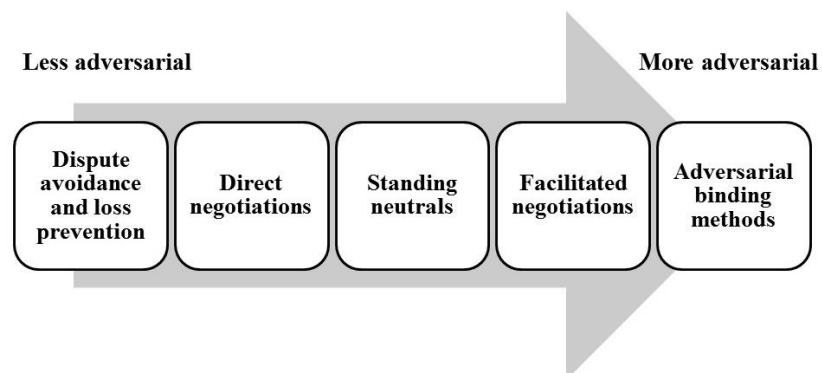
*b) Movement towards the MDR*

The traditional methods remain as the stepping stone for dispute resolution reform efforts because it has well-served the construction industry for many years (Cheeks, 2003). The industry today acknowledges the expansion of the traditional methods into MDR as described by the CPR Institute for Dispute Resolution: Parties may agree, either when a specific dispute arises, or earlier in a contract clause between business ventures, to engage in a

progressive series of dispute resolution procedures. One step typically is some form of negotiation, preferably face-to-face between the parties. If unsuccessful, a second tier of negotiation between higher levels of executives may resolve the matter. The next step may be mediation or another facilitated settlement effort. If no resolution has been reached at any of the earlier stages, the agreement can provide for a binding resolution through arbitration, private adjudication or litigation (CPR, 1998).

Whilst the above statement is agreeable and appears that the MDR process moves closer to the sources of dispute, the CPR description regrettably does not incorporate the functions of that loss prevention and dispute avoidance offer to the development and operation of the whole process of dispute resolution. Yet, Mix (1997) indicated that when these components are added, the parties may join-work to anticipate dispute causing events and to avoid conflict whenever possible.

The construction industry has developed a broad range of operations for dispute avoidance, management and resolution, and the contracting parties can use these options individually or in combination as a condition precedent before the final binding enforced resolution. The next sections aim to deliberate on the five broad categories based on the use or lack of functions that the parties deem fit to their dispute situations. There are five main components of the MDR, namely: 1) dispute avoidance and loss prevention; 2) direct negotiations; 3) standing neutrals; 4) facilitated negotiations; and 5) adversarial binding method. Figure 3 shows that MDR consists of steps of instrument adopted in resolving disputes within the construction contract. The steps range from non-hostile technique and as it moves further to the right side of the dispute resolution spectrum, the methods are found to be more adversarial that may substantially impact the project performance and relationship of the parties.



**Figure 3: The dispute resolution continuum adopted in the MDR**

c) *Components of the MDR*

i) Dispute Avoidance and Loss Prevention

Literature has shown that the parties to a construction contract implement loss prevention and dispute avoidance measures in their own business practices, adopt partnering to promote teamwork, and agree upon dispute resolution project (Stipanowich, 1996). Loss prevention and dispute avoidance, whether performed within individual firms or as a group with partnering, according to Cheeks (2003), is not an ADR method because it is not used specifically to resolve disputes, but rather a philosophical statement that makes a public commitment by management to prevent dispute whenever possible, and to resolve quickly when they do occur.

Gebken and Gibson (2006), in their study, estimated that the money spent on transactional cost for dispute resolution based on ADR, such as arbitration, mediation and negotiation, might amount to billions. In this respect, Cheung et al. (2000) suggested that in determining the success of project dispute resolution, the largest portions of the activity must be resolved at the site level. Harmon (2003) insisted that disputes should be resolved in the most economical way with the highest satisfaction for parties. In order to do so, the mechanism should avoid overly complicated procedures and promote resolution of conflicts at the lowest organisational level possible and procedural level (Cheeks, 2003; Cheung et al., 2004). Furthermore, the project managers should be expected to actively focus on avoiding and preventing conflicts from escalating into claims, and resolving claims to prevent them from becoming disputes (Ng et al., 2007; Singh, 2003). Indeed, the underlying philosophy of this obligation is derived from an established notion that ‘prevention is better than cure’ (Danuri et al., 2015).

The fundamental difference between dispute resolution and dispute avoidance is that it is a mechanism usually provided in the contract to effectively avoid disagreement from escalating into dispute (Danuri et al., 2010). In short, the philosophy underlying the dispute avoidance concept is to “advocate that problems to be brought out in the open during construction”, that is conflicts are handled and resolved soon after they occur, before it escalates to a dispute that could last for the duration of the contract or even after the project is completed (Thomson et al., 2000).

Additionally, Cheung (2014) advocated that equitable and efficient contracts are considered to be the gateways to dispute avoidance. This view has been supported in a

number of industry reviews. For instance, Hong Kong claims to have the first ever industry review, which recommended risk allocation as one of the areas that should be improved (Construction Industry Review Committee (CIRC) 2001; Levett, 2001) as fair risk allocation would minimise the occurrence of disputes. Similar suggestions have also been forwarded in the industry reviews conducted in the United Kingdom (UK) (Egan, 1998; Latham 1994). Risk can be defined as the exposure to the probability of economic or financial loss or gain, physical damage or injury, or delay, as a consequence of the uncertainty associated with pursuing a particular course of action (Cheung, 2014). Risks reduce whenever humans acquire more information about the occurrence or non-occurrence of future loss (Macneil, 1975). Uncertainty represents a situation where there is little or no empirical basis for the information of probability distribution (Chapman & Cooper, 1987).

The above definition shows that risk has at least two components: risk event and potential loss or gain. The degree of risk depends on the complexity, size and duration of the project. Contractual provisions distribute risks between the parties who, in turn, seek compensation financially for the risk they assume. The risk distribution pattern has a major influence on the contract price. The application of risk management provides explicit recognition of the risks which parties to a construction project are required to take. In difficult cases, one-sided risk allocation can result in a party withdrawing from the proposed scheme. It is not uncommon for these project end with major disputes. Unreasonable risk allocation therefore lays the seed of dispute (Cheung, 2014).

## ii) Direct negotiations

Negotiation as a method to resolve dispute has been discussed substantially in the earlier sections, since DSD process is primarily conducted in the way of negotiation. In the context of construction industry, project managers can resolve disputes on site when they promptly discuss the problem and reach an agreement. This rapid response to problems and their resolution by mutual agreement are pillar tenets of dispute avoidance and loss prevention. When rapid agreement is not possible, the affected party must be willing to engage in prompt, substantial, and honest negotiation (Groton, 2000).

The job-site negotiations are likely to succeed when the levels of disagreement as to the entitlement and amount in controversy are relatively low (Cheeks, 2003). Those negotiations should occur, at least, initially, at the level closest to the dispute before moving

to progressively higher levels of management because with each successive step up the management ladder, the negotiators are further moved away from the facts. However, each move away from the project level personnel allows the management to focus on the broader, long-term business relationships with fewer emotional entanglements (Groton, 2000). These job-site negotiations offer the additional advantages of reduced costs, less disruption, better information, preserved relationships and less diversion of human resources (DeSilva, 1998).

iii) Standing neutrals

Failing to reach a settlement in construction project dispute negotiation is not uncommon. One of the failing scenarios is withdrawal, where a negotiator loses interest in continuing the discussion and leaves the negotiation table.

When the construction parties are unable to resolve their conflicts and disputes within the context of mutual interests, they may obtain assistance from project standing neutrals to facilitate negotiated settlement within the context of on-going project. Neutral standing advisors are distinguishable from outside neutral litigators that the parties will engage for external resolution in subsequent steps of this process. The functions of the standing neutrals form a transition between project-based dispute resolution and external-resolution methods that rely upon external litigators to address specific issues that the parties could not resolve by direct negotiations (Groton, 1996).

The parties invest in these standing neutrals to act as advisors from the beginning of a project by compensating them for the time spent attending regular project progress meetings. Their presence at these meetings provides the basis for them to assist in identifying areas from which problems could emerge and advising the parties to identify appropriate procedures and techniques to address the issue they erupt into disagreement and disputes. The standing neutrals are not responsible for the day-to-day activities of the project. However, regular meetings with the project parties provide them with sufficient knowledge about the progress of the project for them to facilitate dispute settlement within the context of the work and concurrent with the performance of the project (Groton, 1996).

The parties are free to structure a standing-neutral process in various ways to suit the project size, complexity and culture of the project participants. The function can be fulfilled by the panels representing specific technical disciplines required by the project. Many projects, particularly those of large size, assemble these standing-neutrals into a three-member

Dispute Review Board (DRB) (Groton, 1996). If a dispute arises, the parties can quickly mobilise the respective neutral(s) to assist in the settlement negotiations because of their familiarity with the project and their responsibility to it (Cheeks, 2003).

iv) Facilitated negotiations

If the parties fail to resolve their dispute within the framework of the first three levels, they cross the “continental divide” of dispute resolution and move down a slippery slope (Cheeks, 2003). When this occurs, the parties will start to lose control of the pace and cost of the processes because the dispute moves to an issue-by-issue basis and the consultants, experts, and lawyers take control of the process. Consequently, the parties will find the process or outcome less satisfactory (Groton, 1996).

This method is regarded as “slippery slope” that uses facilitated negotiation in a last effort to avoid the final binding adjudication. In this regard, numerous techniques are available for the industry, including advisory expert opinion, mediation, mini-trials and non-binding arbitration. Within these methods, the neutral third party receives “evidence” from each disputing party. However, the neutral’s role varies widely depending on the actual method adopted. Most of the methods vest no power to the third party to make decision or even recommendations. Some procedures allow the neutral to issue detailed reports assessing the facts and stating a recommended basis for settlement. Other procedures provide the neutral with authority to render an opinion of the probable outcome (Groton, 1996).

This level differs from the previous level of dispute resolution in three ways. First, these neutrals enter the dispute resolution with essentially no prior information or knowledge about the project or the parties. Secondly, these dispute resolution activities occur in an environment totally removed from the concurrent project activities. Thirdly, the parties, more often than not, employ consultants, experts, and counsel to prepare and argue their respective position.

v) Adversarial binding method

When the parties are unable to deal with one another on their own terms, they will recourse to submit their conflict for final binding adjudication by a tribunal that imposes a binding decision (Cheeks, 2003). As previously discussed, this final level of MDR was the

second step of the traditional two-tier approach (Stipanowich, 1998). Whatever the method will be at this stage, the cost will be large, the time consumed to reach a conclusion will be exhausting, and the parties at the end of the day will probably feel no one has “won” (Cheeks, 2003).

This stage involves methods that could render a legally binding decision such as adjudication, arbitration and litigation. This research puts emphasis on investigating the process of adjudication within the context of construction ADR. The alternative to arbitration is the use of adjudication, whose decision can be temporary and it allows for quick determination (Dancaster, 2008; Owens, 2008). Adjudication usually deals with the payment problem between the contracting parties. Often, from the contractor’s perspective, it can assist in expediting payment and improving cash flow within the construction industry (Teo & Aibinu, 2007; Uher & Brand 2008). However, the “bindingness” of an adjudication decision may not be final as they are subjected to review or appeal to arbitration or litigation.

While adjudication is often described as a cheaper and quicker option than litigation (Agapiou, 2011), adjudication has not always been used in the manner intended (Riches and Dancaster, 2004). Minogue (2010, p. 20) bemoaned the increasingly legalistic character of adjudication, stating *“it has now adopted all of the hallmarks of mini-litigation, most adjudications start with rather pointless jurisdictional and procedural wrangling. They continue with lengthy position papers that are pleadings in disguise. Parties then produce reports from independent cost advisers and even witness statements. Finally, as we have seen, despite the exemplary taken by the court, there is endless argument about enforcement.”*

The industry has been indoctrinated by the constant notion about the absurdity of litigation, the absolute necessity of avoiding it at all cost, the importance of loss prevention and negotiated settlement, and even though much frustrations are documented in literature associated with litigation of construction dispute, there are construction disputes for which the parties, with advice of counsel, should at least consider litigation as their option. Litigation may properly be the preferred method when: 1) disputes involve a favourable legal precedent; 2) emergency relief is sought; and 3) the amount of money in dispute is large; or 4) information that is required can only be obtained by applying the rules of discovery.



### 3.3 Theories and Dimensions of the National Culture

The purpose of this section is to explore some models and frameworks that describe the dimensions of national culture. To understand the cultural influence on societies, one needs *typologies* (Schein, 1985a) or *dimensions* (Hofstede, 1984) for analysing the behaviours, the actions, and the values of the members. This is rather crucial as Ogbor (1990) opined that the frameworks used to describe the assumptions that a particular cultural society may have about reality that is grouped into four categories: *cultural dimensions* (Hofstede, 1980, 1984, 1985), *cultural paradigm* (Schein, 1985a), *cultural patterns* (Geertz, 1973) or *pattern variables* (Parsons and Shils, 1952). The next subsections will briefly examine some theories and rivalry theories on the framework of national culture dimensions.

Without understanding the perplexing concept of national culture within academic's point of view, it is difficult to reach a coherent understanding on culture, national culture, much less any influences of it. Whilst there is an extensive body of knowledge unfolding the theories of national culture, there is also a vast amount of supportive criticism of the whole notion of national culture itself and how it has been dismissed not only for the doubt of whether national culture is measurable, but also whether culture can be seen as stable and homogenous. As Avruch (1998) observed, the intensity of confusion also arises not only from the difficulty of the term itself and from the abundant of ways in which it has been theorised and explained, the difficulties also further emerge when the concept of national culture has been factored into various academics disciplines that have adapted the notion to their own disciplinary, terms and idioms.

Culture as a concept is very difficult to define. Authors have written on a topic that in some ways deals with the definition of culture differently. The word "*culture*" has many meanings. It is most commonly described as a way of life of a society or of groups of people within the society. Culture cannot exist or be perceived as culture on its own, it needs to have shared meanings, shared understanding and shared sense making among the members within a society. According to Asma (1995), culture must exist with a society as it is the group of people who create and give significance to its shared ways. Therefore, culture can be regarded as a collection of behavioural patterns relating to thoughts, manners and action which members of a society have shared, learned and passed on to the following generation.

According to anthropologists, there are two levels on which culture can be learned – conscious and unconscious levels. While the conscious level is easier to understand and explain through materialisation such as artefacts, dressings and rituals, it is the unconscious

level of our mental programming that sets human pattern of thinking, feeling and behaving (Asma, 1995). Thus, to understand the true meaning of culture, we need to look beyond the conscious level and go deeper into the human values and assumptions deeply embedded at the unconscious level.

Culture is often difficult to change. Even if it does, Hofstede (1984) believed it does so slowly. This is because it is not only exists in the minds of the people but, if it is shared by a number of people, it has become crystallised in the institution of these people that they have built together for example through their family structures, educational structures, religious organisations, associations, forms of government, work organisations, law, literature, settlement period and even scientific theories. Many ethical and moral dilemmas arise from failure to properly manage cultural differences, which include expatriates' culture shock, unfamiliar local work styles, different negotiation styles, different professional standards and construction codes as well as codes of conduct and ethical standards (Hall & Jaggar, 1997).

This means that the beliefs, norms and value system can influence the members of the community to behave and act in a particular way considered acceptable by other members of the group (Rashid & Ho, 2003) but may be unsuitable and unacceptable for a certain group members. This fact is somehow interesting. This shows that, dealing with people from different cultures requires knowing the culture diversities; for instance, the way we deal with them, what we say and what we should avoid saying, how to communicate and to be aware of the cultural taboos because what is accepted in one culture may not be accepted in another (Kawar, 2012).

Another interesting, yet concise definition of the word “*culture*” was found by Jaggar (2006) in the Royal BC Museum, Victoria, Canada - *in order to survive, human must provide for their material, emotional and intellectual needs. These are satisfied by culture – a complex system that includes tools, language, arts and beliefs. Cultures vary because they must be compatible with their supporting environment thus different climates, terrains and sources of food evoke different cultural responses.* This definition has become the motivation of this study, which aims to explore the compatibility of the Western model to Malaysian setting. This definition also inspires not only because it describes that a poor cultural fit will cause uncertainty of the foreign approach for elsewhere, it also stimulates ideas on the necessity to comprehend the complexity of the relationship between national culture and dispute resolution process.

Since culture is an intangible concept that can only be seen from human's behaviour, it becomes essential to develop a means of making it more solid. There are two core methods identified in categorising culture – *cultural typologies* and *cultural dimensions* (Liu et al., 2006). Although typologies are easier to understand than dimensions, they are problematic in empirical research. In reality, most cases are hybrid, and arbitrary reasoning has to be made in classifying them as belonging to one type or another. Thus, this study chooses to look further into the second approach – *cultural dimensions*, as they are useful in mapping the cultural differences in terms of values and practices embraced by social groups (Ankrah & Langford, 2005; Liu et al., 2006).

The concept of national culture or national character has suffered from vagueness. There has been little consensus on what represents the national culture. Since culture is an intangible concept that can only be seen through people's behaviours, it is necessary to develop a means of making it more concrete. Culture can be identified in the form of structure known as culture dimensions. Thus, it is crucial to understand the purpose of culture dimensions – to map culture differences in terms of values and practices embraced by the organisation (Ankrah & Langford, 2005; Liu et. al, 2006).

We can use categories to differentiate one culture from others. The term *national culture dimensions* have been originally defined as categories that organise data culturally (Hoft, 2003). The notion of national culture dimensions originated in a cross-cultural communication research by Hall et al. in the 1950s. Since then, several models and dimensions of national culture have been established by many researchers.

The reorientation of culture by Avruch (1998) supported the view that individual embody multiple culture that is always the case of psychology and socially distributed. Thus, defining certain culture dimensions does not mean every individual that falls in the same groupings of nation has the exact same dimensions. Nevertheless, it is an average pattern of the beliefs, values, and norms of the whole nation (Hofstede, 1983). A defined dimension form a continuum that allows a framework for analysis and management of cultural differences (Hall & Jaggar, 2007).

In speaking of the context of this study, it recognises the importance of identifying dimensions of cultural variations. One of the reasons is that it opens ways to a more adequate operationalisation and practicality of the concept of culture. The identification of reliable dimensions of cultural variation is what helps this study during its early phase to create a logical-reasoning framework that is capable of incorporating diverse, attitudinal, behavioural,

and empirical phenomena that provides a basis for hypothesis generation of this study. This study seeks to see if national culture dimensions could stimulate explanations why some replications of, for example, the UK adjudication system are successful whereas others are not, as a function of cultural background.

Now that we understand that culture can be identified in terms of constructs referred to as *culture dimensions*, the next sections will identify some of the seminal works in the establishment of culture dimensions that scholars introduced to distinguish cultures.

### 3.3.1 Hofstede

In the 1960's, Hofstede conducted one of the most comprehensive studies on how values in the workplace are influenced by culture. He began analysing a large database consisting of thousands of employees within IBM to collect employee value scores within 1967 and 1973. The data covered more than 70 countries, from which Hofstede first used the 40 countries with the largest database group of respondents and afterwards extended the analysis to 50 countries covering three regions. In the 2010 edition of the book, "*Cultures and Organizations: Software of the Mind*", scores on the dimensions are listed for 76 countries, partly replications and extension of the IBM study on different international populations and by different scholars.

Hofstede's (1984) dimensions are considered the most extensively utilised in many management and behaviour studies. For decades, Hofstede's establishments have been considered a marker post for subsequent researcher (Smith, 2006). As of 2017, there were over more than 54,000 citations to his work. Hofstede (1984) originally identified four dimensions of culture, which are: *individualism/collectivism* (IDV), *power distance* (PDI), *masculinity/femininity* (MAS) and *uncertainty avoidance* (UAI). Later, he further collaborated with other researchers to identify the fifth dimension: *long-term/short-term orientation* (LTO) (Hofstede and Bond, 1988) and the sixth dimension: *indulgence/restraint* (IVR) (Hofstede, 2011). The national culture dimensions identified within his model are described in Table 1 below:

**Table 1: Hofstede's national culture dimensions**

<b>Dimension</b>	<b>Description</b>	<b>Low</b>	<b>High</b>
<i>IDV</i>	In relation to the integration of individuals into primary groups and the degree to which people are expected to stand for themselves, or alternatively act predominantly as a member of the organisation.	<ul style="list-style-type: none"> <li>- Collective interests prevail over individual interests;</li> <li>- Stands for a preference for a tightly knit social framework in which individuals can expect their relatives, clan or other in-groups to look after them, in exchange for unquestioning loyalty.</li> </ul>	<ul style="list-style-type: none"> <li>- Individual interests prevail over collective interest;</li> <li>- Stands for a preference for a loosely knit social framework in society in which individuals are supposed to take care of themselves and their immediate families only.</li> </ul>
<i>PDI</i>	The extent to which the members of a society accept that power in institution and organisations is distributed unequally.	<ul style="list-style-type: none"> <li>- Decentralised decision structures;</li> <li>- There is interdependence between less and more powerful people;</li> <li>- All should have equal right.</li> </ul>	<ul style="list-style-type: none"> <li>- Centralised decision structure;</li> <li>- Less powerful people should be dependent on the more powerful;</li> <li>- The powerful have privileges.</li> </ul>
<i>MAS</i>	The measure by which a culture values behaviour such as assertiveness, achievement, acquisition of wealth or caring for others, social support and quality of life.	<ul style="list-style-type: none"> <li>- Societies in which social gender roles overlap;</li> <li>- Stands for a preference for relationships, modesty, caring for the weak, and the quality of life;</li> <li>- Even the men prefer modesty.</li> </ul>	<ul style="list-style-type: none"> <li>- Societies in which social gender roles are clearly distinct;</li> <li>- Stands for a preference for achievement, heroism, assertiveness, and material success;</li> <li>- Even the women prefer assertiveness.</li> </ul>
<i>UAI</i>	The extent to which the members of a culture prefer structured over unstructured situation. Structured situations are those in which there are clear rules as to how one	<ul style="list-style-type: none"> <li>- People tend to show more easy-going energy;</li> <li>- Flexible;</li> <li>- What is different is curious.</li> </ul>	<ul style="list-style-type: none"> <li>- People tend to show more nervous energy;</li> <li>- Rigid;</li> <li>- What is different is dangerous.</li> </ul>

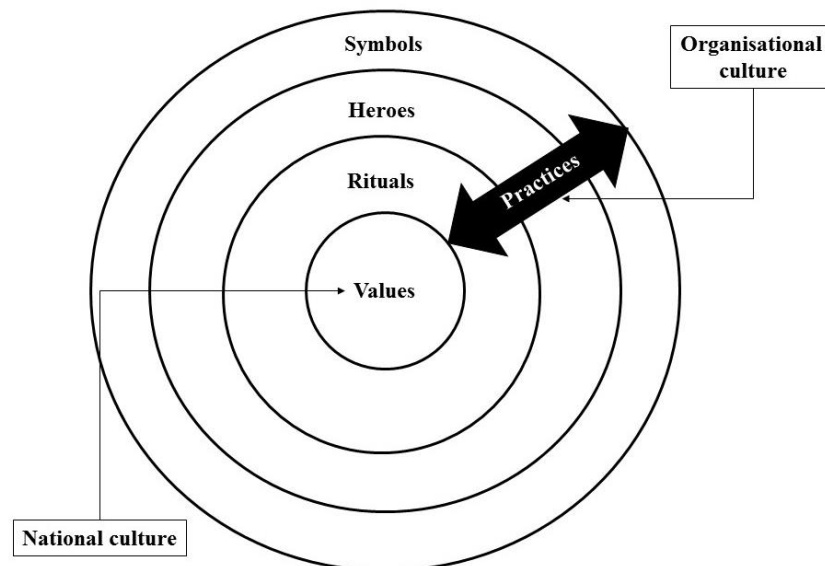
	should behave. The rules can be written down, but also can be unwritten and imposed by tradition.		
<i>LTO</i>	<ul style="list-style-type: none"> <li>- In relation to the choice of focus for people's efforts: the future or the present and past;</li> <li>- The degree of importance placed on the future in contrast to the past and present. It describes a society's time horizon.</li> </ul>	<ul style="list-style-type: none"> <li>- Find values oriented towards past and present.</li> </ul>	<ul style="list-style-type: none"> <li>- Finds values oriented towards the future</li> </ul>
<i>IVR</i>	<ul style="list-style-type: none"> <li>- In relation to the gratification versus control of basic human desires related to enjoying life;</li> <li>- The degree to which the gratification is needed in contrast to the control of basic human desires related to enjoying life.</li> </ul>	<ul style="list-style-type: none"> <li>- A perception of personal life control;</li> <li>- High importance of leisure;</li> <li>- Saving is not very important;</li> <li>- Freedom of speech is viewed as important;</li> <li>- Maintaining order in the nation is unimportant.</li> </ul>	<ul style="list-style-type: none"> <li>- A perception of helplessness;</li> <li>- Low importance of leisure;</li> <li>- Saving is important;</li> <li>- Freedom of speech is not a primary concern;</li> <li>- Maintaining order in the nation is important.</li> </ul>

Source: Hofstede, G., & Hofstede, G. J. (2005). *Organisationer och kulturer*; Hofstede, G. (2008). A summary of my ideas about national culture differences. Retrieved May, 20, 2008; and Hofstede, G. (2010). *National culture dimensions*. US Country.

Hofstede (2010) conceptualised national culture by treating it as implicit, an alternative conception of subjective. He stood firm to this view as he describes *culture* as “mental programming” and as “software of the mind”. Similarly, Rossi (1974) stated that culture speaks of the “*unconscious infrastructure*”, while Schein (1985b) describes it as “basic assumptions and belief ... that operate unconsciously”. The notion is not merely the causal core of mental programming but also territorially unique. McSweeney (2002) further believed that national culture is not theorised as the only culture, or the totality of cultures,

within a nation, but by definition it culturally distinguishes the members of one nation from another.

The definition of culture by Hofstede can also be applied at the organisational level. Figure 4 shows the different levels of culture. In describing culture, Hofstede has made a division into four layers. The research by Hofstede et al. (1991) has shown that cultural differences between nations are especially found in the deepest level – the values. He defined values as broad preferences for one state of affairs over others to which strong emotions are attached and by which one group distinguishes itself from other groups. Essentially, values refer to such preferences like freedom over equality or equality over freedom.



**Figure 4: The different levels of culture**

Source: Hofstede, G., Hofstede, G. J., & Minkov, M. (1991). *Cultures and organizations: Software of the mind* (Vol. 2). London: McGraw-Hill, p. 8.

In comparing national culture with organisational culture, an organisation is less complex and less diffused than a nation. Most organisations have clear objectives and most of the activities within that organisation are aimed towards realising such objectives. Thus, for that matter, a definition of organisational culture can be more precise and specific than in the case of national culture. In comparison, cultural differences among organisations located within the national culture arena are especially identified on the level of practices. Practices

are more tangible compared to values, which require more specific characterisations. This complexity adds more challenges to studying this one.

### 3.3.2 Trompenaars and Turner

Emerging in the 1980's and 1990's, Trompenaars believed that values define culture. Trompenaars's work is primarily based on sociology and the five dimensions of Parsons (1951) and include two measures of attitudes towards time and environment. His work has a modern approach and includes a more robust sample population than Hofstede, including within companies' organisational culture differences.

Trompenaars (1993) illustrated that the concept of cultures comes in layers between products of culture, norms and values and the basic assumptions. When a construction project takes place internationally, any party must be cross-culturally competent. To be competent, Trompenaars and Turner (2011) claimed that the trans-culture manager should be aware of managing seven culture dimensions: 1) *universalism* versus *particularism*; 2) *individualism* versus *communitarianism*; 3) *affective* versus *neutral*; 4) *specific* versus *diffuse*; 5) *inner-directed* versus *outer-directed*; 6) *achievement* versus *ascription* status; and 7) *time as sequential* versus *time as synchronisation*. The cultural dimensions identified within his model are described in Tables 2 to 8 as below:

**Table 2: Universalism vs particularism (rules versus relationships)**

Dimension	Characteristic
<i>Universalism</i>	People try to deal fairly with people based on these rules, but rules come before relationships.
<i>Particularism</i>	People believe that each circumstance, and each relationship, dictates the rules that they live by. Their response to a situation may change, based on what is happening in the movement and who is involved.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 3: Individualism vs communitarianism (individual versus group)**

Dimension	Characteristic
-----------	----------------



<i>Individualism</i>	People believe in personal freedom and achievement. They believe that you make your own decisions, and that you must take care of yourself.
<i>Communitarianism</i>	People believe that the group is more important than the individual. The group provides help and safety, in exchange for loyalty. The group always comes before the individual.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 4: Specific vs diffuse (how far people get involved)**

<b>Dimension</b>	<b>Characteristic</b>
<i>Specific</i>	People keep work and personal lives separate. As a result, they believe that relationships do not have much impact on work objectives, and, although good relationships are important, they believe that people can work together without having a good relationship.
<i>Diffuse</i>	People see an overlap between their work and personal life. They believe that good relationships are vital to meeting business objectives, and that their relationships with others will be the same, whether they are at work or meeting socially. People spend time outside work hours with colleagues and clients.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 5: Neutral vs emotional (how people express emotions)**

<b>Dimension</b>	<b>Characteristic</b>
<i>Neutral</i>	People make a great effort to control their emotions. Reason influences their actions far more than feelings. People do not reveal what they are thinking or they're feeling.
<i>Emotional</i>	People want to find ways to express their emotions, even spontaneously, at work. In these cultures, it is welcomed and accepted to show emotion

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 6: Achievement vs ascription (how people view status)**

<b>Dimension</b>	<b>Characteristic</b>
<i>Achievement</i>	People believe you are what you do, and they base your worth

	accordingly. These cultures value performance, no matter who you are.
<i>Ascription</i>	People believe that you should be valued for who you are. Power, title, position matter in these cultures, and these roles define behaviour.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 7: Sequential time vs synchronous time (how people manage time)**

<b>Dimension</b>	<b>Characteristic</b>
<i>Sequential time</i>	People like events to happen in order. They place a high value on punctuality, planning and staying on schedule. In this culture, “time is money”, and people do not appreciate it when their schedule is thrown off.
<i>Synchronous time</i>	People see past, present, and future as interwoven periods. They often work on several project at once and view plans and commitments as flexible.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

**Table 8: Internal Direction vs outer direction (how people relate to their environment)**

<b>Dimension</b>	<b>Characteristic</b>
<i>Internal direction</i>	People believe that they can control nature or their environment to achieve goals. This includes how they work with teams and within organisations.
<i>Outer direction</i>	People believe that nature, or their environment, controls them; they must work with their environment to achieve goals. At work or in relationship, they focus their actions on others, and they avoid conflict where possible. People often need reassurance that they are doing a good job.

Source and simplified by: <https://www.mindtools.com/pages/article/seven-dimensions.htm>

The framework is particularly useful in understanding and dealing with cultural differences. However, the framework applies within the setting of culture and organisational culture that results in confusion between the two. Trompenaars and Turners established the seven dimensions of culture based on three bases: relationship with people, attitude to time and attitude to the environment. Although there are some similarities in the first two dimensions with the Hofstede’s, Trompenaars’ s and Turner’s framework differs in which the dimensions are behavioural in nature, in contrast to Hofstede’s, which focuses on the values.

Therefore, it can be observed that this framework is easier to interpret as it describes the behavioural aspect rather than values, which are uncertain, ambiguous and harder to identify.

### 3.3.3 The GLOBE Study

GLOBE is an acronym for the Global Leadership and Organisational Behaviour Effectiveness Program. The GLOBE Study of 62 Societies by House et al., (2004) was published based on measured practices and values exists at the level of industry, organisation and society. Thus, the GLOBE project measured culture at different levels with both practices and values. GLOBE’s major premise and finding is that leader effectiveness is contextual, that it is embedded in the societal and organisational norms, values and beliefs of the people being led.

As a first step to gauge leader effectiveness across cultures, GLOBE empirically established nine cultural dimensions that make it possible to capture similarities and differences in norms, values, practices and beliefs among societies. The findings were built based on Hofstede (1980), Schwartz (1994), Smith (1995), Inglehart (1997) and others. The nine dimensions are: 1) *power distance*; 2) *uncertainty avoidance*; 3) *humane orientation*; 4) *collectivism I (institutional)*, 5) *collectivism II (in-group)*, 6) *assertiveness*, 7) *gender egalitarianism*, 8) *future orientation*, and 9) *performance orientation*. The cultural dimensions identified within his model are described in Table 9 below:

**Table 9: The GLOBE’s national culture**

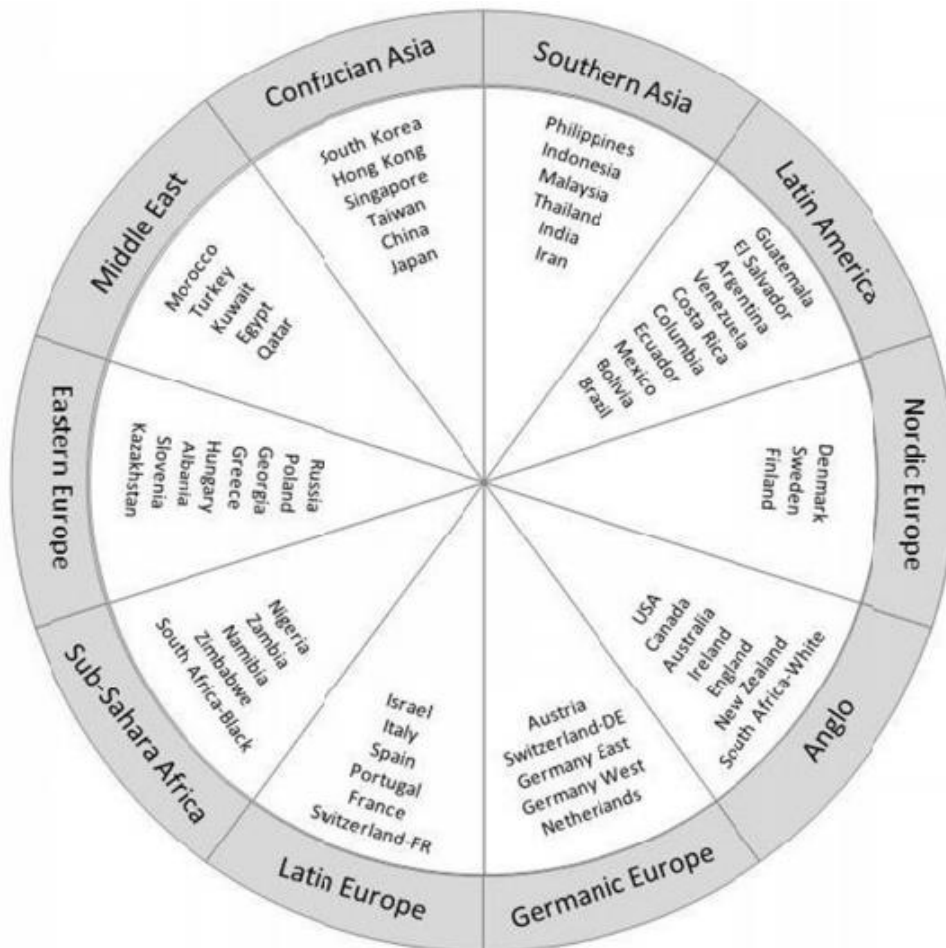
<b>Dimensions</b>	<b>Descriptions</b>
<i>Power Distance</i>	Reflects the extent to which a community accepts and endorse authority, power differences, and status privileges,
<i>Uncertainty Avoidance</i>	Involves the extent to which ambiguous situations are threatening to individuals, to which rules and orders are preferred, and to which uncertainty is tolerated in a society
<i>Humane Orientation</i>	Involves the degree to which a collective encourages and rewards individuals for being fair, altruistic, generous, caring and kind to others.
<i>Collectivism I (institutional)</i>	Shows the degree to which organisational and societal institutional practices encourage and reward collective

	distribution of resources and collective action.
<i>Collectivism II (in-group)</i>	Reflects the degree to which individuals express pride, loyalty, and cohesiveness in their organisations and families.
<i>Assertiveness</i>	Reflects beliefs as to whether people are or should be encouraged to be assertive, aggressive, and tough, or non-assertive, nonaggressive, and tender in social relationship.
<i>Gender Egalitarianism</i>	The degree to which the collective seeks to minimise gender role differences and inequalities.
<i>Future Orientation</i>	Shows the degree to which a collective encourages and rewards future-oriented behaviours such as delaying gratification, planning and investing in the future.
<i>Performance Orientation</i>	The degree to which a collective encourages and rewards group members for performance improvement and excellence.

Source: House, R. J., Hanges, P. J., Javidan, M., Dorfman, P. W., & Gupta, V. (Eds.). (2004). Culture, leadership, and organizations: The GLOBE study of 62 societies. Sage publications

The findings, before allowing GLOBE to establish leadership styles, place 60 of the 62 countries into country clusters (see Figure 5). Cultural similarity is the greatest among societies that constitute a cluster, whereas cultural difference increases the farther clusters are apart, such as the Southern Asia cluster being most dissimilar compared to the Latin Europe.

GLOBE developed an integrated and cross-level theory of the relationship between cultural values and practices and leadership, organisational, and societal effectiveness. The theory is based on the integration of four important theoretical perspectives. GLOBE also has extended the current knowledge base by a more comprehensive conceptualisation of cultural dimension and by introducing new dimensions. The study further conceptualised and measured culture in terms of practices and values.



**Figure 5: Country cluster according to GLOBE**

Source: House, R. J., Hanges, P. J., Javidan, M., Dorfman, P. W., & Gupta, V. (Eds.). (2004). Culture, leadership, and organizations: The GLOBE study of 62 societies. Sage publications.

### 3.4 Summary

This chapter sets out to describe some of the key pertaining areas of the literature review that serve as a basis for the theoretical development of the study. First part of the thesis discusses some of the dominant theories in conflict management and dispute resolution process. Firstly, it outlined the concept of DSD as a form of dispute resolution system. It introduced three approaches to dispute resolution – reconcile interest, power-based, and right-based. DSD is primarily conducted in the way of negotiation. It outlines how disputants should move from a distressed system to an effective system according to the above sequence. DSD also presents six pertinent principles to dispute resolution system. These principles constitute a practical method for cutting cost, achieving potential gains and also aim to produce more satisfying and durable resolutions.

Secondly, the first part presents the concept of MDR as another form of dispute resolution system. MDR is not a strange system in the construction industry. It is employed as an appropriate step in resolving a dispute within a construction project. MDR is established in response to the weakness of conventional methods of dispute resolution in the construction industry that used to heavily rely on litigation and arbitration as a mechanism to resolve a dispute. The movement towards MDR is viewed as revolutionary to the construction industry. The main components of the MDR range from dispute avoidance and loss prevention to adversarial binding method. MDR is considered to complement the concept brought by the DSD as the system moves from reconciling interest to power based system.

This chapter also presents a discussion on some of the landmark theories of national culture. Firstly, it sets out to describe what national culture dimension is and how to understand its practicality and functions in national culture research. Now that the audience understands that national culture dimension is used to map differences regarding values and practices embraced by an organisation, we can use this to categorise culture differences.

The first theory of national culture identified in this study is Hofstede's dimensions. They are described briefly in the next section of this part. Hofstede's dimensions consist of power distance, individualism/collectivism, masculinity/femininity, uncertainty avoidance, long-term/short-term orientation, and indulgence/restraint. This section also addresses the different levels of culture proposed by Hofstede. Summarising from the literature, it is found that organisational culture is less complex and diffused than national culture. This is because cultural differences between nations are located in the deepest level of cultural layer – the value.

The second theory of national culture identified in this study is Trompenaars and Turner's national culture dimension. The dimensions consist of universalism vs. particularism, individualism vs. communitarianism, specific vs. diffuse, neutral vs. emotional, achievement vs. ascription, sequential time vs. synchronous time, and internal direction vs. outer direction. Trompenaars and Turners established the seven dimensions of culture based on three bases: relationship with people, attitude to time and attitude to the environment.

The third theory of national culture identified in this study is GLOBE's national culture dimensions. GLOBE empirically established nine cultural dimensions that capture similarities and differences in values, beliefs, norms, and practice among societies. The nine dimensions are power distance, uncertainty avoidance, humane orientation, collectivism I (institutional), collectivism II (in-group), assertiveness, gender egalitarianism, future

orientation, and performance orientation. GLOBE has extended the current knowledge base via a more comprehensive conceptualisation of cultural dimension and by introducing new dimensions.

# **CHAPTER 4**

## **More Complex Issues Identified from the Literature**



## **4.1 Introduction**

The purpose of this section is to unravel the particularly complex and multidimensional issues identified from the literature within the context of this study. This section will separately discuss two parts, namely dispute resolution process and the national culture, that serve as the main components of the theoretical background of the study.

This chapter first present the reflection on the application of the Dispute System Design (DSD) and its implications on both national culture and adjudication. Furthermore, this part also considers the application of the Multistep Dispute Resolution (MDR) while also relating to its implications on both national culture and adjudication.

This chapter also sets out to address criticisms of Hofstede's, Trompenaars' and Turners' and the Global Leadership and Organisational Behaviour Effectiveness Program's (GLOBE) national culture dimension. This section also intends to address general criticism found in the literature about the issue of national culture research.

## **4.2 Dispute Resolution Process**

Having arrived to the review of some key principles of understanding dispute resolution process, this section presents a discussion on the reflection and application of the principle of DSD and MDR on national culture and adjudication. This is to achieve a holistic understanding on how the two overriding principles affect parties' decision on employing adversarial method of dispute resolution.

### ***4.2.1 Reflection on the Application of DSD and its Implications on National Culture and Dispute Resolution***

Although DSD was first developed in the context of labour dispute, DSD has been applied outside the range of in-house dispute as a way to design new conflict management. Practitioners have seized the opportunity to utilise DSD in new contexts while other societies have been rediscovering traditional forms of dispute resolution. As a result, these trends have resulted in a greater effort on the part to produce conflict management procedures that are more culturally compatible. Brahm and Ouellet (2003) warned that, the potential for cultural imperialism, and the adoption of systems inappropriate to particular cultures, are real

challenges to these efforts to “export” the DSD model. Wildau et al. (1993) argued that practitioners tend to follow either the *prescriptive* paradigm, in which cultures are seen as unique and having their own mechanisms of dispute management that do not translate easily. As a result, Moore and Christopher (1993) offered principles that should be followed when working in other cultural contexts and reminded practitioners to be aware that culture differs as to:

- Direct versus. indirect negotiations;
- Attitudes toward cooperation, competition and conflict;
- The nature and desire for preservation of relationships amongst disputants;
- Authority, social rank, status and caste issues;
- High-context and low-context communications;
- Concepts and management of time;
- Attitudes toward third parties; and
- The broader social and institutional environment which the dispute will operate.

Furthermore, practitioners must not only be aware of the culture in which they are operating, but also the peculiarities of their own culture (Woodrow & Moore, 2002). Since alternative dispute resolution (ADRs) mechanisms often based on DSD notions, it faces unique challenges in different national contexts (Brown et al., 1998).

Within the organisation and environment, Ury et al. (1993) observed cultural background as an obstacle to effective dispute resolution. The beliefs and practices, especially of the senior manager including the president, stressed on the appearance of harmony, avoidance of confrontation, and deference to harmony. This illustrates that in order to make significant changes to an ineffective dispute resolution system, a designer must confront the cultural barriers of a social group or organisation in dealing with dispute.

#### ***4.2.2 Reflection on the Application of MDR and its Implications on National Culture and Dispute Resolution***

The different approaches to DSD – interest, rights and power, generate different costs and benefits. When talking about cost, not only money is at stake. Ury et al. (1993) focused on four criteria in comparing them, namely transaction costs, satisfaction with outcomes, effect on the relationship and recurrence of disputes. So what is a “better” way to resolve

conflicts and disputes without incurring too much cost? Conflict often exists in inter-organisational relationships like the construction industry due to the inherent interdependencies between parties. Given that a certain amount of conflict is expected, an understanding of how such conflict is resolved is important (Borys & Jemison, 1989). The impact of conflict resolution on the relationship can be productive or destructive (Assael, 1969; Deutsch, 1969).

In construction, “better” means resolving disputes without incurring additional financial cost, not affecting the parties’ working and business relationship and does not give bad impact on the quality of the construction work. The most obvious cost of construction dispute can be associated with direct cost that typically involves increased on-site cost, cost that spent to resolve the dispute, and indirect cost, which involves loss of profits, interest, diversion of resources, mainly manpower away from the project in order to prepare for trial or arbitration and damage to reputation. All dispute resolution procedures carry transaction costs: the time, money, and emotional energy expended in disputing, the resources consumed and destroyed, and opportunities lost.

Another way to evaluate different approaches to dispute resolution is by the parties’ mutual satisfaction with the result. In adjudication, the outcome of an adjudication procedure may not be wholly satisfactory to the claimant as he may not receive the full amount of the adjudicated claim, but he did succeed in venting his frustration and thus submitting claims to bring the non-paying party to the adjudication table. A party’s satisfaction depends mainly on how much the resolution fulfils the interests that led a party make or reject the claim in the first place.

Satisfaction may depend on whether the parties believe that the settlement was fair even if the agreement does not fully satisfy their interest. Satisfaction also depends on the perceived fairness of the resolution procedure. For example, in the adjudication process, the judgment about fairness turns on several factors: the conduct of adjudication procedure that is according to natural justice, how much opportunity a disputant had to express himself, whether he believes that the adjudicator acted fairly and impartially.

A third criterion is the long-term effect on the parties’ relationship. The approach taken to resolve a dispute may affect the parties’ ability to work together on a day-to-day basis. Constant quarrels and disagreement in the payment issue may seriously weaken the teamwork among construction parties. This is precisely why the parties want to and have to continue to work with one another until the project is completed regardless of dispute.

Therefore, the industry requires a dispute resolution process that will not destroy these relationships and that will allow the parties to achieve their objectives (Cheeks, 2003).

The final criterion is whether a particular approach produces durable resolutions. The simplest form of recurrence is when the resolution fails to stick. Payment is the core matter to be resolved via adjudication. Payment problem is prevalent within the construction industry. There are suggestions that the problem persists because of the inadequacies in solutions and nature of the parties that many participants operate, hence rising the conflict of interest promotes these unhealthy practices. While adjudication may be effective in resolving payment dispute in the construction industry, ongoing use of adjudication may indicate inherent problems in the relationship.

These four different criteria are interrelated. Dissatisfaction with outcome may strain the relationship, which contributes to recurrence of disputes, which in turn will increase transaction cost. When referring to a particular approach as ‘high-cost’ or ‘low-cost’, it does not necessarily involve transaction cost, but also dissatisfaction with outcomes, strain on the relationship and recurrence of dispute.

As discussed in the earlier section, although a focus on interest can resolve the problem underlying the dispute more effectively than can focus on rights or power, there are situations where rights-based and power-based resolution need to be employed to reach a solution. In the context of adjudication, a competition among the parties to determine who will prevail usually leaves at least one party perceiving itself as a loser. They may compete with words and proof to persuade a third-party decision maker – the adjudicator – of the merits of their case or to compete with actions intended to show the other who is more powerful, as in a proxy fight. The high transaction costs stem not limited from the effort invested in the fight but also from the parties’ destruction of resources.

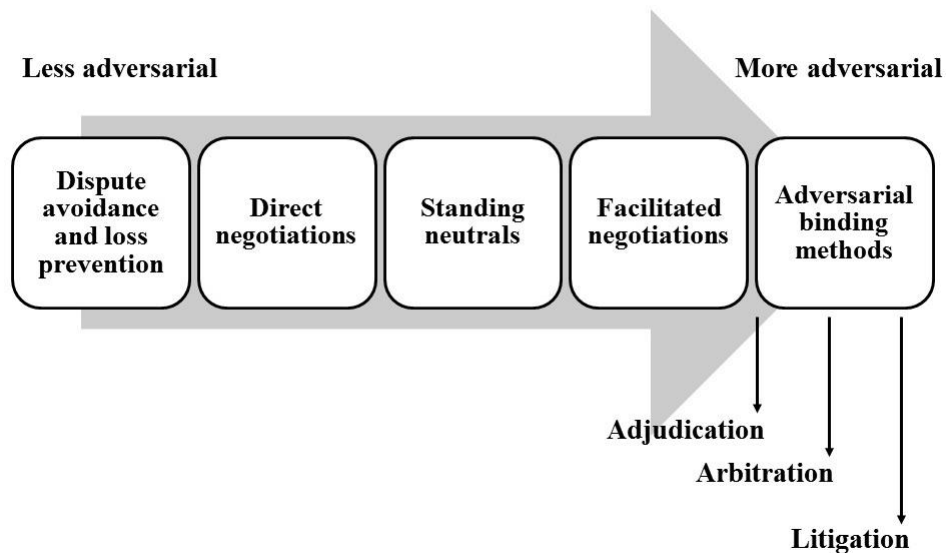
Not all disputes can be resolved by putting focus on interest. Ury et al. (1993) argued that although in general, reconciling interest is less costly than determining who is right and who is more powerful, the proposition suggested by the DSD does not mean that focusing on interests is invariably better than focusing on rights and power. It is useful to consider why. In some instances, interest-based negotiation cannot occur unless rights or power procedures are first employed to bring recalcitrant party to negotiation table. For example, in the initiation of adjudication procedure, an unpaid party may serve a payment claim on the non-paying party (CIPAA, 2012). The use of the word “may” gives an indication that he might in all likelihood had explored other revenues to recover payment. The unpaid party may attempt to reach an

amicable settlement, negotiate or even mediate the matter, but still fail in recovering the payment. Hence, a right based resolution – adjudication, is employed.

In some situations, procedures prescribed by law, contract or organisational rules exist only for certain types of claims. Other claims are ignored, producing frustration that occasionally erupts in a costly right or power contest. Within construction contract, the recognition of the nature and consequences of payment delays and losses led to the development of legal and contractual solutions (Ramachandra & Rotimi, 2011). Payment provisions exist in standard form of contract to check payment deferment and delays. Bonds and guarantees, and insurance provisions also present to provide protection against the risk of non-payment in construction contract. A recent major development is the enactments of security of payment and adjudication to address payment problems in many countries (Cheng et al., 2009).

This is also the case where parties cannot reach agreement on the basis of interest because their perception of who is right is so different that they cannot establish a range in which to negotiate. A right procedure may be necessary to clarify the rights boundary within which the negotiated resolution can be sought. For instance, in the context of construction contract, the issuance of payment certificate might prevent the employer to take action against the contractor for negligence caused by defects that may be present but are unnoticed, such as patent defects that may subsequently turn into latent defects. The employer arbitrarily resists payment or delaying payment on grounds to protect their interests. Although the employer may have accepted the work so that the liability to pay arises, that does not prevent the employer from questioning the work is incomplete or badly done. Hence, the uncertainty about the rights of the parties is sometimes difficult to negotiate by means of interest-focus.

A study by Agipiou (2013) showed that adjudication has not always resolved a dispute, but it provided a quick answer. The study even shows that while the system proved itself, it was much more adversarial than initially anticipated and had not always preserved business relationship. Indeed, this submission is illustrated in Figure 6 showing the position of adjudication within the adversary spectrum of dispute resolution method adopted in MDR where adjudication is considered producing adversarial outcome and does not necessarily preserve good will. Particularly, if the losing party is dissatisfied with the decision, they can resist enforcement and subsequently challenge it in arbitration or litigation.



**Figure 6: The locus of adjudication within the adversary spectrum of dispute resolution method adopted in the MDR**

From the above discussion, the applications and implications of MDR in the context of construction contract are discussed to posit itself particularly within the payment and adjudication matter, thus illustrating the complex nature of dispute resolution. This section also presents a diagnosis on what kind of disputes are likely to arise, how often, between whom, and how the disputes are being handled, which may be useful to give the disputants a base line of current disputing cost and effect of the resolution employed and why it is being used. It also explores the motivations behind the use of procedures and the benefits of each resolution sought.

### **4.3 Theories and Dimensions of the National Culture**

Hofstede, Trompenaars and Turners, and GLOBE examined thousands of managers and employees across the world to classify key social values that they used to develop dimensions to categorise the culture of organisations and nations. The theories were widely used in academics study and commercial field to help the users focus on the importance of social values, norms and belief of a group. Although their findings on culture share many similarities, there is a significant amount of differences in the variables used for their dimensions and how they are measured, making it challenging to compare the results.

The importance of national culture studies is undeniable in helping organisations to understand better the influences of implied cultural environment towards organisations' business performance. However, it is also acknowledged that the theories of national culture are also considerably criticised to have some limitations especially in the dimensions established from the empirical study of various groups of people. It is clear from the literature that the concept of national culture is no simple issue. In fact, some scholars, not without reasonable reasons, have gone far to consider the dimensions as fatal mistakes. Much of the reasons of this are because of the flaws and other methodological weakness; thus, the usefulness of the dimensions is doubted.

Thus, this section aims to deliberate some of the consequential limitations as well as to investigate the credibility of the theories provided. It aims to see both sides of the issue and to infer conclusions from available facts that will provide a better understanding for the research to explore the issue of national culture in dispute resolution.

#### ***4.3.1 Criticism against Hofstede's Model***

In the 1960's, Hofstede began examining the concept of culture within thousands of employee interviews of the IBM company. Hofstede's (1980) findings in *Culture Consequences* is one of the most cited sources in the Social Citation Index (SCI) and probably the most influential work in the study of cross-cultural management. Hofstede's work established a huge research tradition in cross-cultural studies. Although Hofstede's dimension is generally a ground-breaking work and accepted as the most comprehensive model of national culture values, its validity has been widely criticised and its limitations extensively discussed.

For example, Signorini et. al (2009) claimed that the limitations include an oversimplification of cultural differences, inconsistencies between his categories, lack of empirical evidence from educational settings and overall a model of culture as static - instead of dynamic, particularly regarding values. Hofstede also described and highlighted a one-way relationship between values and social culture. Contrary to this, Spencer-Oatey (2000) emphasised that culture is on the mutable nature and is likely to change over a certain period of time. He further argued for a systemic notion of culture which stresses the interdependent relations between all elements of culture (Spencer-Oatey, 2005).

Hofstede's model has also been under criticism for appearing to be unable to account for the complexity of culture as Baskerville (2003) and McSweeney (2002) have found. Mitsis and Foley (2005) for example, found correlations between *power distance* (PDI) and *masculinity/femininity* (MAS) and *uncertainty avoidance* (UAI) dimensions were significantly correlated to the individualism/collectivism dimension. Another example shown by Cambridge (2006) is a high degree of similarity among respondents' answer to Hofstede's questionnaire and therefore a strong correlation between dimensions. Hence, it may be argued that these cultural dimensions may not be separable and as a result, independent causal relationships between specific dimension and behaviour are not as simple as Hofstede portrays (Signorini, 2009).

In a different study, Fang (2003) used indigenous knowledge of Chinese culture and philosophy to expansively criticised Hofstede's fifth national dimension, *long term orientation*. The setbacks include its philosophical flaw and weak design. Philosophically, the genesis underlying long term orientation is Confucian values and this concept is often overlooked by Western researchers due to their unfamiliarity with Chinese values. However, analysing as a Chinese himself, Fang (2003) viewed that the two opposing values of long term oriented and short term oriented are interrelated, represent qualities inherent in all the phenomena in the universe and cannot be treated as opposing poles of values. Thus, a number of values either mean essentially the same thing or are highly interrelated. This leads to the fact that the 'opposite' ends of the Confucian dynamism of long term orientation are actually not opposed to each other.

Fang (2003) suggested that values labelled short term oriented or negative may not necessarily be so, and values labelled as *long term oriented* or positive may not necessarily be so either. It is a fact that 40 Chinese values in the Chinese Value Survey (CVERSUS) essentially mean the items either mean the same thing or are highly correlated. Furthermore, he summarised the flaws of *long term orientation* dimension to be: 1) philosophically flawed because the Chinese Yin and Yang principle is violated by the concept; 2) there is much redundancy among the 40 Chinese values in the CVERSUS; 3) there exists a problem of including non-values and excluding values in the list of Chinese values proposed by the Chinese Culture Connection (1987); 4) inaccurate English translation found in some values in the CVERSUS, which may have, in part, resulted in misinterpretation in the cross cultural surveys and eventual meaningless findings; 5) long term orientation is based on the opinions of a student population whose cultural values can barely represent the average cultural values held by the people in their culture at large; 6) Finally, compared to the first four dimensions,



the fifth does not result from the same technique of factor analysis as used earlier to validate the results (it does not have the same sampling background).

Additionally, McSweeney (2002) challenged the work of Hofstede by debating with an uncompromising critique of Hofstede's methodology. The validity of Hofstede's national culture identification faces two profound problems.

First, the generalisations about national level culture from an analysis of small subnational populations necessarily relies on the unproven, and unprovable, supposition that within each nation, there is a uniform national culture and on a mere assertion that micro-local data from a section of IBM employees was representative of that supposed national uniformity. McSweeney (2002) pointed out that there are three distinct components to culture – organisational, occupational and national. Thus, national culture cannot be assumed to be uniform across a nation. Such approach would be epistemological given the positivist approach to the question of national culture that Hofstede embraced.

Secondly is the elusiveness concept of culture. It was argued that what Hofstede 'studied' is not culture, but rather an averaging of situationally specific opinions from which dimensions of national culture are "unjustifiably" inferred. Even if it is assumed that the answers to a narrow set of questions administered in constrained circumstances are a clear sign of a determining national culture, it requires a contestable belief that Hofstede's methodology successfully identified those cultures.

The criticism, however, does not stop there. Leung et al. (2005) noticed inconsistencies and danger of blindly applying culture-level theory to the individual level and vice versa. It is observed that research examining relationship between culture and individual outcomes has not captured enough variance to make specific recommendations that needed.

It is also submitted that, considering the flaws in Hofstede model, Signorini (2009) concluded that culture cannot be reduced to immutable concepts such as equating 'culture' not 'nationality' or other regional geopolitical constructs. Instead, an alternate approach is by examining micro-cultures particularly to the individual's relevant experience that would allow constructing 'small' models, which would gradually be expanded into larger models of 'culture and intercultural learning. Additionally, one should bear in mind that it is crucial to differentiate clearly between a range of culture research, e.g. cross-cultural, multicultural and intercultural research.

Earley (2006) suggested that academics should stop doing large-scale multi-county surveys altogether and go for alternative mid-range theory instead. Earley (2006) claimed that it lacks a theoretical grounding in anthropology and psychology but did not mention sociology. Hofstede then counter-claimed this by describing his qualitative and quantitative exploration for the culture in twenty Danish and Dutch organisational unit, which illustrates an example of mid-range theory building kind of project.

On a different commentary, Brewer's and Vanaik's (2012) remarked another drawback exposition to what they call the ecological mono-deterministic fallacy of Hofstede's work. This is when individuals' interactions with the presence of other contexts such as families, peer group, laws, institutions are being subjected to aggregate (ecological) analysis that cannot capture the effects of this dimension. This is rather a flawed practice in ranger of literature not only because substantial diversity obtaining a "representative sample" may be problematic, but also there is an irrecoverable loss of micro-level information as it is aggregated (Schuessler, 1999).

Inspired by the view, McSweeney (2013) further made call for academics and practitioners not to suppose the description of national culture as a multi-level "answering machine" to the societal study. Literature is correct to include subjects, be it individuals, organisations and etcetera. However, it is unwise to exaggerate the degree of embeddedness as absolute, uniform and never changing and also to disregard independent non-cultural and non-national cultural influences.

Therefore, it is clear that although Hofstede's theory of national culture has been a dominant theory in the field of cross-cultural studies, it has also been subjected to criticism, especially much problematic for the validity of Hofstede's model is the manner of the conceptual construction.

#### ***4.3.2 Criticism against Trompenaars' and Turner's Model***

Trompenaars (1993) presented a seven-dimensional model of national culture differences, which he argued is particularly relevant to the conduct of international business and understanding cultural diversity in business. The first five factors describe human relationship with other people – *universalism vs. particularism, individualism vs. collectivism, neutral vs. emotional, specific vs. diffused, and achievement vs. ascription*. The remaining two dimensions are orientation in time and attitude towards the environment.

Trompenaars' study was also extensively criticised due to numbers of conceptual and validity issues. Firstly, according to Hofstede (1996), Trompenaars confused the conceptual categories with dimensions. Conceptual categories are present in the mind of any investigator who sets out to do research. In this case, the origin of the first of Trompenaars "dimensions" is the "General Theory of Action" by functionalist sociologist Parson and Shills in 1965. These authors labelled the dimensions "pattern variables". Trompenaars's individualism vs. collectivism was called by Parson as self-orientation vs. collectivity-orientation.

Hofstede (1996) opined that Parson's theory was speculative as it was only one scholar's interpretation of reality as he perceived it, guided by a strong belief that all social phenomena should serve a function. The philosophy was rooted in American society of 1940s. Since then, there is no research found to support Parson's claim that these pattern variables determine all human action, if such a claim could ever be supported.

Secondly, the remaining two Trompenaars' "dimensions" were taken from a book by Kluckhohn and Strodtbeck (1961). Their classification of five *value orientations* was conducted on a field study of five geographically close, small ethnic and religious communities in south-western USA. Out of five values, Trompenaars took *relationship to the environment* and *orientation in time* for his study.

Hofstede (1996) opined that his research samples were small and poorly matched; also, the number of nine countries are statistically insufficient to develop a multidimensional model. The empirical model that he derived was the simplest possible, but probably the only one that his limited database would allow: one single dimension and further simplified into two opposite ideal types, Left Brain and Right Brain cultures. The typologies were found to be not very useful for understanding cultural diversity.

Thirdly, Hofstede (1961) also criticised its lack of content validity. Content validity is the extent to which an instrument covers the universe of relevant aspects of the phenomenon studied, in this case national culture. Trompenaars did not start his research with an open-ended inventory of issues that were on the minds of his future respondents around the world. Since he took concepts as well as questions from American literature of the middle century, it became ethnocentric.

However, despite the above criticism, the study attunes with the waves of commerce, what he thinks the customer likes to hear. The main source of Trompenaars' model, Parson's functionalist scheme did not discuss any dysfunctional and destructive elements. Therefore, in

Trompenaars studies, controversial issues central to cultural conflicts like power struggle, corruption, exploitation, anxiety are rarely addressed. Hofstede (1996) regards this as producing a fast food approach to intercultural diversity communication.

#### **4.3.3 Criticism against the GLOBE's Model**

The GLOBE research project expanded the landmark work of Hofstede's model of five dimensions of national cultures to eighteen. Like Hofstede's model, GLOBE research has also been under a series of criticism.

Pioneer of the study himself, Hofstede (2006) produced a critical review on the GLOBE to check the correlation of Hofstede's dimension with the project result of two-factor analysis. From the analysis, Hofstede voiced out his concern about the GLOBE research that the questionnaire items used may not have captured what the researchers supposed them to measure. Much of the reason is because none of the correlations between the GLOBE factors and the Hofstede's dimension linked the latter to the GLOBE dimensions that were supposed to have been derived from them.

A reanalysis also produced five meta-factors. One was significantly correlated with GNP per capita and from the Hofstede dimensions, specifically with power distance. Three more correlated significantly with Hofstede's individualism/collectivism, uncertainty avoidance, and long-term orientation. The fifth included the few GLOBE questions that related to Hofstede's dimension of *masculinity*. Thus, Hofstede (2003) found that the minds of GLOBE's respondents classified the questions in a way that the researchers' minds did not account for and which closely resembled the original Hofstede model (Hofstede, 2003). This suggests that many of the GLOBE items at the country level may convey hidden meanings not intended and understood by their designers.

GLOBE sought to define its dimensions in a way to hold face validity and to make psychological sense. Thus, Hofstede (2003) empirically found that distinctions derived from comparing collective trends in respondents' answers across countries did not necessarily make psychological sense at the individual level. He further claimed that cultures are wholes and their internal logic cannot be understood in the terms used for the personality dynamics of individuals.

Even with all the attempts of the GLOBE team to reject every single arguments of Hofstede's submission, Hofstede is still in his view that the GLOBE team is also puzzled by their very own negative correlations on other dimensions.

Smith (2006) was invited to comment on the debate. Recognising the problematic nature of what GLOBE measured, he then conclude that GLOBE's measures were based on reports about others "in my society", which were evidently not the same as self-reports on which the Hofstede's dimensions were based. Moreover, he also wondered about GLOBE's way of aggregating data from individuals to the nation level.

Generally speaking, Hofstede (2006) asked a crucial question: what is the use of the GLOBE's dimension? He is a firm believer that dimensions should not be reified as they should not "exist" in a tangible sense. They are constructs, not directly accessible to observation but inferable from verbal statements and other behaviours and useful in predicting still other observable and measurable verbal and nonverbal behaviour (Levitin, 1973). Thus, they are supposed to help us in understanding to better handle the complexity of the social world, or else, they are redundant.

#### **4.4 Summary**

This chapter has set out to discuss more complex issues identified from the literature and its implication to the present study. This chapter addresses the reflections on the application of DSD and its implication on culture and adjudication. Summarising from the literature, it is reminded that some principles should be followed when working in other cultural contexts and to be aware of cultural differences. ADR users must not only be sensitive to the culture in which they are operating but also the peculiarities of their own culture.

Besides that, reflection on the application of MDR and its implications on culture and adjudication found that, although a focus on interest can resolve the problem underlying the dispute more efficiently than can focus on rights or power, there are situations where rights-based and power-based resolution needed to be employed to reach a solution. This is especially so in the context of adjudication in the circumstances where parties cannot reach an agreement by interest because their perception of who is right is so different that they cannot establish a range in which to negotiate. A right procedure may be necessary to clarify the rights boundary within which the negotiated resolution can be sought.

This chapter also deliberates some of the limitations as well as recorded critics to theories of national culture particularly of Hofstede's, Trompenaars's and Turner's and GLOBE's work. This section also presents notable debates surrounding the conceptualisation of national culture research. It is extremely difficult to compare the data between the three theories, as they use different scales to measure countries across the dimension. There is a lack of consistency in the validity for all three theories, leading to confusion among the best model to use. Besides the problem of conflicting findings, researchers seem to arbitrarily choose one or the other national culture score to explain their variable. This is problematic, as the differences in each theory impact the views of researchers have on culture towards the underlying values that result in individual behaviours.

# **CHAPTER 5**

## **The Research Propositions and the Conceptual Framework of the Study**

## **5.1 Introduction**

Previously, Chapter 3 has presented the theoretical background on some of the key concepts relevant to the study. The chapter begins by setting out some of the dominant theories in conflict management and dispute resolution process, including three approaches to dispute resolution process, namely by reconciling interest, power-based and right-based. These varying approaches are then translated into an array of dispute resolution methods available in construction ranging from dispute avoidance to adversarial binding method. Chapter 3 also offers some discussion on the landmark theories of national culture and existing dimensions embedded in them.

Following that, Chapter 4 then explores the particularly complex and challenging issues identified within the context of this study. The chapter begins to draw some reflections on the implications of the Dispute System Design (DSD) and the Multistep Dispute Resolution (MDR) on both dispute resolution and national culture. Chapter 4 also addresses the criticism of the literature on each of the national culture theories presented in this study.

In Chapter 5, the study will present the conceptual framework that maps out the concepts, assumptions and theories that inform this study and the presumed relationships among them. The framework is formulated from the research problem through critical examination of the above dispute resolution principles and the theories of national culture as discussed in the previous two chapters. The framework will then be the primary vehicle to investigate the influence of national culture on the compatibility of adversarial dispute resolution mechanism with national culture in the Malaysian construction industry from the unique perspective of statutory adjudication.

This chapter also presents the research propositions of the study. The propositions are statements about the concepts that will be judged as true or false by providing a critical inference when referred to the observable phenomena of national culture with the compatibility of adversarial dispute resolution mechanism of adjudication in the Malaysian construction industry

## **5.2 Hofstede Predictive Behaviour of National Culture: The Method and Strengths**

In the 1970s, Hofstede got access to a large survey database about values and related sentiments of people in over 50 countries around the world (Hofstede, 1980). These people



worked in the local subsidiaries of one large multinational corporation: IBM. Many parts of the organisation had been surveyed twice over a four-year interval, and the database produced more than 100,000 questionnaires.

Hofstede's primary data were gathered from a pre-existing database of employee attitude surveys undertaken around 1967 to 1973 within IBM subsidiaries in 66 different countries. Some of the survey questions seemed to be pertinent to understanding the respondents' 'values' which he defined as *broad tendencies to prefer certain states of affairs over other* and which are for him the 'core element in culture (Hofstede, 1991). He statistically analysed the answers to these survey questions. He statistically analysed the answers to these survey questions.

According to McSweeney (2002), the analysis, together with some additional data and theoretical reasoning, bi-polar dimensions of a national culture and that 40 out of 66 countries in which the IBM subsidiaries were located could be given a comparative score on each of these four dimensions. From this data he identified four bipolar dimensions namely *individualism/collectivism, power distance, uncertainty avoidance, and masculinity/femininity* which became the basis of his characterisation of culture of the different countries.

A subsequent study later is conducted by Hofstede and Bond introduced a fifth element 'Confucian Dynamism' or 'long/short term orientation' which was an attempt that deals with 'time orientation'.

In the light of globalisation and fast changes around the world, the need for understanding of how people from different cultures interact and communicate has assumed a staggering importance (Bhawuk, 2008). The increasing interest on the active debate about cross-cultural differences and its influence on managerial behaviour was initiated by Hofstede (1980) who developed a model which identified several dimensions of cultural differences. His model has been used ever since for explaining cultural differences and to investigate adequate manager's behaviour in other countries.

French (2010) stated that Hofstede is the pioneer of cross-cultural study and the most influential organisational sociologist. Additionally, Hoecklin (1995) praised his pioneering work, and Powell (2006) claimed that Hofstede created an important milestone of cultural study and a driving force for other researchers to continue researching about culture. While Hofstede's study provided a breakthrough in the analysis of national culture differences, the

other researchers support the findings and further extend his work, making it a giant among academic studies, and one that defined the landscape for the future of this field of research.

For example, it was until the publication of the GLOBE Study that in 2004 a comprehensive alternative to Hofstede gained the interest of a broad range of management and cross-cultural scholars. The revisitation came from a team led by House on the development of the GLOBE Study. Drawing heavily on Hofstede (1980) motivation studies, GLOBE developed nine dimensions, and a framework that would bisect each into “values” and “practices”.

While it has not yet achieved the level of influence and use that Hofstede study relishes, it has been cited over 9,800 times on Google Scholar. For the first twenty years following the publication of Hofstede’s model of national culture dimensions, the work maintained almost a monopolistic position on the research into cross-cultural research. The results of his work have been in support of, innumerable theories, and become a standard in organisation management and business textbooks. One of the most frequent criticism of the study debated in academia is the monolithic nature of IBM as the data source (McSweeney, 2002). However, Hofstede (2002) answered this by contending that matching samples in this way, in addition to be his only choice, added controls for many other variables.

Hofstede’s model is preferred to be used as part of the conceptual model of this study due to its simpler, intuitive and more familiar than other studies. The original four dimension provide a level of insight into culture that can be easily remembered grasped with a relatively minimum the need of reference guide. Furthermore, Hofstede’s model creates a common language for researcher in various field and to use when interacting within or across disciplines. More importantly, for the researcher that are only touching on cross-cultural themes in their work in different primary academic fields, this common language attribute is very important. Readers in other fields are found to be more familiar with Hofstede. Therefore, with the goal of readers understanding, the researcher wants to focus to remain on the main constructs of the paper rather than other extensive models on the complex findings of national culture dimensions.

### **5.3 The Compatibility of Dispute Resolution Mechanisms in the Construction Industry of the Malaysian Society: The Research Propositions**

Culture plays an integral part in shaping behaviour, not just in the individual sense, but a definable group of people such as organisations, industries and countries. This innate ability has clear relevance for dispute resolution in construction projects because of the industry's peculiar nature where organisations sometimes have different conflicting objectives. However, the importance of culture has long been understated, and references made about cultural influence have been majorly anecdotal. Although many difficult construction industry problems have been attributed to culture, not much has been shown by way of formalised research into the culture to show the extent of its impact.

According to WorldAtlas.com, Malaysia is a South East Asian country that is multiracial, with many different ethnic groups living in the country. These include Malay, Chinese, Indians and other indigenous Bumiputera groups. The demographic composition as of 2018 consists of 50.1% of the population are Malay, 22.6% are Chinese, 11.8% are indigenous Bumiputera groups other than the Malays, 6.7% are Indian, while other groups account for 0.7%. Non-citizens account for 8.2% of Malaysia's resident population. This multiracial context makes Malaysia a prosperous society with diverse religion, cuisine, culture and custom.

As Malaysians forge ahead towards becoming citizens of a thoroughly industrialised nation, it is inevitable for its people to respond to the phenomenal rate of rapid change in many aspects of life. The process of industrialisation, development and globalisation often creates new material needs and conditions that stimulate the adoption of new attitudes and value orientation and produces a new social division of workforce.

As Yeh (1988) believed that the value of a good theory is in its predictive power. Therefore, it is crucial to question to what extent does the national culture theory explains behaviour in the workplace in Malaysia. To a large extent, it does. Many examples of the predictive behaviours that Hofstede (1984) presents can be observed in Malaysian companies (Fontaine & Richardson, 2003; Ramalu et al., 2010; Ahmed et al., 2008; Jogulu & Ferkins, 2010; Goodwin & Goodwin, 1999; Noordin & Jusoff, 2010). Most Malaysian scholars argue that Western management theories go some way explaining behaviours in the Malaysian workplace, though it misses the richness of the relationship within an ethnic group and between ethnic groups (Abdullah, 1992; Lim, 1998; Abdullah, 2001).

Much cultural works in construction project management and other social disciplines have utilised countries as the basis of unit analysis (e.g. Ankrah & Langford, 2005; Baba, 1996; Buttery & Morgan, 1998; Chan & Suen, 2005; Davies, 1995). However, this should be taken as an implication that country and culture are the same (Steenkamp, 2001). National boundaries need not always coincide with cultural homogenous societies. Anthropology scholars were critical whether culture is validly conceptualised at the national level. A culture can only be validly conceptualised at the national level if there exists some meaningful degree of within-country commonality and between-country differences.

The literature indicates that this is indeed the case. In defence, Hofstede (1991, p. 12) argued that *today's nation is the source of a considerable amount of common mental programming of their citizens due to a similar and shared language, history, political, legal and educational environment, among others*. Thus, although there is an argument that this does not imply countries are entirely homogeneous, other external forces are framing to a meaningful degree of commonality within the country.

In the present study, a case study is primarily used, although not limited to, a tool for theory-testing. Although the appropriateness of case studies as a tool for theory-testing is a controversial issue, Løkke and Sørensen (2014) opined that the research design for theory-testing case study differs from the research design for theory-building case study. Arguing from a different stance, a case study can indeed be a valuable tool for testing theory. As described by Crabtree and Miller (1999, p. 7), *the goal of theory testing is to test an explanatory theory by evaluating it in different contexts*. Thus, in a broader sense, this study aims not only to contribute to strengthen or reduce support for the theory and to narrow or extend the scope conditions of the theory. In conducting a theory-testing, a proposition, i.e., logical prediction, is derived from the theory and is compared to data in the case.

While previous studies have shown that preferences of conflict styles differ substantially across countries (e.g., Doucet et al., 2009; Gabrielidis et al., 1997; Kim et al., 2007; Posthuma et al., 2006; Ting-toomey et al., 1991), only a small number of studies have analysed the underlying cause for these differences (e.g., Kaushal and Kwantes, 2006; Komarraju et al., 2008; Morris et al., 1998). Thus, prior studies suggest that the differences in individuals' orientation towards different cultural dimensions may be one promising explanation for cross-country differences in individual preferences for conflict styles (e.g., Holt and DeVore, 2005, Komarraju et al., 2008).

For example, literature has repeatedly shown that in general, individualistic society tends to give priority to personal goals and preferences, whereas collectivistic society is more likely to give priority to the need of the group (Ohbuchi et al., 1999; Morris et al., 1998; Ohbuchi & Takahashi, 1994; Trubisky et al., 1991). Specifically, Wei et al. (2001) found that collectivistic society is often associated with indirect and passive communication and non-adversarial styles of dispute resolution, emphasising the value for passive compliance and for maintaining relational harmony in conflict situations, whereas individualistic society is associated with direct and active mode of expression and adversarial style. The level of conclusiveness of the theory is confirmed shows the more faith the theory reflects the reality.

In searching for explanations, the researcher predicts the factor that causes the parties to employ an adversarial method like adjudication in resolving dispute contradicting to traditional belief of uplifting harmony of Malaysian society and why one might have chosen such action in question rather than another. This process is to develop contrastive explanations. According to Belk (2010), contrastive explanation takes two forms. Firstly, it may show that one explanation of a given situation is preferable to some other explanation. Alternatively, it may show why one state of affairs occurs rather than some other state of affairs. Applying this premise, this study aims to demonstrate an advance explanation of the influence of cultural variability on the compatibility of an adversarial method of dispute resolution within the construction industry in an Asian society like Malaysia.

In particular, the study utilises the principles of dispute resolution models of DSD and MDR to show how the outcome of each method varies in less adversarial to highly adversarial concurrently of how the system moves from reconciling interest to exercising power to resolve a dispute. This study does not neglect the fact that construction is a form of commercial business and the industry runs on a profit basis. Thus, a well-timed flow of capital is required for the success of a construction project. This portrays the influence of the parties' goal in dispute resolution. What this fact implies for the analysis of events like the employment of adjudication dispute resolution is essential.

The implication of the alternative theoretical assumption is exceptionally vital. It will be utilised to generate explanation to the original proposition of the study to provide an enhanced rationalisation to understand how cultural variability affects the viability a dispute resolution mechanism used in society. According to Brinberg and McGrath (1983), this mode is to adopt a matching theory-testing case study research design using multiple theories to examine the system from a different angle – triangulation. Examination from the alternative theoretical assumptions show that regular and predictable characteristic reflects unrecognised

assumptions about the problem of a cultural mismatch of a dispute resolution mechanism upon the receiving society in the sense of evidence that making it relevant and the determinant of its occurrences. In this way, the study will prove that one explanation is not conclusively superior or preferable to others, but instead that they all inform many aspects of the field.

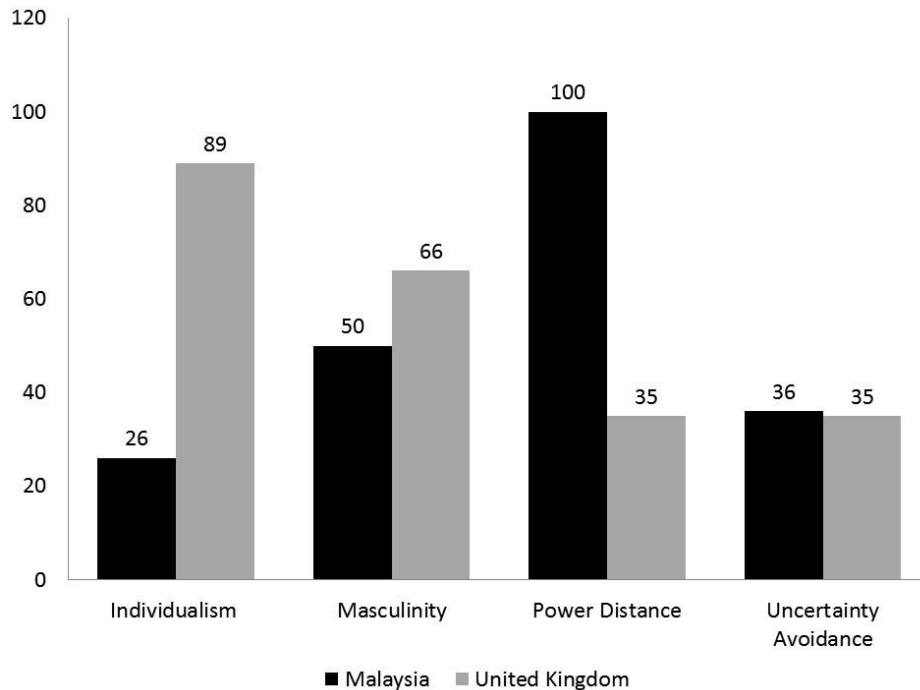
The study utilises culture perspective base in reference to Hofstede's theoretical framework incorporated primarily from national culture dimension as the study theme. It demonstrates how this knowledge, in turn, indicates the importance of culture-specific themes in understanding the viability of a dispute resolution within a country. According to this view, the recent introduction of Western-style statutory adjudication regime in Malaysia may be a poor cultural fit. This provides motivations for the present study to explore the complexity of the influence of national culture on dispute resolution processes. This conceptual framework will be the primary vehicle in pursuing the aim of this study.

While Hofstede's (1980, 2001) concept has been criticised for its bias in measurement, and for neglecting individual differences within cultures (e.g., Fang 2003; Kirkman et al., 2006; McSweeney 2013), it is the concept of culture that is most frequently used in the literature in general and thus still valid to be accepted.

Although Hofstede's theories have been extensively criticised as simplistic, problematic in its conceptualisation and validation, to a large extent it is still found to be the most reliable. Hofstede believes the core element in culture manifests itself as values. Hofstede uses a broad approach to defining values as a broad tendency to prefer certain states of affairs over others (2001, p. 5). Hofstede uses six dimensions to classify national culture values – 1) *individualism/collectivism*; 2) *masculinity/femininity*; 3) *power distance* 4) *uncertainty avoidance*; 5) *long-term/short-term orientation*; 6) *indulgent/restrained*. The study found that only the four dimensions listed above provide the basis for the conceptualisation of every proposition presented in the study and will be discussed in greater detail later.

The research is interested in investigating four classifications of national culture values of Hofstede's model of national culture, namely: 1) *individualism/collectivism*; 2) *masculinity/femininity*; 3) *power distance*; 4) *uncertainty avoidance*. The dimensions will help the study to derive its research propositions that will further be the moderators to understand Malaysian conflict management styles by evaluating them in the context of the implementation of adjudication in Malaysia. These cultural values are as essential and linked with the perspective of dispute resolution principles as outline in DSD and MDR.

As a start, the score obtained by Malaysia in comparison with the United Kingdom (UK) for each dimension of Hofstede’s national culture values is presented in Figure 7 as below.



**Figure 7: National culture score comparison between Malaysian and the UK**

Source: Hofstede (2010), *Software of the Mind*

### 5.3.1 *Individualism/Collectivism*

The fundamental issue addressed by this dimension is the degree of interdependence that a society maintains among its members. It has to do with whether people’s self-image is defined concerning “I” or “We”. In individualist societies, people are supposed to look after themselves and their direct family only. In collectivist societies, people belong to ‘in-groups’ that take care of them in exchange for loyalty.

Triandis (1995) recognised individualism/collectivism to have four important attributes. First, the definition of “self” emphasises independence and personal aspects for individualist versus interdependence and group aspects for a collectivist. Secondly, personal goals are more important for an individualist, whereas group goals take precedence for a collectivist. Thirdly, for individualist, social behaviour is determined by attitudes, personal rights, and contracts. Whereas for collectivist, such behaviours are rooted in norms,

obligations, and duties. Lastly, individualist views relationship as intellectual exchanges, whereas collectivist emphasises the commonality of the relationship, even when this represents a disadvantage.

Many studies have been done to decompose the underlying components of individualism/collectivism that have led to many empirical studies in recent years. Literature has shown that different conceptualisations and measures of individualism/collectivism reflect the complex nature of the concept (e.g., Hui, 1988; Singelis et al., 1995; Triandis, 1995, Wagner, 1995). Although much has been done, many individualism/collectivism researchers reject the idea that the concept is one-dimensional, because categorising individuals or societies as merely individualistic or collectivistic does not do justice to their full range of behaviour (e.g.: Kagitcibasi, 1987; Kagitcibasi & Berry, 1989; Maznevski et al., 1993; Schwartz, 1990; Sinha & Tripathi, 1994). Thus, although they are still being refined, most conceptualisations and measures of individualism reflect this multi-dimensionalism.

Cultural variability of individualism/collectivism has been vastly utilised by many scholars as the significant theoretical dimension to explain differences in interpersonal behaviour across disciplines around the world (Chinese Culture Connection, 1987; Gudykunst et al., 1988; Hofstede, 1980; Hui and Triandis 1986; Triandis, 2000). Theories provide conceptual linkage between cultural variability of individualism/collectivism with conflict styles to be used as an explanatory mechanism to understand its management in different cultures.

The individualism/collectivism dimension is the cultural value dimension that has been examined most often in the context of conflict management styles. A meta-analysis by Holt and DeVore (2005) showed a strong evidence for differences in conflict styles across cultures, especially in individualism versus collectivism differences. Generally, individuals from collectivistic cultures prefer withdrawing and problem-solving styles of dispute resolution more often than individualist. Adversarial methods are more often used in individualistic cultures compared to collectivistic cultures. Additionally, Ting-Toomey et al. (1991) showed that obliging is more often used in collectivistic cultures than in individualistic cultures.

The dimension has emerged in both Western and Eastern philosophy as a critical construct in analysing the underlying norms and rules in different cultures (Hsu, 1981; Yum, 1988). Several studies have supported individualism/collectivism as the significant dimension of cultural variability that affects conflict styles (Chua & Gudykunst, 1987; Leung, 1988;



Leung & Lind, 1986; Ting-Toomey et al., 1989; Nishida, 1989). Specifically, Leung (1988) and Ting-Toomey et al. (1989) found that members of individualistic cultures prefer direct communication styles more than collectivistic cultures. Contrastively, these researchers also found that members of collectivistic cultures tend to prefer avoidance.

Consistent with the findings, Leung's and Lind's (1986) study of dispute resolution compared the U.S. subjects with Hong Kong subjects in their preferences for using adversarial procedures and non-adversarial procedures. Adversarial procedures emphasise autonomy and competitiveness, while non-adversarial procedures emphasise harmony and solidarity in interaction. Overall, the North American subjects preferred the competitive adversarial procedures, while the Chinese subjects were indifferent about the two procedures. Also, Leung (1988) found that members of collectivistic cultures preferred dispute mediation and bargaining procedures more than members of individualistic cultures. Furthermore, he contended that mediation was more effective in maintaining harmonious relations between disputants because of the allowance of face-saving opportunities.

Studies on dispute resolution across cultures indicate that there are differences in dispute styles in individualistic and collectivistic societies. Another example by Kagan et al. (1982) examines differences in conflict styles between Mexicans and Anglo-Americans. The study found that Mexican subjects tend to use more passive and avoidance strategies, while Anglo-Americans tend to use more active and direct strategies. In testing differences concerning African-American and Euro-American conflict styles, Ting-Toomey (1986) found that African-American subjects tend to use more controlling style strategies than Euro-American subjects, who tend to use more solution-oriented styles strategies. Furthermore, Chua and Gudykunst (1987), Leung and Iwawaki (1988) and Leung (1988) observed that members of individualistic cultures tend to use a direct conflict communication style.

Collectivism is related to the focus of collectives and the responsibility related to belonging to a group, whereas individualism is related to the focus of individual, and the ties between other individuals are slightly loose (Hofstede, 2001). In collectivistic societies, values related to the well-being of the group are seen as more critical than individualistic desires such as achievements of an individual. The study makes a general argument that individuals with collectivistic values prefer conflict styles that potentially increase the outcome for all conflict parties involved and non-adversarial, as these styles allow these individuals to act in a way that is consistent to their cultural values. People with collectivistic values are less likely to choose a more confronting conflict management style that may

increase the outcome of only one conflict party at the costs of the other party as such behaviour would be odd for the collectivistic individuals.

Collectivism-oriented value stresses not so much upon individual interest, but preferably on the maintenance of the collectivity and the continuation of harmonious relationships of the members within it. This is frequently contrasted with the greater individualism and egocentrism said to be the characteristic of Anglo-American culture (Hofstede, 1980). It has been suggested that collectivist position has implication for relationships within intra- and inter-organisations. In a non-routine situation such as disagreement, there may be a tendency to locate the issue concerning its importance for the group at large. There will be clear effort to avoid antagonisms that unsettle the group. This suggests that the value patterns associated with harmony and collectivism will be likely to lead to the adoption of non-adversarial conflict style and to the seeking of harmonious as well as maintaining the spirit of collectivity.

Based on the literature, it is believed that the high degree of fragmentation within the construction industry is not only because of the highly specialised and differentiated skills of expertise of each of the project participant, but also the result of group allegiances and identification of each participant as his/her organisation and profession that is considered as the in-group. According to social identity theory, people are attracted to others who are like themselves because this similarity strengthens their self-concept and self-esteem (Tajfel, 1982), and individuals perceive and treat in-group members more favourably than out-group members (Tajfel & Turner, 1986; Turner et al., 1983).

Literature found that, although people make in-group/out-group distinctions in both individualist and collectivist cultures, there are differences concerning in-group/out-group distinction across this dimension. In comparing self-conceptions, individualist usually distinguishes the autonomous self from others, either as individuals or as groups, whereas collectivists usually distinguish between those whom they are related to (in-groups) and those who are not related (out-groups).

Since it can be anticipated that in-group/out-group differences are accentuated due to collectivists' orientation, it can be further predicted that collectivists will likely be predisposed towards cooperation with other members of the in-group as they tend to feel more interdependent with and more concerned about the results of their actions on members of their in-group (Mead, 1976; Triandis, 1990). Triandis et al. (1990) suggest that there is a striking difference in treatment and behaviour towards in-groups and out-groups such that one is much

less cooperative towards those who do not belong to the in-group. In contrast to the individualist, Gomez et al. (2000) found that generally, collectivists discriminate against out-group members and tend to favour in-group members.

Therefore, one can reasonably deduce that in a broader context, individuals in collectivist cultures may show harmony within the in-group, but the entire society may be characterised by much conflict and differentiation because so many interpersonal relationships are framed in in-group/out-group relationships (Phua & Rowlinson, 2013). This reflects very well the position in the construction environment at present.

Within the construction industry, the adverse effects of adversarial in the dispute resolution are worsened when project organisation members are from a collectivist society, as the differences generated from in-group and out-group categorisations regarding professional, educational and organisational backgrounds will tend to heighten inter-organisational discrimination. It is possible that the values that individuals associated with inter-organisational membership begin through different psychological processes in the individualist and collectivist culture, which might influence the relationship between categorisation and cooperation at the inter-organisational level.

It is believed that individual differences in collectivism/individualism may be a moderating factor, and therefore, serves as a mechanism that affects the success or failure of dispute settlement. It has also been found that some aspects of collectivism such as out-group hostility may generally inhibit economic development (Adelman & Morris, 1967; Triandis, 1984), whereas individualism has been associated with higher levels of productivity and gross national products of nations (Adelman & Morris, 1967; Hofstede, 1980; Sinha & Verma, 1987), mainly because it fosters contractual relationship, which is based on the principles of economic exchanges. Generally, in the industrial workforce, companies with an individualistic inclination, who act according to cost-benefit analyses and who are more likely to adhere to the contractual relationships based on principles of economic-exchange, would do better than those dominated in internal in-group favouring behaviours (Phua & Rowilson, 2013).

Essentially, these views underline a crucial aspect of the general inefficiency of the Malaysian construction industry. In essence, construction organisations may be performing well on their own and are competitive with one another, but the collectivist predisposition of individuals tends to undermine the overall project success, and because of the inter-organisational differentiation that spurs due to in-group versus out-group relationships.

Phua and Rowilson (2013) suggested two possible propositions that arise from this argument. First, when individual project participants come primarily from a collectivist society, their treatment of other organisational members who are regarded as the out-group will be laced with much conflict and differentiation. Secondly and therefore, the same definition dynamics that make collectivists identify more strongly with their organisation and make them feel morally obligated to cooperate with their in-group can lead to adverse effects that will also likely make them less cooperative with other project participants.

In this study, organisations operating in the Malaysian construction industry themselves stand to benefit in terms of increased performance and cooperation from the collectivist leanings of its employees, but this will result in a public risk to active inter-organisational cooperation at the project level. This perception may be directed to the fact that collectivists working at the project level are in effect working within the context of an out-group and their reaction towards out-group members should result in fewer cooperative individuals not feeling obliged to attain what they consider as out-group goals.

Hence, this study extrapolates that a higher proportion of the overall adversarial conditions that occur that are taken to adjudication level with the construction industry in Malaysia might also have roots in the collectivistic orientation of its workforces culturally conditioned predisposition of treating out-group members aggressively.

To speak in its entirety, it is reasonably expected that, where the majority of project participants are from a collectivist culture, inter-organisational cooperation will be lower and will in turn compromise overall construction project performance. The individualism/collectivism dimension explicated in this study is couched in the in-group/out-group context, and one must be aware of the multi-dimensional nature of national culture factor when using it as a variable to explain any organisational outcome (Phua & Rowilson, 2013). Thus, this study believes that by looking from social identity theory, the in-group/out-group perspective and looking from sub-culture dimension of individualism/collectivism dimension in analysing conflict management styles, it provides new and useful insights to understand the issue of human behaviour towards cooperation in resolving disputes via dispute resolution mechanism.

Since a dominant component of individualism/collectivism concerns group membership and how it defines an individual's self-concept, it can be assumed that the extent to which a particular in-group membership is salient is an increased individual's perceived similarity to others in the in-group (Brewer, 1979) and the member is more likely to give

cooperation with in-group members. While it is beneficial to have to induce cooperation within each organisation at the dispute resolution table, it is argued that its benefits cannot be appreciated when each group member with strong in-group/out-group perceptions work together in an inter-organisational environment such as in construction.

The previous discussion on cultural orientation shows one of the reasons for the lack of cooperation within the Malaysian construction industry that has impeded the adversarial nature of conflicts and disputes and it has been so far overlooked. The literature suggests that the moderating effect of individualism/collectivism on project participant's cooperative behaviour is argued to arise from in-group/out-group distinction amongst project participants. Undoubtedly, the perception of in-group versus out-group among project participants that largely come from a collectivist society such as Malaysia could have a significant effect on group members' attitudes towards each other as well as their willingness to cooperate in resolving disputes.

One possible explanation that may account for these findings is that the prominence of relationship and harmony-oriented value in Asian cultures points to its importance in a social role. Many Eastern cultures emphasise the values of group harmony and cohesion (Buunk et al., 2010). Individuals are socialised to consider the well-being of the group over their personal needs. Customarily, the culture within a group or an organisation is based on the collectivistic orientation of its member. Rather than just a workplace comprising separate individuals, the collaborative spirit of the commune pervades their work experience. There is considerable emphasis on interdependence, shared concerns and mutual help. In this way, strong links exist between the welfare of the individual, the corporation, and the nation (Abdullah, 1995).

Malaysia, with a score of 26 is a collectivist society. This is manifested in a close long-term commitment to the "member" group, be that a family, extended family or extended relationships. Loyalty in a collectivist culture is paramount and overrides most other societal rules and regulations. Such a society fosters healthy relationships, where everyone takes responsibility for fellow members of his or her group. In collectivistic societies, offence leads to shame and loss of face. Employer/employee relationships are perceived in moral terms (like a family link), hiring and promotion take account of the employee's in-group. Management is the management of groups.

Malaysians from diverse cultural origins have been collectively "programmed" at an early age to recognise to recognise the expected and subtle norms and sensitivities observed at

different levels of interaction. The set of communication symbols and behaviours they adopt at each level of interaction depends on their understanding of the culture of the recipient group (Asma, 1995). In certain situations, such as official board meetings, formal decorum is maintained. The proper term of recognition and local honorific are used. The spirit of collectivism exists in the manner which every group would adjourn together daily. Overall, confrontations seldom occur though disciplinary action and advice tend to be given in a friendly and brief face-to-face discussion. Thus, the study posits that:

***Proposition 1: the higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a collectivistic society.***

### **5.3.2 Masculinity/Femininity**

A high score (masculine) on this dimension indicates that the society will be driven by competition, achievement and success, with success being defined by the winner/best in the field – a value system that starts in school and continues throughout organisational life. A low score (feminine) on the dimension means that the dominant values in society are caring for others and quality of life. A feminine society is one where the quality of life is the sign of success and standing out from the crowd is not admirable. The fundamental issue here is what motivates people, wanting to be the best (masculine) or liking what you do (feminine). Under this dimension, users are free to adopt labels to their taste for competitive versus cooperative oriented behaviours. At one end of the pole, masculinity is associated most strongly with the emphasis of competition values, whilst at femininity pole, it is strongly associated with cooperation values.

Gender is one's sense of maleness or femaleness. According to social learning theory, gender is self-perceived and learnt through a process of socialisation and education, and culturally determined by a society's perceptions of the roles which man and women are expected to perform (Tannen, 1999; Feldman, 1999; Byrne, 2004). For example, Byrne (2004) found that cultural stereotype in most Western societies associates masculine with strength and power, while femininity with tactfulness and sensitivity. Femininity/masculinity dimension is first only applied to the gender role view. However, it emerges as a pattern of female nurturing – femininity, that is associated with harmony, helpfulness, and humility, and

a male assertiveness pattern – masculinity, that is associated with aggression, exhibition, and conceit once applying to the national culture (Hofstede, 1994).

According to Pilkington (1992), in a study of Australian workplace meetings, a direct communication and confrontational language is found to be dominant in its communication style and thus characterised by interruption and verbal sparring where there is a focus on an orderly exchange of views, distinct speaker roles, getting in fast, actively fending off any interruptions, using increased volume and repetition to dominate along with strong verbal signals to lay claim to the floor and silence any potential competitors. The findings are also supported by Wittig (1992) that for the most part, men's conversations are primarily a means to identify and preserve a specific status in a hierarchical social order by exhibiting knowledge and skill and holding centre stage through verbal performance such as story-telling, joking or imparting information.

In the workplace, a man's performance tends to be evaluated against a particular stereotype which supports decisiveness, toughness, self-reliance, resolution, high control and it has been found that men could regulate other people's turn and prevent others from regulating their turns, get more of a say and thus acquire more in meetings (Sinclair, 2001). According to Sadri and Rahmatian (2003), men know the importance of visibility, and in contrast to women, a man will interject in a conversation even if he knows little about the subject. Expletives also feature heavily in male workplace conversations, compared to a female conversation because of their connection with strength, masculinity and confidence in defying linguistic and social convention (De Klerk, 2004).

Scholars recognise the style of interaction discussed above in construction industry and have been highlighted in some studies (Sommerville et al., 1993; Dainty et al., 2000). Nevertheless, it is not to be concluded that conflict in the construction industry is purely a gender-related matter. It instead shows that adversarial and dominant style of behaviour and communication have gender-specific attributes and that is likely to be connected to some extent of conflict in the industry.

In contrast to men, Thompson et al. (2001) noted that women are less likely to use a natural and informal style of language or jargon of a particular group. Women are also less keen to engage in dispute than men, have fewer dispute episodes as a result and use a much more indirect and less physical form of engagement. For instance, Tannen (1999) found that women spend much more time discussing the dangers of contention and anger than men in

their communication style and are characterised by the language of rapport, cooperation, conflict avoidance and nurturing. In a conflict situation, women tend to try to maintain interpersonal relationship and ally themselves with each other. They also employ more indirect psychological modes of engagement than men and their discourse is typically collaborative, focusing on creating and maintaining relationships while criticising and arguing in indirect ways (Sheldon, 1997). In significant contract, men's dispute occurs on a much more interpersonal rather than inter-group level and can initiate rather than preclude friendship (Looemore & Galea, 2008).

The masculinity/femininity dimension affects ways of handling commercial and industrial conflicts. For example, in the UK as well as other masculine countries like the USA, there is a feeling that a good fight should resolve conflicts: let the best man win (Hofstede, 2010 p. 166). Historically, the industrial relations scene in these countries is marked by such fights. If possible, the management tries to avoid having to deal with labour unions at all, and labour union behaviour justifies management's aversion. In the USA, the relationship between labour unions and enterprise is governed by large contracts serving as peace treaties between both parties (D'Iribarne, 1989).

In a feminine culture such as the Netherlands, Sweden, and Denmark, there is a preference for resolution through compromise and negotiation (Hofstede, 2010). In France, which scored moderately feminine in the Hofstede studies, there is occasionally much verbal insult between employers and labour and between bosses and subordinates, but behind this seeming conflict, there is a typically French sense of moderation, which enables parties to continue working together while agreeing to disagree (D'Iribarne, 1989).

Construction is well known as a male-dominated industry with a robust masculine culture (Gardiner et al., 1992; Fenn et al., 1997; Emmitt 2003). The nexus between gender issue and dispute has been very controversial and still unsettles. Previous studies hypothesised that there is a male-centric style of behaviour in the construction industry which acts as a significant source of interpersonal and intergroup disputes.

In relation to resolving construction disputes, contracting parties can take either a cooperative or aggressive stance in pursuing their goals. To this end, cooperative contracting behaviour has long been promoted given the perceived benefits. The cooperative working environment can maintain a harmonious relationship among contracting parties and can allow effective enforcement of contractual rights and obligations (Harmon, 2003; Yiu, 2006).



However, the reality is that conflicts are inherent in most construction projects. This largely contributes to the behaviour of contracting parties remaining generally adversarial in many technical reviews (Latham, 1994; Egan 1998; CIRC, 2001). It has generally been found that adversarial behaviour undermines cooperation among contracting parties and goes against amicable completion of a construction project (Harmon, 2003; Byrnes, 2002; Harmon, 2001).

The construction working environment scene has long shown a mismatch between adversarial practice and preferred state of cooperation. Literature suggests that the preference for parties in adopting adversarial and non-adversarial stance in pursuing their goals depends on the significance of the influence of various apparent drives that stimulate the parties' choice of approach. For example, where construction contracts are not fulfilling the intended role of establishing the contractual responsibilities of the parties (Dozi et al., 1996), opportunistic, aggressive moves may be adopted.

Cooperative behaviour is generally associated with feminine values that emphasise cooperativeness in achieving the parties' desired outcome. Previous studies generally support these notions. For example, Luo (2002) suggested that experience might influence subsequent dealings between the same contracting parties. Having favourable previous dealings could help contracting parties to build up their trusting relationships (Rapoport & Chammah, 1965), to appreciate their respective organisational strength and management style (Tallman & Shenkar, 1994; Rubin & Brown, 2013) and to increase situational flexibility (Larson, 1993; Gulati, 1995).

Contrastingly, aggressive behaviours reflect high masculinity in a contracting scenario, which are mostly due to difficulties in performing a contract, are seen to be one of the drivers to aggressive moves taken by contracting parties. Practical difficulties such as the existence of exculpatory and onerous provisions, the change of project content and the low inter-dependency between contracting parties may bring about ambiguity that creates a breeding ground for shrinking responsibility and shifting blame (Goldberg, 1992). As such, contracting parties are more likely to invoke adversarial behaviour and when this happens, aggressive retaliation from the other contracting parties can also be expected (Dozzi et al., 1996; Hannan & Freeman, 1984).

Furthermore, the maintenance of the ethical and harmonious relationship in construction contracts is also found to be influenced by masculinity/femininity values. Mainly, a good relationship between project participants is the foundation of feminine and

cooperative behaviour between parties (Hartman, 1993; Rosch, 1988; Hair et al., 1995). Contracting parties with previous cooperative experience would reciprocate in subsequent dealings (Katz & Kahn, 1978). Blau (1964) and Luo (2002) recognised that the behaviour is a response to the previous behaviour of the other. Thus, past dealings influence the cooperation or otherwise between the same contracting parties. As suggested by Turner (2004), a contract should aim at aligning client's objectives with the contractors. An appropriate and balance contractual arrangement could attenuate the leeway for opportunism and prohibit moral hazards in a cooperative relationship (Hackett, 1993).

In a study by Cheung et al. (2008), it is found that many construction players did not consider their contracting behaviour as aggressive despite the general view that construction contracting is adversarial. The findings suggested that cooperative and accommodative behaviour scores higher than their aggressive taxonomies scores such as attack and confront. One of the most important cooperative taxonomy is the openness of contracting parties. Essentially, this is a pragmatic and practical approach to tackle problems that are characterised by multi-party involvement, interdependency and conflict-laden. It also makes sense that cooperation is supported by good teamwork and functional relationship among contracting parties.

However, masculinity in contracting behaviour is not always linked to negative attributes in achieving a successful outcome in construction contract delivery. As suggested by McKim (1992) and Jannadia et al., (2000), contracting parties would likely adopt aggressive moves if the contract conditions are strict, harsh and onerous. Risk aversion attitude is one of the most significant challenges to the use of cooperative behaviour in contracting (Dozzi et al., 1996; Hartman, 1993). Cheung et al. (2008) noted that concerning aggressive drivers, "goal-oriented" was ranked as the most important group of drivers. This reflects the downside of over-emphasising self-interest in construction contracting. While it can be attitudinal, the second most crucial aggressive driver behaviour by parties is related to what happens during or unfavourable experience of the course of construction. These cognitive factors can be corrected by cooperative moves, although the initial barrier can be substantial.

This explains why masculinity/femininity dimension is not recognised entirely by numbers of 'success' related indicators such as national wealth. For example, for the other three dimensions, wealthy countries are often found to be on one of the poles – small power distance, high individualism, and weak uncertainty avoidance, and developing countries on

the other. The association with wealth serves as an implicit justification that one pole must be better than the other. However, for masculinity/femininity, though, this does not work. There are just as many as there are wealthy masculine, or feminine, countries. Therefore, the monetary indicator is no clue on which to base one's values.

Cheung et al. (2008) also found that only small numbers of respondents considered their contracting behaviour to be more masculine and confrontational. Although the proof is too small for any form of generalisation, construction is generally known as an adversarial industry with the fact that many projects end up with significant disputes. The findings of the study suggest that construction projects may not be inevitably adversarial. Thus, it is reasonable to deduce that in every construction project, both masculine and feminine behaviours derived from cooperative and aggressive drivers that affect the attitude of the contracting parties co-exist.

A study by Loosemore and Galea (2008) explores the relationship between gender and conflict from the perspective of communication in construction hypothesised that there is a source of male-centric genderlect that acts as a source of interpersonal conflict. It is found that male construction player perceives communication to be a key factor associated with conflict as there is a significant thematic overlap between confrontation and men within the thematic communication group. In stark contrast, women see emotion as a key factor associated with dispute, femininity being active in this theme and men being strongly associated with confrontation. A primary difference found the two 'genderlects' as Tannen (1998) found is that females speak to maintain harmony and healthy relationships, and to keep conversation, whereas males use more assertiveness and continuous communication.

Communication in the industry is found to be dominated by masculine values and by the frequent use of expletives and even encouragement of aggressive forms of discourse. This is not uncommon as these traits seem to be strongly related to the male domination of the industry and also to the competitive pressurised nature of construction projects, which reduces levels of tolerance. Although the possibility of dispute discourse is not automatic and always context-dependent, the domination of masculinity traits enhances the chances of dispute escalation.

Since construction industry is predominantly a male workforce, several scholars promote the increase of female participation in the industry because it has become apparent that much can be learned from the way that women deal with conflict and that men working in

the industry would benefit to improve their style of interaction, mainly when dealing with conflicts. However, Loosemore and Galea (2008) warned that it may not be suitable to generalise this notion to other cultural contexts where there may be less or greater female participation in the industry where the men and women relationships are more complicated, restrained and different, such as in the Middle East and some parts of Asia. Thus, feminising the construction industry may not be feasible for cultural reasons.

Overall, in more masculine cultures, people tend to be more assertive, competitive and strong (Hofstede, 2001). Within the context of dispute styles, it is reasonable to deduce that there is a preference for those styles that better reflect the cultural dimension. Masculine cultures are less likely to prefer a passive conflict style like compromising and avoiding. Rather, they prefer to look for solutions to a conflict that will strive to have their own needs met even if this would mean to be uncooperative. In general, masculinity is expected to be positively associated with an adversarial style and to be negatively associated with non-adversarial styles.

It is apparent from the above discussion that male and female genderlects differ significantly during conflict owing to different social mechanism cultural expectations and educational experiences. It is also clear that these differences play roles during a dispute to influence the level and intensity of conflict that is eventually established. Given that the construction industry in Malaysia and most other countries is male-dominated, it would be reasonable to assume that the dominant genderlect during dispute would be the masculine traits described above. With an intermediate score of 50, a preference for this dimension is difficult to be determined. However, Malaysia can still be considered a moderate masculine society which is highly success-oriented and revenue driven (Ting and Ying, 2013; Sumaco et al., 2014). Thus, the study posits that:

***Proposition 2: the higher the degree of adversary posed by the dispute resolution mechanism, the more likely for the mechanism to have a positive desirability in a masculine society.***

### 5.3.3 *Power Distance*

This dimension deals with the fact that all individuals in societies are not equal; it expresses the attitude of the culture towards these inequalities amongst us. Power distance is defined as the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally. Hofstede (2010) explained that power distance as the way in which societies deal with human inequalities in terms of material and non-material possessions. Prestige, wealth, and power vary in their importance and how people respond to them in different societies.

In relation to workplace behaviour, in countries where employees are not seen as very afraid of boss as not often autocratic or paternalistic, employees express preference for consultative style of decision-making and bosses usually consult with subordinates before reaching a decision. This is a normal behaviour for societies with a low power distance. In countries on the opposite side of the power distance scale, where employees are seen as frequently afraid to disagree with their bosses and where bosses are seen as autocratic or paternalistic, employees in similar jobs are less likely to prefer a consultative boss. Instead, many of them express a preference for a boss who decides paternalistically.

According to Hofstede (2010), power distance scores inform readers about dependence relationships in a country. In small power distance countries, there is limited dependence of subordinates on bosses, and there is a preference for consultation – that is, interdependence among boss and subordinate. The emotional distance between them is relatively small where subordinates will rather easily approach and contradict their bosses.

Cultures that are characterised by high power distance accept and expect inequalities of power and wealth distribution within the society (Hofstede, 2001). Equality and opportunity for everyone is considered important in low distance cultures, while hierarchical differences in social relationships are expected in high power distance (Gunkel, 2014). In relation to the dispute context, the literature suggests that societies with a higher degree of power distance are more likely to prefer conflict styles that allow them to maintain its power distance score in social interactions. Moreover, they are less likely to choose styles that reduce power distance as these styles might lead to reduction in its power and position outcome, which is undesirable.

It is also suggested that a non-adversarial dispute styles are less suitable to maintain power distance and to act consistent with this cultural value. This prediction according to Gunkel (2014) was based on the fact that those styles require an individual to be more cooperative and gives in a little to get a little. To reach a conflict solution and therewith to obtain an outcome that falls between the two conflicting party positions, solution-oriented style relies on cooperative actions, which are not consistent with high power distance.

In regard to an avoidance dispute style, the literature argues that societies with high power distance are more likely to prefer this compared to societies with low power distance orientation. In avoiding a conflict, potential inequalities can persist while a conflict solution might change the current status of the parties and might challenge the existing authority and power, thus resulting in a redistribution of power and control.

It is found that there are relatively few studies that have tested the association between power distance and the different dispute styles. The adversarial style is characterised by exertion of control, low tolerance for alternative views, a competitive orientation, and a rather uncooperative behaviour to meet own needs in a conflict (Rahim, 1983). It is believed that individuals in high power distance societies will prefer a confrontational style as they expect more inequality and they feel uncomfortable to act within a cooperative context.

High power distance score is found to be possibly suggesting a tendency to see authority figures as having unquestioned power within the system. Thus, in a dispute, a propensity to opt for non-adversarial way such as withdrawal or avoidance is logical because the authority person's opinions will hold sway by virtue of their position.

Additionally, Oudenhoven et al. (1998) found a positive relationship between power distance and a non-adversarial style. He et al. (2002) also found that power distance is positively associated with a non-adversarial style and negatively related to adversarial style. The findings of these existing studies are mixed and sometimes contradictory, which might again be explained by the small number of studies and the use of secondary data to characterise countries with respect to different cultural dimensions.

However, Purohit and Simmers (2006) disproved the above predictions by showing that power distance is positively related to the adversarial style of dispute resolution. The study reported that societies from high power distance orientation have the lowest preference

to non-adversarial style of conflict management. An explanation for this finding is suggested by Hofstede (2001, p. 96), who stated that societies with high power distance scores are likely to view the *world as an unjust place and have positive association with power and wealth*. He further elaborated that *individuals from countries with high power distance scores were comfortable with authoritarian value and that power is a basic fact of society that antedates good or evil: its legitimacy is irrelevant* (Hofstede, 2001, p. 98).

Furthermore, societies with high power distance are likely to have an orientation in any disputes to be win-lose rather than a win-win orientation. Moreover, if individuals believe that the legitimacy of its means is irrelevant, they are less likely to compromise, as implicit in the compromising style is the belief that there is equality and legitimacy in the roles of all parties involved in the conflict.

The study however disproves the above notion by Purohit and Simmers (2006) that high power distance societies prefer an adversarial style of conflict management. The study believes that high power distance societies will have the lowest preference of an adversarial way of resolving a dispute based on a number of theoretical reasons. Firstly, as Hofstede (2010, p. 61) mentioned, *in high power distance societies, there is a considerable dependence of subordinate on bosses. Subordinates respond by either preferring such dependence – in the form of an autocratic or paternalistic boss or rejecting it entirely*. Which is in psychology is known as counter-dependence. High power distance societies thus show a trend of polarisation between dependence and counter dependence. This shows that the emotional distance between subordinates and the bosses is relatively large. Thus, subordinates are unlikely to approach and contradict their bosses directly and openly.

Secondly, in organisations, superior and subordinates consider each other as existentially unequal as the hierarchical system is based on the existential inequality. The ideal boss in the subordinates' eyes is the one whom they respect the most is a benevolent autocrat. Thus, relationships between superior and subordinates in a high power distance organisation are frequently loaded with emotions. Applying this logic, it is reasonable to deduce that conflicts are seldom handled in an adversarial manner as these emotions and respect out of superior's autocracy needs to be maintained.

The argument presented above supports evidence from Kirkbride et al.'s (1991) view that conformity is a central theme in a high power distance society, which relies on two

concepts. First, there are the rules of propriety, which structure relationships into hierarchical dualities such as superior-subordinates. Each individual is expected to adjust him/herself to these prescribed interpersonal relationships. Secondly, there is the Confucian concept which emphasises that man does not exist as a separate entity but is inextricably bound up with his context. The individual is expected to conform to prescribed social structures and relationship and to appropriate forms of social behaviour. Thus, there exists a strong and ritualistically reinforced set of norms that guides behaviour, which is hard to negate.

This means that societies with high power distance score accept large power distance between individuals, groups and social strata, and that view of this state of affair is right and natural. Thus, there is further conformity then to the natural order of power relationships. This conformity, if combined together with the associated collectivism orientation, leads parties to consider the relationship between themselves and the other party as one of the most crucial factors in conflict situation. This is why the study opines that there is a tendency for a high power distance society to avoid confrontational style of dispute resolution for the fear of distressing these existing relationships and their mutual dependence. When dispute exists between superior and subordinates, it is natural for the subordinate to give deference to authority that will lead to the subordinate giving in to the superior's wishes. The perceived status and authority of parties in a conflict situation has a strong bearing upon the manner in which the type of outcomes can be expected.

Malaysia scores very high on this dimension (score of 100), which means that people accept a hierarchical order in which everybody has a place and which needs no further justification. Hierarchy in an organisation is seen as reflecting inherent inequalities, centralisation is popular, subordinates expect to be told what to do and the ideal boss is a benevolent autocrat. Challenges to the leadership are not well-received. Thus, applying the above hypothetical arguments, the study posits that:

***Proposition 3: the higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a high power distance society.***



### **5.3.4 *Uncertainty Avoidance***

The uncertainty avoidance dimension has to do with the way that a society deals with the fact that the future can never be known: should we try to control the future or just let it happen? This ambiguity brings with it anxiety and different cultures have learnt to deal with this anxiety in different ways. The extent to which the members of a culture feel threatened by ambiguous or unknown situations and have created beliefs and institutions that try to avoid these is reflected in the score on uncertainty avoidance. It also concerns how society deals with the fact that time only runs one way; that is, we are all caught in the reality of past, present and future that we have to live with uncertainty because the future is unknown and will always be so (Hofstede, 1983).

Uncertainty avoidance refers to the mechanism societies develop to deal with the uncertainties of daily existence and the unpredictability of the future. Some societies respond by having many rules and procedures emphasising stability. According to Hofstede (1983), some societies teach their people to accept this uncertainty and not to become upset by it. People in such societies will accept each day more easily as it comes. They will take risks rather easily, and they will not work so hard. They will be relatively tolerant of behaviours and opinions different from their own because they do not feel threatened by them. Such societies are weak-uncertainty avoidance societies; their people have a natural tendency to feel relatively secure.

On the other hand, other societies teach their people to try to beat the future. Because the future remains essentially unpredictable, such people will have a higher level of anxiety, which is manifested in greater nervousness, emotionality and aggressiveness. Such strong-uncertainty-avoidance societies also create institutions to provide security and avoid risk. Security can be created in three ways. One is technology; through technology, people protect themselves from the risks of nature and war. Houses, power stations and intercontinental ballistic missiles are meant to provide a feeling of security. The second way of creating security is by legal means; laws and all kinds of formal rules and institutions protect people from having the unpredictability of human behaviour. Having many laws and rules implies an intolerance of deviant opinion and behaviour. Where laws cannot be made because the subject is too fuzzy, a feeling of security can be created by the nomination of experts. Experts are people whose word is accepted as law because they are assumed to be beyond uncertainties.

The third means of creating a sense of security is religion. Included in this are secular religions and ideologies, such as Marxism, dogmatic capitalism, or movements that preach an

escape into meditation. Even science is included. All human societies have some form of religion. All religions in some way make uncertainty tolerable, because they contain a message that is beyond uncertainty that helps people to accept the uncertainty of today because they interpret them in terms of something bigger and more powerful that transcends the personal reality. The religions of strong uncertainty avoidance societies claim absolute truth and do not tolerate other religions. Such societies also have a scientific tradition of looking for ultimate, absolute truths, as opposed to a more relativist, empiricist tradition in the weak uncertainty avoidance societies.

Unfortunately, only a few studies have empirically tested the relation between uncertainty avoidance and dispute resolution. Oudenhoven et al. (1998) found that people from high uncertainty avoidance societies less often prefer adversarial method than people from weak uncertainty avoidance societies.

Theoretically, high uncertainty avoidance societies prefer structured, organised, and regulated conditions, whereas societies that are characterised by low uncertainty avoidance are more willing to accept the uncertainty and do not require regulations, strict rules and guidelines (Hofstede, 2001). Gunkel et al. (2014) argued that individuals who tend to circumvent uncertain situations would prefer conflict styles that minimise the degree of uncertainty of that at least do not increase the degree of uncertainty perceived by the individuals. Societies with high uncertainty avoidance would avoid uncertainty and are more likely to prefer solving a dispute using solution-oriented style that searches for a solution that fulfils at least some part of his/her desire. Additionally, the individual is also willing to compromise to search for a win-win solution that gives both conflicting parties a part of what they want to make the conflict more predictable and this way, it will reduce the uncertainty.

The potential outcomes of conflict situation can vary, which makes it rather challenging to predict the outcome in a given conflict situation. Thus, Gunkel et al. (2014) predicted that those with high score in uncertainty avoidance are also likely to wish to escape disputes all together. Societies with a higher degree of uncertainty are also more likely to prefer adversarial method as the high concerns for the needs for other party and the disposition to accept the position and demands of the other party make the potential conflict outcome more certain as the party can better access which concessions are necessary to reach a solution.

This argument however, is contrasted to the arguments by He et al. (2002) and Purohit and Simmers (2006). Purohit and Simmers (2006) believed that uncertainty avoidance is

positively related to a non-adversarial conflict style. High uncertainty avoidance score indicates a need for more rules and regulations to deal with life's uncertainties. Choosing a non-adversarial way such as avoiding or withdrawing from a conflict situation may be a logical response for individuals from high uncertainty avoidance as they may be protected from the feeling of being powerless in dealing with external pressures.

In the study, Purohit and Simmers (2006) reported that decline of adversarial styles of dispute resolution is consonant with high uncertainty avoidance societies. According to Hofstede (2010, p. 161), *the societal norms of high uncertainty avoidance include beliefs that the uncertainty inherent in life is felt as a continuous threat and must be fought and only known risks are taken*. Furthermore, he states that these societies would need clarity and structure and feel powerless towards external forces. In such social milieu, adversarial method may be seen as a risky behaviour and a way of abdicating power to others. Therefore, societies with high uncertainty score may prefer avoiding compromise to decrease the feeling of risk and of giving up control to others. He et al. (2002) supported the above justification as they found that high uncertainty avoidance is negatively related to solution-oriented and positively related to non-confrontational style.

In observing a low uncertainty avoidance society, Gunkel et al. (2014) noted that societies that prefer an adversarial style use aggressive actions and ignore the needs and expectations of the other conflicting party (Rahim, 1983), which puts pressure on the other party and thus might be perceived as being inappropriate. An adversarial style might be effective in finding a solution if the conflict reason is less important to the other party or if the dominant side is more powerful, which is often not obvious and often remains invincible to conflict parties in the early stage of a conflict. Thus, Gunkel et al. (2006) predicted that societies with a low uncertainty avoidance score prefer an adversarial style as the response of the other conflicting party and therewith the outcome of the conflict is clear to predict which creates a low degree of uncertainty.

However, in contrast to assumptions by Gunkel et al. (2014), who presented the view that low uncertainty avoidance society prefers adversarial style by using aggressive actions, an alternative perspective illustrates otherwise. This study believes that societies with a low uncertainty avoidance score see an adversarial method as rather unnecessary. As dictated by Hofstede (2010, p. 196), *high uncertainty avoidance is generally associated with anxiety, and an anxious culture tends to be expressive cultures*. In this way, there are circumstances which are socially acceptable where individuals who belong to this society talk with their hands, to

raise one's voice, to show one's emotions, and to pound on table. These behaviours are results of pent-up aggression.

In contrast to a high uncertainty avoidance society, anxiety levels in low uncertainty avoidance is relatively low. Aggression and emotions are not supposed to be shown. As Hofstede (2010, p. 196) noted that *people who behave emotionally and noisily meet with social disapproval*. Consequently, stress could not be released in activity; it must be internalised. A study by Hofstede and McRae (2004) reported that high uncertainty avoidance societies relate positively with neuroticism and negatively with agreeableness. Neuroticism is the opposite of emotional stability; it combines the personality facets of anxiety, angry, hostility, depression, self-conscious, impulsiveness and vulnerability.

The above correlations explain why societies in low uncertainty avoidance do not prefer adversarial way of conflict management style as claimed by Gunkel et al. (2014). In general, it is contended that the individuals from a low uncertainty avoidance society do not prefer showing or to manifesting expressive behaviours such as being fidgety, emotional, or suspicious as they are more inclined towards giving the impression of being dull, easy going, indolent and having self-control.

Malaysia scores 36 on this dimension and thus has a low preference for avoiding uncertainty. Low UAI societies maintain a more relaxed attitude in which practice counts more than principles and deviance from the norm is more easily tolerated. In societies exhibiting low UAI, people believe that there should be no more rules than are necessary and if they are ambiguous or do not work, they should be abolished or changed. Schedules are flexible, hard work is undertaken when necessary but not for its own sake. Precision and punctuality do not come naturally and innovation is not seen as threatening. Based on the above theoretical prediction, the study posits that:

***Proposition 4: the higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a low uncertainty avoidance society.***

#### **5.4 The Conceptual Framework of the Study**

At this point, the literature review was explored to identify the fundamental concepts of national culture and some key dispute resolution models to achieve a holistic understanding of the key conceptual body of the study. The findings inform the study of existing theories,

which will be used as the bases for future findings. Each concept was extensively discussed in the literature review and has enabled the study to isolate and reintegrate which are imperative to be explored and further utilised to achieve the aim of this study. Figure 8 illustrates the conceptual framework and highlights the primary focus area for this study.

The green circle represents the necessary conceptual framework underlying dispute resolution approaches. In the Dispute System Design (DSD), the representation distinguishes three primary ways of resolving disputes. First is through interest-based, which is to reconcile the disputants underlying interest by doing problem-solving negotiation that exemplifies the interesting approach. Second is through power-based, which determines who has more power by exercising authority. Lastly is through right-based by determining who is right by leaving the matter to justice. Also, the Multi Dispute Resolution (MDR) diagnoses the transition of the level of adversary along the dispute resolution spectrum posed by mechanisms from less to more adversarial ones. It serves to illustrate the position of adjudication within the dispute resolution spectrum. It is found that adjudication can be considered as an adverse method of resolving a dispute because the mechanism is only averagely rewarding, relatively costly and highly arbitrary.

This component is crucial as it serves as the primary conceptual framework underlying the alternative explanations if the propositions presented earlier in the above discussion turn out to be overturned. The diagnosis will help to understand why dispute resolution works or not, why disputants use some procedures, motivation, skills and resources, what change is necessary, and can mechanism be devised to meet the same needs at a reasonable cost for it to work satisfactorily.

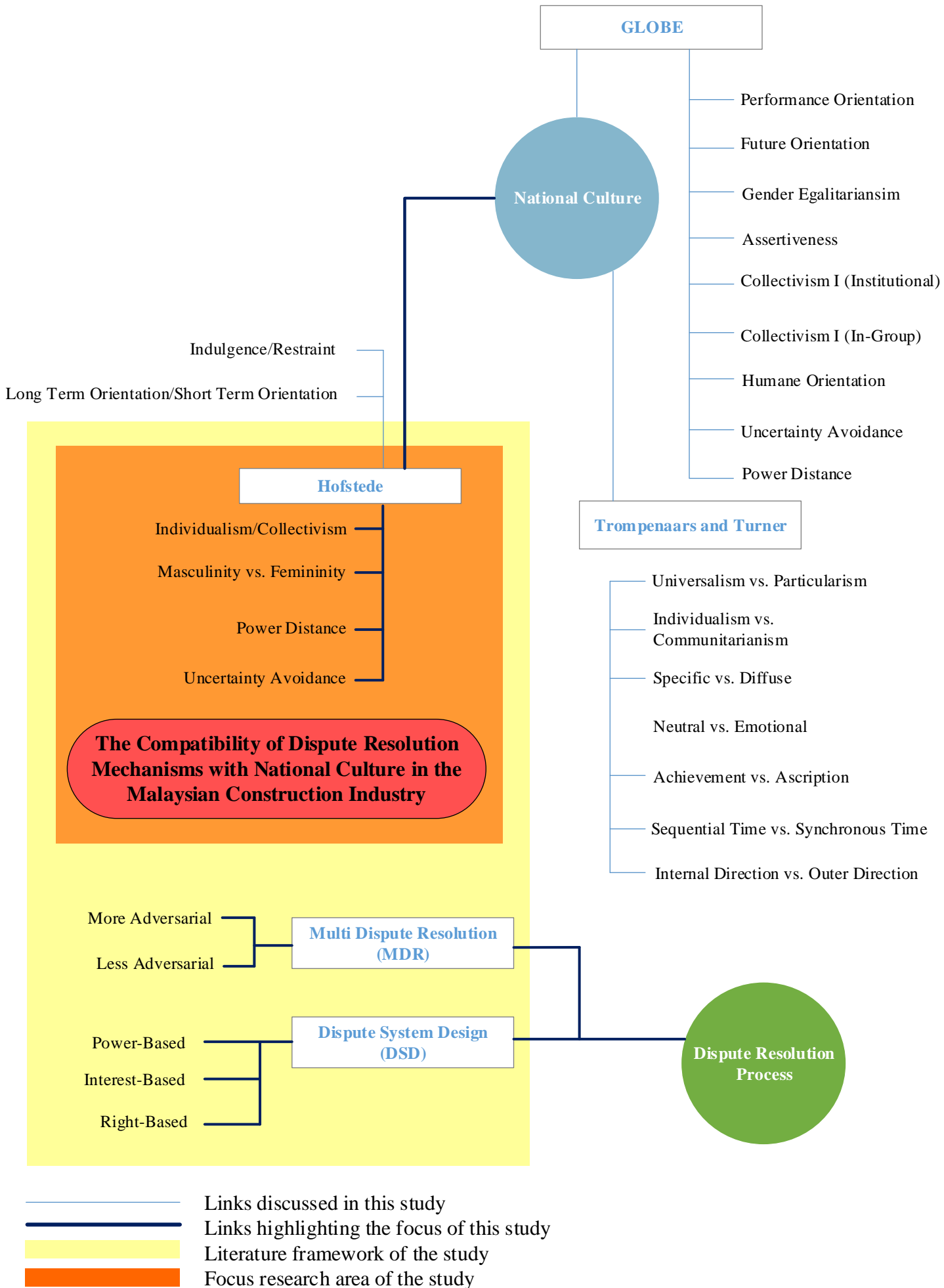
Additionally, the blue circle represents some of the landscape theories of national culture available in the literature. The study identifies and critically explores the concept of national culture and compares them in ways in which the ideology of culture has been theorised. In developing the conceptual framework, the study reviews three influential national culture theories, namely the work of Hofstede, the GLOBE and Trompenaars and Turner. The study engages four national culture dimensions developed by Hofstede (2010) as a baseline concept because it is the model found to be the most comprehensive, both conceptually and operationally.

Initially, Hofstede's model consists of six cultural dimensions, namely: *individualism/collectivism*, *masculinity/femininity*, *power distance*, *uncertainty avoidance*, *indulgence/restraint*, and *long-term/short-term orientation*. The study will consider the first

four are incorporated to form the conceptual framework of this study as shown in the orange shaded area that represents the core focus of this study. The two remaining dimensions are not integrated due to its problematic flaws conceptually and operationally as discussed earlier, which may potentially hinder the study to utilise those dimensions to be part of the leading vehicle to understand the influence of national culture on the viability of a dispute construction mechanism in construction.

The conceptual framework illustrates the concepts underlying the notions of this study. The intention of the study is not only to prove or disprove those propositions but also to provide a thick description by evaluating it in a different context. This type of theory-assessment contributes in a way to strengthen or reduce support for a theory, discover the extent of the scope of the theory and to determine whether the theory can explain the phenomena in hand.

Therefore, the conceptual framework serves as a visualisation of what is the state of knowledge that exists in the field of national culture, and dispute resolution, for further exploration in the empirical world to observe the dependability and meaning of all the concepts identified earlier. The presence of the conceptual framework is crucial to narrow down and caveat the attention of this study to emphasise the influence of national cultures values on the compatibility of an adversarial dispute resolution method in the Malaysian construction industry.



**Figure 8: Conceptual Framework of the Study**

## 5.5 Summary

This chapter provides the reader with the theoretical aspects of Hofstede's national culture model that is relevant to the research. The chapter has justified the adoption of Hofstede's model as the basis for the predictive behaviour of Malaysians and its conflict managements styles from the context of the adoption of adjudication to resolve dispute between construction parties.

Additionally, this chapter also formulates four propositions and it is exceptionally important to be utilised to generate a complete rationalisation to understand the appropriateness of conflict management style and dispute resolution by the Malaysian stakeholders from the lens of Hofstede's national culture value.

Firstly, in individualism/collectivism dimension, the research predicts that adversarial method is not an appropriate or a desirable method of dispute resolution for Malaysian construction stakeholders. This assumption is based on the low score of individualism in Hofstede's national culture model by Malaysia that manifests a close long commitment to the members of the group. In a collectivistic society, Malaysian construction stakeholders is predicted to emphasise on the healthy relationship and harmonious dispute resolution method among the parties. Owing to this, the research foresees that a controlling and adversarial method like adjudication is not appropriate to the relationship longing and collectivistic society of the Malaysian construction industry.

Secondly, in masculinity/femininity dimension, the research predicts that adversarial method is a desirable method of dispute resolution for the construction Malaysian stakeholders. This assumption is based on the high score of masculinity in Hofstede's national culture model by Malaysia that emphasises on competitive and dominating mode of conflict management. Owing to this, the research predicts that an adversarial method like adjudication will found to be compatible to the culture that consists of a need for success values such as money, power and competition in the Malaysian construction industry.

Thirdly, in power distance dimension, the research predicts that adjudication is not an appropriate or a desirable method of dispute resolution for the construction Malaysian stakeholders. This assumption is based on the extremely high score of power distance in Hofstede's national culture model by Malaysia that accepts inequality and uneven power distribution across the society. Owing to this, the research predicts that an adversarial method like adjudication will not be compatible to the culture that does not support challenge to



authority and seniority in a highly hierarchal working structure of the Malaysian construction industry.

Fourthly, in uncertainty avoidance, the research predicts that adjudication is not an appropriate or a desirable method of dispute resolution for the construction Malaysian stakeholders. This assumption is based on the low score of uncertainty avoidance in Hofstede's national culture model by Malaysia that accepts and feels more comfortable in unstructured situations. Owing to this, the research predicts that an adversarial method like adjudication will be unsuitable to the culture of people that practice a more relaxed attitude by not having too much rules if it is unnecessary.

To conclude, these sets of propositions formulated will be the basis for the main theme of inquiry for data collection process, which will be described in the subsequent chapter. These propositions illustrated together with the research conceptual framework will be the vital component of achieving the aim and objective of this study and will ultimately be used to investigate the influence of national culture to conflict management and dispute resolution in construction. In turn, the propositions and the conceptual framework will also be utilised as a tool to propose findings on the compatibility of an adversarial dispute resolution mechanism in the Malaysian construction industry.

# **CHAPTER 6**

## **Research Methodology**

## **6.1 Introduction**

Methodology is a systematic way to solve problem. It is a science of studying how research is to be carried out. Essentially, it involves a procedure by which researchers go about their work of describing, explaining and predicting phenomena. It is also simply understood as the study of methods through which knowledge is gained with the aim of giving the work plan of research.

Different types of research are defined by the use of different methodologies and it plays a vital component for the research in shaping their overall research strategy. It consists of a whole range of procedures, including: asking questions about the world, finding a researchable problem, determining the best method in finding data and the interpretation of the findings. Importantly, it is often necessary to include a consideration of the concepts and theories which underlie the methods.

Thus, this chapter aims to present the methodological strategies adopted in achieving the aim of this study to help researchers direct their thinking to the creation of new knowledge. It involves the systematic search for answers and knowledge in order to develop a conclusion. Through the adoption of a philosophy, approach and method, a framework is created that guides the researcher during the research.

## **6.2 Research Philosophy**

Research philosophy deals with the source, nature and development of knowledge (Bajpai, 2011). In essence, addressing research philosophy involves being aware and formulating your beliefs and assumptions. Since all research are based on assumptions about how the world is perceived and how human can best come to understand it, it is not possible to assume there is a best way to understand the world.

A research philosophy is a belief about the way in which data about a phenomenon should be gathered, analysed and used. Researchers at every stage will make several types of assumption (Burrell & Morgan, 1979). These include assumptions about human knowledge – epistemological assumptions, about the realities you encounter in your research – ontological assumptions, as well as the extent and ways your own values influence your research process – axiological assumptions. These assumptions inevitably shape how you understand your research questions, the method you use and how you interpret your findings (Crotty, 1998).

The key term relating to the way of looking at the world is ‘paradigm’. The major reason this concept is important is that the paradigm we use to view the world, on a day-to-day basis, is very likely to influence how we conduct research (Kuhn, 1970).

In relation to research, it has become clear over the past many years that there are really only two major ways of ‘looking at the world’. One regards the world as largely objective – there is only one truth or a limited number of universal truths, and measurable in terms of the use of numbers. The other view suggests that the world is largely subjective – open to several interpretations, and numeric measurement is not always possible or desirable, hence words are able to indicate findings more accurately. In summary, these are referred to as the quantitative and the qualitative paradigms, respectively (Mason, 2014).

**6.2.1 *Ontological Position***

The question of ‘what is real?’ is concerned with the concept of ontology, and in relation to this there are two possible responses, depending on the specific paradigm (Mason, 2014). Ontological position associates with the researcher’s view of the nature of reality on what assumptions s/he makes about the way in which the world works. Sexton (2003) put ontology in a continuum between realism and idealism, while Easterby-Smith et al. (2012) expanded the continuum further to nominalism. The position along the continuum is illustrated in Table 10.

**Table 10: The connection between truths and facts in ontological continuum**

<b>Ontology</b>	<b>Realism</b>	<b>Internal Realism</b>	<b>Relativism / Idealism</b>	<b>Nominalism</b>
<i>Truth</i>				
	Single truth	Truth exist, but is obscure	There are many ‘truths’	There is no truth
<i>Facts</i>	Facts exist and can be revealed	Facts are concrete but cannot be accessed directly	Facts depend on viewpoint of observer	Facts are all human creations

<i>Reality</i>	External, objective and independent social actor	Is objective. Exists independently of human thoughts and beliefs or knowledge of their existence but is interpreted through social conditioning.	Socially constructed, may change, multiple.	External, multiple, view chosen to best enable answering of research question.
----------------	--	--	---	--

Source: Easterby-Smith, M., Thorpe, R., & Jackson, P. (2012). *Management Research* (Fourth ed.). London: Sage.

Drawing inference from Table 10, realism believes in extreme objectivity of the reality, where there will be only one truth and is predetermined concrete evidence that can be revealed to confirm the reality. Internal realism is loosely rigid but still has the view that reality is objective in nature and that single reality exists but the facts that support the reality cannot be accessed easily. Relativism and idealism have more subjective view about the reality by believing that there is no single reality and a reality is perceived on what the observers think it is true. The opposite end of the continuum is the nominalist, who views that there is no actual truth and all facts are created by people for the purpose to support the ‘truth’ that they created.

In relation to the present study, relativism is identified as the most appropriate ontology. As set out in the objectives of the study, the researcher aims to explore the influence of national culture on dispute resolution, and to extend the knowledge by investigating the existence of relationship between national culture and dispute resolution within the context of the implementation of adversarial dispute resolution of adjudication. The study opines that since culture colours nearly every aspect of human behaviour, the study takes the ontological assumption that the answer to the research problem is not single, and the outcome of the study is based on the opinions and experiences of the national culture beholder who is involved in the dispute resolution field.

The study also opines that reality is not objective, especially social reality and it is socially constructed. The assumption is that there is a need to study how people see the world because perceptions govern action and has real consequences (Sarantakos, 2005). Perception

of the industry players are also said to be related to culture, which is a way of perceiving the environment (Reisinger, 2009). In this regard, Reisinger (2009) acknowledged suggestions made by Samovar et al. (1981) that the similarity in people's perceptions indicates the existence of similar cultures and the sharing and understanding of meanings.

Furthermore, since this study engages with the influence of national culture on dispute resolution, there is a theoretical position which asserts that law is a system or body of law tied specific levels or kinds of kinds of culture (Friedman, 1969). In addition, from the jurisprudence point of view, the philosopher of law seeks to know what the law is and how it works generally and identify how they can be modified, changed or adapted (D'Amato, 1984).

Additionally, this study adopts relativism as its ontological position stance to support Friedman's (1975) submission that what gives life and reality to the legal system is the outside, social world. Furthermore, the legal system is not insulated or isolated and it depends absolutely on inputs from the outside. Cheung and Suen (2002) also believed that from epistemological perspective, this study looks at how people interpret the world, focusing on meanings, trying to understand what is happening and developing ideas through induction form data (Easterby-Smith et al., 1991).

### **6.2.2 Epistemological Position**

Epistemology concerns assumptions about knowledge, what is constituted as acceptable, valid and legitimate knowledge and how we can communicate knowledge to others (Burrell & Morgan, 1979). While ontology may initially seem rather abstract, the relevance of epistemology is more obvious. The multidisciplinary context of built environment means that different types of knowledge – ranging from numerical data to textual and visual data, from facts to interpretations, and including narratives – can all be considered legitimate.

A well-thought-out and consistent set of assumptions will constitute a credible research philosophy, which will underpin the researcher's methodological choice, research strategy and data collection techniques and analysis procedure (Saunders et al., 2009). Two major epistemologies have been identified in the contemporary Western tradition of social science, namely *positivist* – scientific, and *interpretivist* - anti-positivist (Galliers, 1991).



	they can be measured	they can be tested	stakeholders' perspectives	stakeholders' perspectives and applicable to the researcher himself
Generalization	Statistical probability	Statistical probability with minor theoretical abstraction	Theoretical abstraction with minor statistical probability	Logical theoretical abstraction
Sampling requirement	Large numbers selected randomly	Large numbers selected randomly	Small numbers of cases chosen for specific reasons	Small numbers of cases chosen for specific reasons

Source: Easterby-Smith, M., Thorpe, R., & Jackson, P. (2012). *Management Research* (Fourth ed.). London: Sage.

Positivists believe that reality is stable and can be observed and described from an objective viewpoint (Levin, 1988) without interfering with the phenomena being studied. The process involves manipulation of reality with variations in only a single independent variable so as to identify regularities in, and to form relationships between, some of the constituent elements of the social world. Predictions made on the basis of the previously observed and explained realities and their inter-relationships.

Positivism is so embedded in our society that knowledge claims not grounded in positivist thought are simply dismissed as invalid (Hirschheim, 1985). This view is supported by Alavi and Carlson (1992) who found that all the empirical studies were positivist in approach. There has been much debate whether paradigm is entirely suitable for social sciences (Hirschheim, 1985). While the study shall not debate this further, it is applicable as this study deals with this case as it does with interaction of people, and legislation is considered to be or the social science rather than physical science.

At the opposite end, interpretivists contend that only through the subjective interpretation of and intervention in reality can that reality be fully understood. The study of phenomena in their natural environment is key to the interpretivist philosophy, together with the acknowledgement that scientists cannot avoid affecting the phenomena that they study. There may be many interpretations of reality but maintaining that these interpretations are in themselves a part of scientific knowledge they are pursuing.



For this study, the researcher has adopted interpretivism philosophical stance as it allows the researcher to integrate human interest into the study. The study believes that it is the individual that shapes the society, nationally and culturally. Since the study is interested to see how individuals in the construction industry explain their behaviour towards dispute resolution, this stance allows the study to explain human behaviour through their own subjective worldview. Dispute resolution has been proven in the literature that people have characteristic styles of resolving dispute. Mainly, it is the subject of competitiveness and cooperativeness that play integral roles underlying the individual's intentional assumptions. Thus, this study strives to gain an in-depth insight into the participants' meanings and motives behind the adopted certain conflict styles in dispute resolution and how national culture factor operating jointly with conflict goals gives influence on it.

Additionally, the study is keen to let the participants openly share their story to achieve an empathetic understanding on the subject matter. Since national culture is a very complex subject, this stance is chosen to help the study reach multiple understandings to improve the conceptualisation of conflict management within the context of intra-cultural study. This study does not aim to achieve generalisation and representation in its finding. The researcher's goal is to expand and contribute to analytic generalisation through theoretical propositions, not statistical generalisation. Furthermore, the study intends to produce a valid, respondent-led result with rich data to improve the current state of knowledge of national culture and dispute resolution fields.

### **6.2.3 *Axiological Position***


Axiology relates to the researcher's view of the role of values in research. Discussions on axiology is always neglected by researchers and philosophers of science because it is a matter of style that involves sensations and feelings to fit a theory to the world. Nevertheless, Weinberg (1970) did not reject axiology with the belief that it is also critically important as well as other philosophies as it relates to the administration of science and readily exists within science.

Axiology is a branch of philosophy that studies judgment about the values (Saunders et al., 2012). Specifically, Li (2016) believed that axiology is engaged with the assessment of the role of researcher's own value on all stages of the research process. As a result, it becomes the 'aim' of the research. This branch of philosophy attempts to clarify if the researcher is

trying to explain or predict the world and only s/he seeks to understand it (Lee & Lings, 2008).

In research context, a researcher who uses axiological skills in their study are able to articulate clearly their decision in conducting their studies and their values will become the basis upon which a conclusion is drawn out of the data and the analysis that they have made. For this reason, value judgments may lead to different conclusions drawn by different researchers based on the values they are within (Saunders et al., 2012). Sexton (2003) placed two extreme axiologies at two different ends of the axiology continuum which are value neutral – where research is value-free and objective, versus value-biased – where research is value laden and subjective. Table 12 shows the axiology continuum, their characteristics and linkage between axiology, epistemology and ontology.

**Table 12: Axiology continuum, their characteristics and linking between axiology, epistemology and ontology**

<b>Ontology</b>	<b>Realism</b>	<b>Internal Realism</b>	<b>Relativism / Idealism</b>	<b>Nominalism</b>
<b>Epistemology</b>	<b>Strong Positivism</b>	<b>Positivism</b>	<b>Constructionism / Interpretivism</b>	<b>Strong Constructionism</b>
<b>Axiology</b>	<b>Value-neutral</b>	<b>Value-trivial</b>	<b>Value-balance</b>	<b>Value-biased</b>
<i>Role of value in research</i>				
	Research is taken in a value-free way; the research is independent of the data and maintains an objective stance	Values play a minor role in interpreting results; the researcher considers subjective points of view	Values play a large role in interpreting results, the researcher adopting both objective and subjective points of view	Research is value-laden; the researcher is biased by worldviews, cultural experiences and upbringing that will give impact to the research

Source: Easterby-Smith, M., Thorpe, R., & Jackson, P. (2012). *Management Research* (Fourth ed.). London: Sage.

Drawing understanding from Table 12 above, positivists maintain that there is no place for values in the research process. This means that one's values, hopes, expectations and feelings have no place in scientific inquiry. Though positivists carefully contain their value biases during an investigation, values are naturally reflected in the selection of a study topic. Interpretivists on the other end maintain that the researcher's value and lived experience cannot be separated from the research process. The epistemology underlying a constructivist position requires close, prolonged and interpersonal contact with the participants in order to facilitate their construction and expression of the "lived experience" towards the subject being studied. Ponterontto (2005) described that it is impossible to even think that one could eliminate value biases in such an interdependent research-participant interaction. Therefore, constructivists should acknowledge, describe and "bracket" his or her values, but not eliminate them.

The present study falls under value-balance in its axiological stance. As such, values play an integral role in interpreting the result of the study, especially the nature of the topic itself requires the researcher to understand the degree to which cultural values influence the compatibility of a dispute resolution mechanism in the construction industry. The knowledge produced as outcome of the study is heavily dependent on the similarities or differences of cultural value within a group of nation. As reported in the literature, value is the most core system that influences the action and behaviour of a particular society. Hence, the research is value-bound and the researcher is part of being what is being researched. Thus, this study opines that it is appropriate for the researcher, being part of the society under study, to make known of its values underlying the study and actively report its values and biases as well as the value-laden nature information gathered from the field.

### **6.3 Methodological Choices**

Basic and applied researches can be quantitative or qualitative or even both. The decision to adopt quantitative or qualitative research methodological approach generally depends on the personal inclination of philosophical stance of the researcher (Remenyi, 1998). Quantitative research is generally associated with the positivist paradigm. It usually involves collecting and converting data into numerical form so that statistical calculations can be made and conclusions drawn. In contrast to qualitative research, it is the approach associated with the social constructivist paradigm which emphasises the social constructed nature of reality. It is about recording, analysing and attempting to uncover deeper meaning

and significance of human experience, behaviour, belief and including contradictory beliefs, behaviours and emotions. This approach is interested in gaining a rich and complex understanding of people’s experience and not in obtaining information that can be generalised to other larger groups. Table 13 shows the comparison chart between qualitative and quantitative research.

**Table 13: Differences between qualitative and quantitative Research**

Study	Qualitative	Quantitative
<i>Purpose</i>	The purpose is to explain and gain insight and understanding of phenomena through intensive collection of narrative data. Generate hypothesis to be test, inductive.	The purpose is to explain, predict, and/or control phenomena through focused collection of numerical data. Test hypotheses, deductive.
<i>Approach to inquiry</i>	Subjective, holistic, process-oriented	Objective, focused, outcome-oriented
<i>Hypotheses</i>	Tentative, evolving, based on study	Specific, testable, stated prior to study
<i>Research setting</i>	Controlled setting not as important	Controlled to the degree possible
<i>Sampling</i>	Purposive: Intent to select “small”, not necessarily representative, sample to get in-depth understanding	Random: Intent to select “large” representative sample to generalise results to a population
<i>Measurement</i>	Non-standardised, narrative (written word), ongoing	Standardised, numerical (measurements, numbers), at the end
<i>Design and method</i>	Flexible, specified only in general terms in advance of study non-intervention, minimal disturbance, all descriptive — history, biography, ethnography, phenomenology, grounded theory, case study, (hybrids of these) consider many variable, small group	Structured, inflexible, specified in detail in advance of study intervention, manipulation, and control. descriptive correlation, causal-comparative experimental consider few variables, large group

<i>Data collection and strategies</i>	Document and artefact (something observed) that is collection (participant, non-participant). Interviews/Focus Groups (un-/structured, in-/formal). Administration of questionnaires (open ended). Taking of extensive, detailed field notes.	Observations (non-participant). Interviews and Focus Groups (semi-structured, formal). Administration of tests and questionnaires (close ended).
<i>Data analysis</i>	Raw data are in words. Essentially ongoing, involves using the observations/comments to come to a conclusion.	Raw data are numbers. Performed at end of study, involves statistics (using numbers to come to conclusions)
<i>Data interpretation</i>	Conclusions are tentative (conclusions can change), reviewed on an ongoing basis, conclusions are generalisations. The validity of the inferences/generalisations are the reader's responsibility.	Conclusions and generalisations formulated at end of study, stated with predetermined degree of certainty. Inferences/generalisations are the researcher's responsibility. Never 100% certain of our findings.

The main objective of this study is to gather opinions, perceptions and experience of various construction professionals on the influence of national culture on the compatibility of a dispute resolution mechanism. In addition to what and how the interplaying factors, in their views, affect the compatibility of an adversarial dispute resolution mechanism with national culture. In pursuit of this objective, the study adopts the qualitative approach as one can hardly quantify and numerically portray the study of perceptions and experience.

Preliminary exploration from the literature at the outset of the study suggests the study a premise that Malaysia, being an Asian and Eastern-clustered country, implicitly embraces collectivism culture and adopts less adversarial nature in resolving dispute. The premise is submitted here with pure intention to generate more explanations as well as understanding and describing the phenomenon of the influence of national culture and on the compatibility of an adversarial dispute resolution mechanism in a deep, comprehensive manner. Subsequently, the study will identify the lessons from perceptions, experiences and reasoning in respondent's view within the context of construction adjudication.

The qualitative approach adopted for this research has the following advantages. Firstly, qualitative method of inquiry allows examining the complex reality regarding human and behavioural factor that affects the dispute resolution field. For example, whether a dispute resolution process produces a feasible settlement and whether the participants are satisfied with the process. A qualitative assessment of the impact of national culture on the overall compatibility of a dispute resolution mechanism may serve as an illustration of an advantage involved in this approach (Cresswell, 2007; Flick 2009).

Secondly, qualitative approach allows the researcher to capture the context surrounding the adversarial dispute resolution process in the Malaysian construction industry as opposed to quantitative approach, which focuses on pre-determined variables in their measure without addressing how and what circumstances adjudication suitability issues evolved. An analysis of the national culture issue in its interconnectedness with the compatibility of an adversarial dispute resolution mechanism in a country-specific context ensures the holistic treatment of national culture issue within the context of adjudication. In a broader and richer context, the study can picture the reality and allows more accurate understanding on the influence of national culture on the compatibility of a dispute resolution mechanism (Denzin & Lincoln, 2011; Neuman, 2007; Flick, 2009).

Thirdly, qualitative approach allows the researcher to identify values that the participants may have regarding selected national culture aspects. For example, some participants may place a high value on preserving the traditional way of resolving dispute via amicable settlement that allows both parties to negotiate the outcome of the dispute, whilst the same participant may view the importance of the cultural shift in the manner how the Malaysian construction parties choose to adjudicate the settlement of the dispute. In this respect, the researcher can identify participant's values, and then inquire more questions related to them and subsequently receive value-driven answers (Patton, 1990; Denzin & Lincoln, 2011; Neuman, 2007).

Fourthly, qualitative approach allows the researcher to use subjective data (Denzin & Lincoln, 2011). This is a distinctive advantage as it can easily capture individual's experience, for example, of those parties who were involved in adjudications regarding the psychological factor going on between the parties. Qualitative method avoids being locked in rigidly defined variables under investigation, which allows performing in-depth exploration of issues and looking beyond precise numerical assessment of selected aspects.

Fifthly, qualitative approach is the most appropriate method for this study as it allows exploring a new area of scholarly research in dispute resolution field in the Malaysian construction field. An expert confirmed that the issue of national culture on the suitability of adjudication to be implemented in Malaysia was raised during the formulation of the adjudication bill in Malaysia. However, the literature in Malaysia is rather silent about this. In pursuit of producing new knowledge to address this issue, comments, interpretation and opinions from adjudication players will provide a basis for assessment on the influence of national culture towards the viability of an adversarial dispute resolution mechanism in the Malaysian society. Although development of theory is not unique to qualitative research, this approach forms a convenient basis for drawing theoretical insights into dispute resolution field.

#### 6.4 Research Strategy

Within the qualitative approach, there are a number of different strategies that can be adopted, including: narrative research; phenomenology; grounded theory and ethnography (Creswell, 2013b). The research design process begins with the philosophical assumptions that the inquirers make in deciding to undertake a qualitative study. Thus, in many approaches to qualitative research, the researchers use interpretive and theoretical frameworks to further shape the study. Briefly, Table 14 below describes the five qualitative approaches.

**Table 14: Definition and background of five qualitative approaches**

Qualitative approach	Description
<i>Narrative research</i>	Narrative research uses a variety analytic practices and is rooted in different social humanities disciplines. The term assigned to any text or discourse, or, it might be text used within the context of a mode of inquiry in qualitative research, with a specific focus on the stories told by individuals. As a method, it begins with the experience as expressed in lived and told stories of individuals. Writers have provided ways for analysing and understanding the stories lived and told. The procedures for implementing this research consist of focusing on studying one or two individuals, gathering data through the collection of their stories,

	reporting individual experiences, and chronologically ordering or using life course stages the meaning of those experience.
<i>Phenomenological research</i>	Phenomenological study describes the meaning for several individuals of their lived experiences of a concept or a phenomenon. Phenomenologists focus on describing what all participants have in common as they experience a phenomenon. The basic purpose of phenomenology is to reduce individual experiences with a phenomenon to a description of the universal essence. Qualitative researchers identify a phenomenon as an “object” of human experience. The inquirer then collects data from persons who have experienced the phenomenon and develops a composite description of the essence of the experience for all the individuals. This description consists of “what” they experienced and “how” they experienced it.
<i>Grounded theory research</i>	The intent of a grounded theory is to move beyond description and to generate or discover a theory and abstract analytical schema of a process of action and interaction. Participants in the study would all have experienced the process, and the development of the theory might help explain practice or provide a framework for further research. A key idea is that this theory-development does not come “off the shelf”, but rather is generated or “grounded” in the data from participants who have experienced the process. Thus, grounded theory is a qualitative research design in which the inquirer generates a general explanation (a theory) of a process, action, or interaction shaped by the views of many participants.
<i>Ethnography research</i>	An ethnographer is interested in examining the shared patterns of behaviour, beliefs and language and the unit of analysis is larger than the 20 or so individuals involved in a grounded theory study. Focuses on an entire cultural group. A qualitative design in which the researcher describes and interprets the shared and learned patterns of values, behaviours, beliefs, and language of a culture-sharing group. As both a process and an outcome of research, ethnography is a way of studying a culture-sharing group as well as the final, written product of that research. As a process, ethnography involves extended observations of



	the group, most often through participant observation, in which the researcher is immersed in the day-to-day lives of the people while observing and interviewing the group participants.
<i>Case study research</i>	Case study research involves the study of an exploration through one or more cases within a bound system (i.e. a setting, a context). Case study is viewed as a methodology, a type of design in qualitative research or an object of study, as well as a product of inquiry. A qualitative approach in which the investigator explores a bounded system (a case) or multiple bounded systems (cases) over time, through detailed, in-depth data collection involving multiple sources of information, and reports a case description and case-based themes.

Source: Creswell, J. W., & Poth, C. N. (2013b). *Qualitative inquiry and research design: Choosing among five approaches*. Sage publications.

The choice of research strategy is always a subjective exercise, governed to an extent by the researcher’s standpoint, but also the scope of the project, availability of resources and accessibility of data. Since this study puts its focus on the issue of national culture, one may interpret that this study concerns the entire culture-sharing group; thus, ethnography is the appropriate approach to be considered. However, the intent in ethnography is to determine how the culture works rather than to understand an issue or problem using the case as a specific illustration. As a result, case study is chosen as the research strategy of this study.

However, the uniqueness of statutory adjudication regime in the context of Malaysia prohibits even small N-numbers – that is comparison between a few cases. CIPAA is a unique piece of legislation that its kind is only introduced to only a small number of countries in the world. Malaysia is only the second Asian country after Singapore to introduce its own statutory adjudication regime. The uniqueness of the legislation system limits the researcher’s option; therefore, a single case study is the most appropriate strategy for this study.

## **6.5 Methods for Data Collection**

Qualitative data is extremely varied in nature. It includes virtually any information that can be captured that is not numerical in nature. This study utilises in-depth semi structured interview as a tool in data collection.

### **6.5.1 *Semi-structured interviews***

#### ***a) Selection of respondents***

Many researchers, for example Barnett (2002), argued that sampling makes possible a higher overall accuracy than a census. According to Patton (1990), there are no rules for sample size in qualitative inquiry. Sample size depends on what you want to know, the purpose of the inquiry, what's at stake, what will be useful, what will have credibility, and what can be done with the available time and resources. He also further claimed that, the validity, meaningfulness, and insights generated from qualitative inquiry have more to do with the information-richness of the cases selected and the observational/analytical capacities of the researcher than with sample size (Patton, 1990). Hence, the number of participants is not critical in a qualitative study.

This study aims to spend more of its time and resources on designing the means of collecting the data so that information will be more detailed. With purposive sampling method, the research is able to use a set of judgements as described in the next subsection to select its participants that are particularly informative and will best answer the research question and help meet the research objectives.

Interviews conducted with experts were used to gather perceptions and opinion on the influence of national culture on dispute resolution mechanism, particularly in the practice of Malaysian construction adjudication. In this research, purposive sampling was the method chosen to identify the appropriate participants in Malaysia. With this method, individuals were selected based on their experiences central to the phenomenon – the national culture of Malaysia in construction dispute resolution or because they conform to the following criteria set by the researcher:

- Adjudicators who have professional backgrounds in the construction industry, for example, architects, engineers, quantity surveyors, construction lawyers who have been appointed as adjudicators for at least three cases;
- Construction lawyers or claim consultants who have represented claimants or respondents in adjudications or court cases involving adjudication matters for at least three cases;
- Academics or legal advisors to construction stakeholders like contractor, consultant, subcontractor, supplier companies who have substantial knowledge in adjudication; or
- Construction stakeholders with experience as one of the parties in adjudication proceedings, for example the claimant or defendant of an adjudication claim.

The diversity in the backgrounds of the participants guarantees that their opinions are a holistic reflection of the current situation of adjudication as a dispute resolution mechanism in Malaysia. All participants have been appointed for at least three cases and have made decisions on those cases. Adjudicators are seen to be the neutral party in the adjudication process. Owing to their knowledge and experience of in dispute resolution matters in the Malaysian construction industry, the adjudicators are seen to have a fair judgement and knowledge on the aspect of the construction industry national culture on dispute resolution in Malaysia.

To ensure the trustworthiness of the study and to obtain holistic views on the issues under investigation, the users of adjudication were also included in this research. Due to the complexity of the study, the users needed to have specialist knowledge and experience in adjudication dispute in Malaysia. The construction lawyers have represented various construction stakeholders in adjudication or court proceedings on adjudication matters. Again, due to their vast experience working in Malaysia and being a Malaysian, these users can also provide a close observation on the influence of national culture on dispute resolution. In total, fifteen respondents agreed to be interviewed and Table 15 shows the summary of the participants' profile in this study.

The interviews were carried out in a quiet, comfortable setting that is free from interruption, mainly in a meeting room in the participants' offices. All interviews were audio recorded and transcribed verbatim for analysis. The use of an audio recorder increases the

accuracy of the data collection and importantly allows the researcher to be more attentive to the interviewees. During interview recording, the researcher also took some notes but maintain good eye contact with the interviewees. The supplementary notes helped the researcher to formulate new, appropriate questions, stimulate early ideas for subsequent interviews before transcribing for later analysis.

Invitation to participate in the study and a short brief about the research were sent out to 102 potential participants that fulfil the above criteria. Out of the number, 15 individuals expressed their interest and agree to be interviewed for this study. The question list for the interview was emailed to the interested participants a few weeks in advance to allow enough time for the participants to think about the issue to make the interview session later more effective.

Prior to the interview, the participants were briefed on the audio recording and its purpose for the study in advance. Participants were ensured that they agree and were comfortable of being recorded for ethical purpose. The questions also were kept short and reasonably phrased to ease the participants to respond. All interviews lasted from 30 minutes to 2 hours of face-to-face discussion.

**Table 15: Summary of participants' professional background in construction adjudication**

Respondent	Professional experience (years)		Professional background	Nature of work	Adjudication Cases		
	Construction industry	Legal			Adjudicator	Party representative	Dispute
<i>R1</i>	14	6	- Quantity Surveying - Legal	- Adjudicator - Civil Engineer - Contractor	3		5
<i>R2</i>	25	10	- Building / Construction - Civil Engineering	- Adjudicator - Civil Engineer - Contractor	10	3	
<i>R3</i>	32	5	- Architecture / Town Planning - Civil Engineering	- Adjudicator - Architect	13	2	
<i>R4</i>	-	13	- Legal	- Adjudicator - Construction Lawyer - Academic	3		5

<i>R5</i>	35	-	- Electrical / Mechanical Engineering		2	10	
<i>R6</i>	-	25	- Legal	- Construction lawyer	8	3	
<i>R7</i>	-	23	- Legal		13	12	
<i>R8</i>	14		- Legal	- Construction lawyer	4	20	
<i>R9</i>	15	27	- Legal - Civil Engineering	- Construction lawyer - Adjudicator	3	20	
<i>R10</i>	22	-	- Claim Management	- Claim consultant	1		13
<i>R11</i>	-		- Legal	- Construction lawyer - Adjudicator	5		
<i>R12</i>	28	10	- Civil Engineering - Legal	- Adjudicator	8	100	
<i>R13</i>	30	-	- Architecture / Town Planning	- Architect	5		

				- Adjudicator			
<i>R14</i>	32	11	- Building / Construction - Civil Engineering	- Adjudicator - Civil Engineer	12		
<i>R15</i>	16		- Quantity Surveying	- Quantity Surveyor		3	

b) *Interview method*

Interview is probably the most commonly used method in qualitative study. One of the objectives of qualitative interview is first to answer the research inquiry on the appropriateness of an adversarial dispute resolution mechanism in the construction industry within the Malaysian society. The data collection process through semi-structured interview begins where the researcher has a list of themes and some key issues to be covered mapped in the conceptual framework of the study.

The interview involved 15 adjudicators, construction stakeholders and academics with various professional backgrounds in the Malaysian construction industry. The primary goal of the interview questions is to understand the influence of the Malaysian national culture to the compatibility of adjudication as an adversarial dispute resolution mechanism in the Malaysian construction industry. The interview questions were designed to address each of the national culture dimensions identified in the conceptual framework of the study to assess the influence of individualism/collectivism, masculinity, power distance, and uncertainty avoidance on the appropriateness of dispute resolution mechanism considering the introduction of construction adjudication in Malaysia. The interview guide is presented in Appendix E. The interview questions are described in the next paragraph.

In Section A, participants were asked to present their background including number of years of professional experience both in construction industry and legal professions, if any. The study found that almost all interview participants have dual professional expertise in construction and legal sector. The participants were also asked to state their main professional background and the primary nature of their work. Additionally, the participants were also asked to reveal their primary nature of involvement in adjudication and to state how many adjudication cases they have been involved in.

In Section B, participants were asked for their opinion and information on the general overview of the adjudication regime in Malaysia operating under CIPAA. The participants were asked to state their view on the effectiveness of adjudication as a newly introduced dispute resolution mechanism in the construction industry. Furthermore, the participants were then asked for their judgement on the level of acceptance of adjudication among the Malaysian construction stakeholders. Lastly, the participants were also asked for their opinion on the challenges, currently or potentially arising in the future, associated to the implementation of adjudication in Malaysia.



Section C, D, E, and F were dedicated to address the influence of each national culture dimensions identified in the study, namely individualism/collectivism, masculinity/femininity, power distance and uncertainty avoidance accordingly. In Section C, participants were asked about the influence of group attachment between project parties in the situation where disputes arise in construction projects. The participants were also asked on the influence of group attachment factor in the employment of adjudication as the choice of dispute resolution mechanism.

In Section D, participants were asked to describe the reality of superior authority among construction parties in Malaysia. Following this, the participants were then asked for their opinions on the impact of superior and subordinate relationship in the dispute resolution process among the Malaysian construction parties.

In Section E, participants were asked on the influence of gender roles and assertiveness in the dispute resolution process in construction. Participants were asked to describe the values, norms and behaviour of parties in dispute resolution process. Participants were also asked for their opinions on the rationales and justifications for such answers.

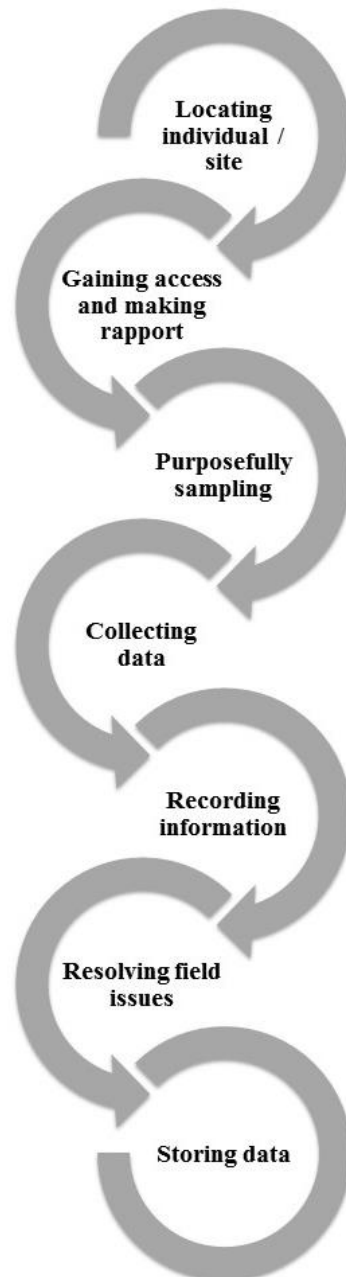
In Section F, the interview solicited their thoughts on the risks and uncertainties involved in invoking the adjudication process. Parties were also asked for the most appropriate dispute resolution mechanism, based on their best judgment, that fits the Malaysian national culture in resolving construction dispute.

Lastly in Section G, participants were asked for their observations, derived from the numbers of years being involved in the Malaysian construction industry, on the general issue of national culture and cultural values among the Malaysian construction stakeholders when it comes to dispute. Finally, the participants were then asked for their opinion if the implementation and practice of adversarial adjudication is appropriate for the construction stakeholders in the Malaysian society.

### **6.5.2 Data Collection Activities**

Creswell (2013b) visualised qualitative data collection activities by illustrating the process involved in “circle” of interrelated activities best displays this process, a process of engaging in activities that include but go beyond collecting data. Data collection are visualised as series of interrelated activities aimed at gathering good information to answer emerging

research questions. As shown in Figure 9, a qualitative researcher engages in a series of activities in the process of collecting data. The below section will describe the developed protocols for recording information in the study.



**Figure 9: Data collection circle**

Source: Creswell, J. W., & Poth, C. N. (2013). *Qualitative inquiry and research design: Choosing among five approaches*. Sage publications

a) *Locating the individual*

Potential participants are first identified through the website of the Malaysian Society of Adjudicators (MSA). It is a body that is formed with a common purpose of having a professional body to promote ethical and professional standards of service of adjudicators in Malaysia, to promote construction disputes by means of adjudication, to encourage and develop adjudication as a method of resolving construction disputes, and to provide communication channel for which adjudication practices may be discussed among professionals.

Potential participants also are identified through the examination of the list of registered adjudicators through Asian International Arbitration Centre (AIAC) panellist. Out of 413 registered entries, potential participants will be further narrowed down to 102 entries based on their nature of service, where this study is looking for participants that provide adjudication service. Emails were then sent out to all targeted individuals to invite them to participate in the study.

b) *Gaining access and making rapport*

This is the activity where gaining confidence of participants plays an integral role of gaining access through the “gatekeeper” Creswell (2013b). First, communication expressing the researcher’s intention to invite the participant’s involvement is made through an invitation letter via email. Once they respond with interest to participate, the researcher will clearly explain to the participants the requirements of the study. The researcher will be as flexible as possible when scheduling appointments with the participants. The researcher will obtain work or cell phone numbers for participants so that follow-ups can be arranged easily.

c) *Purposeful sampling*

This study aims to gather a minimum of 10 participations and 20 at maximum, although more flexibility will be given depending on the real time situation. The number of respondents is set to be limited to that experience, expert and prominent professionals by which a small number of interviews will be selected based on a set of criteria. The selection of the respondents is summarised in Table 16 as follows.

**Table 16: Purposive sampling of this study**

<b>Individual</b>	<b>Description</b>
<i>Adjudicator</i>	The Adjudicator must be a registered adjudicator under the AIAC panellist. He/she also must have a minimum of at least handling one adjudication case of any type of construction projects in Malaysia regulated under the CIPAA 2012. Additionally, adjudicators with professional background in the construction industry, i.e. architects, engineers and surveyors and construction lawyers.
<i>Construction Lawyers and expert regulators</i>	Senior legal advisors (either individuals or firms) to contractor/subcontractor/specialist consultants/material suppliers who have substantial knowledge in adjudication matters. Construction lawyers who have represented them in adjudication or court proceedings on adjudication matters, and legal advisors/or industry representatives to contractor/consultant/sub-contractor/material supplier organisations. Expert regulators were also included due to their vast knowledge and experience in policy making and adjudication make them ideal respondents for the research.
<i>ADR Scholars</i>	Malaysian scholars with expertise in the field of construction industry ADR will be included as potential participants of the study. Their critical insights backed with theoretical perspective would help in increasing dimensions of the issue discussed in this study.
<i>Construction Parties</i>	The respondent can be one of disputing parties that were affected by the implementation of adjudication in Malaysia. The respondent must have a minimum of ten years of experience in the construction industry. The respondent must be someone that is closely involved with the adjudication proceeding, be it the managing director or project manager of the company, or project manager of the company who are involved in the business administration and familiar with construction contracts. These requirements are rather crucial so that their views provide a good reflection in the field of study.

d) *Collecting data*

Data collection will involve two forms of techniques, namely literature reviews and semi-structured interview. These techniques will help achieve the aim and objectives of the study. The literature review provides organisational pattern and combines both summary and synthesis, often within specific conceptual categories. For this study, interviews will be used to gather opinions from parties affected by the adjudication legislation. CIPAA is a potential source of empirical data for this case study, especially in gathering data on the context in which the participants operate. These techniques will be used to assess the viability for the transfer of construction industry dispute resolution mechanism between cultures within the context of the Malaysian adjudication regime. The data collection tools for this study are summarised in Table 17 below.

**Table 17: Data collection tools used in this study**

<b>Data collection tool</b>	<b>Description</b>
<i>Literature review</i>	<p>The first part of the literature is an introductory part of the study that gives an overview of current practice and procedure of adjudication operated under the legislative context of CIPAA.</p> <p>The second part of the Literature Review provides several discussions regarding the main area of theoretical background that serves as the framework of the study. This part is further divided into two sections. The first section discusses some of the prominent theories on principles of dispute resolution process. Meanwhile, the second part identifies the concept of national culture to explore critically the many, sometimes competing, ways in which the idea of national culture has been theorised.</p>
<i>Semi-structured interview</i>	<p>The qualitative data will be gathered using semi-structured interviews. This method will be used to gather participants' opinions that have been impacted by the implementation of the adjudication legislation. The data will produce findings that will complement the aim to assess the compatibility of an adversarial</p>

	<p>method of dispute resolution with national culture in the construction industry of the Malaysian society.</p> <p>Through semi-structured interviews, participants will generate information on the influence of national culture on dispute resolution process. This will form a better and deeper understanding on the compatibility of an adversarial dispute resolution mechanisms with national culture in the Malaysian construction industry within the context of adjudication.</p>
--	---

*e) Recording information*

Upon agreeing to participate in the study, a suitable date and time is agreed with the participants in order to conduct the interview session. On the day, a semi-structured interview will be used as the guide question in the open discussion in order to draw upon their knowledge in the implementation of adjudication. The interview takes up approximately one hour and is audio-recorded with the participant’s permission. The purpose of the recording is so that the content of the interview can be transcribed for data analysis in the later stage. For the purpose of anonymity, the participant’s name will not be recorded. As such, participants will be asked to give a consent before the interview begins.

*f) Resolving field issues*

This study is no exception in facing issues in the field when gathering data need to be anticipated. Generally, a novice researcher is often overwhelmed by the amount of time needed to collect qualitative data and the richness of the data encountered. Table 18 discusses some of the field issues encountered in this study.

**Table 18: Field issues**

Field Issue	Description
<i>Access to individuals</i>	Gaining access to participants is moderately challenging. Because every registered Malaysian adjudicator is required to display and make known of

	<p>their background, nature of service and contact details, the study face no serious barriers in gaining their access.</p> <p>However, the extent of participant’s access stops there. It is almost impossible to identify construction professionals or disputing parties who have experience of going through an adjudication proceeding as Section 20 of the CIPAA expressly provides that the requirement of confidentiality applies to both the adjudicator and parties in the dispute. In this circumstance, no adjudicator agrees to give consent to extend the invitation to the parties under his purview to participate. This circumstance is regarded as a considerable loss for the study to gain a first-hand experience of the disputants in gaining their perception of how national culture influenced the viability of adjudication in Malaysia.</p> <p>Additionally, a small number of adjudicators were initially interested to participate in the study, but at the same time expressed their concerns on the issue of confidentiality, thus deterring their intention to participate.</p>
<i>Interviews</i>	<p>Challenges in qualitative interviewing often focus on the mechanics of conducting the interview. Conducting interviews with participants met some mild challenges. The study, however, faced difficulties related to the researcher’s ability to create good instruction and articulation of the interview questions during the first three interviews conducted. The study found that it is important to start the process of the interview by using “ice-breakers”, reflecting about the relationship that exists between the interviewers, and exhaustively explaining aim of the study.</p>
<i>Ethical issues</i>	<p>This study faces no ethical issues. Ethics Approval was duly approved by the Research, Innovation and Academic Engagement Ethical Approval Panel.</p>

g) *Storing data*

Protecting sensitive data will be considered to ensure the confidentiality of participants’ data, such as their names, contact details and personal information disclosed in the research study. This will be achieved by the conducting the below:

- All research participants will be provided with a research code, known only to the researcher to ensure that their identity remains anonymous and confidential;
- Names and contact details of research participants will be stored on a password-protected computer, accessed only by the researcher and others as appropriate;
- All data collected, such as interview recordings transcripts, will be anonymous and coded, hard paper copies of data including consent forms will be stored in a locked filing cabinet within a locked room, accessed only by the researcher;
- Data stored electronically will be on a password-protected computer, accessed only by the researcher. The information will also be stored on a network drive which is password protected on the F drive;
- All data transported on USB memory sticks will be anonymous, identified only by a code and encrypted to protect against loss;
- All publications of data will be written in a way as to disguise the identity of the research participants involved. Data that can identify an individual will not be used unless prior consent has been obtained from the individual involved;
- Data will be stored and archived for a minimum of 3 years after the graduate award has been presented, to allow verification of data from external sources if necessary, or longer if used for further research.

## **6.6 Methods for Data Analysis**

According to Yin (2007), data analysis involves examination, categorisation, tabulation, or otherwise recombining the evidence to address the initial propositions of a study. Most researchers need to rely on experience and the literature to present the evidence in various ways, using various interpretations. The data analysis of a research project is one of the significant parts of any research as it helps to investigate the collected data and to draw up conclusion based on them. The aim of this process is to assemble or reconstruct the data in a meaningful way (Jorgenson, 1989). Data analysis helps to generate theories which are grounded in the empirical evidence (Hartley, 2004). This study adopts the model by Saunders (2010) in analysing the qualitative data analysis in this sequence: thematic analysis, pattern matching and explanation building. The process of qualitative data analysis in this study is not often



straightforward but instead, in a non-linear sequencing and holistic fashion between the different methods.

### **6.6.1 *Thematic Analysis***

This study chose to adopt Thematic Analysis as its foundational method for the qualitative analysis. The essential purpose for this approach is to search for themes and patterns that occur across the series of interviews conducted. Thematic analysis is chosen because it offers a systematic yet flexible and accessible approach to analyse qualitative data (Braun and Clarke, 2006). It is appropriate for this study as it provides an orderly and logical way to analyse qualitative data, leading to rich descriptions, explanations and theorising.

This approach is perceived as suitable for interpretivist study to explore different interpretations to understand the influence of national culture on the compatibility of an adversarial dispute resolution mechanism in construction from the unique perspective of the Malaysian adjudication regime. In deductive approach, this study creates a provisional starting list of its theme from the conceptual framework, hypotheses and problem area as discussed earlier in Chapter 3, Chapter 4, and Chapter 5. The themes of this study are linked to existing theory.

#### **a) *Procedure for Thematic Analysis***

The following sections provide a set of descriptions on how the analysis was conducted in this study. In practice, these procedures did not occur in simple linear progression. Instead, they are often concurrent, recursive, and researcher went back over earlier data and analysis as the researcher refined the way in which codes and categorise newly collected data to search for analytical theme. The procedure adopted by Saunders (2009) involved are initial exploration of data, codes and coding, organising codes and refining themes.

#### **i) *Initial exploration of data***

The process starts off by becoming familiar with the existing data. At this point, the researcher started to produce transcripts of the series of the interviews conducted. The transcription process, although time-consuming and laborious, allowed the research to develop

familiarity. The transcripts produced were then read and reread to provide the researcher with an understanding on the depth and breadth of its content. At this stage, the researcher paid attention and thoughts about various elements that cover each interview transcript. Figure 10 presents a sample of interview transcript excerpted from this study.

#### **R4**

My name is [REDACTED]. I am a law degree holder (LLB). And then, I further my study in Master of Comparative Laws in Designers' Obligations in the UK and Malaysia. And then I proceed with my PhD studies but in Built Environment, specializing in Construction Legal Matters, particularly in design and risk management, from the legal perspective. Under training, being chambered and undergo pupillage in Ipoh, it's a very general firm. We did everything. Afterwards, I'm qualified to be called to the bar but I didn't renew my license simply because I want to focus on education and construction matters. And then I sit for adjudication courses exam and passed and appointed as the adjudicator. Meanwhile, I also been helping companies giving talks to SMEs and big companies within my scopes.

I've been helping companies in claims and one of the cases I handle right now pending decision now. The biggest project I handled right now in adjudication is 60 million. So, I consider myself now as a non-practicing advocate and solicitor but actively involved in adjudication and also educating construction players.

I actively represent parties. If I were not represent parties, that would be conflict of interest. When companies come and asked for my consultation and advise, so, I will sit on behalf of them and advising them when it comes to adjudication and CIPAA claims.

*What are your views on the effectiveness of CIPAA?*

If I'm not mistaken we are the sixth country in the world with the statutory adjudication, right? In my opinion, we need that. We need that, but we can still improve the scenario, the conditions of how it works. CIPAA works, but there are rooms for improvements.

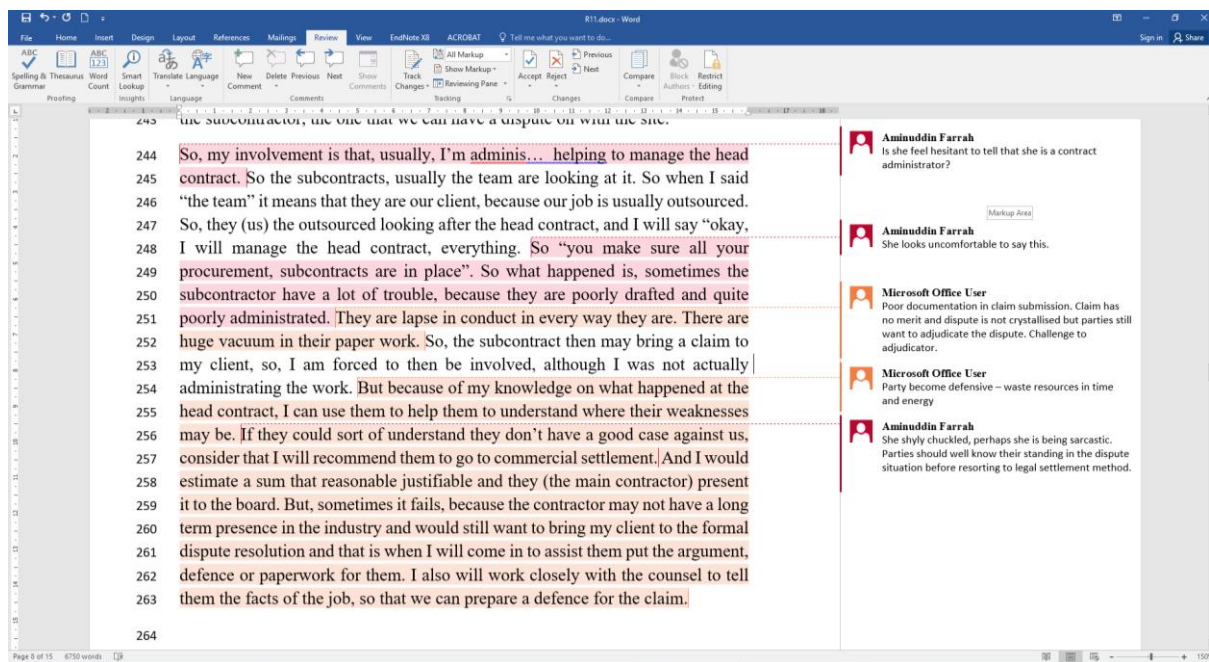
*Describe the level of acceptance of CIPAA among construction players?*

Adjudication is still new, considering the act was introduced in 2012 and enforced in 2014. So I would say it is still new. There are not many people (.) I mean, when we talk about law and legal claims, the parties are, I mean the culture of the Malaysians are hiding away from these kind of things. So if you look at any typical criminal cases even you were just remanded, everybody in Malaysia will see you guilty as charged even you are not formally charged onto you. This is one thing about the Malaysians.

So when we talk about claims, there are many (...) though it gives you avenues to make such a claims, cost is such an issue, time also is an issue for them to go to the normal way. That is one thing. Second thing, talking about the normal ways, such as in litigations and also come down to arbitration. So, some people don't really understand and most of the contracts in

**Figure 10: Sample of interview transcript**

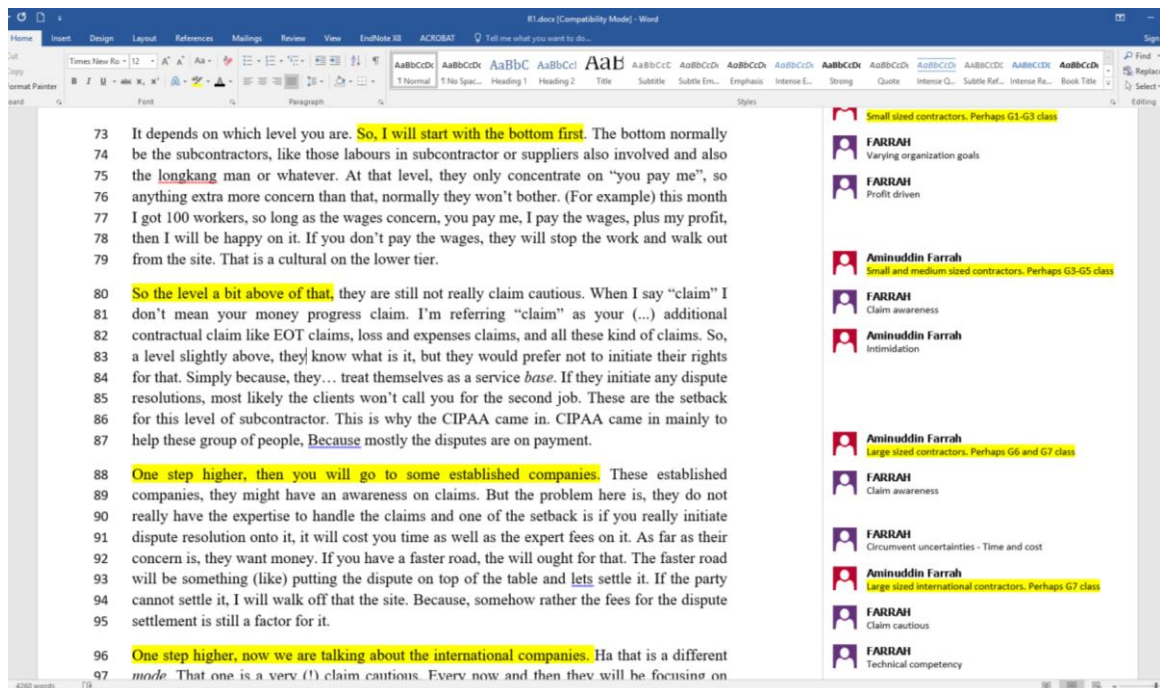
Having read and saturated the thought with the content of a transcript, the researcher allowed herself the opportunity to process them all. Memos were written to note down any initial thoughts, reflections, questions emerging, and ideas prompted by the reading. Memos are recorded in Microsoft Word throughout the study to record thinking that is more detailed or more reflective. Notes were made about things that are seen or said become an important component of the study. Memos were also made to record any thoughts arising from or perhaps relevant to the study. Record were conducted freely without any formal style and structure. The aim is to capture the real time observations while they are still present in mind. Although this is a private task, Hammersley and Atkinson (2007) believed that this kind of writing assists in the process of turning private thoughts into public knowledge as well as become a source for both ideas and justification for ideas in later analyses and writings. However, there is no guarantee that these memos appear to be particularly sensible in later times. Figure 11 illustrates a sample of observation recorded in memos.



**Figure 11: Memo on observations recorded using comment field in Microsoft Word**

At this point, the researcher also explored the storylines each respondent was trying to convey. Analysis at this point was about identifying the larger significance and meaning of objects and events for a respondent, finding connections and interdependencies – within and across the data.

This phase also involved reviewing the narrative created by the respondent. A narrative helps to preserve the flow of the story. Meaning for statements, including those not evident when viewed in isolation, become more apparent in the context. Together, these statements add up to a larger narrative about some aspect of an interviewee’s life. The goal is not to develop a complex interpretive or long analytic description, but rather to simply gain familiarity and integrate the content of each case as preparation for more detailed study to identify pattern and links. Figure 12 shows how sequenced narrative captures what is going on for a respondent of the interview.



**Figure 12: Reviewing respondent’s narrative**

Additionally, indigenous terms that are culturally encoded local terms and colloquial terms are also found to be used by several respondents throughout the interview series to refer to social structure. For example, in describing the relationship and the collectivity between the Malaysian contractual parties, respondents often used *guanxi* to describe social networks and influential relationships, which facilitate their business connection and dealing with conflicts. Another example, the term *kam cing* originating from Cantonese language was often mentioned by some Chinese respondents of the study. Although it has a casual meaning of describing sentimental feelings among the individuals, the study must carefully interpret the identification of this words to capture the meaning of the content.

Familiarisation with the data involves a process of immersion that continues throughout the study. At this phase, the researcher was interested to look for meanings and recurring patterns in the data. Without familiarity, the engagement process of analytical procedures will be hard to follow. Therefore, initial exploration of the data is an important process in the research analysis.

ii) Codes and coding

Coding is a method used to categorise data with similar meaning. Coding involves labelling a passage of data on what the researcher understands of what that passage is about. The code is then used both to represent and to access that passage along with other data that are similar. Qualitative coding is about data retention, rather than data reduction (Richards, 2009). This purpose is to make the data more interesting and accessible for further analysis.

The process generally involved two stages. The first stage is open coding – using priori or emergent codes. Secondly, the research moves on to refining or interpreting to develop more analytical categories – focused coding. A code extract of data is referred to as unit of data. A unit of data may be several words, a sentence, a number of sentences, a complete paragraph, or other chunk of textual data captured by a code (Saunders et al., 2009). The size of a unit data will be determined by the meaning of it and some unit will overlap while some will be coded using more than one code. Inevitably, initial codes will be revised as work proceeds to allow review of sources coded earlier. Finally, categories that are developed during coding will be further reviewed and refined before the next analysis.

The coding process was conducted using Microsoft Word. Microsoft Word is a simple yet powerful tool for coding as the researcher was already familiar with it, data were already transcribed into it, there were no import or export issues, it is available on every computer and codes are easily linked to the writing-up process. There are altogether 61 codes derived from the first interview as shown in Figure 13 and 14. The codes were then tabulated, and a comparison of codes was made to trace the evolution of various concepts along the analytical journey as shown in Figure 13 and Figure 14.

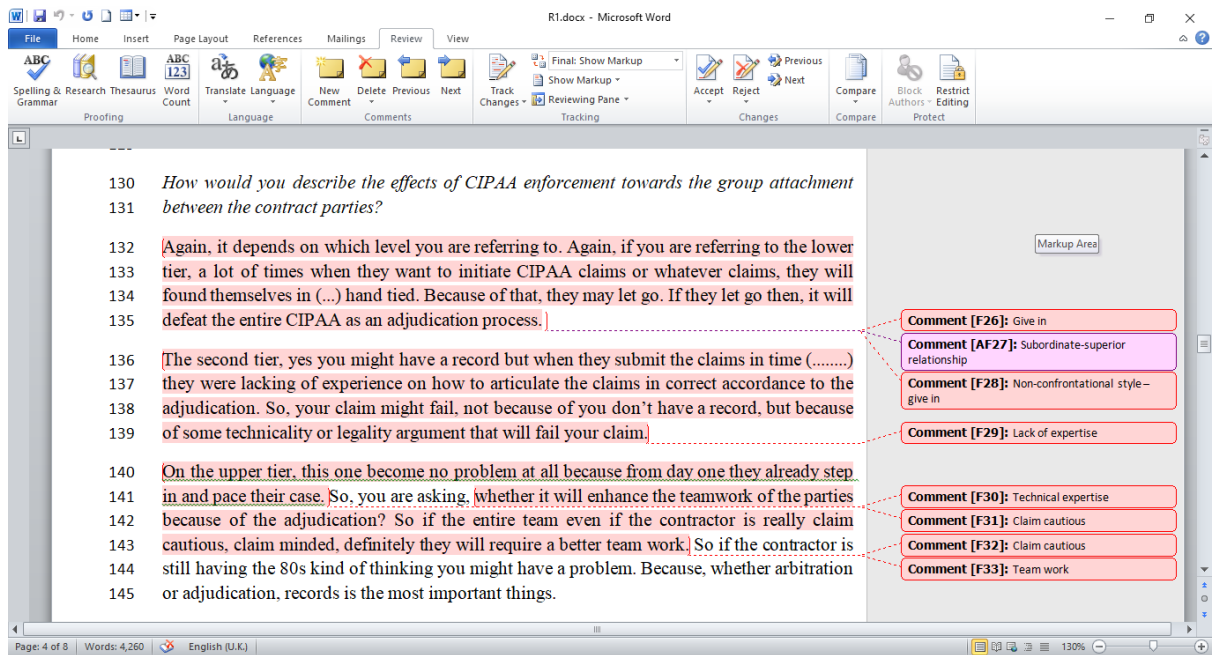


Figure 13: Open coding for interview 1

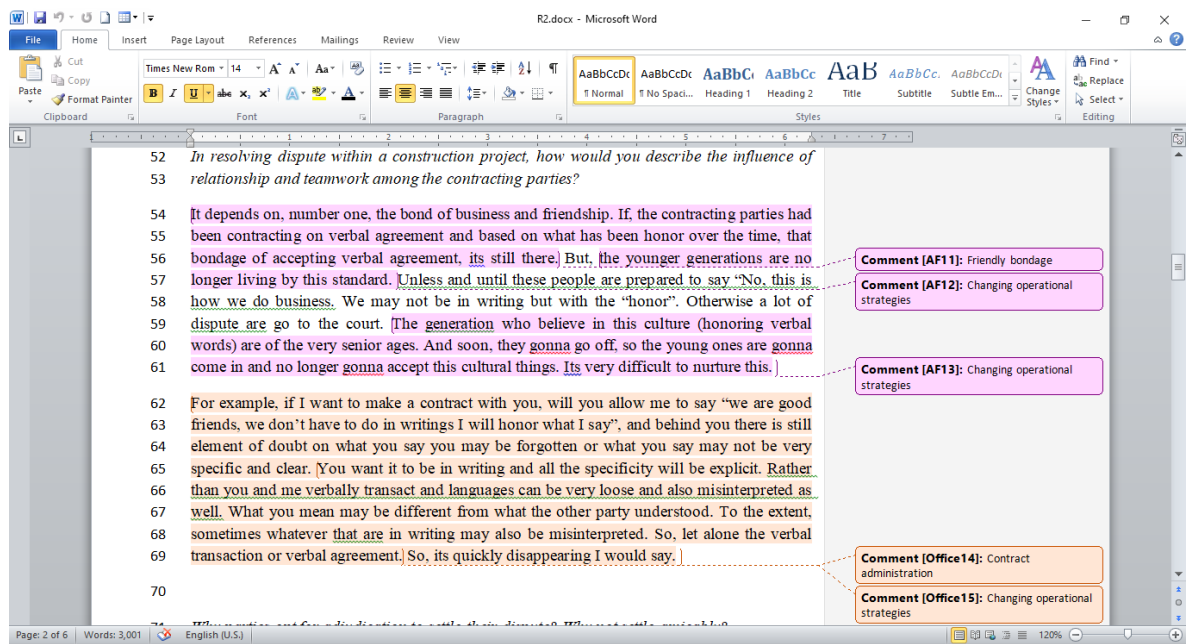


Figure 14: Open coding for Interview 2

### iii) Organising codes

The kind of codes created is reflected in each of the label given, impacts on subsequent accessibility of evidence needed to support an argument. Specific labels were used for passage of data such as "give in" and "back out" rather than just point to the general class of category



being described. However, codes were not given too narrowly as it will limit the analysis if they do not gather a balanced data to give a sense of what is trying to be described. Balance was kept between generality and specificity of codes.

Table 19 indicates that new codes were added when new information surfaced during the analysis process of the interview. Some initial codes were upheld to a higher abstraction level during the next analysis when additional codes that define and describe it emerged from the data. On the highest level, some initial themes also began to emerge based on the characteristic of the codes and concepts found. Note that, the grouping of the various codes, concepts and themes are merely suggestive at this stage. As the analysis process moves along, the codes will be refined and restructured.

**Table 19: Sample of comparisons for the initial codes between interview 1 and interview 2**

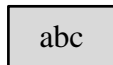
Interview 1			Provisional themes	Current interview transcription		
<i>Initial sub-codes derived from analysis of Interview 1 transcription</i>	<i>Initial codes derived from analysis of Interview 1 transcription</i>	<i>Initial concepts emerged from Interview 1</i>		<i>Initial concepts emerged from Interview 2</i>	<i>Initial codes derived from analysis from Interview 2 transcription</i>	<i>Initial sub-codes derived from Interview 2 transcription</i>
Intimidation	Contractor	Challenging commercial environment and dilemma	Circumvent uncertainties	Challenging commercial environment and dilemma	Contractor	Intimidation
Prejudice within the industry						Prejudice within the industry
Closed market transition						Closed market transition
Financial distress						Financial distress
Cost and time						Cost and time
						Domino effects
						Economic pressure
					Employer	Sub-standard work and non-performant

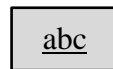



						Ali Baba culture
				<u>Conflicts</u>	Deteriorating relationships	
	Strong assertion of right	Assertiveness	Conflict management	Assertiveness	Strong assertion of right	
	Emotional				Emotional	
				<u>Unassertiveness</u>	Give in	
	Inequality bargaining power	Superior's authority	Hierarchy and power	Non-confrontational	Inequality bargaining power	
	Decision making				Decision making	
	Deference	Superior-subordinate relationship		Solution oriented	Deference	
			Conflict of interest			
	Positive outlook	Industry's responses	Security of Payment Regime and Adjudication	Industry's responses	Positive outlook	
		Natural justice and impartiality			<u>Adjudicator</u>	Background and expertise

						Natural justice and impartiality
					<u>Improvement strategies</u>	Proper record keeping and documentation

Note:-

 The shaded area with normal words denotes additional new codes emerged from the analysis of current interview

 The shaded area with underlined words indicates that either it is a new code or concept emerging from current interview or the promotion / demotion of initial codes in level 1 to a higher level of abstraction where more codes are available and added after the analysis of current interview

 The cross shaded area indicated the additional code emerged in the subsequent interview that were not exists in the previous interview

#### iv) Refining themes

Refining themes and the relationship between them is an important part of the analytical process. The themes that were devised will be part of the coherent set that will provide the researcher with a well-structured analytical framework to pursue for next analysis. Themes development was largely a mental-development process, as the researcher re-read and re-organised the data. As the researcher began to develop themes, coded data extracts were reorganised under the relevant theme or concept. This helps the researcher to evaluate whether these coded data are meaningful to one another within their theme and whether themes are meaningful in relation to one another in the data set. As the researcher continued to examine the data set, the codes used, and the themes devised to organise the coded data to test the hypotheses were further refined and the relationship between them was revised.

#### **6.6.2 *Pattern Matching Analysis***

Hak and Dul (2009) defined pattern matching as the comparison of two patterns to determine whether they match or not. Pattern matching is the core procedure of theory-testing with cases. Testing consists of matching an *observed pattern* with an *expected pattern* – a proposition and deciding whether these patterns match – resulting in a confirmation of the proposition, or do not match – resulting in disconfirmation of the hypothesis. Essentially, Hak and Dul (2009) recognised that in pattern matching, as opposed to *pattern recognition* – a procedure by which theory is produced, the expected pattern is precisely specified before the matching takes place.

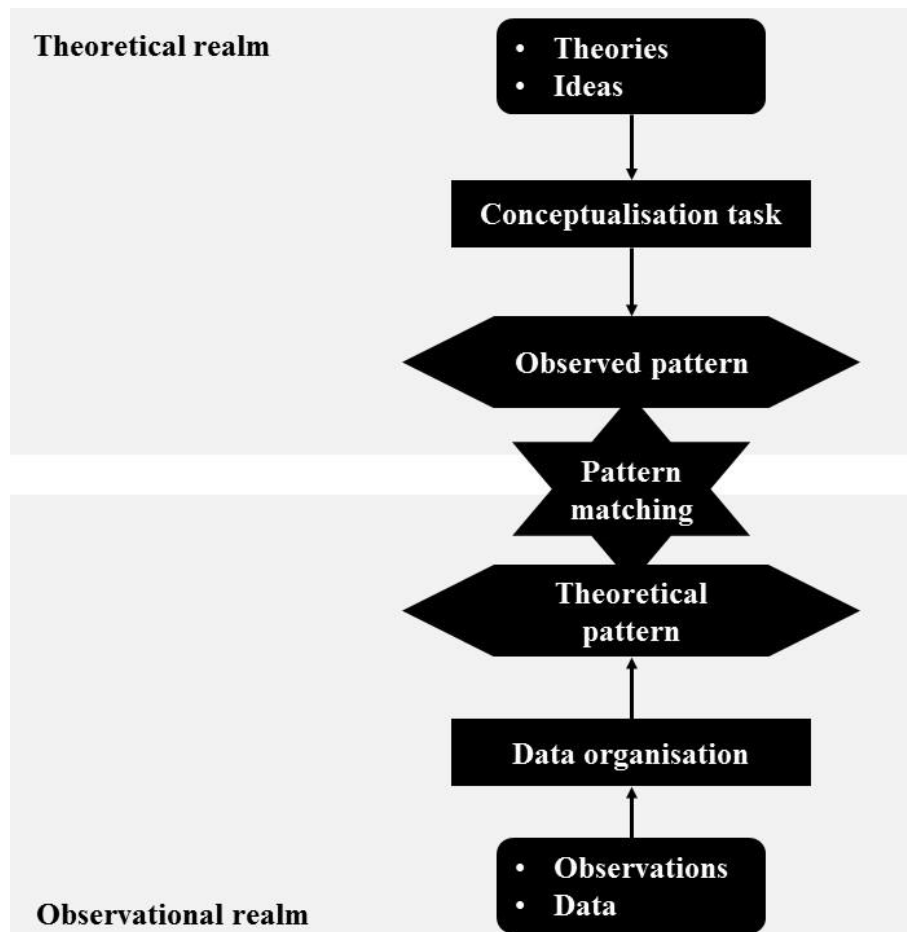
Campbell (1975) labelled the term pattern identification as a characteristic of qualitative analysis that he defined as holistic – analysing the pattern, rather than atomistic – analysing the components. He further argued that the single case study design could provide a strong test of a theory if an entire set of expectations is deduced from that theory, which together would constitute an expected pattern, could be shown to be true in the case. He believed that qualitative analysis in this design tends to disconfirm rather than confirm a prior belief because of the requirement that, in the test, each separate element of a pattern that is observed exactly as expected.

a) *Approach to pattern matching analysis*

In qualitative research, pattern matching lies at the core of the attempt to conduct thematic analysis (Trochim, 1989). According to Trochim (1985), pattern matching involves an attempt to match two patterns where one is a theoretical pattern and the other is an observed one. In Figure 15, the top area of the figure illustrates the realm of theory. In this study, the theory originates from a formal tradition of theorising combined with the researcher's ideas. The conceptualisation task involves the translation of these theories and ideas into a specifiable pattern indicated by the top part in the form of research propositions.

The bottom part of the figure shows the observational realm. This is widely meant to include direct observation and data collected from the field. The collection of the data and organisation of relevant operationalisation relevant to theoretical pattern is termed as observational pattern, as shown in the lower area of the figure. The inferential task involves the attempt to relate, link, or match these two patterns as indicated by the arrows in the figure. To the extent that the patterns match, the researcher can conclude that the theory predicting the observed pattern receives support.

However, the underlying assumption is that it is not possible for the researcher to fully equate what is observed with an objective reality. For this reason, the pattern match is not simply performed between theories and facts, but between different levels of theories (Lakatos, 1970, Wible & Sedgley, 1999). The general purpose of this stage is to make implicit mental models as explicit as possible.



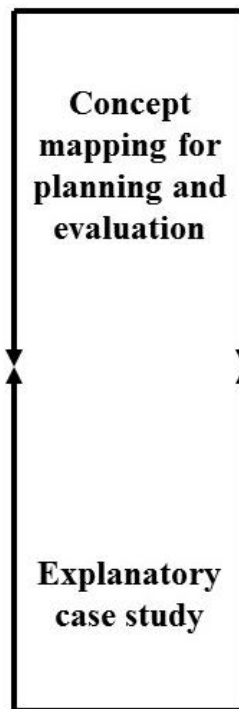
**Figure 15: Pattern matching analysis framework**

Source: Trochim, W. M. (1989). Outcome pattern matching and program theory. *Evaluation and program planning*, 12(4), 355-366.

*b) Application of pattern matching analysis*

As illustrated in Figure 16, the study adopts full pattern matching, a category of method that embodies all stages of the general pattern-patching process (represented by the bold arrows) namely initial theorising, conceptualising, defining and specifying theoretical patterns, and matching the expected patterns with the observed data (Trochim, 1989). This application is chosen because it is best suited to studies whose goal is to examine causal relationships and build explanations. The emphasis is on a very rigorous research design, with as much conceptualisation and operationalisation prior to data collection as possible (Sinkovics, 2018). The study has constructed alternative explanations before data collection is carried out. This is to ensure it establishes causality and the validity of the causality.

**Theoretical realm**



**Observational realm**

**Figure 16: Full pattern matching in qualitative research**

Source: Wible, James R. and Norman H. III Sedgley (1999), "The role of econometrics in the neoclassical research program," in *What do economists know?: New economics of knowledge*, Robert F. Garnett (Ed.). London; New York: Routledge, 169-190.

This study focuses on developing explanations to understand the influence of national culture on the compatibility of an adversarial dispute resolution mechanism in the Malaysian construction industry. It sets out to answer the research question of: why the Malaysian construction players, contrary to Asian core values, choose to deploy an adversarial dispute resolution mechanism like adjudication to resolve construction disputes.

The unit of analysis for this study as specified earlier is the national culture of the Malaysian construction players. The study uses the introduction of statutory adjudication regime in Malaysia as the unique single case study. The data collection was guided by a protocol and comprised interviews.

### **6.6.3 Explanation Building**

To achieve the aim of the study, a qualitative inquiry single case study of the Malaysian adjudication regime is adopted to understand the compatibility of the implementation of a Western-style and adversarial statutory regime with national culture in the Malaysian construction industry setting. Applying the similar analogy in experimenting, this study treats the Malaysian adjudication regime as an individual case, like a laboratory investigator selecting the topic of a new experiment. Under this mode, the study aims to achieve analytic generalisation, which, according to Yin (1994), utilises previously developed theory to be used as a template to compare the empirical result of the case study striving to generalise a particular set of results to a broader theory. This study aims to establish analytic generalisation on the influence of national culture on the compatibility of an adversarial dispute resolution mechanism in the Malaysian construction industry.

In discussing socially constructed knowledge claim – constructivism, Crotty (1998) identified the assumption that humans engage with their world and make sense of it based on historical and social perspective – that we are all born into a world of meaning bestowed upon us by our culture. Thus, the adoption of qualitative approach is seen to be one of the strengths in conducting this study as it allows the researcher to understand the context or setting of the participant by visiting this context and gathering information personally (Creswell, 2013a).

Case study research strategy refers to describing a particular occurrence to reach a conclusion about a certain phenomenon (Myers, 2013). According to Yin (2014), a case study research strategy is an inquiry that investigates a certain phenomenon in its real-life context, to lift off the boundaries between that phenomenon and its context. Because the nature of the main aim is to investigate why events occurred in the way they did, this type seeks to analyse the inter-linked actions that impacted the events that occurred.

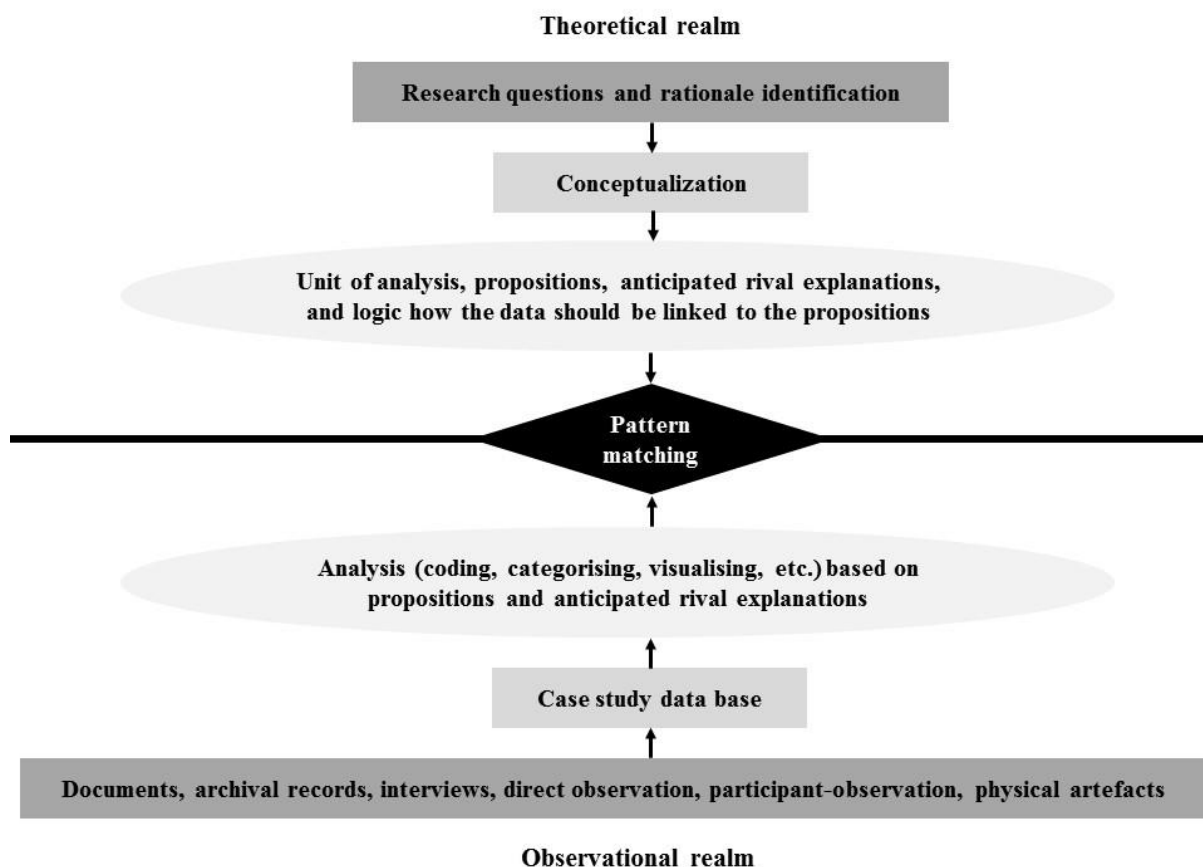
In searching for the explanation, the researcher identified the factors that caused the construction parties to prefer deploying adjudication as a means to resolve disputes and why one might have chosen such action in question rather than another. This process is to develop contrastive explanation. According to Belk (2010), contrastive explanation takes two forms. Firstly, it may show that one explanation of a given situation is preferable to some other explanation. Alternatively, it may show why one state of affairs occurs rather than some other state of affairs. Applying the latter conceptual consideration of contrastive explanation, this study chooses to investigate and create explanations to understand the contradicting phenomenon happening in the Malaysian construction industry.

The early part of this chapter described the dispute resolution from the national culture perspective base with reference to the Hofstede's theoretical framework which incorporates primarily from individualism/collectivism theme. It has demonstrated how this knowledge, in turn, indicates the importance of culture-specific themes in understanding the compatibility of a dispute resolution within a particular country. According to this view, the recent introduction of Western-style statutory adjudication regime in Malaysia might be considered to be a poor cultural fit. This provides motivations for the current study to explore the complexity of the influence of national culture on dispute resolution processes. This theoretical framework will be the main vehicle in pursuing the aim of this study.

In attempting to explain a particular event, the analyst cannot simply describe a full state of the world leading up to that event (Allison, 1971). For this argument, the study accepts Hempel's (1965) characterisation of the logical explanation that the logic of explanation requires singling out the relevant, critical determinants of the occurrence, the junctures at which particular factors produced one state of the world rather than another. A scientific understanding of causality is "mechanical" – effect naturally follows cause (Belk, 2010). However, Belk (2010) opined that such a deductive-nomological example or known as scientific explanation is normally not feasible to understand the state of human affairs as human actions result from ideas and free will.

As a result, the main mode of reasoning in explanatory case study is inferential and inductive rather than deductive, and causation is construed more broadly. The researcher will need to identify actions or ideas that have a strong causal influence on subsequent events as causes. This is somewhat critical for the researcher to summarise the various factors as they have bearing on the occurrences. Figure 17 illustrates the logic of the previous analytic step of pattern matching in line with its application in an explanatory case study design.





**Figure 17: The logic of pattern matching and its application in case study design**

Source: Trochim, W. M. (1989). Outcome pattern matching and program theory. *Evaluation and program planning*, 12(4), 355-366.

## 6.7 Summary

This chapter has discussed extensively the methodologies and strategies adopted in the current research. Throughout the chapter, it is emphasised the key notion regarding the research design, namely that the adopted methodology should be appropriate to the study to meet its objective and achieve the research aim.

The starting point of the research methodology design was to identify the researcher's position regarding its philosophy and its position regarding the nature of reality. This refers to the choice of ontological, epistemological, and axiological position. The researcher believes that reality is socially constructed and subjective. Approaches to the concept and study of culture have varied between academic disciplines, and sometimes even within them. Culture thus can be whatever a scholar decides it should, with a clear operationalisation of each

approach. In line with this, phenomenological paradigm is adopted because the researcher believes that culture can be described by how human beings experienced.

As this research chooses to deal with subjective data, it will adopt a qualitative research approach. The research does not intend to make a generalisation based on precise numerical measure, but rather to gain insights into the preferable method of dispute resolution in construction by participants of the study and why the method chosen is the most appropriate one from the cultural point of view. Furthermore, the study also attempts to critically examine the impact of national culture on conflict management and dispute resolution of the Malaysian construction parties, which has also determined the choice of qualitative paradigm of the study.

Methodology also requires selection of the appropriate methods of data collection and data analysis. The researcher adopts an in-depth semi-structured interview as the primary data collection tool as this study investigates perceptions and opinions, rather than just mere facts and figures. The author formulates the interview questions based on the interrogation on some of the theories and assumptions that were relevant to the achieve the research aim and objectives.

The researcher will then analyse the data in three stages, namely – thematic analysis, pattern matching and explanation building. Thematic analysis is a vital method of qualitative data as it focuses on identifying patterned meaning across the data set. Once the pattern of data is identified, the research will then move forward to the next analysis method – pattern matching. At this stage, the research will attempt to link the two patterns where one is a theoretical pattern of formulated in the research propositions to the observed and operational ones from the data collection. The purpose of this stage is to explore whether the observed pattern is consistent with the predicted theories in the research propositions. The third technique of analysis adopted in this study is explanation building. This step is an attempt to explain a phenomenon discovered from the pattern matching stage.

The following chapter presents the collection of data and analysis of the qualitative data gathered during the in-depth interviews through thematic analysis.

# **CHAPTER 7**

## **Thematic Analysis**

## 7.1 Introduction

This chapter delineates the results of in-depth interviews conducted with the construction stakeholders and key adjudication practitioners in Malaysia that consist of adjudicators, contractors and clients with key expertise ranging from architects, engineers, lawyers and quantity surveyor. Presenting the participant's own words and opinions, this chapter captures their experiences in the exercise of adjudication and their perceptions of cultural issues facing the adoption of adjudication in the construction industry.

Chapter 7 also serves the first of the overall analysis strategy of the study. It is to prepare to look for patterns, themes that occur across the data. In this chapter, the coding process of the qualitative data of interview transcription to identify themes and pattern for further analysis in Chapter 8.

## 7.2 Thematic Analysis

A total of six themes emerged related to the influence of national culture on the implementation of adjudication in Malaysia. Due to the sheer amount of data and the abstract nature of the thinking process, it is deemed that the analysis is sufficient to depict the rigours of the analytical process. It provides adequate information to the main research issue under investigation. There are sufficient conceptual details and descriptive quotations to give the reader a comprehensive and holistic understanding of the themes discovered. The themes identified are "*Group Aspect*", "*Conflict Management*", "*Hierarchy and Power*", "*Circumvent Uncertainties*", "*Security of Payment Regime and Adjudication*", and "*Construction Contract Management*".

All themes are collectively presented in Table 20 to provide a general overview of the findings. Additionally, each of the themes is individually described to explain the way it emerged from the concepts, codes, and sub-codes in the succeeding sections. The six themes were later used to reveal the pattern to be tested with the research propositions. It is important to test the proposition against the emerged data to seek alternative explanations and negative example that do not conform to the pattern of the propositions. Alternative explanations usually exist, and only by testing the propositions identified that the researcher will be able to move towards the conclusion and formulate an explanatory theory (Saunders et al., 2009). To avoid a lengthy presentation of this chapter, all interview transcriptions addressing each of the themes, sub-themes, concept, and codes of the analysis are coded and enclosed in Appendix F.

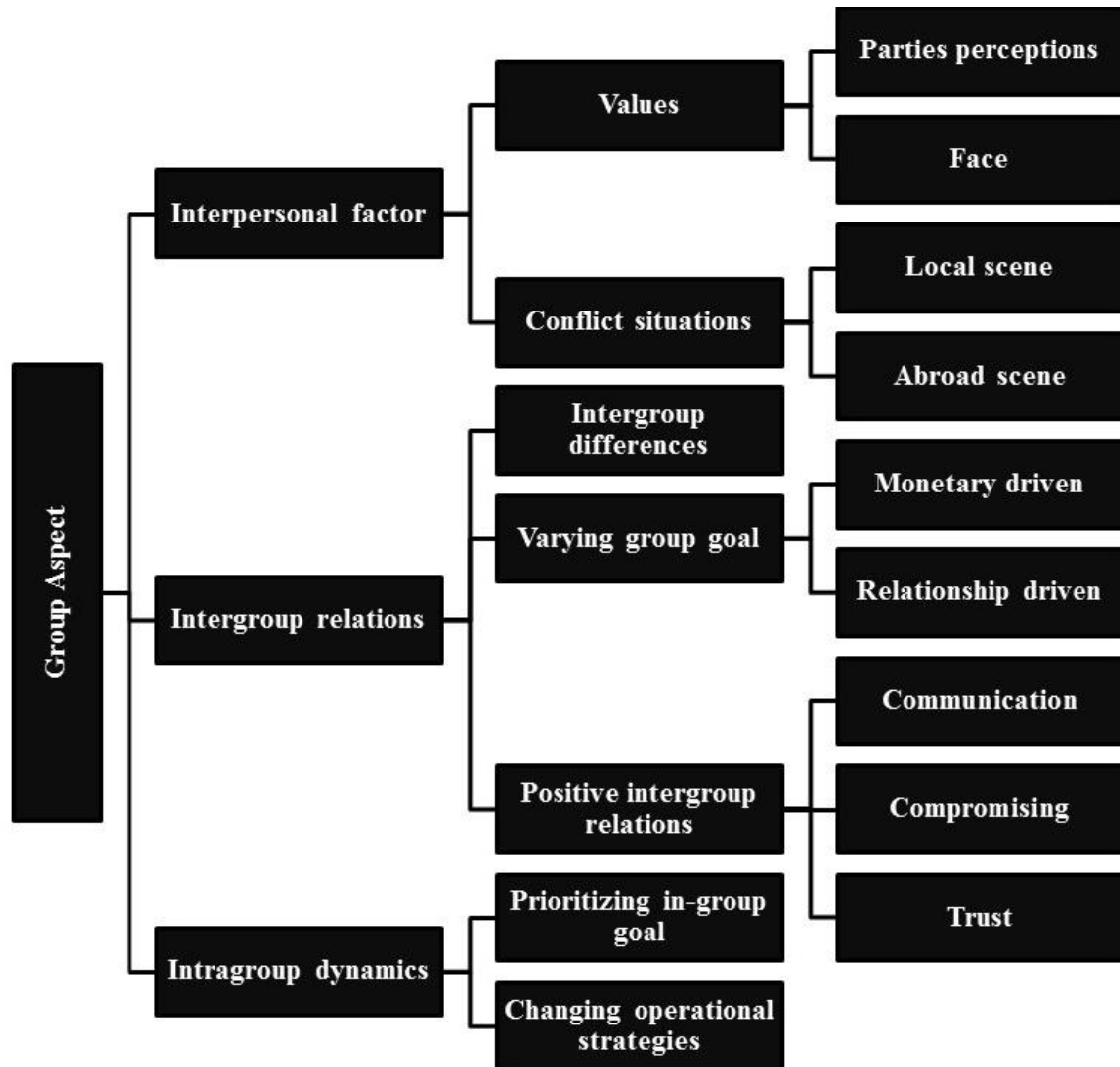
**Table 20 Summary of findings**

<i>Themes</i>	<i>Sub-themes</i>	<i>Concept</i>	<i>Codes</i>
<b>Group Aspect</b>	Interpersonal factor	Values	Parties perceptions
			Face
		Conflict Situations	Local scene
			Abroad scene
	Intergroup relations	Intergroup differences	
		Varying group goal	Monetary driven
			Relationship driven
		Positive intergroup relations	Communication
			Compromising
	Intragroup dynamics	Prioritising in-group goal	
		Changing operational strategies	
<b>Conflict Management</b>	Aggressive	Strong assertion of right	
		Emotional	
		Opportunism	
	Passive	Give in	
		Avoidance	
	Solution-oriented	Negotiation	
		Mediation	
	Conflict strategies	Claim handling technique	
		Dispute Settlement	

<b>Hierarchy and Power</b>	Superior's authority	Master-servant attitudes	
		Inequality of bargaining power	
		Decision making	
	Superior-subordinate relationship	Evaluation of position	
		Deference	
		Conflict of interest	
<b>Circumvent Uncertainties</b>	Contractor's perspectives	Intimidations	
		Closed market	
		Financial distress and economic pressure	
		Domino effects	
		High competition	
		Hesitation	
		Late and non-payment	
	Employer's perspectives	Sub-standard work and non-performant	
		Sub-contracting Structure	
		Cost constraint	
	Shared struggles and dilemma	Deteriorating relationships	
		Cost and time	
		Privacy	
		Political patronage	
		Losing	
	Industry's responses	Positive outlook	

<b>Security of Payment and Adjudication Regime</b>		Scepticism	
	Challenges	Manipulation	
		Limitations	
		Formality	Roles of the lawyers
	Adjudicator	Natural justice and impartiality	
		Background and expertise	
<b>Construction Contract Management</b>	Dispute resolution clause		
	Dispute settlement phase	Formal	
		Informal	
	Contractual claim	Claim minded	
		Merit of claim	

### 7.3 Theme 1: Group Aspect



**Figure 18: Theme 1 – Group aspect**

Figure 18 illustrates the categories that have been grouped together under this theme. Every organisation is a collective formation, which consists of diverse people, their values, behaviours, and attitudes together with relations to one another. Within construction, large organisations of a project are made up of many groups of stakeholders. It would not be possible to achieve the objectives of the successfulness of the project completion without the existence of consultants, contractor, sub-contractors, and suppliers groups. The scale and complexity of construction activity requires it to be broken down into manageable chunks of activity.

However, such groupings tend to focus their attention and resources inwards of the activity, perspectives, and needs of their group rather than the overall activity of the organisation. In construction, the significance of groups is that they are achievement-oriented



and provide competitive advantage. Nevertheless, the formation of group can lead to other behaviours emerging because these organisations develop a degree of independence from other organisations and could face difficulties in directions and control. As one respondent stated, in extreme cases in dispute, they can become hostile to the management of the whole project organisation.

*TI (1)*

Respondents also agree that a positive functionality of group network can be the key to a successful dispute resolution process.

*TI (2)*

*TI (3)*

### **7.3.1 *Interpersonal Factor***

Interpersonal factor comes down to individual differences by the way in which factors such as values, attitudes and perception differ from one individual with another. It is believed that these differences also play a part in the essence of conflict management and dispute resolution because humans are different, and no two individuals are completely alike.

One respondent believes that empathy can be a key to conflict resolution. Although it is difficult to have a sensible conversation when an individual is frustrated, project leaders therefore need to get the conversation in a calmer mood and collaborative basis to reach a common understanding and work towards sensibly resolving the conflict.

*TI (4)*

Deciding when to take more serious action to recover payment can be tough. One respondent believes that difficulty in deciding to embark on adjudication when chasing debt is a typical reaction by any individuals or parties regardless of boundary of any countries or nations.

*TI (5)*

The role of society and its system of values and norms plays a role in building its legal structure, legal process and the interaction of the law in societal change and social control. One respondent note that if a legal structure is placed under an unfit society, there is a danger that it

could undermine the potential of the system to be working effectively. When the respondent was asked whether or not she thinks CIPAA has a suitable place within the Malaysian construction players, she was sceptical if CIPAA could operate to its full functional means given there are opportunistic parties who will find ways to manipulate the mechanism for their own deceitful needs.

*T1 (6)*

Another respondent also believes that the successfulness of the mechanism depends on the user and his/her personality. Determinant of personality has several origins. The respondent notes that the upbringing environment of a person like family influences, cultural influences, education influences and other environmental forces shapes a person's personality, thus affecting their style of conflict management.

*T1 (7)*

*a) Values*

Another source of individual differences is values. Values are learned by individuals as they grow older and mature. Cultures, societies and organisations shape values. Businesses have shown increasing interest in values over the recent years. This interest goes along with the emphasis on ethics in the working environment. As values are general beliefs about right and wrong, they form the basis for ethical behaviour.

Many respondents make references of how Asian values play important roles in shaping the parties' behaviour while dealing with disputes in the construction field. The Malaysian population is an amalgamation of different ethnic cultures. The Chinese forms the second largest ethnic group and race, comprising nearly a quarter of the Malaysian population, after the Malays. Today, there is a significant presence of Malaysian Chinese in the country's commerce and business sectors.

One respondent offers a simple example of how traditional Malaysian Chinese contractor would normally form their agreement back in the 90s. Although the practice of oral agreement is no longer established in Malaysia, it presents an illustration of how cultural values were deeply ingrained among Chinese Malaysian contractors and how they shaped their business practice.

*TI (8)*

The importance, practice and structure of Chinese relationships is not only a legacy inside the China. Even if the importance of relationships has been emphasised during the centrally planned economy in the China, similar relationship structure exists and has always existed in Chinese communities outside China. Thus, *guanxi* and the importance of relationships too have their origins deep in the Chinese culture that normally exists among Malaysians. However, because of the Western influence, industrialisation and the impact of modernisation, it is essential to bear in mind that the cultural orientation of a Chinese Malaysian is not necessarily the same as that of Chinese people from China.

*TI (9)*

*TI (10)*

The concept of *guanxi* in Chinese context has a deeper cultural concept that is not only limited to human relationship from the purely social perspective but also extended to business networks. One respondent was asked if the initiation of CIPAA by one party could result in adverse effects on the maintenance of his/her organization's *guanxi* with the other party. She believes that it is not the intention of the Act to result in bad *guanxi* among the parties, but because Malaysians put very high emphasis on relationship-building, such action can cause discomfort for the parties to work cooperatively to resolve the dispute.

*TI (11)*

She further believes that mediation is preferred as it can help parties to avoid the risk of win-loss situation. When goodwill exists between the parties, mediation, being non-adversarial, helps promote amicable settlements and preserves business relationships. This is because parties in mediation retain control over their positions and can walk away or take time to reconsider the situation.

*TI (12)*

However, one respondent with years of experience working in international contract does not believe that cultural factor has very much impact on the way business is conducted in Malaysia, particularly when parties have dispute in regard to non-payment issue.

*TI (13)*

i) Parties perceptions

Perception involves the way we view the world around us. Social perception is the process of interpreting information about another person. Many activities rely on perceptions. Direct experience with the attitude of another party is a powerful influence of perceptions formed. A respondent explains that tailoring your actions based on perceptions created towards different attitudes of humans at work is an important managerial skill that can improve conflict management.

*TI (14)*

ii) Face

Face is a sociological concept that refers to self-image, dignity or prestige in social contexts. In conflicts, when one's face is threatened, the person will tend to save or restore his/her face. To save face means to preserve one's reputation, credibility or dignity and this is often achieved by avoiding actions or situations that may result in shame. Along with other Asian countries, Malaysia is known to be a face-saving culture.

*TI (15)*

Face-saving has allowed parties to maintain harmonious relationships most of the time. The desire to save face is so prevalent in Malaysians that subordinates are expected to or often feel hesitant to speak up in front of those deemed to be superior or with higher authority, even when they wanted to do so.

*TI (16)*

Additionally, the face-saving culture is also found to be the reason why Malaysian parties feel reluctant to resort to legal action to help them resolve disputes. Being a collectivist society, feelings of shame can be felt at the individual level as well as the collective level. In this way, actions of one party can affect the reputation of the project group they belong to. Some parties often struggle as they do not prefer to stand out by initiating adjudication against their employer as it will expose the employer to losing face. The influence of face saving also has deterred the parties to seek for external help. One respondent describes that the struggle intensifies when the parties cannot bear to work cooperatively with their employer but having dispute with them at the same time.

*T1 (17)*

*T1 (18)*

It is still unclear why mediation has a low up-take in the Malaysian construction industry. Although the concept of face saving is closely associated with mediation, parties seldom adopt the mechanism as a means to resolve their disputes. Many scholars predict that Malaysia has a cultural attribute that prefers mediation. However, this position might overlook the fact that because of their group value, their attitude is different towards opponents who are in-group or out-group members when dealing with conflicts, particularly when conflict has become fully-fledged.

*T1 (19)*

At other times, this can escalate into situations that breed dishonesty. The Malaysian parties can be so focused on projecting a competent and respectable image of themselves at work that when these values are threatened, the parties automatically shift into face-saving mode even if it involves some deception.

*T1 (20)*

*b) Conflict situations*

This clearly characterises a "win-lose" approach. This thinking suggests that the other is in the wrong, that their position is unreasonable, and that they are out to take advantage. Emotion takes on a large role in the process and reinforces the "under siege" mentality and willingness to fight to win. It is unfortunate, but some organisations may consider such an approach as competition and reward it. This has powerful implications for internal working relationships as it diminishes trust and cooperation while encouraging in-fighting. Overall, this approach tends to be counter-productive to the overall well-being of the organisation.

Although culture is an essential part of dispute resolution, a respondent opines that human reactions towards dispute know no national boundaries. When a party is in dispute with other, frustration often results. A respondent explains that it is a common defensive mechanism that parties will resort to fix the dispute and fix the dysfunctional behaviour that he perceives will not solve the dispute.

*T1 (21)*

In Malaysia, one single construction project is often sub-let to many subcontractors. However, it is also common that a single subcontractor can contribute more than 50% and can have as much as 90% portion of the total work value to a construction project. A respondent also states that because the Malaysian construction industry practices a distinctive sub-contracting method, it has become one of the major problems of project dispute.

*TI (22)*

i) Local scene

Generally, every construction project has a standard contract form which will express all the contracting parties' intention and provision. In Malaysia, contract administration revolves around the pre-construction stage, construction stage, and post-construction stage. A respondent notes that the appreciation on the importance of contract is different by international parties. A number of core provisions will need to be addressed by foreign parties in most Malaysian construction and engineering contracts to protect the interest of their members.

*TI (23)*

Malaysian construction parties do not prefer a direct and confrontational style when dealing with disputes against their business partners. Several respondents confirm this and explain that the parties would rather choose a more soothing and informal ways in talking out the dispute over casual meetings to reach for an amicable solution. One respondent states that even though Singapore and Malaysia historically share the same root of cultural values, they still greatly differ in their preferences of conflict management style.

*TI (24)*

Another respondent notes that the differences can be attributed to the level of professionalism and ethics widely practiced by Singaporean contractual parties. Unsatisfactory level of professionalism by some construction players is found to be the root cause of dispute widely spread within the local industry.

*TI (25)*

Similarly, a respondent explained that a direct adversarial method like adjudication is the least preferable method of dealing with disputes because some Malaysian parties tend to

take the workplace dispute to the extent of personal dissatisfaction. It can result in behaviours such as emotional withdrawal, dissolution of personal relations and aggression.

*TI (26)*

Because the nature of some relationship arrangement between the employer and contractor through alliance contracting is seldom clearly documented, one respondent opines that it poses a great barrier for the industry to improve the level of professionalism. One problem with selective tendering is that the standards or reasons for selection of the companies are unclear, so that the discretionary power of the ordering party is too great.

*TI (27)*

The importance of adoption of a new practice like adjudication to improve the current work system in the Malaysian construction industry is widely recognised. Since the early studies of this shift, the problem of transferability of the adjudication model has been a central debate. One respondent feels that due consideration needs to be made on the impact of culture variable on the adoption of the new legal structure.

*TI (28)*

*TI (29)*

ii) Abroad scene

So far, the study has focused on some illustrations on the current state of conflict, disputes and adjudication in Malaysia. This section will draw a few descriptions by the experience and observation by the respondents on the issue of national culture and the implementation of adversarial dispute resolution mechanisms in other Asian countries.

Previously, one respondent discussed how international contracting parties, particularly from China, normally treat the sovereignty of construction contract that differs from the local contracting parties. Another respondent also confirms his view that parties are often caught in disputes because foreign contractors fail to understand the prevailing culture that results in a different local business ethics.

*TI (30)*

Respondents also observe the cultural differences of parties' conflict management styles. One respondent says his experience working as an engineer abroad has shown him that people from different cultures are more confrontational than Malaysian parties. Parties often resort to direct ways of dealing with dispute and feel comfortable in resorting to a formal method to fix the dispute. He further explains that this kind of situation is a norm there that parties are optimistic in solving the dispute and moving on with the work.

*T1 (31)*

*T1 (32)*

In comparing with the Malaysian parties, respondents explain that Singaporean is believed to have relatively higher level of professionalism and work ethics. Due to this proficiency, adjudication is more appropriate and suitable for the Singaporean parties as a means to resolve disputes because parties are more open-minded and solution-oriented in fixing the dysfunctional problems. Additionally, alternate explanation also suggests that because Singapore is considered more Westernized, the Singaporean parties tend to prefer to be more direct and confrontational when dealing with disputes. However, the pattern is believed to be complicated. Some examples are shown below.

*T1 (33)*

*T1 (34)*

*T1(35)*

### **7.3.2 Intergroup Relations**

Due to the possibly large number of people involved in the construction process and their differing organisational goals and objectives, the potential for variation, external factors, changed conditions, and diverse expectations all set the stage for potential miscommunication, misunderstanding, and ultimately conflict. Intergroup relations refer to interactions between individuals in different groups and interactions that take place between the groups themselves collectively, such as between contractors-consultants, consultants-employers, and contractor-employer

Intergroup cooperation is essential to the effective functioning of complex organisations. However, because intergroup functioning is so embedded within itself, it is



exposed to the risk of undermining intergroup cooperation, thus making it more difficult to achieve and sustain among the groups within the organization. A respondent emphasises the importance of connection and cooperation between intergroup relations.

*T1 (36)*

Respondents describe that it is important for members of the group to shift away from destructive hostility and aim for constructive cooperation.

*T1 (37)*

A respondent also makes references to the importance of making acquaintances with the “inside” people, in order to be awarded with the tenders.

*T1 (38)*

A respondent also opines that intergroup differences can be facilitate where there is a collaborative contact exists for intergroup relations. The most conventional strategy is through working cooperatively to achieve a common goal and also the additional critical factor of potential friendship to develop beyond the interaction itself. Through these, harmony is said to occur through direct contact between opposing group members with the presence of core comprising conditions.

*T1 (39)*

A respondent comments that at the point of conflict assessment, the intergroup relation has become even more challenging to maintain a collaborative mood when the members of outgroup has more superiority, including entitlement and having a special objective.

*T1 (40)*

*T1 (41)*

*a) Intergroup differences*

It can be suggested that intergroup differences where the behaviour of members of each group is usually competitive with people favouring their own group over outgroup that sometimes can become hostile and highly destructive. Intergroup conflict becomes negative

when it escalates to the point where parties feel defeated, a climate of distrust and suspicion hence develops.

At the group level, the worldview of suspicion and distrust focuses specifically on the perspective that outgroups are untrustworthy and have undesirable intentions towards the ingroup. Even when such hostility does not exist, this suspicion can breed into distrust and can cause group members to see the behaviour by the outgroup as vindictive. As one respondent illustrates:

*T1 (42)*

Group categorisation is generally suggested to be even more competitive and aggressive than individual level. Group conflict can easily enter into escalating spiral hostility marked by polarisation of views between black and white with comparable reasons and actions views in directly opposite ways. A respondent describes that the nature of adjudication is increasing the tension between the parties.

*T1 (43)*

Given the differentiation that exists in construction business companies and the challenges, the integration and coordination of different groups within a project organisation can be a challenging process. Rather than thinking in terms of resolving or eliminating such conflicts, the groups found a number of different ways in which they deal with conflict. As one respondent illustrates, parties with bigger outweighing interest over the dispute often choose to take an immediate approach of compromising in which they aim to reach a middle-ground position that reflects mutual sacrifices.

*T1 (44)*

*T1 (45)*

Direct and adversarial method is described as an assertive mode of conflict style in which the group attempts to achieve their own goals at the expense of the other. The competitive method among the groups can lead to poor overall performance when competition changes to open conflict and results in decreased performance. However, it is not necessary to see the adversarial method from a negative light. The respondent explains that when the outcome of the conflict is critical and it cannot be compromised, priority becomes different and direct confrontational method is deemed to be appropriate as parties see that being right matters more than preserving the relationship with the other party.

*T1 (46)*

*T1 (47)*

*b) Varying group goal*

When groups need to cooperate, this is a frequent source of conflict. Differing goals, objectives and internal environment of groups are also a potential source of conflict, especially when task and element function differs. A reason for this hostility is the bringing together of two quite separate constructional functions. When these goals are competitive, hostility becomes evident and negative impression of the out-group and negative effects towards the out-group arise. On the other hand, when groups need each other to achieve an important common and collaborative goal, positive spirits towards the out-group spring up.

*T1 (48)*

Inter-group aggression can arise as a result of conflicting goals and competition as well as illustration for the feelings of prejudice and discrimination toward the out-group that accompany the aggression. A respondent opines that feelings of resentment can arise in the situation where the parties see the competition especially in monetary form. Hostility arises especially when the parties see the dispute as zero sum-fate, in which only one group is the winner.

*T1 (49)*

Cost overburden is a significant financial burden to a subcontractor. Although operating at a lower expense and a smaller scale, a subcontractor generally performs a greater skill than the general contractor could. Hence, a respondent comments that because this group is heavily cash flow-dependent, the primary goal of the group typically is in terms of money rather than any other interests.

*T1 (50)*

*i) Monetary driven*

A common business goal is to attain profitable operation, which typically means increasing revenues while minimising expenses. Construction projects require an extensive

outlay of labour and material resources. Thus, securing ample finance for upcoming works is a goal that a typical contractor cannot afford to fall short of. Thus, because the growing nature of construction business is extremely risky, the respondents state that parties will not underestimate the risk of monetary loss over the preservation of relationship.

*TI (51)*

*TI (52)*

Intergroup relations is also found to be consistently and negatively associated with a range of prejudice measures. A respondent explains that his company's relationship with the client is often characterised by distrust, corresponding with feelings of suspicion and a lack of confidence in his companies' good intentions.

*TI (53)*

The prevalence of intense competition among construction players, especially when the bulk of the slowdown came from the property sector, notably the residential and commercial segments, can prove to lead to substantial anxiety as the parties are unsure of the unforeseen future.

*TI (54)*

ii) Relationship driven

Communality is a spirit of cooperation and belonging arising from common interests and goals. Another important early goal for a new construction company is building relationships with clients. In the construction industry, the quality of the business relationship that the parties develop is believed to have a significant influence on the company success. A respondent repeatedly highlights the necessary for parties to aim for a win-win solution when facing disputes.

*TI (55)*

Establishing integrity and trust is essential to the success of construction project. A respondent notes that at the beginning of projects, parties must show they always act in good faith. Without this fundamental understanding, fear, distrust, suspicion and defensiveness affect the start-up of the business relationship.

*T1 (56)*

A respondent also states that everyone must overcome several obstacles including the cost, schedule and unforeseen conditions. The groups need to collaborate and work against these variables, not against each other. This close collaboration becomes a team effort from the beginning and the players work more efficiently to achieve shared goals.

*T1 (57)*

Every construction employer wants to work with a contractor who has integrity, respects the project goals, collaborates, communicates and perform to the highest standard of quality. These in turn will develop trust and confidence in the employer. A respondent explains that performance will either solidify or destroy relationships in the long term. Employer will measure their level of confidence by the contractor's performance.

*T1 (58)*

Managing relationship with employer is vital as part of the process of establishing and maintaining strong rapport between the companies and their client base as a means of showing loyalty. The aim of this is to create a partnership spirit between parties and employers rather than considering the relationship as merely transactional. Respondents state that by seeing the contractor respond to their needs, the employer will most likely to continue using their services.

Parties often feel uncomfortable when they have to deal with differences among people. Because of these differences, parties must face disagreements, arguments and even open conflict. A respondent expresses that because differences can complicate the job in many ways, it is important for him to handle them effectively. Irrational feelings such as anger, anxiety and fear are created through controversy and parties do not always recognise them. Thus, it is necessary that the party does not take critical attitude towards feelings.

*T1 (59)*

Relationship conflict focuses on personal incompatibilities and differences of opinions, with outcomes shown to be in lowering the performance of teams. A respondent notes that construction parties that are caught in relationship conflict experience cognitive functioning as their focus shifts to interpersonal conflicts, which restricts necessary functions for decision-making and creative thinking. As a result, parties become so focused on reducing the stress, which results in reduced information sharing, reduced commitment to the group and in turn less desire to participate actively in decisions and its implementation.

*T1 (60)*

As discussed earlier, *guanxi* pervades an apparent area of the Malaysian construction business process. *Guanxi* strategy is helpful for maintaining relationship driven process as part of the company's long-term goal, such as for negotiating prices and terms of payment. Respondent believes it is necessary for the construction stakeholders to recognise doing business in Malaysia is not just a matter of price and product, it takes a lot of tolerance and compromise. To succeed, stakeholders must rely on friendship and good personal relationships, which often takes time and patience to grow.

*T1 (61)*

c) *Positive intergroup relations*

Relationship management involves the process and strategy of continuing a level of engagement between an organisation and its target such as employer base, stakeholders and competitors. Within construction, the rise of collaborative working mode such as joint venture, partnering, business alliance as well as supply chain collaboration, has increased the focus of collaborative elements of project organisations. Since the market in Malaysia has become increasingly stringent, many construction companies have shifted away from this belief and begin to overlook the importance of maintaining stakeholder relationships effectively.

*T1 (62)*

Communication between the groups in conflict usually breaks down. This can be critically dysfunctional as within a project organisation, sequential dependence or reciprocal interdependence among the parties is usually necessary.

*T1 (63)*

The quality of the relationship between constructions parties heavily depends on the quality of communication involved. A respondent states that developing a healthy and friendly project environment, in which everyone feels like their work and point-of-view is valued, can often be key to the success of a project.

*T1 (64)*

As discussed earlier, verbal agreement was widely practiced in Malaysia as a form of construction contract. Although forming an oral agreement is risky, the practice was widely adopted because previous business relationships were based on friendship among parties. Cross-group friendship is a form of contact that is especially effective in achieving positive feelings. This relation reinforces the link between the parties and reduces intergroup anxiety by removing threats to the groups' distinctiveness.

*TI (65)*

i) Communication

Communication has a big role in conflict management. It is observed that poor communication always results in misunderstanding and eventually conflicts. Respondents agree that to communicate the conflict effectively, they must be polite but convincing.

*TI (66)*

Inter-group bias generally refers to the tendency to evaluate the in-group or its members more favourably than the out-group and its members. In construction, mild form of bias is expressed by a participant who observes the large majority of interactions have the potential to become intergroup and chance for rivalry becomes salient.

*TI (67)*

Communication also reflects structural differences in power and authority attached to the society. Thus, some views by participants extrapolate that it is extremely difficult for people of different status in the organisation to communicate across a power hierarchy.

*TI (68)*

An atmosphere of negative communication can be extremely difficult for parties to recover from. Negative communication erodes trust. The longer negative communication can degrade the quality for communication and teamwork among the parties, the longer it takes for them to recover and to become productive. The following passage illustrates how parties experience a total communication breakdown and work disruption when dispute is at the peak point of hostility.

*TI (69)*

ii) Compromising

Compromise is a conventional way for resolving intergroup conflicts. Construction parties will compromise to try to find a solution that will at least partially satisfy everyone. This style is a balance between winning and a concern for the other party's needs. Respondents denote that for this to work, everyone is expected to give up something. A respondent comments that the compromising style is useful when the cost of conflict is lower than the cost of losing ground or face.

*T1 (70)*

Compromise is more desirable when the parties have a range of tangible outcomes and alternatives that are open for consideration such that the final decision is one that remains within the control for both parties. A respondent argues that when parties are able to truly listen and attempt to respectfully understand the position of the opposing party, they can often come to accept their agreement. The mutual acceptance of differences improves the prospect of a productive solution to the dispute.

*T1 (71)*

The respondent also opines that the need to compromise is essential especially when the value of maintaining relationship is more important than the tangible outcomes of the disagreement.

*T1 (72)*

*T1 (73)*

However, while compromise may produce an agreement, it does not always resolve problems that address the underlying conflict. This is because compromise is frequently an agreed resolution to a problem but not usually the optimal solution sought by either party. The passage below illustrates how compromising may generate a solution but not resolve the issues associated with the agreement. As a result, both parties in the dispute may continue to harbour ill feelings or other dissatisfactions can resurface again if parties continue to undermine and over-compromise the dispute over time.

*T1 (74)*



iii) Trust

Trust is a fundamental component of any social interaction. In construction contracting, trust has been generally understood as the willingness of project team members to share information. This description shows that the mutual dependence of contracting parties can foster a trusting environment appropriate for information sharing so that both can honour their commitments. The presence of trust is crucial to minimise the adversarial position of construction industry holistically. As a respondent explains below:

*T1 (75)*

Changing condition during construction phase of a project are common. In a distrusting environment, employer often assesses the submissions by the contractor with respect to claim submission with an opportunistic lens. Likewise, contractors always inflate their claim submission in anticipation of sceptical evaluation. As a respondent states, this scenario is extremely common in construction with dispute becoming the eventual outcome.

*T1 (76)*

*T1 (77)*

Trust that exists on calculus-based trust describes a rational choice perspective, where trust emerges when the trusting party perceives that the trusted party intends to perform an action beneficial to the trustor. From this perspective, trust emerges primarily by economic interest and often based on the existence of economic incentives for cooperation or breach of trust. This illustrates how economic conditions primarily shape the level of trust that exists among the Malaysian contracting parties as described by a respondent below.

*T1 (78)*

All these uncertainties make many clients feel vulnerable in relation to contractors, and also likewise. Parties are likely to concentrate on defending their position rather than focusing on building a more proactive co-operate relations within the project organisation. Major sources of conflict in construction projects are contractual claims for additional payment of work resulting from errors, omission and changes in the contract document. When dispute occurs, a respondent comments that it is undesirable for parties to rely on construction law for behavioural guidance if they wish to inspire trust.

*T1 (79)*

There is an optimal level of trust in each relationship. The more interdependency needed between the parties, the more trust is required so as to achieve efficiency. As a respondent states, trust has its cost, cost for building it, potential cost for breach of trust and costs of inefficiency related to excessive trust.

*T1 (80)*

Hence, the employer-contractor interaction suggests that a major problem with construction contract and procurement practices is that these tend to produce behaviours and attitudes that contradict intuitive cooperative relationship and trustworthy exchange.

### **7.3.3 *Intragroup Dynamics***

The term intragroup refers to affairs occurring within the group or internal community. Understanding intragroup dynamics can be useful in making sense of the behavioural process within the group that involves processes such as decision making, conflict management and tactical operating strategies. In construction, it is important to understand the dynamics within, regardless of the size of the group. Like every other company, a contractor must have a business strategy and an operating strategy. An operations strategy is a long-range plan for the operations function, and it frames how operations should be conducted to support business strategy. Typically applied at tactical level, it is often traceable as a pattern of decision. This subsection illustrates participants' excerpts on these issues.

*T1 (81)*

#### *a) Prioritising in-group goal*

Prioritisation is one of the key abilities all organisations must have to carry the sustainability of the companies towards success. Poor cash flow is notorious as being the biggest killer of business, which means keeping on top of it is crucial. Respondents explain that contractors always put their cash flow monitoring as one of their top priorities because it can help ensure the financial stability of their business. Their opinion takes into account the many factors that may affect their cash flow and to take small but incremental steps to improve before it is too late.

*T1 (82)*

Sometimes construction projects suffer because cash is not flowing. Respondents agree that if a contractor is not paid, the project may be stalled. By ensuring that the parties that are doing the work get paid, initiating adjudication is believed to be necessary to recover money to ensure that projects will not be hijacked or suffer from delays. Respondents believe that it is crucial to take any measures in recovering their debt to keep the cash flowing as they are also in the position of debtor to other parties. They also add that CIPAA would protect all parties from main contractors, subcontractors, suppliers, consultants, as well as employers through the increase of integrity within the industry.

*TI (83)*

*TI (84)*

Again, a respondent highlights the ever-increasing competitive nature of the construction industry and an unbalanced ratio of supply and demand as a catalyst for the conducts of prioritising the in-group organisational needs over the others. The respondent also adds that organisations are left with little choice but to perform competitively to stay relevant in the industry.

*TI (85)*

*TI (86)*

*TI (87)*

If a business runs out of cash and is not able to obtain new finance, it will become insolvent. Thus, a respondent notes that survival of the cash flow is the life-blood of all businesses, particularly the small enterprises.

*TI (88)*

In relation to the construction industry, a respondent notes that the ‘big boys’ in the industry play rough while smaller and ‘weaker boys’ are often trampled. Lengthy contractual chains cause money to be withheld at the upper reaches of the contractual chain, causing a ripple effect as these parties seek to maintain and protect their own positions, often denying the parties whose monies are currently due. This way, parties such as contractor and sub-contractor of the projects can find themselves suffer from the delays and disruption caused by the lack of funds for work production, which eventually will force them into insolvency.

*TI (89)*

*b) Changing operational strategies*

Change has become a norm in most organisations. There are many forces acting on organisations which create the need for change. There are many ways that these forces can be classified; one clear pattern emerged is to categorise them from either outside or inside organisations. Business failure and downsizing have become experiences to Malaysian contracting parties. Findings from the interview reveal that organisations must deal with ethical, environmental and social issues that drive the change in operational strategies.

Respondents agree that competition is becoming fierce, and companies can no longer afford to rest on their laurels. A respondent describes the problematic nature of the industry's environment. There is no breathing space for the companies to take a step back and try to work its way up to a more collective and efficient future.

A respondent comments on the effect of modernisation and economic influences that drives organisations to rethink the most efficient ways to use resources, disseminate and gather information. Construction parties no longer operate on what they call as an ancient way of verbal agreement basis but rather formalising the agreement through a written contract explicitly laying out duties, obligations and right for each party to the contract.

*T1 (90)*

*T1 (91)*

Ethical scandals have also brought ethical behaviour in organisations to the forefront of public attention. Ethical issues in regard to transparency, favouring, and other relationships matter has been an ethical dilemma. Construction parties seem to be trapped in a conventional and dysfunctional structures that eventually deteriorate its association with the employers. The need to manage ethical behaviour has brought about several changes in organisations and formalisation of it on a contractual agreement is one way to manage ethical issues.

*T1 (92)*

A respondent also notes a change in how contractors take regards of the issue of friendship and business relationship. Both business and friendship take time and effort to build. He also added that contractors used to be welcoming, sociable and pleasant as they perceived those are usually the initial requirement to build that valuable business relationship and has needs as its foundation. However, contractors now have shifted to focus on building business relationships and not depending on those traits as much as before.

*T1 (93)*

*T1 (94)*

Employer's representatives have been facing numbers of old-aged criticism on their approach to the administration and dispute avoidance where some part of it have been driven by the architect or the engineer exercising an uneven hand in deciding differences in favour of the Employer. It is a complete fiction to say that employer's representative could possibly act independently of the employer on every issue because of many other constraints such as policy and financial situation. This illustrates existing close ties between the employer with their architect and engineer. Nevertheless, a respondent noticed the trend shift of how consultants are becoming more daring to take legal action against the employer should disputes emerge. It is rather unconventional for such party to initiate adjudication against the employer.

*T1 (95)*

Any changes from an agreed well-defined scope and schedule of work are varied. Stated differently, it is a change in any modification to the contractual guidance provided to the contractor by the employer or employer's representative. As discussed earlier, respondents have witnessed an enormous increase in the use of contracts to govern relationships as well as the increasing formalism by the Malaysian contractors in the work practiced.

*T1 (96)*

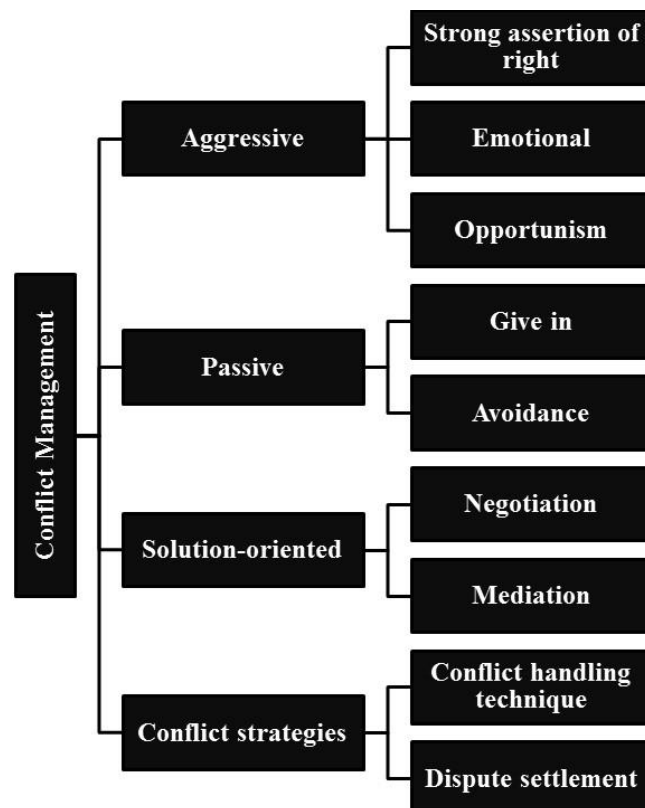
The interview reveals that, progressively, the issue of professional ethics within the construction industry affects a wide spectrum of population. Contractors are keen to make a profit; hence their actions are inclined to business ethics. A respondent notes that the ethical standard in Malaysia is still low. Construction players are becoming more behaved with professional integrity and reasonable care. Only when professional ethics are well practiced, problems may be eliminated directly.

*T1 (97)*

#### **7.4 Theme 2: Conflict Management**

Dealing with dispute is part of the portfolio of every construction professional. People may take different approaches in handling a challenging situation. In evaluating conflict behaviours, two main categories of technique are identified across the interview series, namely

assertiveness and unassertiveness technique. Figure 19 illustrates the key concepts captured within this theme.



**Figure 19: Theme 2 – Conflict management**

#### **7.4.1 Aggressive**

An aggressive style of dispute resolution does not allow the other person to share their opinions and often leads by force or an attacking style. This method is claimed to be ineffective and results in immediate increase of intergroup conflict and stress. Parties who face aggressive style in conflict situations would feel attacked personally and professionally; hence the team members would become emotional, less productive, distancing themselves from cooperative mode and breeding negative feelings. An aggressive approach is also claimed to potentially damage relationship with the other party.

An example of when aggressive situation spurs along the course of the project is during the negotiation of construction claims. A claim should never be exaggerated, misleading and unreliable. However, equitable adjustment is based upon judgmental factors like estimates and opinions that are sometimes incapable of numerical certainty. Because claims are based on

equitable adjustments that are based on many other subjective variables, it is natural when claims involve delay or impact costs vary in range of substantially. A common aggressive behaviour often arises when dispute claim negotiation is not going well between the contractor and the employer.

*T2 (1)*

From the contractor's perspective, the interpretation of the claim-causing event and financial impact of those events should be able to support each judgment and the subjective variable must be considered to be treated fairly. On the other hand, from the perspective of the employer, the party often begins the negotiation from the opposite end of the spectrum for the same justifiable reasons. Employers often apply their judgment conservatively as truth. Consequently, each side typically creates tension and gives little in negotiation to reach a mutually agreeable settlement.

*T2 (2)*

*T2 (3)*

The construction industry is often described as being adversarial, that is frequently involving conflict, opposition, confrontation, dispute and even hostility. Constant quarrels and disagreement in the payment issue of adjudication seriously weaken the teamwork spirit among the parties. There are a number of reasons for the adversarial nature of adjudication as a medium to resolve disputes. As a respondent indicates, the degree of parties' satisfaction with the outcome of adjudication is relatively low because the decision imposed by an adjudicator yields a win/lose outcome.

*T2 (4)*

*T2 (5)*

The aggressive ambience of adversarial adjudication also intensifies when dealing with difficult people along the course of the dispute. Aggressive behaviour by parties during dispute settlement in construction covers wide range of scenarios that occur in the process, such as working with aggressive people, ingenuously disagreeing with others, dealing with pressure and intimidation, as well as dealing with ignorant and unreasonable people. These factors are found to be a great challenge to the efficiency of adjudication as a noble medium to resolve commercial construction disputes. While adjudication was initially not intended to be

adversarial, in some cases, the process may emulate the adversarial style and lead to cost escalation.

*T2 (6)*

*T2 (7)*

Adjudication is simply another adversarial method of dispute resolution. With adjudication, each party hopes that the adjudicator will arrive at a favourable decision to them, with no control over the decision and the outcome. Although a party dissatisfied with the adjudicator's decision can still resolve the matter in arbitration or litigation, adjudication simply perpetuates the adversarial methods with no guarantee of success.

*T2 (8)*

No single dispute resolution method can be universally applied to every single case and the choice of the most suitable means to resolve dispute primarily depends on various factors like attitudes of both parties, nature and quantum of dispute. There inevitably exists some disagreement especially where parties found disagreement and the differences are too large to accommodate the mediation process; hence adjudication is initiated. Thus, it is anticipated that the demand for its usage in the Malaysian construction industry will face a steady growth.

*T2 (9)*

Advocates of adjudication often argue that unlike mediation, a decision is guaranteed at the end of the adjudication process. However, a respondent opines that a high percentage of mediated cases are settled where all parties are happy and satisfied with the outcome is better than an adversarial process where parties only have half of the chance to be satisfied. However, the rate of adjudication cases in Malaysia is found to be steadily growing because many industry participants adopt a short-term view on business development, with little interest in enhancing their long-term competitiveness and cooperativeness. Experience in Malaysia construction disputes indicates that one of the principal reasons for the negative view of adjudication concerns the attitude of the parties rather than the resolution method or issue in dispute.

*T2 (10)*

*T2(11)*

The adversarial nature of adjudication is also said to be amplified by the presence and involvement of lawyers as parties representative. A respondent fears that when parties are



represented by legal experts, these attorneys who are trained to be adversarial use every tactic possible to win the case. They often consider the maintenance of the relationship between the parties to be of secondary importance.

*T2 (12)*

*a) Strong assertion of right*

Most dispute resolution processes have their frame of reference on an adversarial process based on asserted legal right. At the outset, parties typically feel the need to set out all matters in a dispute, inevitably advancing some arguments that are stronger than others. When commercial disputes arise, the instinct to fight hard and prove a point is strong.

*T2 (13)*

*b) Emotional*

The role of emotions in dispute with cultural framework seems to not receive much attention. The relationship of emotions with conflict has been established early on, but often its link is not well understood. Emotions are derived from interactions and relationship that, amongst many others, are framed by the prevalent cultural model. Cultural model informs the person's central values and norms. In Malaysia, it is found that the dominant cultural model emphasises the importance of striving for harmonious interaction and interactions by politeness. Failure to do so will most certainly elicit frustration, anger and disappointment.

Constructions of emotions occur when parties are seen to be non-conformant to the dominant cultural model that emphasises an interdependence in relationships, connected with others and focused on maintaining harmony by adjusting to environment demands. As a respondent illustrates, although the common cause for disputes is errors and variations in contracts, human emotion and the drive to be "right" plays a significant role behind the disturbing trend that hinders early settlement.

Consider the common situation as described by a respondent below. A contractor is probably going to be more than frustrated, and feel being taken advantage of to find the employer denied payment. In this situation, both parties feel "right". As dispute builds, both sides start spending more resources on the dispute, emotions continue to develop and many

aspects of the project face disruptions. A respondent described that the fact of the matter is that the pursuit of “being right” is deeply ingrained in the business values in Malaysia.

*T2 (14)*

During the settlement process, it is crucial for the parties to have thoroughly prepared and be well-informed of their own case in order to be in a positive position to consider settlement of the dispute. A respondent opines that for a dispute settlement to work out productively, parties must enter the process in good faith and be prepared towards positive negotiation and also acknowledge the feelings of the other side during the process.

*T2 (15)*

c) *Opportunism*

Reviewing from the perspective of the employer in the context of the employer and contractor relationship and behaviour, it is suggested that one of the root causes of claims and disputes are opportunistic behaviour on the part of the contractor. Dominant values in the Malaysian society is career, money and status. Thus, tendencies for more competition are characteristic of the Malaysian construction player, even if it is through opportunism.

As a respondent illustrates, her experience of facing opportunistic behaviour within the industry particularly from contractors involves the party making a false or exaggerated claim. In practice, it is found that some Malaysian contractors’ claim is often opportunistically inflated. In this way, employers frequently respond to the reciprocal opportunism by rejecting claims that are out of hand.

*T2 (16)*

The use of certain dispute resolution methods like adjudication can also have the effect of attenuating opportunistic behaviour of the parties. The presence of a third party at the outset of the project team, whose sole objective is to determine the outcome of the dispute often has the effect of encouraging both parties to engage in one-upmanship in dispute battle. As the respondent further illustrates, the assumption on the concept of dispute resolution method to help the parties to genuinely resolve the dispute by the way of adversarial method is not always valid. She further indicates that sometimes an opportunistic contractor may perceive there is little to be gained in resolving matters economically and efficiently.

The opportunistic behaviour that is prevalent within the Malaysian construction industry also increases due to economic factor. Practically, the industry is highly profit-oriented. Owing to this orientation, increasing profit margin is a form of basic need for survival. In this way, parties involved in dispute tend to be on the quest for profit and are eager to prove their worth.

*T2 (17)*

It is exceptionally difficult to resist the enforcement of an adjudicator's award. The respondent denotes that ambush is prevalent in the practice of Malaysian adjudication. Thus, the respondent opines that adjudicators hold the key to a fair and courteous adjudication case, where s/he has the essential skill to grasp and focus the essential issues quickly as well as take on board all parties' submission.

*T2 (18)*

#### **7.4.2 *Passive***

A passive style of conflict management in which the person does not share their opinions or lead directly. Like aggressive style, passive conflict style is found to be inappropriate and unproductive in dealing with intergroup conflict. Passive style of conflict management leads to loss of confidence and control over conflict. The study found that this style is not particularly common or preferred within the Malaysian construction industry. Often known as a harmonising mode, passive conflict management focuses more on preserving relationship than on achieving personal goal.

##### *a) Give in*

Giving in is a behaviour by the disputants in construction as a way to accommodate the need of the other party. Behaviour such as sacrifice, selflessness and low assertiveness is part of the effort by a distressed disputant that is willing to give up their own interest in order to preserve the relationship or protect the interest of the other party. This method is found to have some extent of relevancy as a strategy when the issue of the conflict has little importance to the party.

*T2 (19)*

The giving-in method is closely associated to the accommodating style of dispute resolution and often viewed as peacekeeper mode. However, in a dispute, this creates a passive way of lose/win relationship where the accommodating party may make a choice to acquiesce to the needs of the other, out of stress or kindness. While this may be seen as a weak and non-productive move, a respondent highlights that there are situations when this approach is preferable and will gain more benefits for a party rather than taking a strong position. This is especially when the company is not meeting its targeted goal, seeing that there is greater interest in accommodating the other party's need, thus the giving-in method is preferable to ease out the tension and maintain business relationship.

*T2 (20)*

Two respondents highlight that the giving-in method is an appropriate form of dealing with conflict especially when used in the situations where preserving relationship is more important than winning the issue in hand. Not only that, it is also rather crucial when competing method will produce a more vulnerable and negative outcome, in such a way that the employer is in a more position of authority. This is found to be a barrier for some parties to initiate adjudication against the employer to resolve a payment dispute.

*T2 (21)*

*T2 (22)*

*T2 (23)*

*b) Avoidance*

Conflict avoidance is common in the Eastern region of Asia and the notion of face value and harmony are often invoked to explain this tendency that is often associated with cultural collectivism.

*T2 (24)*

Only few enjoy dealing their conflicts with another party. This is particularly true when the conflict becomes hostile with strong feelings involved. There can be a positive and negative outcome derived from a conflict negotiation. A respondent below states that the important point is to manage the conflict, not to avoid and suppress it until it escalates out of control.

*T2 (25)*

### **7.4.3 Solution-oriented**

A solution-oriented method of dispute resolution is an array of technique that involve managing dispute both by looking for creative and integrative solutions together with by making compromises. This approach has moderate concern for both personal goals and relationships. This approach involves give-and-take whereby both parties give up something to break even the total loss and make a mutually acceptable decision.

#### *a) Negotiation*

The dispute is always negotiated first before other methods are considered. Reaching a settlement through negotiation is also another way to maintain a harmonious relationship between the disputants. Negotiation is the most cost-efficient method to resolve construction disputes as it is informal, speedy and non-complex in nature. A respondent opines that it is a skill crucial to all construction professionals, especially those in a managerial position.

*T2 (26)*

Negotiation among the parties in Malaysia takes time and patience, not by forceful way of legal proceedings. Often meetings of claim are conducted over leisure activities such as coffee break and discussion begin subtly as participants share information about their families, home towns and leisure activities among bosses. As a respondent mentions, the process often begins by forming connections that are essential to Malaysian business rules of friendship first, business later.

*T2 (27)*

Hierarchy is important in Malaysia. Therefore, a respondent states that it is important for the negotiator to meet the top decision-maker directly at the early stage of the contractual conflict. The top management consists of the people who will set the course or tone in guiding the principles of the negotiation.

*T2 (28)*

Treating dispute as a zero-sum game consequently will create a detriment to a win-lose battle. By contrast, a respondent highlights that parties should be able to find the same set of value-creation opportunities in disputes as they deal. Rather than waging a strict competitive battle, parties of both sides of the dispute could negotiate by listening closely to each other by communicating in a positive way.

*T2 (29)*

*b) Mediation*

Malaysia has a social pattern of placing the highest value on the interest of the group. Parties are often willing to maintain a commitment to an intergroup even when their obligations to the intergroup are disadvantageous to the in-group. Respondents of the study illustrate that the relationship between the disputing parties will be a deciding factor to determine whether a confrontation or non-confrontation method of dispute resolution will be appropriate. In this case, parties may still have the tendencies to maintain the current level of good faith and prefer mediation to be appropriate.

*T2 (30)*

As highlighted by a respondent, mediation is particularly preferable and attractive when between the parties wish to maintain their relationship. The critical factor for settlement in mediation process is found to be the positive attitude of the parties. Mediation is a consensual process, thus the likelihood of generating hostility during the process is low compared to other more confrontational dispute resolution processes like adjudication. The maintenance of the relationship between the parties is especially important within the Malaysian construction industry. Parties have to work together until the completion of the work, notwithstanding the fact that disputes often arise early in the works.

*T2 (31)*

In comparison to other dispute resolution methods, mediation is relatively unpopular to the construction industry. Mediation is first introduced in Malaysia in 1998 as part of a standard form. After more than twenty years in the industry, mediation is not progressing at the same pace of adversarial method like arbitration.

*T2 (32)*

It has been further suggested that the final and binding issues are the main problem in mediation and would be more preferable if mediation is placed on a statutory footing. Malaysian parties are found to be attracted to attributes of adjudication that uphold definitive style of dispute resolution compared to mediation. This would explain the low appreciation of the true benefits of mediation. Most likely, this scenario is caused by the uncertainties about the abiding nature of mediation outcomes.

*T2 (33)*

Results from the interview also concluded that disputes with a higher quantum are not appropriate and are preferred to be settled via mediation. The quantum of dispute is found to be a significant variable to the appropriateness of mediation as a dispute resolution method. As respondents illustrate, mediation is often ineffective when one or both of the parties had unrealistic expectations, were intransigent and unwilling to compromise the differences in each other's position.

*T2 (34)*

*T2 (35)*

### ***7.4.3 Conflict Strategies***

This subsection presents a series of improvement strategies suggested by the respondents of the study in order to improve the conflict management practice in the industry. The focus mentioned by the respondents emphasised on the importance of conflict handling skill within the intergroup conflict management, particularly between parties in conflict to bring forth a healthier and more productive way of resolving disputes.

There were also calls for attitudinal and mind-set change from adversarial method to collaborative effort to foster trust and enhance positive commercial bond among contracting parties within the industry. Lastly, some respondents also advocate the need to restore proper integrity and professionalism across the industry through various measures.

a) *Conflict handling technique*

Conflict handling involves careful and proper planning, with clarity, of the strategy for executing a project. This is because disputes often arise from ambiguity or an unclear definition of risk. Conflict handling involves adopting conflict avoidance approaches early on.

*T2 (36)*

A respondent highlights that claim avoidance can be practiced through a good claim management. Problems, delay and claims need to be dealt with at the time in a positive and objective manner. Claim identification involves timely and accurate detection of a construction claim. The claiming party can adopt claim notification ways by alerting the other party of potential problems in a manner that is non-adversarial. In short, parties must appear to be polite, sincere, helpful and cooperative during the claim management process.

*T2 (37)*

Claim examination involves establishing the legal and factual grounds on which the claim is to be based and the potential recovery. Any issues may have to be investigated by interviewing the person in charge behind the claim. Claimant must be able to prove the time and cost elements of the claim.

*T2 (38)*

b) *Dispute settlement*

In the construction industry, most key players identify negotiation as the most effective way of resolving disputes and claims because it helps to maintain harmonious relationships when one party is in conflict with others. A prolonged legal battle is not likely to bring productive outcome to the disputants, but it will merely delay it. Hence, when a construction claim cannot be avoided, a respondent highlights the parties should consider negotiating an acceptable settlement of the dispute before settling for adversarial means.

A respondent opines that the introduction of statutory adjudication regime is much needed and is particularly useful in the Malaysian construction industry. Nevertheless, he still believes that dispute resolution is about recognising when a dispute has arisen and appreciating the escalation of that dispute. It involves understanding the range of techniques that might be



available to resolve the dispute and seeking appropriate middle ground before being placed at a disadvantage in respect of its position with the other party.

*T2 (39)*

A respondent highlights that although adjudication method holds some extent of adversarial feature associated with the process and approach, it has become a tactical way by the Malaysian claimant parties to initiate adjudication against the other party that has been avoiding to resolve the dispute. Adjudication award has helped some parties to use it as a basis to begin the negotiation process by relying upon objective proposals to guide discussion.

*T2 (40)*

At this point, the claimants also rarely resort to threats. The claimants are found to be more open and trusting to work diligently to satisfy their underlying interest and their opponent's by making unilateral concessions and try to reason on the other side. The claimants expect the other party to similarly be open to explore alternatives that may enable the parties to expand the overall situation through trade-offs that advance the interests of both sides.

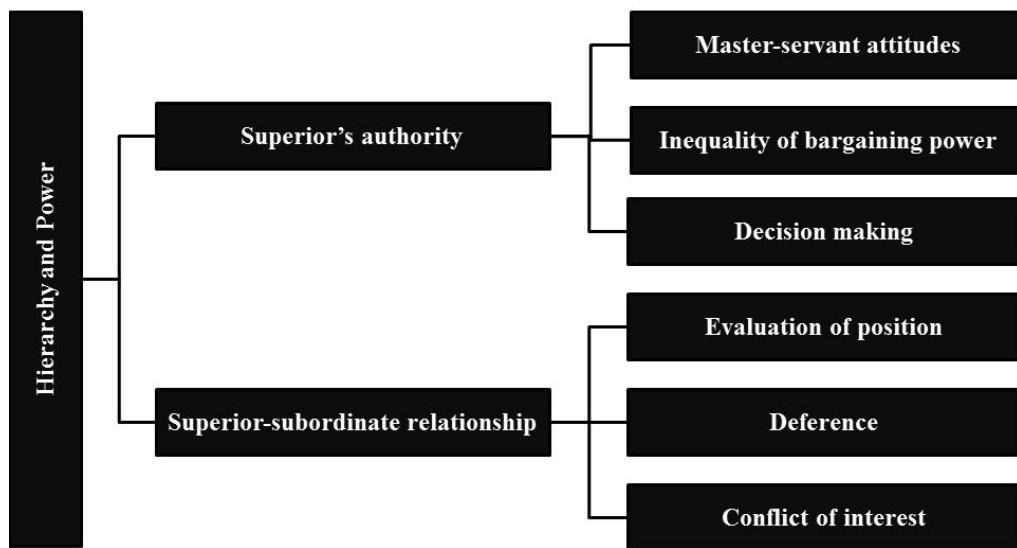
*T2 (41)*

The respondent's view is also similarly mentioned and supported by other respondents, saying that proficient negotiators do not seek to maximise their returns for purely altruistic reasons. Their approach of collaborative negotiation effectively allows them to acknowledge the opponent's interests. In this way, they provide adversaries with terms to induce the opponent to accept agreements. The claimants also often use adjudication to ensure the opponents will honour the deals agreed upon. However, the claimants also acknowledge the likelihood of encountering adversaries in the future. The Malaysian parties tend to be sentimental towards pleasant, courteous and professional dispute negotiators. Hence, the likelihood for the dispute to be resolved over a negotiation at the post-adjudication stage will increase.

*T2 (42)*

*T2 (43)*

## 7.5 Theme 3: Hierarchy and Power



**Figure 20: Theme 3 – Hierarchy and power**

Figure 20 illustrates the categories that have been grouped together under this theme. Hierarchy and power is the first theme emerged from the analysis process. As organisations grow, their work becomes more complex and they tend to increase the formalisation of their hierarchies. Some signs of hierarchy formalisation include job titles, reporting structures and organizational charts. In construction and many other fields, there is a differentiated structure of roles. This layer of roles is visually represented in organization charts that depict a relatively small top management team, at least one layer of middle management, and a larger number of lower employees that are responsible for the daily operation of the organisation. As one respondent notes:

*T3 (1)*

### 7.5.1 *Superior's Authority*

Within the boundaries of the organisation, higher formal rank inheres greater values. Although the values that increase from low to high rank are not always explicit, the higher rank includes control over resources and deference from subordinates. The sorting of individuals into appropriate roles and ranks, however, is a source of decision-making problem as one respondent states.

### *T3 (2)*

Power is a concept related to the capacity or ability to direct or influence the behaviour of other or the course of events. For example, in analysing a conflict from power perspective in construction dispute, two possible situations normally occur when parties are in a power struggle against one another, seeking to determine who will be dominant in the relationship, or a party is attempting to assert power over the others. Traditionally in Malaysia, an employer engages an architect or a consortium of architectural and engineering firms as their representative to perform an independent coordination role to ensure that all members of the project team are working towards a common goal. Although the employer representative is sympathetic to the objectives of the various parties and project stakeholders, they will first and foremost protect the employer's interest. This practice, as one respondent explains, can breed to a conflict.

### *T3 (3)*

In Malaysia, the role that government-linked companies (GLCs) play in the Malaysia economy is extensive and pervasive. As defined by the government, GLCs are companies that have primary commercial objective, but where the Malaysian government has a controlling stake in major decisions, such as appointment of management position, contract awards, strategy, restructuring and financing, acquisition and divestment. They include companies that are directly controlled by the government and state-level agencies.

There is a presumption that GLCs in Malaysia are seen to have preferential access to government contracts and benefit from favourable government regulations. It is believed that there are concerns related to the preferential treatment that they receive with respect of government procurement. Additionally, GLCs also enjoy various other benefits including subsidies, concessionary financing, state-backed guaranty and exemption from antitrust enforcement or bankruptcy rules. Thus, GLCs usually find it easier to be more profitable in increasing investment in sectors where they already have a significant presence. In contrast, private organisations in Malaysia may be reluctant to invest in sectors where GLCs are dominant because they perceive the playing field to be slanting against them.

This suggests a negative relationship and power distribution between the share of GLCs in the construction industry and the rate of investment by private organisations in Malaysia. The relationship may also be non-linear in the aspect where there could be a threshold effect. That is, it is only when the share of GLCs in a sector exceeds a certain level that it could have

a deterrent effect on investment by other organisations. One respondent notices that non-GLC private organisations would tend to be reluctant to invest more in projects where GLC organisations are dominant.

*T3 (4)*

*a) Master-servant attitudes*

The rational view of the role of authority in construction project organisation holds that employers do the thinking and act in the best interests of the project, whereas parties are expected to follow orders in doing work considered necessary. However, some employers tend to dominate the supply chain due to the uneven level playing field. It is becoming apparent that such master-servant attitude is still prevalent and deeply ingrained in the Malaysian construction industry with the exception of a few discerning ones.

*T3 (5)*

*T3 (6)*

The master-servant attitude practiced by Malaysian construction players is also found to become a source of conflict. Conflict can arise when work is not mentioned in the bills of quantities, drawings or specification. In common law, the silence does not mean the contractor has a direct right to claim for extra payment because the employer is not bound to pay for things that a reasonable contractor must have understood were to be done, which happened to be omitted from the bills of quantities. Therefore, one respondent notices that contractors in Malaysia are now beginning to take more cautious steps in dealing with instructions by employer or its representative.

*T3 (7)*

*b) Inequality of bargaining power*

The practical concept of inequality of bargaining power addresses how power is used, manipulated and perceived in real world interactions. Some scholars believe there is no question that some parties are 'weak' when compared to other parties in a transaction. However, bargaining power disparities are a real phenomenon that can affect the ability of the 'weak'

party to secure its preferred terms in a contractual interaction with a ‘strong’ party. Small business owners like small and medium class subcontractors are obvious examples of those who typically experience the inequality of bargaining power.

*T3 (8)*

*T3 (9)*

Contractors, especially the smaller organisations, will normally be posited at a lower chain of power hierarchy, thus having less negotiation power. It is challenging for the smaller organisations to resort to legal action as it is a costly and lengthy process. Many also fear that it will jeopardise future business prospects. Keyword like “bullying” is frequently used when discussing this issue. Many parties choose to suffer in silence or slow down the work rather than terminating the contract that will be more likely to put the parties in an adverse position, thus inhibiting them to recover the default payment.

*T3 (10)*

The complex relationship between scale, efficiency and the respective bargaining power in construction contract has allowed some larger organisations to enjoy higher profits. Thus, CIPAA came into operation, recognising that the cash flow of small contractors and subcontractors who are financially weaker may be disrupted by unjustified deduction or dishonest payment avoidance practices by employers or main contractors who have the upper hand in terms of bargaining and financial power, which may in turn result in construction works coming to a halt and failure. A good illustration of this dilemma is made by a respondent below.

*T3 (11)*

For an unfair transaction in a contractual relationship, the party may be in a situation where they find that a term or terms on which a contract has been entered into, had unfavourable result for them. This usually happens in the form of clauses which take away his right or create obligations which prove to be burdensome, for example, a clause where the contractor is not possible to recover a loss because the employer has exempted itself from the liability. Although there may be a limit to that, parties are still vulnerable to a situation where an obligation must be strictly complied with.

*T3 (12)*

The respondent also notes a prevalent challenge of intense competition within the industry due to an unbalance ratio of contractors and job opportunities. The above situation further worsens when it gives room for opportunistic parties to take advantage of small parties as supply is higher than demand. The smaller parties are left with only few options of adhering to the unfair agreement for the sake of business survival.

*T3 (13)*

However, one respondent, being a lawyer, made a sharp response to the above comments by confirming that CIPAA is neither a mechanism of intervention nor to restrict the parties to form their contract. Instead, he advises the parties to be more wary in getting themselves into what they might perceive as an unequal bargaining agreement.

*T3 (14)*

*c) Decision making*

Decisions are taken by all levels of employee within the organisation. At the lower levels within the organisation, decisions tend to focus on immediate matters involving a sequence of day-to-day activities and the use of current resources in order to achieved targeted output. Because conflict can have a complex effect on decision making, a respondent comments on the importance of employees to assist the top management to understand and comprehend the nature of the dispute in hand and the degree of the risk faced by the organisation. Generally, the larger the decision and the longer timescale involved, the greater the degree of risk associated with it.

*T3 (15)*

For a conflicting situation, an active involvement by a senior level is vital as it usually involves larger financial decision to be made and could have significant and fundamental consequences of the organisational operations. Because the outcome of the decision possesses great interest to the organisation durability, decision making at the senior level often involves many facets and takes considerable time. With time is of the essence in the adjudication process, parties find it challenging to resolve a dispute in a timely manner.

*T3 (16)*

Employee participation is the process of giving employees the authority to make decisions relating to their work process and encouraging them to take responsibilities for their decision. The influence of employees' participation on work outcomes varies across cultures, especially in a country with a very low or high power distance. In Malaysia, a respondent describes that employees in construction organisations fear to be held accountable in a decision-making process, thus prolonging the duration of taking necessary actions in resolving the dispute timely.

*T3 (17)*

### ***7.5.2 Superior-subordinate Relationship***

The relationship between subordinates and superior is a primary example in status differences. Status differences contribute to superior's authority and to the subordinates' respect for it. Interpersonal communication between superior and subordinate is a critical foundation for effective performance in organisations. A respondent highlights the importance of efforts taken to narrow the status gap between superior and subordinates within the organisation in order to ease out the flow of communication and information sharing.

*T3 (18)*

*T3 (19)*

Barrier to communication is a factor that distorts successful communication. One of the barriers of successful communication is status differences. Status differences are related to power and the hierarchy poses a barrier to communication among people at work, especially among subordinates and superior as shown above. Effective supervisory skills make the superior more approachable and help reduce the risk and problems related to status differences. A respondent notes that when employee feels secure to escape the status differences and hopeful to resolve the conflict, they are more likely to be straightforward in upward communication.

*T3 (20)*

One respondent also believes that in Malaysian culture, challenge to authority is not well accepted. This is because leaders are expected to be facts of life. Situation where subordinates question or rather challenge him or try to arrive to alternative solutions in dealing with the conflict will often stir discomfort within the project team.

*T3 (21)*

*T3 (22)*

*a) Evaluation of position*

The standard of work that an organisation uses to evaluate the behaviour of its member is often termed as norms of behaviour. It is important that members or parties understand their own position in the norms of the organisation because it can be an influencing factor. Norms are not always explicit, specifying what or what not to do. They may evolve informally and unconsciously within a group, in response to challenges to protect the group. Two respondents comment that being at the lower tier of the organisation, they need to be more careful in deciding whether it is worthy to challenge an autocratic decision that has worked out against favour. This cultural thinking has found to be prevalent in affecting actions taken by parties in resolving a dispute.

*T3 (23)*

*T3 (24)*

A respondent also further supports the above connotations by saying that when a subordinate lacks seniority over the other, power struggles sometimes occur. This factor has been a major struggle for the parties to resolve the dispute swiftly in a contractual relationship because the concept of seniority has long known to be accepted and become part of norms in a collective group Malaysian, nationally.

*T3 (25)*

*b) Deference*

Status diversity can have important implications for the performance of the construction project team because status hierarchies in the organisation serve to organise interactions within a group and influence how people behave towards one another. A respondent comments that the culture of deference often has a negative impact on the process of dispute settlement. She notes that parties at the lower chain feel pressure to conform or confront to the demand of the



party at a higher status. The respondent also raises her concerns on the dysfunctional effects of deference that is dominant in the society.

*T3 (26)*

*c) Conflict of interest*

One of the toughest problems for the parties is interest conflict that requires them to balance their own values with the interest of the other parties of the organisation. One respondent observes that conflict of interest often happens in projects involving GLCs. Defining GLCs is not very straightforward because they come in various forms and structures. At the risk of oversimplifying the situation, GLCs are companies owned by Government-linked Investment Companies (GLICs), who in turn is used by the Malaysian government to manage their investment. The nature of relationship of the GLCs is highly complex and complicated and has also changed drastically over time. However, there was hardly any serious public conversation about how well they were governed. The respondent raises her concern on the real issue with regards to corporate governance, because power is becoming too concentrated in one party and Malaysia needs to properly examine how to improve this situation.

*T3 (27)*

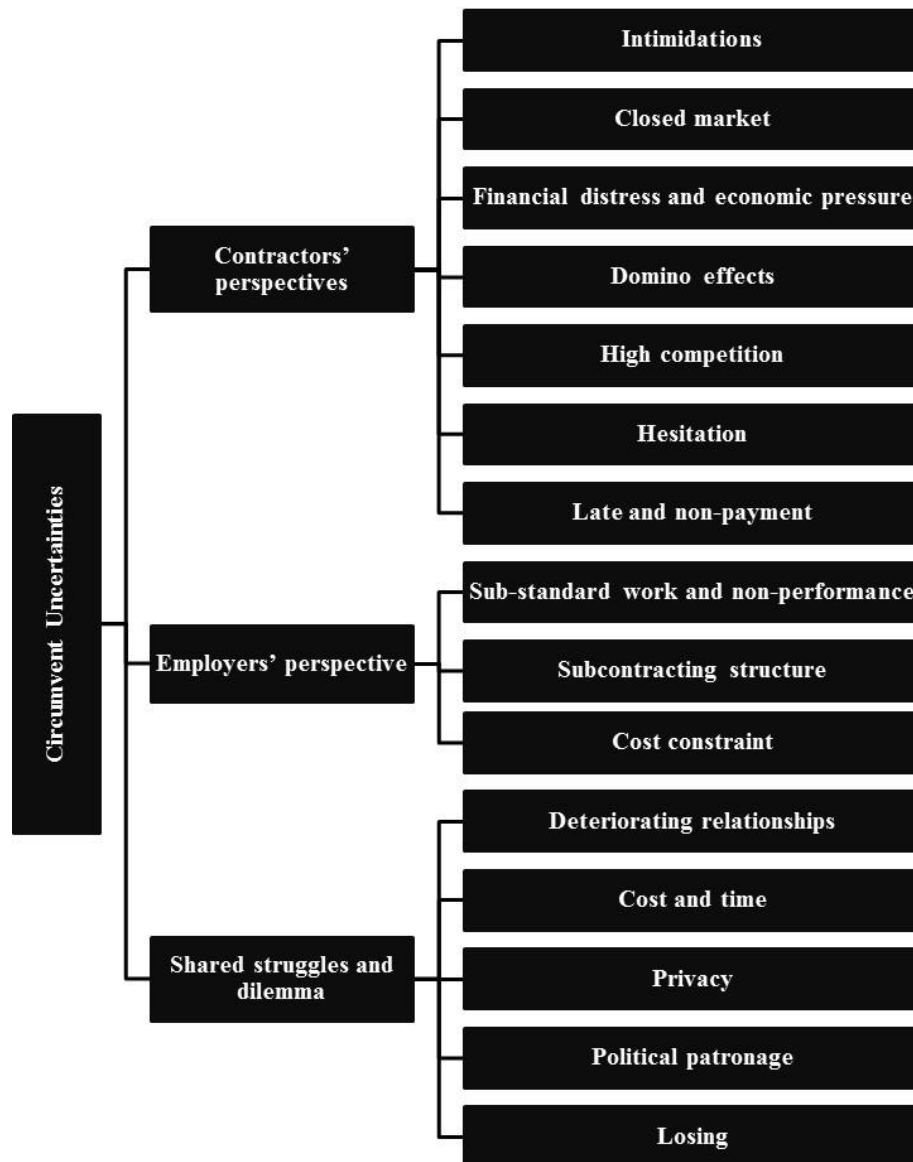
The issue of dominance by the GLCs in the Malaysian construction industry has also hardly been formally discussed elsewhere. Although the creation of this structure is to serve a noble vision, the GLCs had evolved into tools exploited by some irresponsible parties to serve their vested interests. Clearly, a deep sense of frustration is raised by a respondent, particularly being a business person about the pervasiveness of GLCs in the economy. Due to this, she believes that an adversarial form of dispute resolution like CIPAA will not be functional to resolve disputes in all kinds of procurement system in Malaysia.

*T3 (28)*

## **7.6 Theme 4: Circumvent Uncertainties**

An uncertainty problem is the main factor that influences the construction project's implementation parameters. To organisations, managing risks in construction project has been recognised as a very important management process in order to attain the project objectives in

terms of time, cost, quality, safety and environmental sustainability. Sources of uncertainties can originate from various forms. This subsection will illustrate the description of the sources and possible consequences from the unique perspective of contractors, employers and construction players. Figure 21 illustrates the categories that have been grouped together under this theme.



**Figure 21: Theme 4 – Circumvent uncertainties**

Construction is often characterised by uniqueness, complexity and uncertainty. One of the hardest characteristics to deal with is uncertainty, as it can affect a construction project in

many possible ways. There are many different points of concern within a project the parties can recognised during the whole process.

It is obvious that construction organisations do not have exhaustive and precise information, especially regarding making long-term plans. Although it is possible to determine some probability characteristics from experience and data in certain situations, in some situations, there is no data that would be possible to determine peculiarities of parameters in risk-related and uncertain situations.

In macro-economic management, the concept of risk and uncertainty is looked at from the perspective of stability and instability in the economy. As described by a respondent, every construction project is unique and includes a high degree of external and internal uncertainties that can in turn become a threat to the organisation, which is why the organisation leader must be ready for it.

*T4 (1)*

A respondent also comments that most, if not all construction projects are managed through contract and expected to deliver contractual performance. These introduces the organisation to another aspect associated with risks and uncertainties. There are challenges that the employer may pay, pay partially or not, timely or not. From the employer's perspective, the contractor may perform or not and take a performance bond but does not even guarantee the contractual performances.

*T4 (2)*

*T4 (3)*

### **7.6.1 Contractor's Perspectives**

Contractors, like any other party involved in a project, inevitably carry certain risks. Often, the employer tends to allocate more risks for the contractor and accept as little risk as possible. If this is the case, the contractor may increase the project bid price establishing on a fact that responsibility for circumstances likely to occur during the construction phase is vested solely upon him. Appropriate risk allocation between contractual parties is obviously very crucial in order to put the parties on equal footing.

In many cases, underestimated risks lead to financial losses. For example, a respondent explains why the Malaysian contractors were profound on the issue of verbal agreement. Irrespective of whether he had a written or verbal agreement, in some circumstances, there are legal rights that apply. Written instruction sets out a tangible order that can reduce the contractor's risk of uncertainty. There are instances where an individual refuse to give proper account for their instructions and not ready to be accountable and be responsible for the instructions should any error emerges. Disputes arise when there are many change orders that have a cumulative impact on the sub-/contractor that each individual order alone may not replicate.

*T4 (4)*

*a) Intimidation*

In alpha-dominated industries like construction, intimidation is specifically prevalent. Respondents complain that intimidation during the conflict negotiation process occurs in the situation where one party relies on commercial pressure to cause another party to accede its demand. This situation often discourages the decision of the party to recover late or non-payment debt through legal intervention mechanism – adjudication.

*T4 (5)*

Several respondents with construction business background complained of dire practices by some main contractors. A respondent reports that getting paid in the industry is a farce. Although pay-when-paid practice is prohibited, it is still in widespread use. Most small construction enterprises were also too afraid of losing work and lacking in faith that the issue would be followed up. This is why it is believed that with the enactment of CIPAA, conditional payment is nullified and provides remedies for the recovery for payment.

*T4 (6)*

It is not a tale anymore to many that subcontractors and contractors are often forced to deal with main contractors or employer that are in a more powerful bargaining position than what the subcontractor themselves. It is also not surprising that some subcontractors find themselves in such position of hesitation when it comes to enforcing their rights with regards to payment under adjudication law. With that in mind, a respondent feels that it is an appropriate

time to make it unlawful for any party to attempt to intimidate another party to the contract out of using adjudication act.

*T4 (7)*

*T4 (8)*

*b) Closed market*

Closed markets are not physical entities that can be seen through the naked eye in a real world. In contrast to open market, there are protected markets in which not everyone may participate. This may be done to keep some players out of the market or where entry criteria are high or difficult to attain. It is very difficult for non-experts to classify whether a market is an open or closed market, but economists have their own interpretation based on which they judge the openness or lack of it in a market.

The Malaysian construction market is highly competitive, led by public-listed contractors and developers. Protectionism applies to the current market condition that restrain some players from entering the market. A respondent describes that these conditions are likely to occur during tendering phase. She explains that the negative impact of selective market creates a lack of competition with the decline of quality and innovation.

*T4 (9)*

*c) Financial distress and economic pressure*

Payment problems are old age issues that pervade the Malaysian construction industry. Parties in the construction industry often complain of either not getting paid or payment have been unduly delayed. As a respondent said a failure for a party in getting regular and timely payment could result in project delay, decreased profitability and in the extreme case, the organization may go into insolvency.

*T4 (10)*

A respondent also indicates that contractors in Malaysia perceived that delay for a few days to weeks is acceptable and accepted late payment from the clients as they feel that they are often at the mercy of the employers. This could be due to the integral culture of late payment

that the subcontractors perceived late payment for a few days to weeks were acceptable in the Malaysian construction industry.

*T4 (11)*

During times like this, the local construction market experiences economic troubles where money is tight, disputes often occur because parties are not as willing or able to compromise the use of cash to smooth over the rough area. There are times where clauses were drafted to make payment contingent. Nevertheless, these agreements are signed many times because those up the contracting chain generally have more bargain than those below.

*T4 (12)*

Having the nerve to utilise the mechanics of debt recovery in the face of employers or main contractor is not always easy. A respondent points out that when times are rough and cash is very tight, the initiation of adjudication is not a matter of breach of trust, it is a matter of common business sense.

*T4 (13)*

*d) Domino effects*

Late payment in construction projects puts the entire supply chain at risk, which later creates some kind of domino effect in the contract supply chain. For instance, a respondent illustrates that if the employer delays a payment to the contractor, the payment due to the subcontractor or supplier down the chain will also be delayed. This state of affair never brings justice to parties down the chain.

*T4 (14)*

Respondents of the interview also note that such delay creates a vicious cycle and puts strain on companies in awaiting payment position, which will likely result in margin squeeze and inadequate financing. Consequently, it is the company at the end of the supply chain that suffers the most.

*T4 (15)*

*T4 (16)*

*T4 (17)*

*e) High competition*

At both the industry and company level, there is agreement that competitiveness should be maintained and increased. High level of competition is considered to be a major challenge for contractors. As such, contractors are turning aggressive as winning the competition is an important goal in running their business. A respondent explains that companies' competitiveness is influenced by the ability of the leader to observe and react from the relevant business environment in order to outperform the competitors and stay relevant.

*T4 (18)*

Malaysia has seen a great number of traders from different specialisations that in turn makes the construction job market more competitive. The increased regulations of the construction as well as the bidding process for public funded project are often subject to strict rules and high assessment criteria during tender bidding.

*T4 (19)*

One respondent notice that there is fear among local contractors in facing risk becoming subcontractors as international peers are chosen as the main contractors for the job, unless they increase their competitiveness.

*T4 (20)*

*f) Hesitation*

Adjudication is simply another adversarial method of dispute resolution in which one party wins and the other loses. As illustrated earlier, a decision to embark into adjudication has not always been comforting nor easy for sub-/contractors. As respondents agree, especially for public project, the Malaysian government remains as the largest client in the construction industry with a large allocation of national budget is used in public development, contractor for such projects fear to jeopardise the peaceful working relationship with the employer is found to be the primary factor hindering the parties from seeking to initiate adjudication proceeding.

*T4 (21)*

*T4 (22)*

Relationship between negotiators of the two parties is a critical factor in tackling commercial conflicts in construction. In Malaysia, it is found that relationship is a prime factor in business dealings. Employers would not invite contractors with whom they have a bad relationship to tender for their project. Attitude to claim forms as part of tender evaluation factor. This then would become a dysfunctional outcome for contractors as employers would have reservation over the contractor and refrain from future opportunities.

*T4 (23)*

The Malaysian government will also immediately blacklist contractors and suppliers who fail to complete government projects within the stipulated times. The government can no longer accept or continue to bear the losses whenever the contractor fails to deliver the projects as agreed. The standard practice is whenever the government faces problems with contractors, they cannot terminate them immediately before the case settles. In the current challenging economic situation, the government has to make sure that all expenses incurred do not go to waste. Thus, the contractors in public project are more mindful in taking legal steps to resolve disputes.

*T4 (24)*

Adjudication has a number of perceived disadvantages. As one respondent explains, the tight timescales of the adjudication procedure may mean that an adjudicator is rushed into making a rough and ready decision on a matter of considerable legal or factual complexity. A respondent informs that her client was reluctant to refer a dispute to adjudication as this factor may lead to injustice, coupled with the fact that there is no testing of evidence or assertion. Owing to this, further proceedings may be necessary to correct that injustice, leading to increase in legal costs.

*T4 (25)*

*g) Late and non-payment*

Payment problems are old age issues that permeate the Malaysian construction industry. Contractors and parties to the contract so often complain of either not getting paid or payments have been unduly delayed by the employer. The issues of late and non-payment are paramount



to the construction industry compared to other industries. Respondents agree that generally, the issue of late and non-payment results from the paymaster's poor financial management.

*T4 (26)*

*T4 (27)*

A respondent adds that poor financial management is also attributed to the employer's scarcity of capital to finance the project. For instance, they need money to roll to reach their sales and marketing goals.

*T4 (28)*

A respondent also addresses the nature of payment term in construction industry to be too loose and flexible. Arguably, the employer may withhold payment to the contractor or subcontractor for a variety of reasons such as defects, failure to comply with materials provision of the contract and others. In turn, the flexibility has been identified to be clients deliberately delaying payment for their own financial advantages.

*T4 (29)*

*T4 (30)*

Moreover, a respondent explains that factors to delay and non-payment also are subjected to conflict among the parties. At times, there are difficulties in reaching amicable settlement among the parties. Employer also lacks trust in the consultant in relation to the certification process of contractors' progress claim and variation order.

*T4 (31)*

### ***7.6.2 Employer's Perspectives***

In the course of discussing the issue of the payment dispute in the construction industry, although attentions were seen to be directed to contractors, Employers have their own set of struggles too. Employers often have to quickly adapt to the market trends in making any business decision to ensure that their projects are feasible. This often results in inevitable amendments to work directions to meet the market demands.

a) *Sub-standard work and non-performance*

A respondent contends that although connectivity between the parties' relations is important, employers cannot bear to tolerate when a contractor does not meet expectations. If the contract work assignments are not completed on time, the employer has every right to question the contractor as to the cause and to give feedback that the non-performance is unacceptable. If the situation is not resolved, the employer has a performance problem to address.

*T4 (32)*

b) *Subcontracting structure*

Subcontractor-related problems are still quoted as one of the main risks of construction project in Malaysia, identified as one of the prevalent causes of project delays. Respondents agree that subcontracting structure in Malaysia is creating problems to the industry. Profitable contracts were awarded in a less than transparent way to close associates of those in the corridor of power. These awarded companies in turn subcontract the tender to another party that may not have the expertise and resources to take on the full scope of the work.

*T4 (33)*

*T4 (34)*

*T4 (35)*

c) *Cost constraint*

For a construction employer, predicting cash flow is important to ensure that an appropriate level of funding is in place. In construction, apart from poor management, lack of adequate cost control is found to be the most common characteristic of business failure. More commonly, failure at project level receives more attention rather than at the company level, particularly at the project developer level.

Clients face cash flow problems and capital shortage that, in extreme cases, limit efficiency and further squish other profitable firm into insolvency. As a respondent notes, this situation applies when a client becomes insolvent, owing large sums of money to the contractor.

*T4 (36)*

*T4 (37)*

A respondent working for the Malaysian government public works department additionally comments that one the main reasons for late payment is when contractors make error in submitting claims. Because the general guideline to honour payment is strict, most problems occur when contractors are missing some necessary document required. Importantly, contractors should not make errors or mistakes in their claim submission as late submission will be subjected to current year budget allocation. Thus, it is important for contractor to familiarise themselves in public payment procedure.

*T4 (38)*

### ***7.6.3 Shared Struggles and Dilemma***

Late payments spread ill effects up and down the construction supply chain. They seriously hamper clients' and contractors' ability to deliver projects on schedule, to spec and within budget, and if they send a contractor to the wall, multiple projects can be put at risk. Relationships and reputations deteriorate, with the effect of compromising the tender process, as well as finance and creditworthiness. The ability to contract skilled contractors is also affected, and productivity can plummet.

Precisely because so many parties are impacted, it is in everyone's interest that payments are made without delay when they fall due. That makes payment administration a joint responsibility, and that starts with monthly payment applications and valuations, when all parties should be collaborating to provide and receive all the information needed.

A commercial dispute is an unwelcomed risk of every business. It diverts valuable time, energy and resources away for profitable activities. Before commencing adjudication, parties should audit their adjudication risk, which helps them to make sensible commercial decisions. Parties are found to bear some common struggles and dilemma in making decisions to submit the dispute to adjudication. Thus, by highlighting their risk in terms of nature and scope, it allows parties to determine how to prevent and reduce the risk. A respondent explains the common risks parties can face in initiating adjudication.

*T4 (39)*

a) *Deteriorating relationships*

Malaysians make enormous effort to build relationships and will avoid public humiliation or embarrassment. The communication style is not always direct. The desire to maintain face makes Malaysians strive for harmonious relationships. As a respondent explains, face can be disturbed by open criticism. Malaysians are especially sensitive when their authority is challenged in public and showing anger at another person creates uncomfortable situation. In construction, when a party disagrees with his project peer openly, it can lead to deteriorating relationships between the parties.

*T4 (40)*

Generally, across the region, Malaysians prefer a relationship-oriented approach than a task-oriented approach. It is also found that contractual obligations of completing the job to be less important than building a trust. Thus, a respondent explains that communication between Malaysian construction parties tends to be subtle and to avoid saying a direct “no”. Although parties also believed it is best to use the indirect conduit of a third party to deal with problems, nothing will be resolved by showing frustration, anger and impatience. As illustrated below, disputes of final account are found to be frequently resolved via adjudication, despite criticism on the suitability of the quick and rough mechanism to deal with huge quantum dispute. A respondent speculates that submitting dispute at the end of a project will help to preserve the ongoing working relationships.

*T4 (41)*

*T4 (42)*

A respondent states that, commonly between Chinese parties, harmony is paramount. This is usually established if both sides have structured their agreement carefully but tend to destroy the moment conflict arises. Chinese parties do not prefer to use institutions to resolve conflicts with other Chinese because big parts of their social behaviour have evolved explicitly to avoid institutions like the court or any legal structure.

*T4 (43)*

Once a legal institution like any court-like procedure gets involved, it will be straight up a lose-lose relationship between the parties. The business relationship that is considered an important and vindictive culture in Malaysia is prevalent, thus it deters parties from adjudication process.

*T4 (44)*

A respondent also comments that he believes adjudication threatens to damage relationships, especially when the responding party feels that he has effectively been ambushed and attacked by the referring party.

*T4 (45)*

Local old timer construction parties usually have their disputes to be remedied over the next deal. However, a respondent comments that this is less true of a big construction corporation. Large construction companies emphasise justice more than harmony. Restitution is expected to be paid and money to be returned when a party is found to be wrong.

*T4 (46)*

*T4 (47)*

A respondent opines that although somebody with authority is needed to oversee the dispute and make an award to resolve, parties have to realise that by going to the proceeding, it could harm and damage their present business relationships and they are exposed to the danger of having other potential business clients and partners flee from them. In this way, they could risk depriving their business of opportunities and company profits.

*T4 (48)*

Despite these problems, adjudication is not legislated to disturb business relationships, but rather to compromise. The viability of adjudication is highly dependent on parties' cooperation and genuine intention to resolve the dispute. Respondents believe that parallel with the collective spirit of Malaysian relations, if parties wanted to remain on good terms and may want to do business together in the future, parties will avoid adversarial processes that will drive wedges between people.

*T4 (49)*

*T4 (50)*

Respondent also believes that it is rather a fantasy that parties leave the adjudication process with a newfound respect and appreciation for each other for the work commitment and together going forward. This is most likely attributed to the local business culture of vindictiveness.

*T4 (51)*

*T4 (52)*

Personal relationship clearly plays a large role in the Malaysian business culture, including in the construction industry. Trust is key to good business for them and therefore the parties will be looking for a loyal commitment of collective effort in business relationship. If any party becomes aggressive during interaction, trust will drop. Matters of disagreement are expected to be dealt in the most diplomatic and private manner. Criticism can be seen as unfavourable and destructive. A respondent criticises that because of the local business attribute of being highly relationship-dependent, the industry is struggling to improve towards better integrity of working culture, thus hindering dispute from being resolved effectively.

*T4 (53)*

*b) Cost and time*

The costs linked with adjudication involve reaching settlement awards, including expenses relating to avenue, the adjudicator fees and expenses, documentation cost and award cost. Respondents generally agree that cost is one of the most critical criteria for parties when assessing the usage of a dispute resolution method. Although adjudication is claimed to be more economic than arbitration and litigation, it still affects the profit share of the project outcome.

*T4 (54)*

*T4 (55)*

Within the organisation, parties will conduct an assessment to determine the suitability of a dispute for adjudication. A cost-benefit analysis of the value of the case will be undertaken to help the company to better understand the issues involved in the dispute and the expense likely to be incurred.

*T4 (56)*

*T4 (57)*

With the steady growth of the number of disputes being referred to adjudication, parties found it is extremely difficult to challenge an adjudicator's decision. Because the likelihood of

successfully appealing an adjudicator's decision is low, parties usually accept and let go of the dispute because they do not want to incur additional cost.

*T4 (58)*

*c) Privacy*

Confidentiality is another implied and inherent feature on the choice of the ADR process by parties to the dispute. As discussed earlier, Malaysian parties prefer to resolve agreements in a private manner where information of case materials are not allowed to be disclosed to the public without mutual consent of the parties.

*T4 (59)*

*T4 (60)*

*d) Political patronage*

A respondent also admits that contractors who conduct business transaction and survived based on political association as well as expert navigation in the government procurement processes have immensely affected the industry's quality and image. Their appointment is seen not be based on competency and competitiveness, but rather political patronage. In Malaysia, direct negotiation should only be considered only and when necessary due to urgent purchase or there is only one supplier and no price comparison could be made. The appointed must be the expert and well-known for its credibility. A respondent describes it is not always the case.

*T4 (61)*

*T4 (62)*

Transparency and accountability again are major standing issues in the procurement practice in Malaysia and sometimes can be regarded as a sensitive issue. Contractors have the right to expect that contracts and tenders be given to the deserving ones. One of the complaints raised by a respondent is on awarding tenders to deserving contractors. The Malaysian procurement policies and procedures were created to provide transparency and accountability especially in the supplier's selection process. The processes are lengthy and involve discussions

among officers due to the bureaucratic practices. However, interference from someone who is very influential to the top management has interrupted the process and thus it is no longer transparent. A respondent complains that there are cases where recommendation letters from the politician being brought into the meeting and request to award certain contractors because of political reasons rather than their credibility.

*T4 (63)*

*e) Losing*

Under CIPAA, only the receiving party may commence adjudication, not vice versa. This presents a definite strategic advantage to the receiving party to submit a claim under adjudication. Respondents generally agree that employers are usually at a disadvantage when complex disputes arise and claims are initiated by an unpaid party in adjudication, because they will have limited room to negotiate. This is said to almost guarantee the employer to lose their case in adjudication. Criticism arises as it will make CIPAA become unbalanced, where the claimant is entitled to claim damages while the respondent is not allowed to do so.

*T4 (64)*

*T4 (65)*

*T4 (66)*

A respondent is of the view that CIPAA does not provide for the respondent party to raise a counterclaim, which is properly be brought in arbitration proceedings. This implies that the adjudicator does not have the jurisdiction to award a positive monetary payment to the respondent in an adjudication. Again, this position exposes the non-paying party to the risk of floodgates of adjudication claim being brought by contractor.

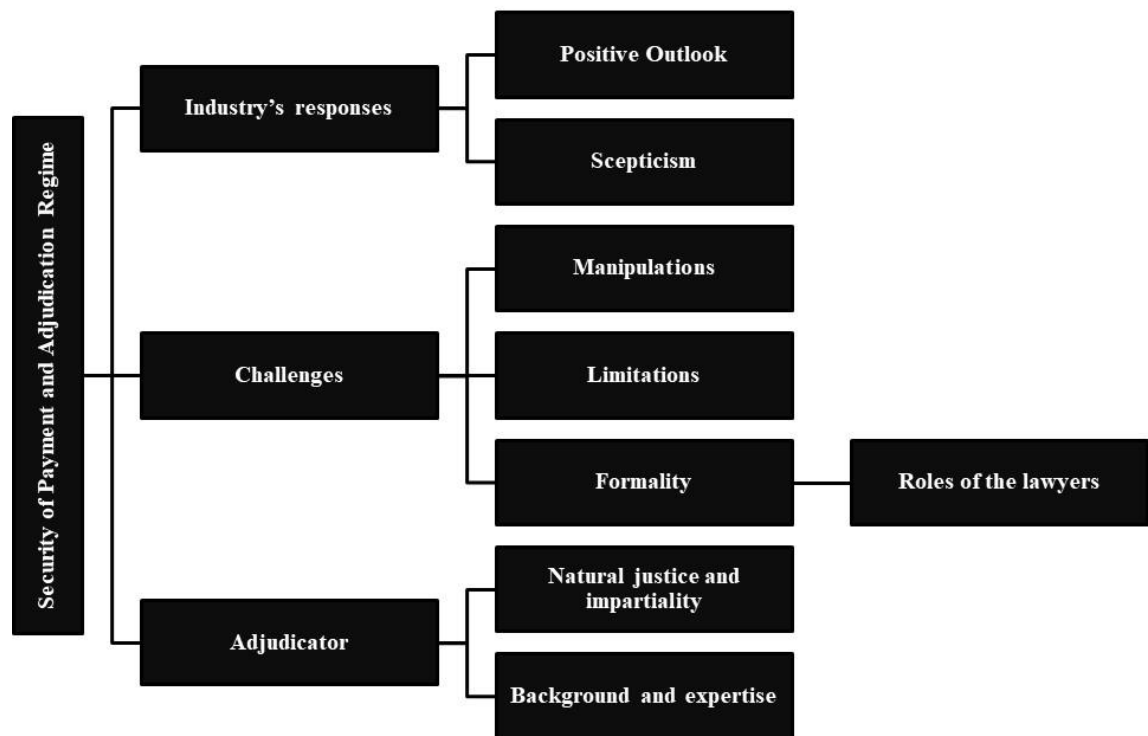
*T4 (67)*

## **7.7 Theme 5: Security of Payment and Adjudication Regime**

The Malaysian Parliament enacted CIPAA, which came into effect in April 2015 with a declared intention to alleviate payment problems in the construction industry through the introduction of a statutory adjudication process. The adjudication proceedings are to ensure that



any payment dispute relating to construction work may be resolved in a speedy but provisional manner, thereby facilitating the cash flow in the construction industry. Respondents of the study were asked on their opinions of how reasonable the Act is so far in the industry. Figure 22 illustrates the categories that have been grouped together under this theme.



**Figure 22: Theme 5 – Security of payment and adjudication regime**

### **7.7.1 Industry's Responses**

The CIPAA coming into effect is generally very much welcomed and the industry hopes that it will herald a new beginning for the construction industry and will be a success in revolutionising the ways disputes are resolved in the construction industry.

*T5 (1)*

There is only little doubt whether the construction player will make use of not only the payment procedures, but also adjudication under the CIPAA. There is some hesitation early on the enforcement while the players become familiar with the procedures. The inception also faced the industry's slow acceptance, the industry players' lack of awareness and

understanding, user ignorance of their entitlement under the Act, and low level of knowledge among the players.

*T5 (2)*

*T5 (3)*

*T5 (4)*

A respondent comments that it was quickly initiated by contractors to initiate adjudication first against the employers. Clearly, the employers engaging in construction work will need to take care and attention with the regards to the Act and management of contract.

*T5 (5)*

The increasing frustration associated with litigation and arbitration in resolving construction disputes has driven a raising demand for an alternative resolution. The pressing demand has prompted the introduction of adjudication as a quick and cheap mechanism to resolve payment disputes in the construction industry. The enactment of CIPAA in Malaysia is seen as a relief due to the growing frustration and doubt on the effectiveness of traditional dispute resolution method practiced in Malaysia.

*T5 (6)*

Additionally, the introduction of CIPAA also receives warm support from the High Court where a specialist construction court is set to change the construction industry in Malaysia.

*T5 (7)*

*a) Positive outlook*

The Malaysian adjudication act is found to have been warmly welcomed by the construction industry. The primary goal of the CIPAA as stated in the Act is to facilitate a regular and timely payment of construction contract. Respondents generally agree with the CIPAA being widely accepted as a cheap and efficient way to resolve disputes and statistics shows the number of cases referred to the Act and the rate of claimant success indicates an increase in parties' paying morale.

*T5 (8)*

*T5 (9)*

*T5 (10)*

CIPAA is considered relatively new to the construction industry in Malaysia. There is a great possibility that the industry's players are still lacking awareness and information about the CIPAA. Thus, the AIAC has taken various efforts to promote education and awareness to the industry players on how they can benefit from the enactment of CIPAA.

*T5 (11)*

*T5 (12)*

The Malaysian construction industry witnesses a significant rise in the number of disputes referred to CIPAA. This movement shows that the application and the acceptability rate of adjudication among the construction players is heading to a positive direction. A respondent claims that CIPAA has been a good reward for the Malaysian construction industry as a means to provide legal access to achieve justice.

*T5 (13)*

*T5 (14)*

*b) Scepticism*

Nevertheless, some scepticism was also recorded, especially on the wide range of the CIPAA application and the overwhelming impact on the industry holistically. A respondent notes that although CIPAA is useful in resolving payment dispute, not all parties necessarily will embark on it.

*T5 (15)*

Because good relationship perseverance plays an integral part among Malaysian business parties, a respondent predicts that adjudication may not be a preferable means to solve a dispute due to many group attachment issues.

*T5 (16)*

*T5 (17)*

A respondent also comments that where the construction market is intense, it is challenging for the small contractor to initiate adjudication against their client because such position would jeopardise their relationship between themselves and the employer.

*T5 (18)*

A respondent also raises her concerns mainly on the overwhelming effects of CIPAA to the industry and her fear that the mechanism will be abused by opportunistic and dishonest parties to seek undeserved monetary relief in a dispute through the adjudication process. Adjudication decision does not necessarily achieve the final settlement of a dispute because either party has the right to have the dispute heard afresh in arbitration or litigation. Nevertheless, experience shows that majority of adjudication decisions are accepted as the final result.

*T5 (19)*

*T5 (20)*

Interestingly, a respondent also critically comments on the purpose of enactment of adjudication act in Malaysia. He opines that adjudication is not a suitable mechanism to resolve all disputes because of its extremely interim nature. His excerpt is as below.

*T5 (21)*

Also, the industry players, especially the paymaster, should not misjudge the needs and necessity of adjudication system in Malaysia, especially since poor payment culture is still prevalent. Adjudication is not intended as a way to correct errors in contract but simply to help an organisation to secure payment of the amount of the money they are contractually entitled to.

*T5 (22)*

Respondents also raised a concern on the issue of the trustworthiness of the adjudication mechanism in Malaysia. Additionally, respondents stress that the adjudicator holds the critical key on achieving the optimum benefits of the CIPAA. Concerns on the availability of suitable competent adjudicators who are able to determine the dispute within the prescribed timeframe is considered as crucial to minimise errors in deciding on a dispute for the work to proceed unimpeded and with less likelihood of serious injustice being caused.

*T5 (23)*

*T5 (24)*

*T5 (25)*

### **7.7.2 Challenges**

The expectation of every enactment is to see that the purpose of making policies or law is realised on targeted beneficiaries as well as to achieve the desired outcome. However, implementation problems do occur and create a barrier between the law conception and outcome. There are series of challenges discussed by the respondents of the study. The challenges vary from technical issues, process and procedural issues, and legal technicalities efficiencies.

As discussed earlier, the Malaysian industry's take up on adjudication at first was initially slow. Some construction projects are far from big cities or in rural areas and many of these projects were carried out by local trade contractors. A number of respondents found that small contractors are ignorant or rather unaware on their right entitlement under the adjudication act and prefer to continue deal disputes using the conventional method.

*T5 (26)*

*T5 (27)*

The study also found that this is due to the fact that small contractors feel unconfident to adopt a new perspective to deal with payment disputes. Many respondents associate the hesitation with the problem of language barrier and legal wordings of the Act. Despite the efforts taken by the legislator to minimise the usage of highly legalised terms in the Act by using simple plain English, small-sized contractors are still having difficulties to familiarise themselves with the CIPAA.

*T5 (28)*

*T5 (29)*

*T5 (30)*

*T5 (31)*

Additionally, a respondent voiced out his thoughts on the key traits of becoming an adjudicator. Whilst anyone can become an adjudicator, a respondent felt that lawyers should exempt themselves from determining payment dispute that is highly technical in nature that requires a decision in quantum. Qualified professionals are considered to be more desirable with knowledge and experience drawn from professional practice from surveying, architectural, legal and engineering background. However, his observation concluded that lawyers seem to be the dominant group of the adjudication pool in Malaysia. The relatively low uptake by construction professionals in training to become an adjudicator is perceived to pose a challenge to achieve the effectiveness of the Act because parties would find it helpful to seek someone who has the core skills and knowledge of the subject matter in order to understand and deal with technical questions pertinent to the issue. When he was further asked why this is the case, his excerpt is as below.

*T5 (32)*

*a) Manipulations*

It was not unknown for some referring parties to attempt to manipulate the adjudication for their own personal agenda. Section 15 of the Act provides very limited grounds on which an adjudication may be set aside and do not concern on the merits of the dispute. Additionally, an adjudicator is entitled to but does not necessarily have to amend if there is any error on clerical or mathematical calculation mistake. Hence, it is established that an adjudication decision will not be set aside even if the adjudicator made a mistake on the law of the facts. A respondent contests that this entitlement is claimed to be challenging for an honest defendant as this will allow plenty of avenue for a defective decision to be enforced upon them. Her excerpts are as below.

*T5 (33)*

*T5 (34)*

*T5 (35)*

Since there is no testing of evidence and assertions, adjudication generally allows a mistaken decision to be honoured in the short-term, which may in turn cause issues of cash flow in the long run. Because adjudication decision must be ready within 70 days of the starting process, adjudication is another way of losing conservable amount of money in a short timescale

for the party who is on the wrong end of an unfavourable decision. Clearly, the above statements support the view that adjudication as a means of dispute resolution does not work with everybody and is not suitable in every scenario. Therefore, it is equally crucial to consider some of its setbacks when considering entering into the process.

*b) Limitations*

It is established that generally adjudication will not be conclusive and will be subject to final determination in arbitration and litigation, opening the possibility of further proceedings. While it might be possible to draft an adjudication procedure that allows multi-party disputes, by doing so, will defeat the key advantage of adjudication being a fast mechanism to resolve a dispute. A respondent comments that the 70 days is too tight in the event of a fairly complex dispute involving multi-party.

*T5 (36)*

In this regard, a respondent notes that no one could expect an adjudicator, operating on a tight timetable, is obliged to reach a decision for every possible dispute that could arise under a construction contract, to deal properly with each point of argument with the same care and detail like as if the point being decided in arbitration and litigation.

*T5 (37)*

Clearly, when parties agree to refer a large and complex dispute to adjudication, careful consideration needs to be given to the balance between achieving an expeditious decision whilst at the same time ensuring the time scales are such that it enables the adjudicator to reach a fair decision. A respondent agrees.

*T5 (38)*

*c) Formality*

Adjudication is a form of dispute resolution procedure which receives growing familiarity to the Malaysian construction industry. One of the key points of adjudication process is that it seldom involves lengthy oral arguments or legal submissions. It is now established that the procedure has become a popular choice for most in the industry and overall, the system has

been proven and been well-supported by the court. Respondents of the study observed that this has, unfortunately, also had the unwanted setbacks of making the process more formal and legalistic.

*T5 (39)*

*T5 (40)*

Adjudication is designed to be a straightforward process to enable parties to resolve disputes inexpensively and in a speedy way. The distinguishing feature of adjudication is the tight time frame within which the decision is provided. It is sometimes perceived that the process confers an unfair advantage on the claimant side, but also generally accepted that it has shifted the balance of power between the parties. Generally, parties do not prefer to be given more time because the process then becomes more expensive. However, in dispute involving millions of Ringgits, it is impossible to for the adjudicator to reach a fair decision within the tight timescale. A respondent notes that it is very difficult for the parties to control this.

*T5 (41)*

i) Roles of the lawyers

Lawyers tend to intrude in the adjudication process. As stated in Section 8(3) of the CIPAA, a party in the adjudication proceedings may allow to be represented by any representative appointed by the party. This provision allows the disputants to be assisted by nominated legal representatives and there is a role for lawyers in the adjudication process. As a respondent notes, the industry should treat them as a guiding hand especially if the adjudicators get the law wrong, which results in the decision not being enforced. The risk, in his opinion, may affect parties to adjudication especially when error relates to mistaken decision by adjudicator.

*T5 (42)*

However, some respondents opine that although the involvement of lawyers is appropriate when parties seek legal advice and assistance if any jurisdictional issue arise, there is much discussion about prohibiting parties from being legally represented in the process. Legal procedures will not dominate the adjudication proceeding, instead plain English and construction language will be used.



*T5 (43)*

*T5 (44)*

The CIPAA is enacted to enable adjudication as an interim measure and summary mechanism where the unpaid party can seek provisional financial relief. Payment disputes are often founded on the method of measurements and evaluations, which are usually technical rather than legal in nature. The Malaysia Evidence Act 1950 will also not be applicable. Additionally, the superiority and significance in weight of the evidence and legal arguments presented by the parties will suppress the process, thus the Act replaced lesser emphasis on strict legal rules and procedures. Thus, this diminishes the need for a lawyer to represent any party.

*T5 (45)*

*T5 (46)*

Some respondents also admit that many disputes are made complicated with the presence of lawyers and the strict application of procedural rules.

*T5 (47)*

### **7.7.3 Adjudicator**

Referring dispute to an external judge may result in additional cost implications and unnecessary time loss to a project. If project parties are competent to effectively facilitate conciliation on site, differences and conflicts may be prevented to develop into disputes. As such, it is found that lack of knowledge, skills, and experience relating to conflict resolution methods and its facilitation procedures may negatively affect the expeditious and rigorous outcome of the procedure. Through the interviews, respondents address the key importance of the characteristics which they describe as essential for an adjudicator.

The ultimate measure by which adjudication quality can be assessed is to be found in the legal accuracy of both procedural and substantive fairness of the adjudicator's awards. Generally, one of the characteristics which the respondents describe as essential for an adjudicator is their ability to grasp the essential issues quickly and focus on those issues, manage their own and parties' time, and to treat the parties fairly and courteously by taking on

board their submissions. As a respondent explains, the adjudication process is generally a quick one, so the necessity to focus on those aspects is important.

*T5 (48)*

Also, the respondents observe it would be clearly absurd to hold adjudication with as high level of scrutiny as in arbitration or litigation. However, he also asserts that there must be a quality baseline below which awards must not fall, otherwise the overemphasis on efficiency in terms of justice would result in a process that the parties would perceive as unfair to them, which in turn can result in higher likelihood that they will challenge it.

*T5 (49)*

*T5 (50)*

The interview also found that over the years, one party often claims that there has been a breach of the rules of natural justice because the reasoning provided is inadequate. It is seldom seen that parties arguing that the adjudicator's reasonings were too detailed and overly lengthy. A respondent opines that parties will moan if they think the adjudicator has overlooked any issues by not mentioning it in his decision.

*T5 (51)*

As an adjudicator, setting out the reasoning is seen as the vital part of the decision-making process and it is found to be helpful to do so to illustrate how the adjudicator has arrived at the decision they made. It can also be particularly useful if there is an alleged breach of the rules of natural justice. However, there are issues of time and money to consider. The adjudicator does not get the luxury of time to make a decision. Thus, at some point, it is unreasonable to incur a fee deciding on a point that adjudicator deems unnecessary in view of the primary findings.

*T5 (52)*

*T5 (53)*

One tactical point adjudicators and parties should consider is the timing of the notice of adjudication. Although extension of time is almost possible to be given in many circumstances, commencing adjudication on festival eves and public holiday periods are not uncommon practice, thus resulting in limited amount of time for the responding parties to prepare their defence. A respondent claims that therefore, it is crucial that parties consider the issue of

appointment of the adjudicator to give a more balanced and fair view on the issue of timing in the notice of adjudication.

*T5 (54)*

*a) Natural justice and impartiality*

As originally conceived, adjudication was intended to be a rough and quick mean of provisionally resolving disputes in ongoing projects to keep the cash flowing. Beyond the broad duty to act “impartially” under S. 24 of the CIPAA, adjudicators are not obliged to act “fairly” or to adopt “fair procedures”. Because adjudicator operates under a tight timescale, adjudication awards are enforceable unless or until the dispute is determined in arbitration and court.

*T5 (55)*

*T5 (56)*

Although the requirement to give reasoning for the decision is not mandatory, parties have the right to ask for a reasoned decision to allow them to understand and if necessary, challenge it. The process emphasis that adjudicators must deal with all arguments submitted before them. This includes the claims made by the referring party and importantly the defences put forward by the responding party. It is particularly easy to overlook this issue especially when the adjudicator has to decide within a limited timescale against a mountain of documents.

*T5 (57)*

*b) Background and expertise*

The study found two opposition groups in regard to the background and expertise of adjudicator appointed in Malaysia. Generally, there are two major camps of adjudicator, first is the ones with legal background and expertise like lawyers, and the ones with technical and commercial expertise consisting of construction professionals like quantity surveyors, architects, and engineers.

*T5 (58)*

Across the interview series, the study found that the respondents held strong preference for adjudicator with technical and commercial expertise as their background experience. This view supports the awareness on the importance of knowledge and experience in construction industry as a critical indicator for resolving disputes in adjudication.

The study also found a struck polarization where a majority of the respondents expressly prefer adjudicators with commercial background to those with legal background as they will be more appreciative of the parties' need to resolve the dispute holistically rather than focusing on entitlement that potentially will create more division between the parties.

*T5 (59)*

Payment disputes can involve matters like delays, loss and expense, disruptions, extension of times and many other issues that revolve around technical determinations compared to complex disputes that involve both technical determinations and contractual entitlement requiring determination on legal norms. Owing to this circumstance, respondents of the study agree that construction professionals with technical experience are preferred to hold the adjudicator role.

*T5 (60)*

Presently, existing statistical data is not available to illustrate the ratio of the main professions sitting as adjudicators in Malaysia. However, criticism and dissatisfaction by the respondents on the domination of the lawyers in the adjudicator pool in Malaysia is recorded throughout the interview series.

*T5 (61)*

Although the evaluative style commonly associated to the nature of lawyer's scope of work in methods like arbitration and litigation is rather useful and appropriate for another adversarial method like adjudication, criticisms were basically drawn based on the submissions that lawyers turning the disputes into legal arguments. Furthermore, the respondents believe that by having a construction professional as their adjudicator, s/he can better understand the commercial constraint and technical complexities that lead to the development of the dispute.

*T5 (62)*

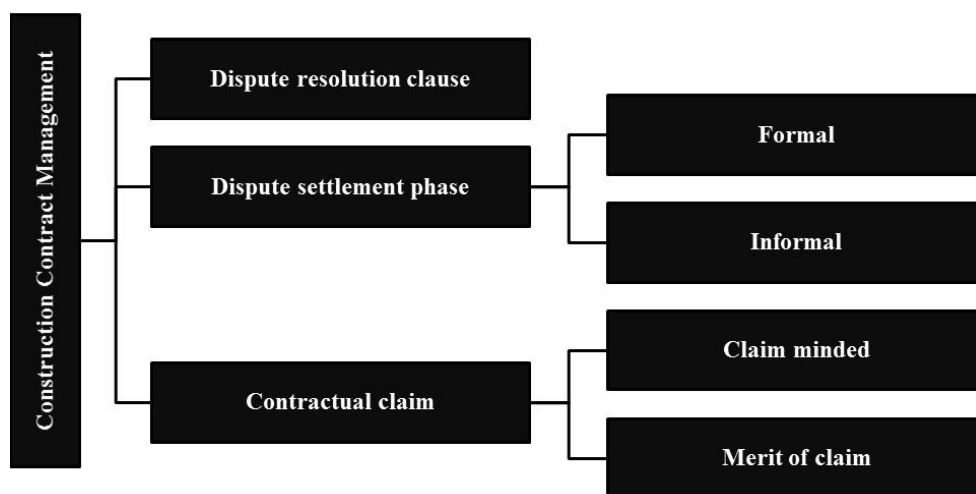
*T5 (63)*

CIPAA allows adjudicators to adopt inquisitorial measure by taking initiative to ascertain the facts and law and if necessary, to appoint an expert to inquire on specific matters for the decision. Nevertheless, the respondents contested that such measures would prolong the process, thus increasing the cost to reach the settlement, which directly defeats the key objective of the whole speedy and cheap process of dispute settlement. These factors are found to greatly affect the satisfactions of the parties in the process if a lawyer is appointed as the adjudicator of a case.

*T5 (64)*

### 7.8 Theme 6: Construction Contract Management

Standard form of construction contracts was used to regulate construction stakeholders' contractual obligations and expectations during the contract administration process. It is during this process that vast amounts of provisions are referred to. In general, interpretation error and misunderstanding of contraction contract are results from illegibility of contract clauses and technical terms. These issues have in turn resulted in disagreements between the contracting parties on their contractual rights and responsibility. The study explores the attribute of construction contract management as the third theme to understand the influence of national culture towards dispute resolution from the perspective of adjudication. Figure 23 illustrates the categories that have been grouped together under this theme.



**Figure 23: Theme 6 – Construction contract management**

Accordingly, contractors are required to fulfil the obligation of a standard contract form used respectively for a construction project. Owing to the technicality and legalese nature of standard form of contract, many parties were exposed to the risk of misinterpretations of the conditions of the contract and misunderstand the legal obligations outlined in the contract. As such, they failed to comprehend the genuine contractual rights and obligations in a construction project, which will result in untoward incidents.

Respondents describe that it is crucial that a contract is as clear and explicit as possible. Although construction contracts may be verbal, respondents recommend for construction contracts to be in writing in order to bring any payment dispute to be adjudicated within the ambit of CIPAA. A written contract presents a clear traced record to the parties' agreement, whereas an oral one is subject to the parties' reinterpretation of the terms.

#### *T6 (1)*

There are no specific requirements of form for construction contracts. Previously, forming a construction contract through verbal agreement was commonly practiced in Malaysia. Proving an unwritten contract can be hard, respondents note that if a dispute happens regarding a verbal contract and parties take it to a judge, the judge will look at the circumstances of the transaction as well as witness statement to discover the contractual terms. Respondents believe that for the benefit of both parties, unwritten contracts are not recommended for construction agreement even though it is legally binding.

#### *T6 (2)*

The Malaysian government, being one of the biggest employers in the Malaysian construction industry, recognises the problem of the impact of cash flow disruption to construction contracts, and alongside the industry stakeholders, they have addressed the issues to be taken seriously. The PWD 203A is a standard form of construction contract used by the Public Works Department of Malaysia (PWD) especially for Public projects.

Upon the introduction of CIPAA, the government plans strategies to overcome and minimise payment disputes in Public projects. The PWD, being the government's construction project implementation agency, improves and aligns its payment-related procedure to suit with CIPAA to minimise any potential claims arising from the contractor. A respondent notes that PWD has taken several steps to make amendments to the PWD 203/203A to further strengthen the payment procedure on ensuring contractors to be paid fairly and accordingly.

*T6 (3)*

### **7.8.1 *Dispute Resolution Clause***

Drafting an effective dispute resolution clause in a contract at the outset is key to avoiding complex and expensive jurisdictional issues, which may in turn escalate the costs of dispute resolution. The dispute resolution clause has a fundamental role in determining, in advance, the structure, mechanism, processes, and legal framework for the resolution of disputes. A respondent notes that some of the key issues arising out of a poor dispute resolution clause formation includes whether to choose adjudication, arbitration or litigation, the ambit of disputes covered in the dispute resolutions and key considerations with the enforcement of adjudication and arbitration award, where the choice of dispute resolution method is not clearly set out.

*T6 (4)*

*T6 (5)*

More often than not, parties see litigation as a last resort, once other alternative means of resolving disputes have been exhausted. It is also common for parties to include escalation clauses in their recommendation that the parties undertake various steps such as exchange information and meetings between directors to seek if they can reach a settlement before either one commences arbitration or litigation proceedings.

### **7.8.2 *Dispute Settlement Phase***

Alternative dispute resolution (ADR) refers to a range of techniques for resolving dispute without seeking redress from the court. Choosing ADR can help the parties avoid lengthy and costly litigation. ADR claims to be flexible and cost-effective while being able to bring a speedy resolution to the problem. The construction industry is regarded as one of the most conflicted and dispute-ridden industries. Over the years, various methods of ADR have been introduced into the construction industry as a means that gives parties in dispute the opportunity to work through disputed issues.

*T6 (6)*

The respondent also states that there are many factors that have impacted dispute resolution in the construction industry. There is a general dissatisfaction with arbitration and the growth of dispute and conflict in the industry led to a review for a different avenue to resolve the dispute more economically through adjudication.

*T6 (7)*

Formal ADR methods include mechanisms which are organised or officially constituted, whereas informal may include those which are not officially recognised or organised. The following section will show some examples of experience and observations by the respondent on the usage of these two method categorisations as well as justifications to their decision to invoke adjudication.

*a) Formal*

Formal resolution process includes attributes like grievances or lawsuits. Formal ADR usually require parties to submit their formal complaint in writing together with evidence which then will be considered by the appointed decision maker. In adjudication, although the outcome is commonly appealable, the process usually takes place within specified deadlines and parties have no control to decide the outcome. Owing to this, respondents raise the necessity for parties to take account of the key considerations for invoking an adjudication.

*T6 (8)*

Before commencing adjudication, the respondent also advises the referring party to conduct adjudication risk audit. Risk audit is a process which helps the party to make sensible commercial decision. The audit should highlight risks, their nature and scope and the referring party should allow preventing or reducing the risk. The dangerous flaw that a referring party can make is not to undertake such formal audit of risk.

*T6 (9)*

The respondent also refers to the issue of unique relationship network and clashes of interest among parties that has led the adversarial process to drive a wedge between parties and ruins relationship. Adjudication, in her opinion, is presumed to uphold the course of naming, blaming and claiming where one side accuses the other of causing an injury and ask a judge to hold the other side responsible. This is followed by defences and frequently counterclaims.



*T6 (10)*

*T6 (11)*

A respondent comments that major construction stakeholders would take a more careful approach in resorting to a formal resolution owing to the circumstances that the adversarial process produces a win-lose outcome where there will be at least one unhappy party feeling resentment and animosity towards the other. None of this, in her opinion, is conducive to fostering positive relationships going forward.

*T6 (12)*

*T6 (13)*

A respondent also believes that when a dispute involves two parties who want to remain on good terms or may want to do business together in the future, it is necessary for the parties to sit down together and air their differences to cooperate on a resolution. Emotions may run high if parties choose to go through the process. Thus, the respondent recommends parties to put their ultimate focus in finding workable solutions, rather than relying on blame-assessment and compensation for perceived past harms.

*T6 (14)*

Addressing the above statement, some respondents disagree to see adjudication in a hostile light. Rather, they believe that the introduction of adjudication in Malaysia has provided an additional legal avenue and more opportunities for the parties to resolve the dispute amicably before going to arbitration or litigation with a minimised aftereffect to the preservation of business relationships. He further stresses that in fact, adjudication is urgently needed in the country as cash flow problem has become an industry endemic.

*T6 (15)*

Over the years, respondents also notice instances where the parties did not want a decision on an amount of money, rather just a decision on principle. It can be a decision in regard to the conditions of the contract or method of measurement valuation. The decision on these matters in adjudication would allow the parties to move forward from the decided point of view together.

*T6 (16)*

*b) Informal*

Informal resolution is less focused on the process and more focused on the outcome. Rather than choosing sides, the parties work in a collaborative mode to try to achieve an outcome that is mutually acceptable. The parties often will take responsibility for developing the outcome rather than leaving the task to an uninterested judge. Mediation is an example for an informal method of ADR.

Within the construction industry, the basic concept of dispute resolution advisor commonly involves the use of a neutral third person/s who advises the parties to a disagreement and suggests possible settlement solutions. Respondents see this method as beneficial because disagreement at site level can be addressed before it turns into a full-blown dispute. Not only it avoids the breakdown in working relationships, but it allows the issues to be dealt with whilst they are fresh in the parties' mind. This method is perceived as preferable for the parties because it limits a legal outcome in the sense that the settlement recommendations could encompass holistic solutions mutually beneficial to the parties and the project.

*T6 (17)*

*T6 (18)*

Informal methods such as negotiation and mediation allow more flexibility and creativity over settlement options, parties are sensibly not ordered to engage these methods as there is a point in the mediation proceeding if it appears to fail. There are factors that contribute to mediation failure. A respondent explains that mediation often does not fail at the early stage as further down the road. Mediators often find it difficult to prevent conflict as the difference is too large to resolve. At that point, concluding a failed mediation may well enable the parties to understand the case against them and even agree on some aspects before resolving it through a formal resolution.

*T6 (19)*

### **7.8.3 Contractual Claims**

During construction of any kind of projects, there are often complications. The size of the project may have no direct influence on the complication, whether additional works are necessary or whether the building will take longer to complete, the cost will be more than the

parties originally contracted for. A contractor may have a claim against employer in relation to a change or delay, a sub-contractor may have a claim against the contractor for the same change or delay. In turn, the employer may have a claim against the contractor relating to a different delay or a defect and the contract may have a claim for the same delay or defect against a sub-contractor. This section explores respondents' experience on the effects of contractual claim into dispute breeding that leads parties to initiate adjudication proceeding.

*a) Claim-minded*

A contractor may make a claim against the employer for loss and expense and the charge of cost for changes to the work, such as a claim for extension of time, variations or as a quantum merit. On the other hand, owners often bring claims against contractors, but more often by the way of counterclaim after a proceeding has been commenced against them by a contractor. Employers are entitled to claim concerning the time for completion, claim concerning the quality of works, claim for termination, and set-off.

Respondents of the study observe there is an escalating trend of 'claim-minded' or 'claim-cautious' attitude among construction stakeholders. Such practice, although is a positive attribute to prevent problems in advance, has in turn created more adverse situation to assert their contractual rights. This situation often creates tension and adversarial ambience among the parties as they are in constant claiming mode and what the respondent describes as seeking for loopholes for claim opportunity.

*T6 (20)*

*T6 (21)*

*T6 (22)*

Compared to medium- and large-sized contractors, the average small contractors have smaller financial reserves and less managerial capabilities. When it comes to a dispute, a small contractor is often caught in disadvantaged position. A respondent suspects that the unresolved disputes cost much higher in small-sized companies compared to a medium-sized ones. The loss of market, which is a more long-term cost of an unresolved dispute, often leads to a disturbed relation with a client.

*T6 (23)*

In comparison to mid-tier contractor, a respondent observes that this type of company has more awareness on their contractual rights and higher determination to pursue it. Parties will look for the most economical and speedy ways to accelerate their contractual claim. According to the respondent, legal spend is highly variable and the characteristics of a company are likely to be defined at their own winning case strategy.

*T6 (24)*

*T6 (25)*

In describing larger companies, the respondent explains that having an efficient dispute resolution system in place is popular for large-sized contractors, particularly in order to minimise the effects of potential grievance on the company. Large-sized contractors often seek help from a qualified claims consultant to help them to make the right decision in analysing the situation and work together to resolve the dispute.

*T6 (26)*

*T6 (27)*

The rise of claim-cautious attitude among construction parties in line with a steady increase of payment disputes referred to adjudication under CIPA bears to the preceding assumptions that small contractors are financially weak. Presently, the operation of CIPAA encourages professionalism in contract administration and also promotes integrity amongst construction stakeholders.

*T6 (28)*

A respondent also states that CIPAA is hoped to help the parties that are vulnerable to unjustified deduction or dishonest payment avoidance practice by the superior party of the contractual chain, be it employers or main contractors.

*T6 (29)*

*b) Merit of claim*

To deal with the problems of claims effectively, it is important for both sides to have an established understanding on the principles and basis to determine the rights and obligations of the two parties. In turn, it is also necessary for the professional representatives of both parties

to be appreciative of the circumstances in which the contractor conducts the risk, in which he can properly be expected to face the financial consequences if things go wrong.

If things go wrong by default on the part of contract, it must be of his concern. However, if the default lies with the employer, then he must face the financial consequences and settle the claims without any loss of time to avoid any negative effect on the continuation of the work.

Where the claim situation arises, the evaluation process starts off by assessing the quantum of money value for the work performed. As burden of proof lies on the claimant, he must show that there is a causal link between the breach and the loss thereby sustained. It is essential to bear in mind there when there are more than one competing causes, parties need to ascertain and define such clashes, timing and losses actually sustained. Generally, a claim can only comprehend the direct losses actually incurred, with possibility to the addition of an agreed element of profit. Therefore, the claimant must bring out concrete evidence while raising the claim, which will not be easily dismissed by the other party.

Claims management allows claims and potential claims to be identified and evaluated. By assessing their merit early on, claims or potential claims can be avoided or resolved quickly. It is important that the process of claim assessment to start at the early stage of the claim as many contracts contain clauses stipulating a notice of delay by the contractor as a condition precedent to the award of an extension of time, which is accompanied with submission of a notification with details of claim.

A respondent opines that prolongation of claim assessment can in turn become a tactical way of negative dispute avoidance because some parties have no contractual and legal basis in submitting a claim. She further claims that in some cases, there was no dispute and that the size and complexity of the dispute meant that it could not be resolved fairly through adjudication.

*T6 (30)*

*T6 (31)*

The respondents were asked further for their opinions on why they think the claimant still insists on invoking adjudication even though the process of assessment proves the claim to be contractually and legally non-existent.

The respondents highlight that the claimant fails to base his claim on a legal reasoning to be accepted as reasonable ground of recovery under law of the contract. Submitting a flawed claim to an adjudicator has been a rising concern for many stakeholders as this exposes the

jeopardy of adjudication being a mechanism to pursue unreasonable and dishonest relief. Additionally, it would lead to potential risk of abuse or floodgates of adjudication claims being brought by irresponsible contractors who want to try their luck in getting more monies from the employers through the process of adjudication.

The respondent also comments that parties must never inflate their claim over any rationalised level of cost and time with the intent of settling for less and effectively attempting to recover its baseline figure. It is a dangerous concept where what parties will find out is that the inflated portion of the claim will often be brought into question and tarnish the positive entitled portion of the claim. The respondent protests that this practice reduces the prospect of a fair settlement.

*T6 (32)*

The adjudicator award is binding unless it is set aside by the High Court, finally decided in arbitration or is subject to a settlement between the parties. CIPAA also specifically provides for the enforcement of an adjudication decision. A party can enforce an adjudication decision by applying to the High Court. A respondent is opined that some basic legal training and knowledge is useful but would not hope to go so far to suggest that adjudicators should be legally qualified. As an adjudicator's decisions can be challenged by only very limited grounds, the best person able to deal with dispute will depend on the fact of that dispute.

*T6 (33)*

To avoid incurring cost and time, referring parties should ensure that a dispute has crystallised and is suitable for adjudication. For a dispute to crystallise, there must have been an opportunity for both parties to consider the position and to formulate reasonable arguments. In the above instances, if a claim is ignored, a dispute can also crystallise.

## **7.9 Summary**

Series of interviews were conducted to gain insights into the influence of national culture on conflict management and dispute resolution. Specifically, the participants of the study were asked for their opinion on the influence of each research proposition formulated in the study, including: individualism/collectivism, masculinity/femininity, power distance and uncertainty avoidance. From the interview, six themes emerged from thematic analysis comprises of "*Group Aspect*", "*Conflict Management*", "*Hierarchy and Power*", "*Circumvent*

*Uncertainties*”, “*Security of Payment and Adjudication Regime*”, and “*Construction Contract Management*”. Each of the themes further extends into many different sub-themes, which help complete and explain its meaning.

These themes will then be taken to the next chapter for summary to identify some of the key striking observations embedded in each of them with the key conceptual framework identified from the literature of this study. The process also has revealed patterns within the data and relationship between them. The pattern and relationship identified will then be matched and compared in the subsequent phase of data analysis in Chapter 8.

# **CHAPTER 8**

## **Pattern Matching and Explanation Building**



## **8.1 Introduction**

This chapter summarises the key findings of the six themes emerged based on the thematic analysis conducted. The chapter also presents some of the notable findings emerging from the themes under investigation to be considered during the explanation building phase in the subsequent analysis section of this chapter.

Chapter 8 is also dedicated to match the propositions that emerge inductively from the data by seeking alternative explanations and examples that conform or do not conform to the pattern and relationship tested. The purpose of analysing the pattern and relationship of the data is to seek for alternative explanations, if the original propositions of the study is not consistent with the pattern emerged from the data. This way, the researcher will be able to move towards formulating valid conclusions and valid explanatory theory.

## **8.2 Summary of the Thematic Analysis Findings**

This section summarises the main research findings of the study excerpt from the Thematic Analysis conducted in the previous chapter. In total, six main themes are found to be significant to understand the influence of national culture on dispute resolution mechanism and its compatibility with national culture in the construction industry of an Asian country through the implementation of adversarial statutory construction adjudication in Malaysia. The themes are namely: “*Group Aspect*”, “*Conflict Management*”, “*Hierarchy and Power*”, “*Circumvent Uncertainties*”, “*Security of Payment and Adjudication Regime*”, and “*Construction Contract Management*”.

### **8.2.1 Theme 1: Group Aspect**

#### **a) Individuality**

People play a significant part in how grouping in society form their way. Individual values, attitudes and perception differ from one to another and found to essentially influence dispute resolution process. Malaysian contracting parties view empathy as one of the key components to dispute resolution. It is important that project leaders maintain the collaborative mode among the parties to reach a common understanding and to work sensibly in resolving the conflict.

From the analysis, it is found that if a legislation is placed under an unfit society, a setback could undermine the full potential of the system to be working effectively. Respondents were found to be sceptical towards the Construction Industry Payment and Adjudication 2012 (CIPAA) and if it could operate to its full functional means given that opportunistic behaviour is still prevalent among the local construction parties who will find ways to manipulate the mechanism for their deceitful needs. However, other respondents also believed that the decision to embark on adjudication when payment debt is due is not an uncommon reaction by any construction entrepreneurs in such situation regardless of their cultural background.

Importantly, the study found support that alongside cultural forces, the successfulness of the mechanism is also heavily dependent on the users' personality. Upbringing environment like a person's family influences, cultural influences, education influences and other environment forces, shapes the individual's personality, thus affecting his/her style of dispute resolution.

*b) Asian values*

Another source of individual differences is values. The interview series drew a clear connotation of how Asian values shape the parties' worldview and behaviours while dealing with disputes in construction. The Malaysian population is the amalgamation of many different races and ethnic cultures. Within the industry, there is a notable presence of Malaysian Chinese in the construction business. The importance of peaceful relationship, normally termed as *guanxi* among project parties, has been emphasised and has always existed among the Chinese communities in Malaysia, not only limited to human relationship from social perspective, but also extended to business network.

The study investigates whether the initiation of CIPAA by one party could result in adverse effects on the maintenance of the *guanxi* existing among the parties. The study found that although it is not the intention of the introduction of CIPAA to result in a bad *guanxi* among the construction contract parties, but because Malaysians generally put high emphasis on the relationship-building and preservation, such action can cause ill-feel and loss of trust for the parties to work cooperatively to resolve the dispute.

Respondents of the study agreed that dispute mediation is perceived to be beneficial as it helps parties mitigate the risk of win-lose situation. In the interest of maintaining the

goodwill between disputants, mediation is preferred to avoid the adversarial ambience by promoting amicable settlement and preserves business relationships. By mediating the conflict arises, parties are able to retain control as well as take time to reconsider the situation.

c) *Face values*

Interestingly, the issue of *face* is also found to be prevalent throughout the research inquiries. Like many other Asian countries, Malaysia is known to be a face-saving culture. Face saving is often associated with avoidance conflict style as a mean to preserve someone's reputation and credibility by avoiding actions and situation that can result in shame.

Face-saving culture is also one of the reasons why the Malaysians parties feel reluctant to resort to legal action to resolve disputes. Parties whose debt are due to be paid often struggle as they prefer not to be daring by initiating adjudication against their employer as it will cause the employer to lose face. The struggle further intensifies when the parties cannot work cooperatively with their employer while being in the middle of dispute with them at the same time.

As discussed earlier, mediation is perceived to be a preferable mechanism in resolving dispute to maintain the cooperative spirit between the contract parties. However, the study found that mediation still has a low take-up in the Malaysian construction industry. Although the concept of face-saving is closely linked with mediation in the literature, the Malaysian construction parties seldom choose to adopt it to resolve their dispute. Thus, the study is intrigued to investigate the explanations underlying this finding.

Additionally, the study also discovers that face-saving practice to be the cause of many dispute in construction because at other times, it can breed into dishonesty. The Malaysian construction parties tend to become so focused on presenting a competent and credible image of themselves at work, that when these values are threatened, the individual will turn to face-saving behaviour even if it is deceitful.

d) *International experience by the Malaysian construction professionals*

The influence of group aspect can also vary when construction party deals with foreign entities. The study establishes that the appreciation of contract is different by foreign

contractors working in Malaysia from what it is usually perceived locally. While the Malaysian construction parties treat construction contract as the primary working agreement, foreign parties at times suffer serious injuries because their perception and attitude towards the construction contract is rather different.

The study also found that, when compared to a foreign party, the Malaysian construction parties do not prefer a direct adversarial style when dealing with disputes against their business partners. The parties would rather choose more soothing and informal ways in discussing the dispute over casual meetings. Respondents of the study also confirm that a direct adversarial method like adjudication is the least preferred method of dealing with dispute because parties tend to lead the dispute at workplace to the extent of personal dissatisfaction.

Parties with experience working abroad witnessed that people from a different culture are more adversarial and outspoken when airing out dissatisfactions. It is a norm that the parties will resort to a direct and formal way to fix a dispute. The phenomena are a norm abroad where disputants are more confident and optimistic in solving the dispute and move on with work.

In comparison to the neighbouring country, although Singapore and Malaysia historically share the same root of cultural values, the preferences for dispute resolution styles still differ. The differences are possibly attributed to the level of professionalism and work ethics that are widely imbibed in the Singaporean working culture. Due to this proficiency, adversarial adjudication is speculated to be more compatible for the Singaporean parties to resolve disputes because parties there are more open-minded and solution-oriented in resolving the dysfunctional problems.

*e) Intergroup relations and dynamics*

The analysis reveals that groupings in project organisations are what drives different project parties to focus their attention and resources to the needs and activity of their group rather than the overall activity of the organisation. This formation has the significance of the groups to be achievement-oriented that provides them with competitive advantage. The group formation increases the degree of independence between parties of the project organisations and could further de-escalate directions and control. Although positive group functionality

can be the key to a successful dispute resolution, in extreme cases where dispute arises, parties can become adversarial to the management of the whole project organisation structure.

Intergroup cooperation is essential to the effective complex organisation. However, the analysis reveals that because intergroup functioning is too embedded in itself, parties are exposed to the possibility of undermining intergroup cooperation, thus making it more difficult to withstand the connections within the organisation. Furthermore, it is found that in intergroup relations, it is difficult to maintain the collaborative mood when one of the groups has more superiority that includes important entitlement.

Looking from the intergroup perspective, the view of suspicion and distrust magnifies the perspective that out-groups are often untrustworthy. Although such adversary may not be obvious, the feelings of distrust can further breed into ill feelings and can cause the group members to view the out-group as vindictive. The study reveals that the nature of the adjudication process further increases the tension between the parties when in dispute.

*f) Trust factor within intergroup*

The mutual dependence of parties can help promote a trusting environment appropriate for activities, such as information sharing that so that both parties can honour their commitment. Thus, the presence of trust is crucial to minimise the existing adversarial nature of construction industry.

Within the local construction industry, trust exists through economic drive. Economic conditions are found to primarily shape the level of trust among the Malaysian contracting parties. The higher the degree of the interdependencies between the parties, the higher the level of trust needed between the parties to achieve their goal efficiently. Nevertheless, there are several costs associated with trust among the parties in construction contract, for example cost of building it, potential cost for breach of trust and cost of inefficiency due to excessive trust invested among the groups.

Given the differentiation that exists in the construction business, the integration of multiple different parties can be a challenging process. Rather than eliminating or resolving the dispute, parties with bigger outweighing interest often choose to take a compromising approach to reach a middle-ground position that demands mutual sacrifices. Looking from a different perspective, when the outcome of the dispute is critical, parties do not prefer

compromise because priority between groups has become different. Hence, a direct adversarial way is seen to be appropriate because right matters more importantly rather than preserving the relationship with the other party.

Cost overburden is significant to construction parties. The study found that the feeling of resentment arises in a dispute where the parties see the competition in monetary form. Construction parties are commonly heavily cash-flow-dependent, where the primary goal of the group is typically in monetary form. Adversary between parties happens in adjudication when only one group is the winner. Hence, the analysis reveals that parties often concern the risk of monetary loss over the perseverance relationship.

The analysis also found that the quality of business relationship that the parties develop also has significant impact on the group success. Parties believe that it is necessary to aim for a win-win solution when facing disputes. Especially important at the early project phase, parties will commence with good faith to build a good start-up of the business relationship.

Positive inter-group relationship is based on commonality driven that parties are expected to work hand-in-hand to overcome obstacles during the course of the project such as cost, schedule and unforeseen conditions. This close collaboration will in turn become a team effort for the parties to work efficiently to achieve common goals. Performance will determine the level of trust underlining the business relationship in the long run.

It is also found that in doing business in Malaysia, it is necessary for the construction stakeholders to recognise that it is not just a matter of money and price. Rather, it takes a lot of patience, tolerance and compromise. In Malaysia, aside from financial stability, friendship and interpersonal relationship pervade an apparent area of construction business process, which often takes time to grow. Hence, parties often treat business relationships as closely related to friendship.

The quality of business relationship between construction stakeholders is also found to be heavily dependent to the quality of communication involved. The way of communication is found to be acceptable by the Malaysian construction parties when airing a disagreement is to be polite but also convincing. Owing to the formation of inter-group differentiation between the parties, communication is found to reflect structural differences in hierarchy attached to the society. It is found that groups with lower authority in the project organisation find it more difficult to communicate openly with groups of different status across the power hierarchy.

The issue of communication across power hierarchy will further be discussed in the theme summary of 'Hierarchy and Power' in the next subsection of the chapter.

Compromise between groups is a conventional way for resolving inter-group conflicts. In the Malaysian construction scene, for compromise to work, every party is expected to sacrifice their organisational needs over the benefit of the project goal. This way is especially useful when the cost of losing ground or face is relatively greater than losing face.

It is also found that when tension escalates during conflicting period, the compromising way is only more favourable especially when parties have a range of tangible outcomes and are open for alternative considerations that still remain within the control of the parties. The Malaysian construction parties are able to respectfully understand the position of their opposing party and often come to accept a mutual agreement. The mutual acceptance of differences and compromising improve the prospect of a productive solution to the dispute. The analysis also reveals that some parties believe that compromise is especially essential when the value of maintaining relationship is more important than the outcomes of the dispute.

Nevertheless, while compromise may produce agreement, the study also found that Malaysian construction parties opined that it does not always resolve problems that address the underlying issue of a conflict because compromising a conflict means parties are looking for an agreed resolution to a problem but not usually the ideal solution sought for the interest of the conflict itself.

Additionally, it is also found that intergroup dynamics also plays a role in making sense of the behavioural process within the group that involves management processes, regardless the size of the group. It is typically traceable as pattern of decisions. Intergroup dynamics often focus on assessing the affairs occurring within the group or the organisation in order to understand the in-group needs.

*g) Group interest*

In construction, cash flow is known as one of the top priorities for construction companies because it ensures financial stability of their business. Thus, parties view payment disputes as a disturbance to cash flow, and the process of adjudication initiation as a small but incremental step to improve the situation before it is too late.

Thus, in protecting the interest of the in-group, parties seen it is necessary to recover money to ensure that projects will not suffer from delay. Importantly, the Malaysian construction parties believe that it is also important to take any measures in recovering their debt to keep cash flowing to protect the interest of other innocent parties from suffering consequential injuries as they are in a crucial position of debtors. Thus, the implementation of adjudication is seen as revolutionary through the increase of integrity within the industry.

Prioritising in-groups' interest as a business strategy is also found to be significant in response to the ever increasing completion in the construction industry. An unbalanced ratio of supply and demand left the parties with little choice but to perform competitively to stay relevant in the industry. Especially for small- or medium-companies, if the organisation runs out of cash and is unable to secure new finance, it will become insolvent.

It is also found that some irresponsible party with bigger power tends act unfairly to the smaller party of the project organisations. A lengthy contractual chain causes money to be withheld at the upper reaches of the contract chain, causing dysfunctional effects and these bigger parties often seek to maintain and protect their own positions by prolonging or denying the parties whose monies are currently due. This forces the organisation to change its operational strategies.

#### *h) Business operational strategies*

Findings of the interviews revealed that changing operational strategies is the result of ethical, environmental and social issues that drive the changes. The Malaysian construction parties generally acknowledge the problematic nature of the industry's environment and the market is becoming fierce and parties no longer afford to rest on their laurels.

Formation of construction contract through oral agreement was once prevalent within the Malaysian construction industry but the parties in the present time no longer prefer to operate on verbal agreement basis but rather to formalise the work agreement through a written contract by explicitly laying out duties, obligations and right for every party in the contract.

The basis underlying the establishment of the business relationship in Malaysia is found to be closely related to friendship or cronyism. This phenomenon brought the issue of ethical scandals that cause ethical behaviour issue to the forefront of public attention. Ethical



issues such as transparency, favouritism and other relationship related affairs have been an ethical dilemma surrounding the Malaysian construction industry. The need to minimise such problems has resulted in several changes to the ways Malaysian construction parties formalise their construction contract, the organisation and the management of it.

The industry also calls for a change in how construction parties regard the issue of friendship in business relationship. Contractors are found to be sociable and pleasant as they perceived those friendly traits are usually the initial requirement to build a valuable business relationship. Nevertheless, some parties have now shifted to focus on building business relationship and not depending on those traits as much as before. The study found an enormous increase in the use of formal contracts to govern relationship as well as the increase of professionalism by the Malaysian construction parties.

*i) Employer and the relationship with its representative*

Finally, findings of the study have also brought attention to the issue of the close ties between the employers and its representative. Employer's representatives have been facing old-aged criticism on their approach to dispute resolution in exercising uneven handling differences between the parties. This illustrates that a close tie exists between the employers and the architect. However, there are instances where consultants take legal action as a bold step against their employer, should dispute emerges. This is rather unconventional for such party to initiate adjudication against the employer.

## **8.2.2 Theme 2: Conflict Management**

*a) Assertive method*

Analysis of the study identifies three main categories of how disputes are managed. First, is through assertive method. Assertiveness in dispute resolution is the quality of being self-assured and confident to stand up for its own right. In negotiating construction claims, respondents highlighted that common assertive behaviour is often recorded when dispute claim negotiation is not going well between the contractor and the employer. Consequently, each side creates tension and gives in only a little to reach a mutually agreeable settlement.

Constant quarrels and disagreement in the payment issue of adjudication is found to weaken the teamwork spirit among the parties. The analysis also found that the parties' degree of satisfaction with the outcome of adjudication is relatively low because the decision imposed by adjudicator yields a win/lose outcome.

Assertiveness in dealing with difficult people are also found to intensify the adversarial ambience of adjudication process. It poses a great barrier to the efficiency of adjudication as a noble medium to resolve commercial construction disputes. Although it was initially not intended to be adversarial, in some cases, the process may evolve the adversarial style that leads to cost escalation. It is also staggering to found that the pursuit of "being right" is deeply ingrained in the values of Malaysians.

The consensus is that no single resolution method can be universally applied to every single dispute and the choice of the most suitable mechanism primarily depends on various factors like attitude of both parties, nature and quantum of dispute. There inevitably exists some disagreements, especially where parties found the disagreement and differences to be too great to accommodate the collaborative style. Thus, it is predicted that the demand for the usage of adjudication in the Malaysian construction industry will keep growing.

The steady growth of adjudication cases in Malaysia is because many industry players adopt a short-term view on business development, with minimum interest in enhancing their long-term competitiveness and cooperativeness. Experience in Malaysia also shows that one of the principal reasons for negative view of adjudication concerns the attitude of the parties.

In Malaysia, it is found that the dominant cultural model emphasises the importance of striving harmonious interaction and interactions by politeness. Construction of emotions occur when parties in dispute act non-conformant to the dominant cultural model that emphasises interdependence in relationships, connected with others and focused on maintaining harmony by adjusting the environment's demands.

The study also draws some experiences on parties dealing with opportunistic behaviour within the industry. Adjudication is also found to play a role in attenuating opportunistic behaviour of the parties. The yield of win/lose outcome has influence on both parties to engage one-upmanship in dispute battle. Thus, it disproves the assumption on the concept of dispute resolution method to help the parties to genuinely resolve the dispute by adversary. The study also found that the practice of ambush is becoming prevalent, owing to profit-oriented nature of the commercial construction industry.

b) *Passive method*

The second method of conflict style is by passive method. Passive style of conflict management is found to not be particularly common or preferred within the Malaysian construction industry. This method is also known as a harmonising mode that emphasises on preserving relationship instead of achieving personal goals and to accommodate the need of the other party. This method is also found to be relevant as a strategy when the issue of the conflict has little importance to the parties.

While this method may be seen to show weakness of the party, the study found that there are situations when this approach is preferable and will gain more benefits for the party rather than taking a strong and direct approach, if the party sees greater interest in accommodating the other party's need. This method is particularly useful to ease out the tension and maintain a harmonious business relationship. Additionally, the Malaysian construction party feels that this method is crucial when the employer is in a more autocratic position. This has become a challenge for some parties to initiate adjudication against the employer.

Additionally, conflict avoidance is also a common strategy especially in East region of Asia and the concept of face value is evoked as an explanatory variable to understand cultural collectivism. The use of avoidance method must be managed to avoid the conflict and suppress it until it escalates out of control.

c) *Solution-oriented*

The third method of dispute resolution is through the solution-oriented method. Negotiation is regarded as the most common mechanism used in solution-oriented method of dispute management. Negotiation is a crucial skill to all construction professionals, especially those in a managerial position.

The study found that the negotiation culture among the Malaysian business parties take time and patience, and importantly not through a forceful way of legal proceedings. The process of negotiation takes place in a leisure ambience and the process often begins by developing trust that are essential to the Malaysian business rule of friendship first, business later.

Hierarchy is also important in Malaysia. The study found that it is common for dispute negotiators to take the approach of consulting a senior management rather than taking an independent stance in approaching the dispute through negotiation. The top management holds the autonomy on who will set the course or tone in guiding the principles of negotiation.

As stated earlier, Malaysia has a social pattern of placing the interest of the group as one of its highest values. The study found that the relationship between the disputants will be a deciding factor to determine whether any kind of dispute resolution will be appropriate. Where parties still have the tendencies to maintain good faith, mediation will be an appropriate mechanism to resolve commercial disputes.

The study gathered response that mediation is particularly preferable and attractive when between the parties wish to maintain their relationship. One of the critical settlement factors in mediation process is a positive attitude of the parties. In Malaysia, the maintenance of relationship between parties is of primary importance because they have to work together until the completion of the work.

Nevertheless, mediation is found to be relatively less popular among Malaysian construction professionals. Mediation is not progressing at the same pace as of other adversarial methods like arbitration. The interview speculated that the issue of finality of mediation outcome to be one of the contributing factors. The study contemplates that Malaysian construction parties are attracted to adjudication compared to mediation that upholds definitive style of decision. The low uptake of mediation in Malaysia would likely explain the low appreciation for the true benefits of mediation.

### **8.2.3 Theme 3: Hierarchy and Power**

#### *a) Organisational autocracy*

Within the framework of an organisation, higher rank normally inheres a higher control of resources and deference from subordinates. In analysing dispute from autocracy perspective, a party either seeks to determine who is the dominant in the relationship or attempts to assert power over the others. Conventionally in Malaysia, an employer engages a consultant consortium as their representative to perform an independent role to ensure that the members of the project party are working towards a common goal. Although the

representative is sympathetic towards the objectives of the project stakeholders, they will first protect the employer's interest.

In Malaysia, the role that government-linked companies (GLCs) plays in the Malaysian economy is extensive and pervasive. Presumption exists that the GLCs in Malaysia are seen to have preferential access to public contracts and benefit from favourable government regulations. Hence, the GLCs often find it easier to be more profitable in the sector where they already have a significant presence. Private organisations in Malaysia at times found to be reluctant to invest in projects where the GLCs are dominant because they perceive the field to be slanting unevenly. This phenomenon suggests a negative power distribution between the share of the GLCs and the rate of investment by private organisations in the Malaysian construction industry.

The rational view of the role of authority in construction is that the employer will think and act in the best interest of the project, whereas subordinating parties are expected to follow and do the work accordingly. Nevertheless, there are some employers who dominate the supply chain due to the uneven level playing field.

*b) Unequal bargaining power*

The concept of inequality of bargaining power addresses how power is used, manipulated and perceived in real world interactions. Bargaining power disparities are a real phenomenon that can affect the ability of a party to secure its preferred terms in a contractual agreement against another party. In construction, small businesses like small and medium-sized contractors are examples of parties who typically experience inequality.

The study reveals that it is challenging for the smaller organisations to resort for a legal action in non-payment disputes not only because it is costly and lengthy, but also for the fear of jeopardising the current relationship and future business prospects. Thus, it is common for Malaysian parties to suffer in silence by slowing down their work rather than terminating the contract that will likely put parties in an adverse position, thus hindering them to recover the payment.

Because the complex state of bargaining power has allowed some larger organisations to enjoy higher profits, the CIPAA came into operation recognising the cash flow of small organisations who are financially weaker may be disrupted by disputed deduction or unfair

payment avoidance practice by parties who have the upper hand in terms of bargaining and financial power, which may in turn result in project halt.

The study also found a prevalent change of intense competition within the industry due to competitive contract opportunities. The current state of the market is further worsened when it some opportunistic parties put unfair terms and leave the smaller parties with less options and to adhere to the unfair agreement for their business survival. However, it is also notable that CIPAA is a non-intervention mechanism to business practice in the Malaysian construction industry.

*c) Decision making*

Dispute is also found to have a complex effect on decision making. Although there is an importance for employees to assist the top management to grasp the nature of the dispute faced by the organisation, active involvement by the senior level is critical and usually involves larger capital decisions to be made that could have a fundamental outcome to the organisational operations and often involve many facets and take considerable time. With time is important in construction project, parties find it challenging to resolve disputes in a timely manner.

The participation of employees in decision making varies across cultures in regards to their power distance value. In Malaysia, it is found that employees in construction organisations do not prefer to be held accountable in a decision-making process, which prolongs the duration of taking necessary actions in resolving the dispute timely.

*d) Subordinate and superior relationship*

The study reveals that status differences have influence on the superior's authority to the subordinates and is respected for it. The importance of actions taken to narrow the status gap between superior and subordinates within the organisation is vital as interpersonal communication is a critical foundation for effective performance in organisations and to ease the process of information sharing.

Nevertheless, status differences are also found to be a critical barrier that distorts successful communication. Effective leadership encourages the superior to be more

approachable to reduce the problems of status differences. In the Malaysian construction industry, it is found that when an employee feels comfortable to communicate with the superior openly, they are likely to be straightforward in resolving the conflict by communicating effectively with the senior management.

The study also supports that in the Malaysian organisational setting, challenge to authority is not well accepted. Situations where subordinates question or challenge the superior openly often cause discomfort among the project team. Parties to a contract ought to review their state of position within the norms of the organisation. Norms are not always explicit; it evolves in response to changes and challenges to protect the interest of the group.

*e) Seniority and deference*

The Malaysian construction parties are found to be more careful in deciding whether to challenge autocratic decisions that are against their favour. This mindset has found to be a significant factor affecting actions by parties in resolving a dispute within a construction contract. Power struggle is a result due to subordinates lacking seniority over the others. The study extrapolates that there is power struggle among parties in the Malaysian construction industry to resolve the dispute swiftly in a contractual relationship because the concept of seniority has been long known to be accepted and part of the norm in a collective group in Malaysia.

In Malaysia, the culture of deference is found to have a dysfunctional influence on the process of construction dispute settlement. The study also establishes that at times, parties in the lower contractual chain feel pressure to conform or confront to the demands of the higher status party that are against favour.

*f) Incompatible interests*

One of the most challenging barriers for the parties is to balance their own interest and values with the other interest of other outgroup members or parties of the organisation. The study found that this issue is prevalent especially in projects involving the GLCs. At risk of oversimplifying the functional structure of the GLCs, defining it is not very straightforward because it can be in various forms and purposes. The nature of relationship involving the Malaysian GLCs is complicated and has drastically changed over the time.

There is hardly any serious and open debate involving public discussion about how well they are governed. The study found some concerns on the real time issue of corporate governance as power is becoming too concentrated at one side and Malaysia needs to properly examine how to improve this situation.

#### **8.2.4 Theme 4: Circumvent Uncertainties**

##### *a) Challenging business environment*

Every construction project is exposed to some level of uncertainties. From the perspective of the contractor, they accept more risk and are responsible for any circumstances that are likely to occur during the project. Equitable risk allocation among parties is important. The Malaysian construction industry are found to be hampered with the issue of verbal agreement. One of the uncertainties involved is when verbal instruction is issued in regards to changes or additional instruction for the work. Unlike written instruction, verbal work order does not set out tangible instructions that can protect the contractor's risk of uncertainty. There are instances where the superintendent officer of the site delays or avoids giving proper instruction to avoid being accountable should an error or change emerges.

##### *b) Economic pressure*

The study found that the Malaysian construction parties face challenges of compulsion during conflict negotiation process. This usually takes place when one party relies on commercial pressure to cause the other party to accept their demands. Pressurisation takes place between the contractual parties is not usually straightforward as it usually involves mental, emotional and psychological persuasions. The study argues that this state of situation becomes a major barrier that often discourages a party to recover the debt through legal mechanisms like adjudication. The study also found that small construction enterprises often find themselves in hesitation when it comes to enforcing their rights under the adjudication law.

Payment problem is an old-age issue that pervades the Malaysian construction industry. The widespread issue of delay and decreased profitability are typical results of failure for construction parties in getting regular and timely payment. The study reveals that



Malaysian contractors view delay of a few days to weeks are acceptable and often feel that they are at the mercy of the employers.

In a challenging economic time where the local construction market is experiencing downturn, dispute occurs because parties are no longer willing or able to compromise over the issue of cash. The decision to utilise debt recovery mechanism like adjudication in the face of the employers or the main contractor is not always easy. The interview analysis records that when cash is tight, the initiation of adjudication is not a conduct or breach of trust but rather a matter of common business sense.

Among the challenges that cause uncertainties to contractors is the state of competition going on in the local market. The competitiveness is influenced by the ability of the organisation leader to observe, learn, and react from business environment in order to outperform the competitors. Malaysia has seen a huge number of traders from different specialisations that increase the competitiveness level of the industry. The local industry also has improved the regulations of the construction activity as well as the bidding process that is subject to strict rules and high assessment during tender evaluation phase. This in turn breeds concerns among local players at the risk of job uncertainties with foreign contractors bidding for the same contract.

*c) Protectionism*

At present times, the Malaysian construction market is highly competitive, led by the industry powerhouses like the GLCs, public-listed construction companies, and big developers. The practice of selective tendering is also found to be still prevalent in Malaysia. Not only limited to the construction industry, protectionism that occurs limits the opportunity of some deserving players from entering the market. The negative impact of the so-called direct negotiation tender creates the impact of selective opportunity that is based on minimum competition.

*d) Causal sequences of late and non-payment*

Late payment in construction projects puts the entire supply chain in an adverse position. Payment withheld at top of the contractual chain creates ripple effects to the entire contractual chain, which put parties in an unjust position. Such delay also creates a vicious

cycle that puts many parties of the contractual organisation in constraint that results in margin squeeze due to inadequate funding.

The study establishes that one of the main factors of the late and non-payment practice in Malaysia is due to poor paymaster's financial management caused by scarcity of resources and capital to finance the project. The payment process practice by many construction parties in Malaysia is found to be loose and flexible. Arguably, the employer may withhold payment for various justified or unjustified reasons. The downturn of the flexibility has been identified for clients to deliberately avoid payments for their own financial advantages.

In a different argument, employers contended that late and non-payment issue is a complex matter. If the contract assignment is not completed on time, within the agreed budget and stipulated quality, the employer has every right to question the contractor as to the cause of it and give feedback on the non-performance.

*e) Cost constraint*

As discussed earlier, poor cash management and lack of adequate cost control is found to be a common characteristic for business failure. Employers face who face cash flow problems and capital shortage often limit their efficiency and become insolvent owing large sums of money to many different parties of the organisation.

*f) Hesitation*

Especially for the public projects in Malaysia, the government remains as the largest employer with a large allocation of national budget for public development. Due to this, contractors are found to be more wary in getting their dispute adjudicated considering it would cause impairment to the future job prospect for the parties. Hesitation to jeopardise working relationship with counterparties is what serves as a primary factor of hesitation for contractors to resort to legal actions in recovering their lawful debt. In this way, referring parties could risk to deprive their future business opportunities and company profits.

The tight timeline of adjudication process is also perceived as another disadvantage. It may mean that an adjudicator is rushed into making a rough decision on a dispute of a considerable legal or factual complexity. The study found that, especially from the employer

counterpart, they were reluctant to refer a dispute to adjudication as this gives room for injustice for them as there is no testing of evidence involved.

g) *Deteriorating relationship*

Analysis from the study found that Malaysian parties make enormous effort to build relationships. The communication style is not direct as it is desirable to maintain face to strive for harmonious relationships. Malaysians are found to be especially sensitive when their authority is questioned while showing dissatisfaction to another person openly creates an uncomfortable situation for everybody in the group.

Generally, Malaysians are more inclined towards relationship-oriented approach and put emphasis on building mutual trust between parties in the project organisation. Communication between parties tends to be subtle but firm. Parties also believe that it is best to use a mildly direct way and they do not prefer expressing frustration, anger and impatience. Dispute on final account is found to be one of the most frequent disputes submitted to adjudication despite criticisms on the adequateness of the mechanism to solve disputes that involve huge quantum. The study speculates that parties submit dispute at the end of the project duration as it will help to preserve the working relationship during the course of work.

A maintained and harmonious business relationship is considered important and a vindictive culture in Malaysia. Thus, the culture of being relationship-oriented practiced by the Malaysian parties is what often deters them from resorting to adjudication to resolve contractual dispute. The process is also believed by some parties to be threatening, particularly when the responding party feels that they have been effectively ambushed by the referring party.

Previously, disputes were remedied and dealt over the next deal between the parties. Presently, this situation is found to be less true. Malaysian construction organisations have now switched to emphasise justice more than harmony. Thus, restitution is expected to be paid.

The study also supports that the introduction of adjudication in Malaysia is not legislated to disturb business relationship of the construction parties but rather to compromise. The viability of adjudication process and how it is perceived is heavily dependent on parties' cooperation and noble intention to resolve the dispute. Parallel with the collective spirit of

relations, parties will stay in good terms in the future if they avoid perceiving adjudication as an adversarial way that will drive wedges between parties.

Personal relationship is also found to play a large role not just in business culture of the construction industry. Parties look for loyal commitment of collective effort in business relationship, thus emphasising the role of trust. Matters of disagreement is expected to be dealt in the most diplomatic and private manner. Because the local business culture is highly relationship-dependent, the industry is struggling to improve the working culture in the Malaysian construction industry, which in turn affects the culture of dispute resolution effectively.

*h) Political patronage*

The study establishes that the practice of relying on political patronage in conducting business as well as expert navigation in the public project procurement are still prevalent. Their appointment is mainly not based on competency but rather patronage. Direct negotiation tender in Malaysia should only be adopted when there is a due necessity for the expertise and competency.

Malaysia's procurement policy and procedures have been in place to provide transparency and accountability in the appointment process of contractors and suppliers. The process is lengthy and involves many layers of bureaucracy. Nevertheless, at times, there is interference by someone who is very influential to the top management, which disrupts the integrity of the process.

*i) Losing*

It is established that employers are usually at disadvantage when complex disputes are referred to adjudication, because they have no chance to negotiate and control the outcome of the dispute resolution. This is said to almost guarantee that the employer to lose their case in the proceeding. Criticism arises against CIPAA as it will make adjudication an unbalanced mechanism where the respondent is not allowed to raise a counterclaim. This implies that the adjudicator does not award a positive monetary decision against the respondent. This factor exposes parties to the risk of floodgates of adjudication claim being brought by contractor.

### **8.2.5 Theme 5: Security of Payment Regime and Adjudication**

#### *a) Malaysian construction industry's feedback*

Generally, the implementation of adjudication in Malaysia nationwide received varied forms of feedback across the industry. CIPAA is much welcomed and is seen as a new beginning to revolutionise the ways disputes are handled within the local construction industry. There is some hesitation recorded at the initial wave of the enforcement among the players while familiarising with the procedure. The inception also gained slow acceptance due to the players' lack of awareness and understanding of the Act, ignorance about their entitlement under the Act, and relatively low level of knowledge on the application and limitations of the Act.

The enactment of adjudication in Malaysia is seen as a relief due to growing dissatisfaction and doubt on the effectiveness of arbitration in Malaysia. The increasing frustration is due the increasing cost and time in resolving construction dispute via litigation and arbitration. The introduction of CIPAA also receives support from the High Court of Malaysia.

On a more positive viewpoint, Malaysian construction players generally agree that CIPAA is hailed as a cheap and efficient way to resolve payment disputes in construction. Statistics shows an inclining pattern of cases referred to the Act and rate of claimants' success indicating a positive paying morale.

Because the Act is new, a great likelihood is recorded on the view that the industry's players are still lacking awareness and information on the CIPAA. Asian International Arbitration Centre (AIAC) has taken a number of initiatives to promote and educate industry players on how they can benefit from the enactment of CIPAA as an effective means of legal access.

Despite the positive outlook, scepticisms were also recorded in regard to overwhelming impact of the enactment to the industry holistically. The study found that perseverance of good relationship plays an integral part among Malaysian business parties. It is also further suggested that adjudication is not a preferable means to resolve construction disputes due to many group attachment issues.

While the construction market is becoming increasingly intense, it has become a problematic barrier for small and medium-sized contractors to initiate adjudication against their client because such move would jeopardise their relationship.

The study also recorded some protests mainly on the tremendous effects of the CIPAA to the industry and fear that the mechanism will be abused by opportunistic and dishonest parties seeking undeserved monetary relief in a dispute through adjudication. Thus, defendants found it is risky because experience shows that a majority of adjudication decisions are accepted as final.

However, the dissatisfactions should not be misjudged the needs and necessity of adjudication in Malaysia, especially when poor payment culture is still prevalent within the construction industry. Parties need to be aware that adjudication is not intended to correct errors in construction contract, but it is merely a mechanism to assist parties to secure payment that they are contractually entitled to.

One of the major issues raised were the emphasis on the role of adjudicator as a critical key player to achieve the optimum benefit of CIPAA. Concerns were raised on the availability of competent adjudicators who can determine the dispute within the prescribed timeframe with minimal error for construction work to proceed unimpededly.

*b) Barriers to an effective implementation of adjudication*

As indicated earlier, the inception of adjudication in the Malaysian industry was initially slow. Many construction activities are situated far from cities and some operate in rural areas that involve only local trade contractors. Small-sized contractors are found to be rather unaware of their rights and entitlement under the Act and prefer to manage conflicts conventionally. Naturally, the low inception is because small contractors feels unconfident to adopt a new perspective to deal with payment disputes. The hesitations were linked to the problem of language barrier and legal wordings of the Act.

The study also discovered a striking finding on the issue of lawyer's role in becoming an adjudicator. A general consensus is recorded throughout the analysis constituting that lawyers should exempt themselves from determining payment dispute that is highly technical in nature, especially when it requires decision in quantum. The study concludes that qualified

practitioners are found to be more preferable to become an adjudicator dealing with quantum matters of a dispute.

Nevertheless, it is found that lawyers constitute a dominant pool of adjudicators in Malaysia. The relatively low involvement by construction professionals as adjudicator pose a major challenge to produce qualified talent with necessary skill to conduct adjudication. The Malaysian construction parties also expressed such preferences because they find it advantageous to seek determination from a professional who has the core skills, technical experience and knowledge of the dispute matter.

The study also concludes that the involvement of lawyers is necessary and appropriate when parties seek legal advice for any jurisdictional issues. Nevertheless, much discussion has been made prohibiting parties from getting themselves legally represented in the process. Legal procedure will not dominate the adjudication proceeding.

Additionally, it is not unknown that parties have been manipulating the adjudication process for their own personal goal. CIPAA provides a very minimal ground on which adjudication can be set aside and it does not concern with the merits of the dispute. It is established that an adjudication will not be set aside even if the adjudicator made an error. Such entitlement is claimed to be challenging for an honest defendant as this will allow plenty of openings for defective decision. Such situation poses a crucial point to consider when entering into the process.

Nevertheless, parties should exempt themselves to expect the adjudicator, operating on a tight timetable to reach a decision, to deal with every possible dispute under the construction contract, and to deal with each point of argument with the same care and detail as if the dispute is decided in arbitration and litigation. Hence, consideration needs to be given to achieve the balance on achieving an expeditious decision, ensuring the time scales are such to enable the adjudicator to reach a reasonable decision. It is also agreed that many disputes will be made complicated with the presence of lawyers on top of the strict application of procedural rules.

c) *Adjudicator*

Referring dispute to an external judge may result in additional uncertainty to the parties. The study concludes that lack of knowledge, skills, and experience relating to conflict

resolution methods and facilitation procedures may adversely affect the expeditious and rigorous outcome of adjudication procedure.

The analysis found that some of the key essentials for an adjudicator is the ability to grasp the essential issues quickly and focus on those issues, manage their own and parties' time, and to treat the parties fairly by taking on board their submissions. It would be absurd to posit adjudication as a high level of scrutiny such as in arbitration or litigation. Owing to this, there must be a quality baseline in terms of justice that parties would perceive as fair for everybody to accept and move on.

Over the years, following the inception of CIPAA, the industry also witnessed that a number of adjudications were challenged due to allegations of breach of natural justice. Challenges on adjudication award in Malaysia are often due to inadequate reasoning provided by the adjudicator. The adjudicator does not get the luxury of time to make an errorless decision. Parties will need to consider at some point whether it is necessary to incur a fee for the adjudicator making a determination on a point that is unnecessary in view of the primary findings. Thus, the party needs to consider the crucial balance and fair view on the timeliness of adjudication procedure.

As discussed earlier, strong resistance is recorded among the Malaysian construction parties on the inclusion of a lawyer as part of the adjudication procedure. Strong preference is made towards adjudicators with technical and commercial expertise as their background experience. This preference supports the awareness on the importance of knowledge and experience in construction as a critical indicator skill to resolve payment dispute in the construction industry.

## **8.2.6 *Theme 6: Construction Contract Management***

### ***a) Standard form of construction contract***

Previously in Malaysia, the practices of formalising construction contracts through verbal agreement were widely adopted. If dispute rises in an unwritten contract, the judge will need to look at the circumstances to discover the contractual terms. Thus, for the benefit of all parties, the Malaysian parties presently do not operate on the basis of oral contract even though it is legally binding.



The government recognises the impact of interrupted cash flow to construction contract and the issue of late and non-payment and effort to overcome the problems to be taken seriously. The PWD 203A is a standard form of construction contract used by the Public Work Department (PWD) of Malaysia to govern the contractual agreement for public projects. With the introduction of CIPAA, the government made strategies to overcome and minimise payment disputes in public projects by improving the efficiency of its payment policy and procedure to suit the implementation of CIPAA. Additionally, the PWD has taken several steps in amending the PWD 203/203A to further strengthen its payment procedure to ensure contractors are to be paid accordingly.

*b) Formal method*

Formal resolution process includes attributes like grievances or lawsuit. Although the outcome of adjudication is usually appealable, the process would take considerable time within a specified deadline and parties have little to no control over the outcome of the proceeding. Owing to this, it is crucial for the referring party to conduct adjudication risk audit as a process to help them to make sensible judgment in reaching a commercial settlement.

*c) Dispute settlement phase*

The analysis refers to the issue of unique relationship and potentially clashes of interest among parties, causing the inefficiency of a formal method as a dispute resolution mechanism to resolve disputes among the parties. Adjudication is presumed to uphold the course of naming, blaming, and claiming, and causing the other side to be held accountable. Construction stakeholders would take more careful steps to resort to a formal resolution owing to the circumstances that the adversarial process produces a win-lose outcome, which deters the functional working relationship from moving forward.

During the settlement phase, when dispute involves two parties who want to maintain good terms for the present and the future, it is necessary for the parties to sit down to talk amicably of their differences to collaborate for a resolution. Thus, it is vital for parties to put their mind on producing some workable solutions, not on blaming assessment.

Excerpts by respondents who perceive adjudication as a non-adversarial process are also recorded throughout the analysis process. It is believed that adjudication in Malaysia has provided additional avenues and more room for the parties to resolve the dispute peacefully before referring the matter to a more adverse method like arbitration or litigation with a minimised aftereffect. In fact, the introduction of CIPAA in Malaysia is much needed because cash flow issue has become an industry endemic.

*d) Claim culture*

The study observes that there is an increasing trend of ‘claim minded’ or ‘claim culture’ attitude among the Malaysian construction stakeholders following the introduction of the CIPAA. It often creates tension and adverse ambience among the parties as they are in constant claiming mode and seeking for loopholes for claim opportunity.

Malaysian contractors are found to have more awareness on their contractual rights and higher confidence to pursue it. Parties often opt for the most economical and speedy ways to accelerate their contractual claim. Having a legal team in place and claims consultant to assist claim matters is also becoming popular for large-sized contractor organisations.

The rise of claim culture attitude among the local contractors in line with a steady increase of disputes referred to adjudication implies that contractors are financially vulnerable. Presently, the operation of CIPAA encourages professionalism and integrity within the industry.

*e) Merit of claim*

To deal with claim effectively, parties must have an established understanding to the principle of determining the rights and obligations of the two parties. When claim arises, parties must start assessing the quantum for the work performed. Claim management allows current and potential claims to be evaluated. By assessing their merit early on, it can be resolved quickly without causing delay to the work progress.

The study supports that prolongation of claim assessment can become a tactical way of negative dispute avoidance. However, complexity arises when the referring party fails to present a legal reasoning as a ground of claim recovery under the contractual law. Submitting

a flawed claim to adjudication has been a rising concern for the stakeholders as it exposes them to the jeopardy of adjudication as mechanism to pursue dishonest and unreasonable relief.

It is also found that, some parties have inflated their claim over the rationalised level of cost but with the intention of settling to recover its baseline figure. This is a precarious concept to apply by the referring party because the claim will often be brought into question and taint the positive entitlement of the claim. Respondents of the study also protest that it can significantly reduce the trustworthiness of the mechanism as a prospect for a fair settlement.

### **8.3 Drawing Interpretations on the Ontological Position**

As the study reviews its philosophical stance, it believes that there is no single truth, and facts are dependent on the viewpoint of the study. The reality of national culture is socially constructed, may change to examine the fluid, unbounded, and changing nature of its phenomena, while deconstructing the concept of national culture. Since culture influences many aspects of human behaviours, the study constructs take the ontological assumption that the research answer is not singular, and the outcome of the study is constructed based on interviewee's experiences and perceptions, while there is no 'correct' or 'incorrect' answer for them. Hence, capturing interviewees' experiences and perceptions implies an equal consideration – although one participant's is very different from another and is far from other experiences and empirical data, the study gives equal attention, as well as the treatment for any other perceptions.

The richness of contextual details of the various perceptions ensures that the qualitative research is robust and in depth, which is a distinctive advantage of qualitative study. Nevertheless, the study is not free from drawbacks, namely that generalisation is hardly possible to be achieved using this approach. Although the contextual specifics and individual perceptions ensure the richness of details, the design feature in turn produces findings that are truly unique and only as far as the specific country is concerned. Thus, the study will draw its conceptualisation of collectivism to reach an operational definition of it from the richness of contextual details provided by the participants' own experience and perceptions.

### 8.3.1 Individualism/Collectivism

The first area of inquiries that will be discussed is the influence of individualism/collectivism on dispute resolution, specifically from the unique perspective of construction adjudication in Malaysia. The proposition of the study is restated as below.

***Proposition 1: the higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a collective society.***

Drawing from the thematic analysis, the results have shown that the above proposition is weakly supported in the case study. Contrary to the research proposition, the study found that adversarial dispute resolution style via adjudication method has a strong desirability to the collectivistic Malaysian construction players. Justifications for the findings will be dealt in the following sections.

The study discusses several possible best explanations for an adversarial dispute resolution method like adjudication is interestingly found to be desirable among collectivistic society of the Malaysian construction parties. The study first considers the conceptualisation of conservatism and interdependence within the Malaysian construction industry. Secondly, the study will discuss how the in-group favouring norm of the Malaysian construction parties influenced the decision to embark into adjudication. Thirdly, the study will also highlight the state of existing harmonious business affair among the construction parties in Malaysia. Finally, the study discusses the influence of intergroup orientation for adversarial working relationship between the Malaysian construction parties. The study will then conclude the alternative explanations for the weak support of the proposition by establishing the basic assumptions of intergroup conflict among the Malaysian construction parties.

#### *a) Conceptualisation of collectivism and interdependence in the Malaysian construction industry*

As far as the construct of collectivism is concerned, there is no single agreed definition or conceptualisation of what it should be. The methodological complexities associated with an essentially latent concept like collectivism have rendered its direct measurement as somewhat problematic. A common approach in literature is to identify espoused norms, practices and

values of a society or organisation as to the principle of giving a group priority over everyone in it that they become synonymous with collectivism.

The fundamental issue that exists in the collectivism dimension is the degree of interdependence that societies maintain among its members. Malaysia, with a score of 26, is a relatively high collectivistic society. This manifests in a close long-term commitment to the “member” group. Loyalty in a collectivist culture is paramount and overrides many other societal rules and regulations, as a collectivistic society like Malaysian fosters strong relationship. Every member of the group is responsible for fellow members of their group. In Malaysia, employer and employee relations are perceived in moral terms. In an effort of conceptualising the collectivism of the Malaysian construction parties, Markus and Kitayama (1991) suggested that the distinction that is made between independent and interdependent construal must be regarded as general tendencies that may emerge when members of the culture are considered as a whole.

Construction project organisation is considered as a circumstance of a large and complex organisation where the total membership of the organisation is subdivided into many different organisations under it as smaller groups that consist of consultant, sub-consultants, contractor, sub-contractors, and material suppliers. Each group has its own leadership, rules and regulations. Each organisation under the project has their own goal, which may or may not be in accordance with the employer’s overall project goal. Each of the organisation also operates with its own degree of cohesion, which varies with feelings of failure or accomplishment. Within the context of the project organisation, these organisations under it operates and are interdependent with one another. For example, the contractor is interdependent in performing complex tasks requiring coordination of effort with the employer of the project for directions. However, differences among them immediately become apparent to members.

Collectivism in the Malaysian construction industry is found to be highly segregated by grouping. Within a project, there are many organisations for different groups of stakeholders, such as the employer, main contractor, consultants, supplier and sub-contractors. Such grouping focuses their attention and resources inwards of the related construction activities and the needs of their own group rather than the overall activity of the project organisation. The formation of group leads to other organisational behaviours because the organisations develop a degree of independence from other organisations, but the emergence

is found to be contradicting with collectivistic values of the Malaysian society holistically. Malaysian construction parties are found to be highly interdependent for many reasons.

In a collectivistic and interdependent society, Markus and Kitayama (1991) advocated that some of the processes involved in social and non-social thinking alike are influenced by a pervasive attentiveness to the relevant “others” in a societal context. The study suggests that in the construal for a Malaysian, the concept of “self” is viewed as interdependent with the surrounding context and it is the “other” and “self-in-relation-to-other” that is focal in individual experience. One general consequence of this self-construal is that psychological processes like cognition, emotion, and motive explicitly and implicitly implicate the interdependence of self and self-in-relation-to-other as a referent point. This form of psychological experience shapes the process of self-definition generally for Malaysians.

Various descriptions of individualist and collectivist cultures present distinctive antecedent factors influence on dispute resolution behaviour in the two orientations. In a simple distinction, collectivism occurs when the demand and interest of groups take precedence over the desires and needs of individuals. Collectivists look out for the well-being of the groups to which they belong, even if such action requires the personal interest to be disregarded. Consistent with this framework, Malaysian organisations with collectivist group orientation is found to display more cooperative behaviour with members of their organisation because they tend to feel more interdependent with and more concerned about the result of action on their in-group.

The study found that the Malaysian construction industry has become highly fragmented and adversarial where cooperative mode of dispute resolution takes place in a set of circumstances that are not wholly conducive even in a collectivistic society like Malaysia. The study now will analyse the dispute resolution process based on individualism/collectivism orientation by understanding in-group favouring norm by the Malaysian construction parties.

*b) In-group favouring norm of the Malaysian construction parties in dispute resolution*

The discipline of intergroup relations is concerned with all types of relationship among a group, including constructive and destructive intergroup conflicts. Intergroup conflict can exist in many forms in various settings in all societies and cultures. In an organisation, poorly managed difference between groups within the same organisation can

dampen morale, create animosity as well as reduce productivity and motivation. Research using social identity theory has shown that individualism/collectivism, while often examined at the societal level, is also central to characterising how behaviour is predisposed at the organisational level. Social identity theory originally proposed by Tajfel (1978) is a branch of theory that predicts certain intergroup behaviours based on perceived group status differences, the perceived legitimacy and stability of those status differences, and the perceived ability to move from one group to another.

A normative imperative of the interdependence society is to maintain the connectedness as a sign of interdependence among other individuals (De Vos, 1985; Hsu, 1985; Miller, 1988; Shweder & Bourne, 1984). Markus and Kitayama (1991) explicated that a society experiencing interdependence sees one unit of self as part of encompassing social relationship and recognising that one's behaviour is determined, contingent on, and to a large extent, organised by what the one perceives to be thoughts, feelings, and action of others in the relationship. The Malaysian construction parties experience as an organisational unit, therefore, includes a sense of interdependence of one's status as a participant in a larger project organisation unit.

Within the construction industry in Malaysia, disputes are resolved largely using the collectivistic nature of the industry players and by the industry's "culture" of dispute resolution. The study found that the view of the "self" and the relationship of the self with "others" are not separate from the social context but as more connected and less differentiated from others. The study further found that Malaysian construction organisations operate on a high interdependence between oneself with others but can turn into a highly independent unit when in dispute. The nature of the relationship is prevalent in many Asian countries within its construction industry and the culture within which the industry operates is what Phua and Rowilson (2003) regarded as the key issues which holds effectiveness of construction that is prone to disputes.

The study also found that in a collectivist culture such as those found in many Asian countries like Malaysia, the emphasis is on attending to the need and goals of the in-group rather than of oneself and maintaining social harmony among the members of the in-group. The in-group favouring norm occurs at group level that motivates behaviour in the intragroup and intergroup context by directing members of the group to first consider the interest of the in-group.

Within the construction industry, disrupted cash flow is known to be the ultimate killer in business and keeping it on top is crucial. Prioritisation has become one of the key skills for commercial construction organisations to carry the sustainability of the organisation. This way, Malaysian parties have always developed a normative in-group favouritism that includes belief that the in-group's needs should precede the out-group's need. Thus, in facing disputes, parties believe that it is crucial to take measures in recovering their debt to protect the interest of the in-group.

Montoya and Pittinsky (2013) proposed that the norm to consider the interests of their group members was an adaptation that not only maximized group member's fitness, but also fostered harmonious intragroup relations and enhanced the viability of the group. Evidence from the context of the Malaysian construction industry shows that in-group favouring norm becomes active once the group context becomes salient. The in-group favouring norm hypothesises the presence of negative intergroup responses when competition is viewed as best supporting the interests of the group. Consistent with the findings, points made by respondents of the study support that the Malaysian economic pressure has turned the construction market fierce and competitive, thus construction organisations can no longer afford to rest on their laurels.

c) *The influence of in-group favouring norm on out-group antagonism*

Although the in-group favouring norm has been repeatedly invoked to justify antagonism towards out-groups, closer inspection shows that the various definitions of the in-group favouring norm indicates that it does not necessarily promote out-group antagonism. The result of the study shows that Malaysian construction parties believe that the quality of business relationship has significant influence on the company's success and it is important for parties to aim for a win-win solution when facing dispute. Consistent to this, Tajfel (1970) defined his "generic norm" as dictating the in-group and by discriminating the out-group. Importantly, empirical evidence supports that the in-group favouring norm among the Malaysian construction parties is primarily motivated to benefit the in-group rather than to harm the out-group.

For example, the rise of the collaborative working mode has increased the focus of collaborative mode in organisations. The Malaysian construction market is stringent, and parties begin to overlook to the importance of minimising antagonism towards the out-group



and striving for a healthy collaboration mode with the out-group without compromising the interest and bias of their own in-group.

Although a tactic centred on emphasising the benefits of cooperating with the out-group appears obvious, considerable studies have proposed that even seeming cooperative intergroup relations can generate hostilities. Consistent with social identity theory, group members are generally motivated to maintain a positive social identity and in doing so, group members are motivated to view their group favourably. The motivation is found then to become a bias and it is amplified in construction projects when employer's representative is often seen to favour the employer in their approach to the administration of disputes. The study concludes that cooperative relations between in-group can also be dysfunctional and produce identity threats that fuel intergroup hostilities.

However, support is also found that there is a high degree of correspondence between the values of in-group favouring norm and horizontal collectivists, as they are both interested in prioritising the in-group's goal and the well-being of group members. The Malaysian construction parties, when in dispute, is found to be highly associated with beliefs in protecting the interest and foster tolerance for all parties and the restraint of action that may harm other parties in conflict. Employers prefer to work with a contractor who has integrity and respect for the project goals by thriving for collaboration in intergroup relations. These in turn will help the employer develop trust and confidence.

The study concludes that the effect of in-group favouring norm is linked to many issues related to group conflict and prejudice within the Malaysian construction industry. The Malaysian construction parties pose some considerable extent on the preference towards in-group favouring norm that motivates behaviour in the intragroup and intergroup context by directing members of the group to first consider interest of the in-group. The current state of affair reflects very well the position in the Malaysian construction industry at present. Parties are viewed as cooperative when the cost of conflict is relatively lower than the cost of losing cooperation and becoming competitive.

One can reasonably extrapolate that in-group favouring norms do hypothesise the presence of negative intergroup responses when competition is viewed as best supporting the interest of the group. The in-group favouring norm and bias towards out-group will take over in the conflict resolution process when the group's demands and needs are not comprehended. The Malaysian construction parties are still operating within the dysfunctional and conventional structure of grouping favouritism, which is found to be deteriorating to the

process of dispute resolution. Hence, the Malaysian construction parties with high tendency in favouring group norm found a positive desirability in adopting adversarial methods like adjudication.

*d) Outgroup orientation for adversarial working relationship between the construction parties*

Despite criticisms on the view of in-group/out-group relations, contemporary research on intergroup relations, prejudice, and discrimination appear to accept that in-group favouring norm and out-group negativity are mutually related. In this section, the study will consider the influence of conflict out-group orientation that is based on the bias on the implementation of adjudication as an adversarial method of dispute resolution that appears to be preferred by the parties in the collectivistic Malaysian construction industry.

The perceived realistic group theory suggests that competition for access to limited resources leads to conflict between groups (Sherif et al., 1961). As groups compete with each other for limited resources, they learn to view the out-group as a competition, which leads to prejudice. For a potential competitor to take resources, they must be perceived as like the in-group on the relevant dimension (Zarate et al., 2004). The theory explains how intergroup hostility can arise as a result of conflicting goals competition over scarce resources such as money. When the value of cooperation becomes insignificant, parties are prepared to give up intergroup harmony to pursue in-group goals.

The above condition illustrates the ever-existing adversary within the Malaysian construction industry. Intergroup competition among the parties in turn becomes adversarial and destructive to the cooperative relations among the project parties and breeds trust issue. At the group level, the worldview of suspicion and distrust focuses on the perspective that out-groups are untrustworthy. In some cases, even if the adversary does not exist, suspicion can breed into distrust and cause in-group to see the behaviour of the out-group as vindictive. The relationship among the parties in construction is considered as a one-off transaction and temporary. Owing to this, parties believe that it is rather inappropriate to solve monetary dispute through an informal way of negotiation because parties already do not see the prospect of continuing the relationship. Intergroup orientation of the collectivistic Malaysian parties is suggested to be even more competitive and aggressive than at the individual level.

Perception of differences between groups leads to a comparison and to a 'we-they' orientation. Thus, in a sense of 'winning' and 'losing' that exists in the adjudication process making the organisation's rationale lies on competition. Comparison of differences in the process of dispute resolution between parties inevitably results in unfavourable outcomes. In the process of talking out the conflicts between parties, they may discover discrepancies in treatment and privilege, point of view, objectives, values, and so on. Distortion in perception further occurs, which favours in-group and deprecates out-group.

At the point where disputes are formally tried in adjudication, disagreement is seen as permanent and inevitable. One of the possible resolutions seems to lie in the defeat of the other party group in adjudication for the other party to achieve its own objectives. The study found that despite the known characteristic of the Malaysian collectivism at the national level, if focus was narrowed down to a specific industry like construction, a high degree of intergroup bias and adversaries are found to be the default culture of its conflict management in the industry. Feelings of resentment arise in the situation that the parties see as competition, especially in monetary form.

Intergroup relations refer to interaction between individuals in different groups and interaction that takes place between the group themselves collectively. Intergroup cooperation is essential to the positive function of a complex organisation. Nevertheless, because the functioning of the group is embedded within itself, intergroup dependence is lesser and becomes difficult to sustain among the groups within the organisation. Thus, when dispute strikes between intergroups among the Malaysian construction parties, it becomes a barrier to the extent that if it goes unresolved, dysfunctional intergroup relations will arise.

Traditionally, the welfare of goals of a group is prioritised over the personal goals of its members in collectivist cultures (Hofstede, 1980; Triandis, 1999). The research originally posits that with a score in the Hofstede's collectivism framework, the Malaysian construction parties have the tendency to nurture a harmonious and an indirect dispute resolution method to preserve a healthy relationship among the parties in the construction project organisation. The result of the qualitative study shows inconsistency in the actuality of the assumptions. The study found that the Malaysian construction parties are diverging when it comes to prioritising their own group goals that inherently cause clash and conflicts among them. When the group goals are competitive, hostility becomes evident and signifies the out-group bias among the project parties.

The study suggests that the Malaysian construction parties have a strong inclination towards behaving competitively and aggressively if dispute exists between groups. Owing to the nature of the industry that is highly profit-driven, parties have a strong reaction towards monetary disputes. This supports Tajfel's and Turner's (1979) assumption that an unequal distribution of objective resources promotes antagonism between groups. Malaysian contractors are operating with a vulnerable condition, especially when disputes are intense and relationship with employer is often characterised by distrust, suspicious and lacking confidence in good trust. The study thus proposes that, where competition becomes the background of the intergroup relations, a group expresses more concern with maximising their outcome. As a result, the group will have a tendency to employ an adversarial method of dispute resolution to compete more with other groups.

e) *Harnessing in-group favouring norm to facilitate positive intergroup relations*

It is important to note that the study does not entirely rule out the reality that being relationship-driven and communality are still the dominant orientation among the construction parties of the Malaysian construction industry. Evidence from the analysis also shows that there is a natural tendency among the parties to first suppress dispute by yielding non-adversarial methods of dispute resolution. The Malaysian construction parties have high appreciation towards the quality of a harmonious business relationship and believe it to have a significant influence on the company's success. The fundamental notion of dispute resolution is striving to attain as close to a win-win solution as possible. The findings align with that of Montoya and Pinter (2014) who showed that the focus on absolute outcomes indicates that positive intergroup relations can result when the out-group is perceived as a pathway to maximising outcomes and when group-level norms are cooperative.

The study also does not rule out that Malaysian construction parties do not prefer a direct and adversarial style when dealing with dispute against their project partner. The study further confirms that under certain circumstances parties prefer a more soothing and informal manner in talking out disputes over peaceful occasions to reach an amicable settlement. The Malaysian avoidance style and the need for harmony is a product of its multitude of faiths and religions that has been the main driver for the practice of harmonious dispute resolutions. For example, Abraham (2009) stated that in Islam, mediation is an indispensable condition and is represented by the concept of *shafa'a* – intercession and concepts of equality and to even up, while in Hinduism, the harmonious conflict resolution process is reflective in the concept of

*panchayat* – a practice of village heads mediating the problems of villagers, whilst the Chinese places great emphasis on the need for harmony and the resolution of dispute in an amicable manner that a Chinese proverb was couched to express dissatisfaction to the adversarial process “in death avoid hell, in life avoid law courts”.

f) *Conclusion*

The study concludes that adversarial dispute resolution style like adjudication has a positive desirability to the collectivist society of the Malaysian construction professionals. The study draws this conclusion based on several possible best explanations for the findings. The study believes that the influence of intergroup adversary embedded within the collectivism value of a society to be the explanative factor of why adjudication is found to be preferable by the Malaysian construction parties from the cultural dimension of individualism/collectivism point of view.

This dimension is found to be the most complex to be analysed to generate possible explanations for the findings. Collectivism of Malaysian is found to be highly segregated by groupings, for example, in terms of race, ethnicity, professional background and hierarchal. In literature, scholars supported that such grouping segregation leads parties to focus their attention to fulfil the interest of their own in-group. This way, the formation of a group leads to developing a degree of independence from other organisation. However, this notion is found to be inconsistent in Malaysia. In Malaysia, the concept of “self” is viewed as interdependence with the surrounding context and it is the “other” and “self-in-relation-to other” that has become the core basis for the collectivism construal of the society.

The study concludes three basic assumptions towards intergroup dispute between Malaysian parties to the employment of an adversarial dispute resolution method. Firstly, the assumption is that disagreement between construction parties is inevitable. When contractor and employer disagree, the assumption is that the disagreement must be resolved in favour of the contractor or the employer, one way or another. Under this assumption, there seems to be no other alternative for the parties to resolve the dispute amicably. This study concludes that if neither party is ready to capitulate, then parties are left with three major mechanisms that may be used.

Firstly, parties may seek resolution through a third-party decision. Adjudication process begins when parties refer the dispute to adjudication to determine the result. Parties

who have decided to start an adjudication will first check the applicable adjudication procedure rules, then prepare and serve the notice of adjudication before appointing an adjudicator and finally prepare the referral notice.

Secondly, parties may get into a win-lose power struggle to capitulation by one group. In the event the adjudication decision is not complied with, the unpaid party can apply to the High Court to enforce the adjudication decision and is then able to commence enforcement proceedings on the adjudication award. On the other hand, in the event of a non-compliance of an adjudication decision, the unpaid party may suspend or slow down the work to demand for direct payment from the principal.

Thirdly, parties can come to an agreement not to determine the outcome. This way, parties choose compromise as a way to sooth the disagreements. Compromise is a conventional way for resolving intergroup conflicts. Parties will try to find a solution that will at least partially satisfy everyone. This style is a balance between winning own's concern and meeting other party's needs. The present study confirmed the findings about the preference of the use of compromise as a one of the many ways of dealing with dispute among the Malaysian project parties. The method of agreeing not to determine the outcome of the dispute is more desirable when parties have a range of alternatives such that an outcome is not necessary at that point of time.

The second assumption is that dispute can be avoided if interdependence of group is unnecessary. This orientation of intergroup working relations rest on the assumption that while intergroup disagreement is inevitable, neither is intergroup agreement. If this assumption can be made, then interdependence between groups is not necessary. Hence, the study concludes that when a point of dispute arises between groups, they can be resolved by reducing the interdependence between parties. Findings of the study reveal that the Malaysian construction parties achieve the reduction by withdrawing themselves from the scene.

One party can choose by withdrawing from the scene of action. When there was a problem with payment at site, Malaysian subcontractors occasionally choose to suspend work and walk off the site, although suspending work on site will result in a repudiatory breach. The findings reveal that one party's withdrawal during dispute reveals that a small-sized contractor somehow suspended the work as an act to protest the non-payment of the completed work.

The third assumption on intergroup disagreement among the construction parties in Malaysia is that agreement and maintaining interdependence is possible. The assumption rests on the existing positive and harmonious intergroup relation that the parties have already established long before disputes between them arise and means of resolving disputes between the group must be found. Resolving conflict by harmony is achieved by smoothing over the conflict while retaining interdependence.

For example, reference can constantly be made to the overall project organisation goals to which both parties are in some degree committed. Partnering approach allows the design and construction process to be performed within an environment of commitment to shared goals among the project parties. A working relationship among team members that is based on a mutually agreeable plan of cooperation creates an atmosphere in which all parties are working in harmony to avoid claims in a formal dispute resolution procedure like adjudication. This way, attention is shifted away from the real issue with surface harmony maintained. However, the danger of relying on harmony maintenance rather than focusing on resolving the real issue of the dispute is that parties will delay or even avoid getting the dispute resolved as a stalling tactic by not addressing the issue of the dispute. The quality of the business relationship is found to be one of the main drivers for the company success in the Malaysian business. The sense of complex harmony maintenance in conflicting situations then becomes a stumbling block in the dispute resolution process when parties put so much focus on maintaining good relations between organisations, but this unhealthy element will indirectly obliterate the dispute resolution process.

Alternatively, agreement may be achieved among intergroup by adopting solution-oriented mechanism such as bargaining, trading, or compromising. A collectivist society puts emphasis on the importance of aiming for a win-win solution when facing disputes. In a general sense, this method is splitting the difference that separates the parties while also retaining parties' interdependence. Within the context of the study, Malaysian parties view compromising as a conventional way for resolving intergroup conflicts. This method is about finding the right balance between winning and safeguarding the other party's need.

Finally, an effort may be made to resolve the disagreement through a genuine problem-solving approach. Here, the effort made by parties is not devoted to determining who is right and who is wrong, nor is it devoted to yielding something to gain another thing. Rather, a genuine effort is made to explore a creative resolution of fundamental points of difference. In this way, construction mediation is seen to be effective in evaluating

commercial realities. Experience shows that the mediation process puts parties on the road to settlement. So, the actual settlement rate is higher in mediation.

This way, there are chances of hugely satisfying mediations where the settlement agreement goes beyond the dispute to achieve a favourable outcome for every party. The concept of mediation is nothing new but is based on a set of Eastern values and teachings, and has further been conceptualised and structured by the West. The fundamentals of mediation are the encouragement of settlement by the assistance of a third party and has been a practice of the East for centuries.

### **8.3.2 Masculinity/Femininity**

The second area of inquiries of this study is on the influence of masculinity versus femininity on dispute resolution, particularly from the unique perspective of construction adjudication. The proposition of the study is restated as below.

***Proposition 2: the higher the degree of adversary posed by the dispute resolution mechanism, the more likely for the mechanism to have a positive desirability in a masculine society.***

Examination from the critical thematic analysis of the study supports that the above proposition is supported. Compatible with the research proposition, the study found that adversarial dispute resolution style via adjudication method has a positive desirability to the masculine Malaysian construction players. Support for the findings will be discussed in the following sections.

The study will draw its support for the above proposition by considering several theoretical discussions. Firstly, the study will explore the influence of masculinity and femininity orientation as a predictive factor for cooperation and competitive behaviour in conflict management and dispute resolution field. Secondly, the study will attempt to draw explanative discussion to support the notion of masculinity as a dynamic variable for adversarial behaviour by stakeholders in Malaysian construction parties. Finally, the study will extend the support by drawing attention to the gender role orientation of the male-dominated construction industry as a source of adversarial behaviour in the construction industry.



a) *Masculinity/femininity orientation as a predictive influence for cooperative and competitive behaviour in dispute resolution*

The dimension masculinity/femininity elaborated by Hofstede et al. (2010) refers to the dominant sex-role patterns in society. A masculine-oriented society emphasises competition and strength. In very masculine cultures, the gap between women's and men's value is very large or hierarchical (Hofstede, 2011). The construction industry is regarded as a highly masculine industry, which is a male dominated society and poses a concern for performance, thus explaining the competition among parties. In contrast, a feminine culture emphasises the value of relationships. In feminine cultures, women's and men's values vary much less. Besides that, gender roles overlap, and expectations are equal for both men and women. Moreover, Hofstede (2001) described feminine cultures as having an interdependence ideal and masculine as having an independence ideal.

This study found that resolution strategies among the construction parties have been found to be highly gender-value specific. Masculinity trait in construction dispute resolution is highly associated with competition among parties in achieving the perceived personal goal. Meanwhile, femininity at the other end emphasises the value of cooperation in dispute resolution among construction parties. With a score of 50, the masculinity orientation of Malaysia is challenging to be determined. However, Malaysia is identified as a masculine society based on Hofstede's national culture score. The study will explain the predictor of masculinity score to explain the adversarial behaviour in dispute resolution of the Malaysian construction parties.

The theory of cooperation and competition behaviours developed by Deutsch (1985) has two basic ideas. The first relates to the type of interdependence among goals of the people involved in a given situation. Second pertains to the type of action taken by the people involved. According to Deutsch's theory of cooperation and competition, there are two basic types of goal interdependence. The first is a positive interdependence in which goals are linked in such a way that the probability of a person's goal attainment is positively correlated with the amount of probability another person obtaining his goal. On the other hand, a negative interdependence where the goals are linked in such a way that the amount of probability of goal attainment is negatively correlated with correlated with the amount of probability of other's goal attainment.

Overall, the dimension of masculinity/femininity refers to the dominant sex-role patterns in society. Previous studies have established that communication in masculine

cultures tend to be associated with attempts to prevail (Hofstede, 1998; Merkin, 2005; Pizam & Fleischer, 2005). In an organisational setting, masculinity represents the degree to which individuals in an organisation tend to place a higher value on assertive and competitive behaviour, but negatively associated with acquiescent response behaviour such as harmony and cooperative, while positively associated with a direct communication style. Thus, it is anticipated that those from masculine society will likely show more use of antisocial compliance gaining tactics by the force, deception competition.

When conducting business negotiation, communication in feminine cultures is geared towards maintaining harmony and equalising interacting parties (Johnson et al., 2005). Thus, the highly feminine value of good working relationship, cooperation and security go by the wayside (Merkin, 2017). Consequently, those from femininity who are attuned to sensitivity and face-saving concerns (Merkin & Ramadan, 2010) prefer to resolve conflict through negotiation and compromise. Additionally, those belonging to feminine culture prefer conflict to be resolved through consensus and consultation (Hofstede, 2001; Kermally, 2005) because this is more likely to preserve harmony.

For Malaysia, with a score of 50 on the masculinity/femininity dimension, it is a challenge to determine the preference for the way in which the construction parties are more inclined towards competition or competitive strategy in conflict management. The findings of the study somehow hinted that Malaysian construction parties are immersed in both masculinity and femininity culture but more inclined towards masculinity orientation due to the influence of the nature of the industry that is highly masculine. This explains why construction parties in Malaysia embrace competitive nature of fighting out dispute while at the same time have a high concern over preserving relationship and intergroup harmony.

The pursuit of 'being right' is deeply ingrained in business values in Malaysia. Reviewing from the perspective of construction stakeholders, it is suggested that the root cause of disputes in construction is not entirely, but significantly, due to the dominant values of the Malaysian society which are money, career, and status. These values are highly associated with masculinity orientation that emphasise the importance of achievement, earnings, and challenge.

b) *Masculinity as an explanatory variable of the adversarial behaviour in the construction industry*

The findings of this study suggested that adversarial behaviour among parties within the Malaysian construction industry is often based on the masculine orientation of the construction project parties, which in turn produces an intergroup competition and aggressive behaviour that is often described as being adversarial. This means that it frequently involves conflict, opposition, dispute and even hostility. The discussion on gender-specific differences in dispute resolution will highlight the likely influence of gender role orientation, specifically the influence of masculinity values to support research the proposition on the preference of adversarial method of dispute resolution among the Malaysian construction parties.

Conflict style has been and continues to be a measure by a variety of different taxonomies. One of the first conceptual schemes for classifying conflict revolved around a simple cooperation and competition dichotomy (Deutsch, 1949). However, doubts were raised over the ability of the dichotomy to reflect the complexity of individual perceptions of conflict behaviour (Ruble & Thomas, 1976; Smith, 1987). There are considerable studies examining societal and individual differences in conflict styles that have focused on gender as an explanatory variable (Brewer et al., 2002). Differences in conflict behaviour of men and women are not determined by biological sex, but rather gender roles, which are considered to represent learned patterns of masculine and feminine characteristics, which in turn may determine how certain individuals and societal groups behave in certain circumstances.

Analysis of the study reveals support for the above proposition that a masculine society like Malaysia has the tendency towards adversarial method of dispute resolution. Although not clear cut, the study provides some support for the prediction that adversarial style is perceived to be more desired by the parties when dealing with disputes. In an organisational context, masculinity represents the degree to which members of the organisation tend to place a higher value on assertive and competitive behaviour and positively associated with extreme response style to conflict, such as direct, self-promotion in addition to lack of attention to face concerns (Tosi & Greckhamer, 2004). Additionally, direct method of dispute resolution used by those in organisations with members of masculine cultures can be sharp and savage.

The Malaysian construction experience shows that parties engaging in a direct adversarial way of dealing with disputes produce aggressive behaviour during the dispute settlement process in construction, and it covers a wide range of different scenarios. The

finding is in line with Jian et al.'s (2007) report that when conducting business negotiations, those from highly masculine cultures have shown to be more likely to use antisocial compliance-gaining tactics characterised by using force, punishment, and deception. This is because highly masculine cultures focus on a work role model of male achievement, emphasising the importance of earnings, recognition, advancement, and challenge.

The above implication is supported by the ever-growing rate of adjudication cases to be one of the most popular methods of dispute resolution method because Malaysian parties adopt a short-term view on business relationship with little interest of maintaining a relation that they perceive to be disadvantageous to them. Drawing from this observation, experience in the Malaysian construction industry also shows that one of the principal reasons for the negative view on the process of dispute settlement concerns the adversarial attitude and behaviour of the disputants rather than the issue of the dispute.

The direct and competitive communication adopted by individuals is found to be confusing and often falsely attributed to individualism (Hofstede et al., 2010). Hence, direct communication may appear to result from individualism, but the function of communication may actually be competition, reflecting masculinity. Hofstede et al. (2010) further dictated that to distinguish between the two dimensions, individualism/collectivism dimensions highlight the conception of self that relates to 'I' versus 'we' and the degree of independence and interdependence people have in groups. On the other hand, masculinity/femininity dimension focus on the part of self that determines whether one's ego or relationship takes precedence respectively, where in masculine society, emotional roles are more likely oriented towards ego effacing roles (Coltrane, 1988; Hofstede, 2000).

In Malaysia, parties typically feel necessary to set out all matters of the dispute by advancing arguments that are stronger than their opponents. When commercial disputes arise, parties feel the instinct to fight hard and prove that a point is strong. The result supports the theories of many survey studies concluding that masculine society induces competition behaviour in their social affair (Deutch, 1949; Brewer et al., 2002; Broverman et al., 1972). The Malaysian construction parties were found to not be able to respond favourably to open disagreement and discussion itself. Direct disagreement weakens relationship, indicating that they characterise protagonist who disagreed directly and openly as unreasonable and difficult to deal with.

Additionally, in comparison to avoidance method, Malaysian construction parties view open discussion to be more beneficial as it stimulates exploration, integration, and

adoption of alternative ideas as well as strengthening interpersonal relationships. Although the findings support that Malaysian construction parties prefer avoidance method, further evidence also suggests that openness and problem solving have the effects of developing perceived cooperative interdependence that encourages the parties to believe that amicable dispute settlement can help them succeed. Direct blaming can result in a competitive struggle to see who can impose their opinion on the other, leaving people committed to their original thinking.

*c) Gender role orientation as a source of adversarial behaviour in the construction industry*

The construction industry is well known to be a male-dominated industry with a strong inclination towards masculinity orientation (Gale, 1994; Sommerville et al., 1993; Dainty et al., 2000; Fielden et al., 2000; Agapiou, 2002; Chandra & Loosemore, 2003). Given that adversarial behaviour has repeatedly been cited as the cause of conflict in the construction industry, it is not surprising that the nexus between gender and conflict has proven to be a factor for intergroup conflict in the construction industry. More specifically, the study found that male-centric behaviour in the construction industry acts as a significant source of interpersonal conflict.

Gender is one's sense of maleness and femaleness. According to social learning theory, the sense of gender is self-perceived and learnt through a process of socialisation and education, in addition to being culturally determined by the society's expectation of the roles men and women are to perform (Tannen, 1998; Feldman, 1999; Byrne, 2004). Consistent with the competitive and cooperative framework of masculinity/femininity, Byrne (2004) noted that the cultural stereotype associate masculinity with strength and power, while femininity with tactfulness and sensitivity. These expectations in turn create a distinct social environment in which men and women deal with conflict in quite different ways.

Gender role orientation in dispute resolution can be traced by ways of communication adopted by the parties in talking out dispute. The study reveals that Malaysian parties' interaction turns adversarial quickly when they start the formal process of adjudication where communication is often characterised by strong aggression, interruption, defensiveness, aggressiveness, and verbal sparring. There is a focus on an exchange of views, distinct speaker roles, actively fending off any counter argument, domination, strong verbal signal to

assert claim and shuts off the competitors with minimal effort to possible settlement. In this way, the manner in which Malaysian construction parties, especially being dominated by males, tend to be aggressive and head-on by using more blocking techniques and expletive language, is found to provoke conflict.

The study also found that the use of expletives and direct language by Malaysian parties is found to be the norm and acceptable way of expressing oneself in a construction site. This supports De Klerk's (2004) connection between the use of expletives in Western society with strength, power, and confidence. The study further indicates that communication in the Malaysian construction industry is highly male genderlect, thus exemplifying the masculine orientation of the industry as well as the society's interpersonal communication and behaviour. Although the possibility of conflict in discourse is context-dependent and not automatic, Galea and Loosemore (2006) stated that the common male genderlect increases the chances of escalation, especially in male-to-male interactions that is common in the construction industry. Men-to-men conflict discourse is dominated by masculine values of confrontation followed by appeasement.

The study argues that there is a need to apply a gender perspective in understanding dispute resolution in construction. The study does not imply that men are naturally hostile. Having said that, in a high masculinity culture, hostility within the industry is associated more with men and these socially constructed notions of masculinity can play a role in driving conflict and aggression.

#### *d) Conclusion*

The study concludes that adversarial dispute resolution mechanism like adjudication has a positive desirability to the masculine society of the Malaysian construction professionals. The study draws this conclusion based on a number of supportive reasonings for this expected finding. The study believes the influence of competitive behaviour underlining the masculine value of a society to be the explanation of why adjudication is found to be preferable by the Malaysian construction parties from the cultural dimension of masculinity/femininity point of view.

The study found the culture dimension of masculinity/femininity to be one of the influential traits to the conflict behaviour, and the conflict style among the parties is gender-value specific. The masculinity trait in construction in general is associated with competitive

behaviour by parties to achieve personal goals. Adversarial behaviour by the Malaysian parties is found to be associated from the masculine orientation that increases intergroup competition and aggressive behaviour that results in the preference for the adoption of adjudication in construction dispute resolution.

The Malaysian experience shows that, looking from the gender-based perspective, parties prefer to engage in a direct and adversarial way of talking out dispute. This finding explains the ever-growing rate of adjudication cases and it has become one of the most fast-growing dispute resolution methods. However, the employment of adjudication out of competitive behaviour has raised a negative view on the process of dispute resolution that concerns with the behaviour rather than resolving the issue of the dispute itself.

### **8.3.3 Power Distance**

The third area of inquiries of this study is on the influence of power distance on dispute resolution from the unique perspective of construction adjudication. The proposition of the study is restated as below.

***Proposition 3: The higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a high power distance society.***

The research investigates how the cultural values of power distance influences dispute resolution among construction players. The study is conducted based on Hofstede's theory of national cultures, carried out partly to see if power distance operates similarly to Hofstede's conclusion in the context of dispute resolution within inter-organisation in construction exclusively. This inquiry was to achieve greater understanding of how power distance influences the process of dispute resolution and strategy choices to resolve dispute according to culture.

Examination from the thematic analysis of the study found that the above proposition is also supported. As according to the prediction, adversarial dispute resolution via adjudication has a negative desirability to the high power distance Malaysian construction players. Support for the findings will be discussed in the following sections.

The study will draw its support for the above proposition by presenting theoretical discussions. Firstly, the study will discuss the much more general conceptualisation of power

and conflict, as well as the influence they have within the culture perspective. Secondly, the study will attempt to discover the influence of power distance through the perspective of the Malaysian national culture. Thirdly, discussion will also be made on the critical reflection of the imbalanced power distribution as one of the sources of conflict and dispute in the construction industry. Finally, the study will deliberate the influence of organisational authority and hierarchy to the construction conflict management style and dispute resolution via adjudication in Malaysia.

a) *Power and conflict*

Many studies have been conducted in an attempt to conceptualise the relationship between power and conflict. Coleman (2000) drew on Deutsch's (1985) work to synthesise a working definition of power to be usefully conceptualised as *a mutual interaction between the characteristics of a person and the characteristic of a situation, where the person has access to valued resources and uses them to achieve personal, relational, or environmental goals, often through using various strategies of influence* (p. 113). Power is then understood in relational terms.

One of the key personal factors that determines people's behavioural patterns regarding power in social relations is relevant to power and conflict from the social dominance theory (Sidanius & Pratto, 1999), which contends that societies organise according to group-based hierarchies, with dominant social group possessing a disproportionate share of positive social wealth – wealth, health, and status. These hierarchies are maintained by several key factors, including the social dominance orientation of members of the group.

Social dominance orientation is defined as a very general orientation of expressing anti-egalitarianism; a view of human existence as zero sum with persistent competition; the desire for hierarchical relationships between groups; and a desire for in-group dominance over out-groups. The study by Sidanius et al. (1994) on social dominance orientation has also identified consistent gender differences in men's and women's level of social dominance orientation, with men having significantly higher levels than women. This way, it is expected for this orientation to group relations to contribute to a chronically competitive orientation to power differences.

Taken together, these views underline an important aspect of the general inefficiency of the dispute resolution practice in the Malaysian construction industry. The rational view of



the role of authority by construction employers is where the subordinate parties are expected to follow orders in doing whatever necessary without questioning the authority. It is salient within the Malaysian society that such master-servant attitude is prevalent and deeply ingrained in the Malaysian construction industry. Such norm that exists in the Malaysian construction industry is found to be one of the sources of conflict.

The study supports that the social dominance orientation can affect how people in an organisation perceive conflicts between groups, how they evaluate authority relations and ultimately the decisions and responses people make towards power differences in conflict situations. Thus, the study assumes that power differences affect conflict process, which in turn can affect the efficiency of a dispute resolution process. It is also important to note that in addition to the existing culture of high power distance in Malaysia, various personal, environmental and behavioural factors involved are themselves.

*b) Power distance through the lens national culture*

The culture in which human are immersed is an important influence on experience of power. Hofstede (1980) identified power distance as a dimension of social relations that is determined by and varies across cultures. He further defined it as the extent to which the less powerful persons in a society accept inequality in power and consider it acceptable. Inequality exists within every culture, but the degree to which inequality is tolerated by society varies from one culture to another.

Malaysia topped as one of the countries in the world with the highest power distance score of 100 according to Hofstede's national culture score. The score suggests that Malaysia's rating is in line with the general trend in Asian countries with usually high levels of power distance. Malaysia is one of the extreme models where the lower-level people will unfailingly defer to the higher-level people and feel relatively acceptable with that as it is the natural order.

The extreme division of power traces back to a joint legacy of the Malay feudal system and the British influence. As a result, Malay culture is very respectful of a complex, nuanced system of titled classes and untitled 'commoner' and tends to grant much power to those at the top of the organisation. The study also found that challenge to authority is not well accepted in the Malaysian organisational setting. In disputes within construction projects, a subordinate organisation working for the employers find it unnecessary to question or

challenge the authority. Parties in a construction project, especially those at the bottom level of the organisational chain contract, ought to review their state and position within the norms of the organisation.

In a high power distance cultures, the notion of empowering subordinates through participation in decisions and delegation of authority is considered inappropriate and insubordinate by employees themselves (Coleman, 2006). The study supports this notion and found that participation in decision making by subordinates in the Malaysian construction industry is not well-accepted, especially by the subordinates. When a conflict arises, subordinates in construction organisations do not prefer being part of the decision-making process in fear of being hold accountable if any matter goes wrong in the future. This is found to prolong the critical duration of taking necessary actions to resolve dispute in a timely manner. The findings support the general notion that the society accepts and expects inequalities of power distribution within itself.

c) *Imbalanced power distribution as a source of dispute escalation in the construction industry*

Research by Deutsch (1973) suggested that situations where there are imbalances of power between groups are more likely to discourage open expressions of conflict and conflict escalation than situations of relatively balanced power. For instance, drawing examples from the analysis of the study, it is found that unequal bargaining power between construction parties in Malaysia encourage hostilities between great power disputants. Unequal bargaining power in the construction industry is a real phenomenon that affects the ability of the ‘weak’ party to secure its preferred terms in the contractual arrangement with a ‘strong’ party. Small-class contractors typically experience inequality in bargaining power especially when in conflict with a superior party within the project organisation. Sidanius and Pratto (1999) have argued that this can account for the utility and ubiquity of asymmetrical group status hierarchies.

The research also suggests that how parties experience power affects how they perceive conflict and how they respond to it. Applying McClelland’s (1975) power orientations, the study suggests that Malaysian construction parties tend to employ an assertive strategy when dealing with dispute in construction. An assertive strategy is the

traditional power-over approach, and is very common among the powerful and in high power societies.

Assertive strategy across group hierarchy is a form of unilateral attempt to use the power resources at one's disposal to impose a solution that one favours. For example, traditionally in Malaysia, the employer engages with the lead designer as their representative to perform a coordinating independent role in the project. Although the representative is sympathetic towards the objective of the various project stakeholders, they will first protect the employer's interest. This practice can breed conflict when a chronic orientation to power becomes the strategy to approach conflicts (Coleman, 2006).

From a practical perspective, a chronic competitive approach to power has harmful consequences. Deutsch (1973) suggested that reliance on competitive and coercive strategies of influence by power holders produce alienation and resistance subjected to the power. This, in turn, limits the power holder's ability to use other types of power based on genuine trust and increases the demand for scrutiny and control of subordinates. Claim in construction is a complex process that at times may involve emotive impact and displaying faults by both parties such as where a delay is initially caused by employer's side and is then complicated by shortcomings by the contractors or sub-contractors. An employer of construction can dismiss claim for extra payment because they are not bound by things that a reasonable contract must have foreseen were to be done even if the work element is omitted from the bill of quantities. This has, in turn, increased caution by contractors in carrying out instructions by the authority of employer's representative. Claim in the construction industry is highly adversarial and often causes a power struggle between parties in construction.

Coleman (2006) further found that when power holders have a chronic competition perspective on power, it reduces their chance to see sharing power with members of low-power groups as an opportunity to enhance their own personal environmental power. From this chronic competitive perspective, power sharing is typically experienced as a threat to achieving one's goals, and the opportunities afforded by power sharing are invisible. If the parties view the conflict over payment as win-lose struggle through adjudication battle, they are unlikely to reflect on the advantages of resolution through amicable settlement and thereby engendering within the parties a sense of control and competition.

The study also found another interesting perspective on the influence of power in construction. Coleman (2006) believed that a low power party tends to be dependent on others, to have short time perspectives, to be unable to plan far ahead and to be generally

discontent. Consistent with the findings, Malaysian contractors for small trade works who tend to embark on adjudication process often place little consideration on the long-term perseverance of business relationships but focus on the short-term financial sustainability of the company, which in turn influences the long-term survival of those groups of contractor within the local industry.

d) *The influence of organisational authority and hierarchy on an adversarial dispute resolution mechanism*

The study earlier predicts that hierarchical differences in social relationships are important, and the adversarial method of dispute resolution via adjudication is not suitable within the high power distance Malaysian society. Examination from the thematic analysis found that this proposition is supported and further discovered that non-adversarial style is the norm of dispute resolution method by the Malaysian society when dealing with conflict across hierarchy levels.

In any organisation, a related component of structure is hierarchy. Barnard (1946) argued that distinctions of status and authority are ultimately necessary for effective functioning and survival of any group above a certain size. As a result, most groups form some type of hierarchal structure to function efficiently. Often, the greater advantages associated with higher positions lead to competition for these scarce positions and an attempt by those in authority to maintain their status.

Norhashim and Aziz (2005) in their analysis of development practices in Malaysia observed that people is amenable to the less-than-transparent business deals struck by entrepreneurs and government as a vehicle to develop the nation. The study further concluded that the general public acquiescence to the norm of vested interest taking a greater cut of the economic pie as long a sizeable benefit is distributed to the masses. Despite recognising the drawbacks of such practice, the society still adheres to “... *the Malay tendency to bow to authority and inherent servitude remains to this day*” (Norhashim & Aziz, 2005; p. 43). This phenomenon of submitting unequal distribution of authority, wealth and status corresponds to Hofstede’s (1994) explanation of a large power distance culture.

In Malaysia, Poon (1998) described that honorifics used to indicate social status and levels of authority, with different titles and ranking structures based on connections with royalty, religious standing, and awards for service of the state. In turn, Ismail (1988) argued

that passive obedience to superiors is one of the basic values of the Malaysian society, and that this strong reverence for elders and traditional leaders extends itself to a preferred authoritarian leadership style. Blunt (1988) confirmed Hofstede's (1980) finding of the high power distance in the Malaysian society.

The Malaysian society are often described as hospitable, accommodating, forgiving, peace-loving and charitable, as well as having high humane orientation. Ismail (1988) noted that people are entitled to magnanimity from those in positions of authority when they demonstrate weakness – as long as their behaviour does not threaten the base values of society, including both state and religion. In turn, this can result in leaders overlooking incidences of incompetence, lack of productivity, tardiness and the likes. Malaysians see authority as figures having unquestioned power within the system; thus in a conflict situation, a propensity to withdraw or avoid is more logical than to disturb the hierarchy within the organisation.

Within the Malaysian culture, status differences between individuals are clearly recognised and acknowledged. Emphasis is placed on the correctness of titles, protocol and rank. For example, in construction, status diversity has critical influence for the cooperation between construction parties because status hierarchy in the organisation serves to organise interactions within groups and influences how they react and behave towards each other. The Malaysian construction industry experience shows that deference is common where people at the top of the project chain has more status and authority. The study discovers that deference, often, has dysfunctional influence on the process of dispute resolution. Construction party at the lowest level of hierarchy chain of project organisation is pressured to conform to the norm of adhering to the hierarchical power distribution.

In situations where there is a substantial challenge to power by a low power party, the usual response from the high power party falls into categories of repression or ambivalent tolerance (Duckitt, 1992). If the validity of concerns of the low power party is not recognised, high power party is likely to use force to quell the challenge of the low power party. However, if the challenges are recognised as legitimate, high power party may respond with tolerant attitude and expressions of concern, but ultimately with resistance to implementing any real challenge in the power relations (Duckitt, 1992). This has been termed as the *attitude-implementation gap* (Coleman, 2006).

In light of the unreflective tendency to dominate, it becomes critical for the high group to be aware of the likelihood that they will provoke resistance and alienation from the low

power party with whom they are in conflict, though using illegitimate techniques, inappropriate sanctions, or influence that are considered excessive for the situation (Deutsch, 1973). The cost of the high power group is not only ill will but also the need to be continuously vigilant and mobilised to prevent retaliation by the low power party.

The enforcement of adjudication regime in Malaysia is seen as a step to provide temporary relief to small parties in construction whose cashflow is disrupted by non-payment in the construction contract. The introduction of adjudication received a cynical reaction from employer organisations in Malaysia as being forceful as it is made mandatory and compulsory. In the Malaysian construction industry, smaller sized contractors are normally placed at the lowest chain of power hierarchy, thus having smaller negotiation power. Construction parties choose to adhere to whatever situation and outcomes of the dispute with the higher rank party rather than resorting to an adversarial legal avenue that will put parties in a power-challenging position. However, employers now face challenges of dealing with the rise of unjustified contractual claims.

The study also supports the notion that challenge to authority is not widely accepted in the Malaysian construction industry. Excerpt from the interview of the study found that it is vital for parties to understand their place within the norm of the organisation as it can be an influencing factor. Parties at the lower tier of the organisation are found to be more careful in evaluating the decision to challenge the autocratic decision that has worked out against their favour. This is a form of high power distance cultural thinking that has in turn affected the decision-making process to invoke adjudication against the defaulting party. When the subordinate party lacks seniority, power struggle occurs, thus becoming a major struggle for the parties to resolve dispute swiftly because the concept of unquestioned authority has long known to be accepted and to be a norm to a high power culture of Malaysia.

According to Deutsch (1973), the powerful tend to be more satisfied and contented than those not enjoying high power as they have longer time perspective and more freedom to act and plan for the future. These higher levels of satisfaction lead to vested interests in the status quo and development of rationales for maintaining power, such as the Employer being the owner of the construction project has more superior competence against the subordinate parties. Fiske (1993) has demonstrated that powerful parties tend to pay less attention to those in low power because they view them as not affecting their outcome and are often motivated by their high power to dominate matters.

Thus, in conflict situations within the high power distance Malaysian society, high power party often fails to analyse and at times underestimate the power of low power subordinate parties. In turn, high power party attempts to dominate the relationship, use pressure tactics, use competing dispute resolution strategy, therefore making it difficult to arrive at an amicable agreement that is satisfactory to all parties.

e) *Conclusion*

The study concludes that adversarial dispute resolution style like adjudication also has negative desirability to the high power distance society of the Malaysian construction players. The study draws this conclusion based on a number of possible best explanations for the expected findings. The study believes the influence of authority and hierarchy embedded within the high power value of a society to be the explanative factor of why adjudication is not preferred by the Malaysian construction parties from the cultural dimension of power distance point of view.

This dimension is also found to be one of the most complex to be analysed to generate supports and possible explanations for the findings. Malaysia is one of the top countries in the world to score a very high power distance according to Hofstede's national culture score. This proves that Malaysia is one of the extreme models where seniority and authority challenge is not well accepted. The confounding social relationship of hierarchal differences in Malaysian construction organization and is found to be the basis of why adversarial method of dispute resolution via adjudication is not suitable to resolve disputes across hierarchy level in a high power distance society like Malaysia.

The introduction of adjudication received a sceptical view from employer organisations in Malaysia as it opens a minefield of challenges to authority and problems of dealing with complex payment claims. Power struggle has become a problem to the party that wishes to have their payment claim dispute resolved under the mechanism of challenging authority as the accepted norm of the society.

#### 8.3.4 *Uncertainty Avoidance*

The fourth area of inquiry that will be discussed here is the influence of uncertainty avoidance on dispute resolution specifically from the unique perspective of construction adjudication. The proposition of the study is restated as below.

***Proposition 4: the higher the degree of adversary posed by the dispute resolution mechanism, the less likely for the mechanism to have a positive desirability in a low uncertainty avoidance society.***

Drawing from the thematic analysis of the study, the results have shown that the above proposition is weakly supported. Contrary to the research proposition, it is found that adversarial dispute resolution method via adjudication has a strong desirability to the low uncertainty avoidance of the Malaysian construction players. The section will explore the possible explanations for the outcome and construct an alternative argument on why the findings are contrary from the predictions.

The study discusses several possible best explanations as to why an adversarial dispute resolution method like adjudication is interestingly found to be desirable among low uncertainty avoidance society like the Malaysian construction parties. The study first considers the uncertainties within the context of conflicts and disputes in the Malaysian construction industry. Secondly, the study will discuss the influence of uncertainty avoidance on the establishment of the CIPAA.

##### *a) Uncertainties in the construction disputes*

In the current study, we focus on a cultural dimension that has received less attention, uncertainty avoidance. Uncertainty avoidance concerns how society deals with the fact that time only runs one way. That is, we are all caught in the reality of past, present and future and humans have to live with uncertainty because the future is unknown and will always be so (Hofstede, 1983). In a low uncertainty avoidance society, people accept uncertainty and do not become upset by it. People in such societies will accept each day more easily as it comes. The people in this society will also take risks rather easily. Society with a weak uncertainty avoidance will be relatively tolerant of behaviours and opinions different from their own because they do not feel threatened by them, in addition to having a natural tendency to feel relatively secure.



Uncertainty avoidance is particularly relevant to crisis and conflict negotiations because interactions are often risky, complicated and characterised by two parties trying to make sense of other's position and intentions.

The study reports a stark finding that stakeholders in the Malaysian construction industry has a relatively higher uncertainty avoidance trait in contrast to Hofstede's uncertainty avoidance score of Malaysia at the national level. In Hofstede's study, Malaysia scores very low in this dimension, which means that it has a low preference for avoiding uncertainty, making it one of the countries that have a low score in Hofstede's study. However, the findings somehow hinted that the Malaysian construction parties may score a higher level of uncertainty avoidance in dispute resolution.

In construction, uncertainty is one of the main problems that influences project's implementation parameters. Managing risks in construction projects has been recognised as a very important element of management process to achieve the project objectives in terms of time, cost quality, safety and environmental sustainability. In recent years, scholars described uncertainty as associated with uncertainty management, which is the process of integrating risk management and value management approaches of a construction process. Theoretically, uncertainty can be defined as a lack of certainty involving variability and ambiguity. In uncertain situations, parameters are uncertain and no information about probabilities is known. The uncertainty in undertaking a construction project comes from many sources and often involves many participations in the project.

Since each project party tries to minimise their own risk, the conflicts among various parties can be crucial to the project. Findings from the interviews were analysed according to the perspective of the employer, contractor, and shared challenges as a whole project players. The study found that, it is often that the referring party will usually conduct a risk audit before commencing adjudication. Risk audit in this context is a process which helps the party to make a sensible decision by considering all the likelihood of outcomes and consequences of the commencement. Malaysian parties are found to be wary in resorting a formal resolution since adjudication procedure will produce a win-lose outcome where there will be at least one unhappy party feeling resentment towards the other. This may become a barrier to fostering a positive relationship going forward.

Moreover, in the Malaysian workplace, administrative policies and procedure have been made more explicit and this could be translated to Malaysians becoming more concerned

about uncertainties of the future and would take all kinds of means to regulate and legitimise their business activity. Within the construction industry, contract administration takes place in the pre-construction, construction and post-construction stage. In comparing the Malaysians' experience doing commercial construction business with foreign parties, the study found that parties found a major difference of how foreign parties treat and view the legitimacy of construction contract.

In Malaysia, all business transactions are governed and ruled by the contract. The adherence to contract is probably due to British influence and history in Malaysia. Parties face challenges when working with a foreign party, for example contractors from PRC because contract is less of their concern. The differences show that Malaysian construction parties have higher uncertainty avoidance in legitimising and dispute resolution.

Specifically, since formality is important to high uncertainty avoidance societies (Doney et al., 1998), it is likely that consistent behaviours will have a positive impact on adversarial style of dispute resolution. Consistent with this prediction, Giebels and Taylor (2009) found that crisis negotiators who use tactics consistent with the cultural frame of the other side were more effective in securing concession from a perpetrator. In their study, individualistic rather than collectivistic perpetrators were inclined to respond in a compromising way towards the use of persuasive arguments used by a conflict negotiator.

*b) The influence of uncertainty avoidance on the compatibility of an adversarial dispute resolution with national culture in the construction industry*

The research investigation of uncertainty avoidance considers relevant behaviour of strategy. At the strategy level, the study focuses on influencing behaviour and the use of legitimising. Legitimising refers to what has been agreed by society at large, including reference to the law, procedures, and moral codes (Giebels & Noelanders, 2004). In order to mitigate their low tolerance for deviance, societies with high uncertainty avoidance tend to be characterised by high levels of rules and structure (Triandis, 2004) as they place high value on law and regulations in organisations, institutions and relationship (Hofstede, 2001). Because conforming to these social norms, rules and procedure is expected, the behaviour of others become more predictable (Doney et al., 1998).

In line with the above prediction, a legislative intervention has become a trend in the Malaysian construction industry, thus suppressing uncertainties of its payment practice. Essentially, cash flow management is crucial for a business organisation to sustain and survive in the long run. Without cashflow, the organisation will suffer and bleed slowly to liquidation. If a construction company has completed assembling a job or works but is not getting paid in a timely manner, as a suffering company, it needs a mechanism that could assist them to recover the outstanding debt within a short span of time. This is one of the reasons why the Malaysian government has proposed and enforced the CIPAA to alleviate the cash flow problem among the construction community.

This line of reasoning is consistent with a number of studies in international business and workplace interactions. Individuals from high in comparison to low uncertainty cultures are more sensitive to controllability in perceiving strategies issues (Barr & Glynn, 2004), have a higher preference for activity standardisation (Newburry & Yakova, 2006) and a greater reliance on formal procedures (Hwang & Grant, 2011). Armstrong (1996) further found that written rules at work are considered to be more important by people originating from high uncertainty avoidance than low uncertainty avoidance societies. Together, this evidence suggests that the use of statutory adjudication as part of legitimising in dispute resolution may be particularly influential in the Malaysian construction industry because it removes uncertainty.

Legitimising instigates structure in the process and provides direct instruction of, for example, what is going to happen next and why it happened. In essence, this appears to be what societies with high uncertainty avoidance adhere to, so that behaviour of humans would be more guarded by the use of legitimising. Interestingly, the effect for legitimising attitude in dispute resolution indicates the high levels of authority on law and regulation of the Malaysian construction industry through the establishment of CIPAA in regulating payment practice.

### c) *Conclusion*

The study concludes that adversarial dispute resolution method like adjudication has positive desirability to the low uncertainty avoidance society of the Malaysian construction professionals. Findings of the study are found to be inconsistent with the critical prediction presented. The study suspects that Hofstede's cultural score of uncertainty avoidance

dimension is not entirely relevant to the construction industry. This is because, in construction, uncertainty becomes one of the main problems that influences the project's execution parameters. Uncertainty situations revolving around the industry becomes one of the main drivers for the higher uncertainty tolerance among the Malaysian construction parties in comparison to what is anticipated by Hofstede's score.

Evidence from the interview shows that the Malaysian construction industry operates in nervousness and disrupt to cash flow is highly sensitive to parties, which drives the urge to resolve the dispute as quickly as possible. Thus, the study establishes that the nature of uncertainties and ambiguities in the construction industry is the best possible alternative explanation this study can offer to the preference of employing adjudication as a means to resolve payment dispute quickly and more cheaply.

#### **8.4 Summary**

Chapter 8 provides the reader with the explanatory theory derived from critical interpretation of the pattern and relationship identified in the previously developed themes from the thematic analysis. It begins by summarising some of the key notable findings of all six themes identified in the study namely "*Group Aspect*", "*Conflict Management*", "*Hierarchy and Power*", "*Circumvent Uncertainties*", "*Security of Payment and Adjudication Regime*", and "*Construction Contract Management*" that the research finds to be relevant to be compared and tested against the originally formulated research propositions.

This chapter then presents the process of pattern matching of the data that involves predicting a pattern of outcomes based on formulated propositions to explain what the research expects to find from the data analysis. In Chapter 5, the research developed conceptual framework to investigate the compatibility of an adversarial dispute resolution mechanism with national culture in the construction industry of the Malaysian society by utilising some of the existing dispute resolution principles; Multi Dispute Resolution (MDR) and Dispute System Design (DSD) dispute resolution concepts, and Hofstede's model of national culture. This framework is then used to test adequacy of the framework as a mean to explain the findings. Each of the proposition of the study namely – *individualism/collectivism*, *masculinity/femininity*, *power distance* and *uncertainty avoidance*, are then revisited for examination to see if the pattern identified across the subjective data

matches that which has been predicted through the conceptual framework to assess the influence of national culture in dispute resolution

The chapter then generate understanding from patterns emerged in the data to produce an explanatory theory of the phenomenon under study by linking and interpreting the social construction of the Malaysian construction parties in selecting the appropriate dispute resolution mechanism. The chapter presents the complexities to appreciate the multiple realities within a context of statutory adjudication to understand the appropriateness of a dispute resolution mechanism in construction industry through the lens of national culture. The chapter also presents some ideas by linking the theoretical propositions and observational empirical data to investigate the compatibility of the adversarial dispute resolution method with the Malaysian national culture. Finally, this chapter presents its concluding verdicts on the compatibility of an adversarial dispute resolution with national culture in Malaysia.

# **CHAPTER 9**

## **Conclusion**

## **9.1 Introduction**

This chapter brings together the main findings of the research that provide the means to achieve the aim of the research for understanding the appropriateness of dispute resolution by the Malaysian construction stakeholders in statutory adjudication from the perspective of national culture. This is followed by a section dedicated to discussing the main contributions to the body of knowledge. In addition, the chapter also presents the limitations of the research followed by several recommendations for future research.

## **9.2 Brief Outline of the Study**

The current state of knowledge in the field of national culture research consists of a multitude of dimensions, the most abundant mass of studies stem from values in the workplace. The importance of national culture values has been extensively debated in many previous studies on the compatibility of dispute resolution mechanisms in a society. In general, Asian societies measure high on collectivism as they emphasis cooperation, interdependence and harmony. In contrast, an individualistic society has higher sense of personal identity and less concern on the attainment of collective interest. Thus, dispute resolution process can also differ due to the distinctive standpoint on the compatibility of a society to adopt certain methods that are suitable with the cultural values of that society.

Studies have predicted which dispute resolution suit a specific culture of society. Findings from the literature show that individualist societies like many Western countries prefer a more adversarial method of dispute resolution while collectivist societies like most of Asian countries are more comfortable in using a less adversarial method to resolve disputes. These conventional notions about national culture and dispute resolution that were practiced by the Western world were questioned in light of the compatibility of the method to be applied in the Eastern societies.

Although the theoretical framework of national culture has been utilised in various fields to understand the cultural values of an organisation at workplace, the concept of it still suffers from vagueness and little consensus on what represents it. This research is conducted as a pursuit to theoretical exploration to question the appropriateness and relevance of a Western-originated adversarial dispute resolution method in Malaysia.

National culture refers to a set of norms, behaviours, customs and values shared by the population of a nation. Hofstede's theory on national culture theory is a framework that describes the influence of a society's national culture on the values of its members, and how these values relate to behaviour. Literature shows that national culture plays a significant role in shaping dispute resolution. As a result, the core question for the field of construction dispute resolution is the degree to which the national culture values of the society within the industry of a country-specific can lead a certain forms of dispute resolution to be more or less suitable. Hofstede's theory of national culture indicates that national culture dimensions construct a major distinctiveness between the Western and Eastern model.

As a result, the recent introduction of statutory adjudication as a new dispute resolution in the Malaysian construction industry raises a question of a potential compatibility challenge on the implementation of a Western-style legislative intervention to the national setting. The aim of the study is to assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society. The recent introduction of statutory adjudication in Malaysia is seen as a potential for a case study to be conducted to address the influence of national culture on the appropriateness for the employment of a Western-originated and adversarial dispute resolution mechanism in an Asian society.

Literature review was conducted to identify the fundamental concepts of national culture by linking it to some key principles to dispute resolution. A conceptual framework was then established to illustrate the key concepts underlying the notion of this study. The study primarily utilises four Hofstede's national culture dimension as a vehicle to assess the compatibility of a dispute resolution mechanism. The conceptual model serves as visualisation of context and boundary of the study and also to address the existing state of knowledge in the field of national culture and dispute resolution.

The research derives a set of propositions based on the pattern of Malaysians' national culture in four dimensions of the Hofstede's model, namely *individualism/collectivism*, *masculinity/femininity*, *power distance* and *uncertainty avoidance*. The research conceptualises the four dimensions and further proposes four independent research propositions derived by conceptually relating each of the dimensions with the subject of dispute resolution.

The first proposition of the research predicts that parties in a collectivistic society have less preference to accept adversarial dispute resolution mechanism. Secondly, the research



predicts that parties in a masculine society have more preference to adopt adversarial method of dispute resolution. Thirdly, the research predicts that parties in a high power distance society have less preference to employ adversarial method of dispute resolution. Finally, the research also predicts that parties in a low uncertainty avoidance society have less preference to utilise adversarial method as an avenue to resolve dispute. The research envisages that the national culture of along with its preferred conflict styles will be an explanatory influence on the predictable low preference of adversarial method as a dispute resolution in the construction industry.

To test the above propositions, the research adopts a qualitative, interpretive single case research and draws data on 15 in-depth semi-structured interviews from various stakeholders in the Malaysian adjudication regime. Through the thematic analysis of the data, six principal themes have emerged to support the inquiry of the study. Further pattern matching analysis between the six principal themes and four propositions of the research reveals that the national culture of Malaysia is found to be compatible and suitable to adopt an adversarial method of dispute resolution in its construction industry.

### **9.3 Main Findings of the Study**

The aim of this study is to assess the compatibility of an adversarial method of dispute resolution in the construction industries of the Malaysian society. The research utilises the recent introduction of adjudication in Malaysia as a single qualitative case study of this wider phenomenon. The research derived four propositions based on the pattern of Malaysia's national culture in four distinctive dimensions derived from Hofstede's national culture model of *individualism/collectivism*, *masculinity/femininity*, *power distance* and *uncertainty avoidance* by conceptually relating the dimensions to the various styles of dispute resolution.

The study proposes critical interpretations based on the findings to offer alternative explanations that invalidate previous research's overall predictions of the low compatibility of an adversarial method of dispute resolution with the national culture in the Malaysian construction industry.

The first proposition is on the *individualism/collectivism* dimension. The study found that this proposition is weakly supported as a pattern of the data shown that adversarial method of dispute resolution is found to be compatible to the construction parties in a collectivistic society. Contrary to what has been originally predicted in the formulated

proposition. The research proposed that this finding is due to the factor of inter-/independency and intergroup behaviour of the construction parties that stems from the intergroup behaviour of the parties to construction that increases the hostility between groups in conflicts, thus leading the parties to employ adversarial method to resolve their dispute.

Secondly, in *masculinity/femininity* dimension, the study found that this proposition is supported as a pattern of the data proves that an adversarial method of dispute resolution is found to be appropriate to the construction parties in a masculine society consistent to the originally formulated proposition. The research concludes that this finding confirms that the adversarial mode of dispute resolution adopted by parties in a masculine society in the construction industry is precise to support the decisions of the parties to competitively win their dispute.

The third proposition is on the *power distance* dimension. The study found that this proposition is also supported as a pattern emerged from the data confirms that adversarial method of dispute resolution is not an appropriate method to the high power distance society, consistent with the originally formulated proposition. The research summarises that this finding supports the theoretical prediction that a seniority challenging nature of dispute resolution method like adjudication is not preferable in a society where authority gap between parties to the contract is large across its hierarchical structure. Parties in that society by cultural trait do not prefer challenging autocracy or disturbing the power hierarchy in the project organisation.

Lastly, in *uncertainty avoidance*, the research reveals that parties in a low uncertainty avoidance society prefer adversarial method to resolve disputes. The research speculates that this is because the circumstances that parties who belong to that society feel uncertain being in a dispute alongside with other uncertainties and ambiguous factors that exists in the construction industry. The uncertainty in turn increases the desirability to resolve disputes in a quick manner. Thus, the study speculates that due to the risky nature of the construction industry, all stakeholders engaged in the industry will mitigate the negative impact of risks and uncertainties exist in construction which in turn suggest a higher uncertainty level than what Hofstede's may have projected.

To conclude, the research found that the results from analysis prove the first proposition, *individualism/collectivism* – is not supported. Adversarial dispute resolution method has a positive desirability to the parties in a collectivistic society. Secondly, the study shows that the second proposition, *masculinity/femininity* – is strongly supported. Adversarial

dispute resolution method has a positive desirability to the construction parties in a masculine society. Thirdly, the research proves that the third proposition, *power distance* – is also supported. Adversarial dispute resolution method has negative desirability to the construction parties in a high power society. Lastly, the study also shows that the fourth proposition, *uncertainty avoidance* – is weakly supported. It is found that adversarial dispute resolution method has a strong desirability to the construction parties in a low uncertainty avoidance society.

By implication, the research develops a critical clarification by analysing the influence of national culture to the implementation of dispute resolutions in the construction industry. The research utilises adjudication as an instrument to appreciate how national cultural values influence the appropriateness of employing an adversarial dispute resolution mechanism in construction. This way, a better understanding on national culture of a society helps prepare the users to fully enjoy the benefits of a new implemented avenue.

#### **9.4 Revisiting the Aim and Objectives of the Study**

The aim of this research is restated as below:

*To assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society.*

The motivation to conduct this study stems from the newly enacted Construction Industry Payment and Adjudication Act 2012 (CIPAA) by the government as Malaysia's own statutory adjudication regime in the construction industry. The introduction raised the profound enquiry of the adoption of Western-originated systems, assumptions and concepts in an Asian and Eastern-oriented country like Malaysia. The research is then to answer the question on what is the likelihood of compatibility of applying these ideas and what is the social cost for it? The very core issue addressed in this research is the extent to which cultural values can influence the compatibility of an adversarial dispute resolution mechanism in the construction industry via a single case study of the Malaysian statutory adjudication regime under the CIPAA.

#### **9.4.1 Objective 1**

Objective 1 of the study is restated as below:

*To identify and understand the concept of national culture.*

The findings for the Objective 1 were discussed in Chapter 3: Theoretical Background of the Study and Chapter 4: More Complex Issues Identified from the Literature of the thesis. In these chapters, the research addressed the theoretical background on some of the key concepts of national culture within the context of dispute resolution that are relevant to this study. Theoretical investigation through reviewing the literature has provided the thesis with a context to draw variables related to national culture in dispute resolution. The chapters also make references to the relevancy of the theoretical discussion on the practice of adjudication in the construction industry. Additionally, Objective 1 is also addressed by exploring the existing complexities and criticism of the multidimensional issues identified from the literature within the context of national culture and dispute resolution to appreciate the complexities of the subjects under study.

#### **9.4.2 Objective 2**

Objective 2 of the study is restated as below:

*To identify and understand the key principles of dispute resolution process.*

Objective 2 is briefly introduced and discussed in Chapter 3: Theoretical Background of the Study and Chapter 4: More Complex Issues Identified from the Literature. Following this, Chapter 5: Research Propositions and the Conceptual Framework of the Study, then further rigorously explored the influence of national culture on dispute resolution by presenting the conceptual framework that maps out the theoretical inquiry of this study. This objective is achieved by mapping out the concepts, assumptions and theories of national culture and its impact to dispute resolution that informs this research and the presumed relationships among them. Having established the influence of national culture on dispute resolution from examination of the literature, a conceptual framework is developed to illustrate the focus areas of the study. The conceptual framework is then systematically charted out to guide the inquiry process of the study to ensure a rigorous study is carried out to achieve the subsequent objective of the study.

### **9.4.3 Objective 3**

Objective 3 of the study is restated as below:

*To assess the influence of national culture on the compatibility of an adversarial dispute resolution method in the construction industry of the Malaysian society.*

Objective 3 of the study is achieved through the rigorous analysis on the case study conducted in – Chapter 7: Thematic Analysis and Chapter 8: Pattern Matching and Explanation Building, of the thesis. Chapter 7 delineates the results of the in-depth interview conducted with the construction professionals in Malaysia including adjudicators, contractors and client ranging from various backgrounds and expertise in construction. The chapter sets forth the participants' opinions and experiences in the practice of adjudication and their perception on the impact of national culture dimensions to the dispute resolution within the context of the construction adjudication.

Subsequently, Chapter 8 of the study further sets out some of the notable key findings emerging from the themes developed during the interrogation of data in Chapter 7. This chapter also presents the result of the propositions tested in the study by the process of pattern matching of the data that involves predicting a pattern of outcomes based on formulated propositions to explain what the research expects to find from the data analysis. All propositions were revisited and examined to find out the influence of national culture dimension on the appropriateness of an adversarial method of dispute resolution in the construction industry.

## **9.5 Contribution to the Body of Knowledge and Policy**

The research has made several unique and critical theoretical contributions to national culture and dispute resolution practice. The current state of knowledge in the field of national culture consists of a multitude of dimensions, the most abundant mass studies from cultural studies at workplace. The study contributes to a significantly less explored realm in cross-border field, namely the influence of national culture on dispute resolution in construction.

The findings of this study have been published at the 13th International Postgraduate Research Conference (IPGRC) 2017, in which the paper discussed on the impact of national culture on dispute resolution in the context of statutory adjudication in the construction industry. In addition, the paper also argued that the cultural factors that becomes a significant

factor on the appropriateness of dispute resolution methods. Aminuddin and Chynoweth (2017) opined that cultural variables can predict some aspect of conflict resolution practices. Hence, dispute resolution is greatly influenced by cultural characteristic. The study also described dispute resolution strategy was based on Hofstede's model of national culture.

The study offers an innovative analytical approach on the influence of national culture on dispute resolution. It combines the assessment of the multidimensional nature of Hofstede's national culture model examination and its effect on the compatibility of an adversarial dispute resolution mechanism as this raises new challenges on the adaptability of the Asian society to employ an adversarial dispute resolution method.

The motivation for carrying out such study is well summarised by Asma (2006) whereby to ensure that any management theories and practices from abroad are being translated and contextually interpreted into local terms. The current state of studies conducted on national culture model does not sufficiently address a holistic conceptual understanding of national culture and its effect on the choice of dispute resolution method in construction.

The research has made several unique and critical contributions to theory. The first contribution is made in relation to Asian cultural values. The analysis of the perception of reality by the Malaysian construction players establishes that growing up in a collectivistic society like Malaysia means people of the culture have a unique social reality that are particularly defined by others, especially those who matter a great deal to them. However, as the research begins to explore the subject of the study through the corporate working culture of the construction players, the study realises that the values of the Asian countries' workplace are derived from individualistic societies, where the individual is free to determine his/her own reality.

The study also proves that as construction players in many Asian countries are exposed to working with people from different cultures, in which serve as a guide to the people's understanding and actions to help them to see their culture – which stems from their ethnicity, religion, environment as well as working experiences from a different perspective. The study also identifies that while Asian countries are confronted with conflict in values, they also learn to become interculturally competent as they have to develop a more inclusive and integrated experience which guides their subsequent understanding, appreciation and action. This transformative learning has paved their way for the development of a new meaning structure for the construction players to function as its own unit of society at their Western-influenced workplace.

More importantly, the research also identifies that dispute resolution process will always be a cultural process and not primarily a matter of principles, techniques and skills. Those Western working culture that is related to softer and affective aspects of human development such as dispute resolution may not go so well across culture. The contribution of this research is in a validation effort of an existing theory suggesting that dispute resolution is simply not one of technique and methods, but rather it is about accomplishing dispute resolution objectives in the social and cultural contexts of an existing heterogeneous Malaysian work setting.

The study also contributes an extension to knowledge on Malaysian cultural values whereby Malaysians at the workplace comprise many different ethnic origins. Over the years, each ethnic group has been able to retain its own unique cultural trait as an identity and live in harmony with others in multicultural Malaysia. While each of the ethnicity differs in many symbolic expressions, the common denominator lies in the deep-seated East Asian values, some of which are: respect for elders, collectivistic orientation, harmonious relationships, a concern for face saving, and a religious orientation. By knowing how to flex and use the expected behaviours appropriate for each conflict styles, Malaysians have grown to respect and recognise each other's minefield of sensitivities. The study identifies that Malaysian construction stakeholders know what to avoid and what to pay attention to in order to gain respect and promote harmonious working relationship in construction.

The result of this study on the dispute resolution of the present and future construction managers suggest that, while there is a general tendency towards peaceful and harmonious method of dispute resolution through compromise as the most ideal strategy in dispute resolution, a deeper assessment indicates a crucial overall tendency towards adversarial and direct style in resolving dispute.

It is very much a prevailing belief in Western world's management thinking that, in the complex and fast-changing business field, competitive advantage can be gained if the organisational dynamic behaviour encourages competition. Competition style is adversary and it operates as a zero sum-game, in which one side wins and other loses. In general, business owners benefit from holding the competitive strategy from crisis situations and decisions that generate ill-will such as pay cuts or layoffs.

The future managerial practice in the Malaysian construction industry leans towards the adversarial and direct position in resolving dispute and consequently, disputes may often be resolved inadequately from a collective point of view. This brings to a fundamental issue

in the debate concerning cultural differences in business management and social studies, and to what extent is management practice influenced by organisation and society. The issue is much more significant than culturally labelling the society and determining what method suits them appropriately. On the contrary, however, it is about the clash of conventional values associated to the societies with the values of expanding global capitalism.

One of the major issues for Asian countries like Malaysia as a young industrialising economy of the far South East Asia is in how to deal with the clash of capitalist values with conventional values as the society develops. Economic development in construction tends to diminish the traditional value system of the society when capitalism takes root. The economic success in many parts of the world is due to individualism which construction parties in Malaysia do not or choose not to alter. The choice of dispute resolution in the Malaysian construction industry thus is a result of the adaptability to managerial practice to capitalism in the construction business.

Reflecting upon the enactment of foreign-inspired model of adjudication in Malaysia, this research encourages the policy makers to tap their local values and resources and harness them to meet global standards and value of speed, responsiveness, value-added work, resolution orientation and innovative thinking to improve dispute resolution practice in construction. By doing so, construction stakeholders will be fully anchored in their own indigenous soil to enable them to function from a position of strength. Hence, this study underscores the importance to pilot their conflict managerial practices which are based on positive local values before implementing them nationwide.

Finally, this research also calls for the policy maker to find ways and means to build a high-performance work culture by resolving the contradiction in values of becoming a prosperous modern state and preserving our local traditions. Furthermore, the research encourages the ability to effectively combine the values often associated with a resolution-oriented dispute resolution culture with people and cultural orientation as well as to develop a repertoire of skills to demonstrate them through the people's daily practices. Malaysians do not only have to translate but they should also interpret any foreign work practices originating in an urban individualistic culture into patterns of work organisation that is reflective of a more collectivistic, communitarian and familial setting.



## 9.6 Research Limitations

The findings of this research are tempered by several limitations. Firstly, one of the research limitations stems from the methodology adopted in this study. By adopting qualitative strategy, the quality of the data gathered is highly subjective. This is where the nature of data collection process in qualitative research can also be a negative component of the process. The research relies on one individual perspective and includes instinctual decisions that can lead to incredibly detailed data. It also can lead to inaccurate data due to the reliance on the researcher's subjectivism. The quality of the data also is highly dependent on the skills and observation of the researcher. Control of bias must consistently be applied to help remove bias so that data collected would be possible for the researcher to make any claim and then use their bias qualitatively to prove the point.

Secondly, Malaysia is a multi-ethnic, multicultural and multilingual society and the many ethnic groups in Malaysia maintain separate cultural identities. The research does not address this multiethnicity aspect in studying the "culture" subject of the Malaysian society in identifying the preferable dispute resolution method by the society. The participants of the study comprise mainly Chinese ethnicity construction professionals and with only a small number of Malay and Indian interview participants. This limitation is particularly problematic especially since each ethnic group has its own underlying cultural values that separate it from others, and they have achieved different levels on integration.

Thirdly, findings of the study heavily rely on experience and opinion from the adjudicator's point of view and only account for small involvement by the parties in interest to adjudication process. This limitation is attributed to the difficult access to identify and gain participation with actual experience of dealing with adjudication process. Attempts to include this group of participants may raise ethical questions regarding breach of privacy if any information released is not consented because adjudication is a private procedure involving multiple parties in interest.

Fourthly, generalisability of the findings across Malaysia is not applicable because the study was conducted in Klang Valley and Penang without taking into consideration the other locations such as East Malaysia, where market conditions, working cultures and industry practices might be different as compared to West Malaysia. However, the focus of the study is in obtaining depth rather than breadth of information and such generalisability of qualitative findings is cautioned because no attempt was made in this research to consider respondents from the other locations or trades apart from where it is intended.

Fifthly, the researcher also believes that the unbalanced ratio of male and female participants also hindered the research to achieve a more meaningful research outcome. Based from the interview sessions conducted, it could be concluded that female participants tend to be more thoughtful in giving opinions about the study. Many scientific researches confirm that male and female have distinctive ways on dispute resolution. Since the subject of the study is about dispute resolution, the result of the study is predicted to be more interesting if the study includes a more balanced ratio of gender participation.

Sixthly, the researcher also believes that the unbalanced opinions and view obtained from private and public construction key professionals also limit the full potential of the research to achieve a better outcome. In adjudication, most of the responding party consists of client organisations and primary contractors. The likelihood for this group of organisations to be impacted by the enactment of adjudication is substantial. However, the difficulty to get access of these adjudication parties as discussed in the third point of the above hampers the research to obtain a more balanced view on the impact of adjudication to the construction stakeholders from a more holistic point of view.

Seventhly, although interview is a powerful tool of data collection method, interview also has inherent weaknesses. In this study, the open-endedness nature of the interview method adopted cause digression and lack of standardisation across the interviews. Hence, this can result in a largely varied interview durations conducted in the study that lasted from thirty minutes to two hours. This is also due to the absence of pilot study conducted at the beginning of the study to strengthen the interview protocol. This missing step is rather important to help identify if there are flaws, or limitations within the interview design that allow necessary modifications to the methodology.

## **9.7 Directions for Further Research**

The research has highlighted four components of the Hofstede's model of national culture namely – *individualism/collectivism*, *masculinity/femininity*, *power distance* and *uncertainty avoidance*. Revelation of the study exposes that each of the national culture dimension under study entails more complicated issues associated with it. Further research can be conducted exclusively on each of the national culture dimensions to obtain a deeper understanding on the influence of each of the dimensions on the appropriateness of dispute resolution in construction. Additionally, future research can also be dedicated to investigating

the remaining two national culture dimensions of the Hofstede's model that were not included as part of subject of the study.

Additionally, the future research can expand the scope of the research by addressing the impact of multi-ethnic of the sub-culture unit exists within the society, from a cultural point of view, on the influence of national culture on dispute resolution in the construction industry. Furthermore, the future research can also improve the balance of gender ratio in its participants by accounting more opinions and experience from female construction professionals' point of view.

## **9.8 Summary**

This chapter outlined the key findings of the research and highlighted the contribution that the study has made to the existing knowledge. The chapter also addressed the research limitations and suggested lines of inquiry for further research. The research aim and objectives have been fulfilled.

## References

- Abdullah, A. (1992). The Influence of Ethnic Values on Managerial Practices in Malaysia. *Malaysian Management Review*, 27(1), 3-18.
- Abdullah, A. (1996). *Going Glocal: Cultural Dimensions in Malaysian Management*. Malaysian Institute of Management.
- Abdullah, A. (2001) *The Influence of Malay Cultural Values on Management in Malaysia*. An unpublished Ph.D thesis. Universiti Kebangsaan Malaysia, Malaysia.
- Abraham, C. (2009). *Alternative Dispute Resolution in Malaysia*. ASEAN Law Association.
- Adelman, I., & Morris, C. T. (1967). *Society, Politics & Economic Development; A Quantitative Approach*. Johns Hopkins University Press, Baltimore.
- Agapiou, A. (2002) Perceptions of Gender Roles and Attitudes Towards Work Among Male and Female Operatives in the Scottish Construction Industry. *Construction Management and Economics*, 20, 697–705
- Agapiou, A. (2011). Scottish Construction Lawyers' Awareness and Experiences of Alternative Dispute Resolution. *Proceedings of the Institution of Civil Engineers-Management, Procurement and Law*, 164(4), 181-192.
- Alavi, M., & Carlson, P. (1992). A Review of MIS Research and Disciplinary Development. *Journal of Management Information Systems*, 8(4), 45-62.
- Allison, G. T. (1971). *Essence of Decision*. Boston: Little, Brown, 536.glc
- Anakwe, U., Purohit, Y. S., & Simmers, C. (1999). Cultural Influences on Conflict Management Styles: A Comparative Analysis between US and Nigeria. In *Proceedings of the Eastern Academy of Management International Conference- Managing in a Global Economy VIII*, Prague, Czech Republic.
- Ankrah, N. A., & Langford, D. A. (2005). Architects and Contractors: A Comparative Study of Organizational Cultures. *Construction Management and Economics*, 23(6), 595-607.
- Aminuddin, F. & Chynoweth, P. (2017). *The Impact of National Culture on Dispute Resolution: A Literature Review in the Context of Statutory Adjudication in the Construction Industry*. International Postgraduate Conference (IPGRC) 2017, Salford: University of Salford, United Kingdom.
- Assael, H. (1969). Constructive Role of Interorganizational Conflict. *Administrative Science Quarterly*, 573-582.
- Baba, K. (1996). Development of Construction Management Based on Regional Culture. *The organization and management of construction: Shaping theory and practice*, 1, 119.
- Bachner, J. (1995). *Alternative Dispute Resolution: Successful New Approaches to Ancient Problems, a Message to Client from ASFE*. Association of Soil and Foundation Engineers, Silver Spring, Md.
- Bajpai, N. (2011) "Business Research Methods" Pearson Education India

- Baskerville, R. F. (2003). Hofstede Never Studied Culture. *Accounting, Organizations and Society*, 28(1), 1-14.
- Blake, R. R., & Mouton, J. S. (1970). The Fifth Achievement. *The Journal of Applied Behavioral Science*, 6(4), 413-426.
- Borys, B., & Jemison, D. B. (1989). Hybrid Arrangements as Strategic Alliances: Theoretical Issues in Organizational Combinations. *Academy of Management Review*, 14(2), 234-249.
- Braun, V., & Clarke, V. (2006). Using Thematic Analysis in Psychology. *Qualitative Research in Psychology*, 3(2), 77-101.
- Brewer, N., Mitchell, P., & Weber, N. (2002). Gender Role, Organizational Status, and Conflict Management Styles. *International Journal of Conflict Management*, 13(1), 78-94.
- Byrne, M, 2004, Workplace Meetings and the Silencing of Women: An Investigation of Women and Men's Different Communication Styles and How these Influence Perceptions of Leadership Capability within Australian Organisations, University of Western Sydney
- Byrnes, J. D. (2002). Before Conflict: Preventing Aggressive Behavior. R&L Education.
- Brown, H. J., & Marriott, A. L. (1999). *ADR Principles and Practice* (p. 12). London: Sweet & Maxwell.
- Brewer, M. B. (1979). In-group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis. *Psychological bulletin*, 86(2), 307.
- Brown, S., Cervenak, C., & Fairman, D. (1998). *Alternative Dispute Resolution Practitioners Guide*. Center for Democracy and Government.
- Burrell, G. and Morgan, G. (1979) *Sociological Paradigms and Organisational Analysis*. London: Heinemann.
- Buunk, A. P., Park, J. H., & Duncan, L. A. (2010). Cultural Variation in Parental Influence on Mate Choice. *Cross-Cultural Research*, 44(1), 23-40.
- Cambridge, J. 2006. An Enquiry into the Validity of Hofstede's Framework for the Description and Analysis of Educational Values of Teachers in International Schools. PhD thesis, University of Bath, Bath.
- Campbell, D. T. (1975). III. "Degrees of Freedom" and the Case Study. *Comparative Political Studies*, 8(2), 178-193.
- Chan, E. H., & Tse, R. Y. (2003). Cultural Considerations in International Construction Contracts. *Journal of Construction Engineering and Management*, 129(4), 375-381.
- Chan, E. H., & Suen, H. C. (2005). Disputes and Dispute Resolution Systems in Sino-foreign Joint Venture Construction Projects in China. *Journal of Professional Issues in Engineering Education and Practice*, 131(2), 141-148.
- Chua, E. G., & Gudykunst, W. B. (1987). Conflict Resolution Styles in Low-and High-context Cultures. *Communication Research Reports*, 4(1).
- Cooper, D. F., & Chapman, C. B. (1987). *Risk Analysis for Large Projects: Models, Methods, and Cases*. John Wiley & Sons Inc.

- Cheeks, J. R. (1996). Settlement of Shallow Foundations on Uncontrolled Mine Spoil Fill. *Journal of performance of constructed facilities*, 10(4), 143-151.
- Cheeks, J. R. (2003). Multistep Dispute Resolution in Design and Construction Industry. *Journal of Professional Issues in Engineering Education and Practice*, 129(2), 84-91.
- Cheng, T., Soo, G., Kumaraswamy, M., and Jin, W. (2009) 'Security of Payment for Hong Kong Construction Industry – Workable Alternatives and Suggestions', *Building Journal Hong Kong China*, 60-77.
- Cheung, S. O., Tam, C. M., Ndekugri, I., & Harris, F. C. (2000). Factors Affecting Clients' Project Dispute Resolution Satisfaction in Hong Kong. *Construction Management & Economics*, 18(3), 281-294.
- Cheung, S. O., Suen, H. C., & Lam, T. I. (2002). Fundamentals of Alternative Dispute Resolution Processes in Construction. *Journal of Construction Engineering and Management*, 128(5), 409-417.
- Cheung, S. O., Suen, H. C., Ng, S. T., & Leung, M. Y. (2004). Convergent Views of Neutrals and Users about Alternative Dispute Resolution. *Journal of Management in Engineering*, 20(3), 88-96.
- Cheung, S. O. (2014). Dispute Avoidance Through Equitable Risk Allocation. In *Construction Dispute Research* (pp.99-109). Springer International Publishing.
- Coleman, P. T. (2006). Power and conflict. *The handbook of conflict resolution: Theory and Practice*, 2, 120-143.
- Construction Industry Review Committee (CIRC). (2001). *Construct for Excellence*, Construction Industry Review Committee, the Government of the Hong Kong Special Administrative Region.
- Coulson, R. (1983). Dispute Management Under Modern Construction Systems. *Law and Contemporary Problems*, 46(1), 127-135.
- Crabtree, B. F., & Miller, W. L. (Eds.). (1999). *Doing Qualitative Research*. Sage Publications.
- Crotty, M. (1998) *The Foundations of Social Research*. London: Sage.
- Denzin, N. K., & Lincoln, Y. S. (Eds.). (2011). *The Sage Handbook of Qualitative Research*. Sage.
- Dancaster, C. (2008). Construction Adjudication in the United Kingdom: Past, Present, and Future. *Journal of Professional Issues in Engineering Education and Practice*, 134(2), 204-208.
- Danuri, M., Suhaimi, M., Mohd Ishan, Z., Mustaffa, N. E., Karim, A., Bari, S., & Rahmin, A. (2015). Dispute Avoidance Procedure: Observing the Influence of Legal Culture Towards a Workable Legal System. *Journal of Social Sciences & Humanities*, 23(2), 509-535.
- Davies, H. (1995). Interpreting Guanxi: The Role of Personal Connections in a High Context Transitional Economy. *China Business: Context and Issues*, 155-169.
- De Klerk, V. (2004) The Role of Expletives in the Construction of Masculinity, in Johnson, S. and Meinhof, U.H. (eds) *Language and Masculinity*, Blackwell, Oxford.

- Deutsch, M. (1969). Conflicts: Productive and Destructive. *Journal of Social Issues*, 25(1), 7-42.
- Deutsch, M., Coleman, P. T., & Marcus, E. C. (Eds.). (2011). *The Handbook of Conflict Resolution: Theory and Practice*. John Wiley & Sons.
- D'Iribarne, P. (1989). *La logique de l'honneur, gestion des entreprises et traditions nationales*. Paris, Seuil.
- Doucet, L., Jehn, K. A., Weldon, E., Chen, X., & Wang, Z. (2009). Cross-cultural Differences in Conflict Management: An Inductive Study of Chinese and American Managers. *International Journal of Conflict Management*, 20(4), 355-376.
- Duckitt, J. H. (1992). *The Social Psychology of Prejudice*. Praeger Publishers/Greenwood Publishing Group.
- Jones, D. (2006). Construction Project Dispute Resolution: Options for Effective Dispute Avoidance and Management. *Journal of Professional Issues in Engineering Education and Practice*, 132(3), 225-235.
- Easterby-Smith, M., Thorpe, R., & Jackson, P. (2012). *Management Research* (Fourth ed.). London: Sage.
- Egan, J. (1998). *Rethinking Construction: The report of the Construction Task Force to the Deputy Prime Minister on the Scope for Improving the Quality and Efficiency of UK Construction*. Department of the Environment, Transport and the Region, London.
- Emmitt, S & Gorse, C, 2003, *Construction Communication*, Blackwell Publishing, Oxford
- Epie, C. (2002). Nigerian Business Negotiators: Cultural Characteristics. *Journal of African Business*, 3(2), 105-126.
- Fang, T. (2003). A Critique of Hofstede's Fifth National Culture Dimension. *International Journal of Cross-cultural Management*, 3(3), 347-368.
- Fenn, P, Lowe, D & Speck, C, 1997, "Conflict and Dispute in Construction", *Construction Management and Economics*, vol.15, pp.513-518
- Friedman, L. M. (1969). Legal Culture and Social Development. *Law & Society Review*, 4(1), 29-44.
- Gabrielidis, C., Stephan, W. G., Ybarra, O., Dos Santos Pearson, V. M., & Villareal, L. (1997). Preferred styles of conflict resolution: Mexico and the United States. *Journal of Cross-Cultural Psychology*, 28(6), 661-677.
- Galea, N., & Loosemore, M. (2006). Men and Conflict in the Construction Industry. In *Proceedings of 22nd Annual ARCOM Conference* (pp. 843-850).
- Gardiner, P. D., & Simmons, J. E. (1992). Analysis of Conflict and Change in Construction Projects. *Construction Management and Economics*, 10(6), 459-478.
- Giebels, E., & Noelanders, S. (2004). *Crisis Negotiations: A Multiparty Perspective*. Veenendaal, NL: Universal Press
- Giebels, E., & Taylor, P. J. (2009). Interaction Patterns in Crisis Negotiations: Persuasive Arguments and Cultural Differences. *Journal of Applied Psychology*, 94(1), 5.

- Goodwin, J., & Goodwin, D. (1999). Ethical Judgments Across Cultures: A Comparison between Business Students from Malaysia and New Zealand. *Journal of Business Ethics*, 18(3), 267-281.
- Gulati, R. (1995). Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances. *Academy of Management Journal*, 38(1), 85-112.
- Gunkel, M., Schlägel, C., & Engle, R. L. (2014). Culture's Influence on Emotional Intelligence: An empirical Study of Nine Countries. *Journal of International Management*, 20(2), 256-274.
- Gudykunst, W. B., Ting-Toomey, S., & Chua, E. (1988). *Culture and Interpersonal Communication*. Sage Publications, Inc.
- Hackett, S. C. (1993). Incomplete Contracting: A Laboratory Experimental Analysis. *Economic Inquiry*, 31(2), 274-297.
- Hak, T., & Dul, J. (2009). "Pattern Matching" in Mills, A. J., Durepos, G., & Wiebe, E. (Eds.). (2010). *Encyclopaedia of Case Study Research: L-Z; index (Vol. 1)*. Sage.
- Hall, M. A., & Jaggar, D. M. (1997). Should Construction Enterprises, Working Internationally, Take Account of Cultural Differences in Culture?. In 13th annual ARCOM conference (pp. 1-10).
- Hammersley, M., & Atkinson, P. (2007). *Ethnography: Principles in Practice*. Routledge.
- Hampden-Turner, C., & Trompenaars, F. (1997). Response to Geert Hofstede. *International Journal of Intercultural Relations*, 21(1), 149-159.
- Hannan, M. T., & Freeman, J. (1984). Structural Inertia and Organizational Change. *American Sociological Review*, 149-164.
- Harmon, K. M. J. (2001). Pseudo Arbitration Clauses in New York City Construction Contracts. *Construction Briefings*, July.
- Harmon, K. M. (2003). Conflicts Between Owner and Contractors: Proposed Intervention Process. *Journal of Management in Engineering*, 19(3), 121-125.
- Hartley, J. 2004, Case Study Research. In Cassell, C., and Symon, G. (Eds), *Essential Guide to Qualitative Methods in Organizational Research*, SAGE, London
- Hartman FT. (1993). *Construction Dispute Resolution Through an Improved Contracting Process in the Canadian Context*, PhD Thesis, Loughborough University of Technology, Loughborough, UK..
- bels, G. (1983). The Cultural Relativity of Organizational Practices and Theories. *Journal of International Business Studies*, 14(2), 75-89.
- fonta, G. (1984). *Culture's Consequences: International Differences in Work-related Values (Vol. 5)*. Sage.
- Hofstede, G., & Bond, M. H. (1988). The Confucius Connection: From Cultural Roots to Economic Growth. *Organizational dynamics*, 16(4), 5-21.
- Hofstede, G., Hofstede, G. J., & Minkov, M. (1991). *Cultures and Organizations: Software of the Mind (Vol. 2)*. London: McGraw-Hill.



- Hofstede, G. (1983). The Cultural Relativity of Organizational Practices and Theories. *Journal of International Business Studies*, 14(2), 75-89.
- Hofstede, G. (1996). Riding the Waves of Commerce: A test of Trompenaars' Model of National Culture Differences. *International Journal of Intercultural Relations*, 20(2), 189-198.
- Hofstede, G. (2006). What did GLOBE Really Measure? Researchers' Minds versus Respondents' Minds. *Journal of international business studies*, 37(6), 882-896.
- Hofstede, G. (2008). A Summary of My Ideas about National Culture Differences. Retrieved May, 20, 2008.
- Hofstede, G. (2010). National Culture Dimensions. US Country.
- Hofstede, G., & McCrae, R. R. (2004). Personality and culture revisited: Linking traits and dimensions of culture. *Cross-cultural research*, 38(1), 52-88.
- Hofstede, G., Hofstede, G. J., & Minkov, M. (2010). *Cultures and organizations: Software of the mind*. Revised and expanded. McGraw-Hill, New York.
- Hofstede, G. (2011). Dimensionalizing cultures: The Hofstede model in context. *Online readings in psychology and culture*, 2(1), 8.
- Hoft, N. L. (2003). Communicating the Risks of Natural Hazards: The World-at-large is at Stake. *Global Documentation: Case Studies in International Technical Communication*. Boston: Allyn and Bacon.
- Holt, J. L., & DeVore, C. J. (2005). Culture, Gender, Organizational Role, and Styles of Conflict Resolution: A Meta-analysis. *International Journal of Intercultural Relations*, 29(2), 165-196.
- House, R. J., Hanges, P. J., Javidan, M., Dorfman, P. W., & Gupta, V. (Eds.). (2004). *Culture, Leadership, and Organizations: The GLOBE Study of 62 Societies*. Sage Publications.
- Hodge, B., J. and Anthony, W. P. (2002) *Organisation Theory: A Strategic Approach* 6<sup>th</sup> Edn. Prentice Hall.
- Hirschheim, R. (1985). Information Systems Epistemology: An Historical Perspective. *Research Methods in Information Systems*, 13-35.
- Hui, C. H., & Triandis, H. C. (1986). Individualism-Collectivism A Study of Cross-Cultural Researchers. *Journal of Cross-Cultural Psychology*, 17(2), 225-248.
- Hsu, F. L. (1981). *Americans and Chinese: Passages to Differences*. University of Hawaii Press.
- Inglehart, R. (1997). *Modernization and Post Modernization: Cultural, Economic, and Political Change in 43 societies*. Princeton University Press.
- Ismail, N. A. R. (1988). Value Systems of Malay and Chinese Managers: A Comparative Study. *Economic Performance in Malaysia: The Insider's View*, 95-109.
- Jaggar, A. M. (2006). Reasoning About Well-being: Nussbaum's Methods of Justifying the Capabilities. *Journal of Political Philosophy*, 14(3), 301-322.

- Jannadia, M. O., Assaf, S., Bubshait, A. A., & Naji, A. (2000). Contractual Methods for Dispute Avoidance and Resolution (DAR). *International Journal of Project Management*, 18(1), 41-49.
- Jorgenson, D. L. 1989, *Participant Observation: A Methodology for Human Studies*, SAGE, California.
- Kagan, S., Knight, G., & Martinez-Romero, S. (1982). Culture and The Development of Conflict Resolution Style. *Journal of Cross-Cultural Psychology*, 13, 43-59.
- Katz, D., & Kahn, R. L. (1978). *The Social Psychology of Organizations* (Vol. 2, p. 528). New York: Wiley.
- Kaushal, R., & Kwantes, C. T. (2006). The Role of Culture and Personality in Choice Of Conflict Management Strategy. *International Journal of Intercultural Relations*, 30(5), 579-603.
- Kawar, T. I. (2012). Cross-cultural Differences in Management. *International Journal of Business and Social Science*, 3(6).
- Khandwala, P. N., (1980), *Management in our Backyards*, *Vikalpa* 5(3), 173–184.
- Kim, T. Y., Wang, C., Kondo, M., & Kim, T. H. (2007). Conflict Management Styles: The Differences Among the Chinese, Japanese, and Koreans. *International Journal of Conflict Management*, 18(1), 23-41.
- Kirkbride, P. S., Tang, S. F., & Westwood, R. I. (1991). Chinese Conflict Preferences and Negotiating Behaviour: Cultural and Psychological Influences. *Organization Studies*, 12(3), 365-386.
- Kluckhohn, F. R., & Strodtbeck, F. L. (1961). *Variations in Value Orientations*.
- Komarraju, M., Dollinger, S. J., & Lovell, J. L. (2008). Individualism-Collectivism in Horizontal and Vertical Directions as Predictors of Conflict Management Styles. *International Journal of Conflict Management*, 19(1), 20-35.
- Latham, S. M. (1994). *Constructing the Team*. London: HM Stationery Office.
- Laurent, A. (1983). The Cultural Diversity of Western Conceptions of Management. *International Studies of Management & Organization*, 13(1-2), 75-96.
- Leung, K., & Iwawaki, S. (1988). Cultural Collectivism and Distributive Behavior. *Journal of Cross-Cultural Psychology*, 19, 35-49.
- Levett, D. (2001). Drafting and Risk Allocation in the New Hong Kong Standard Form of Building Contract. *International Construction Law Review*, 18(4), 716-723.
- Levitin, T. 1973. Values. In J. P. Robinson & P. R. Shaver (Eds), *Measures of Social Psychological Attitudes*: 489-502. Ann Arbor MI: Survey Research Center, University of Michigan.
- Li, Y. (2016). *Expatriate Manager's Adaption and Knowledge Acquisition: Personal Development in Multi-National Companies in China*. Springer Publications
- Lincoln, Y. S., & Guba, E. G. (1985). Naturalistic inquiry. *The Blackwell Encyclopaedia of Sociology*.

- Liu, A. M., Shuibo, Z., & Meig, L. (2006). A Framework for Assessing Organisational Culture of Chinese Construction Enterprises. *Engineering, Construction and Architectural Management*, 13(4), 327-342.
- Løkke, A. K., & Sørensen, P. D. (2014). Theory Testing Using Case Studies. *Electronic Journal of Business Research Methods*, 12(1).
- Luo, Y. (2002). Contract, Cooperation, and Performance in International Joint Ventures. *Strategic Management Journal*, 23(10), 903-919.
- Lytle, A. L., Brett, J. M., & Shapiro, D. L. (1999). The Strategic Use of Interests, Rights, and Power to Resolve Disputes. *Negotiation Journal*, 15(1), 31-51.
- Maiese, M. (2004). Interests, Rights, Power and Needs Frames. Beyond Intractability. Eds. Guy Burgess and Hedi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2004.
- Markus, H. R., & Kitayama, S. (1991). Culture and the Self: Implications for Cognition, Emotion, and Motivation. *Psychological Review*, 98(2), 224.
- Mason, P., & McBride, P. K. (2014). *Researching Tourism, Leisure and Hospitality for Your Dissertation*. Goodfellow Publishers.
- McClelland, D. C. (1975). *Power: The Inner Experience*. Irvington.
- McGrath, J. E., & Brinberg, D. (1983). External Validity and The Research Process: A Comment on the Calder/Lynch Dialogue. *Journal of Consumer Research*, 10(1), 115-124.
- McKim, R. A. (1992). *Risk Behavior of Contractors: a Canadian Study*. Project Management Institute.
- McManamy, R. (1994). 'Industry Pounds Away at Disputes. *Engineering News Record*, 24(3).
- McSweeney, B. (2002). Hofstede's Model of National Cultural Differences and Their Consequences: A Triumph of Faith - A Failure of Analysis. *Human relations*, 55(1), 89-118.
- Mendoza, G. A. (1991). *Management, the Asian way*. Asian Institute of Management.
- Merriam, S. B., & Mohamad, M. (2000). How Cultural Values Shape Learning in Older Adulthood: The Case of Malaysia. *Adult Education Quarterly*, 51(1), 45-63.
- Mix, D. M. (1996). ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism. *Ohio St. J. on Disp. Resol.*, 12, 463.
- Montoya, R. M., & Pittinsky, T. L. (2013). Individual Variability in Adherence to the Norm of Group Interest Predicts Outgroup Bias. *Group Processes & Intergroup Relations*, 16(2), 173-191.
- Moore, C. (1993). Have Process, Will Travel: Reflections on Democratic Decision Making and Conflict Management Practice Abroad. In *Forum of the National Institute for Dispute Resolution* (pp. 1-12).
- Morris, M. W., Williams, K. Y., Leung, K., Larrick, R., Mendoza, M. T., Bhatnagar, D. & Hu, J. C. (1998). Conflict Management Style: Accounting for Cross-national Differences. *Journal of International Business Studies*, 29(4), 729-747.

- Myers, M. D. (2013), *Qualitative Research in Business and Management* (2<sup>nd</sup> ed.). London: SAGE Publication Ltd.
- Woodrow, P., & Moore, C. (2002). What Do I Need to Know About Culture? Practitioners Suggest. *A Handbook of International Peacebuilding: Into the Eye of the Storm*, 89-105.
- Neuman, W.L. (2007). *Basics of Social Research. Qualitative and Quantitative Approaches* (2nd ed.). Pearson.
- Newman, K. L., & Nollen, S. D. (1996). Culture and Congruence: The Fit Between Management Practices and National Culture. *Journal of International Business Studies*, 27(4), 753-779.
- Ng, H. S., Peña-Mora, F., & Tamaki, T. (2007). Dynamic Conflict Management in Large-Scale Design and Construction Projects. *Journal of Management in Engineering*, 23(2), 52-66.
- Noordin, F., & Jusoff, K. (2010). Individualism-collectivism and Job Satisfaction between Malaysia and Australia. *International Journal of Educational Management*, 24(2), 159-174.
- NSW Government (1996), "NSW Government green paper: security of payment for subcontractors, consultants and suppliers in the New South Wales construction industry' 51", *Australian Construction Law Newsletter*, pp. 41-51.
- Ogbor, J. (1990). Organizational change within a cultural context. *The Interpretation of Cross-Culturally Transferred Organizational Practices*.
- Ohbuchi, K. I., Fukushima, O., & Tedeschi, J. T. (1999). Cultural Values in Conflict Management: Goal Orientation, Goal Attainment, and Tactical Decision. *Journal of Cross-Cultural Psychology*, 30(1), 51-71.
- Ohbuchi, K. I., & Takahashi, Y. (1994). Cultural Styles of Conflict Management in Japanese and Americans: Passivity, Covertness, and Effectiveness of Strategies. *Journal of Applied Social Psychology*, 24(15), 1345-1366.
- Oudenhoven, J. P., Mechelse, L., & Dreu, C. K. (1998). Managerial Conflict Management in Five European Countries: The Importance of Power Distance, Uncertainty Avoidance, and Masculinity. *Applied Psychology*, 47(3), 439-455.
- Owens, C. (2008). Dispute Resolution in the Construction Industry in Ireland: A Move to Adjudication?. *Journal of Professional Issues in Engineering Education and Practice*, 134(2), 220-223.
- Parsons, T., Shils, E. A., & Smelser, N. J. (Eds.). (1965). *Toward a General Theory of Action: Theoretical Foundations For The Social Sciences*. Transaction publishers.
- Patton, M. (1990). *Qualitative Evaluation and Research Methods* (2nd edition). London: Sage.
- Pekerti, A. A., & Thomas, D. C. (2003). Communication in Intercultural Interaction: An Empirical Investigation of Idiocentric and Sociocentric Communication Styles. *Journal of Cross-Cultural Psychology*, 34(2), 139-154.

- Phua, F. T., & Rowlinson, S. (2003). Cultural Differences as An Explanatory Variable for Adversarial Attitudes in The Construction Industry: The Case of Hong Kong. *Construction Management and Economics*, 21(7), 777-785.
- Pilkington, J 1992, "Don't Try and Make Out That I'm Nice: The Different Strategies Women and Men Use When Gossiping." *Wellington Working Papers in Linguistics*, 5, pp. 37-60
- Posthuma, R. A., White III, G. O., Dworkin, J. B., Yáñez, O., & Stella Swift, M. (2006). Conflict Resolution Styles Between Co-workers in US and Mexican Cultures. *International Journal of Conflict Management*, 17(3), 242-260.
- Purohit, Y. S., & Simmers, C. A. (2006). Power Distance and Uncertainty Avoidance: A Cross-National Examination of Their Impact on Conflict Management Modes. *Journal of International Business Research*, 5(1), 1.
- Rahim, M. A. (1983). A Measure of Styles of Handling Interpersonal Conflict. *Academy of Management Journal*, 26(2), 368-376.
- Ramachandra, T., & Rotimi, J. O. B. (2011). The Nature of Payment Problems in The New Zealand Construction Industry.
- Ramalu, S. S., Rose, R. C., Uli, J., & Samy, N. K. (2010). Personality and Cross-Cultural Adjustment Among Expatriate Assignees in Malaysia. *International Business Research*, 3(4), 96.
- Rapoport, A., & Chammah, A. M. (1965). *Prisoner's Dilemma: A Study in Conflict and Cooperation* (Vol. 165). University of Michigan press.
- Rashid, M. Z. A., & Ho, J. A. (2003). Perceptions of Business Ethics in A Multicultural Community: The Case of Malaysia. *Journal of Business Ethics*, 43(1-2), 75-87.
- Ratner, C. (1997). *Cultural Psychology and Qualitative Methodology: Theoretical and Empirical Considerations*. Springer Science & Business Media.
- Rubin, J. Z., & Brown, B. R. (2013). *The Social Psychology of Bargaining and Negotiation*. Elsevier.
- Reisinger, Y. (2009). *International Tourism: Cultures and Behavior*. USA: Elsevier Butterworth-Heinemann.
- Rossi, I. (1974). *The Unconscious in Culture*. New York: Dutton.
- Sadri, G., & Rahmatian, M. (2003). Resolving Conflict: Examining Ethnic-racial and Gender Differences. *Equal Opportunities International*, 22(2), 25-39.
- Saunders, M., Lewis, P., & Thornhill, A. (2009). Understanding Research Philosophies and Approaches. *Research Methods for Business Students*, 4, 106-135.
- Saunders, M., Lewis, P., & Thornhill, A. (2012). *Research Methods for Business Students* (Sixth ed.). Edinburgh, UK: Pearson Education Limited.
- Sarantakos, S. (2005). *Social Research* (3rd ed.). Basingstoke: Palgrave Macmillan.
- Schein, E. H. (1985a). *Organisational Culture and Leadership: A Dynamic View*. San Francisco.

- Schein, E. H. (1985b). Defining Organizational Culture. *Classics of Organization Theory*, 3, 490-502.
- The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649)
- Schuessler, A. A. (1999). Ecological Inference. *Proceedings of the National Academy of Sciences*, 96(19), 10578-10581.
- Schwartz, S. H. (1994a). Are There Universal Aspects in The Structure and Contents of Human Values?. *Journal of Social Issues*, 50(4), 19-45.
- Sidanius, J., & Pratto, F. (1999). *Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression*. Cambridge University Press.
- Sidanius, J., Pratto, F., & Bobo, L. (1994). Social Dominance Orientation and the Political Psychology of Gender: A case of Invariance?. *Journal of Personality and Social Psychology*, 67(6), 998.
- Signorini, P., Wiesemes, R., & Murphy, R. (2009). Developing Alternative Frameworks for Exploring Intercultural Learning: A Critique of Hofstede's Cultural Difference Model. *Teaching in Higher Education*, 14(3), 253-264.
- Sinha, J. B., & Verma, J. (1987). Structure of Collectivism, in C. Kagitcibasi (ed) *Growth and Progress in Cross-Cultural Psychology*, Swets & Zeitlinger, The Netherlands, 123-9.
- Smith, P. B., & Peterson, M. F. (1995, August). Beyond Value Comparisons: Sources Used to Give Meaning to Management Work Events In Twenty-Nine Countries. In annual meeting of the Academy of Management, Vancouver, Canada.
- Smith, P. B. (2006). When Elephants Fight, The Grass Gets Trampled: The GLOBE and Hofstede projects. *Journal of International Business Studies*, 37(6), 915-921.
- Spencer-Oatey, H. (2000). *Culturally Speaking. Managing Rapport Through Talk Across Cultures*. London: Continuum.
- Spencer-Oatey, H. (2005). *E-china: Sino-UK e-learning Programme: Sino-British Collaboration to Develop eLearning Courseware: A Work-in-progress Report on Overarching Issues*. Bristol, United Kingdom: Higher Education Funding Council for England.
- Stipanowich, T. J. (1996). Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution. *Constr. Law.*, 16, 8.
- Stipanowich, T. J. (1998a). The Multi-door Contract and Other Possibilities. *Ohio St. J. on Disp. Resol.*, 13, 303.
- Stipanowich, T. J. (1998b). Reconstructing Construction Law: Reality and Reform in a Transactional System. *Wis. L. Rev.*, 463.
- Sumaco, F. T., Imrie, B. C., & Hussain, K. (2014). The Consequence of Malaysian National Culture Values on Hotel Branding. *Procedia-Social and Behavioral Sciences*, 144, 91-101.
- Tajfel, H. (1978). *Differentiation Between Social Groups: Studies in the Social Psychology of Intergroup Relations*. Academic Press, London.

- Tajfel, H. (1982). Social Psychology of Intergroup Relations. *Annual Review of Psychology*, 33(1), 1-39.
- Tallman, S. B., & Shenkar, O. (1994). A Managerial Decision Model of International Cooperative Venture Formation. *Journal of International Business Studies*, 25(1), 91-113.
- Tannen, D. (1999). *The Argument Culture: Stopping America's War of Words*. Random House Digital, Inc.
- Tenbrunsel, A. E., & Messick, D. M. (2001). Power Asymmetries and The Ethical Atmosphere in Negotiations.
- Teo, E. A. L., & Aibinu, A. A. (2007). Legal Framework for Alternative Dispute Resolution: Examination of The Singapore National Legal System for Arbitration. *Journal of Professional Issues in Engineering Education and Practice*, 133(2), 148-157.
- Thomas, K. W. (1992). Conflict and Conflict Management: Reflections and Update. *Journal of Organizational Behavior*, 13(3), 265-274.
- Thompson, R. M., Vorster, M. C., & Groton, J. P. (2000). Innovations to Manage Disputes: DRB and NEC. *Journal of Management in Engineering*, 16(5), 51-59.
- Ting-Toomey, S., Gao, G., Trubisky, P., Yang, Z., Soo Kim, H., Lin, S. L., & Nishida, T. (1991). Culture, Face Maintenance, and Styles of Handling Interpersonal Conflict: A Study in Five Cultures. *International Journal of Conflict Management*, 2(4), 275-296.
- Tjosvold, D., Johnson, D. W., & Johnson, R. (1984). Influence Strategy, Perspective-taking, and Relationships between High-and Low-power Individuals in Cooperative and Competitive Contexts. *The Journal of Psychology*, 116(2), 187-202.
- Triandis, H. C. (1990). Cross-Cultural Studies of Individualism and Collectivism, in J. Berman (ed.) *Nebraska Symposium on Motivation*, University of Nebraska Press, Lincoln, 41-133.
- Triandis, H. C. (1984). Toward a Psychological Theory of Economic Growth. *International Journal of Psychology*, 19(1-4), 79-95.
- Triandis, H. C. (1995). *Individualism & collectivism*. Westview press.
- Triandis, H. C. (2000). Culture and Conflict. *International Journal of Psychology*, 35(2), 145-152.
- Trochim, W. M. (1989). Outcome Pattern Matching and Program Theory. *Evaluation and Program Planning*, 12(4), 355-366.
- Trochim, W. M. (1985). Pattern Matching, Validity, and Conceptualization in Program Evaluation. *Evaluation Review*, 9(5), 575-604.
- Trompenaars, F., & Hampden-Turner, C. (1999). *Riding the Waves of Culture*. Competency-London, 6, 19-19.
- Trompenaars, F., & Hampden-Turner, C. (2011). *Riding the Waves of Culture: Understanding Diversity in Global Business*. Nicholas Brealey Publishing.

- Trubisky, P., Ting-Toomey, S., & Lin, S. L. (1991). The Influence of Individualism-Collectivism and Self-Monitoring on Conflict Styles. *International Journal of Intercultural Relations*, 15(1), 65-84.
- Tsai, J. S., & Chi, C. S. (2009). Influences of Chinese cultural orientations and conflict management styles on construction dispute resolving strategies. *Journal of Construction Engineering and Management*, 135(10), 955-964.
- Turner, J. R. (2004). Farsighted project contract management: incomplete in its entirety. *Construction Management and Economics*, 22(1), 75-83.
- Turner, D. F., & Turner, A. (2014). *Building contract claims and disputes*. Routledge.
- Turner, J. C., Sachdev, I., & Hogg, M. A. (1983). Social Categorization, Interpersonal Attraction and Group Formation. *British Journal of Social Psychology*, 22(3), 227-239.
- Uher, T. E., & Brand, M. C. (2008). Claimants' View of The Performance of Adjudication in New South Wales. *Engineering, Construction and Architectural Management*, 15(5), 470-484.
- University of Oklahoma. Institute of Group Relations, & Sherif, M. (1961). *Intergroup Conflict and Cooperation: The Robbers Cave Experiment* (Vol. 10, pp. 150-198). Norman, OK: University Book Exchange.
- Wall Jr, J. A., & Callister, R. R. (1999). Malaysian Community Mediation. *Journal of Conflict Resolution*, 43(3), 343-365.
- Weinberg, A.M. (1970). Views: The Axiology of Science: The Urgent Question of Scientific Priorities Has Helped to Promote a Growing Concern with Value in Science. *American Scientist*, 612-617.
- Westwood, R. and Everett, J. (1995). Comparative Managerial Values: Malaysia and the West. *Journal of Asia Pacific Business*. 1(3): 3-37
- Wildau, S. T., Moore, C. W., & Mayer, B. S. (1993). Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad. *Mediation Quarterly*, 10(3), 303.
- Wei, W. U., Yuen, E., & Zhu, J. J. (2001). Individualism-Collectivism and Conflict Resolution Styles: A Cross-Cultural Study of Managers in Singapore. Manuscripto não-publicado. Faculty of Business Administration, National University of Singapore. Retirado de: <http://www.adr.gov/events/2009/nov19-2009-materials-article.pdf>.
- Wittig, M. (1992). *The Straight Mind and Other Essays*. Beacon Press.
- Xie, J., Song, X. M., & Stringfellow, A. (1998). Inter Functional Conflict, Conflict Resolution Styles, and New Product Success: A Four-Culture Comparison. *Management Science*, 44(12-part-2), S192-S206.
- Yin, R. K. (2008). *Case Study Research: Design and Methods*, California: Sage Publication Inc.
- Yum, J. O. (1988). The Impact of Confucianism on Interpersonal Relationships and Communication Patterns in East Asia. *Communications Monographs*, 55(4), 374-388.
- Zarate, M. A., Garcia, B., Garza, A. A., & Hitlan, R. T. (2004). Cultural Threat and Perceived Realistic Group Conflict as Dual Predictors of Prejudice. *Journal of Experimental Social Psychology*, 40(1), 99-105.





University of  
**Salford**  
MANCHESTER

**Research, Innovation and Academic  
Engagement Ethical Approval Panel**

Research Centres Support Team  
G0.3 Joule House  
University of Salford  
M5 4WT

T +44(0)161 295 5278

[www.salford.ac.uk/](http://www.salford.ac.uk/)

3 August 2017

**Farrah Azwanee Binti Aminuddin**

Dear Farrah,

**RE: ETHICS APPLICATION STR1617-105: The Impact of National Culture on the Viability of Dispute Resolution Mechanism in Construction: A Case Study of the Malaysian Adjudication Regime**

Based on the information you provided, I am pleased to inform you that your application STR1617-105 has been approved.

If there are any changes to the project and/ or its methodology, please inform the Panel as soon as possible by contacting [S&T-ResearchEthics@salford.ac.uk](mailto:S&T-ResearchEthics@salford.ac.uk)

Yours sincerely,

A handwritten signature in blue ink that reads 'A Higham'.

Dr Anthony Higham  
Chair of the Science & Technology Research Ethics Panel

## **Appendix B: Participant Information Sheets**

### **Participant Information Sheets**

You are invited to take part in a research study. Before you decide, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Kindly ask if there is anything that is not clear of if you would like to know more information. Take time to decide whether to take part. Thank you for reading this.

### **Title of the research**

The Compatibility of Dispute Resolution Mechanisms with National Culture in the Construction Industry: A Case Study of the Malaysian Statutory Adjudication Regime

### **Name of the researcher**

Farrah Azwanee binti Aminuddin  
PhD Student  
40, Room 413, 4<sup>th</sup> Floor, Maxwell Building  
School of Built Environment  
The University of Salford  
Salford, M5 4WT  
United Kingdom

### **Aim of the study**

To assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society.

### **Why have I been chosen?**

The introduction of statutory adjudication - an adversarial form of dispute resolution, in an Asian country like Malaysia that is associated with very different traditions of cultural interaction - therefore raises a potential question of cultural incompatibility between the choice of dispute resolution style and the national culture of the society in which it is implemented. The purpose of this research is therefore to assess the compatibility of an adversarial method of dispute resolution in the construction industries of the Malaysian society. It takes the recent introduction of adjudication in Malaysia as a single qualitative case study of this wider phenomenon.

### **Do I have to take part?**

Participation in this study is entirely voluntary and, as such, you can withdraw from the study at any point of stage. It is fully within your power to decide whether to participate in this study. Further information can be provided to you if it helps you in deciding on your participation. If you agree to participate, a consent form will be given to you for your signature. As stated, you can still withdraw from the research at any time without giving any reason.

**Should I agree to take part, what will happen next?**

If you agree to participate in the study, you will be provided with a copy of the interview questions. This will provide you with additional details of your involvement and what questions the researcher will ask you. The researcher welcomes any questions regarding the interview questions. After the initial stage is completed, a suitable date and time and location for the interview will be arranged according to your preference.

**What will happen during the interview session?**

Upon agreeing to participate in the study, a suitable date and time will be agreed with you in order to conduct the interview session. On the day, a semi-structured interview will be used as the guide question in the open discussion in order to draw upon your knowledge in the implementation of adjudication. This interview will take up approximately 1 hour long and will be audio recorded with your permission. The purpose of the recording is so that the content of the interview can be transcribed for data analysis in the later stage. For the purpose of anonymity, your name will not be recorded. As such, you will be asked to give an explicit consent before the interview.

**Will my participation in this study be kept confidential?**

The researcher is fully committed in maintaining the confidentiality and protecting any data as well as information. All the data obtained from the interview will be kept confidential and secure. Your anonymity will be maintained. Codes and numbers will be allocated as identifiers but no information will be reset that will identify the participant. The interview will be transcribed anonymously with the content saved on a password protected computer that will only be accessed by the researcher. The data will then be used as part of the final thesis and any related publications. After collection, the data will remain securely stored for up to 3 years after the PhD has been awarded. This is to comply with the University of Salford's data retention policy. After the period has expired, the data will be securely destroyed with data protection guidelines and for the interest of maintaining confidentiality.

**What are the potential benefits of participating?**

Your experience and expertise in the field of adjudication makes your insights a vital contribution to the extension of the state of knowledge of dispute resolution process in Malaysia. Such contribution is beneficial in improving the practice of adjudication in Malaysia.

**What will happen to the results of this study?**

The study results will be analyzed, interpreted and compiled in order to assess the viability of adjudication as a dispute resolution mechanism in construction industry within the context of the national culture in Malaysia during the writing up of the PhD thesis. The findings will also be presented and published in related fields such as in academic journals, conferences and seminars. In addition, the findings will be shared with other researchers and practitioners. At any place the findings are used, the details will be kept anonymous unless written consent had been given to disclose the information.

**Is there any risk involved?**

The nature of the research does not expose the participant to any form of risk in the study.

**Will the participant get paid?**

Participation in the research is voluntary. As such, there is no financial incentive involved with the study.

**Contact for further information**

Farrah Azwanee binti Aminuddin

PhD Student

E: [f.a.b.aminuddin@edu.salford.ac.uk](mailto:f.a.b.aminuddin@edu.salford.ac.uk)

T: +44 (0) 7784 79 5711

Dr. Paul Chynoweth

Senior Lecturer in Construction & Property Law

E: [p.chynoweth@salford.ac.uk](mailto:p.chynoweth@salford.ac.uk)

T: +44 (0) 7970 39 2008

I hope you will be interested in this research study and your participation will be very much appreciated. Thank you very much for your time and consideration.

Many thanks and kind regards,

Farrah Azwanee binti Aminuddin



## Appendix C: Participation Invitation Letter

[Name of participant]

[Office address]

[Date]

Dear [.....]

**Conducting a Research Entitled: The Compatibility of Dispute Resolution Mechanisms with National Culture in the Construction Industry: A Case Study of the Malaysian Adjudication Statutory Regime**

I write to you as a Doctoral candidate at the School of Built Environment (SoBE), The University of Salford, United Kingdom. At this time, I am conducting a study entitled “**The Compatibility of Dispute Resolution Mechanisms with National Culture in the Construction Industry: A Case Study of the Malaysian Adjudication Statutory Regime**”. The study is being supervised by Dr. Paul Chynoweth. This letter is to invite you to participate in the study due to your experience and expertise in the research area.

Briefly, on the rationale of the study, the role of culture is increasingly recognised as important in shaping dispute resolution. As a result, a core question for the field of dispute resolution is the degree to which the cultural values of the people within a particular society lead certain form of dispute resolution to be more or less effective in maintain social order by resolving disputes. The researcher argues that in order for a foreign originated legislation to be effectively exercised in a different local setting, some of the key enabling factors are culture and appropriate conflict management styles within a fragmented society which should be taken account for. Thus, the main aim of this study is ‘**to assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society.**

If you accept, you will be asked to involve in an in-depth face-to-face interview in order to talk about the compatibility of an adversarial dispute resolution mechanism with national culture.

Participation in the study is voluntary. The data from the interview will be kept in the strictest confidence while anonymity will be maintained. Participants can withdraw from the study at any time without prejudice.

The data collection process will be minimally disruptive to the participants’ working hours. The time of the interview can be arranged at the time of your convenience. The contribution you make towards the research will be crucial for the study and your participant would be greatly appreciated.

This study has been cleared in accordance with the ethical review guidelines and processes of the University of Salford. Once, participation is confirmed, further information on the research will be sent to you along with the participation information, an informed consent form and the interview questions will be provided in advance.

You are free to discuss this study if you have any questions, kindly contact the researcher by telephone or return by email. I look forward to hearing from you.

Yours faithfully,

Farrah Azwanee binti Aminuddin  
PhD Student  
E: f.a.b.aminuddin@edu.salford.ac.uk  
T: +44 (0) 7784 79 5711

Dr. Paul Chynoweth  
Senior Lecturer in Construction & Property Law  
E: p.chynoweth@salford.ac.uk  
T: +44 (0) 7970 39 2008

School of Built Environment (SoBE)  
University of Salford  
Salford, M5 4WT  
United Kingdom

**Appendix D: Consent Form for Interview Participants**

Title of the Study : **The Compatibility of Dispute Resolution Mechanisms with National Culture in the Construction Industry: A Case Study of the Malaysian Statutory Adjudication Regime**

Researcher’s name : **Farrah Azwane binti Aminuddin**

Supervisor : **Dr. Paul Chynoweth**

*If you agree to participate, please complete and sign the consent form as below*

- Taking Part**
- |   | Yes                      | No                       |
|---|--------------------------|--------------------------|
| • I have read and understood the project information sheet dated 24/08/2017.  | <input type="checkbox"/> | <input type="checkbox"/> |
| • I have been given the opportunity to ask questions about the project.   | <input type="checkbox"/> | <input type="checkbox"/> |
| • I agree to take part in the project. Taking part in the project will include being interviewed and audio-recorded.  | <input type="checkbox"/> | <input type="checkbox"/> |
| • I understand that my taking part is voluntary, I can withdraw from the study at any time and I do not have to give any reasons why I no longer want to take part. | <input type="checkbox"/> | <input type="checkbox"/> |

- Use of the information I provide for this project**
- |  |                          |                          |
|--|--------------------------|--------------------------|
| • I understand my personal details such as contact details will not be revealed to people outside of this study. | <input type="checkbox"/> | <input type="checkbox"/> |
| • I understand that my words may be quoted in publications, reports, web pages, and other research outputs.      | <input type="checkbox"/> | <input type="checkbox"/> |

- Anonymity**
- |   |                          |                          |
|---|--------------------------|--------------------------|
| • I would not like my real name to be used in the study | <input type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|

---

[Interviewee’s Name] Signature Date

---

Researcher: Farrah Azwane Aminuddin Signature Date

**Project contact details for further information:**

Researcher    Farrah Azwane binti Aminuddin    [f.a.b.aminuddin@edu.salford.ac.uk](mailto:f.a.b.aminuddin@edu.salford.ac.uk)  
 Supervisor    Dr. Paul Chynoweth    [p.chynoweth@salford.ac.uk](mailto:p.chynoweth@salford.ac.uk)



## Appendix E - Interview Guide

### **The Compatibility of Dispute Resolution Mechanisms with National Culture in the Construction Industry: A Case Study of the Malaysian Statutory Adjudication Regime**

I would like to invite you to participate in the interview for this doctoral research project. The aim of the research is **to assess the compatibility of an adversarial method of dispute resolution with national culture in the construction industry of the Malaysian society**. Kindly be reminded that the questions to be answered in **Malaysian construction industry scenario only**.

The interview will last about 45 to 60 minutes. With your permission, I will record the interview for the purposes of transcription which will be deleted after 3 years upon the completion of the study. The interview is **confidential**. Your identity will not be revealed without your permission and your responses will not be attributed to you. Your participation is **voluntary**. If you decide to take part, you are free to **withdraw** at any time without giving a reason.

---

#### **Section A – Interviewee’s Background**

1. How many years of professional experience do you have in the following? (Please do not overlap (double count) your answers in “a” and “b”).
  - a. Construction industry (if any): \_\_\_\_\_ years
  - b. Legal (if any): \_\_\_\_\_ years
  - c. Total (a) + (b) from above: \_\_\_\_\_ years
  
2. What is your **main** professional background?
  - Architecture/Town Planning
  - Building/Construction
  - Engineering – Civil/Structure
  - Engineering – Electrical/Mechanical
  - Engineering – Others
  - Legal
  - Management
  - Quantity Surveying
  - Others; please specify: \_\_\_\_\_
  
3. Based on the following, what is the **primary** nature of you work?
  - Construction professional e.g. architect, engineer quantity surveyor
  - Adjudicator or arbitrator or mediator
  - Solicitor
  - Contractor company
  - Sub-contractor company
  - Government or government owned- or government linked company

- Legal advisor
  - Academia
  - Others; please specify: \_\_\_\_\_
4. What is your **primary** involvement in adjudication?
- None
  - Adjudicator
  - Legal representative in adjudications
  - Legal representative in court proceedings on adjudication matters
  - Party in dispute
  - Others; please specify: \_\_\_\_\_
5. Approximately, how many **adjudications** have you involved?
- None
  - Adjudicator: \_\_\_\_\_ cases
  - Legal representative: \_\_\_\_\_ cases
  - Party in dispute: \_\_\_\_\_ cases

### **Section B – General Overview of the Adjudication Regime in Malaysia**

1. Generally, what are your views on the effectiveness of adjudication as a dispute resolution mechanism in the Malaysian construction industry?
2. At your best knowledge, what is the level of acceptance of adjudication and the enforcement of the CIPAA among the Malaysian construction players?
3. In your opinion, what are the challenges, in present or potentially in the future, associated with the current implementation of adjudication and/or the current enforcement of the CIPAA?

### **Section C – The Influence of ‘Group Attachment and Relations’ to Adjudication**

1. From your observations or experience, how would you describe the influence of group attachment and relationship between the project parties in dispute resolution?
2. From your point of view, how would you describe the impact of group attachment and relationship between parties on the initiation of adjudication as the choice of dispute resolution method in construction?

### **Section D – The Influence of ‘Authority and Equality’ to Adjudication**

1. From your observation, is superior authority exists among parties in construction project and can you describe the reality of it?

2. From your opinion, how would you elucidate the impacts of superior-subordinate relationship on dispute resolution process in construction?

### **Section E – The Influence of ‘Gender Roles and Assertiveness’ to Adjudication**

1. How would you describe the values, norms and behavior of the disputing parties in the adjudication process?
2. Based on your opinion of the above question, why do you think the disputing parties behave that way?

### **Section F – The Influence of ‘Uncertainty and Risks’ to Adjudication**

1. In your opinion, what do you think are the risks to be bear by the disputants towards many aspects as the consequences of initiating adjudication?
2. Based on your opinion of the above question, what do you think is the suitable approach to deal with disputes that match with the Malaysian national culture in construction?

### **Section G – The Compatibility of the Malaysian National Culture on the Implementation of Dispute Resolution in Construction**

1. From your experience, how would you describe the cultural values associated to dispute resolution of the Malaysians in construction?
2. What is your opinion on the compatibility of adjudication as a dispute resolution mechanism with the Malaysian national culture in construction?

----- End of questions, thank you -----

## Appendix F: Interview Transcription for Thematic Analysis

### 7.3 Theme 1: Group Aspect

T1 (1)	<i>I agree with you because you talked about a very important factor here, the relationship. Which you consider as a national culture. I also think that, you are right when you say we have this collectivistic attitude among us. Because no one wants to take accountability of anything, everything decided by board of directors or something. And this is the culture that has contributed to dispute, and when dispute has get worsen. [R11, L452-457]</i>
T1 (2)	<i>... adjudication will then become suitable, because only when the relationship has completely transparent and broken down. [R11, L507-508]</i>
T1 (3)	<i>The relationship between ... as you put it correctly, contracting parties not only restricted to construction industry but, to any contracting parties as it is commercial in nature. The relationship is the key. It's extremely important in resolving disputes. [R14, L20-22]</i>

#### 7.3.1 Interpersonal Factor

T1 (4)	<i>That is why I believe, communication is the key. How you handle them is important. We are all human, so human touch plays a role here. If you have a good rapport, matters can be talked through. If you keep arguing and grumbling, it will become difficult to improve. Don't always look for faults. [R10, L29-32]</i>
T1 (5)	<i>I believe this is also because, under such circumstances human nature is being human. It doesn't have anything to do with any nation, there is always a tendency on not wanting to admit they had done something wrong, it's always the other party that is wrong. That is how disputes propagates, that is how dispute materializes in construction industry [R12, L84-89]</i>
T1 (6)	<i>Is it suitable? It's not suitable to be placed in the situation where parties are opportunistic. Yes, its suitable if everyone is open minded and professionally want to improve ... But, really, there is nothing wrong with the process, the people, I guess will decide the usefulness of a system. Whether they can really utilize it for the better good or whether to abuse it for the good for themselves. So, I think it may be suitable, but may not be used in a correct manner. [R11, L443-449]</i>
T1 (7)	<i>And this also influenced by the people who run the company, they would have a different culture, different upbringing, different education, different experience, different personal background, and many other things. Let say if I am a non-confrontational type, I will try and solve this in a non-confrontational way. In short, it is quite heavily depending on the user. But, you have to look at the system, the playfield, and the people in there. [R13, L321-326]</i>

#### a) Values

T1 (8)	<i>... the Chinese when they do business, they're word of mouth. Meaning, what they say carries a weight. In other words, it carries honour. That is a cultural aspect... Because, the Chinese knew themselves as from very old generation, very trustworthy people. What they say is golden and it may not be in writing. But, in a modern and also economic pressure, sometimes one cannot perform, even though their words are golden, [R2, L31-39]</i>
T1 (9)	<i>The other thing is, the Chinese place a lot of relationship factor, and we called it guanxi. In doing business, this cultural aspect is very important for us. [R2, L33-35]</i>
T1 (10)	<i>In this region, especially when we are talking about being Asian, I must tell you that relationship is a very big factor! It is exactly that. It's about the relationship, because it is the big parts of our culture. I believe where I suppose that is part of up-bringing culture that we brought to our working life where deference is paid to a more senior person. [R11, L37-41]</i>
T1 (11)	<i>I don't think the act is legislated to result in relationship deterioration. But because of cultural factor, our people, such act is considered adverse. It shows that you are no longer having good will. No matter what the decision will be. Because the decision, ultimately may only favour to one side. It will break the good will between the parties. So, if the parties have a dispute, and have an open mind to resolve it, they will not embark it at the first place. [R11, L147-153]</i>
T1 (12)	<i>Although it is a private proceeding, it will already give you a bad and ill-feelings towards the other party. However, if parties have an open mind to solve the dispute, and still carry much of the relationship value in resolving the dispute, they will go for mediation. That will give medium to more flexibility and shaping their decision. It is going to be a decision that both parties are going to</i>

	<i>be happy about. [R11, L154-159]</i>
T1 (13)	<i>I think that cultural aspect (... ..) Yes, if you look from Asian culture and all there are differences in the big picture. But, when you zoom down to the construction industry, because it is a very commercial undertaking and if you work in the (construction) business line, where there is only a little profit to be made, particularly in certain types of contract. So therefore, the reaction when the cash flow is obstructed is pretty typical anywhere else in the world. [R12, L19-23]</i>

i) Parties perceptions

T1 (14)	<i>I would rather say it depends on the individual. We can't run away from disputes, no matter what is the size of the project. It will boils down to the personal characters. Some of them are very extremely claim cautious "A little bit of portion I want to claim! I want to claim!" [R1, 225-228]</i>
---------	---

ii) Face

T1 (15)	<i>One, is I think the main reason is face value, Malaysians often don't want to be seen to be the bad guy who starts the dispute resolution process. [R6, L68-69]</i>
T1 (16)	<i>I constantly remind my Project Manager, no matter how bad the situation has become, do not belittle the employer in front of the consultants. If you want to give advice, talk to them personally and discuss politely. If you hentam (criticized) them openly in front of everyone. They will hate it. Respect is important. We need to be sensitive and give face to the employer. [R10, L203-206]</i>
T1 (17)	<i>But, in Malaysia, a number of case is on final account dispute. the reasons being I think, Asian cultures doesn't really lend itself to having on one hand a dispute in adjudication and the other hand carrying on work at the site so because of that, usually they will work until it finish, and then they will commence adjudication. [R8, L35-48]</i>
T1 (18)	<i>Other cultures of other jurisdiction, disputants don't mind the parties coming in to help them negotiate and settle the dispute. But in Malaysia, somehow there is still a firm resistance in involving the third party process unless it's a last resort. [R6, L90-92]</i>
T1 (19)	<i>There is another dispute resolution process that hasn't been taken off in Malaysia that is mediation. Mediation was very well used in other jurisdiction because of the face value aspect. [R8, L88-89]</i>
T1 (20)	<i>Major players, they will definitely take more cautious approach of because their image and presence of their company in the industry is very important, and also the outcome of any adjudicator may affect them, may affect their bottom line, and may affect their company values, principles and all these. So they are more cautious on approaching adjudication. [R11, L196-200]</i>

b) Conflict situations

T1 (21)	<i>Some people might take a little less time, but ultimately if you put that constraint for too long (...) different people have different so-called breaking point, and it doesn't matter if the company is a Germanic company or Malaysian company, if you got a big strong contractor that can sustain its own cash flow then it will last a bit longer before it takes action. But, if you got a contractor that can't sustain for long, either you go bankrupt or you have to fight for your money. [R12, L13-18]</i>
T1 (22)	<i>So in Australia, the Act intends to protect the subcontractors. Why? Because they are small timers, doing only bricklaying, plastering, flooring for example. Whereas, in Malaysia "Ok, I got this project A-Z, I will sub it down from A-Z also". So, the subcontractor sometimes is also a big company. So, this is where the difference is. In fact there is one idea many years ago to consider whether the cultural aspect on whether Malaysia is suitable for CIPAA. From that perspective, because of the differences of contracting methods, Australian they don't sub it 100%, no they don't do that. [R9, L177-183]</i>

i) Local scene

T1 (23)	<i>But in Malaysia, everything is governed; everything is rule by the contract. Maybe because of the British influence and history in Malaysia. We are strictly following the British contract system. In the way, comparing back with the Chinese, when they came in Malaysia. The contract, I would say, is the least of their concern. But, the Malaysian people treating contract as the ultimate, I think that should be the way because everything should spelt out in the contract. So, they have a conflict / clash there. That's why I said the culture may play a different role in dispute resolution. Some of the Chinese investors came in become a contractor here, they suffer serious injuries because of these</i>
---------	---

	<i>perceptions and attitude toward the contract. [R3, L67-74]</i>
T1 (24)	<i>In Malaysia, the cultural of the Malaysian tends to be less adversarial compared to other countries. Even with just comparing to Singapore and Hong Kong. What I find is that the Malaysians don't like to refer their disputes to formal dispute resolution processes like arbitration or litigation and use them as the last resort. I think Malaysians by nature tend try to settle things over teh tarik (tea and coffee break), informally getting the management to sit down and to solve matters as amicably as possible. [R5, L46-51]</i>
T1 (25)	<i>What I do notice in Malaysia, when I compare it perhaps with Singapore, the nearest example. The standard of professionalism among contractors, employers and consultants (...) are generally lower than what is equivalent to Singapore. That itself has an influence in breeding dispute. [R12, L69-72]</i>
T1 (26)	<i>Malaysian cultures is a little bit different in the sense that they don't want to start the formal dispute resolution process, but once the process started, things is going to get a little bit more personal in the sense that "You sue me for this particular project, I will never want to work with you again in another project". It's just the culture. I think the Malaysians, it's a lot of faces value in the sense that "yes we can settle, but if we can't settle then we are going to evoke formal ADR, but I won't work with you again in another project".</i>
T1 (27)	<i>Here, I think our industry is still "protected"; there is a lot of "relationship" going around. So, a lot of tenders are not necessarily open. How do you select people to prequalify? Maybe you know "somebody". "Do you want to do my job? Okay, I will put you in the list". [R11, L495-498]</i>
T1 (28)	<i>In fact, there is one idea many years ago to consider whether the cultural aspect on whether Malaysia is suitable for CIPAA. [R9, L180-182]</i>
T1 (29)	<i>So, when you introduce CIPAA, we just go "let see how it goes". You know Malaysian style, right? [R9, L186-187]</i>

ii) Abroad scene

T1 (30)	<i>Then we have a lot of projects (executed) by the China, he is acting as counsel for them. And they have different cultures on looking at things. Example, once the Chinese contractors came in, they don't really look into the contracts. [R4, L61-64]</i>
T1 (31)	<i>My experience working in overseas is that, parties are quite very happy to start proceedings against their default parties the moment the disputes arise. Sure, there were talks and settlement but at the same time they have already started engaging the formal process of resolutions. That culture seems to be accepted in various jurisdictions overseas. Because it's an accepted norm for them, they don't take it personally with the sense that only you could also sue me the next day in another project together. [R6, L54-59]</i>
T1 (32)	<i>In Australia, adjudication is suitable for them because they are more in a way that to pursuing contractual rights is their natural rights. They can fight you in court but definitely they can work together later on. [R9, L166-168]</i>
T1 (33)	<i>If you want to do a comparison of for example between Malaysia and Singapore, our differences are very small. Perhaps the culture of Singapore is what they call more Westernized than the Malaysian culture. But yet, the take up and the use of adjudication in Malaysia is faster than Singapore. So, that tells you something else. [R12, L37-40]</i>
T1 (34)	<i>I have experienced when I was running a project in Singapore. It was related to Changi Airport. You know airport project right, where the airplane is landing; you can only work at night, in fact only after midnight, 12am to 5am. The contractor that we were contracting at that time has two packages of work. One is already finished, in fact finished in arbitration, while we are still doing phase two. So, I got this unique experience in the morning, we are sitting at the Singapore international arbitration centre, having arbitration with the project manager and the contractor. And after the arbitration, all of us go to dinner and go to site together and do the job there, although in the morning we are sitting in the arbitration against each other, but in the evening we do the work on site. And it was fine. Because as a professional, you are relying on the dispute resolution process to find a solution. It's nothing personal, really. It's just to find a solution, whatever it may be, let it be. [R12, 130-140]</i>
T1 (35)	<i>In this region, although we are almost similar. But the working culture in Singapore is considered as developed country. And we are still considered as a developing country. So, they have had more exposure with foreigners. And they are stricter in adhering to their contracts. Because of that, they have brought their level of industry one level up or maybe even more than that. So, they are able to then administer contract properly, more properly I would say. And if they have dispute, adjudication suits them well because they are very (...) objective about it, its not personal. They will be like "okay look, we have a dispute, lets settled it" "okay, lets see if the third party can agree to either of us". So they are taking a professional approach, in that sense, I think mainly because they are more</i>

exposed to foreign contractors. [R11, L485-495]

### 7.3.2 Intergroup Relations

T1 (36)	<i>If you have a good relationship between parties, the chances of and likelihood of the disputes to arise between the parties is less. So, that is actually a very important factor. And where you find disputes coming up, there will be a direct co-relation with the decrease in friendliness or conversations, which would have decreased. Where parties find themselves to be in the position where they becoming more and more adverse or their communication has been strained, then you will see the likelihood of dispute is coming. So, it's important! It's extremely important! [R14, L22-28]</i>
T1 (37)	<i>The fundamental to a success relationship is win-win. If we can't achieve this, it will be painful to work together. [R10, L61-62]</i>
T1 (38)	<i>You need to constantly build up the reputation and relationship with one another. Treat them meals. kam cing (sentimental feelings) is important. Because the demand is getting high and the market is saturated already. In Malaysia, when you have the relationship, it is easier to get help or to lobby for jobs. [R10, L79-82]</i>
T1 (39)	<i>Relationship and communication are really the keys of everything. A lot of issues can be resolved you have these two skill. If you have a problem and ask for a help, people will help you based on friendly party basis. Without a good relationship with each other, no matter how stable and strong your company is be it financially or technicality, people will not bother if you are not close with them. Only when they are able to accept you then you can sit down and discuss together. [R10, L13-18]</i>
T1 (40)	<i>... the relationship become more difficult to maintain when it hits this process. That is why the decision to embark in adjudication to me is already at the high point of their dispute episode coming on from a very long troubling matter due to this "strange relationship" throughout the project. [R11, L236-239]</i>
T1 (41)	<i>... how parties fall into disputes is because of this. Their poor contracts administration - that is why they go into disputes. After signing a poorly drafted contract, and you run the contract, and even worse, conducted yourself in a way that nobody what knows on what actually has been agree or disagree, they are no proper records because of this "relationship".</i>

#### a) Intergroup differences

T1 (42)	<i>Because, for many of them, when it is a one-off transaction, then its much more difficult to resolve the dispute in an informal way. Because, I may not see the prospect of continuing the relationship, I don't know whether I'll get your next project. Because you tell me you need to go through your internal process of open tender. So how am I going to fight with that (other competitors). What kind of assurance I will get that if I give up 2 million for his project, I can recruit that for another project in. You cannot even give me that assurance and it makes me hesitant to commit. [R7, L75-83]</i>
T1 (43)	<i>By its nature, it is adversarial, definitely. That means, it is adversarial because the right in both of the parties together with the obligations of the parties are in conflict. That is why it has to be adversarial. [R9, L83-85]</i>
T1 (44)	<i>Major players, they will definitely take more cautious approach of because their image and presence of their company in the industry is very important, and also the outcome of any adjudicator may affect them, may affect their bottom line, may affect their company principles and all these. So they are more cautious on approaching adjudication. [R11, L196-200]</i>
T1 (45)	<i>They will have due diligence to study whether indeed they have a good case. They might not even embark into this process if they don't think they have even the chances of even 50% of winning. Because of course, it will not worthy of pursuing, it will be right, it will be partly right. But just imagine, you spend a long time, a lot of money, in this process, and that may divert your resources to a more productive work and it may be consider also, because of their wider interest. They may consider this particular dispute do not have an overriding interest over other interests. [R11, 200-207]</i>
T1 (46)	<i>Whereas in a small company, they have no other interest there is only one interest, survival. This could be one of the 5 jobs they have and they have to go for it because they have to compel to that. [R11, L207-210]</i>
T1 (47)	<i>... usually they are not in the industry for a long term, they don't do big jobs, they only do for small trade jobs. So, for them, it's a do or die. If I don't do this, my company will be just liquidated. So they have no choice and they have limited long term strategy being in this industry or the</i>

	<i>competition is too stiff for them. So, they embarked into this process because all other considerations do not matter anymore, whether it preserve relationship or not. Survival of the company is more important. So this is the typical situation for a small company. [R11, L182-189]</i>
--	---

b) Varying group goals

T1 (48)	<i>Well, relationship is important, but cash flow is more important. If your relationship is good but you have no money, where does the relationship go? [R2, L23-25]</i>
T1 (49)	<i>So, if you say generating the neutral trust and all these things, like I said this always have the value to it. When the value is small, the contractor doesn't mind losing it. Of course, if you are talking about we having a long term established relationship with a developer who have a lot of project, that may differs the mind set a little bit. But, that mind set has price. There is only so much that I can bear, there's only so much risk I can take, but ultimately somebody has to settle the bill. So, when your margin is stiff when the times and the market are not doing very well, then I think my tolerance level, from the contractor's point of view, will certainly be much lower. [R7, L98-105]</i>
T1 (50)	<i>The bottom normally be the subcontractors, like those labours in subcontractor or suppliers also involved and also the longkang man or whatever. At that level, they only concentrate on "you pay me", so anything extra more concern than that, normally they won't bother. (For example) this month I got 100 workers, so long as the wages concern, you pay me, I pay the wages, plus my profit, then I will be happy on it. If you don't pay the wages, they will stop the work and walk out from the site. That is a cultural on the lower tier. [R1, L61-67]</i>

i) Monetary driven

T1 (51)	<i>Because the market has become more challenging and complex day by day, there is not so much of the issue of trust and friendship anymore but profit driven. Under such situation, the trust factor may not be as strong as it used to be before. [R10, L7-9]</i>
T1 (52)	<i>... because it is a very profit driven and undertakings, when there is a constrained on the cash flow, something that is holding back the money, the reaction is pretty much the same. It doesn't matter what is your background, some people might take it longer before they decide to take action. [R12, L10-13]</i>
T1 (53)	<i>Since majority of the decision made is fully profit-driven, sometimes I feel funny when I met clients who continually met you just to discuss on the contract clauses and conditions of agreement alone that make you feel that they are not trusting you with the work. We will question, if you do not trust, why do you appoint us? Trust is important in sort of relationship. [R10, L41-44]</i>
T1 (54)	<i>Back then; this wasn't such a big problem in the industry. Number one, the industry was less competitive. So, what it means is that, at that time, for example like if you bid for a job, and you can have a very healthy profit margin, so even if you receive less money, its still okay. You don't earn as much, but you are not losing your pants. But, because the industry has grown, more players comes in it has become more competitive, but the projects volume did not grow in the same speed as the players. So, the market is becoming more competitive. Therefore, margin has been cut now we are talking about single digit profit margin for most of the players. A lot of players will not be able to survive unless they really get the money that they deserve. [R7, L18-26]</i>

ii) Relationship driven

T1 (55)	<i>The fundamental thing in creating a working relationship is win-win. If we can't reach this, do not bother to talk about the future. [R10, L161-162]</i>
T1 (56)	<i>... parties enter into such relationship that during the commencement of the project with good spirit and good will for corporation. That is always the case. It doesn't matter anywhere in the world. [R12, L65-687]</i>
T1 (57)	<i>Yes, misunderstanding is inevitable. But, I choose to see it in a positive light for the sake of the project. Don't take all conflicts personally. At the end of the day, we still shake hands and when we look at the completed project. We will feel satisfied. [R10, L169-171]</i>
T1 (58)	<i>I never face any problem with my client. If you conduct your obligations properly, know your limits and rights. People will not take advantage of you. If you understand your contract well, they will respect you. [R10, L164-166]</i>
T1 (59)	<i>I constantly remind my Project Manager, no matter how bad the situation has become, do not belittle the client in front of the consultants. If you want to give advice, talk to them personally and</i>



	<i>discuss politely. If you hentam (criticize) them openly in front of everyone. They will hate it. Respect is important. We need to be sensitive and give face to the client. [R10, L203-206]</i>
T1 (60)	<i>... as a major player, we are talking about people who have been in the industry for more than 20 to 30 years and are serious to be in this industry, they will consider that any disputes can be resolved, but not in adjudication, there are other ways of commercial settlement, ..... they will think for a more important factor other than the dispute of what we have now such as the long term relationship with the disputant, where both parties usually then consider place a lot of importance to their relationship because they need it for the long term. [R11, L167-174]</i>
T1 (61)	<i>... the Chinese place a lot of this relationship, we called it quanxi. In doing business, this cultural aspect is very important for them. Because, the Chinese knew themselves as from very old generation, very trustworthy people. [R2, L33-35]</i>

c) Positive intergroup relations

T1 (62)	<i>What I observe is, in Malaysia when I look at my former bosses, they used to have a strong trust because they view the relationship more to like friendship or like family. But as construction industry gets more complicated, they no longer want to operate in that way, it turns into a big corporation that is run by a group of stakeholders and CEOs. [R10, L1-4]</i>
T1 (63)	<i>If you have a good relationship between parties, the chances of and likelihood of the disputes to arise between the parties is less. So, that is actually a very important factor. And where you find disputes coming up, there will be a direct co-relation with the decrease in friendliness or conversations, which would have decreased. [R14, L22-26]</i>
T1 (64)	<i>Friendliness is the ability to communicate. Not necessarily the friendliness means ability to have a cup of coffee together or have lunch together or whatever. Not that friendliness. But, is the ability to sit down across the table and communicate freely and the ability of the other party to receive this communication and both parties have a mutual trust as well as respect for each other. [R14, L32-36]</i>
T1 (65)	<i>It depends on, number one, the bond of business and friendship. If, the contracting parties had been contracting on verbal agreement and based on what has been honour over the time, that bondage of accepting verbal agreement, it's still there. [R2, L54-56]</i>

i) Communication

T1 (66)	<i>That is why I believe, communication is the key. How you handle them is important. We are all human, so human touch plays a role here. If you have a good rapport matters can be talked through. If you keep arguing and grumbling, it will become difficult to improve. Don't always look for faults. [R10, L29-32]</i>
T1 (67)	<i>Relationship and communication are really the keys of everything. A lot of issues can be resolved if you have these two skill. If you have a problem and ask for a help, people will help you based on friendly party basis. Without a good relationship with each other, no matter how stable and strong your company is be it financially or technicality, people will not bother if you are not close with them. Only when they are able to accept you then you can sit down and discuss together. [R10, L13-18]</i>
T1 (68)	<i>It is important that I try to bridge the gap by mediating my team with the client. I will talk to the client on a separate occasion and try to reach a solution together from a more personal and informal level. Communication is important to be clear and directed to the right person, people with authority of decision making. [R10, L133-136]</i>
T1 (69)	<i>On a worse scenario, they can't talk. They really cannot communicate, and the communication is to be the barrier for this. So that is when the lawyers will communicate, because the parties themselves cannot see eyes to eyes. That usually happened when in arbitration. Right, when you have gone as deep as in arbitration. Its very difficult, very seldom the parties will talk during the arbitration process. Unless one party is pushed against the wall, he needs to actually negotiate, then the negotiation would be conducted with the presence and assistance of counsels. Not a direct communication anymore. [R14, L83-89]</i>

ii) Compromising

T1 (70)	<i>... as a major player, we are talking about people who have been in the industry for more than 20 to 30 years and are serious to be in this industry, they will consider that any disputes can be resolved,</i>
---------	--

	<i>but not in adjudication, there are other ways of commercial settlement, somehow they will think for a more important factor other than the dispute of what we have now such as the long term relationship with the disputant, where both parties usually then consider place a lot of importance to their relationship because they need it for the long term. [R11, L167-174]</i>
T1 (71)	<i>Strictly speaking although schedule is very important, we need to compromise sometimes. When working, we need to support each other as a team. As a contractor, I will support my client and my supplier will support me. [R10, L75-77]</i>
T1 (72)	<i>The client can be honest to tell us what his problem so that we can discuss on some contingency plan. This level of trust is hard to achieve. We will appreciate what they have done for us during difficult time. So, I will try to compromise this time. It's always both sides need to play roles. [R10, L64-67]</i>
T1 (73)	<i>Sometimes, you need to understand and compromise. You cannot be too hard and harsh on the client as well. You cannot say "Hey, your payment hasn't come in yet. I will stop working!" When the client sees that you are threatening, they also will feel scared to give you job. Then relationship becomes sour. [R10, L22-25]</i>
T1 (74)	<i>It used to be the situation where, there is a dispute, we sit down to (...) (allow) both parties able to reach compromise in many ways. "You take a bit less, I pay a little bit more. Or, I tell you what, I still have 3 more jobs coming up, why don't I just give that to you so you make your money during the next three jobs. This job, all of us will suffer some loses, why don't we just walk away to maintain the relationship". Contractors a lot of time they are, wary of their own reputation, they don't want to be seen as too harsh. Otherwise, they may have difficulties in getting jobs. [R7, L54-60]</i>

iii) Trust

T1 (75)	<i>The client can be honest to tell us what his problem so that we can discuss on some contingency plan. This level of trust is hard to achieve. We will appreciate what they have done for us during difficult time. So, I will try to compromise this time. It's always both sides need to play roles. [R10, L64-67]</i>
T1 (76)	<i>Since majority of the decision made is fully profit-driven, sometimes I feel funny when I met clients who continually met you just to discuss on the contract clauses and conditions of agreement alone that make you feel that they are not trusting you with the work. We will question, if you do not trust, why do you appoint us? Trust is important in sort of relationship. Clients still do doubt the contractors. It is normal traditional perception they have and it still going on in the industry. [R10, L41-48]</i>
T1 (77)	<i>The contractor does not trust the clients too. They often feel scared that the client doesn't pay them. For example, normally the progress payment is once a month, right? But sometimes, the client will pay only half of it or 2 or 3 months later. Since the contractors are very tight on cash flow, they have no choice then to slow down their work. [R10, L50-53]</i>
T1 (78)	<i>Because the market has become more challenging and complex day by day, there is not so much of the issue of trust and friendship anymore but profit driven. Under such situation, the trust factor may not be as strong as it used to be before. [R10, L7-9]</i>
T1 (79)	<i>Where the trust factor has gone away, the communication drops, and when that communication drops, than the disputes comes in. Because in order to enforce a parties' trust or parties' claims, he would then need to find a third party solution which can be either by the way of mediation, adjudication or arbitration. Just to convince that initial party's submission "Look my claim is worth 1 million, and it is rightful to make sure you pay me that". So that becomes the entire essence. [R14, L36-41]</i>
T1 (80)	<i>So, if you say generating the neutral trust and all these things, like I said this always have the value to it. When the value is small, the contractor doesn't mind losing it. Of course, if you are talking about we having a long term established relationship with a developer who have a lot of project, that may differs the mind set a little bit. But, that mind set has price. There is only so much that I can bear, there's only so much risk I can take, but ultimately somebody has to settle the bill. So, when your margin is stiff when the times and the market are not doing very well, then I think my tolerance level, from the contractor's point of view, will certainly be much lower. [R7, L98-105]</i>

7.3.3 Intragroup Dynamics

T1 (81)	<i>But, when you zoom down to the construction industry, because it's a very commercial undertakings and if you work in the (construction) business line, there is a little profit to be made, particularly in</i>
---------	--

	<i>certain type of contract. So therefore, the reaction when the cash flow is obstructed is pretty typical. [R12, L20-23]</i>
--	---

a) *Prioritizing in-group goal*

T1 (82)	<i>So rather than being stuck in that position, many of them do not want to go the process of being out of money, even though he knows very well that he will be out of work with the opposing party. That is the risk that is always happen. I think survival for the subcontractors is more important. [R2, 116-119]</i>
T1 (83)	<i>If I'm the subcontractor and I'm facing this problem, and you don't forget the sub-sub-contractor also can take action again sub-contractor for adjudication. So they will be multiple action if you don't start. Because, if you take action and you show to your sub-sub-contractor that you take action, at least you stop one action. [R2, L120-123]</i>
T1 (84)	<i>... there are main contractors who just work with all type of subcontractors, and in those instances, you do see the subcontractors commencing proceedings against main contractors. It is actually those sort of adjudication I think which are common in Malaysia as between the subcontractor and the main contractor. The subcontractor normally commencing action against the main contractor whom he doesn't commonly work with on a regular basis. [R8, L18-22]</i>
T1 (85)	<i>Back then; this wasn't such a big problem in the industry. Number one, the industry was less competitive. So, what it means is that, at that time, for example like if you bid for a job, and you can have a very healthy profit margin, so even if you receive less money, it's still okay. You don't earn as much, but you are not losing your pants. But, because the industry has grown, more players comes in it has become more competitive, but the projects volume did not grow in the same speed as the players. So, the market is becoming more competitive. Therefore, margin has been cut now we are talking about single digit profit margin for most of the players. A lot of players will not be able to survive unless they really get the money that they deserve. [R7, L18-26]</i>
T1 (86)	<i>When that becomes the norm of the industry, that is no longer a question of choice, because if you don't sign this type of contract, you will be out of business, all together. So, you really have no choice unless to playing in the same arena with those kind of terms. [R7, L37-40]</i>
T1 (87)	<i>I think once they left the site and payment is not forthcoming (...) firstly they have already held this cash flow problem during the work because the money has not been coming in. So, I suppose (during) post-completion they are left with little choice but need to commence some sort of proceedings to recover the debt due to them. [R8, L46-49]</i>
T1 (88)	<i>... usually they are not in the industry for a long term, they don't do big jobs, they only do for small trade jobs. So, for them, it's a do or die. If I don't do this, my company will be just liquidated. So they have no choice and they have limited long term strategy being in this industry or the competition is too stiff for them. So, they embarked into this process because all other considerations do not matter anymore, whether it preserve relationship or not. Survival of the company is more important. [R11, L182-189]</i>
T1 (89)	<i>But it's the big guy that is make it tough. So, this is another way of the smaller guys to get payment or get at least something. Because at the end of the day, its all about money. If you pay me 50% also I will be happy, I survive and I will carry on, I can fight in the next battle to do another job, its okay, I don't have much profit, but its okay, at least there is a lifeline. [R13, L153-157]</i>

b) *Changing operational strategies*

T1 (90)	<i>... the cultural aspect is there, but it is slowly eroding. Everything now should be in writing. But those days when we said "I will honour this". It's through verbal expression. I suppose it's a generation thing. Because of the modernization, and various aspect of economic influences, your words are sometimes not treated to be honourable. [R2, L40-44]</i>
T1 (91)	<i>So nowadays we already release many standard form of contract, we want everything to be clear, we want everything to be in writing. Say, when you go to arbitration or adjudication, we want to know what form of contract you are contracting on. It doesn't matter what you have said earlier. Unless, you can prove the evidence. But everything nowadays are in the square and corner of the form. So, the culture aspect in construction is something disappearing very quickly. [R2, L44-49]</i>
T1 (92)	<i>For example, if I want to make a contract with you, will you allow me to say "we are good friends, we don't have to do in writings I will honour what I say", and behind you there is still element of doubt on what you say you may be forgotten or what you say may not be very specific and clear. You want it to be in writing and all the specificity will be explicit. Rather than you and me verbally transact and languages can be very loose and also misinterpreted as well. What you mean may be</i>

	<i>different from what the other party understood. To the extent, sometimes whatever that is in writing may also be misinterpreted. So, let alone the verbal transaction or verbal agreement. So, its quickly disappearing I would say. [R2, L62-69]</i>
T1 (93)	<i>What I observe is, in Malaysia when I look at my former bosses, they used to have a strong trust because they view the relationship more to like friendship or like family. But as construction industry gets more complicated, they no longer want to operate in that way, it turns into a big corporation that is run by a group of stakeholders and CEOs. [R10, L1-4]</i>
T1 (94)	<i>It depends on, number one, the bond of business and friendship. If, the contracting parties had been contracting on verbal agreement and based on what has been honour over the time, that bondage of accepting verbal agreement, it's still there. But, the younger generations are no longer living by this standard... The generations who believe in this culture (honouring verbal words) are of the very senior ages. And soon, they are going go off, so the young ones are going come in and no longer going accept this cultural thing. It's very difficult to nurture this. [R2, L54-61]</i>
T1 (95)	<i>... traditionally in Malaysia, the relationship between employers and consultants like architect and engineer and qs is very close relationship, and I rarely saw the consultants commencing proceedings against the employer. But that has now change when adjudication comes in where you do see consultants quite regularly commencing adjudication against the employer. So, they are willing to engage. But that is something suddenly we did not see before. [R15, L24-29]</i>
T1 (96)	<i>Before that right, Malaysian contractors are not claim cautious. After north south highway, they became aware on the importance of contract administration and the awareness to their contractual entitlements, their right. For example, last time ok, the consultant seems to be the king on site you know. The architect says "You do this!" "Ah, okay I will do, thank you" "You do that!" "Okay". But now, if the architect says "Do this" the contractor will say "Please issue me an instruction". So, now the mind-set has totally changed. Since then, the whole thing become progressively more and more complicated! Therefore, Malaysian contractors now are more claims aware. More and more cautious about their contractual right. [R9, L34-44]</i>
T1 (97)	<i>So, the whole construction industry is changing to a way of more professional. And also, I'm thinking that the education level is increasing. Last time, the contractor is just a labour. They just work. Now, contractors they have their own professionals. They have their own lawyers, they have their own engineers, quantity surveyors. And the way the contractor doing it is much more professional compared to last time. [R9, L48-52]</i>

## 7.4 Theme 2: Conflict Management

### 7.4.1 Aggressive

T2 (1)	<i>Sometimes parties aggrieved because they are upset because of their rejected claim or sometimes he feels disrespected. [R2, R165-166]</i>
T2 (2)	<i>Therefore, the anger of the employers will start building up and he will start saying that "look, this is not actually a genuine claim, we have told this guy before. But he still refuses; this guy is a stubborn contractor. He is not a contractor that we would want to work again as a partner". So, for that started to happen. So, the longer the settlement process take into place be it via adjudication or arbitration, the stronger these negative feelings will fortify in parts of mind of the parties. [R14, L60-65]</i>
T2 (3)	<i>... obviously the other party is going to have a challenging job defending the claim. So, the other side then, becomes very defensive, because it will be clear by then, that it has a lot of weaknesses in their case. So, the atmosphere is volatile, going from accusative to defensive to aggressive. Sometimes, the party will just go all out, there's nothing to hide anymore, so the party become aggressive because you need to assert your right but you don't really have any facts to support your case. [R11, L228-235]</i>
T2 (4)	<i>You have to understand adjudication procedure. Adjudication I would say is adversarial because the procedure's nature resembles as litigation as the parties need to put up their case within time given. [R3, L65-67]</i>
T2 (5)	<i>Whereas, in adjudication, it is similar to arbitration, you will call independent third party, the adjudicator to make a decision, and this decision is binding. The different is one is temporary and one is permanent, that's all. It is adversarial in the nature of that way. On top of that, if you look at our CIPAA, it is adversarial system, but at the same time, it allows the adjudicator to look for the fact himself, it means it is open to inquisitorial method. But party is becoming competitive to win their arguments. [R9, L78-83]</i>
T2 (6)	<i>... not to say the adjudication system itself is source of the adversarial. It's actually the people that cause trouble. [R12, L142-144]</i>

T2 (7)	<i>During the claim negotiation, it depends on the person behind the claim. So, if the person handling the claim, they already have the prejudice mind block “I don’t care, I want to sue you. I will see you in court” then, no need to talk already is it? [R1, L252-253]</i>
T2 (8)	<i>Based on what indicated earlier, usually when it comes to adjudication, parties tend to switch on their adversarial mode, very defensive and a little bit more aggressive and they are less and minimal to discussing the possible settlement. This is to say that they don’t sometimes try, but they don’t really put a lot of effort because of the face value as such. So, I find the Malaysians to be a bit more defensive and aggressive when they started the formal process of adjudication process. [R6, L135-141]</i>
T2 (9)	<i>When its adversarial you have to call for a third party to decide for you, for an independent decision. Not like mediation, in mediation, if I don’t like it I will walk out. Mediation I (the party) has a control on the outcome. I can agree to it I can say you go to hell I don’t want it. I can terminate the whole thing. [R9, L69-77]</i>
T2 (10)	<i>I would say that, taking decision to go to adjudication is a very high road. You are prepared to cut ties and get blacklisted or whatever. The relationship, I think would obviously become adversarial unless the party has a very open minded to say that they agree that they have a disagreement that needs a third party to decide independently for them. But, it is very uncommon! Most parties become very aggressive ... the relationship will start to become sour. [R11, L213-218]</i>
T2 (11)	<i>... we have a discrimination here, then you impose a law here to stop or prevent this discrimination, but sometimes, it becomes the other way, it over-corrects it. It becomes the other way discrimination. So, in this case, for me this analogy, yes it was very unbalanced in the beginning, and then CIPAA came in, but the whole thing become overcorrected, and then it has now become rather than putting people back on same plank. It has now tilted the whole field to the claimant. And given extra ordinary power or opportunities to exact a “revenge” on what they think “Oh these were the bullies in the past, now it’s my time! I’m going to turn the table on them!”. Then, they have been given this idea for the parties to think that “Ahhh, don’t worry, nobody can bully me now”. But that actually is actually bad for the industry. Because it gives people the idea that “with nothing, you still can get something”. So, it doesn’t encourage the industry as a whole to improve the practitioners to properly draft a contract, properly maintain the records, diligently administer the contracts, professionally manage conflict, conduct themselves professionally, clarify ambiguities, execute your obligations. [R11, L429-444]</i>
T2 (12)	<i>I have heard stories that lawyers have been telling the clients don’t waste time with adjudication because of its temporary finality. “I want a final decision. If I win, so what? The other side might still have to appeal, and it will go on and on and on. So, why waste your time? Why waste your money? Let’s just go straight to the court.” [R13, L109-113]</i>

a) Strong assertion of right

T2 (13)	<i>So, once the party has established a chance that “I think I may have a real good chance based on the facts now”, obviously the other party is going to have a challenging job defending the claim. So, the other side then, becomes very defensive, because it will be clear by then, that it has a lot of weaknesses in their case. So, the atmosphere is volatile, going from accusative to defensive to aggressive. Sometimes, the party will just go all out, there’s nothing to hide anymore, so the party become aggressive because you need to assert your right but you don’t really have any facts to support your case. [R11, L227-235]</i>
---------	--

b) Emotional

T2 (14)	<i>The employer will feel that he has been violated by this one particular contractor and obviously emotions and ego step into place. Therefore, the anger of the employers will start building up and he will start saying that “look, this is not actually a genuine claim, we have told this guy before. But he still refuses, this guy is a stubborn contractor. He is not a contractor that we would want to work again as a partner”. So, for that started to happen. So the longer the settlement process take into place be it via adjudication or arbitration, the stronger these negative feelings will fortify in parts of mind of the parties. [R14, L58-65]</i>
T2 (15)	<i>Sometimes, you need to understand and compromise. You cannot be too hard and harsh on the client as well. You cannot say “Hey, your payment hasn’t come in yet. I will stop working!” When the client sees that you are threatening, they also will feel scared to give you job. Then relationship becomes sour. [R10, L22-25]</i>

c) *Opportunism*

T2 (16)	<i>... the perception of the opportunistic attitudes of the claimants is a great challenge. It's only that way because they are thinking adjudication is "softer" than arbitration and litigation, so we are going in anyway. Because, they are going to get something out it no matter what, half of it, it's okay to them! 25% is also okay! So, what happened is they start to put huge claim, but nothing is between the value, nothing! But, when it comes to the bottom line at the sum, you see so many zeros at the back! If the arbitrator cut a few zero, they will still get something, so let's put a bigger claim! They put more zero! But then if they get to cut a few zeros, they are still not entitled to that amount! But still, they get something!! [R11, L401-411]</i>
T2 (17)	<i>But these cases then becoming a merriment cases when they see the result of this and they will go "Oh look look, there is a good chance (of winning)". If you look at the statistic at the KLRCA. The success rate is so high! So, it encourages anybody who don't even have half of the chance not even less than that percent and they will go in, you know. Because what is it? I am filling for 2 million. 2 million is a big money for me, and I only have to spend for some number of days, a little bit more money, why not take chance?! Why not?! Yeah? I mean never mind about this good will, because I am a small company so I've got everything to lose already. I don't need this relationship thing anymore, right. So, I will take the chance. [R11, L373-383]</i>
T2 (18)	<i>... this is the challenges here, the opportunistic attitude that a lot of cases are being notified to be taken into place here. And, there aren't enough capable adjudicators to look at these issues properly, to give a fair view to produce a competent decision. So, I think this is real challenge facing CIPAA among our construction so called culture, presently. [R11, 367-371]</i>

7.4.2 *Passive*

a) *Give in*

T2 (19)	<i>When economy is bad and not many jobs laying around, you have no choice. The contractor will have to kow tow (bow their head) to the client and obey all the conditions. [R10, L193-194]</i>
T2 (20)	<i>And when the dispute actually then become clear and they needed to go for a dispute resolution process, owing to obviously the corporate decision, the corporate scenario is unique where you need to hit the bottom line and if it's not, it has to be a commercial decision. Therefore, the relationship factor gives way to commercialism. [R11, L80-85]</i>
T2 (21)	<i>Again, it depends on which level you are referring to. Again, if you are referring to the lower tier, a lot of times when they want to initiate CIPAA claims or whatever claims, they will found themselves hand tied. Because of that, they may let go. If they let go then, it will defeat the entire CIPAA as an adjudication process. [R1, L120-123]</i>
T2 (22)	<i>The lower tier is going to swallow their pride and let go. So, a lot of clients are taking advantages of these. So, whatever you are claiming extra, I will pay you later, that kind of stupid reasons. But, again, if on the client side, we shouldn't take this kind of advantage. You must negotiate. Face the claim directly, don't hide yourself away from the claim. [R1, L209-213]</i>
T2 (23)	<i>In some instances, when the decision is made, we will issue termination letter. Sometimes these contractors have political connections and they will go to appeal to ministers. So, when this happens, we have to pull back the termination. [R10, L36-38]</i>

b) *Avoidance*

T2 (24)	<i>If I'm in a lower tier, if I can avoid a claim, I will avoid. [R1, L90-91]</i>
T2 (25)	<i>... you cannot escape from a claim. When you have a claim, face it, manage it, get the parties to sit and discuss on the table. Rather than straight away submit to adjudication or arbitration. Somehow rather than not, they must have a solution on it. [R1, L140-143]</i>

7.4.3 *Solution-oriented*

a) *Negotiation*

T2 (26)	<i>I constantly remind my Project Manager, no matter how bad the situation has become, do not belittle the client in front of the consultants. If you want to give advice, talk to them personally and discuss politely. If you hentam (openly criticise) them openly in front of everyone. They will hate it. Respect is important. We need to be sensitive and give face to the client. [R10, L203-206]</i>
---------	---

T2 (27)	<i>What I find is that the Malaysians don't like to refer their disputes to formal dispute resolution processes like arbitration or litigation and use them as the last resort. I think Malaysians by nature tend try to settle things over teh tarik (tea and coffee break), informally getting the management to sit down and to solve matters as amicably as possible. [R6, L47-51]</i>
T2 (28)	<i>In dealing with a difficult Project Manager, if I cannot deal with him, I will go straight to his boss. I tell him if anything happens, my pocket and your pocket is affected by this. Other people will get affected too. Project Manager is just an employee. With the evidence I showed you, better rectify it before I keep claiming you for the mistakes. [R10, L197-200]</i>
T2 (29)	<i>That is why I believe, communication is the key. How you handle them is important. We are all human, so human touch plays a role here. If you have a good rapport matters can be talked through. If you keep arguing and grumbling, it will become difficult to improve. Don't always look for faults. [R10, L29-32]</i>

b) Mediation

T2 (30)	<i>Depending on the capability of the contractor the sum can be as high as 20 million. They would let it to accumulate to 20 million to finally say "Enough is enough I can't take it anymore". That is a big amount of money! And to wait two years for that 20 million amount of money shows a level of patience. So, how come our society can maintain that level of patience? Still want to settle it without bringing the third party and still wanting to have that negotiation. It's only when it really stretching and they can't stretch it anymore that is when they said "Look, I need a third-party help". [R14, L180-186]</i>
T2 (31)	<i>However, how I would say is that, if parties have open minded to solve the dispute, and still carry much of the relationship value in resolving the dispute, they will go for mediation. That will give medium to more flexibility and shaping their decision. It is going to be a decision that both parties are going to be happy about. [R11, L155-159]</i>
T2 (32)	<i>There is another dispute resolution process that hasn't been taken off in Malaysia that is mediation. [R6, L88-89]</i>
T2 (33)	<i>So, if you asked me whether other method is suitable or not right. I'm not too sure. I think the definitive style is suitable. Mediation, I have no statistic. I am a mediator myself. So far, I have mediated 3 cases, but let me tell you, all failed! Maybe I'm a lousy mediator I don't know. But I can tell you those three times, none of those 3 cases succeeded with the decision. That means they still go for adjudication and arbitration. [R9, L191-195]</i>
T2 (34)	<i>One factor I think because the difference is too great. They themselves have done a lot of talking and negotiation, but still cannot resolve. [R9, L196-197]</i>
T2 (35)	<i>If the differences in opinion are too big gap to reach, obviously you won't be able to reach for an agreement even though you try very hard to mediate or negotiate to settle. [R2, L74-76]</i>

#### 7.4.4 Conflict Strategies

a) Conflict handling technique

T2 (36)	<i>So, number one, avoid conflict, prevent it, deal it before it get into dispute. So that is the picture of dispute resolution. That is why we have our meeting like Dispute Avoidance Practice Committee. [R2, L203-205]</i>
T5 (37)	<i>... you cannot escape from a claim. When you have a claim, face it, manage it, get the parties to sit and discuss on the table. Rather than straight away submit to adjudication or arbitration. Somehow rather than not, they must have a solution on it. [R1, L140-143]</i>
T5 (38)	<i>So this is the problem, why can't you face it (the claim) bring it on the table and get the parties to sit down and look at it whether it's a genuine claim or not. So, if it's really not a genuine claim, then that fella is really a claim minded kind of person. You got to tell them "look, this claim is not genuine, if you want to go, go ahead with it, but I'm telling you it's not going to work". [R1, L239-242]</i>

b) Dispute settlement

T5 (39)	<i>It is still required (CIPAA). But, does that mean that by having CIPAA, our society or culture has lost its initial culture of negotiating, meetings in a face-to-face manner? I think no. That practice remains the same. [R14, L175-177]</i>
---------	---

T5 (40)	<i>... acknowledging the fact that adjudication itself is adverse, I think large number of contractors do try to make the adjudication itself less hostile. So far, in many instances, the adjudication decision is not strictly enforced against the other party. Instead, it is used as a basis to negotiate and settle the matter. [R8, L49-53]</i>
T5 (41)	<i>... the edge of hostility is taken off of it. Because parties still try to negotiate and settle it. So, for example if you have adjudication decision ordering the employer to pay the main contractor 1 million ringgit, often there will be further negotiation for that amount being paid by instalment or a lesser sum being paid out or something like that. That happened quite frequently. [R8, L54-58]</i>
T5 (42)	<i>... they know themselves that whoever they are talking too is not the decision maker, you might never even ever see the MD, so by escalating the matter, there is a hope that the top management will step in and the dispute can still be resolved. Lots of the times, this is the reason why actions are commenced. Initially not thinking to go all the way, but to escalate it. [R12, L113-117]</i>
T5 (43)	<i>I think some smart contractors will use adjudication as a process not to actually complete it, but as a mean to reopen the opportunity to negotiate. And they will get back to the table to negotiate and try to close that particular issue without even kind of invoking the adjudication notice. So, that is also happening, but that data has not been captured anywhere else. That is definitely happening because I have got with us one particular contractor where he brings the claim and that we have respond to it. But, instead of going on with the adjudication notice, he call us and “Can we sit down and have a conversation”. [R14, L68-75]</i>

## 7.5 Theme 3: Hierarchy and Power

T3 (1)	<i>If you are a developer and maybe as a listed company, you are answerable to the board of directors and the board in turn has to answer to the shareholder. The shareholder will answer to the shareholder. The shareholders normally did not care what happen to the on-site work. They only care about getting their dividend and share prices. They only care about the profit of the work, this is why some people pursue more profit rather than improving the quality of the work. [R10, L116-121]</i>
--------	--

### 7.5.1 Superior’s Authority

T3 (2)	<i>Because once a decision has been made, some organizations will have a lot of procedures to go through this matter to the board and to give consent to the decision. To make the board understand why the decision is that way, obviously you need to show that you have gone through due diligence to check the facts and to get opinions from experts or counsel whether they may have the chance to have a favourable decision. [R11, L219-224]</i>
T3 (3)	<i>Every time you want to submit a claim, we might be facing some problems how to prepare a claim, how to articulate a claim. Even though you think that we have a case on it, but somehow you don’t have the authority. So architect or engineer tends to use their high end power to suppress you or prevent you to claim. [R1, L4-7]</i>
T3 (4)	<i>They (the private companies) are also reluctant to take any drastic steps to resolve the dispute against the GLCs (...) The public listed company that operate as a private company, could substantially reduce their revenue if they take such measure, unless they are very sure they are capable enough not to work in a public sector or linked to the public sector anymore. [R11, L116-123]</i>

#### a) Master-servant attitude

T3 (5)	<i>The lower tier is going to swallow their pride and let go. So, a lot of employers are taking advantages of these. So, whatever you are claiming extra, I will pay you later, that kind of stupid reasons. But, again, if on the employer side, we shouldn’t take this kind of advantage. You must negotiate. Face the claim directly, don’t hide yourself away from the claim. [R1, L209-213]</i>
T3 (6)	<i>... you have to be aware when a dispute is submitted before you and you will try to think I am at which level. I can say that this behaviour is cultural thing and is affecting my action to take. If I’m in a lower tier, if I can avoid a claim, I will avoid. [R1, L88-91]</i>
T3 (7)	<i>For example, last time ok, the consultant seems to be the king on site you know. The architect says “You do this!” “Ah, okay I will do, thank you” “You do that!” “Okay”. But now, if the architect says “Do this” the contractor will say “Please issue me an instruction”. So, now the mind-set has totally changed. Since then, the whole thing becomes progressively more and more complicated!</i>



	<i>Therefore, Malaysian contractors now are more claims aware. More and more cautious about their contractual right. [R9, L37-41]</i>
--	---

b) *Inequality of bargaining power*

T3 (8)	<i>Because in the local scene, the owner and the lead consultant actually has a very big say in the run of the contract. [R3, L36-37]</i>
T3 (9)	<i>I think adjudication process also will not give them much avenue to resolve their dispute. Although, in law, all parties are seen to be as equal. But truth is, it's not! They are very much attached to this group factor and their ranking in this whole game. [R11, L129-133]</i>
T3 (10)	<i>Bullying is taking advantage of others financially. So it's a sad thing. Sometimes, their behaviour, those days when we have conditional payments - pay when paid, pay if the money is released or whatsoever, they could have received the money but they don't pay you, and how would you know? So, this is why the subcontractors suffer, and it is not good for the industry. I can tell you I've seen some contractors or developers who don't pay to the extent that they cannot sustain, so what do you do? You voluntarily walked out. [R2, L94-99]</i>
T3 (11)	<i>When that becomes the norm of the industry, that is no longer a question of choice, because if you don't sign this type of contract, you will be out of business, all together. So, you really have no choice unless to playing in the same arena with those kind of terms. There is a lot of unfair practice in that sense. Unfair in the context of, always a person with stronger bargaining position, to be to oppressive towards the smaller players. We had that problem. So, I think that is why the Act came in. [R7, L37-43]</i>
T3 (12)	<i>The employers at times are high handed on the agreement, they will have lawyers to draft the agreement and the contractor will have a little say, you either take it or leave it. They have many others lining up for the project. So, you need to back out if you know it's an unfair agreement. [R10, L107-110]</i>
T3 (13)	<i>In instances where the market is not good, people will desperately hunt for jobs. And if you want a job, some employers set that "if you want me to give you a project, you have to follow my terms and conditions" and they will have no choice. So as for CIPAA, I don't think it will help so much, I tell you. When times are bad and there is very limited job around, the contractors will kow tow (follow) the developers and follow their conditions. [R10, L99-103]</i>
T3 (14)	<i>The court, the parliament and the government is not there to help you to rewrite the terms. They are not there to help you to get out of the bad deal that you have voluntarily enter into. So, they take a non-interference approach in that sense. If you are either (...) foolish enough, or brave enough to sign a contract that is so one sided against you, you are taking the risk. Nobody put a gun of your head to sign it. [R7, L32-36]</i>

c) *Decision making*

T3 (15)	<i>... some organizations will have a lot of procedures to go through this matter to the board and to give consent to the decision. To make the board understand why the decision is that way, obviously you need to show that you have gone through due diligence to check the facts and to get opinions from experts or counsel whether they may have the chance to have a favourable decision. [R11, L219-224]</i>
T3 (16)	<i>Some companies have a long-stretched hierarchy when it comes to decision making. But, timing is crucial and certain decision needs to be made quickly. With so much time taken for a decision, I would say it is very challenging for us to move quickly. [R10, L178-180]</i>
T3 (17)	<i>Basically I would say we have a long decision making procedure, long stretched layer of approval because people afraid to be accountable. And this comes to the collectivistic factor and accountability. Decisions are not made when they needed to be made; it basically just contributed to the deterioration of a project that leads to dispute. [R11, L466-467]</i>

7.5.2 *Superior-subordinate Relationship*

T3 (18)	<i>If I go to the site, I can understand the problem faced by my staff better. Sometimes, it is difficult for them to talk to the employer because of the authority gap. [R10, L130-131]</i>
T3 (19)	<i>It is important that I try to bridge the gap by mediating my team with the employer. I will talk to the employer on a separate occasion and try to reach a solution together from a more personal and informal level. Communication is important to be clear and directed to the right person, people with</i>

	<i>authority of decision making. [R10, L133-136]</i>
T3 (20)	<i>In dealing with a difficult Project Manager, if I cannot deal with him, I will go straight to his boss. I tell him if anything happens, my pocket and your pocket is affected by this. Other people will get affected too. Project Manager is just an employee. With the evidence I showed you, better rectify it before I keep claiming you for the mistakes. [R10, L197-200]</i>
T3 (21)	<i>... architects in Malaysia, usually is the boss on site. Now, you have Project Manager in the project giving decision like “Mr. Architect, you are wrong, the Contractor is correct”. It change your (the Architect’s) decision. So, of course I think, the architect may not like it. [R9, L108-110]</i>
T3 (22)	<i>... if you start an adversarial process during the project itself, it will create an ill will and maybe hatred among the parties. For example on the extension of time, “Why delay? Because the architect give me the drawing late”. You already offend the architect. [R9, L229-232]</i>

a) Evaluation of position

T3 (23)	<i>... you have to be aware when a dispute is submitted before you, try to think “you are at which level?” I feel that this thinking is a cultural thing and is affecting my action to take. If I’m in a lower tier, if I can avoid a claim, I will avoid. [R1, L88-91]</i>
T3 (24)	<i>Let me tell you one example, I was acting as a counsel for one listed company. The chairman of this company was a former deputy minister. And now he is a chairman for a big public listed company. When he engages me to start on arbitration, he told me “Mr. XXXXX, the day I start arbitration against the government, is the day I close down this company”. That means the fear of the reprisal. The fear of not getting future job is real. Do you get me or not? But it’s not so obvious now. But it used to be that way. [R9, L199-205]</i>
T3 (25)	<i>The perception of the seniority it could be by age, by position, and where this party stands in the scheme of the work. For example, we have a lot of deference for people that may have the title, for example with someone with “Datuk”, which mind set greatly affects how dispute resolution will be approached. So, that is a huge factor to me in resolving dispute - the culture of deference. [R11, L41-46]</i>

b) Deference

T3 (26)	<i>So, the relationship is what I would call as the ‘culture of deference’. There are lots of deference paid to sometimes authority that sometimes, I don’t think they are correct in the way they run things, but people won’t say anything about it. The other is, what you may want to call attributes of our society. [R11, L461-465]</i>
---------	---

c) Conflict of interest

T3 (27)	<i>... we have to consider different scenarios in different country, in our country, we have this GLC (government linked companies) they usually are working for public sector work. Therefore, it’s ... I would say ... unheard of my knowledge that such companies to try to take government to adjudication to settle their dispute. Because, basically part, if not all of it, owned by some ministries, so there is a conflict of interest there. The process cannot work for them. [R11, L98-104]</i>
T3 (28)	<i>There is also not one GLC, there are a many other GLCs and other private companies under the structure. When these (private) companies decide to take drastic step to go to formal dispute resolution, it maybe be turned out of their favour. Once this happened, the likelihood to get blacklisted is apparent. Once this happened, they are going to be deprived of their main sources of income. How will they survive as a corporate? So, what I’m saying is that it’s an interest of this survival factor; they will not embark into this process. Importantly, it is clearly contrary to existence of the company. [R11, L105-112]</i>

7.6 Theme 4: Circumvent Uncertainties

T4 (1)	<i>Because the market has become more challenging and complex day by day, there is not so much of the issue of trust and friendship anymore but profit driven. Under such situation, the trust factor may not be as strong as it used to be before. [R10, L7-9]</i>
T4 (2)	<i>... in a modern world and knowledge about litigation, exposure to social media, other legal systems and also economic pressure, when one cannot perform, even though their words are golden, but he cannot perform what they said, he has no other choice to opt for some form of force of law. [R2,</i>

	L37-40]
T4 (3)	<i>There are many elements why people don't move forward from there and have final settlement. Either genuinely the defaulting party is at fault, or has no money, or the opposing party they say your work is sub-standards, you don't perform work on time, you're causing delays, you're causing disruption, you don't have enough resources. [R2, L76-79]</i>

### 7.6.1 Contractor's Perspectives

T4 (4)	<i>Because of different policies and procedures, sometimes the small-time officers afraid to issue a written instruction and give oral instruction instead. This is very common and very troublesome. Once they give oral instruction, the contractor will follow and claim for the additional work. Once the claim comes in, everybody will point fingers to each other. This way the contractor will become frustrated and relationship will become sour. [R10, L183-187]</i>
--------	---

#### a) Intimidation

T4 (5)	<i>If they initiate any dispute resolutions, most likely the clients won't call you for the second job. These are the setback for this level of subcontractor. [R1, 72-74]</i>
T4 (6)	<i>I think we need adjudication. There are lots of things where bullying took place in the industry. So many times that the subcontractors went bankrupt because of the non-payment conducted by the main contractors and also back-to-back clauses is a big issues in the industries for the past few years. So, with the introduction of CIPAA, they assist us to make sure the flowing of the bloodline of the industry. So that is why say it is really helpful although we need to improve more. Hopefully the bullying practice by the main contractor and client will be reduced. [R4, L207-213]</i>
T4 (7)	<i>I personally found that in the local market, the client are still prejudice. The moment you submit a claim, woo straight away they feel offended. Because you can see the market itself is not really that open. So the field major player, like the clients, will use some ways to suppress. So when you submit a claim, the client will go "woo come on, you don't want a next job ah?" that kind of unhealthy culture. [R1, L136-140]</i>
T4 (8)	<i>Parties are not just giving in and that time that you find the "bigger boys" who sometimes you will find to bully the subcontractors. So this bullying element is not healthy. Bullying is being like "why are you being so difficult? You don't want this job? I've got many other jobs lined up for you do. So if you are being so hard, I will cut you off, the other contracts". So, they can give in, but over how many times? [R2, L89-93]</i>

#### b) Closed market

T4 (9)	<i>I think our industry is still "protected"; there is a lot of "relationship" going around. So, a lot of tenders are not necessarily open. How do you select people to prequalify? Maybe you know "somebody". "Do you want to do my job? Okay, I will put you in the list". So they get the job, where they secured it through so-called negotiated tender. It's not competitive tender. When it was negotiated tender or selective tender, then there is still a layer of "protection" in that sense. So, we cannot alleviate our working standards because when you have "protection", people just won't improve. [R11, L495-502]</i>
--------	--

#### c) Financial distress and economic pressure

T4 (10)	<i>Especially for the small contractor. Their capital might not be that strong. And their financial backing might not be that good. Not many bank want to back up these groups. So, whether you can get your progress payment on time, it is very important to the players. [R3, L23-26]</i>
T4 (11)	<i>A lot of the time, the cash flow has been delay for more than 6 months and no contractor will be able to sustain or bear the financial burden. I met a contractor that did a job for 2 million but received less than 1 million of what he has done. He was told about let say less than 5 million of contract. That is very big money for a small contractor. They are not complaining. [R3, L43-46]</i>
T4 (12)	<i>... if you drag payment, you got this big guy who is controlling the market, for example let say the market is very bad now, there is a recession, and there is only the big guy with cash. So he is going to control the market, and he is going to lay his terms, take it or leave it, I'm going to pay you 6 months after the work, take it or leave it. Whether you want to call it economic duress or whatever you want to call it, that is fine, you took the job I will consider you agree. It's weird in this industry</i>

	<i>that people still take advantage over other people. It's usually "the big guy" those who are stronger, financially, who also take advantage of the weaker ones. So I find it very disappointing. [R13, L145-152]</i>
T4 (13)	<i>For example, normally the progress payment is once a month, right? But sometimes, the client will pay only half of it or 2 or 3 months later. Since the contractors are very tight on cash flow, they have no choice then to slow down their work. [R10, L51-53]</i>

d) *Domino effects*

T4 (14)	<i>When the contractor owes him money, he own the supplier the money also and also worker. It goes down to the whole chain of suffers. [R3, L47-48]</i>
T4 (15)	<i>So, if the money is not forthcoming, then it put a lot of people in difficulties. This one will have a huge chain effects all the way down. If the taps if off at the top then chances of people to get paid at the down is maybe zero. That will put a lot of people out of business. [R7, L14-17]</i>
T4 (16)	<i>... and you don't forget, he can be the subcontractor who had another sub-contractor. So when sub-sub-contractor is involved, apart from he himself not getting money, he's going to deprived many other party without money. It's the repetition of the same. [R2, L113-116]</i>
T4 (17)	<i>If I'm the subcontractor and I'm facing this problem, and you don't forget the sub-sub-contractor also can take action again sub-contractor for adjudication. So they will be multiple action if you don't start. Because, if you take action and you show to your sub-sub-contractor that you take action, at least you stop one action. [R2, L120-123]</i>

e) *High competition*

T4 (18)	<i>Back then; this wasn't such a big problem in the industry. Number one, the industry was less competitive. So, what it means is that, at that time, for example like if you bid for a job, and you can have a very healthy profit margin, so even if you receive less money, it's still okay. You don't earn as much, but you are not losing your pants. But, because the industry has grown, more players comes in it has become more competitive, but the projects volume did not grow in the same speed as the players. So, the market is becoming more competitive. Therefore, margin has been cut now we are talking about single digit profit margin for most of the players. [R7, L18-25]</i>
T4 (19)	<i>Because, for example, you as a developer, last time, you beat one out of the five to do your project. Now if you call for tender, probably fifty companies comes in. [R7, L72-74]</i>
T4 (20)	<i>When you have competitive competition, people have to improve. They have no choice, you have to be the best to be on top of the game. So then, you don't have rely on things like relationship perseverance and all, because you know your stuff. [R11, L502-505]</i>

f) *Hesitation*

T4 (21)	<i>So far, in terms of the employer and the main contractor is concerned, depending on the nature of the employer, assuming he is the government or he is a very large development company. Then, I think there is a reluctant on the main part of the contractor as to commence proceedings (adjudication) against such an employer. The risk being the work may not come again. [R8, L7-11]</i>
T4 (22)	<i>They reluctant to do it while the work is still on-going (commencing adjudication). The reason is because as you say, it is regarded as a fairly adverse mean of enforcing a claim, and because of that there is reluctant to do so while you are still doing work on site. [R8, L43-45]</i>
T4 (23)	<i>So, a lot of work in government, infrastructures, huge job like airports, dam or whatever national development projects. These private companies, they will be reluctant to take this step, because they don't want to sour the relationship and want a good will and also potential work. Unless, they have decided that they will and they are more than capable of gaining revenue from outside of this realm, and they will seek either in private sector or in foreign countries. [R11, L124-129]</i>
T4 (24)	<i>Once this happened, the likelihood to get blacklisted is apparent. Once this happened, they are going to be deprived of their main sources of income. How will they survive as a corporate? So, what I'm saying that it's a (...) in interest of this survival factor, they will not embark into this process. [R11, L108-112]</i>
T4 (25)	<i>... surrendering your fate to an adjudicator, meaning to say that having the third party to have a final say about it, there is no other way to proceed with it accept to fight for your case. You have to take the position that you are right during this quarrel. So, that to me is one great factor that the parties will consider. [R11, L160-164]</i>

g) *Late and non-payment*

T4 (26)	<i>Most of them in general, the culture, there are a lot of bad paymaster. Those who have the money are not willing to pay to the contractors who have completed their work. So I think the depth of the problem is quite high. [R5, L36-38]</i>
T4 (27)	<i>It is not common these days to find a good paymaster that will not delay their payment. [R10, L151]</i>
T4 (28)	<i>Definitely they will pay you, of course (sarcastically). Provided that they have good sales. To reach a good sale they need to do all sorts of billings, wait for the purchaser to make decision, some problem during payment collection. But, the contractor suffers due to all these internal purchase issue. That should be your problem, not ours. But still payment is delay some more. [R10, L88-91]</i>
T4 (29)	<i>Our industry is very weird, I would say. Because, you will see a lot of times, that is happening as well, whether to a contractor, subcontractor or even to consultants, clients don't pay. There must be reasons why they didn't pay or they drag the payment. I don't understand this at all. Can you see a doctor and tell the doctor "I want to pay in instalment? Can I get a discount? Can I pay you next month?" It's only in the construction industry that is happening. The (payment) term is so flexible, it's the way the industry works. So, it's only in here that it is kind of weird. In construction industry, you do the work first, I bill you later. So, maybe this way has been exploited. [R13, L135-144]</i>
T4 (30)	<i>They sometimes don't release the payment and nobody can do anything. [R3, L90]</i>
T4 (31)	<i>We are talking about the contractor as well as the employer, so where the contractor's claims are something which the employer did not have a trust in the underlining basis of it, and keeps on rejecting that particular claims. Then, the contractor will feel that their back has been pushed to the wall. [R14, L41-44]</i>

**7.6.2 Employer's Perspectives**

T4 (32)	<i>Eventually the question now is whether you can perform or not. If you can't perform, then it will be no use. You may have a good relationship and rapport with the developer and yes relationship is important, but if you cannot perform, he can't give you job. That is not right. [R10, L84-86]</i>
---------	---

a) *Sub-standard work and non-performance*

T4 (32)	<i>Eventually the question now is whether you can perform or not. If you can't perform, then it will be no use. You may have a good relationship and rapport with the developer and yes relationship is important, but if you cannot perform, he can't give you job. That is not right. [R10, L84-86]</i>
---------	---

b) *Sub-contracting structure*

T4 (33)	<i>... the subcontract are all maybe 2 3 4 millions. Big contracts and it is very common that he engage sub-subcontractors. And he has a leverage of 6 million already. Imagine he didn't pay the first subcontractor, A. He would do the same for B C D. Each one them he owes 6 million, or 4 of them you owe 20 million. You are being financed! See? That is what is happening in the industry. [R2, L99-104]</i>
T4 (34)	<i>An opportunistic contractor is just like a broker contractor. Their objective is to get the job to sell it to another subcontractor. They are not usually intend to stay serious in the industry for long. They often have their own personal agenda to gain as much profit as possible. [R10, L93-97]</i>
T4 (35)	<i>... adjudication will then become suitable, because only when the relationship has completely transparent and broken down. [R11, L507-508]</i>

b) *Cost constraint*

T4 (36)	<i>Sometimes it's not that they don't want to pay. They don't have the money to pay. [R9, L237]</i>
T4 (37)	<i>Some clients are so desperate and want to squeeze the cost. They will discuss the contractor and negotiate to cut down some cost. We, the contractor have no choice, as we want the job to survive. When the contractors have less profit, he will cut corners and produce sub-standard work. [R10, L144-147]</i>
T4 (38)	<i>... amount of construction work done have exceed the allocated budget for the year. The government, will pay, definitely. But, have you check your claim? How can we release the payment</i>

	<i>if you didn't submit adequate documents? What if there is a claims miscalculations? I'm sorry, you need to make necessary corrections, resubmit and repeat the whole process. You must also remember, the payment procedure in public project is very tight. If you missed this (payment) batch, you will need to wait for the next one. And I don't know what the budget is for next year. Contractors must pay attention to this. [R15, L120-127]</i>
--	--

### 7.6.3 Shared Struggles and Dilemma

T4 (39)	<i>A lot of claimants when it comes to going for adjudication against their client is of course there is the risk of they will not be employed again by their client. I think they have to take this risk. Because, a lot of client will not be happy. Since a lot of negotiation have taken place and the client is still not paying, they expect the claimant to wait and to be more patient. But, of course, you cannot ask the claimant to wait for few more years. I think it's a bit unfair. So, that is why most of payments that I deal with they have already given up on the client already. They don't expect any future job with the client that's why they proceed with a formal ADR. [R5, L55-62]</i>
---------	---

#### a) Deteriorating relationships

T4 (40)	<i>Malaysian cultures is a little bit different in the sense that they don't want to start the formal dispute resolution process, but once the process started, things is going to get a little bit more personal in the sense that "You sue me for this particular project , I will never want to work with you again in another project". Its just the culture. I think the Malaysians, its a lot of faces value in the sense that "yes we can settle, but if we can't settle then we are going to evoke formal ADR, but I won't work with you again in another project". [R6, L60-65]</i>
T4 (41)	<i>But, in Malaysia, almost all the adjudication, I think, is on final account disputes. the reasons being I think, Asian cultures doesn't really lend itself to having on one hand a dispute in adjudication and the other hand carrying on work at the site so because of that, usually they will work until it finish, and then they will commence adjudication. A large number of adjudication, one they are commenced by the subcontractor against main contractor. Two, they are mainly on final account disputes. [R8, L35-40]</i>
T4 (42)	<i>If you look at the statistic from AIAC, you see people think CIPAA is to facilitate cash flow in the construction industry. But, I think nearly half of them is on final account. So, when we speak about final account, future relationship is not going to be important anyway. Now, for those other cases during the currency of the project, my experience is their relationship is not really that good anyway. [R9, L157-160]</i>
T4 (43)	<i>Strictly speaking, when we are talking about local Asian context, adjudication is a step to a formal dispute resolution. I think parties would have accepted that the outcome or just even the act of going into adjudication may, most probably, or highly likely will affect their future working relationships. That is why this step will not be embarked until a clear idea of where the disputant may stand after this. [R11, L141-146]</i>
T4 (44)	<i>Usually when the disputes goes into dispute resolution of so called formal dispute resolution under the litigation, arbitration, or adjudication is because one of the parties have decided that no point talking to the other side anymore. [R12, L109-112]</i>
T4 (45)	<i>What would you lose further is from the employer point of view is you will lose the relationship as a whole. The employer will feel that he has been violated by this one particular contractor and obviously emotions and ego step into place. [R14, L57-59]</i>
T4 (46)	<i>Contractors a lot of time they are, wary of their own reputation, they don't want to be seen as too harsh. Otherwise, they may have difficulties in getting jobs. So, this thing was happening previously. But, I don't think that remains true that way. Some may still practice that way, especially the old timers. But, I think that factor has become rather manageable, simply because like I said previously when times are good, margin is good then you have room to maneuver. Like I said, I don't mind giving you a 20% discount of this, because I still have a 10% in my pocket. But today, my margin is 6% only how am I expecting to give you more discount? So, I want the full 6% because this is already very little. I have a lot of mouth to feed, I have a lot of commitments that I need to pay. So, in that sense, the room for negotiation and the room for kam cing based (sentimental feelings) type of relationship resolution is much less. [R7, L54-69]</i>
T4 (47)	<i>Also, I have so many other choices. I don't get it with you I will look for it in other projects. So, in that sense, some of the old timer may run on that basis. But for a new and big company, they are more on the corporate side, they are more to follow by the book. All these affect the ability to generate this of long term relationships. [R7, L84-87]</i>

T4 (48)	<i>They will never go there as long as the relationship is okay. But, it shouldn't be that way. You can still have a relationship but, somebody must see who is right. But it's not the case here. Once they have decided that to choose between relationship and adjudication, which would be the last resort. I don't think they will be able to talk to each other again or do anything. Because as a company, as an organization, you would probably just blacklist them. So, parties have to depart ways. [R11, L507-514]</i>
T4 (49)	<i>I don't think the act is legislated to be that way. But because of cultural factor, our people, such act is considered adverse. It shows that you are no longer having good will. No matter what the decision may be. Because the decision, ultimately may favour only one party. It will break the good will between the parties. So, if the parties have the dispute, and have an open mind to resolve it, they will not embark it. [R11, L147-153]</i>
T4 (50)	<i>... especially in local market, when you have a case before the respondent, the next round is very difficult to see them and sit down together and having coffee and continue business. Very difficult. I'm not sure whether oversea situation is like this. It's very very difficult already. This is after the amicable settlement fails. [R1, L249-252]</i>
T4 (51)	<i>I would say that, taking decision to go to adjudication is a very high road. You are prepared to cut ties and get blacklisted or whatever. The relationship, I think would obviously become adversarial unless the party has a very open minded to say that they agree that they have a disagreement that needs a third party to decide independently for them. But, it is very uncommon! Most parties become very aggressive; the relationship will start to become sour. [R11, L213-218]</i>
T4 (52)	<i>... party can really sit down and settle amicably, I think the relationship can still been preserved. But, if the parties already went beyond that, enter into arbitration or adjudication, for them to maintain that kind of relationship would be a little bit really hard. [R1, L246-248]</i>
T4 (52)	<i>So, construction industry then suffers, because we don't attract the best of the skills, the best of the minds. And people who then come into the industry depend heavily on relationship to survive to make a job successful!. It is now less dependent on your skill or decision making, problem solving maybe now you have those among the managers. But, still, relationship is a huge factor to ensure job longevity. But, if your relationship fails, then, they bring out this kind of Act, it's been used only at a time where they needed it they want to use it. It's always about a relationship. [R11, L477-484]</i>

b) Cost and time

T4 (54)	<i>... because, somehow rather the fees for the dispute settlement is still a factor for it. [R1, L82-83]</i>
T4 (55)	<i>I think Malaysians also generally are very cost-sensitive. Once they choose to evoke formal dispute resolution process they would involve fees and costs whether it's for paying the lawyers service, adjudicator's fees. [R6, L69-72]</i>
T4 (56)	<i>So, if you are looking at the medium claims, provided the bosses willing to spend money for that, they will still consider for it. [R1, L91-92]</i>
T4 (57)	<i>... they also going to feel concerned on the cost. I won't say its cheap. The cost and time is really a factor. Not like a civil case. In civil case, at least you got a legal aid. For commercial dispute you got no legal aid on it. So you have to fork out all the money in pocket. Of course, you can claim back if you win the case. But that amount is not really a small amount and the disputants or the claimants really going to have to think about it. "I have to fork out a sum of money, put in the stakeholders' account for 3 to 4 years and you will not know the result. Of course if you win the case, then everything will come back. So that is one of the factor you have to consider. [R1, L214-221]</i>
T4 (58)	<i>... in a way it almost make the adjudicator more powerful than for example high court judge. Because in high court judge, after hearing the case, they are still subject to review and public are still able to look on the merit of the decisions. But, for adjudicator, once you are done. Its final. Like I said, yes the law provides that the parties can still re-open in litigation and arbitration. But, a lot of times, those things do not happened because of the time and money constrained. It may be not worth it. [R7, L128-134]</i>

c) Privacy

T4 (59)	<i>It's also the fact that the party wants to resolve among themselves. They don't like to bring in third party into the purview and get to say in the dispute settlement and negotiation process. So, they want an utmost privacy. So if you start adjudication process, it will involve an adjudicator coming in looking into the disputes, same goes to arbitration and litigation where you project matter are subject to scrutiny. Not to mention other parties such as lawyers to involve as well. I think Malaysians generally don't like to bring outside parties unless it is really necessary. [R6, L74-79]</i>
---------	---

T4 (60)	<i>Firstly, it cost a lot of money. Although it is a private proceeding, it will already give you the bad and ill-feelings towards the other party. [R11, L154-155]</i>
---------	---

d) *Political patronage*

T4 (61)	<i>I think our industry is still “protected”; there is a lot of “relationship” going around. So, a lot of tenders are not necessarily open. How do you select people to prequalify? Maybe you know “somebody”. “Do you want to do my job? Okay, I will put you in the list”. So they get the job, where they secured it through so-called negotiated tender. It’s not competitive tender. When it was negotiated tender or selective tender, then there is still a layer of “protection” in that sense. So, we cannot alleviate our working standards because when you have “protection”, people just won’t improve. [R11, L495-502]</i>
T4 (62)	<i>That is why the decision to embark in adjudication to me is already at the high point of their dispute episode coming on from a very long troubling matter due to this “strange relationship” throughout the project. [R11, L236-239]</i>
T4 (63)	<i>Political influence is very strong especially during the tender process. When we have go through the selection process and have make suggestion to the employer on the contractors that we think is the most suitable, everyone is satisfied. But when we submit to the top management for approval, you will get another reply coming from nowhere instructing to appoint certain selected contractor. [R10, L123-127]</i>

e) *Losing*

T4 (64)	<i>Like I said, there will only be one winner in adjudication. The best that the employer can hope for is zero. They get nothing out of it. So in that sense, sitting in employers’ shoe, of course I won’t like it. And a lot of the times, I can understand where the employer is coming from. Because the chance may well be with the contractor, because the duty of the employer is to pay, but if the main contractor is not performing, the project will get stop. And the luck may not necessarily lies with the employer. [R7, L137-142]</i>
T4 (65)	<i>Let say I am starting adjudication, usually I will insert my payment claim and their side may insert their payment response. Then after that I serve a notice of adjudication to start the whole proceedings. So now the question is, the risk, as far as the claimants concern, is relatively lower compared to the other side. This is attributed to the perception that the claimant usually wins. [R9, L144-148]</i>
T4 (66)	<i>... surrendering your fate to an adjudicator, meaning to say that having the third party to have a final say about it, there is no other way to proceed with it accept to fight for your case. You have to take the position that you are right during this quarrel. So, that to me is one great factor that the parties will consider. [R11, L160-164]</i>
T4 (67)	<i>The gain will always outweigh the risk, from contractors’ point of view, especially the smaller ones. Simply because, what do they stand to lose. If I lose in adjudication, I have to pay you some cost. Which won’t be a lot; this is different from arbitration, for example. I’m looking for a lot of cost and time investment. In arbitration, if I start the arbitration, you have a counterclaim, I may end up having to pay you instead, not you are paying me, if I lose the case. In adjudication, the present decision is as set out by the court is that, counterclaim is not allowed. So, in that sense, the contractor that is very little to lose, in term of money. [R7, L90-97]</i>

## 7.7 Theme 5: Security of Payment and Adjudication Regime

### 7.7.1 Industry’s Responses

T5 (1)	<i>I think CIPAA is very well welcomed. As I said, when there is a great disparity and parties are having very unequal bargaining powers, it will be welcomed in that sense because it helps them to bring themselves to the same level. [R11, L309-311]</i>
T5 (2)	<i>It’s not easy. Adjudication is new, a lot of parties in adjudication are not get used to the process, everybody is learning, I am learning, other adjudicators also are learning because the framework of CIPAA has never been tested properly, it’s just very new. [R6, L110-112]</i>
T5 (3)	<i>So once, you have things run smoothly and lots of amendments coming out, slowly the contractor will learn on how to use it and they will be part of the normal practice. [R1, L278-280]</i>
T5 (4)	<i>... statutory adjudication is very much helpful. We are governed by the scale, so the scale cost is much cheaper as compared to arbitration and litigation. So when it comes to Malaysians,</i>



	<i>understanding the whole concept is important, that is the cost here. And CIPAA adjudication do helps. The thing is that, it is not yet well ... I'm not saying well accepted, but it is not well-familiarized by the construction parties in Malaysia. Not just yet. We really need to do more to educate the people about CIPAA. [R4, L49-54]</i>
T5 (5)	<i>CIPAA as I say, it was mainly designed to deal with the payment issue. It would help the lower tier rather than the upper tier. So, I do not know whether you say is it really helpful or not. It depends on who is using the CIPAA. [R1, L264-266]</i>
T5 (6)	<i>... there has been a lot of disappointment on how arbitration has been conducted. I have to say the lousy quality of arbitrators. So, because of this disappointment, the whole industry has been looking for some other ways to resolve the dispute in unpainful way, not expensive and not results in that sometimes both parties are not happy with the award. It took so long to decide which is not in line with the needs of the commercial company. So in that sense, due to this disappointment in arbitration, so adjudication has been a great welcome to a lot of people. Knowing that they may have some sort of justice without going through a lot of pain. [R11, L330-338]</i>
T5 (7)	<i>From what I can see, what attract client the most to it is not actually so much on the fact that it is cheap and fast. The things that attract them the most that is they does not require their involvement, so they don't need to come as a witness. That is one of the major attractions of CIPAA. It is something done in writing and you have a decision that are readily enforced and it's very efficiently managed by the AIAC. The construction court in Shah Alam also compliments the process very well. So I think it's working very well in Malaysia. [R8, L133-138]</i>

a) *Positive outlook*

T5 (8)	<i>It helps with the cash flow. Every year, they provide with annual report. The number of cases increases quite rapidly. Last year there is roughly 800 cases. From this statistic I can say it helps the contract administration and contractor to survive. [R3, L101-103]</i>
T5 (9)	<i>So far, so good. I managed to have good judgment, at least for all my case. So I think there is a lot of potential of contractors in utilizing the CIPAA. Because I think even if you go to AIAC, their record also show most of the time the claim through CIPAA is successful. [R5, L30-32]</i>
T5 (10)	<i>Based on statistic published by the AIAC, it has been very good. It's obvious. If you look at the data year in and year out there's a mile increase every year as to people using CIPAA for dispute resolution. It seems to me that, people trust the system. Therefore, they are quite happy to rely on the system to get their dispute resolved. They won't trust the system if they don't see the figures going up every year. [R6, L144-148]</i>
T5 (11)	<i>As long as the awareness goes, if they have been make known, they will love it. I have met up with quite many of them, in fact last Friday I met with another old friend, he had in hand 5 or 6 matters which are in adjudication. So, they are very receptive. Because, the primary objective of CIPAA as you know is for the cash flow. So, the moment this mechanism is made know, absolutely they will go for it. [R1, L19-23]</i>
T5 (12)	<i>I'm not saying well accepted, but it is not well-familiarized by the construction parties in Malaysia. Not just yet. We really need to do more to educate the people about CIPAA. [R4, L52-54]</i>
T5 (13)	<i>In my opinion, we are in a good direction, although people were sceptical before its introduction, we just need to improve. [R4, L229-230]</i>
T5 (14)	<i>... if your context does CIPAA allow for the cash flow? Then the answer is yes. Because, CIPAA is very short. According to statistic in the KLRCA, more often than not, the claimant will usually get the award, the only question is on the regards of the quantum whether he gets the full amount or he gets some percentage which has been look into the quantum (.....) So, if the context is "does the money flow?" I think yes, CIPAA has achieved that, because of that, the contractors now having the courage to bring an action in CIPAA just to get money or to get some amount of the money and the negotiation will be based on the quantum. On that score, yes, they have achieved that. [R14, L137-146]</i>

b) *Scepticism*

T5 (15)	<i>CIPAA is very welcomed, although not necessarily they (the major players) will embark them. But, it's nice to have something even though they might not use it. [R11, L326-328]</i>
T5 (16)	<i>I think adjudication process also will not give them much avenue to resolve their dispute. Although, in law, all parties are seen to be as equal, but truth is it's not! They are very much attached to this</i>

	<i>group factor and their ranking in this whole game. [R11, L129-133]</i>
T5 (17)	<i>So it's an effort to try to put parties into equal footings so that they can have the chance to adjudicate their disagreement. That may be true. But, I don't think it worked in some scenarios. For example, we have to consider different scenarios in different country, in our country, we have this GLC they usually are working for public sector work. Therefore, I would say, its unheard of my knowledge that such companies to try to take government to adjudication to settle their dispute. Because, basically part, if not all of it, owned by some ministries, so there is a conflict of interest there. The process cannot work for them. [R11, L97-104]</i>
T5 (18)	<i>In instances where the market is not good, people will desperately hunt for jobs. And if you want a job, some clients set that "if you want me to give you a project, you have to follow my terms and conditions" and they will have no choice. So as for CIPAA, I don't think it will help so much, I tell you. When times are bad and there is very limited job around, the contractors will kow tow (follow) the developers and follow their conditions. [R10, L99-103]</i>
T5 (19)	<i>It encourages people to utilize the Act, I don't know whether you can consider that as successful by the statistic just because more people embark into this process. But if, the process has been abuse, I don't consider it as successful. [R11, L396-398]</i>
T5 (20)	<i>I have the impression that the intention is not at the correct feet with what it's been used for. I think, somewhat (...) it has been abused by the claimants. It's kind of work the other way, what we called as "reverse discrimination". Meaning to say, there will be sacrifice or loss to help a certain problem. [R11, L409-412]</i>
T5 (21)	<i>But, if you want to say "Has CIPAA goes beyond that? In "resolving" the dispute, with regards to understanding the core of that particular dispute and try to resolve it so that parties can never have this kind of dispute again?" I don't think CIPAA has achieved that. May be it wasn't even designed to achieved that as well. So, if you are talking about resolving a dispute as in final and for all for it to never occur between the contractor and the employer? CIPAA has actually failed to actually do that. That one, I think the best mechanism would be the mediation. Mediation is really the method in resolving a dispute once and for all so they would never come back again. But CIPAA? No. It is based on progress and IPC (interim progress certificate) number whatever and the next IPC you will see the same issue again. Because the communication, the trust factor has gone and CIPAA does not able to recover that. Which just on the IPC, an amount is the money I'm claiming and you should decide yes you should pay on that point. Then the next IPC, will becomes the issue and it will become the quantum. And CIPAA does that. So it's a mechanical means to resolve that particular dispute. That's it, nothing more than that. [R14, L147-161]</i>
T5 (22)	<i>... the question which employers ask is "why do you actually need CIPAA?" because employers pay. Right? Employers do pay. There is a certificate that has been certified by the survey. I'm sure in international companies where you have international engineers doing it, right? Employers will pay. They maybe will be a bit slow in paying but payment is usually there. I think the main contractors were quite worried about it. So, is there a need to have CIPAA? Well, maybe there is. [R14, L166-171]</i>
T5 (23)	<i>... although in adjudication they say the decision is rough justice, it must be a right decision, the correct decision. Rough justice doesn't mean it is based on wrong decision. If the number of wrong decision is big, then people will lose trust in the system. [R3, L109-112]</i>
T5 (24)	<i>At the end of the day, this whole problem, they dump it on CIPAA, meaning that they will get out of this. I would say the statistic now is worrying, it encourages the claimant the idea that "Oh, it's okay, we just continuing as we are (without improving), because we now have a whole lot of new power! So we will still run the contract poorly and we done badly, with all this poor record, we can still get something. And even if we get bits, I'm still happy!" So, I think that is a real challenge that now the table has turn in a way that it is not ... to me, it's okay to put people on the same level of the playing field, but it's not okay to contribute to the perception that the claimants that "you will get something, even you may be wrong". [R11, L449-459]</i>
T5 (25)	<i>The challenges would be obtaining a decision which one could actually say that it is correctly adjudicated upon. I think that would be a kind of challenge. I think there is no challenge so far to administer CIPAA. That's been done and the court has been quite helpful in regards to enforcing of the decision. The challenge would be making sure the quality of the decision is of the par and the standard of where everybody can accept it. I think that is one big challenge. [R14, L193-197]</i>

### 7.7.2 Challenges

T5 (26)	<i>So far, again, based on the statistic, most of the cases that are referred to CIPAA are based on bigger cities like in the Klang Valley, Johor and Penang. Now, what you find when you go outside these regions and go to more rural areas, nobody seems want to know more about CIPAA. We don't</i>
---------	---

	<i>know exactly why that is. [R6, L151-154]</i>
T5 (27)	<i>I think it's part of cultural thing as well. The mind-set of the parties that are based on the rural areas compared to the urban areas are different. Those who lives in the city are more in touch in tuned to modernization and they seem to trust the system better than people who lived in the rural areas who either don't know they system or if they know about it, they are just not interested with CIPAA because of many issue like they have never been through it or they are not comfortable with it and stay with their comfort zone. [R6, L156-161]</i>
T5 (28)	<i>The other thing that I found in about the people in rural area like the sub sub-contractors, the usage of language also in Bahasa Malaysia of Cantonese and Mandarin and they are not so familiar with English although in my opinion CIPAA used quite plain English language. CIPAA usage has been dominated by English speaker/writer parties, they usually feel more confident to rely on the system. The way they administer their business is also in English. I think CIPAA has not really reached out to smaller rural companies; language barrier is maybe one of the reason. Apart from cultural differences between urban people and rural people. [R6, L162-168]</i>
T5 (29)	<i>... one of the challenges is to reaching out one the non-English speaking parties. I think CIPAA has to be universal and must also put emphasis on Malay and Chinese speaking parties. And also to ability to actually educate them. Although you may have the infrastructure, but language barriers have the impact on many parties in Malaysia also trying to educate them about the system. So, its not only the question of educating but also training them. The KLRCA has done a fantastic job educating people about CIPAA, training people / adjudicators. But everything has been done in English. So i think, at some point in time, this whole system may work effectively if we incorporate bilingual or trilingual factor in it. Language barrier is one thing. As well as cultural differences that the urban and rural parties also vary, for example the level of education plays role in the effectiveness as to informing the rural parties to realise the availability and potential of CIPAA in resolving their dispute. [R6, L171-181]</i>
T5 (30)	<i>So far, again, based on the statistic, most of the cases that are referred to CIPAA are based on bigger cities like in the Klang Valley, Johor and Penang. Now, what you find when you go outside these regions and go to more rural areas, nobody seems want to know more about CIPAA. We don't know exactly why that is. [R6, L151-154]</i>
T5 (31)	<i>I think it's part of cultural thing as well. The mind-set of the parties that are based on the rural areas compared to the urban areas are different. Those who lives in the city are more in touch in tuned to modernization and they seem to trust the system better than people who lived in the rural areas who either don't know they system or if they know about it, they are just not interested with CIPAA because of many issue like they have never been through it or they are not comfortable with it and stay with their comfort zone. [R6, L156-161]</i>
T5 (32)	<i>... they will look at it in term of profitability on the investment they are about to make "How much money can I make from this? Not much. So, I'm not interested." So, if you look at the payment scale, its (the fees) not that much. So, as a construction professional, as an Architect, I make more money running project as a consultant. Same with the QS. Same with the engineer as well. There are two payment scale in Malaysia, our CIPAA adjudication act. One scale is the standard scale and one scale is the recommended scale by the AIAC. Because, the standard scale is low. That was approved by the Minister of Works. The minister propose a very low scale, so when you offer a low scale, you will get like monkey being offered with the peanuts quality. [R13, L283-291]</i>

a) Manipulations

T5 (33)	<i>I have the impression that the intention is not at the correct feet with what its been used for. I think, somewhat (...) it has been abused by the claimants. Its kind of work the other way, what we called as "reverse discrimination". Meaning to say, there will be sacrifice or loss to help a certain problem. [R11, L425-429]</i>
T5 (34)	<i>... we have a discrimination here, then you impose a law here to stop or prevent this discrimination, but sometimes, it becomes the other way, it over-corrects it. It becomes the other way discrimination. So, in this case, for me this analogy, yes it was very unbalanced in the beginning, an then CIPAA came in, but the whole thing become overcorrected, and then it has now become rather than putting people back on same plank. It has now tilted the whole field to the claimant. And given extra ordinary power or opportunities to exact a "revenge" on what they think "Oh these were the bullies in the past, now it's my time! I'm going to turn the table on them!". Then, they have been given this idea for the parties to think that "Ahhh, don't worry, nobody can bully me now". But that actually is actually bad for the industry. Because it gives people the idea that "with nothing, you still can get something". [R11, L429-439]</i>
T5 (35)	<i>But these cases then becoming a merriment cases when they see the result of this and they will go</i>

	<i>“Oh look look, there is a good chance (of winning)”. If you look at the statistic at the AIAC. The success rate is so high! So, it encourages anybody who don’t even have half of the chance not even less than that percent and they will go in, you know. Because what is it? I am filling for 2 million. 2 million is a big money for me, and I only have to spend for some number of days, a little bit more money, why not take chance?! Why not?! Yeah? I mean never mind about this good will, because I am a small company, so I’ve got everything to lose already. I don’t need this relationship thing anymore, right? So, I will take the chance. [R11, L363-373]</i>
--	---

b) Limitations

T5 (36)	<i>I can say, yes, it has a place in Malaysia. But, it (the effectiveness) may be limited to certain only certain scenarios. For example, you may be caught up in the GLC scenarios that I mentioned just now... you may be caught up in the GLC scenarios that I mentioned just now. You may also end up in a situation where both parties are major players in the industry and probably it is wise to sort it out through commercial settlement. So how effective it is, its probably effective if you have disparity. And very great opposing interest. [R11, L294-299]</i>
T5 (37)	<i>I think any party that goes into adjudication realistically should be expecting the adjudicator to give a fair decision. So they will want a decision that is fair in the sense of appropriate reasons, the outcome of the decision is correct based on facts presented by the adjudicator. But due to the time constraint, things also have to be realistic and understanding is important that the adjudicator may not have the full picture. Sometimes the presentation of facts may not been done in a proper manner or presented in a way that the adjudicator may not have a full grasp on the factual background of the dispute. [R6, L95-101]</i>
T5 (38)	<i>Because sometimes, you can’t express things in paper. You know, when you something, put it down on a paper but it will still not enough, you still cannot capture what the dispute is about, especially in a way that is a very technical ones. [R13, L234-237]</i>

c) Formality

T5 (39)	<i>Adjudication is becoming increasingly legalistic. It has been increasingly used as a platform to decide for legal arguments rather than industry technicality for example differences in rates. A lot of them, so far in my experience they don’t talk about rates at all. Because the claims is based on certificates. I just prepare a responds and brought up rates issue, so let’s see how the decision goes. [R10, L222-226]</i>
T5 (40)	<i>... they think it is a very legalistic process. So, they feel that they are not very interested. [R13, L282-283]</i>
T5 (41)	<i>So you are supposed to decide based on documents submitted. ... You put up your fact, I put up my fact to counter argue. The adjudicator will decide on that. They don’t need to find out facts of the case. So a lot of time, you don’t get to the point where I tried to reach out of the fact, I will just decide on what they told me. That is the rule of the game. You talked about the parties it is based on their submission, claim, and respond. You don’t need to call them for meeting or hearing as that is not necessary. In fact that is not advisable, given the short time. So, it’s quite rigid. Very little we can incorporate about this matter. [R4, L66-75]</i>

i) Roles of the lawyers

T5 (42)	<i>... you cannot hide from the facts that adjudication involve some legal aspect and also industrial aspect and a good adjudicator has to come with both. When the claimant came they can be represented by lawyers. So, lawyers might have ways of presenting the case. [R4, L97-100]</i>
T5 (43)	<i>I mean the construction community itself, they do not expect a lawyer to be involved in CIPAA. Simply because they want the CIPAA purely on technical matters. So, all the legal arguments are out of picture. Because, when you start coming from a legal point of view and legal argument, those technical laymen, sorry to say, they are not going to keep up. [R1, L269-273]</i>
T5 (44)	<i>You want to use the court and get lawyers involved? Really? Is that going to help you? At the end of the day, what is going happen is you are going to spend more of your money and give it to the lawyers and you will never recover that money from that legal action. So what’s the point? I don’t see the point. The lawyers will get the money. I see this situation all the time and I am disappointed. I think the lawyers did their job fantastically. They just play with words, they are clever at words, their English is very good that is their mother tongue and that is how they make money. “What is the</i>

	<i>meaning of these words? Why did you put “and”? Why didn't you put “or”? Why didn't you put “and” and “or”? What is the meaning of this? What is your intention?” There is a dispute at the time and you ask this sort of question. [R13, L162-171]</i>
T5 (45)	<i>There is a minor number of cases of abusing the CIPAA, I'm not totally sure about this, but they are from my observation and hear and say. They are trying to slip in and find the loop holes of CIPAA. Some are giving a hard time to the respondent, and bring the case to the court. There are few cases that been brought up to the Federal Court to decide on some legal point of view. It's something totally out of expectation and not the intention of CIPAA. [R1, L259-263]</i>
T5 (46)	<i>I have heard that lawyers have been telling the clients don't waste time with adjudication because of its temporary finality. “I want a final decision. If I win, so what? The other side might still have to appeal, and it will go on and on and on. So, why waste your time? Why waste your money? Let's just go straight to the court.” [R11, L109-113]</i>
T5 (47)	<i>... if I am the party in dispute I will not be happy because when the lawyers come in they will... I will not say intimidating but trying to get the weak party to answer this and this question. And sometimes, they want to ask this question but put it in another way, today they ask it this way, tomorrow they will ask a different way, different words, but the same thing. 3 or 4 times, you will just sit and listen and listen until one of the sides will object or the witness will say “Eh, yesterday you asked me this question, I told you the answer. Now you are asking me the same question again?” So, is this how you call dispute resolution? I don't think so. [R13, L181-188]</i>

### 7.7.3 Adjudicator

T5 (48)	<i>But it's the adjudicator that holds the key here that determines the effectiveness of the delivery here. We can see a great disparity in terms of the quality of the person to act as an arbitrator or adjudicator. So, that is why there are decisions made by adjudicators which are not entirely satisfactory. But that has much to do with the quality of the adjudicator. The process is summary in nature. It's meant to be short. But, it does not follow that the adjudicator would therefore be expected or can be accepted that the adjudicator would be any of less quality, I don't subscribe to that. So, that's why the Act the framework is fine. Our country needs that. But really the role of the adjudicator is the key challenge. How do we make sure that we have enough competent adjudicator? Who can really come out with a fair and correct decision? [R7, L110-119]</i>
T5 (49)	<i>Basically, there are two camps of adjudicator; basically there are two camps of. There is a legal camp and there is a construction camp. The legal camps kind will say “Oh, you know, if you get an adjudicator from that side (professional camps), you better get into technical issues, because you if faced with a lot legal issues, they cannot decide, because they are not qualified with legal matters”. But we don't expect them, but they must be able to follow the rules, understand the natural justice and understand the steps how to coherently set out their decision. So that is the real challenges, because if you don't set out logically no one could understand your logic or the decision and it will be challenged in arbitration. [R11, L381-390]</i>
T5 (50)	<i>So, you don't expect the adjudicator to be perfect. He may not get the decision correct all the time, often there are room for mistake and hopefully it's not too far off the mark. Also, the time frame to make decision, should have expect something is fair given the circumstances. [R6, L101-104]</i>
T5 (51)	<i>I have also seen the parties that are not happy with the adjudication decision that has been published by the adjudicator. Sometimes different people have different level of expectations. I think sometimes, to say the decision is fair or not, it depends on the reasons and grounds for that decision who didn't satisfy the parties to further justifying the particular outcome for the process. [R6, L105-109]</i>
T5 (52)	<i>There are two reports that I have received when we were having our discussion with the fellow adjudicators and also with the KLRCA where some decision delivered are not up to the mark. There are many reasons (to this), they are knowledgeable but they couldn't produce a good reasoning decision is number one. Secondly, perhaps maybe because of the time frame given is too short and they are not (...) having enough time to really put their effort in supporting the decision they have made. Sometimes, you know the case, but time is very short for you to deeply investigate to support your decision. [R4, L170-176]</i>
T5 (53)	<i>And the level of knowledge that you need to have, not simply in the aspect, but also industrial (technical) aspect of the matter will help you in delivering a good decision. And simply giving good decision will not be sufficient enough if you can't rightly present it properly. There cases where decision was given in a very simplistic manner. So, you need to write good decision with good counts to support your decision, not simply decides without giving any grounds. To have a good ground means you have to do your homework, you have to get knowledge there then you can really good decision to the issue. [R4, L109-116]</i>

T5 (54)	<i>But he (the lawyer) can write nicely, he can put perspective with the issues~ and he can be persuasive~ and he can be reciting the case nicely~ compared to the respondent, for example. So, the respondent might not be able to do the same (within short amount of time). So, here the adjudicator plays a very big role to really understand the route of the dispute. And if you look at all the sections in CIPAA, empowers the adjudicators to dig more into the matters to have more insights of the issues in relation (to the dispute). So, that do give (um) power to the litigator before he makes decision. [R4, L101-107]</i>
---------	---

a) *Natural justice and impartiality*

T5 (55)	<i>The adjudicator or the arbitrator has to be independent, has to be impartial. The natural justice has to be fulfilled. [R11, L289-291]</i>
T5 (56)	<i>So, as an adjudicator or even as a contract administrator, you have to look at the claims impartially whether the claimants really have the merits into the case or whether is it a genuine claims or not, are they taking advantage from it or not, then only you decide which way to go. [R1, L143-146]</i>
T5 (57)	<i>And also, he has thoroughly considered all the facts before he write the decision. Thoroughness is also highly expected. Unfortunately, the kind of huge burden of an adjudicator because of the time factor and the project records could be ranging from 4 to 5 years. And the expectation to absorb all the facts within this tight timeline and make a decision is very high. But parties still expect of it. They still aspect the adjudicator to make what they perceived as correct decision in their favour. [R11, L280-287]</i>

b) *Background and expertise*

T5 (58)	<i>So, we have difficulties when we have two types of adjudicators. We have the one with legal backgrounds or the one who has technical background; people like us the construction professionals. [R11, L298-300]</i>
T5 (59)	<i>Many of the disputes are engineering in nature, rather than architecture in nature. So, it is best that it is ventilated by the engineers. Engineers must have proper trainings. Like if you have engineers, they may have good experience, but we need engineers that are able to articulate the dispute resolution process in a proper and fair decision. Its important to have this kind of people to avoid the conflict to renowned into dispute, having resolved maturely. [R2, L182-186]</i>
T5 (60)	<i>He needs to understand what happened in the construction work or what happened in construction site on a day to day basis, because that is when he will be able to assess the claim. And understanding the nature of the claim. At this point of time, adjudicators in Malaysia have 45 working days to come out with a decision. That is 45 days barring any meetings between the parties barring any hearing times. He will just be looking at documentations. Now, these documents sometimes to you in orderly fashion, sometimes they are not. Sometimes they just throw to you bundles and bundles and bundles which I tend to believe that, the presenter of those documents, presenter of that case, he doesn't the understand he bundles which he is giving you as well. So he just gives you all. And you as an adjudicator will need to look at the bundles and make sense of it. [R14, L97-106]</i>
T5 (61)	<i>When an adjudicator makes a decision, look at the adjudicators in KLRCA, a very big majority are the lawyers. So, in fact, a lot of time, I noticed the adjudicator decides on the legal issues (relating to the payment) rather than the technical issues for example differences in rates. Of course, in this case the lawyers are not suitable to decide. I don't think they know about the rates anyway. But then, so far, honestly, almost all of my adjudication, the adjudicators only two or three are non-lawyers, the rest are all lawyers. And some of them are lawyers, but non-practicing lawyers. This is how it happens. [R9, L98-105]</i>
T5 (62)	<i>If you want the lawyers to do differences in rates and go through the rates one by one, I don't think lawyers are suitable, because they have no technical basis. But, surprisingly, a lot of adjudicators are being argued on legal principles, surprisingly! For example, whether final account can be brought under CIPAA?! Are you serious? [R9, L125-129]</i>
T5 (63)	<i>I'm not saying lawyers were not good arbitrators/adjudicators, but more suitable people will be the technical people because these are the technical matters which require you to know technicity and you can understand them and you can move faster for the process. Otherwise, you will take more time to explain to lawyers, judges what this technical matters is. Then you're further delaying this matter. This is happening in the industry. Many judges and lawyers are sitting as arbitrators. Not saying I'm criticizing. But arbitrators, way back in 1950s it were started by engineers and architects and accountant, but not lawyers. They recognized this as technicality issue. [R2, L195-203]</i>

T5 (64)	<p><i>So, if he looks at those documents, and if he doesn't have enough understanding or knowledge on what happened in construction project on a day to day basis. He will not be able to put the piece together, be able to see the entire picture or to ask the relevant question in order to come out with his decision. Then his decision will not be factual, his decision will be much based on whatever is the correct number. But, construction, as we know is a science, law is an art. Construction is a science, it's an engineering science. And the claim which is based on money. The claim is also based on mathematical science. Right?! How does a contractor come out with his loss and expense? What is his cost? What are his profit elements? And all these need to be based on a document which we all commonly refer as to BQ. So, in the BQ, the rates are stated. So, what happened in the contract whether there is no BQ, whether it's a lump sum documents, how are you going to start assessing whether what is being claimed by the contractor is factually correct?! Unless you say "I want quantum experts to come in". Quantum expert or any kind of experts are expensive; parties may not want to engage them. And looking at adjudication which is actually a fast process and the claims may not be as high as you need to actually get a quantum expert. Then, quantum expert may require time, and no two quantum experts are going to be the same. So you are going to have a trial within a trial situation. And in adjudication you can't have trials. So, if you bring an adjudicator who has very little knowledge on what goes at site on a daily activity basis, everybody will be really having problems. [R14, L109-127]</i></p>
---------	--

## 7.8 Theme 6: Construction Contract Management

T6 (1)	<p><i>You want it to be in writing and all the specificity will be explicit. Rather than you and me verbally transact and languages can be very loose and also misinterpreted as well. What you mean may be different from what the other party understood. To the extent, sometimes whatever that is in writing may also be misinterpreted. So, let alone the verbal transaction or verbal agreement. [R2, L65-69]</i></p>
T6 (2)	<p><i>So nowadays we already release many standard form of contract, we want everything to be clear, and we want everything to be in writing. Say, when you go to arbitration or adjudication, we want to know what form of contract you are contracting on. It doesn't matter what you have said earlier. Unless, you can prove the evidence. But everything nowadays are in the square and corner of the form. So, the culture aspect in construction is something disappearing very quickly. [R2, L44-49]</i></p>
T6 (3)	<p><i>In public sector, unless something is very wrong with the contract that they cannot agree with some of the aspect because the control of the government contract is very strict. In public contract a lot assessment will be done, and if the job is done you must make a payment if you don't do that, there are a lot of answering that needs to be done to your office. So, in that sense, progress payment (in public contract) is quite regular. I know in private sector, it may not necessarily happen. [R3, L85-93]</i></p>

### 7.8.1 Dispute Resolution Clause

T6 (4)	<p><i>The normal practice is that they will put down the so called dispute resolution clause by the way of arbitration. Ok, so that means, the party agrees to submit their dispute to arbitration and let the tribunal of arbitration to settle. But, it doesn't stop the party to go directly to litigation. Because, different matter they will settle. Like CIPAA cases, so they are dealing with payment issue. So, doesn't mean that if you have an arbitration clause in the contract itself and they will stop the party to go to CIPAA. It's a totally different issue. So, the aggressive party, they may run both at the same time (arbitration and adjudication) [R1, L33-40]</i></p>
T6 (5)	<p><i>So, if the clauses were drafted loosely, normally we called it "midnight" terms. Normally, then party already settled all the dollar and cents, all the conditions, the resolution clause will be the last resort. During closing, when all the bosses already go down to celebrate and the lawyer will still ding-dong still struggling to draft the dispute resolution clause and just say "ah never mind lah just go, close it". So then, if that is the case, the arbitration agreement is drafted in a very loose way, and then you might have a chance to get away from the arbitration agreement and straight away to the court. [R1, L51-58]</i></p>

### b) Dispute Settlement Phase

T6 (6)	<p><i>I will always say ADR is just like a toolbox. You are a workman. You have a toolbox, when you open up the toolbox, "Wow, so many different tools, every tool is for different purposes." So, it's important to selecting the tools for the correct purpose. What are you trying to do, what is it that you are trying to achieve, what item you are trying to fix then there is a tool to do the job. So you</i></p>
--------	--

	<i>decide what tools. [R13, L116-121]</i>
T6 (7)	<i>So by the time, the contractor is already suffering and when do this going to end? It doesn't make sense. All the money is being paid to settle this issue. It's like a roller coaster journey, once you embark on it, you cannot stop and go back. Sorry! So, there is no way of stopping until to the end. I don't get it. But, that is the process. And because it's a roller coaster ride, it is very scary. [R13, L194, 198]</i>

a) *Formal*

T6 (8)	<i>... adjudication is a step to a formal dispute resolution. I think parties would have accepted that the outcome or just even the act of going into adjudication may, most probably, or highly likely will affect their future working relationships. That is why this step will not be embarked until a clear idea of where the disputant may stand after this. [R11, L141-146]</i>
T6 (9)	<i>I would say that, taking decision to go to adjudication is a very high road. You are prepared to cut ties and get blacklisted or whatever. [R11, L213-214]</i>
T6 (10)	<i>... the relationship become more difficult to maintain when it hits this process. That is why the decision to embark in adjudication to me is already at the high point of their dispute episode coming on from a very long troubling matter due to this "strange relationship" throughout the project. [R11, L236-239]</i>
T6 (11)	<i>So the longer the settlement process take into place be it via adjudication or arbitration, the stronger these negative feelings will fortify in parts of mind of the parties. [R14, L63-65]</i>
T6 (12)	<i>Major players, they will definitely take more cautious approach of because their image and presence of their company in the industry is very important, and also the outcome of any adjudicator may affect them, may affect their bottom line, and may affect their company principles, values and all these. So they are more cautious on approaching adjudication. [R11, L196-200]</i>
T6 (13)	<i>During the settlement stage it depends on the claimant. So, if the claimant, they already have the prejudice mind block "I don't care, I want to sue you. I will see you in court" then, no need to talk more right? [R1, L252-255]</i>
T6 (14)	<i>They will have due diligence to study whether indeed they have a good case. They might not even embark into this process if they don't think they have even the chances of even 50% of winning. Because of course, it will not be worthy of pursuing, it will be right, it will be partly right. But just imagine, you spend a long time, a lot of money, in this process, and that may divert your resources to a more productive work and it may be consider also, because of their wider interest. [R11, L200-206]</i>
T6 (15)	<i>I think it fits. Simply because, no matter where you are in the world, it doesn't put a restriction for parties to always looking for options on how to settle the dispute. And I think adjudication is one process that helps parties settle disputes relatively quickly and strategically. Putting aside the face aspect, if parties got not choice unless to refer the disputes to the formal dispute resolution process. Moreover, the approach of adjudication is much softer than arbitration or court process. [R6, L82-87]</i>
T6 (16)	<i>I think large number of contractors do try to make the adjudication itself less hostile. So far, in many instances, the adjudication decision is not strictly enforced against the other party. Instead, it is used as a basis to negotiate and settle the matter. [R8, L55-53]</i>

b) *Informal*

T6 (17)	<i>It's important to have this kind of people to avoid the conflict to renowned into dispute, having resolved maturely. Because at that point in time, the parties are still talking to each other. [R2, 185-187]</i>
T6 (18)	<i>By the time they reach up to adjudication stage, they are in dispute already. That they cannot settle within the team already (...) So, you can say it's a third party, but its actually an in-house advisor, internally engaged by the project to solve the dispute at early stage amicably without going into a formal adversarial settlement like adjudication and arbitration. [R3, L30-35]</i>
T6 (19)	<i>... people who so-called in weaker position, they will always want to settle. To the extent that, economically, financially, they could no longer sustain. You must understand some subcontractors are not doing one subcontract work with just one particular contractor. They are doing many other subcontract works. Where do you think they are going find money? You get stuck in one or two, that's where you have to move your fund from others to financially support the one in default, and how many times can you do that? So, why don't they want to settle? Genuinely, they want to settle. They understand it will take time, they understand the lawyer will involve, claim consultants will be</i>



there, and these are the cost usually they have to figure out first. [R2, L80-88]

### 7.8.3 Contractual Claims

#### a) Claim minded

T6 (20)	<i>Previously, Malaysian contractors are not claim cautious. After the north-south highway project, they became aware on the importance of contract administration and the awareness to their contractual entitlements, their right. [R9, L34-37]</i>
T6 (21)	<i>So, now the mind-set has totally changed. Since then, the whole thing becomes progressively more and more complicated! Therefore, Malaysian contractors now are more claims aware. More and more cautious about their contractual right. [R9, L40-42]</i>
T6 (22)	<i>I would say there is a major cultural shift. Contractor companies right now are more aware of claims. [R9, L53-54]</i>
T6 (23)	<i>So the low level party, they are still not really claim cautious. When I say “claim” I don’t mean your money progress claim. I’m referring “claim” as the additional contractual claim like EOT claims, loss and expenses claims, and all these kind of claims. So, a low level party, they know what is it, but they would prefer not to initiate their rights for that. Simply because, they treat themselves as a service base. If they initiate any dispute resolutions, most likely the clients won’t call you for the second job. These are the setback for this level of subcontractor. This is why the CIPAA came in. CIPAA came in mainly to help these group of people, because mostly the disputes are on payment. [R1, L68-75]</i>
T6 (24)	<i>... then you will go to some established companies. These established companies; they might have awareness on claims. But the problem is, they do not really have the expertise to handle the claims and one of the setback is if you really initiate dispute resolution onto it, it will cost you time as well as the expert fees on it. As far as their concern is, they just want money. If you have a faster road, the will ought for that (...) Because, somehow rather the fees for the dispute settlement is still a factor for it. [R1, L76-83]</i>
T6 (25)	<i>So, you know, a lot of contractors or contracting companies, even for the medium-size, they will have in-house legal department. And you can see some claim consultancy coming up helping people to prepare claims and all. [R9, L42-44]</i>
T6 (26)	<i>One step higher, now we are talking about the international companies. Ha, that is a different mode. That one is a very claim cautious! Every now and then they will be focusing on loopholes in the contract and trying to find which area that I might or you might have a claim against. They are very cautious mind. [R1, L84-87]</i>
T6 (27)	<i>They will really engage with lawyers or even claim consultants even during the project execution time. They just want to pace their way to claims. They just want to accelerate their rights to the claims. [R1, L92-95]</i>
T6 (28)	<i>Last time, they scared and very worried of offending the employers. Now, they can write a very formal claim documents, detailing step by step of why they are entitled of the claim. So, since then on ok, the contractor is more aware of the contractual right. And this is how I think the whole game of contracting has already a shift to where it is now. [R9, L54-57]</i>
T6 (29)	<i>The moment they got claims, they will rather sweep under the carpet or try to find a way to avoid the claims. [R1, L149]</i>

#### b) Merit of claim

T6 (30)	<i>So this is the problem, why can’t you face it (the claim) bring it on the table and get the parties to sit down and look at it whether it’s a genuine claim or not. So, if it’s really not a genuine claim, then that fella is really a claim minded kind of person. You got to tell them “look, this claim is not genuine, if you want to go, go ahead with it, but I’m telling you it’s not going to work”. [R1, L239-242]</i>
T6 (31)	<i>I will tell my boss “look, this is not actually a genuine claim, we have told this guy before. But he still refuses; this guy is a stubborn contractor. He is not a contractor that we would want to work again as a partner”. [R14, L61-63]</i>
T6 (32)	<i>Because, they are going to get something out of it, no matter what, half of it, it’s okay to them! 25% is also okay! So what happened is they start to put huge claim, but nothing is between the value, nothing! But, when it comes to the bottom line at the sum, you see so many zeros at the back! If the adjudicator cut a few zero, they will still get something, so let’s put a bigger claim! They put more zero! But then if they were to cut a few zeros, they are still not entitled to that amount! But still, they</i>

	<i>get something!</i> [R11, L387-394]
T6 (32)	<i>This is very subjective. This is inherent matter that appears in all justice system. Even in court, people will say some judges are better than the other. It's unavoidable. In court litigation, there is still appeal procedure. So, it still subject to a way of check and balance. The danger is that in adjudication, it is not appealable. You can apply for set aside, but it's only on four very limited grounds. Which always does not touch on the merits because the merits of the decision of the adjudicator can always be examine later in a full-blown litigation or arbitration. But that is not entirely realistic in many circumstances because of the time and cost involves.</i> [R7, L120-127]



# **LAWS OF MALAYSIA**

**Act 746**

**CONSTRUCTION INDUSTRY PAYMENT AND  
ADJUDICATION ACT 2012**

Date of Royal Assent	...	...	18 June 2012
Date of publication in the <i>Gazette</i>	...	...	22 June 2012

# LAWS OF MALAYSIA

## Act 746

### CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

---

#### ARRANGEMENT OF SECTIONS

---

##### PART I

##### PRELIMINARY

Section

1. Short title and commencement
2. Application
3. Non-application
4. Interpretation

##### PART II

##### ADJUDICATION OF PAYMENT DISPUTES

5. Payment claim
6. Payment response
7. Right to refer dispute to adjudication
8. Initiation of adjudication
9. Adjudication claim
10. Adjudication response
11. Adjudication reply
12. Adjudication and decision
13. Effect of adjudication decision
14. Consolidation of adjudication proceedings
15. Improperly procured adjudication decision
16. Stay of adjudication decision
17. Withdrawal and recommencement of adjudication proceedings
18. Costs of adjudication proceedings
19. Adjudicator's fees and expenses, *etc.*
20. Confidentiality of adjudication

## PART III

## ADJUDICATOR

## Section

21. Appointment of adjudicator
22. Appointment of adjudicator by parties
23. Appointment of adjudicator by Director of the KLRCA
24. Duties and obligations of the adjudicator
25. Powers of the adjudicator
26. Power of adjudicator not affected by non-compliance
27. Jurisdiction of adjudicator

## PART IV

## ENFORCEMENT OF ADJUDICATION DECISION

28. Enforcement of adjudication decision as judgment
29. Suspension or reduction of rate of progress of performance
30. Direct payment from principal
31. Concurrent exercise of remedies

## PART V

## ADJUDICATION AUTHORITY

32. Functions of KLRCA
33. Policy directions

## PART VI

## GENERAL

34. Immunity of adjudicator and KLRCA
35. Prohibition of conditional payment
36. Default provisions in the absence of terms of payment
37. Relationship between adjudication and other dispute resolution process

PART VII

MISCELLANEOUS

Section

- 38. Service of notices and documents
- 39. Regulations
- 40. Exemption
- 41. Savings





# LAWS OF MALAYSIA

## Act 746

### CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

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

[ ]

**ENACTED** by the Parliament of Malaysia as follows:

#### PART I

#### PRELIMINARY

#### **Short title and commencement**

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

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

#### **Application**

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

### **Non-application**

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

### **Interpretation**

4. In this Act, unless the context otherwise requires—

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

“adjudication proceedings” means the process of adjudication under this Act;

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

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

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

“construction contract” means a construction work contract or construction consultancy contract;

“construction work” means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of—

- (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
- (b) any road, harbour works, railway, cableway, canal or aerodrome;
- (c) any drainage, irrigation or river control work;

- (d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
- (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

and includes—

- (A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and
- (B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

“construction work contract” means a contract to carry out construction work;

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

“Government” means the Federal Government or the State Government;

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

“KLRCA” means the Kuala Lumpur Regional Centre for Arbitration;

“Minister” means the Minister charged with the responsibility for works;

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

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

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

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

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

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

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

## PART II

### ADJUDICATION OF PAYMENT DISPUTES

#### **Payment claim**

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

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

- (a) the amount claimed and due date for payment of the amount claimed;
- (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
- (c) description of the work or services to which the payment relates; and
- (d) a statement that it is made under this Act.

### **Payment response**

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

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

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

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

### **Right to refer dispute to adjudication**

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

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

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

### **Initiation of adjudication**

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

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

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

### **Adjudication claim**

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

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

### **Adjudication response**

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

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

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

### **Adjudication reply**

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

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

### **Adjudication and decision**

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

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

- (a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
- (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
- (c) such further time as agreed to by the parties.

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

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

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

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

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

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

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

### **Effect of adjudication decision**

**13.** The adjudication decision is binding unless—

- (a) it is set aside by the High Court on any of the grounds referred to in section 15;
- (b) the subject matter of the decision is settled by a written agreement between the parties; or
- (c) the dispute is finally decided by arbitration or the court.

### **Consolidation of adjudication proceedings**

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

### **Improperly procured adjudication decision**

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

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially;  
or
- (d) the adjudicator has acted in excess of his jurisdiction.



### **Stay of adjudication decision**

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

- (a) an application to set aside the adjudication decision under section 15 has been made; or
- (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

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

### **Withdrawal and recommencement of adjudication proceedings**

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

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

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

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

- (a) the adjudication proceedings come to an end and the parties are free to recommence adjudication proceedings afresh; or
- (b) the adjudication proceedings may be continued by a new adjudicator appointed by the parties and the adjudication proceedings shall continue as if there is no change of adjudicator.

**Costs of adjudication proceedings**

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

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

**Adjudicator's fees and expenses, etc.**

**19.** (1) The parties and the adjudicator shall be free to agree on the terms of appointment of the adjudicator and the fees to be paid to the adjudicator.

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

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

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

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

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

### **Confidentiality of adjudication**

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

- (a) with the consent of the other party;
- (b) to the extent that the information is already in the public domain;
- (c) to the extent that disclosure is necessary for the purposes of the enforcement of the adjudication decision or any proceedings in arbitration or the court; or
- (d) to the extent that disclosure is required for any purpose under this Act or otherwise required in any written law.

## PART III

### ADJUDICATOR

### **Appointment of adjudicator**

**21.** An adjudicator may be appointed in the following manner:

- (a) by agreement of the parties in dispute within ten working days from the service of the notice of adjudication by the claimant; or
- (b) by the Director of the KLRCA—
  - (i) upon the request of either party in dispute if there is no agreement of the parties under paragraph (a); or
  - (ii) upon the request of the parties in dispute.

### **Appointment of adjudicator by parties**

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

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

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

### **Appointment of adjudicator by Director of the KLRCA**

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

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

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

- (*a*) the parties may agree to appoint another adjudicator in the manner provided under paragraph 21(*a*); or
- (*b*) the Director of the KLRCA may proceed to appoint another adjudicator in the manner provided under paragraph 21(*b*).

### **Duties and obligations of the adjudicator**

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

- (*a*) there is no conflict of interest in respect of his appointment;

- (b) he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;
- (c) he shall comply with the principles of natural justice; and
- (d) there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence.

### **Powers of the adjudicator**

**25.** The adjudicator shall have the powers to—

- (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
- (b) order the discovery and production of documents;
- (c) set deadlines for the production of documents;
- (d) draw on his own knowledge and expertise;
- (e) appoint independent experts to inquire and report on specific matters with the consent of the parties;
- (f) call for meetings with the parties;
- (g) conduct any hearing and limiting the hearing time;
- (h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;
- (i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;
- (j) issue any direction as may be necessary or expedient;
- (k) order interrogatories to be answered;
- (l) order that any evidence be given on oath;
- (m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

- (n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;
- (o) award financing costs and interest; and
- (p) extend any time limit imposed on the parties under this Act as reasonably required.

### **Power of adjudicator not affected by non-compliance**

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

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

- (a) set aside either wholly or partly the adjudication proceedings;
- (b) make any order dealing with the adjudication proceedings as the adjudicator deems fit; or
- (c) allow amendment to be made to the document produced in the adjudication proceedings.

### **Jurisdiction of adjudicator**

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

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

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

## PART IV

### ENFORCEMENT OF ADJUDICATION DECISION

#### **Enforcement of adjudication decision as judgment**

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

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

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

#### **Suspension or reduction of rate of progress of performance**

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

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

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

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

- (a) is not in breach of contract;
- (b) is entitled to a fair and reasonable extension of time to complete his obligations under the contract;
- (c) is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party; and
- (d) shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court pursuant to subsection 37(1).

### **Direct payment from principal**

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

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

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



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

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

### **Concurrent exercise of remedies**

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

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

## **PART V**

### **ADJUDICATION AUTHORITY**

#### **Functions of KLRCA**

**32.** The KLRCA shall be the adjudication authority and shall be responsible for the following:

- (a) setting of competency standard and criteria of an adjudicator;
- (b) determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;
- (c) administrative support for the conduct of adjudication under this Act; and
- (d) any functions as may be required for the efficient conduct of adjudication under this Act.

**Policy directions**

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

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

## PART VI

## GENERAL

**Immunity of adjudicator and KLRCA**

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

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

**Prohibition of conditional payment**

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

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

- (a) the obligation of one party to make payment is conditional upon that party having received payment from a third party; or
- (b) the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

**Default provisions in the absence of terms of payment**

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

- (a) the contract price for the construction work or construction consultancy services;
- (b) any other rate specified in the construction contract;
- (c) any variation agreed to by the parties to the construction contract by which the contract price or any other rate specified in the construction contract is to be adjusted; and
- (d) the estimated reasonable cost of rectifying any defect or correcting any non-conformance or the diminution in the value of the construction work or construction consultancy services performed, whichever is more reasonable.

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

- (a) the fees prescribed by the relevant regulatory board under any written law; or
- (b) if there are no prescribed fees referred to in paragraph (a), the fair and reasonable prices or rates prevailing in the construction industry at the time of the carrying out of the construction work or the construction consultancy services.

(3) The frequency of progress payment is—

- (a) monthly, for construction work and construction consultancy services; and
- (b) upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.

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

**Relationship between adjudication and other dispute resolution process**

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

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

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

**PART VII****MISCELLANEOUS****Service of notices and documents**

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

- (a) by delivering the notice or document personally to the party;
- (b) by leaving the notice or document at the usual place of business of the party during the normal business hours of that party;
- (c) by sending the notice or document to the usual or last-known place of business of the party by registered post; or
- (d) by any other means as agreed in writing by the parties.

**Regulations**

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

### **Exemption**

**40.** The Minister may, upon considering the recommendation of the KLRCA, by order published in the *Gazette*, exempt—

(a) any person or class of persons; or

(b) any contract, matter or transaction or any class thereof,

from all or any of the provisions of this Act, subject to such terms and conditions as may be prescribed.

### **Savings**

**41.** Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.



