REGULATORY FRAMEWORK FOR ADJUDICATORS IN THE MALAYSIAN CONSTRUCTION INDUSTRY

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A dissertation submitted for the degree of Doctor of Philosophy

at the University of Strathclyde

School of Law

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September 2016

DECLARATION OF AUTHENCITY AND AUTHOR'S RIGHT

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Signed:

Date:

DEDICATION

For Mak & Abah, Al-Fatihah.

I dedicate my dissertation work to my family and friends. A special feeling of gratitude to my sisters Wan Nor Azah, Wan Azni, Wan Asma and Wan Anizal whose words of encouragement and push for tenacity ring in my ears. My brothers Abdullah, Hussaini, Zulkafli and Zukri, you guys are the best. To the clan of Ibrahim and Sham, you guys are everything to me. Anis and Nicola, you are the best companion ever.

ACKNOWLEDGEMENTS

A special thanks to Professor Bryan Clark for his countless hours of reflecting, reading, encouraging, and most of all patience throughout the entire process of completing this PhD. Thank you, Dr Andrew Agapiou, Professor Donald Nicolson, Dr Claire MacDiarmid and Dr Nicole Busby. A special thanks also goes to the members and staffs of Humanities & Social Sciences Faculty for their continued support.

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ACRONYMS AND ABBREVIATIONS

AANZ	Adjudicators Association of New Zealand Inc.
ACE	Association for Consultancy and Engineering
ADR	Alternative Dispute Resolution
AMINZ	Arbitrators' and Mediators' Institute of New Zealand Inc.
ANA	Authorised Nominating Authorities
ANB	Authorised Nominated Bodies
ARC	Adjudication Reporting Centre
ARRU	Adjudication Research and Reporting Unit
BCA	Building and Construction Industry Singapore
BDT	Building Disputes Tribunal
CCA 2002	Construction Contract Act 2002
CCR 2003	Construction Contract Regulations 2003
CECA	Civil Engineering Contractors Association
CIArb	Chartered Institute of Arbitrators
CIB	Construction Industry Board
CIC	Construction Industry Council
CIDB	Construction Industry Development Board of Malaysia
CIPA 2012	Construction Industry Payment and Adjudication Act 2012
CIPA-R 2014	Construction Industry Payment and Adjudication Regulations 2014
CPD	Continuing Professional Development
FIDIC	International Federation of Consulting Engineers

FRA	The Financial Services Authority
HGCRA 1996	Housing Grants, Construction and Regeneration Act 1996
ICE	Institution of Civil Engineers
IEM	The Institution of Engineers Malaysia
JCT	Joint Contract Tribunal
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LCA 2006	Lawyers and Conveyancers Act 2006
LDEDCA	Local Democracy, Economic Development and Construction Act 2009
LPA 2011	Legal Profession Act (Chapter 161) (Revised Edition 2009)
LSA 2007	Legal Service Act 2007
LSB	Legal Services Board
NEC	New Engineering Contract
NSW 1999	New South Wales Building and Construction Industry Security of Payment 1999
OECD	The Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
PAM	Pertubuhan Arkitek Malaysia
P.D.	Project Director
PSRB	Professional, Statutory and Regulatory Bodies'
PWD	Public Work Department Malaysia
QS	Quantity Surveyor
RIBA	Royal Institute of British Architects
RICS	Royal Institute of Chartered Surveyors

SMC	Singapore Mediation Centre
S.O.	Superintending Officer
SOPA 2004	Building and Construction Industry Security of Payment Act 2004
SOPA-R 2005	Building and Construction Industry Security of Payment Regulations
SRA	Solicitors Regulation Authority
TECBAR	Technology and Construction Bar Association
TeCSA	Technology and Construction Solicitors Associations
TDR	Traditional Disputes Resolution
UKIPG	The UK Inter-Professional Group
UK	United Kingdom

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ABSTRACT

Following the precedent move by the United Kingdom when it enacted the Housing, Grants, Construction and Regeneration Act 1996 (HGCRA 1996) in 1998, the enactment of the Construction Industry Payment and Adjudication Act 2012 (CIPA 2012) in 2014 is expected to improve the cash flow problems in the construction industry in Malaysia. Parallel with statutory needs to resolve disputes via adjudication, the statutory adjudicator exists to conduct the adjudication process. However, in contrast with the Building and Construction Industry Security of Payment Act 2004 (SOPA 2004) in Singapore, HGCRA 1996 and CIPA 2012 does not provide a mandatory regulatory framework for adjudicators. In view of that issue, the author aims to identify and test an appropriate regulatory framework for adjudicators in Malaysia by comparing and contrasting the existing regulatory framework in the UK, Singapore, New Zealand and Malaysia. In addition, the author will also explore the current regulatory framework for construction professionals and legal practitioners since both professions made up more than 90% of adjudicators in the UK, Singapore, New Zealand and Malaysia.

Towards the journey to achieve the aim of the research, the author will start by exploring the relevant underlying theories of existing regulatory framework for construction professionals, legal practitioners and adjudicators in the UK, New Zealand, Singapore and Malaysia. The author will also address and articulate the theory behind the existence of adjudicators and the fundamental theory on relevant skill and knowledge for adjudicators. These findings will help to support the process of developing theoretical regulatory framework that will be used as a guide to identify an appropriate and credible regulatory framework for adjudicators in Malaysia. With the theoretical regulatory framework in hand, the author has sought to test empirically the framework practicality within the Malaysian context via a small scale of evaluative studies. The evaluative studies proven to be a big step to understand the acceptance of the advocated theoretical regulatory framework for adjudicators. Ultimately, it can be concluded that the propose regulatory framework for adjudicators in Malaysia is tested and approved via the small scale studies.

INTRODUCTION

1.0 Introduction

The total contribution by the construction industry to Malaysia's Gross Domestic Product (GDP) is significant. In the first quarter of 2015, the construction industry contributed approximately 9.7% of the overall GDP for the Malaysian economy (Bank Negara Malaysia, 2015). As a developing country, the construction industry plays a vital role in generating wealth and improving the quality of life in Malaysia. However, late payment is endemic in construction contracts and has been explicitly recognized as the main problem recurring from project to project (Kho and Abdul Rahman, 2010). Earlier, Lim (2005) said that the common modes of enforcement of construction claims in Malaysia were at that time by way of arbitration or litigation and stated that litigation is affordable but takes too long while arbitration is faster but expensive. Supardi and Adnan (2011a) highlighted that sub-contractors in Malaysia have to bear the burden of the current structure of payment mechanisms in the standard forms of contract which include payment upon certification, direct payment from the employer, and contingent or conditional payment. As a consequence, such problems may damage the cash-flow in construction projects and sometimes lead to delays or total abandonment of the project running to potential losses of millions not only to the parties but also for the industry and in terms of the national wealth as a whole.

The perceived success of the security of payment regime and statutory adjudication in the UK and other countries, coupled with payment concerns in the Malaysian construction industry has prompted the government to establish an industry-specific Act that gives parties in contract statutory rights to progress payments through recourse to adjudication (Che

Munaaim, 2009). Since 2003, the Construction Industry Development Board of Malaysia (CIDB) has collaborated with the construction industry to develop the Construction Industry Payment and Adjudication Act 2012 (CIPA 2012). In building an appropriate adjudication model, Malaysia had the benefit of learning from two major models – the UK/New Zealand model and the New South Wales, Australia/Singaporean model (Ameer Ali, 2007). CIPA 2012 received Royal Assent on 18 June 2012 and was published in the Gazette on 22 June 2012. After thorough consideration by the Ministry of Works, the act was put into action starting from 15 April 2014 along with the approved Construction Industry Payment and Adjudication (Exemption) Order 2014 and the amended Construction Industry Payment and Adjudication Regulations 2014. Preparing for implementation of the CIPA 2012 required certain duties to be carried out by the Kuala Lumpur Regional Centre for Arbitration (KLRCA). KLRCA has been mandated as the 'Adjudication Authority' in Malaysia via S 32 of CIPA 2012 and is obligated to carry out certain duties listed under S 32(a) – (d) that will be explain in briefly in Chapter 4 of this thesis. Usually, the introduction of new legislation is inherently constrained by levels of local knowledge and capacity within implementing agencies. Looking back at the other jurisdictions that have enacted payment regimes within an Adjudication Act, the impact of the enactment to the construction industry arose after about a year[1] after implementation. As an example, in 2006, a year after the introduction of the Building and Construction Industry Security of Payment Act 2004 (SOPA 2004), the Building and Construction Industry (BCA) in Singapore published industry feedback and observations on the regime to provide an indication on improvements achieved on cash-flow problems in the industry. It is encouraging to perceive how the industry embraced the changes and dealt with the new statutory right created by CIPA 2012 in the early years. It will

[1] See *Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] EWHC Technology 254 (12th February, 1999).* This is the first time that the court has had to consider the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996.

hence be interesting to monitor the growth of the payment and adjudication regime in Malaysia after it is in full swing and further monitor how it has affected the industry.

The construction industry recognised adjudication as a unique 'fast track' alternative dispute resolution process, designed to keep cash flowing down the supply chain in order to generate the work that needs to be done to complete a construction project. Contractual and statutory adjudication processes have established the adjudicator as a new profession in the construction industry. In the UK context, Lord Young[2] (2003) observed that the system of adjudication has rapidly built up a substantial degree of confidence on the part of those involved in the construction industry. This observation was also supported by Turner (2000), Atkinson (2001), Bingham (2002), Chau (2007), Bingham (2008), Wright (2010), Kennedy et. al. (2010), Atherton (2013) and Chow (2013). In addition, the Adjudication Reporting Centre (2000-2012) in their reports provides records that adjudication has become the primary method for resolving construction disputes in the UK over the last decade.

It was noted that the adjudicator plays a key role in the success of statutory adjudication as adjudication determinations are legally binding decisions that can significantly affect the financial position of businesses (even if only on an interim basis), if not challenged in arbitration or court. According to Tate (2010), in adjudication, the users need to be assured that the adjudicator will provide 'right' decisions that reflect the parties' contractual positions. It would hence seem essential that the decisions are made competently and fairly for all the parties involved. The UK Housing Grants, Construction and Regeneration Act 1996 (HGCRA, 1996) and its implementing Scheme chose to be largely silent on the issue of required competency and quality of adjudicators. The only provisions lain down in the regime

[2] *Costain Ltd v. Strathclyde Builders Ltd* [2003] ScotCS 352

in this sense set out concisely for the adjudicator to act impartially and abide with the rules of natural justice. In brief, HGCRA 1996 only states that parties in construction contracts will be able to name the chosen adjudicator in the contract but in the case where there is none, the Scheme[3] will provide Authorised Nominated Bodies[4] (ANB), each of which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party. This has created a significant trend where, through the demand in the market, adjudicators in the UK have begun to enjoy the benefit of being selected by an ANB. Ameer Ali (2005), Uher & Brand (2007), Che Munaim (2009), Ameer Ali (2013) and Green (2013) agreed with the system and concluded that the confinement of nominating adjudicators through ANBs is perceived as a way of ensuring the selecting of quality adjudicators.

Over the years, there have been complaints made against the quality of adjudicators as recorded by the Adjudication Reporting Centre, Glasgow Caledonian University and in 2012 the complaints increased from 0.26% in the previous year to 2.44%. There have been cases where the complaints were upheld but this amount to a relatively small percentage. Nevertheless, even though the percentage are relatively small, it can be projected as an indicator on the industry's views on the quality of adjudicator. Basically, it can be speculated that, if the quality of the adjudicators satisfies the industry, there should be no complaints against the adjudicators. Thus, there must be some guidelines that should be implemented by the ANBs to improve the quality of the adjudicators. In addition, parties may also challenge the adjudicator's appointment; however, most such challenges have been made on the ground

[3] The Scheme for Construction Contracts (England and Wales) Regulations 1998; The Scheme for Construction Contracts (Scotland) Regulations 1998; The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011; The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011 and The Scheme for Construction Contracts (Scotland) Regulations 1998 (Amendment) (Scotland) Regulations 2011

[4] A body authorised to receive and administer adjudication applications and adjudication responses, appoint adjudicators, issue adjudication determinations and provide relevant support to facilitate adjudication.

that no dispute crystallised when the appointment was made. Yet, some adjudication cases still end up in arbitration or litigation to either enforce or challenge the adjudicator's decision.

HGCRA 1996 came into force in 1998 and the first case arising from alleged error of an adjudicator was brought to litigation in January 1999[5] where the adjudicator was accused of committing a procedural error in conducting the adjudication in breach of the rules of natural justice. In New Zealand the first case brought to the District Court was in February 2004, approximately a year after the Construction Contract Act 2002 (CCA 2002) came in to force on the 1st April 2003 and Judge D M Wilson QC in *TUF Panel Construction Limited v Robert Ernest Capon*[6] advocate that statutory adjudication brought radical changes in legal matrix and those entities that will benefit from the enactment of the act must be prepared to accept consequences from the adjudication process. '…the case calls for examination of the impact on the construction contract of a radically changed legal matrix'. In addition, for Singapore; since SOPA 2004 came into operation, the act has apparently been considered by the courts on a few occasions only. However, it was noted that most of the cases[7] has been brought to litigation due to the error made by adjudicators in determining their jurisdiction. This scenario illustrates that in the early stage of statutory adjudication, there are issues on the insufficient knowledge of adjudicator on the application of the adjudication process in the payment regime. Accordingly, adjudicators as the important players in the regime must understand in detail the payment and adjudication regime to cultivate the decisions that will exemplify the main policy objective behind the legislative intent of the regime and to provide a statutory mechanism to enforce the right to cash flow in the construction industry as

[5] *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] EWHC Technology 254
[6] DC NSD CIV 2003/044/2801
[7] See *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] SGHC 142; [2007] 4 SLR 364, *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 23; *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd [2010] 1 SLR 733; AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

envisioned in the Latham Report and observed by Lord Denning in *Dawnays Ltd v FG Minter*[8].

In the year 2000, the UK Construction Industry Board (CIB) expressed in their report their concern with the background of adjudicators due to the nature and concept of statutory adjudication and in particular the ability of adjudicators to provide a correct answer in a limited time[9] and a proposal was made for Ministers to consider how better guidance could be given to the adjudicators. Additionally, this issue was further confirmed by the Construction Umbrella Bodies (CUB) Adjudication Task Group (2004)[10] in their submission to the Review Group[11], reporting that those who responded in their survey for the report commented that adjudication was working well although there were concerns about the quality of adjudicators. The Review Group agreed that this could be best dealt with through training and additional guidance. Smith (2003) reported that in the early years after the enactment of the HGCRA 1996, the industry called for government intervention to reduce complaints over unsatisfactory conduct by adjudicators and highlighted again that there were concerns about the quality and competency of adjudicators. However, rather than intervene with new legislation the government chose to support the Construction Umbrella Bodies

[8][1971] 2 All ER 1389

[9] H.H Judge Browsher QC (2000) observed that the speed in which things are being done in the adjudication process can cause breach of natural justice. He continued by referring to judgment of Mr. Justice Dyson (1999) that a mere procedural error should not invalidate an adjudicator's decision. So he concluded that a court should not be astute enough to upset a decision of adjudication on grounds of procedural error. Recently, Lord Chatwick (2006) observed that the task of adjudicators is to find an interim solution which meets the needs of the case. He also added that the need to have the right answer has been subordinated to the need to have an answer quickly. See *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) BLR 93, *Discain Project Services Ltd V Opecprime Developement Ltd* [2002] BLR 402 and *Carillion Construction Ltd v Davenport Royal Dockyard Ltd* [2006] BLR 15

[10] Comprising of 23 appointed members and augmented by representatives from Federation of Master Builders (FMB), Scottish Construction Industry Group (SCIG) and Technology and Construction Solicitors Association (TesCSA).

[11] Chaired by Sir Michael Latham appointed by Nigel Griffiths, then Parliamentary Under Secretary of State at Department Trade and Industry (now Department for Business, Enterprise and Regulatory Reform (BERR))

Adjudication Task Group[12] document entitled 'Guidance for Adjudicators' in 2002 and 'Users' Guide for Adjudication' in 2003. In addition, some ANBs[13] from the UK have also provided rules, guidance and guidelines for adjudicators. However, the said documents only act as guidance on the rules in conducting the adjudication process without any specification on the required quality and competency of an adjudicator.

Accordingly, as a preliminary assessment of the issues, the ANBs published their own sets of rules in the form of codes of ethics/conduct in an effort to render their adjudicators competent. Nonetheless, most ANBs in the UK still use the guidance published by the Construction Umbrella Bodies (CUB)[14]. However, the need for qualified and competent adjudicators has never been significantly assessed as a key problem in the adjudication process since the courts chose to use the robust solution of not interfering with the adjudicator's decision unless proven to be outside of her/his jurisdiction or in breach of the principles of natural justice. Even though concerns over the quality and competency of adjudicators first arose over a decade ago, no solution was offered by the UK government either in the recent amendment to the Scheme made in the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) to the HGCRA 1996.

It can be concluded that in general, even though the selection of adjudicators in the UK is determined by market trends, there are no available points of reference in respect of appropriate standards set out in statute or from the code of practice/conduct in the primary professional role of adjudicators to ensure the existence of properly qualified and competent

[12] Formed in May 2001, following the demise of the Construction Industry Board

[13] e.g.: Royal Institution of Chartered Surveyors (RICS) published Surveyors Acting as Adjudicators in the Construction Industry and the Technology and Construction Solicitors' Association (TeCSA) published Adjudication Rules.

[14] Representative forum for the leading umbrella bodies in the industry such as CIC, The Construction Confederation and the CPA. It took over the pan-industry responsibility for overseeing adjudication issues following the demise of the Construction Industry Board in 2001

adjudicators with suitable skill to deal with the challenges faced in the adjudication process. Furthermore, Dyson J observed in *Macob Civil Engineering Ltd v Morrison Construction Ltd*[15] observed that the approach to enhance adjudicators' quality was not being highlighted for the adjudicator due to the temporary binding status of the adjudications' decision. However, he further advocate that decision is still a decision and the temporary status of it should not be treated as the obstacle in an attempt to improve the adjudicators' quality. Accordingly, it is important to look into all the relevant and debatable issues that surround the means to recognise the minimum qualifications needed to become adjudicator. There is hence a need to respond to some of the simple questions circulating the construction industries in Malaysia such as: Who shall determine the minimum qualifications for adjudicators? What is the magnitude of competency needed to be achieved to maintain effective and current adjudicators? Does the double regulatory framework[16] for professionals in the industry bring a positive or negative value for adjudicators? What are the biggest obstacles faced by adjudicators in working within a quick and robust regime? Is a double regulatory framework for adjudicators a benefit to public interest?

2.0 Thesis Title

'Regulatory Framework for Adjudicators in the Malaysian Construction Industry'

3.0 The Aim

The aim of the research is to identify and test an appropriate regulatory framework for adjudicators in Malaysia.

[15](1999) BLR 93

[16] Explained later in Chapter 4 of this work, but essentially a system in which adjudicators are subject to regulation as such but also in the context of their other (primary) professional role

4.0 The Objective

The aim is supported by the following objectives:

a) To understand the evolution of the adjudication process in the United Kingdom, New Zealand and Singapore.
b) To map out the needs of the construction industry for competent adjudicators.
c) To explore the theoretical basis for the regulation of professionals and examine different frameworks of regulation that currently exist.
d) To understand the current market trend to accredit and regulate adjudicators in the UK, New Zealand and Singapore.
e) To assess the gaps in existing provisions regarding appointment, training and regulating of adjudicators in the UK, New Zealand and Singapore.
f) To understand the philosophy behind existing regulatory frameworks for construction professionals and legal practitioners.
g) To examine the complexities of regulation in respect of adjudicators who are already subject to separate regulatory control existing in respect of their other professional roles (Double Regulation).
h) To understand if the regulatory frameworks benefit the public or exist merely as a means for the professionals to pursue their own personal gain.
i) To establish credible regulatory framework for adjudicators in Malaysia

5.0 Research Statements

The thesis is designed to suit a single aim to identify and test an appropriate regulatory framework for adjudicators in Malaysia. Instead of enhancing the theoretical component, the

author has chosen to emphasise the empirical aspect of the research. In doing so, the author will explore the relevant underlying theories for regulatory frameworks to develop a theoretical regulatory framework. It will form the basis of subsequent empirical data collection and analysis made throughout the research process. Accordingly, the author will start by exploring the relevant underlying theories of existing regulatory frameworks for construction professionals, legal practitioners and adjudicators in the UK, New Zealand, Singapore and Malaysia. The data gathered will be developed to become the theoretical regulatory framework that will be used as a guide to identify an appropriate regulatory framework for adjudicators in Malaysia. The regulatory theories will then be supported by the theory relating to knowledge and skills. After a thorough exploration of the underlying theories on regulatory frameworks, knowledge and skills, the author will synthesize and critique theories and will conclude and identify a theoretical framework that will be used to interrogate the available empirical evidence on the various existing framework.

Chapter 1 and Chapter 2 of the thesis have been designed to address and articulate the theory behind the existence of adjudicators and the fundamental theory on relevant skill and knowledge for adjudicators. Both chapters have been critically analysed to published the theoretical framework that will become the foundation of the regulatory framework for adjudicators. Chapter 1 will provide the information on the perceptions of the construction industry's players on adjudicators. This will build up the trust from the industry to accept adjudicators as the third party provided in the industry via contract or specific act to help resolve disputes. Chapter 2 will the supplied the information on the level of qualifications, knowledge and skills that is perceived as an important benchmark to accept adjudicators to provide their services to the parties in disputes. As such, both chapters will become the solid ground in developing the theoretical framework for adjudicators. The theoretical framework

includes two tiers of regulating mechanisms of entry and maintaining requirements. The empirical study on the existing regulatory framework for adjudicators from other jurisdictions also has provided the author with insight into the notion of public interest and how it theoretically becomes the root to the existence of the regulatory framework. In essence, adjudicators, construction professionals and legal practitioners have been regulated to protect not only the public interest but also their own interest. In addition, it was noted that the existing regulatory framework for occupations or professions use principle-based approaches as their underpinning philosophies. Thus, the above steps have provided the author with necessary theoretical and empirical underpinning to draw an academically credible regulatory framework for adjudicators in Malaysia.

With the theoretical regulatory framework in hand, the author has sought to test empirically the framework practicality within the Malaysian context via a small scale of evaluative studies. The studies have been carried out by means of interviews sessions with five well informed construction professionals. Seven main questions were asked of the interviewees which were narratively drafted to support the findings and conclusions made in the thesis. Specifically, the author has produced the theoretical regulatory framework for adjudicators that includes the contributing factors from CIPA 2012, CIPA-R 2014, KLRCA Rules to the interviewees. It can be noted that the interviewees are aware of the framework structure since they themselves are professionals that have been regulated regularly. Furthermore, they have confidence that the proposed framework will strengthen CIPA 2012 implementation in Malaysia since it will contribute to the existence of knowledgeable and skilled adjudicators. The steps taken above have proven to clearly articulate the research to identify and test an appropriate regulatory framework for adjudicators. Ultimately, it has submitted that the

author from this work manage to produce a credible regulatory framework for adjudicators in Malaysia.

6.0 Chapter Outline

8.1 Introduction

This chapter will give a brief description of the research question, aim, objectives, methodology, scope and the thesis chapter's outlines. The fundamental aim of this thesis is to identify and test an appropriate regulatory framework for adjudicators in Malaysia. The assessment of different regulatory processes for adjudicators under three major reputable payments and adjudication regimes will highlight briefly the history of each jurisdiction for a basic understanding of the system. Research statement of the thesis will be explain in the same chapter. Towards the process to answer the research question and reaching the aim and objectives of the thesis, it is particularly important for the author to appropriately design the strategy or plan of action that links methods to outcomes. The research design and framework will be use to provide guidance on the central elements of the research including the philosophy behind the regulatory framework for professionals, the data collection methods and the process to analyse the data collected via theory, primary empirical study and secondary empirical study. In accordance with the research design recognised, the author will provide the brief outline of the thesis. The outline will describe in general the content of each chapter to deliver the structure to the thesis.

8.2 Chapter 1

Chapter 1 is designed to reach the first objective of the research. It reviews the history behind the existence of adjudicators in the construction industry. It also defines the differences between conflicts and disputes that usually lead to the process of resolving differences in the construction industry. Furthermore, this chapter will discuss if adjudicators can indeed be classified as a profession and if they are subject to a regulatory framework to maintain their professionalism.

8.3 Chapter 2

In the process of developing and building the regulatory framework for adjudicators in Malaysia, Chapter 2 will review the theory behind the profession and the knowledge and skills anticipated from adjudicators. In general, the exploration of the theories behind profession will be synthesize and critique the existing manner of determining what is profession. The author will then address the criticism that has been made to the approach adopted in order to determine whether adjudicators can be considered as profession or not since it was distinguished that these approaches have been subjected to market control, collective project or interpretive scholars. Accordingly, the findings will be collaborated and supported with the needs of knowledge and skills for a profession

In the first instance, the idea and concept of knowledge and skills in general will be evaluated and how the same is applied to the construction industry is also examined. According to Chiarello (2011), Friedson (1977) and Larson (1978), professions deploy power in the form of expertise and a relatively closed and esoteric system of knowledge. So, the relationship

between their expertise as professionals in construction fields and their performance as adjudicator will be explored to fill the gaps established in the existing criterion for accreditation and regulatory framework systems. The quality and competency of the adjudicators varies according to their qualification and skill in their permanent role, either as a construction professional or lawyer. This particular chapter will meet the objectives which seek to map out the needs of the construction industry for competent adjudicators en route to reach the main purpose of the payment and adjudication regime.

8.4 Chapter 3

Chapter 3 will explore the notion behind regulation and how the regulation is connected to the mainframe of the regulatory framework for occupation or profession. It will also discuss the existing regulatory frameworks' historical development as well as general theories pertaining to regulation of professionals' regulations. It will also explore the reason behind the presence of regulation and in what manner law and other sorts of regulation complement each other. Finally, it should be noted that there are various types of regulatory frameworks used by institutions or professional bodies to regulate their members. One such method is self-regulation, which may take a number of forms. The various forms shall be explored to reveal self-regulation's importance as one of the most common and arguably effective instruments used to regulate professionals.

8.5 Chapter 4

Chapter 4, consist the primary empirical study of the existing regulatory framework for the adjudicators in the UK, New Zealand and Singapore as well as Malaysia. In this chapter the

author will analyse the current regulatory framework systems which exist for adjudicators and the existing regulatory framework systems in their respective root (or primary) professions. It was noted from the secondary empirical study in Chapter 2 that most adjudicators are either construction professionals or lawyers that have their own regulatory framework that will regulate them according to the objectives of their existence. It was also established that the Malaysian Government has appointed several regulatory boards under their respective statutory Acts in order to accredit, manage and regulate professionals in the construction industry including engineers[17], architects[18], surveyors[19] and contractors[20]. By reviewing all the different regulatory frameworks for the primary profession of adjudicators, this chapter is also intended to capture the objective of assessing the gaps in the existing provision regarding appointment, training and regulating of adjudicators in the UK, New Zealand and Singapore.

It is expected that findings in this chapter will conclude that adjudicators actually have to deal with double regulatory processes since most adjudicators are professionals, experts or specialists who have existing professional qualifications[21] in the construction industry in relation to roles such as architects, quantity surveyors or civil engineers (Adjudication Reporting Centre, 2000) or even lawyers. Overall this chapter will provide insights into the general structure of the regulatory framework for adjudicators and their prime professions in addition to the contribution of double regulatory frameworks for the public interest.

[17] Registration of Engineers Act 1967 (Revised – 2007) – Act 138
[18] Architect Act 1967 (Revised 2007) – Act 117
[19] Quantity Surveyors Act 1967 (Revised – 2002) – Act 487, Licensed *Land Surveyors Act* 1958 (Revised 1991) - *Act* 458
[20] Construction Industry Development Board Act 1994 – Act 520
[21] See S.I 2007 No. 2781 Section 7 (1) (a), (b) & (c)

8.6 Chapter 5

In Chapter 5, first and foremost the author will relate on the issue of public interest and how it has affected the regulatory framework for occupation or profession. The author then will explore and articulate the problems that could be imposed with the double regulatory control framework that need to be sustained by the adjudicators. This chapter will also touch on the issue whether double regulatory frameworks for adjudicator benefits the adjudicators' self-interest or public interest. It is designed to highlight the link between entry regulatory framework as construction professionals or legal practitioners and the entry regulatory framework set for adjudicators. This chapter finally will study the impact of double regulatory entry control framework and how it contributes in enhancing the overall quality of an adjudicator.

8.7 Chapter 6

The early part of this chapter will provide the theory behind the regulatory framework for professionals in general. Drawing the data gathered and analysed from all the chapters in this thesis, the author will then identify, develop and propose a credible framework to be adapted in Malaysian context. This chapter will also highlight the differences between what has been proposed by the author and the existing framework actually implemented under CIPA 2012. Generally, this chapter will produce the aim and objectives of the thesis. At the same time, the findings will aid the discovery and examination of gaps in the existing provisions regarding appointment, training and regulating of adjudicators in the UK, New Zealand and Singapore. Besides, this chapter will help to establish the standard currently adopted as the

prerequisite qualification for adjudicator, whether it has been determined by the market or by statutory requirements.

8.8 Conclusions and Contribution to Theory

The final chapter will sum up all the analysis that has been done throughout the chapters included in the thesis. It will explore whether the findings made can be tied up together to achieve the objectives envisioned for the thesis. This chapter will explore all the connections made in other regions encapsulated to achieve the aim of this research in analysis. Therefore, by tying up all the relevant information and evidence illustrated in all the chapters of this thesis, this chapter in general will seek to draw conclusions about the lesson learned from the other jurisdictions on the existing mechanism for regulatory framework for adjudicators. In addition, this chapter will also analyse the findings made via interviews made with a number of well-informed construction professionals. The findings will conclude whether the proposed regulatory framework for Malaysian adjudicators is credible to be use and apply under CIPA 2012. Consequently, the discussion will conclude whether the double regulatory frameworks for adjudicators will benefit the notion of public interest.

7.0 Conclusions

To sum it up, the accumulation of challenges portrayed in the adjudication process in the UK ended up with the enactment of Part 8 of the LDEDCA. In general, the enactment of LDEDCA was to strengthen the right to adjudication that has been extended to construction contracts made verbally and improvements in cash flow. The prominent changes that are directly connected to adjudicators are to statutorily eliminate the difficulties arising from the

'slip-rule'[22] and 'Tolent clauses'[23]. However, there are no practical efforts to provide a statutory regulatory framework for adjudicators to practice in the market in the UK compared to the Singapore regime. However, on a positive note, the New Zealand regime recently proposed changes to the CCA 2002 provision to include regulations to prescribe specific qualifications for adjudicators[24]. It is the objective of the author to review all the existing systems to regulate adjudicators and establish if the current entry regulatory frameworks are for the good of the public interest.

[22] It was previously held that adjudicators have the power to correct mistakes or accidental clerical errors in their decisions and this was referred to as the 'slip rule' in *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314. The LDEDCA now statutorily allow the 'slips' made by adjudicators in their decisions within a reasonable period of time to be corrected in accordance with the decision in *YCMS Ltd v Grabiner* [2009] EWHC 127 (TCC).

[23] The 'Tolent clauses' named after the case they appeared in *Bridgeway Construction Ltd v Tolent Construction Ltd* (2000) CILL1662. The clauses require the referring party in adjudication to pay all the legal and expert costs of both parties, plus the costs of the adjudicator. In the said case, HH Judge Mackay held that it did not offend the HGCRA 1996. Ten years later, Mr. Justice Edwards-Stuart in *Yuanda (UK) Co Ltd v WW Gear Construction Limited* [2010] EWHC 720 (TCC) disagreed and held that that 'Tolent clauses' do not comply with the purpose of the HGCRA 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme) since neither give adjudicators jurisdiction to decide costs. LDEDCA permits parties to confer power on the adjudicator to allocate and apportion responsibility for his own fees and expenses between the parties.

[24] The New Zealand Government introduced into the House on 29 January 2013 a bill to amend the CCA 2002 and the changes are intended to apply from 1 November 2013.

CHAPTER 1

HISTORICAL REVIEW OF THE EXISTENCE OF ADJUDICATORS IN THE CONSTRUCTION INDUSTRY

1. Construction industry, disputes and their resolution

The construction industry as discussed in Introduction at Para 1.0 has been described as an important economic contributor for a country. The industry consists of vast activities that include input from many stakeholders with complex and multifaceted supply chains (Eccles, 1981; Baccarini, 1996; Dubois & Gadde, 2002; Wood & Gidado, 2008; Senaratne & Udawattaa, 2013). Thus by its nature, the construction industry has the tendency to become a breeding site for disputes. Many scholarly papers and books (Diekmann & Girard, 1995; Fenn et al, 1997; Kumaraswamy, 1997; Gould et al, 1999; Mitropoulos & Howell, 2001; Carnell, 2005; Gould, 2007; Cakmak & Cakmak, 2014) have discussed disputes and their resolution in the industry, however according to the NBS National Construction Contracts and Law Survey (2013) there has been an alarming rate of increase in disputes in the construction industry for the past 12 months in the UK.

1.1 Defining Disputes

In *Cruden Construction Limited v. Commission for the New Towns* [1995] 2 Lloyds Reports 387[25], HHJ Gilliland QC stated at para 29 that: -

'The words 'dispute or difference' are ordinary English words and unless some binding rule of construction has been established in relation to the construction of those words in clause

[25] See also *Monmouthshire County Council v Costelloe & Kemple Ltd* [1965] 5BLR

35 of the JCT contract I am of the opinion that the words should be given their ordinary every day meaning'.However, since construction projects are unique in nature, there has been significant debate about the true meaning of 'disputes' in the construction industry (Cree, 1992; Kumaraswamy, 1997; Reid and Ellis, 2007; Jaffar et al., 2011; Brown & Marriot, 2011). It has also been recognized that payment problems are age-old issues that have permeated the Malaysian construction industry over the years (Judi & Abdul Rashid, 2010). Such matters have become central to most disputes arising in the construction industry (Ameer Ali, 2005; Mohd Danuri et al, 2006; Woo, 2009; Kho & Abdul Rahman, 2010; Judi & Abdul Rashid, 2010; Abdul-Rahman et al, 2011, Supardi et al, 2011a, Rajoo, 2012).

Parallel with the intricacy of the industry, construction contracts are expected to be complex and require many different tasks to be carried out in a synchronized manner for their objectives to be achieved. They also often involve a variety of technical specifications and logistical arrangements. Since most disputes lead to different types of resolution processes[26] it is useful to distinguish the terms 'conflicts' and 'disputes' in the construction industry context. In general, disputes can include any differences between the parties[27] and usually refers to situations where there is a conflict over rights (Rajoo & KS Singh, 2012). However, conflict is a broader term and may encompass a state of opposition between people, ideas, or interests or be defined as a serious disagreement or argument (Merriam-Webster, 2014). Gale (1992) argues that causes of conflict stem from differences in objectives and ideologies and/or territory or role. Some authors do not differentiate between both terms and even use the terms interchangeably throughout their work (Moore, 1989; Bishop, 1992; Bercovitch & Langley, 1993; Mitropoulos & Howell, 2001; Al-Tabtabai and Thomas, 2004 and Gebken, 2006). In summarising previous research, Jaffar et al. (2011) concluded that conflict and

[26] The resolution process includes discussions, negotiations, mediations, arbitrations and litigations.
[27] S 108(1) Part II HGCRA 1996, S 5 Part 1 CCA 2002

disputes share the same definition and generally involve disagreement regarding interests. On the other hand, Brown & Marriot (2011) surmised that a dispute is one of a range of events considered as a conflict and Deustch (2006) perceives that injustice is a frequent source of conflicts. In this sense, however, it should be noted that as GC21[28] states, a defined meaning may be different from the meaning of the word or phrase in ordinary usage. Reid and Ellis (2007) argue that there is no definitive meaning of 'dispute' and claim that the existence of a dispute in construction adjudication is a subjective issue requiring a practical common sense approach to the facts, the law and policy consideration. Interestingly, Cree (1992) states that dispute have similar characteristics to construction projects in that they have a beginning and an end.

In 1997, Kumaraswamy published a conceptual model (Figure 1.1) to capture his position in relation to disputes. According to a report published by the Cooperative Research Centre for Construction Innovation (2006) this model can be generally viewed as the starting point for the exploration of disputes and dispute resolution.

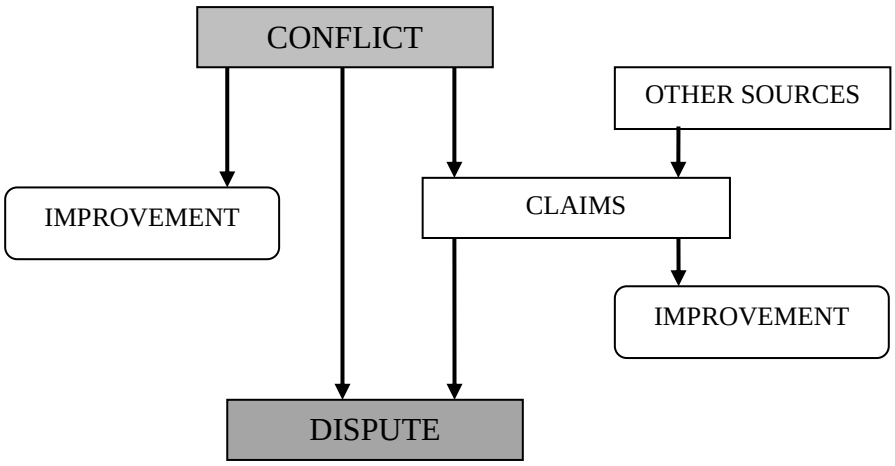

Figure 1.1: Conceptual Model Conflict and Disputes (Kumaraswamy, 1997)

[28] GC21 (Edition 1/Rev 15 September 2009) RTA General Conditions of Contract, New South Wales Department of Commerce

This model shows that conflict and disputes are actually different in that conflicts will lead to disputes and not the other way around. Fenn et al. (1997:513) supported this approach and concluded that 'Conflict, it is proposed, exists wherever there is incompatibility of interest, and therefore is pandemic. Conflict can be managed, possibly to the extent of preventing a dispute resulting from the conflict. Dispute is associated with distinct justiciable issues. Disputes require resolution'. Therefore, dispute management is advocated as a means of recognising conflict and dealing with it efficiently (Layers, 1992). Therefore, I conclude that there are slight differences between conflict and dispute. Conflict can be prevented and managed (Blake & Mouton, 1970; Smith, 1992; Rahim, 1992 and Gardiner & Simmon, 1992) but disputes need to be resolved (Cooper, 1992; Mackie, 1991; Fenn et. al., 1997). With that note, for the purpose of this research, it is contended that if conflict is not managed properly it can escalate into disputes and such disputes require resolution.

Over recent years, it can be seen that the construction and engineering industry has been a fertile ground for disputes (Sweet, 1959; HHJ Newey, 1991[29]; Gould et al, 1999; Oon, 2003; Ward, 2005; Chong, 2005; Chern, 2011). If arising disputes are not resolved as soon as possible, they will cause delay, increase the project cost and sometimes adversely affect the outcome of the project. Moreover, disputes can lead to a breakdown in the relationship between the parties and scupper the prospect of future business between them. As such, disputes should be controlled and managed in a systematic manner. There are various techniques for resolving a dispute. Some techniques are formal, while others are informal and are tailored to the needs of the dispute. The parties to a dispute can agree to any method of resolution and often the construction contracts spell out a resolution process[30].

[29] *Emson Eastern v EME Developments* (1991) 55 BLR 114

[30] Arbitration (Clause 34-5-34.11 of PAM 2006, Clause 67.0 of PWD Form DB (Rev. 2007), Clause 66.0 of P.W.D. Form 203/203A (Rev. 1/2010), Clause 67.1 of FIDIC 4, Clause 55 of IEM 2009 Standard Form for

Chong and Rosli (2009) stated that there are a few different popular methods of dispute resolution in the construction industry, such as negotiation, mediation, adjudication, arbitration and litigation. According to Rajoo and KS Singh (2012), parties in dispute can resolve the matter either through Traditional Disputes Resolution (TDR) methods or employ Alternative Dispute Resolution (ADR) methods. The term 'TDR' in effect relates to litigation which is defined by the Contract Dictionary (3rd Edition) as the 'process of resolving a legal dispute before a court'. However, it was suggested that ADR has become a favoured tool for dispute resolution over litigation in recent years (David, 1988; Wilkinson, 1995 and White, 1997) as a result of a general disappointment with traditional dispute resolution methods (Brooker and Lavers, 1997). Therefore, Royal Institute of Chartered Surveyors (RICS) (2013) advocate that ADR refers to a range of techniques that includes but is not limited to negotiation, mediation, adjudication and arbitration for resolving disputes without seeking redress from the courts.

Even with ADR in the picture, by law there is nothing to prevent parties in disputes to bring the matter to litigation. The litigation process is defined and governed by rules of civil procedure, which can be rigid and inflexible when compared to alternative methods of dispute resolution. Daly (2010) states that while the courts are the guardians of justice, public policy and practicality combine to necessarily limit access to the court. For example, Litigation for construction and engineering in England and Wales takes place in the Technology and Construction Court (TCC). In brief, there are some 81 Parts of Court Rules and Practice Directions, 13 additional Practice Directions and also 51 Statutory Instruments

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Civil Works and Clause 47.3 of CIDB Form of Building Works) and Mediation (Clause 35.0 in PAM 2006, Clause 47.2(b) of CIDB Form of Building Works, Clause 63.1(2) and clause D.1 of IEM 2009 Standard Form for Civil Works)

under the Rules of Civil Procedure. The rules are continually being updated[31] which requires the parties to constantly keep abreast of new provisions. Moreover, there is Pre-Action Protocol - the Pre-Action Protocol for Construction and Engineering Disputes - that must be abided by the parties. Consequently, the parties in dispute need to hire legal professionals to deal with such matters. In short, litigation amounts to a significant amount of effort, time and manpower and the costs can be enormous. Additionally, there are other processes, such as compiling issues, factual and legal arguments, which have to be undertaken before the disputes can be presented to the court. It can be noted that the TCC[32] is fully equipped with its own Guide which can be described as rigid and inflexible when compared to alternative methods of dispute resolution. This demonstrates that litigation is quite complicated, difficult for the layman to comprehend, and can amount to extra allocations of expenses to disputing parties who go down the litigation route.

In Malaysia, according to Sufian & Md. Amin (2010) there are basically 3 stages of preparation that are required before the real trial procedure can commence. This includes the gathering evidence stage[33], pre-trial case management stage (PTCM)[34] and preparation of full trial[35]. This has been viewed as a very tedious procedure (Feld & Carper, 1997; Merna & Bower, 1997) incurring valuable costs and time which the parties in construction projects are rarely able to give up. Furthermore, specialists will be needed and small contractors in particular may suffer since they will have to engage legal expertise to conduct such processes, resulting in extra costs which may critically damage their financial situation. In addition, there is also the trial itself which will include another 6 stages to be endured

[31] As of 1st October 2012 there are 59 updates for the Civil Procedure Rules in the UK
[32] The full range of work undertaken by the TCC is set out in CPR Part 60 and the accompanying practice direction.
[33] Under Order 24 RHC 1980 (Discovery), Order 26 RHC 1980 (Interrogatories), Order 27 RHC 1980 (Admission) and Order 29 RHC (Anton Piller Order)
[34] Order 34 RHC 1980 (PTCM)
[35] Order 35 RHC 1980 (Procedures and Contents of Documents/Bundles for Full Trial)

including the opening statement, examination-in-chief, cross examination, re-examination, defendant's submission and closing speech. However, on the bright side, winds of change over the past four years have seen a dramatic increase in the efficiency of the courts in Malaysia. This is due to recent reforms that have taken place since 2009: namely by implementing the clearing of case backlogs, improving service delivery and improving access to justice (Malaysia, 2012). The process of improving service delivery has seen the introduction of the New Commercial Court – a specialised court which has a strict timeline of only 9 months from the date of filing until the decision is delivered (Azmi, 2010 and Tiang, 2012).

To sum up, even though there have been recent measures to speed up the process in courts, the litigation process still tends to foster an attitude of uncovering every possible fact, examining every possible document, and exploring every possible legal theory that will prolong the dispute resolution. Besides, nowadays there are many benefits that emanate from ADR processes. It can be argue that ADR provides more choice for parties in dispute to use the processes that best suit their circumstances. It must be noted, that nowadays it has become the trend for the government (Department for Bussiness Innovation and Skills, 2012; Danuri et al, 2012; Tzi, 2007) and the judges (Lord Woolf, 1995; Jillani, 2004; Kajimanga, 2013) to support the ADR process since ADR are viewed as a supplement the original legal system (Hoe, 1987). As an example, a published report by the Ministry of Justice in New Zealand in 2004 argued that there are five major benefits of ADR recognised internationally: increased prospects of settlement; improved satisfaction with the outcome or manner in which the dispute is resolved among disputants; reduced time in dispute; reduced costs related to the dispute resolution; and increased compliance with agreed solutions.

2.0 Adjudication

There are a number of common dispute resolution methods which have been used in the industry that fall under the 'ADR' umbrella as stated above. These processes shall not be explained in detailed in this thesis given that its focus is on one form of ADR, namely adjudication. The process of adjudication is of some antiquity and many historians contend that in Greece, Rome, England, Scotland and much of Continental Europe, the processes we now call adjudication or arbitration in fact preceded the creation of courts and the process we now call litigation (Anderson, 2001). Generally, adjudication includes the formal judgment or decision of a court or tribunal (Dictionary of Law, 2009:15). However, in the context of alternative dispute resolution, adjudication can be described as a binding process carried out by a third party to resolve disputes arising between parties in a construction contract which is simpler, faster and less expensive by comparison to litigation or arbitration (Turner, 2003; Gould, 2007; Maritz, 2009; Lim et al, 2010; Rajoo, 2011 and Singh, 2015). The construction industry recognised adjudication as a unique 'fast track' alternative dispute resolution process, designed to keep cash flowing down the supply chain in order to generate the work that was needed to complete a construction project. Bentley (1992) suggested that adjudication in the construction industry will provide a method of speedy and flexible interim solutions for disputes, pending (if necessary) their detailed legal consideration by arbitration and litigation. According to Gaitskell (2007), outside the construction industry the term adjudication has long been in use, with many and various meanings. In the UK construction industry scene, it is obvious that the main aim of HGCRA 1996[36] is to provide a statutory right for adjudication as a temporarily binding and quick means to resolve disputes in the construction industry

[36] S 104 – S 108 Part II

which is also cost effective[37]. This process has been predominantly supported by many judges and authors (J Dyson[38], 1999; J Coulson[39], 2005; Chan et al, 2006; Uher & Brand, 2008; Atherton, 2010).

Some construction contracts spell out that one process of dispute resolution must take priority over others; for example, that mediation[40] and adjudication[41] must be undertaken before arbitration or litigation commences. In *Macob,* Dyson J (1999) observed that Parliament had not abolished arbitration and litigation in construction disputes when they introduced adjudication as an intervening provisional stage in the dispute resolution process. This reflects the courts' intention for parties in disputes to follow the flow of dispute resolution processes. Substantially, for a contractual process of dispute resolution to be enforceable it must be set out in a reasonable manner prescribed in the provisions of the contract. Ramsey J in *Halloway & Halloway v Chancery Mead Ltd*[42] outlined some approaches to be adopted for a dispute resolution clause to be enforceable, namely that it should meet at least the following three requirements: -

i. the process must be sufficiently certain in that there should be the need for an agreement at any stage before matters can proceed;
ii. the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined; and
iii. the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.

[37] Court of Appeal decision of *Bouygues* v *Dahl-Jenson (UK) Limited* (2001) 3 TCLR 2
[38] *Macob Civil Engineering Limited* v *Morrison Construction Limited* [1999] All ER (D) 143 (at para 13-14).
[39] *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC)
[40] IEM 2009 Standard Form for Civil Works module D
[41] S 34.1 of Agreement and Conditions of PAM Contract 2006 (with/without quantities)
[42] [2007] EWHC 2495 (TCC)

Following this, even though the construction contract may contain provisions or conditions on dispute resolution, they must be in a form which can be understood by both parties and the process of each disputes resolution procedure must be described accordingly. For example, provision under the New Engineering Contract (NEC) prescribes that if negotiations in the contractual chain break down, the adjudicator is responsible for the settlement of disputes before it can be brought to arbitration. Provision under NEC has created the need for an adjudicator as a medium to determine disputes under the construction contract. Under the adjudication regime[43], the adjudicator can be either a person named earlier by the parties in a contract or nominated by recognized 'adjudication authorities'[44] and agreed by both disputing parties to assess the evidence provided and provide a legally binding decision on the dispute arising. In short, the adjudicator can be a creature of contract or statute.

3. Adjudicators in the construction industry

Dyson J in *Macob Civil Engineering Limited v Morrison Construction Limited*[45] highlighted the fact that the Parliament's intent was to see that adjudication should be conducted for those who are familiar with the grinding detail of the traditional approach to the resolution process of construction disputes like arbitrations and litigations. This statement suggested that those conducting the process should be someone with experience in resolving disputes in the industry. According to a glossary of legal terms, an adjudicator is a person who resolves disputes under an adjudication procedure. In the construction industry, adjudicators usually act in an intermediate capacity between an expert and an arbitrator. This echoes the sequence of dispute resolution processes where in the construction industry, when a dispute arises,

[43] HGCRA 1996 in the UK, CCA in New Zealand, SOPA in Singapore and CIPA in Malaysia
[44] The term will be defined later in Chapter 4 of this thesis
[45] [1999] BLR 93

experts such as contract administrators, engineers, architects or surveyors will be consulted to resolve the issue first before commencing to another level such as adjudication and finally to the court if the process of ADR failed. In the UK, the HGCRA 1996 itself does not define the term 'adjudicator' but merely sets out a number of requirements, nominating procedures and confinement of the powers that an adjudicator has to meet in order to comply with HGCRA 1996. However, in *Costain Ltd v. Strathclyde Builders Ltd*[46], Lord Young (2003) defined adjudicators as a type of arbiter[47] appointed by the parties to a contract to decide one or more disputes arising under that contract. Maritz (2009) further described the adjudicator as a third party intermediary appointed to resolve a dispute between the disputants and their decision is binding unless reviewed by arbitration or litigation. In Malaysia, under the CIPA 2012, the adjudicator is defined under S 4 as an individual appointed to adjudicate a dispute. Similarly, under the SOPA 2004 in Singapore, S 2 states that the term 'adjudicator' means a person appointed under the Act to determine a payment claim dispute that has been referred to him or her. However, no specific definition is given in the CCA 2002 in New Zealand.

The adjudicator is rather like a referee in games, who assesses the facts and rules of the game, gives a decision and the parties in dispute must straight away obey it at least on a temporary basis[48]. The adjudicator can acquire his or her authority contractually via agreement between parties to a construction contract or statutorily by the HGCRA 1996 in the UK or other statutory regimes for adjudication that apply in other jurisdictions such as in New Zealand[49],

[46] *Costain Ltd v. Strathclyde Builders Ltd* [2003] ScotCS 352
[47] a person who settles a dispute or has ultimate authority in a matter
[48] See *Macob Civil Engineering v Morrison Construction* [1999] BLR 93, *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd* In the Court of Appeal (Civil Division) 31st July 2000, Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth [2002] BLR 288, *Quietfield Limited v Vascroft Contractors Limited* [2006] EWHC 174 (TCC), *Bluemover One Ltd v Breen Construction Co Ltd : Arbitrators & Mediators Institute of New* Zealand [2007] Adj. L.R. 07/03 and *WW Gear Construction Limited v Mc Gee Group Limited* [2012] RWHC 1509 (TCC)
[49] Construction Contracts Act 2002 (CCA 2002)

the states of New South Wales[50], Victoria[51], Western Australia[52], Queensland[53], Northern Territory[54], Isle of Man[55], Singapore[56] and Malaysia[57]. Prior to statutory embedding of the adjudication process, adjudication was often deployed on a consensual basis in which parties in dispute agreed to use a selected intermediary to resolve their disagreement. Nevertheless, according to Supramaniam (2007), construction industry players in Malaysia did not warm to the idea of consensual adjudication and so the idea of compulsory adjudication was mooted to assist the existing dispute resolution process. In particular, the process was promoted as an answer to delayed payment problems which had ultimately become hazardous to the health of the construction industry.

An adjudicator assesses the evidence presented by the parties, in order to reach a decision that is legally binding unless it is then referred to arbitration or the courts, or is settled between the parties themselves. Nominating the qualified adjudicator usually depends on the agreement of both disputing parties and one of the common challenges in the process is to find the best adjudicator for the matter at hand. In addition, even in this scenario of 'rough and ready justice', adjudication can contribute considerably to the resolution of disputes. In addition, one could argue that adjudication will be more successful with the help of qualified and competent adjudicators to deliver consistently high quality decisions. This is an issue that this thesis will turn to in chapters 3, 4 and 5.

[50] Building and Construction Industry Security of Payment Act 1999 (Amended in 2002)
[51] Building and Construction Industry Security of Payment Act 2002 (Amended in 2007)
[52] Construction Contracts Act 2004
[53] Building and Construction Industry Payments Act 2004
[54] Construction Contracts (Security of Payment) Act 2004
[55] Construction Contract Act 2004
[56] Building and Construction Industry Security of Payment Act 2004 (Amended 2006) (SOPA 2004)
[57] Construction Industry Payment and Adjudication Act 2012 (CIPA 2012)

3.1 *Adjudicator a creature of contractual agreement*

As stated above, for the purpose of this thesis, the author will only focus on adjudication. A contractual adjudication process is an express provision incorporated in the conditions of a contract. Adjudication became recognised as one of the contractual means to resolve disputes in the construction industry as early as the 1990s within the International Standard Form of Contract (Maritz 2009), though according to Bently (1992), adjudication clauses were introduced as a set-off clause, as early as 1976 via JCT 63 63 Sub-Contract forms (Green and Blue Forms). Before 1976 there were no standard forms of construction contract[58] that contained adjudication provisions (Bingham et al. 2004). Hence in 1976 the National Federation of Building Trade Employees' (NFBTE)[59] standard form of subcontract introduced obligatory contractual adjudication provisions. This development was subsequently followed by the DOM/1[60] and DOM/2[61] standard forms of contract.

Aeberli (2006) noted that the provisions on contractual adjudication are limited only to certain types of disputes and he claimed that such provisions were not widely used. The provisions[62] only pertain to claims in relation to loss and/or expense or damage alleged to have been suffered or incurred by the contractor resulting from a breach of the subcontract by the subcontractor. They do not apply, for instance, to alleged underpayments or under-valuation of work. This is further enhanced by the court decision in *A Cameron v Mowlem*[63]

[58] Including what are normally referred to as building contracts, engineering contracts and contracts for M&E works. See also Uff et al,1999: 514 .
[59] After 1997 it is known as The Construction Confederation.
[60] Standard Form of Sub-Contract for Domestic Subcontractors appropriate for use when the form of Main Contract is: JCT Standard Form of Building Contract - Local Authorities/Private edition/ With/Without quantities
[61] Standard Form of Sub-Contract for Domestic Subcontractors appropriate for use when the Form of Main Contract is: JCT Standard Form of Building Contract - With Contractor's Design`
[62] Clause 24.3 of Nominated Sub-Contract 4 (NSCA) forms used with Joint Contract Tribunal 80 (JCT80). In 1987 Amendments, Clause 23 confirms the right to set-off and expanding to claims on loss and expense; Clause 4.33 to 4.88; Joint Contract Tribunal 87 (JCT87). Clause 90, ICE New Engineering Contract
[63] (1989) 52 BLR 25

which held that the adjudicator had an extremely limited power under these contractual provisions. The construction and engineering standard form of contract published by the Joint Contract Tribunal (JCT), Institution of Civil Engineers (ICE), Association for Consultancy and Engineering (ACE), Civil Engineering Contractors Association (CECA) and International Federation of Consulting Engineers (FIDIC), includes adjudication in its provisions as one of the dispute resolution methods. Furthermore, since the contractual adjudicator is not a party to the construction contract, her/his services must be regulated by a separate contract. This agreement defines the adjudicator's scope of work, her/his responsibilities, the duration of services, compensation and reimbursement for services, and legal relations. To complement the necessities, each of JCT, ICE and NEC publish an adjudicator's agreement, e.g. NEC3 Adjudicator's Contract, for which guidance notes and flowcharts are available (Charret, 2009).

In Malaysia, the construction contract for government projects use the standard form of contract published by the Public Works Department (PWD)[64]. There are four institutions, organizations and public departments in Malaysia that produce standard forms of construction contracts. These are

(a) The Institution of Engineers, Malaysia ('IEM");

(b) Pertubuhan Arkitek Malaysia[65] ('PAM');

(c) Construction Industry Development Board[66] ('CIDB'); and

(d) Public Work Department ('PWD').

[64] PWD 230 (without quantities)/203 A (with quantities) and PWD Form DB (Rev.2007) – for Design and Build contract

[65] The Institution of Architects Malaysia

[66] Construction Industry Development Board was established in Malaysia under the Construction Industry Development Board Act (Act 520)

Most of the non-government construction contracts use local standard forms of contract such as the IEM 2009[67] standard forms and these essentially are hybrid forms[68]. Some construction contracts such as the IEM Conditions of Contract for Mechanical and Electrical Works essentially follows the corresponding FIDIC standard form. PAM 2006[69] amended the earlier PAM 1998 and PAM 1969, which are nearly identical to JCT 63 published in the UK. Additionally, the CIDB Standard Form of Contract for Building Works-2000 Edition (CIDB 2000) promoted by the Construction Industry Development Board, Malaysia was launched on 13 September 2000. Generally, most of the standard forms of contract prescribe the qualification needed for contractual adjudicators. FIDIC Conditions of Contract for Design-Build and Turnkey prescribe the essential qualifications[70] of the person being appointed in the following terms: the adjudicator must be conversant with the particular discipline of works, must not be connected in any way to either party and must be impartial. The terms of appointment of the adjudicator, including his duration of employment, scope of work, extent of authority and remuneration, must be mutually agreed upon by the parties or established by the appointing body. As for payment, each party normally pays one-half of the remuneration; the contractor either pays this directly or it is deducted from his preliminaries.

Construction contracts differ from other commercial contracts in that, other than the parties to the contracts themselves, i.e. the Employer and the Contractor, there is an intermediary individual who features prominently throughout the terms and conditions in the construction contract who serves as contract administrator for both parties. This third person is variously

[67] IEM Conditions of Contracts for Works Mainly of Civil Engineering Construction 2009 promoted by The Institution of Engineers, Malaysia

[68] The hybrid form is a combination of two different kinds (e.g. mixed of goods and services contract/those that are comprised of separate service, construction or manufacturing elements) of construction contract forms to produce a new form

[69] Agreement and Conditions of PAM Contract 2006 (With/Without quantities), Copyright of Pertubuhan Arkitek Malaysia, Kuala Lumpur, Malaysia.

[70] See S 20.3

referred to as ‘the Engineer’ in IEM standard forms, the ‘the Architect’ in PAM forms and ‘the Superintending Officer’ or ‘S.O.’ and ‘the Project Director’ or ‘P.D.’ in PWD and CIDB forms or contract administrators. Usually the third party named in the contract is also the person or officer explicitly tasked with resolving conflicts which arise in a construction contract. In some standard forms of contract, any disputes must first be referred to the Engineer/Architect/S.O./P.D. for a final decision before one can resort to arbitration. However, there is a distinct difference between a contract administrator and an adjudicator. The adjudicator is a third party who is not involved at all in the process of administrating the contract but rather focuses on deciding and determining disputes between parties. Nonetheless, she/he must work within the terms and conditions given in the contract[71].

Typically, disputes in construction contracts relate to differences arising in terms of payments. Any conflict or disagreement encountered is resolved by reference to the terms and conditions spelt out in the construction contract and all the standard forms discussed herein provide arbitration as a means of dispute resolution. PAM 2006[72] and CIDB 2000[73] go one step further for dispute resolution by providing mediation as an alternative. In CIDB 2000 recourse to mediation is compulsory and the disputing parties must attempt to resolve any dispute between them by mediation prior to resorting to arbitration. Nevertheless, conflicts that transform into disputes keep on spreading like wild fire in the construction industry (Malleson, 2013; EC Harriss Built Asset Consultancy, 2013; Tolson, 2013). Consequently, a strategic solution promoted by the industry was the adding of another level of dispute resolution - adjudication[74] - as an intermediary solution and the creation of adjudicators as a profession. However, the standard form of contract published by the PWD has excluded

[71] See Clause 34.1. 34.2 and 34.3 PAM 2006
[72] Clause 35.0
[73] Clause 47.2
[74] Clause 34.0

provision on adjudication. This is unfortunate because as discussed earlier most government projects used this standard form of contract.

Based on the argument above, it can be established that consensual and contractual adjudication processes, are not being used to their full capacity to resolve disputes. This is supported by Gaitskell (2007) who reported that during the pre-statutory adjudication era, resistance by main contractors and employers meant that contractual provisions which aided cash flow were not widely used. Likewise, Kennedy et. al. (2010) stressed that a major concern expressed by subcontractors, albeit those whose experience was almost entirely limited to adjudications in respect of set-off claims in domestic subcontracts, was that if they referred a dispute to adjudication they might be denied future opportunities to tender for work. These concerns led to the underuse of the adjudication provision contracts. Consequently, players in the industry have resorted to statutory adjudication and this has led to the creation of statutory adjudication.

3.2 *Adjudicator a creature of statute*

Gaitskell (2007) emphasized the need for statutory adjudication when he stated that, '[i]n order for adjudication to have any real impact it had to be compulsory so that powerful employers or main contractors could not simply strike such clauses out of contracts they made'. This echoes the statement made by Latham (1994:87) when he states that: -

> 'If a dispute cannot be resolved first by the parties themselves in good faith, it is referred to the adjudicator for a decision. Such a system must become the key to settling disputes in the construction industry.'

The construction industry is typically adversarial in nature (Doran, 1997) and hence as I have noted, is a breeding ground for disputes. The industry is quite diverse, covers a wide range of end products and employs a large variety of different professions (Whitfield, 1994). According to Phua and Rowlinson (2003) the adversarial nature of the construction industry exists due to many reasons. It can be argued that it originates generally in the conditions of contract that establish the legal responsibilities and relationships among the parties involved on a project. The contract also specifies the procedures for schedules, payments, and contract administration. Accordingly, in his judgment, Lord Morris of Borth-y-Gest observed that where the parties enter into detailed building contracts there were 'no overriding rules or principles covering their contractual relationships beyond those which generally apply[75]' and this principle enhances the adversarial nature of the construction industry. Additionally, Chong and Rosli (2009) argue that the contracting parties' controversy and adversary would be increased together with the consumption of cost and time once a higher stage of dispute resolution applied as illustrated in Figure 1.1 below: -

Figure 1.2: Stages of Dispute Resolution (Chong and Rosli, 2009)

[75] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689

In the UK, under the New Engineering Contract (NEC) contract conditions, the Adjudicator's Contract was developed to resolve disputes when negotiation fails. The Adjudicator's Contract describes the adjudicator as one acting independently and not as an arbitrator. In the construction industry, Lynch (2011) states that adjudication was introduced to rid the industry of adversarialism and contractual abuse, which had made it notorious as a conflict-ridden industry. Hickey (2009), in his speech at the TECBAR Annual Conference 2009, highlighted that even with the robust court enforcement in support for adjudication process, it still provides relatively quick cash flow relief for the construction industry. Accordingly, the decisions made by adjudicators 'must become the key to settling disputes in the construction industry' (The Latham Report: Para 9.4). Thus, Mr Justice Akenhead in *Aspect Contracts (Asbestos) Limited v Higgins Construction PLC*[76] has set basic principles on the enforcement of the adjudicators' decisions that should be adapted by the Court in general. The principles are as follows: -

a) The decisions of adjudicators can be enforced by the Courts, essentially on the basic that there is a contractual undertaking in effect that the parties shall treat the decision as binding, albeit for the time being (e.g. *VHE Construction plc v RBSTB Trust Co* [2000] BLR 187)

b) Those decisions are to be enforced by the Courts even if the adjudicators have answered the questions or disputes referred to them incorrectly as a matter of fact or law (e.g. *Bouygues (UL) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507)

[76][2013] EWHC 1322 (TCC). See also judgment made by Dyson J in *Macob Civil Engineering v Morrison Construction* [1999] BLR 93; LJ Buxton in *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd* [2000] EWCA Civ 507; Lord Reid in *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529; Associate Judge Christiansen in *Bluemover One Ltd v Breen Construction Co Ltd : Arbitrators & Mediators Institute of New Zealand* [2007] Adj. L.R. 07/03; HH Judge Thornton QC in *Mott MacDonald Ltd v London & Regional Properties Limited* [2007] EWHC 1055 (TCC); Lord Malcom in *Specialist Insulation Ltd v Pro-duct (Fife) Ltd* [2012] CSOH 79; Mr Justice Akenhead in *Working Environments Limited v Greencoat Construction Limited* [2012] EWHC 1039 (TCC) and Mr Justice Edwars-Stuart in *R and C Electrical Engineers Limited v Shaylor Construction Limited* [2012] EWHC 1254 (TCC).

c) Those decisions are to be bind the parties to the construction contract until and unless the parties agree otherwise or the tribunal of final resolution (be it arbitration or a Court) decides otherwise.

The principles illustrated that the adjudicator's decision is binding on the parties, temporarily at least, by virtue of their agreement to that effect. Holder (2000) in his study reported that more than 60% of the respondents in his survey agreed the importance of the adjudication in facilitating the settlement of the final account. In addition, Lee Sei Kin J (2011) noted that there are satisfactions of the disputing parties on the determinations made by adjudicators in Singapore. He further advocated that percentage of adjudications' determinations that has been filed for litigations are very small compare to the number of adjudication applications filed each year through the nominating authorities in Singapore.

Nevertheless, it must be noted that the settlement of disputes in binding decisions must be to the satisfaction of both disputing parties. Accordingly, the disputing parties must work together with the adjudicator to help in identifying relevant disputed issues that need to be resolved (Cheung & Suen, 2002). It was argued by Gould (2007) that adjudicator intervention to resolve disputes is significant since they are guaranteed to produce binding decisions unlike in mediation[77]. However, the outcome of dispute resolution using third party intervention also depends on the competency of the said third party. In an empirical study by Bowes (2007), it was noted that 57% of his respondents agreed that even if the adjudicators are not very familiar with the construction industry the decisions made in the adjudication process are not affected. The advantages of third party intervention via adjudication is

[77] Mackie (1991) and Gould (2007) described mediator as a neutral third party that will only assist and aid the parties in disputes to resolve their differences but will not impose a binding decision.

collectively agreed not only by the parties in dispute[78] but also by the government, with the introduction of statutory adjudication by countries like the UK, Australia, New Zealand, Singapore and Malaysia. As Latham (1994) suggested in his report, underpinning adjudication by legislation will help the adjudicator to consider a wide range of issues permissible by the act and the decision will be implemented immediately since statutory underpinning will provide a legal timeframe for the disputes to be resolved. Thus, the argument above has illustrated the importance of knowledge, skills and competency of the adjudicator that will be discussed in detail in Chapter 2 of this thesis.

With the introduction of statutory adjudication via HGCRA 1996 in the UK, followed by similar adjudication and payment regimes in Australia, New Zealand, Singapore and Isle of Man, the role of the adjudicator[79] has become recognized statutorily as an intermediate and interim dispute resolution tool. As a result, arbitration and litigation have become increasingly seen as the last option when parties are unable to resolve their differences in the contract. As a creature of statute, appointed pursuant to a legislative measure, the adjudicator derives all her/his powers from statute to adjudicate in construction contracts or projects when disputes crystallize. In view of the unique multilayered hierarchy existing in construction practice (Rajoo & Singh, 2012) and the arguable weaknesses of present dispute resolution procedures (Lam & Loo, 2013) in mediation (Cooper, 1992; Zack Jr, 1998; Singh, 2011), contractual adjudication (Anderson, 2001), arbitration (Latham 1994; Rajoo, 2008;

[78] This can be deduced with the growth of rate in adjudication referrals in the UK, established by the Adjudication Reporting Centre in their Report No. 12 (October 2012): Figure 1 at page 2. See also the Adjudication Statistic published by the Building Construction Authority (April 2005 – December 2013) at https://www.bca.gov.sg/SecurityPayment/adjudication_statistics.html which depicts, since the enactment of SOPA 2004, that there has been a steady growth of number of applications to use adjudication as a disputes resolution process in Singapore.

[79]Clause 4 of CIPA 2012: to mean an individual appointed to adjudicate, Clause 2 of Building and Construction Industry Security of Payment Act 2004 (SOPA 2004): to mean a person under this Act to determine a payment claim dispute that has been referred for adjudication, and review adjudicator or a panel of review adjudicators), Clause 5 of Construction Contract Act 2002 (CCA 2002): to mean an individual appointed in accordance with CCA 2002 to determine a dispute that has been referred to adjudication.

Rajoo & Singh, 2012; Chow, 2013) and litigation (Flood, 1993; Latham, 1994; Rajoo & Singh, 2012), the establishment of CIPA 2012 can be considered more than welcome in Malaysia especially in terms of payment disputes[80]. With the enactment of statutory adjudication processes, the UK, Australia, New Zealand, Singapore and recently Malaysia recognised that timely payments are vital to the very survival and continuity of business within the construction industry. Payment delay often triggers domino effects in the construction industry affecting players involved especially the contractor and sub-contractors who rely on cash-flow to undertake the requisite work for the construction contract (Maritz, 2007 and Rajoo, 2012).

HGCRA 1996, CCA 2002, SOPA 2004 and CIPA 2012 represent legislation enacted specifically to facilitate regular and timely payment, to provide speedy dispute resolution through adjudication and also to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. HGCRA 1996[81] and CCA 2002[82] apply to both contracts made in writing or orally. However, SOPA 2004[83] only applies to written contracts for construction work or contracts for the supply of services or goods for construction projects carried out in Singapore. Following the Singapore

[80] Lord Justice May (2003) in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750 observed that construction contracts do by their nature generate disputes about payment. In addition, Lord Denning's observation on payment being the life blood of the building trade in *Dawnays Ltd v FG Minter* [1971] 2 All ER 1389 has been cited numerous times (cited with approval in *Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, at 214 (HL) Lord Diplock ;The Court of Appeal also quotes Lord Denning with approval again in *Salem Limited v Top End Homes Limited* [2005] Adj.L.R. 07/19; Cited by Lord Justice May in *Tally Weijl (UK) Ltd v Pegram Shopfitters Ltd* [2003] EWCA Civ 1750) to echo the seriousness of payment default disputes that contribute to the shortage of cash flow in construction/building projects. Lord Justice Chadwick in *Carillion Construction Limited v Davenport Royal Dockyard Limited* 2005 EWCA Civ. 1358 emphasized the importance of payment in the construction industry by referring to Parliament's recognition that in the absence of an interim solution, the contractor may be driven into insolvency, through a wrongful withholding of payments properly due. The motion is to resolve the dispute on payment as soon as possible and in this sense statutory adjudication becomes the new resort in the industry due to its special characteristic as a speedy resolution procedure..

[81] S 107of HGCRA 1996 has been repealed by S 139 (1) and S 139 (2)(a) & (b)

[82] S 9 (c) of CCA 2002

[83] S 4 (1) of SOPA 2004

Framework, CIPA 2012[84] applies to every construction contract[85] made in writing relating to construction work carried out wholly or partly within the territory of Malaysia and will capture all construction agreements between: -

i) contractors and principals/owners/clients;

ii) sub-contractors and contractors;

iii) suppliers and sub-contractors/contractor;

iv) plant and equipment hirers and

v) sub-contractors/contractor and consultants and clients including construction contracts entered into by the Government

Since CIPA 2012 focuses only on disputes arising in respect of payment[86] issues, the adoption of mandatory requirements could be particularly useful for the development of adjudication in Malaysia. In this sense, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), established as an authorized body to conduct adjudication in Malaysia, will play its role in promoting the role of adjudicator as a profession. Equipped with the notion that statutory adjudication, which has existed only since the HGCRA 1996 and now dominates the construction dispute field (Gaitskell, 2007), statutory adjudicators practicing within the legal framework of statutory adjudication processes may have a greater commitment to improve their skills and competency reputation as the expectations from industry will escalate for them to perform well.

[84] S 2 of CIPA 2012

[85] S 4 of CIPA 2012 interpret 'construction work'

[86] Part II of CIPA 2012: Adjudication of Payment Disputes and S7 (1) states that an unpaid party or a non-paying party may refer a dispute claim made under S 5 to adjudication. Payment under CIPA 2012 means a payment for work done or services rendered under the express term of the contract.

4. Profession

In its simplest term The Oxford Dictionaries Online (2013) defines a profession as a paid occupation, especially one that involves prolonged training and a formal qualification. The definitions and meanings given in the dictionaries are always similar and rarely subjected to any rationale or any specific reason. Accordingly, definitions are given without any explanation for their usage in sentences and usually overlap with each other. A good definition should comprise 'genus proximum'[87] and 'differentia specifica'[88] (Aristotle, 384-322 BC in Pennance (2014)). This is the root of the decompositional way of explanation in which a meaning of a word can be explained by identifying it with linguistic and common sense understanding of a language (Engelberg, 2014). Historically, the analysis of the professions shows two main structures: the trait approach (Carr-Saunders and Wilson, 1933; Parsons, 1939; Greenwood, 1957; Wilensky, 1964; Millerson, 1964; Wenocur and Reisch, 1983; Macdonald, 1995; Abbot, 1988 and Hugman, 1996) and the power/social approach (Friedson, 1970a; Johnson, 1972; Johnson, 1972; Cullen, 1978; Larson, 1978) which emerged during the 1970s.

Discussion about what a profession is includes argument about issues of professionalization, professionalism and professional identity which are complex, multilayered and constantly evolving (Lumsden, 2010). It can be argued that professions involve technical, specialized and highly skilled work. The term 'profession' can be defined in many ways which includes the 'theoretical scheme' that includes a process of identifying the profession according to its special attributes (Saks, 2012). Brante (2011) states that there have been several attempts to define professions based on the specific difference of a profession, which is to formulate

[87] nearest genus
[88] specific difference

criteria for their essence in both a linguistic and as a common sense understanding of a language. Greenwood (1957), Goode (1960) and Brante (2011) has argued that an occupation will becomes a profession when it acquires core characteristic that will distinguished its establishment to be superior from other common occupation. It can be concluded that a profession required and determined their own sets of specialized qualification, knowledge and skills that can be use and applied in their daily routine work. It also constitutes distinct training and programs of study that is specifically controlled by regulatory bodies to increase value to the service offers to the public for higher economic reward. It must be noted from the discussion above; adjudicator basically have the core essence of attributes that can be associated with a profession. They are governed by a specific standard of training to ensure its integrity to serve the public as a whole. However, since adjudicators derives their special knowledge and skills from their prime profession like construction professionals or legal practitioners, they are not profession per se. Nonetheless, it can become more professionalized with prolonged specialized training in a body of abstract knowledge and a collectively or service orientation as described by Goode (1960)

5. Conclusion

Following the arguments in this chapter, two major themes can be recognized. It can be established that disputes are still a major concern in the construction industry. Since, statutory adjudication aims to provide quick and binding decisions, the adjudicator must remain professional in dealing with the limitation offered by the adjudication regime. However, with the legislative power mandated by the respective Act, being adjudicator becomes important to fulfill the society and the industry needs. Besides, the role has evolved from being a contractual creature to a statutory recognized occupation since the establishment of the

statutory rights for payment and adjudication. Accordingly, this chapter has set out a foundation to further discuss the role of the adjudicator in the construction industry and the need for it to regulated, specifically in the countries in which the adjudication procedures are mandatory. Accordingly, the minimum standards for knowledge and skills required by adjudicators will be debated in depth in Chapter 2 of this thesis to provide additional requirement in term of identifying an appropriate regulatory framework for the Malaysian situation.

CHAPTER 2

KNOWLEDGE AND SKILL OF ADJUDICATORS

1.0 Introduction

Skills and knowledge are important for any occupation or profession. Since the introduction of statutory adjudication, the need to acquire knowledge and skill as an adjudicator has been highlighted by many (Construction Industry Board (CIB), 2000; Smith, 2003; Construction Umbrella Bodies (CUB) Adjudication Task Group, 2004; Aeberli, 2005; Uher & Brand, 2007; Coulson J, 2011). In the UK, anyone can be an adjudicator[89] and accordingly, HGCRA 1996 has preserved the autonomy of parties to select their adjudicators through contract or via nomination by ANBs. The CIArb (2013) in their website state that the task of adjudicators is to judicially listen to the facts and evidence presented by the parties in disputes, apply the relevant law and issue a decision. The quality and competence of adjudicators varies tremendously, and there is always a risk that the person nominated may not be competent – technically or otherwise – to deal with the matter referred. Thus, it has been suggested that adjudicators nominated must have core skills[90] in the adjudication process and the construction industry to understand arising complexities.

Historically, adjudicators in the UK have been chosen due to their experience as construction professionals[91], legal practitioners practicing in construction law or as experts practising in other established methods of dispute resolution like arbitration and mediation. ANBs then

[89] S 2 (1) of The Scheme

[90] According to National Vocational Qualifications (in Scotland it was known as Scottish Vocational Qualifications) the core skills are Communication, Numeracy, Information and Communication Technology, Problem Solving and Working with Others.

[91] Experts in construction professional fields such as architecture, engineering, law or surveying

compiled lists of names and most backgrounds ranging from lawyers to construction professionals and other construction practitioners[92] including established arbitrators (ARC, 2000). Responding to the need to supply the market with competent adjudicators, ANBs in the UK and ANAs in New Zealand have published sets of criteria to assess the knowledge and skills for candidates to become adjudicators. Learning from the experiences of the adjudication regime pioneers in the UK and New Zealand, the sole adjudication authority in Singapore has statutorily prescribed the qualification needed. However, Malaysia has only statutorily prescribed the experience needed to become an adjudicator under the Construction Industry Payment and Adjudication Regulations 2013[93]. Before the knowledge and skills needed by the adjudicators are discussed, it is best to acknowledge and understand the concept of knowledge and skills in brief to support the argument made later for adjudicators.

2.0 Knowledge and Skills in Brief

2.1 Knowledge

Knowledge-creating concepts begin life as data. Transforming data to information, to knowledge and finally to wisdom helps shape effective strategies to manage knowledge and create new markets to serve customers (Garvin, 1993; Stewart, 1997; Tobin, 1997; Hansen, 1999; Wah, 2000). In general, Nonaka & Takeuchi (1995), Grey (1996) and Van Beveren (2002) contend that knowledge involves human capabilities. Subsequently, Smith (2001) suggested that knowledge is a human, highly personal asset and represents the pooled expertise and efforts of networks and alliances. Knowledge can be classified into tacit and explicit (Polanyi, 1958; Nonaka & Takeuchi, 1995). Tacit knowledge is made up of mental

[92] Persons with experience in surveying, typically have qualifications in engineering, building expertise.
[93] Drafted by KLRCA and has been approved by the Ministers responsible.

models, values, beliefs, perceptions, insight and assumptions (Smith, 2001; Ambrosini & Bowman, 2001). Tacit knowledge has been characterised as personal in nature and difficult to extract from a person's mind (Sachez, 2004). In brief, tacit knowledge gathers things that we know how to do but is hard to explain to others in words or in numbers. On the other hand, explicit knowledge can easily be transferred to others through various means. Explicit knowledge is technical and can be acquired through formal education or structured studies (Smith, 2001). However, both forms of knowledge are equally important for adjudicators since according to Carrillo et al. (2000), knowledge can be viewed on the basis of its final use and/or the context of its use.

2.2 Skills

Dictionaries define skill as the ability to do something well[94], the ability to use one's knowledge effectively and readily in execution or performance, a learned power of doing something competently[95] and an ability to do an activity or job well, especially because one has practised it[96]. There are some common terms that can be abstracted from the dictionaries' definitions, which include ability, knowledge and the notion of doing something well. In brief, skills need ability to use knowledge as a base to perform well in activities or jobs. Thus, skills have been defined by Dada and Jogboro (2012: 78) as "proficiency or ability acquired or developed through training and experience". It is a capability and expertise in a particular occupation or activity that can be categorised into 'basic skills'[97], 'generic skills'[98] and 'specific skills' (Great Britain, 2006: 6). Skills, according to Katz (1974), can be divided into

[94] http://oxforddictionaries.com/definition/english/skill?q=skill
[95] http://www.merriam-webster.com/dictionary/skill
[96] http://dictionary.cambridge.org/dictionary/british/skill?q=skill
[97] Literacy and numeracy
[98] Team work and communication

technical skill, human skill and conceptual skill. In the case of construction professionals, technical skills, which can be defined as an understanding of, and proficiency in, a special kind of activity particularly involving methods, processes, procedures, or techniques, are important for construction project activities.

Skills can be developed through experience and may be applied according to different circumstances. According to Bridges (1993), the terms 'transferable', 'generic', 'core' and 'cross-curricular' skills have been used interchangeably[99]. He further explained that transferable skills tend to be preferred when people are talking about the application of skills across different social contexts and listed interpersonal communication, management skills and collaborative group-working skills as examples. However, it was argued that 'specific skills' tend to be less transferable (Great Britain, 2006). Moreover, it was suggested that the transfer process of skills occurs when previously learned knowledge affects the way new knowledge is practised (Cormier and Hagman, 1987; Fleming, 1991) and implemented when there are variations in the normal work routine (Perkins & Solomon, 1992). Therefore, it is relevant for adjudicators in terms of applying the skills developed in their primary occupation or profession to be adapted in a different context, by transforming the same from one situation to another.

3. Knowledge and Skills for Adjudicators

Some empirical studies (Robinson et al., 2001; Carrillo et al., 2002; Egbu, 2004) have been undertaken, concluding that tacit knowledge in personnel is more important than explicit

[99] All terms have 'central aspiration' or rooted from the same source and can be applied either or both: (i) across different cognitive domains or subject areas; (ii) across a variety of social, and in particular employment, situations.

knowledge when both are applied within the context of the construction industry. Nesan (2012) explained that due to the temporary nature of construction projects and the typical short-term relationships between personnel, tacit knowledge is usually retained by the individuals and organisations without proper knowledge management programmes. In addition, the fragmented nature of the construction environment leads to the solving of several unprecedented problems during the project, from which is it difficult to document and from which others can learn. As such, tacit knowledge resides in the minds of the individuals working within a particular project and the process of acquiring tacit knowledge from the personnel becomes very valuable to other construction projects. Therefore, Pathirage et al. (2007) established the importance of tacit knowledge in relation to organisational performance and achievement of competitive advantage, in addition to further highlighting the relevance of tacit knowledge in the construction industry by considering its essential characteristics. Knowledge has become more specialised and technology more complex in the construction industry, resulting in a long list of disputes[100] and in parallel, greater power for established professions as well as the growth of new professions such as mediators and adjudicators. Naturally, the knowledge acquired during their practice as architects, engineers or quantity surveyors can be adapted as skills in order to resolve disputes while adjudicating[101].

[100] It was noted that disputes in the construction industry arise from many different sources (Fenn et al., 1997). Fenn et al. (ibid) summarised from their literature review a range of different reasons behind arising disputes in the construction industry. They then concluded that disputes over contractual terms appeared in each separate analysis of the causes of construction disputes as a common source. Accordingly, knowledge and understanding as to the conditions of construction contracts are very important in the construction industry as these underline the obligations of each party under their agreement. It is also said that the conditions of contract have as their purpose to establish balance (Türegün, 1996 cited in KÖKSAL, 2011) and fair allocation of risk between contractors and clients (Tritton, 1957 cited in KÖKSAL, 2011).

[101] See Chapter 4, discussion on the qualifications to be adjudicators as stated in CCA 2002, SOPA-R 2005 and CIPA 2012.

As will be elaborated in the discussion below, the knowledge gleaned as architects, engineers or surveyors in the construction industry has become important as a skill in adjudication proceedings. Nesan (2012) states that it is the tacit knowledge of personnel that brings competence and skills to the individuals in the construction industry. He further argues that creativity is one of the prerequisites for efficient practice of tacit knowledge as it focuses on the nature of the thought process and intellectual activity, which generate new insights or solutions to problems. Since adjudicators essentially need to be creative, tapping into the embedded knowledge and implementing it in the adjudication proceedings provides advantages to the construction professionals. For example, adjudication process must be settled within a very limited time as prescribed by the payment regimes. The essence of adjudication is speed. As construction professionals have established their competency in dealing with time limitation in the construction industry, they are theoretically trusted to use their pertinent skills and knowledge to be applied efficiently in the adjudication process. Therefore, construction professionals are in a good position to provide fresh and relevant concepts in elucidating disputes in the adjudication process. Besides, one of the major tasks for professionals in construction projects is to execute all their professional works according to the contract of engagement (Hussin & Omran, 2009). Furthermore, it was distinguished in *Sutcliffe v Thackrah and Others*[102] that an architect owes his employer contractual and often tortious duties to carry out his work with the reasonable skill and care to be expected of a competent architect. Since the adjudication process provides contractual arrangements between adjudicators and the disputing parties in addition to the contractual obligations imposed by the Schemes, construction professionals are expected to apply the relevant tacit knowledge earned in their professional tasks in order to diffuse their contractual obligation competently.

[102] [1974] AC 727. See also, *Greaves & Co. (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 W.L.R. 1095 (C.A.).

Legal practitioners have long been familiar with the concept of adjudication. In a sense, to adjudicate means to resolve a dispute between other people. Hence, arbitrators, judges, tribunal panels and ombudsmen can all be considered adjudicators (The Nationwide Academy for Dispute Resolution (UK) Ltd, 2000). Legal practitioners are trained in the administration of justice where evidence needs to be substantiated by facts proven and legal principles are argued to establish relevant authorities. Thus, it is considered that these skills embedded in legal practitioners can be adapted to the adjudication process[103]. Accordingly, apart from skills and knowledge gained in the legal field, legal practitioners need to also have expertise in construction practice. Legal issues thriving in the construction industry shape the industry to become more complex and challenging. Thus, construction law evolves and the need arises for legal practitioners and their expertise.

Generally, legal practitioners are required to give input during procurement stage and provide their services when disputes crystallise during the construction period. The construction contracts involved in construction law can be very complex and technical, and legal practitioners will need to have a good grasp of contract law and tort, as well as having excellent analytical skills and attention to detail. However, this is a very 'hands on' practice area, and common sense and a practical attitude will also go a long way. Accordingly, with experience working within the construction law environment, legal practitioners would seem very appropriate in the adjudication process as adjudicators. Moreover, the need for the skills and knowledge of legal practitioners is further enhanced with the judgment in *Humes Building Contracts v Charlotte Homes* (Surrey)[104]. HH Judge Gilliland QC, in that case,

[103] In a similar way that it is presumed that practising lawyers and advocates are eligible for the judicial bench in the UK by virtue of their prior experience.
[104] [2007] (QBD) TCC 106/06

emphasised the need for adjudicators to carefully consider the legal basis of any claim made and ensure that their decision logically follows from that legal basis. Thus, the need for legal knowledge in the context of adjudication seems inevitable.

Table 2.1 illustrates that in addition to experience gained in related fields (specifically in legal and construction-related fields), advanced knowledge and understanding of the adjudication process itself is essential. Therefore, the ANBs, ANAs and adjudication authority have set up guidance on the minimum requirement of knowledge and skills required from adjudicator candidates. The knowledge and skill required to become adjudicators will be discussed below.

Table 2.1: Adjudicator's Knowledge and Skills

Criteria	CIArb	CIC	RICS	TeCSA	SMC	AMINZ	The Tribunal	AANZ	KLRCA
Experience in related fields	√	√	√	√	√	√	√		√
Base criteria									
Advanced Knowledge and understanding of adjudication	√	√	√	√	√	√	√		√
Knowledge									
•Understanding of relevant law on adjudication, contract, tort and evidence or other legal framework.	√	√	√	√	√	√	√		√
Skills									
•Technical knowledge in legal and construction issues	√	√	√		√	√	√		√
•Time management	√	√	√	√	√	√	√		√
•Accurately identify issues and interests of disputing parties	√	√					√		
•Communication skills	√	√	√				√		√

Adapted and based from tables by Maiketso (2002, 2011)

Note: -

Chartered Institute of Arbitrators (CIArb), Construction Industry Council (CIC), Royal Institution of Chartered Surveyors (RICS), Technology and Construction Solicitors' Association (TeCSA), Singapore Mediation Centre (SMC), Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ), Building Disputes Tribunal (The Tribunal), Adjudicators Association of New Zealand Inc (AANZ), Kuala Lumpur Regional Centre of Arbitration (KLRCA)

3.1 Knowledge

There is little academic discussion on the knowledge requirements of adjudicators. Some have been highlighted over the years but none are discussed in detail to help ascertain the knowledge required before one is appointed as an adjudicator. However, it was observed that the courts[105] have suggested that the thorough understanding of the requirements of adjudication regime is vital for adjudicators to perform well. Nonetheless, the baseline has been set through the entry requirements to become registered adjudicators with the ANBs, ANAs and adjudication authorities. For ANBs in the UK, adjudicators are expected to have sufficient knowledge of the HGCRA 1996 and the related Scheme.

Table 2.1 clearly illustrates that in addition to experience gleaned from other related fields like construction practice or law; the prospective adjudicator must have advanced knowledge and understanding of the adjudication process itself. Hence, most of the ANBs necessitate that the applicant attends training sessions designed specifically to equip the prospective adjudicator with explicit and essential knowledge on adjudication[106]. However, it was also noted that some ANBs, ANAs or adjudication authorities recruit members via invitation only. Nonetheless, according to Green[107] (2013), a member of the Executive Team of the Building Disputes Tribunal (BDT)[108] in New Zealand, the invitation is extended to persons "on the basis they are respected and recognised as leading construction lawyers, arbitrators and/or

[105] *Systech International Ltd v PC Harrington Contractors Ltd* [2011] EWHC 2722 (TCC) when Akenhead J observed that "an adjudicator who undertook the role of adjudicator was not merely being employed to produce decisions but in broad terms to put in effect Parliament's intentions". See also *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, *RG Carter Limited v Edmund Nuttall Limited* [2002] EWHC 400 (TCC), RSL *(South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC) and *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, [2006] BLR 15.

[106] The training usually includes programmes which cover the law of obligations, the law of adjudication, adjudication practice and procedure and decision writing.

[107] Via email dated 15 January 2013

[108] BDT is the Authorised Nominating Authority (ANA) for adjudicators in New Zealand.

judges. A few are selected primarily on the basis of their strong technical knowledge and experience for appointment in qualitative disputes only". But in essence, the BDT agreed that both strong technical knowledge and experience are required and that such attainments must be proven by the invitees.

The rapidly growing complexity of the construction industry (Chan et al., 2002), the development in construction technology (Gigado & Wood, 2008; Toor & Ofori, 2008), arising ethical problems due to the complicated nature of the construction industry (Fan and Fox, 2009), legal responsibilities (McElroy et al., 2006; Gigado & Wood, 2008; Stein and Hiss, 2003) as well as increased competition and changing client demands (Goodman and Chinowsky, 1997; Nicol & Pilling, 2000), demand that professionals in the industry expand and update their knowledge, skills and credibility to safeguard their professional standing. Therefore, within the construction industry, perceived knowledge in the complexity and nature of a construction contract is seen as one of the most significant factors in project success and achieving competitive advantage (Koskinen, 2000; Sense and Antoni, 2003). Thus, adjudicators need to be equipped with advanced knowledge and understanding of the process of construction itself as a basic criterion to become a member of the profession since statutory adjudication exists to support the success of the industry as a whole.

Statutory adjudication regimes bestow powers on the adjudicator to enable her/him to properly and effectively conduct the adjudication process[109]. So, for example, adjudicators have the power to control the proceedings of adjudication to suit the particular requirements of their jurisdiction. As discussed below, advanced knowledge in adjudication process capitals around the adjudicators' understanding of the statutory and contractual framework of

[109] S 108 (2) (f) of HGCRA, S 16 (4) of SOPA 2004, S 42 of CCA 2002 and S 25 of CIPA 2012

the adjudication[110]. Adjudicators must understand the principles and aims of the Act as well as the powers that emanate with the nomination as adjudicators via ANBs/ANAs/adjudication authorities or by agreement of the parties in disputes. It is essential for adjudicators to determine whether or not the particular governing Act bestows upon them absolute discretion as to the conduct of the adjudication or not. Furthermore, they must become accustomed with terms such as jurisdiction, rules of natural justice, impartiality and bias. Therefore, the criterion to have advanced knowledge and understanding of the adjudication process as well as underpinning legal framework has become a benchmark for ANBs, ANAs and adjudication authorities to ensure that their adjudication panel is market ready. To ensure an appropriate level of knowledge in adjudication, some of the ANBs, ANAs, and adjudication authorities have fashioned training programmes that include exams while others accept membership via an interview session or by means of a 'reregistration process'. The processes serve as the market restriction to control the quality[111] of adjudicators.

Since adjudicators are perceived to inhabit some recognised professional attributes, it is thus necessary to identify the level of knowledge needed to be one. Lord Pearson in *Drummond-*

[110] The salient difference between the HGCRA and other statutes (CCA 2002, SOPA 2004 and CIPA 2012) is that adjudication regimes under said statutes are purely statutory, unlike HGCRA, which revolves around the notion that a statutory entitlement to adjudicate underlays the contractual provisions for adjudication. Accordingly, CCA 2002, SOPA 2004 and CIPA 2012 explained the mechanism to enforce or challenge the adjudicator's decision. Therefore, it is vital for adjudicators to really understand the roots of the adjudication proceedings under their jurisdictions.

[111] Bartlet (2003) suggested a few qualities that must be rooted within adjudicators for them to perform effectively. The qualities suggested are as follows: -

i) He is familiar with construction contracts and construction processes
ii) He understands the philosophy and purpose of adjudication and the nature and extent of the adjudicator's powers
iii) He acts fairly at all times
iv) He drives the adjudication process forward so as to be able to reach a decision within the time limit but he also gives space for the parties to reach a compromise if that is their wish
v) He makes judicious use of his power to take the initiative in determining facts and the law
vi) He handles with firmness a claimant who seeks to overload the process, or a recalcitrant respondent
vii) He produces a clearly expressed and enforceable decision.

Jackson v British Medical[112] observed that "words may be defamatory of a trader or business man or professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity". It is therefore necessary to consider the background and primary profession of adjudicators since the professional man has some advantages over others.

As Bingham LJ at para 20 observed in *Eckersly v Binnie & Partners*[113], "…a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field… He must bring to any professional task he undertakes no less expertise, skill and care than any other ordinarily competent members of profession would bring, but need bring no more." ANBs, ANAs and adjudication authorities have thus suggested that the essential knowledge includes an understanding of the relevant law on adjudication, contract, tort and evidence or other legal precepts and technical knowledge relevant to the function of an adjudicator. This knowledge is inculcated through experience gained in other relevant professional fields such as construction practice and law.

Therefore, it is vital for adjudicators to apply some of their knowledge from their primary profession in their secondary role as adjudicators. Nevertheless, the extent to which an adjudicator must apply his or her own knowledge is subject to the decision made in the case of *Balfour Beatty Construction v The Mayor and Burgesses of the London Borough of*

[112] [1970] 1 WLR 688 at 689
[113] (1998) 18 Con LR1

Lambeth[114]. In the said case, Judge Lloyd QC observed that an adjudicator is not of course limited to make his decision based on the material presented by the parties. He may obtain further information and may apply his own knowledge and experience. Above all, he has to take the initiative in ascertaining the facts and the law. He has an absolute discretion to do what he considers necessary. However, it was also observed by Lord Hodge in *Carillion Utility Services Ltd v SP Power Systems Ltd*[115] that an adjudicator is required to disclose to the parties information, which he has obtained from his own experience or from sources other than the parties' submissions, if that information is material to the decision which he intended to make[116]. As the adjudication process resides in the state of quick and binding decision settling, the expert personal knowledge of construction professionals and legal practitioners that usually work in construction fields can be seen as an added value. Hence, knowledge by itself is not enough, as adjudicators also need to have an analytical and objective mind that can collect the required information, develop hypotheses and scrutinise those hypotheses. Accordingly, the adjudicators require skills on top of knowledge to be competent adjudicators.

3.2 Skill

3.2.1 Technical knowledge

The adjudication process can be regarded as highly technical since it comprises of the process of ascertainment of the facts, assessing the evidence and deciding the law, which must all be pulled together in the form of a decision to settle the dispute. It takes a very technical practice

[114] [2002] EWHC 597 (TCC)
[115] [2011] CSOH 139
[116] See also *Costain Ltd v Strathclyde Builders Ltd* [2003] ScotCS 352

and technical knowledge or skills to understand the complex elements required to effectively complete tasks associated with a given profession (Gushgari et al, 1997; Boyd and Pierce, 2001; Odusami, 2002). Technical knowledge is a skill that resides in individuals (Polanyi, 1958; Nonaka & Konno, 1998: Meso & Smith, 2000) and may be difficult to express (Polanyi, 1966; Wagner, 1987; Nonaka & Konno, 1998; Cowan et al., 2000; Lubit, 2001). It is a professional man's technique since Lord Pearson in *Drummond-Jackson v British Medical*[117] *(at 698)* observed that "professional man's technique is at least relatively permanent, and it belongs to him: it may be considered to be an essential part of his professional activity and of him as a professional man." Technical knowledge is a skill that is harder to articulate and can only be acquired by practicing it over a long period of time (Sawyer & Stone, 2006). Thus, it can be assumed that the ANBs, ANAs and adjudication authorities specifically prescribed technical knowledge as a required standard since these types of skills can be established from professionals' experience and it is anticipated that construction professionals and legal practitioners are well endowed with such skills.

3.2.2 Communication skill

As the adjudication process often arises in a highly contentious atmosphere, listening and speaking to both parties will help adjudicators avoid the pitfalls of breaches of natural justice. The parties in disputes must be heard and treated courteously at all times to ensure that both parties are satisfied with the way the adjudicators dealt with each issue arising in the dispute. Furthermore, adjudicators must convey all their application of knowledge when rendering a decision, thus, communication skills, including written skills, are essential. Decisions made must be accompanied by reasoning even though under the Scheme, reasons are not required

[117][1970] 1 All ER 1094 at 1104

unless one or both of the parties asks for them. Mr Justice Jackson in *Carrilion Construction Limited v Davenport Royal Dockyard Limited*[118] viewed that reasons to be given by an adjudicator pursuant to Paragraph 22 of the Scheme will be considered sufficient in so far as at least a brief statement of those reasons is proffered, which is sufficient to show that the adjudicator has dealt with the issues remitted to him and sets out his conclusion on those issues[119]. Similarly, the statutory adjudication regimes in New Zealand, Singapore and Malaysia require the adjudicator to set out the reasons for his decision[120]. The adjudicator must give reasons so as to make clear that he has decided all of the essential issues put before him and also for the parties to understand in the context of the adjudication procedure what the adjudicated decision is and why the adjudicator has made it[121]. Accordingly, adjudicators must write in a context that can be understood by both parties to ensure both parties are well informed as to the decision made by her/him. Overall, the ability to communicate information accurately, clearly and as intended, is a vital life skill and something that should not be overlooked by adjudicators. In addition to the technical knowledge and communication skills deliberated above, Coulson J. (2011) highlighted the skills of time management; ability to grasp essential issues quickly and focus on these, as well as the ability to treat the parties involved in the adjudication fairly and courteously as essential requirements for adjudicators. Thus, it is essential to discuss these issues further:

[118] [2005] EWHC 779 (TCC)
[119] See also *Balfour Beatty Construction (Northern) Limited v Modus Corovest (Blackpool) Limited* [2008] EWHC 3029 (TCC) and *NAP Anglia Ltd V Sun-Land Development Co. Ltd* [2011] EWHC 2846 (TCC)
[120] S47 (1)(b)(ii) of the CCA 2002, S 17 (2) of the SOPA 2004 and S 12 (4) of the CIPA 2012
[121] See *Thermal Energy Construction Limited v AR & E Lentjes UK Limited* [2009] EWHC 408 (TCC)

3.2.3 Time management

Adjudication is a process of speed; it must be settled according to the time limitation provided by the statute or any agreed extended period. Dyson J. in *Macob Civil Engineering Limited v Morrison Construction Limited*[122] observed that the timetable for adjudication in the HGCRA is very tight (some might say unreasonably so) and could lead to injustice[123]. Additionally, in *CIB Properties Limited v Birse Construction*[124], the Judge observed that in an adjudication process, complexity[125] of the disputes is not an issue, but the question is whether the adjudicator is able to make a fair decision within the time limitation set by the act. It was established that HGCRA has given the general right for parties to refer any kind of dispute at any level of difficulty to be adjudicated. Thus, the time limitation cannot serve as an excuse to pick and choose the level of complexity suitable to be adjudicated by the adjudicators providing that they can adjudicate according to the power given to them by HGCRA.

Furthermore, it was observed by Judge Lloyd in *Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd*[126] that adjudicators ought to be well aware of the importance of complying with the time limit since it is crucial to the effectiveness of adjudication. Therefore, there is an inherent element of rough justice in adjudication, given the tight timetable involved. However, at the same time, the adjudicator has an overriding duty to act fairly and impartially[127]. It was further suggested by Judge Llyod in the learned case that a rapid

[122] [1999] CLR 16
[123] This decision was later approved by Court of Appeal
[124] [2004] EWHC 2365 (TCC)
[125] It was noted that there is no restriction as to the size or complexity of the disputes which may be referred to adjudication. See also *The Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] BLR 135 and *Amec Group Limited v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC).
[126] [2003] EWHC 3100 (TCC)
[127] S 108 (2) (e) of HGCRA and Para 12 (h) of the Scheme

timetable might conflict with the requirement for adjudicators to act impartially. In other words, even with time limitation, adjudicators must not sacrifice the need for a fair decision. Paragraph 13 (g) in the scheme state that adjudicators must "…give directions as to the timetable for the adjudication…." In addition, Paragraph 15 of the Scheme even mentions the "timetable of the adjudicator made in accordance with his powers" must be abided by the parties. Accordingly, time management is important and the adjudicator must use his skill to set the timetable in an appropriate way in order to establish a fair decision within the time limitation set by the Act. S 108 (2) (c) of HGCRA requires the adjudicator to reach his decision within 28 days[128] following the requirements of the various rules set out in the scheme.

Additionally, it was implicitly acknowledged that if an adjudicated decision is not delivered promptly, it can result in unenforceability of that decision. Indeed, HHJ Coulson QC held at para 75 in *Cubitt Building & Interiors Ltd v Fleetglade Ltd*[129] that "[a]djudicators do not have the jurisdiction to grant themselves extensions of time without the express consent of both parties. If their time management is so poor that they fail to provide a decision in the relevant period and they have not sought an extension, their decision may well be a nullity"[130]. Accordingly, adjudicators with power[131] prescribed statutorily must try to complete the process and produce decisions in time or risk them being unenforceable. Furthermore, with recent developments such as those as in *PC Harrington Contractors Ltd v Systech*

[128] 20 days as per S 46 (2) (a) or 30 days as per S 46 (2) (b) of the CCA 2002; 14 days as per S 17 (1) (b) of the SOPA 2004 and 45 days as per S 12 (2) of the CIPA 2012

[129] [2006] EWHC 3413 (TCC)

[130] For further discussion, see *St Andrews Bay Development Limited v HBG Management Limited* (2003) CILL 2106; *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2004] ScotCS 94; *Hart Investments Ltd v Fidler* [2006] EWHC 2857 (TCC); *Epping Electrical Company Ltd v Briggs & Forrester (Plumbing Services) Ltd* [2007] EWHC and *Lorraine Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC).

[131] Para 13 of the Scheme has prescribed extensive powers for adjudicators to control the adjudication proceedings.

International Limited[132], the adjudicator may not be entitled to be paid, if in the course of his conduct, he has breached the rules of natural justice, thus rendering his decision unenforceable. In addition, for adjudicators practicing in Singapore, a late decision can be considered disastrous since the adjudicator is then not entitled to be paid, and shall not retain any fee or expenses in relation to an adjudication application if he has failed to make a determination on the application within the time allowed as stated in S 31 (2) of the SOPA 2004[133]. This provision provides very powerful 'encouragement' to the adjudicator to set his timetable right and time management skills will thus be of significant benefit.

3.2.4 Ability to grasp essential issues quickly and focus on it

The construction industry can be considered generally very happy with the essential characteristic of a rapid decision in adjudication, even if it means that there is rough justice[134]. In the UK, it appears to have been accepted that the construction industry prefers a quick decision even if it is the wrong decision[135]. In the said case, the Court of Appeal upheld the judgment of Mr Justice Dyson[136] that even if an adjudicator had answered the question put to him in the wrong way, the court would not interfere with the adjudicator's decision since the purpose of the adjudication procedure in section 108 of the HGCRA was to provide

[132] [2012] EWCACiv 1371

[133] New Zealand has the same provision in S 57 (5) of CCA 2002 and S 19 (6) of CIPA 2012 applied in Malaysia.

[134] H.H Judge Richard Seymour QC in *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC) observed that the introduction of adjudication has undoubtedly brought many benefits to the construction industry in the UK, but at a price which brought significant injustice as the procedure adopted is in the interest of speed. Hon. Robert Semellie QC in *Concrete Structure NZ Ltd v Michael D Palmer & Moncur Engineering Ltd* [2006] Adj.L.R. 04/06 cited a case of *Rupert Morgan Building Services v Jarvis* [2004] 1 WLR 1867 (CA) which makes plain that such legislation like CCA 2002 is essentially a cash flow measure implementing what has been colloquially described as a 'quick and dirty' exercise to avoid delays in payment pending definitive determination of litigation. See also *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) BLR 93, *Costain Ltd v Strathclyde Builders Ltd* [2003] ScotCS 352 and *Mott MacDonald Ltd v London & Regional Properties Limited* [2007] EWHC 1055 (TCC)

[135] Bouygues UK Ltd v Dahl-Jensen UK Ltd [2000] EWCA Civ 507; Phil UK Limited v Ramboll UK Limited [2012] [CSOH] 139

[136] *Bouygues UK Ltd -v- Dahl-Jensen UK Ltd (In Liqu.)* (1999) (TCC) [2000] BLR49

the parties to a construction contract with a speedy method of resolving disputes. However, to be efficient in time management, adjudicators must have the ability to grasp the issues presented by referring parties quickly. It will help them to set a timetable that will suit the complexity of issues presented and consider, for example, if they have jurisdiction to decide the case.

It was fully understood that, in adjudication, there is an absolute requirement for adjudicators to identify clearly and early in the process the legal basis of claims and defences as well as the essential logic of the legal analysis required[137]. In addition, Judge Toulmin in *CIB Properties Limited v Birse Construction*[138] observed that a referring party in disputes must choose adjudicators who are knowledgeable and experienced in the issues concerned since adjudicators are involved in the administration of justice. Thus, there is high relevancy between the skills of adjudicators and the issue they need to adjudicate. In addition, the skills to grasp essential issues may prevent adjudicators from losing their jurisdiction. Focusing on the right issue in disputes will help adjudicators to determine whether to proceed with the proceedings or just resign if it was clear that they do not have jurisdiction to make the decisions.

3.2.5 Ability to treat the parties involved in the adjudication fairly and courteously

HGCRA 1996 only imposes a duty on the adjudicators to act impartially[139]. However, it is appropriately recognised that adjudicators are under a duty to apply the rules of natural

[137] As per Gilliland J observation in *Humes Building Contracts v Charlotte Homes (Surrey)* [2007] (QBD) TCC 106/06
[138] [2004] EWHC 2365 TCC
[139] S 108(2)(e) of the HGCRA

justice[140], even though adjudication is supposed to be undertaken within a short timescale. It is noted that a decision which has not been arrived at impartially is not binding[141]. Lack of impartiality is evidenced by bias, which is an attitude of mind preventing the person from making an objective determination of the issues that have to be resolved[142]. In addition to the requirement to act impartially, by virtue of CCA 2002 and SOPA 2004, adjudicators under these jurisdictions are also required to act independently and in a timely manner[143], avoid incurring unnecessary expense[144] and comply with the rules of natural justice[145]. Furthermore, under CIPA 2012, adjudicators must declare in writing at the time of acceptance of their appointment to serve according to S 24 of the said Act. Thus, the adjudicators need to possess the relevant skills to act fairly to conform to the requirement of the relevant adjudication regime to ensure the decision made is binding.

4.0 Conclusion

According to Akenhead J in *CG Group Ltd v Breyer Group Plc*[146], adjudicators are needed only to address the factual and legal issues as articulated in the submissions and evidence submitted by both parties in disputes. They could not be criticised on natural justice[147] grounds if they did that. Jurisdictionally, adjudicators have to address the dispute and defences referred to them by both parties. The judgement made by the learned judge provides

[140] *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC)
[141] *Costain Ltd v Strathclyde Builders Ltd* 2004 SLT 102; *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139; *Barrs v British Wool Marketing Board* 1957 SC 72; *Inland Revenue v Barrs* 1961 SC (HL) 22; *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] BLR 288 and *Highlands and Islands Authority Ltd v Shetland Islands Council [*2012] CSOH 12
[142] *Director General Of Fair Trading v Proprietary Association Of Great Britain & Ors* [2000] EWCA Civ 350
[143] S 41(a) of CCA 2002 and S 16 (3)(a) of SOPA 2004
[144] S 41(b) of CCA 2002 and S 16 (3)(b) of SOPA 2004
[145] S 41(c) of CCA 2002 and S 16 (3)(c) of SOPA 2004
[146] [2013] EWHC 2722 (TCC)
[147] pursuant to the rules of natural justice, each party has the right to a fair hearing before an impartial tribunal, failing which an adjudicator's decision will not be enforceable. Breaches of natural justice by the adjudicator may include procedural irregularity, failing to act impartially or the existence of bias or apparent bias.

an indication of the importance of having a broad knowledge of how the adjudication process works. It is obvious that awareness of adjudication procedure will aid adjudicators to publish decisions according to the statutory framework provided by the adjudication regime. During the course of instituting adjudication as a quick, simple and cheap process of the interim resolution of disputes, the Royal Institution of Chartered Surveyors (RICS) published a guidance note entitled 'Surveyors acting as adjudicators in the construction industry'[148] to serve as best practice to help adjudicators approach the process in a sequential manner. Therefore, the effort made by the ANBs, ANAs and adjudication authorities in equipping adjudicators with essential knowledge on the adjudication procedure and its development can be considered extremely important[149]. Accordingly, it is suggested that the guidance note will help to enhance the knowledge of adjudicators and also provide practical assistance to help adjudicators undertake their role in an expeditious and appropriate fashion (Sir Vivien Ramsey, 2012).

In addition to the knowledge, expertise and practical experience embedded in adjudicators, skills are exceptionally vital. The effectiveness of statutory adjudication as a mechanism to resolve disputes in the construction industry is largely reliant on the professionalism of adjudicators plus their ability and skills in managing the parties and conducting the adjudication process expeditiously. Parties in disputes expect experienced and erudite adjudicators to produce valid and binding decisions. Thus, possessing necessary skills and knowledge on the subject matter of the dispute at hand as well as the skills to manage and run

[148] This is the 3rd edition of the publication.

[149] Earlier, Construction Umbrella Bodies Adjudication Task Group has published 'Users' Guide to Adjudication' in 2002 and 2003. In addition, the Adjudication Society and the Chartered Institute of Arbitrators (CIArb) entitled as follows; Guidance Note: Construction Contracts and Construction Operations, Guidance Note: Adjudicator's Liens, Guidance Note: Natural Justice and Guidance Note: The Scheme for Construction Contracts. Earlier CIArb also produced Guidance Note: Jurisdiction of the UK Construction Adjudicator in May 2011.

the adjudication in as efficient a manner as possible will arguably ensure that the objective of the adjudication regime will be achieved.

Adjudication proceedings under HGCRA are not legal proceedings but are proceedings designed to avoid the need for legal proceedings. Even though adjudication decisions are only provisionally binding, it is now becoming firmly established as a tool of dispute resolution. It can be considered fortunate for the construction industry; the courts have limited challenges on adjudication decisions, essentially only to the matters of jurisdiction and in respect of breaches of natural justice. It was firmly established that the rules of natural justice do apply to adjudications but are subject to limitations. Therefore, the adjudicator has to conduct the adjudication proceedings with the rules of natural justice or as fairly as the limitations imposed by Parliament permit. Besides, the courts agreed that certain minimum standards of conduct are required from adjudicators, and that those standards are found in the well-established principles of natural justice. Thus, the duty to act impartially as portrayed in S 108(2) of the HGCRA is, in its essence, a duty to observe the rules of natural justice and it is not simply a duty to show non bias. Since knowledge is a conceptual understanding of information, theories, principles or research, skills are needed as strategies and processes to apply the knowledge to complete a duty. As impartiality is an inclination to weigh both views and opinions equally, being impartial requires all the right combinations of skills and knowledge for adjudicators. Thus, consolidating knowledge and understanding the importance of being impartial is the key to producing enforceable decisions as adjudicators and avoiding the pitfall of being challenged via arbitration or litigation.

On the jurisdiction difficulty, it was found that adjudication under HGCRA is necessarily crude in its resolution of disputes. Errors of fact and law do not vitiate the decision which has

to be complied with, unless of course it was not authorised and thus made without jurisdiction. The jurisdiction of an adjudicator's decision will of course normally be defined by the scope of the dispute that was referred for adjudication. This is the plain expectation to be derived from section 108 of the HGCRA and paragraph 9(2) and 23 of the Scheme. Unless the parties have agreed to be bound by the result of the adjudicator's investigation on her/his own jurisdiction, ruling on that issue will not be determinative and the challenger can defeat any subsequent enforcement proceedings by showing a respectable case that the adjudicator had reached an erroneous conclusion as to her/his jurisdiction. Thus, it is an advantage for adjudicators to possess relevant skills and knowledge so as to determine their own jurisdiction. Adjudicators need to realise that the decision made must be enforceable to avoid incurring unnecessary expenses to the disputing parties. They must also understand that the purpose of the procedure (adjudication) is to enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what is likely to be a complex and expensive dispute. Accordingly, the theme for jurisdiction and the rules of natural justice must be treated as the upmost essential knowledge and skills to be embedded and enhanced in adjudicators.

The adjudication regime provides adjudicators with absolute discretion as to the conduct of adjudication but within the scope of requirements set out in the respective Acts. It was noted that the adjudication process occurs in a patently adversarial setting. It is determined based on the evidence presented in documentary forms and upon written submission and is enforceable by law. Therefore, with its adversarial settings, adjudication is covered by the scope of litigation privilege. Nevertheless, it was observed that even though adjudication is a judicial process, it is legally and procedurally different from judgment of court or award by arbitrator since an adjudication decision is only temporarily binding. Thus, an adjudicator's award is not

expected to demonstrate the same quality of reasoning as a judge. However, an adjudicator must give intelligible reason in relation to the matter disputed; failure in doing so will equal the adjudicator's failure in complying with her/his obligations if contractually she/he is required to do so. Reasons must be provided so as to make clear that adjudicators have decided all of the essential issues put before her/him. In addition, it is essential for the parties to understand, in the context of adjudication procedure, what the adjudication decision is and why it was made. Nonetheless, adjudicators must be aware that pursuant to Paragraph 22 of the Scheme, reasons given must be sufficient to show that the adjudicator has dealt with the issues remitted to her/him and what her/his conclusion is on those issues. Accordingly, in-depth knowledge about the requirement in the HGCRA 1996, CCA 2002, SOPA 2004 or CIPA 2012 is paramount for adjudicators and the application of its requirement needs skills.

It was established that decisions are to be enforced by the Courts[150] even if the adjudicators have answered the questions or disputes referred to them incorrectly as a matter of fact or law since it was established that the provisional nature of adjudication is linked with the short time limits within which the process has to be concluded. However, the speed in which things are being done in adjudication process can cause breach of natural justice. Despite that, discretion as to the conduct of adjudication limits the need for adjudicators to become masters in all areas since the adjudicators can easily obtain advice, especially in establishing the facts and the law from experts, provided the disputing parties are informed and have sight on the advice that has been obtained.

[150] See judgment in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522; *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* [2002] BLR 288; *Mott MacDonald Limited v London & Reginal Properties Limited* [2007] EWHC 1055 (TCC) and *Herbosh-Kiere Marine Contractors Limited v Dover Harbour Board* [2012] EWHC 84 (TCC)

Nonetheless, knowledge and skills are indispensable even though errors of fact and law do not vitiate the decision which has to be complied with, unless of course it was not authorised and thus made without jurisdiction. Accordingly, adjudicators must be responsive in respect to the notion that the system of construction adjudication was introduced by HGCRA 1996, even though it was noted that the courts are required to respect and enforce adjudications decisions. In other words, the judges should deal relatively robustly with challenges on jurisdictional or fairness ground following the objectives of HGCRA 1996 and the Scheme which requires the courts to respect and enforce an adjudicator's determination unless it is plain that the matters decided by adjudicators were not referred to them or they completed the task with obvious unfairness. This is due to the fact that the object of the enactment of the regime is as a special mechanism built for the construction industry to provide quick, simple and cheap processes for interim and binding resolution of disputes. Furthermore, with the best practice guidance notes provided by ANBs, ANAs and adjudication authorities, it is expected that the quality of decisions established by adjudicators must reflect how they deal with the disputing parties' rights and duties under the relevant construction contracts. Essentially, all the knowledge and skills discussed above are part and parcel of a whole that will contribute to the effectiveness of the adjudication scheme to the construction industry. In conclusion, the knowledge and skills of adjudicators will determine the quality of the decision and provided that the adjudicator acts within his jurisdiction and applies the principles of natural justice in her/his decision, such decisions will be binding and enforceable.

CHAPTER 3

REGULATION AND REGULATORY FRAMEWORK

'Good regulation is vital to maintaining standards and making sure that there is a level playing field for businesses to compete. Effective and targeted regulation can play a vital role in correcting market failures, promoting competition, ensuring fairness at work and providing protection for consumers and the environment'. John Hutton (2005)

1. Regulation

1.1 The History of the Definition of Regulation by Economists and Scholars

This chapter will discuss the essential nature of regulation to ensure an appropriate standard for professionals. The Oxford English Dictionary defines 'regulation' as 'the action or fact of regulating', and 'to regulate' as 'to control, govern, or direct'. In its simplest and narrowest sense, regulation refers to a set of authoritative rules accompanied by a mechanism, usually a public agency, for monitoring and promoting compliance with those rules (Baldwin et al., 1998). While it is not disputed that regulation plays a major role in the organization of a society, according to Baldwin et al. (1998) different approaches have been taken by economists and political scientists when regulation is being debated. Economists argue that regulation amounts to a tool to protect public interest and the political scientist have focused primarily on how it works (Baldwin et al., 1998). Regulations help to set boundaries on how

society works, particularly on the idea of 'limitation of action'[151]. Regulation is for the betterment of the quality of economic and social life. Hancher & Moran (1989) advocate regulation as a defining feature of a social organization system, equipped with the presence of rules and how it can be enforced to protect the public interest. Regulation can also be envisioned as a formal contract between state and public.

Regulation has sparked interest from different multi-disciplinary approaches which has led to various definitions of the term by scholars using their own methodology (Black, 2002; Jordana & Levi-Faur, 2004; Feintuck, 2004; Cave et al., 2010; Baldwin et al., 2012). Regulation in its simplest terms, has been defined as a rule or directive made and maintained by authority (Moran, 2003). Economists like Stigler (1971) and Posner (1974) observed that regulation is designed and operated for the benefit of an industry and both used the term 'regulation' in its widest sense (Ogus, 2001). Posner (ibid) added that regulations are a product within the principle of supply and demand in the market and can be acquired by those who value them the most. Orbach (2012) summarised that the term regulation in the legal context is usually reflected as a 'control' or 'constraint'. However, due to usage of the word 'control', he then argued that regulation enables, facilitates or adjusts activities without restrictions. In their book, which has been described as a main textbook for regulation in the UK (Black, 2002), economists like Baldwin et al. (1998) identified and discussed three definitions of regulation as a targeted rule, as direct state intervention in the economy and as encompassing all mechanisms of social control. It can be established that all the definitions listed above usually reflect the scholar's specific disciplinary concerns and experiences. Generally, Baldwin et al. (1998:20) refer to 'regulation to a set of authoritative rules accompanied by a mechanism, usually a public agency; for monitoring and promoting

[151] It has come to the author understanding that regulation set limits to what can or cannot be done by a person or body. It gave boundaries to control conduct and set limitation to actions.

compliance with those rules'. Jordana & Levi-Faur (2004) then, concluded that regulation was a specific form of governance and suggested that the three definitions of regulations will bring changes to the economic and social context of the theory on regulation itself. However, Baldwin et al. emphasized that when regulation is connected with economic influence, it can be considered as a set of tools used by state agencies to control the economy of a nation. As such, regulation can be considered as all means of social or economic influence (Baldwin et al., 2012) including unintentional and non-state process (Baldwin et al., 1998).

On the other hand, Black (2002) argued that the first two definitions are clearly focused since both definitions are connected with the state activity and suggested that without state connection, any purported regulation is not in fact regulation. She continued with the observation that only the third definition breaks away from the state. Consequently, Black (1996, 1998 and 2001) has alluded in her work to the complexity in defining regulation and whether it amounts to 'centred' or 'decentred'[152] regulation. She then proposed (2008:139) the definition of regulation as follows: -

> 'Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes which may involve mechanism of standard setting, information gathering and behaviour modification.'

[152] Decentred regulation employs techniques rather than rules, and if it adopts rules they may be of non-state bodies which are not bound by the procedures of the state in creation, promulgation and application (Smith, 2002). It approaches state regulatory success as always elusive, precarious and rarely as functioning smoothly, and as requiring sophisticated 'enrolment' of the regulated in the overall processes (King et al., 2006).

For this research, the definition given by Black is used since it covers the definition, mechanism or tools and objective of regulation[153].

1.2 Regulation and Market Failure

Pigou (1920) suggested that if the markets fail, intervention by government with public interest theory through provision of externalities regulation, theoretically can improve the welfare of the market. The notion of 'market failure' serves 'useful expositional and heuristic purposes by pinpointing the structural deficiencies of market institutions and private litigation in coping with spill overs' (Stewart, 1981:1264). Markets sometimes fail to achieve positive and efficient outcomes or fail in delivering an efficient allocation of resources which may lead to a loss of economic and social welfare. Basically, market failure occurs when markets unsuccessfully progress economic efficiency. This has been observed clearly by Spicker (2000:97) when he states that 'markets are insufficient to guarantee welfare' since they have limitations. In a book review, Van Doren (2008) suggested that market failure can be seen as a 'normative rationale'[154] for government intervention following the status of government as a welfare maximizing social planner. Consequently, market failure happens when price mechanisms that regulate supply and demand break down. Market failure can occur due to a wide range of reasons such as market dominance by monopolies (Ogus, 2002; Hantke-Domas, 2003; Shleifer, 2005; Boehm, 2007; Morgan & Yeung, 2007), public goods (James, 2000; Morgan & Yeung, 2007), asymmetry of information (James, 2000; Ogus, 2002;

[153] However, it can be noted that Moran (1986) claims that breaking away the definition of regulation from state connections will create new conceptual problems. This is due to the difficulty of maintaining the common sense between centred and decentred regulations (Moran, 1986) since both regulations depends on each's contributions to the other. Thus, he suggested this will have resulted in the creation of hybrids of both regulations that will benefit the public, the state and regulated beings

[154] It is a theory that utilizes theological or philosophical analysis to conclude how people and institutions should behave. It is an attempt to discern what causes what without stirring any emotions in both parties. It is an input from the government and exists to correct some of the shortfalls of the free market economy

Morgan & Yeung, 2007), and externalities influence (spill over effects) which may be either positive or negative (Ogus, 2002; Morgan & Yeung, 2007, Freiberg, 2010). Ogus (2002: 629) also offers 'the non-economic justification as distributional justice where the unregulated market leads to outcomes which do not accord with what is perceived a just distribution of resources and paternalism where individuals are assumed to be not good judges of welfare'. Accordingly, regulation is commonly prescribed as an antidote for market failure (Breyer, 1982; Bromwich, 1985; Peltzman, 1989; Noll, 1989; Ogus, 1994) and with government involvement it can create efficient outcomes. Regulations will help to mitigate failures by restructuring the market for better outcomes.

1.3 Law and Regulation

Historically, the legal and regulatory regimes of most countries are not indigenous, but rather shaped by their colonial heritage (Shleifer, 2005:448). In the UK, common law has been developed and it has spread through the Commonwealth countries of New Zealand, Malaysia and Singapore, which are covered under the scope of this thesis. In short, common law inter alia encompasses a legal system that is characterized by the establishment of independent judges and juries. Law establishes and recognises many forms of authorisation to practise for professionals such as licences, certificates, permits, accreditation systems and registration mechanisms that in turn can allow or prohibit action (Freiberg, 2010:6).

From the legal viewpoint, regulation is difficult to define with accuracy and lawyers tend to accept statute promulgated by sovereign legislature as the paradigmatic form of regulation (Morgan & Yeung, 2007). In addition, regulation must be supported by legal structure as it

will ensure the doctrine of check and balance[155]. Morgan & Yeung (ibid) also showed that in regulation, law has both a facilitative role and expressive role. Since regulation is generally suggested as some form of intervention in order to correct behaviour or a situation, the law can be used as an instrument to reach the objective in correcting the flaw. According to Hantke-Domas (2003:166), 'the idea of public interest in regulatory affairs in law has existed since Lord Hale's work, The Portibus Maris (1787)'. It is also recognised in judicial determinations such as *Allnutt v. Inglis*[156] in the UK in the nineteenth century where the court held that if a person takes the benefit of a monopoly conferred on him by an act of parliament, he has an equivalent duty to exercise his proprietary rights reasonably and it also introduced the idea of reasonable price.

Accordingly, the notion of public interest has helped judges to solve controversies on regulation (Hantke-Domas, 2003). However, Feintuck (2004:181) argued that when legal systems fail to develop conceptual frameworks for legitimate protection on the basis of the public interest they have significantly contributed to the failure of regulation with public interest theory. Since the law itself does not promise a well-governed nation, regulation sets requirements for compliance by the public and institutions as regulation derives powers from the legal structure promulgated by the Parliament. As a result, the intertwined framework of law and regulations will supplement each other for effective governance of the nation.

During the UK Budget 2004, the Chancellor asked Sir Phillip Hampton to lead a review of regulatory inspection and enforcement to reduce the administrative cost of regulation in the

[155] The doctrine refers to a mechanism designed to limit the power of a single individual or body of government and provide for the harmonious interrelationship of the people and all of the organs of government or other social institutions. Checks and balances are intended to allow legitimate power to govern and good ideas to be implemented, while abuse of power, corruption, and oppression are minimized.
[156] (1810) 12 East 527

UK for the protection of public interest (National Audit Office, 2008). This was due to the increasing concern of the government about the specific regulation policies and the quality of the institutions and processes regulations are set into and implemented by. The review was also predicted to produce a report to supplement the Regulatory Reform Act 2001. In December 2004, an interim report was submitted and in March 2005 a final report (Hampton Report) was published by HM Treasury. At about the same time, the Prime Minister of the UK asked the Better Regulation Task Force (BRTF) chaired by David Arculus to look at the new Dutch approach of introducing a target for reducing administrative costs on paperwork burdens and the concept of a 'One in, one out' rule for regulation.

'Regulation - Less is More: Reducing Burdens, Improving Outcomes' was subsequently published and complemented by rationalisation made in the Hampton Report, the gist of which establishes a rolling programme of simplification of existing regulations and also recommending an extended Regulatory Reform Act as a tool to deliver the suggestion. Both of the reports' recommendations were accepted by the UK government and resulted in the publication of 'A Bill for Better Regulation: Consultation Document'. It also resulted in the enactment of Legislative and Regulatory Reform Act 2006. This is an example of how law can be used to increase awareness and understanding of regulatory issues that intersect between law and regulation.

1.4 The General Theory of Regulation with Government Intervention

1.4.1 Introduction

Government can create a set of rules backed with legal power such as litigation and enforce them which is the traditional 'command and control approach'. This is a classical framework of regulation which involves the regulator making and enforcing a set of rules. It is also concerned with using power to control society (Freiberg, 1987). The command and control approach to regulation is a system in which the government or state intervene fully to correct market failure or social behaviour through expressive force or power of the law as in legislation (Stewart, 1981; Sinclair, 1997; Landry & Varone, 2005; Morgan & Yeung, 2007). According to Baldwin et al. (1998; 8) it is a term of rhetoric coined to discredit orthodox forms of regulation and major tasks inherent within it perceived to be rule making, enforcement and applications of sanctions. It is a mandatory regulation (Tietenberg, 1992) or rule-based coercion (Morgan & Yeung, 2007) and there is no or little room to escape from it (Sinclair, 1997). In this instance, the regulation is applied through legal rules which prohibit specified conduct and set out a clear penalty for breaches of those regulations. According to Cole & Grossman (1999), there are suggestions that this approach is inherently inefficient and costly compared to the market base approaches.

The value that underpins this approach is enforcement (Baldwin et al. 1998). For Shleifer (2005:443), 'enforcement theory specifically recognises a basic trade-off between two social costs of each institution: disorder (ability of private agents to harm others) and dictatorship (the ability of the government and its officials to impose such costs on private agents)'. Through the years, there have been many critiques focusing on the inefficiency of this

approach (Sunstein, 1990; Bernstein, 1993; Moran, 1995). Sinclair (1997:531) finally concluded that the command and control approach is described as being cumbersome, end of pipe, and ineffective for generating the types of changes in corporate policy organization and strategy that will lead to environmentally sustainable industrial practices as well as resulting in an adversarial relationship between regulator and the regulated. However, Frieberg (2010:1) recently suggested that it is well established that regulation involves more than mere legal rules. It is diversified, complicated and pervasive. He then added that government is now using more diverse and interconnected regulatory tools to achieve the aim of regulation. It was parallel with Diver's (1998) notion when he highlighted the importance of what he termed 'rule precision' or the accuracy of administrative rules to avoid vague public interest standards in a command and control system.

Alternatively, the government can always set up rules governing private conduct and then leave the enforcement to the private sector which is generally considered cheaper (Shleifer, 2005:445). The theory of regulation has been divided into two main categories: the public interest theories (Stigler, 1971; Posner, 1974; Peltzman, 1976; Joskow and Noll, 1981; Den Hertog, 2010) and the Chicago/private interest/capture theory (Huntington, 1952; Bernstein 1955; Kohlmeier, 1969; Posner, 1974; Joskow & Noll, 1981; Guerin, 2003; Morgan & Yeung, 2007). In addition, there is also the 'public choice' theory (Crew & Rowley, 1988; Eskridge Jr., 1988; Macey, 1991; Den Hertog, 1996).

1.4.2 Theory of Public Interest for Regulation

Bozeman (1987:34) rationally states that public interest is a hopelessly ambiguous term. However, according to James (2000:330), 'the theory defines it as the interest of individuals,

promoted by free markets in which the voluntary exchange of goods and services with no market distortions, rather than the interests of privileged groups'. The public interest theory has often been equated with the interests of the government (Pigou, 1920; Schubert Jr., 1957; Meltzer & Richard, 1981; Salamon, 1987; Hantke-Domas, 2003; Christensen, 2011). According to Posner (1974:1) the theory holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. It is also identified as regulatory intervention occurring in the interest of the public at large (Joskow and Noll, 1981). It was an acceptable theory until Richard Harry Coase (1910-2013) in his work 'The Problem of Social Cost' published in 1960 challenged the accepted view. According to Baffi (2013: 2) Coase's arguments against Pigou's tools are represented by the famous theorem, according to which a public intervention is not necessary in order to obtain efficiency when transaction costs are low. In fact, recently, Hantke-Domas (2003:165) argued that possibly the Public Interest Theory does not in fact exist as there is no apparent evidence to support a 'theory' on public interest. However, in term of regulation, the theory is very much alive since there is common understanding that Government regulation exists to correct some of the shortfalls of the free market economy.

The approach and concept for regulation has long been for the good of 'public interest theory'. It is often claimed that the main rationale behind regulation it to protect public interest (Gaffikin, 2005). Traditionally, the public interest view was centred on the impression that public utilities like gas and water were natural monopolies. For Mitnick (1980:7), 'regulation is the public administrative policing of a private activity with respect to a rule prescribed in the public interest'. In addition, with Selznick's (1985) definition of regulation in mind, Feintuck (2004:179) concluded that 'regulation is the use of the concept of the public interest as a justification for regulatory intervention into private activity,

limiting the exercise of private power, in pursuit of objectives valued by the community'. There are two systems of public interest theory that relate to regulation: the wide protection of public interest (Stigler, 1971; Posner, 1974; Peltzman, 1976) and the idea of protecting social welfare when the market fails (Joskow and Noll, 1981; Den Hertog, 2000). The public interests' theory was developed by Pigou in 1920 when he concluded that if the market fails, the government should provide intervention to improve welfare through taxation or regulation since they provide the legal framework for transactions by the public. This particular theory is as old as the political philosophy of government intervention; both coexist in the political, philosophical and legal areas (Hantke-Domas, 2003). According to Shleifer (2005) the theory is based on the notion that unhindered markets fail because of monopolies and governments have the power to correct this failure through regulation. The aim of public interest theory is to engender better economic quality for society (Ogus, 1994). It is a familiar concept but challenging to define (Baldwin & Cave, 1999; James, 2000; Feintuck, 2004). Clarity in the scope of market value and tensions between the market and public interest approach can avoid muddy policies (Feintuck, 2004 & 2010). Economists have identified the theory as a branch of economics welfare for a nation (Joskow & Noll, 1981; Aranson, 1990; Den Hertog, 2000).

Feintuck (2010) suggested that there are two major problems with public interest theory, namely: the elusiveness of the concept theoretically and at practical level, its delicateness. This notion was later agreed by Christensen (2011). Earlier, Feintuck (2004) reasoned that the concept appeared to be an empty vessel to be filled in different times with different contents and there is apparent lack of agreement on what the content should be. The concept has been attacked and discredited explicitly because it fails to explain why regulation fails in delivering public interest outcomes (Baldwin and Cave, 1999). On a more positive note,

Feintuck (2010:248) suggested that the concept of public interest may form a valuable adjunct to existing constitutional, legal principles and regulatory practices. For two decades starting from the 1970's, the attack on the public interest theory for regulation (Herman & McChesney, 1997; Bagdikian, 2004) especially in key industries such as utilities (Baldwin et al., 2010), has led to the movement of *deregulation* in the UK and US and thus gave rise to the term *better regulation* in the UK in 1997. There is also a concern that regulation will evoke red tape[157], overload and excessive bureaucratisation[158] of economic and social life (Baldwin et al., 2010; Cabinet Office UK, 2012; Solicitors Regulation Authority, 2012).

Still, for Goodsell (2004), much depends on context and red tape may contribute to social welfare even if it frustrates some while benefiting others. Hantke-Domas (2003) argued that authors like Stigler, Posner and Peltzman did not differentiate between the political concept of public interest and the scientific theory of it. He also suggested that the findings of Joskow and Noll were not concrete since there is no empirical evidence to support their conclusions. He then argued that there is a possibility that the theory is non-existent since there is empirical evidence that shows the theory is designed to protect the personal interest of politician and policy makers. This is supported by an empirical test undertaken by Prager in 1989 when he assumed that the regulation which supported interest groups is inconsistent with the core intention of public interest theory.

In contrast, recently, Christensen (2010) asserted that regulation represents the government's attempt to set limits to the scope of private activities thus enhancing the importance of public

[157] Bozeman (1993:283) define *red tape* as 'rules, regulations and procedures that remain in force and entail a compliance burden and that have no efficacy for the rule's functional object'.
[158] The Cabinet Office of the UK has promoted a Red Tape Challenge in order to involve the public in reducing regulations red tape that has affected business and even damaged the economy. http://www.redtapechallenge.cabinetoffice.gov.uk.

interest. He argues that regulation can be assumed to be designed effectively to protect the public interest with regulatory policy the shield to protect the public against private activity. He also further argued that regulatory administration is often captured by regulatory interest; as a result, it is systematically biased to the advantage of the regulated interest. However, Christensen also admitted that the creation of the new design of theory of economics for regulation is actually more modest and reforms the classic public interest theory. In the end, public theory interest is commonly adapted by the government in order to mediate market failure. Even though the theory has suffered critical attacks throughout its existence, it is still current albeit now refined to meet the challenges of time and evolution of the market.

1.4.3 Capture Theory for Regulation

With the attack on the regulation theory of public interest, an alternative theory which has come to the fore is that of 'capture'. Under this theory, regulatory developments are driven by private interests that lobby for special entitlement of immunity (Williams, 2004). The 'capture' or 'interest group' theory emphasizes the role of interest groups in the formation of public policy (Laffont & Tirole, 1991). Dal Bo (2006) narrowly defines regulatory capture as a specific process through which regulated monopolies manipulate the state agencies that are supposed to control them - a repercussion contrary to the specific aims and objectives of public interest theory. According to Berry (1984), Bernstein (1955) presented one of the most influential formulations of the theory. It was further developed by George J. Stigler in 1971 in his seminal paper entitled 'The Theory of Economic Regulation' which echoed the view of Olson[159]. In brief, Stigler believed in a simple framework of regulation where government as

[159] Olson (1965) in his work argued that the existence of a large group will lower the expected value of contributions by individuals to public goods since a large group will hinder action for the benefit of the group's interest. After almost two decades, Olson (1982) expanded his theory by implying that the public with

regulators face strong pressure from consumers and producers in the market to capture their special interest. He strongly argued that even small businesses have strong special interests and possess the capabilities to capture their regulators. This can be comprehended from the perspectives of utilities supply in which political influence is usually grown alongside it (Dal Bo, 2006). Since the framework of regulation presented by Stigler is thought to be too modest[160] as he only advocated the demand for regulation, Peltzman (1976) then expanded the idea. Peltzman's theory gave balance to the Stigler idea by looking at supply factors that might motivate regulators to produce regulations that benefit consumers even with the force factors by producers of the market. Peltzman's work includes consumers and producers as masters of the regulators and, in addition, benefited broader and diverse industries compared to utilities only as featured by Stigler.

Following the introduction of capture theory, scholars (Baron and Mayerson, 1982; Sappington, 1982; Becker, 1983) began to develop frameworks to analyse it. According to Dal Bo (2006) one way to understand capture is by understanding the three-tier hierarchy of regulation which consists of the government, regulator and an agent in the market. Laffont & Tirole (1991) argued that Peltzman, Stigler and Becker (1983) engaged in 'blackboxing'[161] the supply-side factor in their equation. In addition, the captured theory framework also ignored the problem of informational asymmetries which has been identified as one of the reasons for market failure, especially in the market for professional services. Laffont & Tirole (ibid) then introduced an agency-theoretic regulatory framework that includes both the demand and supply factors to eliminate the problems identified. This framework approached

'distributional coalition power' generate unnecessary levels of regulation that will reduce economic efficiency and output. His latest work has been hailed as 'the grand application of his earlier ideas to the world and history at large' (Rosser, Jr., 2007:2)

[160] Posner (1974) thought the problematic area of the idea is its failure to state clearly the impact on the entities being regulated.

[161] 'Blackboxing' is 'the way scientific and technical work is made invisible by its own success' (Latour, 1999:304)

the informational asymmetry problem and has been held as one of the most successful frameworks leading to the publishing of their book entitled 'A Theory of Incentives in Regulation and Procurement' in 1993. Earlier, Weingast and Moran (1983) had enhanced Stigler's and Peltzman's work when they added a legislative framework. The attachment of the legislative framework applied a structured statutory system to regularise the benefits for different interest-captured groups. According to Williams (2004), the framework provides the actual legislative mechanism by which demands made by captured groups are routed into the policy-making process. Therefore, capture theory conceptually will provide the 'base outline' to shape the regulations with the specific intentions in safeguarding the specific group's interest.

1.5 Professional Regulation and Public Interest

It was established that the market failure view of regulation in the context of the professions focuses on the information asymmetry[162] between the professional and the client (Stephen & Love, 1999; Philipsen, 2007). According to Healy & Palepu (2001), a potential solution to the information asymmetry problem is regulation that requires professionals to fully disclose their private information. Services provided by professionals are received by clients in forms of experience goods, a concept developed by Nelson (1970)[163]. According to Nelson, the quality of experience goods cannot be assessed correctly even after consumption of the goods. Accordingly, if clients cannot evaluate the quality of a professional, but can only discriminate on price, the professionals have no incentive to provide high-quality services

[162] Information asymmetry is thought by economists to promote an unwillingness to trade and increase the cost of capital as investors 'price protect' against potential losses from trading with better informed market participants (Bhattacharya & Spiegel, 1991, Welker, 1995).

[163] This work has established that limited consumer information on product quality can have adverse welfare effects, both because firms may have weak incentives to invest in quality and because, faced with any given set of options, consumers may make suboptimal choices.

and this results in the good professionals being booted out of the market by the bad professionals (Philipsen, 2007).

In public interest theory, professional regulations through licensing or accreditation are asserted to be corrective measures to ensure that professionals supplied to the market are of a sufficiently high and standard quality. Posner (1974) argued that the public needs protection through regulation because when economic markets are left alone they are unlikely to operate efficiently. Den Hertog (2010) agrees with Posner and adds that the aim of this regulation theory is to counter the negative welfare effects of dominant firm behaviour and to stabilize the market. Furthermore, it was suggested that regulatory intervention is always directed towards gaining an improvement in social welfare (Philipsen, 2007). Consequently, the public-interest theory asserts that the general good, rather than special interests, is the regulatory goal (Ginasar, 2012).

The views of economists on the regulation of professional services tend to divide between those based on a public interest perspective, welfare-theoretic or market structure regulation usually associated with Pigou (1938) and those based on private interest perspectives or conduct regulation (Stephen, 2004)[164]. Baldwin et al. (1998) have enlisted three types of approach to regulation and the first entails regulation to further the public interest, associated with the growth of regulatory activity in the US. Vee & Skitmore (2003) suggested that there are always links between professionals and services provided to the public. Therefore, as discussed in chapter 1 of the thesis, it can be submitted that professional services markets are characterized by particular qualities and knowledge (Appelbaum & Lawton, 1990; Whitbeck,

[164] Some researchers have divided the theory of regulations into economic and social regulation, see Philipsen (2007), Den Hertog et al. (2010) & Ginosar (2012), welfare theoretic, contracting theory and capture theory, see Shleifer (2005), capture theory, public interest theory, political economy theory (Bowrey et al., 2007)

1997; Kaidonis, 2008). These qualities will demonstrate a systematic and elite knowledge that can justify some form of regulation[165] to protect consumers and ensure service quality (Canada Competition Bureau, 2007). This measure has been captured by the 'public interest theory'[166] for regulations as discussed earlier in this chapter. Johnson (1992) advocated that a professional generally tends to honour their client's needs more than the public. Therefore, professionals need regulatory bodies that will guarantee quality offers to the market and to the public. Accordingly, Bowrey et al. (2007) submitted that in order to protect the public interest, professional bodies have imposed regulation systems on members before they are allowed to practise in the market. In addition, there are also the needs for the professionals to continue their professional development programs which are vital for the members to keep their registration valid.

1.6 Theoretical Background of Professional Regulations

In general, professional regulatory systems exist in two large groups: regulation on market entry and regulation on 'market behaviour' or conduct (Paterson et al., 2003). Since professions exist to provide professional services to the public, they are bound to have a sort of mutual liaison to protect both the profession and the public[167]. Therefore, Ball (2009) argues that public interest theory served as the underlying principle to ensure that members of

[165] Within the terms of professional discourse, 'regulation' is conceptualised as that which is 'internal' to the professional organisation (Cooper et al., 1994). This approach deals with the shortcomings of the market itself to deal with certain problems preventing an economically efficient outcome in a market (Varian, 1984; Cooter & Ulen, 2004) which includes information problems, externalities, the presence of public goods and market power (Contreras, 2003; Philipsen, 2007).

[166] The origins of the public-interest theory of regulation are rooted in the classical concept of representative democracy and the role of government within it (Christensen, 2011).

[167] It was concluded by Spada Limited (2009: i) in their reports on the role of professions in the UK that '…most professions have tended to think narrowly of their own discipline and their own individual roles in public life'. However, this idea needs to be change. Accordingly, professionals must prove themselves as valuable commodities in the market that will meet the need and requirement of the public as consumers in the market. As an exchange for the service, the public will provides recognition to the existence of the professions. Therefore, to ensure this notion is achieved, there must be parallel understanding by the profession and the public that both need each other to protect their interest to survive in the failing markets.

a profession are regulated and regulation has been developed in an attempt to control errant behaviour and maximize the responsibilities of professionals. Ball's argument echoed the UK Inter Professional Group (2002:6) notion that Professional Regulation exists 'to assure the quality of professional services in the public interest. Therefore, it is vital for a professional to be regulated to meet the standard require by the public and this issue will be discussed further in Chapter 4 of the thesis when I will identify whether adjudicator is currently being regulated with the public interest notion in mind.

It can be argued that the regulation of a profession involves the setting of standards of professional qualifications and practice[168]; the keeping of a Register of qualified persons[169] and the award of titles[170]; determining the conduct of registrants, the investigation of complaints and disciplinary sanctions for professional misconduct'[171]. This statement illustrates that regulation will protect the public from unqualified professionals that will reduce the quality of the service delivered. Such regulation is thus involved setting the standard for qualification, keeping a list of qualified professionals, establishing the procedure to tackle complaints from the consumer and disciplinary action if misconduct is demonstrated and proven. Hence, governments have regulated 'in the public interest' because they want to ensure that people undertaking certain tasks are properly qualified and trained (Professions Australia, 2003). Furthermore, regulation will provide the government with the opportunity to

[168] S4 of the Architect Act 1997, By-law 18 of the Institute of Civil Engineers By-laws and Bye-law 2.2.1 of The Bye-Law 2: Membership and Registration of the Supplemental Charter of the RICS in the UK; S 10(1)(a) & (b) of the Architect Act 1967, S 22 (3) of the Registration of Engineers Regulations 1990 (Revised 2003) and section 10(2) of Registration Of Engineers Act 1967 and S 10 (1) and S 10 (2) of the Quantity Surveyor Act 1967 in Malaysia.

[169] S 8 of The Architect Act 1991 S 16 of the Professional Engineers Act 1992 in Singapore; S 4 of the Chartered Professional Engineer of New Zealand Act 2002 in New Zealand.

[170] S 20 of Architect Act 1997 in the UK, S 7(1)(a) of the Quantity Surveyor Act in Malaysia; S 10(3) of the Architect Act 1991 and S 10 (3)(b) of the Professional Engineers Act 1992 in Singapore; S 7(2) of The Registered Architect Act 2005 in New Zealand.

[171] S 9 of the Architect Act 1997 in the UK; S 4(1)(f) of the Architect Act 1967, S 4 of the Registration of Engineers Act 1967, S 4 of the Quantity Surveyor Act 1967 in Malaysia; S6 of the Architect Act 1991, S 6(a)-(h) in the Professional Engineers Act 1992 in Singapore; S 12 and S 67(b) of the Registered Architect Act, S 11 (1) of the Chartered Professional Engineer of New Zealand Act 2002 in New Zealand.

control and ensure the quality of service provided to the public (Law & Kim 2005; OECD, 2009).

Professional services include services that provide technical advice, legal advice or medical advice to consumers. Such a service can be classified as a credence good[172] in which the consumers never completely discover their need and their quality (Bloom, 1984; Parasuraman et al., 1985; Emons, 1999; Stephen, 2004: Brown & Minor, 2012) and the supplier knows more about customer needs than does the customer (Thakor & Kumar, 2000; Dulleck & Kerschbamer, 2006; Causholli et al., 2010). It is recognised that the rise of professional regulation is due to comprehensive lobbying by professions to secure state support in order to gain power and market security as recently as the nineteenth century (Larson, 1978; Abbott, 1988; Berman, 2006). Thus, when Bowrey et al. (2007) discussed professional regulation for accountants, they pointed out that the theory of regulation generally explained the regulation that limits professional licensing. They argue that since public interest theories are based on the notion of market failure, it can be asserted that professional licensing corrects this market deficiency by ensuring that professionals supplied to the market are of a sufficiently high standard. The market failures of professional services occur due to the competitive process which generates efficiency that prevents expansion of market power (Stephen, 2004) even though it can achieve best value for money for the consumer. Market failure under structural factors such as the existence of 'market power' (Stephen, ibid) and 'information asymmetry' [173] problems (Carr-Saunders & Wilson, 1933; Stephen, ibid; Bowrey et al., 2007; d'Andria, 2012) is most often associated with the professional service market. Information asymmetry

[172] The term was introduced by Darby and Karni in 1973. Dulleck and Kerschbamer (2006:5) define it as goods which 'an expert knows more about the quality a consumer needs than the consumer himself'.

[173] Information asymmetries arise in professional services when clients have limited or no access to the information on the quality of the services provided in the market and professionals know more about the professional service being performed than the clients.

is a condition when the market fails to produce the ideal quantity of professional service (Stephen & Love, 1999). Consequently, it has been said that information asymmetry creates strong incentives for the seller to cheat on services (Emons, 1999) and is also blamed for market failure that applies to professional markets in general (Stephen & Love, ibid). Since regulation in general should be transparent, comprehensive, accountable, proportional, and consistent and targeted (Hampton, 2005), by contrast to the information asymmetry situation, it can be used as a tool to correct market failure for professional services (Stephen & Love, 1999). Accordingly, Decker and Yarrow (2010) observed that the development of reputation and self-regulation can be seen as a collective effort to maintain certain reputational standards of conduct/performance required to counter the problems of information asymmetry.

1.7 Professional, Statutory and Regulatory Bodies' (PSRB) Role in Professional Regulation

After discussing in brief the theoretical background of regulation for professionals, the thesis will now focus on the existence of PSRBs and the impact they have had on professional regulation processes. PSRB is an umbrella term for a very diverse group of bodies, including a large number of professional bodies, regulators and those with statutory authority over a profession or group of professionals (HEBRG, 2011). Professional bodies without statutory underpinning may attain legal power to exist and regulate their members through 'incorporation'. In general, incorporation is the process by which a new or existing business registers as a limited company which has a legal entity that has a separate identity from the owner (Companies House, 2013) [174]. PSRBs are expected to develop, implement, and enforce

[174] Under common law, bodies or associations that exist without legal power cannot sue nor be sued in their own name, but only in the names of the individual members. In other words, without incorporation, the professional bodies are not recognised as having legal personality (For a discussion of the concepts of legal personality and

various rules that are designed to protect the public by ensuring that services from members of the profession are provided in a competent and ethical manner. It is noted even though some PSRBs are mandated to govern their own professions; there are still some recommendations on 'best practice procedure' and 'better regulation' agenda that need to be implemented by PSRBs to accommodate government intention. Over time, professionals have been regulated differently by PSRBs. There has also emerged a general understanding that PSRBs have become the source for much professional regulation (Arnold, 2005; Cooper and Robson, 2006; Suddaby et al., 2008). Most professional bodies started off as voluntary associations with the object of promoting their profession. A professional body is different from a statutory or regulatory body as it is usually independent from the state compared to the latter which has powers mandated by Parliament. Hence, Daniels (1973) noted that a statutory and regulatory body's sole power is to police their members' performance, which reflects the core of professional autonomy[175] that it receives from the state[176]. For instance, statutory and regulatory bodies have the power to develop misconduct procedures to control deviant performance of their members and are trusted to undertake proper regulatory action in respect of those who do not perform their work competently or ethically to protect the public interest. Therefore, Daniel (1995) points out that to the public, discipline application and enforcement in a profession will project how they are governed to serve by the regulation imposed.

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capacity, see MacCormick (2008). However, it must be noted that professional bodies in Scotland and England are not all required to be incorporated under the Companies Act. Thus, the professional bodies in Scotland for Advocates, Solicitors or Doctors are all set up under different arrangements or statutes. In addition to legal advantages, incorporation constitutes a *prime adjunct* (second in command) in the search for professional status (Millerson, 1964:88). Equipped with legal sanctions, PSRBs gained powers to become more active in regulating their members by means of self-regulating.

[175] Professional autonomy constitutes the core of professionalism, professional identity and professional practice (Horsley and Thomas, 2003). The professionals have a high degree of control of their own affairs in term of making independent judgments on their work (Bayles, 1981). In addition, primarily the professionals serve their own interests and professional autonomy can only be maintained if members of the profession subject their activities and decisions to a critical evaluation (peer review) by other members of the profession.

[176] According to Horsley & Thomas (2003:36) 'the state remains the ultimate source of societal legitimacy and therefore State regulation confers a corresponding legitimacy on the regulated group'.

It is evident from a review of literature that there are various frameworks of regulatory frameworks that exists ranging from the extremes of full statutory regulation of title and practice to a voluntary accreditation system used by PSRBs to govern their professionals (The UK Inter-Professional Group, 2002; Stephen, 2004; Prados et al., 2005; Bowrey et al., 2007; Ball, 2009; Boon, 2010; Law Commission, 2013). Copper et al. (1992:7) argue that professional bodies are 'entrepreneurial' agencies established to represent and enhance the interests of their members, with an additional role as setters and enforcers of standards conferred upon them by the state. Additionally, a professional body represents its members' interests in dealing with government and other public bodies and the media (OFT[177], 2004) and exists to maintain the professions' prestige and trust in the society, as well as autonomy and control (Blass, 2010). It also acts as a governing body (some with statutory powers) to fix standards for education and entry requirements to the market including the entitlement for professional status. It may also promulgate ethical standards and professional rules which are used to regulate members (UKIPG, 2004). In addition, ethical standards and professional rules promulgated by peers in professional bodies will create stronger and effective professions (Department of Education UK, 2010) and enforcement of the standards through a complaints and disciplinary procedure will help to protect the public interest (OFT, 2004). In the context of professional regulation, PSRBs are entrusted with the power to maintain control or oversight of the legitimate practice of the occupation (Harvey, 2004). Regulations for professionals have existed since the Code of Hammurabi in Babylon and the Merchant and Craft Guilds during the medieval times in Europe (Young, 1985; Cox & Foster, 1990).

[177] Office of Fair Trading, United Kingdom

Harries-Jenkins (1970) noted that professionals occupied two distinct, irreconcilable systems as they became members of both the profession itself as well as the professional association. He added the fact that the association is one of the constituent elements of professionalization that attempts to ensure exclusiveness of the group and also become the locus of sanction mechanisms and the centre of authority. This notion is distinct from the nineteenth century views of professionalism that emphasised the elements of social status and key institutional scientific developments. Earlier, Chapman (1952) elucidated about the education-based association which includes the process of studying at tertiary level, qualifying as a professional and post-graduation competency assessments. Millerson (1964) then expanded this view suggesting that the professional organization can be divided into four basic types according to its aims and purposes; (i) The Prestige Association, (ii) The Study Association, (iii) The Qualifying Association and (iv) The Occupational Association (Millerson, 1964). Later, Harries-Jenkins (1970) echoed Millerson but extended the definition to eight types of professional association including the prerogatives, post-graduation and registered associations which are based on the different elements of professionalization. Some are expanded from the list provided by Millerson and some reprise the work of Chapman. However, through the years, and as organizations began to merge, their overlapping role and functions instigated the streamlining of their aims to protect either the public or the private interest. This relates to the basic function of a professional organisation to organise to qualify, to further study the subject and communicate information obtained, to register competent professionals and to promote and preserve a high standard of professional conduct.

1.8 Professional Self-Regulation and Restriction of Entry

In their judgment, the Lords of the Judicial Committee of the Privy Council[178] observed that there is no general principle of convention jurisprudence which prevents professional self-regulation. Accordingly, Flood (2011) citing Johnson (1972), Freidson (2001) and Evetts (2011), advocates that self-regulation is a core characteristic of professionalism. The intention of establishing regulation for professionals is designed mainly to protect the title of a profession like solicitors, advocates, architects, engineers and quantity surveyors[179]. In addition, regulation will create restriction on entry (Baarsma et al., 2008) into an occupation by removing unqualified and 'low-quality'[180] professionals to the market. Moran (2003) states that the 19th century saw the establishment of a new pattern of professional regulation

[178] *Sadler v General Medical Council (GMC)* [2003] UKHL 59

[179] S 20 of Architect Act 1997; S 7 (1) of Architect Act 1967; S 7 (1)(a) – (d) Registration of Engineers Act 1967; S 7(1)(a) of QS Act 1967; S28 of the Legal Profession Act 1976

[180] Quality includes values of what is considered important from an individual, institutional, national or international perspective (Hamalainen, 2003). According to Cerqueira (2006), accreditation originated in the United States of America (US) and it was born from the demand for appropriate working conditions by the US surgeons that has nothing to do with quality assurance or improvement (Giraud, 2001). However, Van Damme (2001) argues that the quality assurance systems, particularly as used by the public sector, must balance improvement with accountability. Many authors and researchers have described and concluded that aside from stimulating sustainable quality, improvement efforts (Chen et al., 2003; Montagu, 2003; Mays, 2004; Sutherland & Leatherman, 2006; El-Jardali et al., 2008; Baskind et al., 2010) are used to demonstrate credibility and a commitment to quality and accountability (Baldi et al., 2000; Griffith, 2002; Peter et al., 2010; Kaminski, 2012). Quality assurance is a planned and systematic review process of an institution or program to determine whether or not acceptable standards of education, scholarship, and infrastructure are being met, maintained and enhanced (Hayward, 2006). According to El-Khawas (1998) there are, in fact, two distinct processes of quality assurance, one that looks outward to an organisation's external constituencies, and a separate process that looks inward, examining educational practice and results. Additionally, Vroeijenstijn (2003) states that quality assurance is also concerned with taking a formal, independent decision whether or not certain prescribed or minimum requirements are met. At the beginning of the twentieth century, medical professions in the US and the UK started an accreditation process of their professional education which was later disseminated to other professions (Van Kemenade & Hardjono, 2010). Even though accreditation and quality assessment in Europe have their roots in the 1950s (Patil & Pudlowski, 2005), only over the past 25 years has it expanded and led to formal procedures for quality assurance for the public interest, especially in the higher education sector (Westerheijden, 2001; Schwarz and Westerheijden, 2003) with the signatories to the Bologna Declaration in 1999 (Erichsen, 2004; Patil & Pudlowski, 2005; Stensaker &Harvey, 2006; Dante et al., 2013). The declaration has led to the establishment of the Norwegian Agency for Quality Assurance in Education (NOKUT) in Norway, The Finnish Higher Education Evaluation Council (FINHEEC) in Finland and Austrian Accreditation Council in Austria. The other branch that links accreditation with quality is in the form of quality improvement. Thus, accreditation and quality are inseparable and can be viewed together as part and parcel of a quality management framework. Nicholas (1999:3) suggested the significance of both terms by referring specifically to the medical and health field, stating that: - 'A growing interest and expansion in accreditation programs has occurred worldwide during the past decade as demands for improved quality have increased and as a means to qualify providers for payment under new health reform frameworks or to otherwise regulate providers'.

in contrast to the traditional concept of special regulation known as 'gentlemanly'[181] that historically had shaped the style of professional regulation. John L. Powell Q.C. (2000:1) explained that 'Professional is an acquisitive concept, acquisitive of aspirations and expectations - but also of liabilities'. Thus, the need to be regulated is prioritized to balance the responsibilities and liabilities of professionals to the market. Furthermore, 'regulation carries the meaning of control with a hint of regularity' (Vohs and Baumeister, 2004:2*)* and in the larger sense will protect the public (Ng, 2000). Thus, Ball (2009) has suggested that there has to be a balance in minimising regulation in order to control responsible behaviour since in every action taken there will be a negative and positive impact on either consumers or the profession itself.

It has been contended that professional self-regulation with government intervention provides a stable template for professional governance when professions are granted a high degree of autonomy in organizing their own affairs and positioning public interest as their main object (Flood, 2011). Even with the attack on this framework via a series of well-documented failures of professional self-regulation (Baumeister and Heatherton, 1996; Davies, 2005; Blass, 2010) which coincided with the era of 'deregulation', the self-regulatory framework has largely remained intact albeit with some improvement[182]. Bartle and Vass (2005) have classified self-regulation as a point on a spectrum as illustrated in Figure 3.1 below.

[181] Gentlemanly is a characteristic of autonomy power which exist when the peers of a profession define and regulates the service provided through registration of members and setting adequate standard of practice (Daniels, 1973).

[182] According to Mills et al. (2011), there are trends towards statutory regulation of professions since the old frameworks of simple self-regulation are perceived as failures. Accordingly, the new and improved self-regulation frameworks tend to be more focused on consumer needs. As the framework deliberately focuses all professional activity on achievement of the public interest, the power of the public will be naturally aligned with building the power of professionals to provide better services to the public. It can be done via a common method of holding a regulatory body accountable to the public through the appointment of members of the public to its governing board (Randall, 2000).

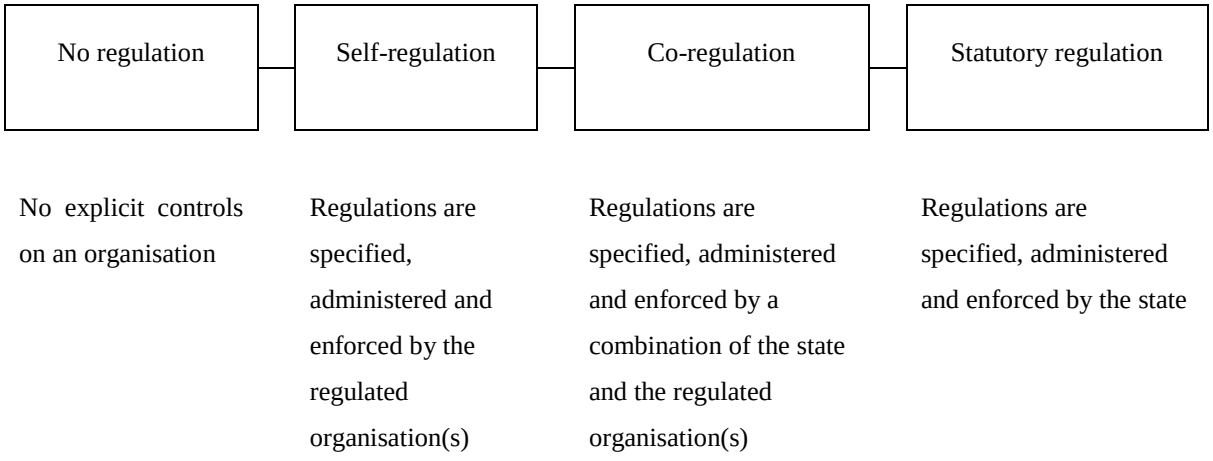

Fig. 3.1: Self-regulation as a Point on a Spectrum

The idea of self-regulation by professional bodies has existed since the nineteenth century (Moran, 2003), mainly in setting up frameworks for the regulation of a particular area (Bartle & Vass, 2005) and has manifested itself through both informal and formal mechanisms (Blass, 2010). According to Schultze (2007), the self-regulating profession features a unique combination of knowledge and skills, a commitment to duty above self-interest or personal gain and for Reader (2002:4 as cited in Schultze, ibid) independence from external interference in the affairs of the profession (self-government). However, Schultze (ibid) then added, that towards the end of nineteenth century and through the twentieth century, changes in the essential characteristics of self-regulation led to a rationale of public protection behind self-regulating. For Svorny (2000: 298), self-regulation 'is a situation where the board comprised from representatives of the profession regulated and has an autonomous power delegated by the state'. Prior to Svorny's definition Black (1996a:26) stated that the term self-regulation 'is used to described the disciplining of one's own conduct by oneself, regulation tailored to the circumstances of particular firms and regulation by a collective group of the conduct of its members or others' and argued that the essence of self-regulation is a process of 'collective government'. She then identified four possible relationships

between the self-regulation framework and state intervention: namely, mandated self-regulation, sanctioned self-regulation, coerced self-regulation and voluntary self-regulation. This identified relationship is featured in Bartle and Vass's (2005) classification spectrum of self-regulation. Figure 3.1 above sets out the evolution of regulation with intervention from the state and at the same time reflects on how state intervention moulds the regulatory framework for professionals.

Since industry is argued to have more expertise and technical knowledge (Bartle and Vass, 2005), regulation of professionals is arguably best achieved under the auspices of PSRBs. The Institute for Learning (2009) advocates that the professionalism and professional empowerment of individuals is intrinsic to self-regulation and self-improvement. Therefore, self-regulation can be deduced as an important criterion for the enhancement of a profession in gaining public trust. The term 'self' in self-regulation is not used in the literal sense, but implies some restriction including a legislative requirement from the government plus the engendering of outcomes that would not be obtained by individuals in the context of market behaviour alone. In recent developments, self-regulation has shifted from the 'laissez faire'[183] state to 'welfare' state and finally to the 'regulatory' state in which intervention by the state is extensive (Bartle and Vass, 2005). The situation is recognised under Bartle and Vass's classification spectrum as 'co-regulation state'. It is based on the idea of *passing the baton* for the process of making rules, implementations and control of a profession to the PSRBs by the government. In exchange, by way of legislation the professionals will be recognized legally, which enables them to achieve a professional status plus gain greater autonomy and control of the profession in addition to greater financial rewards (Randall, 2000). It is a substitute for

[183] A doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights (http://www.merriam-webster.com, 2013)

the 'command and control approach'[184] (Sinclair, 1997; Baldwin & Cave, 1999) and recognised as one of the classic cited characteristics that will differentiate occupations and professions thus creating professionalism through the process of professionalization[185].

Balthazard (2010:1) suggested that self-regulation is based on the concept of an occupational group entering into an agreement with the government to formally regulate the activities of its members. Accordingly, Randall (2000) suggested that the self-regulation framework will provide the government with some controls over the practice and the service supply to the public. In general, the government will grant authority to a regulatory authority through legislation that will provide a framework for regulation and the power limitation[186] of the regulatory authority. However, the degree of intervention by government varies according to the particular regulatory framework respectively adapted by the PSRBs. From the discussion above it can be concluded that in the modern context, most PSRBs act under mandated self-regulation in which they are required by the state to formulate and enforce norms within a framework defined by the state. Schultze (2007: 45-46) states that there are specific mandates of PSRBs that have adapted self-regulation frameworks which can include one or all of the following roles: -

[184] Command and control regulation depend on effective monitoring and enforcement (Parker, 2002). Ogus (1994: 5) define it as regulation 'in which standards, backed by criminal sanctions are imposed on suppliers'. The command and control approaches are alleged to be costly and inefficient (Hahn and Stavins, 1991; Moran, 1995; Harrington & Morgenstern, 2004). Thus, 'self-regulation, in particular, has aroused considerable interest from policymakers as a result of the ideological push towards deregulation and smaller government' (Sinclair, 1997:530).

[185] 'Professionalization is a process, diffused through many occupations by means of Qualifying Association which demonstrated ability to covert occupation into profession' (Millerson, 1964:24). 'It is suggested that professionalization can be defined in terms of six constituent elements: structural, contextual, activity, educational, ideological and behavioural' (Harries-Jenkins, 1970:58)

[186] Power limitation sets boundaries to the powers given to statutory regulatory boards. As explained by Mills et al. (2011:9) that 'the role of regulatory authority is to regulate profession in public interest, not to punish individual registrants or to redress civil or criminal wrongs'. As an example, Legal Service Board which has been established under S 2 of the Legal Service Act 2007 has been prescribed with power limitation via S 3 to S 7. In Malaysia, Quantity Surveyor Act 1967 established Board of Quantity Surveyors and prescribed the board power limitation via S 3 to S 4a of the said act.

a) ‘Determining entrance requirements;
b) Providing a system of registration to determine required applicant qualifications;
c) Licensing professional practitioners;
d) Establishing and maintaining levels of competency;
e) Establishing and maintaining codes of conduct (ethics and standards);
f) Receiving, investigating and adjudicating complaints; and
g) Administering a disciplinary process to sanction members who failed to maintain established standards and practices’ (Allred, 2002 as cited in Schultze, 2007).

For Casey (2005), PSRBs act as *gatekeepers* to the professions in their assessment of the qualifications of prospective members and afterwards regulate the conduct of the licensee by establishing rules of practice and standards of conduct enforceable through the discipline process. The process of ‘gatekeeping’ usually starts with the cooperation of the PSRBs and the higher education institutions to provide adequate qualification for a student embarking on a route to becoming a particular professional. Harrison (1984:153) noted that PSRBs may seek to ensure the competence of entrants to the institution by controlling: admission standards of those accepted for training; content of the accredited courses; amount and type of practical experience needed for a licence to practise; methods and standards of teaching; and standards of student assessment. It is a qualification process and a fundamental part of any system of professional regulation to determine who is able to enter the profession and defines those who are subject to the regulatory framework (Legal Service Institute, 2012). In accordance with this idea, regulation as regards entry to the profession must remain in the hands of the profession by preservation of high entrance requirements, recognising appropriate courses offered and through continuous review of the standard of accredited higher education institutions.

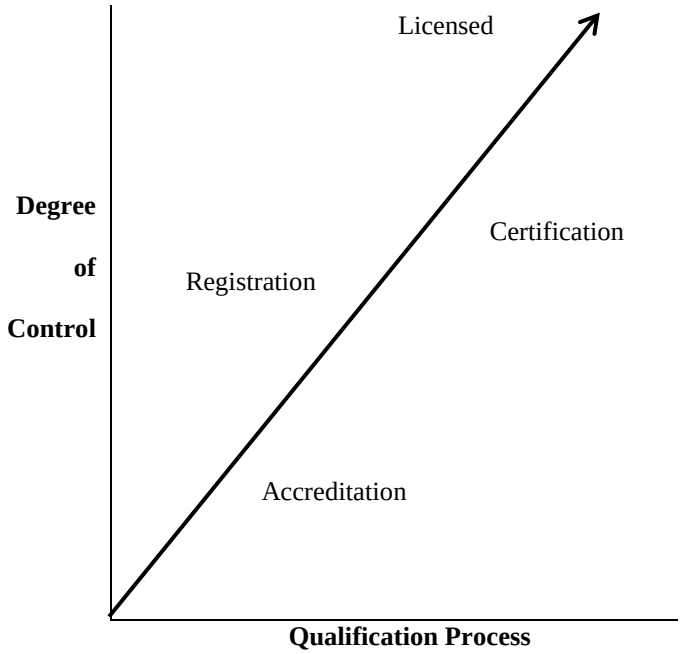

Figure 3.2: Degree of Control in Qualification Process

At a glance the relationship between the qualification process and the degree of control to the market can be illustrated by Figure 3.2. Accordingly, professionals are consistently controlled before being allowed to serve the market via accreditation, registration, certification or/and licensure offered by professional, statutory or regulatory bodies. In general, the various terms are often used to describe several different activities in respect of the credentialing process or approval of individuals or institutions. These are the common terms used in professional regulation (Black, 1996; Paterson et al., 2003; Vohs & Baumeister, 2004; Decker and Yarrow, 2010). Table 3.1 by Schultze (2007) summarised the fine points of each terms: -

Table 3.1: Status of Entry Requirement

Status	What is it?	Purpose	Focus	Key Words
Accredited	Certification of educational program	Appropriate standard of education for professionals Establishment of educational standard	Educational standards for members	Educational Standard
Registered	Issuance of a certificate of registration by public or private governing body	List of people meeting a specified set of objective criteria or qualifications Identification of members for public	Identification of those who are qualified	Identification
Certified	Issuance of certification by a public or private governing body	Individual's attainment of knowledge and skill Protection of the profession and establishment of public respect for it	Credentials of members	Credentials and eligibility to practise
Licensed	Issuance of a licence by a publicly mandated governing body granting right to engage in activities of a given occupation Attest to a person's attainment of a degree of competency required to ensure protection of the public's health, welfare or safety	Individual's competency and accountability Protection of public through regulation System available and transparent to the public	Protection of public interest	Accountability

The accreditation system in most countries is based on national legislation[187] and in some cases special law is created to enable the accreditation[188]. In its basic definition, accreditation

[187] E.g. Medical Act 1983 by establishing the General Medical Council (GMC) which is responsible for registering medical graduates who are able to work as doctors in the UK. The GMC not only accredits but controls medical education in the UK. The Legal Service Act 2007 in the UK created a Legal Services Board (LSB) to oversee the regulation of the legal services market in England and Wales. LSB will oversee regulation of the legal services market within a framework of statutory goals, including promotion of an independent, strong, diverse and effective legal profession.

[188] E.g. Accreditation Regulations 2009 (Statutory Instrument No 3155/2009) and The Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006 in the UK

gives official approval or endorsement[189]. Selden (1960) defines accrediting as the process whereby an organisation or agency recognises a college or university or a programme of study as having met certain pre-determined qualifications or standards[190]. It is also described as a public statement that a certain threshold of quality has been achieved or surpassed (Campbell et al., 2000; Harvey, 2004; Freiberg, 2010) and it is best understood within the context of mechanisms of quality assurance (Pagliarulo, 1986; El-Khawas, 1998; Hamalainen et al., 2002; Provezis, 2010) and to certify a set of defined standards and quality (Hamalainen, 2003). The rationale behind accreditation as suggested by Harvey (2004) is primarily about control of a sector since accreditation is more explicit than other external quality processes such as audit, assessment[191] or external examining. Accreditation is also concerned with taking a formal, independent decision on whether or not certain requirements are met (Vroeijenstijn, 2003). In general, there are two basic groups of accreditation association: specifically, the accreditation of the institutions and accreditations of programs (Harcleroad, 1980; Pagliarulo, 1986; El-Khawas, 1998; Baker, 2002; Harvey, 2004). Registration is the process of identification in order to suggest to the public that a person has been recognised as an individual qualified to serve the market. The recognition gained via membership from relevant professional bodies establishes their proven knowledge and understanding. It marks that an individual's competence has been assessed and they have attained the standard required to practise in the market.

The primary purpose of licensure is to protect the public interest via professional regulations procedures. Licences for professionals are issued by legislated and self-governing professional bodies. Theoretically, licensing indicates the imposition of a universal skills-

[189] Merriam-Webster Inc., Merriam-Webster's collegiate dictionary.
[190] See also Thrash (1979)
[191] Assessments judge quality and standards against system wide criteria or benchmarks.

based entry requirement at a minimum standard (UK Commission for Employment and Skills [UKCES], 2011). 'Licensure refers to the process of issuance of a licence by a public mandated governing body' (Schultze, 2007:47) and it confirms that the licence holder meets prescribed standards of competence and typically, licensing boards are created to control entry into an occupation (Law & Kim, 2005). It goes beyond the need for specific requirement for a qualification and exists to project accountability designed to protect the public (Schultze, 2007). Certification differs from licensing in that it is usually offered by a private or non-governmental agencies and it refers to a situation in which there are no restrictions on the right to practise in an occupation.

2. Conclusion

Professional bodies have a major role in governing professions through regulation and the need to satisfy public interest expectations. PSRB accreditation describes the accreditation, approval or recognition of specific programmes during tertiary education which form part and parcel of the whole design of the regulatory frameworks for professionals. Typically, regulatory frameworks for professionals start as early as in the educational stage, specifically during tertiary education for accreditation. It was observed that high quality people are critical to professions' futures, thus, ensuring the continuing inflow of appropriate entrants to the profession is essential (International Federation of Accountants, 2019). Professional bodies with statutory powers will scrutinize syllabi offered by colleges and universities to conform to their markets' demands. Thus, the higher learning institutes are deemed credible to ensure that only individuals with specific qualifications are accepted as students to further their studies in accredited programmes. Accordingly, the role played by professional bodies as gatekeepers is supported by the higher learning institutes in ensuring the qualities of

professionals supplied to the market are at minimum at the accepted and accredited standard. Furthermore, to suit educational aspirations, the government[192] only recognises higher learning degrees awarded by institutions that have been granted degree-awarding powers by a Royal Charter, Act of Parliament[193] or the Privy Council[194] - known as 'recognised bodies'. There are explicit criterions[195] that must be met and these are designed for the institution to establish that it can demonstrate firm guardianship of its own standards to produce competent professionals.

Commonly, membership of a professional body is dependent on achieving certification or accreditation, which demonstrates that the individual concerned is appropriately qualified to work in a given field. Members of all professions and professional bodies have an important responsibility to the community in which they live: to the public interest, not just to their current clients or employers or to themselves. This is one of the characteristics of a profession. Since many professions offer expert knowledge as their service for the public, professionalism becomes the function of demonstrable skill, competence and professional ethics. Such terms as 'accreditation', 'registration', 'certification' or/and 'licensure' described above refer to a process in achieving prescribed minimum standards[196] to satisfy the

[192] The UK Government through Department for Business, Innovation & Skills is responsible for the policy aim of making the higher education system more efficient and diverse. It has published a detailed document in this sense entitled 'Applications for the grant of taught degree awarding powers, research degree-awarding powers and university title: Guidance for applicant organisations in England and Wales' dated 11 March 2011.

[193] In the UK there are professional bodies established through Act of Parliament, e.g.: Architects Registration Board via Architects Act 1997 which has statutory responsibility to prescribe the qualifications that are needed to become an architect.

[194] S 76 of the Further and Higher Education Act 1992 and S 48 of the Further and Higher Education (Scotland) Act 1992 empower the Privy Council.

[195] Refer to documents and guidance published by Department for Business, Innovation and Skills on 11 March 2011 entitled 'Applying for powers to award taught degrees, research degrees and university title'

[196] Rooney and van Ostenberg (1999: 9) described standards as follows: -

'Standards can develop from a variety of sources, from professional societies to panels of experts to research studies to regulations. Standards might also be organization-specific, such as those reflected in a hospital's clinical policies and procedures or clinical practice guidelines for the management of emergencies. Standards might evolve from a consensus of what are "best practice", given the current state of knowledge and technology'.

government or the market and expectations of the public. Professional bodies play an important role in preserving the expectations from the public and the government by seeking to supply only competent professionals to the market and in unison sustaining the professionalism of the professionals regulated by them. They are also charged with the duty to protect the public from members of the profession who fall below their standards[197]. Gatekeeping through accreditation, registration, licencing and certification by professional bodies seeks to keep the market free from unqualified and incompetent individuals. For adjudicators in the construction industry, the gatekeeping routes usually combine the training and accrediting process designed to equip them with an understanding of the adjudication regime. Some ANBs, ANAs and authorised bodies will keep and publish a list of accredited or registered adjudicators that are easily accessible to the public[198]. In *Neelu Chaudhari v The Royal Pharmaceutical Society of Great Britain*[199] Mr Timothy Corner QC observed that there is an obvious and clear public interest that all professional bodies should behave appropriately, and that all professionally qualified persons act according to the standard set either in statutes or regulations. Corresponding with this observation, professional bodies must continue to strive to improve the standard of their accreditation processes for adjudicators in order to gain public trust.

To conclude the discussion, it is essential for a professional body to play its role in protecting the public and at the same time maintain the standard of professionalism of its members through appropriate regulatory design. A profession is statutorily regulated when law sets up the regulator to protect the public. Some professions are voluntarily regulated by independent

[197] Sinha v General Medical Council [2009] EWCA Civ 80
[198] S 28 (4)(a) of SOPA 2004
http://www.buildingdisputestribunal.co.nz/ADJUDICATION/ADJUDICATION+PANELS.html,
http://www.aminz.org.nz/Person?Action=List&Confirm=PostBack&DataFilter_id=16&DFF_39=299&DFF_41=[Any]
[199] [2008] EWHC 3190 (Admin)

regulatory organizations set up by the profession. However, both kinds of professional bodies have a specific responsibility and role in providing assurance as to the quality of services provided by their members. To achieve this, professional bodies must be dedicated to upholding and promoting high quality professional practices, including through the regulation of their members. The professional bodies must develop strategies to ensure their relevancy and contribution for the good of the profession. Regulation is indispensable, however, sometimes regulatory design may be in place but practical implementation lags significantly due to factors involving lack of financial and technical resources as well as falling behind new developments in legislation and policy changes. By tightening up regulatory frameworks - especially the accreditation process - professional bodies will keep their relevancy as recognised bodies which control the supply of qualified professionals to the market through tight regulatory frameworks. By means of regulation, professional bodies must emit clear evidence that they are serious and effectively discharging their regulatory activities for the public interest. As such, the regulatory framework for adjudicators must be designed to suit the challenges received internally or externally specifically from new legislative requirements or policies made by the government. Serious consideration must be made to tackle new issues by statutory or professional bodies that accredit adjudicators. The said bodies need to analyse their overall purpose and role in the regulatory domain for adjudicators since good regulation is vital to maintaining standards and making sure that there is a level playing field for businesses to compete in the market, in addition to the good of public interest.

CHAPTER 4

THE EXISTING REGULATORY FRAMEWORK FOR ADJUDICATORS

1. Introduction

As emphasized in Para 1.1 of Chapter 3, regulation is an attempt to alter the behaviour of others to reach a satisfying benchmark that will benefit the public, the state, and the regulated beings. In addition, there is a general need for a standard mechanism of regular public disclosure by business and if the public interest is to be protected, the need for regulation is vital. Furthermore, regulation can be seen as an administrative policing mechanism to support the notion of the public interest. However, professionals, in general, are inclined to believe that their obligations to their client far outweigh their responsibility to others, such as the public (Johnson, 1991:28). This perception might arguably endanger and jeopardize the importance of the public interest notion, as emphasized by Pigou (1920), Stigler (1971), Posner (1974), Selznick (1985), James (2000), Gaffikin (2005), and Christensen (2010). Furthermore, it will hamper the idea of promoting the public interest notion for adjudicators while enhancing the development of capture theory, as discussed in Para 1.4.3 of Chapter 3. This argument is discussed and developed throughout this chapter in order to establish the importance of the public interest notion behind promulgation of legislation and regulation for professionals.

2. The Adjudicators

2.1 Appointment and Qualities of Adjudicators

It has been well-established that ‘Adjudicators are not judges; they are often not even lawyers. They are construction professionals who, by virtue of their knowledge and expertise, are deemed competent to obtain a quick and fair resolution to a dispute between parties to a construction contract’ (Atkinson, 2004b:1). The statement made by Atkinson (2004) has been well-supported by the data retrieved from the reports produced by ARC, in which has highlighted the facts that construction professionals or legal practitioners who are practising in the construction industry has been appointed as adjudicators to serve the adjudication market since the introduction of HGCRA 1996 in the UK. Accordingly, it can be concluded that the adjudicators must at least possess qualifications as a construction professional with minimum requirement, possess the qualifications and experiences that are related to the construction industry or legal practitioners with relevant experience in the disputes resolution process.

In addition, before they are allowed to practice as adjudicators in the market, the industry requires for the adjudicators to be trained, registered, and certified by the nominating authorities. Furthermore, the court has extended the qualities that are essential to be possessed by adjudicators, as listed in the following: -

i) Knowledgeable in assessing the contentions, factual and legal, made by the disputing parties[200].

ii) Knowledge on Principles of Natural Justice[201]

iii) Experience in the construction field[202]

iv) Understand the time limitation of the adjudication process[203]

Before further discussion is made on the regulatory framework that has been established for adjudicators, the author discusses the process of nominating and appointing the adjudicators.

2.1.1 Nominating and appointing adjudicators

Finding suitable candidates is not an easy task. Parties in disputes must carefully select the adjudicator since the adjudication process will have been a waste of money if the decision cannot be enforced (Atkinson, 2004). Therefore, if there is no agreement between the parties in dispute, the intercession made by ANBs will be sought after the dispute has arisen and they will appoint adjudicators from their list or panel of accredited and regulated adjudicators. Therefore, some have argued that the confinement of nominating adjudicators through ANBs is a way of ensuring the selection of quality adjudicators (Uher & Brand, 2007; Che Munaaim, 2010). Nonetheless, for Anderson (2001), under contractual adjudication, the preferred approach is for the adjudicator to be selected by specifying the adjudicator in the

[200] See *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93; *Costain Ltd v Strathclyde Builders Ltd* [2003] ScotCS 352; *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139; *Aspect Contracts (Asbestos) Limited v Higgins Construction PLC* [2013] EWHC 1322 (TCC)

[201] See *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC); *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] EWHC Technology 434; *Glencot Development and Deign Co. Ltd v Ben Barret & Son (Contractors)* Ltd Unreported 13 February 2001

[202] See *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] BLR 288; *Paton & Anor* [2011] CSOH 40

[203] See *Costain Ltd v. Strathclyde Builders Ltd* [2003] ScotCS 352; *Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd* [2003] EWHC 3100 (TCC); *Mott MacDonald Ltd v London & Regional Properties Limited* [2007] EWHC 1055 (TCC)

contract at the time of contracting. Accordingly, it can be noted that HGCRA 1996[204], CCA 2002[205] and CIPA 2012[206] followed suit with the contractual mode of appointment, but then, added provisions for ANBs, ANAs, and authorized adjudication body to nominate the adjudicator. However, under SOPA 2004[207], the appointment of adjudicator shall only be done via the ANB.

When an appointment is made under ANBs, ANAs or authorized body, this is can be termed as an 'ad hoc'[208] appointment. Rajoo and Singh (2012) suggested that the ad hoc appointment, nevertheless, be premised on the potential adjudicator candidate having relevant experience or being trained and certified to practise as an adjudicator. Moreover, in Rajoo and Singh's opinion, it is inconceivable that the appointers may have no regard whatsoever of such criteria other than merely commercial matters, such as the adjudicator's fees and if the appointer be the ANBs, ANAs or authorized body, it will be the body's responsibility to ensure suitable adjudicators are given the relevant task. Therefore, the adjudication Acts under the scope of this study have been clear on the procedure to appoint an adjudicator. Besides, HGCRA 1996, CCA 2002, and CIPA 2012 stated that the parties in dispute can appoint adjudicators by nominating them in the contract or by agreement after disputes arise. This situation is predicated on the basis that the prior consent of the adjudicator to being so named will presumably have been sought and obtained (Stevenson & Chapman, 1999). In summarising the argument above, it can be established that in general, adjudicators under the payment regimes can be appointed via agreement or by nominating authorities, as agreed by the disputing parties or only through the nomination of authorities, as permitted by the Act.

[204] S 2 (1)(a) of the Scheme
[205] S 33(1)(a) & (b) of CCA 2002
[206] S 21 (a) of CIPA 2012
[207] S 14 (1), (2) and (3) of SOPA 2004
[208] Latin shorthand meaning 'for this purpose only'.

It is true that most of the Acts on adjudication do not prescribe any special qualifications, experience, and technical criteria for assuming the role of an adjudicator. Turner (2003), in his critical analysis of the CIB 'Reviews of the Scheme for Construction Contracts', highlighted that at that time, there was a distinct lack of any valid accreditation system for adjudicators. Turner also suggested that the accreditation system could be via a self-regulatory body or as a statutory requirement and the body concerned should be able to agree on a common curriculum, which would ensure that all adjudicators would have attained a certain level of relevant expertise. Additionally, according to Turner, obviously some adjudicators will still perform better than others, but the basic performance levels should be raised and the propensity for errors, such as those that occurred in *Discain Project Services Ltd v. Opecprime Developments Ltd*[209], would be reduced if not eliminated. However, since then, no effort has been taken by the UK government to intervene with this problem albeit that some ANBs have taken steps to impose an accreditation programme for adjudicators.

Even though Turner's suggestion has been made quite some time ago, it is still relevant when the quality of adjudicators is still in question. In June 2011, in a talk entitled 'Adjudicators - Acting Judicially', Lord Hamilton suggested that adjudicators have a responsibility to ensure that they are 'fully equipped with requisite knowledge' (Lord Hamilton, 2011). This includes some knowledge of the law, although it may not extend to a complete understanding (since adjudicators can seek legal guidance), but does include knowing as to what is happening in the world of construction, developments in construction law, and so on. This is parallel with the stated view of Coulson J (2011) that there are still questions arising concerning the

[209] [2001] EWHC Technology 450. In this case, the adjudicator made the decision without consulting one of the parties in disputes. The judge succumbed to the fact that the act equal to a very serious risk of bias and will constitute towards breach of natural justice.

qualities requisite for a good adjudicator. Hence, Coulson suggested that there are basic characteristics that have to be rooted in adjudicators before they should be allowed to practise. The three essential characteristics of an adjudicator are the ability to manage time, the ability to grasp the essential issues to be adjudicated quickly, and the ability to treat the parties fairly and courteously. Furthermore, Part 8 of LDEDCA, which amends the existing HGCRA 1996, has been viewed to increase the complexity of the adjudication process and to incline it towards an adversarial approach (Anon, 2010; Huck, 2012). The most significant change in this sense is the abolition of the requirement for contracts to be in writing. This means that even purely oral agreements made within the meaning of construction contracts[210] and construction operations[211] are captured under LDEDCA (Brawn, 2010).

Other than that, according to Agapiou (2012), while the legislative changes may not have an impact on the role of the adjudicator, it will affect their modus operandi and they will need to find additional time to consider the formation of the verbal contract to ascertain the precise intentions of the parties. Agapiou then concluded that inevitably, where oral agreements are concerned, adjudicators will also need to consult witnesses and where differing views exist, there will be a need to probe witness statements through some form of cross-examination. This is likely to be highly contentious, potentially giving rise to grievances, injustice, and challenges to adjudicators' decisions. However, it is still rather a concern when the RICS, after more than a decade of the enactment of HGCRA 1996 plus LDEDCA, still states that there is no pre-qualification for a person to act as a construction adjudicator that can be named in the contract. However, as discussed further below, the concern on the quality of adjudicators has prompted the ANBs, ANAs, and authorized bodies to publish their own criteria for the recruitment of new adjudicators.

[210] S 104 of HGCRA 1996
[211] S 105 of HGCRA 1996

In New Zealand, under CCA 2002, there is a brief requirement for eligibility of an adjudicator, where the Act recommends that the adjudicator must meet the requirements relating to qualifications, expertise, and experience, as may be prescribed (if any)[212]. However, even pursuant to S 82[213] of the CCA 2002, there is no prescribed detailed criterion intended for qualifications, expertise, and experience of adjudication needed to practise under this legislation. Nonetheless, under SOPA 2004, the government made a move by exercising the intentions made in S 41 of the Act to include the eligibility criteria of the adjudicators with intention to practise in Singapore. The criteria have been prescribed under S 11 Building and Construction Industry Security of Payment Regulations (SOPA-R 2005), where it stated that the person is only eligible to register as an adjudicator if 'the person possesses such degree or diploma in architecture, building studies, engineering, environmental studies, law, planning, real estate or urban design, or such other qualification, as may be recognised by the authorised nominating body; and the person has working experience of at least 10 years in, or relating to, the building and construction industry in Singapore, and has successfully completed the pre-qualification assessment and training course conducted by the authorised nominating body'. Even though the Malaysian CIPA 2012 is basically a model that combines the benefit of learning from two major models – the UK/New Zealand model, and the New South Wales, Australia/Singaporean model (Ameer Ali, 2007), as there is no specific requirement for eligibility criteria of an adjudicator prescribed in the Act.

[212] S 34(1) of CCA 2002

[213] Regulations: The Governor-General may, by Order in Council, make regulations providing for any matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

2.2 Adjudicator and the need to be regulated

NEC Adjudicator's Contract Guidance Notes (2005:1) states that, 'The Adjudicator should be a person with experience or professional in the type of work included in the contract between the Parties and who occupies or has occupied a senior position dealing with disputes. She/he should be able to understand the viewpoint of both Parties professionally'. Formerly, professional regulation or occupational regulation was considered somewhat of a peculiar topic in the UK. However, in modern times, occupational regulation has become pervasive in western industrialised nations, especially in the United States of America. Accordingly, with lessons learned from some of the oldest sets of renowned professionals like lawyers and health practitioners, the whole topic of professional regulation has become more prominent since it was eminent that regulation helped to improve the services provided by professionals. This can be abstracted through a strong legal foundation and support for the regulation of medical[214] and legal[215] personnel that exists throughout the region, and many regulatory initiatives that affect quality are in the process of development. Moreover, the United Kingdom Inter-Professional Group (UKIPG), which exists as a forum for the professions, considers that a profession must have a governing body that sets standards of education as a condition of entry and achievement of professional status and which sets ethical standards and professional rules, which are to be observed by its members (The UK Inter Professional Group, 2002).

The qualities of the services provided, especially in critical professions that deal directly with people (e.g. doctors and lawyers), are usually monitored through a strict accreditation

[214] National Health Service Reform and Health Care Professions Act 2002
[215] Legal Service Act 2007

programme and specially designed regulatory framework to control the services provided to the public. Being two of the oldest and most established professions, lawyers and doctors have come under special attention from the government through prescribed law[216]. Even though there have been hiccups along the way, it can be argued that the regulatory framework has been developed over time for its betterment. Generally, for solicitors[217] or barristers[218] in England and Wales[219], the standards for their regulating frameworks are set and maintained by the Solicitors Regulation Authority and the Bar Standard Boards with regulatory powers vested in them by the Master of the Rolls[220] and the Lord Chancellor[221].

As discussed in Chapter 1, the adjudicator possesses most of the professional attributes to be recognised as a professional even though they are not recognised as a profession per se. Nevertheless, with the power mandated to them via adjudication Act, an adjudicator's decision is binding and easily enforceable. Generally, adjudication has much in common with expert determination, which relies on the expertise and experience of the adjudicator in his or her primary profession. For example, if the disputes arise from the aspect of the design in the construction works, the adjudicators with primary qualifications, such as architects or engineers, will be called into action, but if it is on the payment matters, adjudicators with quantity surveying experience will usually be nominated. Usually adjudicators are selected from experts with their real expertise lying in their primary professions (ARC, 2010). In consequence, these will create a market demand for different adjudicators to be nominated

[216] National Health Service Reform and Health Care Professions Act 2002 and Legal Service Act 2007
[217] After graduating with Bachelor of Law (LL. B) and completing Legal Practice Course (LPC) for two years and a Professional Skills Course, a person can be qualified as a solicitor
[218] To become a barrister, graduate of LL.B. is required to complete the Bar Vocational Course (BVC) instead of the LPC and then seek a pupillage for one year.
[219] Legal education in Scotland is slightly different than the rest of the UK. LL.B degrees awarded in other parts of the UK are not recognized as part of the qualification process to become solicitors or advocates in Scotland and vice versa.
[220] The Master of the Rolls is one of the Heads of Division and is Head of Civil Justice. As the leading judge dealing with the civil work of the Court of Appeal, he or she presides over the most difficult and sensitive cases.
[221] The Lord Chancellor is a Cabinet minister and currently a Member of the House of Commons.

pursuant to the type of disputes, which have been referred to the ANBs. Accordingly, as discussed earlier in Chapter 2, they must be generally experts in the subject matter in dispute in order to provide reasons[222] for their decisions. Therefore, it must be noted that the decision must be made by qualified people who are familiar with issues of the disputes, especially when highly technical issues arise about the construction process itself.

3. The Critical Analysis of the Existing Regulatory Framework for Adjudicators in the Constructions Industry

Table 4.1: Summary of Existing Regulatory Framework for Adjudicators

Country/ Profession	Professional Act/ Legitimacy to practise	PSRBs' Recognition & Self-Regulates	Single Nomination Authority	Professionals' Qualifications as Construction Professionals or Legal Practitioners	Mandatory Registration and Professional Practice Examination/ Assessment	Code Of Practice/ Ethics/ Conduct	CPD
UK	HGCRA 1997	No	No	No	No	No	No
Malaysia	CIPA 2012	Yes	Yes	Yes	Yes	Yes	Yes
Singapore	SOPA 2004	Yes	Yes	Yes	Yes	Yes	Yes
NZ	CCA 2002	Yes	No	No	No	No	No

[222] HHJ Stephen Davies in *Thermal Energy Construction Limited v AR & E Lentjes UK Limited* [2009] EWHC 408 (TCC) observed that the adjudicator must give intelligible reason in relation to the matter disputed, as failure in doing so will equal the adjudicators failing in complying with her/his obligations under the contractual adjudication scheme. He further explains that the adjudicator must give reasons as to make clear that she/he has decided all of the essential issues put before her/him and also for the parties to understand in the context of adjudication procedure what is the adjudication decision and why she/he made it.

3.1 Professional act/legitimacy to practise

There is no specific requirement in HGCRA 1996 and the Scheme for adjudicators to be registered with professional bodies before they can practise in the UK[223]. Even so, Smith (2003) reported that in the early years after enactment of the HGCRA 1996, the industry called for government intervention to reduce the number of complaints about the unsatisfactory conduct of adjudicators. However, the UK Government only responded by proposing for a specific body, namely the Construction Umbrellas Bodies Adjudication Task Group, to improve the guidance and the training procedure for adjudicators. Accordingly, the Users' Guide to Adjudication was published in 2003 to guide adjudicators during the adjudication process, for instance, guidance on the principle of natural justice, challenges to jurisdiction, unmanageable documentation, intimidating tactics, giving reasons, party costs and clerical errors in decisions to control the quality of the adjudication process, as well as the adjudicator *per se*. However, since then, there has been no more tangible effort by the UK Government to regulate British adjudicators via legislation.

The decision made by the UK Government can be related to the statistical data published in a report by ARC in 2013. It must be noted that there were seventeen (17) active ANBs in the UK, as reported by the ARC as per February 2014 with more than 840[224] adjudicators. However, the report established that complaints made against adjudicators' decisions were at very low levels and that, to date, none had been upheld after further investigation was carried out by the respective ANB. In addition, Knowles Ltd in 2010 published a survey of

[223] The adjudicators can be nominated in the contract as per Para 2(1)(a) of The Scheme or nominated by the ANBs specified in the contract as per Para 2(1)(b) of The Scheme.
[224] It must be noted that adjudicators in the UK can be registered with more than one ANB.

adjudication users, indicating that out of 85 respondents, 78 treated the decision made by adjudicator as the final resolution to their dispute. Albeit the statistics, it was noted that most parties were content with the adjudicators' decisions and accepted the roles played by the adjudicators, while the minority that had challenged the decision reflected some gaps that had to be addressed under adjudication, specifically on the decision made by adjudicators. Accordingly, in addition to the reports made by the ARC that has been published since year 2000, it can be argued that even though without legislative arrangement by the UK government to regulate adjudicators, the system determined by the market through the existence of ANBs has been accepted by the construction industry community. Similar to the UK, the authorised nominating authority (ANA)[225] in New Zealand has become the regulatory body for adjudicators even though there is no legal requirement for an adjudicator to be registered before practising in the market.

Unlike the UK and New Zealand, in Singapore SOPA 2004, which has been in operation since April 2005, has been found to be more in common with the Australian payment and disputes legislation (Charret, 2009) rather than HGCRA 1996 or CCA 2002. SOPA 2004 was modelled on the New South Wales Building and Construction Industry Security of Payment 1999 (NSW 1999) (Teo, 2008). In contrast with the UK and New Zealand that have multiple ANBs and ANAs, SOPA 2004 prescribes via Part VI S 28 (1) that the Minister of National Development of Singapore has the ability to authorise an organization to regulate adjudicators that can practise in Singapore. Accordingly, a professional body, namely the Singapore Mediation Centre (SMC), has been authorised under SOPA 2004 to legally register and regulate all adjudicators in Singapore. Hence, it is illegal for adjudicators to practise in Singapore if they are not registered with SMC. This indicates that the Government of

[225] A person (whether incorporated or not).

Singapore has alternatively set up rules to govern private conduct discussed earlier in Para 1.4.1 of Chapter 3. This is consonant with Mitnick's argument (1980) on regulation examined in Para 1.4.2 of Chapter 3. This approach also chimes with Williams' (2004) argument when he contended that regulation can be done via public administrative policing to uphold rules prescribed for the benefit of the public interest. Learning from Singapore's experience in the process of regulating adjudicators, Malaysia moved a step forward in this sense by prescribing in S 32 of CIPA 2012 that the KLRCA is the sole adjudication authority in Malaysia. However, CIPA 2012 still allowed for the disputing parties to appoint the adjudicators by themselves. Optionally, KLRCA's Director will appoint the adjudicator upon request of either party in dispute if there is no agreement to appoint one.

Accordingly, it can be concluded from the assessments of different regulatory frameworks that only Singapore, via S 14 (1) of SOPA 2004 and SOPA 2004-R, has 'legalised' the adjudicator as a profession with the public interest notion in mind. Even though it has been suggested that there are problems with the public interest theory of regulation, theoretically, the concept may possibly be applied to successfully gain support from the market. This notion is supported by Mitnick (1980) when he stated that the central idea of regulation by the government is by implication conducive to the public interest. Mitnick (ibid) further argued that such an approach can demonstrate a valuable adjunct to the existing constitutional, legal principles, and regulatory practices of a government. Nonetheless, it can be debated that even though professional regulation has been set up for the good of the public interest, in the case of adjudicators in the UK and New Zealand, the regulatory frameworks are primarily driven by private interest to gain trust from the construction industry community. Accordingly, it can be noted that the theory of public interest for the regulatory framework for adjudicators moves parallel with the capture theory for regulation. Hence, it

demonstrated the facts, as discussed in Para 1.4.3 in Chapter 3 of this thesis, that regulatory developments for professionals are motivated for special legal entitlement to legitimately practise in a monopoly-controlled market.

3.2 Recognition of PSRB

Para 1.7 in Chapter 3 of this thesis discusses the role of PSRBs in professional regulation. Accordingly, it was noted that in contrast with regulatory and statutory bodies, professional bodies normally start off as a voluntary association for the benefit of a group of people with the same interest. ANBs, ANAs, and adjudication authorities have powers mandated by the Parliament. Therefore, nominating bodies have the power to develop their own sets of regulatory measures to control the entrance and the performance of their members. It is eminent that some nominating authorities exist because of the enactments of the payment regimes. However, it was also distinguished that most of the nominating authorities are PSRBs that have established themselves as bodies that arguably will serve to protect the public interest and at the same time, maintain their professionalism in the construction industry.

However, it was suggested by Daniels (1973), Bayles (1981), Horsley & Thomas (2003), and Blass (2010) that primarily, professional bodies are inclined to serve their own interest through various regulatory frameworks, as Cooper et al. (1997) labelled in his work as being 'entrepreneurial'. Nominating authorities like SMC, Building Disputes Tribunal (BDT), Arbitrators' and Mediators' Institute of New Zealand Inc. (AMINZ), Adjudicators Association of New Zealand Inc. (AANZ), and KLRCA received their statutory power through payment regimes and became automatically envisioned as entities to protect the

public interest. Additionally, nominating bodies like KLRCA and SMC are statutorily empowered to prescribe the setting of competency standards and the criteria an adjudicator to practise. As a result, SOPA-R 2004, as well as Construction Industry Payment and Adjudication Regulations 2014 (CIPA-R 2014), is enacted by the government to support the statutory regulatory framework for the adjudicators in Singapore and Malaysia. Thus, this can be argued as one of the commitments by the government to protect and serve the public interest as the payment regimes in this country are enacted to provide security of payment to the construction industry. Akin to their existence as PSRBs, ANBs, like the RICS, developed accreditation systems to control the market for adjudicators. Hence, it can be argued that with the credentials renowned by nominating authorities as PSRBs, the governments that have enacted the payment regimes have made a sensible move to gain public trust. Parallel with statutory empowerment, nominating authorities will have control over the adjudicators within the 'observation circles of the government'.

Overall, the payment regimes motivate the establishment of nominating bodies for adjudicators[226]. In a nutshell, under the payment regimes in the UK, New Zealand, and Malaysia, the disputing parties will have the option to request for an adjudicator to be nominated by the ANBs, ANAs or the adjudication authority. However, it is a different setting in Singapore. As pointed out in Para 3.2 above, it is illegal for an adjudicator to practise in Singapore if she/he is not registered with the ANB. Therefore, even though the SMC has already existed as one of the leading disputes resolution centres, SOPA 200 has recognised SMC as a statutory body authorised to register and discipline their members to protect the public interest, as envisioned by Daniel (1995).

[226] Para 2(1)(a) of The Scheme, S 33(1)(2)(d) of the CCA 2002, S 14(1) of SOPA and S 32 of CIPA 2012

Following the establishment of statutory recognition of adjudicators, and in addition to the expansion of the need to ensure the quality of adjudicators in the market as argued through public consultation by the Minister of Building and Construction in New Zealand, there are proposals to create legally binding regulations[227] to prescribe appropriate qualifications, expertise, and experience requirements for adjudicators that will benefit the public interest. Accordingly, as the latest addition to the payment regimes community, Malaysian regimes also have gazetted the prerequisite requirement for a person to be accredited as an adjudicator. Prescribing regulatory requirements for adjudicators can be argued to benefit the adjudication process and by extension to the public. In addition to recognising PSRBs in Para 1.7 in Chapter 3 of this thesis as the main source for professional or occupational regulation, it has been noted that from the existing trends, the payment regimes have established the ANBs, ANAs, and the adjudication authority as PSRBs for adjudicators. Accordingly, it can be concluded that by establishing the nominating authorities as PSRBs, regardless of the power given to the nominating authorities, public interests could be projected as the main theme for the regulatory framework of adjudicators.

3.3 Self-regulation

Parallel with the regulatory reform for professionals' services, as discussed in Chapters 1, 3, and 4, it can be argued that the main objective of all regulatory frameworks for professionals, either statutory or otherwise, is to assure the quality of professional services for the public interest. However, it was advocated that direct state regulation has long been criticized as a commercial practice restriction (Haas-Wilson, 1992), inflexible, excessively expensive, inadequately designed, poorly enforced, and vulnerable to special interests (Green & Hrab,

[227] S 82 of CCA 2002 contains provisions allowing regulations and on 24 February 2003, the Construction Contract Regulations 2003 (CCR 2003) has been enacted.

2003: 3). Therefore, grounded by the analysis of the different, but highly similar regulatory systems for construction professionals and legal practitioners, it can be established that there is increasing use of various forms of self-regulation by PSRBs to avert from it. However, it must be noted that even though there are movements towards self-regulation, the framework consisted of some intervention by the state to control the quality of a profession. Since most nominating authorities arose from PSRBs, self-regulation has been adopted to regulate adjudicators under the payment regimes.

Earlier, Chapter 3 of this thesis has concluded that self-regulatory regimes stand on the fact that it is the members of the profession who have the best knowledge on the standard services offered to the market. As argued in Para 1.5 and 1.8 in Chapter 3, supported by the analysis set out in the table above, self-regulation by nominating authorities takes a variety of forms, including but not restricted to voluntary codes of conduct developed according to the need of the statutory and the industry. It can also be advocated that adjudicators within the construction industry in the UK, New Zealand, Singapore, and Malaysia have been allowed to operate as professionals to perform their duties because they have been granted the power of self-regulation by the government. With statutory powers, nominating authorities may seek to ensure the competence of entrants to the market by controlling: admission standards of those accepted for to practise; prescribing the content of the accredited courses; as well as determining the amount and the type of practical experience needed for a licence to practise.

Following the discussion and conclusion established in Chapters 1, 2, and 3 of this thesis, it can be suggested that adjudicators have to undergo their own accreditation, registration or licensure process before being accepted or recognised as professional members in what can be termed as ‘entry regulation’. Regulated adjudicators need to maintain their professionalism

via professional assessment and Continuing Professional Development (CPD) processes throughout their practising years and this may be labelled as 'conduct regulation'. For example, construction professionals and legal practitioners must go through the same arrangement of regulatory frameworks (Chilver et. al., 1975; Warne, 1993; Patil & Pudlowski, 2005; Ball, 2009; Dada, 2011). Accordingly, it can be suggested that the general structure of the accreditation and registration processes has been conducted by the nominating authorities as a gatekeeping process and most of the nominating authorities self-regulate themselves.

Registration-based regulatory frameworks for professionals, in general, can collectively be referred to as processes concerned with maintaining professional standards both via education and guidance, in addition to normative disciplinary processes with a view to protect public interest (Mills et. al., 2011). Para 1.5 and 1.6 of Chapter 3 have discussed in detail the theory behind the existing professionals' regulation frameworks. As debated in the same chapter, since adjudicators portray professionalism characteristics in their attributes, the researcher argues that they can be categorised as a profession. It was also recognized earlier that when the market fails, interventions are needed to rectify arising difficulties. However, in the case of adjudicators, there is no market failure, but a new market for professional's services has been created by the payment regimes. Therefore, it can be argued that the need for adjudicators to be regulated professionally is not intended as an intervention, but it is a set up as a precaution to prevent the market from failing. It is consonant with the positive attitude towards the establishment of the payment regimes as a corrective action to protect the construction industry that is synonymous with the economic growth of a country. In addition, professional regulation is intended to ensure the quality of the services to the public and to

prevent the problem of asymmetrical information that will threaten the creation of adjudication as a dispute resolution mechanism.

Moreover, it has been debated in Chapter 2 that being an adjudicator requires a person to possess relevant skills and knowledge. The skills and knowledge must be in consonant with the need of the payment regimes and the construction industry. Therefore, regulators will have to evaluate and approve the skills and knowledge of adjudicator candidates before allowing them to serve the market. In professionals' regulation, professional norms will be fostered by peer review and it has been recognised as a self-regulating process. Accordingly, through the analysis made pertaining to payment regimes of each jurisdiction under the scope of this thesis, it is clear that self-regulation has been employed by nominating authorities as the approach to regulate adjudicators. Accordingly, self-regulation has been established as the essence of professionalism, designed to protect a profession (Johnson, 1972; Freidson, 2001; Evetts, 2011; Flood, 2011). Therefore, it was promoted previously that professional self-regulation packaged itself with a significant privilege for its members (Larson 1977; Murphy 1988). Significantly, as highlighted in Para 1.8 of Chapter 3 in this thesis, generally, no principle in law can prevent the process of self-regulation by professionals. However, it must be noted that if the government wishes to govern the regulation, the government must convey to the principle of governing within the principle of law (Senden, 2005).

Moreover, the self-regulatory frameworks rectify market failure by setting the entry standards, monitoring competency, and adopting mechanisms to enforce the standards prescribed (Ogus, 1997; Black, 2002; Parker et al., 2004). The analysis carried out on the regulatory frameworks in the UK, New Zealand, Singapore, and Malaysia revealed all the key elements that have been adopted by the nominating authorities. For example, in the UK,

RICS, the Construction Industry Council (CIC), Chartered Institute of Arbitrators (CIArb), as well as Technology and Construction Solicitors Associations (TeCSA), provide entry standards that must be satisfied before a person can apply to be registered as an adjudicator. It can be as simple as being a registered member of other ANB or as rigorous as passing exams and training programmes organized and controlled by the ANBs. The SMC in Singapore relies heavily on a strict accreditation and registration process. This is due to the fact that regulatory frameworks for adjudicators in Singapore are tied with statutory needs prescribed in SOPA-R 2004.

Another key element of professional regulation is the process of monitoring and many nominating authorities like RICS, TeCSA, SMC, AMINZ, and even KLRCA that employ the process of mandated CPD programmes as the appropriate method. Yearly activities as adjudicators must be well-documented for evaluation by the committees formed by the nominating authorities. These processes will determine whether the registered adjudicators are fit to practise and serve the market for the good of public interest. Finally, as some nominating authorities concurrently function as PSRBs for primary professions, the same method or mechanism to maintain and control the standards are fixed. Accordingly, most nominating authorities prescribed their own codes of ethics and mechanisms to uphold them.

3.4 Professionals' Codes of Practice/Ethics/Conduct

It was noted from a survey by Ernst & Young (2009) that confirms that in conditions of economic downturn, such as those prevailing in Europe and the rest of the world at the moment, there are increased temptations to sacrifice ethical behaviours for short term gain. Accordingly, it can be argued that if the professionals are equipped with integrity, it will be

one of the contributing factors that will increase the economic values of a country. Therefore, professionals' conduct needs to be regulated as many studies have advocated this as an approach to protect both the public and the professionals themselves (Larson, 1977; Horowitz, 1980; Freidson, 2001; Baker, 2005; Dingwall, 2008; Adams, 2009). The International Federation of Accountants (2007:6) defined codes of conduct as 'Principles, values, standards, or rules of behaviour that guide the decisions, procedures, and systems of an organization in a way that (a) contributes to the welfare of its key stakeholders, and (b) respects the rights of all constituents affected by its operations'. In other words, a code of conduct is a principle behaviour restriction that will benefit the system, the organization, the profession, and the public. Since adjudicators have been classified as a profession, a Professionals' Code of Practice/Ethics/Conduct has been adopted by nominating authorities who are to be observed and complied with by professionally by the adjudicators. It must be noted that the term "code of practice/ethics/conduct" has been used interchangeably by different regulators, but in sum, they principally mean a way to communicate the values of a profession, standards of proper conduct acceptable for decision making, and the basic rules for behaviour of professionals. Furthermore, under economic values, it was projected that good conduct and integrity of professionals will contribute to market success.

Meanwhile, for adjudicators, it has been established that an adjudicator must conduct the adjudication process in any manner that she/he thinks fit[228], however, the conduct must not override the duty to ensure that disputes have been concluded in a fair manner, in accordance with the natural justice principles[229]. For adjudicators in Singapore and Malaysia, it is a statutory responsibility of the nominating authorities to determine the code of conduct for an

[228] S 42(1)(a) of CCA 2002, S 16(4)(a) of SOPA 2004 and S 25 of CIPA 2012
[229] S 41(c) of CCA 2002, S 16(3)(c) 0f SOPA 2004 and S 24(c) of CIPA 2012

adjudicator[230]. In New Zealand, if a person or an incorporated person seeks to gain authority as an ANA through an application to the Minister in charge, there are requirements for those entities to submit details of any system that in place (or plans to have in place), which will ensure that the functions, duties or exercise of powers of an adjudicator are undertaken in an efficient and proper manner[231]. On the other hand, in the UK, there is no statutory obligation for ANBs to prescribe a Codes of Practice/Ethics/Conduct for adjudicators. However, most of the prominent[232] ANBs like the CIArb, CIC, RICS, and TeCSA have established their own set of Codes of Practice/Ethics/Conduct as part of their regulatory framework, as one of their strategies to market their adjudicators. This is due to the fact that there are more than 20 active ANBs that have established themselves in the UK construction industry.

Following the discoveries of the importance of a set of Codes of Practice/Ethics/Conduct for adjudicators, it is vital for adjudicators to abide by the regulation not only for the benefit of the profession, but by extension of the good of public interest. Improper conduct of adjudicators will reflect the deterioration to some degree the values of the adjudication process and the payment regimes. In general, this notion will tarnish the positive movement made by the government in promoting adjudication as a statutory that recognises dispute resolution mechanism to help the construction industry.

3.5 Nomination Authorities

Based on the latest report published by the ARC in 2014, there was a significant competition between ANAs in the UK. As mentioned above in April 2014, there were more than 840

[230] S 28(4)(b) of SOPA 2004, S 32 of CIPA 2012 and R 2(b) of CIPA-R 2014
[231] Schedule 2 of Construction Contracts Regulations 2003
[232] As to date, data extracted from Adjudication Report No. 13 by the ARC has indicated that the ANBs stated above have been regulating more than 423 active adjudicators in the UK.

registered and regulated adjudicators in the UK. It must also be noted that in the New South Wales (Australia), under NSW Act 1999, the Australian Government was aware that the services provided by the ANAs to adjudicators were varied widely (NSW Government, 2012). Although the disputing parties have the freedom of choosing any person as adjudicators to resolve the dispute, it can be noted that the construction industry in UK seems to place trust in the adjudicators being offered by the ANBs. From October 2005 until April 2012, the number of adjudicators nominated by ANBs kept increasing and only 10% out of 257 reported adjudications sampled were nominated by agreement or by specification in the contract. The regulating processes are voluntary and yet many adjudicators in the UK are registered to market themselves to the public. While self-regulation is alleged to profit those who participate within it, there is substantial positive evidence from the reports of ARC (2012), Knowles Ltd (2010), and Scottish Executive Report (2004) that the quality of the adjudicators seemed to be accepted by the industry participants. The adjudication proceedings organized by the adjudicators have proven to be a success since they have given a positive effect to the popularity of adjudication as preferred formal dispute resolution process in the construction industry[233]. Furthermore, the report by ARC also highlighted the fact that when adjudicators were nominated by the ANBs, the challenges to the appointment have been found to decrease throughout the years. Therefore, it can be argued that the data suggested the notion that the consumers in the adjudications' market had been satisfied with the regulatory framework set up by the nominating authorities for their professional adjudicators. By collaborating with the findings in Chapter 3 on the principle of self-regulating by PSRBs, it can be claimed that in adjudication, competition between ANBs benefits the public as a whole.

[233] See Gould (2007), Kennedy et al (2010), Baskaran (2014) and *Costain Ltd v. Strathclyde Builders Ltd* [2003] ScotCS 352.

Meanwhile, there are only three ANAs in New Zealand. All are self-regulated with some statutory sanctions for the process of authorising the nominating authorities. For example, the ANAs must apply to be approved as a nominating authority[234] and the guidelines on the fees entitlement for adjudicators[235]. While the process of self-regulation of adjudicators in the UK seemed to have been accepted by the construction industry, a different view emerged in New Zealand. In 2010, New Zealand reviewed CCA 2002. On the back of public consultation, the proposed amendments, entitled 'Review of The Construction Contract Act 2002: Proposal Change' (The Review), were published in April 2011. The public, in general, had been satisfied with the authorization process of the ANAs; there is, however, suggestion by the experts and scholars on adjudication like Ameer Ali (2013), whereby regulations should be enacted to specifically prescribe the qualifications, expertise, and experience requirements for adjudicators. These motivations arguably exist due to the non-satisfaction sentiment of the users as to the competency of the adjudicators in the market, as highlighted by Ameer Ali & Wilkinson (2008), as well as Ameer Ali (2013) in his reports submitted to the Commerce Select Committee on The Construction Contracts Amendment Bill 2013. There were even reports submitted for the amended version of CCA 2002 to intervene with the approach adjudicators used to handle adjudication proceedings. The proposed amendments seek to improve the competitiveness and the competency of adjudicators and are consonant with the intention of the New Zealand Government in refining the determinations or decisions produced by the adjudicators, and at the same time, improving the views of the public on the validity of the determination made under CCA 2002 (Foss, 2013; The Commerce Committee, 2013; Walton, 2014). Accordingly, New Zealand is moving towards the need of a statutory self-regulatory framework for their adjudicators.

[234] S 65 of the CCA 2002
[235] S 57 of the CCA 2002

As for Singapore and Malaysia, both for the time being have only one nominating authority. Singapore allowed for any person to apply for authorization to be a nominating authority. However, CIPA 2012 via S 32 and 33 has prescribed KLRCA as the sole adjudication nominating authority. Under R 11(1) of SOPA-R 2005, the person must be registered with SMC before being allowed to practise and must be a person who possesses at least 10 years of relevant experience in the construction and building industry. In terms of eligibility to practice in Malaysia, CIPA-R 2014 in R 4, prescribes 7 years of relevant experience in the construction industry, plus being registered as a certified adjudicator with KLRCA. Besides, Singapore and Malaysia provide self-regulatory frameworks for adjudicators with a statutory sanction provided and prescribed by SOPA 2004 and CIPA 2012 respectively. Thus, registration and certification can be argued as the means of providing competent[236] adjudicators for the market, as anticipated by the payment regimes in both countries.

Since most nominating authorities existed before the enactment of the payment regimes, the regulatory frameworks for professionals are designed arguably to protect the title of a profession and to remove unqualified entry into the market, as discussed in Para 1.8 of Chapter 3, by creating restriction on entry. Thus, they are inclined towards serving the interest of the profession rather than the public interest. Nevertheless, it was noted that with government intervention, there will be a stable template for nominating authorities to organise their priorities and move forward with positioning public interest as their main objective. The movement of 'deregulation' has positively changed the traditional framework employed by the nominating authorities. New and improved frameworks have been promoted to focus on consumer needs with the intention to provide better services to the public by shifting their essential characteristics towards public protection. Accordingly, the move by

[236] S 14(1) of the SOPA 2004, S 28(4) of SOPA 2004, S 32 (a) of CIPA 2012 and R 3(2)(b) of CIPA-R 2014.

the payment regimes to authorise only a few nominating authorities or sole adjudication authorities as a gatekeeper for adjudicators and by prescribing registration and certification as the means to allow them to practise in the market, indicates the intention of the government to serve the public interest.

3.6 Qualifications as construction professionals or legal practitioners

As discussed earlier, adjudicators historically existed in the construction industry through construction contracts, and thus, adjudicators have become recognised as those with vast experience in the construction and building industry. Therefore, moulded by the market trend, as indicated and established in ARC reports since the first publications in year 2000, construction professionals have been recognised as adjudicators. However, as concluded in Chapter 1 of this thesis, with the increasing number of disputes arising in times of economic strain, the adjudication process has become more adversarial and the disputes crystallized typically have become more complicated and demanding. In addition, adjudication has been assumed as a panacea to all kinds of disputes and with the introduction of LDECDA 2009, there are 'unintended consequences of ushering in an adversarial approach in determining when a contract has been formed' (Philpott, 2010:2)[237]. Accordingly, the need for legal professionals as adjudicators increased since the adjudication process will be more complex, as anticipated by Gemmell (2010:2), due to the introduction of the clause that permits the inclusion of oral contract under the term of construction contract captured by the adjudication regime in the UK.

[237] This scenario is more connected to the UK as the HGCRA 1996 deals with all kinds of disputes and it is not restricted to payment and cash flow problems arising in the construction industry, as enacted in the New Zealand, Singapore, and Malaysia.

In addition, the construction industry plays an important role in terms of improving domestic performance in the economy of a country (Strassmann, 1970; Tse & Ganesan, 1997; Crosthwaite, 2000; Chang & Nieh, 2004). Since the construction industry requires input from other sectors like employment, material production, and services, it will create a multiplying effect for the economy. Furthermore, the construction industry also provides a very important contribution through its job generating ability for unskilled, semi-skilled, skilled labour, and professionals. Architects, engineers, and surveyors are the traditionally recognised professions that inhabit separate roles in the construction industry (Chan et al., 2002; Wilmot-Smith, 2006). However, with the rapidly growing complexity of the construction industry (Chan et al., ibid), the development in construction technology (Hanna et al., 2008; Toor & Ofori, 2008), the ethical problems due to the complicated nature of construction industry (Fan & Fox, 2009), legal responsibilities (Stein & Hiss, 2003; McElroy, Friedlander & Rowe, 2006; Hanna et al., 2008), and increased competition and changing client demands (Goodman and Chinowsky, 1997; Nicol & Pilling, 2000; Briscoe et al., 2004); construction professionals must admit to the changing atmosphere by expanding and updating their knowledge, skills, and credibility to protect their profession, as anticipated in Chapter 2. The outcomes in Egan and Latham reports further confirmed the concept debated before. It carries the challenge for the construction professionals and their associated professional institutes to review their changing roles in their society (Nicol & Pilling, 2000). Parallel with this, regulatory frameworks, either statutorily underpinned or via voluntary registration, have become more stringent in order to protect the professionals and their functions to serve the market. With the latest developments and the need to cope with the expansion of legal requirements as portrayed by the adjudication regime, construction professionals have to develop new skills. At the same time, they have to muddle through with the necessities to keep their professionalism in other fields.

Construction law is built on the contracts between the parties involved in the engineering and construction industry and usually the contract is in the form of standard form contract. In addition to the standard form of contract, the document contract between parties in the construction industry also contains the drawings, specifications, and bills of quantities or other related materials, which are essential to clarify the obligations of the parties in contract. Under commercial contracts, a standard form of contract is used to bind the relationship between parties (Burke, 2000; Johnston, 2006) and offers both advantages and disadvantages (Paterson, 2010) to both parties. Some perceived that the form is cumbersome, complex, and often difficult to understand. Moreover, there is a problem of the heavy usage of legal language and legal wordings in the standard form of contract which create problems to the parties. This is mainly due to the fact that the language and the phrases applied in the existing forms of contract can be traced back and evolved from contracts of late 19th century England, which were drafted by lawyers for their own private clients (Duncan-Wallace, 1986). Lord Morris of Borth-y-Gest in *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern* at paragraph 3 observed that 'When parties enter into a detailed building contract, there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts. The particular wording of a particular contract may have to be considered in relation to particular facts. A decision in some one particular case as to the meaning and application of words in a contract will not have governing force as to the meaning of different words in a different contract'.

It is fully understood that construction contracts need to be carefully drafted and managed to avoid disputes, but at the same time, provide mutual understanding between parties in the contract. The contract will be fully effective when it clearly lays out the obligations of each

party, as well as the remedies for necessary safeguards, however, none can be read in the same context as the other. Furthermore, it also must be legally correct to provide proper judicial interpretation (Ameer Ali, 2008a). Hence, it is important to draft construction contracts in plain language which can be understood by parties entering into contract (Ameer Ali and Wilkinson, 2009) and a simplified contract can protect parties from pitfalls on small jobs (O'Brien and Barbahen, 1990). The idea suggested by Ameer Ali and Wilkinson (ibid) is actually echoing the statement made by a 19th-century Scottish Sheriff, Mackay when he considered that: 'The style of good legal composition… says in the plainest language, with the simplest, fewest, and fittest words, precisely what it means' (Mackay, 1887: 326). However, there is no standard form of contract yet devised for the construction industry which can meet every permutation and combination of construction project, each with its own fine particularities and sensitivities related to budget, construction time, site, and environmental considerations (Shapiro, 2005).

Traditionally, in the construction industry, the owner of a construction project will engage professionals in the construction industry to design the works and administer the contract. In terms of design, the architect will usually be employed as leader of the design team (Wilmot-Smith, 2006). Depending on the type of the standard form of contract used, administration of the contract will be headed by the architects for building projects and for engineering projects, and civil engineers are the best candidates. The other professionals like QS, structural engineers, as well as mechanical and electrical engineers, are then appointed to complete the team. Architects, as construction administrators, will ensure the works done on site conform to the drawings and specifications made. The standard form of contract provides a multi-tier system for disputes resolution, which is initiated by mandatory reference to the contract administrator as a basic form of direct negotiation that provides a simple party-based

problem solving technique, followed by arbitrators. When interpreting disputes arising from discrepancies in contract documents or work on site, the architect as contract administrator will shift her/his role to be in a quasi-judicial capacity and become impartial either to the owner or the contractor (The American Institute of Architects, 2008).

In his work, Gould (1998) concluded that ADR can lead to three distinct movements, one of which includes the lawyer's counter attack or the remodelling of litigation practice seeking to ensure that lawyers are included as part of the ADR process in the construction industry. As its last resort, legal practitioners more often than not will be designated to assist in solving the disputes. This is due to the fact that lawyers generally perform a gate-keeping role, advising clients on the most appropriate form of dispute resolution for particular cases (Agapiou & Clark, 2011). Recently, up to April 2012, legal professionals disclosed their appearance in statutory adjudication where they made up to 35% of adjudicators practicing in the UK market (ARC, 2012). Finally, it can be noted that legal practitioners and the construction industry cannot be parted. Legal practitioners make a great point of reference in terms of legal-based disputes and contribute to reduce legal jargon misinterpretation in the construction contract.

Based on the latest statistics published by the ARC (2012), from year 2000 onwards, construction professionals, led by quantity surveyors, have become the dominant professionals nominated as adjudicators. Nevertheless, recently, legal practitioners have become prominent players in the adjudication market. Ameer Ali (2010) noted that most adjudicators registered with the ANAs in New Zealand are legal practitioners. Under SOPA 2004, SMC has listed 121 registered adjudicators[238] and the numbers between construction

[238] http://www.mediation.com.sg/expert-panels/register-of-adjudicators/

professionals and legal practitioners are balanced. The same scenario is portrayed in Malaysia and KLRCA through their designated conversion and training programme to accredit and register adjudicators after the enactment of CIPA 2012, which produced 241 panels of adjudicators up until 30 January 2013. Based on qualification background, 146 were from legal fields, 38 were engineers, 19 were QSs, 12 were architects, and 26 were drawn from other construction-related fields and accounting. As per year 2014, 293 adjudicators had been registered with KLRCA and most were legal practitioners. There are legal requirements also as to who can practise as adjudicators in Singapore and Malaysia. SOPA-R 2005 and CIPA-R 2014 have prescribed[239] for adjudicators to have at least 10 years' or 7 years' experience practising professionally in the construction or building industries of the respective countries. Moreover, Singaporean adjudicators must possess a degree or diploma in architecture, building studies, engineering, environmental studies, law, planning, real estate or urban design, or such other qualification as may be recognised by the authorised nominating body[240].

However, CIPA-R 2014 does not prescribe any tertiary qualification as a condition to become an adjudicator in Malaysia. Nonetheless, it can be argued that by assessing the entry requirement to become adjudicators, as stipulated in CIPA-R 2014[241], it can be noted that the Malaysian Government and KLRCA as the nominating authorities under CIPA 2012 assume a position that it has been basically a general understanding that people with experience practising in the construction industry will usually possess tertiary qualifications as construction professionals, for example, architects, civil engineers, and quantity surveyors. Besides, the qualification must be recognised by KLRCA. Accordingly, it is an undeniable

[239] R 11(1)(b) of SOPA-R 2005 and R 4(a) of CIPA-R 2014
[240] R 11(1)(a) of SOPA-R 2005
[241] R 4 of CIPA-R 2014

fact that in the four regions that enacted the payment regimes reviewed in the thesis, adjudicators practising in the market have not become adjudicators based on their academic and professional qualifications in this field. Most have their own primary discipline as either a construction professional or a legal practitioner. As a result, the regulatory framework imposed on both types of professionals had been critically analysed in this thesis. Although many professions have attached themselves to the construction industry, the analysis had been limited to the main players: namely, architects, civil engineers, and QSs.

Besides, it had been noted that the principal areas of expertise of the ANBs' adjudicators in the UK are the quantity surveyors, civil engineers, and architects in that particular order. First and foremost, it is illustrated from the discussion in Chapter 3 that apart from being regulated before being allowed to enter the market, the professionals' regulatory frameworks include the procedures pertaining to the regulation of conduct. Both can be termed as regulation in respect of 'market entry' and the regulation of 'market behaviour' of the professionals. The typical route to be registered as a professional is as follows: -

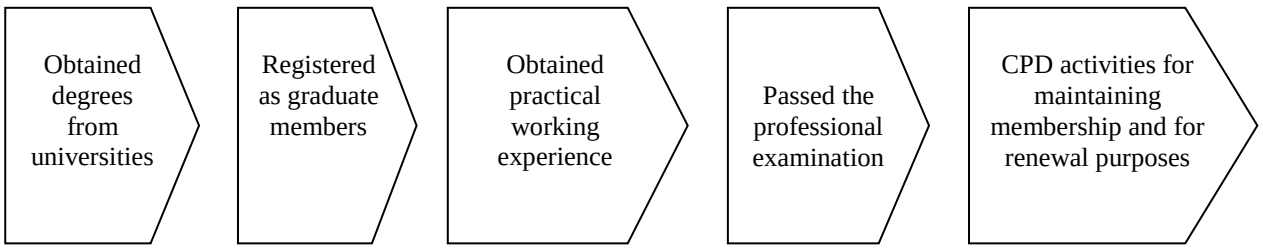

Figure 4.1: Typical Route of Regulatory Framework for Professionals

The findings from the analysis have been summarised and the outcomes are depicted in Table 4.2 and Table 4.3 in the following: -

Table 4.2: Summary of the Existing Regulatory Framework for Construction Professionals

Country/ Profession	Professional Act/ Legitimacy to Practise	Statutory/ Regulatory/ Professional Bodies Recognition	Tertiary Education/ Degree Accreditation Programme	Mandatory Professional Practice Examination/ Assessment	Mandatory Registration	Licence to Practise	Code of Practice/ Ethics/ Conduct	CPD
UK								
Architect	AA 1997[242]	Yes	Yes	Yes	Yes	No	Yes	Yes
Engineers	No	Yes	Yes	Yes	No	No	Yes	Yes
QS	No	Yes	Yes	Yes	No	No	Yes	Yes
Malaysia								
Architect	AA 1967[243]	Yes	Yes	Yes	Yes	No	Yes	Yes
Engineers	ROE 1967[244]	Yes	Yes	Yes	Yes	No	Yes	Yes
QS	QS Act 1967[245]	Yes	Yes	Yes	Yes	No	Yes	Yes
Singapore								
Architect	AA 1991[246]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Engineers	PEA 1992[247]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
QS	No	Yes	Yes	Yes	No	No	Yes	Yes
NZ								
Architect	RAA 2005[248]	Yes	Yes	No	Yes	No	Yes	Yes
Engineers	CPE 2002[249]	Yes	Yes	Yes	Yes	No	Yes	Yes
QS	No	Yes	Yes	Yes	No	No	Yes	Yes

[242] Architect Act 1997
[243] Architect Act 1967
[244] Registration of Engineers Act 1967
[245] Quantity Surveyor Act 1967
[246] Architect Act (Chapter 12) (Revised Edition 2000)
[247] Professional Engineers Act (Revised Edition 1992)
[248] Registered Architect Act 2005
[249] Chartered Professional Engineer of New Zealand Act 2002

Table 4.3: Summary of the Existing Regulatory Framework for Legal Practitioners

Country/ Profession	Professional Act/ Legitimacy to Practise	Statutory/ Regulatory/ Professional Bodies Recognition	Tertiary Education/ Degree Accreditation Programme	Mandatory Professional Practice Examination/ Assessment	Mandatory Registration	Licence to Practise	Code of Practice/ Ethics/ Conduct	CPD
UK[250]								
Barrister	LSA 2007[251]/	Yes	Yes	No	Yes	Yes	Yes	Yes
Solicitor	SA 1974[252]	Yes	Yes	No	Yes	Yes	Yes	Yes
Advocate	SSA 1980[253]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Malaysia								
Advocate	LPA 1976[254]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Solicitors		Yes	Yes	Yes	Yes	Yes	Yes	Yes
Singapore								
Advocate	LPA 2011[255]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Solicitors		Yes	Yes	Yes	Yes	Yes	Yes	Yes
NZ								
Barrister	LCA 2006[256]	Yes	Yes	No	Yes	No	Yes	Yes
Solicitor		Yes	Yes	Yes	Yes	No	Yes	Yes

It has been established that both the construction professionals and legal practitioners have been subjected to the same general structure of self-regulation. Parallel with regulatory reform, the main objective of all regulatory frameworks for professionals, either statutory or otherwise; aim to assure the quality of professional services in the public interest. Accordingly, the common features of the regulatory framework encapsulate the need to abide

[250] It must be noted that in the UK, solicitor bodies and English barristers rely on external providers to carry out their own tests and will be monitored by the PSRB.
[251] Legal Service Act 2007
[252] The Solicitors Act 1974
[253] Solicitors (Scotland) Act 1980
[254] Legal Profession Act 1976
[255] Legal Profession Act (Chapter 161) (Revised Edition 2009)
[256] Lawyers and Conveyancers Act 2006

by the 'Principles of Professional Regulation' prescribed by UKIPG (2002). The common features established under regulatory framework registration for professional membership are listed below: -

3.6.1 Registration Process

a) Educational Qualification

The typical route to qualify as a construction professional or legal practitioner is a combination of academic studies at a university and practical experience. The respective countries under scope of the research have put in place a systematic approach[257] to evaluate and accredit their universities and institutions of higher learning or college. Accordingly, professional degrees, such as those in construction fields and law, should be recognised by the respective PSRBs. PSRBs will prescribe, or directly recognise universities or institutions that offer accredited syllabi, courses or programmes for the purpose of educational qualification. Recognised universities or higher learning institution will design courses to meet the criteria outlined by the PSRBs. The accreditation of degree programmes is subject to a review by the PSRBs as and when deemed necessary. As a basic requirement for continued accreditation, universities or colleges typically submit annually to the PSRBs on any changes made to their programmes. PSRBs will set up an accreditation council or committee that customarily consist of professional members, representatives from the government, and representatives from the universities or institutions. It is also noted that universities or

[257] Most of the accreditation processes use Evidence-based Design Accreditation. The goal of the program is not to test people about their knowledge of the current evidence, but instead, teaches a process to identify and use available and credible research to inform design, and how to develop goals and hypotheses, gather data, and measure results to share with the industry.

colleges should adhere to the entry requirements into their degree programme imposed by the Qualifications Agency[258] of the respective country.

b) Practical Experience

In addition to academic qualifications, any application to be a registered member of a PSRB must be accompanied by practical experience gained in the related industry. This comprises of the acquisition and the development of special skills and a professional approach that bridges the gap between educational bases and professional qualifications requisite for practise as professionals. Before gaining practical experience, some applicants are required to be registered with the PSRBs as graduates members, intrants or pupils. Essentially, practical training and work experience have become an integral requirement for graduates planning to register as professionals. In principle, practical experience involves or connects with 'hands on' practice. Experience in this context can be defined as 'knowledge and skill that is gained through time spent doing a job or activity' (Macmillan Dictionary, 2013). Meanwhile, Davenport and Prusak (1998) referred to such experience as past events, whereas Martin and Hughes (2009) stated that practical experience will help a person to appreciate the capabilities and limitations of theories, equipment, systems, procedures, and standards typically used in the corresponding fields. As for construction professionals, they need to complete a minimum of up to 4 years' practical experience supervised by a registered professional working in the construction industry to become registered with their PSRBs. In the case of the legal profession, legal practitioners promote a more stringent registration process. There is a vocational stage in addition to the requirement to complete a traineeship

[258] E.g.: British Accreditation Council in the UK, Malaysian Qualification Agency in Malaysia

through pupillage stage. PSRBs will prescribe the requirements needed and practical experience must be documented thoroughly according to the rules.

c) Professional Assessment

Completion of practical experience will lead to a process of assessment (The UK Government, 2005; Valence, 2003; RICS, 2014). Professional assessment will be undertaken by members of the profession elected by the governance authority of the PSRBs (The UK Government, 2005; Engineering Council UK, 2013). This is under the assumption that only the profession itself has the best capacity to recognise and regulate the knowledge of an applicant (Center for Advancement of the Enterprise Architecture Profession, 2010; American Institute of Architects, 2013). The assessment[259] process will be done via submission of the paperwork in compliance of practical experiences[260], professional interviews[261], and written examinations[262]. Some regulatory bodies join forces with professional bodies to conduct such assessment programmes[263]. Passing the professional assessment will entitle the applicant to become registered or chartered members of the PSRBs[264].

[259] S 37 and S 38 of the Registration of Engineers Regulations 1990 (Revised 2003)
[260] S 10(1)(a) Architect Act 1967; S 26(1) Architect Rules 1996; S 22 (3) of the Registration of Engineers Regulations 1990 (Revised 2003); Section 10(2) of ROE 1967
[261] Part 5 of the Registered Architects Rules 2006
[262] Section 4(2) of AA 1997; By-law 28 of ICE By-Laws
[263] S 4(1)(ga) of the Architects Act 1967
[264] S 10(2) of ROE 1967; S 10(3)(b) of PEA 1992

d) Practising Certificate

It usually takes a minimum of seven years to obtain the necessary qualifications and experience for registering construction professionals and legal practitioners. As a common structure, once a person has completed the three steps above, the registration process is almost complete. Once registered, the professionals may offer their services to the public. However, grounded on Table 5.1, compared to legal practitioners, only architects and engineers in Singapore are required to acquire a license to practise on top of being registered with their respective PSRBs. There are two types of licensure: title act and practice act. For architects and engineers practising in Singapore, the practising act applies so that a registered professional is authorised to engage in professional work in which she/he is qualified to practise.

e) The Establishment of the Construction Professional 'Co-Regulation Framework'

Moran (2003) labelled the traditional style of self-regulation in the UK as 'club government' and earlier, Stacey (1992) described it as the 'gentleman's club' approach to professional regulation. Nonetheless, due to the disadvantages highlighted (Dingwell and Fenn, 1987; Van Den Bergh and Faure, 1991; Randall, 2000), Bartle and Vass (2005) pointed out that there has been a significant trend away from self-regulation, especially during the last two decades of the 20th century. Moreover, there are different perceptions on what is self-regulation and mostly have believed that self-regulation offers benefits for public interest and adds real value to the functioning of efficient markets (OFT, 2009; Ministry of Consumer Affairs New Zealand, 1997). On the other hand, Baggot (1989: 436) stated that 'self-regulation remains a rather vague and elusive concept'. However, The Baroness Deech of Cumnor (2012) clearly

argued that ‘For many centuries, professions, such as medicine and law, were trusted to self-regulate and indeed, their professional pride was, and is, such that the strictest regulators are often one’s own peers in a profession or business, because there is self interest in maintaining standards and entry’. This is parallel with the view that legal professionals should be trusted to self-regulate since self-regulation is the ‘essential element in the protections of lawyers’, ‘independence’, and it supports the methodology of ‘professionalism’ (Davies, 2010). Consequently, a self-regulatory regime stands on the fact that only members of the profession have better knowledge of the standard services offered to the market as discussed earlier in Chapter 2. Undeniably, legal practitioners enjoy this status since the formation of 'The London Law Institution' in 1823. However, the traditional framework of self-regulation has been diluted to a certain degree in that the government has infused the regulatory framework for professionals with the establishment of state agency via statutory enactment acting on behalf of the government to ensure that the public benefited from the regulation enacted. In addition, due to regulatory reform in the UK for the benefit of consumer and public interest, the government inaugurated the Legal Services Board (LSB)[265] to oversee the profession in England and Wales. Akin to the reform of financial service regulation, legal practitioners are now regulated with a move to outcomes-focused regulation[266] set by the government through the enactment of LSA 2007[267].

[265] 1 May 2008. Recently, the SRA and Bar Standard Boards have highlighted the complexity of the LSA 2007 (primary act) in their response to ‘Ministry of Justice – Call for evidence on the regulation of legal services (2013)’ in England and Wales. Bar Standard Boards even suggested for the LSB to be disestablished by 2017. LSB has been labelled as super regulators (Institute of Trade Mark Attorneys, 2013) that have been established to fit the concept of one super-regulator rather than a number of smaller regulators with the thought that this could simplify regulation of legal services for the public.

[266] A regulation system that inclines to the public interest and for clients’ benefit. It is designed to put the client first and this does not prejudice the public interest. It is about achieving the right outcomes for clients (Ball, 2008).

[267] A similar arrangement has also been made via the establishment of a public body for the legal profession in Singapore and New Zealand.

Thus, as illustrated in Table 4.2, construction professionals show similar characteristics to legal practitioners since they are governed by either a professional or a regulatory body or both. Besides, the existence of PSRBs is equipped with legal powers granted to carry out the function in regulating the profession based on the concept of 'self-regulating'. However, it is argued that closed professional shops can lead to an inherent lack of independence to carry out enforcement with a view to protect the public rather than the professional body or its members (Brown, 2003). Additionally, with the trends in regulation or 'regulatory crisis', as projected by Baldwin & Black (2007) or 'era of institutional regulatory innovations' (Levi-Faur & Gilad, 2004), none operates without any state control. As a matter of fact, there have always been some basic rules set by the government that define the boundaries of self-regulation.

Corresponding with this notion, Randall (2000) stated that professional self-regulation enables government intervention over the practices of professions and services provided to the market. For example, currently, PSRBs for construction professionals were designated as 'authorised bodies' and subject to external controls from the government[268]. Even though the governing authorities of PSRBs can be observed to be dominated by the members of the profession, due to the process of renewing and repealing of the professional regulatory legislation for construction professionals, some of the PSRBs' governance authority has been infused with the participation from various other related professions or even non-professionals[269]. Thus, this framework contributes to the growth of state-sanctioned

[268] It was noted, even with the power to self-regulate, PSRBs must comply with the requirement to 'subject to approval of Ministers responsible for the industry' for the purpose of promulgating the rules for conduct for professionals.
[269] E.g.: S 3(1), Schedule 1 of Architects Act 1997, S 2(1), Schedule 1 of Architects Act 1997, S 52 and S 53 of Registered Architects Act 2005

intervention to the construction professionals' self-regulatory framework in what can be described as a co-regulatory model.

f) Collaboration between PSRBs

Some professional bodies work under the incorporation of Royal Charter and some even create a 'Reciprocity Agreement'[270] to regulate and protect the title of their profession. In terms of restricting entry to the market, PSRBs function primarily to set the requirement for admission to the profession as a statutory means to protect the market from unqualified practitioners. However, there are conflicts between the professional and regulatory bodies when both have different objectives on their establishment, for the good of professional interest and the latter working towards public interest. Regulatory reform is sought to promote the public interest by providing the public with a transparent regulatory system. This creates a scenario where PSRBs have to work with less than one 'super-regulator'[271], such as when the UK government enacted legislation like LSA 2007. In addition, CPE 2002 in NZ created an atmosphere in which PSRBs have to co-exist as one organization. Accordingly, in Malaysia, regulatory bodies like BQSM have jointly organised professional exams for admission as members with professional bodies like RISM. Furthermore, SIA in Singapore developed a CPD framework to accommodate the need for continuing professional education prescribed by BOA.

[270] Webster's New World Law Dictionary (2010:498) gave a legal definition to reciprocal agreement as '…obligations assumed and imposed by two parties as mutual and conditional upon the other party assuming same obligations'. In general, the bussinessdictionary.com (2014) defined reciprocity agreement as quid pro quo arrangement in which two or more parties agree to share their resources in an emergency or to achieve a common objective. It usually consists of an exchange of privileges, which one or both parties may never even end up exercising.

[271] The Explanatory Notes to the LSA 2007 provides for LSB as a single oversight body to sit at the head of the new regulatory framework for legal practitioners in the UK and ensure that the approved regulators carry out their regulatory functions to the required standards (LSB, 2013).

g) Localization Factor

Statutory regulation, as seen in Malaysia, has set up protections for their construction professionals[272] to practise. In addition, for legal practitioners, the same prescribed manners were practised until a new amendment to the Legal Profession Act 2012 was passed in Parliament in 2013 to allow foreign lawyers to practise in Peninsular Malaysia. For Singapore, graduating from a local university is one of the qualification criteria for membership application and experience gained from working locally is a necessity. Arguably, this is mainly due to the strict statutory procedure for the construction industry under the Building Control Act regime[273]. As for the UK, with the establishment of DIRECTIVE 2005/36/EC[274], localization factors are open throughout the European Union, thus providing and setting higher trust in each other's regulatory framework for professionals.

3.7 Mandatory registration and professional practice examination/assessment

As set out in Figure 3.2 and Table 3.1 in Chapter 3 of this thesis, in general, the processes of accreditation, registration, certification, and licensure serve to restrict the entry of a professional to the market. As argued by Schultze (2007), the focus of the process is to make known to the public the educational standard of the members of a profession and

[272] S 10 (3) of AA 1967, S 10 (3) of QS Act 1967 and S 10 (4) of ROE 1967. However, there have been almost equal negative and positive perceptions on the need of foreign professionals in the Malaysian construction industry (Ponnusamy et.al, 2011).

[273] Include but not limited to Building Control Act (Chapter 29), Building Control Regulation 2003, Building Control (Accredited Checkers and Accredited Checking Organisations) Regulations, Building Control (Buildability) Regulations 2011, Building Control (Buildable Design) Regulations, Building Control (Temporary Buildings) Regulations, Building Control (Environmental Sustainability) Regulations 2008 and all the Amendments to Building Control Act and Regulations.

[274] Published under The Treaty of European Union and of the Treaty Establishing the European Community. Directive 2005/36/EC confers the recognition of professional qualifications that came into force in 2007. It has since been amended several times. It was based on the Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 in establishing a mechanism for the recognition of qualifications in respect of the professional activities.

identification of those who are qualified to serve in the market, as credentials to the members of a profession and as protection for the public interest. Accordingly, most of the nominating authorities are keen to follow the regulatory framework of self-assessment by the peers that have been recognised to satisfy the public interest expectations in professional service marketing strategies. The statutory arrangement in Singapore under SOPA 2004 and SOPA-R 2005 made registration a mandatory procedure before a person can practise as an adjudicator[275]. Accordingly, the SMC as the authorised nominating body prescribed must establish and maintain a register of adjudicators, as well as provide training[276] for the persons who are on the register of adjudicators. Furthermore, before being registered, the person who is applying to be an adjudicator must successfully complete the pre-qualification assessment and training course[277] conducted by the SMC. The pre-qualification includes the educational accomplishment and the experiences gained while practising as a professional in the construction industry. It was noted earlier that in the same scenario, professional bodies with self-regulatory frameworks will usually provide a similar procedure before permitting any person to become a registered member of their organizations. It is a process to eliminate the unqualified individual from entering the market for the good of the profession, and at the same time, maintaining the public interest and trust. This perception is parallel with the argument made by Mills et al. (2011) when they advocated that registration regulatory frameworks for professionals, in general, are collectively referred to as the process of maintaining professionals' standards both via education and guidance, in addition to the normative disciplinary processes with the notion for the good of public interest. Furthermore, payment regimes were enacted to provide an adjudication process for the rapid and economical resolution of payment claim disputes, thus, preliminary elimination processes via

[275] S 28(4)(a) of the SOPA 2004
[276] S 28(4)(c) of the SOPA 2004
[277] R 11 (1)(b) of the SOPA-R 2005

registration and pre-assessment are vital to ensure that the objectives envisioned by the government will be carried out for the good of the construction industry.

However, it has been pointed out that there is no prescribed law for adjudicators to be registered with any nominating authorities in the UK and New Zealand. Hence, there are no specific pre-requisite criteria for a person to become an adjudicator. Both regimes rely heavily on the market to control the quality of the adjudicators, created on the demand made by the disputing parties. However, since most nominating authorities are rooted as PSRBs, a similar process of registration and pre-assessment of the applicant as an adjudicator has been adapted. Therefore, the nominating authorities will provide training courses ranging from a three-day training programme or a diploma qualification programme for the adjudicators before being enlisted as a panel to serve the market under HGCRA 1996. Additionally, it can be argued that the registration processes are completed via a self-regulation regulatory framework based on the guidance from the soft law[278] published by the respective nominating authorities.

With the extensive prescribed requirements on the conduct[279] of the adjudication process in New Zealand, CCA 2002 demonstrates high expectation for adjudicators to be qualified, very experienced, and competent in their role of resolving disputes. Accordingly, educational bodies like the University of Waikato, University of Auckland, and Victoria University in New Zealand are working together with the nominating authorities to provide educational programmes to prepare adjudicator candidates with the relevant knowledge and skills as required by CCA 2002. Following the paths sets by other nominating authorities, in addition

[278] Bothe (1980), Tammes (1983), and Gruchalla-Wesierski (1984), agree that it is a characteristic of soft law to be in written form. According to Chinkin (1989), there is a wide diversity in the instruments of so-called soft law which make the generic term a misleading simplification.
[279] S 45 (a)-(g) of the CCA 2002

to the prescribed requirement of the CIPA 2012 and CIPA-R 2014, KLRCA made an early arrangement for registered adjudicators by arranging a two-day course with the aim to accredit and convert the existing panellist arbitrators with KLRCA to become adjudicators. Mandated with the power to set the competency standard and criteria of an adjudicator[280], besides determining the standard terms of appointment of an adjudicator[281] and providing training and conducting examinations for an adjudicator[282], it has implemented an adjudication training programme for the public as their first step to accredit more adjudicators. The programme had been aimed to provide the industry with respectable numbers of adjudicators in terms of numbers and qualifications. It was also intended to gain public trust and to keep the notion of public interest intact (KLRCA, 2012).

3.8 CPD and maintaining registration with the nominating authorities

Corresponding with the training, pre-assessment, and registration regulatory framework for adjudicators, there is a pre-existing need for nominating authorities to maintain their registered lists of adjudicators. It is noted in Chapter 3 of this thesis, that the entry controls regulatory framework using the process of accreditation, registration, certification, or/and licensure is pre-arranged as a minimum standard to satisfy the market requirement, including the statutory or public expectations of a profession. However, as noted from *Neelu Chaudhari v The Royal Pharmaceutical Society of Great Britain*[283] and as argued by Schultze (2007), self-regulatory frameworks by PSRBs normally include the entry regulations system, plus the process of establishing and maintaining levels of competency, in addition to the

[280] S 32 (a) of the CIPA 2012
[281] S 32 (b) of the CIPA 2012
[282] R 2(c) of the CIPA-R 2014
[283] [2008] EWHC 3190 (Admin)

disciplinary procedure. Accordingly, nominating authorities in all jurisdictions analysed have established a system to maintain the competency of their registered adjudicators.

In New Zealand, nominating authorities must have a working system to ensure that the adjudicators registered will undertake appropriate continuing education and professional development programmes that are relevant to their role as an adjudicator[284]. Accordingly, all three authorised nominating bodies require their registered adjudicators to comply with the CPD programme that had been developed earlier to serve their purposes as PSRBs and has been amended to suit the needs of adjudicators. CPD involves both 'learning' and being 'fit to practice', knowing both the 'why' and the 'how', as well as putting learning into practice. It will be assessed and recognized when professionals are able to determine their own learning needs through reflection within the totality of their practice (Schostak et al., 2010). It cannot be quantified but peers in the same fields will have the ability to verify the competency level based on the guidelines prescribed by the PSRBs. Nevertheless, as for RICS (2014), CPD is 'a commitment by registered members to continually update their skills and knowledge in order to remain professionally competent and achieve their true potential'. Meanwhile, in the UK, the ANBs follow the methods prescribed by PSRBs in assessing the competency of their registered adjudicators. Most ANBs require the adjudicators to supply their CPD commitment on an annual basis and failure to comply may lead to removal from the registered list. Even though CPD requirement was not statutorily prescribed in Singaporean and Malaysian payment regimes, it has statutorily bestowed the power for the nominated authorities to provide training[285] for the adjudicator. The training programmes must be designed to ensure and maintain the adjudicators' level of knowledge, skills, and experience, besides keeping them updated with the latest developments on the law affecting

[284] Schedule 2(h)(i) of the CCR-2003
[285] S 28(4)(c) of SOPA 2004 and R 2(c) of the CIPA-R 2014

the adjudications process. Accordingly, KLRCA has offered and has continually provided relevant adjudication courses that aid in enhancing and maintaining the level of competency needed and expected by the public. Moreover, both SMC and KLRCA require the adjudicators to submit their CPD requirement to be evaluated annually. The requirements are envisioned to provide stability to the status of adjudicators, and at the same time, ensure that the trust displayed by the public has been fully considered.

4. Conclusion

Historically, self-regulating for professional bodies is based on the concept of granting the power to formally regulate the activities of the members of profession by the government to an occupational group through an agreement made by both parties (Rueschemeyer, 1983). In Singapore, the government encourages a disclosure-based regime of capital market regulation, a framework of self-regulation that relies upon market forces and mechanisms to encourage the adoption of best practice and drive out bad practice (Leow, 2001). However, public interest proved to be the basic need for any intervention by the government to correct market failure. In terms of regulating adjudicators, statutory sanctions have been adapted in New Zealand, Malaysia, and Singapore; parallel with the notion of public interest. However, it was noted that the capture theory for regulation is adaptable in the UK and the public interest notion has been kept alive even though the regulatory framework was moulded by the demands in the market. Even though they are movements to reform the self-regulatory process, the market trend that had been studied above exhibited deviation from the intended process. Self-regulations regulatory frameworks are kept active by the PSRBs with slight intervention from the Government. Apparently, market trends motivate the ANBs as regulators in the UK to capture a regulatory framework that benefits the consumers, as

anticipated by Peltzman's expanded ideas of Stigler's work, which has been discussed in Para 1.4.3 in Chapter 3 of this thesis. Therefore, the notion of public interest is still being apprehended as the root to regulate adjudicators in the UK. Furthermore, it has been identified by Laffont and Tirole (1991) that the capture theory ignored the informational asymmetries rationale that has been identified as one of the major reasons for professional services markets' failures. Even though some gaps have been discovered in the regulatory framework for adjudicators, it can be safe to argue that the intention of the government to keep the lifeblood of the constructions industry alive and flowing will motivate the notion of public interest.

CHAPTER 5

PUBLIC INTEREST AND DOUBLE REGULATORY FRAMEWORK FOR ADJUDICATORS

1. Introduction

As established in Chapter 3, there are fundamentally two different types of professional/occupational regulatory systems: regulation in respect of market entry, and regulation in respect of 'market behaviour' or conduct. In this thesis, the scope of the work had been limited to regulation in respect of market entry or what can be termed as the 'regulatory entry framework', but certain aspects of the regulation of conduct have been touched on in brief in Chapter 4. Chapter 3 and Chapter 4 provide the impression that regulatory control is established via accreditation, registration, and licensing processes. These measures have become the principal gatekeeping processes, which effect or seek to effect the exclusion of unqualified and incompetent practitioners from entering the market. Furthermore, market trends in the UK and statutory self-regulation sanctioned in New Zealand, Singapore, and Malaysia, as discussed in Chapter 4, supported the arguments that adjudicators need to be regulated to achieve the aims and objectives of the respective payment regimes. Accordingly, it is noted that the ANBs, ANAs, and the adjudication authority in all the jurisdictions discussed, function as PSRBs to regulate the entry and the conduct of adjudicators professionally.

Chapter 4 also establishes that construction professionals and legal practitioners are required to be registered with PSRBs before being admitted to the market. Whether being set up on a statutory or voluntary footing, mandating membership of PSRBs is inspired by the interest of

a profession in safeguarding its social status and standing of a profession, and at the same time, providing assurance to the public by permitting only those qualified to serve the market. Referring back to the reports produced by ARC since year 2000, in the UK, even though the market was very competitive with more than 17 active ANBs, the market could be argued as being controlled by a few ANBs that were recognized by the markets as PSRBs. In addition, only established professions like quantity surveyors, legal practitioners, and civil engineers had been actively nominated by the ANBs. Earlier, it was noted that the nomination of quantity surveyors, legal practitioners, architects, and civil engineers as adjudicators had been equal in number. However, recently, it has been established that 70% of the market is now being controlled by quantity surveyors and legal practitioners. Such circumstances can be said to exist because disputes in the UK market are now streaming towards payment and contractual problems (ARC, 2012). Besides, the commitment by the ANBs towards marketing regulated adjudicators has arguably gained public trust[286] even with the simplest form of entry regulation. The entry regulations set formal quantity controls and reduce the service providers, pushing prices higher than in an unregulated market (Svorny, 1999). Thus, persons being regulated in the market will earn more, as debated by economists like Friedman and Kuznets (1945), Arnauld (1972), Arnauld and Friedland (1977), Domberger and Sherr (1989), The Monopolies and Mergers Commission (1970), as well as Van den Bergh and Faure (1991). In addition, the regulation in service markets may lead to the capturing of regulatory process by the industry itself (Stigler, 1971; Benham and Benham, 1975; White, 1980; Svorney, 1987; Van den Bergh and Faure, 1991; Faure, 1993; Van den Bergh, 1993), and the problems of asymmetric information (Leland, 1979; Weingast, 1980, Stephen and Love, 1999; Law and Kim, 2004). There is also the argument that has been debated and suggested that regulations are actually being deployed to raise a profession's social status (Parsons,

[286] ARC (2014) in their reports No. 13 established the fact that more than 90% of adjudicators in the UK were nominated via the ANBs.

1939; Weber, 1947; Larson, 1997; Abbot, 1988; MacDonald, 1995; Lawson, 2004) rather than protecting the financial interest of the profession (Resnik, 2000; Freidson 2001).

The scenario in New Zealand is similar to that in the UK. Green (2013) argued that in New Zealand, the Building Disputes Tribunal controlled almost 90% of the market for adjudicators even though their adjudicators were registered only by invitation. Nonetheless, it must be noted that only selected individuals are invited by the Building Disputes Tribunal as their registered adjudicators. Moreover, they are classified into two different levels of adjudicators and are nominated according to their level of experience to deal with disputes in New Zealand's construction industry. In contrast with the UK and New Zealand, in Singapore and Malaysia, as discussed in Chapter 4, one must be statutorily recognized and qualified either as a construction professional or legal practitioner equipped with more than 7 years' experience in the construction industry. Accordingly, it can be argued that as a second profession, adjudicators are being regulated twice. Thus, this brings us to the issue as to what can be termed as a 'double entry regulatory framework', which could benefit the public interest.

2. Double Entry Regulatory Framework for Professionals

To support the notion of public interest, profession offers a first degree as a key stage in the education of those who go on to be registered as construction professionals or legal practitioners. However, it is of equal importance for them to go on to fulfilling careers in other related or unrelated sectors of the economy to enhance their experience, competencies, and wages. As discussed in Chapter 1 and Chapter 4 of this thesis, being a professional, in addition to operation of state sanctioned regulatory frameworks, may both contribute to gained public trust. This is parallel with Friedson's (1994) argument that the market for

services epitomizes that professionalism is always based on public claims for the professionals to acquire specialised training and skills. It is also distinguished in Para 4.1 of Chapter 1 that professions project characteristics that differentiate them from occupations as they acquire technical autonomy and require observation from peers to determine the qualities of the service they provide to the public. Therefore, it can be argued that there are needs for specialised training and skills and it will motivate states to sanction authorised statutory regulatory frameworks for the professionals. Accordingly, as noted in Chapter 4, there are requirements from the nominating authorities for adjudicators to have specialised skills in other construction-related professions. In addition, since most adjudicators are professionals in the construction industry, they are bound either by the state rules or the professionals' bodies to be regulated before they can provide their services to the public. Thus, being double regulated has become a reality for adjudicators before they can serve the markets. Accordingly, it must be noted that being double regulated as a professional is not a new phenomenon. It can be argued that the circumstance has occurred since the growth of the modern day profession. The concept of double regulation has been driven by the need to transform and improve the standard of a profession. Accordingly, there are other factors that can contribute to the need for a profession to be twice regulated. The contributing factors pertinent to the construction industry are discussed further in the following.

2.1 Contributing Factors for Double Entry Regulatory Framework

2.1.1 Legislative Requirements

Malaysia statutorily protects the title and the function of construction professionals. Similarly, Singapore protects the title and the function of their architects and engineers. In contrast, the UK only statutorily protects the title of the architect and their functions are not protected at all[287]. Meanwhile, New Zealand only protects the titles of architect and engineer. However, it was observed, for example, that the New Zealand Government is making changes to legislation across the construction field to provide incentives for building professionals and tradespeople to take responsibility for the quality of their work (Huo, 2013). Thus, it can be noted that in addition of being regulated by professional's act and legislation, the construction professionals are also required to comply with the requirements imposed by planning and building legislation in their respective countries. As an illustration, in order to comply with the requirements of Building Control Act (Cap 29), Singapore puts into effect The Commissioner of Building Control[288] that keeps and maintains a register of accredited checkers (AC)[289], a register of specialist accredited checkers, and a register of accredited checking organisations. Accordingly, the Building Control (Accredited Checkers and Accredited Checking Organisations) Regulations prescribe the requirements for registration of an AC, including being a professional engineer registered under the Professional Engineers Act in the civil or structural engineering discipline with practical experience in the design or construction of buildings in Singapore at a professional level for a

[287] As tabled in Para 3 of Chapter 4
[288] S 3(1) of the Building Control Act
[289] A person registered under S 16 of the Building Control Act 29 to check the structural works of a construction project in Singapore.

period of not less than 10 years. In addition, the appointment of a 'qualified person' (QP)[290] by the employer is often necessary. Thus, these statutory requirements have created a regulatory control environment where construction professionals need to be registered and accredited according to the requirements of the planning and building legislation regime.

2.1.2 Complex Activities in the Construction Industry

The construction industry is very diverse, covers a wide range of end products, and employs a large variety of different professions (Whitfields, 1994). Professionals, such as architects, engineers, and quantity surveyors, have created the landscape of a country and the status of their services has been projected through the quality of buildings, skyscrapers, bridges, and roads they have produced. However, the global construction industry is experiencing a swift change from new markets, technology, as well as changing methods of procurement and contract management (Pries & Janszen, 1995; Adamson & Pollington, 2006; Fernie et al., 2006). The construction industry has also been restructuring itself around risk management, increased complexity of projects, and procurement innovation - an agenda to which architects have been largely unable to contribute or shape. Therefore, the design and the construction of buildings in the modern context have become a more complex operation that involves different professions, contractors, subcontractors, and operatives on site; entailing a great number of different activities. Accordingly, the government and the industry have had to impose new regulatory requirements to capture the trust of the public. As a result, many professions co-exist in the industry to serve the market and the public. Furthermore, from the perspective of a profession, Vough et al. (2013: 1051) concluded that recently, 'many professions are facing declining public confidence, as well as increasing vulnerability to

[290] S 6(3) of the Building Control Act states that QP would either be an architect or a PE who is registered with the Board of Architects or the Professional Engineers Board respectively.

public perceptions regarding their value, including the exclusivity of their knowledge bases'. Consequently, professionals in the industry are required to be regulated to regain public trust, since it will provide a higher level of confidence for the consumers of the services delivered.

Another important issue here concerns the fact that the deregulation transformation in the 1990s in the UK has significantly affected the procurement of construction professional services (Connaughton & Meikle, 2013). Accordingly, there are requirements for a profession to engage with formal quality management systems, equality policies and procedures, as well as health and safety arrangements to participate in construction projects. Thus, the new arrangement creates new positions or occupations, which traditionally was not recognised in the construction industry like quality engineers, health and safety officers or even legal advisors. Hence, the existing professions or occupations within the industry must expand their knowledge and skills to venture into the new positions created. Thus, it can be contended that such developments are one of the primary contributors leading to the greater complexity of the construction industry.

2.1.3 Construction Contract Administration Hitches

The construction industry today has acquired a legendary reputation for extraordinary factual and legal complexity (Bruner et al., 2007). Traditionally, depending on the type of construction project concerned, architects and civil engineers are the commanders in construction projects. Contract administration is one of the most important jobs related to construction projects and involves numerous tasks occurring before and after contract execution and work order issuance. All work must be administered in accordance with contract specifications, terms and conditions, legislation and regulations, as well as

department policy. However, owing to changes in technology and new legislation, the role of the contract administrator is shifting from clerical function and responsive order placer to a proactive strategic participant who is involved in major expenditure decisions (McCue & Pitzer, 2000; McCue & Gianakis, 2001). Besides, good contract administration is required to manage design specification, contractual agreements, competitive tendering, evaluation, cost control, variations, final accounts, claims, and even disputes; this will eventually help to reduce construction costs. Hence, many issues and requirements that coincide in the construction contract are interrelated with the principal legislation enacted for construction contracts. The construction industry scenario is complex and involves a lot of stakeholders. Inevitably, some legal issues exist despite of every effort being made to avoid and resolve them. In addition, it was argued by Muir (2005) that the industry is now under greater regulation through the construction codes and licensing requirements, plus the increasing environmental and safety laws imposed. Consequently, these factors have affected the administration of the construction contracts and the process has become more complicated, while the nature of disputes has become more sophisticated. Thus, unsurprisingly, legal practitioners are often sought after to provide the contract administrator with relevant legal advice.

Accordingly, due to the need to protect construction professionals' position in the construction industry, some construction professionals have taken the initiative to pursue their studies in legal fields[291] and some have even qualified to practise[292]. In unison, legal practitioners have discovered new areas to practise within and they have enhanced their qualifications with degrees in construction fields. For example, according to the ARC (2000),

[291] Through for example, Masters degrees in Construction Law
[292] Note the development of Commercial Attorneys in Scotland, construction professionals with legal training who have gained limited rights of audience in civil courts.

Royal Institute of British Architects (RIBA) had reported that 77% of their adjudicators held more than one qualification and RICS quoted 10 dual-qualified adjudicators. It can be argued that the emergence of the modern construction law[293] has affected not only the administration of the construction contract, but expanded the competition to be recognised as professionals in the construction industry. This has, thus, led to the expansion of expertise that needs to be regulated in the dual area.

2.1.4 Professional Background of Disputes Resolution Experts

Reports from Banwell (1964), Latham (1994), and Egan (1998) have been published with a view to improve the efficiency and the quality of the construction industry. The reports basically agreed on the need for effective techniques to eliminate or control the disputes issues that had been identified as the culprit that will further deteriorate the wellness of the construction industry. A call for earlier methods of dispute resolution to protect the industry has been one of the major concerns of the reports. Thus, many so called 'alternative disputes resolution' processes have been championed to assist in resolving disputes in construction and engineering projects. As it has already been noted in this thesis, the enactment of adjudication regimes provides space for construction professionals and legal practitioners who practise construction law to occupy the role as adjudicator (RICS, 2001)[294]. Furthermore, as it has been noted in Chapter 4 of this thesis, two types of technical expertise exist in the construction field: one held by technical experts (construction professionals), plus the other held by legal experts (lawyers practising in construction law) and both like to think that

[293] The earliest known principles of construction law were primitive and punitive. The Code of Hammurabi is said to be based on even older collections of Sumerian and Akkadian laws. Under its 'eye for an eye' system of justice, Hammurabi's Code dictated that builders be punished for injuries to others caused by the collapse of their buildings (Bruner et al., 2007).

[294] See also R 11(1) of the Building and Construction Industry Security of Payment Regulations and R 5(1) (a) of the Final Draft of Construction Industry Payment and Adjudication Act 2013.

construction disputes are focused on their particular realm of expertise (Flood and Caiger, 1993). In addition, The Honourable Lord Drummond Young at Para 15 observed in *Constain Limited v Strathclyde Builders Limited*[295] that 'adjudicators are chosen because of their knowledge of the construction industry and their knowledge of adjudication and construction law'. This cements the notion that the fact that adjudicators practising in the construction industry have their own primary profession either as construction professionals or legal practitioners. It, thus, follows that adjudicators must first be regulated as professionals in their prime profession and then regulated again as adjudicators.

Even though as discussed in Chapter 3, only Singapore and Malaysia have mandatorily prescribed the eligibility criteria for a person to be registered as an adjudicator, most ANBs in the UK and ANAs in New Zealand have now taken a similar approach. Generally, the basic admissibility criteria to become adjudicators are directed to those who are qualified and experienced construction professionals or lawyers who have been practising construction law. Many queries[296] have been raised regarding the issue of the quality and the competency of adjudicators. The Construction Industry Council (2002) in the UK launched a study pertaining to this matter and has since instituted a common theme and minimum criteria for training adjudicators. Consequently, most candidates are required to meet minimum qualifications, such as gaining practical experience in the construction industry either as construction professionals or legal practitioners, in addition to initial training[297] to become adjudicators. Moreover, since adjudicators exercise a statutory power of decision[298], the

[295] [2003] Scot CS 316

[296] See Report of The Construction Umbrella Bodies Adjudication Task Group on Adjudication under the Construction Act, July 2004; Speech by Chief Executive of Construction Industry Council and Chairman of the Construction Umbrella Bodies (CUB) Adjudication Task Group (2004) during the 10th Adjudication Update Seminar in April 2004.

[297] However, some perceived that the adjudicators are not sufficiently trained (The Scottish Executive, 2004; Naseem, 2013) and the initial training may have been derisory (Riches & Dancaster, 2004).

[298] *Willis Trust Co Ltd v Green* [2006] Adj. L.R. 05/25

standard and competency of an adjudicator not only lies in the expertise that has been developed in their primary profession, but at the same time, they must acquire skills from other areas related to the requirements of the regime. This means that, in addition to skills developed in training prior to being registered, adjudicators must submit to continue professional development enrichment programmes.

2.1.5 Liberalisation and Globalization of the Service Market

In Malaysia, the Government has taken steps to liberalise the services sector to attract more investments, bring in more professionals and technology, as well as strengthen the competitiveness of the sector, and at the same time, provide the same common understanding to the international market. During his budget speech on 7th October 2011, the Prime Minister of Malaysia announced the liberalisation of 7 broad sectors, including the professional services sector, and to date; the architectural, engineering, and quantity surveying services sectors have progressively implemented the liberalization process (Malaysian Investment Development Authority, 2012). This development, thus, verified the liberalisation of construction professionals in Malaysia. According to Yusof and Yusoff (2012), as part of her international obligations under both the World Trade Organization (WTO) and General Agreement on Trade in Services (GATS) documents, Malaysia has been expected to open her domestic market to foreign players by liberalising any trade barrier policies, particularly in services sectors, and at the same time, provide professionals to the international markets. Therefore, construction professionals from Malaysia have the opportunity to practise in foreign countries. Even though trade barriers have been opened, some countries may maintain their policies pertaining to the registration as professionals to serve the market. It was noted that opening up new markets requires supplementary rules and regulation to ensure that

public services continue to be provided in an appropriate way and that the consumer is not adversely affected. To that extent, it is crucial for Malaysian professional service providers to enhance their capacities and capabilities to face the challenges that liberalisation brings. In addition, the Professional Services Development Corporation (PSDC)[299] promotes international accreditation and certification, such as ISO, Project Management Professional (PMP), Value Management, and 6-sigma, among professionals and professional services firms to enhance their recognition and reputation, particularly in the global market. Accordingly, some construction professionals must abide by these procedures and are required to undergo the double entry regulatory frameworks in their home and foreign land.

3. Double Regulatory Control Framework for Adjudicators in the UK, New Zealand, Malaysia, and Singapore

As noted in Chapter 4, professional regulation is partly provided through a regulatory control framework, which allows each profession to have an appropriate degree of independence in setting professional standards, while allowing the government to have statutory control for the good of public interest where suitable. Accordingly, PSRBs, which do not have a statutory framework, often adopt the same approach through their own rules. Therefore, in addition to the regulatory control in their prime profession, the second tier of regulatory controls suffices through the stringent control of the ANBs for adjudicators. Even though adjudicators in New Zealand are not required to be registered statutorily with the ANAs, the judgment made by Venning J in *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd*[300] can be taken as an indicator of the importance of being registered and regulated by ANA. The said

[299] PSDC is a government-company, 100% owned by the Malaysian Ministry of Finance and strategically placed under the Ministry of Works.
[300] High Court, Auckland, CIV 2005-404-6984, 10/4/06

judge advocated that S 33 of CCA 2002 has clearly prescribed the process of nominating an adjudicator. However, in this case, the adjudicator had not been appointed pursuant to the need of S 33. Following the circumstances, the judge advocated that if the adjudicators were not registered with the authorised nominating bodies, he had no standing under the Act to act as adjudicator.

If adjudicators are nominated by ANBs, there are certain admissibility criteria that need to be fulfilled to render them eligible. It was statistically confirmed in the UK, that the main source of appointment of adjudicators was by ANBs (Adjudication Reporting Centre, 2012). For instance, RICS appears to be committed to improving the quality of the adjudication service as it provides the publishing of a third edition of its guidance note entitled 'Surveyors acting as adjudicators in the construction industry'. The guidance note recommends that adjudicators should be fully conversant with the statutory framework contained within the HGCRA and the amendments introduced by the LDEDCA. Accordingly, RICS has set out the requirements for applicants interested in gaining membership of the Panel of Construction Adjudicators. The initial requirement includes the need to have both professional qualification and 10 years' post-qualification experience relating to the candidate's primary profession, in addition to successful completion of the RSPH/RICS Diploma in Construction Adjudication. On top of that, aspiring adjudicators must go through an interview session after being assessed by an 'Assessment Board'. The route map to becoming an adjudicator registered with RICS has thus proven to be very stringent. Accordingly, RICS has been recognised as one of the leading nominators for adjudicators in the UK construction dispute resolution scene. With the different selected criteria set up by the ANBs, ANAs, and adjudicating authorities nowadays, it is safe to argue that the double regulatory control framework for adjudicators has indeed become a reality.

Meanwhile, New Zealand embarked on statutory adjudication via the enactment of CCA 2002. Structurally, CCA 2002 is very much different to the HGCRA as it contains fundamentally the entire legislative framework for both payment and adjudication, besides dealing with the issue of payments before adjudication (Kennedy-Grant, 2007). In addition, the terms of the CCA 2002 only allow for statutory adjudication. Thus, the adjudicators purposely exist in New Zealand only under statutory mandate. As discussed earlier in Chapter 4, there are only three ANAs in the New Zealand; however, the Tribunal can be seen as the prominent nominating body (Green, 2013). To recap, as stated by Green (ibid) in Para 4.4.1.2 in Chapter 4, adjudicators registered with the Tribunal are invited from well-renowned judges, lawyers, construction professionals, and all professionals accordingly registered with their own professional bodies. Hence, it can be argued that even though there is no specific criterion that has been adapted by the Tribunal to select and enlist adjudicators, they will be regulated through CPD programmes. BDT provides a CPD programme for its adjudicators and all adjudicators are required to sustain appropriate levels of CPD. In a way, the adjudicators are still subject to a regulatory framework in order to maintain their existence as adjudicators with BDT. Even though it is not for statutory purposes, compliance with the requirements of the ANAs will enhance the chances of them being nominated.

In Singapore, under S 14 of the SOPA 2004, all adjudicators must be nominated by ANAs. Accordingly, R11 of the Building and Construction Industry Security of Payment Regulations 2005 prescribes certain eligibility criteria for a person to be registered with the ANA. Thus, Singapore has created a double regulatory pathway for adjudicators. Within the construction profession, only architects and engineers are regulated statutorily. As for quantity surveyors, there is no mandatory requirement for them to be registered under professional bodies.

However, they can only practise as professional quantity surveyors in Singapore if they are registered with the SISV[301]. Accordingly, all the construction professionals in Singapore have to go through a double regulatory control framework in Singapore.

As for legal practitioners, as discussed in Chapter 4, the Singapore legal profession has fused meaning that both advocates and solicitors can appear in any court in the country. Accordingly, both sets of legal practitioners are obliged to go through a very authoritarian regulatory process. The regulatory framework for legal practitioners in Singapore has been discussed in Para 3 of Chapter 4. Apart from being registered, they are also required to obtain practising certificates to practise legally in Singapore. As portrayed in Figure 3.2 and Table 3.1 in Chapter 3, being licenced is argued to be the highest degree of control-entry process for an occupation or a profession. In addition to this, since statutory registration as an adjudicator also applies for construction professionals or legal practitioners; double regulatory control does exist in the Singapore atmosphere. Since Malaysia has followed the path of Singapore's adjudication regime, a double regulatory control framework for Malaysia has become a reality on a statutory footing after the enactment of the CIPA 2012. Even though the prescribed rules are not as stringent as that articulated SOPA 2004 and SOPA-R 2004, the restriction of entry on a person to be qualified as an adjudicator has been set by the adjudication authorities.

4. Consideration of Relevant Public in Adjudication Regimes

Before any regulatory framework shall be applied to adjudicators, it can be argued that the use of the concept of the public interest as justification will be a challenge. In general, the

[301] SISV has a reciprocity agreement with Australian Institute of Quantity Surveyors, American Petroleum Institute, Hong Kong Institute of Surveyors, New Zealand Institute of Quantity Surveyors and New Zealand Planning Institute which allows mutual recognition of corporate members practice in the respective countries.

whole public must be considered in respect of a matter, which is asserted to be of public interest. However, practically, there will be a large number of people whose welfare will not directly be affected by the regulatory framework of adjudicators. Since the public interest concept has been argued to be very ambiguous, as depicted in Para 1.4.2 in Chapter 3 of this thesis, the rationale of including the notion under the regulatory framework for adjudicators requires a lot of consideration. However, it seems that in the case of regulatory frameworks for adjudicators, consideration of the public has always been the construction industry community that has been discussed and highlighted in the report provided by Latham and Egan.

In essence, the construction industry has failed to provide security of payment to its players. Thus, government intervention in the form of legislative intervention has been invoked to correct the failure. Nevertheless, in the UK, competition and market demand play a vital role in conjuring the needs for a regulatory framework for adjudicators. On the other hand, the requirement to regulate the adjudicators with a minimal sanction by the government has always been one of the objectives by those who had promoted the need for the adjudication regimes in New Zealand, Singapore, and Malaysia. For example, as noted in Chapter 4, the CCA 2002 and CCA-R 2003, the New Zealand Government maximized the control on the adjudicators' market by strategically including the need for nominating authorities to pursue consent from the government before being allowed to publicly nominate the adjudicators. The same measure has been applied by Singapore and Malaysia, as indicated and discussed in the Introduction and Chapter 3 of this thesis.

Besides, it can be noted that acting in the public interest is not a general requirement for the PSRBs. However, some are required to do so and others choose to do so, for example, a sense

of duty, or as a means of enhancing their reputation and influence (Institute of Chartered Accountants in England and Wales, 2012). As a result, the phrase 'in the public interest' is used by governments, politicians, regulators, lobby groups, professional bodies, journalists, activists, businesses in the public eye, academics, and others to justify a wide range of policy proposals and actions that affect more than a small circle of people. In view of that, the relevant public interests that need to be protected in the adjudication regime will therefore only be a sub-set of the whole public. This includes those whose welfare will be advantaged or disadvantaged after the enactment of the adjudication act, although this is not always clear-cut. Therefore, it can be suggested that in rectifying the market failures in the construction industry, the adjudication regimes are really intended to be targeted for the benefit of the construction industry community. Explicitly, it can also be suggested that the object of interest will always be the disputing parties in the construction industry. However, it must be distinguished that interests for one particular entity can coincide with those of others. Inevitably, some will have a public interest perspective that will be put into account. Nonetheless, the regulatory intervention through the introduction of a regulatory framework for adjudicators either with government sanction or not, can be advocated as the corrective measure to prevent further damage to the market failure in the construction industry.

5. Public Interest and Adjudicators

As discussed previously, regulation primarily exists to correct market failure. By extension, market failure needs to be corrected to protect the public interest. It also has been argued that the public demands regulation to protect their interests in terms of receiving services equal to the monetary value of payments made to professionals. Even though the theory of public interest has been claimed to be non-existent, the concept is firmly recognized in the

enactment of the adjudication regimes. Along with the presence of other professions, such as construction professionals and legal practitioners, adjudicators serve as tools to ensure that the public interest theory will be sustained for the benefit of the industry and the country as a whole.

Moreover, it has been debated in Para 1.4.2 in Chapter 3 of this thesis that there have been violent attacks on the theory of public interest that has led to the process of deregulation. However, many scholars have suggested the best practice for regulations to satisfy the need of the public interest. Sparrow (2000) and Better Regulation Executive (2010) recommended a simplified regulatory regime that attempts to enhance the public interest need by motivating the professions and the parties involved in each regulatory framework to take greater responsibility for their actions. This approach, thus, attempts to encourage the public to have a greater degree of trust in the profession. Besides, it can be argued that to become equal with the public interest theory, a regulatory framework for adjudicators must be designed to be simple in order to promote competition amongst adjudicators. This will be vital for adjudicators as it will stimulate their level of service to gain trust from the public. As a result, this has been encapsulated in all adjudication regimes analysed since the power on how to conduct the proceedings of the adjudication has been specified to the adjudicator. Accordingly, adjudicators will have a chance to project their capabilities and make a positive impact on the public as the consumer to their services. Accordingly, for an example, in an open market demand, such as that in the UK, the public as the consumers will acknowledge which adjudicators have better insight on the proceedings in terms of combining their existing experience, skills, and knowledge. Therefore, the credibility of an adjudicator will be highlighted and it may create demand for her/his services in the adjudication market.

Nonetheless, better service brings with it a higher commitment from adjudicators and may lead to the increasing of the fees for their services. This is a risk that has been argued will elude the theory of public interest, as advocated by Coase (1960), Hantke-Domas (2003), and Baffi (2013). However, with an integral belief in public interest firmly in mind, the governments in New Zealand, Singapore, and Malaysia have designated that there will be authorized groups in the form of nominating authorities that will serve as the regulators for adjudicators. In general, powers have also been given to the nominating authorities to prescribe the fees schedule for adjudicators. However, in order to ensure that the fees recommended will not burden the consumer and to sustain the public interest theory, the government via the adjudication regime has also prescribed for the nominating authorities to inquire for the consent and approval from the government concerning the schedule fees. Therefore, it can be noted that the government, at arm's length, has captured the need for the public interest to be satisfied in the adjudication process. Furthermore, even though the authority to regulate adjudicators has been given to the regulators, the government still has an involvement in terms of approving a suitable regulatory system for adjudicators for the benefit of public interest. In conclusion, it can be argued that within the regulatory framework, the notion of public interest is intended to be kept alive for the benefit and the success of the adjudication regime in the construction industry.

6. Public Interest and Natural Justice in Adjudication

Even though there are no explicit terms for adjudicators to adhere to in respect of the need to protect the public, they are bound to observe the need to be independent, impartial, and comply with the rules of natural justice. It has been argued that the rule of natural justice should be a fundamental principle of every fair legal system to protect the public interest.

Therefore, it was established in general, within the adjudication regimes in the UK, New Zealand, Singapore, and Malaysia, natural justice can be used as a basis to set aside an adjudication decision[302]. In short, adjudicators must adhere to the notion of the right to be heard of the disputing parties and to decide adjudications proceeding on its own term that will be supported by its individual facts and figures.

Hence, in adjudication, the right of parties to be heard is vital. With this right, come a right to be given notice and a right to receive any evidence against her/him. Accordingly, it can be noted that the adjudication regimes have appended the essentials of the rules of natural justice[303] and accordingly, adjudicators must adhere to these requirements. In addition, the statutory requirements of the adjudication procedure[304] have been outlined explicitly in each regime. There are requirements on the rule of the natural justice that can be used by the adjudicators as guidelines to make their decisions in the adjudication process. In addition, there are essential guidelines published by the nominating authorities to ensure that the adjudicators are fully aware of the principles of natural justice for the benefit of the public interest theory.

Moreover, it had been well-established in the UK, New Zealand, Singapore, and Malaysia that adjudicators' decisions are binding at least on an interim basis until finally determined by arbitration or litigation. In the absence of any valid ground of challenge, which is very limited, adjudicators' decisions cannot be challenged. The most successful grounds used in challenging decisions, thus far, have been related to on jurisdictional issues and breach of

[302] See S 41(c) of the CCA 2002 and S 15(b) of the CIPA 2012. See also Balfour Beatty Construction Ltd v London Borough of Lambeth, Costain Ltd v. Strathclyde Builders Ltd, Discain Project Services Ltd v Opecprime Development Ltd and RSL (South West) Ltd v Stansell Ltd.
[303] See S 25 and S 37 of the CIPA 2012; S 42 of the CCA 2002
[304] See Part 1 of Schedule in The Scheme; Part 3 of CCA 2002; Part IV of the SOPA 2004; Part II of the CIPA 2012

natural justice[305]. Lord Chadwick at Para 86 in *Carillion* emphasized this fact when he stated that 'the need to have the 'right' answer has been subordinated to the need to have an answer quickly' as adjudication has been envisioned by the government as a quick and temporarily binding decision. Too many challenges could lead to a waste of time and expenses, and thus, scuppering the main aim of the new payment regimes. Accordingly, it can be argued that the court approach that has been justified as being in the public interest as the real reason behind the enactment of the adjudication regimes is to improve the efficiency of the construction industry. However, this notion was put to test in *Whyte & Mackay Ltd v Blyth &Blyth Consulting Engineers Ltd*[306] when the adjudicator's decision was challenged on human rights grounds. Moreover, it has been noted that Protocol 1 Art.1 of the European Court of Human Rights (ECHR) states that 'Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest'. It was argued in this case, that adjudicator's award does not identify the parties' true legal rights and obligations. Accordingly, there is no other satisfactory public interest justification for the enforcement of the adjudicator's award. However, adjudication is a "rough and ready" process designed to provide a speedy and relatively cheap provisional interim award. Additionally, in adjudication, if the adjudicator wrongly answers the right question, it could not be asserted as a basis to resist the enforcement of an adjudicator's award. Furthermore, it was noted in *Carillion Construction Ltd v Devonport Royal Dockyard*[307], Mr Justice Jackson advocated at Para 80 that '[t]he adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish)'. On top of that, Lord Malcolm at Para 55 in *Whyte & Mackay* is in view that the process and the nature of the adjudication are not sufficient to be adopted to comply with the protocol under article 6 of

[305] See Carillion Construction Ltd v Davenport Royal Dockyard Ltd [2005] EWCA Civ 1358 (CA)
[306] [2013] CSOH 54.
[307] [2005] EWHC 778 (TCC)

ECHR. Thus, the court at Para 40 has come to an opinion that in adjudication, there is no general or public interest served. However, the Court of Session has ruled that in certain occurrences, the adjudicator's awards may be challenged. As a result, it can be argued that 'public interest' may play a significant role in adjudication and adjudicators must be fully aware of the current progress in the adjudication theme. Thus, this will bring us to discuss the existence of double regulatory framework for professionals that arguably will benefit the public interest in the adjudication process.

7. Public Interest and Adjudicators

It was noted from the discussion above that double regulatory existed due to different circumstances, and in a nutshell, help to support the notion of public interest. Accordingly, it will be appropriate to discuss specifically on the necessity to include the notion of public interest towards the movement of professionalism for adjudicators. Black (2001) and (Bartle & Vass, 2007) have reiterated that towards the effort to recognise new regulatory paradigms, it is important to understand that a regulation system involves the multiple interests of many stakeholders. Learning from the evolution of other professions' regulatory frameworks, as discussed in Para 3.6 in Chapter 4 of this thesis, the government has been recognised as an important player in this complex regulation system, serving various roles in the evolution of professions, arguably in the public interest. Accordingly, the movement to statutorily regulate adjudicators in Singapore, Malaysia, and recently in New Zealand, as discussed in Chapter 4, it requires the professions to convince government that only the profession itself has the ability, skills, training, and qualities to provide essential services as required by the payment regimes. In return, the adjudicators will accept obligations to provide their services and to govern their conduct to act within the underlying concept for public interest even though at

the same time, they are alleged to be pursuing their own interest. This is parallel with Friedson's (2001:122) opinion on the 'ideal-typical of professionalism', which is always dependent on the direct support of states to tolerate its positions against the public interest need.

7.1 Public interest and adjudicators' skills and knowledge

It has been advocated that regulatory frameworks have always restricted the market by allowing only those with qualifications, experience, and skills to offer their unique expertise to the public. A higher degree of skill and knowledge is vital for adjudicators as this may militate against her/him from making or producing improper, conflicting, ambiguous or confusing reasoning while making adjudication decisions. Arguably, it can be identified that the special market interest like adjudication can only be served by those who have gained the profession's and the public's trust in other related and recognised fields in the construction industry. As concluded in Chapter 1 of this thesis, adjudication is a judicial process designed to protect the consumers of the service from payments' disputes. Statutory adjudication provides adjudicators with absolute discretion on how to conduct the process. Therefore, skills and knowledge will help the adjudicators to decide according to the facts and figures extracted from individual disputes brought for decision to the adjudicators and will create confidence on the adjudicator's ability as an important tool to resolve disputes via adjudication process for the consumers.

As illustrated in Chapter 2 of this thesis, in the construction industry, knowledge has become more specialized and technologies more complex, resulting in greater power for established professions, as well as the growth of new professions like adjudicators. In addition,

adjudication is adversarial in nature, thus, adjudicators need to have skills that will deliver their decisions to the understanding and satisfaction of the disputing parties. Even though adjudicators are not expected to demonstrate the same qualities as judges when delivering their decisions, the interest of the public as a whole must serve as the top priority as it will help to serve the objective of the payment regimes. For example, it can be argued that even though strong educational backgrounds and qualifications can be perfected by additional skills and knowledge, the public trust and interest, according to Macdonald (1995), are also measured as vital by outward appearance for professionals to be accepted by the consumers. Accordingly, it can be concluded that professions have been labelled professions with the existence of PSRBs that will act as a body that will function to control the quality, standards, and reputation of a professional.

7.2 Public interest and adjudicators' ethics and codes of conduct

It must be noted from the discussion throughout this thesis that a perfect market for credence goods requires the parties involved to make rational decisions; adopt rational conduct; control transaction costs; be one which information flows vividly for the consumer from the service provider; as well as freedom of decision-making and market entry. However, as discussed in Chapter 3, the markets do fail and therefore, interventions by government in the form of regulations have to exist to protect the public interest. Since the professions exist on the basis that they inspire public interest and trust in their services, a real or perceived lack of ethical, conduct and behaviour standards should be considered as the most serious of threats to professions. Hussin and Omran (2009: 251) professed that 'one of the professional's endeavours in avoiding or minimising the risks in his/her profession is to carefully perform the duty according to the professional standard'. In addition, there are the underlying

problems of asymmetrical information that have led to market failures of professionals' services, as discussed in Chapter 1, Chapter 3, and Chapter 4. It had been illustrated that the consumers of adjudicators' services are vulnerable since they lack expertise to judge whether the adjudicator that they have hired is doing a good job. Accordingly, Friedman (2006) advocated the clients and consumers of services products must have faith in professional ethics and competency of a professional above the selections provided by the market.

With the enactment of the HGCRA 1996, CCA 2002, SOPA 2004, and CIPA 2012, the adjudicators enjoy uniqueness and ubiquitous expertise in the construction industry. This means; the adjudicators will have the power to monopolise the market. Thus, recognising adjudicators as professionals will help the markets to provide trusted professionally-regulated adjudicators in improving the public trust, as well as to avoid the asymmetrical information problems in the professional market. However, professionals historically have come up against distrust because of their perceived self-interest, not to mention episodic scandals around breach of standards or worse, which can initiate the collapse of the professionals' market. Therefore, measures must be taken to avoid the uncertainty of the standard of services offered in the name of public interest. According to Slattery (2006: 1), codes of ethics for professionals reflect the 'moral values held by individuals in the group, shape the standards of behaviour the group holds and enforcement of codes of ethics or standards of behaviour, which in turn, mould the group values'. Meanwhile, Olatunji (2007:37) summarised that the opinions generated by experts and scholars on professional ethics as the need to 'justif[y] the acceptability of abstract standards of behaviour against practical tasks, not exclusively limited to technologies, transactions, activities, pursuits, and assessment of institutions, but by including more of practical conceptualization and public expectations in the interest of responsibilities, willingness to service the public, and astute competencies'. In

engaging adjudicators, especially in the UK and Malaysia, the disputing parties rely primarily on the information provided by the adjudicators themselves on the quality and the standards of the services provided. Accordingly, it will coincide with the notion of 'word of mouth' marketing styles, as advocated by Bingham (2013) earlier when the adjudication regimes started to establish itself as a special recognised method by the state to resolve disputes. Accordingly, 'word of mouth' reputation can be argued as the preliminary gatekeeping process recognised by the disputing parties in identifying or differentiating between good and bad adjudicators. Nonetheless, as the process of adjudication has become more complex in the UK, it is clear from ARC reports that the need for professional adjudicators to be nominated by the ANBs has increasingly become a chosen path for the disputing parties.

Furthermore, as discussed in Chapter 4, the CIArb, CIC, RICS, and TeCSA are prominent figures that have been actively chosen to provide professional adjudicators to the market. It has been illustrated that these bodies are well-established as PSRBs that are renowned for their own sets of code and professional ethical standards to guide the behaviour and conduct of their members. Some of the conduct-related regulatory processes rendered, for example, by CIArb, RICS, and TeCSA, can be considered robust, nonetheless, some are more in the process of 'reregulating'. Moreover, it was established that in the UK, the payment regimes do not put on a restriction on the numbers of nominating bodies for an adjudicator to be registered with. Accordingly, some ANBs have accepted registered members from other ANBs without any regulation procedure. Instead of leaving the regulatory framework for adjudicators unattended, in New Zealand and Singapore, adjudicators must be statutorily regulated by the nominating authorities in terms of entry and their conduct with the intention of sustaining their professionalism for the good of public interest. Hence, the process of regulating must be approved by the government or its appointed authorities. Therefore, it can

be advocated that the notion of public interest can be strongly preserved and used to govern the conduct and behaviour of the adjudicators. It can be established from the argument above that the shift towards ANB-sponsored adjudicators occurred due to the trust of the public in regulated professions. In addition, construction industry players have also put their trust in the proven capability of the PSRBs as nominating authorities. It can be argued that this belief is grounded on the understanding of the construction and legal community of the importance of having an explicit prescribed code of conduct to govern their professions. As Olatunji (2007:39) argued, as professionals, there is 'frequent temptation to provide trade secret in exchange for unscrupulous inducements, compromise to dispense professional service with very despicable low level of honesty, especially when faced with competency challenges traceable to negligence and stern denial of fault'. In addition, he also stated at page 39, that commonly there is 'the tendency to exaggerate services provided to deceive client' for more monetary value. Therefore, by recognising specific bodies to govern and control activities, there is a probability that the movement to transfer recognised established conduct and ethics policy by the PSRBs can reduce and control the tendency to exaggerate unnecessary services provided to deceive clients. Accordingly, in contrast with Kaye's (2006) argument that this movement provides only a small explicit policy transfer between professions, the findings presented in Para 3.6 of Chapter 4 and the argument made here in this thesis reflect otherwise.

7.3 Public interest, professions and PSRBs

Professions, as a group, help shape ways of thinking about problems that fall within their realm of technical expertise (Dingwall & Lewis 1983). In summary, it can be suggested that the public requires professionals to protect their interest by arbitrating in conflicts (Faulhaber,

2005); enforcing minimum standards for competition (Wise, 2003); or providing a minimum criterion for professionalism (The Accountancy Foundation Review Board, 2002), in addition to promoting openness to allow individuals to make appropriate decisions (Watts and Zimmerman, 1979). The public rely on the ethical integrity of professionals in a way unprecedented in other occupations because the services offered by professionals are characteristically different from goods that are sold by a manufacturer, merchant or retailer. As a profession, even though on the secondary level, adjudicators must go through the process of an entry regulatory framework that has been put into place to assure the public of the quality of the adjudicators. A professional provides intangible services, thus evoking the asymmetrical information problem, and the consumer of the services has to take them on trust. It is in the nature of some of these services that they are going to be unsuccessful. Typically, as discussed in Chapter 4 of this thesis, accreditation and registration have become the gatekeeping processes to differentiate between qualified and unqualified individuals to practise as adjudicators and at the same time, create trust for the purchasers. This indicates that the profession itself via its own set of regulatory frameworks and nominating authorities are working towards observing the public interest concept.

In the UK, it has been suggested by Craig (2007) that since governments from the early 1980s habitually treated professions as no different from trade unions or businesses, professionals were branded as self-interested bodies competing in the free market. The traditional view holds that were it not for the self-regulatory role of professional bodies, which forced them to set high standards of entry requirements, plus well-developed and recognisable codes of ethics and conduct, a profession would be no different than a trade

union[308]. However, it has been noted in the discussion on PSRBs in Para 1.7 of Chapter 3 that regulatory bodies have always been known to serve and act in the public interest. Accordingly, Copper et al. (1988) advocated that PSRBs have a twin function in assuring quality services to the public, as well as representing their members in the regulative bargain with the state. Nevertheless, it has been noted that regulatory bodies regulate the professional activity or individual professionals with powers mandated by the parliaments via legislation. On the other hand, professional bodies are more synonymous with the idea that they often protect and act in the interest of the profession itself. However, the public interest still maintains their position as the top priority in professional bodies' political consultation, even over members' interests when the two interests are in conflict (Chapman, 1952; Fargo and McAdoo, 2007; Bartlett et al. 2007). In fact, it was advocated that most professional bodies are equal with regulatory bodies in that they do not see a conflict at all between the public interest and professional members' interests because professionals must maintain the public trust in order to survive. Nonetheless, as illustrated in Chapter 3, the perceived self-interest of the professions has brought about significant changes in regulatory structures as the traditional framework of self-regulation is shifting to one of the 'hybrid regulatory frameworks'.

7.4 Public interest and self-regulatory framework for adjudicators

Under the theoretical understanding of regulation, the most common motive behind any regulatory framework is for the protection of the public. In the world of professionals, the self-regulatory framework is required to protect competitive monopoly markets in the face of threats of invasion by others. From this angle, for adjudicators, the self-regulatory privilege

[308] According to the gov.uk (2014) a trade union is an organization with members who are usually workers or employees and it looks after their self-interests.

provided by the adjudication regime structures can be deemed to be a defensive measure that will protect the incomes and status of adjudicators by restricting supply to the market. Thus, even though on a very slim foundation, the self-regulatory entry framework adapted by nominating authorities that has been created whether by the market trend or with government interventions can be argued to contradict the public interest notion. It was reflected in Chapter 3 that currently, most ANBs, ANAs, and adjudication authorities have made an effort to prescribe qualifications and experience-based criteria for a person to become an adjudicator. Accordingly, it can be suggested that the self-regulatory restrictive rules for adjudicators are not inspired by self-interest, but rather claimed as for the benefit of the public interest.

As for the ANBs in the UK, as discussed in Chapter 4, the four most prominent ANBs in the UK – namely, CIArb, CIC, RICS, and TeCSA – have adopted different kinds of accreditation processes to register their adjudicators. In New Zealand, even though the initial review of the CCA 2002 proposed to create regulations to prescribe appropriate qualifications, expertise, and experience requirements for adjudicators, it did not materialize. Nonetheless, it must be noted that since the adjudicators in the UK, New Zealand, and Malaysia can be nominated by parties in disputes, the adjudicator services must be regulated by a separate contract as the adjudicators are not a party to the construction contract. This contract fundamentally ensures that the adjudicators comply with the requirements envisioned by the adjudication regime since it has been established that a contract is needed to govern the rights and the obligations of parties in contract.

Although it can be advocated that no mechanism for self-regulatory framework is perfect, according to Tuohy (1982:126), self-regulation for adjudicators can be viewed as problematic

if the nominating authorities are ‘not reviewed and authorized in a forum [that] does provide for political judgements and for accountability, to a wide variety of interest through political channels’. Accordingly, in the UK, it can be alleged that such negative perceptions of self-regulatory frameworks will emerge in circumstances in which nominating authorities have been granted the self-regulatory authority without procedural or process constraints against them as regulators being measured and assessed by the government. However, after more than a decade, even though there have been some arising questions over the quality and the competency of adjudicators, as discussed in Chapter 3, the demands from the industry for adjudicators to be statutorily regulated are limited. The same cannot be anticipated of the nominating authorities in New Zealand, Singapore, and Malaysia since there are prescribed statutory requirements that advocate the need for nominating authorities to assume the consent from government before the self-regulatory framework can be adapted for adjudicators. Thus, lessons must be learned from the self-regulatory framework for construction professionals and legal practitioners, as discussed in Para 3.6 of Chapter 4, which concluded that, in general, professions necessitate ensuring that their actions can withstand scrutiny by the markets and the government.

However, it must be noted that there are limits to the intervention by the government. These vary from country to country and it is parallel with the idea of ‘liberty principle’ advocated by Mill (1865:6) when he stated that ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others’. The perceived self-interest of the professions has brought about significant changes in regulatory structures that would strike back against professional independence. Nonetheless, the traditional concept of self-regulation that is vital to professional identity is changing along with the deregulation and reform process in addition to the evolution of the

self-regulatory framework, which can be argued to be more flexible to adapt with the current changes and perceptions of the public interest notion.

7.5 Striking the right balance between professional and public interest in adjudicators' regulatory framework

Professional responsibilities to the public and self-interest as professionals often coincide and reinforce one another, but both do come into conflict with one another (Moore & Loewenstein, 2004). Spada Limited (2009: i) in their research on British Professions, suggested that 'most professions have tended to think narrowly of their own discipline and their own individual roles in public life' that arguably will lead to the collapse of the theory on public interest. In addition, the 'self-interest' concept on professions has brought in changes in the traditional system of self-regulation. As discussed in Para 1.4 of Chapter 3 in this thesis, regulatory frameworks are moving towards reforms that include state intervention by entering into a regulatory bargain with the state. The changing process in the traditional self-regulatory framework has been widely branded as the 'regulated self-regulation' by Kaye (2006), 'meta-regulation' by Scott (2004), and 'co-regulation' by Bartle and Vass (2005); this regulation process was earlier depicted by Black (2002) as a 'decentred understanding of regulation'. Furthermore, the reforms in regulatory frameworks for construction professionals and the legal practitioners throughout the years, as depicted in Para 3.3 of Chapter 4 in this thesis, suggest that there are challenges in balancing self-interest against the broader acknowledgement of the consumers in public trust. Accordingly, scholars and experts[309] have

[309] It was illustrated in Rhode (2003) for the legal profession and Chalkley (1990); Pollington (1999); Nkado (2000) and Poon (2004) for construction professionals. In addition, in the UK, the enactment of Legal Service Act in 2007 provides important regulatory reforms and signals for better understanding of the role of public interest in shaping regulatory frameworks for legal practitioners in the UK.

advocated for a movement in the profession to seek further efforts to enhance public interest in the regulatory processes.

Balancing the profession's need and the public interest is hard since a number of arising issues is required to be addressed. The issues include, but are not limited to: -

7.5.1 Self-interest

Creating barriers in the form of an entry regulatory framework for entering an occupation/profession means that there are fewer people competing for the available jobs in that profession. Self-interest can be argued to propel this idea since it was noted from the illustrated entry regulatory framework of the learned professions in Chapter 3 and Chapter 4 of this thesis that fewer professionals practising in a market increases the benefits for the profession itself. Even with the privilege[310] offered by the public in trade for public interest to be upheld, in reality, being professional has generally led to a combination of achieving higher status, as well as greater wealth and power, which is equal to the idea of promoting self-interest. For example, even though it has been acknowledged that public interest should be the top priority in the regulatory framework for adjudicators, the recent movement[311] made by the adjudication authorities in Malaysia portrayed that the public interest theory can be deterred by prioritizing self-interest in terms of the wealth received as a regulated profession. In addition, as illustrated in the entry regulatory framework in the UK, adjudicators are not restricted from being registered with more than one ANB. This situation arguably promotes

[310] These privileges include the right to carry out certain work forbidden to others and the right to engage in self-regulation either with or without state sanction.

[311] In suggesting ideal fees for adjudicators in Malaysia, the KLRCA proposal has been rejected by the Minister in-charge due to the fact that it will burden the disputing parties. However, the KLRCA does not agreed with the changes suggested by the Minister concerning the fees structure and published their own set of fees structure that, in general, will be seen as promoting self-interest more than public interest notion.

self-interest rather than public interest since being registered with more than one ANB will not offer more choices to the disputing parties. It will only enhance the chances of the adjudicator being nominated by the ANBs to resolve disputes.

7.5.2 Avoiding asymmetrical information problems

As discussed earlier, problems of asymmetrical information in professional services have triggered market failures in respect of credence goods. Professional services cannot be provided in the same way as any other goods. Consumers are exposed to being potentially misinformed on the quality of the adjudicators because they lack the expertise to judge if she/he has done a good job. Accordingly, for Friedman & Mason (2006), consumers must rely on professional ethics and competency above and beyond the pure choice of market options. Therefore, the establishment of the nominating authorities has been perceived by the state as a direct measure to reduce cases of misinformation to the public on the quality of the adjudicators. However, it must be noted that the nomination of the adjudicators is not controlled by any established system by the nominating authorities that have been approved and recognised by the state.

From the discussion depicted in Para 3 of Chapter 4 in this thesis, adjudicators' basic qualifications, either as construction professionals or legal practitioners, have often been used to decide on the kinds of disputes that she/he should adjudicate. Accordingly, the disputing parties are required to provide details on the disputes that they need to be adjudicated. Nevertheless, it must be noted that registered adjudicators have been assessed on their skills, knowledge, and competency. In addition, the disputing parties have the power to reject nominations made by the nominating authorities. However, since the process of nominating

adjudicators has remained vague, it can be argued that the public would have not been provided with sufficient or sufficiently reliable information on the capability of the adjudicators. Thus, the nominating authorities must hold firmly the trust that has been given to them by the state and the public to act as part of the system to rectify market deficiencies by providing clearer information to the disputing parties in terms of the nomination process.

7.6 Conclusion

Therefore, it can be concluded from the argument above that regulatory frameworks for adjudicators will help to uphold the public interest notion. The balance between regulation and representation is crucial to professional identity. Accordingly, adjudicators, as a pure new profession created for the interest of the public, must be regulated. Besides, there is evidence suggesting that regulatory frameworks for adjudicators in the UK has changed throughout the first decade of the adjudication regime and self-regulation is now being used to maintain the notion of public interest. However, Trebilcock (1976) advocated earlier that total reliance on self-regulation frequently attracts suspicions of foul play in terms of monopoly, protectionism, and administered markets. In addition, almost three decades later, Collins (2006) argued that since the PSRBs themselves have set prescriptive rules about standards of entry and behaviour, and in continuing education for the professionals, there are risks that professional interests will be set above the public interest. He continued, proposing that there is a tendency to disguise an opportunity to create monopoly rents for their members by setting disproportionately stringent *ex ante* rules, claiming that such rules are in the public interest. Thus, the fact that adjudicators in New Zealand, Singapore, and Malaysia are now regulated with minimum state sanctions has brought a higher degree of justification on public interest requirements under the adjudication regime.

8. Impact of Double Regulatory Control Framework Towards the Notion of Public Interest

The defining feature of professional services is that they require practitioners to possess a high level of technical knowledge. Thus, professionals are subject to qualitative regulatory control frameworks. These can take the form of minimum periods of education, professional examinations, and minimum periods of professional experience. In many cases, regulatory control frameworks are coupled with protection of the service provided to the market. Therefore, regulatory control frameworks are combined with the reserved rights of government, markets, and consumers to ensure that only practitioners with appropriate qualifications and skills can carry out certain tasks. According to the Office of Fair Trading (2009), regulation plays an important role to help markets function effectively and at the same time, ensuring that they support wider policy goals. It has been argued that 'licensing of professionals, based on laws and regulations strictly limiting the supply of services to authorised individuals, is a more stringent form of self-regulation than certification of members of a professional body, where the latter function is voluntary, and does not hinder access of non-certified individuals to the market' (Paterson et al., 2003:15). However, it was observed in Chapter 4 that some voluntary self-regulations do prohibit the usage of certain protected professional titles if the practitioner is not a member of the relevant professional body. Thus, this limiting of the market excludes entrants who are not professionally assessed to practise since public interest is the main objective of any regulation prescribed.

It was established that adjudicators must go through a double regulatory control framework since adjudication is not typically a primary profession. However, with the enactment of the

adjudication regime, it has become a statutory profession that needs governing professionally. Generally, professionals' regulations, as discussed in Para 1.5 of Chapter 3, restrict competition between professionals. Professional regulation cannot, however, be a guarantee against the failure of professional services by individual members, even if its principal purpose is to protect consumers (UK Inter Professional Group, 2002). Furthermore, in the construction fields, in addition to the existing regulatory entry framework for professionals, complementary systems of regulation are being developed by governments to improve the quality of product in the industry[312]. Standards, regulations, and legislation are part and parcel of the modern construction sector. Thus, whether it is viewed in a positive or negative light, the double regulatory entry framework might have some impact on construction professionals, legal practitioners, and adjudicators.

8.1 Enhancing knowledge and skills of adjudicators for public interest

The statutory framework for the adjudication regime is intended to create clear understanding in order to deal with disputes under construction contracts, and thus, remove uncertainty in the adjudication process. With its potential as a key contributor to the economy of countries like Malaysia, Singapore, and New Zealand, the construction industry needs every bit of help it can get, in terms of a good-quality regulatory framework. It was noted that the regulatory process is grounded on the act of prevention (UKIPG, 2002). Under a regulatory control framework, it prevents unqualified people from entering the market. Through the regulatory conduct framework, disciplinary actions are taken to prevent incompetent professionals from practising in the market. Both have an influence in safeguarding the public interest. Accordingly, good regulation will provide the industry with some security from wasting

[312] The Building Control Regime in Singapore

unnecessary expenses by hiring adjudicators who are not qualified or competent to resolve the disputes. In some cases, regulation will be the most effective way of achieving policy outcomes. Hence, striking the right balance in the regulatory system as a mechanism to provide the adjudicators with relevant knowledge and skill to reach the envisioned objectives of the adjudication regime is vital to fulfil the need for public interest and protections.

Although most adjudicators are well-trained technically in their primary fields (Redmond, 2001)[313] as construction professionals or legal practitioners, the knowledge and skill to become adjudicators need to be enhanced and supported through training programmes. It can be argued that the knowledge and skills acquired by practising in their prime profession will definitely contribute to the knowledge and skills required from an adjudicator. Accordingly, ANBs, ANAs, and adjudicating authority provide and equip the adjudication candidate with basic knowledge and understanding in the adjudication process via a training course before they are admitted as adjudicators. Usually, the content of the training course includes, but is not limited to the law applied in the respective country, the legal basis of adjudication, the use of adjudication, how adjudication is applied to resolve disputes in practice, and how to write enforceable decisions. The targeted outcomes from the training are the ability of the future adjudicators to deal with the statutory requirements of the adjudication regime and discharge their role as adjudicator, in addition to the ability to produce the enforceable decision or determination.

It was also observed in Chapter 4 that some of the ANBs, ANAs, and adjudication authorities are putting their own regulatory frameworks for adjudicators to be evaluated regularly on the decision made as adjudicators before being allowed to renew their registration with the

[313] See also Whyte and Mackay v Blyth & Blyth Consulting Engineers [2013] CSOH 54 at Para 38

nominating authorities. In brief, as discussed in Para 5.1.1 Chapter 4, some adjudication authorities have made it mandatory for an applicant to possess prescribed qualifications and as noted in Para 6.1.2 Chapter 4, some adjudicators are invited based on the experience as where other adjudication authorities leave selection to market demand. Most have CPD requirements as one of the prerequisite rules to maintain an adjudicator's position on a panel. The CPD requirement is clearly concerned with the purpose of developing and maintaining a professional's competence. Other nominating bodies include a 'professional peer-reviewed process[314]' that basically seeks to control the quality of the adjudicator's offer in the market. Furthermore, as discussed in Chapter 3, Para 1.2, this process will arguably help to control if not eliminate problems of asymmetry of information that may crash the market. All regulations made pertaining to the competency and enhancement of adjudicators are promulgated with the objective of maintaining the quality of adjudicators in the market and at the same time, protect the adjudication users. Therefore, it can be speculated that with both regulatory frameworks concurrently applied to professionals and adjudicators, the level of skill, knowledge, and competency attained will be beneficial to the adjudication process.

8.2 Better-quality services for the public interest

Campaigners of government licensing and other occupational regulation advocated that unless the government has a hand in guaranteeing quality, consumers will receive substandard and overpriced services. Thus, the market will fail and government interventions are required to control the situation. Accordingly, for the government, with the intention to avoid 'asymmetry of information', the consumer's protection and satisfaction are the main objectives of any

[314] A professional peer review focuses on the performance of professionals, with a view to maintain standards of quality, improve performance, and provide credibility to gain the public trust of the credence goods provided by the professionals to the market.

regulation imposed on professionals. In *SEF Construction Pte Ltd v Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [42], Prakash J concluded 'that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to the process of the adjudication'. Thus, it was noted that the quality of the adjudication will be very much dependent on the adjudicator, and the process that culminates in the appointment of an adjudicator must be done accordingly albeit it may not be anywhere near as exacting as that, which is conducive to a judicial appointment. Frequently, PSRBs support government regulation on their members in order to protect them from false and unprincipled competitors, as well as to maintain the reputation of their profession. PSRBs are keen on protecting their profession by keeping their registered members up to date on relevant developments in the industry. On top of the rigorous regulatory control framework, disciplinary regulatory frameworks are in place for all the PSRBs analysed in Chapter 4. Arguably, abiding by codes of conduct will help to discipline professionals. CPD requirements for renewing registration or licences keep the profession abreast with the latest vicissitudes in the construction or legal fields.

For ANBs in the UK, competition between nominating bodies is fierce. Therefore, in order to compete in the open market since no statutory regulations are imposed by HGCRA 1998, the ANBs have taken serious precautions before admitting any adjudicator on their panel for nomination purposes. However, it was observed in Chapter 4 that except for CIArb, RICS and TecSA in the UK and SMC in Singapore, some ANBs, ANAs or adjudication authorities merely re-register the adjudicators accredited by others. In addition to a registration fee, a 1 to 3-day training course in adjudication will often be thought to be adequate to prepare a person with some basic knowledge of the adjudication profession. Therefore, Lovegrove (2012)

argued that it is not terribly difficult to become an adjudicator. Nevertheless, since most of the ANBs, ANAs, and adjudication authorities require the candidate to have a professional background in construction or legal fields, the likelihood of poor quality adjudicators is deemed to be minimised. This is so because of the robust regulation[315] and stringent regulatory control framework of construction professionals and legal professionals. Thus, with both regulations working concurrently, the result is likely to be positive for the adjudication process since both systems complement each other. Accordingly, the quality of the adjudication process is likely to be better as a result.

8.3 Improving the quality of decisions to benefit the public interest

Adjudication intended by the Scheme is a quasi-judicial process (Atkinson, 2001). It deals with the parties' rights and duties under the construction contract. Accordingly, the adjudicator's duty is to ascertain facts and law. In making their decision, adjudicators make a statement of those rights and duties. Lord Reid in *Ballast Plc v The Burrell Co (Construction Management) Ltd*[316] observed at Para 30 that it 'cannot be appropriate for the courts to undertake an investigation into the merits of the dispute in order to ascertain whether the adjudicator has reached the same decision as a court would have done'. Thus, it is noted that the decisions of adjudication are not to be expected to reach the same quality of the court's decisions at least in terms of what can be viewed as a pure interpretation of the law. However, there must be basic and essential conditions to be satisfied for the existence of an enforceable decision. Under the Scheme, adjudicators are not required to give reasons unless the parties have so requested. However, in practice, reasons are essential for disputing parties.

[315] Robust regulation can be defined as a regulating regime whose basic design principles stay the same over time, or are restored after a challenge, but whose detailed operationalization adapts to changing demands and situations (Hale, 2013).
[316] [2001] (CSOH) BLR529

Furthermore, Coulson J argued that one of the rules to fashion an enforceable decision is that it must 'provide clear result' to be understood by the disputing parties[317].

As observed in the qualifying criteria to be registered as adjudicators, RICS, CIArb, and TeCSa set a mandatory syllabus under their training regime to ensure that the adjudicators registered with them have the essential skills and knowledge to write a valid and enforceable decision. The content of the syllabus includes but is not limited to the nature and the content of an adjudicator's decision. It was anticipated that after the training, the adjudicators would be able to correctly identify the scope of the adjudicator's role, the timing of the decision, allocating costs, liability for the adjudicator's fees, awarding interest, and correcting errors under the slip rule. By being regulated upon registration and adhering to the code of conduct of the nominating bodies, adjudicators should be aware of the importance of producing enforceable decisions since producing unenforceable decisions means that they will breach statutory and contractual obligations. They will be subject to losing their fee[318] or complaints being made against them to their respective ANB. Complaints will be investigated and if upheld, it may result in appropriate disciplinary or in the most extreme case, the adjudicator being removed from the list of registered panels with the nominating authorities.

8.4 Control service fee of adjudicators for the public interest

Excessive regulatory control frameworks may reduce the supply of service providers, with negative consequences for competition and quality of service. The adjudication process is

[317] Further debate on the law of reasoning for adjudicators' decisions can be abstracted from *Diamond v PJW Enterprises Ltd* 2004 SC430; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 (CA) [2006]BLR15; *CSC Braehead Leisure Ltd & Anr v Laing O'Rourke Scotland Ltd* [2008] CSOH 119; *Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd* [2009] EWHC 408 (TCC); *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC) and *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC).

[318] *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA Civ 1371

fundamentally concerned with providing a quick and cheap dispute resolution process to improve cash flow in construction projects. However, with a very restrictive service provider, the cost of getting the best adjudicators may become burdensome to the parties in disputes. To get the best adjudicator, the disputing parties must be prepared to pay for the service provided by the adjudicator. According to ARC (2012), an hourly charge-out rate for adjudicators increased more than 20% in 2012 compared to 2011. Some adjudicators' charges are now more than £200 per hour with the average between £175 and £200 per hour. There is also a consistent trend towards longer adjudications, in which some adjudicators have taken more than 42 days to resolve the disputes even though 69% of the procedures adopted to resolve disputes are employed through a 'documents only' procedure (ARC, 2012). In a sense, such trends appear to defeat the purpose and the objectives of the adjudication process. However, given the factors provided by *Fenice Investments INC (Fenice) v Jerram Falkus Construction Limited (JFC)*[319]; the speed of the process, experience, and seniority of adjudicators do affect the cost of adjudicators. Consequently, being recognised or regulated as experts in the construction industry or legal field does contribute to the cost of adjudication. However, it can be noted that the hourly rate is not determined in a vacuum; there must be some bases for the rate imposed as an adjudicator. Accordingly, the rate imposed by professionals in their prime profession can be used as a basis to determine the hourly charge-out rate for adjudicators.

As for the limitation on the adjudicator's fee, the HGCR is silent on the matter. Following the UK, CCA 2002 for New Zealand deals with adjudicators' fees in S 57 of the said act. However, there is no capping for the hourly-rates. As for Singapore, the rates have been statutorily provided via SOPA-R 2005 and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. The fee for adjudicator in Singapore must not

[319] [2011] EWHC 1678 (TCC)

exceed $300 per hour subject to the claimed amount in the disputes. In Malaysia, CIPA-R 2014 had set a schedule of fees that resembles the schedule of fees recognized by the statutory regulated construction professionals in Malaysia. Nevertheless, Para 25 of the Scheme provides that the adjudicator can determine his own fees. *Fenice* also provided the authority on the reasonableness of an adjudicator's fees. In Fenice, the adjudicator proposed for the parties to accept his fee of £350 per hour, plus expenses and VAT. However, after losing the adjudication, JFC refused to pay the adjudicator's fee on the basis that it was excessive. HH Judge Waksman QC, in his judgment, dealt with the reasonableness level of the fees charged by adjudicators. The said judge considered many factors that contributed to the reasonableness of the fee and for him, the burden to prove reasonableness must rest on the adjudicator. He then acknowledged that seniority and experience of the adjudicator can contribute as a factor for reasonability of the rate. The judge also recognized the fact that the qualification of an adjudicator is a factor that may determine the hourly charge of an adjudicator. The case offered a positive result for adjudicators in terms of the level of their fees for services rendered and recognised the demands of the role. Therefore, the double regulatory control framework can contribute to the factor of reasonableness in terms of fixing the fee for an adjudicator, since both frameworks run concurrently to provide qualification, experience, and seniority for adjudicators.

Earlier in an ARC report as per February 2000 (ARC, 2000), it was reported that the ANBs charged a flat rate fee ranging from £59 to £264 with the most common fee charged being £176, including VAT. However, nowadays, it was observed that in the UK, the rate has increased. As for RICS, the charges for administration cost to named adjudicators are £382, TeCSA charges £250, CIC charges £300, and CIArb charges £360. In Singapore, the SMC charge is $2400 (approximately £1150) if the claimed amount in the dispute is lower than

$24,000 in Singapore Dollars (or approximately £11,510) or if the amount disputed is more than $24,000, 10% of the claimed amount or $33,600 (approximately £16,126), whichever is lower. In New Zealand, the AMINZ administration fee is $500 (approximately £250). However, for BDT, charges are calculated based on the type of claims and the amount of claims disputed between parties. Meanwhile, the BDT overall charges range from $1,500 to $7,500 (approximately from £758 to £3,793) for fully administered fixed fee adjudication service for Low Value Adjudication Claims (LVC's)[320] of limited complexity. As for General Adjudication Claims[321] with BDT, the Security for Adjudicator's Fees and Expenses range from $6,000 to $20,000 (or approximately from £3034 to £10,116), which must be paid by the claimant or jointly paid by the disputing parties. In CIPA-R 2014, the KLRCA has imposed administrative fees, which include a registration fee of RM250 (approximately £45) to register the adjudication matter, an adjudicator appointment fee of RM400 (approximately £72), and an administrative support fee of 5% from the adjudicator's fee, as prescribed in the Schedule II of the regulations.

9. Conclusion

It was observed above that double regulatory control and discipline frameworks are not a new phenomenon either in the construction industry or legal fields. Since professionals furnish to the public the credence good, in which the profession has superiority in terms of information pertaining to the service, the regulatory framework, superintended by the profession itself, is needed to protect the public. Additionally, it was established in this chapter that there are inherent factors that lead to a double regulatory control framework towards construction professionals. It can also be argued that all the factors accordingly bring positive impacts

[320] Amount of claim disputed ranges from below $4,999.99 to $49,999.99.
[321] Amount of claim disputed ranges from $49,999.99 to more than $1,000,000.00.

towards the quality of services provided by the professionals to the public. Legislative requirements built into the construction industry are shaping the framework of regulations for professionals. It was also noted that changing world policies in terms of liberalisation and globalization of the service market have had a great impact on the construction and legal fields. Apart from being regulated in their home country, in terms of expanding their expertise, professionals are also subject to another set of regulatory frameworks internationally if they want to be competitive in their own fields globally. It is sometimes feared that competition in vital professional services may suffocate or constrict industries since only professionals who are willing to spend more will be available to market their expertise. This possibly creates high market concentration, resulting in the effects predicted by the private interest theories of regulation, particularly in those aspects that are termed by economists as being 'rent-seeking' or in layman terms, the power to control the fees of an occupation. Furthermore, the double regulatory framework arguably may increase the cost of adjudication since the existence of the nominating bodies will create the need for direct and indirect costs to be borne by the end user of the regime.

In addition to the service fee, nominating bodies will impose administration costs if the disputing parties require them to nominate adjudicators to adjudicate disputes. There has been a significant trend that has evolved from the basic fixed administration fee in the UK to a more refined mode to calculate fees for administration costs of the adjudication nominating authorities. However, the administration charges for nominating adjudicators in the UK are basically lower compared to other jurisdictions. Nonetheless, for small contractors, which the adjudication regimes are targeting to aid, it may burden their cash flow. Positively, the regulatory control framework created for adjudicators, on top of the regulatory system for professionals, can be argued will benefit the public interest. As argued earlier in this thesis,

the services provided under regulatory frameworks are basically a better choice. Even though the nominating authorities are not liable for bad or unenforceable decisions, their reputation is at stake. In the UK, the ANBs are the PSRBs that will set the formal route for qualification, covering examinations and assessment, competence and experience required, as well as standards for professional ethics. Thus, within this very competitive market, debatably, the decisions produced by adjudicators nominated by the ANBs will reflect their commitment to produce good adjudicators for the public. Moreover, their reputation as PSRBs in existing markets contributes to their success in maintaining their positions in leading ANBs in the UK. Within the controlled environment of the ANBs, adjudicators are usually bound by codes of conduct with the nominating authority. In addition to the statutory requirement to act impartially, as is articulated in Chapter 4 that most nominating authorities have their own code of conduct or ethical guidelines, which contractually bind the adjudicators[322].

Having said this, however, the disciplinary frameworks of nominating authorities assessed in this thesis did not clearly define the consequences of an adjudicator breaching the code of conduct. As an illustration, in the UK, CIArb does not provide a specific framework for adjudicators only. However, CIArb has the equivalent regulatory disciplinary framework for all its members notwithstanding whether they are acting as an arbitrator or adjudicator, and parties who are not satisfied with the services provided by the adjudicators are entitled to complain to the nominating authorities. Under SMC, the codes of conduct provide that the complaint will be dealt first by the SMC before referral is made to the Complaint Panel who will determine the complaint[323]. According to ARC (2012), complaints made against

[322] As in TeCSA Adjudication Rules 2011, Version 3.2 or Surveyors acting as adjudicators in the construction industry published by RICS. The SMC published Adjudicator Code of Conduct Ver. 2 that applies to all persons appointed by the SMC to act as adjudicators pursuant to the SOPA 2005 and SOPA-R 2005 and the Building and Construction Industry Security of Payment (Amendment) Regulations 2012.

[323] The Complaints Panel may take the appropriate action, including but not limited to:

adjudicators increased from 1.20% in year 9 to 2.44% in year 13 after the enactment of the Act. However, it is a stark fact that none has thus far been upheld. In view of that, it can be suggested that consumers are aware of the means to complain if they are unsatisfied with the quality of the decisions. However, the existence of a clearly defined disciplinary regulatory framework is welcome in the adjudication field. In addition, with the recent development of the law, the Court of Appeal in *Systech International Ltd v PC Harrington Contractors Ltd*[324] overturned a controversial TCC decision, which required the parties to pay an adjudicator his fee even if the decision made was unenforceable. In *PC Harrington Contractors Ltd v Systech International Ltd*[325], it was principally established that an adjudicator will not be entitled to his fees where the decision he produces is not enforceable due to his failure to apply the rules of natural justice. It is clear that if adjudicators fail to abide by the principles of natural justice resulting in unenforceable decisions, they would not be entitled to their fees.

However, it has also been observed that non-compliance with the rules of natural justice means that adjudicators are in breach of their code of conduct, as well as the statutory requirements of the adjudication regimes. PSRBs monitor and regulate their members by using codes of ethics and codes of conduct. Both aid in clarifying the profession's values, provide a reference point for decision-making, and can be used as a framework for disciplinary and regulatory proceedings. Breach of these codes will lead to disciplinary actions taken against the professionals even though it is not *ipso facto*[326]. This means that any disciplinary action by members of PSRBs shall be taken based on the facts of each and every

(a) Take no further action on the complaint;
(b) Reprimand and/or issue a written warning;
(c) Revoke or suspend the accreditation of the aadjudicator for a specified period; or
(e) Decline to renew the appointment of the aadjudicator.

[324] [2011] EWHC 2722 (TCC)
[325] [2012] EWCA Civ 1371
[326] Ipso facto can directly translated as 'by the fact itself' (Dominik, 2006).

case separately. Therefore, most codes of ethics are principle-based, providing guidance as to the principles upon which professional judgement, expert advice, and decisions should be based. Accordingly, adjudicators registered with nominating bodies should be bound by their respective codes of conduct and nominating bodies can act under statutory[327] or contractual powers[328] to provide disciplinary proceedings for professionals.

In concluding the argument above, it can be established that the double regulatory entry framework imposed on adjudicators will benefit and support many aspects of the service provided in the name of public interest. In terms of enhancing and preserving the quality, skill and knowledge of the adjudicators, the framework that mandatorily sets specific qualifications and training needed for becoming an adjudicator will basically set a higher standard of person that can be accepted as adjudicators. Besides, training and CPD programmes offered by nominating authorities are often designed to improve professionals' specific knowledge on the adjudication process. The facts are that in the UK, some 90.7% of the appointments of adjudicators were made via the ANBs (ARC, 2012). Concurrently, it was noted that registered members of the PRSBs are subject to Professional Codes of Ethics and Codes of Conduct to guide the professional's behaviour, which epitomizes fundamental principles and moral values towards the public interest. Accordingly, since PSRBs are the nominating authorities[329] and the adjudicators are rooted as professionals[330], the implementation of the regulatory framework, either as to the entry requirement or disciplinary action, is not an ample burden for both. Entry fees or registration fees payable to the ANBs, ANAs or adjudication authorities can be considered reasonable when compared to the

[327] E.g.:- Solicitors Regulation Authority, Bar Standard Boards and Architect Registration Board
[328] E.g.:- Engineering Council UK, The Royal Institution of Chartered Surveyors and Singapore Institute of Surveyors and Valuers
[329] As observed in the UK, New Zealand, Singapore and Malaysia.
[330] whether in the construction or legal area

benefits received by adjudicators in setting the service fee for the UK markets. Recently in Singapore, the government has increased the value of fees payable to adjudicators from $250 per hour to $300 per hour. Such an increase can be seen to have verified the importance of substantial remuneration for adjudicators. However, recently in the UK scenario, with the rising of resurgence claims issued in the TCC[331], there is an allegation that adjudicators' fees have increased disproportionately and sometimes the quality of the decision can be questionable (Hilton and Shaw, 2013). Accordingly, it can be argued that a well-defined and clear statutory regulatory framework that includes the market control requirement, applicable remuneration for adjudicators, and disciplinary framework will motivate positive impact towards the welfare of the profession, the professional, and the construction industry. To sum it up, the advantages of being regulated statutorily or voluntarily can be seen as consonant with reaching the objectives of the adjudication regime. In addition, being double regulated will arguably aid to positively enrich the quality of the adjudicators, and concurrently, will help to improve the quality of the decisions[332], parallel with the process of improving the construction industry to be free from cash flow problems.

[331] 18% of the claims arise from the adjudication process, as highlighted in the Annual Report of the Technology and Construction Court 2011-12. The percentage rose steadily at approximately 1% each year, as highlighted in the report made through Annual Report of the Technology and Construction Court from 2005.

[332] Even though it was noted that an adjudicator's decision is not expected to be the same quality as the reasoning of a judge the ANBs, ANAs, and adjudication authorities have encouraged the adjudicator applicants to attend training courses that usually will include an adjudication writing skill as part of the training syllabus.

CHAPTER 6

PROPOSING THE REGULATORY FRAMEWORK FOR ADJUDICATORS IN MALAYSIA

1. Introduction

In Malaysia, there has been tremendous evolution in improving the regulatory framework to control the nation progress to suit the needs of becoming a developed country by the year 2020. In order to provide the significance and working regulatory framework for adjudicators, it is essential to understand the philosophies behind the occupational/professional regulation before we proceed with establishing regulatory framework of regulation for adjudicators in Malaysia. Additionally, this section will discuss and analyse the findings of an open-ended small scale interview session with five active and practicing construction professionals who are also registered as adjudicators with KLRCA. The interview session was conducted to abstract raw empirical data from the players in the industry to support and test the finding made vie secondary empirical data in this thesis.

1.1. Underpinning philosophies behind occupational/professional regulation

The key public policy justification for occupational regulation in general, and licensing in particular is its ability to protect consumers and the wider public from incompetent and unscrupulous practitioners. It was distinguished earlier by Bayne (2012) in regulatory framework for medical and health profession that a good deal of factors should be deliberated before any regulatory philosophy and framework can be adapted to regulate a profession, for

example; the current trends, contemporary approaches to regulation and other related philosophical frameworks for regulatory practice for other professions. However, it can be contended that published literature on the topic of regulatory philosophy for professional regulation is limited. Moreover, most studies can be abstracted from the medical and health profession (Lahey & Curie, 2005; Gubb & Meller-Herbert, 2009; Bayne, 2012) and legal practitioners (Dworkin, 1978; Perlman, 2003; Clementi, 2004; Hosier, 2014). However, in terms of using different theories behind regulation for business, the financial regulation provides a great deal of published literature to help the author understand the current regulatory framework applied, specifically in financial business in general[333]. Hence, we can argue that there are needs to abstract the trends and approaches to professionals' regulatory framework that exist in the current professional framework of the construction professionals and legal practitioners to substantiate the philosophy behind the professional regulations' framework.

Nevertheless, through the process of assessing the current trends of regulatory framework for professionals in general, there is an emerging evidence of two different philosophies that underpin the current regulatory framework, which can be identified as the 'rule-based regulatory framework' and 'principle-based regulatory framework'. We noted that through the same process; there is a different designation that has been given to the identified regulatory framework. For instance, rule-based regulatory framework has been described as 'representational rules framework' or 'prescriptive-based regulatory' and principle-based regulatory framework, which are also termed as 'performance-based regulations', 'standards-based rules' or 'risk based regulation'. Substantially, both philosophies of regulatory framework for professionals differ with respect to the source of their authority, in which the

[333] For further discussion please refer to Olin (2005), Financial Services Authority (2007), Cunningham (2007), Ford (2008), Black (2008), Sato (2009) and Black (2010).

rule-based regulatory framework typically gather their authorities in state rules of professional conduct as compared to principle-based, which are more diverse in its' origin (Perlman, 2003).

1.1.1 Rule-based Regulatory Framework

As described by Perlman (2003), this type of regulatory framework acquires their authorities from the state rules. In other words, the main sources of the regulatory framework for professionals are the acts or laws that are specifically enacted to control the behaviours of a profession. As noted by many authors, the regulatory framework is an asset or a rule prescribed by the government or state to placate the need of eliminating incompetent professionals from the market and at the same time protecting the consumer's interest (Arrow, 1963; Leland, 1979; Weingast, 1980; Law & Kim, 2004). According to Montagnes & Wolton (2015:1), where the rule-based regulatory framework published 'clear, unchanging standards and so can resolve uncertainty'. In terms of professional regulatory framework, lawmakers and regulators often try to prescribe in great detail of what exactly professionals must and must not do to meet their obligations to the government or state and the consumers or public. It explicitly prescribes in detail how professionals should behave (Perlman, 2003; Burgemeestre et al., 2009) and comply with the specific procedural requirements outlined (Hosier, 2014). In other words, the rule will set the behavioural or standards of conduct for professions. However, we also noted that the same regulatory framework is contended to be too narrow, rigid and inflexible to meet the modern world requirements and challenges (Porter & van der Linde, 1995; Oster & Quigley, 1977; Howard, 1994; Porter-O'Grady, 2010). Furthermore, the rule-based regulatory frameworks are based on the mentality of one size fits all, which encourage a loophole mentality as described by Puri (2008).

1.1.2 Principle-based Regulatory Framework (Structural Rules)

In the principle-based approach, the regulations norms are formulated as guidelines. For instance, the principle-based regulation can be distinguished from the rule-based regulation that it does not necessarily prescribe detailed steps that must be complied with, but rather sets an overall objective that must be achieved, as it governs the professionals' action. Essentially, the professionals need to know how capable they are in managing the risk involved in what they are doing. In addition, the principle-based regulatory frameworks set out the limitations of actions in providing services for the consumers. For Perlman (2003), the principle-based rule approach usually helps to define the profession itself. Therefore, for Black et al. (2007: 191), this type of regulatory framework projects the necessity of 'moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or principles to set the standard by which the regulated firms must conduct themselves. The statement was echoed by Financial Services Authority (2007: 4) when they indicated that the said regulatory framework is '… moving away from dictating through detailed, prescriptive rules and supervisory actions on how firms should operate their businesses'. Furthermore, under the principle-based regulatory framework, rules can be interpreted according to the underlining principles. Fundamentally, the principle-based framework involves placing greater reliance on principles and outcome-focused. It focuses on the norm of high-level rules as a means of achieving regulatory objectives, and having less reliance on prescriptive rules (Financial Services Authority [FRA], 2007). Inherently, as highlighted by FRA (2007), this framework needs to be supported by effective supervision due to the fact that the application of principles involves a significant element of judgment. Furthermore, under a principle-based regulatory framework, rules can be interpreted according to the underlining principles

that provide a basis upon which a detailed, flexible and competitive framework can be developed for better outcomes. As such, Hosier (2014) in her work describes the principle-based regulatory framework as a regulation system that accentuates the objectives rather than the process. Thus, this regulatory framework has been correspondingly being dubbed as the 'objectives-based regulation' (Terry et. al., 2012) or 'outcomes-based regulation' (Black et al., 2007).

Currently, the Solicitors Regulation Authorities (SRA) is supporting the 'outcomes-based regulation' in which their code of conduct for solicitors' concentrates 'on providing positive outcomes which when achieved will benefit and protect clients and the public' (SRA, 2015:1). In addition, The Law Society of Scotland has included in their corporate plan for 2013/2014 to move towards a principle-based system of regulation rather than the rule-based approach that has been set out in the Solicitors (Scotland) Act 1980[334].

1.1.3 Conclusion

From the short argument above, we can suggest that historically, professional/occupational regulatory frameworks are underpinned by the philosophies of creating explicit regulations and rules to satisfy the state and the consumers' needs. We also noted that as currently displayed by the SRA and The Law Society of Scotland, moving towards and adapting the philosophies of the principle-based system regulation with its potential advantages have proven to be an approach of proportionality. It '…simplify regulatory burdens on solicitors and to eliminate the one size fits all approach to regulation mean focusing resources and regulatory compliance tools' (The Law Society of Scotland, 2014:6). For instance, the focus

[334] Section 34 of this Act allows the Law Society to set practice rules for regulating the professional practice, conduct and discipline of solicitors and incorporated practices

on principle-based system is at sync with Black (2008) when she states that in the rule-based system, '[T]he more precise the rules, the more complex they become, the greater the number of 'gaps' that is created, the greater the potential for internal inconsistencies in their application, the more uncertain their application becomes in any particular circumstance'. Hence, the statement made by Black is commonly agreed by the UK Government in reforming the regulatory system in the UK by campaigning on the 'outcomes-based' regulatory system to create new regulatory architecture for the government and private sector. Moreover, this is also due to the fact that in the rule-based regulation, both regulators and industry pay more attention to the administrative process and enforcement rather than to how to reflect good industry practice in achieving regulatory goals. Alas, the system will actually create red-tapes that will hinder the objectives of the regulatory process for the benefit of the public at large. Besides that, given the blend of rule-based and principle-based philosophies behind the regulatory framework for professionals in the UK, it is quite difficult to single out the difference between both systems. However, we can argue that the element that made the difference between both systems is the way it is being implemented rather than how it has been drafted statutorily. This is parallel with Black (2008:17) when she indicates in her work that it is 'not so much what their rules look like, but how they are applied.

2. Analysis on Structured Open-Ended Interview Sessions

2.1 Introduction

The main objectives of this interview session with informed construction professionals are to test the applicability of the recommended regulatory framework for adjudicators that will be adapted in Malaysia. The author has argued that the appropriate regulatory framework for

adjudicators in Malaysia should be adapted from the system for entry and conduct requirement found in Singapore. Principally, that regulatory framework closely resembles the regulatory framework for construction professionals in Malaysia. Other than that, the regulatory framework that has been widely used for construction professionals in Malaysia includes two tier of regulating mechanism prepared and administered by the PSRBs. The first tier is on the basis of mandatory entry requirement; i.e. accredited qualifications, years of experience or the prerequisite necessity to pass exams or interviews session. Meanwhile, the second tier includes the requirement to maintain their professionalism throughout the years of practicing by adhering to the ethics and guidelines specified for the professionals, acquiring new knowledge to keep the competency levels or submitting to an interview to assess their level of skills to practise before being able to renew their registration with their respective regulating bodies. In addition, the opinions of the interviewees on the CIPA 2012, professionalism and the benefits of being regulated will support the analysis and conclusions made by the author in this thesis.

According to one of the interviewees; Sr Patmawati Paddong, the issue of payment has been a 'silent and painful journey' for contractors in the construction industry. The introduction of CIPA 2012 is expected to shed help alleviate the problems of shortage and disruption of cash flow for contractors in the Malaysian construction in resolving disputes on payments. However, since the implementation of the Act is still at an early stage, a number of grey areas remain to be smoothed. For Ir Harban Singh, the act is a mess and Sr Hashimah Harun agreed, and then highlighted the fact that there are so many glaring questions on how it can be employed appropriately for the benefit of the industry and the country. All the interviewees agreed on one particular subject, and the recognition was that CIPA 2012 is still new and the implementation of the statutory adjudication will not be too rapid. Nevertheless,

for them, the CIPA 2012 is anticipated to provide positive changes in the payment culture for contractors in Malaysia.

2.2 Methodology

Various issues have been highlighted in the interview questions. Generally, the answer to each question posted to the interviewees was based on their own experiences and opinions. Overall, there were seven main questions which narratively drafted to support the findings and conclusions made throughout the thesis. Some of the questions were supported with additional and clarifying questions to make sure the answers are very much relevance to the aim of this thesis. Furthermore, it should be parallel with question and the objectives of the thesis. The answers from the interviewees were expected to be relevance mainly because all of them are registered as adjudicators in Malaysia. In addition, all of them are also registered as construction professionals in Malaysia.

The first question focused on the interviewees' insights on CIPA 2012 and the problems that have surfaced after the enactment of the Act. The second question sought to steer the interviewees to provide their knowledge on the process of regulating professionals in the construction industry in Malaysia. Question number three examined the idea of recognising adjudicators as professionals, followed by a question on the need for regulating adjudicators. Next, the fifth question tapped into the opinions of the interviewees on the idea of adapting regulatory frameworks from other jurisdictions with similar legislative provisions on adjudication. The sixth question sought to further seek their views on the theory of adapting regulatory frameworks from construction professionals to suit the regulatory framework for adjudicators. Finally, the author made a statement on adapting the regulatory framework from

the existing regulatory framework of Singapore and adapting it to meet the needs of Malaysian political and social culture. This was followed by a question to generate opinions on that framework's practicability for the Malaysian construction industry.

We should take note that the interviews with informed construction professionals were conducted with the objective of testing the recommended regulatory framework in this thesis. After considering this factor, the author chose to interview five (5) prominent construction professionals recognised as registered adjudicators with vast working experience in the Malaysian construction industry as quantity surveyors and engineers. To exclude the factors of bias answers, the selected interviewees were a mixture of the government and private sectors employees. This selection was done to ensure that both parties, recognised as two of the biggest stakeholders in the construction industry in Malaysia, were represented in the interview session. Furthermore, the answers would be expected to epitomise the idea from the government and the private sectors. Besides that, the selected interviewees consented to be interviewed for about 30 to 45 minutes and the interview process was undertaken in a period of three (3) months. Most of the interviews took place in the interviewees' offices. Only one interviewee decided to be interviewed at the lobby of KLRCA's Building in Kuala Lumpur.

For instance, the interview process was conducted using structured, open-ended questions, as the promulgated structured question requires a clear topical focus and well-developed understanding of the topic. In this case, since the author has proposed to adapt a specific regulatory framework to regulate adjudicators in Malaysia, the structured open ended question approach was deemed suitable in order to achieve the objectives of the interview session and the aims of the thesis in particular. In addition, structured interview questions generally provide little room for variation in responses (Gill et al., 2008; O'hara et al, 2011;

Bryman, 2012). According to Bryman & Bell (2015). The questions in the structured interview are usually very specific to ensure that the answers provided will be based on the factors of 'true' or 'real' variation and not because of the interview context. In gist, every interviewee received the same interview inducement to control the extent on the answers given. This approach was conducted to keep the consistency and to standardise the ordering and phrasing of the questions from one interview to another. However, by leaving the questions open for further discussion, the interviewees were left with the option to further elaborate their answers. For instance, open-ended interview questions are typically used when the same questions are asked of all interviewees. According to Salmons (2010: 51) the purpose of an open-ended question is to 'elicit short narrative answers'. The primary benefit of such an approach is that it will provide much more detailed information. Another advantage of an open-ended interview is that, in addition to fulfilling the original interview objective, the open ended questions provide complete explanations and can lead interviewers in new directions, letting them see perspectives and opportunities they did not consider before. Furthermore, the interviewee can also clarify what they mean, with motivations often revealed. Nevertheless, Ary et al (2009) argue that even though open-ended questions are easy to construct, the process of analysing the data can be tedious and time consuming. The clarity and applicability of the findings usually depend on the skills of the researcher (Woods, 2011).

Besides the sets of questions that were asked of the interviewees, accompanying the last question is a draft of the theoretical regulatory framework for adjudicators. The interviewees were informed in brief on how the regulatory framework will work. The regulatory framework that was presented to the interviewees is as follows: -

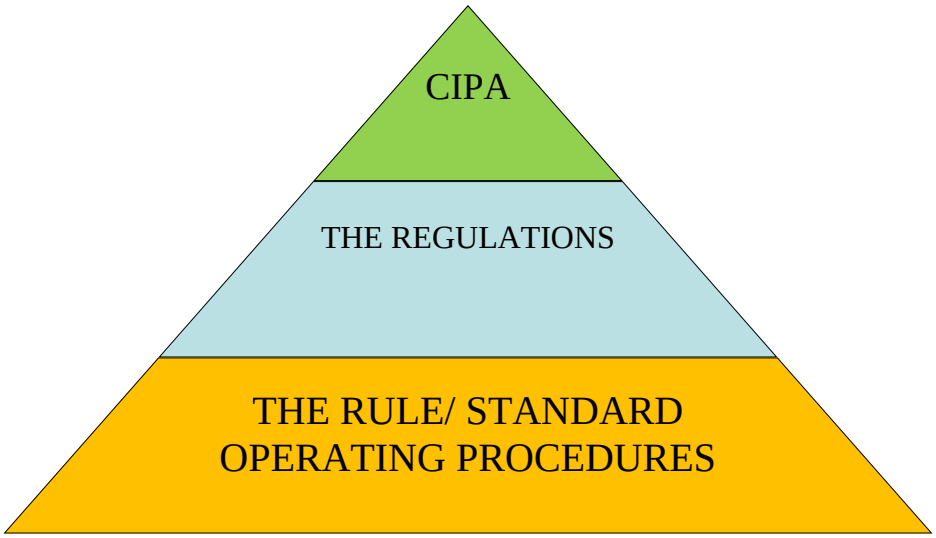

Figure 6.1: Typical regulatory framework for adjudicators in Malaysia

The interviewees were informed that the basic guideline for the regulatory framework will be CIPA 2012 itself. In addition, as stated in Part V of CIPA 2012, KLRCA will be expected to provide the industry within information on the setting of competency standards and criteria of an adjudicator. This will be done via the published regulations and finally, the conduct of adjudicator will be determined by the set of rules or standard operating procedures that must be followed by the adjudicators registered with KLRCA. Accordingly, the information given above has been expected to give a clear picture on how the proposed regulatory framework will work in brief.

It must also be noted that none of the interviewees are practising lawyers. However, the author would like to acknowledge that two of the interviewees do have a legal background. Sr Amran Mohd Majid holds a double degree in Quantity Surveying and in the field of law (Jurisprudence). He has also sat and passed the Certificate in Legal Practice with the Legal Profession Qualifying Board, Malaysia. This qualification will allow Sr Amran Mohd Majid

to be admitted as an advocate and solicitor under the Legal Profession Act 1976 [Act 166] to practice law in Malaysia. In addition, Ir Harban Singh is also a professional advocate and solicitor even though he is not practicing. However, it must be emphasized that he had been through the vigorous regulatory process to become a professional advocate and solicitor in Malaysia that were discussed earlier in Chapter 4 via Table 4.3.

It must be noted that the author intended to propose a regulatory framework for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirements made by the ANBs in the UK could be adapted as well. Basically, the framework will be designed as based on the regulatory framework for construction professionals in Malaysia. In April 2012, 34.5% of the adjudicators in the UK were lawyers (ARC, 2012). In Malaysia it was noted that about 48% of the adjudicators empanelled with KLRCA are lawyers (Martin, 2015). Even in Singapore under SOPA 2004, there are more than 35% lawyers registered as adjudicators (SMC, 2016). By observing the trend on the qualification background of adjudicators in the UK, Malaysia and Singapore it can be speculated that lawyers will have no problems with the proposed regulatory framework. This is well supported by the data established above and furthermore, as discussed in Table 4.3, Chapter 4 of this thesis, legal practitioners have to endure even more robust and challenging regulatory frameworks before they can practice as lawyers. Accordingly, the proposed regulatory framework for adjudicators can be argued as a comparatively mild process and in its infancy, it can be noted that legal practitioners have taken the early advantage by becoming adjudicators.

2.3 The Analysis

After the interview process, the author transcribed the session of each interviewee. The process was done manually using the recorded version of each interview session. There were a few possible approaches in analysing qualitative data gathered from the interview session like biography, phenomenology, grounded theory, ethnography and case study (Creswell, 2007). However, in general, qualitative data analysis consists of the process of identifying, coding and categorising themes surfacing from each transcript. (Creswell, 2003; Creswell, 2007 and Kvale, 2007). Accordingly, for Boyatzis (1998: x-xi), the five good elements of a good coding system are the labels, definition of the themes, the description of the themes, the description of any qualification or exclusions to identifying themes and the example of both.

2.3 Conclusion

It was apparent throughout the interview session that all interviewees were relying on the fact that CIPA 2012 is still in its infancy. For one interviewee '… the implementation of the statutory adjudication in Malaysia construction industry is a new benchmark' and another interviewee stressed that '[T]his adjudication in Malaysian industry is still at the very early stage'. There were many unanswered questions and many grey areas were yet to be explained. Besides that, the interviewee even described the act as 'a mess'. However, it was important for all the parties participating in the Malaysian construction industry to at least have a broad idea on how the Act works and how it can help them ease payments and cash flow problems. There are a few factors that have been identified in contributing to the current glaring problems of CIPA 2012 such as political scenario, culture of works, the governance of the adjudicators, guidelines and interpretations of the subject matter and the people factor. All the interviewees were on the same understanding when referring to the factors that have

influenced the way CIPA 2012 currently works in Malaysia. They believed that Malaysia has its own unique way of handling new changes in the construction industry, and the changes will be acceptable but the progress of adjusting will be slow.

As professionals, all the interviewees agreed that the process of regulating the professionals is indeed important. One of the interviewee orated that 'Adjudicators need to undergo a regress process where they know their boundary'. Three of them approved of the idea of increasing the competency of the professionals via the process of regulating. Furthermore, all three agreed that being regulated might adequately contribute to enhance the competency and offer moral support for professionals. On the view of categorising adjudicators as a profession, three of the interviewees rejected this notion. They viewed that being adjudicators should not be equated with a profession *per se*. According to this view, adjudicators as a whole need to be backed by qualifications and experience from other occupations or professions practicing in the construction industry. In their opinion, the adjudicator only provides impromptu services where and when required. Nonetheless, all of them came to an understanding that adjudicators need to be regulated or controlled to comply with a certain standard even though they are not professionals. This is due to the fact that adjudication is a new procedure to resolve payment disputes in the construction industry that is bound by the enactment of CIPA 2012. Accordingly, they need to be accredited or registered and in years to come, the conduct of adjudicators must be structured according to some guidelines or rules.

Four of the interviewee concurred over the question as to whether Malaysia should adapt the regulatory framework from another jurisdiction. All of them suggested that we should learn from other countries' experience and at the same time try to adopt and adapt the regulatory framework for adjudicators to complement the social and culture response in Malaysia. For

one interviewee, 'I think it is a good system for regulatory framework that they have in the UK…'. However, one interviewee opined that the regulatory framework via the accreditation process introduced by KLRCA in Malaysia was far more superior and ahead in terms of providing reliable adjudicators to the market than that in other jurisdictions. In terms of producing competent adjudicators, one interviewee highlighted that in Malaysia, the fact that parties in dispute will have the choice to choose their own adjudicators somehow reduce the need for competent adjudicators. However, choosing adjudicators from a pool of registered adjudicators provided by an authorised body like KLRCA is better for the peace of mind.

After analysing the existing regulatory framework for adjudicators from other jurisdictions and also the existing regulatory framework for construction professionals, the author proposed the adaptation of the regulatory framework used in Singapore as an academically credible framework to be used in Malaysia. In addition, the framework will be incorporated with the regulations outline in the regulatory framework specifically designed for construction professionals. However, some adjustments must be made in order to suit the needs of the Malaysian construction industry landscape. One interviewee thought that the adjudicator '…must be involved in the [construction] industry with [at least] twenty years of experience'. Three interviewees suggested for the years of experience to be increased from 7 years to 10 years or more. Except one, all of the interviewees agreed with this idea for the time being since CIPA 2012 is still new. For him, 'The professional bodies should follow what KLRCA has done'. However, all were inclined to view this merely as a preliminary framework that can be enhanced and improved throughout the years to come. Since the proposed framework resembles the framework that is recognised by most parties in the construction industry, the idea can be developed to be a strong regulatory framework for adjudicators under CIPA 2012. Moreover, certain criterion must be introduced and developed

to gain consumer confidence. On the other hand, one interviewee believed that the framework that has been offered by KLRCA is a very credible and strong system.

In conclusion, the evaluative interview session has proven to be very informative for the author. It provides more information from the practitioners' point of view that has not been recorded in the literature findings, although CIPA 2012 is still at its first phase stage. It would take some time before the act can be considered synonymous with the needs of the construction industry. However, the Act must emphasise the need to produce competent and knowledgeable adjudicators to make sure that the adjudication process will be handled smoothly and in line with the Act itself. According to one of the interviewees, '…regulatory framework provides a promise that the adjudicators supply to the market is very well trained…', she also emphasised that '…this is the best step to make sure the competency are at par with what the markets demands'. Another interviewee stated that she fully agreed in '…the aspect that we (Malaysia) need a body to regulate adjudicators'. One interviewee even opined that '[I]t can increase the threshold level'. It was also projected that even with its slow progress, adjudication and adjudicators will play bigger roles in the construction industry in Malaysia. Other than that, one interviewee also highlighted the fact that the introduction of familiar regulatory framework will be widely accepted. Therefore, proposing a credible regulatory framework which is highly distinguishable in Malaysia for adjudicators is important and highly recommended by the interviewees.

3. Theoretical and Empirical Underpinning Regulatory Frameworks for Adjudicators

Chapter 3 and Chapter 4 of this thesis have provided the ground rule on the basic principle in developing credible regulatory framework for adjudicators in Malaysian landscape. It has been established that, other nations with payment regimes Act has adapted the regulatory framework for adjudicators using the 'Regulatory Governance' scheme. Levi-Faur (2011) suggests that regulatory governance proposes a decentred and mutually adaptive policy regime that relies on regulation and offer and alternatives between the command and control approach and *laissez faire* liberalism. In other words, it focuses on the ways that the government and the private sectors can successfully operate together in order to attain the ultimate objectives of the payment regime Act. Basically, in the legal context in Malaysia, the hierarchy of power to regulate lies in the order of Act, regulations, code of practice and guidelines as the industry code of practice and guidelines do not have the force of law. Nonetheless, they help to further enhance and clarify the provisions established in the Act and Regulations. Accordingly, it has been established in Chapter 4 that the regulatory framework for adjudicators has taken the same approach in benefitting from the concept of complimenting each other between the Act and Regulations by means of establishing the code of practice and guidelines.

Self-regulating with some statutory sanction has been promoted by the payment regime Act for adjudicators regulatory framework. Even though the payment Act does not explicitly convey the need in any of the provision in the Act, the establishment of the nominating authorities has proven otherwise. Moreover, the Act also includes the provisions for the regulation to be published accordingly to support the Act. From the analysis made on the

existing regulatory framework for adjudicators in the UK, New Zealand and Singapore, the regulation issued is mainly connected with the basic requirement needed for the qualification of an adjudicator. Some even proceed with the need of the process of recognising the related qualification in the construction industry to be included as a basic criterion to become adjudicators. Meanwhile, others impose on the requirement for experience and competency test via exams before the registration process.

The nominating authorities have been fully obliged with the need to regulate their adjudicators. This has been proven with a set of requirements that has been published by nominating authorities that must be satisfied by any person wanting to be an adjudicator. Furthermore, it has been proven that with the self-regulating framework, the nominating authorities have full control in producing adjudicators that will meet the market demands. Besides that, the entry regulation provides the nominating authorities with common and basic adjudicators with education and professional background that links to the construction industry. The entry requirement has been extensively tighten by petitioning for the adjudicator to be fully equipped with skills and knowledge derived from other professions such as construction professionals or legal practitioners. In addition, there are nominating authorities that demand for the adjudicators to mandatorily seat and pass special exams before being listed as adjudicators. It basically provides some precautions to provide the market from failing. In addition, some nominating authorities also provide conduct regulation process by assessing the competency of their adjudicators before renewing their registration for every five years.

CIPA 2012 has been transformed massively from the first draft initiated earlier by CIDB, from being too prescriptive using the theory of rule base to being more flexible and

encouraging self-regulation process. The provisions in the Act are supported by regulations, code of conduct and guidelines to suit the theory of principle-based. Furthermore, this has also been the underpinning philosophy that has created the regulatory framework for adjudicators as established earlier in Table 4.1 in Chapter 4 of this thesis. Accordingly, in the Malaysian context, the adaptation of the regulatory framework established in other nations with the same payment regime is expected. Furthermore, as discussed in detail on the importance of public interest in Chapter 5 of this thesis, it is essential for the regulatory framework to comply with the requirement. This is due to the fact that it will basically enhance the trust of the player in the construction industry to use adjudication as a rapid and an inexpensive mechanism for determining disputed progress payment. Besides, it has been noted as reported by the Adjudication Research and Reporting Unit (ARRU) at the University of New South Wales and the ARC in the UK that, the empirical evidence advocated that the main aim of the payment regime Act in improving payment flow in the construction industry has been to a large extent, being achieved. This has been realised mainly to the utilisation of experience and independent adjudicators that has been well regulated via the existing regulatory framework.

From the analysis and argument made in Chapter 4 on the Critical Analysis of the Existing Regulatory Framework, the nominating authorities have been recognised as the PSRB's for adjudicators. Moreover, the usage of the nominating authorities as the main source of appointment of adjudicators reaches more than 90% (ARC, 2012). This proves that the disputing parties have become accustomed with the procedure and at the same time trust and have relied on the qualities of adjudicators that has been provided by the nominating authorities to the market. However, we must note that in some jurisdiction like Singapore and New South Wales in Australia, an adjudicator can only be appointed by ANA or ANB. In

addition, adjudicators cannot operate outside ANA or ANB and it indicates the trust that has been put to the nominating authorities by the government. Consequently, the nominating authorities must behave like PSRB's in order to fulfil the requirement and demand of the market for experienced, competent and independent adjudicators. They are responsible for establishing and maintaining a register of adjudicators, establishing and administering the codes of conduct for adjudicators, and training and accrediting adjudicators.

Through the existence of the nominating authorities, the skill and knowledge of adjudicators as deliberated in Chapter 2 of the thesis could be rated. Although nominating authorities are being set up first and foremost to provide and regulate adjudicators, some have been known to provide various services to adjudicators to substantiate their existence. Moreover, some provide administrative functions for the adjudicators, in which can be effective as compared to the service offered by a court registry to a judge. We also established from the analysis made in Chapter 4, that nominating authorities also promote the legislation on behalf of the government including providing talks, seminars and including operating and maintaining dedicated websites only for adjudication. Usually, the websites will contain information about the legislation in brief, the latest news regarding adjudications process, the guidance on the usage of the adjudication process and most importantly, they also provide the list of qualified and registered adjudicators for the consumer's benefit. For instance, public interest ought to be the pillar of the regulatory framework for adjudicators; the empirical data on the service fee have also provided the information on the importance of being paid accordingly to the adjudicators. As distinguished in the Conclusion of Chapter 5, refined framework to calculate fees has been imposed by the nominating authorities. Therefore, according to the data provided by ARRU, adjudication fees are generally modest to the satisfaction of the adjudicators, the parties in disputes and the nominating authorities.

We can conclude from the argument above, that the theoretical framework for adjudicators in other the UK, Singapore and New Zealand consists the essential elements as follows: -

i) The Parent Act

ii) The Regulations

iii) The Guidelines

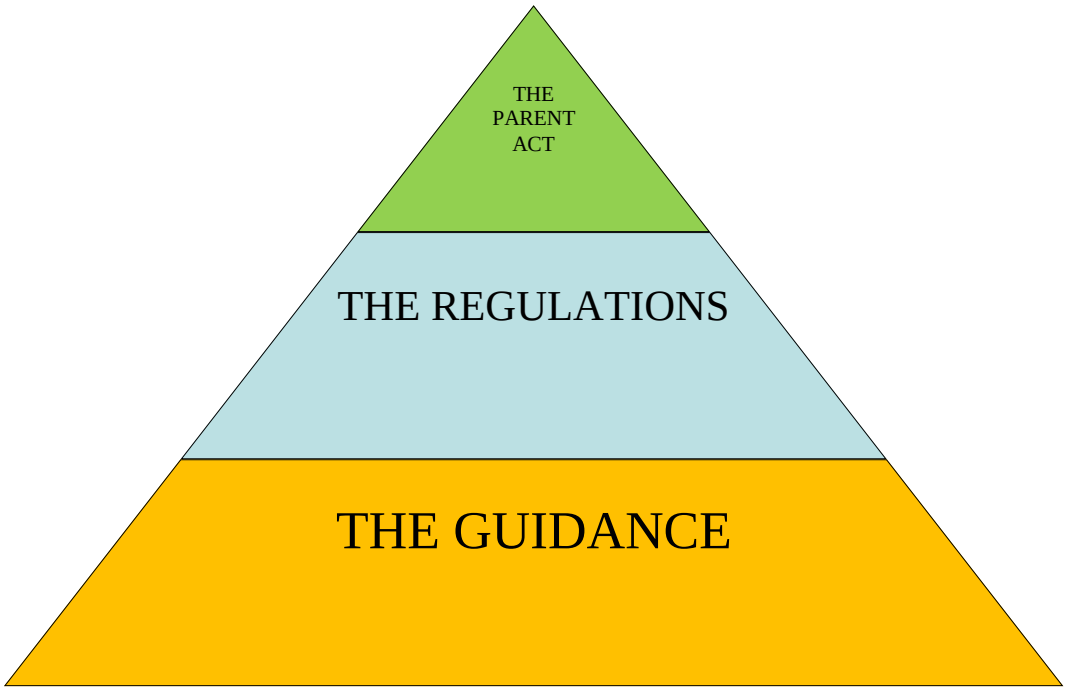

Figure 6.2: Theoretical regulatory framework for adjudicators

4. Regulatory Framework for Adjudicators in Malaysia

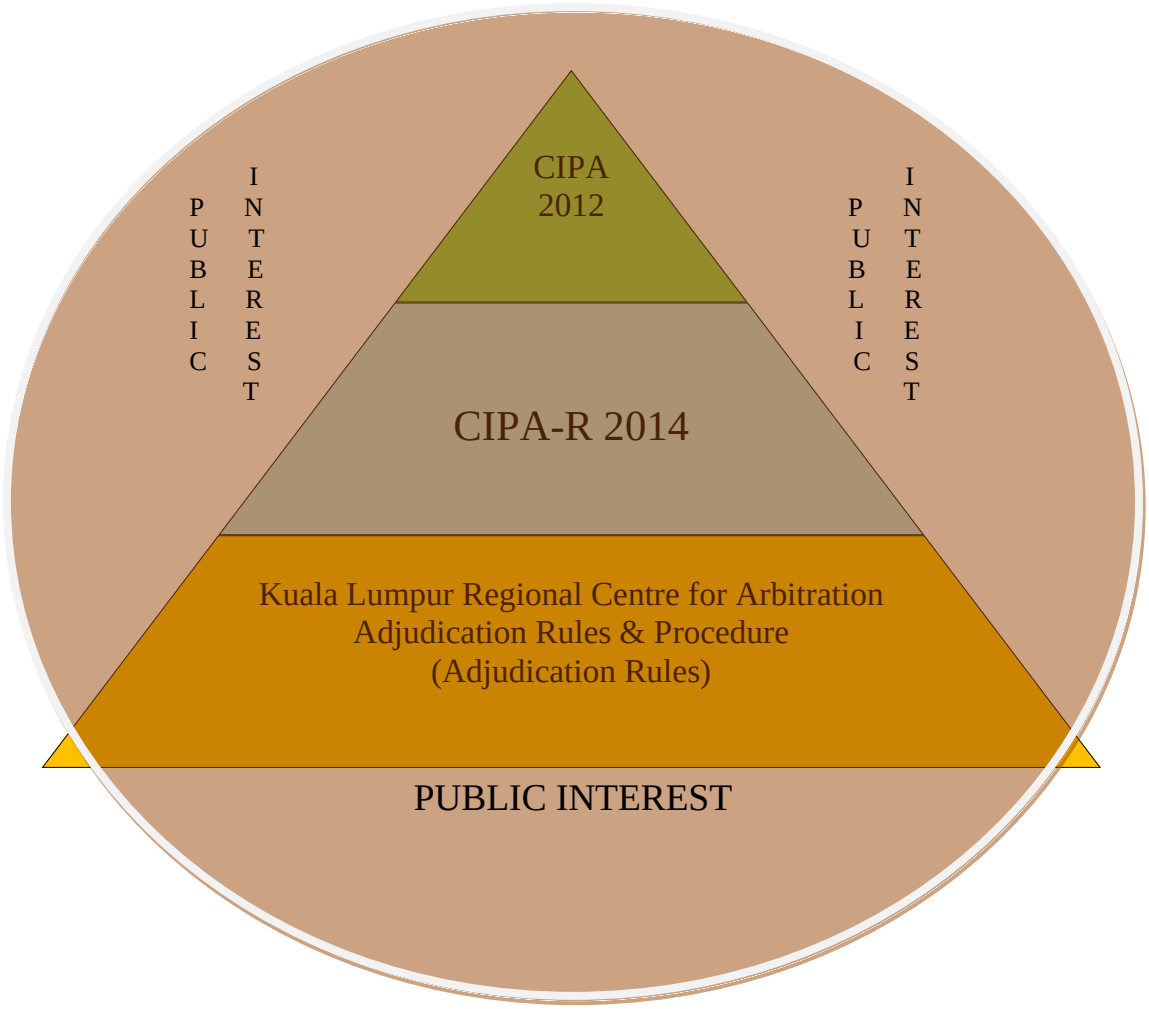

Figure 6.3: Regulatory framework for adjudicators in Malaysia

4.1 Introduction

It was well established as discussed and argued in Chapter 5 of this thesis that 'Public Interest' has become the key and mutual pillar for any regulatory frameworks, especially the regulatory framework for professionals. Consistent with the underpinning philosophies of occupational/professional regulation and the theoretical regulatory framework for adjudicators, Figure 6.2 above provides an overview regulatory framework for adjudicators

under CIPA 2012 in Malaysia. Furthermore, we should acknowledge that the recommended regulatory framework above is grounded on the existing legitimate constructions professionals' regulatory framework in Malaysia. As argued and established in para 1.6 of Chapter 3 in this thesis, the process of regulation involved the process of setting the standards of qualifications, registration, determining the conduct or code of practice, investigation complaints and disciplinary sanctions. In addition, the regulatory framework illustrated in Figure 6.2 can be adapted from top to bottom in terms of the importance of the regulation. Since legislation is the essence of the regulatory framework advocated and in unification of the underpinning philosophies of principle-based approach, CIPA 2012 should prescribe modest yet important clauses as a basic guideline to develop regulations and supporting guidance for the framework. Other than that, the Regulation should also prescribe regulations that will sustain the need of the legislation. Finally, the supporting guidance will be the spirit of the framework which will include the rules, procedure and code of conduct that have to be followed by the adjudicators. Fundamentally, the Regulatory Framework advocate by the author takes legal restriction promulgated by government and is supported by a self-regulation process by the construction industry, via adjudication authorities to provide a credible and adaptable regulatory framework for adjudicators under CIPA 2012.

4.2 Moulding the Regulatory Framework for Adjudicators in Malaysia

4.2.1 Public Interest

According to the Institute of Chartered Accountants in England and Wales (2012:4), 'The public interest is an abstract notion. For instance, asserting that an action is in the public interest involves setting oneself up in judgement as to whether the action or requirement to

change behaviour will benefit the public overall. Apart from that, setting up a regulation that will benefit the public must be clearly identified and set out. Since the ultimate objective of the regulation as discussed above is 'to correct the market'; the notion of public interest must be equally approached to produce regulations that will satisfy the markets. Thus, the policy maker must clearly identify the consumer of the product and their needs to ensure that regulations made fulfil the requirements.

Besides that, the standard public interest theory of regulation is based on two assumptions: first, unhindered markets often fail due to the problems of monopoly and second, governments are benign and capable of correcting these market failures through regulations (Shleifer, 2005). As explicitly discussed in Chapter 5 of this thesis, 'Public Interest' has been renowned as the backbone for the promulgation of legislations, regulations and other supporting rules. Although the payment regime has never publicly stated the intention, we have noted in the discussion throughout the thesis that the existence of the payment regimes is the response made by the government as a solution for the problem that plagues the construction industry. Furthermore, the author is persistent to acknowledge that public interest must be seen as one whole entity that will support and help the process of moulding the credible regulatory framework for adjudicators. Referring to Figure 6.2 above, the author also has put the triangle that made up the regulatory framework inside the sphere of public interest. The figure will show the importance of public interest as the reliable source in constructing any regulation that will be easily acceptable by the consumers of the service. In addition, the consumers in service market need to eliminate the asymmetrical information problems. By orientating the regulatory framework to the public interest notion, the credibility of adjudicators and the trust of the consumers will be higher as noted in ARRU

reports published by the Department of Finance and Services of New South Wales in Australia.

4.2.2 Simplicity

For the author, any regulatory framework must provide simplicity for the regulator and the occupation/profession that is going to be regulated. Moreover, it should be parallel with the principle-based approach that will underpin the regulatory framework submitted for adjudicators under CIPA 2012. With that principle in mind, simplicity will become the conceptual design features for the intended regulatory framework. For instance, simplicity will provide a simple standard that is clearly expressed in a straightforward language, where it can be easily comprehended by the adjudicators. In retrospect with CIPA 2012, the simplicity concept has been adopted as it provides modest clauses that emphasises on clarity, brevity, and the avoidance of technical language, particularly in relation to official government or business communication. In exercising the powers conferred by S 39 of the CIPA 2012, the Minister, upon considering the recommendation of the KLRCA has made the CIPA-R 2014 with the same intention.

4.2.3 The Parent Act: CIPA 2012

As discussed before in the thesis, to this date, CIPA 2012 has been deployed in the construction industry in Malaysia to resolve any payment disputes using adjudication as a tool. CIPA 2012 delivers the process flow to the main steps involve in adjudication process. Along with the act, the adjudicators exist with bestowed duties and powers to ensure the best application of the Act itself. Legislatively, in terms of the philosophies and clarity, CIPA

2012 has provided a very good outline on the regulatory framework for adjudicators. Moreover, according to CIPA 2012, adjudicator only means an individual appointed to adjudicate under this Act. Besides that, no person shall be recognised as an adjudicator outside the scope of this Act. In addition, Part III of the CIPA 2012 is solely focused on adjudicators. Starting with outlining the appointments process, the clauses contained in this section also provide the information on the duties, obligations and powers of the adjudicators. Unlike HGCRA 1996, CCA 2002 and SOPA 2004 and based on the lesson learned from this jurisdiction, Clause 27 even provides the explanations on the jurisdiction[335] of an adjudicator. Accordingly, parallel with the necessity of the CIPA 2012 on the subject of adjudicator, the regulatory framework formulated will be exclusively interactive with the knowledge and skills needed from adjudicator that has been discussed comprehensively in para 3 in Chapter 2 and para 7.1 in Chapter 5 of this thesis.

The Government of Malaysia has promulgated and passed CIPA 2012 as a law. Accordingly, for the legislation to be effective, we need a body to carry out the instructions of the legislators. That is the job of administrators who are supposed to take orders from the legislative body and carry out any instructions they receive. Therefore, in order to carry out the law and by virtue of Part V of CIPA 2012, KLRCA has been named as the adjudication authority or the administrator of the law. In essence, apart from being the adjudication authority to administer CIPA 2012 in whole, KLRCA has a key role to play in being the default appointing and administrative authority of adjudicators in Malaysia. Furthermore, the submission made in CIPA 2012 pertaining to solely nominated KLRCA as a sole adjudication authority for CIPA 2012 has proven the argument of the author on the

[335] It must be noted that under CIPA 2012, the parties may agree after the appointment of the adjudicator to extend the jurisdiction of the adjudicator to decide on any other matter arising from the construction contract

importance of PSRBs as the regulatory administrator at para 1.7 in Chapter 3, para 3.2 and 3.6.1 (f) in Chapter 4 and 7.3 in Chapter 5 of this thesis.

4.2.4 The Regulations: CIPA-R 2014

As argued in Chapter 3 of this thesis, the good regulations under the regulatory framework are crucial as secondary tools in the process of regulating a profession and correcting market failure, as it ensures fairness and provides protection to the consumers. Accordingly, it is vital for KLRCA to provide a level situation in a market for the adjudicator to compete. Moreover, this process can be achieved by recommending respectable regulations to control the adjudicators market. Besides that, it should act as a barrier to differentiate between good and bad adjudicators. For example, dissimilar with SOPA 2004, under CIPA 2012, the adjudicator has the jurisdiction to decide the validity of the payment claim and the payment response since both are recognised as the basic and essential conditions that should be decided by the adjudicators. Accordingly, the regulations should include the need for the adjudicator to have the standard skills and knowledge that have been discussed earlier in Chapter 2. In support to this view, Tan (2014) advocates that CIPA 2012 has imposed some requirements on adjudicators which will consequently reflect the attributes of skills and knowledge that are needed to be a competent adjudicator. However, we must note that in the construction industry in Malaysia, the consumers of adjudication are aware that the candidate to be nominated as adjudicators are usually people that have vast experience, skills and knowledge in the construction industry. As mentioned in Chapter, the variation of people will include arbitrators and mediators in addition to the reputable and competent construction professionals in the construction industry.

Upon the activation of S 39 of CIPA 2012, the Minister[336] upon considering the recommendation of KLRCA has endorsed the publication of CIPA-R 2014. The most important part of CIPA-R 2014 that relates directly to the adjudicators in terms of the process of regulating them is specified in Regulation 4. It basically explains the competency standard and the criteria of adjudicator that have been discussed earlier in this thesis. However, the standards set up are basically lower than the relative standards that have been established under the SOPA-R 2005. Although we believe in the usage of principle-based approach, the Regulations 4(a) and 4(b) are too brief. In addition, KLRCA must at least consider to promote construction professionals with relevant degree or diploma in the fields that are related to the construction industry. This is due to the fact that, in the construction industry, the construction professionals will usually have to go through another set of regulatory framework contributing in enhancing their skills, knowledge and competency. This statement is reinforced with the critical analysis that has been done and projected in Figure 4.1 and Table 4.2 in Chapter 4 of this thesis. Accordingly, we can suggest that experience for any person that has the intention to be registered as adjudicator must have at least 10 to 15 years of experience practicing in the construction industry. The suggestion is well supported by four of the interviewees in the interview session to test the findings of the thesis.

The disputing parties are free to appoint any person as adjudicator under the Act, although the restriction on the people who can practice as adjudicator under CIPA 2012 must be tighten up. However, the recent data compiled by KLRCA in 2014 has shown a significant confidence by the disputing parties in Malaysia to nominate adjudicators that have been trained and registered with KLRCA[337] (Stewart, 2015). For instance, the data collected are consistent with the development of appointing adjudicators through ANBs that have been

[336] Means the Minister charged with the responsibility for works
[337] Up until October 2015, there 328 adjudicators that has been trained and registered by the KLRCA.

published by the ARC in the UK and ANAs as claimed by the Building Disputes Tribunal (2013) in New Zealand. It can be concluded that although CIPA-R 2014 has been established by KLRCA, the regulations are recommended to be tighten and to be at par with the regulations sets under SOPA-R 2005. Notably, the most important skills and knowledge of the adjudicators that have been argued and prescribed in Table 2.1 in Chapter 2 are worth to be established to propose the appropriate regulation for the regulatory framework for adjudicators. This is explicitly important in terms of managing and satisfying the need to comply with the market expectations.

4.2.5 The Guidance: KLRCA - Adjudication Rules & Procedure (Adjudication Rules).

With the principle-based approach, the guidance should prescribe the need for competence and reliable adjudicator. Accordingly, the guidance should be read to support the need that has been indicated in the Parent Act and the Regulations. Besides that, the analysis and discussion made in Chapter 4 and Chapter 5 have indicated that the Parent Act and the Regulation have legal weight and are usually being used to prescribe the entry requirement for an occupation or a profession. As identified before, the guidance has no legal impact on the adjudicators in terms of legitimacy. This means that if the adjudicator had broken their code of practice, they did not break any law. However, the code of conduct has its impact to control the behaviour of an occupation or a profession. For instance, rules, guidelines and code of conduct/practice can be designed, established and implemented to support CIPA 2012 and CIPA-R2014. In addition, the rules shall prescribe on the good practice of the adjudication process. This will enable the adjudication authority to provide administrative support to the adjudication. Moreover, the rules should clarify the clauses and regulations prescribed in CIPA 2012 and CIPA-R 2014. As highlighted in Para 3.4 of Chapter 4 of this

thesis, the SMC has issued a supporting guidance for SOPA 2004 and SOPA-R 2005. SMC Adjudication Procedure Rules (3rd Edition, April 2015), in Annex C of the rule, contains the explicit rules on the Code of Conduct for adjudicator under SOPA 2004. In addition, Rule 9 advocates the rule on 'Complaints and Complaints Procedure'. The rule in general describes the procedure for the disputing parties who are not satisfied with the performance of the adjudicator to make an official complaint against the adjudicator. The complaints will be administered by the SMC 'Complaints Panel' for decision making on an appropriate action that will be made against the adjudicator who breaks the code of conduct. In brief, under SOPA 2004, the ANB have made an effort to regulate the adjudicators not restricted for the entry regulation but also are adamant to regulate the conduct of the adjudicators in Singapore.

Pursuant to S 32 and S 33 of the CIPA 2012, KLRCA then produces the Kuala Lumpur Regional Centre for Arbitration - Adjudication Rules & Procedure (Adjudication Rules). In brief, the Adjudication Rules provides the construction industry player with the relevant rules and procedures to be followed and read together in conjunction with the CIPA 2012. It gives a tremendous help to the adjudicators in terms of administrative procedure, since it provides the relevant standard forms to be used and applied by the adjudicators. Rule 8 provides rules for the conduct of the adjudication process. However, no rules have been prescribed to attend the code of conduct or any means for the disputing parties to make official complaints against the adjudicators.

5. Conclusion

The main objective of this thesis is to provide a credible regulatory framework for adjudicators under CIPA 2012 in Malaysia. Looking back at the history of the establishment

of CIPA 2012, we must note that the reference has been made to HGCRA 1996 and SOPA 2004. For instance, the author, in an interview session with 5 practicing construction professionals, had purposely set up a single question to acquire legit and credible suggestions from the interviewees on this matter. Except one, all the interviewees agreed that under CIPA 2012, the adjudication authority should 'adopt and adapt' the regulatory framework that has been established under HGCRA 1996 and SOPA 2004. However, the regulatory framework must be well planned to suit the current situation in the construction industry in Malaysia. In addition, the author has also suggested for the regulatory to resemble the regulatory framework for construction professionals in Malaysia. Besides that, four of the interviewees agreed with the idea as this will help meet the aim of the Act itself. One interviewee mentioned that, '[T]he best way is to get an authorised body to accredit adjudicators who are good and qualified with quality'. In fact, from the analysis that has been made to the ARC and ARRU report, the utilisation of experience and independent adjudicators will be a significant instrument to support the smooth sailing of the payment regime. This will prevent the construction industry as one of the contributors to the nation income from falling apart just because of the 'cash flow' problem.

CONCLUSION

'As the world has grown more specialized, countless such experts have made themselves similarly indispensable. Doctors, lawyers, contractors, stockbrokers, auto mechanics, and mortgage brokers, financial planners: they all enjoy a gigantic informational advantage. And they use that advantage to help you, the person who hired them, get exactly what you want for the best price. Right? It would be lovely to think so. But experts are human, and humans respond to incentives.' (Levitt and Dubner 2005: 5)

1. Conclusion

Alfred (2007: 36) states that professional services are largely created and sustained by the continued interest, expectations and demand of the public. The aphorism above reveals that professionals' regulatory frameworks must be designed to balance the need of protecting public interest with the self-interest of a profession. It was established in Chapter 1 that adjudicators need to be regulated for the good of public interest. Chapter 2 established that skills and knowledge embedded in the prime profession need to be enhanced and improved via regulatory entry frameworks conducted by the respective ANBs, ANAs or the adjudication authority in the countries which fall within the scope of this study.

However, as discussed in Para 3.2 in Chapter 4 and Para 6.3 in Chapter 5 of this thesis, there are concerns about whether the adjudication nominating authorities have genuinely been concerned with the need to produce adjudicators that will serve in accordance with statutory requirements and for the good of public interest. It was determined in Para 3.6 in Chapter 4 of this thesis that the existence of statutory tied regulatory frameworks for construction

professionals and legal practitioners has been seen as central in controlling the quality of the services provided to the market by these professionals.

As discussed in Para 6.5 in Chapter 5, the perceived self-interest of the professions has heralded significant changes in regulatory frameworks as the traditional framework of self-regulation has shifted to one of 'regulated self-regulation' where the state provides an arm's length control over the regulatory framework proposed by the PSRBs. Given the role required of the nominating authorities to protect the market from unqualified and incompetent adjudicators, albeit the situation in the UK, it was fully agreed by the payment regimes in New Zealand, Singapore and Malaysia that the government should have an arm's length control of its nominating authorities.

By promoting the object of public interest in the framework and further clarifying the disciplinary procedure for misconduct among adjudicators, it can be argued that the recent innovation on regulatory framework for adjudicators in New Zealand, Singapore and Malaysia are moving from self-regulation to regulated self-regulation framework. This movement will help in achieving the main objectives of the adjudication regimes. This is due to the fact that the quality of decisions depends, to a significant degree, on the quality of the adjudicators produced to the markets by the ANBs, ANAs and adjudication authorities[338].

It has been alleged by economists and scholars[339] that regulation for professionals is connected to the aims to monopolize and increase their earnings in the market by restricting competition through accreditation, registration or licensing. However, as discussed in Para 3.6

[338] It must also be noted that quality is also dictated by other factors such as levels of remuneration and timeframe for consideration of disputes and the process itself.
[339] as discussed in Para 1.8 in Chapter 3

in Chapter 4, and Paras 7.4 - 7.5 in Chapter 5 of this thesis, contrary to those popular beliefs, regulation for professionals nowadays may prove to have more benefits and value for consumers than detriments. In addition, as discussed previously in Para 3 in Chapter 4 of this thesis, it can be suggested that most nominating authorities have developed robust regulatory frameworks which seek to ensure that public interest is protected.

Standardized versions of the statutory entry regulations framework adopted in Singapore are appreciated as one of the steps taken by the government to improve adjudicators' competency. Comparatively, in the UK, there are no exclusive statutory guidelines supported by the government relative to the qualifications required of adjudicators under HGCRA 1996 and the Scheme. However, market necessities have undoubtedly contributed to the regulations promulgated by the ANBs in order to provide skilled, knowledgeable and competent adjudicators with the aim to fulfill the Parliament's intention for the new scheme. As for adjudicators of statutory origins, there are obligations that need to be satisfied. The main objectives of adjudication regimes are to create a platform to resolve construction disputes in as efficient a manner as possible and in particular, to ease the cash flow of a project. Accordingly, adjudicators as moderators for the adjudication process and encapsulated in boundaries set by regulation are central in expediting these objectives. In providing their professional services in the public interest, it is arguable that their levels of requisite knowledge, skills and competencies can only be assessed by peers. Thus, learning from the experience of other professions in the construction industries and legal fields adjudicators in the adjudication regimes in New Zealand, Singapore and Malaysia have adapted the regulated, self-regulatory framework as envisioned by Black (2002) and supported by Kaye (2006), Scott (2004) and Bartle & Vass (2005).

Behind any regulation, there must be valid and rational reasons. The government may choose to intervene in the market, largely on the grounds of wanting to change the allocation of resources and achieve what they perceive to be an improvement in the economic and social welfare of a country. For construction professionals and legal practitioners, the problem of asymmetry of information has been recognized as the main cause of market failures. The market will fail since it rationally undervalues some good services and overrates some bad services comparative to the information available to the public. This was recognised by Larson (1978: xvi) that in reality, professionals are 'producers of special services [who] sought to constitute and control a market for their expertise'. Thus, it is proven that only professionals can manipulate the information provided to the public regarding the quality of their services. Accordingly, the government needs to control and balance the information received by consumers in order to protect public interest. Therefore, solutions are made available through regulations imposed. However, a variety of economic and institutional factors determine whether regulations eliminate information asymmetry, or leave some residual information problems.

Accordingly, the establishment of PSRBs, whether on a statutory or voluntarily basis, serve as information intermediaries which seek to manage or eradicate problems in the professionals' atmosphere. Another significant factor that has grounded the regulatory framework for construction professionals and legal practitioners is the fact that both professions are vital to the economic features of a country. In addition, apart from the need to leverage asymmetrical information problems, regulation can stimulate consumers' investment in skills and knowledge needed from the construction professionals and legal practitioners. Thus, simplification is vital for the success of regulatory frameworks for professionals since unnecessary complexity may affect the consumers in terms of increased compliance costs.

The author has established that double regulatory entry frameworks imposed on construction professionals and legal practitioners are not a new occurrence. Both professions are heavily regulated directly or indirectly in order to conform to the national policies of a country. It was also noticed that some professionals have dual qualifications. Thus, being double regulated (or more) is not that unusual since most will have to go through two different sets of regulatory entry framework before being qualified to practise in their respective fields. For example, it was established by ARC (2000) that at that time, there were 67 dual-qualified adjudicators registered with the ANBs (ARC, 2000). Therefore, it can be speculated that professionals practising in the construction industry are not concerned about being double regulated since this brings more credentials to their qualifications to practise. Furthermore, it was observed that since being regulated may enhance the skills, knowledge and competency as an adjudicator, the idea of being regulated again may be an attractive proposition for professionals.

Naturally, due to statutory necessity, construction professionals and legal practitioners need to renew their registration or licence annually, whereas some adjudicators are only voluntarily assessed 3 or 5 years after being registered. Accordingly, several established regulatory frameworks for adjudicators can be considered lax compared to more robust and stringent regulatory frameworks that are compulsorily borne by construction professionals and legal practitioners. It should also be noted that the market for adjudicators in the UK is still open for adjudicators being merely nominated contractually by the disputing parties. Nevertheless, in promoting best practice and producing reliable adjudicators to a very competitive market, the ANBs in the UK have started to encapsulate the idea of promoting adjudication as a prime profession in the dispute resolution field. Thus, adjudicators are expected to promote their

excellence in the field area. Consequently, the regulatory framework for adjudicators has become more assessment oriented – a move prescribed with the intention towards the betterment of the profession rather than mere compulsory attendance in short courses provided by the ANBs.

The key issues that need to be tackled through the moulding of the regulatory framework are the factors of real importance in terms of quality for consumers, which the regulatory framework would seek to deal with. To sum up, the author strongly believes that the current self-regulatory frameworks for adjudicators by the nominating and adjudication authorities have adapted the notion of public interest. For more than a decade, evidence suggests that ANBs have provided the UK market with qualified and competent adjudicators and the system of adjudication has rapidly built up a substantial degree of confidence on the part of those involved in the construction industry in order to resolve disputes arising during the construction phase of a project. Even though there has been a significant amount of criticism, the effects of a reliable and reputable system to regulate the adjudicator can be seen in the reporting that one of the established ANBs with its own regulatory entry and disciplinary framework has become the main choice for consumers seeking the right adjudicators for the issues at hand.

Furthermore, beyond regulating entry for adjudicators, the ANBs have gone an extra mile in publishing guides for best practice for adjudicators as a means to protect public interest. Significantly, this thesis has proven that the double regulatory framework in the form of the regulated self-regulatory framework for adjudicators serves to protect public interest in adjudication regimes. On top of that, the findings in this thesis strongly suggest the need for adjudicators to be well-equipped with the skills, knowledge and to have acquired the

competency acknowledged by the public in order to practise in the adjudication market. Overall, it can be observed that the double self-regulatory frameworks for adjudicators are designed to serve and protect the public interest notion.

2. Contribution to Knowledge

In the journey to establish the credible regulatory framework for adjudicators under CIPA 2012 in Malaysia, the author has contributed new knowledge to the existing theory of the regulatory framework. It was noted that regulatory framework has been created to the best interest of the consumers of the services provided to the market. However, none of the theory includes one major theme that has always been there but never been captured before. 'Public Interest' is introduced to underpin the regulatory framework as a whole.

In addition, Chapter 2 of the thesis has published the knowledge and skills essential to adjudicators. The author is poised that both of the findings will be the most influential factors to help the regulators in promulgating the credible regulation that can be accepted and approved by the Government. Since the adjudicators themselves will be the most influential tools, regulating them will become essential to the success of the payment act. It can be argued that the findings in terms of the theoretical regulatory framework for adjudicators as projected in Figure 6.2 in Chapter 6 of this thesis have potential to be used not only in Malaysia, but also in other countries that are keen to make sure that their payment acts work properly and smoothly for the benefit of the construction industry as a whole.

Interview Questions and Transcripts

Set of Questions

Dear ……., I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

No	Main Question	Additional Question	Clarifying Question
1.	Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?	• Are there any glaring problems in the process? • How did you learn about these problems? • Under what circumstances does each problem arise? • Do the problems affect the implementation of the statutory adjudication in the Malaysian construction industry? • What is the scope of the problems? • Have you noticed any changes in the construction industry dispute resolution system since the enactment of the Act?	• Can you expand a little on this? • Can you tell me anything else? • Can you give me some examples?

No	Main Question	Additional Question	Clarifying Question
2.	In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?	• Why?	• Can you expand a little on this? • Can you tell me anything else that is relevant here? • Can you give me some examples?
3.	In your professional opinion, can adjudicators be considered as professionals?	• Why?	• Can you expand a little on this? • Can you tell me anything else that is relevant here?
4.	Do adjudicators need to be regulated?	• How?	• Can you expand a little on this? • Can you tell me anything else that is relevant here?

	Main Question	Additional Question	Clarifying Question
5.	For your information, there are different approaches in the process of regulating adjudicators in other jurisdictions that have introduced statutory adjudication. The UK relies on an entry regulatory framework approach which is based on market demand. (*This occurs when the demand from the consumer will determine the qualifications and level of expertise needed to conduct the adjudication procedure.) This also occurs in New Zealand. On the other hand, Singapore statutorily enacted both an entry and conduct related regulatory framework. (*The particular qualifications and criteria to become an adjudication will be determined by regulations enacted by the government) Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?	• Why?	• Can you expand a little on this? • Can you tell me anything else that is relevant here?

	Main Question	Additional Question	Clarifying Question
6.	The Construction Industry Payment and Adjudication Regulations 2014 recently set minimum standards and criteria for adjudicators that can provide services to the market. * As per Regulation 4: Competency standard and criteria of adjudicator The competency standard and criteria of an adjudicator are as follows: a) the adjudicator has working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognized by the KLRCA; b) the adjudicator is a holder of a Certificate in Adjudication from an institution recognized by the Minister; c) the adjudicator is not an undischarged bankrupt; and d) the adjudicator has not been convicted of any criminal offence within or outside Malaysia. In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?	• Why?	• Can you expand a little on this? • Can you tell me anything else that is relevant here?

	Main Question	Additional Question	Clarifying Question
7.	From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. What is your opinion on this statement?		

Thank you for your cooperation. It has been a pleasure to discuss this matter with you and your professional advice and opinions are highly appreciated. Please be assured that all data gathered shall be confidential and only viewed by the project team and that nothing will be published in such a manner as to disclose the identity of interviewees. A copy of the study findings shall be available to you on request.

Transcript Interview

Interviewee : Sr Dr Rozina Mohd Zafian

Date : 25st May 2015

Place : 16th Floor, Menara Tun Ismail Mohd Ali, Kuala Lumpur

Time : 11.00 am

Dear Dr Sr. Rozina Mohd Zafian, I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

Question No. 1

Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?

Answer:

From my opinion, the implementation of the statutory adjudication in the Malaysian construction industry will not be too rapid. It will be a very process. Because I think many of the participants in the construction industry are still trying to grasp what is adjudication. Especially so, it is targeted for those who are facing payment problem, especially among the subcontractor, rather than the main contractor. But they are those parties who are the slowest in learning what adjudication is. I doubt if they really know the adjudication process. And what it can do for them. But the [for] the main contractor or the bigger players in the construction industry would be very well aware of what adjudication is. And they have no doubt in employing lawyers to assist them in the adjudication process. The smaller contractors will have to think twice about invoking adjudication even if they know it will help them because they do not want to jeopardise their business relationship with their client or the main contractor. And this is the culture in the Malaysian Construction industry or the culture face by the Asian. And this scenario has been reflected in New Zealand construction industry, whereby the smaller contractors are reluctant to invoke adjudication because it would be adversarial relationship with the main contractor. However, if the construction industry payment [problem] is moving very slowly, [and] then I believed the KLRCA will be

actively promoting adjudication or arbitration to settle payment problem in the construction industry. Ok. The glaring problems will be the knowledge.

- Do you think that the problem itself will affect the implementation the adjudication process in few years to come? Or if the KLRCA played their role, the problem will be solved?

At the same time, KLRCA are not only promoting adjudication, but they seem to be actively promoting arbitration in various aspect. Now they are going into the financial Islamic arbitration, marine and I don't think they are putting much emphasis on adjudication as much they are doing it for arbitration. And furthermore, adjudication is a temporarily binding dispute resolution so parties who might want a permanent solution would prefer arbitration. No doubt arbitration is more expensive but adjudication being a provisional decision making, will open up [or] enable the other party who is aggrieved with the adjudicator's decision to reopen the issue either in arbitration or litigation. So there is competition between arbitration and adjudication. Especially so, KLRCA are now promoting fast track arbitration rather than the original type of arbitration process.

- Have you noticed any changes in the construction industry dispute resolution system since the enactment of the Act?

As a government officer, I think adjudication has a good impact on the government sector. No doubt, there is only one adjudication case so far. But, the effect that adjudication will have on the construction industry especially in the government sector has proven that parties have speeding up in making payments. They are trying to resolve payment issues as fast as possible. And in ensuring that adjudication will not take place in the government sector we have already revised the Conditions of Contract in order to protect the government and also to make the contractor more accountable in making their claims.

Question No 2

In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?

Answer:

Yeah, I think it is sufficient. Especially, since we have examinations or we have log book to [be] filled in. We have the special route; we have all the interviews on the experiences of the quantity surveyor (professionals). So, I think it is sufficient to ensure the competency of professionals.

Question 3

In your professional opinion, can adjudicators be considered as professionals?

Answer:

Adjudicators per se… are not suited to be call professionals. They have to be backed up by some external experiences and qualifications to support the issues that they will be handling. For example, we have so many disputes in the construction industry some are related to legal issues, some are related to technical issues, construction issues, supervision issues and what not... Especially since adjudication is targeted for payment issues, so there is a great necessity to those involve in adjudication to be well equip with technical knowledge and the basic of construction law, in order to become an adjudicator. However, it can be a profession but as a secondary profession that will have certain important knowledge to be applied. For example, lawyers can also be adjudicators, provided that they have, I mean if they are trying it in construction industry they must have a basic background in construction law to support their professionalism to be an adjudicator.

Question 4

Do adjudicators need to be regulated?

Answer:

Of course, definitely. Adjudicators need to undergo a regress process where they know their boundary. They know how to make decision, they know how to study the documents and they must know how to tackle the parties. They had to have various knowledge to enhance their professionalism as adjudicator. Otherwise they will make a decision which is not accepted by the parties. In addition to being regulated, experience in the industry will enhance their competency. And I would say the current adaptation of experience base by KLRCA to registered adjudicator is not enough. I expect 7 years is too risky. At least 15 years.

Question 5

Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?

Answer:

I think this is a very important question. Especially when we can learn so much from other countries by looking at how they regulate their adjudicators, how they develop the regulatory framework so that their adjudicators to be worldwide accepted. I think Malaysia will learn a

lot from these countries. Because these countries have their own bodies; for example, in Singapore they have a single body to regulate their adjudicators. In a sense that, the adjudicators in Singapore will need to be registered with that single body [in order] to be call an authorised adjudicator. And in New Zealand, they have several bodies to regulate their adjudicators and so does Australia. And although in UK, it is a bit flexible since you did not have an adjudicator that will be regulate by a single body, nevertheless most adjudicators would fall under one of the bodies because they know the importance of being up to date with the legal issues, with the current awareness of adjudication's case law. It will help them in making their decision (as adjudicator). So, Malaysia in a way, I believed has learnt from all this country not only on how to regulate their adjudicators but also to produce the act itself. The Malaysia act has incorporated a lot of what other countries has been practising. And probably we have covered some aspect which is not covered by other countries. Overall, I must say that we must adopt and adapt.

Question 6

In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?

Answer:

The first issue is that in Malaysia, the adjudicator need not be selected only from KLRCA's adjudicator panel. We allowed the parties to select their own adjudicator. We give freedom of choice. But if we take an adjudicator from a pool of accredited adjudicators from KLRCA we would be more confident since the adjudicators would certainly be undergone a stringent procedure to become adjudicators to held a proceeding before making a decision. I believed this is more in line with what we should be targeting at. Because we need quality adjudicator and also [need] quality decision. And it would be better for us if we have a certified or accredited adjudicator. So that we are always updated with their CV's and we know how far their experiences are. And whether they are more suited to our kind of disputes.

Question 7

From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. This model includes the entry and conduct regulatory framework where the process of regulating will be done throughout the period of registration as adjudicator.

What is your opinion on this statement?

Answer:

I fully agreed with you in the aspect that we need a body regulate adjudicators. The best way is to get and authorised body to accredit adjudicators who are good and qualified with quality. At the moment we lack of good arbitrators. But maybe we can overcome that in adjudication which is focused more on payment. So there is no requirement for an adjudicator to go into loss and expense or other areas of disputes. If they are good in payment and if the get proper training in payment issues, I think their decision would not be contested and it would probably be the final decision for both parties. I mean, if they would agree for the decision as a settlement agreement for that issues. However, I also believed that parties should be given a freedom to choose their own adjudicator. Why? It is because sometimes an adjudicator who is agreed by both parties might be a person who would be regularly appointed if there are future disputes in a same project. And that person would have the knowledge of the disputes or whatever contention of the parties from the beginning. But, no doubt it is not easy to get both parties to agree on the same adjudicator, who to both parties are not bias or impartial. But, if they can get or agreed a single adjudicator to settle all their disputes, then it would be better for both parties. However, if you take adjudicator from a panel of adjudicators by KLRCA, then every dispute would have different adjudicators. This may not be or well agreed by both parties. The adjudicators would have to study the whole process again. However, it would also ensure impartiality which is good for the parties. So there is always be a good and adverse point on this matter.

We do not anticipate that there will be too much dispute for a single project, especially for a small contractor. Once there is adjudication case between the parties, I certainly believed that the main contractor if he defaults in payment, he would not repeat the same mistake again. It would not be good for his financial status. So once you go into adjudication to me, I believe you would fall into the same trap twice. So, on that basis it is good to have an adjudicator from the panel of KLRCA's adjudicators but with improvement. KLRCA should not be contented with their procedures and regulations, if they detected something is missing, they should always improve and improvised the procedures until it is perfected to produce high quality and competent adjudicators. This is something that we want to see in the future.

Interviewee : Ir. Harban Singh

Profile : Professional and Chartered Engineer, Arbitrator, Adjudicator, Mediator, Advocate & Solicitor (non-practicing). Among his other professional affiliations, he is a member of the Adjudication Society and the Association of Independent Construction Adjudicators. Ir Harbans Singh commenced his career in Malaysia before working in Germany and thereafter locally in various professional capacities. He is presently domiciled in Malaysia where he is active in construction law and dispute resolution. Ir Harbans Singh is the recipient of the IEM's Tan Sri Haji Yusof Prize (2001), the Cedric Barclay and the Chartered Institute of Arbitrator's Award for the Diploma in International Commercial Examination (2003). He is also the author of a series of four books entitled 'Harbans' Engineering & Construction Contracts Management", co-author of the book "The PAM 2006 Standard Form of Building Contract" and "Construction Law in Malaysia", contributor to the "Malaysia Standard Forms & Precedents: Construction & Engineering Contracts"," The Ingenieur" and the "Malayan Law Journal".

Date : 6th June 2015

Place : KLRCA Lobby, Kuala Lumpur

Time : 12.45 pm

Dear Ir. Harban Singh, I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

Question No. 1

Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?

Answer:

One year only. I do not know whether you have attended my talk or not. [For me] this act is a mess. Unless there is an amendment, we are already having so many problems. People are

going to court. I do not know whether you are aware; there are already cases on retrospectives issues. All these things are definitely affecting the implementation of this act. People are not sure. Which way to go? The High Court decided these retrospectives, now the party has appeal and the Court of Appeal is now considering the issue. And then I also understand about three weeks ago somebody manage to get an injunction to stop an adjudicator from proceedings. So it takes time for the implementation to be ok. Not only the act itself, the problem is people are not sure. One of the glaring problems is when the government has given an exemption. How do you interpret exemptions? All this has giving rise to the problems.

From my point of view, I don't know about KLRCA because KLRCA is in a much better position to give the insight on this matter since they are appointing adjudicator and they are getting back the feedback. So they are in a better position to provide the insight on this matter. We have also this Malaysian Society of Adjudicators. They also are getting feedback on this matter. So for me I just give you my views from my experience practicing as adjudicator.

- Have you noticed any changes in the construction industry dispute resolution system since the enactment of the act?

It is too early to tell. Because, the first few (court) cases only has been decided towards the end of the year in 2014. For me, the changes could be seen yet. We have to wait a bit longer for us to see any changes that arise after the implementation of the act.

However, for now, Malaysian payment culture is not change. Because, frankly I tell you, our construction industry is based on power and the top player are using the intimidating tactics towards the small people or those who are weak. So what is the point of having CIPA if the culture has not been change? Some are so powerful that they think the act would not affect them. From their point of view if the sub-contractor brought adjudication in, they will simply eliminate those who dare from being appointed in the upcoming project. So when we have this kind of mentality, the law won't work. We have so many good laws and regulations, but if we still have selective enforcement it just won't work! So unless we change this culture and mentality nothing can be done. Malaysia and Singapore are the only two Asian countries that have this act. Our working cultures are different from the western societies. The right to use the act has not been respected. It has been seen as the challenge of power to the top player. Moreover, with the exemption power, all the big guns are aiming for this, so how could the law work properly. It is not fair. To me adjudication is just another layer of disputes resolution that is not going to work if the culture has not been change through and through. The trend is here; arbitration is dying because of the same issues. On paper everything is good but the implementation is hard work. God willing, someday it will work if people know the right and respect the right.

Question No 2

In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?

Answer:

It is a fact that 90% of the engineers are not interested in becoming an adjudicator. In fact, of you look at the KLRCA list of adjudicators, most are lawyers. The people in the construction industry are hardly there. There are hardly any architects, hardly any QS or engineers or even contractors. You see the whole point of getting CIPA going was to get more of this people to practice as adjudicators. Because of this, it turns into a very "legal" environment. So it defeats the whole purpose of the act. Might as well we go to arbitration or court since it will be basically the same.

For me Board of Engineers is doing hardly anything. We are being registered and then have to gone through some CPD requirement. That's all. I am a member of others mechanical engineer's institution abroad, I found out that those people are giving more professional support than our local organisations could. Other than your four magazines per year, there is nothing else. Once in a while they will hold so called courses and they will charge you. So, there's no room for professional development. BEM (Board of Engineers Malaysia) is a statutory body, who are controlling BEM? The head is the Director of PWD. Compare to lawyers, BAR Council is elected, so there's accountability. So in BEM there is no accountability. I am keeping my distance away from BEM. I used to do training and all that for them but it was a thankless job. I do not know what they are doing.

Question 3

In your professional opinion, can adjudicators be considered as professionals?

Answer:

I don't think so. I think you shouldn't equate it to profession. Because, adjudicator's world is different. You are trying to dispense your responsibilities. It is more like a service. It is an impromptu service like mediator. It is a form of service. I don't see it as a profession. Even like arbitration, I also did not consider it as a profession. Basically you are just providing a service and it is more than just doing a job. So I treat it differently from other profession. It kind of a contribution to the society and in the process you will be paid a certain sum of

money for your services. I do not think money is the bottom-line. Because when you make it a profession, then money will become the main idea. Money orientated.

Question 4

Do adjudicators need to be regulated?

Answer:

I don't think that adjudicators need to be regulated, if only, I mean in whatever panel you are listed, the panel will make sure that you comply with certain level of standards. And I think this is what the KLRCA has been doing. Same thing as SMC (Singapore Mediation Centre) has been doing in Singapore. In that sense, I think on the other hands, parties must not appoint just anybody to be adjudicators.

Question 5

Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?

Answer:

I think our accreditation process is much more superior than any other countries. KLRCA is the only one who is running a structured programme for adjudicators. I don't think anybody else has done the same. That is my personal knowledge. I may be wrong. This is due to the fact that other people from other countries are coming down for training in KLRCA from UK, Hong Kong. I feel that, in fact we are ahead of them.

Question 6

In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?

Answer:

Definitely! I think the whole point of this act, I remember when this whole idea... before this whole act came to be, and our argument was adjudication will be as effective as the quality of adjudicators. If we don't have good adjudicators, then how are we going to have a good adjudication? People look at adjudication as a rough justice only. So why do we need people who are … you know trained and this and that? But our view was different. We want adjudication to work, so the starting point is the people must what adjudication is all about. The adjudicators must have the basic skills. So non-lawyers have to be teach legal skills. For lawyers, we teach them about construction industry skills. And then let them go through a structured programme. So, the whole premise is like that. The nature of it is by having a programme of accreditation, and then follows by CPD programme. After three years the

KLRCA will evaluate the adjudicator performance. This is what the KLRCA is doing. CPD is a means to keep their adjudicators up to date and at the same time controlling the quality and competence of the adjudicators.

For me KLRCA must maintain this approach to help in enhancing the competency and qualities of the adjudicators. The ground work has been set up by the Director of KLRCA it's up to the next Director to uphold and maintain and upgrades the system. For me the regulating framework for adjudicators done by KLRCA is very structured and very transparent and they have done a very good job in that sense. Another point, KLRCA being international organization lends their credibility to help enhancing and maintaining the quality of the adjudicators under their belts. This is why the government had decided to choose KLRCA as the governing body for adjudication in Malaysia. It is independent and they have set up a very high standard for their panel to be marketed.

Question 7

From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. This model includes the entry and conduct regulatory framework where the process of regulating will be done throughout the period of registration as adjudicator.

What is your opinion on this statement?

Answer:

I think it should be the other way around. The professional bodies should follow what KLRCA has done. I will be very frank! As for our professional bodies, especially the engineering bodies the regulatory framework that they have been adapted is not up to the mark. We must be transparent. As we look at this way, KLRCA is not a professional body, it is an international organization, so I think the level is a bit different. Our professional bodies should move forward and learned a few tips from independent organization. But our problem is basically on being transparent. Since the professional bodies are being set up and control by the government. For me there is no accountability. They are appointed and not elected through a better system like Bar Council. How the professional level is going to be enhance with this system?

Interviewee : Sr. Amran Bin Majid

Date : 21st May 2015

Place : 15th Floor, Menara Tun Ismail Mohd Ali, Kuala Lumpur

Time : 1.45 pm

Dear Sr. Amran Bin Majid, I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

Question No. 1

Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?

Answer:

Currently for government project it is a bit slow. This my point of view as one of the government's personnel involved in an adjudication process for a government project. Of course throughout the case all the parties involve complied with the requirements and needs of the act. But the problem is, I am not satisfied with the process. It does not provide the right justice for the whole project. The process is a bit to summary. The adjudicator decision is based only on the submission of both parties without any verification or cross examination on the justification itself. I personally feel that the adjudication supposed to be determined summarily but not for a big project or disputes on complicated matter.

To be fair to Malaysia, the act is still new. Even though the act does not determine the value of the disputes, it should be put into consideration once the act is in the full swing. The value and the subject matter is the key to good decision that has to be made in a very limited timeline. In my experience, of course the act talks about the payment for work done and services, however in this particular case the disputing parties also submit loss and expense claim. Of course under our opinion, the subject matter is not covered under the act since claims for loss and expense are considered as damages. But again, this is only our interpretation; it should have been ventilated in the act. This is one of the glaring problems, the interpretation of the subject matter itself are not that clear. So, we have to wait for the court to decide on this issue. This is because, the interpretation come under the question of law.

Since the act is still new, everybody is deducing the shady area on their own. So we need time to consolidate it. But if we go to the underline philosophy of the act itself, in this case it is supposed to be fast, cheap and should be use for less complicated matters. If you adhere to that maybe it will work. For me, maybe if we adhere to the underlying principle of this act, it might work properly.

- How did you learned about the problems?

As I mentioned earlier, for government project, we only came across one project. Luckily the adjudicator agreed with our justification and submission. However, it turned out the other party are not happy with it and is submitting the matter to arbitration pertaining to the same subject matter. In other words, even though the acts allow for any scale of disputes pertaining to payments, it is still best for this complicated matter to be resolved under fine justice process like litigation or arbitration.

- Have you noticed any changes in the construction industry dispute resolution system since the enactment of the Act?

Any changes in the construction industry? No. No changes. Maybe the effect is not that big. The industry is still struggling to adapt to the new changes. However, I hope that one day, the confusion will end. There are a lot of uncertainties on some of the terms in the act.

Question No 2

In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?

Answer:

Again, it depends. Base on my knowledge, some good has been captured by the existing regulatory framework that can be considered to contribute to enhance the competency of a person being regulated. CPD programmes have helped the professionals to become more alert in what is happening in the industry itself. It basically can give some confidence for the consumer of the services. However, on the hind side, it can choke the supply of the professionals and fewer options can be given to the parties in choosing their professionals. But this is not major problem. I would not agree 100 percent on the contribution of the regulatory framework to enhance the competency and the skills of a person. But sometimes it helps to have something rather than none.

Question 3

In your professional opinion, can adjudicators be considered as professionals?

Answer:

No. I would say, since there are no regulatory body that oversee the adjudicators itself. It will fall short of that. Simply because in the event you are already a professional like quantity surveyors and the disputes are pertaining to payment disputes or final account for that matter, it is just another professional that are making the decisions. Notwithstanding, the fact that he is also an accredited adjudicator. So, adjudicator is not a professional by itself. He or she had to rely on their knowledge and skills from their primary professions. Another point is because the act is silence on this matter. The act does not prohibit non-professionals from becoming adjudicator. Let's have a look at arbitrator. Are they professionals? No. Some decisions made by arbitrator are bewildering. Some arbitrator nowadays, under Malaysian context are former judges, who are not even accredited by any professional's bodies. So, by itself, adjudicators are not professionals. For me to a professional, you must have certain criteria dictated. The person must have gone through all these criteria. If they have gone through this particular criteria, for them to be educated maybe fair enough then they can be call professional.

Question 4

Do adjudicators need to be regulated?

Answer:

I believed so, in certain situation. Of course the act talks about it. The immunity provision is one of it. But there is situation whereby when an adjudicators did not give any decision in the designated time frame. Could you blacklist him? Of course the KLRCA can do it via administration, just like arbitration. So what do you do to them? In that sense, of course notwithstanding the fact that this people can be legally bound by common law or agreement if the appointment were done by disputing parties. Nevertheless, to makes thing in perspective they should be regulated through the allocation of the act.

Question 5

Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?

Answer:

Yes. We may have to learn from others, but at the same time, we must think of a system that will suit our environment and working conditions rather than adapted or mirror other

countries regulations. At the same time, not thinking about their culture or their legal perspectives, some countries have peoples that are really professionals in the construction industry. They can read the construction drawings and they can estimate the contract properly. Even though, there are so many registered contractors, but for the time being this is not the case in Malaysia. In our case it is about selling the projects rather than administering the project for the end user satisfaction. In other words, they just become the intermediaries. So once disputes arise, it will be any kind of disputes rather than focusing on competent disputes. So in that situation, if we want to regulate adjudicators in a Malaysian context, we have to consider this as a priority as opposed to what have been applied in the UK or Singapore. Then maybe we will come out with better regulation.

Question 6

In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?

Answer:

Help? I would say, what the KLRCA has been doing now is not enough. I would have increased it and tightens it. I think what KLRCA is doing now is to increase the numbers of certified adjudicators in Malaysia. Maybe that is why the regulatory framework with entry requirements is a bit low. I would say if we want to have formal adjudication in Malaysia, we should have high requirement for entry to ensure quality. And then the public will attract to see adjudication as alternative disputes resolution. Rather than putting and spending their money on adjudicator whom may not be competent in legal interpretation to be making decision, which disregard to other rules or provisions of the law. At the same time, if it involves a lot of money the adjudicators will facing the lawyers who will be the counsel of the disputing parties. So when you are a junior adjudicator with only 7 years' experience in the construction industry, I bet they can't handle it. So, I would say at this stage if the KLRCA are serious notwithstanding the fact that they want a lot of adjudicators in the market, they can just put a high level of entry requirement to produce adjudicator that will have high level of decisions. So, to conclude it I would say no. The existing regulatory framework does not help to enhance the quality and competency.

Again, if you want to go back to the first philosophy of the act as promoted by Construction Industry Development Board (CIDB) when they are selling this idea is "Cheap". To help the small contractors and to help the subcontractors who could not afford legal proceedings. So they would have adjudication as their alternative dispute resolution process and it is supposed to be cheap. If that is the intention, notwithstanding the fact that everybody wants justice, it should be limited to a certain kind of disputes. Sad to say, once the act has been out, it does not promote that. In fact, the act talks about written agreement. For small contractors, they do not really have any written agreement. They might have oral or they might have correspondence that can be accepted as written. So I would say New Zealand may have a better model but maybe the philosophy behind it is different. Maybe New Zealand's (act) are talking about quality decision and notwithstanding the time limitation.

Question 7

From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. This model includes the entry and conduct regulatory framework where the process of regulating will be done throughout the period of registration as adjudicator.

What is your opinion on this statement?

Answer:

It is ok. Fair enough for the time being. It can increase the threshold level. But again it is not by way of, in a sense that as in Malaysia, the act also talk about KLRCA can set the criteria. So you can put it as it is. However, it does not mean that we still can get quality adjudicator from this clause, since at the same time the act also allows them (disputing parties) not to follow KLRCA guidelines. Fair enough. To ensure or as guidance to the industry it is fair enough.

But again, as I say, it should not be at 7 years, the experience I mean. You can set certain criteria like being a professional. I will go more than what the Singapore has implemented, I mean, it supposed to be more than 10 years. For me it must be twenty. Since the adjudicator must give the ultimatum decision within 45 days. The person must be involved in the industry. I would argue, if KLRCA can actually classify the adjudicators in to different class by looking and into their back ground rather than make it open. For example, I have seen a very bad decision made by an arbitrator. The dispute is on termination and the arbitrator happened to be a professional quantity surveyor. The worst decision I've seen. This fellow is not legally trained, so he had been blacklisted after our Attorney General is upset by his decision. So I think we must categorise the adjudicators. Maybe we can follow the guideline from New Zealand as well. The training must be there. But for, as I say before, complicated matter should be ventilated via higher type of dispute resolution system of fine justice. Maybe the value of the disputes will make a credible cut off for the regulatory framework for adjudicators.

Transcript Interview:

Interviewee : Sr. Hashimah Harun

Date : 24th April 2015

Place : 3rd Floor Menara PJD, Kuala Lumpur

Time : 1.45 pm

Dear Sr. Hashimah Harun, I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

Question No. 1

Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?

Answer:

This adjudication in Malaysian industry is still at the very early stage. It was approved by the (Malaysian) Cabinet in 2012. So, the implementation only started last year in April 2014. But, there are so many glaring questions on how the adjudication in Malaysia will be carried out. Ok. First thing is that the scenario of our construction industry I would to say is totally different from other countries like UK. Because, a lot of factors contribute to the problems in the scenario of construction industry in Malaysia.

- Are there any glaring problems in the process?

One of it, the glaring factors where it comes with political scenario. There are cases like, for example where the decisions of the people in construction industry are being are dictated by political (masters) influences. So, something must be done like if you want to carry out totally the implementation of the adjudication in Malaysia, we had to look at the local scenario. It cannot be a copy or duplicate from the (system) in UK or Australia. Especially projects with the government. So, the will be a lot of factors that affecting it.

Another glaring problem would be on how would the adjudicators from the government side carry out the like assessment on adjudication process. Now, I would say there is no governance yet like in the government to do their work. For example, should the adjudicators

do their work during office hours or after office hours and maybe they would spend more time on adjudication, maybe they would rather do their core business in the government. So those are the glaring areas. As to like payment, now the government servants are subject to declare their income. At the moment there are standard minimum fee set by KLRCA, but again it is between the adjudicators and the person who wants to pay you. There is a minimum standard but if the person who engaged the adjudicator willing to pay more, why not.

On the other hand, another glaring area is people in adjudication process. Some adjudicators would prefer that they be on the other side of the fence. Like, they don't need to adjudicators but rather as an advisor to the person who has disputes in payment. This pays more. Moreover, since the adjudication implementation is still new, we do not have any tested case because whereby nobody really knows if really the adjudicators appointed by KLRCA are being really tested with the actual project.

- How did you learn about these problems?

Through our day to day experience we learned about the situation. For me, even I am a certified adjudicator; I have not experience any case yet. That is the thing that I feel like glaring. We are asked to register, to be certified but I don't see any job come in so I could practise my knowledge. We have gone through the training. For over one year, we have been a certified adjudicator nothing comes in.

- Under what circumstances does each problem arise?

Like I said, scenario in Malaysia is different. Sometimes contractors in Malaysia rather not go for disputes. They will settle it between internally especially if they are doing the government projects. So that's how the problems arise. You see, people in the construction industry in Malaysia are not meticulous about claims. They are more tolerant. Sometime they don't even have any disputes. But this can be seen especially in the government's projects.

- Do the problems affect the implementation of the statutory adjudication in the Malaysian construction industry?

We have yet to see. Until we have gone through the process, we have yet to see on that.

- Have you noticed any changes in the construction industry dispute resolution system since the enactment of the Act?

Changes in the construction industry, not really. Not really. The only things that change is the fear within the government sector where we tell our people to be more careful when they are making payments. This is mainly because government (projects) has been given exemption until the end of this year. Maybe next year we will see how the outcome of the enacted Act.

Question No 2

In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?

Answer:

Yes. Obviously. It will enhance the competency and knowledge. For me the existing regulatory framework whereby the quantity surveyors are being regulated, it had made a lot of differences in the way the professionals practice in the construction industry. In Malaysia we are governed by the act. So this will ensure that we have a certain standard to be fulfilled before being recognised as quantity surveyor. And we have to make sure that we are being assessed yearly just to have a valid requirement to practice as construction professionals. Not only are we being regulated via registration, we are also being assessed on our competency before being allowed to practice every year. So, well indeed, I believed the existing regulatory framework as construction professionals do ensure the competency of regulated person. In addition, we have to gain trust from the public that will engaged us to do the work that they are not be able to do by themselves since we are the professionals here. I think they will be more competent.

I think it is important for an adjudicator to have some technical experiences especially that are related to the construction industry. You cannot have a medical doctor to become adjudicator in the construction industry. First thing is if you do not have any basic in construction, then you won't be able to appreciate the problem. I think people from the technical background with legal knowledge will be better. They will be a better person as adjudicators. So to have people from professional bodies like engineers, quantity surveyors, architects maybe, or any other professionals from certified regulatory body, they would make better and competent adjudicators.

Question 3

In your professional opinion, can adjudicators be considered as professionals?

Answer:

Yes. Why not? I have met a few adjudicators who just concentrate and focus on adjudication. He doesn't have time for himself. He has 200 cases. You don't have to have other profession. Sure. Maybe our education system in university needs to start to produce adjudicators. There should be a special course where students are being trained to become adjudicators. For example, RICS are offering diploma in adjudication. Maybe Malaysia should follow suit. It is another profession and a good profession.

For me, I am now the Director of Training in Public Works Department. I am now looking towards having some sort like for a special course for adjudicators. Since PWD as a technical

department, we are on the liberty to go into adjudication implementation. We should have a special module for adjudication in our centres of excellence to train adjudicators as professionals. So there will be another milestone where we can open for outside people to come in and being certified as adjudicators from us. This will create more revenue for the government and we can produce more certified adjudicators to be certified by PWD. This is my ambition. We want our centre of excellence to at par with international requirement. PWD is an established organisation. 143 years of experience. I don't think people will question our certification for professionalism. Right?

Question 4

Do adjudicators need to be regulated?

Answer:

Yes. I think they need be regulated on entry base and throughout their registration period. In order to ensure that the market will receive competent and good adjudicators, regulatory frameworks are indispensable. In order to regulate adjudicators, we need to have a good regulatory system. Assessing base on yearly competency requirement is a good start. If one certificate is valid for 10 years, it is not a good system. In term of experience, 7 years are not enough? It should be more. More than 10 years I would suggest. To maintain the quality of adjudicators, yearly assessment is crucial. The adjudicators need to learn new things, new knowledge, learned from other people experience. Yearly renewal for practice is also a good step. For me what KLRCA have done is good. However, the 5 days training programme is not enough. If people being trained are from construction professionals, it is fine. However, if the people who attended the course have no construction experience, I don't think it is the right way.

Question 5

Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?

Answer:

I think, in the UK, disputes governed by HGCRA 1996 are not specific for payment only. For in UK, the industry has different way of thinking and scenario. Like I said earlier, in Malaysia it is different. People try to suppress the problem. They do not want to bring their disputes to higher level. Unless if they cannot resolve then they will bring it to the higher level but most disputes have been settled in their internal lower level of disputes resolving system.

I think it is a good system for regulatory framework that they have in the UK where there is a competition between many bodies that will have the power to regulate adjudicators to meet

the market demand. The public will be supplied by more adjudicators but the problems in Malaysia if we implement the same system as the UK; we will have more supply that demand of adjudicators. There need to be balance. If we have many case and many adjudicators, it will be good. But we have too many adjudicators with no case it will be a waste. For me as in Malaysia or ASEAN people we do not like to quarrel. If we can resolve than it will be settle quietly.

If for the government side, we are a good pay master. We will pay but sometimes a lot of factors contribute to the late payment but we will pay. It is matter of time frame. Now or later but you will get paid. That is the scenario.

As for the system in Singapore where the act binds the regulatory system, I think that should be the way. KLRCA must make sure that only people who are qualified can be registered as adjudicators. This will guarantee the quality. For KLRCA, if the intention is money making from the regulatory system, then it will defeat the purpose of the act. Quality of adjudicators must be ensured. Minimum standard must be set as a criterion. For example, technical knowledge is essential, and then we will have good adjudicators in the market. If you are a project owner, you will want someone with good technical knowledge to come in and resolve your problems. For example, if the person has experience in construction industry but as a marketing manager, the appreciation of the problem or disputes is different.

Yes, Malaysia should use the concept of 'adapt' and 'adopt'. We should not start from scratch; we should not start from zero. We should learn from other countries. We should start from their experience. Take the best from each country and adapt it in our country. That should be the way. Don't start from zero. If we are not the premiere, you learned from the people who have gone through the process. In fact, you will be better.

Question 6

In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?

Answer:

I agreed and support this. However, the system should be more advance. Rather than relying on the entry requirement only, KLRCA are supposed to gain some help from other professional recognised bodies like the BQSM, RISM, Board of Engineers or Board of Architects in order to regulate the conduct and ethics of the adjudicators. As for the next step, I would to suggest for the Public Works Department (PWD) to have the power to produce their own adjudicator and this matter should be brought up to the Minister level. PWD should create our own module to contribute in the process of registering adjudicator. We don't have to go to KLRCA, we can do it here. This is because; we (PWD) are the biggest technical body in Malaysia. We have more than 4,000k professionals in construction industry from different background. It will be extra mileage for our professionals to become adjudicator. Why must we go through KLRCA? We do it here. And then we should open for people from outside. People will trust us more, because PWD is the authority.

- Could you give your final insight on the regulatory process for adjudicator and for adjudication implementation?

Since adjudication is still new in Malaysia, I would say still at the formation phase, where people in the industry are still like confuse. Until we really go into it, we try and tests and experience a few cases. Then only we know at what level we can achieve in adjudication. So, I would feel that KLRCA should not be left alone. I think the professional bodies in Malaysia; have to work along and hand in hand with KLRCA. JKR also must play a bigger role in this matter. PWD as the biggest technical body should come and work together with KLRCA, the board of professionals to provide better plant form for the implementation of the adjudication in Malaysia.

Question 7

From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. This model includes the entry and conduct regulatory framework where the process of regulating will be done throughout the period of registration as adjudicator.

What is your opinion on this statement?

Answer:

This is rather interesting. Basically, as a professional that has been regulated and still being regulates, this model provides some comfort for the consumers in construction industry. It somehow provides a promise that the adjudicators supply to the market are very well trained and at the same time are govern by a set of standard rules and regulation. For me this is the best step to make sure the competency is at par with what the market demands. Furthermore, since we are ready to represent adjudicator as a profession, with the adaptation of the conduct regulatory framework, adjudicators will be well accepted by the public. And I believed this will show the seriousness of the Malaysian government to make sure that the adjudication process will work on track and at the same time will resolve the problems of payment in the construction industry in Malaysia.

Interviewee : Sr. Patmawati Paddong

Date : 25th April 2015

Place : Office of ETIKAHIJAU, Kota Kinabalu, Sabah.

Time : 4.45 pm

Dear Sr. Patmawati Padong, I am Wan Azlina Ibrahim, and I am conducting this interview to capture some empirical data to validate my findings in my PhD. Thesis on the regulation of construction adjudication in Malaysia at the University of Strathclyde, United Kingdom.

During this interview session I would like to discuss the following topics: adjudication; the adjudicator and professionalism; the regulatory framework for adjudicators; the perception of the quality of adjudicators; and the potential adaptation of regulatory frameworks from other jurisdictions in Malaysia.

Question No. 1

Can you provide your insight into the implementation of statutory adjudication in the Malaysian construction industry?

Answer:

I think the implementation of the statutory adjudication in Malaysia construction industry is a new benchmark to our industry especially to topic of disputes in payment. It has been a long painful journey for the contractor when the payment to them is not been paid. There is no attention to it. I put in the 'silent painful journey' since from my experience when the contractor has not been paid, either they have to wait until end of the contract and they will proceed to the arbitration. It takes too long. It always difficult for them to claim their cost for the interest or other cost that arises due to the time factors and the waiting period. So to me the adjudication under CIPA 2012 is a good sign, a positive sign to our construction industry. It a new or I think it's a tools to resolve this problem. So far the payment problems have been neglected.

- Are there any glaring problems in the process?

Of course there must be some hiccups here and there since it is a new thing and a new act. And people are not quite aware of it. The knowledge is not there yet, there's no experience yet. I think there are some glaring problems like some of the adjudicator have no experience and they are a bot reluctant to take a lot of cases. Number two; there might be difficulties in delivering the judgement because of their lack in experience. But to me, this is just a small hiccup where it can be learnt through the time. So, I don't see any problem there. It just a minor problem and it can be solved.

- Do you think that this problem might affect the implementation of the statutory adjudication?

As I said before; it just a minor problem. We can just go ahead.

- Have you noticed any changes in the construction industry dispute resolution system since the enactment of the Act?

Yes, I have. To say that it has been a big change, no. not yet. I can see that there is awareness among the construction industry members. People are starting to ask, what is adjudication? What is CIPA 2012? How it will help to solve their payment problems? And some people do not quite agree with the CIPA enactment. However, for me, if their feedbacks are positive or even negative; it is actually a good sign. There is an act that can be used as a tool to solve problems.

Question No 2

In your personal experience as a regulated professional in the construction industry, does the existing regulatory framework for professionals ensure the competency of persons so regulated?

Answer:

Yes, it is. Because when you have certain standard for the professional, you have to meet the minimum criteria before you can practise your profession. You will have the right knowledge towards the profession. So, this means that, regulated professionals have to acquire the knowledge before you can become a professional. No 2 is you have to have a standard so not simply anybody can become or practise as a professional. We have to have a certain level for the professional to gain the confident of the market. This is important in delivering the services of a profession.

I think that the purpose of the existing regulatory framework is for the good of public interest. It must be! The public must have the confident in the profession in order for them to hire the professional's services. If we leave it open, anybody can claim to be professionals. Plus, there will be no standard criteria to recognise the profession. It is not a profession when there are no standard criteria to identify them as one.

Question 3

In your professional opinion, can adjudicators be considered as professionals?

Answer:

Yes, because the adjudicator must have certain knowledge and skills for them to deliver their judgment. 1st and foremost, the must know the act itself. No. 2, they must have the knowledge in construction industry and they must have the knowledge of legal. When I said knowledge, this will also include experience in the industry as well. At least more than 10 years in the industry. They must be well verse on the condition of contract for them to deliver

their services. It must be considered as a profession. For example, if you want to be an adjudicator, you must have gone through the accreditation programme before KLRCA certified you as an adjudicator. For me, adjudicator needs to be regulated before being recognised as a professional. In order for the profession to gained the confidence of the market by being regulated.

Question 4

Do adjudicators need to be regulated?

Answer:

Yes. As I said before, adjudicators need to be regulated since it can be considered as a profession. For me, it must start with bodies that are supposed to set up standard criteria for a person to become adjudicator. And for the adjudicator to get updates or additional knowledge, the said body must provide some sort of on-going training programme to make sure the level of competency will not be deteriorating across the time.

Question 5

Do you think that Malaysia should learn from the experiences of other jurisdictions or should adapt a regulatory framework to suit its own construction industry environment?

Answer:

I think the Malaysian should learn the experience from other jurisdictions and mould it to their own existing culture and environment of our own construction industry. And, from that we should tackle the best experience. However, we must introduce it step by step before we can expend it towards the good of our own regulatory system.

Question 6

In your professional view, will this form of professionals' regulatory framework help enhance the quality and competency of an adjudicator in Malaysia?

Answer:

Yes, it will. For me if you have experience, you will already have the knowledge for you to process and evaluate your adjudication case before making the judgment. For example, if you have experience in the construction industry, you can easily pick up the relevant history and nature of the condition of contract to resolve the payment issue. Also, if you have the training on CIPA, you can notice the flow of the payment process in the construction industry. Also if you have to go for training during your registration period, you will be kept updated on the scenario of adjudication implementation in Malaysia. Training will enhance the quality and the competency of adjudicator. So, the people will have no doubt on your capability to resolve disputes.

If you look at the regulations stated at 4 (b), I noticed that the adjudicator may acquire their qualification as adjudicator from other bodies, apart from the KLRCA itself. From my opinion, this will create a healthy competition between different regulatory bodies in order to produce better adjudicator to be promoted to the consumer. KLRCA are supposed to be proud since they have elected as the sole bodies to produce and certify adjudicators in Malaysia. But, monopoly is not good for the market. It is good if Malaysia have an open ended way to appoint other regulatory body for adjudicator. Competition can be good for the market. More regulatory body seem to be better. But, for now at this point of time, we should take things slowly.

Question 7

From my research, I would like to propose a regulatory model for adjudicators that will adapt the requirement for entry and conduct of adjudicators from Singapore under The Building and Construction Industry Security of Payment (SOP) 2004, Building and Construction Industry Security of Payment Regulations and Building and Construction Industry Security of Payment (Amendment) Regulations 2012. In addition, some requirement made by the Authorized Nominating Bodies in the UK could be adapted as well. Basically, the model will be close to the model for regulatory framework for construction professionals in Malaysia. This model includes the entry and conduct regulatory framework where the process of regulating will be done throughout the period of registration as adjudicator.

What is your opinion on this statement?

Answer:

I agree and welcome such proposal for certain advantage as follows: -

No. 1, the model suggested for regulatory framework is close to the model practice by professionals in Malaysia, especially the construction professionals. So it will be widely accepted. No. 2, it will fit the existing professionalism culture. In addition, I would rather suggest for the adjudicator to have their own body, and then it will be even better. The organization body can focus on the development and welfare of the adjudicator only rather than it become some part of other organization. I believe it will make a lot of difference if the adjudicator has its own organization body.

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Legal Profession and Legal Aid (Scotland) Act 2007

Legal Profession Act (Chapter 161) (Revised Edition 2009)

Legal Services Act 2007

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National Health Service Reform and Health Care Professions Act 2002

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Registered Architects Rules 2006

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Property Misdescriptions Act 1991

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The Scheme for Construction Contracts (England and Wales) Regulations 1998

The Scheme for Construction Contracts (Scotland) Regulations 1998

The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011

The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011

The Scheme for Construction Contracts (Scotland) Regulations 1998 (Amendment) (Scotland)

TABLE OF STANDARD FORMS OF CONTRACT

Agreement and Conditions of PAM Contract 2006 (with Quantities)

Agreement and Conditions of PAM Contract 2006 (without Quantities)

CIDB Standard Form of Contract for Building Works (2000 Edition)

CIDB Standard Form of Sub-Contract for Nominated Sub-Contractor

FIDIC Conditions of Contract for Construction (Red Book)

FIDIC Conditions of Contract for Plant and Design/Build

FIDIC Conditions of Contract for EPC Turnkey Projects (Silver)

FIDIC Short Form of Contract (Green Book)

GC21 (Edition 1/Rev 15 September 2009) RTA General Conditions of Contract, New South Wales Department of Commerce

ICE New Engineering Contract

IEM Conditions of Contracts for Works Mainly of Civil Engineering Construction 2009

IEM Standard Conditions of Sub-Contract for use in Conjunction with the IEM Conditions of Contracts for Civil Engineering Works

IEM Conditions of Contract for Mechanical and Electrical Works

JCT 63 Sub-Contract Forms

NEC3 Adjudicator's Contract

NEC3: Engineering and Construction Contract

Nominated Sub-Contract 4 (NSCA) forms used with Joint Contract Tribunal 80 (JCT80)

Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract PWD Form 203

Standard Form of Contract to be Used Where Drawings and Specifications Form Part of the Contract PWD Form 203A

Standard Form of Design and Build Contract PWD Form DB (Rev. 2007)

Standard Form of Sub-Contract for Domestic Subcontractors appropriate for use when the form of Main Contract is: JCT Standard Form of Building Contract - Local Authorities/Private Edition/ With/Without quantities (DOM/1)

Standard Form of Sub-Contract for Domestic Subcontractors appropriate for use when the Form of Main Contract is: JCT Standard Form of Building Contract - With Contractor's Design (DOM/2)

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