

CONTRACT IN WRITING REQUIREMENT FOR STATUTORY  
ADJUDICATION CLAIM UNDER CIPAA 2012

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## **DEDICATION**

To my beloved wife, Jasa Binti Abdul Rahman, who has sacrificed her only weekend with a weekend husband, in order for him to have a better future – thank you for always be my supporter.

To my children, who could only be with their father one night per week, I will ensure that you will have a better future with us as a family.

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## ABSTRACT

Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) requires any construction contract brought for payment claim under CIPAA 2012 has to have a 'contract made in writing.' However, the definition of 'contract made in writing' is neither outlined in CIPAA 2012 nor in its subsidiary legislation. This ambiguity led to several number of court cases for setting aside the adjudication decision on the basis that there was no contract made in writing for adjudication to take effect. Therefore, the objective of this study is to identify the requirement to satisfy 'contract made in writing' provision under CIPAA 2012. This study was conducted as a legal research on five court cases in Malaysia related to 'contract made in writing' provision and CIPAA 2012. An analysis was also made on the only Singaporean case which relates to written contract and Singapore's Building and Construction Industry Security of Payment Act 2004 (SOPA 2004) as a comparison. The study found that Malaysian adjudicators and court judges are still applying the same basis for validating privity of contract in other construction contract dispute to CIPAA 2012 related cases. Any type of documents that can prove the presence of all elements for formation of a contract were accepted by the court except for oral evidence and oral statement by witnesses. Consequently, a pure oral contract without any contemporaneous evidence in writing will never be accepted for adjudication under CIPAA 2012. This study also concluded that a formal written contract is not required to satisfy the contract made in writing requirement.

## ABSTRAK

Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 (CIPAA 2012) mewajibkan mana-mana tuntutan bayaran dalam kontrak pembinaan yang ingin dibawa untuk adjudikasi di bawah CIPAA 2012 perlu mempunyai ‘kontrak pembinaan yang dibuat secara bertulis.’ Walau bagaimanapun, definisi ‘kontrak pembinaan yang dibuat secara bertulis’ tidak diberikan di dalam CIPAA 2012 dan peraturan berkaitan. Kesamaran ini membawa kepada beberapa kes mahkamah untuk mengenyahkan keputusan adjudikasi atas alasan kontrak bertulis tidak wujud, maka tuntutan bayaran tersebut tidak layak untuk adjudikasi. Oleh itu, objektif kajian ini adalah untuk mengenalpasti perkara yang perlu untuk memuaskan peruntukan ‘kontrak pembinaan yang dibuat secara bertulis’ di bawah CIPAA 2012. Kajian ini dilaksanakan sebagai kajian undang-undang atas lima kes mahkamah di Malaysia yang berkaitan dengan ‘kontrak pembinaan yang dibuat secara bertulis’ dan CIPAA 2012. Analisa juga dibuat terhadap satu-satunya kes mahkamah di Singapura yang berkaitan dengan Akta Sekuriti Pembayaran Industri Bangunan dan Pembinaan 2004 (SOPA 2004) sebagai perbandingan. Kajian ini mendapati adjudikator dan mahkamah di Malaysia masih lagi menggunakan asas yang sama bagi mengesahkan kewujudan kontrak dalam pertikaian kontrak pembinaan pada kes-kes berkaitan CIPAA 2012. Apa-apa dokumen yang boleh membuktikan kewujudan semua unsur dalam pembentukan sebuah kontrak adalah diterima oleh mahkamah melainkan bukti lisan dan keterangan lisan oleh saksi. Oleh yang demikian, kontrak yang sepenuhnya lisan tidak akan diterima langsung untuk adjudikasi di bawah CIPAA 2012. Kajian ini juga memutuskan bahawa kontrak rasmi secara bertulis adalah tidak diperlukan untuk memuaskan peruntukan ‘kontrak pembinaan yang dibuat secara bertulis.’

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**LIST OF ABBREVIATIONS**

<b>CIDB</b>	Construction Industry Development Board
<b>CIPAA</b>	Construction Industry Payment and Adjudication Act
<b>FIDIC</b>	International Federation of Consulting Engineers
<b>HGCRA</b>	Housing Grants, Construction and Regeneration Act
<b>IEM</b>	Institute of Engineer Malaysia
<b>JCT</b>	Joint Contracts Tribunal
<b>KLRCRA</b>	Kuala Lumpur Regional Centre for Arbitration
<b>PAM</b>	Pertubuhan Akitek Malaysia
<b>PWD</b>	Public Works Department
<b>SOPA</b>	Building and Construction Industry Security of Payment Act

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background of the Problem**

The Construction Industry Payment and Adjudication Act (CIPAA) was gazetted on 22<sup>nd</sup> June 2012 but only implemented on 15<sup>th</sup> April 2014. The Act, which was modelled on similar act in United Kingdom – the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 – was aimed to rectify cash flow problem with contractors and sub-contractors which was caused by dispute with client that led to payment delay (Rajoo, 2016).

The Act covers a wide definition of construction contract, which include both construction and consultancy scopes, all type of buildings and structures and also procurement of materials, equipment and manpower necessity for the jobs. The Act also encompass almost all existing industries including oil and gas, petrochemical, power and telecommunication. It is suffice to summarise that apart of shipbuilding, all kind of construction work could not escape the jurisdiction of this Act.

Section 2 of the act requires any dispute brought under CIPAA 2012 should have a contract in writing, “this Act applies to every construction contract made in writing...”

Chow Kok Fong, Lim Chong Fong, & Oon Chee Kheng (2014) stated that unlike Singapore's Building and Construction Industry Security of Payment Act 2004 and the Construction Act, there is no provision in the CIPAA 2012 to guide and explain, or to limit, the meaning of the term 'made in writing'.

The authors further added that in order to make the Act effective, the phrase 'made in writing' should be broadly and liberally construed which could also include contract that is 'evidenced in writing.' Additionally, the author further suggest that an oral contract which is implied or inferred by the exchange of correspondence or proven by payment certificates issued should also be classed as a contract 'made in writing'.

In addition, they also draws the similarity of CIPAA 2012 to the original form of section 107 of United Kingdom's (UK's) HGCRA which was intended to force the industry to adopt a standard form of contract. The reason for such requirement was to lift the burden of adjudicator from assessing evidence of oral contract.

In UK's case of RJT Consulting v DM Engineering (2002), the requirement for a complete written contract was strictly followed in which the court stated that;

*“What was needed under section 107 of the HGCRA was a document which recorded the whole agreement. It was not sufficient that there was written evidence that there was an agreement.”*

However, written agreement does not mean that a formal contract documents have to be signed. A clearly worded letter of intent or award from which the terms of contract may be ascertained is enough. In Harris v Ridgewood (2007), the respondent raised that there was no contract in writing and that the adjudicator had no jurisdiction to proceed with the adjudication but the court pointed out that the letter of intent made plain there was a 'complete agreement.'

In a High Court of Kuching's case between Naim Engineering Sdn. Bhd. And Pembinaan Kuantiti Sdn. Bhd. [2016], the case highlights the need for proper written contract to prove the privity of contract between both parties.

The plaintiff (NESB) in the summons is the main contractor for a building construction project and a respondent (PKSB) for an adjudication application under CIPAA 2012. The defendant in this case is the sub-contractor of that project which is also the claimant in the adjudication motion. The main contractor is actually taking over the project from another main contractor (Sebiro) and act as the contract administrator with all the original's main contractor's sub-contractors and vendors. However, both main contractors agreed that the original main-contractor will be responsible to pay the sub-contractors and vendors. As such, the claimant was denied claim under statutory adjudication on the ground that there was no written contract between the sub-contractor and the new main contractor.

In order to deduce the intention, the court has to look into all documents between all parties including Sebiro, to see whether all the essentials of a valid contract are present and the parties have come to a binding agreement as shown in the case of *Lau Sieng Nguong v Hap Shing* [1969].

Finally, the court found that there was no privity of contract between NESB and PKSB after considering all documents and agreements between the parties as follows:

1. The main contracts, JVA, supplementary agreements, deed of novation and subsequent agreement did not involve PKSB as a party of the contracts.
2. There was no formal construction contract signed between NESB and PKSB.
3. The summary payment was certified by Sebiro and nothing mentioned about NESB.
4. All other correspondences on payment between PKSB and NESB suggested that NESB was acting on the instruction and on behalf of Sebiro.

Based on the above case, it shows that the Malaysian court is not strict in interpretation of 'contract in writing.' However, the decision was solely based on the court's interpretation of available documents. A repetition of such cases in the future, where 'contract in writing' is disputed, could obviously burden the court with more unnecessary cases.

## **1.2 Statement of the Problem**

The lack of definition for ‘contract in writing’ in Section 2 of CIPAA 2012 makes acceptance of payment claim under statutory adjudication open to interpretation by the adjudicator. Therefore, many contracts that did not have proper contract documents could be denied their rights for statutory adjudication.

However, if an adjudicator accept such cases and decided in favour of the claimant, the respondent might apply for setting aside the adjudication decision at court on the pretext of Section 15(d) where the adjudicator has conducted beyond his jurisdiction due to absence of a written contract. This will burden the court with unnecessary cases that should have been settled at adjudication.

To assist adjudicator in evaluating acceptance of any payment claim for statutory adjudication and for the claimant to be fully prepared with the right evidence, it is important to identify documents that are acceptable by the court to satisfy the ‘contract made in writing’ requirement.

## **1.3 Objective of the Study**

To identify the requirement to satisfy ‘contract made in writing’ provision under CIPAA 2012.

## **1.4 Scope of the Study**

The first part of the study will cover on practice of oral construction contracts and construction contracts without formal contract documents, particularly on the evidence used to prove such contract exists in court. The basic elements for formation of a contract will be reviewed in order to understand the minimum obligation for an agreement to be accepted as a contract.

Court cases related to contractual dispute in construction contract which involve oral contract or oral evidences will also be reviewed in order to establish the Malaysian court's acceptance to submitted evidences in deciding on existence of an oral construction contract or a construction contract without proper written contract.

The study will then be narrowed down to requirement of written contract under CIPAA 2012 to evaluate if insufficiency in definition of written contract is an issue that can deny the claimant an access for adjudication claim.

Further study will focus on court cases related to CIPAA 2012 to assess the court's interpretation of written contract in Section 2 of CIPAA 2012 and the court's acceptance to various types of written evidence, oral terms and oral evidences if any.

However, information from court cases related to CIPAA 2012 could be limited as only parties that were not in favour of the adjudication decision might challenge the decision in court. Initial search in LexisNexis found five cases related to contract in writing under CIPAA 2012.

Further study might also be done on cases in Singapore, UK or the Commonwealth, particularly which relates to adjudication act in the respective country such as UK's Housing Grants, Construction and Regeneration Act 1996.



## **1.5 Significance of the Study**

Findings from this study could help players in the construction industry to have proper written contract and document management to ensure existence of a written contract can be proved and subsequently meet the requirement for contract made in writing under Section 2 of CIPAA 2012.

The findings could also be used by adjudicators in making decision to either accept or reject any adjudication claim that have ambiguous proof of written contract which hopefully, can reduce the amount of cases brought to the court on the basis of not meeting ‘contract made in writing’ requirement.

Additionally, this study could hopefully drive the building industry especially for sub-contracting works to embrace standard form of contract for better management of their contractual matters.

## **1.6 Research Methodology**

This study will be conducted as a legal research on recorded court cases in Malaysia as well as relevant Commonwealth cases. It is purely a qualitative research. The study will be divided into two major parts in which the first one concerns with literature review to understand theoretical aspect on formation of a contract in general and oral construction contract in specific.

The second part will dives into studies related to CIPAA 2012 cases in which the author will try to establish the requirement for which the court may consider an agreement as a contract made in writing. Figure 1.1 shows the flow chart of this study.

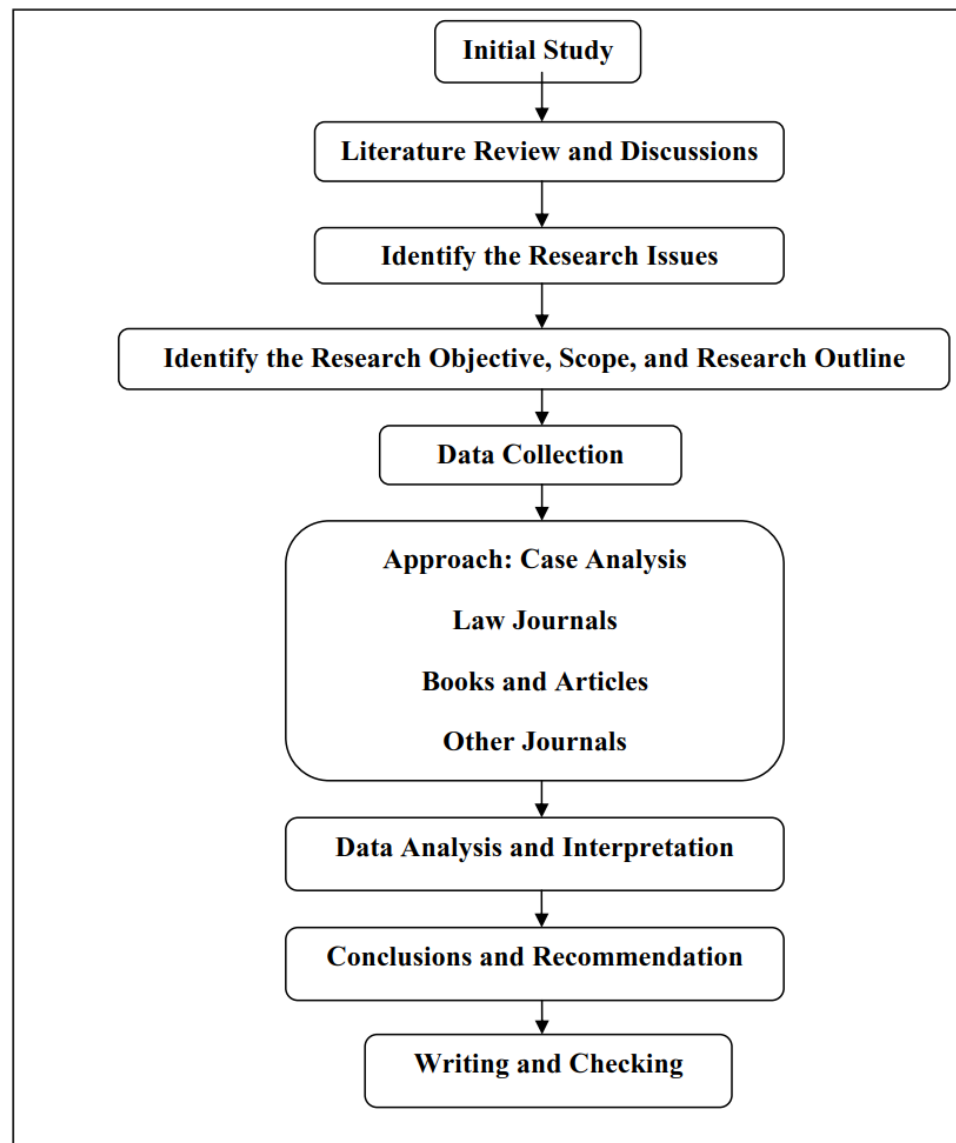


Figure 1.1 Flowchart of the research works.

### 1.6.1 Initial Study

The first part of the study will cover on practice of oral construction contracts and construction contracts without formal contract documents, particularly on the evidence used to proof such contract exists in court. The basic elements for formation

of a contract will be reviewed in order to understand the minimum obligation for an agreement to be accepted as a contract.

Court cases related to contractual dispute in construction contract which involve oral contract or oral evidences will also be reviewed in order to establish the Malaysian court's acceptance to submitted evidences in deciding on existence of an oral construction contract or a construction contract without proper written contract.

The study will then be narrowed down to requirement of written contract under CIPAA 2012 to evaluate if insufficiency in definition of written contract is an issue that can deny the claimant an access for adjudication claim.

### **1.6.2 Data Collection**

To proceed with the second stage of the study, primary data related to adjudication decision made under CIPAA 2012 will be collected. The best source of data is adjudication report from every cases. However, such document is confidential and not accessible through public channel. Secondary data based on the adjudication report was also not available currently.

As such, the study will focus on another form of primary data which is form reported or recorded court cases. The primary source of the cases will be from LexisNexis journal which UTM has access to, namely Malaysian Law Journal and Malaysian Law Journal Unreported. Another source of the record could also be retrieved from Kehakiman website.

The main keyword to be used during searching of the right report will be CIPAA, adjudication and 'in writing.' From the list of cases, further filtering will be done manually to identify if the 'in writing' issue is specifically related to Section 2 of

CIPAA 2012. Only cases which is related to Section 2 of CIPAA 2012 will be considered for analysis.

In addition to data collection from Malaysian cases, additional data collection to is also to be done for Singapore's and United Kingdom's court cases. It is expected that sample size from Malaysian cases will be limited due to the relatively short period since CIPAA 2012 being in force. As such, additional reference form other jurisdiction might be necessary.

Similarly with the Malaysian cases, the source for Singapore and UK's cases will be from LexisNexis Academic database. The keyword to be used is similar except that the term CIPAA to be replaced with SOPA or 'security of payment' in the case of Singapore and HGCR or 'housing grant' in the case of UK. This is to reflect search filtering based on the country's respective acts.

### **1.6.3 Data Analysis**

Further study will focus on court cases related to CIPAA 2012 to assess the court's interpretation of written contract in Section 2 of CIPAA 2012 and the court's acceptance to various types of written evidence, oral terms and oral evidences if any.

Analysis on the selected law case report will be conducted by identify the followings:

1. Nature of the payment dispute
2. Adjudication decision
3. Reason for adjudication challenge at court
4. Document's being considered by the court as evidence to support claim on existence of a written contract
5. Court's decision on existence of a written contract

From the above information, correlation between adjudicator's decision and court's decision is to be established. The analysis will also look if any documentation or evidences are being accepted or rejected by the court to establish a contract made in writing.

#### **1.6.4 Completion**

The final stages of the report comprised of writing the report and making conclusion out of the findings. For quality control, the draft write-up was submitted for Turnitin verification and also to the supervisor for comment. Recommendation was also be included to improve future study and also the practice in the industry where applicable.

#### **1.6.4 Assumptions and Limitation**

Similarly to arbitration, information from court cases related to CIPAA 2012 could be limited as only parties that were not in favour of the adjudication decision might challenge the decision in court. For example, a claim might be denied by the adjudicator on the ground of no written contract or the adjudicator reject an oral evidence. However, the claimant did not further challenge it in the court. Therefore, such information is not available for this study.

## **1.7 Organisation of the Chapters**

This thesis will be separated into five major chapters (excluding Chapter 1: Introduction) in which the first two chapters are literature review to understand the basic theory, concept and rules behind formation of a contract and adjudication processes. Conclusion of these chapters will assist in giving the basis on how the court will establish oral construction contract in normal construction dispute not related to CIPAA 2012.

The next two chapters are comprised of analysis to the collected data which is reports of court cases in Malaysia and other jurisdiction. Finding from these chapters will become the conclusion in which it will be compared to conclusion in the first two chapters. Any differences between court's method and decision in cases related to CIPAA 2012 and non-CIPAA 2012 cases will be outlined as part of the final conclusion.

The final chapter is the conclusion and recommendation section where the final conclusion of this study will be discussed and future improvement to the industry will be recommended where applicable.

Follows are organization of the chapters:

Chapter 1: Introduction

Chapter 2: Oral Contract in Construction Industry

Chapter 3: Statutory Adjudication in Malaysia

Chapter 4: Analysis on Malaysian Cases

Chapter 5: Analysis of Law Cases in Other Jurisdiction

Chapter 6: Conclusion & Recommendation

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