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THE CLOCK THE REGULATIONS NEVER SET: EMPANELMENT BY POLICY UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

by

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Abstract

Regulation 4 of the Construction Industry Payment and Adjudication Regulations 2014 prescribes the competency of an adjudicator. It requires seven years of working experience in the building and construction industry in Malaysia or in any other field the Centre recognises. It requires a Certificate in Adjudication from an institution the Minister recognises. It requires that the adjudicator is not an undischarged bankrupt and has not been convicted of a criminal offence within or outside Malaysia. It fixes no term. It provides for no expiry. It requires no periodic re-registration. The Asian International Arbitration Centre has nevertheless imposed a fixed three-year term with automatic expiry. It has done so by internal

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policy. The policy governs every panel of the Centre. It applies to all panellists alike, whether admitted before it, under it, or hereafter. The Centre once undertook something different. Its published guidance told arbitrators on its panel that renewal upon expiry would be automatic and that the Centre itself would issue the fresh certificate. The undertaking was given to arbitrators and not to adjudicators. But the policy now governs every panel by a single instrument, so the Centre cannot take the benefit of a distinction it has abolished everywhere else. That undertaking has become a renewal which must be applied for and may be refused without reasons. This article makes two submissions. The first is that such a term ought not to exist at all. The prescribed criteria already provide for every case in which a person ought to leave the register. An expiry identifies no unfitness and cures no defect. The cycle it generates protects nobody. A renewal at discretion places the standing of the qualified at the disposal of the institution which appoints them. The second submission is made in the alternative. If a term is to exist, it must be created lawfully, by regulation under s 39 and not by policy, with transitional provision and with notice, criteria, reasons and review. The Federal Court has affirmed the Centre's immunity from suit. These questions are therefore unlikely to reach a court. The argument is offered where it can still be tested, which is in the literature. The comparators support both submissions. Mature schemes work without time-limiting the individual adjudicator. Where a term does exist, it lives in the statute or the regulations. The article closes with graded proposals and a model provision.

I. INTRODUCTION: TWO WAYS TO LEAVE A REGISTER

An adjudicator's qualification is prescribed by law and contains no limit of time. His standing on the panel now expires every three years. The first proposition is the Minister's, made by regulation under an Act of Parliament. The second is the Centre's, announced in a policy. This article is about the difference.

An adjudicator on the Centre's panel holds his standing upon published terms. His appointment expires automatically after three years. Renewal must be sought two weeks before it does. It may or may not be granted. He may be removed at any time, in the Committee's absolute discretion, without any reason stated. The decision is expressed to be final.[2] None of these terms appears in the Act. None appears in the Regulations which prescribe his competency. Panellists have begun to record publicly that their empanelment

2 Asian International Arbitration Centre ('the Centre'), Policy on Empanelment of Panellists, Parts D (paras 4.1–4.4) and E (paras 5.2–5.3), published at <www.aiac.world/Become-A-Panellist-> accessed 18 July 2026. The policy is examined in Part IV below.

has been granted for three years only.[3] Some adjudicators have complained that they must apply afresh for a standing the law never made temporary. Those developments have prompted this article.

The change is sharper than those terms suggest. It reverses an undertaking. Under the arrangements which preceded this policy the three-year cycle carried automatic renewal. The Centre's own published guidance said so, in terms addressed to arbitrators empanelled with the Kuala Lumpur Regional Centre for Arbitration. Renewal upon expiry would be automatic. The Centre would conduct the due diligence. The Centre would issue the new certificate in due course.[4] The panellist had to do nothing. The Centre may answer that the undertaking was given to arbitrators and not to adjudicators. The answer is a fair one so far as it goes. It does not go far.

The policy now in force is a single instrument governing every panel of the Centre, and it imposes the same term upon each. An institution which has abolished the distinction between its panels cannot revive it in order to disclaim what it once promised. Under the policy as it now stands he must apply two weeks before expiry. The Committee may or may not renew. No reasons need be given. The decision is final. The term was not introduced. It was converted. What was a housekeeping cycle performed by the Centre has become a discretion exercised over the panellist. It was converted without notice to those who held their standing upon the earlier footing.

A person may leave a public register in either of two ways. He may be removed because he has ceased to deserve his place, having lost the qualification, the solvency or the good character his admission required. Or he may be removed because a rule made after his admission, and without his voice,

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3 See eg 2KBW, 'Steven Perian KC empanelled to the AIAC's Panel of Arbitrators & Mediators' (5 December 2024) <https://2kbw.com/steven-perian-kc-empanelled-to-the-aiacs-panel-of-arbitrators-mediators/> accessed 18 July 2026, recording empanelment 'for a term of three years'. That instance concerns the arbitrator and mediator panels; the term is expressed to apply uniformly across all the Centre's panels: Policy on Empanelment, Part D, para 4.1.

4 Guidance published on the Centre's website to arbitrators empanelled with the Kuala Lumpur Regional Centre for Arbitration, in these terms: 'renewal of empanelment upon expiry of the 3-year term will be automatic. KLRCA will conduct due diligence and issue a new certificate to you in due course'. The wording is that indexed by a public search engine on 28 July 2026. Direct retrieval of the page at <www.aiac.world/become-a-panellist> returned an Error 500 on 28 and again on 29 July 2026, and a contemporaneous record of preservation dated 29 July 2026, comprising the current policy, the Director-era version of September 2021 and the indexed wording of the legacy page, is on file with the author.

has decided that his place shall simply expire. The first is the enforcement of a standard. The law has never quarrelled with it. The second is something else. It is the subject of this article.

Consider the position of those in the second case. A person is admitted to a register under a regime which fixes no term. He does nothing wrong. He continues to meet the standard the law prescribes in every particular. Years after his admission a policy is adopted. It provides that empanelment shall endure for a fixed period only and shall then expire. In due course his standing lapses. No criterion has failed. A clock he never set has run. He receives no notice that the decisive date has come. He is given no reasons. He is given no opportunity to be heard. He learns of his removal, if at all, from the quiet disappearance of his name from a public list. He had no part in the making of the rule that unmade him.

It is for such persons that this article is written. Their position supplies its lens. The question they raise is not whether an institution may keep an accurate register. Of course it may. The question is whether it may end the standing of the qualified by a rule adopted after their admission, when the conditions of their qualification are fixed not by the institution but by law.

Statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 is now the principal means by which the Malaysian construction industry resolves its payment disputes.[5] The Act constitutes the Centre as the adjudication authority. The scheme depends upon a panel of qualified adjudicators which the Centre maintains. The competency of those adjudicators is prescribed by reg 4, made by the Minister under s 39. Those criteria contain no term and no expiry.

One feature of the landscape should be stated at the outset. It explains why an argument of this kind belongs in a journal. The Federal Court has held that the Centre is immune from suit, including from judicial review, in the exercise of its functions. It declined to distinguish between the Centre's international functions and its domestic functions as the adjudication authority.[6] The questions raised here are therefore unlikely to be decided by a court. Where the

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5 Construction Industry Payment and Adjudication Act 2012 (Act 746) (the Act or CIPAA), in force 15 April 2014, as amended by the Construction Industry Payment and Adjudication (Amendment) Act 2024 (Act A1738), in force 1 January 2026 together with the amending Regulations of 2025.

6 *Asian International Arbitration Centre v One Amerin Residence Sdn Bhd & Ors and another appeal* [2025] 2 MLJ 634; [2025] 3 CLJ 633 (FC) (13 February 2025), restoring the decision of the High Court which had struck out a judicial review of the Centre's acts as the statutory adjudication authority.

curial route is closed, two correctives remain. The first is the regulation-making power of the Minister. The second is the scrutiny of the profession and of the scholarship. Scholarship matters more when the courts stand back, and not less. It is in that spirit that what follows is offered.

What follows is kept to principle and to the public record. The argument is not a plea about any individual case. It is a thesis about power. It advances two submissions. The first is of substance. The second is of vires. They are advanced in that order because the order matters.

The primary submission is that a fixed term of empanelment ought not to exist at all. It is not merely unauthorised. It is unnecessary, and it is harmful. The criteria the Minister has prescribed already do the whole of the work. An expiry identifies no unfitness in the person it removes. The cycle it generates is administrative labour of no utility to anyone. The discretion to renew is a standing instrument by which the qualified may be removed for reasons that need never be disclosed. The better course is plain. Removal should proceed upon the criteria the law has already set out, case by case, upon notice and with reasons given.

The subsidiary submission arises if a term is thought necessary notwithstanding. It must then be created legally. A fixed term with automatic expiry is a substantive condition upon standing. The Act and the Regulations do not authorise the Centre to impose it by policy. A matter of this substance falls to be prescribed by the Minister under s 39. Its application to those already empanelled, without notice, reasons or a hearing, offends the hierarchy of legal norms and the requirements of procedural fairness alike.

The article develops those submissions in turn. It sets out the statutory architecture and the policy which overlays it. It states the case against a term upon its merits. It examines the objections of vires and of fairness. It considers what the immunity means for redress. It describes the governance in which the empanelment power now sits. It sets the Malaysian position against the comparable security-of-payment schemes. It closes with graded proposals for reform and a model provision.

II. THE STATUTORY ARCHITECTURE OF ADJUDICATOR EMPANELMENT

The Act deals with the adjudication authority in Part V. Section 32 constitutes the Centre as that authority. It also enumerates the Centre's functions. They include setting the competency standard and criteria of an adjudicator. They include determining the standard terms of appointment. They include setting

adjudicator fees and administering adjudication.[7] Section 39 confers on the Minister the power to make regulations for carrying out the Act. It is under that power that the Regulations were made, reg 4 among them.[8]

Regulation 4 is the provision on which the analysis turns. It prescribes four criteria. The adjudicator must have working experience of at least seven years in the building and construction industry in Malaysia, or in any other field recognised by the Centre. He must hold a Certificate in Adjudication from an institution recognised by the Minister. He must not be an undischarged bankrupt. He must not have been convicted of any criminal offence within or outside Malaysia.[9] That is the whole of the prescribed criteria. Three features of them govern what follows. First, they are substantive and personal. They attach to the individual's qualification, not to any period of time. Secondly, they are in form conditions of admission, satisfied once and for all, though solvency and the absence of conviction are naturally continuing. Thirdly, and decisively, they contain no temporal limb. There is no term. There is no expiry. There is no cycle of renewal. There is no requirement that a qualified adjudicator re-register in order to remain qualified.

The relationship between the criteria and the register must be kept clear. It is the key to the whole matter. The criteria are the substance, fixed by the Regulations. The register is the administrative record, maintained by the authority, of those who satisfy them. Empanelment is the act of entering a qualified person upon that record. That distinction runs through the analysis. The term in question does not operate upon the criteria, which the Centre cannot alter. It operates upon the register, which the Centre maintains. So the question is this. Does a power to maintain a register carry with it a power to time-limit the standing of those who qualify for entry upon it?

One further matter of context bears on the argument. The Act entrusts payment disputes to a single adjudicator. Those disputes are often of high value and technical complexity. He decides on the documents and within a

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7 CIPAA, s 32. Following Act A1738, the default appointment of an adjudicator, formerly made by the Director of the Centre, is made by the President of the AIAC Court of Arbitration: see ss 21(b) and 23. The amendment did not alter the competency criteria in reg 4.

8 CIPAA, s 39; Construction Industry Payment and Adjudication Regulations 2014 (PU(A) 103/2014), made in exercise of the powers conferred by s 39 upon considering the recommendation of the Centre, and in force with the Act on 15 April 2014.

9 Construction Industry Payment and Adjudication Regulations 2014, reg 4. The Centre's published empanelment materials reproduce these criteria and add administrative requirements, notably participation in its Certificate in Adjudication programme and the passing of the associated examination.

compressed timetable. The guarantee of quality on which the scheme rests is therefore the prescribed competency of the person appointed.[10] That is why the criteria are prescribed by legislation and not left to institutional discretion. The qualification of the decision-maker is a matter the Minister chose to fix. It is against that deliberate choice that a further temporal qualification, added by policy, must be measured.

III. THE AMENDMENT OF 2024 AND THE LOCUS OF THE APPOINTING POWER

The empanelment question arises at a moment of institutional change. The change must be described, for it bears on where the appointing power now sits. The Amendment Act of 2024 came into force on 1 January 2026, together with the amending Regulations of 2025. Its thrust is institutional. It reflects the reconstitution of the Centre's governing structure. Of present relevance, it relocates the default appointing function. Formerly the Director of the Centre appointed an adjudicator in the absence of agreement. That function is now exercised by the President of the AIAC Court of Arbitration.[11]

The significance of the amendment lies as much in what it did not do. It transferred the appointing function to a new office. It did not enlarge the power to fix the conditions of empanelment. It did not amend reg 4. It added no temporal limb to the competency criteria. The reform relocates who appoints. It leaves untouched the substance of who may be an adjudicator. If anything it sharpens the point. Parliament and the Minister revisited the scheme in 2024 and 2025. They made numerous institutional changes. They did not take the opportunity to prescribe a term. The silence of the amended law upon the very matter the policy purports to govern is itself telling.

IV. THE ADMINISTRATIVE OVERLAY: THE POLICY ON EMPANELMENT

The Centre's policy on Empanelment of Panellists is a single instrument. It governs admission to, and continuance on, all of the Centre's panels. Part B sets out the standard requirements for each category. For adjudicators it reproduces

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10 On the design of the scheme and the centrality of the adjudicator's competence, see Sundra Rajoo, Leong Hong Kit and Cindy Wong Xien Yee, *Law, Practice and Procedure of Adjudication* (LexisNexis 2023).

11 CIPAA, ss 21(b) and 23, as amended by Act A1738; and see the definition of 'President' introduced by the amendment. The panel is the roster from which the default appointing power is exercised.

reg 4 and adds participation in the Centre's certification programme.[12] Part C provides for review and appointment by an Empanelment Committee. The Committee meets quarterly. Its decision is stated to be final and to require no reasons. A successful applicant receives a letter of appointment and a Certificate of Empanelment issued by the President.[13]

Part D is the provision in issue. A panellist is appointed for a period of three consecutive years only. The appointment expires automatically upon completion of the term. The panellist is to submit a request for renewal two weeks before the term ends. The Committee may then renew for a further three years. Paragraph 4.7 preserves the power of the President to appoint a non-panellist of special expertise to a particular proceeding.[14] Part E provides for removal for breach of the code of conduct. It also provides that the Committee may remove a panellist at any time, in its absolute discretion, without stating a reason.[15]

Two features of this scheme are significant. The first is that the architecture is general. It is drafted once and applied across every panel, from arbitrators to mediators to domain-name panellists. For most of those panels the Centre's requirements are its own institutional standards. They are unconstrained by statute. A term there is unobjectionable, being an exercise of the Centre's discretion over its own roster. The adjudication panel is the exception. There the criteria are not the Centre's to set at large. They are prescribed by reg 4.

A uniform policy has thus imported into a statutory regime a device designed for non-statutory ones. The second feature is historical. The term in its present character is a recent introduction. Under the earlier arrangements there was no fixed term for adjudicators and no cycle of expiry and renewal. Where a three-year cycle operated elsewhere upon the register, upon the arbitrator panel, the renewal was the automatic one already described.[16]

The substantive change was therefore not the introduction of a cycle. It was the conversion of automatic renewal into a renewal which must be applied for and may be refused without reasons. A version of the policy in that discretionary form was in published circulation by September 2021. But the instrument bears no date of adoption upon its face. It identifies no adopting authority. Neither its adoption nor the date from which it was treated as

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12 AIAC Policy on Empanelment of Panellists, Part B, para 2.2 (adjudicators), reproducing reg 4 and adding the certification requirement.
13 Ibid, Part C. The membership of the Empanelment Committee is not published.
14 Ibid, Part D, including para 4.7.
15 Ibid, Part E.
16 The guidance cited above at n 4.

operative can be ascertained from the document itself.[17] What can be ascertained is this. The version now published vests the empanelment functions in the Empanelment Committee and in the President of the AIAC Court of Arbitration. That office came into being upon the commencement of the amending legislation on 1 January 2026. The operative text therefore cannot predate January 2026.[18] It contains no transitional provision of any kind. It is applied as a single instrument to all panellists alike, to those admitted before it, to those admitted under it, and to those who may be admitted hereafter. Persons admitted under the former open-ended regime are accordingly subject to a term they never accepted. Their admission made no provision for an expiry. It is they who have no voice in the rule that removes them.

V. THE CASE AGAINST A TERM OF EMPANELMENT

Before the questions of vires and of fairness are reached, a prior question should be asked. Is a term of empanelment a desirable thing at all? The question is prior for this reason. If the answer is no, the lawful installation of a term is not the object to be pursued. It is merely the least objectionable course open to an institution which has resolved upon one. The submission of this article is that a fixed term with automatic expiry has no proper place in the statutory adjudication scheme. There are four reasons. The prescribed criteria already suffice. The term yields nothing. It creates administrative burden without utility. And it confers a discretion over professional standing which cannot safely be conferred.

The first reason is that reg 4 already provides for everything the scheme requires. Two of its four conditions are by their nature continuing, being solvency and the absence of conviction. The code of conduct supplies a third continuing obligation. An adjudicator who becomes bankrupt may be removed. So may one who is convicted, or who breaches the code. He may be

17 The version of the policy vesting the empanelment functions in the Director was in published circulation by September 2021; the current version, vesting them in the Empanelment Committee and the President of the AIAC Court of Arbitration, is published at the Centre's website, accessed 28 July 2026 (copies on file with the author). Neither version bears a date of adoption on its face or contains any transitional provision.

18 AIAC Policy on Empanelment of Panellists, Parts A–E, published in full at <www.aiac.world/Become-A-Panellist-> accessed 24 August 2026. The instrument bears no date of adoption. The earlier version, vesting the empanelment functions in the Director of the Centre, remains available at <admin.aiac.world/uploads/ckupload/ckupload_20210913110309_13.pdf>. For the commencement of the amending legislation and the appointment of the first President of the AIAC Court of Arbitration, see the Centre's announcements of 2 and 10 January 2026 at <www.aiac.world/news>.

removed at any time, upon the facts as they are found, with notice given and with reasons stated. That is the enforcement of a standard. It is the ordinary administration of a qualification-based register. Nothing in this article questions it. The register is therefore not left unprotected by the absence of a term. Every case in which a person ought to leave the register is already provided for, and by a ground which identifies why he ought to leave it.

The second reason is that a term adds nothing to competence. The adjudicator who is competent on the day before his term expires is competent on the day after. No criterion has altered in the interval. Nothing has been discovered about him. An expiry therefore identifies no unfitness. It cures no defect. It operates against the compliant and the non-compliant with perfect indifference. Suppose the concern is currency, that an adjudicator should remain active and abreast of a developing jurisprudence. The appropriate response is then a published requirement of continuing professional development or of recent activity. It is enforced as a ground of removal against the individual who fails to meet it. An expiry, by contrast, falls upon everyone, whether he has met it or not. A requirement which distinguishes between the current and the stale does the work that is wanted. A term does not.

The third reason is that the term generates administrative labour of no utility. Every three years each panellist must request renewal within a stipulated period before expiry. The Committee must convene and consider. Diligence must be conducted. Fresh certificates must be issued. The exercise is repeated across every panel of a multi-service institution, and for every panellist upon it. The Centre's own search facility describes that panel as numbering more than a thousand.[19] Nothing in the industry is made safer by any of it. No party to an adjudication is given any protection by it. The Centre's own earlier practice exposes the difficulty with precision. Its published guidance said renewal would be automatic and that the Centre itself would conduct the diligence and issue the certificate.[20] If renewal is automatic, the term is an empty formality whose only product is paperwork. If renewal is not automatic, the term is not a formality at all. It is a power. That conversion of the formal into the discretionary is the true subject of this article.

The fourth reason is the gravest. A term with a renewal at discretion converts a register of the qualified into an instrument of control over them. No published criterion governs the renewal. The decision upon it is expressed to be

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19 The Centre's panellist search facility describes the panel as comprising more than a thousand panellists, at <www.aiac.world/panellist> accessed 24 August 2026.

20 The guidance cited above at n 4.

final and to require no reasons. The membership of the Committee which takes it is not published. There is besides a power to remove a panellist at any time, in absolute discretion, without any reason stated.[21] A power in that form is a power to end the standing of a person who satisfies every condition the law prescribes. It may be exercised for reasons which need never be disclosed. It rests upon a footing which cannot be examined. Whether it is in fact abused is beside the point. The objection is structural. It does not depend upon proof of motive in any case. The vice of an unconstrained and unreviewable power over professional standing is not that it will certainly be misused. It is that nothing in its design prevents misuse. Those subject to it must depend upon forbearance rather than upon law. Add the immunity affirmed for the Centre and the position is plainer still.[22] A discretion unconstrained in its criteria, unexplained in its exercise and unreviewable in the courts is as near to an unaccountable power as an institution is ever likely to hold.

The practical answer which the Centre would make should be stated, because it is a better answer than any of the textual ones. A register without a term, it would be said, fills silently. It fills with the inactive, the uncontactable, the retired and the deceased. A periodic requirement to come forward is then the only reliable means of keeping the roster real. The concern is legitimate. The answer is not that the concern is imagined. The answer is that expiry is the wrong instrument for it. The problem so described is specific. It is the panellist who no longer wishes to serve, or who cannot be reached, or who has ceased to practise. The remedy for a specific problem is a specific requirement. Publish an obligation to confirm currency and to maintain contact details. Make breach of it a stated ground of removal. Enforce it against the individual in breach. Automatic expiry does none of this. It falls upon everyone. It removes the active and the willing upon precisely the same terms as the departed. An instrument which cannot distinguish between the panellist who has retired and the panellist who has just concluded three adjudications is no solution to the problem of dead wood. It is the felling of the orchard in order to be rid of it.

A related consequence deserves separate notice. It is not obvious until the term is seen in operation. Where standing ends upon a date rather than upon a criterion, the date is known to the institution alone. So is the manner of its computation. The adjudicator whose empanelment is treated as having

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21 AIAC Policy on Empanelment of Panellists, Part C (review and appointment by the Empanelment Committee, whose decision is stated to be final and to require no reasons, and whose membership is not published), Part D, paras 4.2 and 4.3 (automatic expiry upon completion of the term and the request for renewal) and Part E (removal at any time in the absolute discretion of the Committee without a reason stated).

22 The decision cited above at n 6.

expired, and expired from a date already passed, is not told when the term was taken to have begun. He is not told upon what document the computation rests. He is not told by whom the decision was made, or upon what material. If no reasons are given and the record is not produced, he cannot establish the facts of his own removal. A person who cannot establish those facts cannot contest them, however strong his case in law may be. A criterion is different. It must be asserted before it can be applied. An assertion can be answered. That is the practical difference between removal upon a ground and removal upon the mere passage of time. It favours the institution in every instance.

There is, finally, a consideration of independence. It tells against a term quite apart from the manner of its introduction. An adjudicator who must periodically seek renewal from the institution which appoints him to his cases holds his standing upon sufferance. He holds it at the discretion of a body he may, in the discharge of his duties, have occasion to displease. Security of tenure is not a privilege of the decision-maker. It is a condition of the integrity of the decision. That is why the conditions of adjudicative office are ordinarily fixed by law rather than left to the pleasure of an administrator. The logic of the scheme points the same way. The Minister prescribed the competency of adjudicators by regulation precisely so that the qualification of the decision-maker should not lie at the institution's disposal. A tenure renewable at that institution's discretion returns to it, by another route, exactly what the Regulations withheld.

None of this denies the Centre a legitimate interest in an accurate register and an active panel. None of it questions the removal of those who cease to qualify or who breach the code of conduct. What is objected to is the expiry. What is proposed in its place is the honest application of the criteria the law has already prescribed. It follows that the primary remedy urged here is not the lawful installation of a term. It is the abandonment of the term altogether. The argument which occupies the remainder of the article is therefore advanced in the alternative. It is advanced because institutions do not always take the better course. It is advanced because a term which is to exist at all must at the least exist lawfully. If a regulatory regime of periodic revalidation is to be created, it must be created by the instrument the Act appoints for that purpose. It must protect those already admitted. It must carry the incidents of notice, criteria, reasons and review. To that argument the article now turns.

VI. THE HIERARCHY OF NORMS

The first and most fundamental objection is one of the hierarchy of legal norms. The Act is the primary legislation. The Regulations are subsidiary legislation made under s 39. The policy on empanelment is neither. It is an

administrative instrument, a statement of institutional practice, ranking below the Regulations. It is trite that subsidiary legislation must conform to its parent Act and is void to the extent of any inconsistency. Section 23(1) of the Interpretation Acts 1948 and 1967 gives the principle statutory force.[23] That is the discipline to which even subsidiary legislation is subject. An administrative policy ranks lower still and has no legislative effect at all. It cannot achieve what an inconsistent regulation could not.

The point may be put as a syllogism. The competency criteria for adjudicators are fixed by reg 4. A fixed term with automatic expiry is, if it bears on an adjudicator's standing at all, a further condition upon that standing. A further condition upon a matter the Regulations have prescribed cannot be added by an instrument of inferior rank. So far as the policy makes the standing of a reg 4 adjudicator lapse by effluxion of time, it adds a limb the Minister did not enact. Upon ordinary principle it is ineffective to do so.

It is no answer that the policy is not, in form, subsidiary legislation, and so is not caught in terms by s 23(1). The subsection expresses a broader principle. A power to administer a scheme is confined by the instrument which confers it. The body entrusted with that power may not, by rule or by practice, enlarge or contradict what the enabling law has laid down.[24] Suppose a policy could do by administrative fiat what a regulation could not do consistently with the Act. The discipline of the hierarchy would then be meaningless. The rank of the instrument does not lower the standard to which its content is held. It raises it. The policy has behind it no delegated legislative authority at all.

VII. ADMINISTERING A REGISTER OR IMPOSING A CONDITION?

The Centre's strongest answer is one of characterisation. It would say that a term of empanelment is not a competency criterion at all, and so does not touch reg 4. It would say that the term is part of the administration of the register, which the Act commits to the Centre. It would say that maintaining a register sensibly includes reviewing it periodically to confirm that those upon it still qualify. On that view the term is housekeeping and not a new qualification. Housekeeping is the Centre's to arrange.

Much of what the policy does is indeed legitimate administration. That must be conceded. The processing of applications, the meetings of the

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23 Interpretation Acts 1948 and 1967 (Act 388), s 23(1); 'subsidiary legislation' is defined in s 3 as any instrument made under an Act and having legislative effect.

24 On the supervisory jurisdiction over the exercise of statutory powers and review for illegality, see *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 (FC).

Committee, the conduct of examinations, the issue of certificates and the keeping of records current are all ordinary administration. So is the removal of those who become bankrupt, are convicted, or breach the code of conduct. None of it is open to objection. Suppose the term did no more than provide a periodic occasion to verify continued compliance with reg 4, removing only those who no longer qualify. It would then be unobjectionable.

But that is not what a fixed term with automatic expiry does. Its defining feature is that it terminates the standing of a person who continues to satisfy every prescribed criterion. The adjudicator whose term expires has not become unqualified. He holds the same certificate and the same experience. He is not bankrupt and not convicted. He meets reg 4 in every particular. What has changed is not his qualification but the calendar. A mechanism which ends the standing of a fully qualified person is not the verification of the prescribed criteria. It is the addition of a new one, namely that qualification shall endure only for three years unless renewed. That is a condition of substance. Regulation 4 does not contain it.

The contrast with removal for cause sharpens the point. Removal for breach of the code, or upon the loss of solvency or good character, is the enforcement of a continuing criterion. It is properly within the administration of the register. Automatic expiry is different in kind. It operates without reference to any criterion at all. It operates upon the mere passage of time, against the compliant and the non-compliant alike. It is because expiry is indifferent to qualification that it cannot be justified as the administration of a qualification-based register. The register may be pruned of those who cease to qualify. It may not be periodically emptied of those who still do.

VIII. THE S 32 ARGUMENT AND THE 'STANDARD TERMS OF APPOINTMENT'

A more textual answer relies on s 32 itself. The Centre is the body responsible for setting the competency standard and criteria of an adjudicator. It is also responsible for determining the standard terms of appointment. It might say that it therefore has express warrant for both the criteria and the terms upon which adjudicators serve, and that a three-year term falls within one limb or the other.

The argument does not survive examination of either limb. Take first the setting of competency standard and criteria. The Minister has exercised the regulation-making power and prescribed those criteria in reg 4. The Centre's function is then to administer and apply the prescribed framework, not to supplement it. The general responsibility conferred by s 32 is discharged, as to

the content of the criteria, by the specific prescription in reg 4. It does not license the addition of criteria of the Centre's own. A general power and a specific prescription are read together, and the general yields to the specific upon the very matter the specific addresses.[25]

Take next the determination of the standard terms of appointment. The phrase will not bear the weight placed upon it. Read in context, those are the terms upon which an adjudicator is engaged to determine a particular dispute. They are the terms of the retainer. They embrace fees, expenses, the basis of remuneration and the incidents of the engagement. They are the terms of the appointment to adjudicate. They are not a tenure upon the panel. The placing of the phrase among the fee-setting and appointment functions of s 32 confirms that reading. So does the practical reality that the standard terms operate when an adjudicator is appointed to a reference. To convert them into a warrant for a fixed tenure upon the register is to make the phrase do work which neither its language nor its context supports.

There is a further reason to resist the argument. Suppose s 32 truly authorised the Centre to fix a term of empanelment. It would then have authorised the Centre to do so directly. The Minister's prescription of the criteria in reg 4 would be a curious half-measure, fixing the qualifications but leaving their duration to policy. The coherent reading is otherwise. The substance of who may be an adjudicator, including any temporal qualification, belongs to the Regulations under s 39. Section 32 confers the administration of that regime, together with the terms of particular appointments. Nor can the policy directions for which s 33 provides supply what the Regulations have not. Those directions steer the administrator in the discharge of its functions. They do not legislate. A direction attaching an expiry to a standing which reg 4 confers without limit of time would be an amendment of subsidiary legislation by correspondence. The Policy does not even claim that provenance. It stands lower still.[26]

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25 On the disciplined reading of the enacted text and the relationship between general words and specific provision in the Act, see *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2020] 6 MLJ 224 (FC).

26 CIPAA, s 33. The directions are issued by the Minister charged with the responsibility for legal affairs, after consultation with the Minister charged with the responsibility for works, on the discharge by the Centre of its functions under s 32.

IX. RETROSPECTIVITY, THE UNHEARD AND LEGITIMATE EXPECTATION

The objections so far are objections of vires. They would hold even against a term imposed only prospectively, upon persons admitted after the policy took effect. A distinct and graver set of objections arises from the application of the term to those already empanelled. Here the difficulty is not only that the term lacks authority. It is that its retrospective operation is unfair. Here the position of the voiceless reaches its sharpest expression.

A person admitted when empanelment carried no term received a certificate which stated no term. He received it under a framework which imposed none. The natural understanding of such an admission is that it endures until it is properly determined, by the loss of a prescribed criterion or by a lawful removal. It is not that it silently expires upon the introduction, years later, of a term he never accepted. To end such a standing by a later policy, without notice, without the communication of any term-end date, and without the opportunity to make the very renewal request the policy contemplates, is to defeat a legitimate expectation.[27]

It must be acknowledged that a legitimate expectation cannot prevail against an express statutory provision. That limit tells against the Centre rather than for it. There is no provision requiring the term. There is none authorising it. The expectation is not asked to override the law. It is asked to be honoured in the absence of any law displacing it.

Procedural fairness supplies an independent objection. It is the objection which speaks most directly for the unheard. The removal of an established professional standing is not the refusal of a fresh application. It ordinarily attracts a duty to act fairly, to give notice, to afford an opportunity to be heard, and to give reasons where the decision is adverse.[28] The policy says the Committee's decisions are final and require no reasons. That cannot displace the duty where an existing standing is being taken away. The content of fairness

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27 On a legitimate expectation founded upon an existing state of affairs and the requirement of a hearing before it is disturbed, see *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (SC); and see *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar* [2010] 2 MLJ 377 on the significance of an established and undisturbed state of affairs to the lawfulness of a later intervention.

28 On the refusal of the courts to allow decisions affecting existing interests to be insulated by clauses purporting to make them final or to oust review, see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (CA); and, on the insistence upon substance over technicality and the breadth of the supervisory remedies under para 1 of the Schedule to the Courts of Judicature Act 1964, *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 (CA).

is fixed by the common law and by the nature of the interest affected. It is not fixed by the self-description of the body which acts. The vulnerability is greatest with automatic expiry, because the affected person is given no occasion even to know that the decisive date has arrived. It is one thing to remove a person after telling him why and letting him answer. It is another to let his standing lapse in silence. The law has always regarded the second as the graver.

X. THE TWO POSITIONS THE POLICY LEAVES OPEN

The operation of the term can be tested by asking what it leaves open to the adjudicator who satisfies every criterion reg 4 prescribes. The policy leaves him two positions and only two. He may apply, and take his standing henceforth upon the policy's terms. Or he may decline to apply, and keep his qualification while losing his place. Each deserves examination. Between them they demonstrate, in concrete form, the displacement of the prescribed criteria.

Those who have applied have not cured the difficulty. The vires question is untouched by compliance. Jurisdiction cannot be conferred by consent. No estoppel can be set up in the face of a statute.[29] If the term is a condition the Act and the Regulations do not authorise, it does not become authorised because qualified persons have submitted to it. They submitted facing the practical necessity of remaining appointable. A policy is not validated by the obedience it extracts.

A panellist who has accepted a certificate expressed to run for three years holds a standing changed in kind. What was a continuing status under an open-ended regime has become a terminable licence. It is renewable at the discretion of a committee whose decision is final and for which no reasons need be given. He has preserved his appointability. He holds it, from now on, periodically at discretion.

The position of those who have not applied must be stated in two registers, for the law and the machinery diverge. In law nothing has changed. The criteria in reg 4 know no term. His qualification is intact. Nothing in the Act disqualifies him from appointment. In fact the machinery forecloses him, and it does so by the policy's express terms rather than by any inference. Paragraph 4.2 causes his empanelment to expire automatically. His name leaves the published register. Paragraph 4.6 then provides that to be appointed as an

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29 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49; [1964] AC 993 (PC), on appeal from the Federation of Malaya), affirming the general rule that a party cannot set up an estoppel in the face of a statute, subject to the character of the statutory policy in question.

adjudicator a panellist must possess a valid Certificate of Empanelment.[30] Default appointment from the register is the ordinary route by which adjudicators come to be appointed. Exclusion from the register is therefore, in practice, exclusion from appointment. Nor does para 4.7 assist him. The President's power to appoint a non-panellist is conditioned upon an expertise not available amongst the panellists. The removed panellist can scarcely ever satisfy that condition. His expertise is by definition of the very kind the panel holds.

Set side by side, the two positions disclose the policy's true effect. The qualified adjudicator must either submit to terms the Regulations never imposed, or retain his qualification in law while losing appointability in fact. In neither position do the prescribed criteria govern who actually adjudicates. In both, the governing instrument is the policy. The demonstration is textual. It rests upon the policy's own published paragraphs. A condition upon standing has been imposed, and is operating, from a rank below the law which was to be its only source.

XI. FINALITY, REASONS AND THE CONSEQUENCES OF ACTING BEYOND POWER

Two of the policy's features deserve separate notice, being its statement that decisions are final and its dispensing with reasons. They are precisely the features a well-designed scheme would not have. A clause declaring a decision final does not oust the supervisory jurisdiction of the court. A statement that no reasons are required does not convert an unfair process into a fair one. Finality and the absence of reasons describe how the Committee prefers to act. They do not determine what the law requires of it.

If the term is unauthorised, the consequence is invalidity to the extent of the inconsistency. The offending limb falls, being the fixed term and its automatic expiry as applied to adjudicators. The remainder of the policy stands. The practical result is that a reg 4 adjudicator, once empanelled, remains empanelled until his standing is determined according to law. An administrative act may enjoy a presumption of regularity until it is challenged. The presumption does not cure a want of power. It merely allocates the burden of raising it.

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30 AIAC Policy on Empanelment of Panellists, Part D, paras 4.2 and 4.6; and for the non-panellist gateway, para 4.7.

The consequences of acting beyond power are not confined to the individual removed. Decisions and appointments taken in reliance upon an invalid condition are themselves exposed. Suppose an adjudicator's standing is wrongly treated as lapsed, and appointments are made, or refused, upon that footing. The regularity of those appointments may be drawn into question. So may the enforceability of the decisions which follow. That injects avoidable uncertainty into the very finality the scheme exists to provide. The Centre also acts contrary to its own statutory function, which under s 32 is to administer the prescribed regime and not to add to it. An adjudication authority whose register rests upon a condition it had no power to impose weakens the scheme it was created to serve. It does so at a time when it can least afford it. The lesson is not merely that the individual has a grievance. It is that the institution has an interest, and a strong one, in keeping within the law which confers its powers.

XII. AMENABILITY, IMMUNITY AND THE AVENUES OF REDRESS

If the term is unauthorised, or its application unfair, what follows in law? The natural answer is judicial review. When the Centre acts as the adjudication authority under Part V it exercises a statutory public function. Amenability turns upon the nature and source of the power exercised. It does not turn upon the legal personality of the body exercising it.[31] That answer must be qualified by the immunity already mentioned. The Federal Court has held that the Centre is immune from suit, including from judicial review, in the exercise of its functions. The immunity rests upon the International Organizations (Privileges and Immunities) Act 1992, read with the host country agreements and the Act.[32] The ruling substantially narrows the curial route. Any analysis of remedy must proceed upon the footing that a direct challenge faces a formidable threshold, and perhaps at present an insuperable one.

One consequence concerns the reach of the immunity itself. Section 34 protects acts or omissions done in good faith in the performance of the Centre's

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31 On amenability and the factors relevant to it, see *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor* [2010] 3 MLJ 145 (FC). Judicial review proceeds under O 53 of the Rules of Court 2012, with the reliefs available under para 1 of the Schedule to the Courts of Judicature Act 1964; on standing, the 'adversely affected' test in *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi* [2014] 3 MLJ 145 (FC).

32 The decision cited above at n 6. The immunity rests upon para 1 of the First Schedule to the International Organizations (Privileges and Immunities) Act 1992, applied to the Centre by the regulations made under that Act and read in the light of the host country agreements, and the court held that the Centre is immune in the exercise of its functions as prescribed under the Act.

functions. Consider an act done wholly beyond those functions, which the enabling law does not authorise at all. It is at least arguable that such an act does not attract a protection framed by reference to their performance. The immunity of an institution for what it is empowered to do is not obviously an immunity for what it is not. Whether that argument can confine the immunity is a matter for a future case. It is put here as an argument and not as a settled position.

The other consequence is practical. Where the curial route is narrowed, the levers of redress shift. They shift towards the Minister, who holds the regulation-making power under s 39 and to whom the coherence of the scheme is entrusted. They shift towards the Asian-African Legal Consultative Organisation, whose consent conditions the delegation of the Centre's authority. And they shift towards reform, to which this article turns at its close.

The consequence of a term should be stated in proper proportion, lest the argument be mistaken for a claim that delisting strips an adjudicator of function. It does not. Removal from the panel affects the roster from which the President makes default appointments. It does not touch the adjudicator's qualification under reg 4. It does not remove the capacity to be appointed by the agreement of the parties. Nor does it remove the capacity to be appointed by the President under the express power to appoint a non-panellist of special expertise.[33] The policy itself concedes the point for pending matters. A panellist removed from the register may continue to perform his duties until the end of the proceeding concerned.[34] The subject of any challenge is therefore the register and the principle, not the adjudicator's standing to sit. That is a reason for proportion in the remedy sought. It is not a reason to leave the principle untested. The integrity of a statutory register is itself a matter of public interest.

XIII. GOVERNANCE, APPOINTMENT AND THE QUESTION OF SUBSTANTIVE INDEPENDENCE

The empanelment power now sits within a larger change in the Centre's governance. The setting must be described, fairly and from the public record, because it bears upon the confidence the scheme commands. A Supplementary Agreement to the Host Country Agreement was concluded in February 2024

33 AIAC Policy on Empanelment of Panellists, Part D, para 4.7; and see the principle that parties cannot contract out of the statutory regime, which underscores that the right to adjudicate does not depend upon the composition of the Centre's roster.

34 Policy on Empanelment, Part E, para 5.4.

between the Government of Malaysia and the Asian-African Legal Consultative Organisation. It created a Board of Directors of between five and seven members. The government appoints the Chairman and the Deputy Chairman in consultation with the Organisation's Secretary-General. It appoints all other members directly. A Chief Executive Officer was introduced for administration. A committee to establish a Court of Arbitration was appointed by the responsible Minister.[35] Independence is a structural property. It is tested by structural questions. Who appoints? For what term? With what security of tenure? Who may remove? Who controls funding? Upon the public record the appointment power over the apex of the Centre is concentrated in the government. The inaugural Board included senior officers of the government's own legal establishment. Its first Chairman and its present Chairman have each held the office of Attorney General. Under art 145 of the Federal Constitution the Attorney General is the principal legal adviser to the government.[36] The office which chairs the Centre's Board is therefore the office which advises the government that appoints it.

The countervailing considerations must be stated with equal candour. They are substantial. The Principal Agreement expressly guarantees the independence of the Centre. It obliges the host government to respect its independent functioning.[37] The Board includes independent members and members of international standing drawn from outside Malaysia. The reform is presented as separating administration from decision-making. It is presented as a response to a period of damaging instability in the Centre's leadership. The first Chairman has since left the Board upon his elevation to the Federal Court, though that departure changed the person and not the office. It has been observed, with force, that if the object had been to capture the institution there were simpler means than a board of this composition. These are real answers. An honest analysis records them.

It is natural to ask whether the regulatory instinct which the policy displays is related to that governance. The question must be approached through the date upon which the term was actually applied. It is not to be approached

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35 Supplementary Agreement to the Host Country Agreement between the Government of Malaysia and the Asian-African Legal Consultative Organisation relating to the Asian International Arbitration Centre (Malaysia), 20 February 2024, amending the Principal Agreement of 15 March 2023; the inaugural Board was established on 4 April 2024.

36 Federal Constitution, art 145(1), under which the Attorney General advises the Yang di-Pertuan Agong and the Cabinet upon legal matters. The observation concerns the office and not the holder, and nothing is imputed to any individual who has held it.

37 Principal Agreement, article V. In pursuance of the host country agreements, the Government of Malaysia has guaranteed the independent functioning of the Centre, as the Federal Court recorded in the *One Amerin Residence* appeal.

through the date upon which a document in that form first appeared. A version of the policy vesting the empanelment functions in the Director was in published circulation by September 2021. But circulation is not adoption. The instrument carries no date of adoption. The record does not establish that a term with automatic expiry was applied to adjudicators at that time. The operative instrument is the policy in the form now published. It governs every panel of the Centre. It is applied to all panellists, past, present and future. That version cannot predate January 2026. It confers the empanelment functions upon an office which did not exist until the amending legislation commenced on 1 January 2026, and whose first holder was announced on 10 January 2026. The instrument therefore dates itself, notwithstanding that it carries no date upon its face. It dates itself to the present governance.

That chronology places the application of the term alongside the new governance rather than before it. The Amendment Act came into force on 1 January 2026. It relocated the default appointing function to the President of the AIAC Court of Arbitration. The current policy vests the empanelment functions in the Empanelment Committee and in the same President. That office sits within a Court of Arbitration established upon the work of a committee appointed by the responsible Minister. The institution's Board is appointed by the government.[38] The version which applies the term across every panel, and to every panellist past and present, belongs to the same period.[39] Two powers between them determine who actually adjudicates. One is the power to admit to and remove from the register. The other is the power to appoint from it. Both are now gathered in offices constituted under the new arrangements. The discretion over standing is being exercised at general scale for the first time from within them. Custody is what matters here. A discretion unconstrained in its criteria, unexplained in its exercise and unreviewable in the courts takes its practical character from the hands which hold it.

Contemporaneity is not causation. Nothing in the foregoing asserts that the one arrangement was adopted because of the other. The observation imputes nothing to the integrity of any office-holder. It does not suggest that any individual acts otherwise than in accordance with his own judgment. It does not assert that control is exercised through any person, because the record does

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38 For the two versions of the policy and the offices in which they respectively vest the empanelment functions, see above at n 15. For the relocation of the default appointing function to the President of the AIAC Court of Arbitration, see above at n 9. For the Supplementary Agreement, the composition of the Board and the committee appointed to establish the Court of Arbitration, see above at n 32.

39 The policy in the form now published, cited in Part IV above, which is expressed to govern all of the Centre's panels and contains no transitional provision.

not establish it. The point is structural and prophylactic. A governance arrangement which concentrates appointment in the executive creates a standing risk to independence which form alone does not dispel. The proper response to such a risk is not suspicion but safeguard. The bearing upon the argument is nevertheless direct, and it strengthens the primary submission rather than the subsidiary one. A discretion which ought not to exist at all is least tolerable where the offices holding it are constituted by executive appointment and its exercise is protected from review. In that combination the ordinary correctives are absent together. The converse is the remedy. Fix the conditions of an adjudicator's standing in the Regulations. Require a ground, a notice and reasons for any departure from them. The question in whose hands the discretion lies then loses the greater part of its force.

XIV. A COMPARATIVE NOTE: WHERE THE TERM LIVES

The Malaysian scheme belongs to a family of security-of-payment statutes which share a common ancestry. The comparison bears upon both submissions advanced here. Upon the first, it shows that a term is no necessary feature of a working scheme. Several of the mature statutes have operated for decades without time-limiting the standing of the individual adjudicator at all. Upon the second, it shows where a term lives when it exists. It lives in the statute, or in subsidiary legislation made under it, or it is administered by a body whose authority to accredit is itself conferred by statute. It is never introduced by the internal policy of a single institution operating alongside a regulation which is silent upon the matter.

In the United Kingdom the foundation is the Housing Grants, Construction and Regeneration Act 1996. The machinery of adjudicator nomination is set out in the Scheme for Construction Contracts, a statutory instrument. Adjudicators are selected by adjudicator nominating bodies whose role is defined by that instrument. The architecture of nomination lives in delegated legislation. It does not live in the private policy of a nominating body.[40]

In Singapore the Building and Construction Industry Security of Payment Act 2004 provides that adjudications are administered by an authorised nominating body. That body derives its authority from the Minister under the statute. So authorised, it establishes and maintains the register of adjudicators

40 Housing Grants, Construction and Regeneration Act 1996, s 108; Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

and accredits and trains them. The power to accredit and register is a statutory delegation. It is not an autonomous institutional practice.[41]

Australia furnishes the closest analogues. They are instructive precisely because several of them do impose a term, and do so in legislation. In Victoria the authorisation of a nominating authority is granted under the Security of Payment Act for a period of up to three years, extendable. The term is a creature of the Act.[42] In Western Australia the point is sharper still. Adjudicators are registered under the Act. Their registration is renewable. An application for renewal is required no later than one month before expiry. There is a provisional category of registration for a limited term. Here is a statutory scheme with the very features the Malaysian policy asserts, a term, an expiry and a renewal on application. They are placed where they belong, in the legislation, with the procedural incidents spelled out.[43] In South Australia a nominating authority is authorised by the Minister under the Act, and the eligibility criteria for adjudicators are prescribed by regulation.[44]

New Zealand completes the pattern. Its Construction Contracts Act 2002 distributes the nominating function among authorities constituted under the legislation.[45] Two lessons follow, and they correspond to the two submissions of this article. The first concerns where these schemes differ. Some of them legislate a term and some do not. Victoria and Western Australia do. The United Kingdom and New Zealand instead vest the nominating function in bodies constituted under the legislation, and their statutory texts prescribe no term for the individual adjudicator. A term is therefore no necessary feature of a working scheme, and the suggestion that periodic expiry is indispensable to a competent panel is not borne out by the comparators. The second is that where a term is desired it is put where such matters belong, in the instrument which carries legislative or regulatory authority, with its incidents of notice, application and renewal expressly provided. The vice identified here is therefore twofold. The idea of an expiry is objectionable in itself. The vehicle

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41 Building and Construction Industry Security of Payment Act 2004 (Singapore); the authorised nominating body is authorised by the Minister and maintains the register of adjudicators under that authority.

42 Building and Construction Industry Security of Payment Act 2002 (Vic); the term of an authorisation of a nominating authority is for a period of up to three years, extendable.

43 Building and Construction Industry (Security of Payment) Act 2021 (WA); adjudicators are registered under the Act, registration is renewable on application made not later than one month before expiry, and a provisional registration operates for a limited term.

44 Building and Construction Industry Security of Payment Act 2009 (SA), ss 18 and 29; adjudicator eligibility criteria are prescribed under s 18, and nominating authorities are authorised by the Minister under s 29.

45 Construction Contracts Act 2002 (New Zealand).

chosen for it in Malaysia is objectionable independently. If the idea is to be adopted notwithstanding, the comparators show that the lawful path is available and well trodden. It has simply not been taken.

The practice of the major arbitral institutions is sometimes offered as a counter-example. They maintain and periodically review their panels by internal rule. Upon inspection the example proves the point rather than answers it. Those panels are constituted as a matter of institutional discretion, unconstrained by any statutory criterion. The institution is free to set and revise the conditions of its own roster because no law has fixed them. Statutory adjudication differs in exactly the respect which matters. Its competency criteria are prescribed by law. A condition upon standing which the law has taken into its own hands cannot be reclaimed by institutional policy.

XV. REFORM: THE BETTER COURSE AND THE LAWFUL COURSE IF A TERM MUST EXIST

The primary proposal of this article requires little machinery. It is that no term of empanelment should be introduced at all. The fixed term presently imposed by policy should be withdrawn so far as it applies to adjudicators. The conditions of an adjudicator's standing would then be those the Minister has prescribed. They would be enforced as conditions are properly enforced, by removal upon a ground which is asserted, notified and capable of being answered. Suppose it is thought that adjudicators should remain current. That object may be secured by a published requirement of continuing professional development and of recent activity, enforced against the individual who fails to satisfy it. Those whose empanelment has already been treated as having expired should be restored to the register. Their qualification was never lost.

Suppose, however, that the Centre and the Minister remain of the view that a regulatory regime of periodic revalidation is required. Such a term must still be created legally. What follows sets out what legality and good design would require of it. These proposals are offered in the alternative and without prejudice to the primary proposal. They proceed from the minimum which legality demands to the design which the best schemes achieve.

First, and foundationally, the conditions of an adjudicator's standing must be prescribed in the Regulations under s 39. That includes any term, any renewal cycle and any ground of removal. It must not be announced in institutional policy. This is the non-negotiable core, and it is drawn directly from the comparators. Western Australia and Victoria place the term in the Act. Singapore and South Australia derive the accrediting authority's power from the statute. The United Kingdom houses the nominating architecture in

a statutory instrument. Malaysia's anomaly lies in the policy as much as in the term. If a term is to exist at all, the cure is to move it into the Regulations, where it will carry the authority a policy lacks.

Secondly, any term once prescribed must carry express transitional provision for those already empanelled. It should either preserve their existing standing, or assign to them a defined term running, with due notice, from the commencement of the amendment. No one's status should lapse silently or retrospectively. The comparators that renew do so on notice and on application. They never do so by ambush. The transitional principle is what protects the voiceless with whom this article began.

Thirdly, renewal must rest on stated criteria related to competency. Continuing professional development is one. A minimum of recent activity is another. Continued satisfaction of the reg 4 conditions is a third. Renewal must not rest on unfettered discretion. That converts the term from a cull into a genuine revalidation of continuing fitness, which is the only justification a term has. A renewal refused must be refused upon a ground the criteria supply, and not at large.

Fourthly, procedural fairness must be built into the scheme as a design feature. It must not be left to be supplied by litigation. There should be notice before expiry. There should be an opportunity to seek renewal. There should be reasons upon a refusal or a removal. There should be an avenue of internal review. The policy's present language, that decisions are final and require no reasons, is precisely what a well-designed regulation would omit.

Fifthly, and completing the design, the body which admits, renews and removes should be constituted transparently, with published terms of reference and a published membership. Its decisions upon individual standing should be kept structurally separate from executive influence. A scheme in which adjudicative standing is fixed by law, revalidated upon published criteria and reviewable is one in which the question whether the Centre is truly independent is answered by design rather than by trust. A register so constituted cannot readily become an instrument of control.

XVI. A MODEL PROVISION

Suppose a term is to be had. Upon that assumption, and without prejudice to the primary proposal that none should be introduced, the following is offered as a model. It shows how an amended reg 4, or a short new regulation made under s 39, might install a term lawfully and fairly. It is a drafting sketch and not a finished instrument. The periods and criteria are illustrative. But it demonstrates that everything the present policy seeks to achieve can be

achieved within the law, and better.

Draft Regulation (illustrative)

4A Term and renewal of empanelment of adjudicators

(1) A person who satisfies the competency standard and criteria in regulation 4 may be empanelled as an adjudicator, and shall remain empanelled for a term of three years from the date of empanelment, subject to renewal under this regulation.

(2) Not less than three months before the expiry of a term, the Centre shall give the adjudicator written notice of the date of expiry and of the right to apply for renewal.

(3) On the application of the adjudicator, the Centre shall renew the empanelment for a further term of three years if the adjudicator continues to satisfy the criteria in regulation 4 and has, during the expiring term, satisfied the continuing requirements prescribed under paragraph (4).

(4) The continuing requirements are: (a) the completion of such continuing professional development as the Centre may publish; and (b) such minimum of recent activity or currency as the Centre may publish; and any such requirement shall be published before it is applied.

(5) Where the Centre proposes to refuse renewal, or to remove an adjudicator otherwise than upon the loss of a criterion in regulation 4, it shall give the adjudicator written notice of the ground, an opportunity to make representations, and, if it proceeds, written reasons; and the adjudicator may within twenty-one days apply to the Centre for a review of the decision.

(6) Transitional. A person empanelled before the commencement of this regulation shall be treated as empanelled on the date of commencement, and paragraphs (1) to (5) shall apply to that person accordingly; and no such person's empanelment shall be treated as having expired by reason only of the passage of time before that date.

The draft is illustrative only. Its architecture is the point. It fixes the term in subsidiary legislation made under the enabling power. It protects those already empanelled by an express transitional provision. It grounds renewal in published criteria related to competency rather than in discretion. It builds notice, reasons and review into the process of refusal or removal. An adjudicator under such a regulation would know the term. He would receive warning of its expiry. He would be judged for renewal against stated criteria. He would be told why if renewal were refused. That is what the present policy conspicuously does not provide.

XVII. CONCLUSION

The competency of adjudicators under the Construction Industry Payment and Adjudication Act 2012 is fixed by reg 4, prescribed by the Minister under s 39. Those criteria contain no term. They contain no expiry. They contain no requirement of re-registration. The principal submission of this article is that the omission is not a gap to be filled. It is a feature to be preserved. The prescribed criteria already provide for every case in which a person ought to leave the register, and they do so upon a ground which must be asserted and may be answered. An expiry removes the qualified without identifying any unfitness in them. It confers upon the institution a discretion over professional standing which is unconstrained by published criteria, unexplained by reasons, declared to be final and, upon the present state of the authorities, unreviewable. A power in that form ought not to exist. Its existence is not made tolerable by the good intentions of those who hold it.

The subsidiary submission is one of vires and of fairness. It arises if a term is to be imposed notwithstanding. A fixed three-year term with automatic expiry, introduced by an internal policy, sits above the Regulations in ambition but below them in rank. As applied to adjudicators it adds to the prescribed criteria a temporal condition the Regulations do not contain. Upon ordinary principle it is, to that extent, ineffective. Its application to those admitted under the former open-ended regime engages legitimate expectation. It engages also the fairness owed before an established standing is taken away.

This article began with the person who leaves a register not because he has ceased to deserve his place. He leaves because a rule made after his admission, and without his voice, has decided that his place shall expire. The law's longstanding discomfort with the retrospective and the unheard is not sentiment. It is the recognition that standing conferred under one set of rules should not be withdrawn under another adopted later and applied silently. Nothing in the argument denies the Centre a legitimate interest in a current and active panel. It denies that an expiry is the way to secure one.

The distinction, in the end, is threefold. A term prescribed by regulation, with transitional provision and procedural fairness, is a legitimate policy choice. This article submits that it is an unwise one. But it is at least lawfully made and open to argument upon its merits. A term merely announced in policy is a matter of vires. A term announced in policy, applied to those admitted before it, and enforced without notice or reasons by a body from whose decisions there is no appeal is neither of these things. It is simply power exercised because it can be. Until a term is prescribed in the manner the Act contemplates, the better view is this. A reg 4 adjudicator, once empanelled,

remains empanelled until his standing is determined according to law, and not by the ticking of a clock which the Regulations never set. That conclusion is owed not least to those who have no voice in the making of the rule that would remove them. For them, the insistence that power be exercised only according to law is the whole of their protection.