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CIPAA 2012 – A Practical Approach For Recovery Of Payment

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It is common in the construction industry that contractors or sub-contractors face difficulties to collect payment. In this regard, the CIPAA 2012¹ offers a speedy and practical way to recover payment under a construction contract.

Adjudication commenced under the CIPAA 2012 generally takes about 105 working days from the service of a payment claim until the delivery of an adjudication decision. The winning party can register the adjudication decision so that it can be enforced as if it is a judgment of the Court.² Another benefit of an adjudication lies in the fact that it is very unlikely that an adjudication decision would be set aside by the court.³

This alert will discuss the features of adjudication under the CIPAA 2012.

Prohibition Of A Conditional Payment Mechanism

Pursuant to Section 35 of the CIPAA 2012, a contractual provision that imposes conditions before the release of payment is void. In this respect, a back-to-back payment mechanism clearly falls within Section 35, which includes a “pay when paid” clause or a “pay if paid” clause.

However, Section 35 does not mean that a contractual provision that provides for a conditional payment mechanism is void automatically, but it is only void when a payment dispute is the subject of adjudication under the CIPAA 2012.

¹ Construction Industry Payment and Adjudication Act 2012

² Section 28 of CIPAA 2012

³ The statistics at page 40 of the report entitled “CIPAA Conference 2018 – Sharing Solutions” dated 07.05.2018 prepared by the Asian International Arbitration Centre demonstrates that 50% of the adjudication decisions were subject to an application to set aside the said decisions. Out of the 50%, only 4.35% of the decisions were set aside, whilst 28.26% were not set aside, and 17.39% are pending applications.

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Therefore, Section 35 removes a hurdle in a claim for payment. Based on this, the Court has held that, amongst others, payment clauses of the following nature are void:

- (a) a clause which provides that the payment to a sub-contractor at the lower spectrum of a project is subject to payment by the owner/employer to the main contractor.⁴
- (b) a clause which provides that payment for work done by sub-contractor at the lower spectrum of a project is to be paid by the owner/employer instead of the main contractor.⁵
- (c) a clause which provides for a “pay if certified” mechanism.⁶

Literally, Section 35 would only void a contractual provision that imposes condition prior to payment. Although there was no such provision in *Mei He Development Sdn Bhd v Eosh Industries Sdn Bhd*,⁷ the High Court nevertheless referred to Section 35 to bar the non-paying party from citing the non-payment by the employer as an excuse to withhold payment to the unpaid party. Further, a conditional payment mechanism cannot be used as a ground in an application to stay an adjudication decision.⁸

Given that the courts have demonstrated readiness to interpret Section 35 widely, it begs the question of what would constitute conditional payment. In *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & Another case*,⁹ it was held that the “Parliament had left it to the court to determine on a case by case basis as to whether a conditional payment term would be defeating the purpose of the CIPAA.”

⁴ First Commerce Sdn Bhd v Titan Vista Sdn Bhd and another case [2021] MLJU 376

⁵ Ireka Engineering & Construction Sdn Bhd v Tri Pacific Engineering Sdn Bhd and another summons [2020] MLJU 548

⁶ Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd [2020] 1 LNS 2170

⁷ [2021] 1 LNS 425

⁸ Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd [2021] 1 LNS 367; ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2021] MLJU 540

⁹ Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another case [2016] 5 CLJ 882

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Default Provisions Under Section 36 Of The CIPAA 2012 & Powers Conferred On The Adjudicator Under Section 25 Of The CIPAA 2012

It is very often the case that parties are in dispute in respect of the value of work done or rates applicable. An example would be the reluctance to certify a payment certificate; or the reluctance to issue an invoice as the sum certified is far lower than the sum submitted. In such a situation, it hinders one from claiming for payment because compliance with contractual provisions would usually be a pre-requisite to a contractual claim. However, if a payment dispute is subject of adjudication under the CIPAA 2012, Section 36 provides for default provisions in respect of (i) the right to claim for payment notwithstanding the absence of relevant payment terms, (ii) the applicable rates in the event of the absence of applicable rates in a construction contract, (iii) the frequency of payment and (iv) the due date for payment.

Section 36 recognises a right to claim for progress payment even in the absence of relevant payment terms in a construction contract. Further, in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal*¹⁰ it was held that Section 36 “is a fall-back section when there is no agreed contractual provision as to payment or payment terms are inadequate or unworkable”. Section 36 (if applicable) therefore absolves the burden of the party claiming for payment (i) to strict proof of the presence of a payment term; and/or (ii) to strict adherence to the relevant payment terms notwithstanding that the relevant payment terms have become unworkable (usually as a result of a pending dispute between the parties). The resulting effect is that a sub-contractor is able to claim for payment even there is no certification of a payment certificate.¹¹

In respect of the rates claimable, Section 36(1) of the CIPAA 2012 provides that it shall be in accordance with (i) the contract price for the works done, (ii) any other rate specified in the construction contract, (iii) any rates in respect of

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¹⁰ [2019] 8 CLJ 433

¹¹ *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728; *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd* and another case [2017] MLJU 146

variation agreed by the parties and (iv) the estimated reasonable cost of rectifying defects or the diminution in the value by virtue of the defects. Section 36(2) further provides that in the absence of the rates stated in item (i) to (iv) earlier, reference shall be made to the fees prescribed by the relevant regulatory board, or in the event there are no prescribed fees, the fair and reasonable prices or rates prevailing in the relevant industry at the time the works were carried out. The court in *Bumimetro Construction Sdn Bhd v Sun-Jaya M&E Sdn Bhd*¹² allows Section 36(2) to be invoked if the parties "could not agree on the rates".

In addition to the above, the practicality of adjudication under the CIPAA 2012 is further enhanced by the enactment of Section 25 of the CIPAA 2012 which confers power on the adjudicator to, amongst others, "review and revise any certificate issued" and to "decide or declare on any matter notwithstanding no certificate has been issued". An adjudicator therefore has the power to order payment notwithstanding the absence of a certificate. This was demonstrated in *Ritma Hebat Sdn Bhd v Kayangan Kemas Sdn Bhd*¹³ where the court upheld the adjudicator's decision that the retention sum is due and payable, notwithstanding the non-paying party's refusal to

Statutory Adjudication Does Not Require The Agreement Of The Other Contracting Party

It is common for a construction contract to contain a dispute resolution clause, and very often this may be in the form of a multi-tiered dispute resolution clause. Generally, the courts have interpreted such dispute resolution clause strictly, which requires strict compliance by the parties, to give effect to the intention of the parties.¹⁴

With the CIPAA 2012, it is a statutory right of an unpaid party to resort to adjudication under the CIPAA 2012. In this regard, (i) the unpaid party is not required to comply with such dispute resolution mechanism; and (ii) the agreement of the other contracting party is not required. In *Martego Sdn*

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¹² [2020] MLJU 136

¹³ [2017] MLJU 2034

¹⁴ Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773

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Bhd v Arkitek Meor & Chew Sdn Bhd,¹⁵ the court held that “statutory adjudication does not require the agreement of the parties to commence the process and prevails over any contractual agreements to the contrary between the parties”.

The decision in *NCT Building & Civil Engineering Sdn Bhd v Sinohydro Corporation (M) Sdn Bhd*¹⁶ demonstrates that a member of an unincorporated consortium (which consists of 2 members) is an unpaid party within the meaning of section 5 and may commence adjudication notwithstanding the non-participation of the other member.

Conclusion

Having said that, it is pertinent to note that adjudication would not prevent the commencement of arbitration or litigation, nor would it affect any pending reference to arbitration or litigation. This is provided under Section 37 of the CIPAA 2012.

Notwithstanding, given that an adjudication decision may be delivered in about 105 working days from the service of a payment claim, in the normal course of events, a decision would be reached first in the adjudication proceedings. In the event that the decision is in favour of the sub-contractor claimant, the sub-contractor claimant still gets his payment while the arbitration or civil suit is still in progress. Therefore, the object of the CIPAA 2012 to provide speedy and binding (until set aside) is not defeated.

Authored by Stephanie Chong Keh Yin, associate with the firm’s Dispute Resolution practice.

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¹⁵ [2016] MLJU 1051

¹⁶ [2020] MLJU 776