

CONTENTIOUS COMMENTARY ON FEDERAL COURT DECISION IN JACK-IN PILE (M) SDN BHD V BAUER (M) SDN BHD THAT CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 IS PROSPECTIVE

Introduction

The year of 2019 witnessed a significant and remarkable change in the Malaysian law of Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) with the delivering of the Federal Court decision in the recent landmark ruling in Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2019] 1 LNS 1566 (“**Bauer**”) on 16 October 2019. The Federal Court had in its decision upholds the position taken by the Court of Appeal and ruled that CIPAA only applies prospectively to construction contracts which were entered after the date of the coming into force of the CIPAA in 15 April 2014. The Federal Court had also further clarified on the application of Section 35 of the CIPAA in governing the validity of ‘pay-when-paid’ clauses in construction contracts besides clarifying on the points of law on the retrospective application of the CIPAA.

CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

CIPAA 2012 which came into force on 15 April 2014 is well-knowingly a piece of legislation enacted by the Malaysian Parliament with a declared intention to alleviate payment problems in the construction industry through the introduction of a statutory adjudication process. The adjudication proceedings are to ensure that any payment dispute relating to construction work may be resolved in a speedy but interim manner and thereby facilitating the cash flow in the construction industry under the Act.

Section 35 CIPAA 2012

Apart from introducing statutory adjudication, CIPAA also contained provision such as Section 35 which governs the payment terms within the construction industry in Malaysia. This provision is substantive in nature and is thus distinct from the remaining parts of CIPAA

which introduce and regulate the procedure for statutory adjudication and are procedural based.

Section 35 of CIPAA prohibits conditional payment arrangements between contractual parties in a construction contract. One commonly occurring conditional payment arrangement is the ‘back-to-back payment’/ ‘**pay-when-paid**’ clause, by which a contractor agrees to pay his sub-contractor only upon receipt of payment from the employer, which will be discussed as follows.

BACKGROUND FACTS OF BAUER CASE

In Bauer, pursuant to a Letter of Award dated 16 March 2011 (“**the construction contract**”), the Appellant, Jack-In Pile (M) Sdn Bhd was appointed by the Respondent, Bauer (Malaysia) Sdn Bhd as its subcontractor for the supply and installation of Spun Piles in a development project in Gombak (“**the Project**”).

The construction contract contains, essentially, a classic ‘pay-when-paid’ clause, i.e. Clause 11.1 which stipulated that all payments to the Appellant shall only be made within seven (7) days from the date the Respondent received their related progress payments from the employer of the Project namely ITD-Vertex Consortium Sdn Bhd (“**the employer**”). The Respondent had thus since March 2011 reiterated its reliance on Clause 11.1 and as a result, there was no obligation on the Respondent to make any payments to the Appellant until and unless the Respondent has received the related progress payments from the employer.

A payment dispute eventually arose between the parties. The Appellant had on 3 August 2016 issued a payment claim against the Respondent pursuant to the adjudication process under the CIPAA. The adjudicator in delivering the adjudication decision held that the Respondent was liable to make payments to the Appellant at the conclusion of the adjudication proceeding and that the Appellant applied to the High Court

to enforce the adjudication decision. The Respondent on the other hand, applied to the High Court to set aside the adjudication decision.

The core contention between the parties was that whether Clause 11.1 of the construction contract, i.e. the “pay-when-paid” clause would be rendered void under Section 35 of CIPAA that prohibits any conditional payment provision in a construction contract and whether Section 35 of CIPAA applies to the construction contract entered into between the parties prior to the enactment of CIPAA, i.e. 15 April 2014.

The High Court by relying on the decision of UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor [2015] 11 MLJ 499 (“**UDA Holdings**”), held that the CIPAA including Section 35 applied retrospectively to contracts entered before 15 April 2014 and that Clause 11.1 being a conditional payment provision was rendered void under Section 35 of CIPAA. It accordingly decided in favour of the Appellant by granting the enforcement application and dismissed the Respondent’s setting aside application.

In deciding the question of the applicability of Section 35 of CIPAA to the construction contract between the parties which had existed prior to the coming into force of CIPAA on 15 April 2014, the Court of Appeal reversed the High Court decision by adopting a different view to the rationale expressed in UDA Holdings and held that CIPAA is “**prospective in nature**”. The Lordship of David Wong Dak Wah, JCA came to the conclusion that as there was no express provision in CIPAA excluding or including construction contracts made prior to the commencement of the CIPAA and the absence of clear words in the legislation showed to the contrary, section 35 of CIPAA which related to the substantive right of the contractual parties must then be given a prospective effect thereby validating the ‘pay-when-paid’ clause in the construction contract between the parties. Therefore, CIPAA was concluded by the Court of Appeal to be prospective in nature and Section 35 cannot apply retrospectively to outlaw a conditional payment arrangement that had been agreed prior to the coming into effect of CIPAA.

The Appellant appealed to the Federal Court due to the dissatisfaction with the Court of Appeal’s decision.

FEDERAL COURT'S FINDINGS

In the appeal before the Federal Court, the ultimate question of law posed to the Federal Court was that whether the CIPAA which came into effect on 15 April 2014 is to be construed as having retrospective or prospective operation.

In reaching its decision, the Federal Court expressly disagreed with the rationale of the High Court decision in UDA Holdings where CIPAA was firstly decided to be retrospective in nature in that case. The Federal Court found that High Court in UDA Holdings did not appear to appreciate fully the statutory provisions of the Interpretation Act 1948 and the common law position that, in the absence of clear and express wordings to the retrospective effect of a legislation, i.e. the CIPAA, the legislation cannot be applied retrospectively. As there is already a presumption that legislation is to only apply to the future, retrospective operation is thus not allowed unless there is a clear intention by the Parliament through express wordings stated in such provisions.

The Federal Court went on to take note of the arguments in the earlier Federal Court decision in View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22 (“**View Esteem**”) which had referred to UDA Holdings and held that the decision in View Esteem had merely mentioned UDA Holdings in passing but did not go on to decide on the correctness or otherwise of UDA Holdings. It is therefore simply incorrect for the appellant’s counsel to assert that the Federal Court in View Esteem had affirmed the decision of the High Court in UDA Holdings as the issue of whether the CIPAA was retrospective or prospective in nature was not even a live issue to be decided in View Esteem.

In dismissing both appeals, the Federal Court concluded that the provisions of CIPAA, i.e. Section 35, which prohibits conditional payment clauses in the construction contracts, i.e. the ‘pay-when-paid’ clause contained in Clause 11.1 of the construction contract, undoubtedly impairs the substantive rights of the contractual parties to freedom of contract. Thus, any interpretation that CIPAA takes effect retrospectively would inhibit the exercise of the Respondent’s vested right in accordance with the bargain entered into between the parties. As such, the Federal Court held that in

the absence of any express intention by Parliament that CIPAA is to be applied retrospectively, the CIPAA can only be applied prospectively, i.e. to construction contracts entered into after 15 April 2014. The entire adjudication proceedings and its adjudication decision are therefore rendered void.

CONCLUSION

This recent Federal Court's pronouncement on the law of CIPAA in Bauer is far reaching and will inevitably have a significant impact on the construction industry in Malaysia, in particular those who are having payment disputes in respect of construction contracts which were entered into prior to 15 April 2014.

As the law of CIPAA currently stands, the payment disputes which arose before the enforcement of CIPAA on 15 April 2014 are now

exempted from being resolved via the adjudication mechanism stipulated under CIPAA and that the 'pay-when-paid' clauses in construction contracts entered before 15 April 2014 remain valid and enforceable. In other words, payments need not have been paid by the contractors to the subcontractors as stipulated under the conditional payment clauses in the construction clauses. However, there may have been payments already then made out for the previous successful enforcement of adjudication decisions via High Court judgments. Therefore, it remains to be seen how the Federal Court decision in Bauer will impact the ongoing matters as well as the already decided adjudication matters in respect of the pre-15 April 2014 construction contracts via the High Court judgment. Since a High Court judgment cannot be set aside "automatically" due to a new development in the law in a separate case or appeal and such claims may still be pending final determination in arbitration or litigation.

