

Commercial Litigation

CIPAA As At April 2018

What is A Conditional Payment Clause and When is it Void?

Is CIPAA Prospective or Retrospective? Or A Hybrid?

Introduction

The Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) came into force on 15 April 2014. The CIPAA has brought in significant changes to the construction industry. However, like other newly introduced legislation, CIPAA too is facing teething issues and several issues have arisen since it came into force. This article will discuss the effect of CIPAA and the position of conditional payment clauses in the light of recent developments.

Briefly, CIPAA provides a new regime in which an unpaid contractor can claim for payment for work done or services rendered under the express terms of a written construction contract. CIPAA was introduced with the objective of providing a speedy procedure for the temporary resolution of payment disputes under construction contracts. With such an objective in mind, CIPAA has invalidated conditional payment clauses in construction contracts, mainly to ease cash flow in the construction industry.

What is Conditional Payment as Envisaged in Section 35 CIPAA?

Section 35(1) of CIPAA provides that *any* conditional payment provision in a construction contract in relation to payment under the construction contract is void. Section 35(2) provides that it is a conditional payment provision *when* (i) the obligation of one party to make payment is conditional upon that party having received payment from a third party, or (ii) the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party. Is “conditional payment” therefore to be restricted to the two instances described in section 35(2)?

In the case of **Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and anor [2017] 7 MLJ 732**, the High Court held that for the purposes of section 35, “conditional payment” is not restricted to the two instances described in section 35(2). The High Court held that a more expansive interpretation has to be adopted because in describing the two instances, Parliament did not use the expression “conditional payment *means*” or “conditional payment *includes*” but rather, the Parliament had chosen to state a *general principle* first in section 35(1) and has couched it to be all-encompassing by using the expression “*any conditional payment provision*”. In this regard, the High Court held that

Commercial Litigation

clause 25.4(d) of the PAM Standard Form of Contract amounted to a conditional payment clause within the ambit of section 35 of the CIPAA. Clause 25.4(d) provides that:

“Until after the completion of the Works under Clause 25.4(a), the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined. Upon completion of the Works, an account taking into consideration the value of works carried out by the Contractor and all cost incurred by the Employer to complete the Works including loss and/or expense suffered by the Employer shall be incorporated in a final account prepared in accordance with Clause 25.6”

What is the effect of section 35 of the CIPAA? Section 35 of the CIPAA effectively takes away the *contractual right* of the paying party to pay only upon the satisfaction of certain conditions and *replaces* the same with a default payment provision under sub-sections (3) and (4) of section 36 of the CIPAA which provides that:

“Section 36(3)

The frequency of progress payment is

- (a) Monthly, for construction work and construction consultancy services; and*
- (b) Upon the delivery of supply, for the supply of construction materials, equipment or works in connection with a construction contract.*

Section 36(4)

The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice.”

When is conditional payment clause void?

In view of the operation of section 35 and section 36, is a conditional payment provision in a construction contract still valid?

The High Court in the case of **Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party) [2017] MLJU 376** held that a conditional payment clause is only void for the purposes of adjudication. The learned Judge held that:

“If Parliament had wanted the prohibition to be of general application in the construction industry, it would have amended the Contracts Act 1950 and not confine and restrict its operation to statutory adjudication under the CIPAA.”

The decision in **Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)** appears to suggest that the contracting parties' rights to agree on conditional payment is not voided or taken away but rather *suspended* when the matter is adjudicated under the CIPAA. This is consistent with Section 13 of the CIPAA which provides that the adjudication decision only has **conditional finality**:-

Commercial Litigation

“The adjudication decision is binding unless:

- (a) It is set aside by the High Court on any of the grounds referred to in section 15;*
- (b) The subject matter of the decision is settled by a written agreement between the parties; or*
- (c) The dispute is finally decided by arbitration or the court.”*

In other words, the parties can still rely on the conditional payment clause when the dispute is referred to arbitration or the court for final determination.

Does CIPAA apply prospectively or retrospectively?

Another question that relates to section 35 is whether CIPAA applies prospectively or retrospectively.

The High Court in **Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor [2015] 5 CLJ 527** held that the CIPAA applies retrospectively. The Court of Appeal subsequently affirmed the High Court’s decision. However, the Court of Appeal in the recent case of **Bauer (Malaysia) Sdn Bhd v Jack in Pile (M) Sdn Bhd (Civil Appeal No: B-02(C)(A) – 1187-06/2017)** took a different approach. The Court of Appeal held that CIPAA only has prospective effect.

In the case of **Bauer (Malaysia) Sdn Bhd v Jack in Pile (M) Sdn Bhd**, Bauer (Malaysia) Sdn Bhd was the main contractor for a project known as “*Cadangan Membina 3 Blok 39 Tingkat 689 Unit Rumah Pangsa Kos Tinggi dan 23 Unit Kedai 2 Tingkat yang mengandungi Kemudahan Tadika, Dewan Serbaguna, Surau serta 4 Tingkat Podium Tempat Letak Kereta & Rekreasi dengan 1 Tingkat Basement di atas Lot P.T. 3901, HS (D) 61423, Jalan Aman Fasa III (Kg Berembang), Mukim Ulu Klang, Daerah Gombak, Selangor Darul Ehsan*”.

Bauer (Malaysia) Sdn Bhd appointed Jack in Pile (M) Sdn Bhd as its subcontractor for the supply and installation of Spun Piles. Clause 11.1 of the contract between the parties provided that Jack in Pile (M) Sdn Bhd shall be paid within 7 days from the date Bauer (Malaysia) Sdn Bhd received its related progress payment:

“11.0 *Progress Payment*

11.1 ***All payments shall be made within 7 days from the date the Specialist Contractor received their related progress payment and subjected to 5% retention...***”

The employer of the project was ITD Vertex Consortium. ITD Vertex Consortium was wound up in 2012. In 2013, Bauer (Malaysia) Sdn Bhd lodged its proof of debt with the liquidator of ITD Vertex Consortium which included the certified and uncertified amounts claimed by Jack in Pile (M) Sdn Bhd. Naturally, the payment claimed by Jack in Pile (M) Sdn Bhd was stalled in view of the circumstances.

On 23.8.2016, after CIPAA came into force, Jack in Pile (M) Sdn Bhd commenced adjudication proceedings under the CIPAA against Bauer (Malaysia) Sdn Bhd for payment for work completed.

Commercial Litigation

The adjudicator in coming to his decision applied section 35 CIPAA and adjudicated Clause 11 to be void. The adjudicator then proceeded to award Jack in Pile (M) Sdn Bhd a sum of RM906,034.00 for work done.

Bauer (Malaysia) Sdn Bhd applied to set aside the adjudication decision at the High Court. The application was dismissed by the High Court. The High Court in dismissing the application of Bauer (Malaysia) Sdn Bhd applied the decision in **Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor**, i.e. that CIPAA has retrospective effect and therefore Clause 11 is void by virtue of section 35 of the CIPAA.

Bauer (Malaysia) Sdn Bhd appealed to the Court of Appeal. The Court of Appeal departed from the decision of **Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor** and held that the CIPAA does not have retrospective effect. Premised on the same, the Court of Appeal allowed Bauer (Malaysia) Sdn Bhd's appeal and reversed the High Court's decision in favour of Jack in Pile (M) Sdn Bhd.

In arriving at its decision in **Bauer (Malaysia) Sdn Bhd v Jack in Pile (M) Sdn Bhd**, the Court of Appeal found that the CIPAA is a legislation that affects *substantive rights*. Substantive rights in this regard refers to (i) a right to an additional avenue to claim under the CIPAA; and (ii) a right of parties to agree upon the pay when paid mode, which is now deemed void under section 35 of the CIPAA.

The Court of Appeal further held that unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be of prospective effect. As the CIPAA does not contain such "clear words", it is therefore prospective in nature. In the words of the Court of Appeal:

"31. There is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched rights of individuals retrospectively unless with clear words within the statute. As we are aware there are no such clear words in CIPAA 2012. That being the case, there is no hesitation on our part to conclude that CIPAA 2012 is prospective in nature. In so far as section 35 is concerned, clause 11 of the construction contract remains afoot and valid."

The Court of Appeal however did not clarify as to whether the prospective effect of the CIPAA means that all construction contracts executed prior to coming into force of the CIPAA would be excluded or merely payment disputes that arose before coming into force of the CIPAA are excluded.

On the other end of the spectrum, the case of **Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor** took the position that the purpose of CIPAA is to provide a speedy procedure for temporary resolution of payment dispute in construction contracts through the introduction of a new forum, i.e. adjudication, *"it would be appropriate for such procedural and adjectival legislation to be applied retrospectively unless there is a clear contrary intention in the statute itself"*. In other words, CIPAA *operates retrospectively to cover both construction contracts and payment disputes that arose before the CIPAA came into force.*

Notwithstanding the above conflicting decisions by the Court of Appeal, observation should be taken of the recent decision of the Federal Court in the case of **View Esteem Sdn Bhd v Bina Puri Holdings Berhad [2017] MLJU 1852** where the Federal Court not only referred to the High Court's decision in **Uda Holdings Bhd v Bistraya Construction Sdn Bhd & Anor**, but appears to have tacitly approved the same:

Commercial Litigation

The application of section 41 of CIPAA had been earlier considered and decided by the High Court in the case of UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor [2015] 5 CLJ 527 which held that CIPAA as a new Act applied retrospectively. The High Court held that CIPAA applies to construction contracts entered into before the coming into force of CIPAA and also to payment disputes that arose before the enforcement of CIPAA.

*It is significant to note that in the case of UDA Holdings Bhd. the KLRCAs as the body designated by CIPAA as “the adjudication authority” (see section 32) had itself propounded that this new Act should apply only to payment disputes that arise after CIPAA has come into force. **The High Court in UDA Holdings Bhd held that CIPAA has a full retrospective effect to cover both construction contracts and payment disputes that arose before CIPAA came into force. In the result, it would appear that section 41 of CIPAA is not only a “saving provision” but also a “transitional provision” as CIPAA has been declared by case law to apply retrospectively to pre-existing payment disputes.***

*The problem on this issue arises following the decision in the UDA Holding Bhd that CIPAA applies retrospectively, not only to construction contracts made before CIPAA came into force, but also to payment disputes arising before CIPAA came into force. **In the result, in transitional cases like the present case, a determination has to be made each time under section 41 of CIPAA whether the exclusion applies.***

Moving forward

Pending a final determination by the Federal Court on whether CIPAA has retrospective or prospective effect or is a hybrid, contractors/consultants should not be deterred from bringing claims under the CIPAA.

This is because when faced with two conflicting decisions from the Court of Appeal, it is submitted that an adjudicator ought to be at liberty to choose which to follow. In this regard, the Federal Court’s decision in **Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1** is instructive:

“The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

The said exceptions are as decided in Young v Bristol Aeroplane Co Ltd [1944] KB 718. The part of the decision in Young v Bristol Aeroplane in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s 3.

*To recap, the relevant ratio decidendi in Young v Bristol Aeroplane is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, **when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one;** thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords.”*

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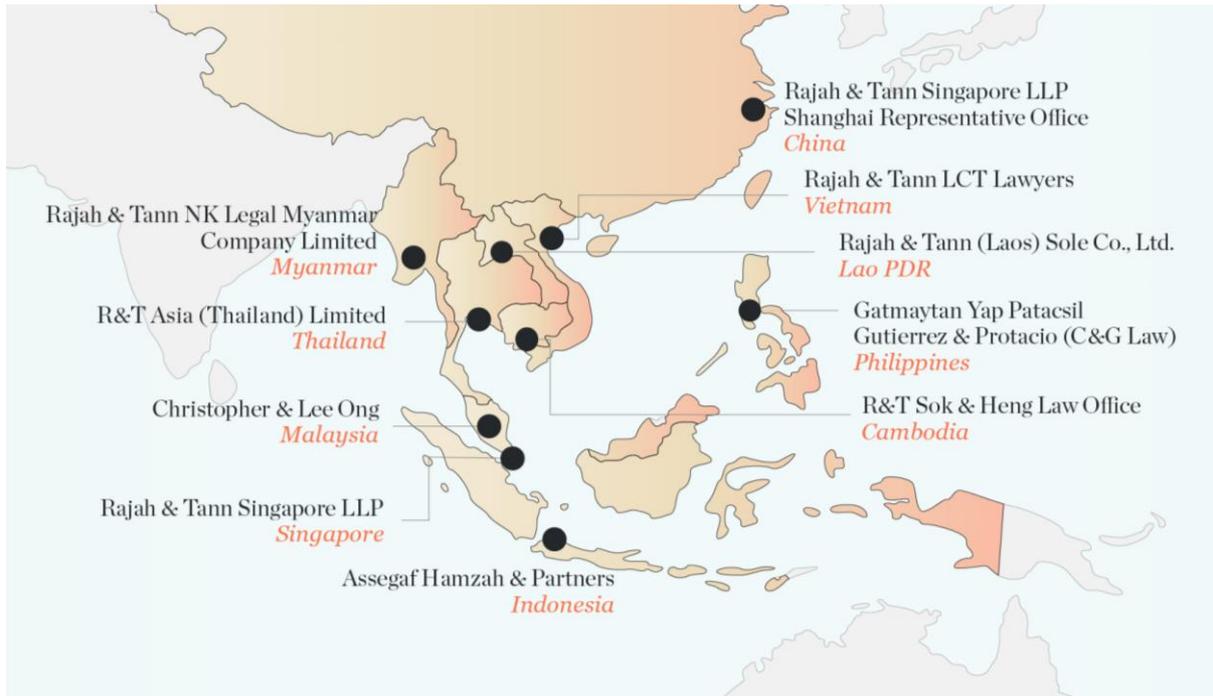
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