

REHDA TALK 2018

CIPAA: LEGAL REVIEW

“PAY NOW, ARGUE LATER”

1

SESSION ON : TUESDAY, 4TH DECEMBER 2018

PRESENTED BY: Ir. Harbans Singh K.S.

EXPECTATION – REALITY=DISAPPOINTMENT

- **PRINCIPAL AIMS/EXPECTATIONS OF STATUTORY ADJUDICATION UNDER CIPAA**
- **ENCAPSULATED IN ITS LONG TITLE**

“An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters”.

- **PRINCIPAL FEATURES/EXPECTATIONS**

1. Summary in Nature
2. *“Pay Now, Argue Later”*
3. To complement other methods of dispute resolution
4. To maintain cash flow and prevent constriction of cash flow
5. To statutorily balance the adverse risks of one-sided contracts.
6. To bring good governance in the financial administration of construction contracts

REALITY PER THE PRINCIPAL STAKEHOLDERS

- AIAC
- EMPLOYERS
- CONTRACT ADMINISTRATORS
- CONTRACTORS
- SUB-CONTRACTORS/SUPPLIERS
- SUB-SUB CONTRACTORS
- ADJUDICATORS
- LAWYERS
- CLAIM CONSULTANTS
- COURTS
- OTHERS

REALITY - IMPACT OF THE PRACTICAL IMPLEMENTATION OF CIPAA THUS FAR ON:

- SUMMARY NATURE OF ADJUDICATION
- PAYMENT CULTURE
- CASH FLOW
- CONTRACT ADMINISTRATION
- IMPROVEMENT IN QUALITY OF WORK, PROFESSIONALISM, ETC
- MANAGEMENT/REDUCTION OF CLAIMS & DISPUTES
- AMELORATION OF PERVASIVE ONE SIDED IMPOSITION OF RISK CULTURE
- CHANGE IN TENDER BID PRICES
- NEW SUPPORT WORK FOR PROFESSIONALS
- WORK LOAD OF THE COURTS
- GOOD GOVERNANCE AND FINANCIAL MANAGEMENT OF CONTRACTS
- ON THE CONSTRUCTION INDUSTRY AS A WHOLE

REALITY-PRINCIPAL CONCERNS OF PARTIES/STAKE HOLDERS

5

- GROWING DISILLUSIONMENT AS ADJUDICATION HAS APPARENTLY LOST ITS INTENDED PURPOSES AND HAS BECOME AKIN TO “FAST TRACK ARBITRATIONS”.
- ADJUDICATION HAS BECOME “TOO LEGAL”, BEYOND THE UNDERSTANDING AND DIRECT INVOLVEMENT OF LAY PRACTITIONERS
- BENEFITS ONLY A FEW PARTIES E.G. LAWYERS/CLAIMS CONSULTANTS, AIAC, ADJUDICATORS, COURTS, POLITICIANS, ETC
- ENFORCEMENT OF RIGHTS/ENTITLEMENTS IN THE COURTS AND UNDER THE CONTRACT- SLOW, DIFFICULT, FRUSTRATING, FRAUGHT WITH LEGALITIES BEYOND THE ABILITIES OF LAY PRACTITIONERS.
- LITTLE PENETRATION BELOW THE SUB-CONTRACTOR LEVEL WHERE NEEDED MOST
- ALMOST AUTOMATIC RIGHT OF APPEAL TO THE VARIOUS LEVELS OF THE COURT HIERACHY WHICH IS RELATIVELY TOO CHEAP FOR “LOSERS” BUT “WINNER’S” COSTS AWARDED BY COURTS TOO MEAGRE. ENCOURAGES USE OF COURTS TO DELAY/FRUSTRATE REALIZATION OF AWARDED REMEDIES
- COURTS APPEAR TO VIEW AND TREAT ADJUDICATIONS LIKE ARBITRATIONS/LITIGATION- “ARGUE FIRST, PAY LATER” INSTEAD OF “PAY FIRST, ARGUE LATER”
- COURTS’ DECISIONS SEEM NOT TO BE CONSISTENT, DIFFICULT TO UNDERSTAND BY LAY PRACTITIONERS AND USE TO ASSESS THE RISKS INVOLVED AND THE IMPLEMENTATION OF RIGHT TO ADJUDICATE

REALITY - ADJUDICATORS' MAIN CONCERNS

6

- ▶ LAY ADJUDICATORS APPARENTLY CAN'T HANDLE REFERRALS ANYMORE. NEED A DETAILED AND THOROUGH UNDERSTANDING OF THE LAW WHICH IS NOT EXPECTED OF THEM IN THE FIRST PLACE DUE TO THE VERY NATURE OF ADJUDICATION.
- ▶ COURTS SEEM TO VALUE LEGALITIES MORE THAN THE PAYMENT/CONSTRUCTION ASPECTS/OBJECTIVES OF CIPAA. THEREFORE ULTIMATELY FAVOURS, "LAWYER-ADJUDICATORS" INSTEAD OF ADJUDICATORS WITH ONLY CONSTRUCTION BACKGROUND.
- ▶ FEES NOT COMMENSURATE WITH WORK DONE.
- ▶ RISK OF SETTING ASIDE/NON ENFORCEMENT OF ADJUDICATION DECISIONS GETTING MORE COMMON.
- ▶ TRAINED ADJUDICATORS' PREFERENCE THEREFORE NOT TO ACT AS ADJUDICATORS BUT TAKE UP ADJUDICATION SUPPORT WORK WHICH IS MORE LUCRATIVE/REWARDING WITH LITTLE FINANCIAL RISK OR RISK TO REPUTATION.
- ▶ GENERAL RELUCTANCE OF "EXPERIENCED" ADJUDICATORS TO TAKE ON APPOINTMENTS UNLESS ESSENTIALLY AS PART OF "NATIONAL SERVICE".
- ▶ FEAR OF DAMAGE TO REPUTATION IF DECISION EVENTUALLY SET ASIDE BY THE COURTS SINCE ADJUDICATORS HAVE NO RIGHT TO INTERVENE, EXPLAIN, CORRECT OR EXPUNGE ANY ADVERSE COMMENTS/FINDINGS BY THE COURTS.

CONCLUSION

7

- ADJUDICATION UNDER CIPAA HAS APPARENTLY GONE SOMEWHAT “OFF TRACK” AND TRANSFORMED INTO “FAST TRACK ARBITRATION” NOT CONTEMPLATED WHEN FIRST ENACTED
- MUST REVERT TO THE INITIAL PURPOSES/OBJECTIVES
- MUST ENSURE NOT ONLY “Fast Justice” but also “Rough Justice” METED IN A SUMMARY MANNER TO UPHOLD THE REQUIREMENT OF “Pay First, Argue Later” WHICH IS A HALMARK OF ADJUDICATION.
- IF NOT PUT BACK ON TRACK, INDUSTRY WILL LOSE TRUST/CONFIDENCE IN EFFECTIVENESS OF ADJUDICATION AND IT WILL SOON SUFFER THE SAME, SAD FATE THAT ARBITRATION HAS SUFFERED IN THIS COUNTRY.
- COURTS MUST ATTEMPT TO REVERT TO THEIR EARLIER APPROACH IN FULLY SUPPORTING STATUTORY ADJUDICATION AND THE OBJECTIVES OF CIPAA, WHICH APPARENTLY SEEMS TO BE ABERRATED OF LATE.
- IN THE FINAL ANALYSIS, IF ABOVE SHORTCOMINGS ARE NOT ADDRESSED PROMPTLY, THE ONLY EFFECTIVE OPTION LEFT TO AN UNPAID PARTY TO PURSUE WOULD BE TO AVOID ADJUDICATION AT ALL COST AND STRAIGHT AWAY LITIGATE ITS DISPUTE AS THIS WILL BE CHEAPER, FASTER AND MORE EFFECTIVE.
- QUESTION: IS THIS WHAT THE INDUSTRY AND THE GOVERNMENT/PARLIAMENT WANTED WHEN THEY ENACTED CIPAA?

THANK YOU