



# **POTENTIAL IMPLICATIONS AND LIMITATIONS OF CIPAA: ITS IMPACT, BENEFIT AND SHORTCOMINGS**

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**HAROLD & LAM PARTNERSHIP**  
ADVOCATES AND SOLICITORS



# WHAT WERE THE COMPLAINTS WHICH LED TO CIPAA?

## ➤ CASH FLOW !!

### ➤ Caused by, amongst others :

- non-payment / delayed payment
- under-certification
- long and protracted legal proceedings
- “pay when paid” / “pay if paid”



# **COUNTRIES WITH SIMILAR REGIME?**

- **\* THE UNITED KINGDOM (1998)**
  - **\* NEW SOUTH WALES, AUSTRALIA (1999)**
  - **\* NEW ZEALAND (2002)**
  - **\* SINGAPORE (2004)**
  - **\* MALAYSIA (2014)**
- 
- **\* MALAYSIA FOLLOWING THE FOOT-STEPS OF 'FIRST – WORLD' COUNTRIES !!**



# **MORE COUNTRIES MAY JOIN !!**

-  **\* Africa**
-  **\* Hong Kong**
-  **\* Mauritius**
-  **\* Dubai and Qatar**



# SUCCESS OF CIPAA – 2017 STATISTICS

Since 15.4.2014 – March 2017 = 2 ½  
years, more than 760 cases have  
been filed



# SUCCESS OF CIPAA – 2017 STATISTICS

- ➔ **As of end of 2016, total claims made in adjudication has exceeded**
  - ➔ **RM1.5 billion**



# **SUCCESS OF CIPAA – STATISTICS 2018**

**As of March 2017, KLRCAs has trained and accredited about 650 Adjudicators who are qualified to adjudicate disputes under CIPAA**



## **SUCCESS OF CIPAA – THUS FAR**

**Number of Adjudication Cases  
have now exceeded the number  
of Construction Arbitration Cases  
commenced per year !!**





# LOOPHOLES ?



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# The Loopholes (1), and are they closed?

- The extent of Section 41 ?
- What is the meaning of “construction contract made in writing” under Section 2 ?
- What are the exempted Contracts ?
- Who, exactly, is the “Unpaid Party” ?
- What is the effect of Section 6(2) ?
- What is the effect of Section 6(4) ?
- Can a Non-Paying Party raise a counterclaim ?



# The Loopholes (2), and are they closed?

- Can a Non-Paying Party be the Claimant in an adjudication proceeding ?
- The extent of the Adjudicator's power to withhold Decision under Section 19(5)?
- The power of the Adjudicator in extending time under Section 25 (p) ?
- What are the criteria for Stay of Adjudication Decision under Section 16 ?
- What do you mean by 'denial of natural justice' under Section 15(b) ?
- Can the Adjudicator decide on his own jurisdiction?
- What does 'costs to follow the event' really mean under Section 18(1) ?



# The Loopholes (3), and are they closed?

- Must the Adjudicator hold an oral hearing when requested to do so ?
- What is the extent of the power under Section 25 (m) and Section 25 (n) ?
- What is the extent of the power of the Adjudicator under Section 26 ?
- Can you enforce only a part of the Decision under Section 28 ? If yes, does it mean that you can also sever the bad from the good under Section 15 ?
- Is Direct Payment by Principal mandatory if the criteria under Section 30 are satisfied ? Who bears the burden of proving Section 30 (5) ? What happens if Adjudication Decision is set aside after payment ?



# The Loopholes (4), and are they closed?

- Can you successfully pursue Winding Up proceedings based on Adjudication Decision ?
  - Is Section 35(2) exclusive or inclusive?
  - When Section 36 applies, and whether it extends to cases outside of CIPAA?
  - **Time and cost taken for enforcement of Adjudication Decisions?**
- **ANY MORE ? !!**



# **OTHER STATISTICS – COLLATED BY HLP\* - As of 2017**

**Based on HLP's records, the total number of cases handled by us is 82 cases, of which 64 cases proceeded to registration with the KLRCAs - which is equivalent to about 8% of the total number of adjudication cases filed in Malaysia thus far**

*\* Note: The Statistics compiled by HLP are solely for private use and reference only. HLP do not warrant the accuracy of the analysis based on the Statistics. The Statistics cannot be used by any other party for any purpose whatsoever without the prior written consent from HLP.*



## **OTHER STATISTICS – COLLATED BY HLP**

**From the number of cases filed,  
35% of the cases were settled  
before the conclusion of CIPAA  
proceeding**



## **OTHER STATISTICS – COLLATED BY HLP**

**Out of the 65% which proceeded to the conclusion to CIPAA, 2 have been referred to arbitration, and 4 to Court Litigations. The rest were either settled or enforced against the losers.**





## **OTHER STATISTICS – COLLATED BY HLP**

**Approximately 90% of the adjudication decisions were in favour of the Claimants, either partly or wholly**



# WHAT DO THESE STATISTICS TELL YOU?

Contractors have more confidence  
in Adjudication than Arbitration /  
Court Litigation

Employers think otherwise!



# WHAT DO THESE STATISTICS TELL YOU?

➡ **Because**

**Success Rate for Contractors is**  
**High !!**



# WHAT DO THESE STATISTICS TELL YOU?

It shifts the power imbalances in favour of Contractors and Sub-Contractors !!





# **WHAT DO THESE STATISTICS TELL YOU?**



**It reduces construction litigation or arbitration in Malaysia, i.e. parties settled their claims during or after CIPAA decisions**



# WHAT DO THESE STATISTICS TELL YOU?



**It improves cash flow and payment behavior in the Construction Industry in Malaysia**



# SCOPE OF CIPAA

- ➔ IT IS A ZERO-SUM GAME FOR CONTRACTORS AND CONSULTANTS !!



# PITFALLS OF CIPAA

## Open to Abuse !!

- **“Zero-Sum Game” for Contractors, Suppliers and Consultants;**
- **Employers are often subject to ‘ambush’ due to strict timelines – is it true ?;**
- **“Pay First, Argue Later” or “Pay, then Run Away” ?**





**THANK YOU**



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