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IS CONSTRUCTION INDUSTRY AND PAYMENT
ADJUDICATION ACT 2012 RETROSPECTIVE OR
PROSPECTIVE?

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Ranked in Top 100 International Arbitration Practice 2012

PROSPECTIVE OR RETROSPECTIVE?

- CIPAA does not explicitly exclude construction contracts made prior to the date of commencement of the CIPAA
- Unlike other legislations in UK (section 104(6)(a)), NSW (schedule 2.2.2), NZ (section 9(b)), and Singapore (section 4) which expressly make clear as to the application to construction contracts made after a certain specified date
- In the absence of express words, a statute is prospective in its application if it affects substantive rights and retrospective if it affects procedural rights

SUBSTANTIVE VS PROCEDURAL

- Statute is considered affecting substantive rights if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty with regard to events already passed
- Contrasted with a statute which is purely procedural where no person has a vested right in any particular course of procedure but only a right to prosecute or defend a suit according to the rules or the conduct of an action for the time being prescribed

ARGUMENTS FOR RETROSPECTIVITY

- CIPAA provides a mechanism for speedy resolution of payment disputes through adjudication and remedies for recovery of such payments in order to facilitate regular and timely payments in the construction industry (see long title of CIPAA)
- The decisions made by adjudicators pursuant to CIPAA are only temporary in nature and would not affect a party's right to seek final resolution through litigation or arbitration
- CIPAA is merely procedural in nature as it does not affect substantive rights under the construction contract and therefore, it should apply retrospectively

ARGUMENTS FOR PROSPECTIVITY

- Although CIPAA only settles payment disputes on a provisional, interim basis, it would still affect substantive rights as it allows a party to recover payment under a construction contract faster than it would otherwise have been under the pre-existing laws
- CIPAA affects substantive rights
 - Section 28 – Enforcement of adjudication decision as judgment
 - Section 29 – Suspension or Reduction of rate of progress of performance
 - Section 30 – Direct payment from principal
 - Section 35 – Prohibition of conditional payment

UDA HOLDINGS BHD
V
BISRAYA CONSTRUCTION SDN. BHD
[2015] 11 MLJ 499

- The Court of Appeal affirmed the decision of the High Court and held that CIPAA applies retrospectively: -
- *[225] It is therefore the conclusion of this court that it is the clear intention of Parliament that CIPAA applies to all construction contracts regardless of when those construction contracts were made; and that would extend to the payment disputes that arise under those construction contracts. The Act applies so long as the construction contracts are made in writing and that such construction contracts are carried out either wholly or partly within the territory in Malaysia. The only exception to this are those payment disputes where proceedings in relation to such disputes have already been commenced either by way of court proceedings or arbitration before the operation of the Act, that is before 15 April 2014.*
- In making this determination, the COA adopted a purposive interpretation in lieu with Section 17A of the Interpretation Acts of 1948 and 1967 and the Federal Court decision of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449. With that, COA's focus was that the purpose of CIPAA is to provide a speedy procedure for temporary resolution of payment dispute in construction contracts via a new forum.

VIEW ESTEEM SDN. BHD.
V
BINA PURI HOLDINGS BHD
[2018] 2 MLJ 22

- The Federal Court was presented with, and answered 8 questions of law relating to CIPAA 2012, none of which specifically included a question of whether CIPAA applies retrospectively or prospectively.
- Notwithstanding the 8 questions, the Federal Court addressed the case of *UDA Holdings*: -
- *[9] The application of s41 of CIPAA had been earlier considered and decided by the High Court in the case of UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5 CLJ 527 which held that CIPAA applies to construction contracts entered into before the coming into force of the CIPAA and also to payment disputes that arose before the enforcement of the CIPAA...*
- *[10] It is significant to note that in the case of UDA Holdings Bhd the KLRCA as the body designated by the CIPAA as 'the adjudication authority' (see s 32) had itself propounded that this new Act should apply only to payment disputes that arise after the CIPAA has come into force. The High Court in UDA Holdings Bhd held that CIPAA has 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 s 41 of the CIPAA is not only a 'saving provision' but also a 'transitional provision' as the CIPAA has been declared by case law to apply retrospectively to pre-existing payment disputes...*

VIEW ESTEEM SDN. BHD.

v

BINA PURI HOLDINGS BHD

[2018] 2 MLJ 22

- *[21] The problem on this issue arises following the decision in the UDA Holdings Bhd that CIPAA applies retrospectively, not only to construction contracts made before the CIPAA came into force, but also to payment disputes arising before the CIPAA came into operation. In the result, in transitional cases like the present case, a determination has to be made each time under s41 of the CIPAA whether the exclusion applies.”*
- The Federal Court’s comments on *UDA Holdings* does not form part of the ratio decidendi of the case and is merely obiter dictum, and on that point, arguably not binding precedent.

BAUER (M) SDN BHD



JACK-IN PILE (M) SDN BHD AND ANOTHER SUIT

[2018] MLJ 640

- Bauer was the main contractor for a project. Bauer appointed Jack in Pile 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 shall be paid within 7 days from the date Bauer received its related progress payment. The employer of the project was ITD Vertex Consortium. ITD Vertex Consortium was wound up in 2012. In 2013, Bauer lodged its proof of debt with the liquidator of ITD Vertex Consortium which included certified and uncertified amounts claimed by Jack in Pile. Naturally, the payment claim by Jack in Pile was stalled in view of the circumstances. On 23.8.2016, after CIPAA came into force, Jack in Pile commenced adjudication proceedings under CIPAA against Bauer for payment for work completed. The Adjudicator applied section 35 and concluded that clause 11 was void thus granting the adjudication award in favour of Jack in Pile. Bauer applied to set aside the adjudication decision at the High Court. In applying UDA Holdings, the High Court concluded that CIPAA has retrospective effect and therefore, clause 11 is void.
- Bauer appealed to the Court of Appeal.

BAUER (M) SDN BHD

v

JACK-IN PILE (M) SDN BHD AND ANOTHER
SUIT

[2018] MLJ 640

- The Court of Appeal considered the case of *UDA Holdings* and clearly pronounced that the whole of CIPAA applies prospectively.
- In applying the “substantive or procedural” test, the COA found that CIPAA is a legislation that affects substantive rights: -
- *[29] Access to justice is in anyone’s view a substantive right. Here CIPAA 2012 has created and given a new avenue of access to justice to claimants in the construction industry. Hence CIPAA 2012 is in essence a legislation relating to a substantive right. We are fully aware that within CIPAA 2012 there also exist a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime is nothing but a by-product or the consequence of the substantive right created by CIPAA 2012...*
- *[31] There is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched right of individual 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.*
- However, Bauer is being appealed to the Federal Court and pending final determination by the Federal Court.

CONDITIONAL PAYMENT

- Section 35(1) 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: -
 - (a) the obligation of one party to make payment is conditional upon that party having received payment from a third party; or
 - (b) the obligation of one party to make a payment is conditional upon the availability of funds or drawdown of financing facilities of that party
- In the case of ***Econpile (M) Sdn Bhd v IRDK Venture 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) because Parliament used the expression “any conditional payment provision”
- NA: section 36 provides default provisions in the absence of terms of payment. Section 36(3) relates to the frequency of progress payments and Section 36(4) relates to the due date for payments under subsection (3).
- NA: Section 35 does not cover pay-when-certified provisions, and therefore, such provisions are not prohibited by CIPAA 2012

WHEN IS A CONDITIONAL PAYMENT CLAUSE VOID?

- In light of both sections 35 and 36, is a conditional payment provision in a construction still capable of being valid?
- In the case of *Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)* [2017] MLJU 376, the High Court held that a conditional payment clause is only void for the purposes of adjudication: -
 - *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*

Thank You

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