

CLIENT
ALERT**Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd – CIPAA 2012 applies prospectively not retrospectively**

Malaysia
6 March 2018

Author**Sabarina Samadi**

Partner
Zaid Ibrahim & Co
(a member of ZICO Law)
sabarina.samadi@zicolaw.com



On 20 January 2015, a [Client Alert](#) was issued on the retrospective application of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) based on the decision in [UDA Holdings v Bistraya Construction Sdn Bhd & Anor \[2015\] 5 CLJ 527](#) (“UDA Holdings”). The High Court’s decision in UDA Holdings was subsequently upheld by the Court of Appeal in July 2015.

Recently however, the Court of Appeal in [Bauer \(Malaysia\) Sdn Bhd v Jack-In Pile \(M\) Sdn Bhd \(Civil Appeal No: B-02\(C\)\(A\)-1187-06/2017\)](#) (“Bauer’s case”) decided to depart from its decision in [UDA Holdings](#) by holding that CIPAA applies prospectively instead of retrospectively.

In [Bauer’s case](#), the Court of Appeal set aside the Adjudicator’s decision and allowed a “pay when paid” clause in a construction contract to remain valid on the basis that section 35 of CIPAA which outlaws “pay when paid” clauses did not apply.

Relevant background

The contractual provision that was the subject of this judgment was clause 11 of a construction contract between the parties. The clause reads:

“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 Sub-Contractor shall submit his claims with measurement records of work done including demarcated sketches and/or delivery orders (where applicable), duly endorsed by the Specialist/Main Contractor’s and Consultants authorised site staff. The cut-off date for the progress claim shall be on 20th day of each calendar month.”

Jack-In Pile, the Respondent was a subcontractor of Bauer (Malaysia) Sdn Bhd, the Appellant. The Appellant was employed by ITD Vertex Consortium (“ITD Vertex”) which was wound up in 2012. The Appellant informed the Respondent that ITD Vertex was wound up and assured the Respondent that steps would be taken to recover monies from ITD Vertex to pay the Respondent.

The payment claims by the Respondents was stalled however in view of the predicament faced by ITD Vertex and this consequentially gave rise to payment disputes between the parties.

An adjudication proceeding was commenced against the Appellant under CIPAA on 23 August 2016 and the central dispute before the learned Adjudicator was the applicability of section 35 of CIPAA vis a vis clause 11.1 of the construction contract.

CIPAA had already come into force during the adjudication proceeding and the crucial question to be decided upon was the applicability of section 35 of CIPAA to the construction contract between the parties which had existed prior to CIPAA coming into force on 15 April 2014.



Section 35 reads:

“35. Prohibition of Conditional Payment

1. Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

2. For the purposes of this section, 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 payment is conditional upon the availability of funds of drawdown of financing facilities of that party.”

The Appellant argued that if section 35 of CIPAA did not apply, then they had no obligation to pay the Respondent as ITD Vertex had not paid them. The Respondent on the other hand, argued that clause 11 had been outlawed pursuant to section 35 and the Appellant could not seek cover under the same.

The Adjudicator found that section 35 did apply and ignored clause 11 of the construction contract. The Adjudicator determined the Appellant liable and awarded a sum of RM906,034.00 to the Respondent. The Appellant then filed an application in the High Court to set aside the Adjudicator’s decision whilst the Respondent filed its application to enforce the same.

The High Court agreed with the Adjudicator and found that clause 11 being a conditional payment clause had been rendered void by section 35 of CIPAA. The High Court referred to the decision in [UDA Holdings](#) and held that CIPAA applied retrospectively. Consequently, the High Court Judge dismissed the Appellant’s setting aside application and allowed the Respondent’s enforcement application.

Aggrieved by the decision of the High Court, the Appellant appealed to the Court of Appeal.

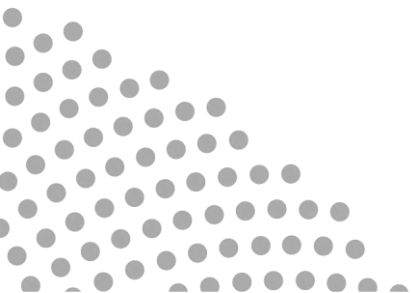
Basis of Decision

In allowing the appeal, the Court of Appeal held that where a law affects substantive rights, the law looks forward, not back.

Prior to CIPAA, claimants in the construction industry can only resort to either the Courts or arbitral tribunal to settle their disputes. With the coming into effect of CIPAA however, claimants now have an additional avenue to claim for their contractual fees. CIPAA has in effect created and given a new avenue of access to justice to claimants in the construction industry and is in essence a legislation relating to a substantive right.

Although within CIPAA there also exists 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.

Any legislation affecting that CIPAA is prospective in nature. In so far as section 35 is concerned, clause 11 of the construction contract remains afoot and valid. CIPAA therefore had no application to construction contracts that existed between parties before it came into force on 15 April 2014.





Best Practice

The Court of Appeal's judgment in [Bauer's case](#) is in direct contrast to [UDA Holdings](#) as to the applicability of CIPAA to construction contracts. Pending final determination by the Federal Court, a party intending to initiate a payment claim via adjudication under CIPAA should bear in mind that "pay when paid" clauses in a construction contract entered into before 15 April 2014 remains valid and if such clause has been incorporated into the contract, it is highly foreseeable that the counter party will rely upon it to resist the payment claim.

For a copy of the grounds of judgment, please see click [here](#).

If you have any questions or require additional information, please contact [Sabarina Samadi](#) or the ZICO Law partner you usually deal with.

This alert is for general information only and is not a substitute for legal advice.

www.zicolaw.com

