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CIPAA Does Not Apply to Contracts Before 15.4.2014

Last week, the Federal Court in *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* (“*Bauer*”) put to rest the question of whether the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA**”) applies to construction contracts entered into prior to CIPAA coming into force on 15.4.2014.

Background

The Court of Appeal in *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor* decided on 13.7.2015 that CIPAA applies retrospectively even to contracts entered into before CIPAA came into force. However, subsequently, on 22.2.2018, the Court of Appeal in *Bauer* came to a different conclusion and held that CIPAA applies prospectively, i.e. only to contracts entered into after CIPAA came into force.

Federal Court in *Bauer*

Last Wednesday, the Federal Court in *Bauer* held that CIPAA is prospective in nature. In so holding, the Federal Court observed the following:

- (a) The court needs to look at whether the statute (in this case CIPAA), if applied retrospectively, would impair existing rights and obligations of the parties. If it would, then unless there is clear provision in the statute stating otherwise, the statute must be construed as having only prospective effect.
- (b) CIPAA is an Act that takes away the substantive rights of parties. Particularly, the court found that:
 - (i) the sub-contractor has never disputed nor challenged the pay-when-paid clause in the agreement entered into between the parties, which was before 15.4.2014. Instead, the sub-contractor had been receiving payment from the main contractor in accordance with this clause.
 - (ii) if CIPAA applies retrospectively, the pay-when-paid clause would be unenforceable and void pursuant to Section 35 of CIPAA. This would not only frustrate the bargain entered into by the parties, but would also be grossly unfair to the main contractor.

contractor, which had arranged its affairs based on the validity of this clause.

- (c) Since CIPAA affects the parties' substantive rights and there is no provision in CIPAA to say that it applies retrospectively, CIPAA can only be interpreted to apply prospectively. This is further reinforced by the fact that Parliament could have — but did not — insert a provision in CIPAA to say that CIPAA shall apply retrospectively.
- (d) Accordingly, since the contract in this case pre-dates the effective date of CIPAA, the entire adjudication proceeding, including the adjudication decision, was void.

Conclusion

All in all, the Federal Court's decision in *Bauer* is to be welcomed for providing clarity on the applicability of CIPAA. It may affect dispute arising out of construction contracts entered into before 15.4.2011 which are being adjudicated, and related adjudication decisions which are being challenged. Given the passage of time since the implementation of CIPAA almost six years ago, these are likely to be few.

Darshendev Singh and Leong Chee Weng

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