

DOES CIPAA APPLY RETROSPECTIVELY – The decision of *Bauer (M) Sdn Bhd v Jack-In-Pile (M) Sdn Bhd* [2018] 4 MLJ 640

by Foo Joon Liang

The Construction Industry Payment and Adjudication Act 2012 (CIPAA) came into force on 15th April 2014. Apart from introducing statutory adjudication, CIPAA also contained provisions which govern payment terms within the construction industry.

Section 35, for instance, outlaws conditional payment arrangements. One commonly occurring conditional payment arrangement is the back-to-back payment clause, by which a contractor agrees to pay his sub-contractor only upon receipt of payment from the employer.

Another such provision is Section 36, which introduces default terms for payment in the event the contract between parties is silent on certain aspects of payment.

UDA HOLDINGS

Very early on, the question as to whether CIPAA applies to contracts inked prior to 15th April 2014 (when CIPAA came into force) arose. Or, is the application of CIPAA to be pegged to when the payment dispute arises?

This was considered in the case of **UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor [2015] 5 CLJ 527**. The High Court, having heard substantial arguments from various parties including the then Kuala Lumpur Regional Centre for Arbitration (now the Asian International Arbitration Centre) as amicus curiae, concluded that CIPAA was retrospective. It applied to contracts inked even prior to it coming into force. The High Court held:

“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 decision of the High Court in **UDA Holdings** was upheld by the Court of Appeal. For awhile, that was generally taken as a pronouncement of the applicability of CIPAA. In **View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 1 MLJ 22**, the contract in issue was entered into prior to CIPAA coming into force. Whilst View Esteem, as the respondent, did preserve its right to contend that CIPAA did not apply given that the contract pre-dates its coming-into-force, this argument was never really pursued before the High Court or in the appeals therefrom.

Federal Court in **View Esteem** did not deliberate on whether CIPAA, or any specific part of it, was retrospective given that it was not an issue pursued. The Federal Court proceeded on the basis that it is, citing **UDA Holdings**. Thus, the Federal Court’s decision in **View Esteem** must be viewed in this context.

I mention **View Esteem**, as the Federal Court’s decision in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 1 MLJ 22** has been widely cited as having endorsed the view in **UDA Holdings** that CIPAA is retrospective in its application.

UDA Holdings was generally applied until the decision of the Court of Appeal in **Bauer (M) Sdn Bhd v Jack-In-Pile (M) Sdn Bhd [2018] 4 MLJ 640** seemingly rendered a contrary view. In between, there is no reported decision of our courts departing from **UDA Holdings**, even when considering the application of Sections 35 and 36. It is timeous to look at why Sections 35 and 36 are given special mention.

SECTIONS 35 & 36 CIPAA

Section 35 prohibits conditional payment arrangements. A conditional payment arrangement, for illustration sake, includes a situation where “the obligation of one party to make payment is conditional upon that party having received payment from a third party”. This is sometimes colloquially labelled as a back-to-back payment term.

Section 36, on the other hand, introduces default terms into a construction contract where that contract is silent on those aspects. For example, where a contract does not provide for a timeline or schedule for payment, Section 36 imposes an obligation to make progress payments monthly to the contractor.

These are provisions that are distinct from the remaining parts of CIPAA, which introduce and regulate the procedure for statutory adjudication. In other words, Sections 35 and 36 are substantive in nature, whereas the other provision introducing statutory adjudication are procedural.

It must be borne in mind that CIPAA is a legislation on “Payment” and “Adjudication” in the construction industry. It is not limited to adjudication.

UDA Holdings was not a case which specifically concerned Sections 35 or 36. **Bauer** did – it was a case specifically on whether Section 35 applies retrospectively to outlaw a conditional payment arrangement which was entered into prior to CIPAA coming-into-force.

BAUER

In **Bauer**, the Court of Appeal held that Section 35 cannot apply retrospectively to outlaw a conditional payment arrangement that had been agreed prior to CIPAA coming-into-force. The Court of Appeal considered and applied the established principle that substantive laws cannot be applied retrospectively to take away the rights of a person, unless Parliament had expressly legislated such laws to be retrospective.

In the course of making its decision, the Court of Appeal had said that it disagreed with the decision in **UDA Holdings**. The Court of Appeal further observed that “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”.

Presumably due to these statements, **Bauer** has now been relied upon for the proposition that the entire Act – CIPAA – is only prospective in its application.

I respectfully take the view that the decision in Bauer does not extend to the application of CIPAA as a whole; it only concerns the application of Section 35.

First, a reading of the Court of Appeal’s grounds within its context shows quite clearly that the Court of Appeal was only considering Section 35. The Court of Appeal quite clearly set in context its decision at paragraphs 22 and 23 of its judgment:

“[22] ... In the context of this appeal, we are dealing with s 35 ... With that, we move to the crucial issue of the applicability of s 35 of the CIPAA 2012 to the construction contract at hand.”

“[23] The applicability of s 35 of the CIPAA 2012 depends in our view whether CIPAA 2012 was intended to have a retrospective operation. ...”

Then, the Court of Appeal proceeded on the premise that legislation **taking away** substantive rights ought not be retrospective. See paragraph 27 of the judgment:

*“[27] The principle distilled from the aforesaid principles of law is that if the legislation does not **take away** any substantive rights of the citizens of the State, then that legislation would be only “procedural” in nature and can be interpreted as a retrospective legislation unless there are clear words to the contrary. Hence the question before us then is whether CIPAA 2012 gives rise to “substantive rights”.*”

Apart from Sections 35 and 36, the other provisions of CIPAA do not take away any substantive rights. In fact, the Court of Appeal observed that they give a new avenue of access to justice. See paragraph 29 of the judgment:

*“[29] ... 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.”*

Thus, when the Court of Appeal found the provisions of CIPAA to take away substantive rights, it was referring only to Section 35 in that case. This is clear from paragraphs 30 and 31 of the judgment:

*“[30] ... **Section 35** in essence **takes away** the right of the parties to have their payment regime regulated by a “pay when paid” mode. Here there is no dispute that prior to the adjudication process, the Respondent only received payments when the Appellant had been paid by ITD Vertex. ...”*

*“[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.”*

**AFTER
BAUER**

After **Bauer**, High Courts have taken divergent approaches. In **Iskandar Regional Development Authority v SJIC Bina Sdn Bhd [2018] MLRHU 1**, the Johor Bahru High Court took the view that the decision in **Bauer** is limited to Section 35. It held:

“[14] It was this Court’s finding that Bauer dealt specifically with s 35 of CIPAA... Bauer did not deal with the general application of CIPAA. Accordingly the legal position on the retrospectivity application of CIPAA is that as laid down in UDA Holdings which was not overruled by View Esteem. ...”

I understand that the Construction Court in Kuala Lumpur has similarly held. The Construction Court in Shah Alam, on the other hand, has taken the view that **Bauer** stands for the proposition that CIPAA as a whole is prospective.

At the time of writing, leave has been granted by the Federal Court for an appeal against the Court of Appeal’s decision in **Bauer**. The appeal has yet to be heard.