

High Court rules on statutory adjudication

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11 August 2015 | Contributed by Gan Partnership

Litigation, Malaysia

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Introduction

Statutory adjudication was introduced in Malaysia by the Construction Industry Payment and Adjudication Act 2012, which came into force on April 15 2014. The act aims to address cash-flow problems – in particular, payment disputes in relation to the construction industry.

Apart from an expedited dispute resolution process in the form of adjudication, the act prohibits conditional payment provisions in construction contracts and provides for remedies and penalties when payments are not settled in a timely fashion.

A question arose as to whether the act applies retroactively to contracts entered into and disputes that arose before the act came into force. This was considered in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd*.⁽¹⁾ Two separate and unrelated cases were heard together on the common question of whether the act has retroactive application.

Facts

In the first case, UDA Holdings Bhd awarded a project to an unincorporated consortium. Disputes arose between the parties over payment. The consortium initiated adjudication proceedings against UDA under the act. UDA argued that the issue concerned arose before the act came into force and thus applied to the High Court for a declaration.

In the second case, Capitol Avenue Development Sdn Bhd awarded a project to Bauer (Malaysia) Sdn Bhd. During the project, disputes arose between the parties regarding rates. Bauer commenced adjudication proceedings under the act. Capitol commenced proceedings before the High Court for, among other things, declaratory orders that the adjudicator had no jurisdiction to hear and decide disputes which arose before the act came into force.

Before the High Court, both UDA and Capitol contended that because certain provisions in the act affect substantive rights, it cannot apply retroactively, unless there are express provisions to the contrary.

On the other hand, both the consortium and Bauer submitted that a purposive approach must be adopted so as not to prevent the application of the act.

Relying on the saving provision in the act, the Kuala Lumpur Regional Centre for Arbitration – which served as *amicus curiae* in the proceedings – urged the High Court to apply the act retroactively to payment disputes which arose on or after it came into force, regardless of when the construction contracts were concluded.

Decision

The High Court concluded that the provisions of the act which introduce an alternative forum for dispute resolution over payment claims in construction contracts apply retroactively in the absence of an express provision to the contrary. In a lengthy judgment which considered the purpose of the act, whether it is procedural or substantive in nature and the interplay between its various provisions, the High Court found that Parliament's intention was to apply the act to all construction contracts – including payment disputes under construction contracts – regardless of when they were made. This applies to conditional payment provisions; thus, conditional payment provisions (eg, 'pay when paid' clauses) in contracts that were entered into before the act came into force are prohibited.

The only types of dispute expressly excluded by the act (under Section 41) are payment disputes which were commenced in court or through arbitration before the act came into force.

On July 13 2015 the Court of Appeal unanimously upheld the High Court's judgment.

For further information on this topic please contact Foo Joon Liang at Gan Partnership by telephone (+603 2201 1130) or email (joonliang@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2015] 5 CLJ 527.

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