

COURT RULED ON THE CHALLENGES TO THE AIAC AND STATUTORY ADJUDICATION

This is the first decision of a constitutional challenge on the legitimacy of statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA**”). In this case, the High Court was also confronted with a challenge on the appointment of the late Mr. Vinayak Pradhan as the then Director of the Asian International Arbitration Centre (**AIAC**), and the immunity asserted by the AIAC, Mr. Pradhan and the adjudicator.

INTRODUCTION

The legal action was taken out by way of an originating summons. Other than the late Director and the AIAC, Kinta Bakti Sdn Bhd (“**Kinta Bakti**”) and Soh Lieh Seng (“**Soh**”) were named as the 1st and the 2nd Defendants in the action. The Minister of Works, the Minister of Law and the Government of Malaysia were subsequently brought in as the 5th to the 7th Defendants after the commencement of the action.

The action arose from an adjudication under CIPAA between Mega Sasa Sdn Bhd (“**Mega Sasa**”) and Kinta Bakti. Soh was appointed by the late Director as the adjudicator in that adjudication. A typical adjudication setting.

Mega Sasa sought for, among others, the following relief:

- (a) a declaration that the statutory adjudication scheme under the CIPAA is unconstitutional;
- (b) a declaration that the adjudicator’s fees and expenses, and the AIAC administrative fees chargeable for adjudication proceedings, are unconstitutional; and
- (c) a declaration that the appointment of Soh as the adjudicator in the adjudication proceeding between Mega Sasa and Kinta Bakti is invalid due to the invalidity of the late Mr Pradhan’s directorship.

By the time the Originating Summons came to be heard, given the numerous interlocutory applications filed, the adjudication decision had been delivered. The High Court was thus called upon to determine the following issues:

- (a) whether the Originating Summons was rendered academic by the adjudication decision which was delivered before the disposal of the action;
- (b) whether the CIPAA statutory adjudication scheme is unconstitutional;
- (c) whether the adjudicator’s fees and expenses and the AIAC administrative fees chargeable for adjudication proceedings, are unconstitutional and illegal;
- (d) whether the late Mr Pradhan’s directorship was invalid;
- (e) whether Soh and the late Director enjoy immunity from the action.

DECISION OF THE HIGH COURT

PUBLIC LAW EXCEPTION

The Learned High Court Judge acknowledged that the necessity of making a determination on the pleas of Mega Sasa in the action can be perceived or considered academic due to the prior making of the adjudication decision by Soh.

Nevertheless, the Learned High Court Judge held that the Originating Summons came within the narrow public law exception and thus ought to be determined notwithstanding that it may have been academic.

CIPAA STATUTORY ADJUDICATION SCHEME IS CONSTITUTIONAL

The Learned High Court Judge held that statutory adjudication under CIPAA does not violate Article 8(1) of the Federal Constitution on the premise that:

- (a) CIPAA is discriminatory only in the sense that it does not affect everyone but only disputants pursuant to a construction contract;
- (b) such classification is allowed and has a rationale in relation to the object of CIPAA;
- (c) the disputants are treated equally and in the same way under CIPAA.

The Learned High Court Judge also held against Mega Sasa's challenge that the adjudication proceedings under CIPAA is an usurpation of the judicial power of the court and thus a violation of Article 121 of the Federal Constitution. This is because the statutory adjudication under CIPAA is a judicial function, but not a replacement of the courts' judicial power under Article 121 of the Federal Constitution. Further, the adjudication under CIPAA is only binding but does not provide finality as the courts maintain the power to make final judgments and orders.

ADJUDICATOR'S FEES AND EXPENSES, AND THE AIAC ADMINISTRATIVE FEES ARE CONSTITUTIONAL

In this regard, the Learned High Court Judge found that CIPAA does not discriminate between the parties to the adjudication in terms of adjudication fees and expenses, and the AIAC administrative fees. The principle of 'costs follow the event' that penalises the losing party is also applied in the court proceedings and is reasonable.

Mega Sasa also challenged the legality of the administrative fees charged by the AIAC pursuant to Rule 9(2)(b) of the AIAC Adjudication Rules and Procedures, on the ground that the rule and procedure is *ultra vires* of the statute. The Learned High Court Judge, having been satisfied with the evidence that the necessary consultative processes required under sections 33 and 39 of CIPAA have been complied with, was of the view that Mega Sasa's challenge ought to be commenced by way of judicial review and hence it is inappropriate and unnecessary to determine this issue of illegality.

DIRECTORSHIP OF THE LATE MR. PRADHAN IS VALID

It was not disputed that the late Mr. Pradhan was initially and properly appointed as the acting director the AIAC jointly by the Government of Malaysia and Asian-African Legal Consultative Organization (**AALCO**). The dispute arose from the appointment of the late Mr. Pradhan as director of the AIAC on the ground that the appointment was purportedly made by the Government of Malaysia without consultation with AALCO.

On this issue, the Learned High Court Judge agreed with our submissions that:

- (a) this, if at all, is a dispute arising from the Host Country Agreement entered between AALCO and the Government of Malaysia;
- (b) the Host Country Agreement is an international treaty;
- (c) the parties to the Host Country Agreement had agreed on a dispute resolution procedure in Article IV therein, i.e. the parties are to consult and negotiate to resolve the disputes amicably between themselves without the intervention of any external third body;
- (d) it is neither competent nor desirable for municipal courts to adjudicate the dispute;
- (e) it is wrong for the Court to make a decision that may bind AALCO, which is not a party to the proceedings.

Further, the Learned High Court Judge also found in any event that the late Mr Pradhan was at the least then still the acting director, even if he was not the director of the AIAC. Even as an acting director, he had the power and duty to appoint Soh as the adjudicator.

AIAC, DIRECTOR OF AIAC AND THE ADJUDICATOR ENJOYED IMMUNITY FROM THE PROCEEDINGS

The Learned High Court Judge held that section 34(1) of CIPAA confers immunity to both Soh and the late Director from being sued by Mega Sasa in the Originating Summons.

The Learned High Court Judge further held that the late Director and the AIAC enjoyed immunity from the proceedings pursuant to the following provisions:

- (a) section 3(1) of the International Organisations (Privileges and Immunities) Act 1992; and
- (b) Regulations 3 and 3A of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 and its amendment in 2011.

This is in line with a number of High Court decisions on the immunity of the AIAC and the adjudicator. See for example, *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors* [2019] 1 LNS 904.

**POST- MEGA
SASA**

SIGNIFICANCE OF THE DECISION

There are at any given a large number of adjudications on foot, and numerous pending challenges in courts. Indeed, there is no time limit for a challenge on an adjudication decision for as long as they have not been enforced as a judgment under CIPAA. Thus, a

finding that statutory adjudication under CIPAA is unconstitutional, or that the AIAC was incompetent to appoint adjudicators due to the lack of a capacity of the then Director, would have had far-reaching implications to statutory adjudication in Malaysia.

There continues to be a number of adjudications that are being challenged on the ground that the appointment of the adjudicator is invalid on the argument that the appointment of the late Director was invalid.

This was therefore a significant decision by the High Court. Do note that the Mega Sasa has appealed against the decision of the High Court.

Editor's Note – Our Foo Joon Liang and Kang Mei Yee acted for the AIAC and Mr. Pradhan, the late director of the AIAC, in this matter. This article is for general information only and should not be relied upon as legal advice.

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