

# Court rules on challenges to AIAC and statutory adjudication

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## Facts

## Decision

## Significance of decision

A high court recently issued the first decision regarding a constitutional challenge of 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 of the appointment of the late Vinayak Pradhan as the then director of the Asian International Arbitration Centre (AIAC) and the immunity asserted by the AIAC, Pradhan and the adjudicator.

## Facts

The legal action was initiated by way of an originating summons. Alongside Pradhan and the AIAC, Kinta Bakti Sdn Bhd and Soh Lieh Seng were named as the first and second defendants in the action. The minister of works, the minister of law and the government were subsequently named as the fifth, sixth and seventh defendants after the action had commenced.

The action arose from an adjudication under the CIPAA between Mega Sasa Sdn Bhd and Kinta Bakti. Soh was appointed by Pradhan as the adjudicator in that adjudication.

Mega Sasa sought, among other forms of relief, a declaration that:

- the statutory adjudication scheme under the CIPAA was unconstitutional;
- the adjudicator's fees and expenses, and the AIAC administrative fees chargeable for adjudication proceedings, were unconstitutional; and
- the appointment of Soh as the adjudicator in the adjudication proceeding between Mega Sasa and Kinta Bakti was invalid due to the invalidity of Pradhan's directorship.

Given the numerous interlocutory applications that had been filed, by the time that the originating summons came to be heard, the adjudication decision had already been delivered. The high court was thus called on to determine whether:

- the originating summons had been rendered academic by the adjudication decision which was delivered before the disposal of the action;
- the CIPAA statutory adjudication scheme was unconstitutional;
- the adjudicator's fees and expenses and the AIAC administrative fees chargeable for adjudication proceedings were unconstitutional and illegal;
- Pradhan's directorship was invalid; and
- Soh and Pradhan enjoyed immunity from the action.

## Decision

### ***Public law exception***

The high court acknowledged that the need to make a determination regarding Mega Sasa's pleas in the action could be perceived as academic due to the prior making of the adjudication decision by Soh.

Nevertheless, the high court held that the originating summons came within the narrow public law exception and thus should be determined, notwithstanding the fact that it may have been academic.

### ***CIPAA statutory adjudication scheme constitutional***

The high court held that statutory adjudication under the CIPAA does not violate Article 8(1) of the Federal Constitution on the premise that:

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

The high court also rejected Mega Sasa's challenge that adjudication under the CIPAA is a usurpation of the judicial power of the court and thus a violation of Article 121 of the Federal Constitution. This is because statutory adjudication under the CIPAA is a judicial function and not a replacement of the courts' judicial power under Article 121. Further, although adjudication under the CIPAA is binding, it does not provide finality as the courts maintain the power to issue final judgments and orders.

### ***Adjudicator's fees and expenses and AIAC administrative fees constitutional***

In this regard, the high court found that the CIPAA does not discriminate between the parties to an adjudication in terms of adjudication fees and expenses or AIAC administrative fees. The 'costs follow the event' principle 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. Satisfied with the evidence that the necessary consultative processes required under Sections 33 and 39 of the CIPAA had been complied with, the high court held that Mega Sasa's challenge should be commenced by way of a judicial review and that it was therefore inappropriate and unnecessary to determine this issue of illegality.

### ***Pradhan's directorship valid***

It was undisputed that Pradhan had been initially and properly appointed as acting director of the AIAC by the government and the Asian-African Legal Consultative Organisation (AALCO). The dispute concerned Pradhan's appointment as director of the AIAC, which was alleged to have been made by the government without consulting AALCO.

In this regard, the high court ruled that:

- this dispute had arisen from the host country agreement entered into between AALCO and the government;
- the host country agreement was an international treaty;
- the parties to the host country agreement had agreed a dispute resolution procedure in Article IV therein (ie, the parties were to consult and negotiate to resolve disputes amicably between themselves without the intervention of an external third body);
- it was neither competent nor desirable for municipal courts to adjudicate the dispute; and
- it would be wrong for the court to make a decision that bound AALCO, which was not a party to the proceedings.

Further, the high court found that in any event, Pradhan had at least still been acting director of the AIAC even if he was not the director. Even as acting director, he had had the power and duty to appoint Soh as the adjudicator.

### ***AIAC, Pradhan and adjudicator enjoyed immunity from proceedings***

The high court held that Section 34(1) of the CIPAA conferred immunity on both Soh and Pradhan from being sued by Mega Sasa in the originating summons.

The high court further held that Pradhan and the AIAC enjoyed immunity from the proceedings pursuant to:

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

This decision aligns with a number of high court decisions on the immunity of the AIAC and the adjudicator (eg, *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre* ([2019] 1 LNS 904)).

### **Significance of decision**

At any given time there will always be a large number of adjudications underway and numerous challenges pending before the courts. Further, there is no time limit to challenge an adjudication decision as long as it has not been enforced as a judgment under the CIPAA. Thus, a finding that statutory adjudication under the CIPAA was unconstitutional, or that the AIAC was incompetent to appoint adjudicators due to Pradhan's lack of capacity, would have had far-reaching implications for statutory adjudication in Malaysia.

A number of adjudications continue to be challenged on the ground that the appointment of the adjudicator was invalid because the appointment of Pradhan was invalid. This was therefore a significant decision by the high court.

Mega Sasa has appealed the high court's decision.

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