

# High court grants injunction to restrain winding-up proceeding based on disputed adjudication decision

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**Facts**  
**Decision**  
**Comment**

In *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd*, (1) the high court delivered a significant decision for the construction industry regarding contractors' cash flow, which is a determining factor in ensuring the continuity and delivery of construction projects.

## Facts

The defendant, a piling contractor was appointed by the plaintiff, a developer for a project through a letter of award where the Agreement and Conditions of PAM (Malaysian Institute of Architects) Contract 2016 applies. Disputes arose when the defendant made a claim for approximately RM74 million under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) on the plaintiff who in turn issued its payment response (claim in adjudication). The defendant's claim consisted of unpaid progress claims inclusive of some uncertified claims and undervaluation of works done. The plaintiff denied the allegation and contended that it had counterclaims and set-offs against the defendant, with a sum exceeding the amounts claimed by the defendant.

During the adjudication process, the parties issued their respective notices of arbitration against each other where the claim in adjudication formed part of the disputes in the arbitration proceedings.

The adjudicator eventually decided in favour of the defendant (the adjudication decision) and a statutory demand for payment based on the adjudication decision was served on the plaintiff by the defendant. The defendant further stated that winding-up proceedings would ensue if payment was not received within the provided timeframe.

The adjudication decision was subsequently corrected by the adjudicator, but such correction was not reflected in the statutory demand. Aggrieved, the plaintiff applied to the high court for a *Fortuna* injunction to restrain the defendant from presenting the winding-up petition. Prior to the hearing, the plaintiff had failed to set aside the corrected adjudication decision and the defendant had obtained an order to enforce such decision. Up to the time of the hearing, no execution proceedings had commenced and no payment was made.

The main issue in dispute was whether an injunction to restrain the defendant from presenting a winding-up petition against the plaintiff based on the adjudication decision ought to be granted.

## Decision

In granting the injunction, the high court held that the adjudication decision, which formed the basis of the statutory demand, had been disputed by the plaintiff in an arbitration proceeding coupled with cross-claims exceeding the amount in the adjudication decision.

The high court judge granted the injunction on, among other things, the following grounds:

- Notwithstanding the nature of an adjudication decision which is "temporarily final" or provisionally final (pursuant to Section 13 of the CIPAA), such decision is still binding until set aside in court or in arbitration. It does not preclude the winning party from enforcing the adjudication decision.
- An adjudication decision may be enforced in accordance with Order 45 of the Rules of Court 2012 as if it is a judgment of the court pursuant to Section 28(1) of the CIPAA. This means that

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the CIPAA does not envisage that an adjudication decision should be converted and be enforced as a judgment of court.

- While an adjudication decision may form the basis for a statutory demand, an injunction may be issued to restrain the presentation of a winding-up petition, provided that the adjudication decision is genuinely disputed on substantial grounds; or due to the existence of a genuine cross-claim, counterclaim or set off against the petitioner for a greater amount than the adjudicated sum.

### **Comment**

This decision is welcome as it has laid down clear directions for stakeholders in the construction sector when they are faced with payment and financing issues, as well as for litigants. While the CIPAA seeks to ensure early payment or ease cash flow, it is also important to consider whether the sum claimed is subject to further disputes on substantial grounds by the counterparties. The winning party in the CIPAA will have to take a step back to consider its enforcement options, bearing in mind that one is no longer allowed to rashly present a winding-up petition without examining whether the counterparty has a genuine cross-claim, counterclaim or set-off which may be raised in court or in arbitration.

This preliminary assessment would assist the party to determine a suitable dispute resolution avenue – adjudication, litigation or arbitration, to save legal costs and time, especially when time is of essence in the construction industry.

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### **Endnotes**

(1) Originating Summons WA-24NCC-363-07/2019, High Court.

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