

CIPAA: Only Qualified Advocates for Adjudications in East Malaysia?

It is a well-known fact in Malaysia that the governing law of legal profession for Peninsular and East Malaysia differ from one another. Should one wish to commence a court action in the East Malaysia, an advocate qualified under the Sabah or Sarawak Advocates Ordinance would have to be appointed.

However, what about adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA**”) which allows parties to “*be represented by any representative appointed by the party*”. The High Court case of *Tekun Cemerlang Sdn Bhd v Vinci Construction Grands Projets Sdn Bhd*¹ had recently shed light on this matter.

Brief Facts

Disputes arose between Tekun Cemerlang Sdn Bhd (“**Tekun Cemerlang**”), a company based in Sabah and Vinci Construction Grands Projets Sdn Bhd (“**Vinci Construction**”), a company based in Kuala Lumpur concerning a construction project in Sabah.

Through a West Malaysian firm, Vinci Construction served a payment claim and later, initiated adjudication proceedings by serving a notice of adjudication to Tekun Cemerlang (“**Adjudication**”). An Adjudicator was subsequently appointed and directions were given with regard to the Adjudication cause papers.

Subsequent to the service of the Adjudication Claim, Tekun Cemerlang filed an originating summons to stay the Adjudication proceedings on the ground that the Adjudication is a Sabah proceeding for which the representatives appointed by Vinci Construction to act therein are not authorised persons under section 15 of the Advocates Ordinance² (“**AO**”), are non-members of the Sabah bar and that it is illegal and an offence for the said West Malaysian firm to represent Vinci Construction in the Adjudication.

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¹ [2021] MLJU 466.

² (Sabah Cap. 2).

Advocate Ordinance: The Right to Practise in Sabah

Generally, “The right to practise in Sabah” is governed by section 8(1) of the AO which provides that persons admitted under section 6 of the AO and enrolled under section 7 of the AO as advocates thereunder have “the exclusive right to practise in Sabah and to appear and plead” in different levels of court in Sabah or appellate courts sitting in any part of Malaysia. Nonetheless, an Advocate in Sarawak or an advocate and solicitor of the High Court of Malaya may appear and plead before the appellate courts sitting in Sabah for limited cases, as provided in section 8(2) of the AO.

Section 2 of the AO further defines the phrase “*to practise in Sabah*” as those functions and acts that may be performed by the barristers and solicitors in England. The High Court was of the view that section 2 of the AO does not delimit or determine the exclusive right of advocates in those functions or acts as may be performed by advocates in their practice under the AO.

‘Unauthorised Persons’

Section 15 of the AO prohibits any person from practising as an advocate or doing any act as an advocate, if such person is not enrolled as an advocate and without possessing a valid practicing certificate issued under section 9 therein. Such persons are “*unauthorised persons*”.

An unauthorised person, who carries out an act listed in section 16 of the AO which includes amongst others, acting as an advocate in any of the courts of Sabah, constitutes an offence and shall be liable to a fine or imprisonment on conviction.

The High Court’s Decision

Acting as Advocates

It was not disputed by Vinci Construction that the Payment Claim, Notice of Adjudication, and Adjudication Claim were in fact prepared and served by the West Malaysian firm. The High Court held that these actions signified that the West Malaysian firm could not have been acting merely as a servant of Vinci Construction in the Adjudication but instead, have been acting as the advocates for Vinci Construction in the Adjudication. As such, the High Court was of the view that the West Malaysian firm have been practising in Sabah in the Adjudication for the purpose of AO, even though Vinci Construction’s business office and the preparation of the documents for the Adjudication was done by the West Malaysian firm in Kuala Lumpur.

Territorial Jurisdiction of Sabah

The High Court took into consideration the fact that the necessary elements or at least, the substantial elements to sustain the Adjudication had occurred in or are in Sabah. These include the making of the relevant contract, the construction project itself, and the adjudicator appointed. On that premise, the High Court formed the view that this was a Sabah Adjudication.

The High Court proceeded to hold that the matters are plainly within the territorial jurisdiction of the High Court in Sabah and Sarawak with its branch in Kota Kinabalu, Sabah. The court further held that any court proceedings that may arise from the Adjudication as well as any acts and decisions of the Adjudicator are within and subject to the jurisdiction of the courts in Sabah.

As such, Vinci Construction's solicitors, which was a firm of advocates and solicitors based in Kuala Lumpur, are not qualified and are prohibited from practising as advocates under the AO.

Reading the AO with CIPAA

Section 8(3) of the CIPAA provides that parties to an adjudication proceeding "*may represent himself or be represented by any representative appointed by the party*". At first glance, this would suggest that anybody can be chosen, even advocates and solicitors in Kuala Lumpur for adjudication in Sabah.

However, the High Court held that section 8(3) of the CIPAA only gives a party liberty to choose between self-representation or to be represented by another in adjudication proceedings. It does not however, give a party the right to representation which is prohibited by law.

The Cautionary Remarks

The High Court cautioned that this decision deals solely with West Malaysian advocates and solicitors acting and representing Vinci Construction in Adjudication as advocates in Sabah. The High Court expressed that this decision does not concern other professionals in building construction who have the technical skills in building construction and also legal knowledge but are "unauthorised" under the AO.

Comments

The decision in *Tekun Cemerlang* raises some concerns.

The first is the classification of an adjudication as a Sabah adjudication. One of the factors for this was the appointment of an adjudicator based in Sabah. Would the classification change if the appointed adjudicator is from West Malaysia? Assuming it would be reclassified, the appointment of an adjudicator from our neighbour country, Singapore would arguably suggest that the adjudication becomes a Singapore adjudication, placing it beyond advocates and solicitors of the High Court of Malaya and of Sabah and Sarawak.

Adjudication under CIPAA is administered by the Asian International Arbitration Centre (AIAC). CIPAA itself does not restrict the AIAC from appointing adjudicators based on the locality of the dispute. In fact, it is observed that there is no provision in CIPAA which requires the determination of the locality of the adjudication and for the same to be taken into account when appointing adjudicators and/or party representatives. Thus, section 8(3) of the CIPAA allows a party to either “represent himself or be represented by any representative appointed by the party”.

Next, the considerations in section 23(1) of the Courts of Judicature Act 1964 do not apply to the AIAC when the appointment of an adjudicator is made. Thus, weighing factors such as the locality of the project, where the contract was entered into and who the adjudicator is, to determine that this was a Sabah adjudication is, with respect, an erroneous approach.

Further, it is also inconsequential that these matters “are plainly within the territorial jurisdiction of the High Court in Sabah and Sarawak with its branch in Kota Kinabalu Sabah”, since the legal representation was not for court proceedings, but for an adjudication. Unlike an arbitration, there is no provision for a seat for the adjudication under CIPAA. From a jurisdictional standpoint, there is therefore no juridical location for adjudication.

The classification of an adjudication based on its location creates a difficult precedent. It creates a non-existent divide between the adjudication of construction payment disputes between East and West Malaysia. That would also suggest that advocates in Sabah and Sarawak cannot be appointed to act as adjudicators in a West Malaysia-based adjudication.

Second, the High Court viewed as a relevant factor the fact that the West Malaysian firm had to apply legal knowledge and advise on contractual provisions. In *Tekun Cemerlang*, adjudication papers were served on an entity in Sabah. No issue was raised on the firm or its lawyers operating physically in Sabah. Nevertheless, the High Court found that the West Malaysian firm was effectively practising as an advocate in Sabah under the AO. Premised on the same rationale, this approach may also prevent West Malaysian firms of advocates and solicitors from rendering a legal opinion, or even issuing a letter of demand, from their offices in West Malaysia and delivering them to an entity in Sabah.

Third, what about adjudicators? Would advocates and solicitors be prevented from being appointed as adjudicators in the other territorial jurisdictions? As with a party representative, the adjudicator would have to also possess and apply a level of legal knowledge.

Tekun Cemerlang will now have an impact on ongoing and past adjudication proceedings in Malaysia which transcend the East and the West.

For any enquiries on construction disputes, please contact **Foo Joon Liang** (joonliang@ganlaw.my) or **Tasha Lim Yi Chien** (tasha@ganlaw.my).