

## Adjudicator is Bias for Unreasonable Deadlines & Failure to Account for MCO Restrictions

Whilst an adjudicator has wide discretionary powers under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”), can such discretionary power disregard or bypass the restrictions provided in the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 [P.U. (A) 91/2020] (“PCIDR”) more commonly known as the ‘*Movement Control Order*’ (“MCO”)? The High Court (“HC”) upon scrutinising the adjudicator’s conduct in ***Itramas Technology Sdn Bhd v Savelite Engineering Sdn Bhd and other cases***<sup>1</sup> held that there was actual bias by the Adjudicator for amongst others, failing to give effect to the MCO.

### Facts

Itramas Technology Sdn Bhd (“Itramas”) had been appointed as the sub-contractor to build a Solar Power Plant in Gurun, Kedah. Later, Itramas appointed Savelite Engineering Sdn Bhd (“Savelite”) to carry out the supply, delivery, installation, testing and commissioning of certain electrical works in the project (“Works”). Whilst Savelite claimed to have completed the works and that a sum of RM2,577,081.62 was due from Itramas to Savelite, Itramas imposed liquidated damages (“LD”) due to Savelite’s delay based on the rate stipulated in a Schedule 17 which was to be part of the contract.

However, whilst the Schedule 17 produced by Itramas contained the LD rate, it was notably not initialled by Itramas and Savelite. On the other hand, the Schedule 17 produced by Savelite was initialled but the LD rate was left blank.

### Adjudication

The timeline after the service of the Adjudication Reply is important as the Adjudicator had wanted to ascertain the facts and law surrounding Schedule 17. In this regard:

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<sup>1</sup> *Itramas Technology Sdn Bhd v Savelite Engineering Sdn Bhd and other cases* [2021] MLJU 1382.

- 17.03.2020 – Adjudication Reply was served.
- 18.03.2020 – PCIDR / MCO came into force.
- 23.03.2020 – Adjudicator issued an “*Inquisitorial Order to Ascertain The Facts and Law of “schedule 17 – ‘LD’”*” to Itramas only; giving Itramas only 1 day to respond (“Adjudicator’s 23.03.2020 Order”).
- 24.03.2020 – Itramas responded to the Adjudicator’s 23.03.2020 Order. Briefly, Itramas informed that it was impossible to comply with the short deadline. Further, with the MCO in place and Itramas not falling under the “essential services”, Itramas is unable to access the bound contract document that is in the office.
- 24.03.2020 – Adjudicator issued an “*Inquisitorial Order to Ascertain The Facts and Law of “schedule 17 – ‘LD’”*” to Savelite; only giving Savelite 2 days to respond.
- 25.03.2020 – Savelite’s counsel requested for an extension of time until 27.03.2020 and this was allowed by the Adjudicator.
- 27.03.2020 – Savelite’s counsel responded with a letter dated 27.03.2020 which was only received by the Adjudicator on 28.03.2020.
- 28.03.2020 – The Adjudicator made a decision with regard to the Inquisitorial Orders issued on 23.03.2020 and 24.03.2020. In his email, the Adjudicator was of the view that Itramas had failed to prove the initials for Schedule 17 and opined that accessing the physical copy of the contract was unnecessary as it should have been submitted under the Payment Response / Adjudication Response instead of the Inquisitorial Order. Meanwhile, the Adjudicator decided that Savelite had failed to submit its written reply within the extended time limit. Thereafter, the Adjudicator relied on Section 26(1) CIPAA to state that there has been a non-compliance of the CIPAA provisions, ultimately setting aside the parties’ inquisitorial replies.

Whilst there are several issues raised in this decision, this article will only discuss a few salient points.

## **Setting Aside the Adjudication Decision**

### **Was there a breach of the First Rule of Natural Justice?**

#### *Actual Bias*

As the MCO had been in force and the Works in this case did not fall under “*essential services*” as defined in Regulation 2 and Schedule of the PCIDR, Itramas’ directors and employees could not go to Itramas’ office. The HC took note that had Itramas complied with the Adjudicator’s 23.03.2020 Order, Itramas and/or its employees would have committed an offence under Regulation 7(1) and/or 7(2) of the PCIDR. The Adjudicator’s 23.03.2020 Order was issued despite the Adjudicator’s actual knowledge of the MCO. As such, the HC found that the Adjudicator’s 23.03.2020 Order had not been issued in good faith and the Adjudicator could not rely on Section 34(1) of the CIPAA that provides for immunity in civil suits.

The HC also took cognizance of the fact that Itramas was only given one day to comply with the Adjudicator's 23.03.2020 Order and held that an unbiased adjudicator would not have given such an extremely short period of time to comply with the said order.

Further, as a result of the MCO, Itramas could not lawfully accede to the Adjudicator's 23.03.2020 Order. The HC held that the Adjudicator should have accepted the contents of Itramas' response on 24.03.2020 as an unbiased adjudicator. Instead, the Adjudicator came to the conclusion that Itramas had "*failed to prove or substantiate*" that Itramas' Schedule 17 had been signed or initialled by the parties and that Itramas had failed to comply Section 26(1) of the CIPAA.

Lastly, the HC held that the contents of the Adjudicator's 28.03.2020 Email showed the Adjudicator's actual biasness against Itramas.

### **Had the Adjudicator Breached the Duty to be Impartial?**

By the Adjudicator's actions of giving Itramas **one day** to respond while Savelite had **two days** to respond to the respective orders given by the Adjudicator, the Adjudicator had breached such a duty. An impartial adjudicator would and should have treated both claimant and respondent equally and fairly.

Based on the above, the HC had allowed the adjudication decision to be set aside. However, the HC went on to decide the issue of staying the adjudication decision.

### **Stay of Adjudication Decision**

#### **Was there a Clear and Unequivocal Error in the Adjudication Decision?**

##### *Should the Adjudicator have given effect to the PCIDR / MCO?*

As the time period of 45 "working days" in Section 12 of the CIPAA does not include the duration of the MCO, the Adjudicator should have given effect to the MCO. The HC took a step further by highlighting that the failure to do so would cause the object of public health as embodied in the PCIDR to be unattainable.

By the Adjudicator's failure in giving effect to the MCO when issuing the orders dated 23.03.2020 and 24.03.2020 as well as the email on 28.03.2020 despite having made reference to the MCO in the Adjudicator's 23.03.2020 Order, the Adjudicator had committed an error.

### Discretionary Power of Section 25(i) of the CIPAA

The HC held that instead of exercising its power under Section 25(i) of the CIPAA, the Adjudicator should have ordered the parties to produce the original agreement within a specified dateline after the expiry of the MCO. The erroneous exercise of this discretionary power resulted in the orders dated 23.03.2020 and 24.03.2020 as well as the email on 28.03.2020.

### Reliance on Section 26 of the CIPAA

Section 26 of the CIPAA deals with the “Power of Adjudicator Not Affected by Non-Compliance”. The HC held that Section 26(1) of the CIPAA only applies when a party has not complied with a provision of CIPAA. With that in mind, as neither party had breached any CIPAA provision, such reliance by the Adjudicator is unfounded. Even if a party had breached an order that was issued by the Adjudicator under Section 25 of the CIPAA, such a breach is not in contravention of any provision of CIPAA which triggers the application of Section 26(1) of the CIPAA. Thus, the HC held that the Adjudicator’s reliance on Section 26(1) of the CIPAA is an error of law.

Meanwhile, Section 26(2) of the CIPAA applies when a party has breached an order that was issued by the Adjudicator under Section 25 of the CIPAA or when a party has not complied with a matter regarding the production of documents in an adjudication proceeding. As the orders dated 23.03.2020 and 24.03.2020 as well as the email on 28.03.2020 were found to be erroneous, the Adjudicator had wrongfully set aside the responses by Itramas and Savelite on 24.03.2020 and 27.03.2020 respectively.

## **Comments**

The HC’s decision serves as a reminder to adjudicators that although it is important to comply with the strict timelines in CIPAA, care must be taken to ensure that fairness and reasonableness is considered in every decision. An Adjudicator should take into account the ongoing restrictions that are in place such as the then MCO or any such other limitations (such as an Enhanced MCO).

As most legislation cannot be “updated” consistently to keep up with the daily realities that the COVID-19 pandemic present, it is up to the decision-makers to ensure that the purpose of the legislation and the rights of parties are well-balanced. At a time when working-from-home is encouraged and it is common for offices to be temporarily closed for reasons such as sanitisation, adjudicators and parties alike must be attuned to the fact that more time than is usually required may be needed to comply with directions.

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