

CIPAA 2012 : Supporting Documents in Notice of Adjudication – To Include or Not to Include?

MASTERPLAN CONSULTING SDN BHD V MOTOROLA SOLUTIONS MALAYSIA SDN BHD [2020] 1 LNS 219

ISSUES

Section 8(1) of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”) provides that-

“A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.”

[Emphasis added]

What if the Claimant served the Notice of Adjudication without enclosing any supporting documents? Would it fall foul of section 8(1) of CIPAA 2012 and render the Notice of Adjudication defective? Consequently, would it render any Adjudication Decision made based on such Notice of Adjudication liable to be set aside?

These issues arose in the High Court case of **Masterplan Consulting Sdn Bhd v Motorola Solutions Malaysia Sdn Bhd [2020] 1 LNS 219**.

BRIEF FACTS

The brief facts of the case, as reported, are as follows:-

- (a) Masterplan Consulting Sdn Bhd (“**MC**”) appointed Motorola Solutions Malaysia Sdn Bhd (“**MSM**”) to “provide comprehensive maintenance services for various telecommunication works in East and West Malaysia”.
- (b) MC and MSM entered into separate written agreements (“**Contracts**”) for “5 distinct telecommunication works described as the CMSA Sarawak 2018, CMSA Peninsular 2018, CMSA Sabah 2018, C4i 2018 and CMSA Sarawak 2019.”
- (c) MSM had provided the services and deliverables to MC pursuant to these Contracts but dispute and differences arose between parties due to MC’s failure to make payment on MSM’s invoices.
- (d) Consequently, MSM commenced 5 adjudication proceedings against MC pursuant to CIPAA 2012.
- (e) Asian International Arbitration Centre (“**AIAC**”) appointed adjudicator for each of the 5 adjudications. All 5 adjudications were decided in favour of MSM.
- (f) Following therefrom, MC applied to set aside the decisions in the High Court and MSM also simultaneously applied to enforce the adjudication decisions.
- (g) These setting aside and enforcement applications were heard together. Parties agreed that should the setting side applications be dismissed, the enforcement applications would be allowed as a matter of course.



MC'S SUBMISSIONS

MSM raised a common submission for all setting aside applications. MSM submitted that the adjudicators have no jurisdiction “because there is an arbitration agreement in each every of the Contracts” (“**Arbitration Clause**”).

Apart from the decision relating to CMSA Sarawak 2019 Works, MSM further submits that the adjudicator in the other adjudications had no jurisdiction because:-

- (i) The Notice of Adjudication is defective as there was no supporting documents attached to the Notices of Adjudication, in breach of section 8(1) of CIPAA 2012 (“**Defective Notice of Adjudication**”); and
- (ii) MSM had breached **section 8(2) read together with and section 21 of CIPAA 2012** “by directly requesting the AIAC to appoint an adjudicator without having prior attempted to agree with MC on a suitable adjudicator” (“**Nomination of Adjudicator**”).

HIGH COURT'S DECISION

ARBITRATION CLAUSE

Upon considering MC’s submission on this point, the Learned Judge finds that the submission premised on the Arbitration Clause is unsustainable in light of **section 37 of CIPAA 2012** and the **Federal Court case of Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and Another Appeal [2019] 8 CLJ 433** [[Click Here to read our update on the Federal Court case of Martego](#)].

Section 37 of CIPAA 2012 provides that a payment dispute under a construction contract “*may be referred concurrently to adjudication, arbitration or the court.*”

DEFECTIVE NOTICE OF ADJUDICATION

Having studied section 8 of the CIPAA 2012, the Learned Judge finds that it is not mandatory for the Notice of Adjudication to enclose any supporting documents / documentary evidence in support the Claimant’s claim.

“[22] From my reading of s. 8(1) of the CIPAA, I find and hold that it is permissive but not mandatory upon MSM to accompany the notice of adjudication with any supporting document(s) particularly documentary evidence supporting MSM's claims...”

Notwithstanding the above, the Learned Judge encouraged parties to include the Payment Claim in order to facilitate AIAC in identifying and appointing a suitable candidate as adjudicator, should the need arises.

“...In this respect, it is preferable that the payment claim made pursuant to s. 5 of the CIPAA is provided as a supporting document principally for administrative purposes of the AIAC such as identifying a suitable adjudicator in the event a request is subsequently made to the AIAC to appoint when the parties could not agree on a suitable person as adjudicator. Towards this end, I find that MSM in fact annexed its payment claim with its notice of adjudication.”

In view of the above, the Learned Judge finds that “MC's contention that the notice of adjudication is defective is unmeritorious.”



NOMINATION OF ADJUDICATOR

Upon reading section 8(2) together with section 21 of CIPAA 2012, the Learned Judge finds that the appointment of adjudicator is not mandatorily a 2-tier process and that parties can make a direct request to the director of AIAC to appoint an adjudicator pursuant to section 21(b)(ii) of CIPAA 2012:-

“[25] Upon my reading of ss. 8(2) and 21 of the CIPAA, in particular the latter, I find and hold that the appointment of the adjudicator is not mandatorily a two tier process whereby a disputant party must make a nomination of an adjudicator to the other disputant party for its consent, failing which, then to be referred to the director of the AIAC to appoint the adjudicator. It is plain in s. 21 (b)(i) of the CIPAA that the aforesaid two tier process may be adopted, but alternatively, a disputant party may make a direct request to the director of the AIAC to appoint the adjudicator pursuant to s. 21(b)(ii) of the CIPAA. The benefit of the former is to permit the disputant parties to choose a suitable adjudicator particularly when the dispute entails a specific issue of specialised technical complexity whilst the latter permits an adjudicator to be appointed quickly to avoid the hassle of the parties agreeing to an adjudicator.”

Following the above and relying on the case of **One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors [2018]1 LNS 2101**, the Learned Judge finds that MC’s contention on this ground is devoid of merit.

SETTING ASIDE AND ENFORCEMENT APPLICATIONS

In view of the aforesaid findings, the Learned Judge dismissed the MC’s setting aside applications and allowed MSM’s enforcement applications.

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) The presence of an arbitration clause in the construction contract does not prevent parties from referring any payment dispute to adjudication under CIPAA 2012;
- (b) It is not mandatory to include any supporting documents for the claims into the Notice of Adjudication;
- (c) However, it is preferable to include the Payment Claim into the Notice of Adjudication, to enable AIAC to identify and appoint a suitable adjudicator (if necessary);
- (d) It is not mandatory for parties to nominate and/or agree upon a common adjudicator pursuant to section 21(a) of CIPAA 2012;
- (e) Instead, parties can request for the Director of AIAC to appoint an adjudicator pursuant to section 21(b) of CIPAA 2012 even without making any prior attempts to agree upon a common adjudicator.




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