

CIPAA Adjudication: Novation Agreement and Adjudication Decision (Computation of time and Corrections)

ENCORP ISKANDAR DEVELOPMENT SDN BHD V. KONSORTIUM IPMINES MERZ SDN BHD
[2020] 1 LNS 1129

ISSUES

As the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”) only have prospective effect, any payment dispute(s) arising from construction contracts execute before the coming into force of CIPAA 2012 on 15.04.2014 cannot be adjudicated under CIPAA 2012.

If the construction contract, which was executed before 15.04.2014, is subsequently novated to another contractor after the coming into force of CIPAA 2012, can payment dispute(s) arising therefrom (post novation) be adjudicated under CIPAA 2012?

CIPAA 2012 also provides that the Adjudicator shall deliver the Adjudication Decision within 45 working days from the service of Adjudication Response or Adjudication Reply, or their respective expiry (whichever later).

How is this 45 working days computed? Is the 45 working days computed base on the working days at the Adjudicator’s place of work or the working days at where the project site is situated?

Lastly, CIPAA 2012 provides that an Adjudicator “*may at any time correct any computational or typographical error*” in the Adjudication Decision. However, must the Adjudicator give parties the opportunity / right to be heard before making such corrections? Is there a limit as to how many times the Adjudicator can correct the decision? Once? Twice? Thrice?

These questions were answered in the recent Shah Alam Construction High Court case of **Encorp Iskandar Development Sdn Bhd v Konsortium Ipmine Merz Sdn Bhd [2020] 1 LNS 1129**.

BRIEF FACTS

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

- (a) Encorp Iskandar Development Sdn. Bhd. (“**EID**”) appointed Encorp Construct Sdn. Bhd. (“**EC**”) as the main contractor for a construction project (“**Project**”) vide a Letter of Award dated 06.08.2013 (“**LA**”). EC is an associate company of EID.
- (b) Subsequent thereto, EID, EC and Konsortium Ipmine Merz Sdn. Bhd. (“**Konsortium**”) entered into a novation agreement dated 30.06.2015 (“**Novation Agreement**”) whereby Konsortium assumed EC’s obligations under the LA.



- (c) A payment dispute arose between EID and Konsortium in relation to Konsortium's claim of RM27,355,211.06 for work done under the Project ("**Works**"). Arising thereto, Konsortium initiated adjudication under CIPAA 2012 ("**Adjudication**").
- (d) During the Adjudication, apart from challenging the merits of Konsortium's claims, EID also disputed the Adjudicator's jurisdiction on the following 2 grounds:-
- (i) *"Konsortium's Claim was based on LA (6.8.2013). The Construction Industry Payment and Adjudication Act 2012 (CIPAA) only came into force on 15.4.2014. As such, there was no jurisdiction for the learned Adjudicator to decide Konsortium's Claim";*
 - (ii) *"Konsortium's Claim regarding "Variation Orders" (Konsortium's VO Claim) was based on quantum meruit and not on a written contract. Hence, the learned Adjudicator had no jurisdiction to determine Konsortium's VO Claim according to s. 2 CIPAA".*

("EID's 2 Jurisdictional Challenges")

- (e) On 26.09.2019, the Learned Adjudicator delivered the adjudication decision ("**Adjudication Decision**" / "**AD**") in favour of Konsortium where the Learned Adjudicator made the following decision:-
- (a) *EID's 2 Jurisdictional Challenges were dismissed;*
 - (b) *EID shall pay to Konsortium the following sums –*
 - (i) *an amount of RM13,861,784.16 (Adjudicated Amount) within 14 days from the date of the AD;*
 - (ii) *interest on the Adjudicated Amount as stipulated in the AD; and*
 - (iii) *costs of the Adjudication as well as other costs and fees as specified in the AD;"*
- (f) Thereafter, Konsortium requested for the Adjudicator to correct certain "*computational or typographical*" errors in the Adjudication Decision. Before EID could respond, the Learned Adjudicator delivered a corrected adjudication decision ("**Corrected AD**"), correcting certain typographical errors.
- (g) EID's solicitors vide its letter dated 08.10.2019 to the Adjudicator and Konsortium, stated amongst others, the following:-
- (i) EID *"regretted that the learned Adjudicator did not give EID an "opportunity" to reply"* to Konsortium's request for correction; and
 - (ii) There were 2 errors in the Corrected AD.
- (h) In response, the Learned Adjudicator vide email on 15.10.2019 sought the views of both parties. Both EID's solicitors and Konsortium duly responded on 16.10.2019 and 17.10.2019 respectively.
- (i) The Learned Adjudicator then made further corrections and delivered a 2nd corrected Adjudication Decision ("**2nd Corrected AD**").
- (j) However, Konsortium wrote again to the Learned Adjudicator regarding a typographical error in the Corrected AD. Consequently, the Learned Adjudicator delivered a 3rd corrected Adjudication Decision ("**3rd Corrected AD**").



APPLICATIONS BEFORE THE HIGH COURT

Following delivery of the Adjudication Decision (3rd Corrected AD), the parties filed the following applications at the Shah Alam Construction High Court:-

- (a) EID filed an application to Set Aside the Adjudication Decision (“**Setting Aside Application**”) and to stay the Adjudication Decision pending arbitration between EID and Konsortium (“**Stay Application**”); and
- (b) On the other hand, Konsortium filed an application for leave to enforce the Adjudication Decision against EID (“**Enforcement Application**”).

SETTING ASIDE APPLICATION

In the Setting Aside Application, the issues, amongst others, are as follow:-

- (1) Whether Konsortium’s claim is based on the LA dated 06.08.2013 between EID and EC (which predate the coming into force of CIPAA 2012 on 15.04.2014) or the Novation Agreement dated 30.06.2015 between EID and Konsortium, where Konsortium assumed the obligations of EC under the LA?
- (2) For computation of the 45 working days time limit in delivery of adjudication decision, “*whether the definition of “working day” in s. 4 CIPAA apply to s. 12(2)(a) CIPAA when the learned Adjudicator’s office is situated in Kuala Lumpur while the construction “site” (defined in s. 4 CIPAA) is located in Johore?*”
- (3) Whether the Adjudicator breached the rules of natural justice under sections 15(b) and 24(c) of CIPAA 2005, “*when the learned Adjudicator delivered the Corrected AD pursuant to s. 12(7) CIPAA without giving EID a right to be heard. In this regard, does s. 12(7) CIPAA allow the learned Adjudicator to amend the AD thrice?*”

NOVATION AGREEMENT

On this issue, the Learned Judge, in reliant to **sections 63 of the Contracts Act 1950 (“s. 63 CA”)** as well as the Supreme Court case of **LYL Hooker Sdn Bhd v. Tevanaigam Savisthri & Anor [1987] 2 MLJ 52** and the Federal Court case of **Toeh Kee Keong v. Tambun Mining Co Ltd [1968] 1 MLJ 39**, held that:-

“...a novation agreement under s. 63 CA is a new contract which extinguishes the previous agreement..”

In other word, whilst the LA dated 06.08.2013 predates the coming into force of CIPAA 2012 on 15.04.2014, the Learned Judge found that Konsortium’s claim is based on the Novation Agreement dated 30.06.2015, which was executed after CIPAA came into force:-

“Based on s. 63 CA as construed by the above appellate courts, the Novation Agreement came into effect on 30.6.2015 (after the operation of CIPAA). Consequently, CIPAA applies to Konsortium’s Claim.”

In addressing Konsortium’s VO Claim, the Learned Judge also finds that Konsortium’s VO Claim was made pursuant to the Novation Agreement and is not a quantum meruit claim. As long as the Novation Agreement satisfies the prerequisite under CIPAA 2012, the Learned Adjudicator would be clothed with the jurisdiction to determine Konsortium’s claim:-



“[14] Firstly, the learned Adjudicator had jurisdiction to adjudicate Konsortium’s Claim because

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- (1) *all the four requirements in s. 2 CIPAA have been fulfilled as follows –*
 - (a) *Konsortium’s Claim was based on the Novation Agreement which constituted a “construction contract” as defined in s. 4 CIPAA;*
 - (b) *the Novation Agreement was in writing;*
 - (c) *the Novation Agreement concerned “construction work” within the meaning in s. 4 CIPAA; and*
 - (d) *“construction work” regarding the Novation Agreement was carried out wholly in Malaysia;*
 - (2) *s. 3 CIPAA does not apply to the Novation Agreement; and*
 - (3) *the parties in this case, the Novation Agreement or the Project were not exempted from the application of CIPAA under s. 40 CIPAA by the Minister of Public Works.*

[15] Once s. 2 CIPAA applies to the Novation Agreement, the learned Adjudicator had jurisdiction to determine Konsortium’s Claim (which included Konsortium’s VO Claim).

[16] Konsortium’s VO Claim for additional Works performed by Konsortium was based on the Novation Agreement and did not constitute a claim pursuant to the doctrine of quantum meruit...”

45 WORKING DAYS TO DELIVER ADJUDICATION DECISION

On this issue, the Learned Judge found that the computation of 45 working days for delivery of adjudication decision is computed based on the working days at the Adjudicator’s place of work and not the working days at the Project Site.

“[22] I opine that the meaning of “working day” in s. 12(2)(a) and (b) CIPAA depends on the adjudicator’s place of work and not where the “site” (as defined in s. 4 CIPAA) is situated. This view is premised on the following reasons:

- (1) *in the context of s. 12(2)(a) and (b) CIPAA, an adjudicator does not ordinarily work on weekends and public holidays which are applicable to the State or Federal Territory (State/FT) where the adjudicator’s office is situated [Weekends/Public Holidays (Adjudicator’s Office)]. Accordingly, the 45 working days period stipulated in s. 12(2)(a) and (b) CIPAA (45 Working Days’ Period), excludes Weekends/Public Holidays (Adjudicator’s Office);*
- (2) *if an adjudicator’s office is in a State/FT which is different from the State/FT where the “site” (defined in s. 4 CIPAA) is situated, the weekends and public holidays which apply to the site [Weekends/Public Holidays (Site)] cannot be included in the computation of the 45 Working Days’ Period. This is because if a particular day is not a Weekend/Public Holiday (Adjudicator’s Office), s. 12(2)(a) and (b) CIPAA envisage a “working day” for the adjudicator in question even though that day is a Weekend/Public Holiday (Site). Accordingly, the 45 Working Days’ Period in s. 12(2)(a) and (b) CIPAA should be computed based on Weekends/Public Holidays (Adjudicator’s Office) and not Weekends/Public Holidays (Site); and*
- (3) *all the definitions in s. 4 CIPAA apply to the other provisions of CIPAA “unless the context otherwise requires”. As explained in the above subparagraphs (1) and (2), the definitions of “site” and “working day” in s. 4 CIPAA cannot apply to s. 12(2)(a) and (b) CIPAA in view of the context of s. 12(2) and (3) CIPAA.*



[23] *In view of the reasons explained in the above paragraph 22, the 45 Working Days' Period in s. 12(2)(a) CIPAA shall be computed based on the "working days" of the learned Adjudicator in Kuala Lumpur and not according to the definition of "working days" in s. 4 CIPAA (which apply to the site in Johore). Premised on this decision, the learned Adjudicator did not breach s. 12(2)(a) CIPAA and the AD is therefore not void pursuant to s. 12(3) CIPAA."*

CORRECTING ADJUDICATION DECISION

On the Corrected Adjudication Decision, EID challenged the Adjudication Decision on the following grounds:-

- (1) The Learned Adjudicator breached the rules of natural justice *"when the learned Adjudicator delivered the Corrected AD pursuant to s. 12(7) CIPAA without giving EID a right to be heard"*; and
- (2) The *"learned Adjudicator was not empowered under s.12(7) CIPAA to correct the AD three times."*

Having considered the issue as well as section 12(7) of CIPAA 2012, the Learned Judge held that there is no breach of natural justice as the adjudicator may correct any computational or typographical error(s) in the Adjudication Decision *"without informing the parties and without considering any response from the parties"*. The Learned Judge also held that an Adjudicator may make corrections *"as many times as are necessary to correct all computational and/or typographical errors"*.

Consequently, the Learned Judge rejected EID's challenge on these 2 grounds.

DECISION

In the upshot, the Learned Judge dismissed EID's Setting Aside Application and allowed Konsortium's Enforcement Application. The Learned Judge also found no grounds to allow for a stay of the Adjudication Decision and EID's Stay Application was accordingly dismissed as well.

MOVING FORWARD

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

- (a) Even if the construction contract was executed prior to coming into force of CIPAA 2012, as long as the novation agreement is executed after the coming into force of CIPAA 2012 and satisfies the pre-requisite of CIPAA 2012, payment dispute(s) arising therefrom can be adjudicated pursuant to CIPAA 2012 and the Adjudicator will be clothed with the jurisdiction to adjudicate such dispute(s).
- (b) The 45 working days time limit for delivery of adjudication decision is computed based on the working days where the Adjudicator's place of work is situated and not where the Project Site is situated.
- (c) An Adjudicator may correct any computational or typographical error(s) in the Adjudication Decision *"without informing the parties and without considering any response from the parties"* and there is no limit as to how many times such corrections can be made.




CONTACT



ANDREW HENG YENG HOE

Partner

 +6012 205 8413

 andrew@zainmegatmurad.com

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ZAIN MEGAT & MURAD

Advocates & Solicitors
D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia

 +6 03 6207 9331

 +6 03 6207 9332

 zmm@zainmegatmurad.com