

CIPAA 2012 : Easing Contractors' Cash Flow – “Pay Now, Argue Later”

CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

INTRODUCTION

Cashflow continuity is of paramount importance to the construction industry. However, contractors are often times faced with issues on payment, or lack thereof, for various reasons. Some contractors receive only partial payment for work done, some experience inordinate delays in payment. Worst still, some do not get paid at all.

Traditionally, contractors will need to either commence civil action in the Courts or initiate arbitration (if there is an agreement to arbitrate) to recover these payments. These can be time consuming and costly. The strain on cashflow could be immense.

To alleviate the contractor's cash flow dilemma, Parliament passed the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”), where the main objectives are to:-

- (1) Facilitate regular and timely payment;
- (2) Provide a mechanism for speedy dispute resolution through adjudication; and
- (3) Provide remedies for the recovery of payment in the construction industry.

*“...it was clear that the **primary objective** of the CIPAA was to **alleviate cash flow issues** by **providing an effective and economical mechanism**. The mischief, which the CIPAA intends to cure, is none other the cash flow in the construction industry through effective and economical mechanism...”*

[Emphasis added]

Federal Court : Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433

Scope of CIPAA 2012

CIPAA 2012 applies to every construction contract made in writing after 15.04.2014, relating to construction works carried out wholly or partly within Malaysia, including a construction contract entered into by the Government of Malaysia.

CIPAA 2012 is not limited to contractors but is intended to cover almost all players within the construction ecosystem, including:-

- (1) contractors on all level of the contract chain (main contractors / sub-contractors / sub sub-contractors and so on);
- (2) consultancy works (planning and feasibility study, architectural works, engineering, surveying, exterior / interior decoration, landscaping and project management);
- (3) suppliers of construction materials, equipment or workers.

Construction is also widely defined under CIPAA 2012 to include, but are not limited to, construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of any building, infrastructure (from roads and railway to bridges, dams and reservoirs), irrigation, oil and gas, telecommunication and utilities (electrical, water, sewerage).

Despite its wide coverage, CIPAA 2012 does not apply to construction contract entered into by a natural person for any construction work in respect of any building which is less than 4 storeys high and which is wholly intended for his occupation.



CIPAA VS. COURT / ARBITRATION

The construction industry often view the traditional mode of recovery, i.e. Court or Arbitration to be prohibitive, both financially and time wise.

A full-blown dispute resolution in Court or Arbitration can be time consuming as some employers have genuine grievance to ventilate, such as delays in the progress of works (which will result in the deduction of Liquidated and Ascertained Damages from progress payment) and/or defective works. Ventilating and deciding on such complex issues may take considerable amount of time in Court or Arbitration.

There is a delicate balance between allowing the employer to ventilate its grievances and to ensure that the contractor gets a speedy resolution to the payment dispute.

The longer it takes to resolve a payment dispute, the greater the strain on the contractor's cash flow.

This is where the Adjudication scheme under CIPAA 2012 comes in to provide a speedy dispute resolution method by providing an interim decision that is enforceable by embracing the "pay now, argue later" concept.

*"These adjudication decisions, 'being quick and dirty', also "provide a **quick enforceable interim decision** under the rubric of '**pay now, argue later**', are **necessary so as to give "life" back to the enterprise or underlying contract which had reached an impasse or stalemate**. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in court or at arbitration."*

[Emphasis added]

High Court : UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor Case [2015] 5 CLJ527

TEMPORARY FINALITY

Adjudication under CIPAA 2012 does not take away the employer's rights to have their day in Court or Arbitration.

What it does is to provide a **parallel** dispute resolution mechanism that is speedier than Court / Arbitration. The adjudication decision carries the effect of "temporary finality", serving as an enforceable interim decision.

Whilst the employer may commence a civil suit in Court or initiate arbitration, the contractor may concurrently initiate adjudication under CIPAA 2012 and in all likelihood obtain an adjudication decision prior to completion of the Court action or Arbitration.

More importantly, until the payment dispute is decided otherwise by the Court or in Arbitration (or settled between parties), any Adjudication Decision awarding payment to the contractor is enforceable, unless it is set aside or stayed by the High Court.

MANDATORY STATUTORY SCHEME

An aggrieved unpaid party is entitled to initiate adjudication under CIPAA 2012 to resolve their payment dispute for work done in a written construction contract.

The statutory adjudication scheme under CIPAA 2012 is mandatory and cannot be excluded by contract.

*"Further, s. 37 of CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel. **It is also apparent that adjudication is a mandatory procedure under CIPAA 2012** and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate."*

[Emphasis added]

Federal Court : Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433

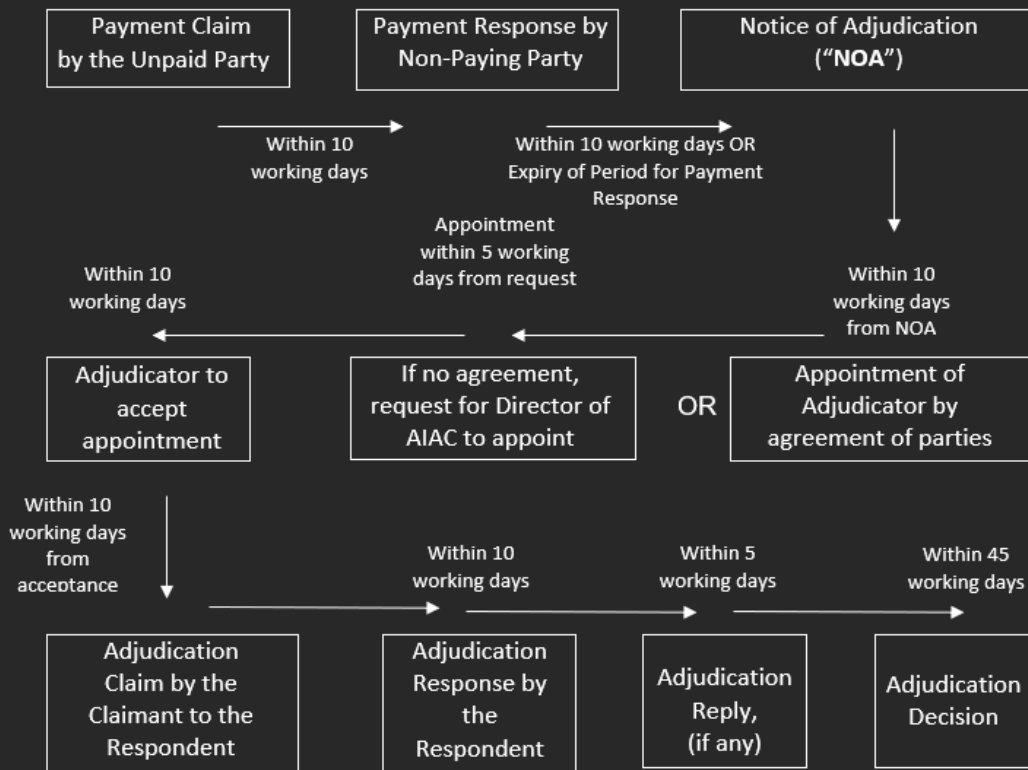
PROCESS FLOW

Adjudication under CIPAA 2012 encompasses 2 stages:-

- (1) Payment Dispute Stage (Payment Claim / Payment Response); and
- (2) Adjudication Stage (Adjudication Claim / Response / Reply / Decision).

The process starts when the contractor, being the unpaid party, serves a Payment Claim to its employer, being the non-paying party. If no payment is made after 10 working days, the contractor can commence adjudication by serving an Adjudication Notice to the employer.

The process flow in a CIPAA 2012 Adjudication is as follows:-



ADJUDICATION DECISION

Unless it is set aside or stayed by the High Court, the employer will need to make payment pursuant to any Adjudication Decision decided in favour of the contractor.

If the employer fails to make payment, the contractor may:-

- (1) Apply to the High Court to enforce the Adjudication Decision as if it is a Judgment / Order of the High Court;
- (2) Suspend or reduce the rate of progress of works after serving the requisite notices under CIPAA 2012; or
- (3) Request for direct payment from its employer’s principal.

TO CIPAA OR NOT TO CIPAA?

Whilst Adjudication under CIPAA 2012 was meant to be a speedier interim dispute resolution mechanism that is both effective and economical, parties may choose to accept the Adjudication Decision as final and agree to cease any further litigation (Courts / Arbitration) in order to save costs and time.

After all, the lesser time and money spent on litigating the dispute, the more resources can put to the next project.




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