



CIPAA 2012 : Direct Payment from Principal and the Retrospective Effect of Ireka and Jack-in-Pile cases

**IT MAX ENGINEERING SDN BHD V PROPEL SYNERGY SDN BHD [2021] 1 LNS 105
12TH MAY 2021**

ISSUES

In *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd [2020] 1 CLJ 193* and *Jack-in Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* and another appeal [2020] 1 CLJ 299, the Federal Court held that the **Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”)** applies prospectively and not retrospectively.

Applying the decisions of Ireka and Jack-in-Pile, Adjudication Decisions premised upon construction contract executed prior to the coming into force of CIPAA 2012 ought to be void, as CIPAA does not apply retrospectively to contracts executed prior it coming into force.

How would the decisions of Ireka and Jack-in-Pile apply to adjudication decisions that successfully survived setting aside applications before the Federal Court’s pronouncement? Would these decisions be automatically void as well, notwithstanding that previous challenge on its validity had been dismissed prior to the Federal Court’s pronouncement in Ireka and Jack-in-Pile?

Specifically, if the Adjudication Decision survived a prior setting aside challenge, can an application for direct payment from the principal (under section 30 of CIPAA 2012) be defeated on the ground that the payment dispute therein arose from a construction contract executed prior to the coming into force of CIPAA 2012?

These questions were answered in the recent Kuala Lumpur Construction High Court case of *IT Max Engineering Sdn Bhd v Propel Synergy Sdn Bhd [2021] 1 LNS 105*.

BRIEF FACTS

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

- (a) The Defendant, Propel Synergy Sdn Bhd (“**PS**”) appointed Vistasik Sdn Bhd (“**V**”) as the contractor to construct a hotel and its facilities in Melaka (“**Project**”).
- (b) By a subcontract dated 18.06.2012, V appointed Lucksoon Metal Works Sdn Bhd (“**LMW**”) to carry out the design, engineering, testing, fabrication, delivery and installation of aluminium cladding and curtain walling system for the Project (“**Cladding and Curtain Walling Subcontract**”).
- (c) On the other hand, by a subcontract dated 30.03.2013, V appointed IT Max Engineering Sdn Bhd (“**ITME**”) to carry out the supply, delivery, installation, testing, commissioning and maintenance of extra low voltage services for the Project (“**Electrical Works Subcontract**”).
- (d) In the course of both subcontracts works, there were disputes between V and LMW as well as between V and ITME.
- (e) Arising thereof, LMW and ITME commenced separate adjudication proceedings against V pursuant to CIPAA 2012..
- (f) In respect of the Cladding and Curtain Walling Subcontract, LMW had on 26.03.2018 obtained an Adjudication Decision in its favour for the sum of RM1,515,280.77.



- (g) As for the Electrical Works Subcontract, ITME had on 24.04.2018 obtained an Adjudication Decision in its favour for the sum of RM197,989.71.
- (h) V commenced setting aside applications against both Adjudication Decisions. Both these setting aside applications were dismissed on 30.11.2018. V did not lodge any appeal against their dismissal.
- (i) As LMW and ITME were not paid by V, they had, by their solicitors' letter dated 15.07.2019 requested for PS, as principal, to make direct payment pursuant to section 30(1) of CIPAA 2012.
- (j) Despite receiving the aforesaid request, PS did not issue the notice pursuant to section 30(2) of CIPAA 2012 nor did PS make any payment to LMW or ITME.
- (k) Following the above, RKT requested for certain corrections to be made to the Original Award pursuant to Article 23 of the PAM Rules / section 35(1)(a) of the Arbitration Act 2005 ("AA 2005") but reserved its rights to object to the delivery of the Original Award beyond the timeline under the PAM Rules. Ken objected to RKT's request for corrections.
- (l) Arising thereof, LMW and ITME commenced separate proceedings to seek direct payment against PS pursuant to section 30 of CIPAA 2012. Both these proceedings were heard together in this case.

PS' SOLE DEFENCE : CIPAA HAS NO RETROSPECTIVE EFFECT FOLLOWING FEDERAL COURT'S PRONOUNCEMENT IN IREKA & JACK-IN-PILE

It appears that the PS did not deny that ITME and LMW have met the requirements under section 30 of CIPAA 2012 to trigger direct payment.

PS' sole defence is that both adjudication decisions are "null and void and of no effect" as they are based on contracts made by parties before the enforcement date of CIPAA 2012. Since CIPAA 2012 has no retrospective effect, it follows that these contracts are not within the purview of CIPAA 2012.

As such, there is adjudication decision for ITME and LMW to mount their respective direct payment remedy against PS.

"[23] In both OS1 and OS2, I find that ITME and LMW have met the requirements on their part respectively as prescribed in s. 30 of the CIPAA. In fact, this has not been denied by PS.

[24] The main and sole defence of PS is that both adjudication decisions which were obtained under the Cladding and Curtain Walling Sub-Contract as well as Electrical Works Sub-Contract are null and void and of no effect because both these contracts were plainly made by the parties before the enforcement date of the CIPAA following the Federal Court cases of Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd [2020] 1 CLJ 193 and Jack-in Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd and another appeal [2020] 1 CLJ 299.

[25] As the result, there is no adjudication decision for ITME and LMW to rely upon to mount their respective direct payment remedy against PS."

Court's Findings and Reasoning

The Learned Judge referred to His Lordship's earlier decision in **Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd and Another Case** [2020] MLJU 2057, where the Learned Judge found that Ireka and Jack-in-Pile's cases have no retroactive effect on the stay of adjudication decisions order in that case.

The Learned Judge reasoned in Kasugi that, the stay order in that case was final as there was no further appeal on that order. In fact, that order had been performed before the Federal Court pronouncement in the Ireka and Jack-in-Pile cases. Consequently, the adjudication decisions ought not to be disturbed.



“[36] The Stay Orders were entered into and perfected by the parties by consent. These Stay Orders are obviously final because they are not appealed upon further by the parties. By the time the retrospectivity rulings in Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd (supra) and Jack-in Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd and another appeal (supra) are pronounced, the Stay Orders have also been performed. In other words, there is no pending challenge against the Stay Orders whether at first instance or at any appellate stage.

“[37] As the result, I find and hold following Hamzah Mat Sah v. Ambank (M) Berhad (supra) that the rulings in Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd (supra) and Jack-in-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd and another appeal (supra) have no retroactive effect upon the Stay Orders. In consequence, the Adjudication Decisions ought not to be disturbed too.”

Reverting to the facts of this case, the Learned Judge noted that both the adjudication decisions in this case were subjected to prior setting aside applications but such applications were unsuccessful. There is also no appeal against such unsuccessful setting aside applications.

*“[27] Likewise akin to the case of Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd and Another Case (supra), the adjudications decisions here that were obtained pursuant to the Cladding and Curtain Walling Sub-Contract and Electrical Works Sub-Contract were already challenged or dealt with in the High Court. In the **Kasugi** cases, those were stay orders of the adjudication decisions made by consent of the parties. Similarly in both the adjudication decisions before me here, there were setting aside applications made but which are unsuccessful. There is no appeal thereto in respect of both of them.”*

In light of the same, the Learned Judge found that the retrospective effect of the Ireka and Jack-in-Pile cases does not apply to the adjudication decisions here as the challenge on these adjudication decisions was disposed by the High Court and there has been no subsequent appeal pending in the Appellate Courts.

“[28] Consequently, I find and hold that the retrospectivity effect of the Federal Court cases of Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd (supra) and Jack-in Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd and another appeal (supra) does not apply here by reason that the challenge against the adjudication decisions had been made and disposed by the High Court and there has been no subsequent appeal pending in the appellate courts. It is too late for PS to mount a fresh challenge here on the validity of the adjudication decisions.”

DECISION OF THE COURT

In light of the above, the Learned Judge finds that the adjudication decisions in this case are not null and void or of no effect. Consequently, the Learned Judge allowed the applications for direct payment.

“[29] The adjudication decisions obtained pursuant to the Cladding and Curtain Walling Sub-Contract and Electrical Works Sub-Contract are therefore not null and void or of no effect. It follows there is no defence on the part of PS; hence OS1 and OS2 must accordingly be allowed.”

MOVING FORWARD

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

- a) The validity of an adjudication decision that survived a prior setting aside application, with no pending appeal, would not be affected by the Federal Court’s pronouncement in Ireka and Jack-in-Pile that CIPAA 2012 only applies prospectively.



(b) The validity of such adjudication decision for purposes of subsequent applications, in this case the subsequent application for direct payment against the principal, would also not be affected on the premise that such application is based on an adjudication decision that has survived a prior setting aside application, with no pending appeal against its dismissal.

If you have any questions or comments on this article, please contact:-

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