

CIPAA 2012 : Can a Stay be Granted after an Adjudication Decision is enforced?

ECONPILE (M) SDN BHD V ASM DEVELOPMENT (KL) SDN BHD & ANOR CASE [2024] 5 CLJ 16

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ISSUES

It is not uncommon for the losing party to file an application to set aside an adjudication decision and/or apply for it to be stayed pursuant to sections 15 and 16 of the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”) respectively. Often, the successful party will also apply for the adjudication decision to be enforced under section 28 of CIPAA 2012.

However, if the adjudication decision has been enforced pursuant to Section 28 of CIPAA 2012 as if it is a Judgment or Order of the High Court, can the said adjudication decision be subsequently stayed pursuant to Section 16 of CIPAA 2012?

Further, in considering a stay application under section 16 of CIPAA 2012, is special circumstances the only consideration or must the Court consider all factors and issues arising from the case?

These questions were answered in the recent Federal Court decision of **Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd and Anor Case [2024] 5 CLJ 16**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) Via a Letter of Award dated 26.09.2016, ASM Development (KL) Sdn Bhd (“**ASM**”) appointed Econpile (M) Sdn Bhd (“**Econpile**”) as its main contractor to carry out Work Package 1: Diaphragm Wall, Contiguous Bored Pile, Earthworks, Piling Works And Basement Structure Works (Basement 2 to LG1) for a project known as:-

“Cadangan Pembangunan Bercampur 69 Tingkat Yang Mengandungi 7 Blok Pangsapuri Servis (4214 Unit), iaitu: Blok A - 58 Tingkat (678 Unit), Blok B - 58 Tingkat (618 Unit), Blok C - 58 Tingkat (560 Unit), Blok D - 58 Tingkat (678 Unit), Blok E - 58 Tingkat (618 Unit), Blok G - 58 Tingkat (502 Unit), 8 Tingkat Podium Tempat Letak Kereta, 7 Tingkat Ruang Perniagaan (Aras 1

- 7), 1 Tingkat Aras Kemudahan (Aras 9), 4 Tingkat Tempat Letak Kereta (Aras LG1, Basement 2 & Basement 1) Di Atas Lot 36190, Mukim Petaling Kuala Lumpur” (“**Project**”)

- (b) Econpile was issued with a Certificate of Non-Completion dated 07.04.2018 notifying Econpile of the imposition of liquidated damages.
- (c) Dispute arose between the parties with regards to uncertified interim valuations No. 16 to 24 and alleged under-certification of interim valuation No. 15, where partial payment was made for Interim Payment Certificate No. 15 but no certificate was issued for progress claim No. 16 to 24.
- (d) Econpile initiated adjudication under CIPAA 2012 to claim for the sums under progress claims No. 16 to 24, as well as the under-certified sum under Interim Payment Certificate No. 15. ASM made a cross-claim in the proceedings.
- (e) Econpile simultaneously commenced arbitration proceedings by way of a Notice of Arbitration dated 18.03.2019. ASM disputed the sums claimed in Econpile’s Notice and subsequently issued its Notice of Arbitration dated 17.05.2019.
- (f) By Adjudication Decision dated 21.06.2019 and a Supplementary Adjudication Decision dated 07.08.2019 (“**1st Adjudication Decision**”), the Adjudicator ordered ASM to pay Econpile RM59,767,269.32 (“**Adjudicated Sum**”), which ASM failed to pay.
- (g) This resulted in Econpile issuing a statutory demand under Section 466(1) of Companies Act 2016 on 25.06.2019. ASM then applied for a Fortuna Injunction on 09.07.2019, which was granted by the High Court on 09.01.2020.
- (h) Econpile filed a Notice of Application (Originating Summons No. WA-24C-113-07/2019) to enforce the 1st Adjudication Decision pursuant to Section 28 of the CIPAA 2012 (“**1st Enforcement Application**”).
- (i) ASM responded by filing the following two (2) applications:-
 - (i) Originating Summons No. WA-24C-118-07/2019, an application to set aside the 1st Adjudication Decision under Sections 15 (b) and (d) CIPAA 2012 (“**1st Setting Aside Application**”); and
 - (ii) Originating Summons No. WA-24C-173-09/2019. an application to stay the Adjudication Decision pending the conclusion of the arbitration where ASM contended that there were clear and unequivocal error as well as a genuine and valid set-off in their counterclaim of RM276,581,893.96 against Econpile in the

Arbitration proceeding, which exceeds the Adjudicated Sums ("**1st Stay Application**").

- (j) The High Court allowed the 1st Enforcement Application made by Econpile on 29.11.2019 and ordered ASM to pay the Adjudicated Sum, legal fees of RM150,000.00 and adjudication cost amounting to RM203,924.40 ("**1st Enforcement Order**"). At the same time, the High Court dismissed the 1st Setting Aside Application and 1st Stay Application.
- (k) ASM then appealed to the Court of Appeal, where the Court of Appeal dismissed the appeal against the 1st Enforcement Order and the 1st Setting Aside Application. However, the Court of Appeal granted ASM's appeal on the 1st Stay Application. In effect, the Court of Appeal granted a stay of the Adjudication Decision even after the 1st Adjudication Decision has been enforced via the 1st Enforcement Order.
- (l) ASM did not appeal against the decisions on the 1st Enforcement Order and 1st Setting Aside Application. However, Econpile applied for Leave to Appeal to the Federal Court on the decision of the 1st Stay Order was granted leave on 03.01.2022 to appeal against the decision of the Court of Appeal in the 1st Stay Application.
- (m) Econpile also initiated a further adjudication proceeding in respect of progress claims No. 25 to 27, where the Adjudicator decided for ASM to pay Econpile the sum of RM5,959,024.99 ("**2nd Adjudication Decision**"). ASM failed to pay the sums to Econpile.
- (n) Econpile applied to enforce the 2nd Adjudication Decision pursuant to Section 28 of CIPAA 2012, which was allowed by the High Court on 28.10.2020 ("**2nd Enforcement Order**"). On the same date, the High Court dismissed an application by ASM to set aside the 2nd Adjudication Decision ("**2nd Setting Aside Application**").
- (o) On 4.2.2021, ASM's application to stay the 2nd Adjudication Decision was dismissed by the High Court ("**2nd Stay Application**"). ASM then appealed to the Court of Appeal against both decisions of the High Court dated 28.10.2020 and 04.02.2021.
- (p) On 28.10.2022, the Court of Appeal dismissed ASM's appeal against the 2nd Enforcement Order and the 2nd Setting Aside Application. ASM did not seek leave to appeal against these Court of Appeal's decisions.
- (q) On 25.11.2022 a different panel of the Court of Appeal went on to dismiss ASM's appeal against the 2nd Stay Application.
- (r) Both the appeals relating to the 1st and 2nd Adjudication Decisions were heard together by the Federal Court ("**Appeals**").

PROCEEDINGS BEFORE THE FEDERAL COURT

The main questions that were posed to the Federal Court in the Appeals are as follow:-

“Question 1

Whether an adjudication decision, after having been enforced pursuant to Section 28 of CIPAA 2012 as an Order of the Court can be stayed pursuant to Section 16(1)(b) of the CIPAA 2012.

Question 2

Whether the Court of Appeal in so deciding to allow the stay application pursuant to section 16(1)(b) CIPAA 2012 has overruled or disagreed, or gone beyond the ratio decidendi of the Federal Court decision in View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2018] MLJ 22; [2019] 5 CLJ 479.”

Stay after Enforcement Order?

The central issue before the Federal Court was “*whether the existence of a valid enforcement order made pursuant to Section 28 CIPAA 2012 precluded the making of an order pursuant to Section 16(1) of the same Act*”. In this regard, the Federal Court considered the following part of the Court of Appeal’s judgment:-

*“[23] It is useful to observe that despite the enforcement order on the adjudication decision (which decision of the High Court we have affirmed on appeal) this is no objection to the granting of a stay on the same adjudication decision. **There are no express prohibitions in the CIPAA stating that stay applications cannot be allowed after the enforcement order has been granted.***

[24] We thus reiterate that requests for stay can be made, and granted, provided the threshold under s. 16 is satisfied, and also that in any event an adjudication decision is not merged into a judgment if an enforcement application is allowed under s. 28 of the CIPAA, since an order obtained pursuant to s. 28 of the CIPAA merely permits the adjudication decision to be enforced as a judgment of the court but is not a judgment in itself (see EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd [2020] 1 LNS 1264; [2021] 1 AMR 594).

*[25] As such, **in order to be deserving of a stay**, the appellant must satisfy the requirements set out in s. 16(1)(a) and (b) of the CIPAA and to show with cogent evidence that there are **special circumstances which justify the granting of a stay** of the said adjudication decision.”*

[Emphasis added]

Having examined the Court of Appeal’s reasonings, the Federal Court disagreed with the Court of Appeal’s reasonings in view of the legislative intention of CIPAA 2012. In relation to the same, the Federal Court found that:-

*“[33] **With respect, we do not agree.** The Court of Appeal in Appeal 2365 opined that since there is no express provision in CIPAA prohibiting the granting of stay after the enforcement order has been granted, an application for stay can be considered and granted. **The reasons of the Court of Appeal are seriously flawed...***

[42] CIPAA is a legislation crafted to address issues common in the construction industry in particular relating to cash flow problems for the unpaid party and only as temporary finality to the payment claims. It is not the end of the end. The Act was designed with the ultimate aim to assist the parties in construction dispute to be paid expeditiously for the work which they had carried out and for adjudication proceedings for payment claims that are due and payable before the determination of the contract.

[43] Section 16 CIPAA expressly stipulates that a party in an adjudication dispute may apply to the High Court for a stay of an adjudication decision in the following circumstances:

- (a) if an application to set aside the adjudication decision under section 15 has been made; or*
- (b) if the subject matter of the adjudication decision is pending final determination by arbitration or the court.*

[Emphasis added]

In view of the legislative intent of CIPAA 2012, i.e. “to assist the parties in construction dispute to be paid expeditiously for the work which they had carried out and for adjudication proceedings for payment claims that are due and payable”, the Federal Court held that there is no provision for a stay of adjudication decision after an enforcement order is given. Consequently, the Court of Appeal had acted in excess of its jurisdiction by granting the stay of the Adjudication Decision:-

[47] The authorities we have stated above resonated that in the construction and interpretation of a statute, the intent and object of the legislation is an important factor which the court cannot ignore. Therefore, the correct approach under CIPAA is to uphold an adjudicator's decision unless there are issues relating to jurisdiction or there has been a serious breach of natural justice. The adjudicators' decisions are binding on the parties until reversed by a court. Thus, the only defence to enforceability is if the findings offended the principle of natural justice or if the adjudicator lacked jurisdiction and, on that basis, the decision is set aside.

*[48] In respect to the provisions under CIPAA to set aside an adjudication decision and to enforce the adjudication decision, we find no ambiguity. **There is no provision for a stay of adjudication decision after an enforcement order is given.** Applying the principles of interpretation of statutes as we have stated above, in the absence of a specific provision the court is not statutorily empowered to grant a stay if the adjudication decision is not set aside. To do so would be incongruent to the intent and purpose of CIPAA.*

*[49] Guided by the rules of statutory construction, and analysis of previous courts' decisions we are of the opinion that by interpreting CIPAA in the manner it had done, **the Court of Appeal in Appeal No. 02(f)-2-01/2023(W) had acted in excess of its jurisdiction under the Act by granting the stay when the Adjudication Decision remained intact and not set aside.** The parties to the adjudication have no option but to comply with the orders of the adjudication decision unless and only unless it has been set aside under Section 16 CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of CIPAA.*

Special Circumstances vs All Factors

As the Court of Appeal also decided the stay application on the basis that there ought to be "special circumstances which justify the granting of a stay" before a stay can be granted, the Federal Court also took the opportunity to revisit the principles governing stay applications in the earlier Federal Court decision of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22:-

*[41] The Federal Court encapsulated the principles governing stay applications under the CIPAA through the judgment of Zulkefli Ahmad Makinudin, PCA in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22:*



[76] The High Court in the present case held that an application under s. 16 of CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating “to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes”.

[77] The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the courts in England, Australia and Singapore. The court placed much emphasis on the decision of the Singapore Court of Appeal in WY Steel Construction Pte Ltd.

[78] The Court of Appeal in the present case adopted a similar approach. It said that unless there was “overwhelming evidence” that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.

[79] We are of the view that such a stringent test is not justified under CIPAA because s. 16 of CIPAA itself contains no such limiting requirement or intent. Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.

[80] It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part...

[81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. CIPAA contains no such restriction.



[82] We are in agreement with the contention of the appellant that a more liberal reading of s. 16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However, to restrict the application of s. 16 of CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

[Emphasis added]

Having revisited View Esteem, the Federal Court held that principles enunciated therein must be followed in deciding a stay application and that the “Court must at all times consider **all factors and issues** subject to the provisions of CIPAA” (and not confine itself to only special circumstances):-

[51] It must be reiterated that the principles enunciated by this Court in View Esteem must be followed in an application for a stay of an adjudication decision pursuant to Section 16 CIPAA if an application to set aside the adjudication decision under Section 15 of the same Act has been made or the subject matter of the adjudication decision is pending final determination by arbitration or the court. In a construction dispute under CIPAA, the Court must at all times consider all factors and issues subject to the provisions of CIPAA.

Answers to the Leave Questions

[50] Having carefully considered the submissions of all parties we agreed with the decision of the High Courts. For the foregoing reasons, in Appeal No. 02(f)-2-01/2023(W), Question 1 is answered in the negative that is, an adjudication decision after having been enforced pursuant to Section 28 CIPAA as an Order of the Court cannot be stayed pursuant to Section 16(1)(b) CIPAA. Question 2 is answered in the affirmative.

[Emphasis added]

KEY TAKEAWAY

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

- (a) An adjudication decision which has been enforced under Section 28 of CIPAA 2012 as if it is a Judgment or Order of the High Court cannot be stayed pursuant to Section 16 of CIPAA 2012; and
- (b) In considering an application for stay under section 16 of CIPAA 2012, the Court must consider all factors and issues subject to the provisions of CIPAA and not confine itself to the special circumstances test.

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

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