

Legal Avenues in Securing Cashflow (Malaysia)

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Legal Avenues in Securing Cashflow

- Statutory Adjudication – Construction Industry Payment and Adjudication Act 2012 (CIPAA)
- Evolution of set-off provisions in Standard Form Contracts

Statutory Adjudication – Construction Industry
Payment and Adjudication Act 2012 (CIPAA)

- Summary, interim mechanism for resolving payment disputes in construction industry.
- Decisions temporarily binding pending final resolution by court, arbitration or agreement.
- Objective is to assist cash flow in the construction industry.
- 5th country to implement after UK, Aust., New Zealand and Singapore.
- Date came into operation : 15 April 2014

CIPAA 2012

Section 2

This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government

'Occupiers' Excluded

Section 3

CIPAA not apply:

- contract by natural person
- construction work in respect of any building which is **less than** 4 storeys high
- wholly intended for his occupation

Exemption

Section 40

- Minister's power to exempt 'any person or class of persons' or 'any contract, matter or transaction or any class thereof';
- Upon considering the recommendation of the KLRCA.
- Must be based on good policy reasons.
- Judicial review?

CIPA (Exemption) Order 2014

Order2(1)

Government construction contract for any construction work -

- that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;
- that relates to national security or security related facilities which includes the construction of military and police facilities, military bases and camps, prison and detention camps, power plant and water treatment plant.

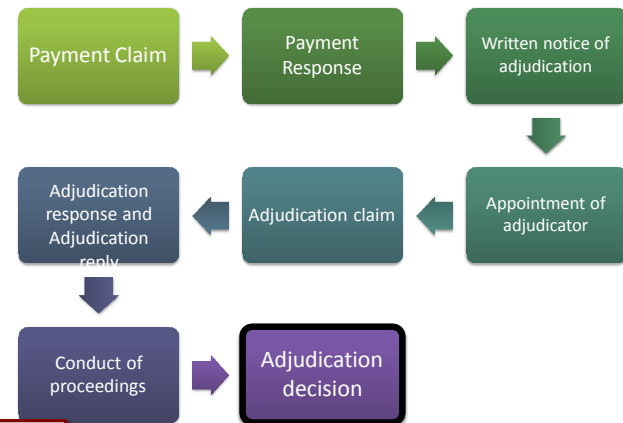
is exempted from all provisions of the Act.

Order2(2)

For Government construction contracts with contract sum of RM20 million and below, the Government will have 30 days instead of 10 working days to serve the Payment Response and the Adjudication Response.

Applicable only from 15 April 2014 to 31 December 2015

Adjudication Process



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Payment Claim

Section 5

- Amount claimed and due date for payment
- Details to identify the cause of action including relevant payment provisions
- Description of the work or services to which the payment relates
- A statement that it is made under CIPAA

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Payment Response

Section 6

If non-paying party chooses to respond:-

- Admit the whole payment
- Admit part of the payment claim
- Dispute entire payment claim

If non-paying party chooses not to respond:-

- Deemed disputed.

Adjudication Decision

- within 45 working days from service of adjudication response or adjudication reply, whichever is later; or
- within 45 working days from expiry of period prescribed for the service of adjudication response if no adjudication response is received; or
- such further time as agreed by parties.
- If not, the adjudication decision is void and adjudicator not entitled to any fees/expenses.

Recourse Against Adjudication Decision

Section 13

The adjudication decision is binding unless –

- (a) it is set aside by the High Court on any of the grounds referred to in section 15;
- (b) the subject matter of the decision is settled by a written agreement between the parties; or
- (c) the dispute is finally decided by arbitration or the court.

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Recourse Against Adjudication Decision

Section 15

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially; or
- (d) the adjudicator has acted in excess of his jurisdiction.

What if there has been non-compliance with provisions of CIPAA?

Section 26 (1)

The non-compliance by the parties with the provisions of this Act whether in respect of time limit, form or content or in any other respect shall be treated as an irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings or the adjudication decision.

Stay of Adjudication Decision

Section 16

- 1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
 - a) an application to set aside the adjudication decision under section 15 has been made; or
 - b) the subject matter of the adjudication decision is pending final determination by arbitration or by court.
- 2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLCA or make any other order as it thinks fit.

Enforcement of Adjudication Decision

If adjudicated amount under an adjudication decision has not been paid:-

- apply to High Court to enforce decision as a judgment/order.
- suspend or reduce the rate of progress of work.
- apply for direct payment from principal.

Prohibition of conditional payment

Section 35

- 1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.
- 2) For purposes of this section, it is a conditional payment provision when –
 - a) the obligation of one party to make payment is conditional upon that party having received payment from a third party; or
 - b) the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

Default provisions on payment terms

Clause 36

Unless otherwise agreed by the parties, a party who has carried out work has a right to progress payment –

- on monthly basis for construction work and consultancy services.
- upon delivery of supply of materials, equipment or workers

Evolution of set-off provisions in Standard Form Contracts

- PAM Contract 1969
- PAM Contract 1998
- PAM Contract 2006

PAM Contract 1969

- No express provision limiting or curtailing employer's right to set-off.
- Pembinaan Leow Tuck Chui & Sons v. Dr.Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 – Supreme Court

“The parties to building contracts are entitled to incorporate in their contract any clause they please. There is nothing to prevent them extinguishing, curtailing or enlarging the ordinary rights of set-off, provided they do so expressly or by clear implication.”

Supreme Court found that the express enumeration of permitted set-offs contained in the building contract clearly implied that the employer was limited to making deductions from the amounts claimed by the main contractor under the scope of permitted set-offs in the building contract and nothing else.

PAM Contract 1998

Clause 30.3(i)

Unless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's certificate by reason of any claim to set-off or counterclaimor for any other reason whatsoever which he may purport to excuse him from making payment

Clause 30.3(ii)

In the event of any disputes or differences as to any rights of the Employer to set-off or to any counterclaimsor for any other reasons then such disputes or differences shall be referred to an arbitrator

PAM Contract 2006

Clause 30.4

The Employer shall be entitled to set-off all cost incurred and loss and expense where it is expressly provided under Clauses 2.4, 4.4, 5.1, 6.5(e), 6.7, 14.4, 15.3(b), 15.3(c), 15.4, 15.5, 19.5 and 20.A.3. No set-off under this clause may be made unless:

- 30.4(a) the Architect or Quantity Surveyor (on behalf of the Employer) has submitted to the Contractor complete details of their assessment of such set-off; and
- 30.4(b) the Employer or the Architect on his behalf has given the Contractor a written notice delivered by hand or by registered post, specifying his intention to set-off the amount and the grounds on which the set-off is made.

PAM Contract 2006

If the Contractor after receipt of the written notice from the Employer or the Architect on his behalf, disputes the amount of set-off, the Contractor shall within 21 days of receipt of such notice, send to the Employer a statement setting out the reasons and particulars for such disagreement. If the parties are unable to agree on the amount of set-off within a further 21 days after receipt of the Contractor's response, either party may refer the dispute to adjudication under clause 34.1. The Employer shall not be entitled to exercise any set-off unless the amount has been agreed by the Contractor or the adjudicator has issued his decision.

PAM Contract 2006

- Clause 2.4 Failure of Contractor to comply with Architect's Instructions.
- Clause 4.4 Contractor to indemnify against liability for fees, levies charges and penalties.
- Clause 5.1 Inaccurate setting out of the works by Contractor.
- Clause 6.5(e) Leave work not in accordance with Contract.
- Clause 6.7 Failure to comply with instructions to rectify, remove or demolish work not in accordance with Contract.
- Clause 14.4 False warranty of title of goods and material.
- Clause 15.3(b) Contractor's failure to comply with undertaking to make good defects and complete works of minor nature.
- Clause 15.3(c) Leave works and defects of minor nature.
- Clause 15.4 Failure to attend to defects which appear within defects liability period.
- Clause 15.5 Failure to attend to critical defects during defects liability period.
- Clause 19.5 Failure to insure against injury to persons and loss/damage to property.
- Clause 20A.3 Failure to take out and maintain CAR Insurance policy.

PAM Contract 2006

Damages for Non-Completion

Clause 22.1

If the Contractor fails to complete the Works by the Completion Date the Contractor shall pay or allow to the Employer Liquidated Damages.

The imposition of Liquidated Damages by the Employer is not subject to the set-off procedures under Clause 30.4 and adjudication.

P.W.D Form 203A (Rev.1/2010)

Clause 33.0

The Government or the S.O. on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sums which may become due or is payable by the Government to the Contractor under this Contract or any other contracts to which the Government and the Contractor are Parties thereto.

THANK YOU!

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