Client Alert

The Construction Industry Payment and Adjudication Act 2012 comes into force

Effective 15 April 2014, the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”) came into force which will provide a new legal avenue to resolve cash flow-related problems in the Construction industry.

“It is an Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.”

– Preamble of the Act

The implementation of CIPAA 2012, according to Minister of Works Datuk Fadillah Yusof, in conjunction with the official opening of the Specialised Construction Courts, will boost the country’s construction industry.

This client alert seeks to outline some of the salient points of CIPAA 2012 below:

CIPAA 2012 is confined to payment disputes

CIPAA is confined to payment disputes in respect of work or services done under a written construction contract and accords a temporary finality to address cash flow problems in the construction industry.

Construction contract has been widely defined under CIPAA 2012

Construction contracts have been widely defined under CIPAA 2012 and as such would apply to every written construction contract which is carried out wholly or partially in Malaysia.

A construction contract entered into by a natural person, however, in respect of any building which is less than four storeys high and which is wholly intended for his occupation will not fall under CIPAA 2012 (Section 3).

“Construction contract” means a construction work contract or construction consultancy contract

“Construction consultancy contract” means a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services

– Section 4, CIPAA 2012
CIPAA 2012 applies to construction contracts by the Government of Malaysia, subject to exemptions.

CIPAA 2012 applies to the private sector as well as to construction contracts entered into by the Government of Malaysia, subject to specified exemptions.

Simultaneous with the coming into force of CIPAA 2012, the Construction Industry Payment and Adjudication (Exemption) Order 2014 (“Exemption Order”) has also come into force.

Order 2 of the Exemption Order provides that a Government construction contract as specified in the First Schedule is exempted from all provisions of the Act and these include contracts for any construction works that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances or that relates to national security or security related facilities.

A Government construction contract for any construction works with the contract sum of RM20 million and below, as specified in the Second Schedule of the Exemption Order, however, is exempted from the application of subsections 6(3), 7(2), 10(1), 11(1) and 11(2) of the Act from 15 April 2014 to 31 December 2015 subject to certain terms and conditions as stipulated in Orders 2(2) & (3) of the Exemption Order. The other provisions of CIPAA 2012 apply to Government construction contracts, including enforceability.

Consent of the parties to the construction contract not required to initiate adjudication under CIPAA 2012

A claimant is able to initiate adjudication under CIPAA 2012 and consent of the parties to the construction agreement is not required as it is a mandatory statutory process.

Parties therefore, will not be able to contract out of the CIPAA 2012 even when the construction contract has prescribed a mechanism for dispute resolution, e.g. arbitration.

Conditional payment/pay when paid/pay if paid clauses are prohibited under CIPAA 2012

CIPAA 2012 prohibits the practice of conditional payment i.e. pay when paid/pay if paid/back to back clauses in a construction contract. As such, any conditional payment provision in relation to payment under the construction contract will no longer be lawful.

Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

- Section 35(1), CIPAA 2012

---

www.zicolaw.com
For the 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.

– Section 35(2), CIPAA 2012

Statutory adjudication process is quicker and simpler as compared to Court or arbitration

Since the adjudicator is required to make a decision within 45 working days of the completion of a reference to him, the statutory adjudication process is quicker and simpler as compared to Court or arbitration proceedings (Section 12(2)).

Failure to make a decision within the stipulated time will render the decision void and the adjudicator will not be able to recover his fees (Section 12(3)).

Remedies of the successful Claimant

The successful claimant may be entitled to the following remedies pursuant to an adjudication decision:-

Suspend Work
If the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly after the receipt of the adjudicated decision under subsection 12(6), a party may suspend performance or reduce the rate of progress of performance of any construction work or construction consultancy services under a construction contract (Section 29(1)).

If the adjudicated amount is not paid within fourteen calendar days from the date of receipt of the notice, the party intending to suspend the performance or reduce the rate of progress of performance shall give a written notice of intention to suspend performance or reduce the rate of progress of performance to the other party (Section 29(2)).

Right to reduce rate of work
Upon the expiry of fourteen calendar days of the service of notice given under Section 29(2) above, the party intending to reduce the rate of progress of performance shall have the right to do so of any construction work or construction consultancy services under a construction contract provided that the party is not in breach of contract; is entitled to a fair and reasonable extension of time to complete his obligations under the contract; is entitled to recover any loss and expenses incurred as a result of the reduction in the rate of progress of performance from the other party; and shall resume performance or the rate of progress of performance of the construction work or construction consultancy services under a construction contract in accordance with the contract within ten working days after having been paid the adjudicated amount or an amount as may be determined by arbitration or the court (Section 29 (3) & (4)).
Secure direct payment from the principal
A written request for payment of the adjudicated amount may be made by the party who obtained the adjudication decision in his favour. This request may be made directly from the principal of the party against whom the adjudication decision is made, if there is a failure to make payment on the adjudicated amount (Section 30(1)).

These remedies can be exercised concurrently unless a stay is granted (Section 31).

Disputes under CIPAA 2012 can be re-determined afresh by arbitration or litigation

Section 13 provides that an adjudication decision is binding unless:-

a) set aside by court based on grounds in section 15;

b) subject matter is settled by a written agreement; or

c) the dispute is finally decided by arbitration or the courts.

Adjudication decision enforceable as judgment
The adjudication decision can be enforced by registering the same as a judgment in the High Court and the High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable (Section 28).

Retrospective Effect of CIPAA 2012?
In its press release dated 15 April 2014, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) informed that CIPAA 2012 is to apply retrospectively, although the regulations do not specifically say so. If the effect is retrospective, CIPAA 2012 applies to all construction contracts with immediate effect save for those that have been exempted.

Need Advice?
If you require any assistance, please contact:

Sabarina Samadi  
(sabarina.samadi@zicolaw.com)

Celine Chelladurai  
(celine.chelladurai@zicolaw.com)