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The real estate market and the construction industry are interrelated, with improvements and progress in one having a positive impact on the other. The introduction of the Construction Industry Payment and Adjudication Act 2012 ("**CIPA Act**" or "**Act**") represents a significant development in the construction industry. It is hoped by the government and the stakeholders of the construction industry that improvements to cash flow and payment disputes within the construction industry will result in fewer delays and abandoned projects, as well as better quality properties and more affordable prices.

The CIPA Act came into force on 15 April 2014. It is stated in the CIPA Act that its objects are 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."

CIPA ACT IS RETROSPECTIVE

The Act applies to every construction contract made in writing, whether made before or after 15 April 2014, relating to construction work carried out wholly or partly within Malaysia, including construction contracts with the Government[1]. It does not apply to contracts made by individuals for the construction of a building less than 4 storeys high intended for his or her own occupation[2]. There is no mention in the Act as to its application to

contracts and/or payment disputes before 15 April 2014. This issue was promptly taken to the High Court[3] which held that the CIPA Act applies retrospectively to both contracts and disputes which arose before the 15 April 2014. The Kuala Lumpur Regional Centre for Arbitration ("**KLRCA**") as the adjudication authority issued Circular 1A dated 11 November 2014[4] to implement the retrospective application of the Act.

TYPE OF CONTRACTS APPLICABLE

The Act has a wide application to contracts for the carrying out of construction work, provision of consultancy services and the procurement of materials and labour.

The application is not limited to written contracts, as the definition of "made in writing" adopted by the KLRCA includes contracts which are not signed, made by exchange of communications in writing or evidenced in writing[5].

The Construction Industry Payment & Adjudication (Exemption Order) 2014 exempts certain government contracts, including the construction power plants and water treatment plants from coming under the Act. However, the exemptions are read narrowly and only apply to contracts involving the federal and/or state governments. Contracts awarded by government-linked companies (GLCs) such as Tenaga National Bhd (TNB)

are not exempt[6].

PROCESS

The dispute resolution mechanism under CIPA Act is faster than litigation or arbitration. In theory, the adjudication process could take as little as 100 working days from commencement to decision.

Before an adjudication proceeding is commenced, an unpaid party must first issue a payment claim. A payment claim can be issued for unpaid interim payments, final payments and retention sums, as long as these sums are due under the terms of the construction contract. It may also be issued before certification of the claim[7]. A claim for "payment" as defined in the Act is limited to "payment for work done or services rendered under the express terms of a construction contract".

A payment response is served within 10 working days from the receipt of the payment claim. In the payment response, the nonpaying party may either admit or dispute the payment claim. If the non-paying party fails to respond to the payment claim, the entire payment claim is deemed disputed.

Thereafter, either the unpaid party or non-paying party may refer the dispute to adjudication. Upon registration with KLRCA, parties have to agree on the choice of an adjudicator or request the director of the KLRCA to appoint one.

KLRCA maintains a register of adjudicators from which it selects an adjudicator[8]. Adjudicators empanelled with the KLRCA must have been trained and certified by the KLRCA, hold a relevant degree or diploma[9] and have at least 7 years of actual working experience, preferably in the building and construction industry. The Adjudicator's fees are to be agreed by the parties, and may be based on the KLRCA Schedule of Fees[10]. In the absence of agreement, the lower fees set out in the CIPA Regulations are to apply[11]. Upon the adjudicator's acceptance of his appointment, the adjudication process begins.

The pleadings start with the adjudication claim being served by the claimant within 10 working days after the acceptance of appointment. An adjudication claim is essentially an amplification of the payment claim, where the nature and description of the payment dispute is presented in greater detail and with supporting documents. The respondent has 10 working days to serve an adjudication response to answer the claim set out in the adjudication claim. The claimant has 5 working days to serve the adjudication reply. Thereafter, the adjudicator has 45 working days to deliver the adjudication decision. Oral hearings and the calling of witnesses are not required and are subject to the request of parties and discretion of the adjudicator.

Proceedings under CIPAA 2012 are essentially summary in nature, often decided based on documents, saving time and costs.

ADJUDICATION DECISION

An adjudication decision is given in writing with reasons. It is binding unless set aside by the high court, settled in writing between parties or finally decided in arbitration or court. It is uniquely described as having "temporary finality".

Adjudication decisions can be set aside if there are elements of fraud or bribery, when there is a denial of natural justice[12], when the adjudicator has not acted independently or when he has acted in excess of his jurisdiction.

COMPLIANCE AND EXECUTION

It is not uncommon for parties to promptly comply with an adjudication decision. However, in the case of non-compliance, the successful party has a few options:

(i) He may suspend or slow down work under section 29 of the Act. (ii) He is also able to demand for direct payment from the principal under section 30 of the Act. (iii) Given that the successful party may concurrently exercise the remedies available, he may also apply to court to enforce the adjudication decision and commence execution proceedings, including winding-up proceedings.

CONFIDENTIALITY

Section 20 of CIPA Act provides that adjudication proceedings shall be confidential, although with limitations and exceptions. The requirement of confidentiality applies to both the adjudicator and parties in the dispute, but not to others involved in the proceedings, such as witnesses.

INCIDENTAL MATTERS

In addition to providing a dispute resolution mechanism to resolve payment disputes, the CIPA Act also provides for 2 incidental but significant matters:

Under section 35 of CIPAA 2012, conditional payment or “pay when paid” or “pay if paid” provisions in a construction contract are void. Given the retrospective application of the Act, such provisions in all construction contracts are now unenforceable. Subcontractors can immediately demand for the payment of any outstanding amount from their main contractor[13].

Pursuant to section 36 of CIPAA 2012, in the absence of express payment terms, parties carrying out construction work or providing construction consultancy services have the right to receive progress payments according to fair and reasonable prices or rates prevailing in the construction industry at the time of the work or services rendered. For construction work, each progress payment is due 30 days from receipt of invoice, delivery of materials or from when services were rendered.

STATISTICS[14]

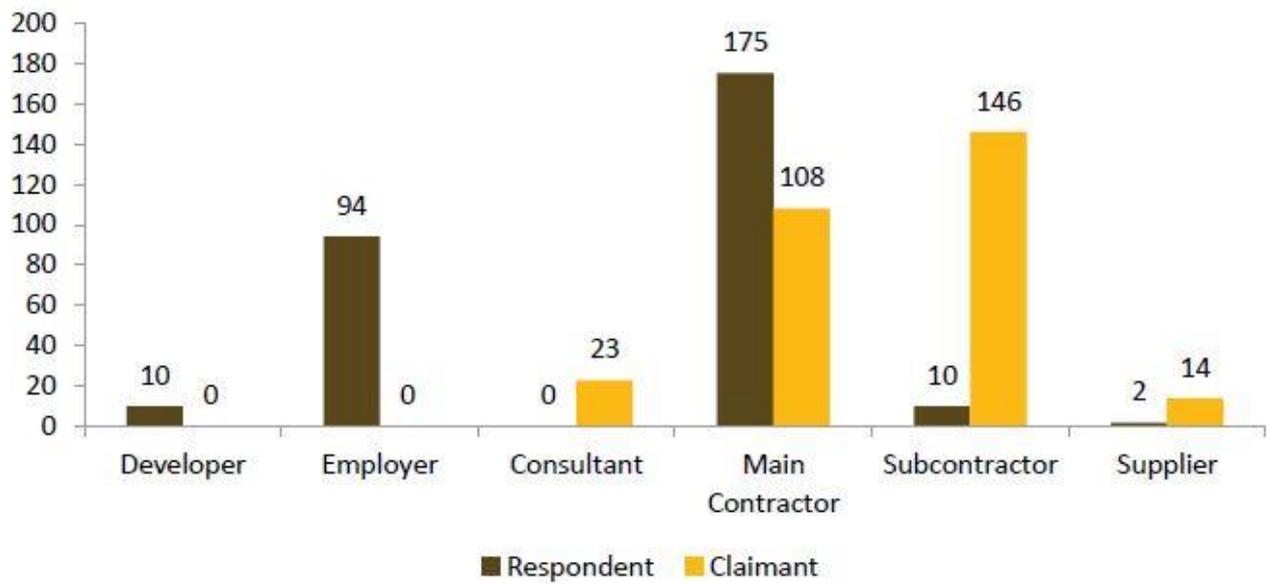
A total of 291 matters have been registered from 15 April 2014 to 15 April 2016. Out of the 291 registered matters, 108 of these were claims by main contractors while 146 were by subcontractors. 94 claims were against employers, while 175 claims were against main contractors. The average claim brought to KLRCA over the past two years was RM4,808,653, while the average adjudicated amount was RM1,977,557.

10 claims arose from government contracts with 7 of them decided against the government. The total amount adjudicated against the government was RM13,564,591.

As for the type of adjudication disputes, the majority were for interim payments, followed by claims for final accounts, payment of professional fees and monies which were withheld[15]. In line with the purpose of the Act, adjudications under CIPAA 2012 remains mostly a "documents only" proceedings, with 251 matters disposed this way.

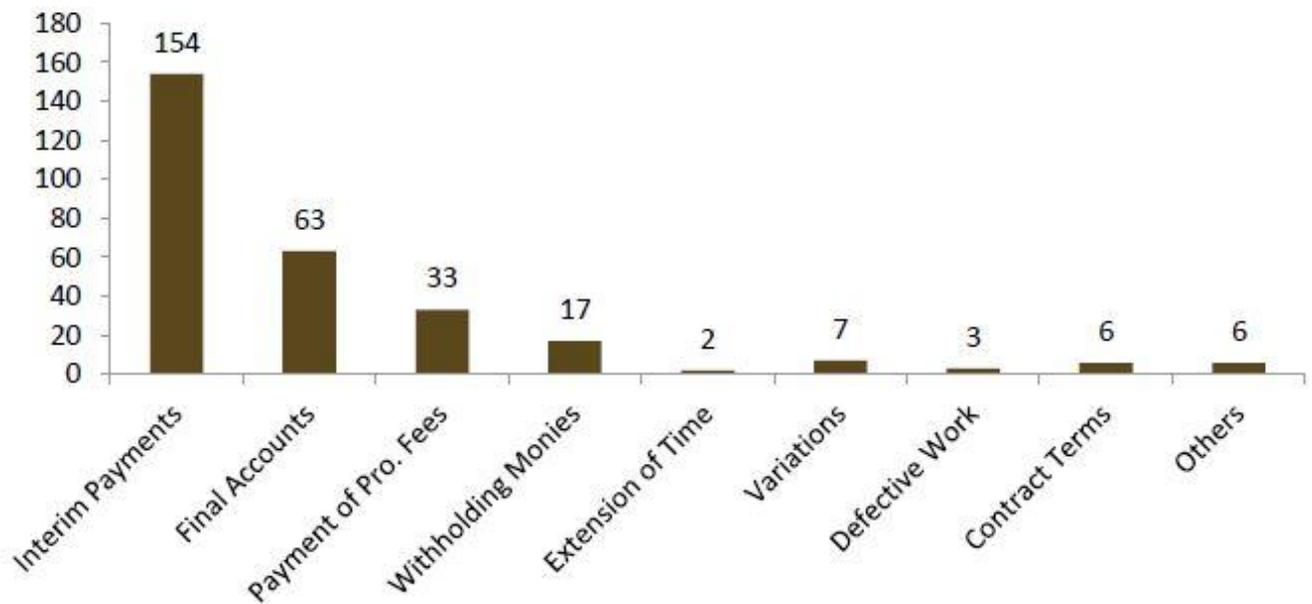
Claimant and Respondent Statistics

(From 15 April 2014 to 15 April 2016)



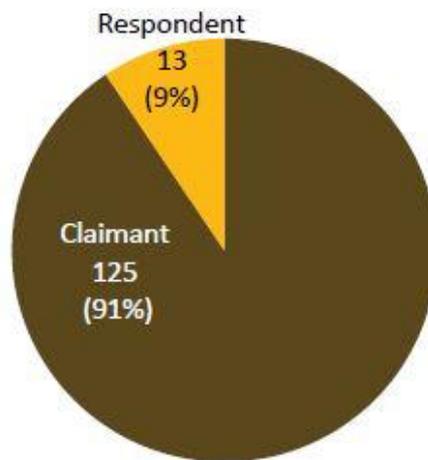
Types of Claims

(From 15 April 2014 to 15 April 2016)



Decision Released in Favour of Claimant and Respondent

(From 15 April 2014 to 15 April 2016)



Adjudication decisions are generally pro-claimants. Out of the 138 adjudication decisions released in the past 2 years, 125 of these were for the claimants. 70 claimants got their claims in full while 55 were partially successful.

CONCLUSION

Since its inception in 2014, construction adjudication under the Act has steadily gained traction. As the players adjust themselves to this new regime, we can expect to see improvements to delivery and quality in the construction industry. It is only a matter of time before the positive impact of the CIPA Act will be seen in the real estate market.

[1] Section 2 of the CIPA Act

[2] Section 4 of the CIPA Act

[3] In the case of UDA Holdings Berhad v Bisraya Construction Sdn Bhd and Capitol Avenue Development Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2015] 5 CLJ 527. MahWengKwai & Associates represented Capitol Avenue Development Sdn Bhd.

[4] The KLRCA initially issued circular 01 dated 23 April 2014 which stated that CIPA 2012 applies retrospectively to contracts made before 15 April 2014 but prospectively to disputes which arose after the date.

[5] KLRCA CIPAA Circular 03

[6] As per the Court's decision in Mudajaya Corporation Bhd v Leighton Contractors (M) Sdn Bhd [2015] 5 CLJ 848

[7] Confirmed by the learned judge in Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] 8 CLJ 728

[8] There are currently 363 adjudicators empanelled with the KLRCA. Source: KLRCA

[9] In order to attend the KLRCA Adjudication Training Programme, participants must hold a degree or diploma; for example in architecture, building studies, engineering, quantity surveying, environmental studies, law, planning,

real estate or urban design, or such other qualification, as may be recognised by the KLRCA

[10] KLRCA CIPAA Circular 02: KLRCA's Recommended Schedule of Fees

[11] Schedule to the CIPA Regulations 2014: KLRCA's Standard Fees for Services and Expenses of Adjudicator

[12] In the case of WRP Asia Pacific Sdn Bhd v Bluescope Lysaght (M) Sdn Bhd [2015] MLJU 1125, Mary Lim J set aside an adjudication decision on the basis that there was a breach of natural justice. MahWengKwai & Associates represented WRP Asia Pacific Sdn Bhd in the case.

[13] This view is reiterated in the recent Court decision in Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd in Kuala Lumpur High Court Originating Summons No.24C-40-11/2015 heard together with IRDK Ventures Sdn Bhd v Econpile (M) Sdn Bhd in Kuala Lumpur High Court Originating Summons No. 24C-41- 12/2015.

[14] All statistics were obtained from KLRCA, as released at the CIPAA 2012 Conference on 18 May 2016.

[15] 154 claims were for interim payments, 63 of the claims were for final accounts, 33 claims were for payment of professional fees and 17 claims were for monies which were withheld.