

Prospectivity trumps retrospectivity and, no, it's not fake news

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Prior to the Federal Court's decisions in *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal)* ([2019] 7 AMR 348) (*Bauer*) and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd (and Two Other Appeals)* ([2019] 7 AMR 309) (*Ireka*), there was a cloud of uncertainty arising from conflicting decisions as to whether the Construction Industry Payment and Adjudication Act 2012 (CIPAA) applies prospectively or retrospectively.

Facts

The issue as to the prospective/retrospective application of the CIPAA first came to light in *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor and Another Case* ([2015] 5 CLJ 527) (*UDA Holdings*), in which the high court decided, among other things, that:

- adjudication is nothing more than a dispute resolution mechanism and the CIPAA essentially provides a choice of forum and does not affect any existing rights conferred by any written law;
- it is a well-established principle that legislation providing for this change of forum in the form of an additional forum (ie, statutory adjudication) operates retrospectively unless there is a provision to the contrary;
- the laws adopting the statutory adjudication regime in several other jurisdictions (eg, the United Kingdom, New Zealand, Singapore, New South Wales, Queensland and the Northern Territory of Australia) expressly provide that their statutory adjudication regimes apply only to construction contracts made after their respective legislation has come into force; the Malaysian Parliament chose not to include a similar provision in the CIPAA;
- in any event, a purposive interpretation of the CIPAA warrants a retrospective application; and
- reading that the CIPAA is available regardless of when the construction contract or payment dispute arose would not have a negative effect on the plain language of the CIPAA.

The high court's decision in *UDA Holdings* was upheld by the Court of Appeal (although no grounds of judgment was delivered).

However, the Court of Appeal in *Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd & Another Appeal* ([2018] 10 CLJ 293 (*Bauer CA*)) departed from *UDA Holdings*, holding that the CIPAA applies prospectively.

These conflicting decisions left stakeholders in the construction industry in a predicament as to whether the CIPAA applied to construction contracts entered into before it came into operation on 15 April 2014.

Decisions

In view of the conflicting Court of Appeal decisions in *UDA Holdings* and *Bauer CA*, leave to appeal was granted by the Federal Court in *Bauer* and *Ireka*.

The two leave questions in *Bauer* may be summarised as follows:

- whether the CIPAA applies to construction contracts entered into before the date on which it come into operation; and
- if the answer to the above is affirmative, does it follow that Section 35 of the CIPAA should apply to construction contracts entered into before the CIPAA came into operation?

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In *Ireka*, the question of law posed to the Federal Court was whether the CIPAA gives rise to substantive rights and is consequently not retrospective in nature, making the adjudication decision in this case liable to be set aside.

Although framed differently, the leave questions in these appeals essentially required the Federal Court to determine whether the CIPAA operated retrospectively or prospectively.

On 16 October 2019 the Federal Court issued separate decisions in *Bauer* and *Ireka* in which it unanimously held that the CIPAA applies prospectively. The Federal Court's reasoning in these decisions is discussed below.

Facts in Bauer

The appellant (Jack-In Pile) was appointed by the respondent (Bauer) as a subcontractor to supply and install spun piles for a construction project under a letter of award dated 16 March 2011. Clause 11.1 thereof stated that all payments to the appellant must be made within seven days from the date on which the respondent received the related progress payments from the employer of the project. The respondent had relied on Clause 11.1 since the commencement of the project and asserted that it had no obligation to pay the appellant until and unless the respondent received the related progress payment from the employer.

On 3 August 2016, after the CIPAA had come into force, the appellant issued a payment claim and subsequently commenced adjudication proceedings for the unpaid amount of the claim. An adjudication decision was delivered on 23 November 2016 requiring the respondent to pay RM906,034 to the appellant. The appellant sought to enforce the adjudication decision while the respondent sought to set it aside. The issue before the high court was whether Section 35 of the CIPAA (which invalidates conditional payment clauses in construction contracts) applied. The respondent's application to set aside the decision was dismissed by the high court, which held that Clause 11.1 was a conditional payment provision which had been rendered void by Section 35. Relying on *UDA Holdings*, the high court held that the CIPAA, including Section 35 thereof, applied retrospectively.

The high court's decision was overturned by the Court of Appeal. Then Judge of the Court of Appeal David Wong Dak Wah found that there was no express provision in the CIPAA excluding or including construction contracts made prior to the its commencement. Justice Wong stated that unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation is procedural in nature, that legislation must be given a retrospective effect unless clear words in the same show to the contrary. Justice Wong then determined that the CIPAA is a legislation relating to a substantive right as it provides a new avenue of access to justice in the construction industry. Although a procedural regime exists within the CIPAA, the procedural regime is a consequence of the substantive right created by the CIPAA. Accordingly, the CIPAA was held to be prospective in nature and the Court of Appeal thereby departed from *UDA Holdings*.

Facts in Ireka

The appellant (Ireka) awarded three subcontracts to the respondent (PWC) before the CIPAA came into force. The subcontracts contained an equipollent clause (Clause 13.1) which conferred a right on the appellant to set-off any money due to the respondent with any sum that the respondent was liable to pay under any other contract between the parties.

The respondent commenced adjudication proceedings against the appellant in respect of RM134,869.25, which was due to the respondent under one of the subcontracts. The appellant did not dispute the amount claimed by the respondent but relied on the cross-contract set-off right in Clause 13.1 to set-off the sum due against the amounts which it claimed were owed to it by the respondent under the other two subcontracts.

The adjudicator issued an adjudication decision in favour of the respondent. In coming to his decision, the adjudicator declined to exercise jurisdiction on the disputes arising out of the other two subcontracts which were the subject of separate adjudications before other adjudicators. According to the adjudicator, Section 5 of the CIPAA allows an adjudicator to decide on only a single construction contract. The high court and the Court of Appeal agreed that the adjudicator was not empowered to decide on multiple construction contracts. The issue of retrospective application of the CIPAA was raised in the Court of Appeal but was held to be immaterial in this case.

Federal Court's decisions

The Federal Court relied on substantially the same reasoning to come to its decision in both appeals.

According to Federal Court Judge Tan Sri Idrus Harun (who delivered the judgment of the Federal Court in both appeals), it is a trite legal principle that "a statute should not be interpreted

retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute". This rule of interpretation is in consonance with the long line of common law authorities which have been adopted in Malaysian jurisprudence. The Federal Court cited several Malaysian cases that have applied this rule, including the Privy Council's decision in *Yew Bon Tew v Kenderaan Bas Mara* ([1983] 1 MLJ 1) and the Federal Court's decision in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* ([2014] 2 MLJ 749).

The Federal Court also referred to *Sim Seoh Beng v Koperasi Tunas Muda Sungai Ara Bhd* ([1995] 1 MLJ 292), in which the Court of Appeal stated that the correct approach to be adopted in order to decide whether a statute has retrospective effect is to avoid categorising the statute as procedural or substantive but to decide whether the statute – if applied retrospectively – would impair existing rights and obligations.

The Federal Court proceeded to consider Sections 19(1), 43(a), 2(1) and 2(3) of the Interpretation Acts 1948 and 1967, which, according to their lordships, are a manifestation of the common law. Read together, these provisions provide that as a general rule, the commencement date of an act, including the CIPAA, cannot be retroactive unless it is clearly intended by Parliament and such intention is evinced by express provisions in the act itself. The Federal Court noted that there is no express provision in the CIPAA from which it could safely infer that Parliament manifestly intended the CIPAA to operate retrospectively.

Despite commending the comprehensive judgment of the high court in *UDA Holdings*, the Federal Court disagreed with it, stating that the high court did not appear to have fully appreciated the Interpretation Acts 1948 and 1967 and the common law position that in the absence of clear and express words to such effect, a statute, such as the CIPAA, cannot be applied retrospectively. The Federal Court added that the absence of clear provisions providing a prospective application of the CIPAA, as compared with the legislation of other jurisdictions which expressly provide for it, does not automatically lead to a retrospective interpretation, as it is not supported by clear evidence. The Federal Court added that to the contrary, the CIPAA is not silent as to its commencement date. Based on well-established rules of interpretation, in the absence of express provision to the contrary, it is plain that Parliament intended that statutory adjudication under the CIPAA should apply prospectively. It therefore necessarily follows that any construction contract entered into before the commencement date of the CIPAA and any payment disputes arising out of such construction contract, are not governed by the CIPAA.

The Federal Court highlighted several other provisions of the CIPAA that would adversely affect the substantive rights of the parties to construction contracts if the act were to operate retrospectively. Section 5, which restricts the adjudicator's power of determination to a single construction contract as opposed to multiple construction contracts, would mean that parties are prohibited from relying on cross-contract set-offs pursuant to multiple construction contracts, such as those in *Ireka*. Further, Section 28 (enforcement of adjudication decision as if it is a high court judgment), Section 29 (right to suspend or reduce the rate of performance of a construction contract when any part of an adjudicated sum is unpaid) and Section 30 (the right of subcontractors to seek direct payment from the principal of a party who fails to pay the adjudicated amount) of the CIPAA will have profound impact and adversely affect the substantive rights of parties if the CIPAA is applied retrospectively.

The Federal Court also rejected the contention in both appeals that the CIPAA should be given retrospective effect by reason that it is a social legislation. According to the Federal Court, the CIPAA applies only to the construction industry and is not for the benefit of society at large.

In light of the foregoing reasons, the Federal Court opined that the application of Section 35 of the CIPAA to the facts in *Bauer* would exclude and impair the respondent's express right under its agreement to pay the appellant only after it had received the related progress payment from the employer. Thus, any ruling that Section 35 applied to Clause 11.1 would be detrimental to the respondent and alter the construction contract, particularly Clause 11.1, in that an act allowed at the time of entering into the contract would now be prohibited by a new statute – namely, the CIPAA. Thus, the Federal Court concluded that Clause 11.1 must prevail over any provision in the CIPAA. Accordingly, the Federal Court answered both questions of law in *Bauer* in the negative and dismissed the appeal. The Federal Court also held that the whole of the CIPAA should be applied prospectively.

Applying the same reasoning, the Federal Court reached a similar conclusion in the *Ireka* appeal. It took the view that Clause 13.1, which provides rights for cross-contract set-offs, concerned substantive rights which had in this case existed before the CIPAA was enacted. Section 5 of the CIPAA, which prohibited the appellant in *Ireka* from relying on the cross-contract set-off provisions in the construction contracts, would undoubtedly have a significant impact as it took away the substantive rights of the parties. Hence, Section 5 could not be applied retrospectively in the

absence of express legislative intention of the same in the CIPAA.

The Federal Court answered the leave question in *Ireka* in the affirmative and held that the CIPAA gives rise to substantive rights and is consequently not retrospective in nature. The Federal Court ordered the decisions of the high court and the Court of Appeal to be set aside and allowed the appellant's application to set aside the adjudication decision.

Comment

The categorical pronouncements by the Federal Court in *Bauer* and *Ireka* that the CIPAA operates prospectively in its entirety appear to resolve one of the main dilemmas faced by stakeholders in the construction industry. Based on these two decisions, it is clear that the CIPAA does not apply to construction contracts made before the CIPAA came into operation on 15 April 2014 and that parties to such contracts are not entitled to resort to statutory adjudication to resolve payment disputes.

The construction industry had barely come to terms with the implications of the *Bauer* and *Ireka* decisions, which were delivered on 16 October 2019, when the Federal Court reignited the debate the following day by granting leave to appeal on a similar question as to the prospective application of the CIPAA in an unrelated case. While the game may not yet be over, it remains to be seen whether the Federal Court will overturn Harun's decisions in *Bauer* and *Ireka*, which appear to be grounded on cogent reasoning and well-established principles of statutory interpretation.

Two questions that have arisen from the Federal Court's decisions in *Bauer* and *Ireka* in relation to construction contracts made before 15 April 2014 are as follows.

First, can adjudication decisions relating to pre-CIPAA construction contracts which have been enforced be set aside with any payments returned? This issue could have been resolved if the Federal Court had applied the doctrine of prospective ruling in *Bauer* and *Ireka*, as it recently did in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* ([2017] 5 CLJ 526) and *Sinnayah & Sons Sdn Bhd v Damai Setia Sdn Bhd* ([2015] 7 CLJ 584). Some of the litigants affected by the decisions in *Bauer* and *Ireka* have commenced proceedings to challenge the existing decisions. It will be interesting to see how the courts will rule on this issue.

Second, in the event that such adjudication proceedings are discontinued, does the party that initiated the proceedings bear the costs incurred in the proceedings? According to Section 17(1) of the CIPAA and Rules 9(5A) and 9(11) of the Asian International Arbitration Centre Adjudication Rules and Procedure, a claimant that withdraws an adjudication claim or a party that requests an adjudication when it is not entitled to do so must bear the costs of the proceedings, unless otherwise ordered. In light of these provisions, the Federal Court's decisions in *Bauer* and *Ireka* may have inadvertently caused financial hardship to claimants that commenced adjudication proceedings in respect of pre-CIPAA construction contracts in reliance on the high court's decision in *UDA Holdings* that the CIPAA operates retrospectively.

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