

## Client Alert

December 2019

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### Retrospective No More: The Construction Industry Payment and Adjudication Act 2012 Moves Forward

The issue on the applicability of the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**") has finally come to an end with the ruling of the highest court of the land in the landmark cases of *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd* and two other appeals. On 16 October 2019, the Federal Court delivered its grounds of judgment holding that CIPAA only applies prospectively to contracts entered into after CIPAA came into force i.e. 15 April 2014.

#### **JACK-IN PILE (M) SDN BHD V BAUER (MALAYSIA) SDN BHD**

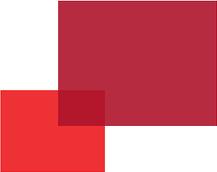
##### *Background*

Jack-In Pile was appointed by Bauer as a subcontractor through a letter of award dated 16 March 2011. The letter of award contains a pay-when-paid clause where all payments to Jack-In Pile shall only be made within seven days from the date Bauer received its related progress payments from the employer. In reliance of that clause, Bauer takes the position that it has no obligation to pay Jack-In Pile until and unless it receives payment from the employer. In return, Jack-in-Pile relied on Section 35 of CIPAA which renders pay-when-paid clauses void.

Jack-In Pile initiated adjudication proceedings against Bauer and obtained an adjudication decision where Bauer was required to pay the sum of RM 906,034.00. Jack-In Pile applied to enforce the adjudication decision. Bauer applied to set aside the adjudication decision on the main ground that Section 35 of CIPAA does not apply retrospectively to the dispute as parties have exercised their contractual rights under the pay-when-paid clause before CIPAA was enacted.

##### *High Court*

The High Court found for Jack-In Pile and held that CIPAA (and Section 35 which voids pay-when-paid clauses) applies retrospectively relying on the High Court decision of *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor* [2015] 11 MLJ 499 ("**UDA Holdings**"). Bauer appealed to the Court of Appeal.



### *Court of Appeal*

The Court of Appeal overturned the High Court's decision and found that CIPAA applies prospectively to contracts entered into after 15 April 2014 given that it affects substantive rights of parties, i.e. rights to payment pursuant to contract. Jack-In Pile appealed to the Federal Court.

### *Federal Court*

The Federal Court affirmed the Court of Appeal's decision that CIPAA applies prospectively and in making its decision, the Federal Court expressly disagreed with the High Court in *UDA Holdings*.

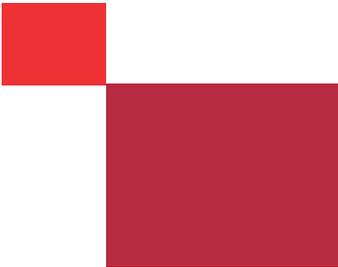
In the appeal to the Federal Court, the following questions were raised for determination:

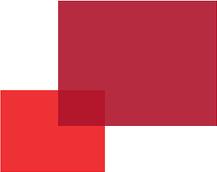
1. *Whether CIPAA applies retrospectively to construction contracts entered into before CIPAA, i.e. 15 April 2014?*
2. *If CIPAA applies retrospectively, does section 35 also apply retrospectively to all construction contracts entered into before CIPAA i.e. 15 April 2014?*

It was held that CIPAA applies prospectively as it affects substantive rights of parties by providing an additional avenue for parties to commence legal actions to claim for monies due and not just a mere change of forum (from court or arbitration to adjudication). It creates a new avenue for access to justice and is not merely a procedural legislation as the procedural regime exists as a by-product of this substantive right.

Hence in so far as Section 35 of CIPAA is concerned, it prohibits parties to rely upon payment arrangements. Its applicability is prospective as well and cannot be relied on to void the pay-when-paid clause entered into before 15 April 2014.

The Federal Court also considered Sections 2, 3 and 41 of CIPAA which set out the applicability and non-applicability of CIPAA. The Federal Court concluded that Parliament would have included an express section in CIPAA if it was intended to apply retrospectively.





## IREKA ENGINEERING & CONSTRUCTION SDN BHD V PWC CORPORATION SDN BHD AND TWO OTHER APPEALS

### *Background*

In the case of *Ireka Engineering*, Ireka appointed PWC Corporation under three contracts for construction projects in Mont Kiara, Sandakan and KL Sentral, all of which were entered into before CIPAA came into force.

Disputes arose under the three projects and PWC Corporation initiated adjudication proceedings against Ireka. Ireka's primary defence and / or cross claim in the adjudication proceedings was that it had a right to set off any amount claimed by PWC Corporation against any amount due or liable to be paid by PWC across all three projects ("**cross contractual set off**").

The adjudicator in delivering a decision in favour of PWC Corporation, decided that he had no jurisdiction over disputes arising out of the other projects and contracts as they concerned other contracts and the disputes were before two other adjudicators.

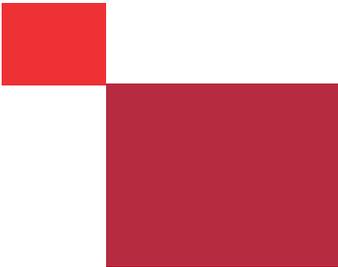
PWC applied to enforce the adjudication decision. Ireka applied to set aside the adjudication decision on the main ground that there was a breach of natural justice when the adjudicator refused to consider the cross contractual set off.

### *High Court & Court of Appeal*

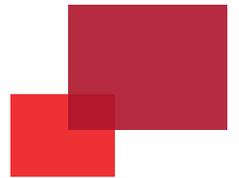
The High Court found for PWC Corporation and held that the adjudicator was right in declining jurisdiction over and beyond the project/contract before him given that the other two contracts were before different adjudicators. This was also affirmed by the Court of Appeal. The arguments that CIPAA applies prospectively were raised by Ireka in the Court of Appeal.

Ireka appealed to the Federal Court.

### *Federal Court*



The same quorum who heard *Jack-In Pile* heard the current appeal and decided (on the same grounds) that CIPAA applies prospectively. The Federal Court did not address the cross contractual set off issue which remains alive today.



## Future Outlook

The Federal Court's decisions in *Jack-In Pile* and *Ireka* impacted the construction industry where all parties with construction contracts entered into before 15 April 2014 can no longer resort to statutory adjudication under CIPAA. It was also stressed that a retrospective application would prejudicially affect vested rights of the parties or the legality of the transaction under the contract.

However, the Federal Court's decisions have created practical difficulties and uncertainties, particularly in relation to the recovery of monies paid out under adjudication decisions which will now be rendered void. For example:

Adjudication Decisions based on contracts entered into before 15 April 2014 and enforced as judgments in the High Court are now void. The following predicaments may be encountered by affected parties:

- a. The avenues to recover the adjudicated sum paid out will likely be through the initiation of arbitration or court proceedings.
- b. The legal recourse for the principal / employer to recover monies paid pursuant to Section 30 of CIPAA where the winning party receives payment directly from the principal / employer is unclear.
- c. The legal recourse for companies wound up premised on a now void adjudication decision is unclear.

