

# CIPAA 2012 – JUDICIAL DEVELOPMENT

11 April 2015  
Belden Premaraj

# Only Judicial Reported Case

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UDA HOLDINGS BERHAD V BISRAYA CONSTRUCTION  
SDN BHD & MRCB ENGINEERING SDN BHD

(heard together with)

CAPITOL AVENUE DEVELOPMENT SDN BHD V BAUER  
(MALAYSIA) SDN BHD

Decision by

Learned Justice Dato' Mary Lim Thiam Suan

# Key Issue

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- Is CIPAA retrospectively applicable to construction contract executed prior to 15.4.2014?
- Is CIPAA retrospectively applicable to payment disputes arising before 15.4.2014?
- Is there a distinction between the construction contract & payment dispute?
- No Express Stipulation that Retrospective

# Key Views: Retrospective

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- CIPAA: only applicable to parameters defined in Section 2 & 4
  - Construction Contract in Writing for Construction Works as defined; and
  - only in respect of the Payment Aspects (Non-Payment, Late Payment or Insufficient Payment)
- Recognise the right to concurrently invoke the option of Adjudication & Arbitration/Court (S.37(1))

# Key Views: Retrospective

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- Unlike Consumer Protection Act, CIPAA did not exclude contracts executed prior to 15.4.2014
- + Other Adjudication Legislation have expressed only Prospective Application for Construction Contracts
- + Section 41: Saving Clause
- + Procedural & Adjectival Legislation: presumed Retrospective : CIPAA is a choice of forum

# Key Views: Retrospective

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- No distinct application of CIPAA for Construction Contract v Payment Dispute
- Payment Dispute not when Payment Claim is made under CIPAA but based on when it arises under the Construction Contract
- Nevertheless, key consideration on application of CIPAA is Section 2: Construction Contract not Payment Dispute

# Key Views: Retrospective

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## Purposive Interpretation: CIPAA a Social Legislation

- Protecting the Contractors? Balance Tilted Slightly
- Prejudice Private Rights for Public Interest  
(Interest of End-User of Construction Project)
- Purpose: Alleviate Payment Problems that Stifle Cash Flow in Construction Industry and Prohibit Payment Terms that Inhibit Cash Flow
- Legislation Encouraging Other Forums Apart from Court

# Key Views: Retroactive

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- Substantive Existing Rights (right in contract or law) or Vested/Accrued Rights (acted upon right) cannot be impaired by presumed Retrospective Application
- Only for amending laws and not entirely new legislation
- Only for Rights in Law not Rights in Contract
- S.13, 28, 29, 30, 35, 36, 37 : Not Rights in Law



# Key Views: Retroactive

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- S.13, 28, 29, 30 and 37 are all consequence of or linked to the Choice of Forum : Not Substantive Rights
- S.35 & 36 : If not retrospective, it defeats the purpose of the Act

# Query?

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- What if retrospective S.35 & 36 defeats a vested/accrued right in contract ? Fairness & Justice
- Why can't an Act be retrospective in the procedural aspects and prospective in terms of substantive aspects where at least they are not linked by the latter being the consequence of the former?

# Other Controversies

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## Judicial or Parliamentary Intervention?

- S.6(4) deemed dispute entire claim even if no payment response
  - Any grounds can still be raised?
  - If so, why bother with Payment Response unless to admit part of whole of claims
- Concurrent Reference to Adjudication & Arbitration/Court
  - Concurrent in time of commencement? What happens when Arbitration Process Commenced Much Earlier?

# Other Controversies

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- Jurisdiction of Adjudicator Challenged
  - No Kompetenz-Kompetenze
  - Not Consider At All?
  - High Court consider under S.15(d)
  - Look-See but don't Decide?
  - If Look-See and believe no jurisdiction- what then?
  - Resign – what reasons ? Cannot use no jurisdiction since no kompetenze. Open to Breach of Appointment & Ridicule
  - If Resign – party can refer again: no res judicata