

Malayan Law Journal Unreported/2018/Volume/TH Heavy Engineering Bhd v Innovative Synergy Solutions Sdn Bhd - [2018] MLJU 31 - 5 January 2018

[2018] MLJU 31

TH Heavy Engineering Bhd v Innovative Synergy Solutions Sdn Bhd

HIGH COURT (KUALA LUMPUR)
LEE SWEE SENG J
ORIGINATING SUMMONS NO WA-24C-2-01 OF 2017
5 January 2018

Wong Guo Bin (John Kan with him) (Izral Partnership) for the plaintiff.

Chew Pei Ying (Low, Vingnesh & Co) for the respondent.

Lee Swee Seng J:

THE JUDGMENT

Parties and Project

[1] The Plaintiff, TH Heavy Engineering Berhad ("TH Heavy") is a public listed company with a particular focus on the business of heavy engineering industry which includes fabrication of offshore steel structures, the provision of other related offshore oil and gas engineering services as well of ship manufacturing.

[2] One of the projects that the Plaintiff had undertaken is to convert a ship (previously known as Nordic Laurita or Deep Producer 1) into a Floating Production, Storage and Offloading ("FPSO") Unit. The Plaintiff would prefer to call this Unit a Vessel.

[3] Innovative Synergy Solution Sdn Bhd ("Innovative Synergy") is one of the suppliers of equipment to the FPSO Conversion Project. Innovative Synergy as the Defendant was appointed by the Plaintiff to supply Fuel Gas Skid and the Fuel Gas Skid was delivered to Dubai to be installed on the Unit by the Plaintiff.

Proceeding in the Adjudication

[4] The Defendant as Claimant in the Adjudication, had issued four (4) invoices ("Invoices") for the total sum of USD411,788.27 to the Plaintiff as Respondent in the Adjudication as follows:

- (a) Invoice No. INV (ISS) 028/003 dated 6.7.2015 for Milestone 3 for the Purchase Order ("Invoice 3");
- (b) Invoice No. INV (ISS) 028/004 dated 14.9.2015 for Milestones 1, 2 and 3 for the Variation Order ("Invoice 4");
- (c) Invoice No. INV (ISS) 028/005 dated 21.12.2015 for Milestone 4 for the Purchase Order ("Invoice 5"); and
- (d) Invoice No. INV (ISS) 028/006 dated 21.12.2015 for Milestone 4 for the Variation Order ("Invoice 6").

[5] The dispute involves the non-payment of monies due for the total sum of USD411,788.27 pursuant to Invoice 3, Invoice 4, Invoice 5 and Invoice 6. The Claimant had commenced an adjudication proceeding under Construction Industry Payment and Adjudication Act ("the CIPAA") against the Respondent.

Problem

[6] TH Heavy contended that the Adjudicator has no jurisdiction as the claim by Innovative Synergy as Claimant in the Adjudication Proceedings was brought in respect of the Claimant's supply of Fuel Gas Skid

for the construction of TH Heavy's Project involving a FPSO Unit for the production and/or processing of gas and condensate/crude oil which work is not construction work within the meaning of the definition of "construction work" under Section 4 of the CIPAA and thus the contract is not a "construction contract."

[7] The Adjudicator would only have jurisdiction with respect to a claim under a "construction contract". TH Heavy argued that the conversion of a ship into a FPSO Unit is not a "construction work" as the FPSO Unit is still a ship though it now is used in the oil and gas industry. The argument is that if the conversion contract is not a construction contract but a shipping contract, then it is outside the scope of CIPAA and with that the equipment or material supplied is also not construction material.

[8] Moreover the project was wholly carried out in Dubai as it is not denied by the Defendant that the installation of the Fuel Gas Skid onto the FPSO Unit was in Dubai.

[9] Innovative Synergy who was Claimant in the Adjudication contended that the Adjudicator has jurisdiction as the CIPAA's definition of "construction contract" means under section 4 "construction work contract" or "construction consultancy contract" and that "construction work" means "the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of (d) Any electrical, mechanical, water, **gas, oil, petrochemical** or telecommunication **work**." (emphasis added) It is not disputed that the Fuel Gas Skid has to be installed and fitted into the FPSO Unit for it to serve the purpose of exploring and exploiting of oil and gas and that it is to be operating from Layang, off the coast of Sarawak.

[10] The Claimant's stand is that the procurement and supply of the Fuel Gas Skid was in the nature of Engineering, Procurement, Construction and Commissioning ("EPCC") Contract and is within the meaning of a "construction contract" which includes a "construction consultancy contract".

[11] Additionally the engineering, procurement, construction and commissioning of the Fuel Gas Skid is "Any work which forms an integral part of or preparatory to" the construction work under the inclusive proviso (A) and it is not disputed that this EPCC work with respect to the Fuel Gas Skid was done fully in Malaysia at the Defendant's factory. Therefore the contract is a construction contract.

[12] Alternatively the contract is with respect to the procurement of construction materials, equipment or workers under the inclusive proviso (B) as necessarily required for any construction works referred to above and that such procurement was made in Malaysia where the equipment was designed, engineered, constructed and commissioned in the Defendant's factory before being shipped to Dubai for installation. Therefore the contract in question is nevertheless a "construction contract" and hence the Payment Claim on the Invoices is within the jurisdiction of the Adjudicator.

Prayers

[13] The Adjudicator had delivered an Adjudication Decision dated 10.11.2016 and a further Adjudication Decision (Amended) on 14.11.2016. Pursuant to the Adjudication Decision, the Respondent is required to pay the Claimant as follows:

- (a) the sum of **USD411,788.27** within 21 days from 10.11.2016;
- (b) the sum of **RM32,435.48** as the costs of Adjudication within 21 days from 10.11.2016;
- (c) interest at the rate of 5% per annum on the sum of **USD411,788.20** from date of the decision until full realisation;
- (d) the sum of **RM20,000.00** as costs of proceeding; within 21 days from 10.11.2016.

[14] There are 2 Originating Summonses before the Court. In Originating Summons No. WA-24C-2-01/2017 (the Setting Aside Application) TH Heavy as Plaintiff is applying to set aside the Adjudication Decision on ground that the Adjudicator had acted in excess of his jurisdiction under section 15(d) of the CIPAA.

[15] There was an earlier Originating Summons No. WA-24C-153-12/2016 filed (the Enforcement Application) by Innovative Synergy, to enforce the Adjudication Decision dated 10.11.2016 and the Amended Adjudication Decision dated 14.11.2016 (collectively called "the Adjudication Decision").

[16] This judgment is with respect to the TH Heavy's Setting Aside Application as Plaintiff to set aside the Adjudication Decision made in favour of Innovative Solution as the Defendant. The Defendant agreed that it could not proceed with the Enforcement Application as there was a Restraining Order obtained by the Plaintiff against all its creditors as part of its restructuring of debts exercise to restrain all suits against it and its related companies.

[17] The parties shall be referred to as the Plaintiff and the Defendant or in the Adjudication context as the Respondent and the Claimant respectively.

Principles

[18] The very limited grounds for setting aside an Adjudication Decision are as provided for under section 15 CIPAA which reads as follows:

"15. Improperly Procured Adjudication Decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

- (a) The adjudication decision was improperly procured through fraud or bribery;
- (b) There has been a denial of natural justice;
- (c) The adjudicator has not acted independently or impartially; or
- (d) The adjudicator has **acted in excess of his jurisdiction.**" (emphasis added)

[19] In a case involving an Adjudicator's core jurisdiction as in the types of construction contracts to which the CIPAA applies under section 2 or that which the CIPAA excludes as in section 3, then if an Adjudicator assumes jurisdiction to hear a dispute arising out of such a contract when he should have declined jurisdiction, he is said to have exceeded his jurisdiction since his jurisdiction does not extend to contracts which are not construction contracts.

[20] Therefore if an Adjudicator misinterprets his jurisdiction with respect to assuming jurisdiction and arrogating to himself jurisdiction when there is none, then this Court would be constrained and indeed compelled under section 15(1)(d) of the CIPAA to set aside the whole of the Adjudication Decision.

[21] If the contract in question is not a "construction contract" then no Payment Claim can be served on TH Heavy as Respondent in the Adjudication as Statutory Adjudication under the CIPAA is only with respect to a "construction contract." Thus any Adjudication Decision made would be null and void as the Adjudicator would not have jurisdiction to proceed to begin with.

[22] Here the Plaintiff is not disputing the amount owing but merely challenging the Adjudication Decision on the ground of a lack of what I would call the core jurisdiction or original jurisdiction of the Adjudicator. In other words, the Defendant would have to proceed not under the scheme of Statutory Adjudication but instead in a normal court proceeding or **arbitration** if there is an **Arbitration** Agreement and obtain a judgment or award as the case may be.

[23] In the event that there is no triable issue that requires proceeding to full trial, the Claimant may proceed to apply for summary judgment.

Whether the work of installation of Fuel Gas Skid in a FPSO Unit being altered, fitted and converted for the "oil and gas work" is "construction work" within the definition under section 4 of the CIPAA

[24] The Plaintiff had argued that the conversion work done on the FPSO Unit is work done on a Vessel and it is in respect of shipbuilding work to which the CIPAA does not apply. Learned counsel for the Plaintiff, Mr Wong Guo Bin, had canvassed the same argument in an earlier case involving the same party i.e. TH Heavy where the Claimant in the Adjudication was one MIR Valve Sdn Bhd and there it was the same Project but its subject matter was the supply of valves from the Claimant's factory in Perak and to be shipped for Dubai for

installation.

[25] The case has been reported as *MIR Valve Sdn Bhd v TH Heavy Engineering Sdn Bhd & other cases* [2017] 8 CLJ 208 and in the Judgment there I had set out the arguments of TH Heavy and gave my reasons for rejecting them.

[26] The definition of "construction work" is important because section 2 of the CIPAA provides that it applies to every "construction contract" made in writing. Section 4 further provides that a "construction contract" means a "construction work contract" or "construction consultancy contract." What then is "construction work"? Section 4 defines it very expansively and even has an inclusive proviso to it under (A) and (B) as follows:

"construction work" means "the **construction**, extension, **installation**, repair, maintenance, renewal, removal, renovation, **alteration**, dismantling, or demolition" of:

- a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
- b) Any road, harbour works, railway, cableway, canal or aerodrome;
- c) Any drainage, irrigation or river control work;
- d) **Any** electrical, mechanical, water, **gas, oil, petrochemical** or telecommunication **work**; or
- e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes--
 - (A) Any work which forms an **integral part of**, or are preparatory to or temporary for **the works described in paragraphs (a) to (e)**, including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and
 - (B) **Procurement of construction materials, equipment** or workers, as **necessarily required for any works described in paragraphs (a) to (e)**." (emphasis added)

[27] Learned counsel for TH Heavy submitted that from a reading of the definition of "construction work" under Section 4, it is clear that the works defined under subparagraphs (a), (b), (c) and (e) are in respect of buildings and/or structures which are clearly affixed and immovable. In short, they fall within the normal meaning of construction works in the construction industry.

[28] I must say that it is an over generalization of the meaning of "construction work". Whilst by and large "construction work" would generally involve "bricks and mortars" and buildings and structures with a certain degree of affixation to the ground that is no justification for saying that it must be narrowly confined to that. Nowhere is the word "immovable" used and where the word "affixed" is used it is in the context of the definition of "site" which means the place where the construction work is affixed whether on-shore or off-shore.

[29] Like all definition sections, section 4 is preceded with the qualifying expression "In this Act, **unless the context otherwise requires** -" (emphasis added)

[30] Thus one should be concerned with whether the work of converting a ship into a FPSO Unit for the oil and gas industry is "construction work" as coming within the main definition and not be unduly swayed by the definition of "site" which is not within the main definition of "construction work" but referred to only in the inclusive proviso under (A).

[31] As can be seen in subparagraph (d) the focus is on the fields of work as in "Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work". I agree with learned counsel for TH Heavy that such a definition appears to be wider than the genus of buildings/structures in subparagraphs (a), (b), (c), and (e).

[32] The reason is not difficult to find. There was already the definition of "construction work" under a prior statute in the Construction Industry Development Board Act 1994 ("CIDB Act") which is word for word

identical to that of CIPAA except for the missing word "oil" between "gas" and "petrochemical".

[33] One does not have to stretch one's imagination too much to surmise that the definition of "construction work" has been taken from or to use a pejorative term, "cut and paste" from the CIDB Act. That is not uncommon if an existing definition serves fine for another statute.

[34] Parliament must have added in the word "oil" because of the importance of the oil industry as a major income earner for our economy and it must have appreciated the fact that many industries are support industries of "gas, oil and petrochemical" work.

[35] This is more particularly so when other jurisdictions have excluded the "oil and gas industry" and our Parliament could not have been unaware of that as the only relevant legislations are those of UK, Australia, New Zealand and Singapore which were all before ours.

[36] The United Kingdom excludes it under section 105(2)(a) of their Housing Grants, Construction and Regeneration Act 1996 as follows:

"The following operations are not construction operations within the meaning of this Part - (a) Drilling for, extraction of, oil or natural gas;

..."

[37] There are similar provision in the New South Wales Building and Construction Industry Security of Payment Act 1997 in section 5(2). In New Zealand under its Construction Contracts Act 2002 it is similarly excluded under section 6(2). There is no express exclusion of oil and gas work under the Singapore Building and Construction Industry Security of Payment Act (Chapter 30B).

[38] The fact that "site" in section 4 of the CIPAA is defined as the place where construction work is affixed whether "on-shore or **off-shore**" would suggest a structure of some permanence in the sea for example an oil rig or a FPSO which is in fact serves as a floating oil refinery. "Off-shore" does not mean that the construction work must be affixed or embedded to the sea-bed. A FPSO may be floating as in semi-submersible rigs or platforms or a converted vessel. There are also oil rigs which are affixed to the seabed and later jack-up as in jack-up rigs. The deciding factor is not the degree of affixation but rather that it is serving the oil and gas industry and that it is work done for this purpose. Indeed when it is functioning as an oil rig, there is a certain degree of affixation to the seabed for how else is the oil and gas pumped out from the seabed?

[39] The definition of "site" in section 4 to mean the place where the construction work is affixed whether on-shore or off-shore compared to a more land-based definition in other jurisdictions, would suggest a designed purpose to cover the oil and gas industry, which in Malaysia is mainly characterized by its activities off-shore. The degree of affixation may not be as permanent as a land-based structure but permanent enough for the FPSO to be at a specific place in the sea and hence off-shore to explore and extract oil and gas from underneath the seabed. Certainly when that work or exploring and extracting is done, it cannot be denied that there is sufficient a degree of affixation off-shore.

[40] The conversion of the ship into a FPSO which serves the oil and gas industry is such that even though outwardly it looks like a ship, it no longer serves the purpose of a ship as in transporting people or goods from one destination to another by sea but rather is now fitted and formulated as and indeed transformed to an oil rig with some degree of permanence off-shore in the exploration and exploitation of oil and gas. Whilst it can still be moved from one place to another it is so that it may better serve the function of an oil rig to explore and exploit better for oil and gas.

[41] In *MIR Valve Sdn Bhd v TH Heavy Engineering Berhad & other cases* (supra) this Court has observed as follows:

"27. Its total character and purpose have been transformed such that though it bears the shape and structure of its former form, its function is now fitted for the oil, gas and petrochemical work. Its focus is forged with the fundamental change and alteration in what it can now do which previously it could not. It is now no longer a ship, but converted now into an oil rig cum refinery.

28. The Wikipedia, accessed on 18.1.2017 defines and explains a **FPSO unit as "a floating vessel used by the offshore oil and gas industry for production and processing of hydrocarbons, and for the storage of oil. A FPSO vessel is designed to receive hydrocarbons produced by itself or from nearby platforms or subsea template, process them, and store oil until it can be offloaded onto a tanker** or, less frequently, transported through a pipeline. FPSOs are preferred in frontier offshore regions as they are easy to install, and do not require a local pipeline infrastructure to export oil. **FPSOs can be a conversion of an oil tanker or can be a vessel built specially for the application. ..."** (emphasis added)

[42] I bear in mind the salutary principle of interpretation of statute as contained in section 17A of the Interpretation Act 1948 & 1967 which provides that "In the interpretation of a provision of an Act, **a construction that would promote the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object." (emphasis added)

[43] The purpose or object of the CIPAA is stated in its long title as follows:

"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." (emphasis added)

[44] It cannot be denied that there are many supporting industries to the oil and gas industry and part of these would include those who do the construction, alteration, installation and conversion work of a ship into a FPSO unit to fit it for the oil and gas industry and those who supply essential parts for the ship to be so fitted and converted to serve its new designed-purpose of production, storage and offloading of oil and gas. A slowdown in cash flow arising from work done or services rendered would affect the oil and gas industry as a whole and with that the economic activities relating to oil and gas which remains a major export revenue for the country.

[45] With respect, the fear of learned counsel for TH Heavy that Adjudicators appointed under CIPAA would be unnecessarily burdened in dealing with *claims not within the construction industry* thereby slowing down the entire payment adjudication process is unfounded. Likewise the corresponding injustice which is feared may also occur in the form of denial of natural justice or rough justice as in having to deal with far too many claims from beyond the construction industry and in not having the time to allow for a proper hearing and taking of evidence.

[46] The KLRCA website at klrca.org accessed on 4.1.2018 showed that there are 499 adjudicators in their panel of adjudicators. The Courts have upheld by and large most Adjudication Decisions. The cure for the fear of lack of suitably qualified Adjudicators must be at the level of training more Adjudicators and not to modify the interpretation of "construction work" to exclude the "oil and gas" industry. As a matter of fact the KLRCA has been doing commendably well in training of Adjudicators and accrediting them and not to mention the need to pass a grueling examination including an Adjudication Decision/Award writing. This is in line with the discharge of its statutory duty under section 32 of the CIPAA as follows:

"The KLRCA shall be the adjudication authority and shall be responsible for the following:

(a) Setting of competency standard and criteria of an adjudicator; ..."

[47] I acknowledge that the word "site" is also part of the definition of "construction work" in the inclusive proviso but not in the main definition where construction work is said to include "any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including **site** clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, **site**

restoration and landscaping".

[48] That is no justification for saying that "site" must then be confined to the land in the sense of it being on-shore with reference to the use of the *ejusdem generis* principle of interpretation of statute. In fact the use of the expressions "on-shore" and "off-shore" have come in normal parlance to refer more particularly and peculiarly to "oil and gas" activities. Rarely would anyone in normal English usage say that they are constructing a building "on-shore" when referring to landed buildings and structures.

[49] I find the following write-up in an oil and gas consulting company's website www.entranceconsulting.com accessed on 4.1.2018 helpful in its explanation of "on-shore" and "off-shore" drilling as follows:

"Onshore versus Offshore"

The amount of recoverable oil and natural gas around the world has been rapidly expanding, thanks to two advanced drilling techniques: onshore and offshore drilling. With significant improvements in fracking continuing to influence the industry, these oil drilling methods have turned otherwise uneconomic drilling locations all over the world to suddenly become profitable. But what's the difference between the two?

In short, **onshore drilling refers to drilling deep holes under the earth's surface whereas offshore drilling relates to drilling underneath the seabed.** These drilling methods are used in order to extract natural resources - usually oil and gas - from the earth. While extracting oil from below the surface of the ocean used to be much more difficult than the traditional onshore drilling method of making wells on land and drilling holes, **offshore drilling has become easier through the innovative methods that have surfaced such as making either floating or fixed platforms on the bed of the ocean to support drilling.**" (emphasis added)

[50] Learned counsel for the Plaintiff also sought to make a distinction between a floating platform as opposed to a fixed one as in a fixed rig or a floating rig with the former possibly qualifying under "affixed off-shore" but not the latter. I hasten to add that to do so would be likened to splitting a strand of hair into its northeast side and northwest side! It would literally be splitting hairs for the focus is on whether the construction work is done "on-shore" or "off-shore" and not whether it is affixed on the seabed or not for when it is performing its work in exploring for and extracting oil and gas, there is a need for affixation to the seabed if not under the seabed to reach the oil and gas deposit!

[51] The learned authors Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng of **Adjudication of Construction Payment Disputes in Malaysia**, Lexis Nexis were dealing with ship building works where a ship is generally considered a chattel when they opined as follows at para [4.12] at p 30:

"Construction works, per se, are annexed to the real property and when completed form part of the real property. It follows that any component or material which is incorporated as part of the works becomes part of the real property, in contrast with chattels which retain their character as personal property. **For this reason it is considered that the Act would not apply to, for example, a shipbuilding contract notwithstanding that these share many characteristics with that of a construction contract.**" (emphasis added)

[52] I am not unaware of the view expressed by Lim Chong Fong (now Judge of the High Court of Malaya) in his article **"The Legal Implication of CIPAA"**, in the KLRCA Newsletter Jul - Dec 2012 at p 9 wherein he had opined as follows:

"It is unclear as to whether ship building such as a FPSO vessel common in the oil & gas industry is encompassed by the CIPAA. Again, it is submitted that the CIPAA does not apply because **the genus of the definition of construction work relates to fixtures whereas the FPSO is a chattel.**" (emphasis added)

[53] A fixture is defined in "Black's Law Dictionary" 8th Edition as follows:

"Personal property that is attached to land or a building and that is regarded as an irremovable part of a real property ..."

[54] The Plaintiff further submitted that its position that ship building FPSO works do not come within the meaning of construction work in the construction industry is further supported when reference is had to the Construction Industry Development Board ("CIDB") Act 1994 and its amendment in 2011.

[55] The Plaintiff submitted that CIDB's position is relevant as the CIDB is the statutory body enacted by Parliament to govern the construction industry and that the CIPAA was enacted to resolve payment claims arising there from in Malaysia. It was argued that the question of whether ship building works including FPSOs come within the construction industry may be derived from a consideration of whether CIDB has any jurisdiction or authority over ship builders or the ship building industry.

[56] The Plaintiff submitted that CIDB does not have any jurisdiction over ship builders or the ship building industry for the following reasons:

- (a) firstly, CIDB is meant to provide for registration of contractors defined as "a person who undertakes to carry out and complete any construction works" and any person not registered or holding a valid certificate of registration issued by the CIDB is expressly prohibited from carrying out and completing any construction works;
- (b) "construction work" is defined in the CIDB (Amendment Act 2011) and is identical to the definition in section 4 of the CIPAA save for the inclusion of the word "oil" in subparagraph (d) to Section 4 of the CIPAA but this is not relevant as explained below;
- (c) as to what types of contractors are required to register with CIDB, CIDB has issued a "Contractor Registration Requirements and Procedures Handbook" where the contractor registration categories are divided into three (3) distinct categories namely, Civil Engineering construction, Construction of Buildings and Mechanical and Electrical with the guide as to which category to register for set out in Annex 4 and specialization under Annex 5;
- (d) from Annex 4 and Annex 5, it can be seen that ship building or ship builders is not under any of the categories of contractors required to be registered with CIDB in order to carry out "construction work" as defined under the CIDB (Amendment) Act 2011;

[57] As the same argument above is a rehashing of the argument from the same learned counsel Mr Wong Guo Bing in the case of *MIR Valve Sdn Bhd v TH Heavy Engineering Berhad & other cases* (supra) I cannot resist reproducing here my rejection of the above submission as follows:

"47. While that may be true, in Annex 5 it is provided under "Registration of Contractor Specialization" the following under category and grade in the Contractor Registration Certificate at p 66 - 76 of the Handbook: **CE09 Oil or gas main pipeline, M13 Offshore drilling structure, B20 Internal gas piping system, CE15 Oil and gas rig**. At category M14 Pollution control system, the works is described as "**construction, maintenance and repair of offshore drilling structure, including drilling rig. One cannot escape the fact that registration of contractors is required under CIDB Act for "gas, oil and petrochemical" works in a FPSO vessel.**"

48. The reason is obvious. Whilst ship building is excluded from the definition of "construction work" under CIPAA, **where the nature of work is concerned, be they electrical, mechanical, water, gas, oil, petrochemical or telecommunication, they are nevertheless covered under CIPAA** and the contractors are required to be registered under CIDB Act before executing the said "construction works". (emphasis added)

[58] The Plaintiff further contended that a FPSO on the other hand is not a building or structure as defined above but is a ship and is treated as part of the ship building industry. Reference was made to a paper entitled "**An Overview of the Shipbuilding Industry in Malaysia**" presented by Datuk Seri Ahmad Ramli Mohd Nor, Chairman, Association of Marine Industries of Malaysia and Nazery Khalid, a senior fellow of the Maritime Institute of Malaysia which paper was presented at the 5th Asia Maritime Conference 2008 at Kuala Lumpur on 24.6.2008 which clearly acknowledges FPSOs to be ships fabricated at shipyards (not construction sites) as follows:

"Focusing on servicing the oil and gas sector and related industries, it has can accommodate the drydocking or vessels of up to 450,000 DWT and has a shiplift system capable of handling ships up to 50,000 DWT. **It is also capable of designing, fabricating, installing and commissioning such as Floating Production Storage Offloading (FPSO) vessels and Floating Storage Offloading (FSO) vessels.**" (emphasis added)

[59] To the Plaintiff further support that a ship such as the Plaintiff's FPSO Vessel does not come within the construction industry is evidenced by the fact that the ship building and repair industry in Malaysia is governed by the Ministry of International Trade and Industry ("MITI") with the licenses for ship building issued by MITI. In short, CIDB has no jurisdiction or authority over ship and consequently FPSOs as they do not come within the construction industry.

[60] I would say that parking the registration of ships under MITI is partly because of the need to collect data on international trade. However as CIDB is now tasked with registration of contractors for the "gas and petrochemical" works, the fact that registration of a FPSO vessel is under MITI is immaterial as one should look at the nature of work carried out. There is also nothing wrong or unusual to have a chattel registered under MITI but work carried out on the chattel must be executed by contractors registered under CIDB.

[61] Learned counsel for the Plaintiff also buttressed his argument by highlighting that a ship building contract cannot be considered as a construction contract as a ship building contract is essentially a "supply of goods" contract. In the case of *NGV Tech Sdn Bhd and Anor v Kerajaan Malaysia* [2016] MLJU 439 at para 16, Azizah J stated that:

"From the Recital of the Agreement, the subject matter of the contract is the purchase of the Vessels by the Defendant, which was to be built by the First Plaintiff. As the Agreement is for the purchase of the Vessels, under section 2 of the Sale of Goods Act 1957 ('SOGA 1957'), Vessel falls within the meaning of "goods", that is "every kind of movable property". The Agreement is then subject to SOGA 1957. This is in line with the case of *Re Blyth Shipbuilding and Dry Dock Company Limited* [1926] 1 Ch 494 where it was held that a shipbuilding contract to be "unquestionably a contract for the sale of future goods within the meaning of the Sale of Goods Act 1893".

[62] However in the present case we are dealing with the procurement and supply of Fuel Gas Skid without which the FPSO would not be able to serve its purpose in the oil and gas work in exploring, extracting and storing of the oil and gas before offloading onto oil tankers or being transported via oil and gas pipes inland.

[63] I would thus conclude that the work of installation of Fuel Gas Skid in a FPSO Unit being altered, fitted and converted for the "oil and gas work" is "construction work" within the definition of the main construction work in subparagraph (d) under section 4 of the CIPAA. As to whether the contract for the supply of these Fuel Gas Skids for the above purpose would qualify to be a "construction contract" would be dependent on whether the contract is for construction work or work that is an integral part of or preparatory to the main construction work as held above or that the contract is for the procurement of construction materials and equipment necessarily required for the main construction work.

Whether the contract in the EPCC of the Fuel Gas Skid is a "construction contract" within the main definition under section 4 of the CIPAA or alternatively within proviso (A) being a contract for work that is an integral part of or preparatory to the main construction work and proviso (B) being procurement of construction materials and equipment necessarily required for the main construction work

[64] The true nature of the contract between the Plaintiff and the Defendant must be examined in greater detail.

[65] As narrated by learned counsel for the Defendant, Miss Chew Pei Ying, the Defendant was appointed as a contractor for "Provision for the Supply of Fuel Gas Skid for FPSO Layang Project" by way of a Purchase Order No. H10000238-1 dated 16.3.2015 ("Purchase Order"). The Plaintiff subsequently issued a Pro Forma Variation Order No. H10000238-VO1-1 dated 8.9.2015 followed by a Variation Order No. H10000238-VO1-1 dated 8.1.2016 ("Variation Order") to the Claimant. The Variation Order was made by the Plaintiff to vary, remove and add the parts of the Fuel Gas Skid.

[66] A copy of the FPSO Layang - Purchase Order Terms and Conditions ("Terms and Conditions") was attached to the Purchase Order.

[67] The Defendant as Claimant in the Adjudication was required to provide EPCC of the Fuel Gas Skid. The

scope of works was provided in the Plaintiff's Purchase Order. The Purchase Order inter alia provides as follows:

- (a) the Skid Equipment/Fuel Gas Skid Package includes but not limited to fuel gas scrubber, fuel gas supper heater, fuel gas filters and fuel gas pre heaters;
- (b) BV certification to be provided by the Claimant;
- (c) all services required for the manufacturing/fabrication of the Package to be carried out at the Claimant's workshop including Factory Acceptance Test and Site Acceptance Test (as per diem rates) and onshore commissioning (as per diem rates);
- (d) the Claimant to submit all final drawings and documentation as specified in the Vendor Document Requirement List (VDRL) including operation and maintenance manual as fully approved by JX Nippon Oil & Gas Exploration (Malaysia) Limited ("Owner").

[68] According to the Terms and Conditions, it is stated that the works was a lump sum contract and includes but not limited to the following:

- (a) the provision of all plant equipment and consumables;
- (b) the provision of all direct, indirect, productive and non-productive labour;
- (c) the procurement, expediting, purchase, documentation, unloading, storing, preservation and incorporation into the work of all material;
- (d) to supply all consumable items including but not limited to materials, supplies, labour, plant, commissioning and others;
- (e) preparation of all documentation including shop drawings, as built drawings and certification documentation;
- (f) other ancillary services.

[69] Payments by the Respondent to the Claimant under the Purchase Order are to be made progressively according to the milestones for work/services completed as stated therein.

[70] Learned counsel for the Defendant/Claimant has helpfully highlighted the relevant parts of the definition of "construction work" that is relevant to the current contract as follows:

"construction work means the **construction, installation** of any **electrical, mechanical, gas, oil, petrochemical work** and includes any work which forms an **integral part of or preparatory to the works**, described in paragraphs (a) to (e) and **procurement of construction materials, equipment** as necessary required for any works described in paragraphs (a) to (e)". (emphasis added)

[71] I agree with learned counsel for the Defendant as Claimant in the Adjudication that they have been engaged by the Plaintiff in what is essentially the EPCC of the Fuel Gas Skid. The Skid Equipment/ Fuel Gas Skid Package includes mechanical and electrical components such as fuel gas scrubber, fuel gas super heater, fuel gas filter and fuel gas pre heater. The Fuel Gas Skid is an equipment that removes moisture and particular contaminants from natural gas extracted from oil/gas wells. The completed Fuel Gas Skid is to be installed by the Plaintiff to the Layang FPSO which will be moored to the Layang Field, offshore Sarawak (see paragraph 10(c) and 14(c) of the Plaintiff's Affidavit in Support ("AIS")). The location of Layang Field is shown at the Basis for Design Layang Field Development SK-10 PSC issued by the Owner.

[72] The Layang FPSO is a converted tanker designed to cater production of 12000bpd condensate/crude, water treatment of 5000 bpd and 180MMscfd gas. It is common knowledge that the oil and gas industry in Malaysia use FPSO for oil and gas extraction. The Fuel Gas Skid is to be installed to the FPSO for the purpose stated above.

[73] Learned counsel for the Defendant referred to the documents below for a distillation of the above summary:

- (1) Form of Agreement dated 26.1.2015 between the Respondent and Drydocks World-Dubai in Exhibit "KSL-4" of the Defendant's Affidavit in Reply ("AIR");

- (2) Extract from the Provision of EPCIC and Leasing for Layang FPSO Facilities from Owner at Exhibit "KSL-5" of the Defendant's AIR;
- (3) Extract of the Basis for Design Layang Field Development issued by the Owner at Exhibit "KSL-3" of the Defendant's AIR.

[74] In the light of the actual details of the work as evidenced in the Terms and Conditions of the Contract in the Purchase Order attachments, one cannot escape the fact that the Claimant's work falls under "**construction and installation**" of "**any electrical, mechanical, gas, oil, petrochemical work**" including "**work which forms an integral part of, or are preparatory to the works described in subparagraph (d)**" and "procurement of construction materials, equipment for works described in subparagraph (d)".

[75] I agree with the Defendant/Claimant that as the nature of the work is EPCC, the work includes design, engineering and project management services of the Fuel Gas Skid. The Federal Court in the case of *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation & Ors (sued as incorporated partnership)* [2015] 9 CLJ 273 at page 290 explained the meaning of such a contract as follows:

"[55] Having sifted the relevant documents we accept the appellant's submission that the contract entered into by the owner and the respondent was a turnkey contract. The facts fall squarely under the type of contract where it is singular in purpose and at a fixed price. Suffice if we refer to Black's Law Dictionary, 9th edn (p.369), which explains "turnkey contract" in this manner:

Engineering, procurement and construction contract:

A fixed-price, schedule-intensive construction contract - typical in the construction of single-purpose projects, such as energy plants - in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the **design, engineering, procurement and construction** of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility. Also termed **turnkey contract**." (emphasis added)

[76] I would say that the design, engineering and project management service form part of the "**construction work**". The design, engineering and project management services include all "**integral and preparatory**" works that will lead to a successful performance of the construction of the Fuel Gas Skid.

[77] In support of the above contention that design, engineering and project management service form part of the "**construction work**", the Defendant/Claimant referred to the case of **Lembaga Pembangunan Industri** (supra) on the interpretation of construction work in section 2 of the CIDB Act which is strikingly similar to section 4 of the CIPAA. The definition of construction work under section 2 of CIDB Act stated at page 279 paragraph 3 is as follows:

"[3] "Contract sum", as legislated under s. 34(2), is defined under sub-s.(8) of s.34 to mean "the consideration for a contract in respect of any construction works". "Construction works" is defined in s.2 as follows:

"construction works" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of -

- (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
- (b) any road, harbor works, railway, cableway, canal or aerodrome;
- (c) any drainage, irrigation or river control works;
- (d) Any electrical, mechanical, water, **gas, petrochemical** or telecommunication work; or
- (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works;

and **includes any works which form an integral part of, or are preparatory to** or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping." (emphasis added)

[78] Further, at pages 291 and 292, the Federal Court held as follows:

"[62] Having perused s.2 of the Act and the facts of this case, **we have instead placed our reliance on the word "includes"**, rather than alluding to the principle of "noscitur a sociis". **The word includes is generally used to enlarge words or phrases in a statute, as in the current Act, with those words or phrases together with those they should include, understood to have their natural meaning** (*Dilworth v The Commissioner of Stamps* (1899) AC 99). Edgar Joseph Jr in *Public Prosecutor v Hun Peng Khai & Ors And Other Cases* [1984] 2 CLJ 290;; [1984] 2 CLJ (Rep) 391;; [1984] 2 MLJ 318 at p. 324 had occasion to remark that **the word "includes" is a word of extension and not of definition**. Evans J in *Loke Yung Hong v Ng See See (F) and 3 Others* [1948] 1 LNS 29;; [1948] 1 MLJ 123 opined:

...one using the word 'include' indicates an extension of the ordinary meaning which may be attached to the word.

[63] Going by the natural meaning, **we are satisfied that the engineering design procurement works, that form part of the "construction works", include all "integral and preparatory" works that will lead to a successful performance of the contract. Surely no construction works may be carried out satisfactorily without the requisite design, drawings, supervision or planning preceding it.** Keating in *Law and Practice of Building Contracts* (2nd edn) at p.59 had occasion to write:

Lump sum contract for whole work-widely defined

Indispensable necessary works

Where the contractor must complete a whole work such as a house, or a railway from A to B. For a lump sum, the courts readily infer a promise on his part to provide everything indispensably necessary to complete the whole work. Such necessary works are not extras for they are impliedly included in the lump sum." (emphasis added)

[79] There is also no doubt that these Fuel Gas Skids are produced in the Defendant's factory in Malaysia and delivered to the Plaintiff in Dubai for installation and hence a contract for the procurement of construction materials or equipment from Malaysia under the inclusive proviso (B) in the definition of "construction work" as shall be further explored below.

Whether the "construction work" was carried out wholly or partly within the territory of Malaysia

[80] There is yet another condition to be fulfilled as provided for in section 2 of the CIPAA which provides that the CIPAA applies to "every construction contract made in writing relating to **construction work carried out wholly or partly within the territory of Malaysia** including a construction contract entered into by the Government." (emphasis added)

[81] Here the contracting parties are Malaysian Companies. Whilst it is not disputed that the installation of the Fuel Gas Skid is done in Dubai on board the FPSO, that part of the work which forms the contract here and which forms an integral part of, or are preparatory to the main construction work is wholly done in Malaysia at the Defendant's factory.

[82] In support of the above contention that the design, engineering and the project management services of the Fuel Gas Skid were carried out wholly in Malaysia, learned counsel for the Defendant/Claimant referred to the following:

- (a) transmittal notes from the Claimant's Office in Kuala Lumpur, Malaysia to the Respondent's Office in Menara TA One, Kuala Lumpur, Malaysia whereby the Claimant submitted the relevant documentation including design and drawings of the Fuel Gas Skid to the Respondent;

Refer: page 154 to 175 of the Defendant's AIR

- (b) emails dated 19.3.2015 and 6.4.2016 from the Claimant to the Respondent attaching the minutes of meeting dated 19.3.2015 and 3.4.2015 respectively for their review. At all material time, the project meeting was held at the Respondent's Office at Menara TA One;

Refer: Emails dated 19.3.2015 dan 6.4.2016 from the Claimant to the Respondent at page 178 to 185 of the Defendant's AIR;

- (c)
 - (i) the Purchase Order inter alia provides that the Respondent shall pay 10% of the contract price upon submission of the relevant major design drawings and fabrication

- documents therein for milestone 2;
 - (ii) the Purchase Order also provides that the Respondent shall pay 10% of the contract price upon approval by the Owner on the major design drawings and fabrication documents listed therein for milestone 3;
 - (iii) the design and engineering of the design drawings and fabrication documents were done in Malaysia and the Claimant had submitted the relevant documents to the Owner in Malaysia and the approvals were from the Owner in Malaysia;
- Refer: Approvals from the Owner on the relevant major design drawings and fabrication documents at Exhibit "KSL-10", page 188 to 233 of the Defendant's AIR
- (iv) milestone 6 states that 10% contract price to be paid upon readiness for delivery Ex Work Dubai. The Claimant is not involved in the installation of the Fuel Gas Skid to FPSO. The Fuel Gas Skid is to be installed to the FPSO by the Respondent;
 - (v) under the payment terms of the Purchase Order, it was stated at the stage of milestone 7 the final 10% payment will be made upon submission of final documents to the Owner in Malaysia;
- (d) the Purchase Order states that all final drawings and documents specified as the Vendor Documents Requirement List (VDRL) were to be prepared and supplied by the Claimant to the Respondent.

[83] Further, the Claimant submitted that the procurement of the materials, equipment of the Fuel Gas Skid were from Malaysia. It is not disputed that the work scope of the Claimant includes procurement of equipment and materials. The Claimant referred to paragraph (G)(f) and paragraph (G)(j) of the Terms and Conditions at page 368 and 369 of the Plaintiff's AIS. The Claimant referred to the following documents to support their submission that the procurement of the materials, equipment of the Fuel Gas Skid were from Malaysia:

- (a) the manual valves for the Purchase Order were purchased from Wagi Valve Asia Pacific Sdn Bhd in Malaysia and the said valves were shipped from Malaysia to Dubai;
- (b) the turbine gas filter for the Fuel Gas Skid were purchased from Pall Malaysia Sdn Bhd and the said gas filter were shipped from Malaysia to Dubai;
- (c) the thyristor control panel for the Fuel Gas Skid were purchased from Pall Malaysia Sdn Bhd and the said control panel were shipped from Malaysia to Dubai;
- (d) Overseas Express Container Lines Pte Ltd (OECL) Bill of Lading No. OECPKG001984 for the shipment of fisher control valve tag where the port of loading is Port Klang, Malaysia and the Port of Discharge is Dubai.

[84] The relevant documents above can be found at Exhibit "KSL-11" (pages 236 to 257), Exhibit "KSL-12" (pages 260 to 271), and Exhibit "KSL- 13" (pages 274 to 276) in the Defendant's AIR respectively.

[85] The Claimant also stated that the Claimant had engaged:

- (a) Bureau Veritas (M) Sdn Bhd from Malaysia to carry out BV certification;
- (b) Create D Enterprise ("CDE") from Malaysia to carry out engineering support for Static & Lifting Structural Analysis and Design Drawing for Fuel Gas Skid;
- (c) SKP Thermal Energy Sdn Bhd ("SKP") from Malaysia to carry out pipestress analysis for Fuel Gas package.

Refer: paragraph 16 of the Defendant's AIR.

[86] In any event, the Claimant submitted that the Layang FPSO will be moored to Layang Field, offshore Sarawak which is within the territory of Malaysia.

[87] Where the "construction contract" includes and thus involves the element of work that forms an integral part of the main work or preparatory to the main work, then one must ask the vital question on where this

work that is being sought to be included was being done.

[88] Likewise when the work includes and thus involves the procurement of construction materials and equipment, one must ask where the procurement of these various components of the construction materials or equipment have come from.

[89] It is pretty obvious that these Works were done wholly in Malaysia and that the procurement too was from Malaysia.

[90] I agree that the above interpretation is consistent with giving the plain and ordinary meaning to the words used in the definition section of the Act as was explained by the Federal Court case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 where at page 458 it referred to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 and held as follows:

"On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, inter alia, as follows:

In summarizing the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:

- (1) Legislation is always to be understood first in accordance with its plain meaning.
- (2) Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation;
- (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading;
- (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language;
- (5) Where the court conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation."

[91] The Claimant submitted that the applicability and non-applicability of CIPAA was discussed in the case of *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499 where the Court observed as follows at page 545 and 546:

"[140]...It is the view of this court that contrary to the submissions made, there are indeed express prescriptions in the Act on the limits of the applicability of the Act. The answer to the question of application is actually provided in the Act itself, specifically in ss2, 3 and 41 of the Act. Sections 2 and 3 of the CIPAA read as follows:

Application

2 This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

Non-application

3 This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

[141] It is clear from a reading of s 2 that Parliament intended that the Act was to apply to construction contracts made in writing and for the territorial application of the Act as opposed to the date when that written construction contract is made. I have already discussed the definition of 'construction contract' earlier. While the definition is wide in its cover, CIPAA does not apply to just any contracts; it only applies to construction contracts. Even then, the construction contracts must be "made in writing"; and **the subject matter of the construction contracts must relate to construction work carried out wholly or partly in Malaysia.**" (own emphasis)

[92] Even if one were to take the Malaysian component as part of a much bigger portion of the main work

that is being done Dubai in the conversion of the ship into a FPSO for the oil and gas work, so long as a part of the work was done in Malaysia, that would suffice and it does not matter how small that part done in Malaysia may be. Parliament in crafting our own CIPAA is at liberty to decide on the scope and ambit of its application with a view to protecting industry and supporting players in the Malaysian oil and gas industry with a view to facilitate cash flow in the industry and to maintain a healthy climate for investment in the oil and gas industry in Malaysia

[93] In the case of *Mudajaya Corp Bhd v Leighton Contractors (M) Sdn Bhd* [2015] 10 MLJ 745 Mary Lim J (now JCA) held at page 757 as follows:

"[27] First, it is significant to note that the CIPAA applies to all construction contracts regardless of who the contracting parties may be. Second, while the definitions of the various terms found in the Act are generally exhaustive in character, it is nevertheless evident from the meaning ascribed to these terms that the arms of application of the CIPAA are long, wide and extensive. **Effectively, this means that the CIPAA applies to all written construction contracts relating to construction works which are carried out in Malaysia even though such works may only be carried out to some small extent in Malaysia's territory.**" (emphasis added)

[94] I would gladly place my support for such a proposition. In this regard the learned authors of the "**Construction Adjudication in Malaysia**", Lam Wai Loon and Ivan Y.F. Loo" at page 33 and 34 have opined as follows:

"...A construction contract is caught by the CIPA Act 2012 **even if only a minute part of the construction work to which the contract relates is carried out within Malaysia** and the substantial part of it is performed outside the territory of Malaysia." (emphasis added)

[95] From the undisputed facts of this case, clearly the contract in question as found in the Purchase Orders and the Terms and Conditions attached attract the application of the CIPAA under section 2 and the definition of "construction contract" and "construction work" under section 4 of the CIPAA. It is not disputed that the completed Fuel Gas Skid will be installed by the Respondent to the FPSO which is used in oil and gas industry. The design, engineering, project management services were carried out in Malaysia and the procurement of materials for the Fuel Gas Skid were from Malaysia. Therefore, the "construction work" was carried out wholly or at least partly within the territory of Malaysia and that the CIPAA applies as it does to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia.

[96] Learned counsel for the Plaintiff relied on the case of *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Ptd Ltd* [2011] NSWSC 165 and summarized the facts and submitted as follows:

- (i) this case related to a claim by Olympia and Hansen Yuncken pursuant to Section 7(4)(b) of New South Wales, Building and Construction Industry Security of Payment Act 1999 ("BCISPA") relating to the territory of Australia, where Section 7(4) provides:
 - "7. Application of Act
 - (4) This Act does not apply to a construction contract to the extent to which it deals with:
 - a construction work carried outside New South Wales;
 - b related goods and services supplied in respect of construction work carried outside New South Wales."
- (ii) in this regard, it is to be noted that although Section 7(4) of BCISPA is couched in the negative in that the Act does not apply to construction work carried outside New South Wales, it is essentially similar in spirit and meaning to Section 2 of CIPAA;
- (iii) what is important to be determined is where the construction work is carried out so as to see if the claim can be entertained under CIPAA;

- (iv) in determining where the construction work had taken place, the Supreme Court of New South Wales went through the contract between Olympia and Hansen Yuncken and found at paragraphs 26 and 27 that:

"[26] In order to comply with its obligations under its contract, Olympia engaged a number of subcontractors. The work performed by the subcontractors included piling, structural steelwork, carpentry and joinery. The claim that was the subject of the adjudication application included amounts payable to those subcontractors, among others. The relevant subcontractors are based in New South Wales and a substantial amount of the work they did in order to meet their obligations under the subcontracts was performed in New South Wales.

[27] In my opinion, the contract between Olympia and Hansen Yuncken dealt with construction work outside New South Wales or at least with related goods and services supplied in respect of that construction work. Under the contract, Olympia was to refurbish a building in the Jervis Bay Territory. Necessarily, the work had to be performed in that territory. **The fact that goods were sourced in New South Wales and work was carried out in New South Wales in connection with the contract does not mean that the contract between Olympia and Hansen Yuncken dealt with construction work in New South Wales. At most, all that could be said was that the contract for the construction work dealt with related goods and services which were supplied in New South Wales because the contract left it open -- or, indeed, given the location of the Jervis Bay Territory, contemplated -- that goods and services of that description would be supplied.** The goods and services actually supplied in New South Wales were related goods and services to construction work carried on in the Jervis Bay Territory because the goods and services consisted of materials and components which formed part of the work on the Geelong building or the provision of labour in connection with the fabrication of those materials and components. The SOP Act does not apply to those related goods and services by reason of s 7(4)(b) of the Act." (emphasis added)

[97] However our definition of "construction work" though similar to the New South Wales' BCISPA is not the same. Their section 5 is reproduced below:

"5 Definition of "construction work"

- (1) In this Act, **construction work** means any of the following work:
- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
 - (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,
 - (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,
 - (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,
 - (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:
 - (i) site clearance, earth-moving, excavation, tunnelling and boring, and
 - (ii) the laying of foundations, and
 - (iii) the erection, maintenance or dismantling of scaffolding, and
 - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
 - (v) site restoration, landscaping and the provision of roadways and other access works,
 - (f) the painting or decorating of the internal or external surfaces of any building, structure or works,
 - (g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

- (2) Despite subsection (1), **construction work does not include any of the following work:**
- (a) **the drilling for, or extraction of, oil or natural gas,**
 - (b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,
 - (c) any other work of a kind prescribed by the regulations for the purposes of this subsection." (emphasis added)

[98] As one can see the marked difference is that oil and gas work have been specifically excluded and there is also expressly stated in section 7(4)(b) that their Act does not apply to related goods and services supplied in respect of construction work carried out outside New South Wales. In that sense their understanding of procurement of construction material and equipment is different from that under our CIPAA.

[99] Learned counsel for the Plaintiff referred to the English case of *Staveley Industries Plc (t/a EI WHS) v Odebrecht Oil & Gas Services Ltd* [2001] Adj. LR. 02/28 from their Technology and Construction Court where there was an application filed by Odebrecht and Staveley on whether the "design, engineering, procurement, supply, delivery to site, installation testing and commissioning of instrumentation, fire and gas, electrical and telecommunications equipment" which was constructed in River Tee, England and to be installed to a module (living quarters) for an oil and gas rig located in the Bay of Campeche, Gulf of Mexico are subjected to the provisions of the UK Housing Grants Construction and Regeneration Act 1996 ("HGCRA"). The application was pursuant to section 104(6)(b) and section 105(1)(c) of HGCRA relating to the following issues:

- (a) whether the construction operation of the module was carried out in England, Wales or Scotland (S.104(6)(b) HGCRA); and
- (b) whether the construction operation of the module forms a part of the land (S.105(1)(c) HGCRA).

[100] Learned counsel for the Plaintiff submitted that the case is illustrative of the application of territorial issue with respect to where the work was done. Section 104(6)(b) provides that:

"(6) This Part applies only to construction contract which-

- (a) are entered into after the commencement of this Part and;
- (b) relate to **carrying out of construction operations in England, Wales or Scotland.**" (emphasis added).

[101] It would be fair to say that Section 104(6)(b) of HGCRA states that the HGCRA does not apply to construction operation carried outside England, Wales or Scotland. It is essentially similar in spirit and meaning to section 2 of the CIPAA. In determining where the construction work had taken place, the High Court of England and Wales held as follows:

"As to point (2), the operations I have just mentioned do not fall within the Act unless they are carried out in England, Wales or Scotland, by virtue of provisions of Section 106(6)(b) of the Act. **Thus the completed building or structures must be in England, Wales or Scotland.** That suggests that the same applies to structures that are to form part of the land." (emphasis added)

[102] I have no quibble with the approach taken in UK with respect to whether the construction work was carried out within England, Wales or Scotland.

[103] However we must not forget that their section 5 of the HGCRA has defined "construction operations" differently from our "construction work" as follows:

"105 Meaning of "construction operations".

- (1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions--
- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
 - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
 - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
 - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
 - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
 - (f) painting or decorating the internal or external surfaces of any building or structure.
- (2) The **following operations are not construction operations** within the meaning of this Part--
- (a) **drilling for, or extraction of, oil or natural gas;**
 - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
 - (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is--
 - (i) nuclear processing, power generation, or water or effluent treatment, or
 - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
 - (d) **manufacture or delivery to site of--**
 - (i) **building or engineering components or equipment,**
 - (ii) **materials, plant or machinery, or**
 - (iii) **components** for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;
 - (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.
- (3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.
- (4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament."

(emphasis added)

[104] One notable difference in the main definition of "construction operations" is the absence of a definition to include any "gas, oil, petrochemical" work. There is also a different definition with respect to our inclusive proviso of procurement of "construction material, equipment" that have discussed extensively in this judgment. In fact by their section 105(2)(d) they have excluded such a contract for procurement **"except under a contract which also provides for their installation."**

[105] As was observed by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 8 AMR 167:

"80. It is to be noted that after a review of the legislation in the other jurisdictions, **the scheme in each jurisdiction is different.**" (emphasis added)

[106] Therefore the cases from other jurisdictions cannot be analogously applied without considering the actual provision in question.

Pronouncement

[107] For all the reasons given above I had dismissed the Plaintiff's Setting Aside Application with costs of RM10,000.00.

[108] In the light of the above decision, learned counsel for the Defendant withdrew the Originating Summons for the Enforcement Application as she cannot proceed any further at this juncture because of the Restraining Order pursuant to the Plaintiff's restructuring scheme with its creditors, which has a maximum extension of 3 months each time when granted by the Court and which is anticipated to expire only in February 2018.

[109] The withdrawal is with no order as to costs and with liberty to file afresh once the Restraining Order has expired and with no prejudice to the Defendant/Claimant's rights under section 28 of the CIPAA for enforcement of the Adjudication Decision.

[110] So the Originating Summons for the Enforcement of the Adjudication Decision was struck out.