

AIAC CIPAA CIRCULAR 09

CIRCULAR ON THE CALCULATION OF WORKING DAYS UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

Since the commencement of the *Construction Industry Payment and Adjudication Act 2012* (the "CIPAA") on 15th April 2014, a number of landmark judicial decisions have been made which have had an impact on the AIAC's administration of adjudication proceedings. One of these decisions was addressed in AIAC CIPAA Circular 1B. The purpose of this circular is to explain the impact of the High Court's decisions in *Skyworld Development Sdn Bhd v Zalam Corporation Sdn Bhd and Other Appeals* [2019] MLJU 162 ("*Skyworld*") and *Encorp Iskandar Development Sdn Bhd v Konsortium Ipmines Merz Sdn Bhd and another summons* [2020] MLJU 1503 ("*Encorp*"), on the AIAC's calculation of "working days" in adjudication proceedings.

Meaning of "Working Days" under the CIPAA

In *Skyworld*, the High Court held that a "working day", for the purpose of the service of documents under the CIPAA, "means a day of 24 hours and anything done within any time on that day is considered done on that day". This is, of course, unless the parties and the adjudicator have expressly agreed that a "working day" ceases at a specific point in time i.e. at 6:00 p.m. on a weekday at the project site location.

In *Encorp*, however, the High Court held that "working day" is calculated with reference to the adjudicator's place of work as opposed to site where the project is located. This departs from the decision in *Skyworld* which still considered "working day" to relate to the site where the project is located, in accordance with Section 4 of the CIPAA.

In calculating deadlines under the CIPAA, including the deadline for the delivery of the adjudication decision, the AIAC will follow the statutory definition provided for in the CIPAA viz, Section 4 and the interpretation taken in the *Skyworld* decision until a decision by a higher court is delivered on this issue. Regardless, the onus is on adjudicators to ensure that the adjudication decision is delivered within the timeframe stipulated in the CIPAA.

Lodgement of Appointment Requests with the AIAC

Parties are also to note that the *Skyworld* decision does not impact the date of receipt of the Request to the Director of the AIAC to appoint an adjudicator (Form 5) by the AIAC, which is regulated by Rule 3(2)(d) of the AIAC Adjudication Rules and Procedure. Specifically, this provision states that appointment requests are to be lodged with the AIAC between 8:30 am and 4:00 p.m. from Monday to Friday (except public holidays), and 9:00 a.m. to 12:00 p.m. on the eve of public holidays. Any documents lodged with the AIAC after these hours shall be considered to have been lodged the next working day.

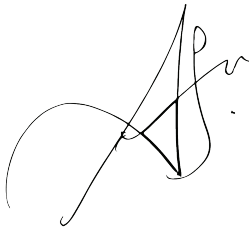
Nevertheless, in acting on the appointment request within 5 working days, as specified in Section 23(1) of the CIPAA, the Director is bound by the *Skyworld* decision.

Proof of Service

In order for the Director of the AIAC to act on any Notice to the Director of the AIAC to register the adjudication (Form 3A), or Request to the Director of the AIAC to appoint an adjudicator (Form 5), the AIAC needs to verify that the relevant timelines in the CIPAA have been complied with by the parties. This is particularly important in the context of the service of the Notice of Adjudication (Form 3) on the Respondent given that Section 7(2) of the CIPAA expressly stipulates that the right of a party to refer a dispute to adjudication only comes into existence only after the expiry of ten (10) working days from the date the Payment Claim (Form 1) is served on the non-paying party by the unpaid party. In determining "working days" in this context, the AIAC will once again defer to the position taken in the *Skyworld* decision.

For this purpose, alongside any such registration notices or appointment requests, the AIAC will require the relevant party to provide evidence that the relevant documents have been served on the other side in compliance with the CIPAA. Failure to provide the proof(s) of service upon the AIAC's request will result in a delay in registering the adjudication proceeding, and/or the Director being unable to act on a party's appointment request.

Dated this 1st January 2021.



Tan Sri Datuk Suriyadi Bin Halim Omar
Director