

AIAC CIPAA CIRCULAR NO 11

CIRCULAR ON THE SERVICES OF NOTICES AND DOCUMENTS UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

In serving as the sole administrative authority under the *Construction Industry Payment and Adjudication Act 2012* (the "CIPAA"), the AIAC is cognizant that there are several provisions therein relating to the service of notices and documents as well as timelines that necessitates clarification. One such provision is Section 38 of the CIPAA, which provides that the **service** of notices and/or documents in adjudication proceedings shall be effected by one of the following modes:

- (a) By delivering the notice or document personally to the party;
- (b) By leaving the notice or document at the usual place of business of the party during the normal business hours of that party;
- (c) By sending the notice or document to the usual or last-known place of business of the party by registered post; or
- (d) By any other means as agreed in writing by the parties.

It should be noted that the operation and application of Section 38 *vis-a-vis* the other provisions in the CIPAA pertaining to the services of notices and documents are of paramount importance. Where there are inconsistencies with the interpretation and application of the services of notices and documents, such may affect the validity and effectiveness of the proceedings as a whole.

In this vein and to provide some clarification regarding this issue, the AIAC sets out the following:

1) Section 38(c) of the CIPAA - Service by Registered Post

To aid in the interpretation of Section 38(c) of the CIPAA, the AIAC is guided by Section 12 of the Interpretation Acts 1948 and 1967 wherein "service by post" is defined as:

"Where a written law authorizes or requires a document to be served by post, then, until the contrary is proved, service - (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post."

This statutory provision was endorsed by the High Court in *Skyworld Development Sdn Bhd v. Zalam Corporation Sdn Bhd & Other Cases* [2019] MLJU 162 (the "Skyworld decision"). In view thereof, where the delivery of notices and/or documents in a CIPAA proceeding is made by registered post, it is presumed that the delivery has been effected when such notice and/or documents would have been delivered in its ordinary course, unless the presumption is rebutted.

For the avoidance of doubt, "delivered in its ordinary course" does not mean date of posting, but when the notices and/or documents would be received ordinarily depending on the location and distance between the sender and receiver. Accordingly, the onus is on

the sender of such notices and/or documents to ensure that a sufficient period of time is allocated within the operative CIPAA timelines to effect delivery where service by registered post is contemplated.

2) Sections 7 and 8 of the CIPAA - Initiation of Adjudication Proceedings

Section 7(2) of the CIPAA expressly stipulates that the right of a party to refer a dispute to adjudication only comes into existence after the expiry of ten (10) working days from the date the Unpaid Party's Payment Claim (Form 1) is received by the Non-Paying Party. Section 8(2) further refers to the receipt of the Notice of Adjudication (Form 3) by the Respondent. In both these provisions, references to the actual "receipt" of the Payment Claim and the Notice of Adjudication is clearly indicated. Therefore, the timeline only starts to run upon actual receipt of the notices or procedural documents by the receiving party.

3) Sections 22 & 23 of the CIPAA - Appointment and Acceptance

Both Section 22 and Section 23 of the CIPAA sets forth the provisions regarding the appointment of an adjudicator by the Parties or the Director of the AIAC, respectively, and the appointed adjudicator's subsequent acceptance. Under Section 22(1), the Claimant shall notify the adjudicator chosen to be appointed in writing along with the referenced Notice of Adjudication. Under Section 23(1), upon receipt of a request, the Director of the AIAC shall complete the appointment within five (5) working days. Following this, both provisions in Section 22(2) and Section 23(2) provide that the appointed adjudicator shall propose and negotiate his terms of appointment and shall within ten (10) working days from the date he was notified of his appointment, indicate his acceptance and terms of appointment.

In respect of the above, the AIAC is also cognizant that the Interpretation Acts 1948 and 1967 does not provide a definition for the word "indicate". Nonetheless, the word "indicate" is distinguishable from the word "deliver". As such, in the event registered post is the mode applied to "indicate" acceptance of the appointment, then Adjudicators are referred to Section 38(c) of the CIPAA, read together with Section 12 of the Interpretation Acts 1948 and 1967 i.e. good service of the Form 6 is presumed to take place if delivered in the ordinary course within the ten (10) working days, unless the presumption is rebutted. Where other modes, such as email, are utilized to "indicate" acceptance of the appointment in addition to registered post, notwithstanding the absence of agreement between Parties for email to be an accepted mode of service, the AIAC shall treat the issuance of the email within the deadline as the Adjudicator's indication of acceptance of the appointment in the first instance.

The AIAC reiterates that the onus is on the Adjudicator to ensure that the Form 6 is issued within the time frame stipulated in the CIPAA.

4) Sections 9, 10 and 11 of the CIPAA - Service of Adjudication Claim, Adjudication Response and Adjudication Reply

Similar to Section 8(2) on the initiation of adjudication proceedings, the provisions in Sections 9, 10 and 11 refer to the "receipt" of the relevant notice and/or procedural documents before the next timeline in the proceeding becomes operative. As the language of the sections is clear, proof of receipt is required prior to confirming the deadline for the

service of the next procedural documents. To illustrate, actual receipt of the Notice of Acceptance of Appointment by the Adjudicator (Form 6) is required to calculate the deadline for the service of the Adjudication Claim (Form 7), the date of which will fall on the tenth working day following the date of receipt, pursuant to Section 9(1) of the CIPAA. Further, where Parties and the Adjudicator have agreed on e-mail as other means as agreed in writing for service of notices and/or documents pursuant to Section 38(d) of the CIPAA, then in the above example, the actual receipt of the email by the recipients containing the notices and/or documents shall be relevant in calculating the deadline for the service of subsequent notices and/or documents.

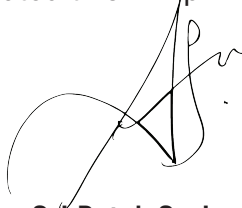
5) Section 12 of the CIPAA – Adjudication Decision

Section 12(2) of the CIPAA stipulates that the adjudicator shall decide the dispute and deliver the Adjudication Decision within forty-five (45) working days, from either the service of the Adjudication Response or Adjudication Reply or the expiry of the period to serve the Adjudication Response. Accordingly, the Adjudicator is required to confirm the date of actual receipt of the Adjudication Response (Form 8), or in absence thereof, to determine the expiry of the period for service of the Adjudication Response based on the date of service of the Adjudication Claim (Form 7) unto the Respondent, towards establishing the deadline for the adjudicator's delivery of the Adjudication Decision pursuant to Sections 12(2)(a) & 12(2)(b) of the CIPAA. The deadline for the Adjudication Decision may also be extended upon agreement by the Parties.

Although the Interpretation Acts 1948 and 1967 does not provide a definition for the phrase "deliver", the AIAC is guided by the interpretation taken in the *Skyworld* decision for the purposes of calculating the deadline for delivery of the Adjudication Decision upon the Parties pursuant to Section 12(2) of the CIPAA. Accordingly, in delivering the Adjudication Decision to the Parties, the AIAC is of the view that the Adjudicator should ensure that the Adjudication Decision is delivered to and received by the Parties within the 45 working days deadline. Where delivery of the Adjudication Decision is being effected by registered post, pursuant to Section 12 of the Interpretation Acts 1948 and 1967, it is presumed that the delivery has been effected when the Adjudication Decision would have been delivered in its ordinary course, unless the presumption is rebutted by the receiving Party. As such, and for added caution, the AIAC encourages Adjudicators to ensure Parties' receipt of the Adjudication Decision within the 45 working days deadline in satisfying the requirement for 'delivery' in Section 12(2) of the CIPAA.

It should also be noted that Section 12(2) must also be read in consonance with Section 12(3), which provides that an Adjudication Decision not made within the 45-day period is void. In view of this, the AIAC reiterates that the onus is on the Adjudicator to ensure that the Adjudication Decision is delivered within the time frame stipulated in the CIPAA.

Dated this 1st April 2022.



Tan Sri Datuk Suriyadi Bin Halim Omar
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