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Our deal experience includes major corporate and commercial transactions associated with or materially impacting social, economic and financial developments in Malaysia. We have also acted on some of the most difficult and complex cases in which the decisions have significantly shaped the laws of the country. Our clients range from government authorities and companies, conglomerates, financial institutions and multinational corporations to small and medium sized enterprises (SMEs), start-ups and private individuals.

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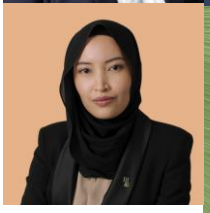

By Shariffullah Majeed and Nurul Aisyah Hassan

When faced with the issue of an arrest of an employee by the Malaysian Anti-Corruption Commission ("**MACC**"), employers must be cautious in handling such a delicate matter. It is pertinent to note that the criminal investigation of criminal charges levelled against an employee on their own cannot form a basis for an employer to commence disciplinary proceedings and take disciplinary actions against the employee.

This is particularly the case when an employer does not have any information on the grounds of the employee's arrest, nor any evidence of any offence being committed. In such situations, an employer would therefore not have any basis to frame a charge or conduct an inquiry into the employee's alleged wrongdoing.

Unfair to Dismiss on Mere Suspicion

In **Abdul Bakar Samsudin v Malaysia Airports Holdings Berhad**[1], the Industrial Court held that the dismissal of an employee merely following his arrest by the MACC was without just cause or excuse. In that case, the employer had proceeded to dismiss the employee on the ground that he had purportedly blemished the company's reputation due to his arrest by the MACC, which became the subject of news reports and the company's name being mentioned as his employer.

The Industrial Court found that the employer had failed to establish any ground of misconduct and mere suspicion by the employer that the employee might be abusing his position and accepting a donation as a form of bribery did not constitute fair dismissal. The learned Chairman in the above case referred to the fundamental right of presumption of innocence under Article **11** (**1**) of the Universal Declaration of Human Rights ("**UDHR**") and went on to explain as follows:

[59] *This basic principle of human rights is well stated in Article 11 (1) of the Universal Declaration of Human Rights (UDHR) which provides that:*

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

1 [2022] 2 LNS 1804

[60] *Based on the above provision of Article 11 (1) of UDHR, it is obvious that the presumption of innocence is a fundamental right of each and everyone of us. On the same breath, it is of the utmost importance to note that the presumption of innocence is essential in ensuring everyone is given a fair chance.*

[63] *In the present case, there is no dispute that, at the time of the dismissal, there was no Charge preferred against the Claimant in any Court of law. The Claimant was arrested by MACC based on a suspicion that the Claimant was involved in an act of corruption and according to the Company the arrest of the Claimant has caused the image of the Company being blemished. This Court is of the view that a mere suspicion alone without any cogent evidence does not justify a dismissal."*

The courts have consistently held that dismissing an employee pursuant to an arrest by the MACC is against public policy and it is not sufficient for the employer to state that its reputation had been blemished by the arrest without any proof that it is not merely their personal perception[2].

Internal Investigation

Thus, in determining whether an employer may commence disciplinary proceedings against an employee, an investigation is a necessary pre-requisite. The fact that an employer is required to act promptly on acts of misconduct ought not to compromise a full and detailed investigation being carried out in respect of any alleged acts of misconduct. This is of utmost importance as the employer should not appear to be acting hastily in prosecuting any employee without making a thorough investigation into the matter[3].

Once an employer has obtained information on the basis of the MACC arrest, the next step would be to conduct an internal investigation to determine whether there are indeed any irregularities or transgressions in transactions which the employee may have been apart of. In this regard, the

2 Abas Tuah v Malaysia Airports Holdings Berhad [2022] 4 ILR 288
3 Development & Commercial Bank Berhad v Michael Raman Shanmugam [1987] ILR 599

employer would need to refer to its internal policies and procedures in place, such as its code of ethics and procedures on management of misconduct.

The internal investigation should be carried out in a fair and proper manner by which the following procedures ought to at least be complied with:

(a) Recording statements from the relevant parties including outside sources, where relevant;

(b) Providing the relevant parties time and opportunity to respond to any questions or questionnaires prepared;

(c) Ensuring that the statements contain all the necessary information relating to the transaction under MACC investigation or any act of misconduct;

(d) Ensuring that the statements are verified and signed by the relevant parties; and

(e) Collating all necessary information and documentation that are relevant to the issue at hand including among others, relevant correspondence and reports.

In the event the internal investigation does not disclose any act of misconduct on the part of the employee, the employer would not have any ground to support the commencement of disciplinary proceedings against him. However, if the internal investigation does disclose a *prima facie* case against the employee, the report of the investigation would form the basis of the charges to be preferred the accused employee and the employer may then commence disciplinary proceedings.

Suspension of the Accused Employee

It is trite industrial relations principle that there is an implied right vested in employers to suspend an employee – so long as the suspension is with full pay and where necessary, such as to allow the employer to carry out investigation into allegations of the employee's misconduct[4].

Further, Section **14 (2)** of the Employment Act 1955 provides as follows:

"(2) For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld."

The burden is on the employer to prove that a suspension is necessary due to the exigencies of the case and thus, cannot simply be imposed on an employee at the employer's absolute discretion.

Instead, it may be invoked by the employer where there is a real, rather than imagined or speculative risk, that the process of the investigations would be prejudiced by the presence of the said employee.

In certain circumstances, employers must also bear in mind its own policies and procedures regarding suspension, and to act within the ambit provided

4 MBF Finance Berhad v Abd Aziz Hashim [1995] 2 ILR 753

under the same to avoid risking a breach of a term of the employee's contract of employment and giving rise to a claim of constructive dismissal.

Conclusion

To conclude, any ongoing investigations or proceedings in a criminal court brought by the MACC against an employee should not have any bearing on an employer's internal disciplinary process and affording due inquiry to the accused employee. In the case of **Zulkeflee Abdullah v Malaysia Airports Holdings Berhad**[5], the Industrial Court emphasised the need for employers to make proper enquiries into the alleged wrongdoing by the accused employee instead of acting hastily based on mere suspicion.

Conversely, even if the accused employee is found not guilty of the charges levelled against him at the criminal court, an employer's finding of guilt of the employee's misconduct internally, may still stand even if he is acquitted by the criminal court[6].

The Industrial Courts have consistently held that the acquittal of employees from criminal prosecutions have no bearing on unfair dismissal claims before the Industrial Court. The stance taken by the Industrial Courts is since the prosecution bears the burden of proving that the accused employee is guilty beyond all reasonable doubt, while an employer needs to prove on the balance of probabilities that it had just cause and excuse to dismiss the employee.

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5 [2021] 2 ILR 129
6 Akmal Hidayat Zamhari v BHIC Marine Technology Academy Sdn Bhd (Award No.: 480 of 2019), Colgate-Palmolive (M) Sdn Bhd v Yap Shyan Meng [2007] 2 ILR 313

Malaysian Construction Law And Practice: A Brief Overview

By Darshendev Singh and Chuck Siew Ka Wai

This article was written for the Malaysian Chapter of the *Chambers Construction Law 2023 Global Practice Guide*.

1.1 Governing Law

Generally, the Malaysian construction market is governed by laws of contract and tort. The laws are further developed through statutes and judicial decisions. Reference is also made to foreign judicial decisions and statutes as a guide. The principal statutes governing the construction market include:

- Contracts Act 1950;
- Construction Industry Payment & Adjudication Act 2012 (CIPAA);
- Federal Roads Act 1959;
- Street, Drainage and Building Act 1974;
- Town and Country Planning Act 1976;
- Highway Authority Malaysia (Incorporation) Act 1980;
- Uniform Building By-Laws 1984;
- Federal Roads (Private Management) Act 1984;
- Road Transport Act 1987;
- Earthworks (Federal Territory of Kuala Lumpur) By-Laws 1988;
- Occupational Safety and Health Act 1994;
- Construction Industry Development Board Act 1994; and
- Town Planners Act 1995

General

Standard forms of construction contract are widely used in Malaysia. However, they are not mandatory in nature. The various standard forms of construction contract are commonly produced by the following institutions:

- Malaysian Institute of Architects (Pertubuhan Akitek Malaysia) (PAM);
- Institute of Engineers, Malaysia (IEM);
- Construction Industry Development Board (CIDB);
- Malaysian Public Works Department (PWD); and
- Asian International Arbitration Centre (AIAC).

It is not uncommon for the standard forms of construction contract produced by PAM, IEM, CIBD, PWD or AIAC to be adopted by the parties. At times, it is not unusual for parties to adopt the FIDIC standard forms.

Private Sector Contracts

For works involving building contracts, it is not uncommon for parties to adopt the standard forms of

construction contract produced by PAM. Amongst others, the following forms are used.

• Between the employer and contractor:

(a) Agreement and Conditions of PAM Contract 2018 (With Quantities);
(b) Agreement and Conditions of PAM Contract 2018 (Without Quantities);
(c) Agreement and Conditions of PAM Contract 2006 (With Quantities);
(d) Agreement and Conditions of PAM Contract 2006 (Without Quantities).

• Between the contractor and subcontractor:

(a) Agreement and Conditions of PAM Sub Contract 2018;
(b) Agreement and Conditions of PAM Sub Contract 2006.

For works involving engineering projects, it is not uncommon for parties to adopt the standard forms of construction contract produced by IEM. Amongst others, the following forms are used:

Apart from IEM and PAM, the AIAC has also released its standard forms of construction contract:

• AIAC Standard Form of Building Contract (2019 Edition);
• AIAC Standard Form of Building Sub-Contract (2019 Edition);
• AIAC Standard Form of Minor Works Building Contract (2018 Edition);
• AIAC Standard Form of Design and Build Contract (2018 Edition);
• AIAC Standard Form of Sub-Contract for Design and Build Contract (2018 Edition).

Public Sector Contracts

For works involving public sector projects where the employer is a federal or state government, statutory body, or government-linked company, it is not uncommon for parties to adopt the standard forms of construction contract produced by PWD and CIBD.

For PWD

Where it is a build-only procurement model, amongst others the following PWD forms are used.

• Between the government (as employer) and contractor:

(a) Standard Form of Contract To Be Used where Bills of Quantities Form Part of the Contract, PWD Form 203A (Rev. 1/2010);
(b) Standard Form of Contract To Be Used Where Drawings and Specifications Form Part of the Contract, PWD Form 203 (Rev.1/2010).

• Between the contractor and the nominated subcontractor:

(c) Standard Form of Contract PWD Form 203N (Revised 1/2010) for Nominated Sub-Contractor Where the Main Contract Is Based Upon PWD Form 203 or 203A.

• Between the contractor and the nominated supplier:

(d) Standard Form of Contract PWD Form 203P (Revised 1/2010) for Nominated Suppliers Where the Main Contract Is Based Upon PWD Form 203 or 203A.

Where it is a design and build procurement model, there is a separate PWD form that is used: the Standard Form of Design and Build Contract PWD Form DB (Rev. 1/2010).

For CIDB

Amongst others, the following CIDB forms are used.

• Between the government (as employer) and contractor:

(a) CIDB Standard Form of Contract for Building Works (2000);
(b) Standard Terms of Construction Contract for Renovation and Small Projects (2015).

• Between contractor and nominated subcontractor:

(c) CIDB Standard Form of Contract for Nominated Sub-Contractor (2002).

• Between contractor and domestic subcontractor:

(d) Model Terms of Construction Contract between Contractor and Sub-Contractor (2007).

Parties

2.1 The Employer

General

Employers in construction projects are either public (which includes federal or state government, statutory bodies, and government-linked companies) or private (which includes public listed companies, private limited companies, joint ventures, partnerships) entities.

Rights and Obligations

Typically, the rights and obligations of the employer vary depending on the construction model being implemented in the construction project. There are two types of construction model, ie, the build-only model, or the design & build model.

Build-only model

Where the design is undertaken by the consultants engaged by the employer, the employer's obligations under a construction contract include providing a design which is fit for its purpose.

Design & build model

However, for a design & build model, the contractor is obliged to provide the necessary documents/drawings/designs in accordance with the employer's requirements.

Besides the above, the employer generally also has, amongst others, the following obligations:

• to make timely payment to the contractor under the construction contract;
• to co-ordinate the construction works through the contract administrator;
• not to obstruct the contractor from carrying out their works;
• to provide to the contractor necessary and reasonable access to the site; and
• to supply necessary information for the con tractor to carry out its obligations under the construction contract.

On the other hand, the employer generally has a right to timely completion of the works which are fit for its purpose and built to satisfactory quality.

Relationship Between the Employer and the Contractor, the Subcontractors and the Financiers

Generally, there is a contractual relationship between the employer and the contractor, and between the contractor and the subcontractors.

It is not uncommon for employers to appoint one main contractor who, in turn, appoints various subcontractors, be it nominated subcontractors and/or domestic subcontractors.

There may also be a separate contractual relationship between the employer, the contractor or the subcontractors on one hand and their respective financiers on the other hand.

Financiers are typically not parties to the construction contract between the employer and contractor, or between the contractor and the subcontractor.

However, financiers may have a separate agreement with the employer, contractor or subcontractor respectively to provide financial aid for the construction project.

2.2 The Contractor

General

Contractors In construction projects are generally private entities (which includes public listed companies, private limited companies, joint ventures, partnerships).

Rights and Obligations

Typically, the rights and obligations of the contractor vary depending on the construction model being implemented in the construction project. There are two types of construction model: the build-only model, or the design & build model.

Build-only model

Where the design is undertaken by consultants engaged by the employer, the contractor is obliged to carry out and complete the construction works based on the design provided.

Design & build model

However, for a design & build model, the contractor is obliged to provide the necessary documents/drawings/designs in accordance with the employer's requirements.

Besides the above, the contractor generally also has, amongst others, the following obligations:

- to complete the works regularly, diligently, and in a good workmanlike and timely manner which are fit for its purpose;
- not to obstruct works/trades by other subcontractors;
- to use materials of satisfactory quality;
- to exercise reasonable skill, care and diligence in performing their obligations to ensure the works are in compliance with the construction contract and specifications;
- to ensure sufficient manpower to execute and/or complete the works;
- to ensure timely delivery of equipment and materials to the construction site; and
- to ensure timely payment of its subcontract tors and/or suppliers.

On the other hand, the contractor generally has a right to timely payment by the employer.

Relationship Between the Contractor, the Employer, the Subcontractors and the Financiers

See 2.1 The Employer (Relationship Between the Employer and the Contractor, the Subcontractor and the Financiers).

2.3 The Subcontractors

General

Subcontractors in construction projects are private entities (which includes public listed companies, private limited companies, joint ventures, partnerships). Generally, subcontractors are engaged for a certain and specialised type of work such as mechanical, electrical, civil & structural, plumbing works, etc.

Rights and Obligations

Typically, the rights and obligations of the subcontractor are dictated based on the scope of works under the subcontract between the main

contractor and subcontractor. The scope of works of a subcontractor do not usually go beyond the scope of works of the main contractor.

Relationship Between the Subcontractors, the Employer, the Contractor and the Financiers

Generally, the main contractor would engage a subcontractor either:

• at its own choice, in which case the subcontractor is commonly referred to as a domestic subcontractor; and/or
• upon the nomination of the employer or the contract administrator, in which case the subcontractor is commonly referred to as a nominated subcontractor. There would normally exist no contractual relationship between the employer and the nominated subcontractor.

Financiers are typically not parties to the construction contract between the contractor and the subcontractor. However, financiers may have a separate agreement with the contractor or subcontractor to provide financial aid for the construction project.

2.4 The Financiers

General

Financiers in construction projects are typically licensed banks/financial institutions. However, there are also construction projects which are self-funded, or funded by other private entities/ individuals.

Rights and Obligations

Typically, financiers do not have express rights under the construction contract as they are not a party to the construction contract. However, in most standard forms of construction contract, there are provisions included giving the employ er the right to assign to its financial institution the employer's rights, interests or benefits under the construction contract. On the other hand, the contractors are usually given the right to assign any payment due or to become due under the construction contract to its financial institution.

Relationship Between the Financiers, the Employer, the Contractor and the Subcontractors

It is not uncommon for the financiers to be required to provide performance bonds in the form of bank guarantees, parent company guarantees, or advanced payment guarantees to the employer, at the request of the contractor.

3. Works

3.1 Scope

Generally, the scope of works in a construction contract is determined, amongst others, by the following contractual documents:

• letter of award;
• bill of quantities;
• agreements and conditions of contract;
• tender documents; and
• drawings and specifications.

3.2 Variations

Scope for Variation

Generally, it is not uncommon for standard forms of construction contract to set out the circumstances which amount to a variation. The variation

may be an addition, alteration or omission to the contractor's original scope of works. Usually, the contract administrator such as the architect or superintending officer will issue an instruction (which dictates the scope of variation) to the contractor. Such instruction is commonly known as a variation order.

Some examples of what amounts to variation based on the standard forms of construction contract include:

- changes to the design or specifications;
- unforeseen site conditions;
- changes in the employer's requirements; and
- delays caused by external factors.

A variation may give rise to either time or money implication. If there is time implication, it would give rise to an adjustment to the completion date typically by way of an extension of time. If there is money implication, it would give rise to an adjustment to the contract price. In addition, it is not uncommon for standard forms of construction contract to contain provisions which entitle the contractor to loss and expense arising from an extension of time.

Price for Variation

Generally, the price for variation is determined according to the contractual provisions dealing with the manner in which a variation is valued. In other words, the method of valuation may differ from one construction contract to another. Some of the common contractual valuation methods used to determine the value of variation include the following.

- *Work of similar character and executed under similar conditions* – stipulated price or rate in the construction contract should be used for valuation.
- *Work of not similar character but executed under similar conditions or similar character but not executed under similar conditions* – price or rate stated in the construction
contract shall be the basis of valuation, with a "fair adjustment".
- *Work of not similar character and not executed under similar conditions* – the valuation shall be at a fair market rate and price.
- *Work cannot properly be measured and valued* – the valuation shall be measured on a "daywork rates" basis.

In absence of a contractual provision dealing with the price for variation, it is not uncommon for a variation to be valued, amongst others, based on the following methods.

- *Section 36 CIPAA:*

(a) it would be based on fees prescribed by the relevant regulatory board under any written law; or
(b) if there are no prescribed fees, it would be based on fair and reasonable prices or rates prevailing in the construction industry at the time of carrying out the construction work.

However, CIPAA would only apply to construction-related works which fall within the ambit of Section 4 CIPAA.

- *Quantum meruit*:

(c) the principle of quantum meruit is enshrined in Section 71 Contracts Act 1950, which allows the contractor to recover a reasonable value for the variation related works or services rendered.

- *Settlement discussion*:

(d) parties are at liberty to discuss and agree on the price for the variations.

Time-Related Costs

If the variation causes delay to the contractor's works which in turn caused losses to the contractor, generally the contractor could apply for an extension of time and loss and expense arising therefrom.

3.3 Design

Build-Only Model

Under a build-only procurement model, the consultants (such as engineers, designers, architects) engaged by the employer are responsible for the design of the construction works in a construction project. The contractor is obliged to carry out the construction works as designed by the consultants and as stated in the contract documents.

Design & Build Model

In a design & build procurement model, the contractor bears the responsibility to design and carry out the construction works. This includes not only preparing the proposed design of the works but also making changes to it as may be necessary so that the construction works are fit for their purpose.

3.4 Construction

It is not uncommon that the employer is not involved in carrying out the construction works but plays a more supervisory and/or supporting role through its consultants. On the other hand, the contractor is tasked to carry out the construction works based on the design provided by the employer's consultants in a build-only model, or to design and carry out the construction works in a design & build model. The subcontractors are engaged for a certain and specialised type of work such as mechanical, electrical, civil & structural, plumbing works, etc.

3.5 Site Access

Generally, in standard forms of construction contract, the contractor bears the risks and responsibility for the site condition from the time the employer hands over site access to the contractor, unless otherwise stated in the construction contract or law. This is also consistent with the common law principle that the responsibility of site conditions falls on the contractor.

Pollution

Generally, both the employer and contractor would need to comply with the Environmental Quality Act 1974, which prohibits pollution in Malaysia. The employer may bear the risk and responsibility in the event pollution arises from the construction site but would, in turn, be able to find its recourse against the contractor and/or subcontractor and/or whichever party was responsible for the pollution.

Underground Obstacles/Geotechnical Conditions

Most standard forms of construction contract provide that the contractor is obliged to inspect and examine the site and its surroundings to have satisfied itself as to the nature of the ground and subsoil, form and nature of the site. As such, the contractor would typically bear the risk of any underground obstacles/geotechnical conditions.

Archaeological Finds

Standard forms of construction contract may also provide that all fossils, antiquities and other objects of interest or value which are found on-site or in excavating the same shall become the property of the employer. Upon discovery of such objects, all necessary precautions to preserve the object in the exact position and condition as it was discovered should be taken and the contractor should immediately notify the

contract administrator to enable the latter to give further instructions regarding such discovery.

The National Heritage Act 2005 requires, amongst others, the contractor, employer or landowner who discovers any object that has cultural heritage significance at the project site, to notify such discovery to the Commissioner of Heritage, authorised officer or district officer.

3.6 Permits

For a development to take place, permits are required. Typically, the party responsible for the permits is the employer who would rely on the consultants including the architect. However, there can be instances where the employer by way of a construction contract places such responsibilities on the contractor. Failing to obtain necessary permits or breaching any permits can lead to, amongst others, a stop work order being issued by the relevant local authority. The permits required for a building construction are generally governed by, amongst others, the Street, Drainage and Building Act 1974 and its by-laws.

3.7 Maintenance

Generally, construction contracts provide that the contractor bears the responsibility for maintenance, safety and protection of the works, construction materials and equipment on-site, including those of the subcontractors during the currency of the works. Further, in some standard form construction contracts, the contractor may be required to maintain the works for a period of 24 months from the date of practical completion of the works (post-completion). It is also not uncommon for a separate maintenance contract to be entered into between the employer and the contractor/third party to maintain the development post completion.

3.8 Other Functions

Generally, the employer does not instruct the contractor or third parties on their internal operation and finance aspects of the construction process.

3.9 Tests

Generally, the responsibility of testing falls upon the contractor. Standard forms of construction contract may provide that the contractor is to carry out testing upon completion of the works as it may be one of the pre-conditions required to achieve practical completion. The typical process for the tests for completion of the works is as follows.

- The contractor is required to give notice to the contract administrator, who shall fix a time for carrying out such test within 14 days upon receipt of the contractor's notice.
- The contractor may proceed to carry out the said test should the contract administrator fail to fix a time within 14 days after the receipt of notice and/or fail to attend the test.
- Thereafter, the contractor is obliged to provide the test reports to the contract administrator.
- The contractor shall bear its own cost and expense such as labour, materials, power, fuel, water, consumables and apparatus as may be required in carrying out the test, which ought to have been priced for in the contract sum.
- If any part of the work fails the test, the con tractor is required to redo the test at its own cost and expense within a reasonable time until successful completion of the test.

3.10 Completion, Takeover, Delivery

Generally, upon the construction works being completed, the contractor will notify the contract administrator to inspect the works together with the contractor, employer and other consultants. If the contract administrator is satisfied that the contractor's works have achieved practical completion in accordance with the construction contract, the contract administrator shall issue a certificate known as a certificate of practical completion (CPC).

The CPC states the date on which the contractor has achieved practical completion and upon which the construction works are delivered and taken possession by the employer. Upon the CPC being issued, the defects liability period of the construction contract shall commence. Generally, the duration of the defects liability period would be between 12 and 24 months. In most standard forms of construction contract, it would also entitle the contractor to release of the first moiety of retention sum by the employer.

3.11 Defects and Defects Liability Period

Generally, the duration of the defects liability period (DLP) varies depending on the standard form of construction contract, which range from 12 to 24 months. The contractor is liable and obliged to make good patent defects identified during the DLP.

Typically, the contract administrator would issue a schedule of defects during the DLP period for the contractor to make good the defects. If the contractor fails to satisfactorily make good the defects within the stipulated time in the construction contract, the employer may decide to make good the defects by themselves or engage a third-party contractor. The employer may then back charge the contractor for additional costs and/or set off the additional costs for making good defects against any monies owed to the contractor including the second moiety of retention sum and performance bond.

Upon expiry of the DLP and provided all defects identified have been made good by the con tractor (or the employer or third party), the contract administrator issues a certificate of making good defects (CMGD). The issuance of the CMGD would usually entitle the

contractor to the release of the second moiety of retention sum by the employer.

After CMGD has been issued, the employer's right to sue for defects lies in an action for breach of contract and/or tort subject to statutory limitation of up to 15 years. This is typically confined to latent defects not reasonably dis coverable during DLP.

4. Price

4.1 Contract Price

In practice, the general method of establishing the contract price of a construction contract is, amongst others, as follows.

• *Lump sum contracts* – The contractor agrees to carry out every task outlined in a construction contract in exchange for a fixed sum of money paid by the employer to the contractor.

• *Measure and value contracts* – The contract sum is an estimate which is subjected to measurement and valuation during the currency of the construction contract or after completion, and payment to the contractor is in accordance with an agreed price mechanism or formula agreed by both the employer and the contractor.

In rare circumstances involving contracts of emergency in nature or those involving uncertainties, the contract price may be determined based on cost reimbursement contracts where the contractor receives actual cost plus a fee to cover his overheads and profits.

Construction contracts may provide for milestone payments, which will be explained in **4.2 Payment**.

4.2 Payment

Interim Payment

Most standard forms of construction contract provide a mechanism for interim payment. The contractors will submit a monthly progress claim to the contract administrator, who will then inspect the works on-site and assess such claim during the currency of the work. The contract administrator would then issue an interim certificate, which states the amount due by the employer to the contractor. The employer is obliged to make payment based on the interim certificates. The interim certificates are only estimates of work done and may be adjusted at the final account stage. This relieves the contractor's cash flow.

Milestone Payment

Milestone payment involves the employer effecting payment progressively upon the contractor's completion of various defined stages of works. It is usually used in "package deal" types of construction contract such as professional services, consultancy, mechanical and electrical, supply contracts and construction contracts involving repetitive work and also minor lump sum contracts.

Advance Payment

Some construction contracts provide that the employer must effect payment in advance of the actual execution of works provided certain pre-conditions of the construction contract are met. The employer can either pay the entire contract sum or a predetermined sum (usually 25% to 30% of the contract sum) to the contractor. In practice, advance payment is applied in small lump sum construction contracts to assist the contractor with cash flow or where the employer's creditworthiness is in serious doubt.

Delayed Payment

Generally, most construction contracts

provide for late payment interest/financing charges in the event the contractor does not receive timely payment under the construction contract. If the construction contract is silent on it, Section 11 Civil Law Act 1956 empowers the Malaysian Courts to award pre-judgment interest and post judgment interest.

4.3 Invoicing

Generally, once an interim certificate is issued by the contract administrator (see **4.2 Payment**), it is not an uncommon practice in the Malaysian construction industry for contractors to issue an invoice for the amount stated in the interim certificate plus government tax to seek payment.

5. Time

5.1 Planning Programme

It is not uncommon in standard forms of construction contract that contractors are required to submit their work programme and/or method statement for carrying out the construction works within a stipulated timeframe, to the con tract administrator for approval.

The work programme would show the sequence in which the contractor proposes to carry out the works and the detailed activities of the works. The method statement would show the arrangements or methods of construction that the contractor wishes to adopt. The work programmes (although not binding) may be used by the contract administrator as a benchmark to monitor and measure the contractor's progress of the construction works and as a basis to assess the contractor's delay and contractor's application for extension of time.

In the event the contractor's progress of works does not meet the approved work programme, the contractor may be required by the contract administrator to revise the work programme and to implement measures (such as increasing manpower or accelerating works) to ensure that their works are completed on time. (See also **4.2 Payment**.)

5.2 Delays

General

Generally, delays may be caused by either the employer, the contractor, a third party or external factors. It is also not uncommon for there to be concurrent delays in a construction project. In other words, there could be a scenario where there are two or more causes of delay overlapping each other, with some being due to the employer's act of prevention and the other due to the contractor. In such a situation, the Malaysian courts generally are more inclined to decide that the contractor is entitled to an extension of time despite there being two or more effective causes of delay. However, the parties to a construction contract may negotiate and agree on provisions governing concurrent delays.

Time-Related Costs

For the employer

If the contractor fails to complete the works by the contractual or revised date of completion, the contract administrator may issue a certificate of non completion (CNC) to certify that the works have not been completed at that specific date. The issuance of the CNC triggers the employer's contractual right to claim for liquidated ascertained damages (LAD) for delay in completing the works on time. The construction contract would provide the amount of LAD per day and the LAD would run from the date of the CNC until the works are completed or until the construction contract is terminated.

For the contractor

If the employer fails to make payment furnish construction drawings to the contractor in a timely manner, the contractor may be entitled to claim for late payment interest, and loss and expense attributed to the delay caused by the employer.

5.3 Remedies in the Event of Delays

See **5.2 Delays**. In addition, if the contractor's works are delayed, the employer may also have the option of terminating the construction contract provided that the pre-conditions for termination are strictly complied with. Usually, the employer would issue a notice of default to the other party to remedy the default within a stipulated

time (usually 14 days). If the party fails to remedy the default, the party may proceed to terminate the construction contract and claim for damages. It is also not uncommon for a standard form construction contract to include a term that the right to terminate is not to be exercised unreasonably and/or vexatiously.

Subsequent to termination, the employer may take the necessary steps to engage a third-party contractor to complete the works and rectify any defects. The employer may back charge the contractor for additional costs and/or set off the additional costs for engaging a third-party contractor against any monies owed to the contractor including from the second moiety of retention sum and performance bond.

5.4 Extension of Time

Generally, when the contractor is delayed in its works due to an occurrence under a "relevant event" in the construction contract, the contractor may be entitled to an extension of time. However, the contractor would usually have to submit a notice and thereafter necessary details and particulars within the time stipulated in the construction contract. In the event that the contractor fails to comply with these pre-conditions, it is not uncommon for the construction contract to stipulate that the contractor is deemed to have waived its entitlement to any extension of time.

The "relevant event" in a construction contract can typically be classified under two categories, which include the following.

• Acts of prevention:

(a) delay in site possession;
(b) b) late supply of information, drawings, instructions, materials, etc, by the employer;
(c) execution of work not forming part of the construction contract; and
(d) other acts of prevention expressly permitted by the conditions of contract.

• Neutral events:

(a) force majeure;
(b) exceptionally inclement/adverse weather;
(c) civil commotion, strikes, lockouts industrial action, embargoes, etc; and
(d) loss/damage to the works occasioned by specified perils or contingencies.

If an extension of time is justified under the construction contract, the contract administrator will have to grant a reasonable extension of time for the contractor to complete the works.

Where the contract administrator fails to properly or at all or in a timely manner assess the extension of time application, an argument may be made that time has been set at large for the contractor to complete the works within a reasonable time.

5.5 Force Majeure

General

Force majeure is a creature of contract. Unless the standard form of construction contract provides for a force majeure clause, it will not be implied into the construction contract.

What constitutes a force majeure event is dependent on the wording and interpretation of the force majeure clause. Events which are not stipulated in the force majeure clause are not recognised as a force majeure event. Hence, it is important for parties to make sure that the force majeure clauses are drafted in a proper manner to take into account of any force majeure events within the contemplation of parties.

Examples of force majeure events include any circumstances beyond the control of the contractor, caused by war, riot, disorder, terrorist attack, governmental or regulatory action, epidemics, nuclear explosion, radioactive or chemical contamination (unless caused by the negligence act, omission or default of the contractor, its agents, or personnel) and natural disasters.

Consequences of Force Majeure

The typical legal and contractual consequence of a force majeure event would be dependent on what parties have agreed in the construction contracts. Such consequences include the following.

• Party (or parties) is relieved from its obligation to perform the construction contract until the force majeure event no longer prevents, hinders or delays the performance of the contractor's works. When a party is relieved from performing its contractual obligations due to a force majeure event, the other party is not entitled to claim damages or specific performance of the construction contract.

• Party (or parties) is required to mitigate the effects of the force majeure event despite the party relying on the force majeure clause being relieved from performing its contractual obligations.

• It is also not uncommon for some force majeure clauses to give rights to either or both parties to terminate the construction contract in the event the force majeure event has been prolonged for a certain period of time (unless provided otherwise).

5.6 Unforeseen Circumstances

Generally, unforeseen circumstances which are not under a construction contract are known as a frustrating event. Some examples which constitute a frustration recognised by the Malaysian courts include:

• destruction of the subject matter;
• outbreak of war;
• non-occurrence of a particular event;
• death or incapacity for personal services;
• change of circumstances; and
• statutory prohibitions.

Where a construction contract becomes impossible to perform or otherwise frustrated, the construction contract automatically comes to an end and/or becomes void pursuant to Section 57(2) Contracts Act 1950.

The rights and entitlement of a party in the event of a frustrated construction contract include the following.

• Section 66 Contracts Act 1950 – Where the construction contract is discovered to be void, any party who has received any advantage under the agreement from the other party is bound to restore it, or to make compensation for it, to the persons from whom it was received.

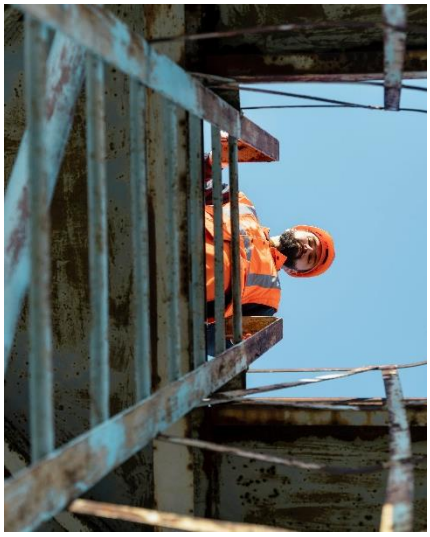
• Section 15(2) Civil Law Act 1956 – If a construction contract is discharged and there are sums paid by a party to the other, the party is entitled to recover from the other party the sum so paid, provided that, if the party who received the payment had incurred expenses before the discharge of the construction contract, the Malaysian court may, if it considers it just to do so having regard to all the circumstances of the case, allow the party to retain/recover the whole or part of the expenses so incurred.

• Section 15(3) Civil Law Act 1956 Where a party obtained from the other party a valuable benefit (other than payment of money to which Section 15(2) Civil Law Act will apply) before the time of discharge of the construction contract, the other party may recover the value of the said benefit as the Malaysian court considers just, having regard to all the following:

(a) the amount of any expenses incurred before the time of discharge by the party who benefited from the performance of the construction contract, including any sums paid by the party to any other party; and
(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the construction contract.

5.7 Disruption

Most construction contracts do not deal expressly with disruption as a form of



remedy. However, claims for disruption may be regarded as a loss and expense claim under a construction contract.

Alternatively, the contractor is still able to claim for disruption costs under Section 74 Contracts Act if the employer breaches the construction contract. The contractor would need to establish the nexus between the cause of the disruption and the effect it would have on the contractor. This is also consistent with the Society of Construction Law Delay and Disruption Protocol: October 2002 at paragraph 1.19.4.

Further, in the event that there is a disruption, the contractor may be able to apply for an extension of time under the relevant provisions of the construction contract.

6. Liability

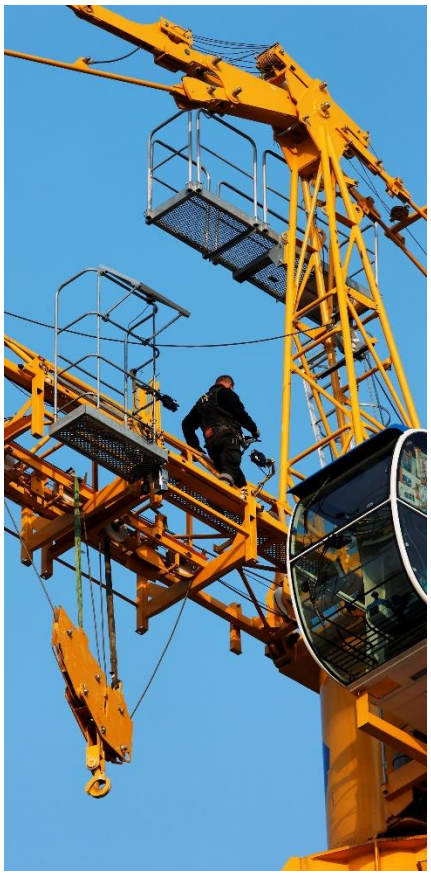
6.1 Exclusion of Liability

Exclusion of liability clauses are not uncommon in construction contracts in Malaysia. However, an argument maybe made that, pursuant to Section 29 Contracts Act 1950, a provision which imposes an absolute restriction against any liability is void to that extent. In fact, Section 29 Contracts Act 1950 reads: "Every agreement, by which any

party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

Exclusion of liability clauses are construed strictly against the party who intends to rely on them, under the contra proferentum rule. If the terms of the exclusion of liability clause are drafted widely so as to raise absurdity, or defeat the main object of the construction contract, such clause would not be upheld by the court.

Further, it is not an excuse for a party relying on the exclusion of liability clause to merely raise it. The party relying on the said exclusion of liability clause bears the burden of proof that the damage was not due to their own negligence and misconduct. The party must still show that they have exercised due diligence and care.



6.2 Wilful Misconduct and Gross Negligence

The concepts of wilful misconduct and gross negligence are common law concepts which have been interpreted by the courts in Malaysia as "a knowingly wrongful action or failure to act or some act or failure to act that was done with reckless carelessness". However, the mere fact that a party has breached a construction contract does not automatically suggest that the said party is guilty of wilful misconduct or gross negligence. It must be viewed as a whole, taking into account all facts and circumstances.

6.3 Limitation of Liability

It is not uncommon for standard forms of construction contract in Malaysia to limit liabilities. Some examples of the said limitation of liability include:

- LAD being capped up to a certain amount or percentage of the contract sum; and
- total liability of the contractor to the employer being capped equivalent to the contract sum.

7. Risk, Insurance and Securities

7.1 Indemnities

Most standard form construction contracts have express provisions requiring the contractor to indemnify the employer against third-party claims arising from the acts or omissions of the contractor. Typically, such indemnities include:

- actions, suits, claims, demands, etc, to which the employer may become liable arising from the acts of the contractor;
- personal injury or death of any person caused/contributed to by the carrying out of the works by the contractor;
- injury or damage to property caused by/contributed to by the carrying out of the works by the contractor; and
- claims by workmen employed by the contractor in and for the performance of the contract.

7.2 Guarantees

It is not uncommon in standard form construction contracts for guarantees to be provided by the parties. The requirement to provide guarantees is based on the contractual terms negotiated and agreed by the parties, and not based on any particular law.

Typically, the employer may be asked to submit a guarantee for payment to the contractor. Amongst others, this includes a parent company guarantee, bank guarantee, director's personal guarantee, etc. On the other hand, contractors may be required to submit performance bonds and advance payment bonds which are in the form of bank guarantees issued by the banks and parent company/directors personal guarantees, either conditional or unconditional.

The performance bond is issued in favour of the employer for a sum equivalent to a certain per centage (usually 5%) of the total contract sum. The performance bond would have to be maintained and kept valid until a certain time (eg, 12 months after the expiry of the DLP). In the event the performance bond expires before the completion of the works, the contractor would need to renew the performance bond; failing which, the employer may call on the performance bond or withhold an amount equivalent to the value of the performance bond. It is not uncommon

for standard form construction contracts to include provisions giving the employer the right to set off amounts due to the employer against the performance bond.

7.3 Insurance

It is not uncommon for contractors to be required to effect and maintain insurances, including the following.

• Insurance against liability of the contractors and subcontractors for personal injury or death to persons, damage to property, works, materials and goods from the date of site possession until the issuance of CMGD. Amongst others, such insurance policies include:

(a) contractor's all risk policy;
(b) erection all risk policy; and
(c) workmen's compensation insurance for foreign workers.

• Insurance covering all executed work, materials, and goods on-site against loss and damage by fire, lightning, explosion, storm, tempest, flood, ground subsistence, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil com motion, theft, etc.

7.4 Insolvency

It is common that most standard form construction contracts provide the right to automatic termination of the employment of the contractor or employer in the event of insolvency.

7.5 Risk Sharing

It is not uncommon for risks to be allocated between parties in a construction contract. However, the responsibilities of both the employer and contractor in construction contracts are dependent on the complexity of the construction contract and whether heavy reliance is placed on the contractor's expertise and knowledge for the particular job.

However, there are certain risks which are generally shared between the employer and the contractor. These include risks relating to:

• pollution;
• delay caused by force majeure event (unless provided otherwise in the construction contract);
• safety and health; and
• fluctuation of material costs.

8. Contract Administration and Claims

8.1 Personnel

The personnel who usually act as contract administrator in a construction project and assess the claims/extensions of time applications made by the contractor are usually the architect, super intending officers, engineers, project directors, etc, depending on the different terms used in the standard forms of construction contract.

Under the standard forms of construction contract, the contract administrator acts as:

• the certifier in exercising his independent and professional judgment when certifying the works, supervising the works on-site and assessing applications for extension of time; and
• agent of the employer, carrying out the employer's instructions and being the liaison between the employer and contractor.

8.2 Subcontracting

It is not uncommon for certain construction works to be subcontracted to a subcontractor due to the nature and specialised skills needed. Such specialised works include, amongst others, the following:

• mechanical works;
• electrical works;
• civil & structural works; and
• plumbing works.

(**See 2.3 The Subcontractors** (Relationship Between the Subcontractors, the Employer, the Contractor and the Financiers).)

It is not uncommon for standard forms of construction contract to contain provisions disallowing the contractor to subcontract its works unless with the consent of the employer; and that the contractor shall be responsible for the acts, defaults or neglect of its subcontractors for ensuring the subcontractors comply with the terms and conditions of the construction contract.

8.3 Intellectual Property

Most standard forms of construction contract provide for intellectual property provisions. However, intellectual property provisions may differ from one standard form to another.

Intellectual property provisions under the standard forms of construction contract include (among others):

- copyright, patent and all other proprietary rights whatsoever in the works and other material developed and supplied by the contractor pursuant to or under the construction contract shall vest in and shall be the sole property of the employer;
- the contractor is responsible for indemnifying the employer against all claims, proceedings, damages, costs, and expenses which may be brought by a third party against the employer by reason of the contractor infringing or being held to have infringed any such intellectual property; and
- in some instances, where the contractor proposes any alternative design or matters of design are left to the contractor, the copyright and all other proprietary rights in that design shall belong to the contractor but the employ er shall be entitled to use the design for the completion, maintenance, repair and future extension of the works.

9. Remedies and Damages

9.1 Remedies

In the event of a breach of the construction contract, there are various remedies available for the parties to the contract.

For the Employer

If the contractor breaches a fundamental term, the employer can decide either to:

- continue with the construction contract while reserving its right to claim for any damages;

or

- accept the employer's breach of the construction contract, thereby bringing the construction contract to an end, and claim for damages.

As far as the contractor's remedies are concerned, the common remedies for the employer include:

- LAD;
- additional cost to remedy the defects of the construction works and/or to continue and complete the construction works;
- deduct any sums due and owing to the employer, from the retention sum withheld by the employer;
- demand on the performance bond; and
- damages.

For the Contractor

If the employer breaches a fundamental term, the contractor can decide either to:

- the sum of value of work done carried up to date of termination;
- variation;
- loss and expenses; and
- loss of profits.

9.2 Restricting Remedies

Generally, it is common practice in Malaysia for standard forms of construction contract to contain provisions which limit the remedies available to a party (see **6.1 Exclusion of Liability** and **6.3 Limitation of Liability**).

9.3 Sole Remedy Clauses

Generally, standard forms of construction contract in the Malaysian construction market may have exclusion of liability and/or limitation of liability clauses (see **6.1 Exclusion of Liability** and **6.3 Limitation of Liability**).

9.4 Excluded Damages

See **6.3 Limitation of Liability**. Some standard forms of construction contract exclude claims for loss of profits and consequential losses.

9.5 Retention and Suspension Rights
Retention of Title Rights

Generally, construction contracts for the supply of building materials contain a retention of title clause where the title of unfixed goods and materials resides with the contractor and/or supplier until it has been paid for or brought at site.

Suspension Rights

It is not uncommon for standard forms of construction contract to contain provisions that allow suspension of works. This includes suspension of works both at the instruction of the employer or at the contractor's own volition.

The contractor is not allowed to suspend the construction works unless it is provided for in the construction contract. Such suspension rights of the contractor include those arising from a situation where the employer fails to make payment of certified sums to the contractor.

In the absence of a provision under the construction contract allowing for suspension of works, the contractor has an option to suspend works pursuant to Section 29 CIPAA which applies to a situation where the contractor succeeds in an adjudication proceeding against the employer, but the employer continues to not pay the contractor the adjudicated amount. Upon payment of the adjudicated amount, the contractor would have to resume works within ten working days. The contractor is entitled to claim for an extension of time, and loss and expense, for this period of suspension.

9.6 Termination

Generally, a party is entitled to terminate the construction contract against another party, if the other party:

- breached one or more fundamental terms contained in the construction contract, which entitles the party to terminate the contract; or
- commits a repudiatory breach – in other words, where one party makes clear, by words or conduct, its intention not to honour its contractual obligations, which goes to the root of the construction contract under common law.

Consequences of Termination of the Construction Contract

Typically, the legal and/or contractual consequences of termination are that the construction contract comes to an end. However, this does not prevent either party from taking the position that the termination is wrongful and suing for damages.

In the meantime (amongst other consequences):

- the contractor shall cease all operations on-site, vacate the construction site within a stipulated time, and remove all materials, equipment and goods which have not been paid for by the employer; and
- within a stipulated time provided in the construction contract, the contract administrator and the contractor shall have a joint inspection to record the value of works executed up to the date of determination.

10. Dispute Resolution

10.1 Regular Dispute Resolution

It is not uncommon for construction-related disputes to be resolved by way of court litigation, arbitration and statutory adjudication under CIPAA.

Arbitration

Arbitration in Malaysia is governed under the Arbitration Act 2005, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006). It is common for most standard forms of construction contract in Malaysia to contain an arbitration clause for a construction dispute to be referred to arbitration, to be administered by the

Asian International Arbitration Centre (AIAC).

It is also not uncommon that arbitration may be held in other arbitral institutions outside Malaysia, usually if one of the parties to the contract is a foreign entity.

Statutory Adjudication

CIPAA came into force on 15 April 2014 with the aim of facilitating regular and timely payment. The purpose of CIPAA is to provide a mechanism for speedy dispute resolution through adjudication. Typically, an adjudication proceeding under CIPAA may take three to four months before the adjudication decision is delivered, and the entire proceedings are primarily based on documents. The adjudication decision is binding for an interim period until the dispute between the parties is finally resolved in either court litigation or arbitration.

As the successful claimant under CIPAA, the claimant is entitled to (amongst others):

- enforce the adjudication decision as if it were a High Court judgment or order;
- suspend or reduce the rate of progress of performance of the construction works until the adjudicated amount is fully paid;
- seek for direct payment against the principal (a party who has contracted with the losing respondent and is liable to make payment to the claimant) of the losing party; and
- exercise any and all of its remedies provided under CIPAA concurrently.

Court

Where a construction dispute is less complex or involves a less substantial amount or does not contain an arbitration agreement, it is not uncommon for parties to refer their disputes to the courts. Currently, there are three specialist construction High Courts in Malaysia. Two are located in Kuala Lumpur (the capital city of the Malaysia) and the third is located in Selangor (a state neighbouring Kuala Lumpur).

Subsequent to the High Court, either party has a right to a two-tier appeal to the Court of Appeal (as of right) and Federal Court (with leave).

10.2 Alternative Dispute Resolution

Alternative dispute resolution (ADR) is widely used in the construction industry in Malaysia. Generally, the most common forms of ADR for construction disputes used by practitioners in Malaysia are statutory adjudication, arbitration, settlement negotiation and mediation. However, statutory adjudication and arbitration appear to have become the primary mode of dispute resolution in Malaysia (see 10.1 Regular Dispute Resolution).

Mediation

Generally, mediation has been promoted and encouraged for many years in Malaysia. In fact, pursuant to Order 3 Rule 2(2)(a) of the Rules of Court 2012, the court at the pre-trial case management stage may consider directing parties to explore mediation.

Unless otherwise agreed by parties, there are no general requirements that disputes ought to be mediated. Parties may decide to insert a mediation clause in a construction contract as a pre-condition prior to parties referring the construction dispute to arbitration.

The Mediation Act 2012 governs the practice and procedure for mediations. There are many avenues for a dispute to be resolved by way of mediation, including:

- mediations administered by the Malaysian International Mediation Centre (formerly known as the Malaysian Mediation Centre);
- mediations administered under the AIAC Mediation Rules;
- ad hoc mediations; and
- mediation administered by the Court's Mediation Centre.

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A Lighter Footprint: ESG In Construction Contracts

By Steven SY Tee & Joyce Ong Kar Yee

Coined by the United Nations, in their 2004 report titled, "*Who Cares Wins*", environmental, social and governance considerations have become an oft-repeated mantra over the years.

Societal shifts in values have persuaded businesses to demonstrate their ESG contributions and reduce the environmental and social harm they may cause in the communities where they operate. Financial institutions are now observing ESG performance of a business as a marker of sustainability and resilience that goes beyond the balance sheet, and therefore also informs lending criteria. Similarly, ESG considerations are factored in by many investors prior to allocating their investment capital.

How does ESG impact the construction industry?

The construction industry faces regulatory, reporting, investment, and consumer pressure to clean up its ESG impact over its heavy use of resources and production of significant waste. In Malaysia, the construction industry records the employment of approximately 1.38 million people[1] and is responsible for generating approximately 25,600 tonnes of construction and demolition wastes every day[2]. Clearly, the construction industry has a role to play in the global initiative to reduce emissions and mitigate climate crisis.

Given that the effective adherence of ESG requirements in the sector rests on the shoulders of all parties along the supply chain, it is important that they are properly incentivized to mitigate the ESG impact of their activities by appropriate contractual arrangements prior to the start of any construction project.

Are the construction standard forms in Malaysia adequate?

The construction sector would have seen several contractual clauses relating to ESG considerations in the Malaysian and international standard forms of contract such as environmental protection, health and safety, and anti-bribery & corruption provisions. These provisions, however, vary from contract to contract.

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1 'Number of people employed in the construction industry in Malaysia from 2015 to 2022' (Statista, February 2023) < https://www.statista.com/statistics/809686/annual-employment-in-the-construction-industry-malaysia/#:~:text=In%202022%2C%20approximately%201.38%20million,the%20construction%20industry%20in%20Malaysia >
2 P.X. Wong and Siti Nur Alia Roslan, 'Construction and Demolition Waste Management in Malaysian Construction Industry – Concrete Waste Management' [2019] 7(1) IUKL Research Journal 26 < https://iukl.edu.my/rmc/wp-content/uploads/sites/4/2020/12/3.-ST_P.X.Wong_.pdf>

The table below demonstrates some examples of ESG provisions contained across the various standard forms:

	JKR Form 203	PAM 2018	IEM Form for Civil Works 2017	CIDB 2000	FIDIC Design-Build 2017
Environment	Compliance with laws generally	Compliance with laws generally	Compliance with Environmental Quality Act 1974.	Compliance with Environmental Quality Act 1974 and relevant laws relating to protection and preservation of the environment.	Compliance with laws generally
	x	x	Submission of environmental protection plan and take reasonable steps to protect the environment.	Consideration shall be given to the preservation and social implications of water and air quality, soil, flora and fauna, within the site during the execution of the works.	Necessary steps are taken to protect the environment and limit all forms of pollution, damage, and nuisance.
Social	Compliance with relevant employment and safety laws.	Compliance with relevant employment laws.	Compliance with relevant employment and safety laws.	Compliance with relevant employment and safety laws.	Compliance with relevant employment and safety laws.
	Maintain clean and sanitary working conditions, ensuring sufficient first aid kits, and provision of safety training programmes.	x	Works may not be carried out at night or on public holidays.	Provision of safety training programmes.	Rate of wages not to be lower than that established for the trade/industry.
Governance	Prohibition of corrupt, unlawful, or illegal activities.	x	x	x	Prohibition of corrupt, fraudulent, collusive, or coercive practice.

As observed, some of the standard forms have obligations to comply with laws and regulations, directly or indirectly pertaining to ESG matters, while some do not. However, these provisions do not seem to be sufficient as more proactive steps can be taken to strengthen ESG performance by the parties. How then can the standard forms be amplified to encourage such steps?

The "E" in ESG

The Environmental aspect is by far the greatest challenge, and most discussed change in the sector. Studies show that the construction sector is the largest consumer of natural resources, consuming 32% of global resources[3], and responsible for 50% of landfill waste, 40% of drinking water pollution, and 23% of air pollution[4]. Employers could introduce provisions found in international standard form contracts that would incentivize the Contractor to act or encourage sustainable onsite working practices. For example:

- Climate change requirements may be incorporated into the scope of work, whereby failure to comply would amount to a "defect" under the contract[5].
- The contractor could also be encouraged to suggest, when executing the works, amendments to the scope of work that are economically viable, which may result in an improvement in environmental performance, and such suggestion could then be entertained as a variation[6].
- The employer can oblige the contractor to provide information regarding the environmental impact of the supply and use of materials and goods, which the contractor selects.
- The employer could withhold the issuance of the certificate of practical completion if any prescribed ESG requirement is not met.
- The parties could decide on an aggregate threshold for carbon emissions permitted for the execution of the works for a particular project, and liquidated damages may be imposed if it is exceeded.

The "S" in ESG

In order to meet the strict timeline of a construction project and for the purpose of reducing cost, contractors may not pay sufficient attention to the welfare and safety of its workers. Social considerations were often dismissed as either immaterial or a lesser priority due to the perception that they are less likely to be subject to punitive actions or present a lower risk to revenue streams. However, issues of diversity and inclusion, modern slavery, and employee wellbeing have been coming to the forefront in recent times. Aside from general obligations to comply with labour laws, additional contractual requirements can be introduced to improve the health and welfare of workers, and the wider community. For example:

- The employer may request documentary evidence that workers are being paid at least the minimum wage and are consistent with industry standards.
- The employer may require the contractor to use its best efforts to

3 'Sustaining the built environment' (CIOB, 5 June 2018) < https://www.ciob.org/blog/sustaining-built-environment>
4 Karolina Dobrowolska, 'How Does Construction Affect the Environment' (ArchDesk, 4 March 2021) <https://archdesk.com/blog/how-does-construction-affect-the-environment/>
5 Observed in the secondary option clause X29 of the NEC4 suite of contracts
6 Observed in supplemental provision 8 of the JCT Design and Build Contract 2016

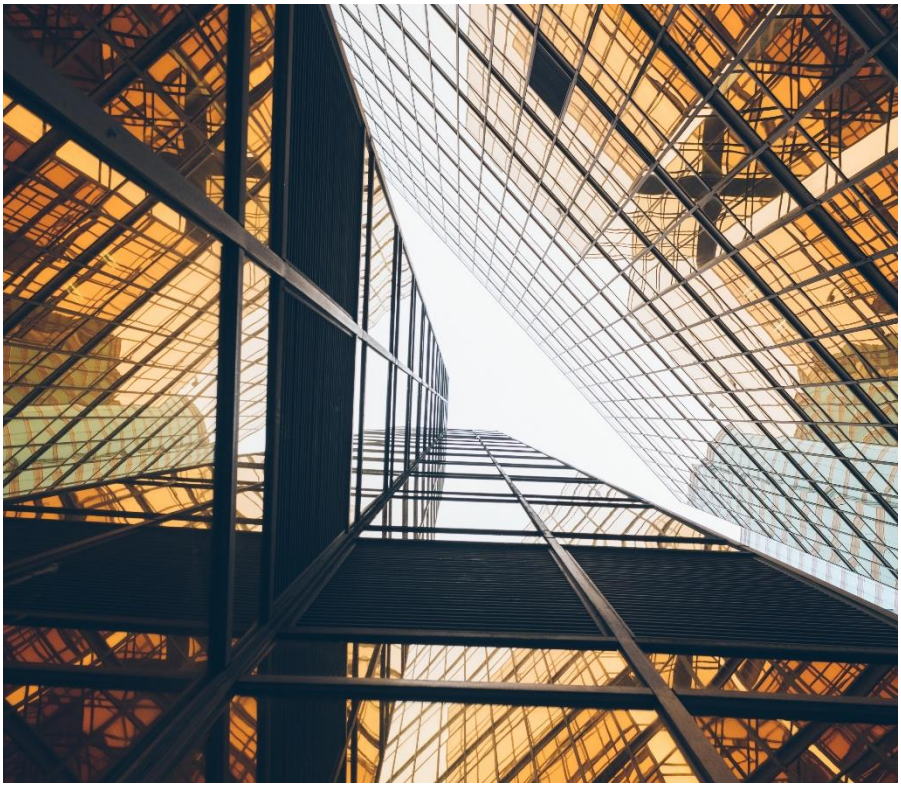
maximise the appointment of local workers and to provide training facilities and programmes to improve their skills.

- The employer may adopt an anti-slavery and human trafficking policy, which the contractor would have to comply with during the execution of the works.
- Working hours for the works may be limited to prevent fatigue, as well as to ensure neighbouring communities are undisturbed by the works.

The "G" in ESG

Companies with good governance would tend to make sound decisions and retain the trust of its stakeholders, and ultimately is more likely to increase its shareholder value. In the construction sector, developers (especially in the public sector) are often scrutinized if a competitive tender process is not practiced in the procurement of the works as it could lead to unfair and/or poor selection of contractors, potentially causing reputational damage. The following are ways good governance requirements can be introduced into the contract:

- The contractor can be made to comply with data privacy, anti-bribery, corruption, or competition laws, as well as other similar or related code of conduct and policies that are developed by the employer.
- A tiered dispute resolution process can be introduced to ensure that disputes are escalated internally to minimize bad relations and discourage lengthy and costly litigation through early resolution of the dispute.
- The employer may introduce perioding reporting requirements to the contractor which are specific to key ESG metrics such as carbon emissions, waste generation, energy consumption, employee turnover and water use.



Closing Thoughts

As employers become keen on proving their ESG credentials, contractors should expect increasing levels of ESG compliance, monitoring and reporting requirements, and the resulting increase in cost. It is worthwhile for contractors to embrace new technology and provide training to individuals for the administration of ESG matters. Particular care should also be taken in ensuring that contractual provisions adequately protect the contractors against the cost of any new regulatory requirements that are introduced during constructions.

Given the widespread acceptance of ESG, contractors should also actively monitor for any governmental grant or subsidy that may be introduced to encourage companies to adhere to ESG requirements. It is important that contract pricing by the contractors adequately reflects the cost of compliance with ESG requirements.

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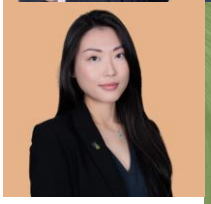
Fraudulent Trading - Directors' Personal Liability and the Duty of Good Faith in Negotiations

By Andrew Chiew Ean Vooi & Nicola Tang Zhan Ying



1. The Federal Court had the opportunity to consider novel questions of law concerning fraudulent trading under S 540, Companies Act 2016 ("**CA 2016**") in **Lai Fee & Anor v Wong Yu Vee & Ors** [2023] 4 CLJ[1].

The Federal Court was invited to consider 3 questions –

Question 1: Where a vendor agrees to the immediate transfer of an asset to a company relying on the representation of the company that the balance purchase price will be paid in the future and the company subsequently fails to pay the balance purchase price when it falls due, are the directors of the company, ipso facto liable to the vendor under S 540 of the CA 2016?

Question 2: Where a company has been adjudged in a previous suit to be liable for failure to pay the balance purchase price under a sale and purchase, and a director of the company is subsequently sued under S 540 of the CA 2016 arising from the said debt: -

(i) is such a director barred by issue of estoppel and/or res judicata from asserting defences which had been unsuccessfully raised by the company in the previous suit?

(ii) may such a director raise as a defence that the company had a legitimate commercial reason not to pay the balance purchase price notwithstanding the judgment in the previous suit?

Question 3: Is the position by Lord Kerr in paragraph of the grounds in the English Supreme Court case **Takhar v Gracefield Developments Ltd and Others** [2019] UKSC 13, namely, "*... that the law does not expect people to arrange their affairs on the basis that other people may commit fraud*" representative of the position of Malaysian law?

Facts

2. The appellants (plaintiffs) were partners of a partnership business, Fave Enterprise ("**Fave**") that owned timber logging rights. The respondents (defendants) negotiated with the appellants to acquire the timber logging rights from Fave. It was agreed the appellants would enter a sale and purchase agreement ("**SPA**") with Centennial Asia Sdn Bhd ("**Centennial**"). The respondents are directors of Centennial[2]. The appellants agreed to transfer their interest in Fave to Centennial for the purchase price of RM7 million ("**Purchase Price**"), which would be paid in 3 tranches.

3. Upon execution of the SPA, the appellants relinquished and transferred their interest in Fave. Although Centennial was the named buyer under the SPA, the respondents caused Fave to be registered under their personal names. The respondents caused another company, Westhill Equity Sdn Bhd ("**Westhill**") to pay the initial 2 tranches of the Purchase Price to the appellants. Centennial defaulted in paying the final balance Purchase Price of RM2.5 million ("**Balance Purchase Price**").

4. Centennial's default resulted in the appellants commencing an action against Centennial in the High Court for specific performance of the SPA and for an order that Centennial pay the Balance Purchase Price ("**Centennial Suit**"). Centennial raised a defence and counterclaimed for misrepresentation. The High Court allowed the appellants' claim and dismissed Centennial's counterclaim. Centennial, an impecunious company, failed to settle the judgment.

5. The appellants brought a separate action in the High Court against the respondents, being directors of Centennial, for fraudulent trading and sought to declare them personally liable for the Balance Purchase Price ("**Fraudulent Trading Action**"). The respondents denied liability. The respondents in their defence claimed misrepresentation by the appellants.

6. The High Court after full trial dismissed the Fraudulent Trading Action[3]. The Court of Appeal affirmed the decision on appeal[4].

7. The Federal Court granted leave to appeal on Questions 1, 2, and 3.

Question 1: Fraudulent trading

8. The Federal Court found the following facts were not in dispute *(Grounds, para [30])* -

8.1 The respondents incorporated Centennial for the sole purpose of acquiring Fave for its timber logging rights.

8.2 The respondents became directors of Centennial not long after they became aware that Fave had been awarded the timber logging rights and the negotiations regarding the sale of Fave began.

8.3 The respondents had full control, power, and were actively involved in the management of Centennial.

8.4 Centennial was a dormant company. It did not have –

(i) any business dealings or history of business prior to the SPA;
(ii) any funds, assets of value and/or any bank accounts as at the date of the SPA;
(iii) a business address; and,
(iv) auditors;

8.5 Centennial shares the same registered address and company secretary with Westhill;

8.6 Westhill is the majority shareholder of Centennial;

8.7 The respondents are directors and majority shareholders of Westhill;

8.8 Westhill does not have a business address; and

8.9 Neither Centennial nor Westhill filed their audited financial statements.

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1 The Federal Court's Grounds of Judgment ("Grounds") may be viewed here.
2 It was also not in dispute the 3rd respondent is a shareholder of Centennial.
3 The High Court's Grounds of Judgment may be viewed here.
4 The Court of Appeal's Grounds of Judgment may be viewed here.

9. On the law, the Federal Court held -

9.1 A company is carrying on a business "*with intent to defraud creditors*" if, –

(i) the company continues to carry on business to incur debts at a time when to the knowledge of the directors, there is no reasonable prospect of the creditors ever receiving payment of those debts[5].
(ii) there is an intent[6] to deprive creditors, of an economic advantage or inflict upon them some economic loss[7] – *Grounds, para [24](ii).*

9.2 The words "*if … it appears*" denotes a lower threshold to trigger the operation of S 540(1), CA 2016 – *Grounds, para [24](iv).*

9.3 The burden of proof to establish fraudulent trading on the balance of probabilities[8] rests on the appellants – *Grounds, para [24](v).*

9.4 An act constitutes fraud when it is established that an unjustifiable risk was taken, resulting in harm or prejudice to another. It is not necessary to demonstrate that, at the moment the debts were accrued, it was known that creditors would not receive payment. What matters is at the time the debts were incurred, there was no reasonable expectation that the necessary funds would be available to meet the debt when it fell due, or in the near future[9] – Grounds, para [24](viii). The Federal Court found this criterion to be partly subjective and partly objective.

9.5 Ascertaining whether there was any intention to defraud is a matter of fact to be inferred from the surrounding circumstances and subsequent actions of the defendants[10] – *Grounds, para [24](ix).*

9.6 To be a knowing party, actual knowledge of the company's fraudulent transaction is required. However, there was no requirement to establish the person had assumed a managerial or controlling role in the company's operations to be deemed complicit[11] – *Grounds, para [24](ix).*

9.7 A single act in the course of carrying on the company's business with intent to defraud only one creditor is sufficient to amount to fraudulent trading; it is not necessary to establish a scheme to defraud[12] – *Grounds, para [24](xi).*

9.8 Whether a person has conducted a company's business with intent to defraud its creditors is a question of mixed fact and law – *Grounds, para [25].*

10. The Federal Court then held –

10.1 Firstly, the respondents used Centennial as the vehicle to execute the SPA notwithstanding they had actual knowledge that Centennial was a dormant company with no assets, business activities, or trading and income. Although the respondents incorporated Centennial for the sole purpose of acquiring Fave, they did not inject any capital into Centennial to meet its contractual obligation under the SPA, i.e., to pay the appellants the Purchase Price. When the Purchase Price became due, the respondents had no reasonable expectation that Centennial would have the funds to settle the debt – *Grounds, para [31].*

10.2 Secondly, the appellants agreed to the immediate transfer of their interest in Fave to the respondents on the representation that Centennial would pay them the Purchase Price. The respondents, however, used Westhill to pay the first 2 tranches of Purchase Price. Westhill was not a party to the SPA and there is no provision in the SPA referring to this arrangement. – *Grounds, para [32].*

10.3 Lastly, another unusual aspect was the transfer of Fave to the respondents instead of to Centennial, even though Centennial was the named buyer under the SPA. There was no provision under

5 ***R v Grantham*** [1984] BCLC 270
6 The person must be taken to intend the natural or foreseen consequences of his/her act (In Re Gerald Chemicals Ltd. (In Liquidation) [No. 001027 of 1977] [1978] Ch 262 at 267)
7 ***Coleman v The Queen*** [1987] 5 ACLC 766
8 ***Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd*** [2015] 7 CLJ 574 (FC)
9 ***Regina v Sinclair*** [1968] 1 WLR 1246
10 ***Rahj Kamal bin Abdullah v PP*** [1998] 1 SLR 447; LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849
11 ***Tan Hung Yeoh v Public Prosecutor*** [1999] 2 SLR(R) 262 HC
12 ***JCT Ltd v Muniandy Nadasan & Ors*** and another appeal [2016] 6 MLJ 635 (CA) at para [42], applied in ***Dato' Prem Krishna Sahgal v Muniandy Nadasan & Ors*** [2017] 10 CLJ 385 (FC) at para [91]. See also Re Gerald Cooper supra; **Morphitis v Bernasconi & Ors** [2003] BCLC 53

the SPA which allowed Centennial to appoint a nominee(s) to take up the shares in Fave. The SPA also mandated the immediate transfer of Fave ownership upon execution, while the full Purchase Price remained outstanding. The respondents therefore became the new owners of Fave, enjoying all the SPA's benefits, while Centennial retained exclusive responsibility for the unpaid Purchase Price.

11. It is important to note Vernon Ong, FCJ.'s findings at paras [34] and [35] of the Grounds where his Lordship held –

"[34] …The procurement of Centennial and Westhill in the defendants' scheme was intended to create corporate layers to obfuscate themselves from the transaction. Both Centennial and Westhill are dormant companies. There was no prospect of Centennial paying the balance purchase price. Westhill was not a party to the SPA; no contractual liability could attach to it because it was not privy to the SPA, and neither did Westhill derive any benefit under the SPA. We also noted the fact that in Suit 128, the defendants had given evidence on behalf of Centennial; that their defence and counterclaim premised on misrepresentation was dismissed.

[35] As such, we have no hesitation in concluding that what was done was dishonest according to the ordinary standards of reasonable and honest people. The fact that Centennial and Westhill were utilised as layers to insulate the defendants leads to an inference that the defendants must have known that their act was by those standards dishonest. The subsequent conduct of the defendants in raising the defence of misrepresentation in the s 540 Suit when that very same defence and counterclaim was dismissed in Suit 128 gives rise to yet another inference as to the intention of the defendants to defraud the plaintiffs. The fact of the defendants' participation in the SPA transaction both at the negotiation stage (pre-SPA), execution stage and post-SPA is not disputed; they were the real controlling arm behind both Centennial and Westhill. In all the circumstances, the fact that this was a single transaction does not negate the inferences arising from the settled facts."

Question 2: Res Judicata

12. The respondents, who were also witnesses in Centennial Suit, relied on the misrepresentation defence pleaded in the Centennial Suit. The defence was rejected by the High Court and Centennial did not appeal. The appellants argued res judicata applies. The High Court and Court of Appeal rejected the argument.

13. The Federal Court did not agree. As the same issue has been determined by the High Court in the Centennial Suit, the Federal Court held res judicata applies and the respondents, who are privies of Centennial as directors are estopped from relitigating the same allegation of misrepresentation.

14. The Federal Court, in coming to its decision, approved Mohd Arief Emran Arifin, JC. (as he then was) explains why decision in **Muhammad Nur Hafiz bin Roslan v Mohamed Izani bin Mohamed Jakel & Ors** [2021] MLJU 2311. The Court in **Muhammad Nur Hafiz** followed Wilson Chan, J.'s decision in **Lo Kai Shui v HSBC International Trustee Ltd & Ors** [2021] 5 HKC 337 where it was held the doctrine of res judicata applies to privies who were not parties to the earlier proceedings. At para [27], Mohd Arief Emran, JC. explains why the doctrine applies –

"[27] I adopt the summary of the legal position as stated by Wilson Chan J in the above-quoted case, which is reproduced as follows: -

"(1) Whether a claim falls foul of the Henderson doctrine of abuse requires the application of a broad, merits-based test and close scrutiny of the facts;
(2) It is no answer to say that the causes of action in the two claims are different, if they arise out of substantially the same facts;
(3) Nor is it a bar to a finding of abuse that the parties in the two actions are different. In particular:

(a) A party may be bound by the Henderson doctrine because he is deemed by virtue of privity of interest as having been the litigant in a prior action; and,
(b) A witness in a prior action may also raise Henderson abuse as a defence when a claim is brought against him in respect of substantially the same issues;
(4) Although the application of the doctrine is necessarily fact- sensitive, factors that have been identified in the case law as supporting a finding of abuse include:
(a) Where a party could have been joined as a defendant to the earlier action, especially if the claims arise from the same underlying facts;
(b) Where the plaintiff knows of the opposing interest of and/or has evidence against a witness in a prior action but fails to join him to the same, only to raise a fresh claim later in respect of the same issues; and,
(5) A claim can also amount to an abuse where it constitutes a collateral attack against a final decision."

Question 3: Implied Good Faith – In Negotiations and Contract Formation

15. Question 3 concerns whether Lord Kerr, SCJ.'s judgment in the English Supreme Court case of **Takhar v Gracefield Developments Ltd and Others**[13], "*… that the law does not expect people to arrange their affairs on the basis that other people may commit fraud*" is representative of the position of Malaysian law.

16. The Court of Appeal[14] –

16.1 held the appellants were "*aware and consciously knew about Centennial's financing standing before they enter into the Agreement*";

16.2 affirmed the High Court's finding that the appellants did not enquire or raise issues concerning Centennial's assets, financials, bank account, or record of business activities before signing the SPA; and,

16.3 held the appellants "*entered into the Agreement (SPA) voluntarily with conscious mind relating to Centennial position" and "reasons related to Centennial's assets, financial standing, bank account and business records are only excuses and afterthought*."

17. The Federal Court was of the view this issue is rooted in the notion of good faith in contract. The position in Malaysia is that except where statutorily imposed and in cases of relational contracts (such as insurance contracts, family settlements, partnership agreements, and employment agreements), there is no implied obligation of good faith when engaging in contractual relations unless expressly provided for under the contract.

18. In analysing the common law jurisprudence developed in –

(a) England (**Yam Seng Pte Ltd v International Trade Corp Ltd** [2013] EWHC 111 (QB) – where the Court doubted whether English Law would recognise a requirement of good faith as a duty implied by law[15]) – see Grounds, paras [46]-[51]; and

(b) Canada (**Bhasin v Hrynew** [2014] SCC 71 - which clarified the principle of good faith in contract law and introduced the duty of honest performance[16]) – see Grounds, paras [52]-[55],

the Federal Court was careful to point out those cases relate to the notion of good faith in contractual performance. Whereas in the case **of Lai Fee**, the wrongful act complained of relates to the duty of good faith and the respondents fraudulent conduct leading to the creation of a contract – Grounds, para [56].

19. In this case, the Federal Court inferred the appellants' consent to enter into the SPA was induced by fraudulent actions on the part of the respondents. The fraud was perpetrated by the

13 [2019] UKSC 13
14 At paras [31], [32] and [35] of the Court of Appeal's Grounds of Judgment. See also paras [20] and [21] of the High Court's Grounds of Judgment
15 See also cases decided post Yam Seng - ***Pakistan International Airline Corporation (Respondent) v. Times Travel (UK) Ltd (Appellant)*** [2021] UKSC 40; ***Candey v. Bosheh & Anor*** [2022] EWCA Civ 1103; ***Mark Faulkner & Others v. Vollin Holdings Ltd & Others*** [2022] EWCA Civ 1371
16 See also cases decided post Bhasin – ***C.M. Callow Inc v. Zollinger*** [2020] SCC 45; ***Wastech Services Ltd v. Greater Vancouver Sewerage and Drainage District*** [2021] SCC 7

respondents with the purpose of persuading the appellants to enter into the SPA with Centennial. Further, the appellants were also induced to immediately relinquish their interest in Fave to the respondents upon the execution of the SPA. The respondents, who immediately benefited from the SPA, sought to shield themselves from any responsibilities or obligations under the SPA by involving Centennial and Westhill. In contrast, the appellants acted honestly and in good faith, with the expectation that the Purchase Price would be settled in accordance with the SPA. In these circumstances, the Federal Court found the appellants ought not be criticised for their actions, or lack thereof.

20. On that premise, the Federal Court found the position in **Takhar** represents the legal position in Malaysia. Particularly, the principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud is not inconsistent with the principle of free consent under Contracts Act 1950. Free consent plays a crucial role in the pre-contract negotiation process and underscores the obligation of good faith in contract formation, specifically, the duty to act honestly. This is because "the Contracts Act starts on the assumption that all contracts are valid. It is only if it can be proved that the consent was procured by coercion, fraud, misrepresentation, or undue influence, then the contract becomes voidable at the option of the innocent party" – *Grounds, para [61].*

21. In **CIMB Bank Bhd v Maybank Trustees Bhd and other appeals** [2014] 3 MLJ 169, the Federal Court ruled that a party who committed fraudulent misappropriation of trust monies could not benefit from its own fraud and that that party cannot rely on the exemption clause under the contract

as a defence. In the written grounds, Ariffin Zakaria, CJ. referred to the following remarks of Lord Bingham in **HIH Casualty and General Insurance Ltd v. Chase Manhattan Bank** [2003] 1 All ER (Comm) 349 at para [15] –

"… fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: fraus omnia corrumpit. It also reflects the practical basis of commercial intercourse. Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever': Lazarus Estates Ltd v Beasley [1956] 1 QB 702 at p 712, per Lord Justice Denning. ***Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal****."*

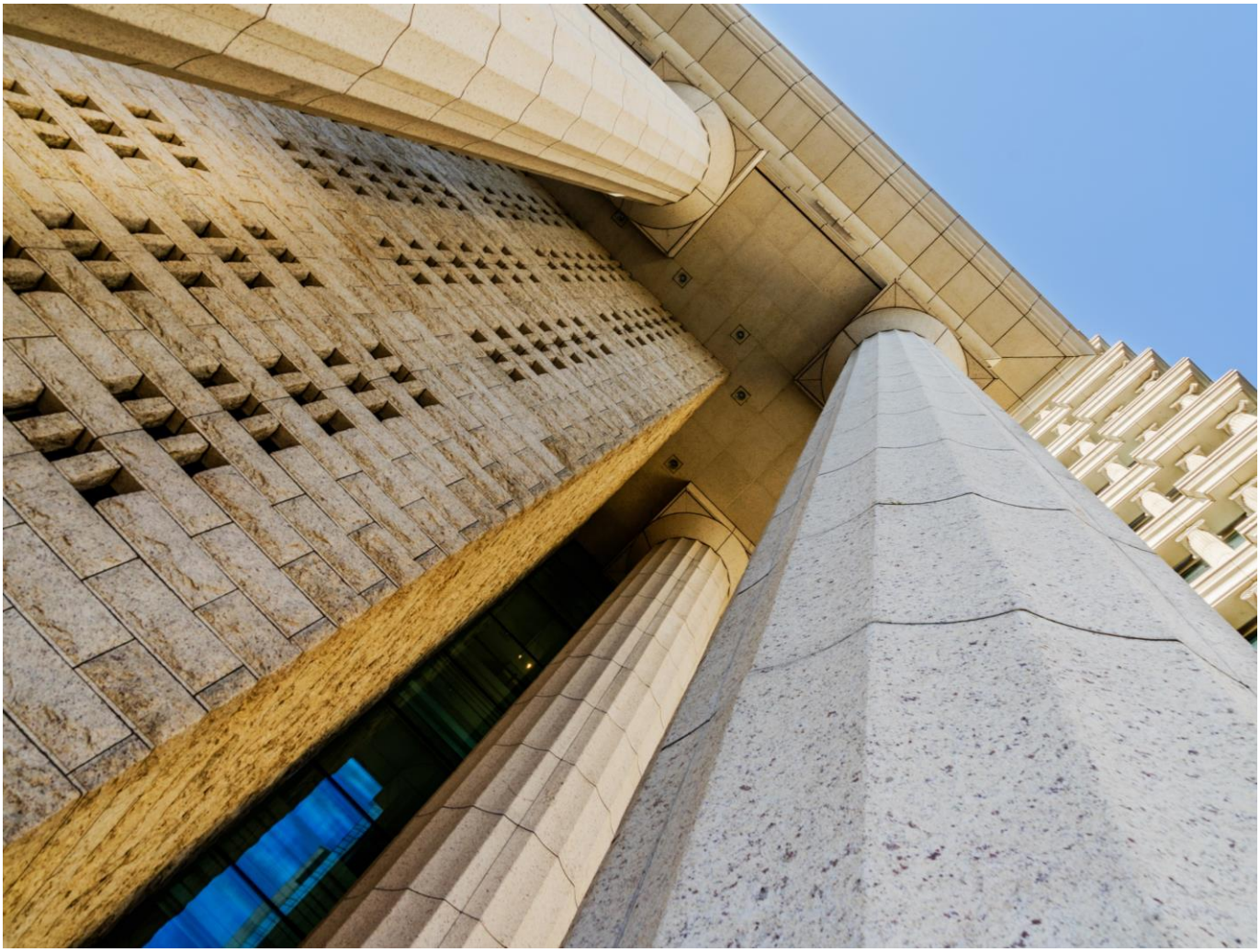
22. In light of the Federal Court's differentiation that **Lai Fee** concerns the duty of good faith in the creation of a contract, the fundamental rule that there is no overarching implied duty of good faith in commercial contracts remains intact in Malaysia. However, there is no escaping the reality that this landmark decision holds the potential to pave the way for the incorporation of good faith into contract performance in future Malaysian court proceedings. This is particularly significant given the Federal Court's recognition of the need for the law to align with the practical reality that honest contracting parties do not anticipate the necessity to "*arrange their affairs on the basis that others may commit fraud*".

Decision

23. The Federal Court answered the questions as follows –

Question 1: Where a vendor agrees to the immediate transfer of an asset to a company relying on the representation of the company that the balance purchase price will be paid in the future and the company subsequently fails to pay the balance purchase price when it falls due, are the directors of the company, ipso facto liable to the vendor under S 540 of the CA 2016?

Answer: Affirmative



Question 2: Where a company has been adjudged in a previous suit to be liable for failure to pay the balance purchase price under a sale and purchase and a director of the company is subsequently sued under S 540 of the CA 2016 arising from the said debt:

(i) is such a director barred by issue of estoppel and/or res judicata from asserting defences which had been unsuccessfully raised by the company in the previous suit?

Answer: Affirmative

(ii) may such a director raise as a defence that the company had a legitimate commercial reason not to pay the balance purchase price notwithstanding the judgment in the previous suit?

Answer: Negative

Question 3: Is the position by Lord Kerr in paragraph of the grounds in the English Supreme Court case **Takhar v Gracefield Developments Ltd and Others** [2019] UKSC 13, namely, "*... that the law does not expect people to arrange their affairs on the basis that other people may commit fraud*" representative of the position of Malaysian law?

Answer: Affirmative

24. Decisions of the High Court and Court of Appeal were set aside. Judgment was entered against the respondents.

If you have any queries, please contact Senior Associate, Nicola Tang Zhan Ying (tzy@lh-ag.com) or Partner, Andrew Chiew Ean Vooi (ac@lh-ag.com), who successfully argued for the appellants in Lai Fee.

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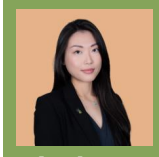

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