

Malaysian Construction Law And Practice: A Brief Overview

By Darshendev Singh and Chuck Siew Ka Wai



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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

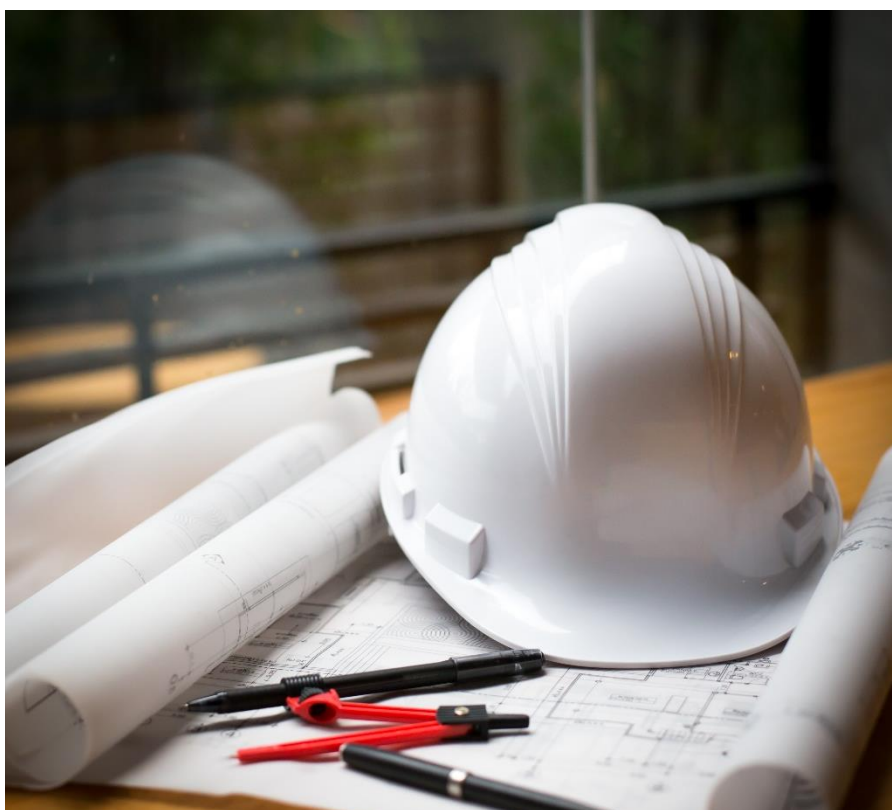
Standard forms of construction contract are widely used in Malaysia. However, they are not mandatory in nature. The various standard forms of construction contract are commonly produced by the following institutions:

- 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, CIDB, 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 contractor 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 subcontractors 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

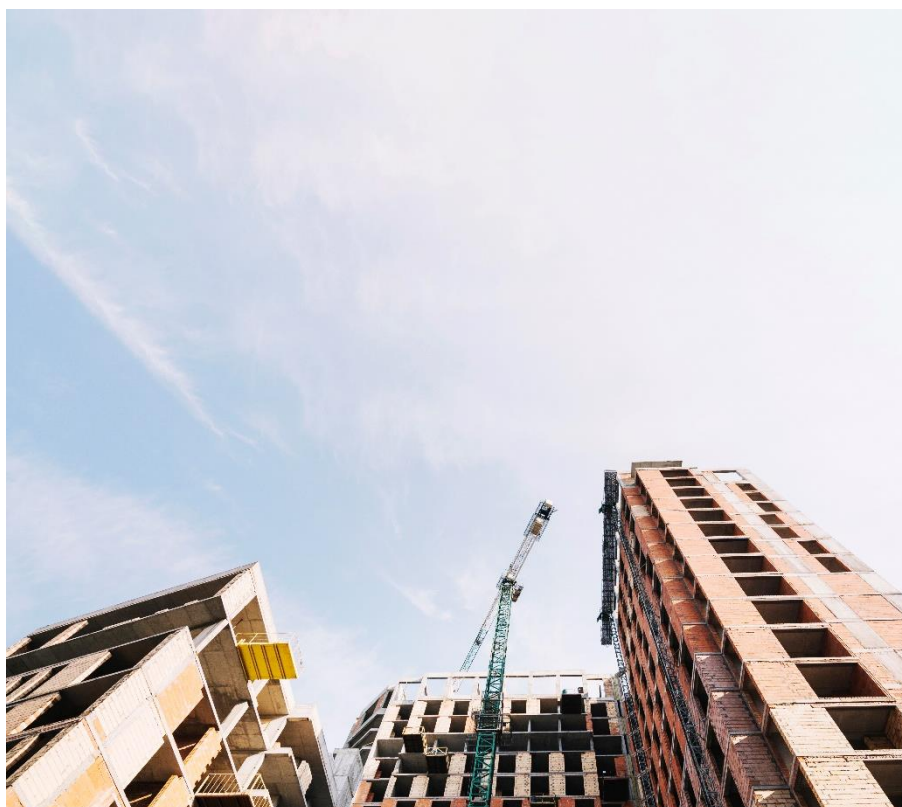
General

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





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

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 employer 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

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:*

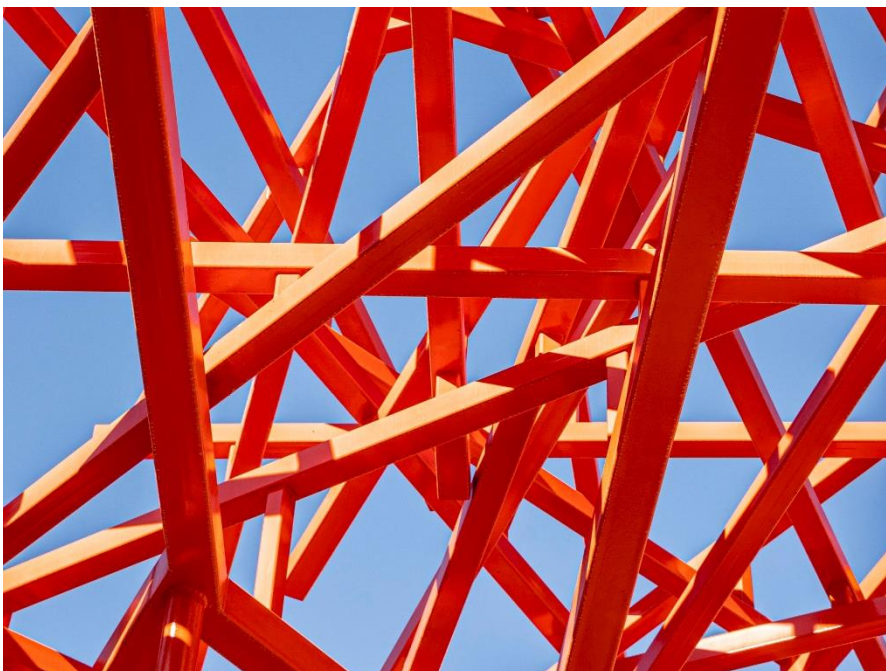
- (c) the principle of quantum meruit is enshrined in Section 71 Contracts Act 1950, which allows the contractor to recover a reasonable value for the variation related works or services rendered.

- *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 contractor 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 contractor (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 discoverable 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

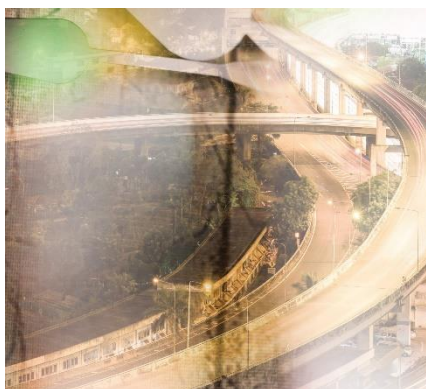
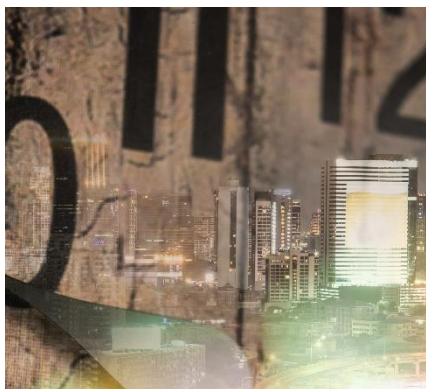
works. It is usually used in "package deal" types of construction contract such as professional services, consultancy, mechanical and electrical, supply contracts and construction contracts involving repetitive work and also minor lump sum contracts.

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 contract 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) 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

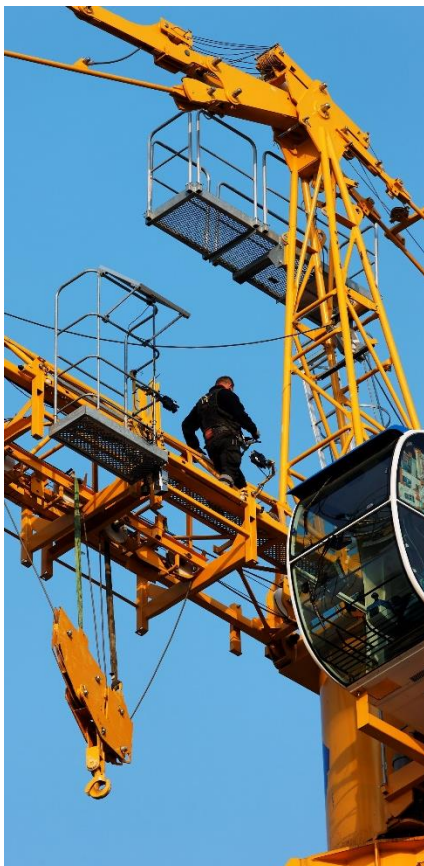
6.1 Exclusion of Liability

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 commotion, 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, superintending 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 employer 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.

LH-AG

About the authors



Darshendev Singh

Partner

Construction, Engineering, Projects,
Infrastructure & International Arbitration
E: ds@lh-ag.com



Chuck Siew Ka Wai

Associate

Construction, Engineering, Projects,
Infrastructure & International Arbitration
E: skw@lh-ag.com