

# BRI PROJECTS IN MALAYSIA: DEMYSTIFYING COMMON MISCONCEPTIONS

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Seven years into the Belt and Road Initiative (BRI), the pandemic-ridden 2020 has been nothing short of a whirlwind of uncertainties and global downturns. Malaysia, rated as a ‘*high opportunity, low risk*’<sup>1</sup> core BRI country, has always been regarded as an attractive BRI destination with a competitive economy. Although many BRI projects are being delayed, put on hold or re-negotiated as a result of various pandemic-related disruptions, most major projects in Malaysia have not been cancelled.<sup>2</sup>

As the year draws to a close, this article seeks to debunk some recurring misconceptions that foreign BRI players tend to have, especially those originating from civil law jurisdictions, venturing into the BRI market in Malaysia.<sup>3</sup>

## A. Pre-Contractual Stage

1. *‘I can close a deal as long as parties agree on the contract sum and major clauses. The law will take care of the rest.’*

The general perception is that contracts drafted in common law jurisdictions (such as Malaysia) are longer and more exhaustive, when compared with contracts made in civil law jurisdictions (such as China). This is primarily attributable to the fundamental differences between common law and civil law legal systems, with civil law systems tending to be more prescriptive and allowing contracting parties to rely on underlying codified rules.

This fundamental distinction frequently results in a mismatch of expectations for civil law contracting parties entering into legally binding relationships for the purpose of their business ventures in common law countries. For instance, parties may agree simple contracts that omit terms believed to ‘*go without saying*’, only to realise when disputes arise that various rights and obligations have not been (impliedly) incorporated into the contracts.

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The importance of prudent contract drafting in common law jurisdictions cannot be overstated. As the legally binding document that governs parties' respective rights and obligations, a contract is the cardinal instrument scrutinised by courts or tribunals when resolving disputes between the parties. Because contract law in common law jurisdictions is underpinned by the doctrine of freedom of contract, common law courts and tribunals generally seek to uphold the parties' intentions<sup>4</sup> when interpreting a contract.

With these differences in mind, parties should adopt a comprehensive approach when agreeing contracts by expressing all agreed terms, with the aim of demarcating as clearly as possible the allocation of risks and responsibilities between themselves. Some of these crucial terms include:

- **Contracting parties:** The most common contracting entity in Malaysia is a locally incorporated private limited company. The significance of this is that the company is a separate legal entity distinct from its shareholders and directors. Only in exceptional cases<sup>5</sup> will the 'separate legal entity' principle give way to make shareholders and/or directors liable.
- **Good faith obligations:** While many civil law jurisdictions codify the duty of good faith, most common law jurisdictions<sup>6</sup> do not generally impose any such duty by default, save for certain categories of contracts<sup>7</sup> in which the duty may be implied.
- **Termination:** The grounds upon which a contract may be terminated are not codified in common law jurisdictions.<sup>8</sup> In the absence of express termination clauses in a contract, the right of an innocent party to treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach.<sup>9</sup>

Where multiple contractual documents are involved, the order of precedence of these documents (in the event of inconsistency) should be expressly stated to avoid any ambiguity.

## B. Contract Execution Stage

*2. 'I am entitled to suspend works because the Employer owes me substantial payments under the Contract.'*

A party has no general right at common law to withhold performance of its contractual obligations on the ground of non-payment by the other party, unless the contract terms

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expressly provide that right.<sup>10</sup> This stands in contrast to the codification of that right in civil law jurisdictions,<sup>11</sup> which allow an unpaid party to suspend performance until the payment default is rectified.

For construction contracts, this difference in expectations of legislative or judicial protection often results in a contractor unaware of this distinction being left with only two choices: continue works at its own increasing cost, aggravating cash flow issues, or risk being sued for breach of contract.

Many standard form construction contracts, such as those of the Malaysian Institute of Architects (PAM),<sup>12</sup> FIDIC<sup>13</sup> and the Public Works Department (PWD),<sup>14</sup> contain express provisions for the suspension of works by an unpaid contractor. However, whether this contractual right can be invoked in a given scenario depends on the actual words used in the clause. Parties should take care to ensure that conditions have been fulfilled, and comply with all procedural requirements, before actually effecting a suspension.

***3. 'I think the works are outside of the current contractual scope, but I will carry out the works first nonetheless, and claim for additional payment later.'***

A contractor's entitlement to additional payment under a contract often comes with

'strings attached'. For instance, the contract may require advance written notice, followed by submission of claims backed by full particulars and supporting documents, within a specified time.

In Malaysia, the courts are typically inclined towards requiring strict compliance with claims procedures, especially where the language of the contract is clear and mandatory.<sup>15</sup> This is equally true of claims for variation works and backcharges. Contrast this with the approach of the Chinese courts, which have (until recently) been relatively lax in enforcing compliance with these procedures, giving greater emphasis to the substantive merits of a dispute to achieve justice between parties.

As such, there can often be an information asymmetry between the contract management team, and the project team that executes the day-to-day work on site. Where the necessity for strict compliance with conditions precedent is not adequately appreciated, resulting in delays or failures in compliance, a party may find itself disentitled from an otherwise valid claim.

This accentuates the importance of establishing streamlined document management systems and proper record-keeping. Particularly for large-scale projects which span multiple years, failing to implement these practices – including effective document

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handover protocols to deal with employee turnover – may make it challenging to gather the evidence necessary to support a claim.

### C. Post-Contract Stage

***4. 'If there is significant sum due and owing to me, I can choose to remain on site even after the contract is terminated, or after the project is completed.'***

To an unpaid party, it may appear strategically attractive to continue occupying a site after a contract has been terminated or a project completed. The aim is typically to exert pressure on the non-paying party or to prevent a new contractor from taking over and executing the works. However, this action is rarely legally permissible in common law jurisdictions.

Rather, many construction contracts impose express obligation on contractors to vacate a site upon termination of the contract or completion of a project, whether or not the employer is in breach of the contract. A court or tribunal may even imply a term that, in the event of a complete breakdown in relationship between parties to a construction contract, the contractor must surrender the site to the owner and seek its remedy against the owner for breach of contract through litigation or arbitration.<sup>16</sup> Courts are likely to enforce these provisions upon the application

of owners by granting a mandatory injunction to compel a contractor to vacate site.

***5. 'If a counterparty fails to pay, I can recover the outstanding sum by commencing or joining winding up proceedings against the holding company.'***

The threshold for piercing the corporate veil in Malaysia is very high.<sup>17</sup> Unless that threshold is met, or there is a separate corporate guarantee, a judgment creditor in Malaysia typically has no recourse against a parent, subsidiary or related company of the judgment debtor.

Therefore, where a defaulting party does not comply with an order to pay, a judgment creditor usually resorts to winding up proceedings against the judgment debtor to recover the debt. However, as a winding up order operates in favour of all creditors, unsecured creditors may gain little or nothing from the eventual realisation of assets. Recovery depends heavily on the surplus (if any) after secured creditors are paid.<sup>18</sup> In this way, a contractor in Malaysia has less protection than contractors in the Chinese construction sector, which enjoy a statutory priority in recovering contract sums from construction project developers.<sup>19</sup>

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These potential challenges in debt recovery later down the line underline the importance of due diligence on prospective business partners to ascertain their financial standing and credibility at the very start of the process, before committing to long-term commercial relationships.

### D. Treading Beyond 2020

As the pandemic's severe infection rates show no definite signs of abating in 2021, economic uncertainty looks likely to continue at a macro level. Cross-border BRI players should therefore be prudent and invest in proper legal advice to understand the legal nuances of different jurisdictions, in order to safeguard their commercial and legal interests, especially in preparation for the challenging period of post-pandemic recovery ahead.

4 This is an objective test to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC); *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (UKHL); *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38.

5 Eg where there is evidence of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil: *Solid Investments Ltd v Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73 (FC).

6 Contract Law of the People's Republic of China (PRC), Articles 6 and 60; Indonesian Civil Code, Article 1338; German Civil Code, Article 242; UAE Civil Code, Article 246.

7 Eg *contracts of insurance and employment: Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200; *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619 (CA).

8 Unlike in civil law jurisdictions, eg PRC Contract Law, Article 94.

9 Repudiation is where a defaulting party has repudiated the contract before performance is due or before it has been fully performed, whereas a fundamental breach is where the promise which had been violated is one of major importance: *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 (FC); *Theresa Toyat & Anor v KHL Sdn Bhd* [2015] 5 MLJ 31 (CA).

10 *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448 (HC); *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] SGHC 107; *Canterbury Pipelines v Christ Church Drainage* [1979] 2 NZLR 347 (NZCA).

Eg Contract Law of the PRC, Articles 68 and 69; UAE Civil Code, Article 247; Thailand Civil and Commercial Code, Section 369.

12 Conditions of PAM Contracts 2006 and 2018, Clause 30.7.

13 FIDIC Red Book 1999 and 2017 Editions: Conditions of Contract for Construction, Clause 16.1; FIDIC Yellow Book 2017 Edition: Conditions of Contract for Plant and Design-Build, Clause 16.1; FIDIC Silver Book 2017 Edition: Conditions of Contract for EPC/Turnkey Projects, Clause 16.1.

14 PWD Form 203 (Rev. 1/2010) and Form 203A (Rev. 1/2010), Clause 50.1 (notably only upon the Superintending Officer's instruction).

15 *Sunissa Sdn Bhd v Kerajaan Malaysia* [2020] MLJU 283 (HC); *Ahmad Zaki Sdn Bhd v Seacera Ceramics Sdn Bhd* [2018] 1 LNS 695 (HC).

16 *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309 (SC Auckland); *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269 (HC).

17 *Solid Investments Ltd* (n 5).

18 The proceeds from the sale of a wound up company are first used to satisfy the debts owed to its secured creditors and payment of the items stipulated under the Companies Act 2016, s 527. The surplus is then be used to satisfy the debt owed to the unsecured creditors rateably.

19 Article 286 of the PRC Contract Law provides that the construction project price shall be paid in priority out of proceeds from the liquidation or auction of the project.

1 The Economic Intelligence Unit as cited in 'BRI Beyond 2020' *The Economist* <<https://www.bakermckenzie.com/-/media/files/insight/publications/2019/11/bri-beyond-2020.pdf>>

2 For example, on the East Coast Rail Link, see Oliver Cuenca, 'Malaysian government announces East Coast Rail Link realignment' (International Railway Journal, 14 September 2020) <<https://www.railjournal.com/infrastructure/malaysian-government-announces-east-coast-rail-link-realignment/>>; on Bandar Malaysia, f?la=en> accessed 24 December 2020, 15. see Sharen Kaur, 'Bandar Malaysia to start with over 12 world-class towers worth RM10 billion in 2021' *New Straits Times* (22 September 2020) <<https://www.nst.com.my/property/2020/09/626299/bandar-malaysia-start-over-12-world-class-towers-worth-rm10-billion-2021>>; on Malaysia's first Artificial Intelligence Park, see Joe Devanesan, 'New AI park could add tech muscle to Malaysia' (Techwire Asia, 27 October 2020) <<https://techwireasia.com/2020/10/new-ai-park-could-add-tech-muscle-to-malaysia/>>, all accessed 24 December 2020.

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