THE LEGAL HERALD

ISSUE 01 | 2024

In this issue...

LH AG ADVOCATES AND SOLICITORS

@LHAG www.lh-ag.com @lhagmy

ABOUT US

Lee Hishammuddin Allen & Gledhill is one of the largest law firms in Malaysia and has been providing personalised legal representation since 1902. While our size and long heritage assure clients that they are in capable hands, we have also proven to be adept and dynamic partners in their affairs. We think outside the box and provide novel solutions that are different from others.

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, and our decisions have significantly shaped the country's laws. Our clients range from government authorities and companies to conglomerates, financial institutions, multinational corporations, as well as small and medium-sized enterprises (SMEs), start-ups, and private individuals.

We have advised or led on both contentious and non-contentious matters in jurisdictions outside Malaysia, often requiring foreign law advice. As the only firm in the country to be selected as a member of Multilaw and Interlaw, each of which is an international network of prominent independent law firms, we have access to over 8,000 lawyers in more than 150 cities worldwide.

Consistently ranked as one of the leading law firms in the country by prestigious industry publications such as Chambers Asia Pacific, The Legal 500 Asia Pacific, Asialaw Profiles, and IFLR1000.

CONTENTS

KDN PP 12853/07/2012 (030901)

REGULATION OF THIRD-PARTY FUNDING: WHY IS IT IMPORTANT AND HOW DO VARIOUS JURISDICTIONS APPROACH IT?

by Crystal Wong Wai Chin & Lim Jia Yun Ruth

On 13 February 2024 (Tuesday), Minister in the Prime Minister's Department (Law and Institutional Reform) Datuk Seri Azalina Othman Said made a public statement announcing a consensus between the Malaysian Government and the European Union (EU) that regulation of third-party litigation funding (TPF) demands heightened attention on an international scale[1]. This announcement triggers timely consideration of the following questions:

- **What is TPF?**
- **Why is the regulation of TPF important?**
- **How do various jurisdictions (focusing on Malaysia, England and Wales, Singapore, and Hong Kong) regulate TPF, if at all?**

In light of Datuk Seri Azalina Othman Said's public statement and the challenges Malaysia has been facing in the Sulu international arbitration case, which involves TPF concerns[2], this article aims to answer these three questions above by highlighting the advantages and disadvantages of TPF as well as examining TPF-related regulations in various jurisdictions.

This article contends that effective regulation of TPF is essential to balance two pivotal elements in our legal system: (i) ensuring accessibility to justice; and (ii) safeguarding against potential misconduct in legal proceedings. It will further suggest that, in light of the global trend towards tighter TPF oversight, Malaysia should actively seek insights from other jurisdictions and tailor its own TPF regulatory measures accordingly. In doing so, the benefits of TPF may be maximised for Malaysians while mitigating its associated risks to the greatest extent feasible.

1. What is TPF?

Third-party funding (TPF) is the provision of financial support from a party not directly involved in a legal dispute ("**funder**") to one of the parties involved in the dispute ("**litigant**") for purposes of legal proceedings. In return, the funder receives a portion of winnings or benefits resulting from the legal proceedings. TPF typically involves an agreement between the funder and the litigant ("**funding agreement**") and has increased in popularity, becoming a multi-billion industry in many regions, including the USA, the UK, and Australia. One example of a global litigation finance firm is Therium Capital Management Ltd, which has funded legal claims worldwide to the value of circa 100 billion USD[3] and is also the funder of the Sulu heirs' claims against Malaysia[4]. In light of the legitimate criticism TPF faces, which will be further

[1] Article in The Edge Malaysia entitled "Azalina: Malaysia, EU recognise need to regulate third- party litigation funding" on 13 Feb 2024 at 10:00PM
[2] Article in The Edge Malaysia entitled "Azalina: Malaysia, EU recognise need to regulate third- party litigation funding" on 13 Feb 2024 at 10:00PM; see also article in the Malay Mail on 12 Feb 2024 at 11:40PM about the launch of the e-book entitled "Sulu Fraud vs Malaysia's Truth" on 11 Feb 2024
[3] Therium's Company Website <https://www.therium.com/about-us/>
[4] Article in The Edge Malaysia entitled "Special Report: The Sulu heirs' claims – A thorn in Malaysia's side" on 25 Jul 2022 at 04:00PM

examined below, it is pressing to increase effective regulation in this growing industry, which has global implications for the integrity of legal processes.

TPF has historical roots in the English doctrine of Champerty and Maintenance. This is why a TPF agreement is also commonly known as a "champertous agreement". "Maintenance" refers to the offence of aiding a party in a legal action despite having no direct involvement in the case, while "champerty" is a form of 'maintenance' through an agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds.

Champerty and maintenance are prohibited under the doctrine of Champerty and Maintenance due to concerns of abuse in the litigation process. The threat of abuse arises from heavy influence of the funders over the legal proceedings, driven by their primary motivation for financial gain instead of a genuine desire to amicably resolve the dispute and/or seek justice. For this reason, champerty and maintenance used to constitute crimes in England and Wales as well as Hong Kong and used to be completely prohibited in Singapore under the strict application of the English common law doctrine. In the past half- decade,

these regions have legalised champerty and maintenance (now known as TPF), with a focus on regulating TPF activities to leverage its benefits while mitigating potential drawbacks.

2. **Advantages and Disadvantages of TPF**

Historically, the disadvantages of TPF were deemed greater than its advantages. This article will first dissect the reasons behind its historical prohibition and persistent cautious attitude of the courts when dealing with TPF practices, then move on to discuss the advantages of TPF which led to its legalisation and current popularity.

Disadvantages

The primary danger of TPF lies in the potential abuse of the justice process through funders who are tempted to "inflame damages, suppress evidence, or even to suborn witnesses"[5] for the sake of winning the legal proceeding without regard to notions of fairness or justice. Even if funders and litigants do not go so far as to carry out these actions of foul play, the temptation to compromise on ethical standards remain prominent in light of the pursuit of financial gain.

Datuk Seri Azalina Othman Said specifically voiced concerns regarding the lack of transparency of funding arrangements, potential conflicts of interest, and the impact of unethical TPF practices on the cost and duration of arbitral proceedings[6]. These concerns constitute threats to the integrity of arbitral processes and were evident in the Sulu case, of which she claimed demonstrated efforts by certain parties to "exploit" this arbitration system through "unethical means" for profit-seeking purposes.[7]

Furthermore, TPF may put the claimant litigant in a more advantageous position than a defendant who is not funded by a third party and does not intend to advance a counterclaim, as funders are typically only interested in supporting claims instead of defending a claim.

For these reasons, the doctrine of Champerty and Maintenance seeks to safeguard the integrity of the judicial system by preventing individuals with no genuine interest in a lawsuit from meddling for profit. This doctrine is premised on concerns of public policy to maintain fairness in a judicial system where legal proceedings are removed from the possibility of foul play arising from purely financial motives.

---

[5] *Re Trepica Mines Ltd (No. 2) [1963] Ch. 199, 220*
[6] Article in The Edge Malaysia entitled "Azalina: Malaysia, EU recognise need to regulate third- party litigation funding" on 13 Feb 2024 at 10:00PM
[7] Article in The Edge Malaysia entitled "Azalina: Malaysia, EU recognise need to regulate third- party litigation funding" on 13 Feb 2024 at 10:00PM

Advantages

However, the major advantage of TPF is that it increases access to justice for those who are unable to afford litigation fees while failing to meet the criteria for legal aid. TPF opens an avenue for financially disadvantaged litigants to seek justice when they are otherwise unable to do so. Globally, there is an increasing recognition that a blanket prohibition of TPF may no longer be suitable for the modern landscape of legal practice in light of the need for broader access to justice, as demonstrated in the Australian apex court decision of *Campbells Cash and Carry Pty Limited v. Fostif Pty Limited [2006] HCA 41*.

Supporters of TPF question whether traditional concerns about fairness in the administration of justice are adequately addressed by existing legal frameworks and suggest that TPF could improve access to justice without threatening the integrity of the justice system if properly regulated. However, critics of this view would highlight that the reality in the TPF industry is that businesses seeking funding for their commercial disputes form the majority of TPF litigants, as opposed to unprivileged members from poorer ends of society seeking access to justice. Nevertheless, the fact remains that TPF is an avenue for access to justice in the face of lack of funds, regardless of the identity of the litigant.

TPF could also constitute vital support for group litigation, which usually comprise of a large number of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial, as recognised in the UK Supreme Court case of R (*on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28*.

Additionally, TPF acts as a crucial resource to the pursuit of justice in meritorious claims, enabling them to be pursued where they might otherwise go unexplored due to prohibitive costs. This is because it is unlikely that a funder will provide financial support to a vexatious or frivolous claim with low prospects of success.

From an economical perspective, TPF also attracts economic benefits, as it is a growing industry that could drive a country's economy.

For these reasons, many jurisdictions have moved from a position of prohibiting TPF to a position of legalising TPF with appropriate regulation. These jurisdictions have recognised the advantages of TPF while being aware that lack of regulation will result in undermining the integrity of the justice system. We will now examine the regulation of TPF in various jurisdictions.

3. Examining How Various Jurisdictions Regulate TPF

Malaysia

As of now, champerty and maintenance (and consequently also TPF) remain prohibited in Malaysia. Therefore, TPF remains unregulated in Malaysia due to its illegal status. However, given its prevalence in international arbitration, Malaysians engaged in such proceedings are likely to encounter TPF practices.

Section 3 of the Civil Law Act 1956 codified the common law doctrine of Champerty and Maintenance. Cases such as *Amal Bakti Sdn Bhd & Ors v Milan Auto (M) Sdn Bhd & Ors [2009] 5 MLJ 95* and *Mastika Jaya Timber Sdn Bhd v. Shankar Ram Pohumall (No. 2) [2010] 10 CLJ 312* have confirmed that champerty agreements and the like are illegal due to public policy grounds[8].

Section 24(e) of the Contracts Act 1950 also empowers the courts to declare agreements contrary to public policy as unlawful, such as TPF agreements. In the Federal Court case of *Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253*, a champertous agreement was deemed contrary to public policy under this provision, demonstrating the legislative framework's alignment with the courts' stance in maintaining

8] See also *Federal Furniture Industries Sdn Bhd v Chim Yiam Lee, Tan & Associates* (Dahulunya dikenali sebagai Chim Yiam, Lee & Associates)(Disaman sebagai firma guaman) [2012] MLJU 1629

the purity of justice.

Further, Section 112(1) of the Legal Profession Act 1976 prohibits an advocate or solicitor from entering an agreement where he is employed for purposes of the litigation which contemplates payment only in the event or success. Agreements of this sort are also considered champertous and are prohibited under this provision because they go against public policy, as demonstrated in the case of *Diana Ann Seah v Jouseph Johnson [2022] 2 SMC 497*. However, this should be contrasted with the scenario where an advocate or solicitor enters into a payment arrangement comprising of (i) basic fees regardless of the litigation outcome; and (ii) success fees in the event of success. This payment arrangement, which consists of success fees on top of basic fees, are permitted[9].

Despite the current prohibition of TPF in Malaysia, it is important to note that this position may change in the future. Malaysia may decide to follow the footsteps of other jurisdictions such as Hong Kong and Singapore, which have evolved from their initial position of prohibition to a more balanced approach of legalisation with regulation. As legal landscapes evolve and societal needs change, the Malaysian courts may continue to refine their approach regarding TPF to better balance the concerns of preserving the integrity of legal processes and ensuring access to justice.

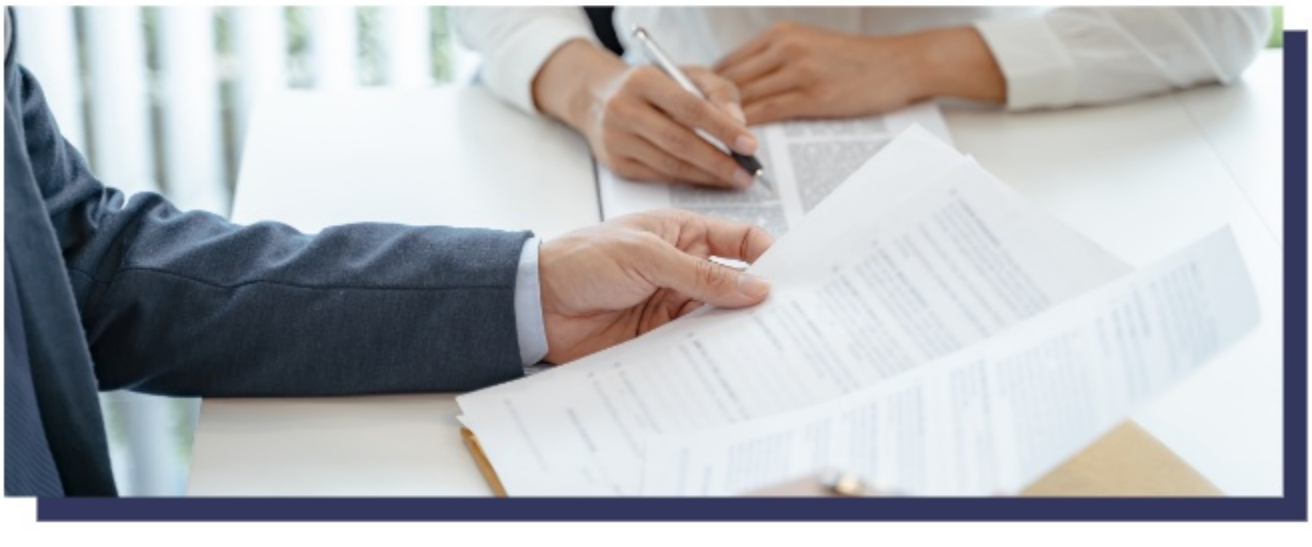
However, there is uncertainty regarding the possibility of lifting the prohibition on TPF in the foreseeable future, as the government's recognition of the dangers posed by TPF has been heightened by the high-profile Sulu international arbitration that Malaysia is undergoing and has actively litigated across four EU member states[10]. As a result of this case which raised concerns of, among others, the importance of upholding ethical conduct, integrity, professionalism, and good practices among the pool of international arbitrators, the Malaysian government is calling for an urgent review and coordination from global leaders to strengthen TPF regulation and prevent abuses of arbitration systems[11].

England and Wales

Champerty and maintenance used to be illegal in England and Wales until the Criminal Law Act 1967 removed them as crimes and torts. However, certain reservations were preserved regarding contracts contrary to public policy. This shift was driven by the increasing demand for legal recourse, leading to exceptions permitting TPF through Conditional Fee Agreements (CFAs) under specific conditions for only certain types of proceedings.

Over the years, the courts' attitude towards TPF has been evolving to place greater emphasis on justification and flexibility while bearing in mind the potential harm TPF poses to the administration of justice. This can be seen in cases like *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932* and *London & Regional (St George's Court) Ltd v Ministry of Defence [2008] EWCA Civ 1212*.

Regulation of TPF in England and Wales is primarily effected through voluntary



[9] *Lua & Mansor (suing as a firm) v Tan Ah Kim [2017] 3 MLJ 371*
[10] Article in the Malay Mail on 12 Feb 2024 at 11:40PM about the launch of the e-book entitled "Sulu Fraud vs Malaysia's Truth" on 11 Feb 2024
[11] Article in The Edge Malaysia entitled "Azalina: Malaysia, EU recognise need to regulate third- party litigation funding" on 13 Feb 2024 at 10:00PM; Article in the Malay Mail on 12 Feb 2024 at 11:40PM about the launch of the e-book entitled "Sulu Fraud vs Malaysia's Truth" on 11 Feb 2024

membership in the Association of Litigation Funders of England and Wales (ALF), an independent body charged by the Ministry of Justice to self-regulate litigation funding. As of today, most established professional funders in England and Wales have voluntarily become members of the ALF in light of the "robust endorsement" the courts have given to the ALF and its Code of Conduct, as can be seen in *Akhmedova v Akhmedova [2020] EWHC 1526 (Fam)*. In 2011, the ALF published its Code of Conduct under the facilitation of the Civil Justice Council, setting standards and practices for funders aimed at protecting funded litigants and managing conflicts of interest. For instance, the Code requires funders to have immediate access to funds and to refrain from exerting undue influence over the litigation to ensure adherence of ethical standards and fair treatment of funded litigants. The ALF also has protective measures such as restrictions on termination clauses in funding agreements and a complaint procedure where funded litigants may seek recourse against their funders. Nevertheless, there are concerns that the voluntary nature of the ALF and the inadequacy of penalties are less effective in preventing abuses of the justice process[12].

Interestingly, legislative regulation was thought to be absent until the Supreme Court case of *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28*, which attracted robust press attention and commentary. In this case, the Supreme Court held that agreements which provide for the remuneration of the funder based on a percentage of damages awarded, a popular type of TPF arrangement, are considered "damages-based agreements" and therefore must adhere to the Damages-Based Agreements Regulations 2013 (SI 2013/609). Without adherence to these regulations, the relevant TPF agreement would be unenforceable in England and Wales.

This 2023 judgment was alarming to the litigation funding industry as TPF parties have always assumed that TPF agreements were ordinary binding contractual agreements that did not need to adhere to any specific legislation or regulation. As a result of this case, most TPF agreements in England and Wales would be "unenforceable as the law currently stands"[13]. It is therefore not surprising that many TPF parties in England and Wales will urgently review their TPF agreements to examine whether they comply with the required regulations, and if not, whether restructuring of the agreement can be effected to achieve compliance[14]. However, in the event that parties are unable to restructure their agreement, they may elect to abandon the litigation, which in turn will attract the possibility of a substantial adverse costs claim or an application for security for costs by defendants against them[15].

The impact of this case towards English-seated arbitrations is currently unclear on the face of the PACCAR judgment. However, in the absence of clear judicial guidance, it is likely that TPF parties in arbitration proceedings will choose to err on the side of caution and seek to attain compliance with the relevant regulations.

[12] Article on the website of the UK Bar Council entitled "Keeping hold of the reins: The challenge of regulating third-party funding of litigation" published on 7 July 2023, <https://www.barcouncil.org.uk/resource/keeping-hold-of-the-reins-the-challenge-of-regulating-third-party-funding-of-litigation.html>

[13] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28 [13]*

[14] Insights by White & Case on their website entitled "Upheaval in the Litigation Funding Industry: UK Supreme Court Rules that many Litigation Funding Agreements are Unenforceable" published on 2 August 2023, <https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding >

[15] Insights by White & Case on their website entitled "Upheaval in the Litigation Funding Industry: UK Supreme Court Rules that many Litigation Funding Agreements are Unenforceable" published on 2 August 2023, <https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding>

In response to this 2023 judgment, it is possible that legislation will soon be enacted to clarify the legal position of TPF agreements, specifically whether they are considered "damages-based agreements" falling under the purview of the Damages-Based Agreements Regulations 2013 (SI 2013/609). In fact, it was reported on 14 January 2024 that the Justice Secretary had stated that he planned 'at the first opportunity' to reverse 'the damaging effects' of the *PACCAR* judgment[16].

Singapore

TPF was completely prohibited in Singapore until 2017 when the Civil Law (Amendment) Act 2017 abolished champerty and maintenance as torts. With the enactment of the Civil Law (Third-Party Funding) Regulations 2017, TPF was permitted in international arbitration and related court and mediation proceedings in limited circumstances as long as the funders met the requisite criteria. Cases such as *Re Trikomsel Pte Ltd (unreported but was referred to and applied in Re Fan Kow Hin [2019] 3 SLR 861)* and *Hyflux Ltd (in compulsory liquidation) and others v Lum Ooi Lin [2023] SGHC 113* confirm the legitimacy of TPF in Singapore.

However, TPF remains generally prohibited for other legal proceedings due to public policy reasons. Despite this general prohibition, the introduction of the TPF scheme in 2017 led to amendments to the Legal Profession Act, issuance of guidance notes by the Law Society of Singapore, and guidelines for third-party funders from the Singapore Institute of Arbitrators (SIArb), among others, to correspond with the new regime. These amendments and guidelines seek to regulate TPF by qualifying third-party funders, managing conflicts of interest, defining the role of third-party funders in legal proceedings, and establishing disclosure requirements. For instance, third-party funders must meet certain financial criteria and ensure no conflicts of interest arise from the funding arrangement. Legal practitioners are also prohibited from holding ownership interests in third-party funders they refer to clients. Additionally, there are stringent disclosure requirements for legal practitioners and arbitrators regarding the existence and nature of third-party funding contracts.

In June 2021, the Civil Law (Third-Party Funding) (Amendment) Regulations 2021 were enacted, which extended the scope of TPF practices to domestic arbitration, proceedings commenced in front of the Singapore International Commercial Court (SICC) as well as related court and mediation proceedings.

Additionally, local lawyers involved in TPF agreements must abide by conduct rules in the Legal Profession (Professional Conduct) Rules 2015, which serve to prevent conflicts of interest. Foreign lawyers involved in SICC proceedings will fall under the governance of the amended Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 as a result of the 2021 TPF expansion. These rules contain provisions regarding disclosure obligations and managing the financial interests of these lawyers in these TPF agreements.

[16] Article in The Financial Times entitled "UK government vows to protect litigation funding that helped sub-postmasters" on 14 January 2024

Hong Kong

Champerty and maintenance are currently torts under Hong Kong law and are also indictable offences at common law, which could result in fines and imprisonment. However, there are three exceptions to the prohibition on TPF, which are listed below:

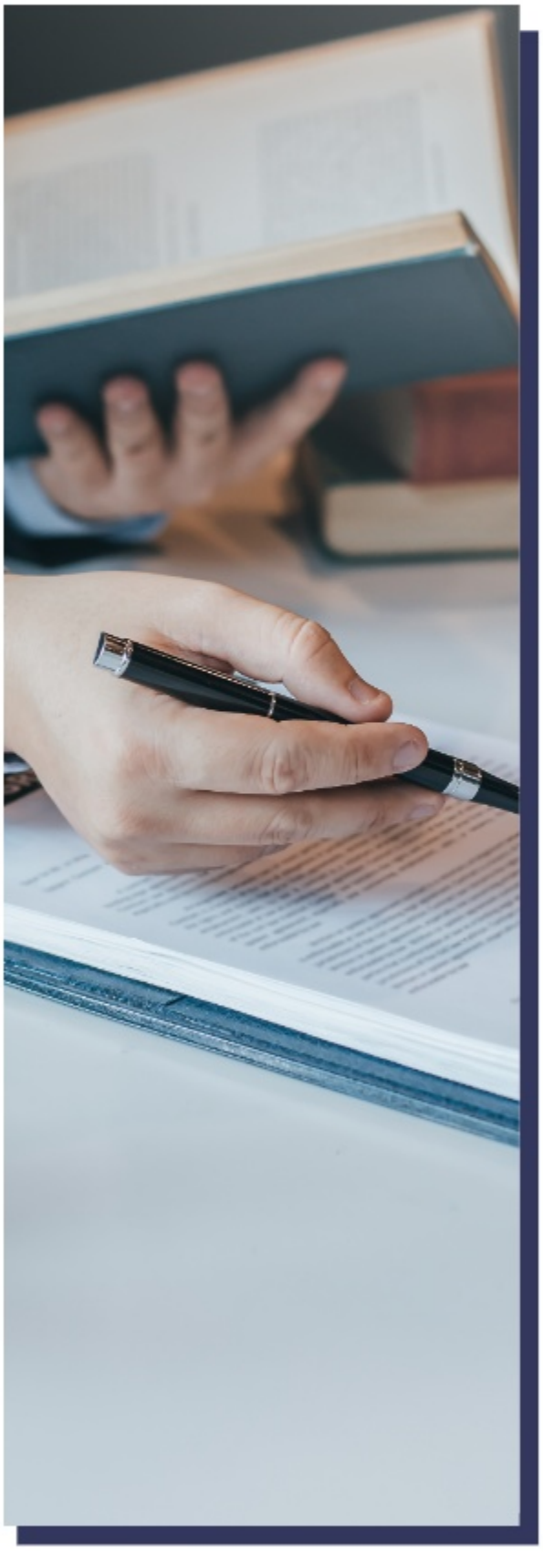
1. Cases where the funder has a legitimate common interest in the litigation's outcome;
2. Cases where access to justice considerations prevailed; and
3. Cases in specific categories such as the sale or assignment of actions commenced in bankruptcy.

The Hong Kong courts have been cautious in enforcing the narrowness of these exceptions, as can be seen in *Raafat Imam v Life (China) Co Ltd and Others [2018] HKCFI 1852 and Re A [2020] HKCFI 493*. In the former case, the court emphasised that these exceptions were not intended to assist a litigant in accessing their choice of solicitor/barrister or to otherwise improve the strength of a legal team that could be deployed. In the latter case, the court clarified that only a litigant who demonstrates impecuniosity can qualify for the "access to justice" exception.

Similar to the situation in Malaysia, legal practitioners in Hong Kong are also prohibited from entering into representation agreements stipulating payment only in the event of litigation success by virtue of Section 64 of the Legal Practitioners Ordinance. The Hong Kong Solicitors' Guide to Professional Conduct also expressly prohibits a solicitor from entering into contingency fee arrangements to act in contentious proceedings.

In 2017, an amendment of the Arbitration Ordinance, fully effective in February 2019, permitted TPF for domestic and international arbitration. Such TPF agreements must now abide by the regulatory requirements under Part 10A of the Arbitration Ordinance and the Code of Practice for Third-Party Funding of Arbitration issued by the Hong Kong Department of Justice. This Code established stringent requirements for third-party funders to qualify, such as maintaining financial capacity and access to a minimum amount of capital. Managing conflicts of interest is also emphasised, with third-party funders required to have effective conflict management procedures and refrain from influencing the arbitration process. Additionally, disclosure obligations are placed on funded litigants, although details of the funding agreement are typically excluded from disclosure.

More recently, in December 2022, sections in Part 10B were added to the Arbitration Ordinance, which provides for what is known as "Outcome Related Fee Structures for Arbitration" ("**ORFSA**"). An advisory body appointed by Hong Kong's Secretary for Justice oversees ORFSAs and acts as its regulatory body.



Concluding Remarks

Internationally, there is an increased awareness that TPF regulation is crucial to achieving a balance between increasing access to justice and preventing abuses of process. The common trait across various jurisdictions in lifting TPF prohibitions is the implementation of appropriate regulations, through direct or indirect means, at every stage where prohibition on TPF is loosened. The unique scenario is that of England and Wales, where parties have always operated on the premise that TPF was free of legislative governance, only to realise in 2023 that this was a mistaken assumption due to the PACCAR judgment[17].

As legal landscapes continue to evolve, policymakers, practitioners, and stakeholders must engage in ongoing dialogue to strike a balance between justice, access, and regulatory oversight in the realm of third-party funding. Collaborative efforts on both national and international levels are imperative to address emerging challenges, uphold ethical standards, and ensure fairness in legal proceedings.

Looking ahead, it would be beneficial for Malaysia to consider legalising TPF while implementing appropriate regulations. This would involve studying regulatory models from other jurisdictions and adapting them to fit Malaysia's socio-economic and judicial landscape.

LH-AG

CRYSTAL WONG WAI CHIN
Partner
Energy, Projects, Infrastructure
& International Arbitration
wwc@lh-ag.com

LIM JIA YUN RUTH
Pupil
Energy, Projects, Infrastructure
& International Arbitration
jylim@lh-ag.com

[17] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28*

DOES A REMOVAL FROM AN ACTING POSITION EQUATE TO A DEMOTION?

by Nurul Aisyah Hassan

In most organisations, interim employment assignments are not uncommon, especially when there is a sudden vacancy in a position and the organisation has not had enough time or opportunity to source for an appropriate permanent candidate.

It is settled that the term "acting" implies that the employee would be temporarily holding the position for someone else for a period of time. This was aptly explained in the case of *Baladevan Nadarajan v PPG Performance Coating (M) Sdn Bhd*[1], where the employee in that case was initially employed as a Production Manager of the company and was later redesignated to the role of Acting Plant Manager pending the company's plant closure. Subsequently the employee was offered the role of Production Manager of the company's holding entity, which he accepted. However, months later, he objected, stating that this was a demotion.

No Indication of Permanence

In finding that the employee was not demoted, the Industrial Court highlighted that it is clear an "acting" position is temporary in nature and not meant to be permanent unless the person is subsequently made permanent. The Court further held that the designation of an Acting Plant Manager was deemed temporary, and the company had the right to revert the employee back to their initial position in an "acting" capacity. The reversion to the original role did not entail any decrease in benefits or earnings for the employee. Additionally, the employee initially agreed to the return to their former role by signing a new employment contract without objection, only to change his mind later.

Recent Developments

The issue of acting positions was revisited by the Court of Appeal in *Keretapi Tanah Melayu Berhad v Mohan Vythialingam & Ors*[2]. In this case, an employee was initially held to be constructively dismissed by the Industrial Court[3] when he was removed from his acting position and reverted to his old position.

The employee, in this instance, was initially employed as a locomotive driver. He was then assigned as Acting Industrial Relations Executive for a fixed period of six months and received an acting allowance. After the end of the six months, the employee was reassigned as Acting Executive, Rules and Regulations, with an acting allowance paid to him. This reassignment was for an unspecified period of time. About ten months later, he was informed that he would be designated back to his original designation as a

[1] [2019] 3 ILR 28
[2] Court of Appeal Civil Appeal No.: W-01(A)-664-11/2019; [2023] 2 ILR 264
[3] *Mohan Vythialingam v Keretapi Tanah Melayu Berhad [2019] 2 ILR 49*

locomotive driver. Dissatisfied with this, the employee resigned and claimed constructive dismissal.

The Industrial Court Chairman held that the "acting" position did not mean that the company could terminate the said position of an employee at any point, let alone where it had not been for a fixed period of time, as in this case. The court highlighted that the employee had been entitled to a reasonable expectation of remaining in the acting position as long as no fixed term had been imposed and no issues on his performance had been raised by the company.

The Industrial Court's decision was upheld by the High Court. The Court of Appeal subsequently overturned the judgment. The Court of Appeal took the stance that at the end of the day, the fundamental feature of the acting position is such that it was temporary in nature. The company was not obliged to provide justification for reassigning the employee to his old position since it is their prerogative to do so.

The Court of Appeal also discussed the case of *A Girish Kumar Gopalakrishnan v. Kilang Kelapa Sawit Sri Lingga Sdn Bhd & Bell Management Sdn Bhd*[4], which displayed distinguishable facts from Baladevan. In *A Girish Kumar*, the company hired the employee as an Assistant Engineer. Thereafter, he was offered the role of Acting Mill Manager by the parent company, along with a monthly acting allowance and a company vehicle. Two years later, the employee was informed that he would be transferred to another mill as an Assistant Engineer, his original designation. There were no complaints made about his performance during his tenure as Acting Mill Manager, and the company even increased his salary and gave him a bonus. The Industrial Court agreed with the employee's argument that he had a legitimate expectation that his appointment as Acting Mill Manager was a promotion and that he would continue to be retained in that position.

The Court of Appeal further noted that this case was different from *A Girish Kumar* as the employee in this instance only received an acting allowance, whereas Girish Kumar had received an increase in pay and a bonus.

Nevertheless, in June 2023, the Federal Court overturned the decision of the Court of Appeal and reinstated the Award of the Industrial Court[5]. However, at the time of writing this article, the written grounds of the Federal Court have yet to be published.

[4] Award No. 1371 of 2010
[5] https://thesun.my/local_news/court-awards-rm93000-to-demoted-train-driver-KC11139425

Key Takeaways

It is without a doubt that companies may find themselves in need of appointing an employee in an "acting" position to ensure the smooth operations of the organisation. For example, where a senior management employee suddenly resigns or is removed, his / her immediate subordinate may be chosen to step in to carry out his / her functions in the meantime. However, this does not mean that the subordinate holds a lien to that role, unless the organisation intends to promote him / her permanently.

An important point to note from the *Mohan* case is that the employee was never offered the position of Acting Executive, Rules and Regulations for a fixed period of time. Hence, the Industrial Court's observation that he had a reasonable expectation of remaining in the acting position so long as no fixed term had been imposed.

Thus, before companies appoint an employee to an acting position, it would be prudent to bear in mind the following:

(i) The term of the appointment to the acting position is specified to be temporary or for a fixed period of time with no expectation of permanence. Where possible, it should also specify the start and end date of the appointment. The term of appointment may also be stipulated to be for a period until such a suitable and qualified candidate is hired in the position permanently.

(ii) It must be specified that the company has an unfettered prerogative to redesignate the employee back to their original position at any time.

(iii) The terms of the appointment should be in writing and agreed by both parties.

LH-AG

NURUL AISYAH HASSAN
Partner
Employment & Industrial Relations
nah@lh-ag.com

THE DOCTRINE OF TRANSNATIONAL ISSUE ESTOPPEL: GREATER CERTAINTY AND FINALITY IN INTERNATIONAL ARBITRATION?

by Lim Chee Yong & Lee Hui En

A party that is unsuccessful in arbitration would typically seek to challenge the arbitration award by setting aside the arbitration award at the *seat court*[1] (active remedy) or by resisting enforcement proceedings before an *enforcement* court (passive remedy)[2]. The co-existence of active and passive remedies, however, undermines litigation finality as it provides an unsuccessful party multiple opportunities to contest the award and have a second bite on the same issues[3].

The doctrine of issue estoppel is not foreign within the Malaysian context and is well entrenched under common law. Applying issue estoppel in a transnational context requires careful consideration in balancing the need for comity and the enforcement court's obligation to uphold the rule of law within its own jurisdiction. This article seeks to build on the growing debate in recent years on the application of transnational issue estoppel in international arbitration.

Separation Of Roles Between the Seat Court and Enforcement Court

The distinction between a seat court (i.e., the court where the seat of the arbitration is located) and an enforcement court (i.e., the court where enforcement of an arbitration award is being sought) are concepts that will not be foreign to users of international arbitration.

The seat court enjoys exclusive jurisdiction over matters concerning the supervision of arbitral proceedings[4] and the setting aside of an arbitral award[5]. All other courts beyond the seat court are limited to the role of an enforcement court in recognising or enforcing (or refusing to, as the case may be) an arbitration award, with no setting aside powers. The interplay between the two courts was succinctly summarised by **Tee Geok Hock JC** (as his Lordship then was)[6]:

> *"Setting aside an arbitral award at the seat court is like cutting off the tree at its trunk and completely uprooting it, whereas a successful opposition to an application for recognition and enforcement of the arbitral award at a particular country is like cutting off only one of the many branches of the tree."*

[1] Arbitration Act ("AA") 2005, section 37.
[2] *Envac Scandinavia AB v Muhibbah Engineering (M) Bhd [2020] MLJU 2092 at [30]; Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd & Anor Case [2018] 2 MLJ 706 at [22], [33].*
[3] Renato Nazzini, "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context" (King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2018-32), page 4.
[4] *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd [2021] 6 MLJ 255 (FC) at [92], [144]-[146].*
[5] *Hew Choong Jeng & Ors v Kok Low Kau ("Hew Choong Jeng") [2022] MLJU 1738 (HC) at [40].*
[6] *Envac Scandinavia AB v Muhibbah Engineering (M) Bhd [2020] MLJU 2092 at [30].*

Considerations for the applicability of transnational issue estoppel would differ depending on whether the prior ruling to be relied upon was issued from a seat court or an enforcement court. The following three scenarios will be considered:

1. Issues previously determined in a *seat* court and subsequently raised in an *enforcement* court (**Seat → Enforcement**);
2. Issues previously determined in an *enforcement* court and subsequently raised in a *seat* court (**Enforcement → Seat**); and
3. Issues previously determined in an *enforcement* court and subsequently raised in *another enforcement* court (**Enforcement → Enforcement**).

Seat → Enforcement

A. Recent Developments in Singapore

Just recently, the Singapore Court of Appeal confirmed in *The Republic of India v Deutsche Telekom AG*[7] ("**Deutsche Telekom AG case**") that the doctrine of transnational issue estoppel applies in the realm of international commercial arbitration. Acting as the enforcement court, the Singapore Court of Appeal dismissed attempts by India to relitigate issues which were already determined at the seat court.

Deutsche Telekom AG commenced a Switzerland-seated arbitration and successfully obtained an arbitration award against India. India failed in its attempt to set aside the arbitration award before the Switzerland Federal Supreme Court was unsuccessful ("**Swiss Setting Aside Decision**"). The arbitration award was thereafter brought for enforcement proceedings before the Singapore courts where India, in resisting the proceedings, sought to rely on the same grounds it had relied during the setting aside proceedings in Switzerland.

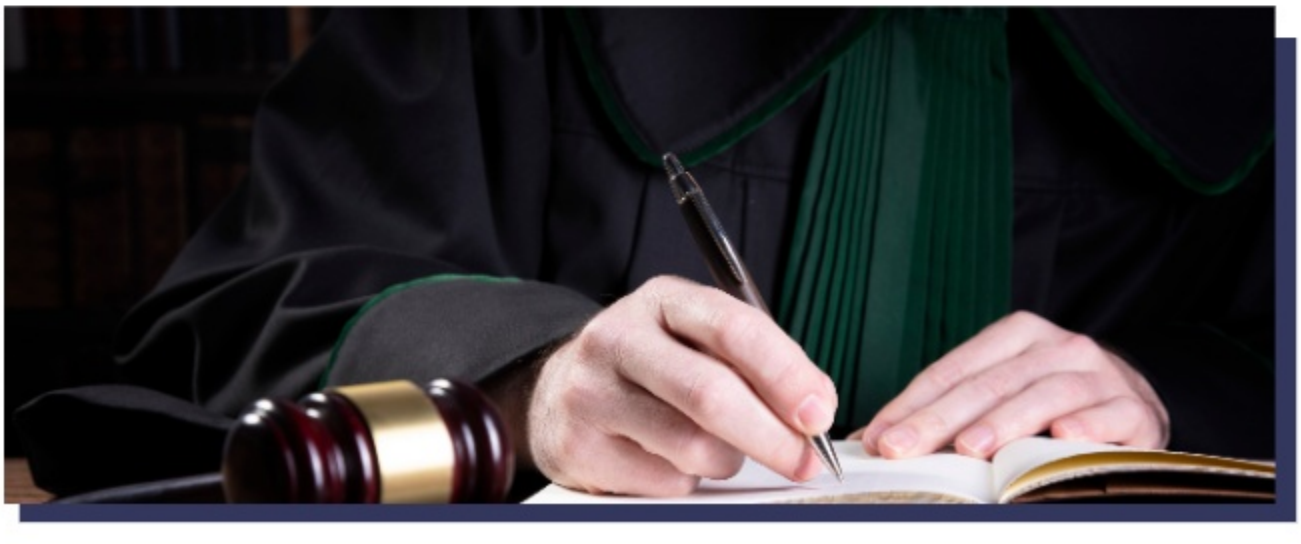
In holding that transnational issue estoppel applies and therefore India was precluded from relitigating the same grounds which had already been determined by the seat court, the Singapore Court of Appeal referred to the principles enunciated, in amongst others, *Merck Sharp & Dohme Corp v Merck KGaA*[8] ("**Merck Sharp**").

[7] *The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10 ("Deutsche Telekom AG case")*
[8] *Merck Sharp & Dohme Corp v Merck KGaA [2021] SGCA 14 ("Merck Sharp")*

Test for Transnational Issue Estoppel and Its Application

Broadly, the following three requirements must be established in order to invoke transnational issue estoppel.

No.	Requirements[9]	Application on the facts
1st Limb	**The foreign judgment must be capable of being recognised in the jurisdiction where issue estoppel is being invoked**: (i) it must be a final and conclusive decision on the merits; (ii) it must originate from a court of competent jurisdiction; and (iii) it must not be subject to any defences to recognition.	The Singapore Court of Appeal was satisfied that the Swiss Setting Aside Decision was final and conclusive, as expert evidence (e.g., legal opinion) showed that the Switzerland Federal Supreme Court was unlikely to revisit the issue of the arbitral tribunal's jurisdiction at the enforcement stage under Swiss law. On this basis, the Singapore Court of Appeal was satisfied that that it was not giving any greater preclusive effect to the Swiss Setting Aside Decision than would otherwise be accorded under Swiss law[10].
2nd Limb	**There must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised.**	The parties appearing before the Singapore Court of Appeal are the same as those before the Switzerland Federal Supreme Court.
3rd Limb	**The subject matter of the estoppel must be the same as what has been decided in the prior judgment.**	In resisting enforcement of the arbitration award, India contended that Deutsche Telekom's investment fell outside the scope of the bilateral investment treaty based on four grounds. However, these four grounds have already been canvassed before and dismissed by the Swiss Federal Supreme Court (as the seat court) in the Swiss Setting Aside Decision. Therefore, India was estopped from relitigating and relying on these four grounds to resist enforcement[11].



[9] *Merck Sharp [35]-[40]; Deutsche Telekom AG case at [64].*
[10] *Deutsche Telekom AG case at [173].*
[11] *Deutsche Telekom AG case at [175]-[176].*

B. Other Examples from the UK and Malaysia

Examples of issues which were held to have created an issue estoppel in the enforcement courts are illustrated below:

a. In *Carpatsky Petroleum Corp v PJSC Ukrnafta*[12], Ukrnafta, who resisted the enforcement before the English court, alleged that there were procedural irregularities in the arbitration proceedings in Sweden. Among others, it was alleged that the arbitral tribunal exceeded its mandate by: (i) dealing with an issue which had not been pleaded; and (ii) failing to apply the calculation model presented by the parties and experts in the assessment of damages[13].

   The same grounds were dismissed in a previous setting aside application before the Swedish seat court, which ruled that there were no procedural irregularities as the Swedish seat court found that the Ukrnafta had sufficient opportunity to present its case. It was further noted that there was nothing to prevent the arbitral tribunal from drawing different conclusions on the assessment of damages. Accordingly, Ukrnafta was estopped from raising the same grounds before the English enforcement court.

b. In a recent Malaysian case of *Qingdao Hongdaxinrong International Trade Co Ltd v Charterwin Trading Sdn Bhd and other cases*[14], Qingdao sought to enforce an arbitration award by the China International Economic and Trade Arbitration Commission (CIETAC) in Malaysia. Charterwin had previously applied to set aside the arbitration award before the Beijing seat court but was unsuccessful. In resisting the enforcement action, Charterwin relied on the same grounds and issues which had already been dismissed by the Beijing seat court[15].

   The Malaysian High Court held that Charterwin was precluded by estoppel from raising the same issues in the enforcement proceedings. In doing so, the High Court made reference to the principle of minimal court intervention[16] and authorities indicating that the role of the enforcement court is merely an overseer[17]. It does not have supervisory jurisdiction similar to that of the seat court[18] and should not look into the merits of the award and allow relitigation of issues that could have been brought up before the arbitrator or the supervisory court[19].

C. Exception – Public Policy

Where public policy considerations are raised, an enforcement court will be slow in invoking transnational issue estoppel[20]. There will be no identity of issues (3rd limb of transnational issue estoppel) as public policy concerns are 'domestic in nature' and would vary between jurisdictions[21].

---

[12] *Carpatsky Petroleum Corp v PJSC Ukrnafta [2020] EWHC 769 (Comm) ("Carpatsky")*
[13] *Carpatsky at [128]-[130], [144]-[146].*
[14] *Qingdao Hongdaxinrong International Trade Co Ltd v Charterwin Trading Sdn Bhd and other cases [2023] MLJU 1467 (HC) ("Qingdao")*
[15] *Qingdao at [30], [52].*
[16] AA 2005, section 8.
[17] *Qingdao* at [38], reference was made to *Open Type Joint Stock Co Efirnoye("EFKO") v Alfa Trading Ltd [2012] 1 MLJ 685 (HC) at [41].*
[18] *Qingdao* at [51], reference was made to *Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd [2015] MLJU 2319 (HC) at [52].*
[19] *Qingdao* at [53], reference was made to *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] SGHC 78 at [56].*
[20] *Deutsche Telekom AG case at [84].*
[21] *Yukos Capital Sarl v OJSC Rosneft Oil, Co. (No 2) [2013] 3 WLR 1329 at [150]-[157].*

a. A Swedish seat court dismissed a setting aside application of an award in which the arbitrators had been deliberately misled by the claimants. It was unclear to the Swedish seat court that the false evidence would have any influence on the outcome of the matter[22]. The decision of the Swedish seat court did not, on its own, trigger issue estoppel before the English enforcement court, which ruled that where fraud allegations are raised and would contravene English public policy, these should be re-examined at trial and decided on their merits[23].

b. In a separate matter, a party who was unsuccessful in arbitration sought to resist enforcement proceedings before the English court on the basis that the witness had been interfered with and prevented from giving evidence in the Paris-seated arbitration. The same ground was canvassed before the French seat court and rejected. As the allegations went beyond the bounds of procedural irregularities, the English enforcement court considered that the more appropriate course was to consider the full merits of the challenge as opposed to short-circuiting the deliberation (by applying issue estoppel)[24].

Enforcement → Enforcement

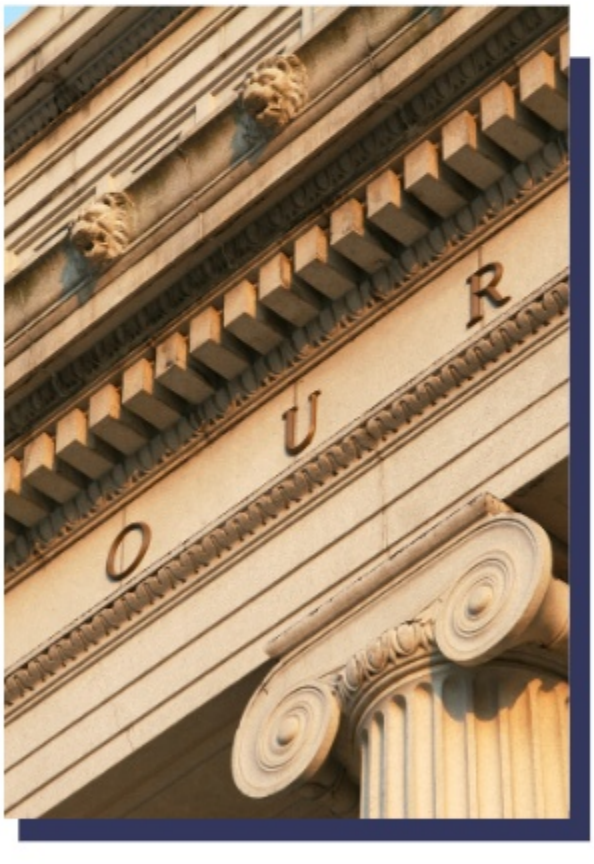
Deutsche Telekom AG case also considered situations where a prior decision from an enforcement court is sought to be relied on by a subsequent enforcement court. There is a general reluctance in applying transnational issue estoppel as it could potentially elevate the status of the enforcement court to that of a seat court and in doing so, undermining the primacy of the seat court. Furthermore, such practice may lead to bad forum shopping, with the successful party first seeking enforcement in an arbitration-friendly jurisdiction and attempting to thereafter bind subsequent enforcement courts in other jurisdictions[25].

Enforcement → Seat

Recently, the Singapore High Court ("**SGHC**") in *Sacofa Sdn Bhd v (1) Super Sea Cable Networks Pte Ltd (2) SEAX Malaysia Sdn Bhd*[26] ("**Sacofa**") applied ***Deutsche Telekom AG case*** and ruled that transnational issue estoppel may be applied in a reverse situation, i.e., where a seat court is presented with a prior decision of an enforcement court.

However, the application of transnational issue estoppel in this situation appears to be limited primarily to **illegality objections** (i.e., an award being contrary to public policy) and not **jurisdictional objections** (i.e., the arbitral tribunal acted in excess of jurisdiction by deciding on claims which did not fall under the scope of the arbitration agreement)[27].

It must, however, be noted that concerns on bad forum shopping ought to still be a relevant consideration when a seat court is presented with a prior decision from an enforcement court. The decision in ***Sacofa***, would therefore appear to be fact specific (where public policy considerations between Malaysia and Singapore are considerably similar) and ought not to be regarded as binding on how a decision from an enforcement court would be treated by a subsequent seat court.



[22] *Stati v Republic of Kazakhstan [2017] EWHC 1348 (Comm) at [62]-[63].*
[23] *Stati v Republic of Kazakhstan [2017] EWHC 1348 (Comm) at [80]-[87] and [92]-[93].*
[24] *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd [2018] EWHC 2713 (Comm) at [60]-[61].*
[25] *Deutsche Telekom AG case* at [91]-[92]. Notwithstanding the above, the English High Court in *Diag Human SE v The Czech Republic [2014] EWHC 1639 (Comm)* once held that transnational issue estoppel was applicable in this situation, however, it appears to be a one-off, fact-specific matter where considerations of bad forum shopping were not argued.
[26] *Sacofa Sdn Bhd v (1) Super Sea Cable Networks Pte Ltd (2) SEAX Malaysia Sdn Bhd [2024] SGHC 54 ("Sacofa")*
[27] *Sacofa* at [74].

Takeaways from Recent Developments

The recent developments are undoubtedly welcoming. Through the application of transnational issue estoppel, the enforcement courts pay greater respect to the principle of international comity, recognise the capacities of foreign and transnational tribunals, and cater to the need for predictability in dispute resolution in the international commercial system, while allowing certain leeway to safeguard the interests of sovereign states with the public policy exception.

While the position in Malaysia appears to be generally aligned with the legal position in Singapore and the UK, it is notable that discussions on this topic in Malaysia have been comparatively limited. Nevertheless, the recent development in Singapore would undoubtedly serve as persuasive guidance for disputing parties when confronted with similar situations.

Disputing parties should therefore exercise great caution in selecting their arbitral seat, as it has the final say on jurisdictional issues, and enforcement courts will generally defer to the seat court's decision on the same subject matter.

LH-AG

LIM CHEE YONG
Partner
Energy, Projects, Infrastructure
& International Arbitration
lhy@lh-ag.com

LEE HUI EN
Associate
Energy, Projects, Infrastructure
& International Arbitration
lhe@lh-ag.com

COMPANIES (AMENDMENT) ACT 2024: KEY AMENDMENTS TO CORPORATE RESCUE MECHANISMS

by Kumar Kanagasingam, Wong Han Wey & Harshinie Paranitharan

Much ink has been spilt over the past years on reforms to the Companies Act 2016 ("**CA 2016**") aimed at fortifying the corporate rehabilitation framework and bolstering corporate transparency, aligning it with global standards and practices[1]. The discussions culminated in the Companies (Amendment) Bill 2023, which was passed by Parliament late last year.

On 2 February 2024, the Companies (Amendment) Act 2024 ("**Act**") was gazetted with a much-anticipated enforcement date of 1 April 2024 recently announced[2]. This article revisits the amendments introduced through the Act, with a particular focus on the improvements to the corporate rescue mechanisms aimed at better facilitating the recovery of financially distressed companies.

PROCEDURAL ENHANCEMENTS FOR SCHEME OF ARRANGEMENT

The Act introduces several procedural enhancements to the scheme of arrangement framework, which remains the preferred method of debt-restructuring to date.

Chairperson of Meetings

The insertion of Section 366(2A)[3] now mandates all meetings for the approval of a compromise or arrangement be chaired by an insolvency practitioner appointed by the Court or, alternatively, a person elected by the majority in value of creditors or members of the company. This may assist in alleviating potential issues relating to the impartiality of the chairperson.

Role of Court-appointed Insolvency Practitioners

While an applicant ordinarily has its own financial advisor (usually an insolvency practitioner), Section 367 of the CA 2016 gives the Court the discretion to appoint an independent insolvency practitioner to assess the viability of the proposed scheme or compromise.

The amendments to Section 367 clarify the powers of the Court-appointed insolvency practitioner, who is entitled to full access to the books and records of the company and to request further information or explanation from any officer of the company[4].

[1] SSM Annual Dialogue 2023 – Companies (Amendment) Bill 2023 (5 December 2023) https://www.ssm.com.my /Pages/ Publication /PDF%20Files /Annual%20Dialogue%202023%20-%20Companies%20(Amendment)%20Bill%202023.pdf ("SSM Annual Dialogue 2023")
[2] Sections 4, 14, 26 and 28 of the Act will come into force on a date to be announced later. Federal Government Gazette, Appointment of Date of Coming Into Operation (26 March 2024) P.U. (B) 118/2024 https://lom.agc.gov.my/act-detail.php?language=BI&type=amendment&act=A1701
[3] Section 9 of the Act
[4] Section 10 of the Act

Furthermore, the appointment of an insolvency practitioner has been made mandatory in the following newly introduced situations:

1. Restraining order against related companies of scheme companies (Section 368A);
2. Super priority financing (Section 368B);
3. Cross-class cramdown (Section 368D); and
4. Pre-pack schemes of arrangement (Section 369C).

In such situations, the insolvency practitioner will be the Chairperson of the scheme meeting. These new situations will be further discussed below.

Proof of Debt Exercise

Section 369B[5] introduces a statutory framework for establishing the status of a person as a creditor for voting purposes at a Court-convened meeting. The process was recently discussed by the High Court in ***Re Top Builders***[6].

This new statutory framework provides certainty regarding the adjudication of the proof. This includes, amongst others, the manner and period for filing a proof of debt, adjudication by the meeting's Chairperson, inspection of other creditors' proof of debt, and challenges against the Chairperson's decision in respect of a proof filed by a creditor.

Power of Court to Order a Re-vote

Section 369A[7] grants the Court discretion to order a re-vote on a scheme at the hearing of an application for sanction. In doing so, the Court may also impose conditions on, amongst others, the manner in which the meeting is to be reconvened, the classification of creditors and their respective rights, including the amount of voting debt and the weight to be attached to the vote.

The introduction of this remedial section caters to situations where it is subsequently discovered that there has been material non-disclosure or some material information clearly lacking in the explanatory statement of the scheme, which may have potentially interfered with and affected the outcome of the voting process. For example, the existence of related-company debts.

Power to Review a Sanctioned Scheme

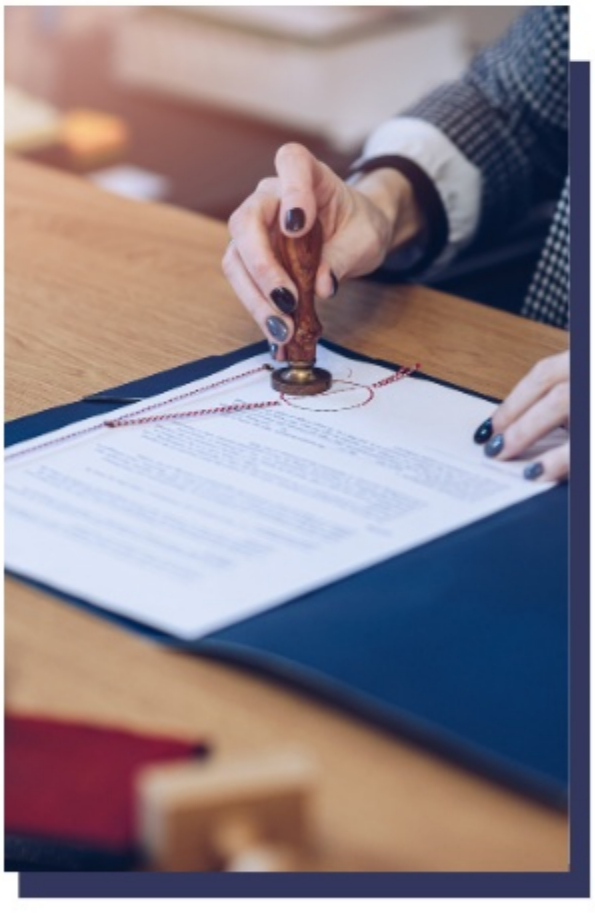
The Courts will now also maintain supervisory powers over a sanctioned scheme. With Section 369D[8], the scheme company or its creditors may apply to the Court to clarify or deal with any breach or omission of the terms of the compromise or arrangement granted.

EXPANSION OF RESTRAINING ORDERS

A company applying for a scheme will ordinarily also apply for a restraining order barring legal actions from being taken against the company, paving the way for attempts to have the scheme sanctioned and get its affairs in order. The Act expands the scope of restraining orders and provides clarity on their applicability.

Scope of a Restraining Order

Firstly, Sections 368(1A) and 368(3A) clarify the type of proceedings that are restrained, including the prohibition of winding up, appointment of a receiver and manager, legal or execution proceedings, enforcement of securities, and enforcement of the right to re-entry or forfeiture under a lease. This amendment streamlines the scope of a restraining order with the moratorium applicable in an application for judicial management or corporate voluntary arrangement.



[5] Section 13 of the Act
[6] *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327 ("Re Top Builder")
[7] Section 13 of the Act
[8] Section 13 of the Act

Automatic Moratorium

Furthermore, the Act provides that an applicant company is entitled to an automatic restraining order upon applying for a restraining order, which lasts until the determination of the application or for a period of two months, whichever is shorter.

This gives the scheme company a brief respite or "breathing space" to formulate or enhance its restructuring plan[9]. The company will also have more time to comply with the mandatory conditions set out in Sections 368(2)(a) to (d) of the CA 2016 to obtain a restraining order[10].

Cooling-off Period

Section 368(3B)[11] introduces a cooling-off period of 12 months before a fresh application for a restraining order can be filed if the scheme company or any of its related companies had previously secured a restraining order or an order for super-priority financing, cross-class cramdown, or a pre-pack scheme. This provision safeguards the interests of creditors and curbs abuse by preventing frequent or hasty use of restraining orders by a company[12].

Restraining Order for Related Companies

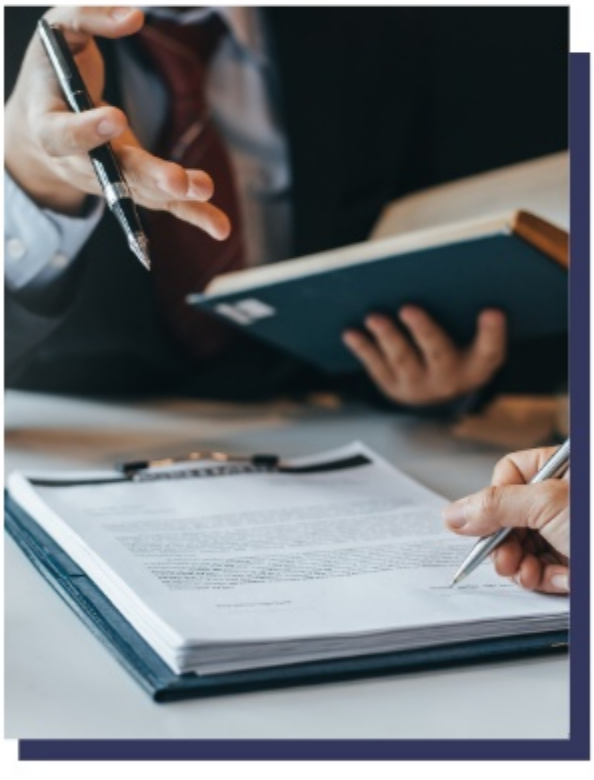
Related holding companies (*subsidiary, holding, or ultimate companies*)[13] are now also entitled to apply for a restraining order. Section 368C allows related companies crucial to the implementation of the compromise or arrangement to similarly obtain protection against legal action. The section codifies the decision of the High Court in ***Sentoria Bina*** that recognised that restraining orders could be extended to entities or parties other than the scheme company[14].

CROSS-CLASS CRAMDOWN ON DISSENTING CREDITORS

The perennial issue of classification of creditors has recently been at the forefront of Malaysian jurisprudence concerning schemes of arrangement, as seen in cases such as ***AirAsiaX Bhd***[15], ***Top Builders***[16], and ***Re Hatten Group***[17]. The different classification of creditors serves to protect minority creditors, whose rights are arguably crammed down as they will ordinarily be outvoted[18]. Therefore, when there are more than one class of creditors and one class dissents, the scheme will not go through.

On this note, the Federal Court in ***Re Hatten Group*** recently held that equal regard must be given not only to the legal rights of the creditors but also to the interests derived from the said rights when determining the classification of creditors. Prior to this, Malaysian jurisprudence focused more on the similarity of legal rights alone[19].

Therefore, the introduction of the cross-class cramdown provision in Section 368D, largely adopted from Chapter 11 of the US Bankruptcy Code, is welcomed as it arguably removes the drawback of the "veto" right each class of creditors previously had. This provision prevents a proposed scheme from being unreasonably defeated by a dissenting class.



[9] *The "Ocean Winner" and other matters* [2021] SGHC 8
[10] *Barakah Offshore Petroleum Berhad & Anor v Mersing Construction & Engineering Sdn Bhd & 3 Ors[2019] MLJU 338; Mansion Properties Sdn Bhd v Sha Chin Yen & Ors[2021] 1 MLJ 527*
[11] Section 22 of the Act
[12] SSM Annual Dialogue 2023
[13] Defined in Section 7 of the CA to mean a holding company, a subsidiary or an ultimate holding company of another corporation.
[14] *Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors [2021] 12 MLJ 690*
[15] *Airasia X Bhd v BOC Aviation Ltd & Ors [2021] 10 MLJ 942* ("AirAsiaX Bhd")
[16] *Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors [2022] 8 MLJ 604* ("Top Builders")
[17] *MDSA Resources Sdn Bhd v Adrian Sia Koon Leng [2023] 5 MLJ 900* ("Re Hatten Group")
[18] *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal [2012] SGCA 9 [2012] 2 SLR 213*
[19] MDSA Resources Sdn Bhd v Adrian Sia Koon Leng [2023] 5 MLJ 900

With the amendment, Courts have the power to sanction a scheme despite there being a dissenting class of creditors, and all classes of creditors will be bound by the compromise of arrangement. In doing so, the Court must be satisfied that:

- 75% of the total value of all creditors meant to be bound have agreed to the scheme; and
- the scheme will not unfairly discriminate between two or more classes of creditors and is fair and equitable to each dissenting class of creditors.

PRE-PACK SCHEME OF ARRANGEMENT

The introduction of Section 369C endorses pre-packed schemes, in which, in summary, are sanction by the Courts on an expedited basis, doing away with the need for a Court-convened meeting. This option minimises both time and costs typically associated with conventional procedures and is particularly advantageous when a company successfully negotiates an arrangement with its major creditors, with minimal opposition from dissenting creditors, if any.

The two essential elements to obtain the Court's approval under Section 369C, as considered by the Singapore High Courts[20] in respect of Section 71 of the Insolvency, Restructuring and Dissolution Act, which is *pari materia* to Section 369C, would be adequate material disclosure of information to all the scheme creditors (with the proper classification) and the satisfaction of the requisite statutory majority in the notional counting of votes.

A method to ensure a pre-pack scheme's success is by incentivising creditors to enter into a lock-up agreement in advance, undertaking to vote favourably in support of the scheme. In ***Re Brightoil Petroleum (S'pore) Pte Ltd***[21], the Singapore High Court held that scheme creditors who entered into a lock-up agreement need not necessarily be separated into a different class of creditors, given that they will not fracture a class when voting on a scheme.

It will be interesting to see how the Malaysian Courts interpret pre-pack schemes, especially when dealing with the issue of classification of creditors (including locked-in creditors, if any), in light of the development of jurisprudence in ***Re Hatten Group***.

SUPER PRIORITY RESCUE FINANCING

Sections 368B and 415A introduces a new financing regime that allows companies contemplating a scheme of arrangement or judicial management to obtain new funds with rights that take priority over existing security interests and unsecured debts.

Upon application, the Court can grant one or more of the following three levels of super priority status to the new funds, termed "rescue financing":

[20] *Re DSG Asia Holdings Pte Ltd [2021] SGHC 209; Re Brightoil Petroleum (S'pore) Pte Ltd [2022] SGHC 35*
[21] [2022] SGHC 35

(a) in the event the company is wound up, the debt arising from the rescue financing is to be paid immediately after the costs and expenses of winding up;

(b) the debt arising from rescue financing is secured by a security interest on a property of the company or a subordinate security interest if the property is already subject to an existing security;

(c) the debt arising from rescue financing is secured by a security interest of the same or higher priority than an existing security, if the rescue financing could not have been obtained and the interests of the existing security holders are adequately protected.

Super priority financing incentivises financiers or white knights to bail out distressed companies without being seen as throwing good money after bad. However, it remains controversial due it its potential nature of "trumping" existing priority rules[22]. In this regard, Courts have not been prepared to grant such debts super priority status if there is insufficient evidence to show that reasonable efforts have been made to first secure financing from other sources[23].

As we are in unchartered waters, the reception of this new form of financing in Malaysia and its actual practical implications, especially against secured lenders, remains to be seen.

INCREASED ACCESSBILITY FOR CVA AND JUDICIAL MANAGEMENT

Eligible Companies

Corporate Voluntary Arrangement (**CVA**), in its current form, is arguably only available to private companies free of any encumbrances[24]. The extensive restrictions under Section 395 of the CA 2016 are reflected in the statistics, where only eight submissions were recorded with the Companies Commission of Malaysia between 2018 and 2022, with no lodgements reported for the year 2023[25].

Similarly, while there has been a steady increase in the number of applications over the past years[26], corporations subject to laws regulated by Bank Negara or the Capital Markets Services Act 2007 ("**CMSA**") were precluded from undergoing judicial management. The general wording of Section 403 of the CA 2016 led the High Court and the Court of Appeal in ***Re Scomi Group***[27] to hold that all public listed companies are not entitled to undergo judicial management.

The amendments to Sections 395[28] and 403[29] of the CA 2016 homogenizes the categories of companies precluded from availing themselves of both CVA and judicial management to the following:

(a) *a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia;*

(b) *a company which is approved or registered under Part II, licensed or registered under Part III, approved under Part IIIA, or recognised under Part VIII of the CMSA; and*

(c) *a company which is approved under Part II of the Securities Industry (Central Depositories) Act 1991.*

---

[20] *Re DSG Asia Holdings Pte Ltd [2021] SGHC 209; Re Brightoil Petroleum (S'pore) Pte Ltd [2022] SGHC 35*
[21] [2022] SGHC 35
[22] Gerald McCormack and Wan Wai Yee, "Transplanting chapter 11 of the US bankruptcy code into Singapore's restructuring and insolvency laws: Opportunities and Challenges" (2019) Journal of Corporate Law Studies. 19(1), 69-104, pg 18.
[23] *Re Attilan Group Ltd [2017] SGHC 283; [2018] 3 SLR 898*
[24] does not apply to public companies, a licenced institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia, a company which is subject to the Capital Markets and Services Act 2007 ("CMSA"), and a company which has created a charge over its property or any of its undertaking.
[25] SSM Annual Dialogue 2023
[26] SSM Annual Dialogue 2023
[27] [2022] 7 MLJ 620
[28] Section 14 of the Act. However, based on the Federal Government Gazette dated 26 March 2024, the amendments to s395 will only come into force at a later date to be announced by the Minister.
[29] Section 16 of the Amendment Act

Duration of Judicial Management Order

In addition to expanding the categories of companies eligible for judicial management, the amended Section 406 addresses any uncertainty as to whether a Judicial Management Order ("**JMO**") can be extended beyond the current 12-month limit. Moving forward, the Courts now retain the discretion to extend the duration of the JMO for a term that the Court deems fit.

This amendment provides leeway to[30] companies requiring more time to devise their restructuring plan and also eliminates the need for a fresh application for a JMO to be made upon the expiry of the initial 12-month period of the first JMO, as considered in *Syed Ibrahim & Co v Trans Fame Offshore Sdn Bhd (under judicial management)*[31].

The amendments allow a broader spectrum of companies to have access to CVA or judicial management, as well as the option to choose (whichever is more suitable), which is in line with the policy consideration of widening the application of corporate rescue mechanisms and strengthening the corporate rehabilitation framework.

RESTRICTION ON TERMINATION OF ESSENTIAL GOODS AND SERVICES CONTRACTS

The introduction of Section 430A[32] on Protection for Essential Goods and Services seeks to restrict the exercise of insolvency-related clauses, such as the right of termination, in contracts for the supply of essential goods and services if a company becomes subject to proceedings of a compromise or arrangement, a voluntary arrangement, or judicial management.

A supplier who wishes to enforce their rights under an insolvency-related clause must first give a 30-day prior notice to the company before exercising such rights. The restrictions would benefit in facilitating the rehabilitation of a company where the distressed company's business relies on such key contracts.

CONCLUDING REMARKS

All in all, the Act represents a step forward from the preceding corporate rehabilitation regime. The *pro-debtor* amendments are a welcomed addition to the shores of Malaysia. It will be interesting to see how companies utilise and benefit from the avenues available to them and how the Malaysian Judiciary interpret and apply these new statutory provisions.

LH-AG

KUMAR KANAGASINGAM
Senior Partner
Dispute Resolution
kk@lh-ag.com

WONG HAN WEY
Senior Associate
Dispute Resolution
whw@lh-ag.com

HARSHINIE PARANITHARAN
Associate
Dispute Resolution
hrs@lh-ag.com

[30] *Capital City Property Sdn Bhd v Achwell Property Sdn Bhd [2020] MLJU 2518*
[31] [2023] 7 MLJ 399
[32] Section 20 of the Act

MEET OUR new partners OF 2024

Chris Toh Pei Roo

Tax, Customs & Trade

Chris has been admitted as a Partner of our Tax, Customs & Trade Practice Group, where he provides tax law representation and advisory services. He holds a First-Class law degree from the University of Leeds and an LLM in International Commercial Law from University College London.

He is particularly experienced in judicial review, having advised and represented multinational corporations, charitable organisations, listed companies, and individuals in tax disputes. He has also represented taxpayers in tax appeals and defended them in civil recovery proceedings initiated by the Government of Malaysia.

A regular speaker on tax matters, Chris has contributed to publications such as the Tax Disputes and Litigation Review and the Malaysia Civil Procedure 2021 (White Book).

He has been recognised as a "Rising Star" for Tax in The Legal 500 Asia Pacific 2024 rankings and praised for his exceptional flexibility and competence. Chris's has also been ranked as "Up and Coming" for Tax by Chambers Asia-Pacific 2024.

Click here to know more about Chris Toh Pei Roo

Joyce Ong Kar Yee

Energy, Projects & Infrastructure | Corporate and M&A | Regulatory & Compliance

Joyce is a key member of the Energy, Projects & Infrastructure Practice Group, focusing on client service across various sectors such as power, energy, construction and infrastructure. She also advises on corporate matters, private equity transactions, joint ventures, and franchise regulations.

Additionally, Joyce spearheads the ESG and Sustainability Practice, and is well equipped to advise on energy transition, carbon capture projects, energy efficiency regulations, and developing governance frameworks.

Recognised as a "Rising Star" in Projects and Energy by the Legal 500 Asia-Pacific 2024 and in the IFLR1000 2023/2024 for Project Development, Joyce brings a wealth of knowledge and experience to her role.

Click here to know more about Joyce Ong Kar Yee

MEET OUR new partners OF 2024

Lim Chee Yong

Energy, Projects, Infrastructure & International Arbitration | Oil & Gas

Chee Yong is a member of the Energy, Projects, Infrastructure & International Arbitration and Oil & Gas Practice Group. He holds a first degree in Mechanical Engineering and Business Finance from University College London and is a member of the Chartered Institute of Arbitrators.

Focusing on international and domestic dispute resolution, Chee Yong's excels in high-value contentious matters within the energy, utilities, and construction sectors. He has the ability to understand and dissect complex engineering matters, particularly in technical disputes.

Through his extended secondment stint with one of the largest oil & gas downstream joint ventures within the region, he has significant experience in dealing with multi-party disputes and proprietary technology within the industry. He is also valued for his advise on project risk management and dispute avoidance for construction projects.

Recognised as a recommended lawyer in the Legal 500 Asia Pacific 2024 rankings, Chee Yong is known for his attentive nature and ability to grasp complex issues quickly. Clients have commended on his ability to decipher technical information and providing clear, understandable business solutions – an added value that sets LHAG apart rom the rest.

Click here to know more about Lim Chee Yong

Nicola Tang Zhan Ying

Corporate & Commercial Disputes

Nicola is a corporate and commercial litigator in the Corporate & Commercial Disputes Practice Group. A recipient of the JPA Scholarship, Nicola graduated with an LLB (Hons) from King's College London and was admitted as a Barrister-at-Law (Middle Temple).

With a focus on civil fraud, fraudulent trading, directors' and shareholders' disputes, and breaches of directors' duties, Nicola acts for both institutional and private clients. She also advises on corporate insolvency and contentious winding-up proceedings. Nicola acts for clients in a diverse range of industries including investment holdings, construction, manufacturing, plantation, logging, banking, automotive, education, insurance, and healthcare. Her international clientele includes corporations from the United Kingdom, China, and Japan.

An ardent advocate, Nicola appears in all tiers of the Malaysian Courts for the conduct of trials, hearings, and appeals. Out of court, she is involved in international and domestic commercial arbitration. Nicola is a frequent contributor to Malaysian Civil Procedure and Bullen & Leake & Jacob's Malaysian Precedents of Pleadings.

Click here to know more about Nicola Tang Zhan Ying

MEET OUR new partners OF 2024

Nurul Aisyah Hassan

Employment & Industrial Relations

Aisyah is a key member of the Employment and Industrial Relations Practice Group, holding a law degree from the University of Exeter. She also holds a Master's in Litigation and Dispute Resolution from University College London (UCL) and is a member of the Malaysia Lincoln's Inn Alumni Association.

Focusing on representing employers in industrial and civil court disputes, Aisyah handles unfair dismissal claims and breaches of employment contracts. She provides guidance on managerial prerogatives, grievances, constructive dismissal claims, performance management, employee transfers, employee retrenchment, and employee misconduct cases.

Aisyah advises companies and statutory bodies on cases involving internal fraud investigations and audits, ensuring compliance with internal procedures. She also provides advice on compliance with ESG considerations, such as providing a safe and healthy working environment, whistleblower protection, and managing sexual harassment claims.

A contributing editor to the Annotated Statutes of Malaysia – Industrial Relations Act 1967 and the Annotated Statutes of Malaysia – Trade Unions Act 1959, Aisyah also co-authors articles published by the firm.

Recognised as a recommended lawyer in The Legal 500 Asia Pacific 2024 rankings, Aisyah brings a wealth of knowledge and experience to her role.

Click here to know more about Nurul Aisyah Hassan

Tiara Katrina Fuad

White Collar Crime

Tiara Katrina focuses on criminal litigation and criminal advisory work and is leading the White Collar Crime Practice. She graduated from the University of Leeds, England, and subsequently completed the Bar Professional Training Course in London.

She brings a strong track record of handling sensitive high-profile cases, with experience in areas such as corruption, abuse of power, criminal breach of trust, and money laundering offenses. Tiara Katrina's experience spans all levels of the Malaysian courts.

Beyond her legal practice, Tiara Katrina is committed to advancing legal literacy. She actively contributes to various news media outlets, providing insightful analysis on legal matters of public interest. She also conducts criminal law workshops for governmental agencies and non-profit organisations, demonstrating her dedication to sharing knowledge and giving back to the community.

Click here to know more about Tiara Katrina Fuad

LH AG ADVOCATES AND SOLICITORS

WE'RE HERE TO HELP!

Get in touch with us:
Phone: +603 6208 5888
Fax: +603 6201 0122
Email: enquiry@lh-ag.com

Visit us at:
Level 6, Menara 1 Dutamas,
Solaris Dutamas,
No. 1, Jalan Dutamas 1,
50480, Kuala Lumpur, Malaysia

For additional information regarding the Legal Herald, kindly contact updates@lh-ag.com or your designated representative.

We appreciate and welcome your opinions, comments, and suggestions.

About Lee Hishammuddin Allen & Gledhill

The firm has over 90 lawyers in Kuala Lumpur, Penang, and Johor Bahru. Our areas of practice include the following specialised practice groups, each led by an experienced partner:

Adjudication
Arbitration
Banking & Insolvency
Capital Markets
Construction
Corporate & Commercial Disputes
Employment & Industrial Relations
Financial Services
FinTech
Foreign Investment
Insurance
IP & TMT
Islamic Finance
Mergers & Acquisitions
Oil & Gas
Planning & Environment
Projects & Construction
Real Estate
Regulatory & Compliance
Securities Litigation
Shipping
Tax, Customs & Trade
Trust, Probate & Administration
White Collar Crime

Published by

Lee Hishammuddin Allen & Gledhill