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# Construction Law 2022

Malaysia: Law & Practice  
and  
Malaysia: Trends & Developments

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# MALAYSIA

## Law and Practice

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## 1. GENERAL

### 1.1 Governing Law

The construction market is generally governed by contract and tort laws, derived from common law and statutes (for example, the Contracts Act 1950).

The construction market is also regulated by statutes, including:

- Construction Industry Development Board Act 1994;
- Construction Industry Payment and Adjudication Act 2012 (CIPAA);
- Housing Development (Control and Licensing) Act 1966;
- Occupational Safety and Health Act 1994;
- Street, Drainage and Building Act 1974;
- Town and Country Planning Act 1976;
- Uniform Building By-Laws 1984.

### 1.2 Standard Contracts

Standard form construction contracts are widely used but are not mandatory.

Most public sector projects use the Public Works Department (PWD) forms. Under the traditional system of procurement where the design of the works is produced by the government, the following forms are used.

- Between the government (as employer) and contractor:
  - (a) PWD Form 203A (where bills of quantities form part of the contract);
  - (b) PWD Form 203 (contract based on drawings and specifications).
- Between the contractor and the nominated subcontractor:
  - (a) PWD Form 203N.
- Between the contractor and the nominated supplier:
  - (a) PWD Form 203P.

Under the design and build system of procurement, there is a separate PWD form that is used, ie, PWD Form DB.

The most-used standard forms in private sector projects are the PAM contracts, propounded by the Malaysian Institute of Architects (also known as Pertubuhan Akitik Malaysia (PAM)). The current versions of the PAM contracts are as follows.

- Between the employer and the contractor:
  - (a) Agreement and Conditions of PAM Contract 2018 (With Quantities);
  - (b) Agreement and Conditions of PAM Contract 2018 (Without Quantities).
- Between the contractor and the nominated subcontractor:
  - (a) Agreement and Conditions of PAM Sub-Contract 2018.
- Apart from the PWD forms and the PAM contracts, the following are some of the other standard form contracts that are available.
- AIAC Suite of Contracts 2019 (propounded by the Asian International Arbitration Centre (AIAC)).
- CIDB Forms (propounded by the Construction Industry Development Board Malaysia (CIDB)).
- IEM Form of Contracts (propounded by the Institution of Engineers, Malaysia (IEM)):
  - (a) IEM Form of Contracts for Civil Engineering Works (Third Edition, January 2017);
  - (b) IEM Form of Contracts for Mechanical and Electrical Engineering Works (Third Edition, January 2017);
  - (c) IEM Form of Nominated Sub-Contract for Engineering Works (July 2020).

International contracts such as the FIDIC suite of contracts are used in some projects in Malaysia.

### **1.3 COVID-19**

The COVID-19 pandemic has severely impacted the construction market. Several Movement Control Orders (MCOs) in 2020 and 2021, and other restrictions imposed by the government of Malaysia to curb the COVID-19 pandemic, have caused or contributed to delays and backlog in construction projects, and the manufacture and/or supply of construction materials. This in turn has given rise to claims and disputes, including for extension of time and loss and expense, and has affected the cash flow and sustainability of many construction-related businesses.

To alleviate the impact of COVID-19, the Temporary Measures for Reducing the Impact of Coronavirus Diseases 2019 (COVID-19) Act 2020 (also known as the COVID-19 Act) was enacted. In particular, section 7 of the COVID-19 Act provides, amongst others, that failure to perform contractual obligations under specified categories of contracts (including construction contracts, and performance bonds granted pursuant to construction contracts), due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (PCID Act) to control or prevent the spread of COVID-19 under the period prescribed by the COVID-19 Act shall not give rise to the other party or parties exercising rights under the contract.

The MCOs have since been lifted and COVID-19-related restrictions have been relaxed.

## **2. PARTIES**

### **2.1 The Employer**

Employers in construction projects in Malaysia may either be from the public sector (including the federal government, state government, statutory bodies, government-linked companies) or from the private sector (whether of domestic or

foreign origin). Generally, an employer under a construction contract has an obligation to make payment to the contractor on time as per the construction contract, to facilitate the works (eg, giving access and/or site possession on time) and to refrain from conduct that prevents the contractor from carrying out the works.

In general, there is a contractual relationship between the employer and the contractor, and between the contractor and the subcontractors. There may also be separate contractual relationships between the employer, the contractor and the subcontractors, and their respective financiers. Financiers are typically not parties to the contract between the employer and the contractor or between the contractor and the subcontractor.

### **2.2 The Contractor**

Contractors in construction projects in Malaysia may either be public limited companies or private limited companies (whether of domestic or foreign origin). Under the traditional system of procurement where the design (usually undertaken by the consultants engaged by the employer) is provided by the employer, the general duty of the contractor is to carry out and complete the construction works as per the design on time and as per the construction contract. Under the design and build system of procurement, the contractor's duty is to carry out and complete the construction works in accordance with the employer's requirements.

### **2.3 The Subcontractors**

Subcontractors in construction projects in Malaysia may either be public limited companies or private limited companies (whether of domestic or foreign origin). Subcontractors are typically engaged for specialised types of work such as mechanical and electrical works, plumbing works, elevators, and escalators.

Subcontractors may be engaged by a contractor based on the nomination of the employer or contract administrator (termed as the “nominated subcontractor”) or engaged by a contractor of his own volition (termed as a “domestic subcontractor”). Generally, there is no privity of contract between the employer and the subcontractor (whether nominated or domestic). The contractor is responsible to the employer to ensure that the subcontractors comply with the construction contract (between the employer and the contractor).

## 2.4 The Financiers

Banks typically act as financiers. Financiers are usually not parties to the construction contract. However, construction contracts typically contain provisions on assignment of the rights, interests or benefits under the construction contract to financiers. For instance, construction contracts may provide that apart from assigning payment due or to become due under the contract to a contractor’s financial institution, the contractor is not permitted to assign his rights, interests, or benefits under the construction contract to other parties unless he obtains the written consent of the employer. In some construction contracts, any form of assignment by the contractor may be subject to the prior consent of the employer.

## 3. WORKS

### 3.1 Scope

The scope of the works may be determined by reference to documents such as the tender documents and drawings, the letter of award, bills of quantities, agreement and conditions of contract and the specifications.

### 3.2 Variations

Construction contracts typically define what constitutes variations to the works and allow

the contract administrator to issue instructions to the contractor to carry out variations. Construction contracts also typically prescribe the procedure for issuance of such instructions (eg, that they must be in writing and issued by a specific person in authority), the method for measuring and valuing variation works, and payment for variation works. For variation works of a similar nature as that originally provided for in the construction contract, it is common to find clauses which stipulate that such works have to be valued based on the contractual rates with the appropriate adjustments where necessary.

### 3.3 Design

In a traditional procurement model, the permanent works are typically designed by the consultants engaged by the employer. The contractor constructs the permanent works in accordance with the consultants’ designs. However, construction contracts may also provide that where the contractor undertakes any design in the permanent works, the contractor is responsible for ensuring the suitability, functionality, safety, etc, of the design. Temporary works (including the design thereof) are usually the responsibility of the contractor.

In a design and build procurement model, the responsibility for design is undertaken by the contractor who may in turn engage consultants to carry out the design.

### 3.4 Construction

The construction works are carried out by the contractor and subcontractors. The employer is usually not involved in carrying out the construction works but may exercise a supervisory or supporting role together with the consultants.

### 3.5 Site Access

The employer is expected to give site access to the contractor before or by the contractual date of site possession in order to facilitate construc-

tion work, although limitations and/or restrictions may be set out in the contract depending on the site location and/or existing conditions.

Construction contracts may provide that the contractor is deemed to have inspected and examined the site and its surroundings and to have satisfied himself as to the nature of the ground and subsoil. In such contracts, the contractor may be precluded from making claims arising from the form and nature of the construction site.

Construction contracts typically provide that all fossils, antiquities and other objects of interest or value which may be discovered on-site or in excavating the site shall become the property of the employer. Upon such discovery, the contractor is typically required to preserve such an object and notify the contract administrator to enable the latter to give further instructions regarding such discovery.

In addition to contractual provisions, the parties are required to comply with the Environmental Quality Act 1974 which contains provisions restricting pollution of the soil and surface of any land. Further, the National Heritage Act 2005 requires (amongst others) an agent, contractor or executor of the landowner who discovers at the project site any object that has cultural heritage significance to report such discovery to the Commissioner of Heritage who shall immediately inspect the object.

### **3.6 Permits**

Permits and approvals are required for construction, and these are generally governed by the Street, Drainage and Building Act 1974 and its by-laws. The Street, Drainage and Building Act 1974 and its by-laws contain provisions for applications for permits and approvals to be made by the principal submitting person, who is typically a professional architect (under the

Architects Act 1967) or a professional engineer (under the Registration of Engineers Act 1967) who is engaged by the employer for a particular project.

### **3.7 Maintenance**

Construction contracts typically provide that during construction, the contractor is responsible for the safety, maintenance and protection of the works, unfixed materials/goods, and equipment and machinery on-site, including those of the subcontractors.

Maintenance post-completion of the works may be part of the construction contract between the employer and the contractor or may be provided for in specific maintenance contracts between the employer or end user and the contractor/third party.

### **3.8 Other Functions**

The employer typically does not instruct the contractor or third parties on the operation, finance and transfer in the construction process.

However, apart from the traditional procurement model and the design and build model, the other project delivery models that are used in Malaysia, particularly for infrastructure works or other public sector projects, include:

- build, lease, maintain and transfer (BLMT);
- build, operate and transfer (BOT);
- build, own, operate and transfer (BOOT).

### **3.9 Tests**

Testing is typically the responsibility of the contractor and may be priced in as part of the construction works. Construction contracts may provide that the contract administrator can instruct inspecting and testing to be carried out. Construction contracts may also provide that the costs of tests shall be borne by the contractor if such tests were required in consequence of

negligence, omission or breach of contract by the contractor.

### **3.10 Completion, Takeover, Delivery**

Typically, once the construction works are completed, the contractor will notify the contract administrator who will then inspect the works together with the contractor, the employer and the other consultants. If the contract administrator is satisfied that the works are practically completed in accordance with the contract, the contract administrator will issue a certificate typically known as a certificate of practical completion (CPC).

The CPC confirms the date upon which the construction works are delivered and taken into possession by the employer and the date upon which the defects liability period under the contract commences. Depending on the construction contract, the CPC may also entitle the contractor to certain payments being made (eg, release of the first half of the retention sum).

### **3.11 Defects and Defects Liability Period**

The length of the defects liability period depends on the construction contract. It is common to have a defects liability period ranging from 12 months to 24 months.

The construction contract usually prescribes the process or procedure for reporting defects during the defects liability period and for the contractor to make good such defects. If the contractor fails to satisfactorily make good the defects within the time stipulated in the contract, the employer may take steps to either make good the defects himself or engage a third-party contractor to make good such defects. The employer may then charge the contractor for the additional costs and/or set off the additional costs for making good the defects against any monies owed to the contractor.

Typically, upon the expiry of the defects liability period and all defects, if any, have been made good by the contractor, the contract administrator will issue a certificate known as a certificate of making good defects (CMGD). The issuance of a CMGD may entitle the contractor to payment for any balance outstanding for works done under the construction contract and/or the release of the retention sum (if any).

## **4. PRICE**

### **4.1 Contract Price**

Generally, contract prices are usually determined as follows:

- lump sum contract; or
- measure and value contract.

A lump sum contract essentially means that the contract has a single total price and once the contractor executes the required scope of work, the contractor is entitled to be paid the said lump sum.

A measure and value contract refers to contracts where the contract sum is an estimate that is subject to measurement or valuation of the actual work done based on the terms and rates in the construction contract.

Contracts may provide for milestone payments.

### **4.2 Payment**

#### **Interim Payments/Progress Payments**

It is common for construction contracts to provide a mechanism for interim payments or progress payments. Typically, this means that the contractor would submit a claim to the contract administrator who will then inspect the works on-site, and evaluate such a claim in consultation with the other consultants and/or the employer. The contract administrator will then

issue an interim certificate for payment, and the employer makes payment based on this interim certificate. Interim certificates contain estimates of work done by the contractor at a particular date whilst the works are ongoing, and may be adjusted at the final account stage.

### Retention Sum/Retention Fund

It is common for construction contracts to provide that the employer is entitled to retain a certain percentage of payment for work done (termed as a “retention sum” or “retention fund”) and for this to be released to the contractor at a later stage provided that the contractor meets certain obligations. For example, the construction contract may provide that the employer is entitled to retain 10% of the amount certified in the interim certificate up to a maximum of 5% of the total contract sum, and for the first 2.5% to be released upon the issuance of the CPC and the second 2.5% to be released upon the issuance of the CMGD, provided that the contractor attends to the making good of all defects (if any).

### Advanced Payments

Some construction contracts provide for advanced payments to be made to the contractor provided certain conditions are met, and a mechanism for recoupment.

### 4.3 Invoicing

Once interim certificates are issued by the contract administrator (see **4.2 Payment**), it is common for the employer to require the contractor to issue an invoice for the amount stated in the interim certificate for payment to be made.

## 5. TIME

### 5.1 Planning, Programme

Construction contracts typically provide that the contractor is required to submit a work programme for the carrying out of the works within

a certain set number of days to the contract administrator for approval. Such a work programme usually shows the order in which the contractor proposes to carry out the works, the detailed activities of the works, and the arrangements or methods of construction that the contractor wishes to adopt. Construction contracts typically provide that the approval of the work programme by the contract administrator does not relieve the contractor of his duties or responsibilities under the contract.

Although work programmes approved by the contract administrator typically do not form part of the contract documents, the contract administrator may use the work programmes to monitor and measure the progress of works and as a basis to assess delay and extension of time. If the progress of works does not conform with the approved work programme, the contract administrator may require the contractor to revise the work programme and to propose and implement measures to ensure that the works are completed on time.

### 5.2 Delays

Aside from monitoring the progress of works with the use of the approved work programme (see **5.1 Planning, Programme**), delay in the carrying out and completion of the works by the contractor may constitute an event of default under the contract, which may entitle the employer to determine the contract provided that certain contractual procedures and/or requirements are met. This typically entails the issuance of a notice of default to the contractor and, if the contractor fails to remedy such a default within a certain time, the employer may proceed to determine the contract.

Construction contracts may also provide that if the contractor fails to complete by the contractual date for completion or the revised date for completion, the contract administrator may



certify that the works have not been completed (commonly termed as a certificate of non-completion or CNC). The issuance of a CNC usually kick-starts the employer's contractual right to impose liquidated and ascertained damages (LAD) for delay on the contractor. LAD typically runs from the date upon which the contractor was supposed to have completed the works under the contract until the works are completed or until the contract is determined.

### 5.3 Remedies in the Event of Delays

See **5.2 Delays**. Additionally, if the contract is determined for the contractor's failure to carry out and complete the works, the employer may either undertake the remaining works himself or engage a third-party contractor to continue and complete works. In such an event, the employer may be entitled to charge the contractor for any additional costs and/or set off costs against any monies that may be owed to the contractor.

### 5.4 Extension of Time

Typically, when a delay event prescribed in the construction contract occurs, the contractor will notify and/or apply for an extension of time within the time stipulated in the contract. Such notification and/or application (which contains information about the delay event, the estimated delay as the contract requires) is made to the contract administrator who will evaluate the application and make a decision on the application. If an extension of time is justified under the contract, the contract administrator will grant a reasonable extension of time for the contractor to complete the works.

### 5.5 Force Majeure

Circumstances that would constitute a *force majeure* are typically defined in the construction contract and may include circumstances such as war, hostilities, natural disasters, riots and epidemics.

### 5.6 Unforeseen Circumstances

Generally, the risks of unforeseen circumstances, and the rights and obligations flowing therefrom, are negotiated and/or contractually agreed upon by the parties. Where a contract has become impossible to perform or otherwise frustrated, the rights and liabilities of the parties are provided for under Sections 15–16 of the Civil Law Act 1956.

## 6. LIABILITY

### 6.1 Exclusion of Liability

The liabilities that cannot be excluded by contract include the following:

- liability for death of a person caused by a wrongful act, neglect or default;
- liability to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant of such a person (under Section 71 of the Consumer Protection Act 1999); and
- absolute restriction of a party from enforcing its rights under a contract (under Section 29 of the Contracts Act 1950).

### 6.2 Wilful Misconduct and Gross Negligence

The concepts of wilful misconduct and gross negligence exist and are derived from common law.

### 6.3 Limitation of Liability

It is generally possible for the parties to contractually limit their liability but not to the extent that it absolutely restricts a party from enforcing its rights under the contract.

## 7. RISK, INSURANCE AND SECURITIES

### 7.1 Indemnities

Indemnities are generally used to limit the risk of the employer.

Construction contracts typically provide that the contractor shall indemnify the employer in the following events:

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

### 7.2 Guarantees

Guarantees may be provided for in construction contracts. Typically, a contractor may be required to provide an on-demand performance bond or performance guarantee issued by a licensed bank or financial institution incorporated in Malaysia in favour of the employer for a sum equivalent to a certain percentage of the total contract sum (eg, 5%) in order to secure the due performance of the contract by the contractor. The construction contract may require such a performance bond or performance guarantee to be valid and effective until a certain time (eg, 12 months) after the expiry of the DLP.

### 7.3 Insurance

The contractor is typically required to effect and maintain two types of insurances, namely:

- insurance to cover the liability of the contractor and all subcontractors from the date of site possession until the issuance of the CMGD to cover personal injuries or death,

damage or loss to property arising from the execution of the works; and

- insurance in the names of the employer and contractor, to insure all executed work, materials and goods on-site against loss and damage by fire, lightning, explosion, storm, tempest, flood, ground subsistence, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, theft, etc.

Some construction contracts may provide for the employer to effect and maintain insurance.

### 7.4 Insolvency

Construction contracts typically provide for the determination of the contract in the event of the insolvency of the employer or the contractor.

### 7.5 Risk Sharing

Sharing of responsibility for risks is a common practice. However, most of the risks are typically borne by the contractor. For example, it is common for construction contracts to stipulate that the contract is a firm price contract and would not be affected by any fluctuations in prices of raw materials. However, there are also construction contracts that contain provisions that allow the contract price to be adjusted in the event of fluctuations in prices of certain types of raw materials.

## 8. CONTRACT ADMINISTRATION AND CLAIMS

### 8.1 Personnel

The personnel that feature most prominently are the contract administrator (eg, “Superintending Officer” (SO) or “Project Director” (PD) under the JKR standard form contracts and “Architect” in

the PAM standard form contracts) and the site agent.

Under the construction contract, the contract administrator exercises a dual role. At times, the contract administrator acts as agent of the employer (eg, regarding instructions to carry out variations to the works) whereas at other times, the contract administrator is required to exercise his independent and professional judgement (eg, certifying the works done by the contractor, assessing applications for extension of time).

Under the construction contract, the contractor may be required to appoint a competent site agent, and any directions, explanations and instructions given to the site agent may be deemed to have been given to the contractor under the contract.

Aside from the contract administrator or site agent, construction contracts may also set out the roles of the consultants for the project (including the engineers and quantity surveyors).

## 8.2 Subcontracting

Construction contracts typically contain provisions governing subcontractors. Subcontractors may either be nominated subcontractors or domestic subcontractors. It is common for construction contracts to have extensive provisions governing nominated subcontractors including the nomination process (including objections to the nominations by the contractor), payments and determination. Construction contracts may provide that the whole of the works or parts thereof shall not be subcontracted without the consent of the contract administrator.

It is common for construction contracts to provide that the contractor is responsible for ensuring that the subcontractors comply with the terms and conditions of the construction contract, and that the contractor shall be fully

responsible for breaches of the contract by the subcontractors.

## 8.3 Intellectual Property

The contractual provisions regarding intellectual property rights differ from contract to contract.

Construction contracts may provide that where the contractor proposes any alternative design or whether matters of design are left to the contractor, the copyright in that design shall belong to the contractor but the employer shall be entitled to use the design for the completion, maintenance, repair and future extension of the works.

Construction contracts may also provide that all royalties or other sums payable for any use of intellectual property in the works have been included in the contract sum and that the contractor shall indemnify the employer against any claims, proceedings, etc, which may be brought against the employer by reason of the contractor infringing any intellectual property rights.

Conversely, there are also construction contracts that may provide that the intellectual property in the works and other material developed and supplied by the contractor pursuant thereto shall vest in and belong to the employer.

# 9. REMEDIES AND DAMAGES

## 9.1 Remedies

Generally, if there is a fundamental breach of contract, the innocent party is entitled to rescind the contract, treat himself as discharged and sue for loss and damage caused by the breach.

## 9.2 Restricting Remedies

It is common practice for construction contracts to contain clauses that limit the remedies avail-

able to a party. For example, the quantum of LAD is treated as the maximum that an employer is able to recover against the contractor if the contractor delays in the completion of works.

### 9.3 Sole Remedy Clauses

Generally, construction contracts do not contain sole remedy clauses.

### 9.4 Excluded Damages

Some construction contracts exclude claims for pure economic losses and consequential losses.

### 9.5 Retention and Suspension Rights

#### Retention of Title

Generally, title in unfixed goods and materials resides with the contractor or the supplier until it has been paid for. Construction contracts may provide that unfixed materials and goods become the property of the employer after he has paid for them.

#### Suspension of Works

Generally, unless expressly provided for, there is no right to suspend the works under the construction contract. Construction contracts may contain provisions allowing the contractor to suspend the works in the event of non-payment by the employer for certified work done. Construction contracts may also contain provisions allowing the contract administrator to instruct the contractor to suspend the works. Under the Construction Industry Payment and Adjudication Act 2012 (CIPAA), a contractor who has procured an adjudication decision in his favour is given the right to suspend or reduce the progress of works if the adjudicated sum is not paid.

## 10. DISPUTE RESOLUTION

### 10.1 Regular Dispute Resolution

The Malaysian courts are competent to adjudicate disputes. The Malaysian courts hierarchy

generally consists of the Magistrates Court, Sessions Court, High Court, Court of Appeal and the Federal Court (with the latter two mainly exercising appellate jurisdiction). Generally, as a court of first instance where an action is commenced:

- the Magistrates Court may hear and decide civil actions up to a value of MYR100,000;
- the Sessions Court may hear and decide civil actions up to a value of MYR1 million; and
- the High Court may hear and decide civil actions above the value of MYR1 million.

Since 2013, there are specialised Construction High Courts in the Federal Territory of Kuala Lumpur, and at Shah Alam, in the State of Selangor Darul Ehsan.

### 10.2 Alternative Dispute Resolution

Alternative dispute resolution (ADR) methods are widely available. The most commonly used ADR methods for construction disputes are arbitration, statutory adjudication and mediation.

#### Arbitration

Arbitration is widely used as a means of alternative dispute resolution for construction disputes in Malaysia. Both the PWD (JKR) forms (mainly used for public sector or public-sector-related projects in Malaysia) and PAM forms (mainly used for private sector projects in Malaysia) contain arbitration clauses. Arbitration is currently governed by the Arbitration Act 2005 (amended in 2011 and 2018). The Arbitration Act 2005 is based on the UNCITRAL Model Law (with modifications). The default appointing authority for arbitrators under the Arbitration Act 2005 is the Director of the Asian International Arbitration Centre (AIAC).

#### Statutory Adjudication

Claimants in a payment dispute arising from a construction contract within the meaning of the CIPAA, which came into force on 15 April 2014,

may also refer such a dispute to adjudication under the CIPAA with a view of obtaining an adjudication decision. An adjudication decision is final and binding between the parties unless it is set aside by the courts, or superseded by a court decision, arbitration award or settlement agreement.

## **Mediation**

In Malaysia, mediation has been promoted and encouraged for many years. The practice and procedure of mediations is generally governed by the Mediation Act 2012. Since Malaysia signed the United Nations Convention on International Settlement Agreements Resulting from

Mediation (Singapore Convention on Mediation) on 7 August 2019, changes in the law concerning mediation may be expected. Generally, there are several avenues for mediation, including:

- ad hoc mediations;
- court-annexed mediations;
- mediations administered under the AIAC Mediation Rules;
- mediations administered under the Malaysian Mediation Centre (set up under the auspices of the Bar Council of Malaysia); and
- mediations administered by Pusat Mediasi COVID-19 (PMC-19) that was set up under the COVID-19 Act.

**Shook Lin & Bok** is an award-winning full-service civil and commercial law firm based in Kuala Lumpur, Malaysia. Established in 1918, it is the oldest law firm of local origin in the country. The firm currently has approximately 52 lawyers who regularly advise and represent local and foreign-based clients in a wide variety of contentious and non-contentious work. Its Building, Construction and Engineering Department has extensive experience in transactional work including project advisory, negotiation and documentation, as well as dispute work includ-

ing court litigation, arbitration, and adjudication under the Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA). The Department has represented both local and international clients such as owners/developers, contractors, architects, engineers, quantity surveyors, consultants and institutions in the construction industry for both advisory matters and dispute resolution. The Department's portfolio of clients includes leading local and international contractors and developers, as well as government-linked companies.

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## Trends and Developments

### Contributed by:

Lam Ko Luen, Victoria Loi Tien Fen and Nina Lai Jian Xian  
*Shook Lin & Bok see p.22*

### Introduction

This trends and developments section will provide an overview of the recent developments in statutory adjudication, housing development projects and COVID-19 legislation in Malaysia.

### Winding-Up Based on Temporarily Binding Adjudication Decisions

*“Cash flow is the lifeblood of the building industry.”*

Payment disputes in the construction industry are a common occurrence in Malaysia. Aimed at alleviating payment issues in the construction industry, the Construction Industry Payment and Adjudication Act 2012 (CIPAA) was enacted in 2012 and came into force with effect from 15 April 2014.

The CIPAA provides a “speedy dispute resolution through adjudication”. It applies to every written construction contract entered into on or after 15 April 2014 for construction works carried out wholly or partly in Malaysia. It also applies to construction contracts entered into by the Malaysian government.

Adjudication under the CIPAA results in an adjudication decision which is only temporarily binding. The CIPAA provides that the adjudication decision would cease to be binding on the parties upon:

- it being set aside by the High Court under limited grounds prescribed under the CIPAA;
- the subject matter of the adjudication decision being settled by a written agreement between the parties; or

- the dispute being finally decided by arbitration or the court.

Be that as it may, the current trend appears to be for the successful party in a CIPAA adjudication to look to the winding-up court to “enforce” the adjudication decision.

In this regard, it is common for the successful party to issue a statutory notice under the Companies Act 2016 (CA 2016), to demand the adjudicated sum. If the “debt” is not paid within the statutorily prescribed period, the successful party will then invoke the deeming provision under the CA 2016 that the unsuccessful party is “unable to pay its debts” and present a winding-up petition against the unsuccessful party.

Fairly recently, the Court of Appeal in *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458 set aside a Fortuna Injunction (ie, an injunction to essentially restrain the presentation of a winding-up petition to wind up a company) granted by the High Court – thus allowing the presentation of a winding-up petition based on an adjudication decision.

The Court of Appeal found the following.

- A balance must be struck between the successful party in “proceeding in collecting his cashflow expeditiously” and the unsuccessful party in pursuing arbitration or a court action for a final determination of the dispute.
- Although a final decision in arbitration or a court action may ultimately overturn the



adjudication decision, this does not render the adjudication decision “disputable”. The reversal of the adjudication decision is an “uncertain event”.

- The failure of the unsuccessful party to settle the debt claimed by the successful party vide a statutory demand gives the impression that the unsuccessful party is “unable to pay its debts” and ought to be wound up. This would be the case even if the company was shown to be solvent as “a simple refusal to pay” is ordinarily insufficient to stop the presentation of a winding-up petition.
- Additionally, regard must be had to the objectives and legislative intent of the CIPAA (ie, “speedy and efficient dispute resolution in the construction industry”).

Generally, upon obtaining an adjudication decision in its favour, the successful party would take steps to register and enforce this at the High Court. However, this does not appear to be a mandatory step before a winding-up petition can be presented, as decided by the Court of Appeal in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244.

Due to the severe implications that would befall a company should it be wound up unnecessarily, winding-up is usually thought of as a remedy of last resort. It is interesting that despite this and the fact that adjudication decisions are only temporarily binding in nature, the courts have declined to intervene by way of a *Fortuna* Injunction. This is so even if the companies appear to be solvent.

It can therefore be expected that more and more parties will be looking to the winding-up court to secure payment based on adjudications under the CIPAA.

## Extensions of Time Granted by the Controller of Housing Ultra Vires

Under the Housing Development (Control and Licensing) Act 1966 (HDA), the Minister of Urban Wellbeing, Housing and Local Government (Minister) has the power to make regulations. One of these regulations is the Housing Development (Control and Licensing) Regulations 1989 (HDR).

Schedule H of the HDR provides for a statutorily prescribed contract of sale (more commonly referred to as the “sale and purchase agreement” (SPA)) between a purchaser and a developer for housing projects in Malaysia. Amongst the standard terms of contract is the agreed delivery of vacant possession within 36 months for housing accommodation in a subdivided building (ie, condominiums and apartments). If the developer fails to deliver within time, it will be liable to the purchasers for liquidated and ascertained damages (LAD) calculated based on the period of delay. Under the HDR, the Minister authorises the Controller of Housing (Controller) to “waive or modify” the provisions of the SPA.

Previously, when the developer is of the view that the project may not be completed within 36 months, it may make an application to the Controller under the HDR to “waive or modify” the provisions of the SPA by extending time to deliver vacant possession. This is no longer the case.

The issue of extension of time was considered by the Federal Court in the landmark decision of *Ang Ming Lee and Others v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and Another* and other appeals [2020] 1 MLJ 281 (“*Ang Ming Lee*”). Here, the developer made an application for an extension of time for the delivery of vacant possession of condominium units after the SPAs were executed. The application was first made to the Controller and, upon it being rejected, an appeal was made to

the Minister. The developer ultimately obtained an extension of time not from the Minister, but from the Controller. The purchasers brought an action against the Minister, the Controller and the developer for the extension of time.

The Federal Court found the following.

- The HDA is a piece of social legislation “designed to protect home buyers” and “the interest of the purchasers shall be the paramount consideration against the developer”. The Minister has been entrusted to safeguard such interest.
- It is the Minister, and not the Controller, that is “entrusted or empowered by Parliament to regulate the terms and conditions” of the SPA. There is no express provision allowing the Minister to delegate this responsibility to the Controller.
- Accordingly, the Controller has no power to “waive or modify” the provisions in the SPA. The Minister’s delegation of such power to the Controller under the HDR is therefore ultra vires the HDA (ie, beyond the Minister’s powers under the HDA).

The decision in *Ang Ming Lee* can be contrasted with the recent case of *Bludream City Development Sdn Bhd v Kong Thye and Others* and other appeals [2022] 2 MLJ 241 (“*Bludream City Development*”). Here, the Court of Appeal attempted to distinguish *Ang Ming Lee* based on the following facts.

The purchasers of units of service apartments similarly brought an action against the Minister, the Controller and the developer for the extension of time granted by the Minister. The purchasers argued that the extension was invalid and that they were entitled to claim for LAD. Similar to *Ang Ming Lee*, an application for extension of time was first made by the developer to the Controller and, upon it being rejected, an appeal was

made to the Minister. The similarities end here. In *Bludream City Development*, it was the Minister and not the Controller who ultimately granted the extension of time.

The Court of Appeal found the following.

- The Federal Court in *Ang Ming Lee* did not consider whether the Minister has the power to “waive or modify” the SPA. The issue was only whether the Controller could do so, and the answer was a resounding no.
- Whilst the Minister cannot delegate his power to “waive or modify” the SPA to the Controller, the Minister nevertheless has the power to do so himself in accordance with the objective and purpose of the HDA.
- Here, the Minister was right to have done so. There was a genuine need for extension of time not due to any fault on the developer’s part. It was also not a case of the developer attempting to take advantage of its own delay and short-changing the purchasers.

Leave to appeal to the Federal Court against the Court of Appeal’s decision in *Bludream City Development* has been filed.

Another interesting case to consider is *Alpine Return Sdn Bhd v Matthew Ng Hock Sing and Others* [2022] 1 CLJ 120 (“*Alpine Return*”), where the High Court attempted to distinguish *Ang Ming Lee* and ruled in favour of the developer. Although recognising that the Controller has no power to grant an extension of time, the Court found the following.

- Since the extension of time was sought for and obtained before the execution of the SPAs, the purchasers are estopped from not honouring the terms of the SPAs. As the SPAs are ultimately still contractual documents, the parties are bound by their bargain (ie, a

period of 60 months instead of 36 months for the delivery of vacant possession).

- The purchasers would be unjustly enriched if they were allowed to claim for LAD based on a shorter completion period that they had never agreed to. The purchasers cannot take advantage of the ruling in *Ang Ming Lee* to “unjustly enrich themselves”.
- In fact, vacant possession had been delivered within 60 months and the purchasers had received this “without any protest and objection”.

An appeal has been filed against the High Court’s decision in *Alpine Return*.

It shall be interesting to see how this controversial area of law will further develop in the near future.

## Delivery of Vacant Possession Calculated From a “Booking Fee”

More often than not, developers in Malaysia will collect a form of deposit commonly known as a “booking fee” from interested home buyers long before the execution of the SPAs. The fact that the collection of the “booking fee” is not permitted under the HDR has not deterred this practice.

The question here is whether the time for delivery of vacant possession is calculated from the “booking fee” or the SPA. The Federal Court set the record straight in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah and Another* and other appeals [2021] 2 MLJ 60. The interpretation of the phrase “from the date of this Agreement” in the statutory prescribed SPA was decided to mean from the date the “booking fee” was paid, and not from the date the SPA was executed.

The Federal Court essentially found the following.

- The creation of the “booking fee” is a devious attempt by developers to thwart the protection afforded to purchasers under the HDA. The developers have put purchasers at a disadvantage by potentially abusing the opportunity to put a later date on the SPA in an attempt to delay the time for delivery of vacant possession.
- The HDA is a social legislation, in that it was enacted to regulate the relationship between the weaker party (ie, purchasers) and the stronger party (ie, developers) due to the inequality in bargaining power. The purpose of the HDA is to safeguard the interests of purchasers by balancing the scales of justice.
- Although illegal, the collection of a “booking fee” does not render the SPA void for illegality. Otherwise, there would be severe consequences to innocent home buyers who were under the impression that the “booking fee” was required to secure their purchase. Instead, the developers ought to have this illegality construed against them.
- Since the developers attempt to secure “an early bargain” by collecting “booking fees”, then the protection of the HDA should operate to bind the developers to such “booking fees”.
- Additionally, the payment of the “booking fee” signifies the striking of a bargain and is “sufficient to constitute an intention to enter into a contract”.

Thus, the Federal Court has now concluded that where a “booking fee” is collected, the time for delivering vacant possession is calculated from the date that the “booking fee” was collected and not from the date of the SPA.

**Reducing the Impact of COVID-19**

Finally, COVID-19 needs no introduction. This subsection will touch on the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (COVID-19 Act) enacted in Malaysia.

Like many other countries, Malaysia enacted the COVID-19 Act in an attempt to soften the blow of the various prescribed measures undertaken in light of the pandemic. A relevant section to consider is Section 7: “Inability to perform contractual obligation”.

Section 7 provides a form of temporary relief to a party when his “inability... to perform any contractual obligation” is caused by the prescribed measures made or taken under the Prevention and Control of Infectious Diseases Act 1988 to combat COVID-19. Section 7 operates by precluding the other party from exercising his rights under the contract provided that the contract in question falls within the list of contracts specified in the Schedule. The list of contracts includes construction contracts, specifically the following.

- Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract.
- Performance bond or equivalent that is granted pursuant to a construction contract or supply contract.

Although the COVID-19 Act came into force on 23 October 2020, the temporary measure afforded by Section 7 applies retrospectively. Section 7 is deemed to have come into operation since 18 March 2020 and will remain in operation until 22 October 2022 by subsequent extension orders under the COVID-19 Act.

As regards interpreting Section 7, the High Court in the case of *Ravichanthiran Ganesan v Lee Kok Sun and Others* [2021] 1 LNS 1581 found the following.

- The burden of proof rests with the defaulting party to establish the two requirements under Section 7 (ie, that he was unable to perform the contractual obligations and that such inability was caused by the measures made or taken under the Prevention and Control of Infectious Diseases Act 1988).
- The “inability” of a party ought to be a “factual inability”, where “the facts make it inevitable that the party cannot perform”. It cannot be a mere refusal by the party to perform his contractual obligations; the threshold is higher than a “mere breach”.
- The COVID-19 Act is not to be resorted to merely to avoid liability just because it arose during the COVID-19 pandemic. That is not the purpose of the Act.

Recently, in *SN Akmida Holdings Sdn Bhd v Kerajaan Malaysia* [2022] 2 CLJ 302 (“*SN Akmida Holdings*”), the High Court found the following.

- Section 7 does not apply to construction contracts entered into by the Malaysian government as a “Government construction works contract” has clearly been excluded in Item 1 of the Schedule to Section 7. A comparison can be drawn to other statutes in Malaysia, including the CIPAA which expressly provides for the inclusion of construction contracts entered into by the Malaysian government.
- The exclusion of a “Government construction works contract” would not defeat the purpose of the Act as these contracts “are well within the control of the Government through the issuance of, among others, administrative circulars”. In the present case, the Superintending Office (ie, the contract administrator) had granted extensions of time due to the

delay in completion of the works caused by the Movement Control Orders implemented by the Malaysian government pursuant to the Prevention and Control of Infectious Diseases Act 1988.

It is anticipated that Section 7 will undergo further developments considering the extension of its operation until late 2022.

Similarly, the High Court in SN Akmida Holdings found that Section 7 cannot be invoked by a party merely because there is a pandemic. The requirements under Section 7 must be satisfied on a balance of probabilities.

**Shook Lin & Bok** is an award-winning full-service civil and commercial law firm based in Kuala Lumpur, Malaysia. Established in 1918, it is the oldest law firm of local origin in the country. The firm currently has approximately 52 lawyers who regularly advise and represent local and foreign-based clients in a wide variety of contentious and non-contentious work. Its Building, Construction and Engineering Department has extensive experience in transactional work including project advisory, negotiation and documentation, as well as dispute work includ-

ing court litigation, arbitration, and adjudication under the Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA). The Department has represented both local and international clients such as owners/developers, contractors, architects, engineers, quantity surveyors, consultants and institutions in the construction industry for both advisory matters and dispute resolution. The Department's portfolio of clients includes leading local and international contractors and developers, as well as government-linked companies.

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