GAR KNOW HOW CONSTRUCTION ARBITRATION

Malaysia

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Malaysia is a common law jurisdiction. Malaysian law and the Malaysian legal system are rooted in English law and legal principle. There are, however, significant differences, which arise from local legislation – for example, through the Contracts Act 1950 (the Contracts Act) – as well as local jurisprudence.

The Federal Constitution is the primary source of law; and the Malaysian parliament is constitutionally empowered to pass laws. Some legislative competency is vested in each state assembly for matters confined to that state. Primary legislation passed in parliament can empower the executive (eg, government ministers or statutory bodies) to issue subsidiary binding rules as delegated legislation. As with other common law jurisdictions, the doctrine of judicial precedent applies and is itself a source of law. New legislation is promulgated in the Government Gazettes, whether federal or state. Provided that legislation is not unconstitutional, there is no absolute prohibition on legislation being passed with retrospective effect, though there is a presumption that legislation creating or affecting substantive and not procedural rights is intended to apply only prospectively.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

Malaysia, through the Contracts Act, adopts a theory of offer and acceptance in determining whether a contract is formed. In order for an agreement to constitute a contract, it must be supported by consideration. In addition, section 30 of the Contracts Act provides that "[a]greements, the meaning of which is not certain, or capable of being made certain, are void." The parties must also intend to create legal relations, though there is a presumption that parties to agreements made in the commercial context intend to create legal relations (Guthrie Waugh Bhd v Malaiappan Muthuchumaru [1976] 2 MLJ 62).

There are no specific requirements of form for construction contracts. Contracts may be oral or in writing unless required to be in writing through specific legislation.

A letter of intent may give rise to a contractual effect if the requirements set out above are fulfilled; however, if the letter is simply an expression of a present intention to enter into a contract at a future date, that will likely not be sufficient to give rise to a contract (Ayer Hitam Tin Dredging Malaysia v YC Chin Enterprises [1994] 2 MLJ 754; Deutsche Bank (M) Sdn Bhd v MBF Holdings Bhd & Anor [2016] 6 MLJ 310). Depending on the circumstances, work done pursuant to a letter of intent falling short of a contract may be the subject of a restitutionary claim.

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

It is settled law in Malaysia that where a contract has foreign elements involved such that the contract is an international one, and the parties expressly choose the law of the contract, that choice will be given effect (James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd [1996] 2 MLJ 97) – however, parties cannot through a choice of a foreign law avoid mandatory provisions of domestic law.

There is no restriction on parties' ability to choose the law of the arbitration agreement, the seat of the arbitration, the arbitral rules, the arbitrator, or the language of the contract and the arbitration; save that if those choices infringe some rule of natural justice (for example, by agreeing to a biased arbitrator) or have public policy implications, that may invalidate the choice. Such terms will be unenforceable under Malaysian law, and may – to the extent that Malaysian law governs the arbitration agreement – invalidate the entirety of the arbitration agreement.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

Malaysian law recognises various types of implied terms.

Terms may be treated as implied through trade usage or custom; however, in order to be implied the term in question must be reasonable and must be consistent with and not contradict the express terms and tenor of the contract as a whole (Cheng Keng Hong v Government of the Federation of Malaysia [1966] 2 MLJ 33).

Terms may also be implied at law – for example, pursuant to section 15 of the Malaysian Sale of Goods Act, where there is a contract for sale of goods by description, it is an implied condition that the goods shall correspond with that description.

Terms may also be implied where the court infers from the evidence that the parties to a contract must have intended to include in the contract though they are not expressly set out therein. The term must be obvious; and must be necessary to give business efficacy to the transaction of the contract (Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151).

Examples of terms that are commonly treated as implied in construction contracts are for non-interference; adequate possession of the site; and, if no completion date is specified or a completion date is not capable of being reached because of the employer's prevention and there is no provision for an extension of the date of completion, that the works are to be completed within a reasonable time.

Under section 36 of the Construction Industry Payment & Adjudication Act 2012, unless otherwise agreed by the parties, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payments, calculated in accordance with the provisions of section 36. The frequency of such progress payments is monthly, with payment due 30 days from the date of receipt of the invoice for the payment.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

The general rule is that the contract administrator is under a duty to act impartially, fairly and honestly (Ling Heng Toh Co v Borneo Development Corporation Sdn Bhd). Case law suggests that parties are not bound by certificates notwithstanding that they may be expressed to be final and conclusive, even absent an express power to open up a certificate (Lim Chon Jet v Lin Chon Jat v Yusen Jaya Bhd [2011] 5 MLJ 239) – it is suggested that this may apply even where the dispute is to be resolved by arbitration. In any event, it seems clear that a certificate expressed to be final and conclusive can be challenged on grounds (aside from fraud and dishonesty and patent errors) such as that of the certifier not having acted independently and fairly; the certificate embodying a wrong decision on a point of law; and, arithmetical and computational error. There is a Malaysian authority that suggests that the certifier may be liable to third parties in tort, provided that it can be established that a duty of care is owed by the certifier to that third party and that there was a breach of that duty (see, eg, Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd [1992] 1 MLJ 23). It is, however, likely to be difficult to establish the existence of such a duty in favour of a contractor (L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 LNS 1321) .

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Malaysian law is in a state of evolution on the issue. The starting point will be the terms of the particular contract in question. A recent High Court decision suggests that where the delay to the works is caused by two or more effective causes, the contractor will be entitled to a full extension of time if one of the causes is a relevant event not within its responsibility (RC Asia Engineering Sdn Bhd v Lion Pacific Sdn Bhd [2021] 1 LNS 1667).

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

Where the contract is itself silent on the subject, it is suggested that disruption costs can be claimed subject to it being established that the disruption flows from a breach of contract by the employer (London Borough Council of Merton v Stanley Hugh Leach Ltd (1986) 32 BLR 51). The contractor would have to prove that actual loss was caused by that breach. Subject to such loss not being too remote

and to the principles of mitigation of loss being satisfied, such loss would be recoverable. Loss must be proven – however, the fact that the specific quantum is uncertain will not itself bar recovery.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

It is assumed that "acceleration" is here to be distinguished from prolongation costs. In Syarikat Pembinaan Anggerik Sdn Bhd v Malaysia Airports Holdings Berhad [2021] 1 LNS 2143, the High Court held that where such a claim is advanced, the contractor must plead and prove that:

- there were in fact relevant extension of time events causing delay and the contractor complied with the procedural requirements for an application to the contract adminsitrator for an extension of time;
- the contract administrator wrongfully refused to grant a reasonable extension of time in response to the contractor's application;
- the contractor thereafter notified the employer of the wrongful refusal and of the need for acceleration works to be undertaken by the contractor to avoid liquidated damages, unless a reasonable extension of time was granted;
- despite such notification, the employer did not instruct the contract administrator to properly discharge its functions; and
- the contractor thereafter proceeded to implement acceleration measures and incurred additional cost and expenses that he or hse would not have incurred but for those acceleration measures. Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

Under Malaysian law, there is no generally applicable concept of "force majeure"; however, there is nothing in Malaysian law that prohibits parties from providing for force majeure events (ie, that certain external events may have the effect of suspending performance, or releasing the parties from performance altogether). The question of what events will qualify; whether they must be unforeseeable; whether they must have permanent effect; and the extent of the effect that they must have, will depend on a construction of the force majeure provisions read in light of the contract provisions as a whole.

Separately, section 57(2) of the Contracts Act recognises the concept of frustration of contract, in providing that: "[a] contract to do an act that, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful." Case law suggests that the concept of impossibility in the subsection extends to circumstances where performance is radically different from that contracted for (see, eg, APT Associates Sdn Bhd v Adnan Ishak & Ors [2016] 4 CLJ 277). It is clear that the fact that the contract has become more difficulty or onerous to perform is insufficient for the doctrine to be invoked (Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666).

The doctrine results in the contract being terminated automatically. However, section 15 of the Civil Law Act 1956 provides for the adjustment of the parties' rights and liabilities upon the frustration of a contract. This extends (but is not limited) to the potential recoverability of monies paid under the contract prior to discharge.

If the risk of the supervening event is contracted for (whether expressly or impliedly), that would preclude the application of the doctrine. Section 57(3) of the Contracts Act provides that "[w]here one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise." It is not settled whether parties can directly contract out of section 57(2) of the Act (on the question of contracting out, see Ooi Boon Leong & Ors v Citibank NA [1984] 1 LNS 26).

Section 58 of the Contracts Act provides that: "[w]here persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement. for the severability of promises where the frustration arises as a result of supervening illegality." Section 59 of the Contracts Act provides that "[i]n the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced."

Other that as provided, there is no concept of severability of promises in the application of the doctrine of frustration under section 57(2) of the Act.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

See question 9.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

Unless the contract provisions provide for some relief, the contractor is likely not entitled to any relief. Subject to the express terms, there may be scope for the contention that the employer ought to issue a variation order to address the impossibility. If the impossibility can be linked to a misrepresentation made by the employer, there may be some scope for relief.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Parties are generally free to contract, and will be held to their promises. Nonetheless, techniques of contract construction often result in the attenuation of language which if read literally, may suggest that the contractor has taken on risks which it cannot foresee or control. See further the answer to 9.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

Although not settled law in Malaysia, if the contractor is under a duty to design the works and the error is connected with that design, there is likely to be a duty to warn. It is suggested that even where the contractor is not under an express design obligation, Malaysian law may recognise that the contractor is under an implied duty of care with respect to errors – however, the test on whether the duty is breached is unlikely to be one of strict liability – rather, the duty will be one of reasonable care. The standard form building contract provides for the contractor to bring discrepancies in the drawings to the architect's attention – and so do other contracts.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

There is no general duty of good faith under Malaysian contract law, though a duty may be recognised or implied in a specific case (Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619). There is no support in the case law for the recognition of such a duty in construction contracts, nor any support in the case law for a duty that would inform the matters at sub-question (b) and (c). On the other hand, it is likely that Malaysian law recognises an implied obligation in construction contracts, to the effect that an employer must not hinder the contractor from performing the contract; and perhaps further that an employer is under a duty to cooperate or to do all that is reasonably necessary to secure performance of the contract.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

A failure to comply with provisions of the contract as to the procedure for notification or making a claim for an extension which are merely directory (as opposed to mandatory) will not extinguish a claim for an extension of time (Syarikat Tan Kim Beng & Rakan-rakan v Pulai Jaya Sdn Bhd [1992] 1 MLJ 42). If, however, the provisions are mandatory, a failure to comply may defeat the contractor's claim (Yuk Tung Construction Sdn Bhd v Daya Cmt Sdn Bhd [2020] 1 LNS 1314). There does not appear to be a difference of approach to claim for extensions of time and relief from liquidated damages; and claims for monetary sums.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

There is no general right to suspend payment or work for non-performance. Set-off against payment, on account of cross-claims, may be permissible, though much in this regard will depend on the terms of the contract. The contract may itself provide for rights of suspension, or termination. A unilateral suspension by one party in circumstances that are not permitted by the contract may itself amount to a breach of contract.

However, where a party has obtained an adjudication decision in its favour for the payment of money, under the Malaysian Construction Industry Payment & Adjudication Act 2012 (CIPAA) provides that where a party has an adjudication decision for payment in its favour, that party has a right under section 29 of CIPAA to suspend performance or to reduce the rate of progress of the works in the event of a failure to pay the adjudication amount. This is subject to certain notice requirements.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

If expressly permitted under the contract, yes. The precise extent and scope of such a right is a matter of construction of the written agreement. However, it has been recognised that such rights 'cannot be exercised unreasonably in the absence of good faith' and further, that a right to omit work is not to be equated to a right to terminate for convenience (Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd [2013] 2 CLJ 437).

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

A construction contract may be terminated in accordance with its provisions or by subsequent agreement.

A construction contract may also be terminated by a party:

- On account of a clear and unequivocal intention of the counterparty to renounce the contract; and
- on account of a breach of the terms of the contract by the counterparty. Not all breaches entitle the innocent party to terminate the contract; rather, the breach must be of a term that constitutes a condition of the contract (in the sense that the term, on an objective construction of the contract, is such that the parties can be taken to have intended there to be a right to terminate upon breach), or the breach is of a sufficiently serious nature so as to justify termination.

In the above circumstances, the innocent party is entitled to elect to terminate the contract, and may do so by communicating its election in words or conduct to the counterparty. Upon such termination, the parties are no longer bound to perform the remaining primary obligations under the contract. The innocent party will have a right to damages for the breach and for the loss of bargain.

Absent express provision, a construction contract cannot be terminated in part.

The consequence of termination for a contractor on an uncompleted project (assuming the termination is on account of a breach by the contractor) is that the contractor can no longer perform the contract and will have to vacate the site, and will likely be subject to a claim from the employer for damages. These claims will usually be for the cost of the employer having to find and pay for a replacement contractor to finish the work (subject to a reduction on account of what the employer would have had to have paid to the original contractor for the work to be carried out). Such claims tend to far exceed the value of any remaining work to be carried out as calculated by reference to the original contractual rates, even where market rates have resulted in the work being cheaper to carry out, due to the costs involved in the process of a new contractor taking over. Termination will also usually entitle the employer to call on any bonds that may be in place. The contractor may also suffer reputational damage.

For the employer, while it may have recourse against the contractor, it usually almost inevitable that the project will end up costing the employer more than was anticipated pursuant to the original construction contract. The award of damages that may ultimately be obtained is almost never equivalent to a full indemnity for the additional costs that will be expended. It is also usually inevitable that there will be delays to the project.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Yes, other rights of termination are available. As to those rights of termination, see answer to 18.

20 What limits apply to exercising termination rights?

A party with a right to terminate ordinarily has to elect on whether to terminate the contract, or to hold the repudiating party to the contract. If the repudiating party then performs, this may result in the innocent party losing its right to terminate. The innocent party in such circumstances will remain bound to perform the contract.

A right to terminate may be waived, or a party may be estopped by its conduct from exercising a right to terminate.

As pointed out in question 14 there is no general concept of good faith in Malaysian law.

Where the termination is pursuant to the terms of the contract, the party purporting to terminate must comply with the contract provisions with respect to notice, including the timing of the notice (Tan Chin Hock & Ors v Metro Laksana Properties [2019] 6 CLJ 801).

As to the rights to terminate for convenience, see answer to 17.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

There is no blanket rule to such effect and much will depend on the circumstances as well as the terms of the contract. However, the taking of such possession will likely be construed as the achievement of practical completion (with concomitant waivers of any notice requirements with respect to such completion) (Crest Worldwide Resources Sdn Bhd v Mudajaya Corporation Berhad [2019] 1 LNS 336). The taking of possession by the employer prior to completion, absent a contractual right to do so, may itself constitute a breach of contract.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

There is no general rule of law to the effect that an acceptance of work constitutes a waiver of a breach of contract by the contractor. However, an acceptance without reservation may be construed as a waiver of a right to damages in respect of a patent defect, particularly if the contract contains provision allowing for the contactor an opportunity to rectify defects notified by the employer. Much will depend on the specific terms of the contract.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Generally, a provision for liquidated damages for delay to completion, if enforceable, would be considered exclusive and exhaustive of the employer's remedies for delay to completion (S Rajoo and H Singh – Construction Law in Malaysia, Sweet & Maxwell Asia, 2012). However, as to provisions for liquidated damages and their enforceability generally, see question 25.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

No. Time is set at large by such an act of prevention, and the contractor is obliged to complete the works within a reasonable time.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

Liquidated damages provisions are generally subject to section 75 of the Contracts Act.

Prior to the Federal Court decision in Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723, section 75 has been interpreted by the courts such that a plaintiff or claimant was disentitled from recovering simpliciter the sum fixed in the contract. A distinction was drawn between cases where, although the evidence disclosed a real loss that was inherently not too remote, it was 'difficult' to assess damages; and cases where damages could be assessed. In the first type of case, the court or tribunal would award an amount that it considered reasonable and fair. In the second type of case, the party claiming damages could not rely on the liquidated damages clause – it had to prove its damages.

In Cubic Electronics, the Federal Court reconsidered the law on liquidated damages, and it would seem that Malaysian law on liquidated damages provisions can now be summarised in the following propositions:

- Section 75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.
- The initial onus lies on the party seeking to enforce a damages clause under section 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein.
- If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.
- In determining what amounts to "reasonable compensation" under section 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in the UK Supreme Court decision in Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67 are relevant.
- A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss that could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage that is likely to be suffered by the innocent party.

Construction contracts involving housing under the Housing Development (Control and Licensing Act) 1966 are not subject to section 75 of the Contracts Act.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

See question 25. If the loss is the subject of a liquidated damages clause, the quantum specified in the clause is likely to represent the upper limit of damages that will be awarded for the loss.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

It is assessed by reference to the loss caused by the breach of contract, but recoverability is limited by the principle that a party is disentitled from recovering losses (or the extent of loss) that could have been avoided by the taking of reasonable steps, as well as rules of remoteness of damage. Thus, section 74(1) of the Contracts Act provides that

[w]hen a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

It has been suggested that the reformulated test for remoteness per the decisions of Lord Hope and Lord Hoffmann in The Achilleas (2009 1 AC 61) is not consistent with section 74(1) of the Contracts Act (Critical System Specialist Sdn BHd v CLLS Power System Sdn Bhd [2019] 6 CLJ 658).

Provided that it can be shown that the lost profits are a loss naturally occurring from the breach, the employer would thus be entitled to damages on that account. The fact that such profits are exceptionally high would not of itself bar recovery, but may lead to inference that the loss is not of itself of a nature that naturally flows from the breach. Much will depend on the specifics of the loss suffered, the terms of the contract, and the nature of the breach.

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

The Malaysian courts have endorsed the position that where it would be unreasonable for a claimant to insist on reinstatement because the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff would be confined to damages calculated by reference to the diminution in value as a result of the non-compliance, and would not be entitled to the cost of reinstatement (Komala Devi M Perumal v Bandar Eco-Setia Sdn Bhd and ors [2016] 1 LNS 1053).

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

No – the employer would be entitled to claim damages for such latent defects (see, eg, UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd [2009] 1 MLJ 737).

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

The position is not settled. It is arguable that such a clause would not exclude liability for losses caused by the breach insofar as such losses flow naturally from the breach (even if such loss was a loss of profit, for example).

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Generally, yes. An appropriately drafted clause would protect a tortfeasor. Such exclusions or limitations are usually however construed restrictively, against the person whose interests they protect.

A party cannot exclude liability for fraud, but it is an open question under Malaysian law as to whether a party can exclude liability for the fraud of its agent.

It is a question of construction of the terms of the particular contract as to whether the exclusion clause extends to protect for recklessness, wilful misconduct or gross negligence.

It should be noted that section 29 of the Contracts Act renders void provisions which seek to restrict absolutely that party from "enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals", or which "limits the time within which [a party] may thus enforce his rights." A recent Federal Court decision suggests that section 29 may invalidate exclusion clauses – however, the case concerned a banker-customer contract and the tenor of the decision suggests that any rule of invalidity extends only to consumer contracts (CIMB Bank v Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1).

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

Generally, there is no right unless the contract provides for it.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Under section 35(1) of CIPAA, any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

Only if the subcontractor has an unsatisfied adjudication decision against the contractor under CIPAA in its favour. In such circumstances – and assuming that money is due or payable by the employer to the subcontractor – section 30(1) of CIPAA permits the subcontractor to serve a "written request" for payment on the employer. The employer must then serve a notice on the contractor to show proof of payment and stating that direct payment will be made after the expiry of 10 working days of the service of the notice. If the contractor does not make payment, the employer must pay.

The merits of the subcontractor's claim will be determined in the adjudication proceedings. The fact that a different substantive law governs the contract ought not to affect the analysis, provided that the adjudicator had jurisdiction.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Provided that the arbitration clause is valid, operative and capable of being performed and the employer has not taken a step in the court proceedings, any court proceedings brought in respect of a dispute falling within the scope of the arbitration agreement are liable to be stayed under section 10 of the Malaysian Arbitration Act 1996. It does not matter that the arbitration is seated outside the jurisdiction.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Malaysian law recognises that consideration may move from a third party who is not party to the contract and that a third party can have the benefit of a contract. However, that third party does not have any right to enforce the contract. Enforcement of the right has to be done by a party to the contract. Rights to enforce a contract could however be obtained through a novation of the contract or a legitimate assignment of the right.

As regards exclusions and limitations of liability, Malaysian law is likely to recognise limitation and exclusion clauses to the extent the common law does. Himalaya type clauses are likely to be recognised.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Malaysian law recognises the principle of separate legal personality. A non-party to a contract will not be liable for the contract. As regards liability in tort, absent the mentioned circumstances liability ought not to arise. Exclusion clauses are thus not relevant.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

For West Malaysia, the general rule is that for claims in contract and tort, the limitation period is six years from the date the cause of action accrued. Under section 26(3) of the Limitation Act 1953, where, in the case of a right of action to recover any debt or other liquidated pecuniary claim, "the person liable or accountable therefore acknowledges the claim... the right shall be deemed to have accrued on and not before the date of the acknowledgement."

Under section 29 of the Limitation Act 1953, where a right of action is concealed by fraud of the defendant or his agent, or of any person through whom he claims or his agent, the period of limitation does not run until the plaintiff has discovered the fraud.

For arbitrations, under section 30(3) of the Limitation Act 1953, time stops running when one party serves on the other party or parties a notice requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator; or, where the submissions provides that the reference shall be to a person named or designated in the submission, requiring him or them to submit the dispute to the person so named of designated.

Limitation periods are part of procedural law and not substantive law. It should be noted that proceedings against the Malaysian government may be subject to a limitation period of 36 months (rather than six years), where the proceeding "is in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the

execution of any such written law, duty or authority". While case law suggests that this ought not to apply to, for example, payments to be made by the government in respect of building contracts, caution is advisable when the claim is against the government.

The East Malaysian states of Sabah and Sarawak each have their own legislation for limitation periods.

There does not appear to be any impediment to parties extending the limitation period. Reducing the limitation period will be invalid, as a provision to such effect is by virtue of section 29 of the Contracts Act void.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

If the Construction Industry Payment and Adjudication Act (CIPAA) applies, the parties cannot exclude it. It is likely, but not settled law, that the operation of section 75 of the Malaysian Contracts Act cannot be avoided (see question 25).

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

If CIPAA applies, the parties cannot exclude it. It is likely, but not settled law, that the operation of section 75 of the Malaysian Contracts Act cannot be avoided (see question 25). Assuming the project is in Malaysia, the project will continue to be subject to local legislation regarding, for example, health and safety, planning, environmental protection and employment laws.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

The answer is not settled, but is likely yes.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

Yes. The Kuala Lumpur High Court and Shah Alam High Court (in the state of Selangor) each have a specialist construction court.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The Sessions Court and the Magistrates Court have jurisdiction over monetary claims of up to 1 million ringgit and 100,000 ringgit respectively. The High Court has jurisdiction over claims in excess of 1 million ringgit, and revisionary and supervisory jurisdiction over the Sessions Court and Magistrates Court. Appeals from the High Court generally go to the Court of Appeal. An appeal from the Court of Appeal may be brought to the Federal Court with leave. There is a doctrine of binding precedent.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

To the first question, yes.

To the second question, the tribunal is not expected to give preliminary indications on the merits, but there is nothing wrong per se in it doing so provided it makes clear that it is doing this as a probable view with the parties being invited to provide further submissions on the point. If the Tribunal is found to have pre-judged or not properly considered a matter, that may render an award liable to be set aside.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Section 11(1) of the Malaysian Arbitration Act 2005 provides that a party may before or during arbitral proceedings apply to a High Court for any interim measure. Section 11(3) makes clear that section 11(1) applies even where the seat of arbitration is not Malaysia. The fact that preconditions have not been satisfied ought not to make a difference to the applicability of section 11(1). However, it is clear that such parallel court proceedings are limited to providing support for and in connection with the arbitral proceedings, and will not displace the arbitration.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

The answer is very likely no.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

Yes. However, while Tribunal appointed experts are permissible, as a matter of practice, they are rare. Experts owe an overriding duty to the Tribunal.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

The Government Contracts Act 1949 provides that all government contracts shall be made in the name of the government and the authorised signatories and the corresponding value of the contracts entered into are as provided for under the Schedule to the Act. Finance Ministry/Treasury Rules will also provide limits to the authority of government servants to enter into contracts depending on the value of the contract.

There is no mandatory requirement for a contract made in Malaysia on behalf of the government or state government to be reduced to a formal written agreement (Syarikat Sebati Sdn Bhd v Pengarah Jabatan Perhutanan [2019] 3 CLJ 157).

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

Offers may be made on a "without prejudice save as to costs" basis. It is usually sufficient that these words are marked on the offer letter.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

The "without prejudice" privilege is recognised.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

The answer is likely no. The question of characterisation of rules of privilege is not settled law, but is arguably likely to be treated as one of admissibility of evidence rather than of substantive right.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Guarantees are contracts – thus the general requirements for the formation of contracts apply. In this regard, section 80 of the Contracts Act specifically provides that "[a]nything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee." Guarantees need not be in writing – they may be valid even if oral.

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

Liability is co-extensive with that of the principal. The guarantee's wording can affect the position.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

Guarantees are a species of contract. Accordingly, the general principles of contract law outlined above will apply.

In addition, there are certain rules that apply with respect to the discharge of guarantors. The main rules are outlined below.

Any variance in the terms of the contract between the principal debtor and the creditor, made without the guarantor's consent, will discharge the guarantor as to transactions subsequent to the variance.

The guarantor will also be discharged by any contract between the creditor and the principal debtor by which the principal debtor is released or discharged. The guarantor will also be discharged by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor.

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the guarantor, unless the guarantor assents to such contract.

If the creditor does any act that is inconsistent with the rights of the guarantor, or omits to do any act that his or her duty to the guarantor requires him or her to do, and the eventual remedy of the guarantor against the principal debtor is thereby impaired, the guarantor is discharged.

The wording of the guarantee can affect the above matters.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

A call may be challenged on the grounds of fraud. In addition, a call may be challenged on the ground of unconscionability (Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401.

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

Only if a strong case of fraud or unconscionability is made out.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.

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Avinash Pradhan is deputy head of Rajah & Tann Singapore LLP's international arbitration practice. He also practises in Malaysia as a partner of Christopher & Lee Ong, a firm within the Rajah & Tann Asia network. Avinash's practice encompasses a broad spectrum of commercial and corporate disputes. He is familiar with conducting international arbitrations under the major arbitral institutions as well as ad hoc arbitration, and with proceedings in both the Singapore and Malaysian courts. He has substantial experience of cross-border disputes and disputes involving a conflict between international arbitration proceedings and court litigation, and is adept at formulating and applying for urgent interim relief, including freezing and anti-suit injunctions. Recognised in *Who's Who Legal* for his 'superb advocacy skills and ability to explain complex concepts easily', Avinash was named in 2016 as one of Singapore's most influential lawyers under the age of 40 by the *Singapore Business Review* and has since been recognised in the 2017, 2018, 2019 and 2020 editions of *Best Lawyers International* as one of Singapore's leading lawyers in the field of international arbitration.

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