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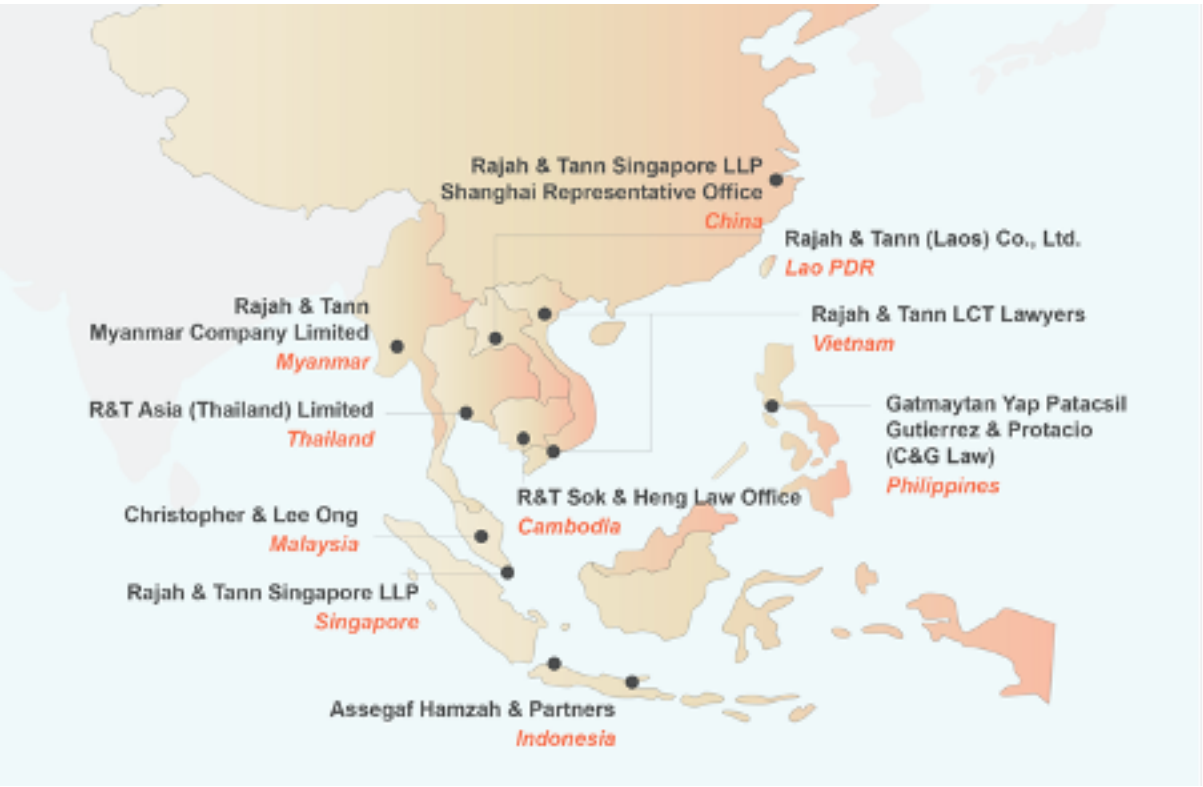


IN THIS ISSUE

Message from Yon See Ting, Managing Partner

Welcome to the first 2020 issue of EncyCLOpedia, our biannual publication for clients. We have taken a little longer to publish the 2020 issue as the focus has been to revamp the look and feel of EncyCLOpedia to be more interactive and user-friendly.

2020 thus far has been stressful to say the least, and there are a variety of things that have occurred which may impact on your business continuity and growth and which may continue to have different implications to industry and to each of us who form part of the workforce in this country.

Specifically, the Government response to COVID-19, the Movement Control Order imposed between 18 March and 14 April 2020 and the consequent challenges we have and continue to face is not something to be under-estimated.

We have already sent our clients and other parties updates on a variety of issues including the following which you may access, should you have missed them:

1. Client Update March 2020: Movement Control Order – Construction Industry: Update on "Critical Works" (Published 24 Mar 2020)

2. Client Update March 2020: Movement Control Order – Update on Employment Issues (Published 23 Mar 2020)

3. Client Update March 2020: Movement Control Order – How Does It Affect the Construction Sector? (Published 20 Mar 2020)

4. Client Update March 2020: Movement Control Order - How Does It Affect the Manufacturing Sector? (Published 20 Mar 2020)

5. Client Update March 2020: The Prevention and Control (Measures Within the Infected Areas) Regulations 2020 – Containing the COVID-19 Outbreak in Malaysia (Published 18 Mar 2020)

6. Client Update March 2020: Anti-Corruption Efforts Intensify at the Stock Exchange (Published 10 Mar 2020)

7. Client Update March 2020: Amendments to the Malaysian Franchise Act 1998 (Published 6 Mar 2020)

8. Client Update March 2020: Legal Analysis of COVID-19 Outbreak: What Businesses Should Be Aware Of (Published 5 Mar 2020)

Other relevant considerations for businesses would include the "Force Majeure" clauses that most contracts contain. Traditionally, such clauses are incorporated into contracts to protect parties from unexpected circumstances that may interfere with their ability to fulfil the terms of the contract, but with COVID-19, "*Force Majeure*" has become the new watchword with untold business implications. You may want to consider reviewing any newer contracts you enter into and even review existing contracts, to take this into account.

From a political standpoint, Malaysia has had an interesting few months which include a change of Prime Minister and government. As we watch from the sidelines and await the impact of this change, it nonetheless has to be business-as-usual – and the question we expect our clients to be considering is: how to ensure we have a sustainable business taking into account there may be political and economic uncertainties on the road ahead.

The focus of this issue is on:

1. The Trademarks Act 2019 and the Madrid Protocol
2. Quick Facts on the Anti-Corruption Landscape in Malaysia
3. Late Discovery of Latent Damage? Limitation Period has been Relaxed by New Section 6A of the Limitation Act
4. Deconstructing Force Majeure Clauses
5. Acquisition of a Business: Asset Purchase or Share Purchase

As always, we hope you find these articles insightful and we will be at hand to provide clarification or advice, as the case may be. We also would like to take this opportunity to share some of the accolades and achievements we have received recently, and to congratulate members of the CLO team who have made this possible.

We hope you find these articles useful. Please share your feedback or comments by emailing us at clo-info@christopherleeong.com

Warm wishes,

See Ting

The Trademarks Act 2019 & the Madrid Protocol

The much-awaited Trademarks Act 2019 came into force on 27 December 2019 replacing the earlier regime under the Trade Marks Act 1976. The enactment of this legislation marks the country's long overdue accession to the Madrid Protocol. This article addresses some of the key impact points that arise from this Act.

What is the Madrid Protocol?

The Madrid Protocol is an international treaty that allows a trademark owner in Malaysia to seek protection of their trademarks worldwide. This in effect allows the trademark owners to apply for a trademark in the 122 countries under the Protocol by filing a single application with the payment of a single fee. Malaysia's recent accession to the Madrid Protocol brings us on par with a majority of the countries worldwide and with our ASEAN neighbours including Singapore, Thailand and Indonesia.

Multiple-class applications

Trademark applications are filed according to the relevant international classes and the specification of goods or services to which the trademarks apply. Under the old regime in Malaysia, applicants could only apply for registration of a trademark in one class per application. The new regime now allows applicants to apply for more than one class of trademark registration in a single application making it a more efficient and cost-effective registration process.

Preliminary Advice and Search

Under the new Act, prior to filing a trademark application, trademark owners can apply to the Registrar of Trademarks ("**the Registrar**") for a preliminary advice and search. The Registrar will conduct the trademark searches and will determine whether the intended mark to be applied for is *prima facie* a registrable trademark.

Thereafter, if an applicant files an application based on the affirmative result of the Registrar's advice and search and subsequently receives a notification of provisional refusal after the examination of the trademark application, the applicant may request the Registrar to refund the application fee.

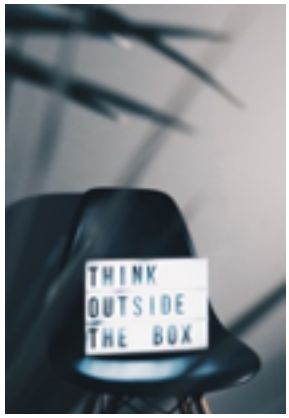
Registration for Non-Traditional Marks and Collective Marks

The new Act extends registration of trademarks to non-traditional marks such as shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof, if they are capable of being represented graphically and capable of distinguishing the relevant goods or services from those of others. Such registration of non-traditional trademarks effectively provides business owners with wider protection against copycats.

The new Act also introduces the registration of collective marks. A collective mark is a trademark used by the members of an association to indicate membership in the association and to distinguish themselves from non-members. This means that organisations such as clubs, trade unions and societies can now apply to register their trademarks. An applicant of a collective mark is required to file an application according to the rules governing the use of the collective mark which include, for example, the persons authorised to use the collective mark and the conditions of membership of the association when applying for such trademark protection.

Security Interest

Under the new Act, business owners can now apply for their registered trademarks to be the subject of a security interest in the same way as other personal or moveable property. This should incentivise business owners to register their trademarks as they can then leverage on these to secure financing from financial institutions.



The rationale is that customers / clients identify a business by their trademark and / or trade name, and there is a positive correlation between the value of the trademark and the growth of business reputation. The recognition of registered trademarks as security interests can boost the inclination of financial institutions to give more weight to trademark ownership, and consequently to grant financing for this alternative form of security. Having said that, it is still too early to determine the impact this can have on the availability of such financing compared to conventional loans.

Wider Protection

The scope of protection granted for trademark owners by the new Act is wider as trademark infringement action can now be taken against infringers for goods/ services that are **related** to the specification of goods/services claimed under a registered trademark. Previously, under the old regime, trademark infringement action can only be taken against infringers for goods/services that are claimed under a registered trademark.

The new Act has codified the remedies generally awarded to successful plaintiffs, which includes damages, account of profits, injunctions, and mandatory orders. Under the old Act, successful plaintiffs in an infringement action would have to elect only one of the two heads of damages, i.e. damages or account of profits. Now, in an action for trademark infringement, the new Act empowers the court to grant both damages and account of profits attributable to the infringement that have not been considered in computing the damages.

The new regime has also consolidated all the relevant provisions for criminal enforcement procedure against counterfeiting activities by including the relevant provisions found under the Trade Descriptions Act 2011 into the new Act.

Registration Conclusive Period

Under the old Act, after seven years have elapsed from the date of registration, there is a presumption that the registration of trademark is valid unless its validity is challenged on the ground that the registration was obtained by fraud or in contravention of the relevant provisions of the old Act. This period of seven years has been shortened to five years by the new Act.

Remedy for Groundless Threats of Infringement Proceedings

When contemplating whether to initiate an action for trademark infringement, one should also be wary of provisions that are introduced under the new Act for groundless threats of infringement proceedings. Under the new provisions, an aggrieved party can apply for a declaration that the threats are unjustifiable, an injunction against the continuance of the threats, or damages in respect of any loss he has sustained by the threats for groundless threats of a registered trademark infringement proceedings.

Enforcement Raid

Under the old regime, the Ministry of Domestic Trade and Consumer Affairs ("**MDTCA**") would only conduct an enforcement raid if the counterfeits bear marks which are identical to the registered trademark. Where the counterfeits bear marks which are similar but not identical to the registered trademarks, the brand owner would have to obtain a Trade Description Order from the court to declare that the infringing mark is a false trade description in its application to such goods under the Trade Descriptions Act 2011 before lodging a formal complaint with the MDTCA.

Where the counterfeits bear marks which are not identical to the registered trademarks, brand owners are no longer required to obtain a Trade Description Order from the court, before proceeding with a raid. The new Act only requires the brand owner to seek verification from the Registrar of Trademarks that the infringing mark is similar to the registered trademark. The verification decided by the Registrar can be *prima facie* evidence in any proceedings before the court.

All in all, the new Act has introduced positive changes which are in line with the development of global market. Businesses in Malaysia are encouraged to take advantage of the more cost-effective way of registering their trademarks in multiple jurisdictions via the Madrid Protocol for wider protection globally. Further, trademark owners should apply to register their trademarks to enhance their ability to leverage their registered trademarks for financing and enjoy the wider protection granted against unauthorised use of similar or identical trademark.

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Quick Facts
on the Anti-Corruption Landscape in Malaysia

Authority in charge

The Malaysian Anti-Corruption Commission ("**the Commission**") was established in January 2009 under Section 4 of the Malaysian Anti-Corruption Commission Act ("**MACC Act**"). The Commission's role is to manage the country's anti-corruption efforts, specifically to eradicate corruption, abuses of power and malpractice in Malaysia. The core divisions of the Commission comprise:

a. the investigation division;

b. the intelligence division;

c. the legal and prosecution division; and

d. the record management and information division.

Extra-territorial effect

The MACC Act covers citizens and permanent residents of Malaysia (including companies and partnerships) and when an offence is committed outside Malaysia, he / she / it may be dealt with in respect of the offence as though it was committed in Malaysia.

Same threshold in bribery offences in the public and private sector

The same threshold applies to the same offences regardless of whether these involve the public or the private sector, but different MACC Act provisions cater to different types of offences.

Duty to report bribery offences

Under the MACC Act, a person (i) being offered gratification or (ii) whom a third party seeks gratification from, must report the third party to the Commission or the police. Failure to report the third party offering gratification attracts a fine of up to RM100,000 or a jail term of up to 10 years, or both; whereas failure, without reasonable excuse, to report the third party seeking gratification attracts a fine of up to RM10,000 or jail term of up to two years, or both.

Key offences under the MACC Act

The main offences under the MACC Act include:

a. corruptly soliciting / receiving OR offering / giving gratification to a third party as an inducement or reward to do or forbear from doing anything [section 16];

b. a corporate liability offence where a person associated with the commercial organisation ("**CO**") corruptly gives or promises to give any gratification for the benefit of a third party with intent to obtain or retain business or obtain an advantage in the conduct of business of the CO [section 17A] **not in force until June 2020*;

c. intending to deceive principal by agent [section 18];

d. corruptly procuring withdrawal of tender [section 20];

e. bribery of officer of public body [section 21];

f. bribery of foreign public officials [section 22]; and

g. misuse of position for gratification [section 23].

NOTE: Once gratification is proved to have been received or offered, it is presumed that the gratification is received or offered in a corrupt manner, and the burden of proof is on the accused to show, on the balance of probability, that the gratification was not received or offered in a corrupt manner.

What is gratification

Gratification is broadly defined under Section 3 of the MACC Act and includes various forms of bribery such as:

a. money, donation, gift, loan, property, financial benefit;

b. any office, dignity, employment, contract of services;

c. any payment, release or discharge of any loan, obligation or liability;

d. any discount, commission, rebate, bonus or percentage;

e. any forbearance to demand any money or money's worth; and

f. any favour of any description, including protection from any penalty or proceedings of a disciplinary or criminal nature.

Penalties for the key offences

Contravening sections 16, 17, 20, 21, 22 and 23 of the MACC Act attracts a fine of up to five times the value of the gratification or RM10,000, whichever is higher, or a jail term of up to 20 years or both.

Contravening section 17A of the MACC Act attracts a fine of up to 10 times the value of the gratification or RM1 million, whichever is higher, or a jail term of up to 20 years, or both.

Defence to a corporate liability charge

The defence to a section 17A corporate liability charge is to establish that adequate procedures have been put in place by the corporation. The Commission issued an adequate procedures guidelines in December 2018 outlining five guiding principles which form the bedrock of adequate procedures:

T	–	Top level management
R	–	Risk assessment
U	–	Undertaking control measures
S	–	Systematic review, monitoring and enforcement
T	–	Training and communication

NOTE: The guidelines is not a one-size-fits-all guide, and should be applied practically, in proportion to the scale, nature, industry, risk and complexity of a CO. Further, since section 17A has not yet been tested in Malaysian courts, how the Malaysian courts would assess the adequacy of the policies and procedures of a CO and the manner of their implementation remains to be seen.

Defence for officers of a commercial organisation

Under section 17A(3) of the Act, if a CO is convicted of a corporate liability offence, the following persons will be deemed to have committed the same offence unless he / she can prove that the offence was committed without his / her consent or connivance and that he / she had exercised due diligence to prevent commission of that offence:

a. a director, controller, officer or partner; or

b. a person who is concerned in the management of the CO's affairs.

Investigation, prosecution & enforcement trend: Whistleblowing coming into play

Apart from detecting non-compliance through audits, the authorities rely on whistleblowing reports from the public. Reports can be made on any anonymous basis, if preferred, but whistleblowers are encouraged to provide their particulars to facilitate the relevant authorities' efforts to follow up and acquire further information if the disclosure warrants an investigation.

Protection for whistleblowers

Under the Whistleblowers' Protection Act 2010 ("**WP Act**"), a whistleblower or informant is accorded protection from detrimental action, civil action, and criminal or disciplinary consequences for making a disclosure. His / her identity will also be kept confidential, even during trial in Court or tribunal.

To qualify for protection, the disclosure must be made to one of these enforcement agencies:

a. the Royal Malaysian Police

b. the Commission

c. the Royal Malaysian Customs Department

d. the Immigration Department

e. the Road Transport Department

f. the Companies Commission of Malaysia

g. the Securities Commission

It is important to keep in mind that this protection can be revoked by the relevant enforcement agency offering the protection if the whistleblower or informant is found to have:

a. participated in the improper conduct;

b. wilfully made disclosure which he / she believed to be false;

c. made disclosure which is frivolous or vexatious;

d. questioned the merits of government policy in his / her disclosure;

e. made the disclosure solely or substantially with the motive of avoiding dismissal or other disciplinary action; or

f. in the course of making a disclosure or providing further information, commits an offence under the WP Act for example, making a disclosure specifically prohibited under the Official Secrets Act 1972.

Alternatives to prosecution

Deferred prosecution agreements are gaining popularity overseas but have yet to be introduced in Malaysia. We currently have the option to make a plea bargain for a charge or a sentence to the charge, or to both under the Criminal Procedure Code.

Double jeopardy rule for corruption and money laundering charges

Subject to certain exceptions, Article 7(2) of the Federal Constitution provides that a "person who has been acquitted or convicted of an offence shall not be tried again for the same offence" and section 302 of the Criminal Procedure Code contains a similar rule.

Section 66 of the MACC Act and section 82 of the Anti-Money Laundering Act further provides that proceedings brought under these Acts are a bar to subsequent proceedings against the accused for the same offence, and is a bar to subsequent proceedings under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.

Other recent anti-corruption initiatives in Malaysia

The key anti-corruption initiatives launched to-date include:

a. the introduction of the ISO 37001 Anti-Bribery Management System which is a voluntary internal control system for organisation to manage, handle, enforce, evaluate and improve its anti-corruption measures;

b. a voluntary corporate integrity pledge where an organisation makes a unilateral declaration against corrupt practices and express its resolve to work towards conducting business in an ethical business environment;

c. the National Anti-Corruption Plan which includes extensive strategies to promote integrity and good governance within political and public sector administration; and

d. the Securities Commission's Code on Corporate Governance with a recently approved recommendation for listed companies to put in place anti-corruption measures and a framework to promote the effective discharge of directors' responsibilities.

Enforcement trend of anti-corruption laws in Malaysia

Both the government and the public's appetite to curb graft and financial crime is strong – as evidenced by the fact that the Commission arrested a total of 1,042 offenders from January to July 2019 alone, and of course, the on-going high profile money laundering and corruption trials.

Come June 2020 when corporate liability offence comes into force and the Commission can bring errant corporations to book, we foresee an increased number of arrests.

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Late Discovery of Latent Damage?

Limitation Period has been Relaxed by New Section 6A of Limitation Act 1953

Introduction

Time limit (or limitation period) is prescribed for a claimant to bring a civil claim in court. In Peninsular Malaysia, the law on limitation periods is governed by the Limitation Act 1953 (Act 254) ("**the Malaysian Limitation Act**"). The objective of limitation periods is to discourage claimants from sleeping on their rights and more importantly, to have a definite end-time for litigation. A claimant is thus barred from obtaining relief (for example, compensation for loss suffered) through a civil claim upon the expiry of the relevant limitation period.

On 4 April 2018, Parliament enacted the Limitation (Amendment) Act 2018 ("**the Amendment Act**") which came into force on 1 September 2019. This article focuses on the new section 6A of the Limitation Act that arises by virtue of the Amendment Act – which allows for limitation periods to be extended in cases founded on negligence not involving personal injuries, where the damage is not discoverable at the time the cause of action accrues.

The Legal Position prior to the Amendment Act

Section 6(1)(a) of the Malaysian Limitation Act provides that actions founded on contract and tort shall not be brought after the expiry of six years from the date on which the cause of action accrued.

AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 3 MLJ 784 ("Abdul Aziz")

The Court of Appeal in *Abdul Aziz* held that *a cause of action for breach of contract accrues on the date of the first clear and unequivocal breach of contract*, whereas *a cause of action founded on tort accrues when the claimant suffers damage (caused by the tortfeasor), regardless of whether the claimant discovers the damage*.

Analysis

An argument was raised in *Abdul Aziz* that the limitation period under section 6(1)(a) of the Malaysian Limitation Act should only start to run from the date on which the claimant (the victim) discovered the damage. The Court of Appeal rejected the argument and held that the position in Malaysia is that time starts to run from the date on which the cause of action accrues regardless of whether the claimant (the victim) discovers the damage. The Court of Appeal noted in passing that unlike the United Kingdom ("**UK**") Limitation Act 1980, there is no provision in the Malaysian Limitation Act which allows the postponement or extension of the limitation period based on the date of discovery of the damage.

The position taken by the Court of Appeal in *Abdul Aziz* may seem harsh especially in cases where the damage is not reasonably discoverable upon inspection and may only be discovered after the expiry of the statutory limitation period of six years.

A great example of this would be latent defects in construction work – where defects in design, materials or workmanship may not be immediately apparent. This is best illustrated in the English House of Lords decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65 ("***Pirelli***").

In *Pirelli,* the plaintiff sued for damages in respect of cracks to a chimney caused by negligent design and/or construction by the engineers involved. The cracks were on top of the chimney concerned and the plaintiff only discovered the cracks after the expiry of the limitation period.

The House of Lords dismissed the action brought by the plaintiff on the ground that it was time barred. As a result of the harshness of the decision in *Pirelli*, the UK's Latent Damage Act 1986 was enacted and introduced a new section 14A to the UK's Limitation Act 1980 which allowed the limitation period to run from the date a plaintiff had knowledge of the facts relevant to the cause of action.

The harshness of the position taken by the Court of Appeal in *Abdul Aziz* has been acknowledged by our Malaysian courts in subsequent decisions. There were also attempts by the courts to redress the perceived unfairness caused by the strict interpretation of section 6(1)(a) of the Limitation Act in *Abdul Aziz* – which led to conflicting judicial decisions in this regard.

AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448 ("Kamariyah")

In *Kamariyah*, the Court of Appeal introduced the *"discoverability rule"* and held that the time limit of six years starts to run from the date when the damage was discovered or ought to have been discovered by reasonable diligence. The Court of Appeal in *Kamariyah* disagreed with the position taken in *Abdul Aziz*.

Following the decision of *Kamariyah*, the law on the application of section 6(1)(a) of the Limitation Act became uncertain.

The discoverability rule as enunciated in *Kamariyah* was applied in some cases – for instance, in *Peninsular Concord Sdn Bhd v. Syarikat Bekalan Air Selangor* [2015] 3 CLJ 682, the High Court applied the approach taken in *Kamariyah* and held that it is untenable in principle that a cause of action accrued before the damage could possibly be discovered.

However, in *Sharikat Ying Mui Sdn Bhd v. Hoh Kiang Po; Hoh Kiang Ngan & Anor (Third Parties)* [2015] 1 LNS 806 ("***Sharikat Ying Mui***"), the High Court chose to apply the approach taken by the Court of Appeal in *Abdul Aziz.*

It is relevant to take note of an observation made by Justice Harmindar Singh Dhaliwal (now Judge of the Court of Appeal) in *Sharikat Ying Mui* that:

> "*Notwithstanding Kamariyah, which appeared to affirm the discoverability rule, this seeming defect however persists in the Malaysian Limitation Act 1953 in that there is no provision which allows time of accrual of action to run from when the plaintiff knows or ought reasonably to know that he has a cause of action. … This deficiency is in my view a matter for Parliament and the time is perhaps overdue for a review of the limitation laws in keeping with the developments in other common law jurisdictions. … Pending such review, the duty of a court of law, as it always is, is only to apply the law as it is.*"

The New Section 6A

The new section 6A to the Malaysian Limitation Act may be seen as a means to redress the perceived harshness of the position taken in *Abdul Aziz*.

It is pertinent to note that section 6 of the Malaysian Limitation Act remains applicable in actions founded on contract and tort where the six-year limitation period runs from the date on which the cause of action accrues.

The new section 6A only applies to actions for damages for negligence not involving personal injuries and where the "starting date" for calculating the period of limitation falls after the date on which the cause of action accrued.

"Starting date"

The phrase "starting date" is defined under section 6A(4) of the Malaysian Limitation Act as the earliest date on which the plaintiff first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action. Section 6A(4) further provides that the plaintiff has the requisite knowledge to bring an action for damages when he or she has:

a. the knowledge of the material facts about the damage in respect of which damages are claimed;

b. the knowledge of other facts relevant to the action including:

   i. that the damage was attributable in whole or in part to the alleged negligence; and

   ii. the identity of the defendant; and

c. the knowledge which the plaintiff might reasonably have been expected to acquire from facts observable or ascertainable by the plaintiff himself or from facts ascertainable by him with the help of appropriate expert advice which is reasonable for the plaintiff to seek.

An action to which the new section 6A applies is to be commenced within three years from the starting date if the said three-year period expires later than the six-year time limit prescribed under section 6(1) of the Limitation Act. However, no action can be brought after the expiration of 15 years from the date on which the cause of action accrued.

In this respect, the new section 6A is similar to the corresponding legislation in the UK – section 14A of the UK Limitation Act 1980; and Singapore – sections 24A-24B of the Singapore Limitation Act (Chapter 163).

The application of the new section 6A is illustrated in the timelines below:

2020	2026	2030	2033
The cause of action accrued (i.e. the date when the damage was suffered)	six-year limitation period under section 6(1) expires. Thus, no action can be brought – unless the new section 6A applies.	The damage is discovered. If the new section 6A applies, an action can be brought.	three-year limitation period under the new section 6A expires. Thus, no action can be brought.

2020	2026	2034	2035
The cause of action accrued (i.e. the date when the damage was suffered).	six-year limitation period under section 6(1) expires. Thus, no action can be brought – unless the new section 6A applies.	The damage is discovered. If the new section 6A applies, an action can be brought.	15-year long-stop limitation period (i.e. 15 years from the date on which the cause of action accrued (2020)), expires. Thus, no action can be brought after the expiry date.

The Scope of Application of the new Section 6A

On a literal reading of the new section 6A, it appears that the new section 6A applies to all actions founded on negligence not involving personal injuries.

However, this may not necessarily be the case, for the following reasons:

a. all four illustrations provided under the new section 6A are scenarios related to construction cases only;

b. the Explanatory Statement to the Bill (on the Amendment Act) states that the proposed new Section 6A "*considers negligence cases involving latent damage in construction cases*";

c. when the Amendment Act was debated in Parliament, the Parliamentary debates mostly centred on latent damage in construction cases.

Accordingly, it remains unclear as to whether the intention of Parliament is to confine the application of the new section 6A to negligence claims involving latent damage in construction cases only.

Be that as it may, it is submitted that the scope of the application of the new section 6A should not be limited to construction cases only.

The illustrations provided under section 6A are merely illustrative of the true scope and ambit of section 6A. The illustrations should not limit the scope of the application of section 6A. Moreover, statements made by the Minister moving the Bill / debates in Parliament as recorded in the Hansard are not determinative of the statutory point in issue, otherwise the same would amount to substituting the words of the statutory provision.

It is worthy to note that the application of section 14A of the UK's Limitation Act 1980 (which is in *pari materia* with our new section 6A) was not restricted to construction cases only, as decided by the English courts. For instance, in *Haward v Fawcetts (a firm)* [2006] 3 All ER 497, the House of Lords applied section 14A in an action for negligent investment advice given by an accounting firm. Having said that, it remains to be seen whether the Malaysian courts will take a similar approach in determining the ambit of our new section 6A.

Conclusion

It is pertinent to note that the new section 6A does not apply to negligent acts resulting in personal injury. Therefore, the position in *Abdul Aziz* will continue to apply in personal injury cases with the limitation period running from the date on which the cause of action accrued and not from the date when the injury was discovered or ought to have been discovered by reasonable diligence.

The harshness following this position is best illustrated in the classic English case of *Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (deceased)) and others v E Jopling & Sons, Ltd* [1963] 1 All ER 341 ("***Cartledge***"). In *Cartledge,* there were several claims brought by employees against an employer for damages in respect of lung disease caused by the continuous exposure of the employees concerned to dust over a period of years during the course of employment.

The House of Lords held that the cause of action of the employees was time-barred because time started to run when the employees suffered damage as a result of inhaling the dust and not the date when the employees became aware of the lung disease. The harshness of the outcome in *Cartledge* resulted in the inclusion of section 11 into the UK's Limitation Act 1980 – which provides for a special time limit of three years in personal injury cases to run from the date of knowledge of the damage (injury). Similarly, in Singapore, section 24A(2) of the Singapore Limitation Act allows a plaintiff to bring an action for damages in respect of personal injury within three years from the earliest date on which the plaintiff has knowledge of the damage.

In view of the foregoing, our Parliament should therefore consider extending the limitation period to negligent cases involving personal injuries as well – thereby bringing the Malaysian position in line with the developments in other common law jurisdictions.

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Deconstructing
Force Majeure Clauses

Seamless and certain progress of works are not only desirable but often required for parties to be able to perform their contractual obligations, in particular, to complete the works on or before the scheduled completion date. At times however, disrupting events beyond the reasonable control of either party may occur and consequently, these disruptions may render the parties' contractual obligations impossible to be performed or completed on time. In such circumstances, the term *"force majeure"* comes to mind as it is a commonly featured clause within contracts that caters for circumstances in which an affected party's obligations under the contract can no longer be performed due to a supervening event.

The Contracts Act 1950 of Malaysia ("**Contracts Act**") does not provide for the concept of *force majeure*. Indeed, it is widely accepted that under common law jurisdictions, *force majeure* is a contractual remedy availed to the contracting parties, and there is no doctrine of *force majeure* which may be implied. The parties to a contract are at liberty to contractually provide for specified types or nature of events which shall be deemed as a *force majeure* event such as those commonly seen in building and engineering contracts. Whether an affected party may rely on the clause relating to *force majeure* under the contract, shall be determined based on the strict interpretation of the wording of the *force majeure* clause.

Force majeure clauses in contracts typically set out the following:

a. the definition of "*force majeure* event";

b. the effect of the *force majeure* events on the parties' contractual rights and obligations, including the consequences of a prolonged *force majeure* event (which will often lead to entitling either party to terminate a contract altogether),

c. the processes for notice by an affected party upon the occurrence of a *force majeure* event; and

d. the requirement for an affected party to take steps to mitigate the effect of the *force majeure* event on its contractual obligations.

It should be noted that some contracts expressly require strict adherence by an affected party to the requirement to provide written notice of the occurrence of the *force majeure* event to the other party, and taking all reasonable steps to mitigate the effect of the *force majeure* event, as a condition precedent to any entitlement that an affected party may have to rely on the *force majeure* clause under the contract to claim for an extension of time and / or direct loss and expenses.

Force Majeure in Standard Forms of Contract

Standard forms of building and engineering contracts are commonly used within the Malaysian construction industry.

In this Article, we explore a form of contract which is commonly adopted for use in the public sector known as the PWD Form 203A (Rev. 1/2010) ("**PWD Form**") which was prescribed by

the Public Works Department ("**PWD**") formed under the Ministry of Works Malaysia. According to Clause 58.2 of the PWD Form, an event of *force majeure* is

> *"an event beyond the control of both parties which are:*
>
> *a.war (whether declared or not), hostilities, invasion, act of foreign enemies;*
>
> *b.insurrection, revolution, rebellion, military or usurped power, civil war, terrorism;*
>
> *c.natural catastrophe including but not limited to earthquakes, floods, subterranean spontaneous combustion or any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions;*
>
> *d.nuclear explosion, radioactive or chemical contamination or radiation (unless caused by the negligence act, omission or default of the Contractor, its agents or personnel);*
>
> *e.pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and*
>
> *f.riot, commotion or disorder, unless solely restricted to employees of the Contractor or its personnel, servants or agents."*

The PWD Form appears to define a *force majeure* event as such events which are specified in the list under Clause 58.2(a) to (f) above. Clause 58.2 is drafted to provide an exhaustive definition which list the categories of events classified as a *force majeure* event under the PWD Form.

However, from a drafting perspective, it may be more beneficial for the contracting parties to consider adopting an "inclusive definition" whereby the contractual provision expressly stipulates that a force majeure event includes but is not limited to the list of categories of events specified.

As a consequence of an event of *force majeure*, Clause 43.1(a) of the PWD Form allows the contractor to submit an application to seek for an extension of time to complete the Works under the contract provided that the contractor provides written notice of the causes of delay and supporting documents to enable the cause and length of delay to be properly ascertained. Further, Clause 58.4 of the PWD Form provides that parties may mutually agree to terminate the contract if a *force majeure* event is of such severity or if it continues for such a prolonged period of time which frustrates the original intention of the contract.

A standard form of building contract commonly adopted for use in the private sector is the PAM Contract 2018 (with quantities) ("**PAM Contract**"), which was prescribed by the Malaysian Institute of Architects. The PAM Contract defines *force majeure* as,

> *"any circumstances beyond the control of the contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters."*

The definition provided under the PAM Contract also appears to be exhaustive and confined to the categories of events specifically set out within the contract provision.

If the contractor forms an opinion that the completion of works will be delayed due to an event of *force majeure*, such contractor may rely on Clause 23.1 of the PAM Contract to apply to the Architect for an extension of time to complete the works. The contractor's application for an extension of time must comply with the procedure set out under Clause 23.1 of the PAM Contract. The said procedure requires the contractor to provide written notice to the Architect informing of the contractor's intention to apply for the extension of time, to provide an estimate period of extension required and to provide supporting documents which will enable the Architect to ultimately fix a fair and reasonable extended completion date or to decide if an extension of time should be granted.

Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co. Sdn Bhd [2007] MLJU 91

Further, Clause 23.6 of the PAM Contract provides for an obligation on the contractor to use its best endeavours and do what is reasonably required to prevent or reduce delay in the progress and completion of works. The contractor would therefore be obliged (as long as it is reasonable) to minimise the effect of a *force majeure* event in performing its contractual obligations.

Here, the defendants argued that their reason for terminating the agreement to purchase soda ash from a supplier was due to the "depressed economy" which had significantly affected the defendant's business. As a result of this, the defendants had to source for the supply of soda ash from suppliers offering cheaper prices and resort to terminating the agreement with the plaintiff. On this issue, the High Court held that a depressed economy was not an event of *force majeure* as the ups and downs of the economic climate are part of the risks of doing business. Events of *force majeure* had to be beyond the control of either party, and which had an effect on one's ability to carry out their obligations under the contract. The reason of *force majeure* therefore cannot be used as a means of escaping a bad bargain.

The Burden to Prove a *Force Majeure* Event

Progressive Ocean Sdn Bhd v Northern Corridor Implementation Authority [2016] MLJU 304

In this case, the High Court held that for a party in an agreement to invoke a force majeure clause, the burden to prove that it is a *force majeure* event lies on the party wishing to rely on the clause. In addition to this, the party must prove that as a result of such *force majeure* event, the party could not perform his part of the obligations in the agreement.

In interpreting a *force majeure* clause, the case of *Eastacres Development Sdn. Bhd. v Fatimah Bt. Mutallip & Anor [2000] MLJU 46* suggests that the courts must be cautious and must look into the construction of the clause in order to determine whether such a clause is wide enough to cover the contingency in question.

Force Majeure vs. Doctrine of Frustration

In contrast to the application of *force majeure* which is contractually provided, the doctrine of frustration is recognised under the Contracts Act and applies as a matter of law. Section 57(2) of the Contracts Act provides that a contract becomes void if performance becomes impossible or unlawful. The event which frustrates the contract would have to be a supervening event which occurs after the contract was formed.

The Contracts Act does not define the term "impossible". However, case law suggests that the concept of impossibility applies where there is a change in circumstances which result in a fundamental or radical change in the obligation originally undertaken by the parties to a contract.

In the event that frustration is proven, the contract becomes void at the date of frustration and section 66 of the Contracts Act provides that any person who has received any advantage under the contract is bound to restore it, or make compensation for it, to the person from whom it was received. In addition to this, section 15 of the Civil Law Act 1956 specifically provides for the following remedies when a contract is frustrated:

a. all sums which, prior to frustration, have been paid or are payable by one party to the other shall be recoverable or shall cease to be payable;

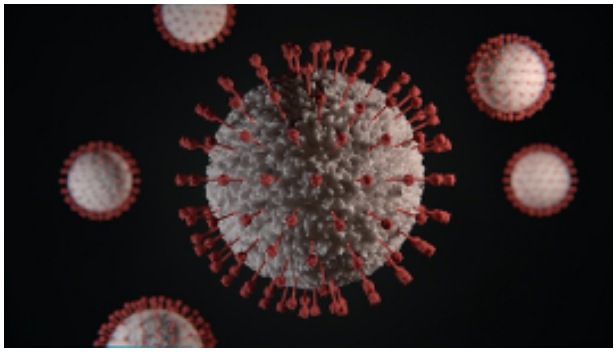
b. where a party to whom money has been paid or to whom money is payable prior to frustration, has also incurred expenses for the purpose of performing the contract, the Court may in its discretion allow that party to retain or recover the whole or any part of the sums so paid or payable; and

c. where one party to the contract has obtained a valuable benefit prior to frustration, the other party to the contract may recover from him such sum, if any, as the Court may consider just.

It is important to note that if the parties' contract falls within the category of contracts under section 16(5) of the Civil Law Act 1956 e.g. any charterparty (except a time charterparty or a charterparty by way of demise), the remedies under section 15 would not be applicable to the parties.

Although both *force majeure* and the doctrine of frustration involve supervening events which are not foreseeable and not caused by either party, it may be useful to note several differences. Unlike *force majeure* where the parties can contractually control the effect of a *force majeure* event, the doctrine of frustration renders a contract void at the date of frustration. As a result, the parties will be released from performing any future obligations under the contract.

Conclusion



Taking into account recent events such as the COVID-19 outbreak and the resulting issuance of the Movement Control Order by the Malaysian Government which applies throughout Malaysia from 18 March 2020 and has recently been extended to 14 April 2020, there may be delays or even impossibilities in the performance of obligations under the contract by an affected party which may impact the completion of projects within the required timelines specified in the contract. In view of this, contractual parties should be aware and should consider if their circumstances could potentially fall within the application of force majeure clauses or the doctrine of frustration.

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Acquisition of a Business

Asset Purchase or Share Purchase

One of the first questions facing the buyer of a business is whether to structure the purchase of the business as a share or a business purchase. This article highlights the different circumstances that would point buyers towards either a share purchase or a business purchase as being the more efficient way to transact the purchase of the business.

In this article, we refer to a "business" as the collection of assets, rights and liabilities that enables its owner to carry on an ongoing concern on a commercial, profit-making basis. The collection of assets, rights and liabilities would typically include real estate holdings, plant and equipment, raw materials, work-in-process, cash in bank, employees, receivable amounts from customers, performance obligations owed under contracts, rights or future rights to receive money under contracts, rights under contracts to receive performance of obligations, amounts payable to suppliers, amounts accrued for payment to suppliers or tax authorities, etc.

Where the business to be purchased is owned or held by a company, the buyer needs to consider whether to purchase the business:

i. by purchasing the shares in the company (i.e. by way of a share purchase agreement); or

ii. by purchasing specific components of the business such as plant and equipment, trademarks, contracts, etc. (i.e. by way of an asset / business purchase agreement).

Circumstances Favouring Share Purchase

Special status / licences

If the target business is dependent on a licence, permit or approval to operate (collectively, a "**Licence**"), and the Licence is granted to the company that operates the target business, this would be one reason favouring the purchase of the (shares in the) company operating the business.

This is especially if the transfer of the Licence from the target company to another entity established by the buyer is not permitted or is difficult, or if the Licence cannot be obtained easily, if not at all, on a fresh application by the buyer. In these circumstances, the buyer may want to purchase the company that holds the Licence instead of component assets forming part of the company's business.

In Malaysia, there are various laws promoting industries or products that allow companies to benefit from grants, exemptions from payment of duties, exemptions from payment of income tax or quotas for importation of goods or hiring of foreign persons requiring work permits. Examples include the pioneer status granted by the Malaysian Investment Development Authority (MIDA), the MSC status granted by the Malaysia Digital Economy Corporation (MDeC), and duty-free shop licences granted by the Royal Malaysian Customs.

Like most Licences, special status is usually granted to the company and this is not transferable. By becoming the shareholder of the company, the buyer does not need to expend time and cost making a fresh application for the status.

Key Employees

Inevitably, any discussion of a business sale creates uncertainty – for instance, about the future direction of the business and whether the buyer will retain all the assets and resources of the business. An oft-overlooked aspect of this process is communication with the employees of the business. If a buyer intends to retain the workforce intact, by purchasing the (shares in the) company – with all employment contracts between the company and its employees in place – this would assure both the buyer and the employees that at least immediately after the purchase, business can operate as usual.

In the asset purchase scenario, the buyer would have to offer fresh employment contracts to the employees the buyer will retain after the transaction. The period during which offers are made and negotiated is usually a period of uncertainty, as employees consider the terms of the offer and the possibility of offers from another potential employers. This type of uncertainty is somewhat controlled in a share purchase transaction.

Dependency on ongoing contracts

Where a target business is dependent on many contracts with counterparties, whether they are suppliers or customers, the transfer of all the contracts to a third party buyer may be practically difficult or time consuming. The transfer of such contracts, by way of novation agreements, requires the specific approval of the counterparty to the contract.

On the flipside, an acquisition by share purchase ensures continuity of contracts between counterparties and the target company, without the need to renegotiate terms of the contracts.

Dependency on track record

In some instances, a business becomes an acquisition target not only for the assets it owns and the business it operates, but also for its track record. For example, to be appointed the contractor for infrastructure projects, it is often a requirement that a candidate company has a track record for performing such works. A buyer that may have the technical capability but not the requisite track record may want to acquire a company with such a track record. In such instances, an acquisition of assets of the target company with the track record would not meet the buyer's requirements. The buyer would have to purchase the (shares in) the target company.

Exhaustive classes of assets & rights

In a share purchase, the buyer can be assured that it acquires all the assets and rights of the company with less need for documentation. The right of the buyer to use the company's name, licences, and intellectual property is also preserved.

On the other hand, in a business purchase, it is important to accurately identify all the assets and rights. It is especially risky when dealing with the transfer of intellectual property and technology assets because many intellectual property and technology agreements have provisions which terminate the contractual relationships upon a change of control.

Accumulated losses

The benefit of carrying forward and setting off accumulated losses against future business profits can be enticing to a buyer. This means paying less tax in the future. However, there are restrictions to the extent and the circumstances under which accumulated losses can be used as a deferred tax asset.

Circumstances Favouring Sale & Purchase of Business

"Cherry picking"

Some of the assets of the company may be subject to claims by third parties like financiers or are otherwise not important to the business. As the buyer can 'cherry-pick' the assets and rights, the buyer can limit its acquisition to those parts of the company that meet the buyer's needs.

By contrast, in a share purchase, the buyer will be acquiring the company along with all its debts and encumbrances, whether disclosed by the seller or hidden.

The purchase of specific assets would be preferable over a share purchase where the buyer does not have a clear view of the debts and liabilities (actual or potential) of the company that owns the business.

Limiting exposure

Even with a thorough due diligence exercise conducted on the business, the risks of acquiring contingent, unknown or unquantifiable liabilities remain. Liabilities arising out of possible claims by inland revenue, lawsuit against the company or pre-existing environmental conditions may simply be too large to be assumed by the buyer.

Where a company has a troubled history with obvious potential liabilities, the buyer may want to acquire the business through a business purchase. The rationale for this route is further reinforced if the completion of the transaction in a short period of time is a necessity, thereby not affording sufficient time for an extensive due diligence to uncover as many liabilities as possible. The drafting of the purchase agreement for a business purchase allows the buyer to only assume those liabilities calculated to be acceptable.

Breach of law

The company that owns the business may potentially be subject to penalties for breach of law that renders the acquisition unjustifiable. This may include, for example, imprisonment of the directors or the officers of the company, or the imposition of corporate liability on the company. Other than inheriting liabilities which are unrelated and not caused by the buyer in the first place, the company's future could also be jeopardised due to reputational damage caused by a breach of law. An acquisition by way of a share purchase will not make sense in this situation.

Selected employment

The buyer may have identified certain employees of the company who are key to the business. Instead of taking over a company which employs more

employees than needed, the buyer, through a business purchase, can choose to only employ identified employees, leaving redundant staff behind.

Representations & warranties

Due to the nature of the acquisition in a business purchase, general representations and warranties for the preparation and accuracy of financial statements do not need to be made as the buyer may be less concerned about the company's financial health. Further, it may be easier for both the seller and the buyer to agree on representations and warranties to be made in respect of a defined list of assets and liabilities rather than all-inclusive classes of assets and liabilities.

However, this may only work to the buyer's advantage if a discrete number of assets is to be acquired, where reference can easily be made to an attached exhibit. If the buyer's intention however, is to acquire substantially the entire business, the descriptions of the assets should be broad enough to cover unlisted assets which may not be discoverable at the time of acquisition.

Stamp duty

For each asset that is to be transferred to the buyer, there are different ways to effect the transfer including by way of assignment, novation or delivery. Stamp duties are ordinarily charged on instruments of transfer and are also payable on the instrument for the transfer of shares.

In the event that a substantial value in the purchase of a business is attributable to assets that are capable of being transferred without executing an instrument of transfer, there may be a correspondingly substantial saving in stamp duties between effecting the purchase by way of share purchase and by way of asset purchase. In a share purchase, the entire value of the shares being purchased is assessed for stamp duties. In an asset purchase in Malaysia, an agreement for the sale of assets is charged with only nominal stamp duties, and if there is no written instrument to effect the transfer of specific assets, for example, if specific assets such as plant and machinery are transferable by delivery, stamp duties will not need to be paid on the transfer.

Conclusion

At the end of the day, it is crucial to determine the appropriate form of acquisition. The buyer has to have a clear understanding of the business to not be surprised, after expending much time and cost into the transaction, by the restrictions inherent in one form of acquisition and the other. It is imperative for the buyer (and the seller) to consult independent legal, tax and accounting advisors before arriving at the most appropriate acquisition structure.

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