The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.
Law and Practice

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Lee Hishammuddin Allen & Gledhill is a multi-practice law firm offering top-quality service as well as providing personalised legal representation to both businesses and individuals. The firm is recognised for its ability to combine all areas of expertise and experience, giving its clients a competitive edge as well as optimum results. The Construction practice group consists of lawyers practising in construction law, with strong industry experience and a track record of providing practical and commercially sound document drafting, advice and analysis of construction claims and disputes.

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1. Standard Forms and Specialist Courts

1.1 Standard Forms of Contract
There are various standard forms of construction contract produced in Malaysia. The principal ones are those produced by the (i) Institute of Engineers, Malaysia (“IEM”), (ii) Malaysian Institute of Architects (Pertubuhan Arkitek Malaysia) (“PAM”), (iii) Construction Industry Development Board (“CIDB”); and (iv) Malaysian Public Works Department (“PWD”).

For domestic works, it is not uncommon for one of the standard forms produced by the IEM, PAM or PWD to be adopted by the parties, depending on the nature of the works.

PWD standard forms are commonly used for projects where the employer is a Federal Government, State Government or Government-Linked Company.

The PAM standard forms are usually used for private building works.

The IEM standard forms are usually used for engineering projects.

On the other hand, it is not unusual to have parties adopting the FIDIC standard forms for international work.

1.2 Specialist Construction Courts
There are two specialist construction courts in Malaysia. One is located in Kuala Lumpur (the capital of Malaysia) and the other is located in Selangor (a state neighbouring Kuala Lumpur). These courts commenced operation on 1 April 2013 and hear disputes that are based on or connected to the following construction-related matters:

- claims by and against local authorities relating to statutory obligations concerning development of land or construction of buildings;
- proceedings relating to arbitration which concerns any of the matters set out above;
- appeals from lower courts on matters set out in the first three items above.

2. General Principles

2.1 Interpretation of Contracts
Some of the general principles applied by the courts when interpreting clauses in a contract are:

- The intention of the parties to the agreement can and must be gathered from within the agreement;
- However, if parties, by their subsequent conduct, give a particular meaning or interpretation to a contract, they may be stopped from resiling from such an agreed meaning;
- In interpreting clauses, due regard must be given to the contract as a whole in order to ascertain the true meaning and intention of the parties as expressed by the several clauses in the agreement;
- Efforts should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or contradictory to the rest of the agreement;
- The words and expressions of each clause must be so interpreted as to bring them into harmony with the other provisions in the agreement;
- Where there is an inconsistency between different provisions of an agreement, the specific provisions may override general provisions;
- The contract is to be construed in accordance with the reasonable expectations of sensible businesspeople or in such a way that a reasonable person versed in commercial matters would construe them;
- In interpreting a contract, the courts will have regard to the substance of the agreement or the factual matrix forming the background of the transaction between the parties to determine the true nature or object of the agreement or transaction. However, the courts will not look at the negotiations leading up to the contract. This generally means that the subjective intent of parties will be disregarded in favour of an objective evaluation of the parties’ intent or purpose in entering into the bargain in the first place;
- Terms can be implied, when it is necessary, so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the contract, in preference to a result which would or might prove unworkable. The implied term must go without saying, it must be 'necessary to give business efficacy to the contract';
Malaysian law does not recognise a general duty to act in good faith when negotiating the terms of a contract. It is an open question whether there is an implied duty to act in good faith during the performance of the contract.

### 2.2 Pre-Contractual Documents and Post-Contract Conduct

As mentioned in Section 2.1 Interpretation of Contracts above, the intention of the parties can and must be gathered from within the agreement. Generally, the conduct of the parties subsequent to the execution of the contract is not a relevant aid in interpretation.

However, the parties by their subsequent conduct may have acted on a common understanding as to the meaning of the contract and, accordingly, may be stopped from resiling from such an agreed meaning.

Although the courts will have regard to the factual matrix, which is everything that was known to the parties at the time they entered into the contract, the court, in interpreting a contract, will not look at evidence showing the subjective intention of the parties including the negotiations or pre-contractual documents leading up to the contract.

### 2.3 Restrictions on Parties’ Ability to Agree Terms

Pursuant to section 11 of the Contracts Act 1950, any person is competent to agree a contract so long as they are of the age of majority according to the law to which they are subject, of sound mind and not disqualified from contracting by any law to which they are subject.

Persons are said to be of sound mind for the purpose of making a contract if, at the time when they make it, they are capable of understanding it and of forming a rational judgment as to its effect on their interests: Section 12 of the Contracts Act 1950.

Malaysia does not have any statute dealing with unfair contract terms. However, a contract is voidable if the consent to an agreement is caused by coercion, fraud, misrepresentation or undue influence. A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

On the other hand, a contract is void if both parties to an agreement were under a misapprehension as to a matter of fact essential to the agreement, but not voidable if it was caused by a mistake as to any law in force in Malaysia.

### 2.4 Limitation and Prescription

Generally, the time period within which one is entitled to bring an action founded on breach of contract or tort, in relation to construction disputes, is six years from the date on which the cause of the action accrued: Section 6 (1) Limitation Act 1953.

Where the action is based on fraud, the right of action is concealed by fraud or the action is for relief from the consequences of a mistake, the period of limitation shall only begin to run from the date on which the plaintiff discovers, or could with reasonable diligence have discovered, the fraud or mistake: Section 29 Limitation Act 1953.

It is important to note that the Limitation Act 1953 does not confer a right of action but has been enacted for the purpose of restricting the period within which such a right may be asserted.

Except for the following agreements, pursuant to Section 29 of the Contracts Act 1950, an agreement that limits the time within which a party is able to enforce their rights or restricts absolutely the ability to enforce their rights by the usual legal proceedings in ordinary tribunals, is void:

- to refer a dispute to arbitration;
- that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred;
- to refer to arbitration any question between the parties which has already arisen or invoke any law as to references to arbitration;
- between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned by any court.

Accordingly, an agreement between the parties to limit the period within which a party is entitled to enforce its rights to bring an action in court is void.

However, the situation differs when it comes to abridging or enlarging the period within which a party is entitled to enforce its rights to bring an action in arbitration. Such an agreement has been found to be valid and does not contravene Section 29 of the Contracts Act 1950.

As such, the parties are free to agree that they would be deemed to have waived any rights to refer any dispute to arbitration if such reference is not made within a prescribed period of time. In such circumstances, the dispute must be referred to arbitration within that specified period unless extended by the High Court pursuant to section 45 of the Arbitration Act 2005 ("AA").

The High Court has the power to extend the time for commencing arbitration proceedings if it is of the opinion that, in the circumstances of the case, undue hardship would
otherwise be caused. Unless excluded by the parties, Section 45 applies to a domestic arbitration. Unless agreed to by the parties, Section 45 does not apply to an international arbitration.

Pursuant to Section 6 (1) Limitation Act 1953, the time within which one is entitled to bring an action based on contract or tort shall begin to run from the date on which the cause of action accrued.

However, among others, where the action is based on fraud or the right of action is concealed by fraud or the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has, or could with reasonable diligence have, discovered the fraud or mistake.

A ‘cause of action’ accrues when a right to sue arises. In an action based on contract, the cause of action normally accrues from the date of the breach.

On the other hand, in an action based on tort, generally the cause of action accrues when the damage is suffered. However, the law is not settled whether a cause of action accrues on the date on which the damage:

- actually occurs; or
- was reasonably discoverable.

There is no specific provision in the Limitation Act 1953 dealing with the discovery of latent defects subsequent to the expiry of the limitation period.

3. Construction Contracts

3.1 Pre-Contractual Duties
As mentioned in Section 2.1 Interpretation of Contracts above, the law does not recognise a duty to act in good faith during the negotiation of the terms of the contract. Having said that, a contract may be challenged if it can be shown that the consent of the innocent party in entering into the contract was obtained by coercion, undue influence, fraud, misrepresentation or mistake.

Unless otherwise agreed, one who has carried out works in anticipation of being awarded a contract and to the extent that the other party has received benefit of the works, may be entitled to claim the expenses incurred in relation to the works if they were not intended to be carried out gratuitously.

Usually, the costs of preparing the tender are factored into the overall contract price. Many contractors prepare tenders on the expectation that the costs of the preparation would have to be borne by the contractor in the event that the contract is not awarded to them. In fact, it is not unusual for provisions to be made in the invitation to bid or tender that any cost and expenses incurred for any tender submissions are at the sole expense of the contractor.

3.2 Formation of the Contract
Generally, there is no particular formal requirement in the formation of a construction contract which differs from the formation of a normal contract in most common law jurisdictions.

3.3 Absence of a Formal Contract
The mere fact that a formal contract is not concluded does not necessarily mean that there is no binding contract between the parties. The courts would look, among other things, into contemporaneous evidence, including the conduct of the parties, to determine the existence of any contract.

Generally, an agreement expressing interest to enter into a contract does not entitle a party to the agreement to insist that a contract ought to be entered into. For example, a letter of intent which usually expresses the employer’s interest to enter into a contract with the contractor at a future date does not, by itself, provide a right to the contractor to insist that a contract ought to be awarded to the contractor. However, this does not necessarily mean that all the terms contained in a letter of intent have no legal effect.

In some cases, the letter of intent may authorise the contractor to mobilise and/or order or purchase materials. This may create a separate but parallel contractual relationship between the parties. At the end of the day, it all depends on the facts of each case.

3.4 Concluding by Conduct
It is possible for a construction contract to be concluded by conduct. In determining whether a contract has been concluded by conduct, the courts would have to look into contemporaneous evidence, including the conduct of the parties, to determine whether a contract has been concluded.

For example, the courts may find that there is a concluded contract where a contractor commences construction work and the employer, having knowledge of the performance, does not at all, or within reasonable time, object to the works being carried out. A contract may also be concluded by conduct where the contractor accepts payment from the employer for works that are to be carried out.

3.5 Failure to Conclude
Whether one is entitled to payment for construction work performed in anticipation of a construction contract which
is not concluded would depend on the circumstances in which the construction works were carried out.

Generally, one is entitled to be paid for such construction works if they were:

- performed at the request of the other; or
- lawfully carried out not intending to do so gratuitously and the other person had enjoyed the benefit thereof.

4. Contractual Terms

4.1 Implied Terms

As mentioned in Section 2.1 Interpretation of Contracts above, terms can be implied, when it is necessary, so as to give them reasonable business efficacy, particularly where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable.

The implied term must go without saying, it must be ‘necessary to give business efficacy to the contract’. Terms are usually implied among other things, based on custom and usage and the previous conduct or course of dealings of the parties.

In construction contracts, it is not uncommon for among other things, for the following terms to be implied:

- The employer will not interfere with or obstruct an architect or engineer in discharging their duties as a certifier;
- The employer has the obligation to appoint a new architect or engineer in the event of death;
- The employer has the obligation to not interfere with the works of the contractor or prevent the contractor from performing their obligation under the contract;
- Although the site may belong to the employer, during the existence of the contract the employer ought not to enter the site, possession of which has been given to the contractor, without the permission of the contractor, who ought not to unreasonably withhold such permission;
- The materials and workmanship delivered by the contractor shall be of satisfactory quality;
- The completed works would be fit for the intended purpose;
- The works would be carried out to a satisfactory quality;
- The contractor would exercise reasonable skill, care and diligence in performing their duties and obligations and in ensuring that the works are in compliance with the contract;
- The works would be carried out by workers with reasonable and adequate capability, experience, knowledge and understanding required to execute and complete the works.

Where CIPAA applies and there is an absence of terms of payment in the construction contract, the default provisions as set out in Section 36 of CIPAA relating to value of progress payments, time for payment etc shall apply.

CIPAA only applies to construction contracts (as defined under CIPAA) made in writing relating to construction works carried out wholly or partly within the territory of Malaysia (including a construction contract entered into by the Federal or State Government) but excludes construction contracts entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation or those construction contracts which are exempted pursuant to Section 40 of the CIPAA.

Currently, Government construction contracts for any of the following construction works are exempted from all provisions of CIPAA:

- that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;
- that relates to national security or security-related facilities which includes the construction of military and police facilities, military bases and camps, prisons and detention camps, power plants and water treatment plants.

4.2 Entire Agreement Clauses

Entire agreement clauses are also commonly found in construction contracts in Malaysia and the courts would generally uphold such clauses. The purpose of an entire agreement clause is to exclude evidence of a collateral contract, misrepresentation, or otherwise vary or alter the terms of the written contract.

These clauses are inserted by parties to ensure that, whatever may have been said during the course of earlier negotiations and discussions, in the end the only agreement between the parties is what is documented in the contract. The purpose is to prevent one party from later alleging that:

- the written document is not complete or exhaustive of the agreement between the parties;
- that there was some undocumented collateral agreement; or
- that the agreement does not truly reflect what was agreed between the parties.

In short, these clauses are agreed to by the parties to ensure certainty in commercial affairs and to prevent or minimise arguments, based on matters not expressly captured in a contract, being raised as an excuse for not complying with documented contractual obligations.
4.3 Exclusive Remedies Provisions

It is not uncommon for construction contracts in Malaysia to contain clauses to the effect that in the event of a breach, one or more of the parties are only entitled to certain remedies as specified in the contract.

Whether or not the courts would uphold such a clause would depend on the construction of the contractual terms. Even if such a clause is upheld, it is likely that the courts would take the approach that the innocent party is not entitled to the remedy as of right and would still need to meet the legal thresholds for such remedies to be granted.

4.4 Failure to Agree on a Price

Where the parties have failed to agree on a price, in circumstances in which it is clear that the works were not performed gratuitously, the party which has benefited from the works is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. This right arises under Section 71 Contracts Act 1950. The compensation would generally be assessed on the basis of the reasonable value of the work.

4.5 Determining Reasonable Value

Generally, reasonable value of the works that have been carried out would be determined not based on the contract price but on a quantum meruit basis having regard to the actual value of the works that have been carried out. In other words, the plaintiff would not receive contractual damages but restitution for the work done.

4.6 Mandatory Payment Terms

Under common law, there is no particular payment term which a construction contract must either include or in respect of which it must make equivalent provision. However, in the absence of terms of payment in a construction contract to which CIPAA applies, the default provisions as set out in Section 36 of CIPAA relating to, among other things, the value of progress payments, time for payments, etc would apply. As mentioned Section 4.1 Implied Terms above, CIPAA does not apply to all construction contracts.

Further, there is no one ‘cast in stone’ definition of a construction contract in Malaysia. However, for guidance one may refer to the definition of ‘construction contract’ as provided in CIPAA. CIPAA defines a construction contract as a ‘construction work contract’ or a ‘construction consultancy contract’.

A ‘construction consultancy contract’ is defined as a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural, engineering, surveying, exterior and interior decoration, landscaping and project management services.

A ‘construction work contract’ is defined as a contract to carry out construction work. “Construction work” is defined as construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of:

- Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
- Any road, harbour works, railway, cableway, canal or aerodrome;
- Any drainage, irrigation or river control work;
- Any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
- Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work.

4.7 Exceptions to the Application of Terms

As mentioned in Sections 4.1 Implied Terms and 4.6 Mandatory Payment Terms above, in the absence of terms of payment in a construction contract and where CIPAA applies, the default provisions as set out in Section 36 of CIPAA relating to, among other things, value of progress payments, time for payments, etc would apply.

4.8 Restrictions on Ability of Parties’ to Agree

Terms

Generally, there are no restrictions on the ability of the parties to agree terms relating to payment in a construction contract. However, by the coming into force of CIPAA, ‘pay-when-paid’ and ‘pay-if-paid’ clauses contained in construction contracts to which CIPAA applies are statutorily void pursuant to Section 35 of CIPAA. Unless exempted, most written construction contracts come within the purview of CIPAA. CIPAA came into force on 15 April 2014 and applies retrospectively.

4.9 Suspension of Performance on Grounds of No Payment

Under Malaysian law, a contractor may not suspend works unless the right to do so is provided under the contract or, where CIPAA applies, the adjudicated amount is not paid in full by the non-paying party.

4.10 Certifiers

A certifier (be it an architect, engineer, superintending officer etc) is employed by the employer for the purpose of, among other things, economically and efficiently securing the completion of the works. In discharging their obligations, the certifier would usually also be required to certify
work done, value of the work done, requests for extensions of time to complete the works, etc.

Certifiers are for all intents and purposes an agent of the employer and are paid by the employer. However, when it comes to certifications the courts have held that there is an implied obligation on the part of the certifier to act independently in arriving at decisions fairly, holding a balance between their client and the contractor.

4.11 Obligations of Certifier
In practice, it is not uncommon for a certifier to consult the employer and/or the contractor prior to arriving at any determination. However, despite consulting either the employer or the contractor, there is an implied obligation on the part of the certifier to arrive at a determination fairly, holding the balance between their client and the contractor.

This implied obligation exits even in a situation where a certifier is to determine a claim by a contractor in relation to matters where the certifier may have an interest in the result of the determination or assessment. Of course, a contractor has the option of challenging the decision of the certifier.

4.12 Failure to Act Impartially
The certifier has no contractual relationship with the contractor and is an agent of the employer. In the event that the certifier fails to act impartially, fairly and/or honestly in discharging their duties as the certifier, generally the contractor may challenge the certification by bringing an action against the employer or by any other means stipulated in the contract. Where CIPAA applies, the adjudicator in determining a payment dispute has the power to, among other things, review and revise certificates relevant to the dispute.

4.13 Parties’ Ability to Agree that Contents are Conclusive
The parties are free to agree that once a certificate has been issued its contents are conclusive and may not be subsequently reviewed. However, it is unlikely that a party would agree to such a clause without there also being a stipulation to the effect that an opportunity would be given to either party to, within a specified period, raise any concerns in relation to the contents and/or issuance of the certificate.

Failure to raise any issues within the specified period or any extended period may prevent a party from later challenging the certificate. The courts would normally uphold such ‘conclusive’ clauses unless it can be shown that the certificate was, among other things, issued as a result of fraud, misrepresentation or bad faith.

However, it is not common for parties in construction contracts in Malaysia to agree to stipulate such ‘conclusive’ effect clauses in relation to interim certificates. On the contrary, construction contracts in Malaysia typically stipulate that interim certificates are not conclusive.

4.14 Parties’ Ability to Agree on a Forum for Review
It is possible for the parties to agree that the opening up, review and/or revision of a certificate is only to be performed in a particular forum (eg arbitration) and the courts will uphold such an agreement.

The rationale behind upholding such an agreement is that that ‘court’s jurisdiction does not include a right to modify contractual rights’: Chase Perdana Berhad v Pekeliling Triangle Sdn Bhd & Ors (2001) MLJU 389 (High Court) & Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd (2003) 1 MLJ 130 (Court of Appeal).

However, where CIPAA applies, the adjudicator has the right to review and/or revise any certificates relating to the dispute referred to adjudication irrespective of whether the construction contract contains any provision to the effect that the certificate is only to be revised and/or revised in a particular forum. It appears that where CIPAA applies, the parties cannot contract out of CIPAA.

5. Time for Performance

5.1 In the Absence of Express Provision
In the absence of any express provision in the contract about the time for performance, the relevant obligation ought to be performed within a reasonable time. Such a term would generally be implied as it represents the unexpressed intention of the parties or is necessary to give business efficacy to the contract. This common law position is codified in Section 47 of the Contracts Act 1950. What is meant by ‘reasonable time’ is peculiar to each contract.

If a party does not perform such an obligation within ‘reasonable time’ and the obligation is a fundamental obligation under the contract, the innocent party may be entitled to determine the contract on the ground that the contract breaker has repudiated the contract.

Depending on the facts of each matter, it may be necessary for the innocent party to provide the contract breaker with a notice to complete which would, in turn, form a firm foundation for the inference of repudiation. The significance of the notice is twofold: “primarily, it fixes day when, if the default is not remedied, the party in default will be held to have repudiated the promise; and, secondarily, it will show that, for equity’s purposes, it is fair for the innocent party to exercise the right of termination”: S&M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd [2015]
MLJU 518 (Federal Court); Sime Hok Sdn Bhd v Soh Poh Sheng [2013] 2 MLJ 149 (Federal Court).

5.2 Extension of Time
If a contract does not provide for extension of time in a situation where the delay is caused by or contributed to by the employer, the relevant obligation may only need to be performed within a reasonable time. What is meant by reasonable time is peculiar to the facts of each matter.

5.3 Liquidated and Ascertained Damages
The employer is entitled, during the course of the contract, to deduct the sums set out in the liquidated damages clause from payments due to the contractor. If subsequently challenged by the contractor during a dispute resolution process (eg arbitration), the owner will have to justify the deduction.

In most common law countries, in order to justify such a deduction, the employer will only have to prove that the liquidated damages clause is a genuine pre-estimate of the damages suffered by the employer as a result of the contractor’s delay.

The employer will only be required to prove the actual loss that it suffered if the contractor can show that the liquidated damages clause is a penalty, and not a genuine pre-estimate of the damages caused by the delay.

In Malaysia, liquidated damages clauses are generally treated in the same way as penalty clauses under English law. Pursuant to Section 75 Contracts Act 1950, the employer is only entitled to damages if it can prove to have actually suffered as a consequence of the delay by the contractor, but up to a limit of the sums set out in the liquidated damages clause.

There are two main exceptions to the general rule that, notwithstanding a liquidated damages clause, the owner is only entitled to damages for the actual loss that it can prove it suffered as a result of the delay.

The first exception is a small category of cases in which:

- One has clearly suffered some real damage by reason of the delay; and
- However, it is not possible to assess the damage actually suffered because there is no known measure that would allow the court to accurately calculate it.

In these limited circumstances, the court can award damages to compensate the employer for its loss, even without proof of the actual damage suffered. Prima facie, the court would assume that a liquidated damages clause is a reasonable sum, since it was agreed to by both parties. If, however, the contractor can show that the liquidated damages is in fact a penalty, the court will only award a reasonable sum, up to the limit of the liquidated damages clause. Compensation cannot be awarded where no loss or damage has been suffered. Otherwise it would be a punishment or unjust enrichment, rather than compensation.

The second exception is contracts prescribed or regulated by statute, which provide for liquidated damages to be paid. For example, housing developers are required, by law, to use contracts prescribed by regulations for the sale of houses to the public. These contracts contain liquidated damages clauses for delay. As these contracts are prescribed by law, the house buyers will be entitled to the liquidated damages so stipulated without proof of loss and as of right.

6. Delay and Disruption

6.1 Delay
In the event of there being a concurrent delay caused by both a contractor’s risk event and an employer’s risk event and the construction contract makes no express provisions for resolving the conflict, the court ought to determine the dominant cause of the delay. If the dominant cause of the delay is due to the fault of the employer, the contractor ought to be entitled to be given more time. Whether the contractor would, in such a situation, also be entitled to costs would depend on the terms of the contract.

6.2 Acceleration
Unless the contract expressly allows the employer to issue an instruction to accelerate works or where the parties mutually agree to the issuance of such instructions, the contractor may not be obliged to comply with such instructions for acceleration. It is an open question whether or not a contractor may not be obliged to comply with such instructions for acceleration. It is an open question whether or not a contractor would be entitled to seek compensation in a constructive acceleration situation ie where a contractor accelerates works on its own initiative in the following circumstances to avoid facing demands for liquidated damages:

- pending certification of an extension of time application; and/or
- subsequent to the rejection of an extension of time application; or certification of a shorter time than the time sought in the extension of time application.

Non-binding guidance can be sought from item 1.18.5 of the Society of Construction Law Delay and Disruption Protocol: October 2002, which suggests that ‘where a contractor accelerates on its own accord, it is not entitled to compensation. If it accelerates as a result of not receiving an EOT that it considers is due to it, it is not recommended that a claim for so-called constructive acceleration be made. Instead, prior to any acceleration measures, steps should be taken by either party to have the dispute or difference about entitlement to
EOT resolved in accordance with the dispute resolution procedures applicable to the contract.

6.3 Global or Total Loss Claims

‘Global’ or ‘total’ loss claim are terms used to describe a claim made by a contractor which is based on various breaches on the part of the employer without being able to identify which particular breach has caused which particular loss. In such a case the contractor would usually claim its loss and expense in a single or global claim. Malaysian law ought not to differ, or substantially differ, from the common law principles that are applicable to the rule on proving damages.

7. Notice

7.1 Notices Required under the Contract

There is no particular limitation or control which applies to a provision in the contract which makes it a condition precedent for notice to be given of the circumstances giving rise to the claim. The courts, generally, take the approach that they will not, in a properly entered into contract, rewrite the contracts irrespective of whether the terms of the contract are unfavourable or unduly onerous to one of the contracting parties.

7.2 Failure to Give Notice

Generally, whether a contractor would have difficulties in making a claim if it fails to comply with a provision in the contract which makes it a condition precedent for notice to be given of the circumstances giving rise to the claim, would depend on the wording of the provision. If the requirement for notice is interpreted as mandatory and not merely directory in nature, the contractor may have difficulties making a claim if it fails to comply with the notice requirement.

Similarly, whether a contractor would have difficulties in obtaining an extension of time in a situation where the contractor fails to comply with a provision requiring notice to be given for a claim for an extension of time would depend on the wording of the provision. If the requirement for notice is interpreted as mandatory and not merely directory in nature, the contractor may have difficulties obtaining the extension of time irrespective of whether the delay was caused by the employer or a third party.

8. Damages

8.1 Monetary Remedies for Breach of Contract

In Malaysia, the primary remedy for breach of contract is an action for damages as opposed to an order for specific performance. Specific performance will only be granted in limited circumstances.

Among other things, specific performance will not be granted where compensation in money is an adequate relief or for a contract which runs into such minutes or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms: Section 20 (1) Specific Relief Act 1950.

In the circumstances, it is not often that one would be able to obtain an order for specific performance of a construction contract.

The objective of an award of damages in a situation of a breach of contract is to place the plaintiff so far as money can do it in as good a position as they would have been in had the defendant performed the contract. However, the innocent party may in some cases elect to be paid for wasted expenses as opposed to loss of profit.

On the other hand, in tort, the object of awarding damages is to try to place the injured party in the same position as they would have been in if the wrong for which they are being compensated for had not been committed.

In seeking to establish loss and claim damages, one is not entitled to any remote or indirect loss or damages.

In granting damages, the court may also grant, among other things, exemplary or punitive damages to punish or deter the defendant from similar behaviour in the future, or aggravated damages where the motive and conduct of the defendant aggravated the plaintiff’s injury.

8.2 Assessment of Damages

Generally, damages would be assessed:

- in breaches of contract, by reference to the losses suffered at the date of the breach;
- in anticipatory breaches, by reference to the losses that may be suffered when performance is due;
- in tort, by reference to the date on which the innocent party suffered damage.

8.3 Parties’ Ability to Exclude the Recovery of Certain Losses

The parties are free, by their contract, to exclude the recoverability of certain losses. These clauses are commonly known as ‘exemption clauses’. Needless to say, such clauses would be construed strictly against the party seeking to rely on them.

If the terms of the exemption clause are so wide as to raise the prospect of an absurdity or defeat the main object of the contract, such a clause may not be upheld. It does not excuse the party claiming the use of it from the burden of proving that the damage caused was not due to their own negligence.
and misconduct. The party must still show that they have exercised due diligence and care. They are not allowed to use such a clause as a cover-up.

8.4 Interest
Unless otherwise provided for by the contract or agreed by the parties, the courts or arbitral tribunal has the discretion to award interest at such rate as it thinks fit on the whole or any part of the debt due under the contract or on damages and, in doing so, the court shall grant post-judgment interest not exceeding the rate of 5% per annum.

The courts generally award simple interest and rarely award compound interest. Further, it appears that the courts may also not award compound interest where the claim sought for represents contractual interest.

The treatment given by the courts to clauses stipulating interest are distinct from clauses stipulating damages payable in the event of a breach. The former would usually be upheld as of right, whereas the latter would usually be construed in accordance with Section 75 Contracts Act 1950. This section has to some extent been discussed above in the Section 5.3 above dealing with Liquidated and Ascertained Damages.

9. Termination
9.1 Breach of Contract
Generally, one is entitled to terminate the contract if the other party:

- breaches one or more of the terms contained in the contract, the breach of which provides an expressed right to terminate the contract; or
- commits a repudiatory breach. A repudiatory breach is where one party made clear, by words or conduct, its intention not to honour its contractual obligations as and when they fall due. This is a common law breach that goes to the root of the contract. Whether or not a particular breach of a contract amounts to a repudiatory breach is a matter that must be carefully considered with the benefit of all evidence and information relating to that particular breach.

Instances where one may be entitled to terminate the contract on the ground of repudiatory breach includes failure to carry out the works regularly and diligently, wholly or substantially suspending works in circumstances where one does not have the right to do so, non-payment of sums due and payable, abandonment of works, persistent failure to commence works, delay in granting site possession, interference with works etc.

Where one party commits a breach which entitles the innocent party to terminate the contract, the innocent party may expressly, or by conduct, elect to either:

- accept the breach, and terminate the contract or bring the contract to an end; or
- affirm the contract by treating it as remaining in force and concurrently seek redress through a claim for damages.

An election has to be unequivocal and made without unreasonable delay to avoid allegations of acquiescence in the continuance of the contract. What is ‘without unreasonable delay’ is peculiar to each case. The courts would look at the facts and circumstances of each case to determine the election that was made.

Should the innocent party decide not to terminate, but instead accept the breach, it should place the contract breaker on notice of its intention to seek compensation for any loss suffered as a result of the breach. Failing such a notice, the innocent party may not be entitled to such compensation.

9.2 Rights to Determine the Contract
Determination clauses are regarded as a typical forfeiture clause and usually strictly construed. An express provision being a determination provision also attracts application of the contra proferentem rule and will therefore be strictly construed.

Accordingly, one should strictly comply with the termination clauses and any required pre-termination notices to avoid the possibility of the termination being found to be wrongful.

The consequences of a wrongful termination of a contract are far-reaching.

9.3 Termination for Non-Payment
Where the construction contract gives the contractor the right to terminate for non-payment of sums due or certified for interim payment, the exercise of a right to determine the contract may, depending on the terms of the contract, be affected by any valid set-off that the employer has and notice of which has been given to the contractor irrespective of whether or not the set-off has been taken into account by the certifier.

Whether or not a termination is valid turns on the question of whether there was a valid reason, at the time of termination, to terminate the contract. Whether the termination party (subjectively) knew or believed there to be one is not relevant.
9.4 Material Breach
The effect of a provision in a construction contract allowing termination for a ‘material breach’ or ‘any material breach’ is that the innocent party may be entitled to terminate the contract if the contract breaker commits a ‘material breach’.

What amounts to a ‘material breach’ is peculiar to each contract. There is no cast in stone definition for ‘material breach’.

Generally, a ‘material breach’ may be construed as a breach that goes to the root of the contract. In other words where one party has made clear, by words or conduct, its intention not to honour its contractual obligations as and when they fall due. Whether or not a particular breach of a contract amounts to a material breach is a matter that must be carefully considered with the benefit of all evidence and information relating to that particular breach.

Instances where one may be entitled to terminate the contract on the ground of material breach includes failure to carry out the works regularly and diligently, wholly or substantially suspending works in circumstances where one does not have the right to do so, non-payment of sums due and payable, abandonment of works, persistent failure to commence works, delay in granting site possession, interference with works etc.

10. Dispute Resolution

10.1 Litigation
Typically, most large construction contracts contain arbitration clauses and any dispute arising therefrom would usually be referred to arbitration.

On the other hand, many informal or small construction contracts do not contain arbitration clauses and any dispute arising therefrom would usually be referred to the courts.

In addition, since the coming into force of CIPAA there has been an increase in the number of construction-related payment disputes being resolved through adjudication.

Generally, there are no restrictions on the ability of parties to a construction contract to have their dispute resolved by dispute resolution methods that are alternative to determination in the national courts. In fact, the courts have generally been pro-arbitration.

Pursuant to Section 4(1) of the Arbitration Act 2005 (‘AA’), any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy, which must be considered in a Malaysian context.

Where CIPAA applies, a party may commence statutory adjudication proceedings against the other party for construction-related payments. It appears that the parties are not entitled to contract out of CIPAA.

10.2 Arbitration
As mentioned above, the courts are generally pro-arbitration. The courts are not entitled to intervene in any matters governed by the AA save and except as permitted by the Act. In fact, it is mandatory for the courts to stay any court proceedings relating to disputes which are the subject of an arbitration agreement in favour of arbitration unless it can be shown that (a) the party applying for a stay of proceedings has taken definite, conscious and deliberate steps to participate in the court proceedings; or (b) the arbitration agreement is null and void, inoperative or incapable of being performed.


Among other things, the courts play a role in enforcing and setting aside an arbitral award. Both awards that are made in respect of an arbitration where the seat of arbitration is in Malaysia and where the seat of arbitration is not in Malaysia are enforceable in Malaysia. However, for the enforcement of an award in respect of an arbitration where the seat of arbitration is not in Malaysia, such award must be an award of a state which is a party to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

In brief, the process of enforcement requires registration of the award as a judgment of the High Court. The application for enforcement is made ex parte, and is typically ordered as of right upon production of the arbitration agreement and a duly certified copy of the award (with a translation into English if in a foreign language). The order for registration of the award must be served on the respondent, who is given 14 days to apply to set aside the registration. Enforcement of the award is stayed pending the determination of the application to set aside the registration of the award.

An arbitral award made in an arbitration where the seat of the arbitration is in Malaysia can be set aside by the Malaysian courts in the circumstances set out in section 37 of the AA which is in pari materia to Article 34 of the Model Law. Article 34(1) of the Model Law, however, has been omitted from the AA.

Pursuant to Section 41 AA, any party may apply to the High Court to determine any question of law arising in the course of the arbitration with the consent of the arbitral tribunal or
of every other party. The High Court, however, will not consider such an application unless it is satisfied that the determination is likely to produce substantial savings in costs and substantially affects the rights of one or more of the parties.

Pursuant to Section 42 AA, any party may, within 42 days of the publication and receipt of the award, refer to the High Court any question of law arising out of the award which substantially affects the rights of one or more other parties.

Unless otherwise agreed, Sections 41 and 42 of the AA do not apply to an international arbitration held in Malaysia but do apply to a domestic arbitration held in Malaysia.

The parties are at liberty to pick the institution that would administer arbitration proceedings including the institutional rules of arbitration that would apply to the arbitration. It is not uncommon:

• in architectural contracts, for the Malaysian Institute of Architects (PAM) to be named as the appointing authority and the rules of arbitration as maintained by PAM to be adopted;
• in contracts involving the government or government-linked companies, for the director of the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) to be named as the appointing authority and the rules of arbitration maintained by the KLRCA to be adopted.

In the absence of an agreement on the appointing authority, by default, the director of the KLRCA shall be the appointing authority. Where the director of the KLRCA is unable to act or fails to act within a specified period of time, the High Court shall, on the application of either party, appoint the arbitrator.

The KLRCA also maintains fast-track arbitration rules designed for parties who wish to obtain an award swiftly with minimal costs. Unless extended, the arbitral award shall be published expeditiously and no later than 160 days from the commencement of the arbitration.

The parties are free to agree on the language to be used in the arbitration. Translators and interpreters are readily and widely available. English is the main language of both law and business in Malaysia, and most commercial arbitrations are conducted in English. Malaysia is a multiracial country and one should not have difficulties in appointing an arbitrator who is able to converse in English, Tamil, Mandarin and/or Chinese dialect.

10.3 Adjudication
Where CIPAA applies, a party may refer a payment dispute under a construction contract to adjudication. CIPAA allows an unpaid party to obtain a quick interim decision (approximately 100 days) in respect of payment for work done or services rendered under the express terms of a construction contract which includes both a construction consultancy contract and a construction work contract as defined under CIPAA. It appears that the parties cannot contract out of CIPAA.

CIPAA applies to construction contracts made in writing relating to construction works carried out wholly or partly within the territory of Malaysia (including construction contracts entered into by the Federal or State government) but excludes construction contracts entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for that person's occupation or those construction contracts which are exempted pursuant to Section 40 of the CIPAA.

Currently, government construction contracts for any of the following construction works are exempted from all provisions of CIPAA:

• that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;
• that relates to national security or security-related facilities which includes the construction of military and police facilities, military bases and camps, prisons and detention camps, power plants and water treatment plants.

An adjudication decision is temporarily binding until:

• it is set aside by the High Court, on limited grounds;
• the subject matter of the decision is settled by a written agreement between the parties;
• the dispute is finally decided by arbitration or the court; or
• it is stayed by the courts pending an application to set aside the adjudication decision or pending the subject matter of the adjudication being decided by arbitration or the court.

An adjudication decision is enforced by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court. However, an adjudication proceeding is deemed terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

The court or arbitral tribunal determining the same dispute that has been adjudicated is not bound by the adjudication decision.
10.4 Expert Determination / Early Neutral Evaluation

In Malaysia, the parties do not usually refer their dispute for an 'early neutral evaluation'. Furthermore, there are not many organised institutions of experts.

10.5 Mediation

Mediation is another form of alternative dispute resolution method in Malaysia which is commonly used.

Unless otherwise agreed by the parties, there are no general requirements that disputes ought to be mediated before determination by the court or arbitration. However, it is not uncommon for the courts to request the parties to explore mediation.

In fact, pursuant to Order 34 Rule 2 (2) (a) of the Rules of Court 2012, the court at the pre-trial case management stage may consider directing the parties to go to mediation in accordance with any practice direction it issues. Usually, mediation will only be explored if all parties are agreeable to it.

The Malaysian Mediation Centre was established in 1999 under the auspices of the Bar Council with the objective of promoting mediation as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolutions.

As appears from the centre's website, the centre is a member of the Asian Mediation Association and provides a comprehensive range of services which include:

- professional mediation services by trained mediators who have been accredited and appointed to the Panel of Mediators of the MMC;
- assistance and advice on how clients may best look after their interests in using alternative dispute resolution processes such as mediation;
- training in mediation techniques;
- accrediting and maintaining a panel of mediators;
- consultancy services in dispute management and conflict avoidance;
- administrative and secretarial support.

The KLRCA also maintains the KLRCA Mediation Rules to assist parties to resolve their disputes.