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# Litigation 2022

Malaysia: Law & Practice  
and  
Malaysia: Trends & Developments

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## Law and Practice

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## **1. GENERAL**

### **1.1 General Characteristics of the Legal System**

Malaysia's legal system is based on common law and follows an adversarial model. Depending on the nature of the proceedings, evidence may be led orally or through affidavits. Legal submissions normally involve a combination of written and oral argument.

### **1.2 Court System**

Malaysia's court system is hierarchical, with the primary courts being (in ascending order) the Magistrates' Court, Sessions Court, High Court, Court of Appeal and Federal Court.

There are two High Courts of co-ordinate jurisdiction, namely the High Court of Malaya (Peninsular Malaysia) and the High Court of Sabah and Sarawak (East Malaysia). Courts that are organised by subject matter are mainly situated in Kuala Lumpur.

Malaysia also has sharia courts, which deal with certain matters involving Islamic law.

### **1.3 Court Filings and Proceedings**

In civil proceedings, court filings and proceedings are accessible by the public. Once a document is filed, it is generally considered public and not confidential.

In criminal proceedings, court filings are not accessible by the public, although proceedings are.

If a party wishes court filings or proceedings to be kept confidential, an application for a sealing or protective order may be made. The court may view a document on a confidential basis before deciding whether to grant such an order.

### **1.4 Legal Representation in Court**

The legal profession in Malaysia is governed by the Legal Profession Act 1976 (Peninsular Malaysia), the Advocates Ordinance 1953 (Sabah) and the Advocates Ordinance 1953 (Sarawak).

Legal representatives who have a right of audience in Peninsular Malaysia are advocates and solicitors of the High Court who are qualified persons under Section 11 of the Legal Profession Act 1976 and hold valid practising certificates.

Legal representatives who have a right of audience in Sabah or Sarawak are advocates and solicitors who have been born in Sabah or Sarawak, respectively, have been ordinarily resident in Sabah or Sarawak for a continuous period of at least five years, or domiciled in Sabah or Sarawak at the relevant time, and hold valid practising certificates. Advocates and solicitors from Peninsular Malaysia are only allowed a right of audience on an ad hoc basis, with leave from the High Court of Sabah and Sarawak for the proceedings in question.

A foreign lawyer will only be allowed a right of audience on an ad hoc basis, with leave from the relevant High Court for the proceedings in question. The foreign lawyer will have to demonstrate skills or ability which local lawyers do not possess.

## **2. LITIGATION FUNDING**

### **2.1 Third-Party Litigation Funding**

Litigation funding is not permitted due to the operation of the common law doctrines of maintenance and champerty. The common law condemns maintenance and champerty for fear that a funder might be tempted to interfere with the course of justice for personal gain.

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## 2.2 Third-Party Funding: Lawsuits

The matter is not applicable in this jurisdiction.

## 2.3 Third-Party Funding for Plaintiff and Defendant

The matter is not applicable in this jurisdiction.

## 2.4 Minimum and Maximum Amounts of Third-Party Funding

The matter is not applicable in this jurisdiction.

## 2.5 Types of Costs Considered under Third-Party Funding

The matter is not applicable in this jurisdiction.

## 2.6 Contingency Fees

Contingency fees are not permitted in Malaysia.

Section 112(1)(b) of the Legal Profession Act 1976 states that no advocate and solicitor shall enter into any agreement to prosecute any suit or action which stipulates or contemplates payment only in the event of success.

As such, contingency fee agreements are void and unenforceable. See *Lee Mun Keong v Precise Avenue (M) Sdn Bhd & Anor* [2014] 8 CLJ 74.

## 2.7 Time Limit for Obtaining Third-Party Funding

The matter is not applicable in this jurisdiction.

# 3. INITIATING A LAWSUIT

## 3.1 Rules on Pre-action Conduct

The court does not impose rules on the parties in relation to pre-action conduct, and generally there are no pre-conditions to initiating proceedings. There are on occasion statutory prerequisites to be complied with, such as issuing statutory notices before commencing proceedings to wind-up a company based on its inability to

pay its debts, bankruptcy proceedings against an individual and proceedings for leave to commence a derivative action.

While there is no requirement for a potential defendant to respond to pre-action letters, in commercial matters the court may treat silence as an acceptance of the allegations since commercial individuals are expected to refute untrue allegations. See *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453.

## 3.2 Statutes of Limitations

The Limitation Act 1953 prescribes the following limitation periods:

- six years from the date of the breach or act for actions in contract and tort (Section 6(1)(a));
- where the action is based on fraud, concealment of fraud or mistake, time starts to run from the date of discovery of the fraud or mistake (Section 29(1));
- 12 years to enforce a judgment from the date it became enforceable (Section 6(3));
- 12 years to recover land from the date the right of action accrued (Section 9(1));
- no limitation period for actions to recover trust property in respect of a fraudulent breach of trust (Section 22(1));
- six years for actions to recover trust property in respect of a breach of trust from the date the right of action accrued (Section 22(2));
- for actions in negligence (excluding personal injury), where the damage was not discoverable before the expiry of six years, the limitation period will be extended by three years from the date of knowledge (Section 6(A)).
- six years to enforce an arbitration award from the date on which it became enforceable (Section 6(1)(c)).

Where a civil suit is filed against the government, the limitation period is 36 months from the date

of the act, neglect or default, or the cessation of a continuing injury or damage. See Section 2 of the Public Authorities Protection Act 1984.

### 3.3 Jurisdictional Requirements for a Defendant

The jurisdictional requirements for a defendant to be subject to a suit in Malaysia are contained in Section 23 of the Courts of Judicature Act 1964, namely that Malaysia should be the place where:

- the cause of action arose;
- the defendant or one of several defendants resides or has their place of business;
- the facts on which the proceedings are based exist or are alleged to have occurred; and
- any land the ownership of which is disputed is situated.

In the case of a foreign defendant, the plaintiff would have to establish that the court has jurisdiction over the claim and that the plaintiff has a good cause of action. See *Joseph Paulus Lantip & Ors v Unilever PLC* [2012] 7 CLJ 693.

### 3.4 Initial Complaint

A complaint is usually initiated by filing (depending on the nature of the proceedings) a writ of summons with a statement of claim, or an originating summons with an affidavit. These documents (save for the affidavit) can be amended after they have been filed, either by right or with leave.

### 3.5 Rules of Service

Service is the responsibility of the plaintiff. The originating process is served personally on the defendant or sent to him or her at their last known address by prepaid AR (advice of receipt) registered post. Substituted service may be effected with leave of court.

A defendant outside the jurisdiction can be sued in Malaysia with leave of court. The plaintiff must show, among others, that he or she has a good arguable case falling within the circumstances set out in Order 11 Rules 1 and 2 of the Rules of Court 2012, and that the defendant is in the particular jurisdiction outside Malaysia. See *Joseph Paulus Lantip & Ors v Unilever PLC* [2012] 7 CLJ 693.

### 3.6 Failure to Respond

If the defendant does not respond to a suit, the procedure which ensues depends on the type of claim made.

Where the claim is for damages, the plaintiff may apply for final judgment in default of appearance for quantified damages, or for interlocutory judgment on liability with damages to be assessed for unquantified damages.

Where the claim is for movable property the plaintiff may apply for judgment for delivery of the property or for assessment of its value, while where the claim is for immovable property the plaintiff may enter judgment for possession of the property.

In the case of other claims, the plaintiff may proceed with the action as if the defendant had entered an appearance, and then apply for judgment in default of defence after the expiration of the period for filing the defence.

### 3.7 Representative or Collective Actions

Representative actions are permitted under Order 15 Rule 12 of the Rules of Court 2012. The plaintiffs have to have the same interest, be members of the same class, have a common grievance and apply for relief beneficial to all members. See *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712.

### 3.8 Requirements for Cost Estimate

There is no requirement to provide clients with a cost estimate of the potential litigation at the outset.

## 4. PRE-TRIAL PROCEEDINGS

### 4.1 Interim Applications/Motions

Litigants may file interim applications before the trial or substantive hearing of a claim to obtain various remedies from the court, such as an interim injunction pending the disposal of the substantive claim, summary judgment, the dismissal of a claim without a full trial, security for costs, discovery and the production of documents.

### 4.2 Early Judgment Applications

A party can apply for early judgment on some or all of the issues in dispute through an application for summary judgment under Order 14 of the Rules of Court 2012. The court may enter judgment if there is no bona fide arguable defence and there are no triable issues. See *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300.

The application can be made for all claims except for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and fraud.

A party can apply to strike out the other party's claim or defence under Order 18 Rule 19. The whole or part of the claim or defence can be struck-out if it does not establish a reasonable cause of action or defence, is scandalous, frivolous or vexatious, may prejudice or delay the fair trial of the action and/or is an abuse of the court's process. The test is that the claim or defence should be obviously unsustainable. See

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

These applications are usually made through a notice of application with an affidavit in support, prior to or shortly after the close of pleadings. The applications will normally be disposed of three to five months after they are filed, during which affidavits will be filed and submissions made.

### 4.3 Dispositive Motions

Apart from summary judgment and striking out applications, applications can also be filed for the disposal of the suit based on preliminary points of law and/or fact.

An application can be made for the summary disposal of the suit on points of law under Order 14A of the Rules of Court 2012. This is an application to move the court to determine any question of law or construction of any document, where the question is suitable for determination without full trial and will be able to finally determine the claim. It is a requirement that the material facts are not in dispute, and that issues of fact are not interwoven with the issues of law. See *Thein Hong Teck & Ors v Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49.

An application can also be filed for the determination of preliminary issues under Order 33 Rule 2. This is an application to move the court to determine any question or issue of fact, law, or mixed fact and law prior to judgment being handed down. The application will be allowed if it appears to the court that a determination of the issue will substantially dispose of the matter or render a trial of the matter unnecessary. See *Krishnan Rajan A/L N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149.



**4.4 Requirements for Interested Parties to Join a Lawsuit**

An interested non-party may apply to intervene in a suit by seeking an order to add him or her as a party under Order 15 Rule 6(2)(b) of the Rules of Court 2012. The court must be satisfied that the applicant's presence is necessary to ensure that all matters in dispute will be effectually and completely determined and adjudicated upon, or that there exists a question or issue between the applicant and a party to the suit arising out of or relating to or connected with any relief or remedy claimed in the suit which would be just and convenient to be determined as between the applicant and that party as well as between the parties to the suit.

The applicant must satisfy the court that they have a legal interest (and not a mere commercial interest) that will be directly affected by any judgment or order given in the action. See *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52.

**4.5 Applications for Security for Defendant's Costs**

A defendant can apply for security for costs on the following grounds under Order 23 of the Rules of Court 2012:

- the plaintiff is ordinarily resident out of the jurisdiction;
- the plaintiff is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the defendant's costs if ordered to do so;
- the plaintiff's address is not stated in the writ or is incorrectly stated;
- the plaintiff changed his or her address during the proceedings to evade the consequences of the litigation.

**4.6 Costs of Interim Applications/Motions**

The successful party can generally recover the costs of an interim application from the losing party. See Order 59 Rule 3(2) of the Rules of Court 2012.

The court has the discretion to award "costs in the cause", where the successful party in the substantive claim will be entitled to the costs of the interim application. See Order 59 Rule 1(3).

**4.7 Application/Motion Timeframe**

An application will normally be heard and disposed of three to five months from the date it is filed.

An applicant may request that the application be dealt with urgently by filing a certificate of urgency with the application, setting out the grounds for the urgency. The court may fix an early hearing date for the application, depending on the urgency.

**5. DISCOVERY****5.1 Discovery and Civil Cases**

Discovery of documents is available in civil cases and is administered by the litigants with leave of the court.

A party may apply for an order for discovery under Order 24 of the Rules of Court 2012. The applicant will have to show that there is a document which is relevant and is or has been in the possession, custody or power of the person against whom the order for discovery is sought.

Further, the court may at any time order a party to give discovery by making and serving on any other party a list of the documents which are or have been in his or her possession, custody or power and may at the same time or subse-



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quently also order him or her to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. The documents in question are the documents on which the party relies or will rely, and the documents which could either adversely affect his or her own or another party's case, or support another party's case. See Order 24 Rule 3.

The overriding test for discovery is whether it is necessary for disposing fairly of the suit or for saving costs. See Order 24 Rule 8.

A party may apply under Order 26 for an order giving him or her leave to serve on any other party interrogatories relating to any matter in question, and requiring the other party to answer the interrogatories on affidavit within a specific period. The court will grant leave for interrogatories it considers necessary for disposing fairly of the suit or for saving costs.

## 5.2 Discovery and Third Parties

It is possible to obtain discovery from a third party who is not party to a suit, or is not intended to be named as a party to a prospective suit, under Order 24 Rule 7A of the Rules of Court 2012.

In an application filed after the commencement of a suit, the applicant has to specify or describe the documents in respect of which the order is sought, show that the documents are relevant to an issue arising or likely to arise out of the claim made, show that the person against whom the order is sought is likely to have or have had the documents in his or her possession, custody or power, and show that the application is necessary either to fairly dispose of the suit or to save costs. The application has to be served on the third party and on every party to the suit. See *Billion Prima Sdn Bhd & Anor v Nutech Company Ltd & Anor* [2017] 1 CLJ 179.

In a pre-action discovery application, similar requirements must be satisfied by the applicant but, in addition, the applicant must state the material facts pertaining to the intended proceedings, and whether the third party is likely to be a party to the subsequent proceedings.

## 5.3 Discovery in this Jurisdiction

The general approach to discovery in Malaysia is that it is intended only for relevant documents to prevent trial by ambush, and not as a fishing expedition.

Discoverable documents are generally those which could support or adversely affect the case of a party or his or her opponent, or lead a party to a train of inquiry which achieves either of these outcomes. See Order 24 Rule 7 of the Rules of Court 2012.

## 5.4 Alternatives to Discovery Mechanisms

The matter is not applicable in this jurisdiction.

## 5.5 Legal Privilege

Malaysia recognises the concept of legal privilege. Order 24 Rule 13(2) of the Rules of Court 2012 allows a party to object to the production of a document on the ground that it is privileged. The court may inspect the document to decide whether the objection is valid.

Further, Section 126 of the Evidence Act 1950 protects from disclosure communication between a client and his or her lawyer, documents given by a client to his or her lawyer and legal advice given by a lawyer to his or her client.

With regard to giving and receiving legal advice, it does not matter whether or not litigation was pending or contemplated at that point in time. With regard to communication between a client and his lawyer, all communication for the pur-

pose of existing or contemplated legal proceedings are protected.

Privilege may be expressly or impliedly waived by a client, abrogated by statute, and does not apply to communications in furtherance of an illegal purpose.

Communications between an in-house counsel and his or her organisation are not protected by privilege.

### 5.6 Rules Disallowing Disclosure of a Document

A party against whom a discovery order is sought can claim that a document ought not to be disclosed on the ground that it would be injurious to public interest, in the event there is any written law which authorises or requires the withholding of the document. See Order 24 Rule 15 of the Rules of Court 2012.

## 6. INJUNCTIVE RELIEF

### 6.1 Circumstances of Injunctive Relief

Injunctive relief may be awarded as either interim or final relief.

An interim prohibitory injunction may generally be granted where there is a bona fide serious issue to be tried, where the balance of justice lies in favour of granting the injunction, and where the applicant is in a financial position to meet his or her undertaking as to damages. See *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

The types of injunctions available include the following:

- a Fortuna injunction to restrain a party from presenting a winding-up petition – see

*Mobikom v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316;

- a Mareva injunction to restrain a defendant from parting with his or her assets, including a worldwide Mareva injunction – see *The Customs And Tax Administration Of The Kingdom Of Denmark v Saling Capital Ltd & Ors And Other Appeals* [2021] 7 CLJ 857;
- an Anton Piller order to allow the plaintiff's representatives to enter a defendant's premises to inspect and remove material – see *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239;
- an anti-arbitration injunction to restrain a party from proceeding with arbitration proceedings – see *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1;
- an anti-suit injunction to restrain judicial proceedings to prevent a multiplicity of proceedings – see *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1;
- an injunction for the detention, custody or preservation of any property which is the subject matter of the suit, or for the inspection of any such property in the possession of a party to the suit – see Order 29 Rule 2 of the Rules of Court 2012;
- an injunction for samples to be taken of any property which is the subject matter of the suit, for any observation to be made on such property or for any experiment to be tried on or with such property – see Order 29 Rule 3;
- an injunction to prevent the infringement of intellectual property – see *Radion Trading Sdn Bhd v Sin Besteam Equipment Sdn Bhd & Ors* [2010] 8 MLJ 648;
- an injunction to prevent the disclosure of confidential information – see *Teoh Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669.

An interim mandatory injunction may be granted in clear cases where the plaintiff is very likely to succeed at trial. See *Timbermaster Timber*

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Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd [2002] 1 MLJ 33.

## 6.2 Arrangements for Obtaining Urgent Injunctive Relief

A party may apply for urgent injunctive relief by filing a certificate of urgency together with the application, which will set out the grounds for the urgency. The court has a discretion to fix a quick hearing date for the application depending on the urgency, which can even be on the same day.

There are no arrangements for out-of-hours judges.

## 6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief may be obtained on an ex parte basis where the case is one of urgency. The affidavit in support must contain all of the following:

- a clear and concise statement of the facts giving rise to the claim and the application;
- the facts relied on to justify filing the application ex parte including details of any notice given to the other party or, if notice has not been given, the reason for not giving notice;
- any answer by the other party to the claim or application;
- any facts which may lead the court not to grant the application;
- any similar application made to another court;
- the precise relief sought.

See Order 29 Rule 2 of the Rules of Court 2012.

An ex parte injunction will automatically lapse after 21 days. The court, when granting an ex parte injunction must fix a date to hear the application inter partes within 14 days from the date of the ex parte order. See Order 29 Rules 2B and 2BA.

## 6.4 Liability for Damages for the Applicant

For both ex parte and inter partes injunctions, an applicant may be held liable for damages suffered by the respondent if the respondent successfully discharges the injunction.

The applicant is not generally required to provide security for potential damages, but must normally provide an undertaking to compensate the respondent for damages in the event the injunction is found to have been wrongly granted. The respondent can apply for fortification of the applicant's undertaking.

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

Injunctive relief may be granted against the worldwide assets of a respondent. See *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad b Hj Hassan & Ors* [2005] 1 MLJ 654.

## 6.6 Third Parties and Injunctive Relief

Injunctive relief is not generally issued against third parties. However, third parties may be bound by an injunction once they have notice of it. For example, banks and financial institutions are duty-bound to comply with a Mareva injunction when they are served with the order. Third parties may apply to intervene in the suit or vary or discharge an injunction.

## 6.7 Consequences of a Respondent's Non-compliance

A party who fails to comply with the terms of an injunction will be liable for contempt of court and may be fined or imprisoned. See *Wee Choo Keong v MBF Holdings Bhd & Anor and Another Appeal* [1993] 2 MLJ 217.

## **7. TRIALS AND HEARINGS**

### **7.1 Trial Proceedings**

At trial, a witness generally gives their evidence-in-chief through a written witness statement previously filed in court and served on all parties, although further oral examination-in-chief is permissible. Thereafter, the witness is subject to oral cross-examination and re-examination. See Section 138 of the Evidence Act 1950.

The evidence of an expert witness is given in a written report signed by the expert and exhibited to an affidavit affirmed by him or her. See Order 40A r 3(1) of the Rules of Court 2012. Similar to witnesses of fact, an expert witness will also give their evidence-in-chief and is subject to cross examination and re-examination.

Arguments by counsel after the trial are generally both written and oral. The court usually directs parties to exchange written submissions and will fix a hearing date to thereafter hear oral argument.

### **7.2 Case Management Hearings**

Interim applications such as injunctions, striking out, amendment of pleadings, discovery and summary judgment are heard in chambers as opposed to open court, and only counsel are entitled to be present.

The court will decide on interim applications based on affidavits filed by the parties, and written and oral submissions by counsel.

For every suit filed in court, a case management will be fixed. During case managements, the court will set timeframes and give directions for the preparation of each party's case for trial. The court may impose sanctions for non-compliance with these directions. See *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461.

The directions that may be given by the court during case managements include the filing of pre-trial documents such as the bundle of pleadings, bundle of documents, statement of agreed facts, statement of issues to be tried, list of witnesses, summary of case and witness statements. The court may also at this stage consider the possibility of settlement of any or all of the issues between the parties. See Order 34 r 2(2) of the Rules of Court 2012.

### **7.3 Jury Trials in Civil Cases**

There are no jury trials in Malaysia.

### **7.4 Rules that Govern Admission of Evidence**

Section 5 of the Evidence Act 1950 states that evidence may be given of facts in issue and relevant facts, but not others. The general rule is that all relevant evidence is prima facie admissible.

Hearsay evidence provides that oral evidence must be direct, in that the witness must have perceived the fact through the medium of their own senses.

Apart from oral evidence, it is common for documents to be adduced in evidence. Section 73A deals with the admissibility of documentary evidence in civil cases, where various conditions need to be fulfilled.

Further, Section 90A provides that in any criminal or civil proceedings, a document produced by a computer shall be admissible in evidence if the document was produced by the computer in the course of its ordinary use. This is so whether or not the person tendering the document is the maker.

### **7.5 Expert Testimony**

When the court has to form an opinion on a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger

impressions, the opinions of persons skilled in the relevant areas are relevant facts. See Section 45 of the Evidence Act 1950.

Parties may introduce expert testimony at trial through the procedure set out in Order 40A of the Rules of Court 2012. The evidence of an expert is to be given in a written report signed by the expert and exhibited in an affidavit affirmed by them, stating among others that they accept full responsibility for the report.

The expert's duty is to assist the court on matters within their expertise. This duty overrides any obligation to the person from whom the expert has received instructions or by whom he is paid. See *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia & Anor* [2015] 7 CLJ 849.

The court can also on its own motion appoint an independent expert to assist it on any question of fact or opinion not involving questions of law or construction. See Order 40 Rule 1.

## 7.6 Extent to Which Hearings Are Open to the Public

In general, the public are allowed to attend hearings which are conducted in open court, such as trials, appeals, judicial review and winding-up petitions.

However, this is subject to the court's power to hear any matter in camera without the presence of the public and the press, if the court is satisfied that this would be in the interests of justice, public security or propriety or for other sufficient reasons. See Section 15(1) of the Courts of Judicature Act 1964.

Proceedings which are heard in chambers, such as an originating summons and interim applications, are not open to the public.

## 7.7 Level of Intervention by a Judge

The judicial system in Malaysia is adversarial in nature. Courts generally adopt a non-interventionist role in the proceedings, and decide on questions of fact and law based on the evidence and arguments advanced by the parties.

The level of intervention by the court during a hearing varies depending on the style of individual judges. Some judges would read parties' written submissions before the hearing and only ask for clarification from counsel during the hearing, while others will undertake a more active inquiry during the hearing.

As for judicial intervention during a witness's testimony at trial, notwithstanding the court's power to ask questions under Section 165 of the Evidence Act 1950, judicial intervention should not be excessive and the court should remain neutral and impartial during evidence taking. See *Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 1 MLJ 743.

There are no rules stipulating when a decision must be delivered after a hearing or trial.

In the case of a hearing, the court may deliver its decision at the hearing, or reserve judgment to a later date if more time is required to consider the matter (usually one to two months).

In the case of a trial, the parties are usually directed to exchange written submissions after the conclusion of the evidence. A further hearing date will be fixed thereafter to hear oral arguments. The judgment or decision will normally be given one to three months after the oral arguments.

## 7.8 General Timeframes for Proceedings

The typical timeframe for a commercial claim commenced by a writ of summons is as follows.

- After the writ of summons and statement of claim are duly served on the defendant, the defendant has 14 days to enter an appearance and a further 14 days to file a defence (and counterclaim if required).
- Thereafter, the plaintiff has 14 days to file a reply to defence (and defence to counterclaim if required).
- Usually, at the case management after the close of pleadings, the court will give pre-trial directions which may include timelines for the filing of interlocutory applications and pre-trial documents.
- Subject to the disposal of any interlocutory applications, the court will fix trial dates. This will depend on the court's and counsel's schedules, and may generally be fixed eight to 15 months from the date of filing the writ.
- After the evidence is concluded at trial, it is usual for the court to give parties up to two months to file and exchange written submissions. A hearing date for oral submissions will also normally be fixed.
- Although there is no fixed timeline for judgment to be delivered, the court will usually deliver judgment one to three months after oral submissions.

## 8. SETTLEMENT

### 8.1 Court Approval

A suit may be settled either in court (by way of a consent order or judgment) or out of court by way of a private settlement.

Court approval to settle a suit is only required in certain circumstances, such as the settlement of a money claim on behalf of a disabled person. See Order 76 Rule 11 of the Rules of Court 2012.

### 8.2 Settlement of Lawsuits and Confidentiality

The settlement of a suit can remain confidential if the parties enter into a settlement agreement with a confidentiality clause. However, in subsequent proceedings, the settlement agreement may be produced in court if the agreement is being challenged or relied on in evidence.

If parties choose to record the settlement in a consent order or judgment, this will be filed in court and will form part of the court record and is therefore generally accessible by the public.

### 8.3 Enforcement of Settlement Agreements

Settlement agreements are enforced in the same way as any other contract. Therefore, a party seeking to enforce a settlement agreement will seek the usual contractual remedies for breach of contract such as damages and specific performance.

### 8.4 Setting Aside Settlement Agreements

A settlement agreement may be set aside by filing an action for that purpose, on the basis that the settlement agreement is void or voidable. Grounds that may be raised include a lack of capacity to contract, mistake, illegality, fraud, undue influence, misrepresentation and coercion. See Part III of the Contracts Act 1950.

## 9. DAMAGES AND JUDGMENT

### 9.1 Awards Available to the Successful Litigant

After full trial, litigants are able to obtain a variety of relief including monetary damages, declarations, temporary and perpetual injunctions and specific performance.



## 9.2 Rules Regarding Damages

The recognised types of damages are as follows.

- Special damages, where the damage suffered is readily quantifiable in monetary terms. See *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675.
- General damages, where the damage suffered is not readily quantifiable in monetary terms. See *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675.
- Aggravated damages, where the defendant's conduct has injured the feelings and dignity of the plaintiff. See *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd and Hong Hing Thai Enterprise Sdn Bhd (Third Party)* [2011] 4 MLJ 354.
- Exemplary damages, which are punitive damages to punish and deter, where there is oppressive, arbitrary or unconstitutional action by servants of the government, or where the defendant's conduct has been calculated to make a profit for themselves which may exceed the compensation payable to the plaintiff. See *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

Whilst there are no rules limiting maximum damages, damages (other than aggravated and exemplary damages) are generally compensatory in nature and will not exceed the actual loss suffered by a plaintiff.

If the claim is for contractual liquidated damages, the maximum damages will be that stated in the liquidated damages clause. See Section 75 of the Contracts Act 1950.

A party may also contractually limit the amount of damages to be paid.

## 9.3 Pre- and Post-Judgment Interest

A successful party may obtain interest based on the pre-judgment period where a contract expressly provides for it, and at such rates provided for in the contract. The court also may award pre-judgment interest on debts or damages on such rate as it thinks fit for the whole or any part of the period between the date when the cause of action arose and the date of judgment. See Section 11 of the Civil Law Act 1956.

A successful party is entitled to obtain post-judgment interest on judgment debts based on the rates contractually provided for, or at the rate of 5% per annum as prescribed by the Chief Justice through Practice Direction No 1 of 2012, to be calculated from the date of judgment to satisfaction. See Order 42 Rule 12 of the Rules of Court 2012.

## 9.4 Enforcement Mechanisms of a Domestic Judgment

A domestic judgment can be enforced through the following means:

- a writ of seizure and sale, where the judgment debtor's property is seized by the court and sold through an auction (Order 47 of the Rules of Court 2012);
- a garnishee order made against a debtor of the judgment debtor, to pay sums due to the judgment debtor directly to the judgment creditor (Order 49);
- a charging order imposed on any interest to which the judgment debtor is beneficially entitled in any securities (Order 50);
- the appointment of a receiver to manage income from the judgment debtor's assets and make payment to the judgment creditor (Order 51);
- bankruptcy proceedings against a judgment debtor who is an individual, whose property will vest in the Director General of Insolvency for payment of all their debts;



- winding-up proceedings against a corporate judgment debtor, whose property will vest in a liquidator for payment of all its debts and thereafter the company will be dissolved;
- a judgment debtor summons requiring the judgment debtor (in the case of an individual) or an officer of the judgment debtor (in the case of a company) to attend court and be orally examined on the judgment debtor's ability to satisfy the judgment (Section 4 of the Debtors Act 1957).

### 9.5 Enforcement of a Judgment from a Foreign Country

Under the Reciprocal Enforcement of Judgments Act 1958, a foreign judgment which is a monetary judgment made by a superior court from the reciprocating jurisdictions listed in the First Schedule (namely the UK, Hong Kong, Singapore, New Zealand, Sri Lanka, Brunei and certain states in India) may be registered in Malaysia.

The judgment creditor may apply to the High Court within six years from the date of the judgment to have it registered by filing an originating summons supported by an affidavit, which:

- exhibits the judgment or a verified, certified or duly authenticated copy thereof, and where the judgment is not in the English language, a translation thereof in that language certified by a notary public or authenticated by affidavit;
- states the name, trade or business and the usual or last known address of the judgment creditor and the judgment debtor respectively;
- states to the best of the information or belief of the deponent that:
  - (a) the judgment creditor is entitled to enforce the judgment,
  - (b) either that at the date of the application the judgment has not been satisfied, or the amount in respect of which it remains unsatisfied,
- (c) the judgment does not fall within any of the cases in which a judgment may not be ordered to be registered under the Act, and
- (d) at the date of the application the judgment can be enforced by execution in the country of the original court and that, if it were registered, the registration would not be liable to be set aside under the Act;
- specifies the amount of the interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration; and
- where the sum payable under the judgment is expressed in a currency other than the currency of Malaysia, states the amount which that sum represents in the currency of Malaysia calculated at the rate of exchange prevailing at the date of the judgment.

See Order 67 Rule 3 of the Rules of Court 2012.

The application may be resisted on the following grounds:

- the judgment is not from a reciprocating country or was registered in contravention of the Act;
- the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- the judgment debtor did not receive notice of the proceedings in sufficient time to enable him or her to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- enforcement of the judgment would be contrary to public policy in Malaysia;
- the rights under the judgment are not vested in the person by whom the application for registration was made;

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- the court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

See Section 5 of the Act.

In other cases falling outside the scope of the Act, an action has to be filed on the judgment at common law. The judgment creditor will normally apply for summary judgment, relying on the foreign judgment as proof of the debt. The defences available against the suit are that the foreign court had no jurisdiction, the judgment was obtained by fraud, the judgment would be contrary to public policy, and the proceedings in which the judgment was obtained were opposed to natural justice. See *Hua Daily News Bhd v Tan Chien Chin & Ors* [1985] 1 LNS 131.

## 10. APPEAL

### 10.1 Levels of Appeal or Review to a Litigation

A party dissatisfied with a decision of the court may appeal to a higher court either as of right or with leave.

Appeals from the Magistrates' and Sessions Courts are to the High Court, and appeals from the High Court are to the Court of Appeal. Most appeals are as of right, although some require leave. Appeals from the Court of Appeal are to the Federal Court with leave.

The Federal Court also has a limited jurisdiction under Rule 137 of the Rules of the Federal Court 1995 to review its own decisions.

### 10.2 Rules Concerning Appeals of Judgments

The High Court can hear civil appeals from the Magistrates' and Sessions Courts. A party is only entitled to appeal if the amount involved is more than MYR10,000, unless the appeal is on a question of law or concerns child support and alimony payments in divorce cases. See Section 28 of the Courts of Judicature Act 1964.

The Court of Appeal can hear civil appeals from the High Court. A party is entitled to appeal as of right, except:

- where the amount claimed is less than MYR250,000 (leave is required);
- where the judgment or order is made by consent of parties;
- where the judgment or order relates to costs only (leave is required);
- where by any written law for the time being in force the judgment or order is expressly declared to be final; and
- where there is a decision in a summary way on an interpleader summons where the facts are not in dispute (leave is required).

See Section 68 of the Courts of Judicature Act 1964.

The Federal Court can hear civil appeals from the Court of Appeal. A party intending to appeal must first obtain leave of the Federal Court and satisfy the following conditions under Section 96 of the Courts of Judicature Act 1964, namely that the appeal is against:

- a judgment or order of the Court of Appeal in respect of a matter decided by the High Court in its original jurisdiction involving a question of general principle decided for the first time, or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

- a decision as to the effect of any provision of the Constitution, including the validity of any written law relating to any such provision.

### 10.3 Procedure for Taking an Appeal

An appeal to the High Court must be lodged within 14 days from the date of the decision. See Order 55 Rule 2 of the Rules of Court 2012.

An appeal to the Court of Appeal must be lodged within 30 days from the date of the decision. See Rule 12 of the Rules of the Court of Appeal 1994.

An application for leave to appeal to the Federal Court must be filed within 30 days from the date of the decision. See Rule 47 of the Rules of the Federal Court 1995. If the Federal Court grants leave, the notice of appeal must be filed within the period directed by the Federal Court. See Rule 108 of the Rules of the Federal Court 1995.

### 10.4 Issues Considered by the Appeal Court at an Appeal

In the case of an appeal after full trial, the appellate court will not interfere with the factual findings of the trial judge, save where the decision of the trial judge was plainly wrong as it could not reasonably be explained or justified and was one which no reasonable judge could have reached. See *Jade Homes Sdn Bhd v Sivananthan Krishnan* [2021] 7 CLJ 487.

In the case of other appeals, the decision of the lower court will be treated as involving an exercise of discretion, and there is a presumption that this discretion was correctly exercised. As such, the appellate court will only intervene if it is clearly satisfied that the lower court was wrong. See *Vasudevan v T. Damodaran & Anor* [1981] 2 MLJ 150.

In exceptional circumstances, new points that were not raised in the lower court may be raised for the first time in the appeal with leave, such

as new points of law which arise from the factual matrix before the lower court. See *Keng Soon Finance Bhd v MK Retnam* [1989] 1 MLJ 457.

### 10.5 Court-Imposed Conditions on Granting an Appeal

An appellate court does not generally impose conditions when granting an appeal, but may order appropriate consequential relief to give effect to its decision or in the interests of justice. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

### 10.6 Powers of the Appellate Court after an Appeal Hearing

Once an appellate court decides the appeal, it is generally *functus officio* and has no further powers. The appellate court may however grant a stay or other similar relief pending a further appeal, or issue consequential orders to clarify or give effect to its decision.

## 11. COSTS

### 11.1 Responsibility for Paying the Costs of Litigation

A successful party is usually entitled to costs from the losing party. While it is possible to submit a bill of costs to the court which will include details of the costs of the litigation (see Order 59 Rule 7(2) of the Rules of Court 2012), in practice the court will award a lump sum to the successful party as costs, which may not be representative of the actual costs incurred.

An award of costs may be challenged by way of an appeal.

### 11.2 Factors Considered when Awarding Costs

In awarding costs, the court is required to take into account all relevant circumstances and, in particular, the following:

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- the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
- the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;
- the number and importance of the documents prepared or perused;
- the place and circumstances in which the business is involved and transacted;
- the importance of the cause or matter to the client;
- where money or property is involved, its amount or value.

See Order 59 Rule 16 of the Rules of Court 2012.

The court may also take into account the following:

- any offer of settlement, or offer to contribute to settlement of the claim – see Order 59 Rules 4 and 8;
- whether anything is done or omission is made improperly or unnecessarily by or on behalf of a party – see Order 59 Rule 5;
- the conduct of the parties, including conduct before and during the proceedings – see Order 59 Rule 8;
- the conduct of the parties in relation to any attempt to resolve the suit by mediation or other means of dispute resolution – see Order 59 Rule 8;
- the extent to which the parties have followed any relevant pre-action protocol or practice direction – see Order 59 Rule 8;
- costs due to unnecessary claims or issues raised in the proceedings – see Order 59 Rule 10.

### 11.3 Interest Awarded on Costs

The court will not usually specifically award interest on costs.

However, interest on costs is claimable where the costs are part of a judgment debt. See Order 42 Rule 12 of the Rules of Court 2012 and Azlin Azrai bin Lan Hawari v United Overseas Bank (M) Bhd [2017] 5 MLJ 43. The rate is determined by the Chief Justice (currently 5% per annum) and is calculated from the date of judgment to satisfaction.

## 12. ALTERNATIVE DISPUTE RESOLUTION (ADR)

### 12.1 Views of ADR within the Country

The general methods of alternative dispute resolution in Malaysia are arbitration, adjudication and mediation.

Arbitration is commonly resorted to in commercial disputes, and has to be contractually agreed as the chosen mode of resolving disputes.

Adjudication is commonly resorted to for construction disputes, where the proceedings are generally governed by the Construction Industry Payment and Adjudication Act 2012.

Mediation is used less frequently – in matrimonial disputes, for example.

### 12.2 ADR within the Legal System

Arbitration clauses are strictly enforced by the courts. A suit filed in violation of an arbitration clause will normally be stayed upon the application of the defendant. See Section 10(1) of the Arbitration Act 2005.

When a suit is filed, the court will usually raise the possibility of mediation with the parties during case managements. If parties agree, the mediation can be conducted either by the court or by an external mediator privately arranged by the parties.

### 12.3 ADR Institutions

The main arbitral institution in Malaysia is the Asian International Arbitration Centre (AIAC), which was formerly known as the Kuala Lumpur Regional Centre for Arbitration (KLRCA). AIAC has a framework for arbitration, adjudication and mediation proceedings, including an international panel of arbitrators, adjudicators and mediators and rules to cater for these proceedings.

The Malaysian Mediation Centre, established by the Bar Council of Malaysia, offers mediation services and has a panel of mediators.

## 13. ARBITRATION

### 13.1 Laws Regarding the Conduct of Arbitration

The principal legislation that applies to both domestic and international arbitrations is the Arbitration Act 2005, which is based on the Model Law. Order 69 of the Rules of Court 2012 provides the procedural requirements for arbitration-related suits such as the enforcement of arbitral awards.

### 13.2 Subject Matters Not Referred to Arbitration

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 or the subject matter of the dispute is not capable of settlement by arbitration under Malaysian law. See Section 4(1) of the Arbitration Act 2005.

### 13.3 Circumstances to Challenge an Arbitral Award

Pursuant to Section 6 of the Arbitration Act 2005, an award is final and binding and may be set aside only if one of the following circumstances in Section 37 is established:

- a party to the arbitration agreement was under an incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it or under the laws of Malaysia;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the Act;
- the award is in conflict with the public policy of Malaysia.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

An award may be enforced by applying to the High Court under Section 38 of the Arbitration Act 2005. Under Order 69 Rule 8 of the Rules of Court 2012, the application shall be made by an originating summons accompanied by an affidavit showing the written evidence which will be relied on, including the original arbitration agreement and the duly authenticated original award or, in either case, a duly certified copy thereof.

Once the application is allowed, the order giving permission to enforce the award shall be served on the respondent by delivering a copy to him or her personally or sending a copy to them at their usual or last known place of residence or business.

Within 14 days after the service of the order, the respondent may apply to set it aside. The award shall not be enforced until after the expiration of

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that period or until after the respondent's application (if filed) has been finally disposed of. See Order 69 Rule 8.

## 14. OUTLOOK AND COVID-19

### 14.1 Proposals for Dispute Resolution Reform

There are no current proposals for dispute resolution reform in Malaysia.

### 14.2 Impact of COVID-19

COVID-19 affected the operation of courts in Malaysia from March 2020. The courts were not fully operational and parties were unable to physically attend court. However, from June 2020 the courts started actively conducting hearings using remote communication technology such as Zoom. The norm since then has been for hearings, and often trials, to be conducted remotely through videoconferencing platforms.

The court will normally give directions regarding the protocols to be adopted prior to the hearing or trial. In the case of trials, the directions include the use of soft copy documents, technological requirements and facilities, recording proceedings, and the location and supervision of witness testimony to ensure the integrity and fairness of the proceedings.

The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 came into force on 23 October 2020. Section 12 of the Act states that any limitation period specified in Section 6 of the Limitation Act 1953 which expired between 18 March 2020 and 31 August 2020 shall be extended until 31 December 2020.



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**Shearn Delamore & Co.** is one of the largest award-winning full-service law firms in Malaysia, with more than 100 lawyers and 230 support staff, and with one of the largest litigation practices in the country. The firm's clients include multinationals, financial institutions, private equity and government agencies. Shearn Delamore has a proud tradition of representing clients in some of the largest commercial, corporate and banking disputes in the country, and is often instructed by international law firms. Its

lawyers appear in the appellate courts regularly, and its partners are often appointed to act as counsel by other law firms. The firm's litigation practice is consistently ranked in the highest tier by a variety of international publications. Its global reach and network include member firms of the World Law Group, the World Services Group, the Employment Law Alliance, Drew Network Asia and other international organisations and multilateral agencies.

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# MALAYSIA LAW AND PRACTICE

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## Trends and Developments

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### Introduction

Any discussion about trends and developments in Malaysia will inevitably involve an assessment of the role COVID-19 has played, and will continue to play, in the country's legal and socio-economic environment. The virus has already had a significant detrimental effect globally, and with the emergence of new variants and sub-variants, it looks set to continue to fashion legal trends in the near future.

### Courts

Like many countries, during the course of 2020 Malaysia moved to a combination of predominantly virtual hearings (mostly utilising Zoom) and reduced physical hearings (mostly for criminal matters). To an extent, we were helped by the fact that the courts already had in place an electronic filing and case management system well before the pandemic. However, the transition to virtual hearings involved changing the mind-sets of the legal profession and, to a lesser extent, the judiciary. It has been disappointing to observe the inherent reluctance of some lawyers to adapt to what is a necessary and inevitable development.

While we are, at the time of writing, transitioning to a predominantly open environment with much-reduced restrictions in Malaysia, it is anticipated that court hearings and trials will continue to be conducted through a combination of physical and virtual hearings, albeit with increasing emphasis on physical hearings (particularly for trials). It is possible, however, that hearings of appeals in the Court of Appeal and Federal Court (Malaysia's two highest courts) will continue to be mainly conducted virtually,

as these courts have been doing so seamlessly since mid-2020.

### Vaccines

A candidate for the hottest topic in 2022 is the COVID-19 vaccine debate, with its extensive social and legal implications. Among the issues that have made, or are expected to make, their way to the courts are:

- the right to refuse to be vaccinated (for both adults and minors);
- the validity of sanctions and restrictions imposed on the unvaccinated (including social and workplace sanctions and restrictions);
- the constitutionality of such measures (including the deprivation of the right to life and equal treatment); and
- the liability of manufacturers and the government for the side-effects of vaccines.

An indication of things to come was the statement by the Minister of Health on 16 October 2021 that *"we will make life very difficult for you if you're not vaccinated because you choose not to"*, suggesting the advent of more sanctions and restrictions on those who are unvaccinated by choice.

Some of these issues are already the subject matter of pending court actions, such as the following.

- An application for judicial review was filed on 27 April 2021 by a Consumer Association and three doctors regarding the emergency use of vaccines.

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- An application for judicial review was filed on 30 August 2021 by parents on behalf of their children, to challenge the government's decision to vaccinate minors and to compel the government to approve the use of Ivermectin. The application was dismissed on 29 October 2021, and the decision is pending appeal.
- On 23 August 2021, news broke about a soldier being dismissed for insubordination for refusing to be vaccinated, resulting in the loss of his pension. There have since been differing statements from government agencies regarding whether vaccinations will be mandatory for civil servants, and the situation remains fluid. On 28 October 2021, the soldier obtained leave to commence judicial review proceedings to challenge his dismissal.

Another controversial issue that will undoubtedly be heavily litigated is whether employers can insist that their employees be vaccinated, given that employers have statutory obligations under the Occupational Safety and Health Act 1994 to provide a safe working environment for all employees.

All this, in addition to the expected litigation regarding the side-effects of various vaccines, will make for an interesting 2022.

There is little doubt that the vaccine debate and its various permutations will rage on for some time to come. Legal jurisprudence which develops in other jurisdictions may well add fuel to the legal fire in Malaysia.

## **COVID-19-Related Legislation**

On 23 October 2020, the Malaysian government implemented the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 to provide temporary measures to reduce the impact of the pandemic.

Section 7 states that the “inability” of any party to perform a contractual obligation arising from certain specified categories of contracts due to COVID-19 measures shall not give rise to the other party exercising its contractual rights. The contracts in question include potentially high-value contracts, such as construction-related contracts and leases and tenancies of commercial immovable property. Section 7 is valid until 31 December 2021 as a result of subsequent extensions of this part of the Act.

Unsurprisingly, litigation has ensued over exactly what constitutes “inability”, and has consequently resulted in the mandatory deferment of the exercise of contractual rights.

On 28 September 2021, the High Court in *Ravi-chanthiran a/l Ganesan (menjalankan amalan guaman di Tetuan G Ravi) v Lee Kok Sun (menjalankan perniagaan milikan tunggal dengan nama dan gaya sebagai L & L Brother Engineering Services) & Ors* and another case [2021] MLJU 1876 construed Section 7 as requiring proof of a high threshold of “inability”, higher than that of a mere breach, and emphasised that the Act is not meant to be relied on by litigants attempting to escape liability which arose during the pandemic.

It is expected that this decision, and the scope of Section 7, will be tested in the courts, given the financial impact of a mandatory and lengthy deferment of the exercise of contractual rights.

## **Online Fraud**

COVID-19 has resulted in more individuals and companies having to operate online – personally, professionally and commercially – through the increased use of electronic systems. One consequence has been a sharp rise in online fraud, including ransomware and scams.

The rise in ransomware has in part been the result of the use of home networks for work, given that home networks are not as secure as office networks, resulting in increased vulnerability to malware attacks. One cybersecurity firm detected a total of 113,010 ransomware threats in Malaysia in the first four months of 2021 alone.

Further, many companies and business enterprises have had no choice but to increase their digital presence due to COVID-19. This includes having to make regular payments online and to conduct most (if not all) of their transactions online, including the issuance of invoices and other usual accounting practices.

The growth in digital transactions has caused cybercrime fraud to increase. Between 1 January 2017 and 20 June 2021, 67,552 cybercrime cases were reported in Malaysia. Of the total, e-commerce scams topped the chart (23,011 cases), followed by illegal loans (21,008 cases) and investment scams (6,273 cases). Based on the statistics generated by CyberSecurity Malaysia, the national cybersecurity specialist and technical centre under the purview of the Ministry of Communications and Multimedia, 5,899 online fraud cases were reported from January to September 2021. See [www.mycert.org.my](http://www.mycert.org.my). Also, according to the Commercial Crime Investigation Department, as at 31 October 2021, a total of 8,162 cases of e-commerce fraud have been reported nationwide this year, a significant increase from the 5,848 cases in 2020.

A problem faced by victims of online fraud, particularly in cross-border online fraud, is that the identity of the perpetrator is often unknown or virtually impossible to trace. As a result it may be extremely difficult to bring the perpetrator to justice. This is especially the case where the funds end up in a foreign jurisdiction or flow through multiple foreign jurisdictions, as is often the case.

The difficulty in pursuing unknown wrongdoers involved in cyberfraud was recently addressed by the High Court in *Zschimmer & Schwarz GMBH & Co. KG Chemische Fabriken v Persons Unknown and Mohammad Azuwan bin Othman (t/a Premier Outlook Services)* [2021] 7 MLJ 178. The case involved a cross-border push payment fraud where the plaintiff, a German company, was deceived by “persons unknown” into making payment for a legitimate transaction into a different bank account under the control of wrongdoers. As a result, the plaintiff paid EUR123,014.65 into the second defendant’s bank account in Malaysia. On 22 December 2020, the High Court granted a Mareva injunction and a proprietary injunction against “persons unknown” and the second Defendant, judicially recognising that the identity of fraudsters in cyberfraud is often unknown.

The injunction orders were subsequently used as a springboard for the grant of further ancillary relief against the bank where the second defendant’s account was, and eventually revealed a wider web of potential defendants who had participated in the fraud. Pursuant to a further application made by the plaintiff, the court then – for the first time – granted a “Spartacus Order”, which is a self-identification order against the “persons unknown” to identify themselves and provide an address for service.

Since *Zschimmer*, there have been other instances where the court has granted similar relief against “persons unknown”. The trend, therefore, is for the court, while recognising the difficulty of effectively pursuing the actual perpetrators, to issue relief that would assist the plaintiff in freezing known funds and assets, and tracing the funds, whether in Malaysia or elsewhere.

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## Online Marketplaces

Malaysians are significant users of online marketplaces in South-East Asia, with one the highest number of digital consumers in the region.

The advent of COVID-19 has driven consumer business to online marketplaces at unprecedented rates. It is not surprising, therefore, that litigation against e-commerce platforms is on the rise.

In *A & M Beauty Wellness Sdn Bhd v Shopee Mobile Malaysia Sdn Bhd* (berniaga sebagai Shopee Malaysia) [2021] MLJU 65, the High Court dismissed the plaintiff's application for, among others, an injunction against Shopee (a leading e-commerce platform) to prevent the sale by unauthorised third parties of products bearing the plaintiff's trade mark on Shopee's platform. In dismissing the plaintiff's application, the court acknowledged that the injunction would undermine the operation of e-commerce platforms, that it was impossible for Shopee to regulate all its sellers, and that Shopee was merely providing a platform (as opposed to being a seller).

It is expected that the business models of e-commerce platforms will continue to be tested through litigation, a trend which was already evolving globally prior to the pandemic.

## Ang Ming Lee

In Malaysia, sale and purchase agreements (SPAs) between purchasers and developers for housing projects are standard form agreements statutorily prescribed by the Housing Development (Control and Licensing) Regulations 1989 (HDR). One of the contractual terms is that vacant possession is to be delivered within a specified timeframe (36 months in the case of condominiums), failing which the developer will be liable to pay the purchaser liquidated damages (LAD).

The HDR and its parent legislation, the Housing Development (Control and Licensing) Act 1966 (HDA), are pieces of social legislation designed to protect purchasers, and are therefore generally construed in favour of purchasers.

Previously, where a developer faced difficulty or anticipated difficulty in completing the project within the prescribed time frame, the developer would apply to the Minister of Housing and Local Government for an extension. As a matter of practice, the application would be made to the Controller of Housing in the Ministry of Housing and Local Government, who heads the government unit administering such applications. Both the Controller and the Minister have statutory powers under the HDR and HDA, respectively, to grant an extension.

However, the floodgates for LAD claims by purchasers against developers have been thrown wide open as a result of the decision of the Federal Court (Malaysia's apex court) in *Ang Ming Lee & 34 Others v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan And Anor* [2020] 1 CLJ 162 (hereafter, "Ang Ming Lee").

In *Ang Ming Lee*, the developer applied for an extension after the SPA was entered into. The Federal Court held that the Controller's decision to grant an extension was ultra vires the HDA and HDR and invalid, as the Controller had no power to waive or modify the SPA. The Federal Court also reaffirmed the strong pro-purchaser approach to be taken when construing the HDA and HDR.

The effect of *Ang Ming Lee* is that, where a developer has obtained what was hitherto a valid extension from the Controller, the developer will still be bound by the statutory timeframe and hence will have to pay LAD to purchasers, notwithstanding the extension obtained. *Ang Ming Lee* has retrospective effect, and therefore

every developer who has obtained and relied on an extension from the Controller suddenly has potentially open-ended, multimillion ringgit liability.

The problem has been exacerbated by subsequent decisions of the High Court and Court of Appeal in the course of 2021, which have extended the scope of Ang Ming Lee. These decisions include cases where the extension was obtained even before the SPA was entered into and was, in fact, expressly reflected in the SPA and agreed to by the purchasers, and where settlement agreements entered into by purchasers who have accepted payment of LAD claims and waived their right to further LAD have been struck down.

Consequently, developers have also taken out third-party proceedings against the government and its officers, seeking indemnification on the basis that their grant of the extensions is unlawful. If these claims are upheld, the government will have to make substantial payments to developers running into billions of ringgit.

It is inevitable that these and other related issues will have to be decided by the Federal Court, which will have to consider the true scope of Ang Ming Lee. There are currently leave applications pending before the Federal Court which will be litigated in 2022.

In the meantime, developers will be subject to further claims by purchasers who hope to receive more LAD, particularly with the current trend of pro-purchaser decisions. The end result will be a substantial adverse financial impact on the housing development industry as a whole, with a consequent rise in house prices for purchasers nationwide.

### **Cryptocurrency**

Operating a Digital Asset Exchange (DAX), which is an online platform that allows customers to trade cryptocurrencies or digital currencies for other assets, requires registration with the Securities Commission Malaysia (SC) and full compliance with the regulatory requirements and guidelines prescribed by the SC. As at 7 October 2021, only four DAX operators have been authorised by the SC.

On 30 July 2021, the SC announced enforcement action against Binance, which operates one of the world's largest DAX by trading volumes, for illegally operating a DAX, and advised Malaysian investors to cease trading through its platforms and to withdraw all their investments immediately. The SC's enforcement action echoes regulatory action taken against Binance in other jurisdictions such as the UK, Hong Kong and Japan. This signifies the strong position taken and caution exercised by SC when dealing with DAX, and will be an interesting development to follow as more global DAX try to enter the Malaysian market.

On 31 August 2019, we had the first cryptocurrency case in Malaysia, where the High Court upheld a lower court's ruling that Bitcoin is a commodity with an attached value, even though it is not money, since real money is used to purchase it. See *Robert Ong Thien Cheng v Luno Pte Ltd & Anor* [2019] 1 LNS 2194.

Cryptocurrency litigation is likely to gain traction as cryptocurrency becomes a more commonly accepted mode of payment. This is notwithstanding the Central Bank of Malaysia's conservative approach to cryptocurrency, in that they have not recognised Bitcoin as legal tender in Malaysia; see the Central Bank's [Statement on Bitcoin](#).



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## Corporate Liability

Section 17A of the Malaysian Anti-Corruption Commission Act 2009, which is a corporate liability provision, came into force on 1 June 2020. A commercial organisation commits an offence if a person associated with it corruptly gives, agrees to give, promises or offers to any person any gratification with intent to obtain or retain any business or advantage for the organisation. If convicted, the organisation will face a fine not less than ten times the value of the gratification or MYR1 million (whichever is higher), and/or a maximum term of imprisonment of 20 years.

The only defence available to the commercial organisation is that it has in place “adequate procedures” to prevent persons associated with it from committing the corrupt acts. On 11 December 2018, the Prime Minister’s Department issued the Guidelines on Adequate Procedures based on the TRUST principles, to assist organisations in understanding the procedures to be implemented in order to prevent the occurrence of corrupt practices.

On 18 March 2021, Pristine Offshore Sdn Bhd became the first company to be prosecuted under Section 17A, being accused of offering a bribe of MYR321,350 to ensure that it was awarded a subcontract. The trial will likely take place in 2022, and will be the first case to test the scope of Section 17A and the adequacy of anti-corruption measures implemented by commercial organisations in Malaysia. This case will be followed with interest, given the anticipated increase in Section 17A prosecutions in 2022 and beyond.

## Conclusion

As can be seen from the above, trends and developments in Malaysia in the course of 2021 have largely been sparked or accelerated by COVID-19. It will be interesting to see how the law and regulatory framework develop to keep up with the demands of the evolving “new normal”.



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**Shearn Delamore & Co.** is one of the largest award-winning full-service law firms in Malaysia, with more than 100 lawyers and 230 support staff, and with one of the largest litigation practices in the country. The firm's clients include multinationals, financial institutions, private equity and government agencies. Shearn Delamore has a proud tradition of representing clients in some of the largest commercial, corporate and banking disputes in the country, and is often instructed by international law firms. Its

lawyers appear in the appellate courts regularly, and its partners are often appointed to act as counsel by other law firms. The firm's litigation practice is consistently ranked in the highest tier by a variety of international publications. Its global reach and network include member firms of the World Law Group, the World Services Group, the Employment Law Alliance, Drew Network Asia and other international organisations and multilateral agencies.

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# MALAYSIA TRENDS AND DEVELOPMENTS

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