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THE IMPACT OF ESG CONSIDERATIONS IN SUPPLY CHAIN CONTRACTS

by Raphael Tay & Shivani Sivanesan

Environmental, Social and Governance ("**ESG**") considerations have emerged as a dominant force reshaping business practices worldwide. While once regarded primarily as corporate social responsibility initiatives, ESG principles are now recognised as integral to managing risk, attracting investment, maintaining regulatory compliance, and preserving reputational value. Increasingly, companies are being held responsible not only for their own operations but also for the conduct of their suppliers and business partners. This broader scope of accountability means that ESG compliance must extend throughout the supply chain, prompting companies to build ESG obligations directly into their contractual arrangements.

Supply chain contracts have become a critical mechanism through which companies implement their ESG compliance obligations and commitments. This strategy is often used by companies in jurisdictions with higher ESG compliance obligations, which usually equates to companies in jurisdictions with higher bargaining power than others.

To illustrate, ESG-related requirements such as anti-modern slavery, sustainability and anti-greenwashing terms (just to name a few) are becoming increasingly common in standard supplier terms and similar contracts provided by larger multinational companies, often headquartered or with core businesses in jurisdictions such as the European Union ("**EU**"), the United Kingdom ("**UK**") and the United States ("**US**").

In doing so, businesses aim to ensure that their entire value chain aligns with their sustainability goals, legal obligations, and stakeholder expectations. Contractual provisions serve as both a tool of risk management (for example, by setting agreed standards of compliance, usually providing audit rights to at least one party over the other to ensure compliance, allocating liabilities and remedies and even allowing for termination), and a means of demonstrating to investors, regulators, and consumers that ESG principles are being meaningfully integrated into business operations. As a result, the negotiation and drafting of supply chain contracts now routinely involve ESG considerations.

This article explores the growing trend of how ESG considerations have influenced the drafting of supply chain contracts, the legal and practical implications for both buyers imposing ESG requirements and suppliers who are required to comply, and practical approaches for integrating ESG into supply chain governance. It is also intended to assist supplier companies operating in jurisdictions outside of those with more stringent ESG compliance legislation, understand the ESG expectations that may be placed on them by multinational customers based in more heavily regulated markets. As part of meeting customers' stringent ESG requirements, suppliers are generally expected to impose equivalent ESG obligations on their own downstream suppliers, ensuring that compliance is passed through the entire supply chain.

The Drivers of ESG Integration into Supply Chains

In recent years, ESG issues have evolved from being seen as voluntary corporate initiatives to becoming critical, often non-negotiable, components of how businesses operate. This shift has been fuelled by several factors, primarily growing regulatory obligations, stakeholder and investor scrutiny, and an effort by companies to keep up with market trends.

Companies are increasingly using contracts as tools to extend ESG standards beyond their own walls and jurisdictions and into the conduct of their suppliers. Imposing contractual obligations in this manner is a tool in which companies are able to manage, and to a certain extent control, their supply chain.

- ### Regulatory Developments

One of the strongest drivers has been legislative and regulatory developments that impose obligations not only on a company's own operations but also on its value chain. Governments are increasingly enacting laws that require businesses to monitor and control ESG risks in their supply chains.

For example, the EU's Corporate Sustainability Due Diligence Directive ("**CSDDD**") requires certain companies to undertake human rights and environmental due diligence across their entire chain of activities, including suppliers and subcontractors in jurisdictions outside of the EU.

Germany's Supply Chain Due Diligence Act also imposes obligations on companies to conduct thorough due diligence on their entire supply chains to assess, prevent, and remedy ESG-related risks - not just in their direct operations, but also among indirect suppliers.

Further, the UK's Modern Slavery Act 2015 mandates companies to disclose efforts taken to prevent human trafficking and slavery in their supply chains.

Because these laws create liability for ESG breaches occurring at the supplier level, companies have responded by inserting ESG-specific clauses into their contracts. These clauses are designed to flow down legal obligations to suppliers, making them contractually responsible for compliance and enabling the purchasing company to demonstrate due diligence and even an "exit route" via termination clauses, if regulatory scrutiny arises.

- **Investor and Consumer Expectations**

Institutional investors and asset managers are increasingly integrating ESG factors into their investment decisions, often requiring portfolio companies to have demonstrable ESG policies extending into their supply chains. Major investors, such as BlackRock and State Street, have published stewardship guidelines emphasising supply chain responsibility as part of corporate ESG performance.

Consumers, too, expect companies to be accountable for the conditions under which their products are made. In industries like fashion, electronics, and food production, supply chain transparency and ethical sourcing are now key brand differentiators. Companies that cannot prove ethical and sustainable supply chains risk losing market share to more socially responsible competitors.

To meet these expectations, there is increasing pressure on companies to keep up with investor trends and demands, and must ensure that their ESG commitments are not hollow. They therefore require not just their own subsidiaries, but also suppliers to adhere to ESG standards through legally binding contractual provisions, ensuring that their commitments are enforceable and verifiable.

- **Reputational Risks and Opportunities**

Cases of labour exploitation, environmental harm, and governance failures originating within supply chains have the potential to cause significant reputational damage to multinational corporations. Negative media exposure can result in consumer boycotts, investor activism, and even regulatory investigations.

Conversely, companies that demonstrate leadership in ESG compliance (including through responsible supply chain management) can be said to gain reputational advantages in the market.

Given these reputational stakes, businesses are embedding ESG obligations into supply contracts not only as a defensive risk mitigation measure but also as a proactive way to align their brand image with their operational practices.

In summary, the convergence of legal mandates, financial market pressures, consumer activism, and reputational risks has made it commercially and legally imperative for companies to impose ESG standards applicable to them, throughout their supply chains. Supply chain contracts have become the primary vehicle for doing so.

ESG-Related Clauses in Supply Chain Contracts

As companies seek to ensure ESG compliance throughout their operations and value chains, supply chain contracts have become a primary tool for translating ESG commitments into enforceable contractual obligations.

Some ESG-related clauses now commonly included in supply chain contracts can be grouped into several key categories:

- ### Compliance with Laws

Suppliers are often required to comply with all applicable laws, including ESG-specific legislation and regulations in the buyer's home country and the supplier's country of operation. Contracts increasingly go beyond legal compliance, requiring suppliers to meet voluntary industry standards or international frameworks such as the UN Guiding Principles on Business and Human Rights or the OECD Guidelines for Multinational Enterprises.

These clauses effectively extend the scope of compliance obligations to the entire supply chain, ensuring that suppliers are not simply adhering to local minimum standards but are aligning with the buyer's broader ESG objectives.

- ### Codes of Conduct and Policies

Buyers often draft detailed supplier codes of conduct covering labour rights, environmental management, anti-corruption, and health and safety. These codes are typically incorporated into contracts either by reference or as annexes.
Suppliers are usually required not just to comply with these codes themselves, but also to impose equivalent obligations on their own subcontractors and suppliers, thus cascading ESG expectations through multiple tiers of the supply chain.

- ### Audit and Monitoring Rights

To verify supplier compliance with ESG obligations, contracts commonly grant buyers the right to conduct audits and inspections of supplier facilities. These may be conducted with or without notice and may include access to documents, interviews with workers, and environmental sampling.

Some contracts also require suppliers to submit regular ESG performance reports, sometimes through digital platforms that allow real-time tracking of compliance indicators such as carbon emissions, water usage, or worker grievance metrics.

- ### Warranties and Representations

Suppliers are often required to make affirmative warranties regarding their ESG compliance. These warranties may cover past conduct (e.g., no history of human rights violations) and ongoing practices (e.g., adherence to specific environmental standards). Such warranties provide a contractual basis for the buyer to terminate the agreement or claim damages if ESG breaches are later discovered.

- ### Termination and Remediation Mechanisms

Contracts typically give buyers the right to terminate the agreement for material breaches of ESG obligations. However, recognising the practical complexities of immediate termination, some contracts incorporate remediation periods during which suppliers are expected to implement corrective action plans. This approach balances the need for strict enforcement with the commercial desire to maintain supply relationships where feasible.

- **Indemnities and Liability Allocation**

Buyers may require suppliers to indemnify them against any losses arising from the supplier's breach of ESG obligations, including regulatory fines, reputational damage, and the cost of remediation measures. Such indemnities not only provide a financial safety net, but also incentivise suppliers to prioritise ESG compliance within their operations.

- **Evolution Clauses**

Recognising that ESG standards and regulatory frameworks are evolving rapidly, some contracts include clauses requiring suppliers to adapt to updated codes of conduct or revised ESG policies issued by the buyer during the term of the agreement.

This ensures that ESG obligations remain dynamic and aligned with the latest best practices and legal requirements, without the need for renegotiating the entire contract.

The Perspective of Suppliers Subject to ESG Clauses

For many companies, particularly those in developing countries or at the lower tiers of a global supply chain, ESG obligations are often not self-imposed, but externally driven. Smaller suppliers may find themselves required to adhere to ESG standards dictated by larger multinational customers based in jurisdictions with more intensive and detailed legal and regulatory ESG requirements.

While these clauses serve important goals, they can also present significant operational and financial challenges for suppliers. Compliance may require investments in new systems, training, audits, or certifications that smaller enterprises may not be equipped to afford. In some cases, there may be tension between the commercial pressure to deliver competitively priced goods and the need to comply with ESG-related expectations.

Moreover, suppliers may not have a clear understanding of what is required of them, particularly where ESG clauses refer to broad international standards or general principles rather than specific obligations. This can lead to confusion, misalignment, or inconsistent enforcement.

The imbalance of bargaining power often means that suppliers are unable to negotiate or modify these obligations, even when they are unclear or burdensome. In some cases, suppliers may feel compelled to sign contracts without fully understanding the consequences of non-compliance.

To improve outcomes, buying companies should adopt a collaborative approach by providing training, guidance, and capacity-building support. Rather than relying solely on punitive mechanisms, a more constructive strategy would involve helping suppliers understand the rationale for ESG obligations and assisting them in meeting those expectations over time.

Practical Approaches for Implementing ESG Considerations in Supply Chain Contracts

To implement ESG obligations effectively, companies may consider the following practical steps:

- **Clarity** - Ensure that ESG clauses are clearly drafted, with specific expectations and measurable requirements.
- **Consistency** - Align contractual provisions with internal ESG policies and public commitments.
- **Capacity Building** - Provide support to suppliers, including training, toolkits, and guidance on compliance.
- **Due Diligence** - Establish robust onboarding and monitoring processes to identify ESG risks.
- **Remediation** - Include mechanisms that allow for corrective actions rather than immediate termination.
- **Continuous Improvement** - Recognise that ESG compliance is an ongoing and continuous process and allow for incremental progress.

Conclusion

ESG considerations are no longer peripheral to commercial transactions. They are now central to the way companies manage their supply chains and contractual relationships. As regulatory and stakeholder scrutiny intensifies, the trend of incorporating ESG obligations into supply chain contracts is set to grow.

While this evolution presents challenges, particularly for suppliers with fewer resources, it also creates opportunities for smaller businesses and those in jurisdictions with developing ESG regulations to strengthen resilience, enhance reputation and be able to compete and remain relevant locally and on a regional and international level. In house counsel advising their internal businesses and stakeholders on supply chain contracts must also be attuned to these developments and help their stakeholders navigate the complex interplay between ESG expectations, legal enforceability, and commercial realities.

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NOT JUST LOGOS ANYMORE: HOW FAR CAN TRADEMARK LAW GO IN MALAYSIA?

by Michael CM Soo & Ling Siew Hui

Trademarks have long served as a cornerstone of brand identity, traditionally encompassing words, logos, and symbols. In a world where consumers remember how something sounds, feels, or even smells, the traditional trademark is insufficient. Brands today are turning to the senses - protecting jingles, packaging shapes, motion graphics, and even signature colours. These unconventional assets, known as non-traditional trademarks ("**NTMs**"), are reshaping intellectual property law. Malaysia's Trademarks Act 2019 ("**TMA 2019**") opened the door, but how far have we really stepped through?

This article walks through the concept of NTMs, offering illustrative examples from around the world - both celebrated and contested. It also considers how Malaysia, through the TMA 2019, is laying the groundwork to embrace these forms of intellectual property.

What are Non-Traditional Trademarks?

Close your eyes and think of a brand - not by its logo, but by the chime you hear when a computer starts up, the scent that hits you when you unbox a product, or the shape of a bottle that needs no label. These are all examples of NTMs - marks that appeal to the senses and distinguish goods or services in ways that words cannot. While traditional trademarks rely on visual symbols like names and logos, NTMs engage sound, motion, colour, shape, position, and even smell.

Let's explore each category through real-world examples that showcase both successful registrations and legal hurdles.

- ### Sound marks

A sound mark relates to the auditory element of branding and can consist of any recognisable sound associated with a good or service. Take, for example, Nokia ringtone that became so synonymous with the brand that it was successfully registered as a sound mark in multiple jurisdictions, including the European Union (EU) and the United States (US). Similarly, the iconic lion's roar of Metro Goldwyn Mayer has also been granted trademark protection in the US.

However, not all attempts to register sound marks are successful. In 1994, Harley-Davidson attempted to trademark the distinct "potato-potato" exhaust sound of its

V-twin engine failed to overcome the hurdles of functionality and distinctiveness. This was met with fierce opposition from 9 other competitors, who argued that similar V-Twin engines naturally produced comparable sounds. After facing opposition proceedings, Harley-Davidson ultimately abandoned the application.

- **Shape marks**

A shape mark protects the three-dimensional form of goods or their packaging, allowing businesses to secure rights over distinctive product shapes. Lindt's chocolate bunny, wrapped in gold foil with a red ribbon, is one such example that enjoys protection in EU.

However, shapes can be debatable. Despite widespread consumer recognition, Nestlé's attempt to register the shape of its four-fingered KitKat chocolate bar shape in the United Kingdom (UK) and EU fell short. The application faced opposition from Cadbury (now Mondelez). The UK Court of Appeal found that while a significant portion of the public recognised the KitKat shape, Nestlé failed to demonstrate that consumers identified the shape alone - rather than other brand elements - to identify the commercial origin of the goods.[1] The verdict goes against a 2016 EU General Court ruling, which, while denying Nestlé a registered trade mark throughout the EU, did find that that the bar had acquired "distinctive character through use" specifically in the UK.[2] and in some EU countries.

The case illustrates the high threshold for registering shape marks, particularly the need to prove that the shape alone, without reliance on other branding, serves as a badge of origin.

- **Colour marks**

A colour mark allows for the protection of a specific colour, either as part of the packaging or when applied directly to the goods. A prominent example would be Tiffany & Co.'s robin egg blue which is widely associated with luxury.

Cadbury's efforts to protect its iconic purple colour (Pantone 2685C) highlight both success and setback in colour trademark registration. Cadbury filed three separate trademark applications in the UK, each describing the colour's use in slightly different way. The first application (Mark 362), which described the colour purple as "applied to the whole visible surface of the packaging of the goods", was accepted by the UKIPO. However, the second (Mark 361) and third applications (Mark 822), which used broader phrase such as "applied to the packaging of goods" or provided no specific limitation, were rejected. On appeal, the UK High Court upheld Cadbury's appeal for Mark 822, holding that the description was sufficiently clear and conceptually distinct as a single, identifiable mark. The Court rejected the broader terms of Mark 361, holding that the description of "applied to the packaging of goods" was too vague and open-ended, which could allow for too many variations.[3]

The decision highlights the need for clear and precise trademark descriptions to ensure legal certainty, particularly for NTMs like colour marks.

1 Société des Produits Nestlé S.A. v Cadbury UK Ltd [2017] EWCA Civ 358

2 Case T-112/13 Nestlé v OHIM [2016]

3 Cadbury UK Ltd v Société des Produits Nestlé SA (Comptroller-General of Patents, Designs and Trade Marks intervening) [2022] EWHC 1671 (Ch)

- **Motion marks**

A motion mark protects moving images or sequences of motion that are used as branding tools, often serving as a dynamic way to capture consumer attention. A standout example is Lamborghini's successful registration of the distinctive movement of its car door. The iconic scissor doors, which open vertically, passed the distinctiveness test and were granted trademark protection in both the EU and the US.

However, not all attempts at registering motion marks have been successful. For instances, KCT GmbH & Co. KG sought to register a motion mark depicting the opening and closing of vehicle windows for expedition vehicles. The EUIPO's Board of Appeal confirmed the refusal of the application, stating that the motion represented a functional process and lacked distinctiveness. The Board emphasised that such movements are commonly used to demonstrate the functionality of products and are not perceived as indicators of the origin of goods or services.

- **Position marks**

A position mark refers to trademarks where protection is claimed for the specific placement of a mark on a product, distinguishing it from others. A well-known example is the successful registration of the red sole of Christian Louboutin shoes in the EU, which was recognised for the specific positioning of the red colour on the sole.

However, position marks are not always successful. In 2024, Loro Piana filed a position trademark for a decorative feature on its footwear. The mark consisted of a band, knot, ribbon, and two metal pendants positioned near the tongue of the shoe. The application was refused by the EUIPO on the ground that the mark was too common and purely decorative, failing to distinguish Loro Piana's products from others in the footwear industry.

- **Scent marks**

A scent mark protects a particular smell that is uniquely linked to goods or services. For instances, Hasbro succeeded in registering the nostalgic scent of Play-Doh in the U.S., described as a *"unique scent formed through the combination of a sweet, slightly musky, vanilla-like fragrance, with slight overtones of cherry, and the natural smell of a salted, wheat-based dough"*.

In contrast, the registration of well-known fragrances has faced challenges. For example, Chanel No. 5, arguably one of the most iconic fragrances in the world, was denied registration in the UK. The Court held that the scent was intrinsic to the very nature of the product, with primary purpose of a perfume being to deliver fragrance. As such, it could not function independently as a trademark.

All the cases above reflect the difficulties in registering NTMs that are functional, not sufficiently distinctive, or described too vaguely.

The Malaysian Landscape

- ### The Trademarks Act 2019

In Malaysia, trademarks are governed by TMA 2019, which came into force on 27 December 2019. The TMA 2019 replaced the previous Trade Marks Act 1976 ("**TMA 1976**"), introducing several key changes to the trademark landscape in Malaysia.

One of the significant changes under the TMA 2019 was the introduction of the concept of a "sign", replacing the narrower definition of a "mark". This effectively broadened the scope of registrable trademarks to include "any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof". The inclusion of protections for NTMs under the TMA 2019 reflects a growing recognition of the need to safeguard distinctive brand features beyond conventional logos and slogans.

Since the enactment of the TMA 2019, 39 non-traditional marks have been successfully registered in Malaysia. An example of a successful non-traditional trademark registration is Maybank's registration of its 3D "Tiger Head Device" shape mark across different classes of goods. Other examples include the registration of a position mark by All Star C.V., which features the placement of design elements on a shoe, and a sound mark by Lazada. These examples illustrate how brand owners are actively using the broader protection afforded by the TMA 2019 to safeguard non-conventional aspects of their brand identity.

- ### Key Challenges

While the TMA 2019 has broadened the definition of registrable trademarks, successfully registering these marks remains a challenging process. Several key hurdles continue to limit the widespread registration of NTMs in Malaysia.

The primary challenge lies in proving distinctiveness. Under Section 23(1)(a) of the TMA 2019, a trademark must be capable of distinguishing the goods or services of one undertaking from those of others. For conventional marks, this is often straightforward, but for NTMs, it can be far more difficult. Applicants must provide compelling evidence that consumers perceive the non-traditional feature as an indicator of origin, rather than merely a decorative, functional, or generic element. For instances, a sound must be one that consumers immediately associate with a particular product or service, not just any generic tune.

Another major hurdle stems from Section 24 of the TMA 2019, which prohibits registration of signs that consist exclusively of the shape or other characteristics necessary to achieve a technical result or that give substantial value to the goods. For instances, a shape may be objected as functional or generic unless it can be shown to be uniquely associated with the brand.

Although the TMA 2019 allows for a broader range of signs, it retains the requirement that trademarks must be capable of being represented graphically. The representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective. This poses particular challenges for NTMs, especially scents which are notoriously difficult to graphically represent in a way that meets these standards. Failing to provide a sufficiently clear and precise representation can lead to rejection of the application at the outset.

Looking Ahead

In the coming years, it is expected that NTMs will become more commonplace as businesses increasingly seek to protect their evolving brand identities. Malaysia's inclusion of NTMs under the TMA 2019 signals its readiness to join the global movement toward recognising innovative brand elements. As Malaysia continues to embrace the protection of NTMs under the TMA 2019, it is anticipated that more businesses will seek to register distinctive elements beyond conventional brand names and logos.

For businesses considering registering NTMs in Malaysia, several practical steps can help enhance the prospects of success:

- Early Planning and Strategy: Identify early on which elements of your branding -whether shape, sound, colour, scent, motion, or positioning - are truly distinctive and capable of serving as an indicator of origin.

- Clear and Precise Representation: Ensure that the representation of the non-traditional mark meets the graphic representation requirement.

- Evidence of Distinctiveness: Gather and preserve strong evidence that the NTM has acquired distinctiveness through use. This could include market surveys, advertising materials, sales data, and media recognition demonstrating that the relevant public associates the mark with your business.

- Avoid Functional Features: Be mindful that purely functional aspects are unlikely to be registrable. For example, if the shape, sound, or motion is dictated by a technical function, it may face objections.

As the Malaysian IP landscape continues to evolve, NTMs will play an increasingly important role in how businesses distinguish themselves. Those who invest early in securing protection for innovative brand elements will not only safeguard their competitive edge but also position themselves at the forefront of a dynamic and modern branding environment. The future of trademark protection in Malaysia is expanding - and for forward-thinking businesses, the opportunities are as limitless as their creativity.

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FORM N IN LAND ACQUISITION PROCEEDINGS: UNLOCKING PARTICIPATION RIGHTS IN LAND REFERENCES

by Rosli Dahlan & Amiratu Al Amirat

> "...First, the issue involves a deprivation of property. Article 13(1) of the Federal Constitution guarantees that no person shall be deprived of property save in accordance with law. In the reading and application of this guarantee, there must be a propensity to safeguard as opposed to denying that guarantee. Unless and until there are clear express provisions restricting a right of participation in any exercise to deprive property, any relevant law must be read to allow if not encourage such participation. The adequacy of any compensation paid for the deprivation may otherwise be compromised."
>
> – Federal Court in ***Spicon Products Sdn Bhd v. Tenaga Nasional Bhd & Ano***r [2022] 4 CLJ 195

The Malaysian Federal Constitution bestows upon its citizens several fundamental rights. Amongst these, the right to property is specifically safeguarded by Article 13 of the Federal Constitution. The right to property inherently includes the entitlement to utilise and benefit from its use without interference. However, the protection in Article 13 is not an absolute one, as the same Article provides for the curtailment of the very right that it establishes:

> *"(1) No person shall be deprived of property save in accordance with law.*
>
> *(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."*

The Land Acquisition Act 1960 ("**LAA 1960**") is one such law that was enacted for the purpose of governing the acquisition of land, the manner of challenging an acquisition process as well as providing the mechanisms for the assessment of adequate compensation to be made. This is made clear from the preamble of the LAA 1960 which states:

> *"An Act relating to the* ***acquisition of land, the assessment of compensation*** *to be made on account of such acquisition, and* ***other matters incidental thereto.****"*

The LAA 1960 is enacted specifically for and limited to the Peninsular Malaysia in its application. The states of Sabah and Sarawak are governed by laws unique to them namely, the Land Acquisition Ordinance Cap 68 for Sabah and Part 4 of the Sarawak Land Code (Cap 81) 1958 for Sarawak.

Overview of Land Reference Process

The procedure and constitution of the Court in a land reference proceeding is spelled out in the LAA 1960. Whilst a judicial review seeks to challenge any non-compliance of the procedural law of acquisition or invalidate the entirety of the acquisition, a land reference proceeding is confined to the matters enumerated in Sections 36 and 37 of the LAA 1960. The scope of land reference proceedings is restricted by Section 44 of the LAA 1960 which states:

> *"(1) In every proceeding under this Part the scope of the inquiry shall be restricted to a consideration of the interests of the persons affected by the objection."*

There are two ways in which the Land Administrator may make references to the Court: (i) on the Land Administrator's own motion;[4] and (ii) by way of an objection against the Land Administrator's award. Central to this issue is the reference by way of an objection against the Land Administrator's award.[5] Where the reference to Court is by "any person interested in any scheduled land", it is upon that person to make an application to the Land Administrator who in turn will refer the application to Court for determination.

The term "person interested" is peppered throughout the LAA 1960. As aptly highlighted by the Federal Court in *Spicon Products*, this phrase is *"used quite liberally throughout the Act, sometimes as 'interested persons' (s 12(2)), 'persons interested' or 'person whom he knows or has reason to believe to be interested therein', and must thus be given a contextual and not literal meaning".*

In that regard, the LAA 1960 provides for the statutory mechanisms to challenge the award of compensation for compulsorily acquired lands under Section 37 of the LAA 1960.[6] Section 37 of the LA allows any person interested, be it pursuant to a notice under Section 10 or 11 or any compensation made under Section 35 or Part VII, who has made a claim to the Land Administrator and refused to accept his award, or has accepted payment of the amount of such award under protest as to its sufficiency,[7] to make an objection to the: (a) measurement of the land; (b) amount of compensation; (c) persons to whom it is payable; and (d) apportionment of the compensation.[8] Section 38(1) of the LAA provides that any objections shall be made by a written application in Form N to the Land Administrator.[9]

Against that backdrop, the core issue in question is whether an interested person is permitted to file an application under Order 15 Rule 6 of the Rules of Court 2012 for leave to intervene in land reference proceedings, in absence of filing Form N.

TNB v Unggul Tangkas

In order to decipher this issue, it is apposite to first discuss the Federal Court's judgment in *Tenaga Nasional Bhd v Unggul Tangkas Sdn Bhd & Anor and other appeals* [2020] 2 MLJ 721 before analysing its subsequent judgment in *Spicon*

4 S.2(1) of the LAA 1960 defines "Land Administrator" as any Land Administrator or other officer appointed under the State land law and includes an Assistant Land Administrator.

5 S.37(1) LAA 1960

6 Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v Orchard Circle Sdn Bhd & Ors and other appeals [2018] 2 MLJ 243

7 Lee Ah Mok & Ors v Pentadbir Tanah Daerah Seremban & Anor [2009] 4 CLJ 611

8 S. 37(1) LAA 1960; Singapore Para Rubber Estate Ltd v Pentadbir Tanah Daerah, Daerah Rembau, Negeri Sembilan [2009] 1 CLJ 13; Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin [2018] 3 MLJ 354

9 S.38(1) LAA 1960

Products Sdn Bhd v. Tenaga Nasional Bhd & Anor [2022] 4 CLJ 195.

Briefly, in *TNB v Unggul Tangkas*, the Respondent's lands were acquired for the Appellant, TNB, pursuant to Section 3(1)(a) of the LAA 1960. The Respondent was awarded RM12,593,196 as compensation which was payable by the Appellant. Aggrieved with the quantum of compensation, the Respondent filed an objection in Form N to the Land Administrator and initiated two land reference proceedings before the High Court. As the paymaster, the Appellant/TNB filed applications under O 15 r 6 of the Rules of Court 2012 for leave to intervene in the land reference proceedings and to file the valuer's report and the relevant rebuttal reports.

The High Court allowed the Appellant's application and so TNB was added as intervener/second respondent in the land reference proceedings but precluded the Appellant from filing its valuation and rebuttal reports. Aggrieved, both parties appealed against the decision of the High Court. Upon hearing the appeals, the Court of Appeal held that the Appellant should not be allowed to intervene in the first place and thus the issue of adducing the valuation and the rebuttal reports shall necessarily fail.

On further appeal by the Appellant, the Federal Court in *Unggul Tangkas* was tasked to determine '*whether the filing of an objection vide Form N pursuant to s 37 of the Land Acquisition Act 1960 is the only mode available for a paymaster to be a party in a land reference proceeding before the High Court?*'. In answering the question in the affirmative, the Federal Court dismissed TNB's appeal and application to intervene under the Rules of Court 2012. The Federal Court, in expounding upon such approach, cited with approval the judgment by His Lordship KN Segara JCA in *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v Inch Kenneth Kajang Rubber Ltd & Anor* [2011] 4 MLJ 403 which held:

> *"In the overall scheme and context of the Land Acquisition Act, any application by the appellant under O 15 r6(2)(b) RHC 1980 to be made a party, is inappropriate. It would amount to an abuse of the process of the court and an attempt to circumvent the clear and unambiguous provisions of the LAA 1960 as regards to the manner and circumstances in which 'persons interested' under the LAA 1960 are to participate in proceedings either before the land administrator at an enquiry or, in court, upon a reference by the land administrator upon any objection to an award.* ***Filling of Form N is the most appropriate and the only mode available under the LAA 1960 to any person interested under the LAA 1960 to become a party in a Land Reference at the High Court relating to the amount of compensation."***[10]

The Federal Court in *Unggul Tangkas* further held that TNB, in its capacity as paymaster, has no legal interest in the land reference proceedings and its interest, at best, was only pecuniary in nature:

> *"[37] It is our judgment that TNB had no legal interest in the land reference proceedings. TNB being the paymaster, it had at the highest only a pecuniary interest (see the case of Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63; [1992] 2 CLJ 1153; [1992] 1 CLJ Rep 344). The evidence in the present case showed that TNB was not aggrieved by the award but was*

10 Tenaga Nasional Bhd v Unggul Tangkas Sdn Bhd & Anor and other appeals [2020] 2 MLJ 721, para 31 *merely apprehensive that the outcome of the land reference proceedings in the High Court may adversely affect its pocket. At any rate, TNB's rights on whose behalf acquisition proceedings were instituted (see s 43 of the Act) and whose interests must be considered by the court whether they have objected or not (see s 44(2) of the Act) without the need for intervention."*

For the reasons discussed above, the Federal Court dismissed TNB's appeal and application to intervene under the Rules of Court 2012.

Spicon Products v TNB

Few years after the pronouncement in *Unggul Tangkas,* the Federal Court revisited this area of the law in *Spicon Products*, except that it was in the context of a landowner who has accepted a Land Administrator's award without any objection:

> "[2] *The single poser in this appeal is* ***whether a landowner who has, without any objection, accepted an award of compensation made by the land administrator is nevertheless entitled to intervene and participate in land reference proceedings initiated by another interested party, namely the 'paymaster' who had objected to that award of the land administrator.*** *This issue is of utmost importance and relevance to the proper conduct of land reference proceedings.."*

In *Spicon Products*, the Appellant was the registered proprietor of the land acquired for the first Respondent (TNB). Pursuant to an enquiry conducted under Section 12 of the LAA 1960, the Land Administrator awarded RM467,154.22 which the Appellant accepted without any objection and therefore did not file any Form N. Per contra, TNB took the view that the award was excessive and proceeded to lodge a formal objection via Form N to object to the award.

At the land reference proceedings, TNB and the Land Administrator were cited as the applicant and respondent respectively. Since the Appellant did not file Form N, the Appellant was not made party to the proceeding. As such, the Appellant invoked O 15 r 6 of the Rules of Court 2012 to intervene in the land reference on the basis that as the landowner, the Appellant would be prejudiced by any reduction to the compensation awarded. Unsurprisingly, TNB opposed the intervener application on the basis that:

(a) The application is an abuse of the process prescribed under the LAA 1960;

(b) The filing of Form N was a compulsory statutory Form and the only mode available under the LAA 1960 for any interested person to be a party in the land reference;

(c) The Appellant's non-filing of Form N was fatal and as such, the Appellant is precluded from partaking in the land reference proceedings;

(d) Any interest of the Appellant was sufficiently safeguarded by the Land Administrator, who is the Respondent in the land reference proceedings; and

(e) It was for the LA to defend the award.

The High Court allowed the Appellant's intervener application and held that Sections 37(1) and 38(1) of the LAA 1960 did not compel the Appellant to file Form N where it had no objections to the award. The Learned High Court Judge also did not find the non-filing of Form N as fatal since it was not the Appellant who was dissatisfied with the award. In that same vein, the High Court noted that only a party objecting to an award is required to file Form N. As such, the High Court ruled that the Appellant ought to be allowed to intervene in order to protect its interests which may be adversely affected.

Aggrieved, TNB filed an appeal. The Court of Appeal agreed with TNB and held that the application to intervene pursuant to O. 15 r. 6(2)(b) of the Rules of Court 2012 was *"in the overall scheme and context of the Land Acquisition Act, to be inappropriate and would amount to an abuse of the court's process"* as *"it circumvents the provisions of the Land Acquisition Act 1960".* As such, O. 15 r. 6(2)(b) of the Rules of Court 2012 is not applicable in land reference proceedings.

Further, the Court of Appeal held that the lodging of Form N is essential for a party to take part in a land reference proceeding as it is the most appropriate and the only mode available under the LAA 1960. As such, the Court of Appeal agreed with TNB that resorting to O. 15 r. 6(2)(b) of the Rules of the High Court 1980 was an abuse of process and that the Appellant's interests are sufficiently safeguarded by the land administrator.

On further appeal, the Federal Court, in ruling in favour of the Appellant, held the following:

(a) The Appellant is not entitled to lodge any objection as it does not fulfil the requirements of Section 37(1) of the LAA 1960 for lodging an objection. This is premised on the facts that the Appellant had accepted the award without any objection and was satisfied with the amount of compensation awarded;

(b) Section 45(2) of the LAA 1960 which states "(2) Save in so far as they may be inconsistent with anything contained in this Act, the law for the time being in force relating to civil procedure shall apply to all proceedings before the Court under this Act" allows for the importation of the provisions in the Rules of Court 2012 as long as those rules are not inconsistent with the LAA 1960;

(c) In the factual matrix of the present case, the application of the Rules of Court 2012 is not at all inconsistent with the LAA 1960;

(d) The landowner's appearance and participation at the reference proceedings are consistent with its rights and interests under Article 13 of the Federal Constitution;

(e) The participation of the Appellant at the reference proceeding is consonant with the rules of natural justice and will assist the court in its determination of the objection lodged; and

(f) None of the provisions within the LAA 1960, whether expressed or by necessary inference, provide for the exclusion of a landowner who has accepted the award without objection to participate at any land reference proceedings.

Consequently, the Federal Court held that a landowner whose land stands acquired and whose interests are undeniably affected by an objection referred to the High Court, is indeed entitled to invoke O. 15 r. 6 of the Rules of Court 2012. In fortifying its position, the Federal Court examined its previous judgment in Unggul Tangkas and held:

> *"[111] For the same reasons that we have already discussed,* ***the interests of such a person interested (that is, the paymaster)****, if not already notified by the court under s. 43 of the Act 486 to attend, surely* ***will be affected one way or another in the reference proceedings*** *in which case,* ***such a person is indeed entitled to attend and participate through the mechanics of the Rules of Court 2012. If a paymaster is entitled to so attend, more so a landowner who has legal and pecuniary interests under art. 13 of the Federal Constitution. In our view, since the interests of all persons interested must be considered by the court when determining the objection or adequacy of compensation, s. 45(2) of the Act 486 must be seen as an enabling provision to ensure that the attendance and participation of all persons interested may be facilitated, and in the present appeal, through O.15 r. 6 of the Rules of Court 2012.****"*

Although it is noted that the Federal Court in *Spicon Products* did not expressly overrule its judgment in Unggul Tangkas, its pronouncement exemplifies the judiciary's essential role in ensuring the significance of adequate compensation relating to compulsory acquisitions of land.

Conclusion

The Federal Court's judgment in *Spicon Products* reflect a growing judicial consciousness in Malaysia toward safeguarding constitutional rights in the face of rigid statutory frameworks. While the LAA 1960 provides the procedural machinery for compulsory land acquisition, it is the courts that serve as the ultimate guardians of Article 13 of the Federal Constitution.

Spicon Products is a persuasive authority that will undoubtedly guide future disputes involving acquisition and compensation. In this regard, the Court of Appeal in *Tenaga Nasional Bhd v Sime Darby Plantation Bhd & Anor (Petronas Gas Bhd, proposed intervener)*,[11] adopted the liberal interpretation by the Federal Court in Spicon Products and allowed the intervener application by the paymaster in the land reference proceeding as it would also be affected if it was denied hearing in those proceedings. The evolving jurisprudence in this area provides a roadmap for reconciling the need for compulsory acquisition with the constitutional imperative to provide adequate and just compensation.

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11 [2024] 6 MLJ 460

GUIDELINE SHIFT: NAVIGATING MALAYSIA'S UPDATED TRANSFER PRICING LANDSCAPE

by Amira Ahmad Azhar & Dharshini Sharma

The transfer pricing ("**TP**") framework in Malaysia has undergone significant reform with the issuance of the Malaysia Transfer Pricing Guidelines 2024 ("**TP Guidelines 2024**"), which apply from Year of Assessment ("**YA**") 2023 onwards. These developments are accompanied by key legislative changes, including the amendment to Section 140A of the Income Tax Act 1967 ("**ITA**"), the introduction of Section 113B of the ITA, and the revised Income Tax (Transfer Pricing) Rules 2023 ("**TP Rules 2023**").

Scope And Application

I. Scope and Application for the Preparation of Contemporaneous Transfer Pricing Documentation

Paragraph 1.3 of the TP Guidelines 2024 provides that contemporaneous transfer pricing documentation ("**CTPD**") must be finalised and dated before the submission of the taxpayer's income tax return for the year of assessment in which a controlled transaction takes place. The Guidelines introduce three categories of CTPD preparation: (i) Full CTPD, (ii) Exemption from CTPD, and (iii) Minimum CTPD.

With respect to full CTPD, the TP Guidelines 2024 revised the thresholds and conditions for mandatory full CTPD preparation:

TP Guidelines 2012 (YA 2022 & Prior YA)	**TP Guidelines 2024 (YA2023 & Onwards)**
Full CTPD was mandated under the following conditions (Paragraph 1.3.1 of the TP Guidelines 2012): • Turnover surpasses RM25 million and related party transactions exceeding RM15 million; or • Financial assistance exceeding RM50 million.	Full CTPD is mandated on the following conditions (Paragraph 1.7 of the TP Guidelines 2024): • Turnover surpasses RM30 million and cross-border related party transactions reach RM10 million annually; or • Receives or provides controlled financial assistance exceeding RM50 million annually.

Permanent establishments will be treated as a (hypothetically) distinct and separate enterprise from its head office or other related branches (Paragraph 1.3.4 of the TP Guidelines 2012).	Permanent establishments are now explicitly required to prepare full CTPD separately from their head offices or related branches, regardless of whether financial thresholds are met (Paragraph 1.4 of the TP Guidelines 2024).

The interpretation of "cross-border related party transactions" remains contentious. Taxpayers generally argue that interest income and expenses should be included, while fixed asset transactions and dividends should be excluded. In contrast, the Inland Revenue Board of Malaysia ("**IRB**") takes the opposite view, excluding interest income and expenses while including dividends and fixed asset transactions.

Secondly, with regard to exemptions from preparing TPD, the TP Guidelines 2024 expand the categories of exemption while concurrently imposing more stringent requirements:

TP Guidelines 2012 (YA 2022 & Prior YA)	TP Guidelines 2024 (YA 2023 & Onwards)
• Individuals not carrying on a business (paragraph 1.3.1 of the TP Guidelines 2012)	• Individuals not carrying on a business (paragraph 1.5(a) of the TP Guidelines 2024); • Individuals carrying on a business (including partnerships) engaging solely in domestic controlled transactions (paragraph 1.5(b) of the TP Guidelines 2024); • Persons entering into controlled transactions amounting to not more than RM1 million annually (paragraph 1.5(c) of the TP Guidelines 2024); or • Individuals involved exclusively in domestic controlled transactions where neither party receives tax incentives; both parties are subject to the same headline tax rate; and neither party has incurred losses for two consecutive years preceding the transaction (paragraph 1.5(d) of the TP Guidelines 2024).

Notably, the IRB maintains that the conditions set out under paragraph 1.5(d) must be satisfied collectively in order to qualify for an exemption. However, an exemption from preparing CTPD does not absolve taxpayers from the obligation to demonstrate compliance. Taxpayers are still required to maintain sufficient documentation to substantiate adherence to the arm's length principle ("**ALP**").

Although failure to submit the analysis within the prescribed timeline does not attract penalties under Section 113B of the ITA, a surcharge may still be imposed under Section 140A(3C).

Thirdly, minimum CTPD as provided under paragraph 11.12 of the TP Guidelines 2024. Taxpayers who do not qualify for an exemption and are not required to prepare a full CTPD may opt to prepare either a full or minimum CTPD. The minimum documentation must include the worldwide group structure, organisational structure, details of controlled transactions and pricing policy. Despite its simplified format, minimum CTPD must still demonstrate compliance with the ALP. Financial transactions, previously excluded from minimum documentation, are now explicitly required to be documented under the minimum CPTD. While individuals not carrying on a business are exempt from CTPD obligations, the Guidelines remain silent on whether dormant companies are similarly excluded.

Supplementary Factors: Tax Incentives and Headline Tax Rates

The TP Guidelines 2024 expressly disqualify taxpayers from exemption eligibility if they benefit from tax incentives, including approvals under Section 127 of the ITA or incentives granted under the Promotion of Investments Act 1986, such as Pioneer Status or Investment Tax Allowance. Mutual exclusivity applies throughout the exempt period, specifically in the year of assessment in which claims are made either under Schedule 7A (Reinvestment Allowance) or Schedule 7B (Investment Allowance for the service sector), both of which are applicable only to companies.

Remarkably, the exemption is denied even if taxpayers do not utilise an approved incentive. A taxpayer claiming for RA during the relevant year is considered to enjoy an incentive and therefore is not exempt from preparing CTPD.

Additionally, the Guidelines require that both parties to a domestic controlled transaction be subject to the same headline tax rate, thereby excluding those benefiting from preferential rates under incentive schemes. For example, under Section 6(1)(m) and (n) of the ITA, a capped rate of 20% may apply to qualifying activities approved by the Minister, as prescribed in Part XVII (for businesses) and Part XVIII (for non-citizen employees) of Schedule 1. Similarly, SMEs taxed under paragraphs 2A and 2D of Part I of Schedule 1 and Labuan entities governed by the LBATA, are considered to operate under distinct headline tax regimes, unless the Labuan entity irrevocably elects to be taxed under the ITA via Section 3A.

II. Controlled Transaction

Initially governed by Section 139 of the ITA, "control" was traditionally based on clear ownership or entitlement thresholds, such as holding the majority of share capital, voting power, or rights in the event of distribution or winding up.

However, since 1.1.2019, Section 140A(5A) further extends this definition by providing that a person holding at least 20% but less than 50% of a company's share capital is now considered to exert control if any of the following conditions

are satisfied: (a) the person depends on proprietary assets by another party; (b) its pricing or business decisions are influenced by the other party; or (c) one or more directors or members of the board of director are appointed by the other party. Accordingly, Section 139 must now be read together with Section 140A(5A) when assessing whether a transaction qualifies as a controlled transaction.
The Arm's Length Principle

I. Arm's Length Range ("ALR")

Under Rule 13(5) of the TP Rules 2023, the arm's length range is defined as the interquartile range, specifically between the 37.5th and 62.5th percentiles of a data set. Any result falling within this range is acceptable to the Director General of Inland Revenue ("**DGIR**"). However, if comparability defects are identified, such as where relevant economic differences cannot be quantified or adjusted, the DGIR may adjust the transfer price to the median or a point above it within the arm's length range.

II. Re-Characterisation of a Transaction

Under Rule 8 of the TP Rules 2012, which is in pari materia to Sections 140A(3A) and 140A(3B) of the ITA, the DGIR is empowered to recharacterise or disregard the form of a transaction. This power may be exercised where: (i) the economic substance of a transaction differs from its legal form; or (ii) the transaction, although aligned in form and substance, differs from arrangements that would have been adopted by independent parties acting in a commercially rational manner. Where such conditions are met, the DGIR may disregard the actual structure and substitute it with one that better reflects economic reality.

This substance over form doctrine recognises that associated persons often enter into arrangements that are not typical of third-party transactions. These arrangements may include relaxed or absent contractual terms, flexibility in altering contracts and transactions driven by group-level strategies. For instance, in example 2.12, a Malaysian entity secured an intra-group loan without providing security or covenants, resulting in a high interest rate. The DGIR determined that no independent lender would extend financing under such terms, concluding that the loan was not structured at arm's length. Accordingly, the transaction was disregarded under Section 140A(3A)(b) and the interest expense was disallowed.

Determination Of The Net Profit

According to paragraph 3.42 of the TP Guidelines 2024, when computing profit-level indicators such as operating margins, it is essential to exclude non-operating items that do not reflect business operations. As outlined in paragraph 3.45 of the TP Guidelines 2024, these typically include interest income, interest expenses, taxes and extraordinary items. While audited financial statements report operating profit as a subtotal, finance costs or income below the line may include trade and non-trade elements. When the financial statements separate operating interest income or expenses from non-operating ones, and the taxpayer can substantiate that such items are trade in nature, they may be included in the computation of the net profit indicator. Proper documentation is essential to justify this inclusion during an audit.

Comparability Analysis

I. Comparable Period

The arm's length price must be determined by comparing controlled transactions with uncontrolled transactions conducted within the same basis year. This requirement is grounded in the principle that transfer pricing must be applied contemporaneously and assessed on a year-by-year basis. A contemporaneous comparison provides the most reliable benchmark as it reflects similar economic and market conditions.

To address practical challenges in benchmarking, paragraph 4.7 of the TP Guidelines 2024 allows comparison with companies whose financial year ends ("**FYE**") fall within a 6-month window before or after the tested party's FYE. Further, as illustrated in Example 4.2 of the said Guideline, comparables with FYEs up to 7 months before or 5 months after may also be used, provided the taxpayer can demonstrate that the periods reflect similar economic environments relevant to the controlled transaction.

II. Multiple Year Data

Under paragraph 7(6)(b) of the TP Rules 2023, taxpayers are prohibited from using multi-year averages to determine the arm's length price. However, multi-year data may still be referenced to identify trends. Paragraph 4.10 of the TP Guidelines 2024 requires that the most current, reliable data be used at the time of documentation. If updated during audit, such revisions will not affect the contemporaneity of the original CTPD and do not attract penalties under Section 113B of the ITA.

III. Losses

Where a tested party incurs losses, paragraph 4.10 of the TP Guidelines 2024 requires the taxpayer to demonstrate that such losses are commercially rational. This includes providing evidence of external non-transfer pricing factors such as economic downturns, strategic missteps, or natural disasters to justify the losses in the context of the arm's length principle.

Intragroup Services

Paragraph 6.1 of the TP Guidelines 2024 defines Intragroup Services ("**IGS**") as services provided within an MNE group for the benefit of other group members, including management, administrative, technical, marketing, and procurement functions.

I. Payment for IGS

Under rules 9(1) and 9(2) of the TP Rules 2023, IGS payments are deductible only if the taxpayer can prove the following conditions:

- **Service Rendered:** The taxpayer must prove the service was rendered. If not, the payment is disallowed under Section 39 of the ITA.
- **Economic Benefit or Commercial Value:** If the service does not confer an economic benefit or commercial value to the recipient, it will be disregarded under Section 140A(3A) of the ITA.
- **Arm's Length Charge:** If the charge is not at arm's length, the DGIR may adjust under Section 140A(3) to reflect arm's length pricing.

Where a transaction is disregarded under Section 140A(3A), the DGIR is obliged under Section 140A(3B) to substitute the original structure with one that reflects commercial and economic reality.

II. Simplified Approach for Low Value Adding Intragroup Services ("LVAS")

For qualifying LVAS, the IRB permits a simplified mark-up of 5% on costs, provided the services involve no significant risks, do not use or develop valuable intangibles, and are not core profit-generating activities. Pass-through costs must be excluded from the cost base unless it can be reliably demonstrated that comparable margins similarly exclude them.

Conclusion

The TP Guidelines 2024 represent a significant evolution in Malaysia's transfer pricing framework, offering enhanced clarity and practical guidance for taxpayers. With the introduction of expanded thresholds, exemptions and the use of LVAs, the Guidelines aim to streamline the compliance process and reduce the burden on business. However, it is crucial for taxpayers to adhere to these requirements, as failure to provide contemporaneous transfer pricing documentation within the specified timeframe can result in severe penalties, including fines or imprisonment under Section 113B of the ITA. As Malaysia's transfer pricing landscape continues to evolve, businesses must remain vigilant in ensuing compliance to mitigate risks and avoid penalties.

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REINFORCING CORPORATE RESTRUCTURING: COURT OF APPEAL'S LANDMARK RULING ON CONSECUTIVE RESTRAINING ORDERS AND COOLING-OFF PERIOD

by Bahari Yeow & Amberly Wong Yenn Yie

The Companies Act 2016 provides for corporate rescue mechanisms for companies in financial distress. One of such mechanisms is through a statutory scheme of arrangement under Section 366. This provision empowers the Court to order a compromise or arrangement between a company and its creditors or members. To facilitate the restructuring process, Section 368 further allows the Court to grant a restraining order, offering temporary protection from creditor actions.

Recently, the Companies (Amendment) Act 2024 introduced Section 368(3B) in the Malaysia's corporate rescue framework to strike a balance between the competing interest of various stakeholders. This new provision imposes a 12-month cooling-off period, during which a company is prohibited from applying for multiple restraining orders, thereby preventing potential abuse of the court process.

In the case of *Martin Bencher (Malaysia) Sdn Bhd v Sapura Energy Berhad & Ors* [2025] CLJU 411, the Court of Appeal addressed issues surrounding the use of consecutive restraining orders, the inclusion of creditor debts in proposed schemes of arrangement, and the interpretation of the newly implemented 12-month cooling-off period. The Court's decision provided important clarity on these legal issues, reinforcing the integrity of Malaysia's corporate restructuring framework and ensuring that it operates in accordance with the legislative intent to assist companies facing genuine financial distress.

Key Background

The appellant, Martin Bencher (Malaysia) Sdn Bhd, initiated two legal proceedings in 2021 against the first respondent, Sapura Energy Berhad, and its subsidiaries, Sapura Fabrication Sdn Bhd and Sapura Offshore Sdn Bhd, for unpaid invoices totalling RM409,242.37 in Suit No. BB-B52-15-10/2021 (**"Suit 15"**) and RM1,140,722.60 in Suit No. BA-22NCVC-482-12/2021 (**"Suit 482"**). In response, the appellant and respondents entered into a Settlement Agreement on 23 February 2022, consolidating the outstanding debts into a sum payable in instalments. However, the respondents defaulted on the agreed payments, leaving part of the settlement sum unpaid.

Facing financial difficulties, the Sapura Energy Group, along with 20 subsidiaries of the first respondent (**"the Group companies"**), sought temporary relief from ongoing legal proceedings. This allowed them to develop a scheme of arrangement with creditors, pursuant to Sections 366 and 368 of the Companies Act 2016 (the **"Proposed Scheme"**). On 10 March 2022, the Group companies obtained ex-parte orders (**"OS 148")** to convene creditor meetings within a 12-month period and to restrain legal actions for three months. On 8 June 2022, the restraining order was extended for an additional 9 months, lasting until 10 March 2023. The Group companies set 31 January 2022 as the cut-off date for determining which debts would be included in the Proposed Scheme.

As the restraining order under OS 148 was expiring, the Group companies filed a fresh set of applications in a new proceeding (**"OS 121"**), seeking fresh restraining orders. The Court granted the request, including a three-month restraining order, which was later extended by an additional 9 months.

The appellant sought to intervene in the proceedings and argued that: (i) the filing of OS 121 amounted to an abuse of process, and (ii) the appellant's debt, which arose from the Settlement Agreement after the 31 January 2022 cut-off date, should be excluded from the Proposed Scheme.

The High Court's Decision

The High Court dismissed the appellant's application, ruling that the restraining order under OS 148 had expired and was replaced by the orders granted under OS 121. Therefore, the filing of OS 121 was not considered an abuse of process.
Furthermore, the High Court rejected the appellant's argument that its debt was outside the jurisdiction of the Proposed Scheme. Despite the Settlement Agreement being signed after the cut-off date, the appellant had voluntarily submitted to the jurisdiction of the Proposed Scheme by lodging proof of debts. Dissatisfied with the High Court's decision, the appellant appealed the ruling.

The Court of Appeal's Findings

The Court of Appeal dismissed the appeal and upheld the High Court's decision. The Court of Appeal's findings are as follows:

I. No Abuse of Process or Multiplicity of Proceedings

A key issue on appeal was whether the filing of the fresh OS 121 application, immediately after the expiry of OS 148, constituted an abuse of process or a multiplicity of proceedings. The Court of Appeal found that there was no overlap between the two applications—OS 148 had expired on 10 March 2023 and OS 121 was filed the following day, on 11 March 2023.

The Court clarified that under Section 366 of the Companies Act 2016, there is no restriction preventing the Court from granting a fresh convening order after an earlier order has ceased to have effect following the expiry of the 12-month time limit imposed by the Court when granting leave. OS 121 was not an extension of OS 148, but a fresh set of orders altogether. As such, the filing of OS 121 was not an abuse of process but a legitimate exercise of the company's rights under the law, aimed at facilitating its financial restructuring and survival.

II. Interpretation of the Cooling-Off Period

The Court of Appeal provided important clarification on the operation of the 12-month cooling-off period under Section 368(3B) of the Companies Act 2016, introduced by the Companies (Amendment) Act 2024. This provision prohibits a company from obtaining a restraining order if a previous restraining order had been obtained by the company or its related company within the preceding period of 12 months.

The Court held that this cooling-off period applies only to new restraining orders and not to extensions of existing orders. In this case, although the restraining order in OS 121 was granted immediately after the earlier order in OS 148 expired, the 12 month period had already lapsed. As such, there was no breach of Section 368(3B). The cooling-off period is measured from the date the initial restraining order is granted, not from the date of any subsequent extension.

The Court of Appeal further emphasised that the introduction of a specific provision on the cooling-off provision is designed to discourage repetitive and repeat filings of applications for restraining orders which would effectively extend the protection period beyond 12 months. However, the Court held that the way the cooling off provision is to be applied shows that the Legislature intended that not every repeat restraining orders cannot be justified. The provision continues to serve the broader objective of facilitating court-sanctioned restructuring schemes where the company's proposal merits genuine consideration and approval by its creditors.

III. Inclusion of the Appellant's Debt in the Proposed Scheme

The Court of Appeal also considered the issue on whether the appellant's debt, which arose from a Settlement Agreement signed after the 31 January 2022 cut-off date, should be excluded from the Proposed Scheme. The appellant argued that its debt should be excluded because the Settlement Agreement was executed after the cut-off date.

The Court ruled that the appellant's debt was validly included in the Proposed Scheme. By filing its proof of debt for debts incurred before the cut-off date, the appellant voluntarily submitted to the jurisdiction of the Proposed Scheme, establishing itself as a scheme creditor. The Court found that the appellant accepted the terms of the Proposed Scheme and was bound by its adjudication process when it participated in the proof of debt exercise. As such, despite the Settlement Agreement being signed after the cut-off date, the debt was rightly included in the Proposed Scheme as it arose from prior obligations.

IV. Broader Legislative Purpose and Comparative Jurisprudence

The Court of Appeal's decision reinforced the liberal interpretation of the provisions governing schemes of arrangement under the Companies Act 2016, specifically Sections 366 and 368. This approach aligns with the broader legislative intent to provide support to distressed companies, enabling them to restructure their financial affairs and avoid liquidation, rather than prematurely compelling them into insolvency.

In support of this reasoning, the Court of Appeal considered several key international cases from other common law jurisdictions that emphasise a purposive and flexible approach to corporate restructuring. For example, in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29, the Singapore Court of Appeal ruled that despite the applicant's three previous failed restructuring attempts, its fourth application, based on a new scheme, did not amount to an abuse of process.

The Singapore Court found that there had been genuine changes in the restructuring efforts. Similarly, in *Century Services Inc v. Canada (Attorney General)* [2010] 3 SCR 379, the Supreme Court of Canada highlighted that the court's discretion in overseeing reorganisation should be interpreted in a purposive and liberal manner, acknowledging the remedial nature of insolvency laws.

Commentary and Conclusion

The Court of Appeal's decision in *Martin Bencher (Malaysia) Sdn Bhd v Sapura Energy Berhad & Ors* [2025] CLJU 411 represents a pivotal development in Malaysia's corporate restructuring framework. The ruling clarifies the application of the cooling-off period under Section 368(3B) of the Companies Act 2016, particularly with respect to granting consecutive restraining orders. The Court's careful balancing of the need to prevent abuse of process with its overarching goal of facilitating genuine corporate rehabilitation ensures a robust framework for distressed companies to pursue recovery.

The Court of Appeal's decision also introduced critical flexibility by affirming that a fresh application for restraining orders may be filed even after a prior order has expired, provided statutory requirements are met. This distinction between new applications and extensions of existing restraining orders facilitates the restructuring process, while maintaining judicial oversight to prevent misuse.

Furthermore, the Court of Appeal reinforced that creditors who engage in the scheme process, such as by submitting proofs of debt, are bound by the terms of the scheme, regardless of when formal agreements are executed. This promotes orderly restructuring and creditor participation, fostering an environment where creditors are encouraged to cooperate in the restructuring process and support the company's recovery.

Moving forward, the *Martin Bencher* decision will likely serve as a key precedence for future case law, particularly in interpreting corporate rescue mechanisms under the Companies Act 2016. This ruling may influence any future legislative reforms in Malaysia, refining the balance between supporting corporate rehabilitation and protecting creditor rights. As the legal landscape evolves, the decision highlights the importance of ensuring a fair and transparent process that provides genuine opportunities for companies to recover from financial distress.

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A PRACTICAL GUIDE TO DRAFTING ARBITRATION AGREEMENTS

by Vinayak Sri Ram & Roshanth Aaron James

Arbitration agreements often play second fiddle to "dollar and cents" terms in a commercial contract. Accordingly, businesses are often overly concerned with the mere "validity" of arbitration agreements, rather than their effectiveness. An arbitration agreement's validity should not be conflated with its efficacy. This misconception overlooks the reality that arbitration agreements are readily upheld in Malaysia, even with minimal procedural compliance.

Under Malaysia's Arbitration Act 2005 ("**AA 2005**"), the only formal requirement of a valid arbitration agreement is that it is in writing (Section 9(3) of the AA 2005). In line with the AA 2005's pro-arbitration spirit, the Court of Appeal in Setia Awan Management Sdn Bhd v SPNB Aspirasi Sdn Bhd [2025] MLJU 1264 recently observed that:

> *"[42] There is a world-wide trend, especially with countries that subscribe to the UNCITRAL Model Law on International Arbitration, of giving every encouragement towards saving and sustaining an arbitration clause even though the words employed to evince an intention to arbitrate are less than elegant and or even embarrassingly inconsistent.* ***Even an economical one word, reference to "arbitration" may suffice."***

Ambiguous arbitration agreements undermine the very purpose of opting for arbitration and often result in procedural deadlock or costly jurisdictional challenges. While such agreements may be technically valid, they frequently result in avoidable expense and delay. It must be remembered that preliminary challenges to an arbitration do not resolve the underlying dispute between parties. In the best-case scenario, they merely kick-start the substantive arbitration.

In light of the foregoing, this article seeks to shift the focus from the mere validity of arbitration agreements towards their efficacy by outlining key practical considerations for businesses to consider when drafting their arbitration clauses.

Consideration: What do you want to arbitrate?

Most boilerplate arbitration agreements are phrased broadly to capture "any disputes" "arising from" or "relating to" the subject agreement. In lay-person terms, these may be described as "catch-all arbitration agreements". However, "catch-all arbitration agreements" are not one-size-fits-all solutions.

The commercial reality is that parties may not wish for every dispute to be resolved via arbitration or, indeed, that not all disputes are suitable for arbitration. As such, parties are permitted to define the precise scope of their arbitration agreement (section 9(1) of the AA 2005). In determining the optimal scope of an arbitration agreement, it is important to consider:

- the nature of the agreement;
- the relationship between the parties;
- any potential related parties; and
- the enforceability of any potential arbitration award against the related parties.

The significance of these factors can be best illustrated via the following examples:

- In special purpose vehicle ("SPV") or joint venture ("JV") agreements, it is critical to precisely define the scope of arbitration. Broad, catch-all arbitration clauses may inadvertently cover internal governance or board disputes. Should an arbitration agreement encompass such issues, it may render the SPV or JV effectively paralysed.

- In transactions structured around a master agreement and related subsidiary agreements—such as licensing, distribution, or supply chain contracts—parties should expressly incorporate the master agreement's arbitration clause into all subsidiary agreements. Failure to do so may exclude certain counterparties from being named in arbitrations. A similar circumstance arose in *ST Group Co Ltd & Ors v Sanum Investments & anor appeal* [2020] 1 SLR 1, wherein the Singapore Court of Appeal confirmed that where a party is absent from the master agreement, they will not be bound the master agreement's arbitration clause, even if they are a party to subsequent subsidiary agreements.

Consideration: When do you want to arbitrate?

It is a common misconception that all arbitrable disputes must be arbitrated immediately. Where parties seek to preserve the commercial relationship between them, it is common for parties to implement a "multi-tier dispute resolution clause". Multi-tier dispute resolution clauses are contractual provisions that outline a structured sequence of dispute resolution steps that parties must follow before commencing formal proceedings, such as arbitration. In *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] 6 MLJ 773, the Federal Court upheld the validity of one such multi-tier dispute resolution clause, stating:

> *"In the final analysis, we would go as far to state that the defendant in this case is not in a position to resile from the terms inserted in the agreement which had imposed obligations on it. To allow it to do so would be tantamount to allowing a party in breach to take advantage of its own wrong. Parties*

must be held to their bargain. In our instant case, the decision of the courts below were based upon a consideration of the dispute resolution process in cll 16 and 17 of the agreement which required an initial reference to the architect/consultant for a decision and if no decision was made by him or if either party was aggrieved by the decision, it may then refer the dispute to arbitration."

What are some commercially viable "first tiers" for parties to consider? Reported case law has provided some helpful suggestions, such as:

- an initial reference to the senior management of the respective companies [*United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177];
- an initial reference of the dispute to an expert [*Juara Serata*, above]; and
- good faith negotiations between parties [*Godell Parking Sdn Bhd v Majlis Bandaraya Petaling Jaya* [2020] 6 MLJ 43].

Consideration: Where should the arbitration be seated?

The seat of an arbitration is often overlooked as an administrative formality. However, the seat of an arbitration is determinative of the applicable legal procedure relating to the arbitration, including the relevant statutory regime, the extent of court involvement and the enforceability of arbitration awards. Different seats give rise to different rights for the parties involved.

Thus, when contemplating the seat of an arbitration, it is material to consider the envisioned resolution timeline of the dispute, as this may differ greatly from jurisdiction to jurisdiction. For instance, English law (Section 69 of the Arbitration Act 1996) permits pre-award appeals on questions of law—something not available under Malaysian law, which only allows post-award challenges under Section 37 of the AA 2005. This difference may materially affect the timeline and cost of the proceedings.

Given its significance to an arbitration, there are a multitude of factors that parties ought to consider when determining a seat. These include:

- whether the seat has a pro-arbitration legal system;
- whether the seat has an independent, competent, and efficient judiciary which respects the arbitration process;
- whether the seat has a sufficient connection with the parties against whom enforcement will be sought (i.e. whether the parties have assets in the jurisdiction of the seat);
- whether there are sufficient facilities at the seat of the arbitration; and

- the legal and administrative costs in the seat of the arbitration.

In that regard, Kuala Lumpur is fortunate that it meets all of the above considerations, including having clear and effective modern international arbitration law, an independent, expert, and efficient judiciary, substantial professional expertise in international arbitration and dispute resolution, first-class facilities at, for example, the Asian International Arbitration Centre (**"AIAC"**), a very effective enforceability regime and immunity for arbitrators from civil liability.

Consideration: The law of the arbitration agreement

The law of the seat ought not to be confused with the law of an arbitration agreement. These are distinct concepts – the law of the arbitration agreement is the substantive law that governs issues relating to the validity and scope of the arbitration agreement. As such, it is good practice to state the law of the arbitration agreement. Failing to state the law of the arbitration agreement, though common, can and often does lead to costly disputes, such as in *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2021] 2 All ER 1. In Enka Insaat, the Supreme Court of England and Wales was tasked with determining the law of an arbitration agreement that, simultaneously:

- referred to Russian law as the "applicable law" of the principal contract; and
- identified London as the seat of the arbitration; but
- did not specify the law governing the arbitration agreement.

Enka Insaat was a pre-arbitration jurisdictional challenge that progressed through every level of the English judicial system before the English Supreme Court dismissed the appeal and concluded that English law would apply. While the respondent prevailed, it was to an extent a pyrrhic victory, given that the dispute may well have been prevented with a short addition to the impugned arbitration agreement.

In Malaysia, we have yet to see a similar jurisdictional challenge. Fortunately, our Parliament has taken steps to mitigate the risk of similar future challenges arising with the passing of the Arbitration (Amendment) Bill 2024 on 24 July 2024. The Arbitration (Amendment) Bill 2024 amends the Arbitration Act 2005 to the effect that where parties fail to agree on the law applicable to the arbitration agreement, the law of the arbitration agreement is the law of the seat. This prevents seemingly minor procedural hurdles from delaying arbitral relief to the parties.

Consideration: How should the arbitration proceed?

In principle, parties are at liberty to negotiate and consent to any bespoke arbitration procedure. Where this occurs, it is known as an *ad-hoc* arbitration. Whilst procedurally convenient, any oversight by legal counsel for the parties or the arbitrators themselves could result in an award being challenged.

Such a circumstance arose in *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2025] SGCA 5. In *Wan Shern*, parties agreed to resolve their construction dispute on a documents-only basis. Hua Tian had raised an unpleaded point in their written submissions which was not specifically addressed by Wan Shern. The arbitrator, in their award, noted that Wan Sern did not object or address Hua Tian's unpleaded point and awarded in favour of Hua Tian accordingly. Singapore's Court of Appeal found that the arbitrator acted in breach of natural justice by failing to appreciate that Hua Tian's point was unpleaded. *Wan Shern* adequately summarises the challenges underlying *ad hoc* arbitrations – any latent risk may be concealed until too late in the day.

In practice, it is more common for parties to refer their arbitrations to an arbitration institution. An arbitration institution will typically possess a "ready-made" set of procedural rules that, together with the legal regime of the arbitration seat, will form the legal foundation of the arbitration and, for a fee, the institution will assist in the administration of the arbitration. This is referred to as an institutional arbitration. In Malaysia, the AIAC is an obvious choice as they constantly update their rules of procedure, the AIAC Rules, to meet international standards and legal developments in arbitration.

Conclusion

To sum up, the jurisprudence of arbitration agreements represents a form of "survivorship bias". Judicial decisions tend to focus disproportionately on arbitration clauses that have "survived" judicial scrutiny. This gives the impression that such clauses are "viable". This elides the reality that such clauses were litigated in the first place due to some innate ambiguity. Arguably, this skewed impression warrants a back-to-basics approach where clarity and commercial sensibility should be prioritised over mere "validity".

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PROVING SPECIAL CIRCUMSTANCES: WHEN COVID 19 TRUMPS COLLECTIVE AGREEMENT?

by Rajeswari Karupiah & Muhamad Sharulnizam Bin Mohd Roni

Recently, our Senior Associate, Muhamad Sharulnizam Mohd Roni, appeared on behalf of the employer in a case pursuant to Section 56(1) of the Industrial Relations Act 1967 filed by a national union representing food industry employees for alleged non-compliance of the Collective Agreement.

The parties to the dispute were Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan (***the Union***) and DCH Contract Manufacturing Sdn Bhd. (***the Company***).

The main issue in the dispute concerned the Company's failure to pay a bonus to employees for the year 2020, which the Union claims is a breach of Article 26 of the 4th Collective Agreement (CA). Whilst the Collective Agreement is binding on the Company, the Company attempted to rely on Section 56(2)(c) of the Act. In the past, where the special circumstances doctrine is invoked, the Industrial Court rarely allowed the variation of the Collective Agreement on grounds of financial distress faced by the employer.

Brief Facts

The dispute arose between the Union and the Company over the non-payment of bonus for 2020, which was allegedly in breach of Article 26 of the 4th Collective Agreement (CA) (Cog. No: 060/2021 dated 3rd May 2021). The Union contended that the Company was obligated to allocate two (2) months' bonuses to all employees, subject to performance adjustments based on a bell curve.

However, due to the financial constraints brought on by the COVID-19 pandemic, the Company did not issue any bonus payments in 2020 to any of its employees. The Company relied on the fact that it faced significant financial losses that year. Despite the losses, the Company prioritized employee welfare by maintaining salaries and, most notably, avoided retrenchment, thereby, ensuring that all employees remained employed without any loss of income.

The Law

Section 56(2)(c) of the Act allows the Industrial Court to make such order as it considers desirable to vary or set aside upon special circumstances any terms of the award or collective agreement.

The law on "special circumstances", is well-established in the case of *National*

Union of Hotel, Bar and Restaurant Workers v. Seasian Hotel Sdn Bhd (Orchard Sun Penang) [1992] 3 CLJ (Rep) 115; [1992] 2 CLJ 865, the High Court quoted with approval the definition of "special circumstances" defined in Banker's Union Clarks of Hove Ltd (1978) ITR 356, wherein it was held as follows:-

> *"What then is meant by special circumstances?*
>
> *In so far as that means that the special circumstances must be relevant to the issue then that would apply equally here, vit in these circumstances, the Employment Protection Act 1975. It seems to me that the way the phrase was interpreted by Industrial Tribunal is correct. What they said in effect was this that the insolvency is on its own neither there nor here. It may be special circumstances. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If for example sudden disaster strikes a company making it necessary to close the concern then plainly that would be a matter which was capable of being special circumstances...*
>
> *In other words, to be special the event must be something out of the ordinary, something uncommon."*

In Malaysian industrial jurisprudence, the courts have traditionally exercised caution when entertaining claims under Section 56(2)(c) of the Act. Employers' attempts to invoke "special circumstances" to vary or set aside awards or collective agreements have frequently been unsuccessful. The legal position concerning "special circumstances" under Section 56(1) of the IRA was long considered well-established. This clarity stemmed from the Supreme Court's decision in ***Hyatt Kuantan Hotel, Kuantan v. National Union of Hotel, Bar and Restaurant Workers [1987] 1 ILR 557***, where it was held that financial incapacity alone does not constitute special circumstances. This principle became a cornerstone in subsequent industrial disputes, reinforcing the notion that mere financial distress was insufficient to justify the variation of awards or collective agreements.

However, the High Court's decision in ***Prestige Ceramics Sdn Bhd v. Kesatuan Pekerja Pembinaan Barangan Bukan Logam & Anor [2001] 5 CLJ 354*** introduced a shift in perspective. The court in Prestige Ceramics suggested that it is necessary to examine the underlying causes of a company's financial difficulties rather than dismissing financial incapacity outright. Notably, this decision diverged from the precedent set in ***Hyatt Kuantan Hotel*** *(supra)*, as the learned judge did not consider the Supreme Court's position or the multitude of cases that consistently rejected financial incapacity as a special circumstance.

The Prestige Ceramics judgment marks an interesting development in the interpretation of "special circumstances," potentially broadening the scope for employers to seek variations based on financial challenges, provided that the root causes are sufficiently compelling. This shift underscores the evolving landscape of industrial relations in Malaysia, hinting at a more nuanced consideration of employers' financial conditions in the context of collective agreements.

In addition, in the case of ***Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn Bhd [2017] 2 ILR 260***, the High Court held as follows:-

> *"Simply put, in the absence of "special circumstances" this court will not exercise its power to vary or set aside the articles of a Collective Agreement.*
>
> *This court is mindful that the phrase "special circumstances" must be special under the circumstances as distinguished from ordinary circumstances.* ***It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.*** *There are countless situations that could constitute special circumstances with each case depending on its own facts. And* ***the list of factors constituting special circumstances is infinite and could grow with time.****"*

Legal Arguments in the Case

In Court, the Union raised, amongst others, the following legal arguments, which can be summarized as follows:-

- **Contractual Interpretation of Article 26**
  The Union argued that Article 26 contains two limbs: (a) an obligation to allocate two (2) months bonus to all employees, and (b) discretion only regarding the amount based on performance. The Union too contended that the bell curve distribution method mentioned in Article 26 means employees might receive more or less than two (2) months based on performance, but all must at the very least, receive something, and that if bonus payment were truly discretionary, there would be no need for Article 26 in the Collective Agreement at all.

- **Timing and Retention of Article 26**
  The Union emphasized that the 4th CA was signed on 24.2.2021, after COVID-19 had emerged and after the alleged losses in 2020. Hence, the Union argued that despite knowledge of the pandemic's impact, the Company retained Article 26 without amendments to include any reservations about bonus payments. This demonstrated the Company's continuing commitment to honour the bonus provision.

- **Performance-Based Obligation**
  The Union maintained that the bonus was contractual and linked to employee performance rather than Company profits and that employees had worked as directed by the Company throughout 2020 and contributed to revenue generation of RM72 million. As such, the Union contended that the contractual obligation remains regardless of the Company's financial performance.

The Company, on the other hand, raised the following legal arguments, which include:-

- **Interpretation of "Will Allocate"**
  A significant point of contention lies in the interpretation of the phrase "The Company will allocate." The Company argued that this phrasing does not impose a mandatory obligation. Unlike stronger contractual terms such as "shall be paid" or "must be paid," the wording "will allocate" is argued to allow for flexibility, particularly in extraordinary situations. This interpretation suggests that the Company retains discretion under specific circumstances, challenging the Union's position that the provision is absolute and enforceable without exception.

- **Force Majeure and Special Circumstances**
  The Company further invoked the concept of force majeure, emphasizing that the COVID-19 pandemic constituted an unprecedented special circumstance beyond its control. It cited the Movement Control Order (MCO), a government-mandated lockdown that significantly disrupted business operations, as a clear example of force majeure. The argument leaned on case law that supports the notion that courts have the power to vary or set aside provisions of collective agreements when genuine special circumstances are demonstrated. The pandemic, coupled with regulatory restrictions, was presented as a compelling justification for the Company's inability to meet its obligations under the collective agreement.

- **Financial Hardship Defense**
  The Company further substantiated its claim of financial distress by presenting evidence of a RM942,000 loss in 2020 and a marked reduction in revenue during the pandemic period. It contended that these financial constraints were genuine and directly linked to the economic downturn caused by COVID-19. The Company too argued that despite these losses, it prioritized business continuity and employee welfare, ensuring that there were no retrenchments or salary cuts. This strategic allocation of limited financial resources was portrayed as a responsible corporate decision aimed at sustaining operations and protecting jobs.

- **Public Interest and Economic Considerations**
  Lastly, the Company invoked Section 30(4) of the Act, which mandates the Industrial Court to consider "public interest, financial implications, and the effect on the economy" when adjudicating disputes. The argument extended to broader economic concerns, suggesting that compelling employers to meet bonus payments during periods of severe financial hardship could destabilize not just the Company, but also have a domino effect on related industries and the wider economy. The Company positioned its approach as a balancing act between business sustainability and employee welfare, highlighting its commitment to protecting livelihoods while navigating financial adversity.

These four (4) pillars form the backbone of the Company's defense, reflecting a strategic reliance on contractual interpretation, force majeure principles, financial hardship evidence, and public interest considerations. Together, they illustrate the multi-faceted legal arguments that employers may employ when faced with disputes over collective agreement obligations during extraordinary times.

Legal Principles and Precedents Cited

- **Definition of Trade Dispute**
  A critical foundation in industrial relations disputes is the definition of a trade dispute. Under Section 2 of the Act, the term is given a broad interpretation, encompassing any disagreement between employers and employees concerning employment terms, conditions, or rights.

  The case of ***Dynamic Plantations Bhd v. YB Menteri Sumber Manusia & Anor [2011]*** served as a key reference, underscoring the wide ambit of what constitutes a trade dispute. In this case, the courts affirmed that disputes related to collective agreements, salary adjustments, and employment benefits fall squarely within this definition, reinforcing the notion that the threshold for establishing a trade dispute is deliberately broad to capture various employment-related conflicts.

- **Social Legislation Interpretation**
  In cases involving social legislation, courts are guided by principles of liberal interpretation. This was firmly established in ***PJD Regency Sdn. Bhd. v. Tribunal Tuntutan Pembeli Rumah & Anor [2021]***, where the Federal Court

ruled that social legislation must be interpreted in a manner that advances its purpose rather than applying rigid or restrictive readings.

The judgment emphasized that the objective of social legislation is to protect vulnerable parties (in this case, employees), and courts are required to interpret the law with a view to enhancing social justice and safeguarding the interests of workers. This principle is particularly relevant in disputes involving employee entitlements under collective agreements or statutory benefits.

- **Precedent on Financial Incapacity**

  One of the significant arguments raised by employers is financial incapacity as a justification for non-compliance with collective agreements. The case of ***Prestige Ceramics*** (supra) introduced a nuanced perspective on this defense.

  In Prestige Ceramics, the High Court acknowledged that substantial financial decline could be a relevant factor in assessing an employer's capacity to fulfill obligations under a collective agreement. This decision departed from the traditional view that financial incapacity per se is not sufficient to constitute "special circumstances" under Section 56(1) of the Act, as previously held in ***Hyatt Kuantan*** (supra). Instead, Prestige Ceramics suggested that the court should examine the causes of financial distress, marking a shift toward a more contextual understanding of economic hardship in industrial disputes.

Conclusion

As the Industrial Court rightly put it its Award No. 415 of 2025 dated 20th March 2025, that collective agreements must be interpreted with equity and good conscience, considering economic realities and public interest. Despite the hurdle, we have managed to get a favourable outcome for the Company. The Court acknowledged that the pandemic created exceptional financial hardship for the Company, including revenue loss, increased operational costs, supply chain disruptions, and significant financial losses, and the Company’s efforts to sustain employment despite its losses were taken into account.

The Court ultimately favored the Company's arguments, determining that the unprecedented nature of the COVID-19 pandemic constituted special circumstances that justified deviation from the strict letter of the Collective Agreement, particularly given the Company's efforts to maintain employment without retrenchments or pay cuts during this challenging period.

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