

# ganperspectives

A PUBLICATION OF ganpartnership

Issue 1

2021



## Our inaugural issue!

It has been an eventful year for us at Gan Partnership. After we welcomed **Bahari Yeow, Lim Zhi Jian** and their team to the firm in July 2020, our expansion this year continues with the admission of **Kang Mei Yee** as a partner on 1 January 2021 followed by the promotion of **Lee Sze Ching (Ashley)** and **Eri Fu Swee Theeng** to Senior Associates.



We are pleased to share that the firm won the **Dispute Resolution Boutique Law Firm of the Year** at the ALB Malaysian Law Awards 2021. We are also grateful for the recognitions accorded by numerous legal publications and research houses, including Chambers & Pacific Asia Pacific, The Legal 500 Asia Pacific, asialaw, Asian Legal Business, Asian Business Law Journal, Benchmark Litigation, Who's Who Legal, and World Trademark Review to our practice and partners. We thank our clients and peers for their support and kind words. We strive to continue delivering cutting-edge legal solutions!

In line with our continuous knowledge sharing initiatives, we are delighted to launch *ganperspectives*, a quarterly newsletter by Gan Partnership focusing on significant local and foreign developments. We look at developments from landmark courtroom rulings affecting boardroom decision makers to emerging legal trends for tech startups in cyberspace. We hope you enjoy reading our inaugural issue!

*Warmest regards,*

**Gan Khong Aik** FCI Arb

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Editor : Foo Yuen Wah



## ALB Malaysia Rising Stars

Our dispute resolution and intellectual partner, Lim Zhi Jian was one of 15 lawyers named as "Malaysia Rising Stars" by Asian Legal Business.

The "Asian Legal Business Malaysia Rising Stars" is an annual list which spotlights lawyers under 40 years of age who are doing high-quality work and in the process earning accolades from their colleagues, superiors and clients.

## State of Emergency challenged

The Yang di-Pertuan Agong declared a nationwide state of emergency from 11 January 2021 to 1 August 2021. Subsequently, the Emergency (Essential Powers) Ordinance 2021 was gazetted on 14 January 2021 to prescribe powers during the state of emergency, in addition to powers under current legislation that are in force. In *Hassan bin Abdul Karim v Perdana Menteri, Tan Sri Dato' Haji Mahiaddin bin Md Yasin & Government of Malaysia* [2021] MLJU 815, the High Court refused the application for leave for judicial review, holding that Article 150(8) of the Federal Constitution ousts the court's jurisdiction to determine the validity of emergency ordinance.



## First Charge for Corporate Liabilities

Since section 17A of the Malaysian Anti-Corruption Commission Act 2009 came into force on 1 June 2020, the first charge was against an offshore vessel company on 18 March 2021. Section 17A imposes corporate liabilities on a commercial organisations for corrupt acts committed for their advantage by a person associated with the organisation.

## News portal fined for contemptuous comments

An online news portal and its editor-in-chief were charged for contempt of court for five offensive comments posted by its subscribers in its comment section. The seven-member apex court bench in *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd* [2021] 2 MLJ 652, in a six to one decision, found the online news portal liable for contempt of court and imposed a fine in the sum of RM500,000. In gist, the presumption of publication under section 114A of the Evidence Act 1950 was not rebutted by the online news portal on the ground that it had no knowledge of the contemptuous comments.

## Malaysian Code on Corporate Governance

The Malaysia Code on Corporate Governance was updated on 28 April 2021. This update introduces best practices and guidance to improve board policies and processes, strengthen board oversight and the integration of sustainability considerations in strategy and operations, and encourage the adoption of best practices.

## RM50,000 as the new indebtedness threshold

With effect from 1 April 2021, the indebtedness threshold under section 466(1)(a) of the Companies Act 2016 has been raised from RM10,000 to RM50,000.



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## Consultation for E-Money Exposure Draft

On 11 June 2021, the Central Bank of Malaysia (BNM) released the "Electronic Money Exposure Draft" ("Exposure Draft") for public consultation until 31 July 2021.

The Exposure Draft provides for the requirements and guidance for issuers of electronic money (e-money) in Malaysia. Once finalised, the Guideline on Electronic Money (E-money) issued on 31 July 2008 and Paragraphs 11.2 & 12 of the Policy Document on Interoperable Credit Transfer Framework issued on 23 December 2019 will be superseded.

## Digital Banks Licensing Framework issued

The Central Bank of Malaysia (BNM) issued a policy document titled "Policy Document on Licensing Framework for Digital Banks" ("Policy Document") on 31 December 2020.

The Policy Document sets out the eligibility requirements for the establishment of a digital bank in Malaysia and the related application procedures. It was reported that BNM may issue up to five licenses for digital banks to eligible applicants by the first quarter of 2022.

## Guidance Note on Provision of Investment Advice

The Securities Commission Malaysia released the Guidance Note on Provision of Investment Advice on 30 December 2020 to clarify when an activity of giving investment advice falls within the scope of a regulated activity under the Capital Markets and Services Act 2007 (CMSA). Any person who contravenes the provisions of CMSA commits an offence.



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## News Media and Digital Platforms Mandatory Bargaining in Australia

The News Media and Digital Platforms Mandatory Bargaining Code ("Code"), which seeks to support the sustainability of Australian news media, came into effect on 3 March 2021.

The Code sets out four key requirements, namely bargaining rules, compulsory arbitration and mediation rules, general requirements, and non-differentiation requirements to guide dealings between news media business and designated digital platform corporations.

## Singapore named amongst world top arbitration spot

Singapore has been named the most preferred seat of arbitration in the Asia Pacific region and the top four worldwide.

The Singapore International Arbitration Centre (SIAC) has also been ranked as the most preferred arbitral institution in Asia Pacific and second in the world, based on the 2021 International Arbitration Survey by Queen Mary University of London and global law firm White & Case.

## Third-Party Funding Framework in Singapore

With effect from 28 June 2021, the third-party funding (TPF) framework in Singapore is extended to cover domestic arbitration proceedings and related court proceedings, proceedings commenced in the Singapore International Commercial Court (SICC) and the related appeal and mediation proceedings.

TPF was first introduced in 2017 for international arbitration proceedings and related court and mediation proceedings.

## Temporary COVID-19 vaccine patent waiver ?

The European Union Parliament adopted a resolution for the negotiation of a temporary waiver of the TRIPS Agreement on patents in order to accelerate global vaccine rollout. This would improve global access to affordable COVID-19-related medical products and address production constraints.

While noting that an indefinite waiver may affect research finance, the MEPs recognise voluntary licencing, know-how and technology transfer to vaccine producing countries are keys to increase global production in the long term.

## India: Whatsapp sues over new digital rules

The Indian government introduced new rules to regulate social media and streaming platforms in February 2021.

The rules, among others, require messaging platforms to make provisions for “identification of the first originator of the information”. Whatsapp, the messaging service platform with the largest market in India, has initiated a legal action at Delhi High Court seeking to declare the new rules unconstitutional as such rules would compromise end-to-end encryption technology and undermine users’ right to privacy.

## New anti-monopoly guidelines in China

The State Administration for Market Regulation (SAMR) released a new set of anti-monopoly guidelines known as the “Antitrust Guidelines for the Platform Economy” (“Guidelines”) in February 2021.

The Guidelines prohibit companies including technology-related corporations like e-commerce sites and payment service providers from a range of monopolistic practices in platform economy to protect fair market competition. Other prohibitions include price fixing, restricting technologies and using data and algorithms to manipulate the market.

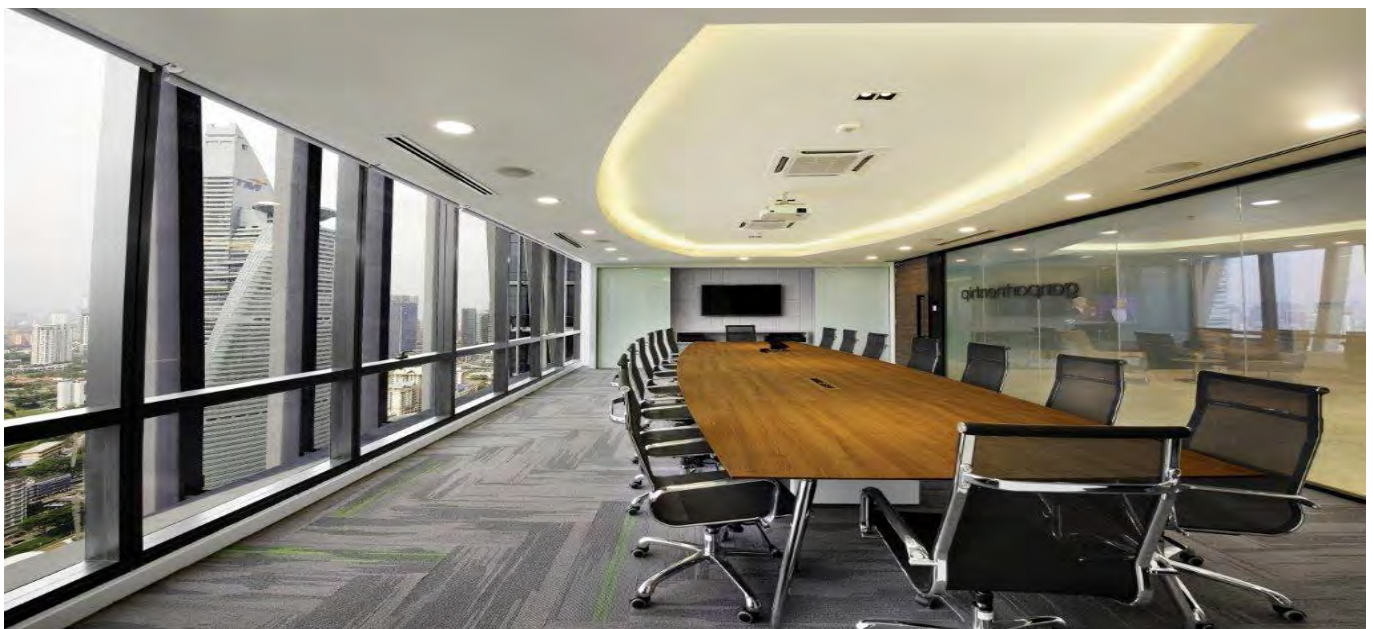
## UKJT Digital Dispute Resolution Rules

The UKJT Digital Dispute Resolution Rules seek to facilitate rapid and cost-effective resolution of commercial disputes involving novel digital technology, such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology and fintech applications.

If adopted in a contract, digital asset or digital asset system, these rules would require disputes that are not subject to automatic dispute resolution process associated with a digital asset to be submitted to arbitration. The juridical seat of any arbitration shall be the law of England and Wales.

## Cryptocurrency mining ban in Iran

The Iranian government has imposed a four-month ban from 26 May to 22 September 2021 on the energy-intensive mining of cryptocurrencies. The ban was introduced following major power disruptions in many cities.



## Prevention and Control of Infectious Diseases Act amended

The Prevention and Control of Infectious Diseases Act 1988 (“Act”) was amended by the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021.

The amendments that came into effect on 11 March 2021 include a provision allowing an authorised officer to order any person who is infected or believed to be infected with COVID-19, or any contact with COVID-19 to wear any tracing device provided to such person.

A new provision is also inserted to penalise a body corporate who commits an offence under the Act, any person who at the time of the commission of the offence was the chief executive officer, chief operating officer, manager, secretary or management personnel may be charged in the same proceedings with the body corporate.

## “Inability to perform contractual obligation” relief extended

Part II of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020, which relieves parties from contractual obligation of certain contracts due to the measures prescribed under the Prevention and Control of Infectious Disease Act 1988 to curb COVID-19, has been further extended for the period from 1 July 2021 to 31 December 2021. Construction-related contracts, among others, will benefit from the extension.



## COVID -19: Legal Developments in Malaysia

### COVID-19 related Fake News

Since 12 March 2021, the Emergency (Essential Powers)(No.2) Ordinance 2021 has been enforced to regulate fake news relating to COVID-19 or the proclamation of emergency in and outside of Malaysia. It shall be highlighted that any person who creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication which contains fake news by any means, with the intent to cause or which is likely to cause fear or alarm to the public, commits an offence.

The person, if convicted, shall be fined for a sum of not more than RM100,000 or be imprisoned for a term of not more than three years, or both. In the cause of a continuing offence, a further fine of not more than RM1,000 for every day during the continuance of the offence after conviction, will be imposed.

### Digital COVID-19 vaccination certificates on blockchain

The digital vaccination certificates issued in Malaysia and Singapore are secured by blockchain technology. A traceability feature is also incorporated where details of the exact batch of the vaccine vial used for inoculation can be shared.



## YouTube's landmark Copyright win

Bahari Yeow, Lim Zhi Jian, Ng Lih Jiun

In the long-running battle between Europe's \$1 trillion creative industry and online platforms, the European Court of Justice ("Court") ruled that Google's YouTube and other online platforms are not liable for copyright-infringing works uploaded by users.

The Court found that *"operators of online platforms do not, in principle, themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms"*. However, such platforms could still be liable under certain conditions. To read more, click [here](#).

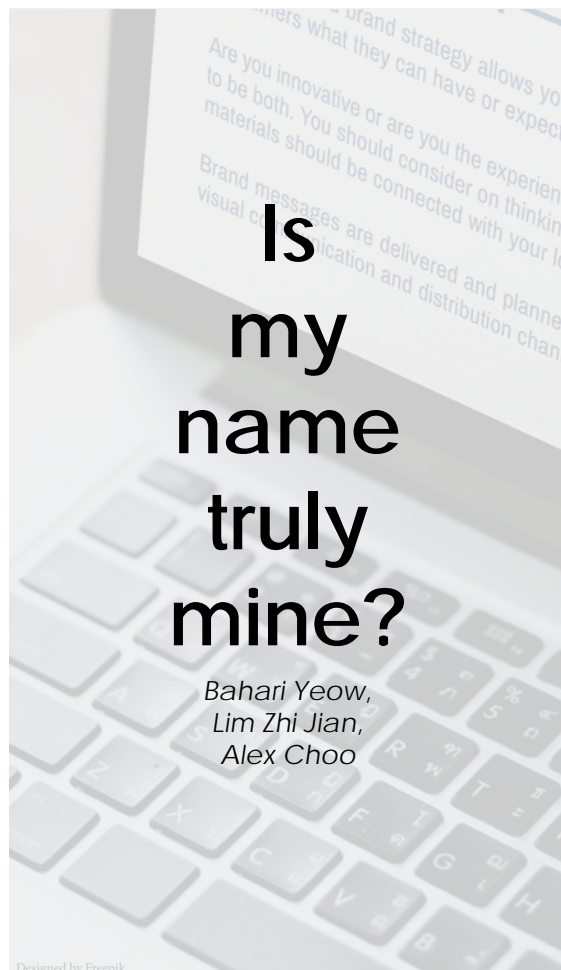
## Injunctions against Shopee?

Bahari Yeow, Lim Zhi Jian, Sabrina Sharin

As e-commerce is booming, it will not be an overstatement to say that online marketplaces have disrupted the retail scene. For example, Amazon gets close to a global 6 billion views a month while in Southeast Asia, Shopee and Lazada attract over 400 million monthly views together.

However, while it is now easier than ever for sellers to connect with buyers, the readily available e-commerce platforms are accessible to both authentic and counterfeit sellers alike. Anyone may register an account and begin selling immediately, without the need to go through any scrutiny or due diligence.

The High Court in *A&M Beauty Wellness Sdn Bhd v Shopee Mobile Malaysia Sdn Bhd* [2021] MLJU 65 has recently delivered what may be some clarification on the extent of liability that online marketplaces such as Shopee and Lazada have regarding IP infringements by their sellers. Could Shopee or Lazada be made responsible for such wrongs by its sellers? To read more, click [here](#).



Mohammad Hafiz bin Hamidun ("Hafiz") is no stranger to the Malaysian public. He is known as a popular Nasyid singer and song composer. Much like other celebrities, Hafiz has also ventured into other businesses, including the fashion and apparel industry.

To this end, Hafiz incorporated the company, Haje Sdn Bhd ("HSB") (formerly known as Mikraj Concept Sdn Bhd that trades in Baju Melayu and Kurtas. On or about February 2017, Hafiz received queries from his fans and/or social media followers whether the products sold by Kamdar Sdn Berhad ("Kamdar"), a company whose primary business selling fabrics with 29 stores in Malaysia, bearing the label 'Hafiz Hamidun' was actually his.

Alerted by this, Hafiz initiated an action against Kamdar for the tort of passing off on the premise that 'Hafiz Hamidun' is his unregistered trademark used for his fashion and apparel line. The crucial question that fell for consideration is simply 'Who owns the goodwill in the label 'Hafiz Hamidun'? Was it Hafiz himself or his company, HSB?' This question was finally put to rest by the Federal Court in *Mohammad Hafiz bin Hamidun v Kamdar Sdn Berhad* [2021] MLJU 816. To read more, click [here](#).



## Section 30 of CIPAA - A Road Less Travelled, Now Widened

*Foo Joon Liang & Carissa How Chen Huey*

Where a party has obtained an adjudication decision in his favour, the victorious party is entitled to seek direct payment for the said decision from the losing party or its principal, vide section 30 of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”).

This article examines the principles fortified by the High Court and the relevant issues to be considered in making an application under section 30 of CIPAA, including the lifting of the corporate veil and the adjudication sums which can be ordered by the Court. To read more, click [here](#).

The High Court decision in *Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case* [2020] MLJU 2389 has fortified this and given further clarity as to the statutory regime as provided under section 30 of CIPAA.

## CIPAA: Only Qualified Advocates for Adjudications in East Malaysia?

*Foo Joon Liang & Tasha Lim Yi Chien*

In *Tekun Cemerlang Sdn Bhd v Vinci Construction Grands Projets Sdn Bhd* [2021] MLJU 466, Vinci Construction Grands Projets Sdn Bhd (“Vinci Construction”), a company based in Kuala Lumpur, being represented by a West Malaysian law firm, commenced adjudication proceedings against Tekun Cemerlang Sdn Bhd, a company based in Sabah, concerning a project located in Sabah.

The issue that eventually arose for the High Court’s determination was whether Vinci Construction could be represented by a West Malaysia law firm. The High Court answered this in the negative.

This article examines the rationale behind such a decision as well as looking at what this means for parties and their choice of representation in adjudication proceedings in the future. To read more, click [here](#).



## Housing Developers Beware – Federal Court Upholds *Faber Union*

*Bahari Yeow, Alex Choo and Sonali Nadkarni*

The Federal Court in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2021] 2 MLJ 60 unanimously held that *Faber Union* [1995] 2 MLJ 597 is a good law. This landmark decision seems to have put to rest the diametrical stand often adopted by housing developers and purchasers pertaining to the calculation of liquidated damages.

Briefly, the issue which arose at the apex court was whether the date for the calculation of liquidated damages begins from the date of payment of booking fees or the date of the Sale and Purchase Agreement (SPA), a scheduled contract under the Housing Development (Control and Licensing) Regulations 1989 (“HDR”).

The Federal Court held that where there is a delay in the delivery of vacant possession in respect of scheduled contracts under the HDR, the date for calculation of liquidated damages begins from the date of payment of the booking fee and not from the date of the SPA. To read more, click [here](#).



## The Aftermath of *PJD Regency Sdn Bhd*

*Foo Joon Liang & Eri Fu Swee Theeng*

Following the apex court’s decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2021] 2 MLJ 60, this article discusses the aftermath of PJD on housing developers for their completed and ongoing housing projects. Specifically, the authors consider four key questions that confront the industry now.

These questions include the retrospective application of the apex court’s ruling, extension of time to deliver vacant possession, and the implications on the claims by purchasers who had taken vacant possession before the apex court’s decision. To read more, click [here](#).

## Management corporation may sue developer for latent defects in common property

*Tan Min Lee & Mah Mun Yan*

A statutory duty to “properly maintain the common property and keep it in a state of good and serviceable repair” shifts between a developer, a joint management committee and a management corporation subject to the timeline provided in the Strata Management Act 2013.

However, when the baton is passed to a management corporation, does the management corporation have standing to sue the developer for any defects in the common property?

The High Court recently addressed this question in *Dua Residency Management Corporation v Edisi Utama Sdn Bhd* [2021] MLJU 140. The management corporation in this case pleaded three cumulative or alternative causes of action, breach of contract, breach of statutory duty and negligence against the developer.

The novel legal issue to be determined by the High Court judge was the management corporation’s cause of action against the developer. To read more, click [here](#).

## Oppression versus derivative actions: courts' wide discretion maintained

*Foo Joon Liang & Lee Xin Div*

Section 346 of the Companies Act 2016 provides the courts with broad powers to grant remedies as they deem necessary to bring an end to the complaints raised in an oppression action. In *Lee Kai Wuen v Lee Yee Wuen* Civil Application No.: 08(i)-148-07/2020(J), the Federal Court refused leave to appeal the Court of Appeal's decision which had found that the courts' powers in an oppression action are broad and unfettered, this extends to the power to order restitution to a company - a remedy traditionally seen as belonging to companies.

There are two significant points from the Court of Appeal's decision. Firstly, the Court of Appeal considered the clear wording in section 346 of the Companies Act 2016 that provides the courts with the discretion to choose from a wide array of remedies and grant the appropriate relief, this includes the discretion to grant a relief that the parties have not prayed for.

On the facts, the Court of Appeal considered it to be trite law that misappropriation of monies can constitute an act of oppression; the same applies when the misappropriation is committed against a family company.

Having held that restitutionary remedies are not prohibited by section 346 of the Companies Act 2016, the ensuing issue was whether the reflective loss principle operated to prevent the granting of such remedies.

The Court of Appeal relied on a decision by the Federal Court in Malaysia and held that the reflective loss principle does not apply to an oppression action, where restitutionary remedies are sought for the misappropriated monies to be repaid by the wrongdoer to the company, provided that there is no risk of double recovery.

To read more, click [here](#).



## Apex court clarifies the concepts of lifting and piercing corporate veils

*Gan Khong Aik & Kang Mei Yee*

In Malaysia, it is an established principle that corporate personality will be disregarded when it is used to perpetrate actual or equitable fraud. However, the principles of lifting and piercing the corporate veil had not been clearly distinguished in the past, save in several occasions where the High Court drew a distinction between the piercing and lifting of the corporate veil.

The principles concerning "lifting" and "piercing" corporate veils are now clarified by the Federal Court in *Ong Leong Chiou v Keller (M) Sdn Bhd* [2021] 3 MLJ 622.

Having analysed the principles based on the facts of this case, the apex court concluded that liability was found against the director concerned and each of the companies involved in the fraud in this case.

Further, the apex court also made clear that fraud in itself allows for the lifting or disregarding the corporate veil independently of the doctrine of piercing the corporate veil. Another notable point in this case is that the apex court acknowledged the pleading of fraud although fraud was not pleaded in the form prescribed – a formal plea of fraud followed by the particulars. To read more, click [here](#).

## Manoeuvring Corporate Governance in Malaysia: Litigation Perspectives

Authored by a team of experienced and seasoned dispute resolution practitioners at Gan Partnership, this book offers a comprehensive discussion focusing on, inter alia, critical components of corporate governance for companies in Malaysia from litigation perspectives. This book critically assesses the roles of and remedies for key stakeholders when dealing with the intricacies of corporate governance under the present regime Companies Act 2016, and other related legislation.

The corporate governance landscape in Malaysia is experiencing a major shift following the introduction of corporate liabilities via the enforcement of a new section 17A to the Malaysian Anti-Corruption Commission Act 2009. The authors discuss the position of corporate liabilities in Malaysia and propose some practical good governance measures to be adopted by companies in view of such legislative developments, by drawing reference to the case studies in other countries that have enforced a similar position.



## 颜合伙律师事务所 中国服务组 ~ 简介

从成立至今的十年里，颜合伙律师事务所一直与中国内地和香港各大知名律所有着紧密的合作关系。同时，本所的合伙人也在中国各个知名仲裁机构及国际仲裁庭担任仲裁员。

本所的合伙人拥有丰富执业经验，多年来秉持着以法为本，并以成果和满足客户的需求为主的服务精神。另外，我们的律师团队在处理各种复杂的法律事务上具备深厚的实力，因此能够及时为客户的法律问题提供有效的解决方案。我们专业且用心的服务获得客户的认可，成了我们与众不同之处。

我们擅长处理的法律业务包括国际仲裁、建筑仲裁以及法律诉讼。我们的专业领域包括企业反贿赂与反腐败、反垄断与竞争、银行与金融、董事会和投资人纠纷、公司治理与合规、商业诉讼与风险管理、危机管理、网络安全、劳资关系、能源与资源、医疗保健与生命科学、保险与再保险、知识产权、房地产、监管与合规、破产重组、体育纠纷、科技媒体和电信及建筑、工程、基础设施与项目。

这十年里，我们的技能和专业知识受到顶尖国际法律指南和独立研究所的认可，其中我们的团队获得《法律500强》、《钱伯斯》、《亚洲法律概况》、《亚洲法律杂志》《法律诉讼名人录》、《基准诉讼》和《世界商标评论》的高度评价。

此外，我们的团队精通多语，并透过与国内外知名技术顾问及专家的广泛人脉，为各类客户无论是杰出人士、上市公司、初创企业还是《财富》世界500强排行榜上的大企业提供全面、创新且有效的解决方案。

近期，因疫情的关系，企业面对各种挑战。我们这期间也积极地为客户提供最新的法律资讯和动态，帮助企业度过难关。



如果有任何业务询问及相关洽谈，请联系中国服务组合伙人江美仪律师 ([meiye@ganlaw.my](mailto:meiye@ganlaw.my))。

# Law On- Demand

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*plus*



## Construction Claims & ADR Conference 2021

Join us for this conference that is jointly organised by Legal Plus and L2 i-CON where our Partner, Foo Joon Liang will be one of the speakers for "Session 2: Legal ramifications and fallout from some recent decisions of the apex court".

This first ever 12-hour virtual marathon is set to happen on 23rd July 2021 from 9am to 9pm (KL Time / GMT +8) and will be held via Zoom. For more information on this event or registration, click [here](#).

## AIAC ADR Week 2021

The Asian International Arbitration Centre (AIAC) is back with the AIAC ADR Week for 2021. For 3 days between 19th to 21st August 2021, the AIAC will host over 120 distinguished speakers from all over the world who will share their thoughts and insights on a range of topics. Our Partner, Foo Joon Liang will be part of the panellists for Session 1 of Day 3- 'Adjudication 2020 Recalibrating Practice and Procedure with Judicial Decisions'. For more information on this event or registration, click [here](#).

Date	Speakers	Topics
July 27	Foo Joon Liang	<b>Kisah Benar: Construction-panadol series Contractors' Perfect Storm</b> a joint session with <b>Ar. Anothny Lee Tee &amp; Ir. Ang Kok Keng</b>
Aug 6	Gan Khong Aik Lee Xin Div Eri Fu Swee Theeng	<b>Business Sustainability: Survival Strategies</b>
Sept 2	Gan Khong Aik Lee Sze Ching	<b>Remote Working - Managing Employees' Performance &amp; Disciplinary Issues</b>
9	Gan Khong Aik Eri Fu Swee Theeng	<b>Corporate Rescue Mechanisms - A Breather for Construction Industry</b> a joint session with <b>Master Builders Association Malaysia</b>
14	Tan Min Lee Lee Hui Juan	<b>Beyond NRP: Managing Tenancy and other Incidental Issues</b>
24	Kang Mei Yee	<b>Exiting Commercial Contracts - A Look at the Termination Clause</b>

To RSVP, please contact our **Knowledge Team** at [forefront@ganlaw.my](mailto:forefront@ganlaw.my).