



A fruitful year for Gan Partnership

2023 has been a fruitful year for all of us at Gan Partnership.

At the start of the year, we were recognised by Asian Legal Business (ALB) as Dispute Resolution Boutique Law Firm of the Year at the ALB Malaysia Law Awards 2023. This marked our second success on the same award in three years. We express our gratitude to ALB for the award and we thank our clients for their continuous support over the years.

Our partner, Joon Liang and his team published their book titled “Time In Engineering” in June 2023. Having the benefit of reading his book, I believe the title would be a great addition to the construction industry as Joon Liang focuses on the common issue in construction disputes – time.

In line with the firm’s efforts in promoting legal development, the members of the firm have conducted various engagement sessions covering different topics with the industry stakeholders as well as communities at large.

We look forward to organising more sessions and feel free to reach out to any member of the firm if you have any topic in mind!



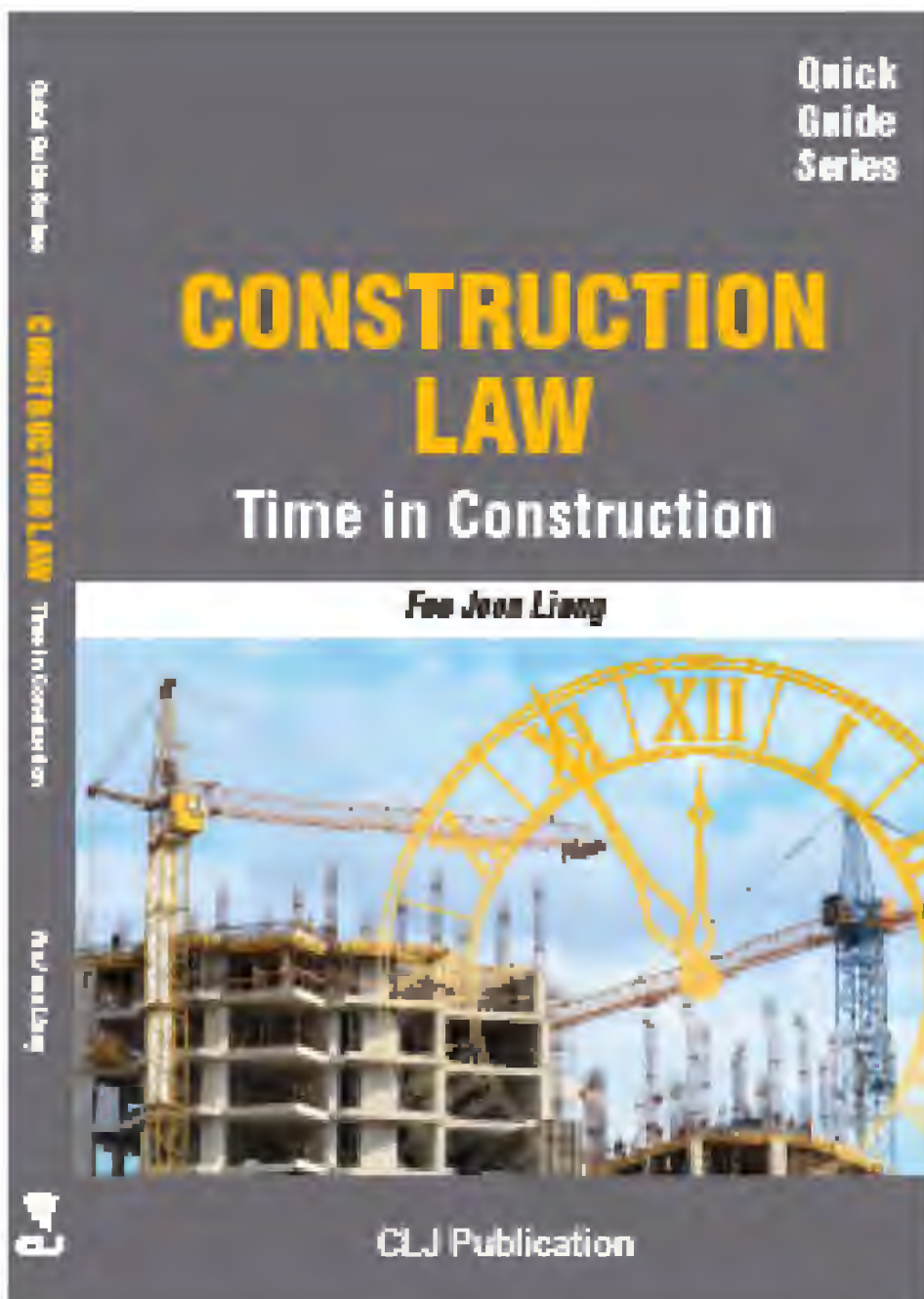
Warmest regards,
Gan Khong Aik FCI Arb

INSIDE THIS ISSUE

- AIAC Arbitration Rules 2023
- Low-value goods tax in the pipeline
- Amendments to Companies Act 2016 passed
- UK: AI is not an inventor
- Indonesia: Pro-investment law petitions rejected



ALA Malaysia



Time in Construction focuses on the heart of a construction dispute – time. With more time, more money is incurred. One party or another will seek to recover or mitigate those expenses. It is either the employer who asserts a claim for delay damages, or the contractor who claims loss and expense for being kept on site longer than he says he should. If there is no entitlement to more time, there is then the potential for a determination of the contract for delays, and the consequent claims for damages. The rights of parties are largely contractual. The authors consider provisions on time in major standard form building contracts applied internationally and in Malaysia such as the provisions in the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) forms of contracts, the Pertubuhan Akitek Malaysia (PAM) form of contract, the Asian International Arbitration Centre (AIAC) forms of contracts, and the Public Works Department (PWD/JKR) forms of contracts.

Within the framework of those contractual provisions, the authors then consider key features in time-related disputes – whether time is of the essence of a contract, and if so, its implications; the effects of delays to progress and completion; the present laws on the imposition of contractual liquidated damages; entitlements to extensions of time; and the monetary implications to extensions of time being granted. The authors have reviewed the latest decisions of the Malaysian courts, particularly those of the appellate courts which definitively state the law, and key decisions of the courts in other Commonwealth jurisdictions.

Control of Smoking Products for Public Health 2023 Bill passed

The Control of Smoking Products for Public Health Bill 2023 (“Bill”) was passed by Dewan Negara on 14 December 2023. Upon enforcement of the Bill, the registration, advertisement, control of the sale and purchase of a tobacco product, smoking substance and substitute product will come under the purview of the Bill.

The contentious “Generational End Game” provision, which prohibits Malaysians born after the year 2007 from buying or consuming nicotine products, has been removed. The Bill, as it now stands, prohibits the sale of any tobacco product to a minor (any person below the age of 18 years old). A minor is also prohibited from purchasing, any tobacco product or smoking substance under the Bill.



Section 498 of Penal Code declared unconstitutional

On 15 December 2023, the Federal Court in *Lai Hen Beng v Public Prosecutor* (Civil Ref. No. 06(RJ)-3-04/2023(B)) declared section 498 of the Penal Code, which criminalises men who enticed married women, is unconstitutional as such provision unlawfully discriminates on the ground of gender which violates Article 8(2) of the Federal Constitution.

Low-value goods tax in the pipeline

Effective 1 January 2024, a sales tax of 10% will be imposed on online sales of imported low value goods below RM 500, except cigarettes, tobacco products, intoxicating liquors, electronic cigarettes.

AIAC Arbitration Rules 2023

The Asian International Arbitration Centre (AIAC) introduced the AIAC Arbitration Rules 2023 (“**Rules**”) which took effect on 24 August 2023. The salient features of the Rules include the re-separation of AIAC Arbitration Rules and the UNCITRAL Arbitration Rules into two parts, the disclosure of third party funding throughout the proceedings up to its conclusion, the arbitral tribunal to facilitate settlement negotiations with agreement of parties, the waiver of technical review of arbitration award by the AIAC Director, the default disclosure of arbitral awards by AIAC two years after its publication, and the incorporation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

Amendments to Companies Act 2016 passed

The Companies (Amendment) Bill 2023 (“Bill”), which amends the Companies Act 2016 (Act 777), have been passed by Dewan Negara on 13 December 2023. According to the Companies Commission of Malaysia (CCM), the amendments proposed by the Bill are “in line with international practices on anti-money laundering and enhance existing provisions to assist companies with financial difficulties post Covid-19 pandemic.”

These amendments, among others, cover the introduction of a new regime for the reporting framework and disclosure of beneficial ownership information and the enhancements to the existing framework concerning the schemes of arrangement and corporate rescue mechanisms.



Indonesia: Pro-investment law petitions rejected

The top court in Indonesia has rejected several petitions calling for the review of the pro-investment law that was passed earlier this year on the ground that the formulation of such law is in line with the constitution. By passing the law, the biggest economy in Southeast Asia seeks to streamline the bureaucracy and attract investment. However, the petitioners viewed that such law was formulated in an unconstitutional manner and unfairly favours businesses over workers and consumers.

UK: AI not an inventor

In *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2023] UKSC 49, the UK Supreme Court has upheld the ruling that an artificial intelligence program, known as DABUS, cannot be named as an “inventor” on a patent application under the Patents Act 1977(UK) as “it is not a person, let alone a natural person and it did not devise any relevant invention”.

Federal Court sheds light on evidential requirements in enforcement of non-REJA foreign judgments

There are two ways to enforce a foreign judgment in Malaysia. The first is through registration under the Reciprocal Enforcement of Judgments Act (REJA) 1958 (revised 1972). The REJA is only available to parties from reciprocating jurisdictions. If REJA is not applicable, the second way to enforce a foreign judgment is through a common law action. The recent Federal Court decision in *Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd - LLC & Anor and Another Appeal* [2023] 2 MLJ 324 addressed the second way. In a unanimous decision delivered by a three-judge panel, the Malaysian Federal Court shed light on the salient evidential requirements under the Evidence Act 1950 with which common law actions to enforce foreign judgments in Malaysia must comply. To read more, click [here](#).

Is leave of court required for proceedings against a liquidator?

When a company is wound up by the court, the court will appoint a liquidator to manage the affairs of the company, including realising the assets and paying the resulting proceeds to the unsecured creditors. In essence, the liquidator represents and safeguards the interests of the general body of unsecured creditors. Therefore, it is crucial for the liquidator to focus on their duties without any interference from other parties including vexatious and frivolous proceedings. Regarding proceedings against a liquidator, there were previously two conflicting judicial decisions on whether prior leave of court is required before commencing proceedings against a court-appointed liquidator. The Federal Court's decision in *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284 put this issue to rest. To read more, click [here](#).

Employee's failure to seek reinstatement does not remove Industrial Courts jurisdiction

Pursuant to section 20(1) of the Industrial Relations Act 1967, an employee who thinks that they have been unjustly dismissed may appeal in writing to the Director General for Industrial Relations to be reinstated to their former employment. In the event the employer and employee are not able to reach a settlement, the Director General will refer the representations to the Industrial Court.

At the Industrial Court, the employee is required to file a statement of case setting out the facts and arguments as to why they consider their dismissal unjust. Generally, the statement of case will also state the employee's desired remedies (reinstatement or compensation in lieu of reinstatement and back wages). In *ACE Holdings Bhd, Norahayu Rahamd & Anor* [2023] 6 CLJ 159, the Court of Appeal decided on the issue of whether the Industrial Court has the jurisdiction to hear an employee's claim for unjust dismissal if they did not plead for a reinstatement remedy in the statement of case. To read more, click [here](#).

High Court rules on getting deposits back post contract termination

Recently, in *Strong Force (M) Sdn Bhd v Khoo Soon Lee Realty Sdn Bhd* [2023] 10 MLJ 894, the High Court decided on a novel point- whether a contractor can seek deposits paid for the purchase of condominiums as provided in the relevant contract, following termination of the contract. Other relevant issues that were decided in this case include the implications of a late delivery of site possession, the need for a revised work programme and the assessment of extension of time applications. To read more, click [here](#).

Res judicata and declarations relating to CIPAA adjudication

The High Court recently decided on two issues in *Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2023] MLJU 1047, answering two questions. First, if an adjudicator had only allowed a portion of the set-off claim in an earlier adjudication, could the next adjudicator allow for the remainder of the set-off claim in a subsequent adjudication? Second, in seeking to set aside an adjudication decision, can a party seek declaratory reliefs against third parties? This article outlines the case. To read more, click [here](#).

Where is the line drawn for conditional payment under CIPAA 2012?

Contract clauses that make payments to one party and that are contingent on payment being received by the other contracting party are void under Construction Industry Payment and Adjudication Act (CIPAA). The CIPAA is meant to provide a speedy resolution to payment disputes, and "pay when (if) paid" clauses delay payment. A recent Court of Appeal decision clarifies that a "pay when certified" clause is not a conditional payment clause and thus falls outside the scope of CIPAA. To read more, click [here](#).

Exploring boundaries of non-delegable duty of care in routine residential construction

In the Federal Court case of *Hemraj & Co Sdn Bhd v Tenaga Nasional Berhad*, the crux of the appeal concerned the imposition of non-delegable duty of care (ie, that third-party contractors ought to take reasonable care when doing a homeowner's excavation works). Leave was granted by the Court on some significant questions. To read more, click [here](#).



Speaking Engagements



Malaysia Legal Forum 2023



International Bar Association



Lexis Nexis



Construction Legal Climate 2023



Courtesy Visit to Lim Chong Fong JCA on occasion of Book Launch 'Time in Construction'



Advocacy Training Course



ICC Indonesia Arbitration Day - July 2023



ICC Malaysia Arbitration Day - May 2023



Launch of Borneo International Centre for Arbitration and Mediation (BICAM) - July 2023



International Malaysia Law Conference 2023