

As we start off this brand new year of 2020, it would be an opportune time to look back at the legal developments that came out of the year just passed, and consider how this may impact your respective businesses and dealings. Whilst they were many, we've picked the top few we feel would be most relevant to our clients.

Here is our CCLC list of the Top 10 legal developments of 2019:

## TOP TEN LEGAL DEVELOPMENTS OF 2019

### 1. **Landmark decision: Controller of Housing has no power to grant extension of time**

Recently, the Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors* ruled, amongst others, that the Controller of Housing has no power to waive or modify any provision in the Schedule H contract of sale (including, in this case, the granting of an extension of time to the developer for completion and delivery of vacant possession). The Court held that section 24 of the Housing Development (Control and Licensing) Act 1966 does not confer power on the Minister to make regulations for the purpose of delegating to the Controller, the power to waive or modify the Schedule H contract of sale. The Federal Court further held that regulation 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires the Act.

The landmark decision significantly impacts the housing industry, particularly housing developers and is expected to open the door to more late delivery claims.

### 2. **Landmark decision: Same rates of maintenance charges in a mixed development project**

The Court of Appeal in *Muhamad Nazri bin Muhamad v JMB Menara Rajawali and Denflow Sdn Bhd* held, in October 2019, that a joint management body cannot set different rates of maintenance charges, under the Strata Management Act 2013, for different types of parcels comprised in a mixed stratified development project. Hence, the Joint Management Body as a body corporate under statute can only determine charges which are mandated under the Strata Management Act 2013 and the fact that there were Joint Management Body resolutions carried by a unanimous vote did not permit them to set different rates of maintenance charges.

### 3. **Trade Marks Act 2019: International registration of trade marks now available**

The landscape of the trade mark system in Malaysia was majorly overhauled in 2019 with the passing and coming into effect just recently, on 27 December 2019, of the Trade Marks Act 2019.

Amongst the most significant changes are the provisions relating to Malaysia's accession to the Madrid Protocol which now allows trade mark owners to seek protection of their mark in over 120 countries with the filing of just one application and payment of a single fee. Non-traditional trade marks including 3D marks, audio/ sound marks and scent marks which are capable of being graphically represented, would now also be registrable.

Others, amongst the plethora of changes brought about by the Trade Marks Act 2019, includes the introduction of multi-class applications and changes to the licensing regime.

### 4. **The Companies (Amendment) Act 2019: Clarifying the mode of execution of documents and redemption of preference shares**

The Companies (Amendment) Act 2019 ("Amendment Act") was gazetted in September 2019 and is awaiting coming into force. It introduces some anticipated amendments to the Companies Act 2016 where some provisions had raised some ambiguity ever since its coming into force back in January 2017.

One of the provisions the Amendment Act seeks to clarify relates to the manner of execution of documents by a company where the much pondered over section 66 of the Companies Act 2016 provided that a company is to execute documents either by way of affixing of a common seal, or by way of signature by at least two authorised officers, one of which is to be a director. This raised the question whether *all* documents must be signed by a director. One can only imagine the logistical nightmare of requiring the sign-off of a director on even documents like receipts, purchase orders etc. particularly in a company of substantial size.

The Amendment Act thus introduces a new section 66(6) which states that that the execution of documents in the abovementioned manner is limited only to documents that are required to be so executed in such a manner by written law, resolution, agreement or constitution.

Another clarification afforded when the Amendment Act comes into force would be that relating to the redemption of redeemable preference shares. It clarifies that the redemption of preference shares out of *capital* does not require a transfer by the company of an equivalent amount from its profits into the share capital account (this shall only apply to redemption of preference shares out of profit). Redemption out of capital only require the satisfaction of the obligation of a solvency statement under section 72(6).

The coming into force of this Act shall be one to watch out for in 2020.

**5. Landmark decision: Retention Sum in construction contracts not held on trust**

In March 2019, the Federal Court in *SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (In creditor's voluntary liquidation)* departed from an earlier Court of Appeal decision in *Qimonda Malaysia Sdn Bhd (In liquidation) v Sediabena Sdn Bhd* and made clear that there is no implication that retention monies in construction contracts are held on trust by the employer for the benefit of the contractor. In fact, if a trust is to be constituted, it would be a matter of construction of the contractual terms and further, the monies would have to set aside separately. The decision has significant implications particularly in the current economic climate, exposing contractors and sub-contractors to the risks of not being able to recover the retention sum. A contractor or sub-contractor who seeks to protect its retention sum in the event of liquidation of the employer would need to seek to include such provisions for creation of trust in its contracts and to require the monies to be deposited and kept in a separate trust account.

**6. New Section 6A of the Limitation Act 1953: Extending limitation periods for negligence cases**

This new section came into force on 1 September 2019 and it provides for the extension of limitation period in cases of negligence not involving personal injuries. Section 6(1)(a) of the Limitation Act 1953 prior to 1 September 2019 stipulates a 6-year limitation period applies for actions brought in contract and tort, which will run *from the date the cause of action is accrued*. However, starting from 1<sup>st</sup> September 2019, Section 6A provides for cases of negligence not involving personal injury, the time limit for bringing an action is 3 years *from the date of the plaintiff's knowledge*. Take for example, the following illustration as provided in the legislation itself:

- C bought a house from D in 2000. In 2010, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the crack had occurred in 2002, two years after C moved into the house. However, C has three years from 2010 (when C discovered the crack) to file an action in court against D for damages.

**7. Significant Decision: Delivery of vacant possession is to be calculated from date of agreement:**

In August 2019, in the case of *GJH Avenue Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & 2 Others*, the Court of Appeal delivered its judgment, holding that the plain language of Schedule G format of sale and purchase agreements should have been applied. Hence, it was decided that the delivery of vacant possession in this case was to be calculated from the date of the agreement and *not* from the date of payment of the booking fee.

## 8. The new digital tax of 6%

Digital tax isn't new, as it has been adopted in many other countries. But it is new to Malaysia. Coming into effect one day after 2019 ended, the digital tax previously announced in Budget 2019 has come into effect on 1 January 2020.

The new service tax of 6% to be levied on online transactions will apply only to services and not goods and seems to only affect sellers and service providers overseas.

According to the Royal Malaysian Customs Department's Service Tax Industry Guides, digital services is defined as "services that is to be delivered through information technology medium with minimal or no human intervention from service provider".

Foreign companies providing such services have been allowed to register with the Customs Department from 1 October 2019 and this registration is mandatory when the total value of digital services provided to a consumer in Malaysia exceeds RM500,000 per year.

Examples of digital services include software, application, videogames, music and film streaming services, subscription-based media like Netflix and Spotify, database and cloud storage services, advertising and online platform, as well as search engines like Google and social networks.

## 9. Landmark decision: CIPAA only applies to construction contracts entered after 15.4.2014

In October 2019, the Federal Court in *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd* unanimously held that the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") only applies prospectively to construction contracts signed after CIPAA came into force, that is, 15 April 2014.

It was further held in *Jack-In Pile* that Section 35 of CIPAA (which prohibits conditional payment provisions – such as pay if paid or pay when paid clauses) does not apply to construction contracts entered into before the coming into operation of CIPAA - 15 April 2014.

Therefore, for payment disputes arising from any construction contract formed before 15 April 2014, parties would have to resolve their disputes through the usual course of arbitration or litigation, and any adjudication proceedings based on a claim arising under a construction contract entered into before 15 April 2014, including the Adjudication decisions, are null and void.

## 10. **Guidelines on Adequate Procedure: Safeguards**

Although technically issued just before 2019 in December 2018, we have sneaked this onto the list given that the impending coming into effect of the corporate liability provisions in Section 17A of the Malaysian Anti-Corruption Commission Act has been a hot and important topic throughout 2019.

The Guidelines give an indication as to the procedures that a commercial organization may implement to avoid corruption and to avail itself of the “adequate procedure” defence. Under the amendments to the MACC Act which shall come into force, a commercial organization can rely on the defence that it had in place adequate procedures to prevent associated persons from committing corruption.

Five guiding principles for adequate procedure form the basis of the Guidelines: Top Level commitment, Risk Assessment, Undertake Control Measures, Systematic review, monitoring and enforcement, and Training and Communication.

The corporate liability provisions of Section 17A MACC Act shall be coming into force on 1 June 2020, and organisations have but a few months left to ensure that they shall have sufficient ‘adequate procedures’ in place to avoid corruption.