

# Empower



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# Note from the Editorial Team

Dear Readers,

International Workers' Day, also known as Labour Day and May Day is celebrated on May 1 to honour all workers across the world. It is a significant event, as its roots to the time, when workers stood against the injustices forced on them in the name of labour. In conjunction with this, HHQ and HLP would like to take this opportunity to wish every one of our readers a Happy Labour Day. We would also like to particularly thank everyone at HHQ and HLP for all their efforts and we would like them to know that their hard work and dedication is greatly appreciated and recognized. We would not be complete without our people as they are the foundation of our organizations.

In this month's edition of the newsletter, we have some very interesting articles to share with you. First, we have an article that explains what legal avenues are available to one in order to resist a wrongful call in respect of a performance bond. This would be particularly useful for our client's in the construction industry.

Secondly, we have a very engaging article which explains whether employers can make it mandatory for employees to be vaccinated and whether they would be required to provide paid leave to employees who wish to get themselves vaccinated. This is a must-read article as it sets out some good reference points from other leading jurisdictions.

Thirdly, we have an article which succinctly explains what are your rights on being arrested and this is indeed very useful to everyone as it elucidates our fundamental rights in law which we must all be aware of.

Finally, our last article briefly explains a recent decision of our High Court which granted its first-ever injunction and Spartacus Order against "persons unknown". Read the article to find out more!

Do also look into our Inside Out section as this month we feature HLP turning 6!

We hope that you enjoy reading this edition as much as we enjoyed putting it together for you!

Happy reading!

**Empower** is a monthly newsletter jointly published by Halim Hong & Quek and Harold & Lam Partnership.

It is distributed for free and can be read on HHQ's or HLP's website at <https://hhq.com.my/> or <https://hlplawyers.com/>

All articles in this publication are intended to provide a summary or review of the subject matter and are not intended to be nor should it be relied upon as a substitution for legal or any professional advice.

## Contact Us



### KUALA LUMPUR OFFICE

OFFICE SUITE 19-21-1, LEVEL 21,  
WISMA UOA CENTRE,  
19, JALAN PINANG,  
50450 KUALA LUMPUR  
T: +603 2710 3818  
F: +603 2710 3820 (Corporate & Real Estate)  
+603 2710 3821 (Dispute Resolution)  
E: [hhqkl@hhq.com.my](mailto:hhqkl@hhq.com.my)

### PENANG OFFICE

C-11-2, LORONG BAYAN INDAH 3,  
BAY AVENUE,  
11900 BAYAN LEPAS,  
PULAU PINANG  
T: +604 640 6818  
T: +604 640 6817  
F: +604 640 6819  
E: [hhqpenang@hhq.com.my](mailto:hhqpenang@hhq.com.my)

### JOHOR OFFICE

A-2-23 & A-3-23, BLOCK A,  
PUSAT KOMERSIAL BAYU TASIK,  
PERSIARAN SOUTHKEY 1,  
80150 JOHOR BAHRU,  
JOHOR  
T: +607 300 8101  
T: +607 289 7366  
F: +607 300 8100  
E: [hhq@hhqjb.com.my](mailto:hhq@hhqjb.com.my)

## HAROLD & LAM PARTNERSHIP

ADVOCATES AND SOLICITORS

### KUALA LUMPUR OFFICE

SUITE 32-5, 32ND FLOOR,  
OVAL TOWER DAMANSARA,  
NO. 685, JALAN DAMANSARA,  
60000 KUALA LUMPUR  
T: +603 7732 8862  
F: +603 7732 8812  
E: [hlp@hlplawyers.com](mailto:hlp@hlplawyers.com)

# CONSTRUCTION PERFORMANCE BONDS: RESISTING A WRONGFUL CALL

WRITTEN BY OOI HUI YING

## **INTRODUCTION**

Performance bonds and bank guarantees are a type of security that is typically used in building and construction contracts. Construction contracts often require a contractor to take out a performance bond, usually in the form of a bank guarantee which can be called upon by the employer in the event of the contractor's breach of the construction contract.

As these bonds are usually on-demand bonds, the process of the call on the bonds are usually done quickly and there may be detrimental to the contractor, as such, it is not surprising that such demands on performance bonds are frequently opposed and challenged.

In this article, we will examine the interpretations of performance Bonds and the means of restraining a demand on performance bonds, with reference to recent Malaysian case laws.

## **WHAT ARE THE TYPES OF PERFORMANCE BOND?**

Generally, there are two types of performance bonds, unconditional or on-demand bonds, and conditional bonds.

Unconditional bonds are performance bonds where the beneficiary can demand for payment from the third-party guarantor without having to prove that the contractor breached the contract.

Conditional bonds are where the beneficiary is not entitled to make a demand on the bond unless some event(s) previously agreed by both parties in the contract occurs. For example, if the parties agreed in a contract that the beneficiary may only call on the bond if there is a breach of the terms of the contract, then the beneficiary may only do so in those specific situations stipulated in the contract.

## **HOW DOES ONE RESIST A CALL ON PERFORMANCE BOND?**

A contractor may attempt to apply to court for an interim injunction to restrain a beneficiary from calling on or receiving the proceeds under a performance bond.

Based on the case laws in Malaysia, the court would only grant injunctive relief if the following requirements are satisfied by the applicant [**See: *KNM Process Systems Sdn Bhd v Cypark Sdn Bhd* [2020] 10 MLJ 321**]:

- (i) The applicant has a valid and arguable cause of action against the party calling the bond;
- (ii) The call on the Bond is unconscionable;
- (iii) The remedy of damages is not an adequate remedy for the party calling the bond;
- (iv) The balance of convenience or the balance of justice lies in favour of the grant of the interim injunction;
- (v) The applicant has provided an undertaking to court to pay damages to the party calling the bond if the final award of the parties' disputes is in the party's favour and if the party has suffered any loss due to the interim injunction;
- (vi) The applicant has complied with all the procedural requirements as laid down in Order 29 rule 1 of the Rules of Court 2012; and
- (vii) There is no policy or equitable consideration which militates against the grant of the interim injunction.

### **WHAT IS CONSIDERED UNCONSCIONABLE?**

The test on unconscionability is fact sensitive and the threshold of establishing unconscionability by the applicant is high. As can be seen in the cases to be discussed below, the allegation of unconscionability must be substantiated with strong cogent evidence, which means that simply showing that there are disputes between the parties pursuant to the underlying contract per se would not ordinarily suffice.

### **Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442**

In this case, Ramly Ali JCA (later FCJ) held that in order to rely on the ground of 'unconscionability' to restrain an abusive demand made by a beneficiary on a performance bond, apart from fraud, there must be strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement.

The Court of Appeal agrees with the High Court's findings that:

- (i) the plaintiff has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of fraud or unconscionability which would mean establishing a strong prima facie case, at least at the interlocutory stage; and
- (ii) the court has to be satisfied (not necessarily beyond reasonable doubt) that a case of "unconscionability" being committed by the beneficiary has been established to an extent sufficient for the court to be minded to order the injunction sought.

### **Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401**

The Federal Court's decision, in this case, is a very important development in this area of law as it became clear that 'unconscionability' is recognised as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond.

In this case, the Federal Court held that the principle recognising unconscionability as a distinct ground to restrain a beneficiary from making a call on a performance bond concurs with good commercial sense and unconscionability may now be raised as a distinct ground in restraining a call on a performance bond.

In defining what constitutes an "unconscionability", the Federal Court agreed with the principles relied on by the Court of Appeal that whether or not "unconscionability" has been made out is largely dependent on the facts of each case, and in every case where "unconscionability" is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith.

**[See also: *Target Resources Sdn Bhd v THP Bina Sdn Bhd* [2019] 6 MLJ 116]**

### **Ahmad Zaki Sdn Bhd v SN Akmida Holdings Sdn Bhd [2021] MLJU 644**

In this recent case, the Plaintiff initiated an injunction application against the Defendant's demand on performance bond. The Plaintiff was granted an injunction against the Defendant by the High Court. The Defendant appealed against the decision of the High Court.

Specifically, on the issue of unconscionability, the Court of Appeal agreed with the High Court's decision that the disputes pleaded by the parties are essentially counter allegations by both parties, and that alone could not constitute unconscionability. Unconscionability must be proven by strong evidence.





## **LATEST DEVELOPMENT IN MALAYSIA - RESISTING CALLS ON PERFORMANCE BOND AND THE COVID-19 ACT**

In the recent High Court case of *SN Akmida Holdings Sdn Bhd v MTD Construction Sdn Bhd and another case [2020] MLJU 203*, the plaintiff sought to rely on the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 ('PCIDR') as an event of force majeure to oppose the defendant's calls on the two bank guarantees on grounds of "unconscionability".

The plaintiff contended that the defendant's call on the bank guarantees was unconscionable for the following reasons:

- (i) the enforcement of the PCIDR resulted in the plaintiff's inability to carry out the works; and
- (ii) it was unconscionable for the defendant's calls on the bank guarantees in view of the enforcement of the Regulations and its three extensions thereafter.

## **THE HIGH COURT'S DECISION**

The learned High Court Judge, relying on the Federal Court's decision in *Sumatec Engineering*, held that the plaintiff must satisfy two tests to show that the calls on the bank guarantees are unconscionable, namely:

- (i) the plaintiff has a "seriously arguable case that the only realistic inference" is that the defendant's call is unconscionable, or has adduced a "strong prima facie" case that the defendant's call is unconscionable; and
- (ii) the plaintiff must satisfy the court that the "events or conduct are of such degree such as to prick the conscience of a reasonable and sensible" person.

The High Court also rejected the plaintiff's reliance on the enforcement of the **PCIDR** as a force majeure event, on the following grounds:

- (i) the plaintiff's work delay had occurred way before the enforcement of the PCIDR;
- (ii) the enforcement of PCIDR does not constitute an event of force majeure within the meaning of "Event of Force Majeure" under the sub-contract; and
- (iii) even if it is assumed that an "Event of Force Majeure" under the subcontract has occurred by way of the enforcement of the PCIDR, clause 41(d) of the subcontract stipulates that the 'event of force majeure' will not affect the rights and liabilities of the plaintiff and defendant which accrued before the enforcement of the PCIDR on 18.3.2020.

## **CONCLUSION**

Based on the cases discussed above, there is no doubt that the Malaysian courts came a long way in developing the law on the demand of performance bond. With the enactment of the PCIDR and the COVID-19 Act, players in the construction industry are anticipating the court's interpretation of the injunctive applications and the effects of the COVID-19 Act on those injunctive applications filed to restrict the calling on performance bond.

In ***SN Akmida v MTD & Ors***, the High Court showed that a party cannot simply rely on either PCIDR or COVID-19 Act to escape the performance of its obligations under a contract, especially when the alleged reasons for inability to perform are past events which are irrelevant to the Regulations.

Given that each case has its own specific facts and governing contract, and the court's decision is largely dependent on the facts of each case, we look forward to seeing how the courts will interpret the PCIDR and COVID-19 Act in the context of restraining a call on performance bond.



**Ooi Hui Ying**

Associate

Harold & Lam Partnership  
Advocates & Solicitors  
[huiying@hlplawyers.com](mailto:huiying@hlplawyers.com)



# VACCINATION OF THE WORKFORCE: IS IT COMPULSORY?

WRITTEN BY ROHAN ARASOO A/L JEYABALAH & TEOH YEN YEE

Malaysia has begun administering COVID-19 vaccinations since February 2021 in accordance with the priority list identified by the Malaysian government. This article aims to provide an insight on:

- (a) whether employers can make it mandatory for employees to be vaccinated to ensure a safe workplace; and
- (b) whether employers are required to provide paid leave to employees who wish to get themselves vaccinated.

## **(A) WHETHER AN EMPLOYER CAN COMPEL AN EMPLOYEE TO BE VACCINATED?**

In Malaysia, Section 15 of the Occupational Safety and Health Act 1994 (“**OSHA**”) imposes a duty on employers to ensure, so far as is practicable, the safety, health and welfare at work of all its employees. Section 24 of OSHA provides that employees have a duty (amongst others) to comply with any instruction or measure on occupational safety and health instituted by their employer. In addition, the Prevention and Control of Infectious Diseases Act 1988 (“**PCIDA**”) and the Regulations made by the Minister of Health by way of the powers delegated to him through the PCIDA provide various rules and regulations including Standard Operating Procedures (“**SOPs**”) that all the employers and employees in Malaysia must comply with at work during this pandemic.

Therefore, an employer has a duty to ensure that the employee is able to work in a reasonably safe workplace. This would include a workplace that is safe from COVID-19 exposure.

That being said, employers however cannot compel their employees to undergo vaccination. Pursuant to the Frequently Asked Questions on the COVID-19 Vaccine issued by the Ministry of Health on 31st December 2020 (“**FAQ**”), it has been clarified by the Government that vaccination against COVID-19 has to be conducted on a voluntary basis and individuals must sign the consent form prior to being vaccinated.



## **SINGAPORE**

In Singapore, whether an employer can make it compulsory for an employee to undergo COVID-19 vaccination will depend on whether such a requirement is reasonable and lawful. Employers should consider the position taken by the government on the vaccine, the employee's health and medical history, as well as the employee's role and responsibilities.

For instance, if the government were to make vaccines compulsory (or compulsory for a certain group of persons, e.g., those in healthcare), and provided there is nothing in the employee's health and medical history that would make that employee unsuitable for vaccination, the case for compulsory vaccination may be more arguable, especially if the employee is engaged in a high-risk role.

On this note, the Ministry of Health and the Ministry of Manpower are currently reviewing the issue of vaccination of workers in specific workplace settings such as researchers or laboratory staff working directly on the COVID-19 virus or those who face a very high risk of exposure to infected individuals, and the Ministries will provide advice on this due course.

Singapore's Minister of Health, Minister Gan Kim Yong, has stated in his Ministerial Statement at Parliament on Jan 4, 2021 that for employees who decline to take the vaccination, it will not be necessary to review their job scope or redeploy them, unless there is a resurgence of cases. Nevertheless, all workers must continue to take necessary precautions such as the wearing of a face mask and ensuring physical spacing of at least one meter apart at the workplace to reduce the risk of transmission.

## **HONG KONG**

Employers are legally required to take reasonable care of their employees' health and safety under common law and the Occupational Safety and Health Ordinance ("OSHO"). However, it is not entirely clear whether requiring an employee to be vaccinated would be considered "reasonable" for employers to ensure safety and health in a workplace. This would most likely depend on the nature of the employee's job and the employer's workplace i.e. whether the employee will be working in an office environment or in a higher-risk location such as a hospital. It should also be noted that not all employees may be immediately eligible for the vaccine as the Hong Kong government has identified certain priority groups that would receive the vaccine. Hong Kong anti-discrimination law protects the characteristics of sex, pregnancy, marital status, disability, family status and race. In requiring employees to undergo vaccination, employers should take care not to discriminate against employees on any of these grounds.

## **UNITED KINGDOM**

In the United Kingdom, employers cannot compel employees to receive medical treatment. There is no specific legislation allowing an employer to require its employees to undergo medical treatment of any kind, including vaccination. However, under common law, there may be instances where requiring individual employees to be vaccinated is considered a reasonable management request. Those instances very much depend on what the employee does in their role, how much interaction he or she may have with a vulnerable population, and considerations with respect to the overall protection of the workforce. Employers who are considering mandating vaccines should also consider whether other, less invasive means of protecting these populations may be sufficient as an alternative, such as requiring frequent COVID-19 tests, or ensuring comprehensive use of personal protective equipment (PPE) and other workplace social distancing measures.

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#### Hong Kong:

- <http://www.hk-lawyer.org/content/legal-considerations-vaccinating-your-employees-and-conducting-covid-19-tests>
- <https://www.conventuslaw.com/report/hong-kong-covid-19-vaccination-can-my-employer/>

#### United Kingdom:

- <https://www.jdsupra.com/legalnews/can-uk-employers-require-employees-to-7252371/>



## **SUMMARY**

In summary, most of the Commonwealth countries do not have a specific legislation which permit and/or allow the employers to compel their employees to be vaccinated. It bears emphasis that compelling an employee to be vaccinated could potentially attract legal liability on the employer's part. Thus, in Malaysia, employers should follow closely and comply with the directions laid down by the relevant authorities such as the Health Ministry and the National Security Council.

The next questions that arises is, if an employee has voluntarily registered for the COVID-19 vaccination programme introduced by the government, is the employer compelled to allow the employee to take paid leave to undergo the vaccination? We shall address this question below.

## **(B) ARE EMPLOYERS REQUIRED TO PROVIDE PAID LEAVE FOR EMPLOYEES TO GET VACCINATED?**

Currently, there is no statutory requirement to compel employers to provide any paid leave for employees to undergo vaccination in Malaysia. Employees in the private sector who have appointments fixed for the COVID-19 vaccination would be granted paid leave over and above the annual leave in most circumstances. However, it remains the discretion of the employer in the absence of any statutory requirement to provide paid leave for the employees.

Lately, the Human Resources Minister has given the green light to all employers to grant an off-day to the employees to enable them to undergo their COVID-19 vaccination. However, the discretion lies with the employer on whether to grant the employee paid leave to undergo the vaccination. It is believed that by providing employees with paid leave to undergo the vaccination, it would encourage more employees to be vaccinated as many are still concerned or sceptical about taking the vaccine due to worries on the potential side effects.

Notwithstanding the fact that the granting of paid leave for employees to undergo the vaccination is at the discretion of the employer, employers are strongly encouraged to educate their employees by creating awareness on the benefits of COVID-19 vaccination, and also allowing employees to take time off work to get themselves vaccinated.



We can see some of the examples as set out below:

1. OCBC Bank has announced that its staff in Singapore will have their medical consultation fees reimbursed in the event they develop side effects from the vaccine. In addition, the employees will get a day off on the day they receive the jab. Employees will also be allowed to work from home for one week after vaccination. They will receive private taxi reimbursement to and from the vaccination clinics and an additional two days of medical leave without the need to provide a medical certificate in the event of side effects. Similar initiatives will be rolled out for employees in the Bank's core markets such as Malaysia and China when the vaccine is available in those countries.
2. Randstad has announced that the company is offering two days of paid COVID-19 vaccine leave to its employees based in Singapore and Malaysia, in hopes of encouraging more staffs to participate in the COVID-19 vaccination programme. According to a press release, this new paid leave is offered in addition to the medical paid leave that Randstad employees are entitled to. Staff are able to apply for this leave on the day of their COVID-19 vaccination to rest at home and monitor their health.
3. A growing number of large US chains are offering their workers incentives to get COVID-19 vaccines. Grocery chain Aldi said that it will provide its hourly workers with two hours of pay for each vaccine dose they receive, giving workers up to four hours total of paid time off. Aldi also said it will "cover costs associated with vaccine administration" for employees who want to get vaccinated. Aldi is "ensuring that all hourly workers who wish to receive the vaccine are able to do so without concern about losing pay or taking time away from work," the company said in a news release. Aldi joins Dollar General, Trader Joe's and Instacart as major US companies that have made similar moves. Dollar General (DG) said that it will give its workers a one-time payment equivalent to four hours of pay after receiving a completed vaccination. Trader Joe's will give workers "an additional 2 hours of regular pay per dose for taking the time to get vaccinated," Kenya Friend-Daniel, a spokesperson for the company, said in an email.



**Rohan Arasoo A/L Jeyabalah**  
Partner  
Harold & Lam Partnership  
Advocates & Solicitors  
rohan@hlplawyers.com



**Teoh Yen Yee**  
Senior Associate  
Harold & Lam Partnership  
Advocates & Solicitors  
yenyee@hlplawyers.com

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# ARREST AND REMAND: KNOW YOUR RIGHTS

WRITTEN BY HAYLEY CHEONG PIN RU

The recent death of a cow milk trader, A. Ganapathy, who succumbed to his injuries alleged to be inflicted while in police custody has caused a stir on social media platforms like Facebook, Instagram and Twitter which have been flooded with hashtags like #JusticeForGanapathy and #BrutalityinMalaysia. Ganapathy was arrested on 24th February 2021 to assist the police in respect of investigations concerning his brother, who was wanted by the police. The Court granted a 13-day remand order, and Ganapathy was released from police custody on the 8th of March 2021 upon which he was admitted to the Selayang Hospital's Intensive Care Unit. Ganapathy passed away at the hospital on 18th April 2021. According to his family lawyer, his autopsy report revealed that he had succumbed to injuries inflicted on his shoulders and legs - while his family members claimed that he was in good health before the arrest other than a history of diabetes and related health problems. Additionally, Ganapathy's mother claimed that Ganapathy had told her that the police had beaten him with a rubber hose while he was in police custody, and that resulted in his legs having to be amputated during his stay at the Selayang Hospital's Intensive Care Unit.[1]

The death of Ganapathy has expectedly riled up citizens, rights groups and Non-Government Organizations ("NGOs") on the issue of police brutality in Malaysia. Eliminating Deaths and Abuse in Custody Together (EDICT), a rights group stressed for an inquiry into Ganapathy's death.[2] On 1st of May 2021, the Malaysian Bar released a Press Release to push for an Independent Police Complaints and Misconduct Commission (IPCC) and Coroner's Act and they have called for an immediate and independent investigation and inquest into the death of Ganapathy in police custody.[3] The president of the Malaysian Bar also stressed that the formation of IPCC is vital for a transparent and accountable police force in our country.

The increasing and ongoing concerns over the news of Ganapathy's alleged death by police brutality calls for immediate awareness and cognizance on our salient rights protected under the law. In this article, we will be talking about our rights under arrest and remand, and what we need to know about arrest and remand under the Criminal Procedure Code ("CPC").

[1]<https://www.malaymail.com/news/malaysia/2021/04/30/report-ganapathys-family-lawyer-says-autopsy-report-confirms-death-due-to-s/1970541>

[2]<https://says.com/my/news/ganapathy-s-lawyer-says-autopsy-confirms-victim-died-of-injuries-on-shoulders-legs>

[3]<https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-reform-police-custody-practices-now>



## **HOW DO YOU KNOW IF YOU ARE UNDER ARREST?**

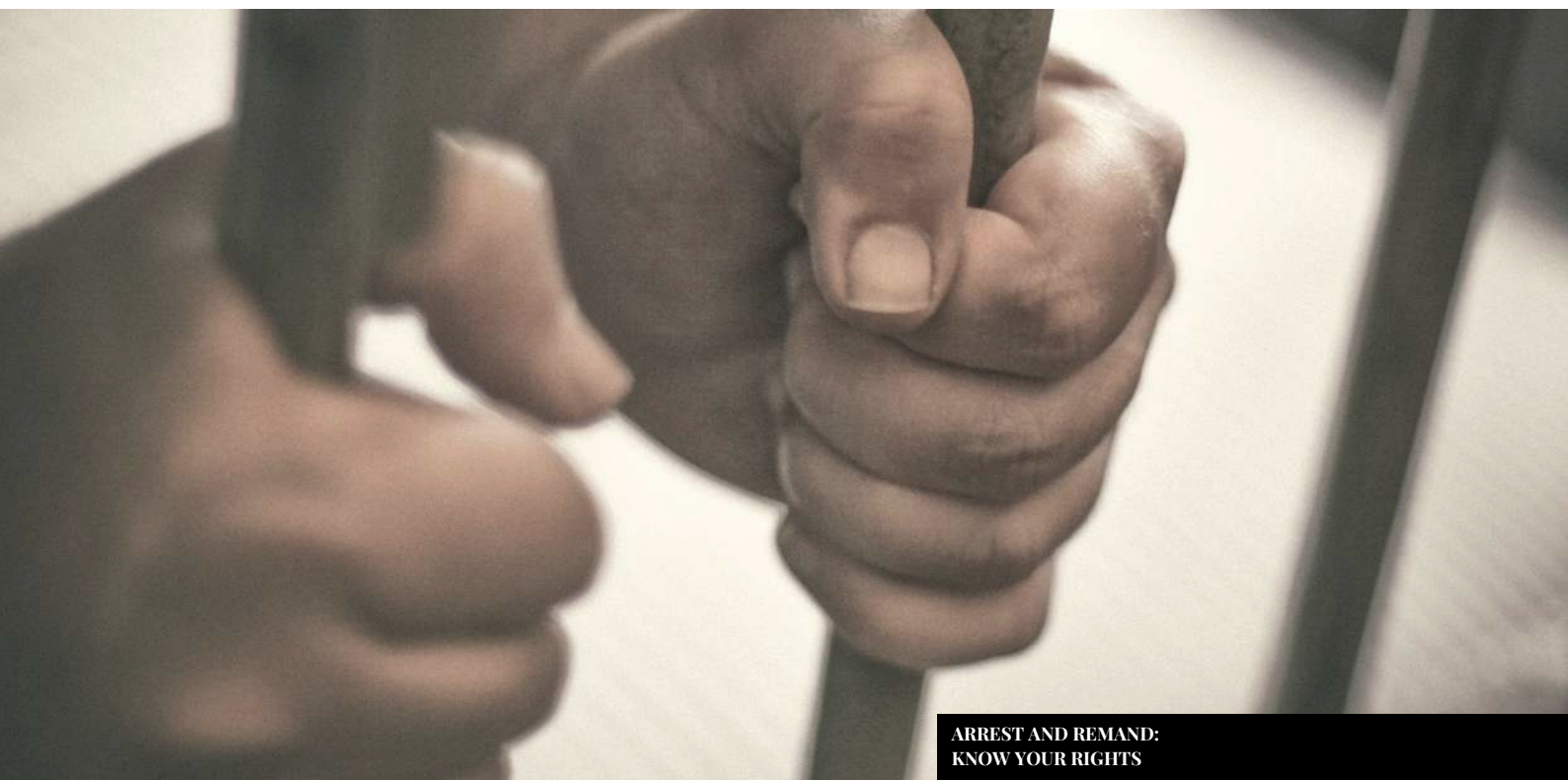
An arrest happens when a police officer touches or confines the body of a person or when someone submits to custody voluntarily by his words or by his actions. In particular, when the police officer verbally informs you in words that you are under arrest, when he uses force to restrain you from going on your way, or when he makes it clear that he will use necessary force to prevent you from going on your way, you will know that you are under arrest.

*Section 15(1)* of the CPC provides that “in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action.” *Section 19(1)* of the CPC provides that a police officer may use reasonable force to apprehend you if you resist arrest, and whether force is required depends on the circumstances of the arrest. For example, when a police officer says “you are under arrest”, and the police officer retains the person to prevent him from escaping, there is an arrest.

## **I AM BEING ARRESTED, WHAT ARE MY RIGHTS?**

Once a person has been arrested, the next question that he should ask is this - what are my rights? Article 5 of the Federal Constitution and *Section 28A* of the CPC lay down the rights to an arrested person that commences immediately upon arrest and they are as follows:-

1. Right to be informed of the grounds of your arrest while being arrested or immediately upon your arrest;
2. Right to communicate with your relative or friend of your whereabouts within 24 hours from the time of your arrest; (unless there is reasonable belief that this could result in an accomplice of the person arrested to avoid apprehension, or there would be destruction, concealment or fabrication of evidence or intimidation of witness or the questioning of statement is so urgent that it should not be delayed after taking into account the safety of others.);
3. Right to communicate or contact a legal practitioner i.e lawyer of your own choice within 24 hours from the time of your arrest; (unless there is reasonable belief that this could result in an accomplice of the person arrested to avoid apprehension, or there would be destruction, concealment or fabrication of evidence or intimidation of witness or the questioning of statement is so urgent that it should not be delayed after taking into account the safety of others);
4. Right to defer any questioning or recording of any statement by the police until the consultation with your lawyer takes place;
5. Right to consult and to be represented by your lawyer within the sight of police;
6. Right to be brought before a Magistrate within 24 hours from the time of your arrest.





## **I AM BEING ARRESTED, WHAT NOW?**

The police officer detaining you is compelled under the CPC and Federal Constitution to bring you before a Magistrate within 24 hours of your arrest if the police officer believes that they have obtained sufficient evidence to charge you. If the police officer believes that there is no case against you after arresting you for 24 hours, the police officer must release you.

If the police officer believes that they will need to detain you for a longer period for further investigation, they will need to bring you before a Magistrate within the 24-hour period, and apply for a remand order. This is provided for under *Section 117* of the CPC. Depending on the type of offence that you are suspected with, the police can apply for a remand order to detain you up to 7 days or 14 days in total.

If the offence that is being investigated is punishable with imprisonment for less than 14 years, your detention period can be extended to 7 days in total, in which the detention shall not be more than 4 days on the first application and shall not be more than 3 days on the second application by the police. On the other hand, if the offence being investigated is punishable with death or imprisonment for 14 years or more, your detention period can be extended to 14 days in total, in which the detention shall not be more than 7 days on the first application and shall not be more than 7 days on the second application by the police.

At the end of your detention period and your extended detention period, the police will have to release you or bring you before the Court to charge you for the offence.

## **CONCLUSION**

The Judiciary in Malaysia is entrusted as the guardian of man's minimal rights under the Federal Constitution and the laws of Malaysia. It is vital that the public is aware of their rights and that they are given access to these rights and exercise it thoroughly.



Hayley Cheong Pin Ru

Associate

Halim Hong & Quek

Advocates & Solicitors

hayley.cheong@hhq.com.my

# INJUNCTIONS AND SPARTACUS ORDER GRANTED AGAINST “PERSONS UNKNOWN”

WRITTEN BY ANKIT R. SANGHVI & MEYER THOR XIAO XIN

## INTRODUCTION

In the ongoing case of *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor [2021] 7 MLJ 178*, the Malaysian High Court granted its first-ever injunction and Spartacus order against “persons unknown”. While being the first case which provides for such remedies against “persons unknown”, it also sets out the necessary clarifications for such remedies.

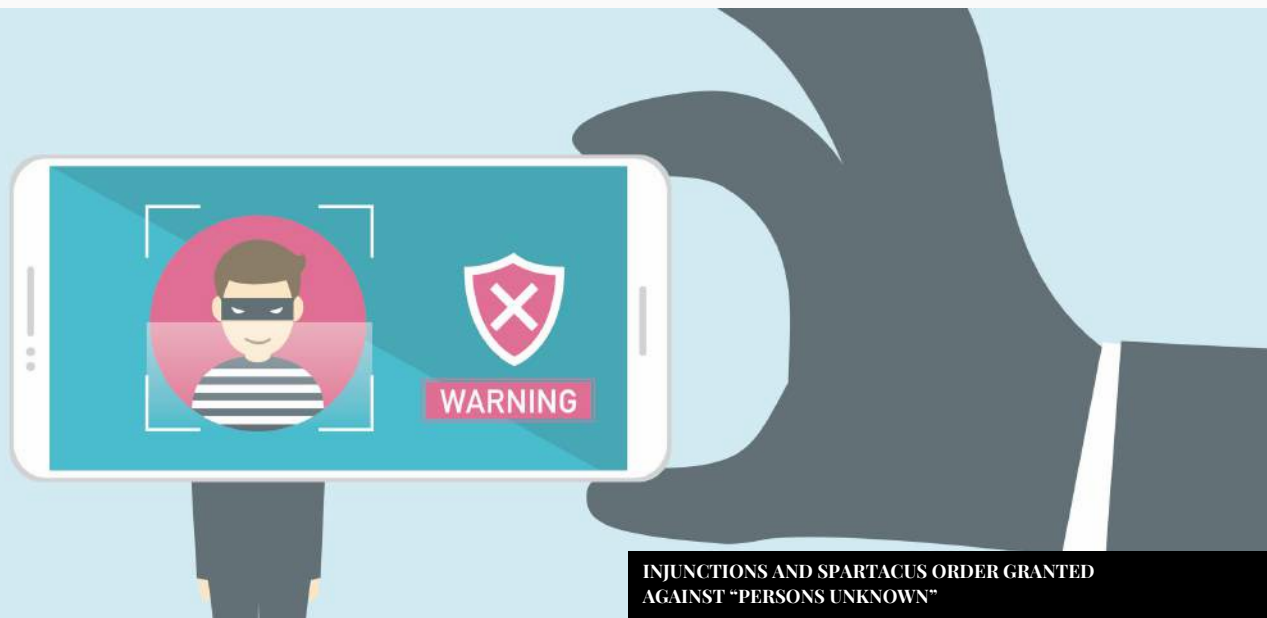
## SALIENT BRIEF FACTS

The Plaintiff is a victim of a cross-border cyber fraud known as ‘push payment fraud’. The First Defendant had infiltrated the email communications between the Plaintiff and the Plaintiff’s South Korean counterpart, KoWorks and subsequently deceived the Plaintiff into making payment into a CIMB bank account in Malaysia. The Plaintiff thought that it was making a genuine payment to KoWorks for a commission payment but the payment was made to the Second Defendant’s CIMB bank account and since then, the First Defendant had siphoned the Plaintiff’s monies away. The Plaintiff eventually discovered the fraud when KoWorks informed the Plaintiff that it did not receive any commission payment.

Following that, the Plaintiff filed an application for a proprietary injunction and a Mareva injunction against the fraudster First Defendant who was named as “Persons Unknown” and the Second Defendant. The High Court allowed the Plaintiff’s application against both the Defendants.

Subsequently, the monies had moved out of the CIMB bank account. The Court allowed the Plaintiff’s application to add the further recipients of these monies as the Third and Fourth Defendants, and granted a further proprietary injunction and Mareva injunction against the Third and Fourth Defendants.

The Plaintiff further filed an application for a self-identification order against the First Defendant, which was similarly allowed by the High Court.



## **FINDINGS OF THE HIGH COURT**

### **(1) COURT CAN GRANT ORDERS AGAINST PERSONS UNKNOWN (THE FIRST DEFENDANT)**

The High Court, in this case, granted injunctive orders against the First Defendant, being “persons unknown”. Even though it is not usual for defendants to be described as “persons unknown” in a suit, nevertheless, the High Court confirmed that the court has the jurisdiction to grant interlocutory orders against “persons unknown”.

Notably, there is nothing in the Rules of Court 2012 which prohibits the filing of a writ of summons and applications against “persons unknown”. In fact, Order 89 of the Rules of Court 2012 for summary proceedings for possession of land allows for a defendant reference to persons unknown.

In granting the injunctions against the First Defendant being “persons unknown”, reference was made to English case law wherein similar injunctive orders against ‘persons unknown’ were made. The High Court referred to the English High Court decision in ***CMOC Sales & Marketing Limited v Persons Unknown and 30 others* [2018] EWHC 2230 (Comm)** (“CMOC”) which confirmed that the Court’s jurisdiction to grant injunctions against “persons unknown”. However, it is a condition precedent that the description used as to the “persons unknown” must be sufficiently certain as to identify both those who are included and those who are not.

The High Court also applied the test laid out by the UK Supreme Court decision in ***Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 3 All ER 1 (SC)** for cases to be brought against anonymous defendants who are identifiable but whose names are unknown. It was stipulated that the defendant must be described in a way that makes it possible in principle to locate or communicate with him.

Moreover, the High Court also confirmed that the Plaintiff merely needs to establish a good arguable case for the court to apply the “persons unknown” jurisdiction as decided in the **CMOC** case.

### **(2) COURT CAN GRANT PARALLEL PROPRIETARY INJUNCTION AND MAREVA FREEZING INJUNCTION**

The High Court further ruled that it has the jurisdiction to parallel reliefs of a proprietary injunction and a Mareva injunction, which is often done in fraud cases, and highlighted the difference between both the remedies. In granting the injunctions against the Defendants, the High Court based in judgment on the following principles:

#### **PROPRIETARY INJUNCTION**

The High Court adopted the three elements for the grant of a proprietary injunction as laid out in the English High Court decision of ***AA v Persons Unknown* [2020] 4 WLR 35** in granting proprietary injunctions against the Defendants. The three elements are as follows:

- (a) the claimant has shown that there is a serious issue to be tried on the merits;
- (b) the balance of convenience is in favour of granting an injunction; and
- (c) it is just and convenient to grant the injunction.

It was further confirmed that there is no need for the Plaintiff to show a risk of dissipation of assets.

### **MAREVA INJUNCTION**

In granting Mareva injunctions against the Defendants, the three trite elements as laid out in the Supreme Court case of *Aspatra Sdn Bhd & 21 Others v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 were being followed. The three elements are as follows:

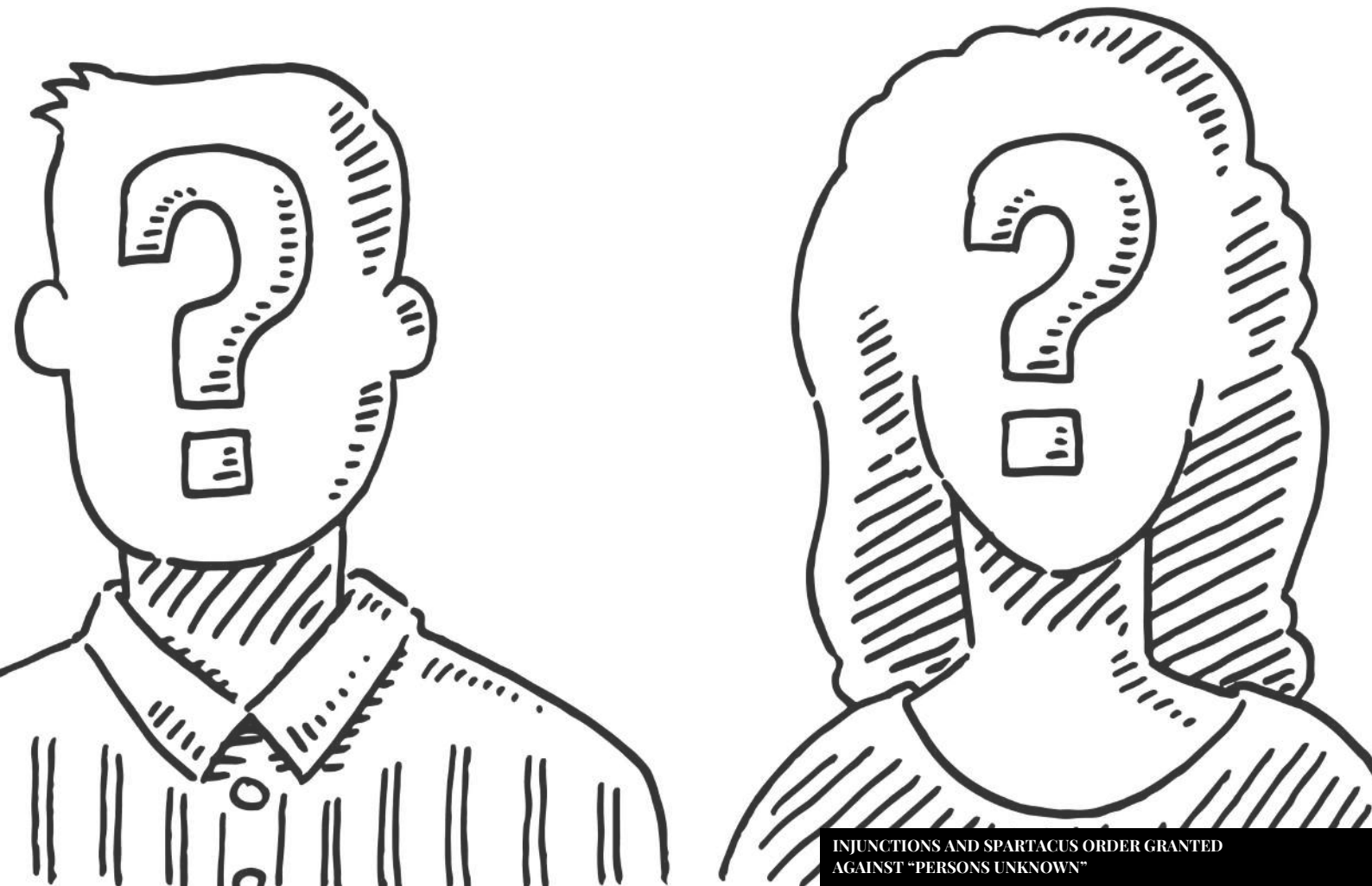
- (a) the applicant must show that it has a good arguable case;
- (b) the defendants have assets within jurisdiction; and
- (c) there is a risk of the assets being removed before judgment could be satisfied.

Notably, the High Court further stipulated that when assessing whether there is a risk of assets being removed, a lack of probity and honesty can be determinative in concluding that there is such a risk of dissipation.

### **(3) COURT CAN ORDER FOR SUBSTITUTED SERVICE AGAINST PERSONS UNKNOWN (THE FIRST DEFENDANT) BY WAY OF EMAIL AND ADVERTISEMENT**

As to the service of cause papers, the High Court is of the view that it is impracticable to effect personal service on the First Defendant being persons unknown and hence ordered substituted service against the First Defendant by way of email and advertisement pursuant to Order 62 Rule 5(1) of the Rules of Court 2012.

It was also stipulated that the proposed methods of substituted service should be those that would most likely bring the proceedings to the notice of the defendant. The High Court was satisfied that in the circumstance of this case, where the only known communication method with the First Defendant is through email, the two most practicable methods that would most likely bring the proceedings to the notice of the First Defendant is by sending emails to the fake email addresses that were used by and in the control of the First Defendant and also by way of advertisement.





#### **(4) COURT CAN GRANT SPARTACUS ORDER IN CASES INVOLVING FRAUD AND PERSONS HIDING BEHIND THE FRAUD**

In addition to the proprietary injunction and Mareva injunction, the High Court further granted a self-identification order against the First Defendant, being “persons unknown”. A self-identification order, also known as a Spartacus order, is an order requiring the persons unknown to identify himself/herself and to provide an address for service.

In granting the Spartacus order against the First Defendant, the High Court applied the English High Court decision in ***PML v Person(s) Unknown [2018] EWHC 838 (QB)***, involving an anonymous blackmail case, where it was stipulated that the purpose of the self-identification order is so that if the plaintiff were to succeed in its claim, such an order is necessary to ensure that the Plaintiff’s remedies are to be effective.

Reference is further made to the CMO case, in which the English High Court observed that the courts often granted self-identification orders against unidentified defendants to identify themselves and provide an address for service.

The High Court was of the view that although the cases granting a self-identification order cited involved blackmailing and threat of publication of confidential or sensitive information, the principles equally applicable in the present circumstances which involved fraud and persons hiding behind the fraud.

#### **CONCLUSION**

The decision in ***Zschimmer & Schwarz*** being the first decision of the Malaysian Courts which grants injunctive orders and Spartacus order against “persons unknown” is indeed groundbreaking. While confirming the court’s jurisdiction to grant such orders against “persons unknown”, the High Court had also clarified the court’s power to order substituted service by way of email in situations when it is impracticable to effect personal service.



Ankit R. Sanghvi  
Partner (on sabbatical)  
Halim Hong & Quek  
Advocates & Solicitors  
ankit.sanghvi@hhq.com.my



Meyer Thor Xiao Xin  
Pupil in Chambers  
Halim Hong & Quek  
Advocates & Solicitors  
meyer.thor@hhq.com.my



# Happy Birthday, HLP!

HLP is proud to announce that it is celebrating its 6-year anniversary. The firm was founded by a small group of dedicated lawyers, with the belief that they could offer clients not only with strategic legal advice, but making the entire process as positive and as cost-effective for its clients as possible.

HLP remains dedicated to that mission, and looks forward to many more years of helping its clients to achieve their goals.

Here's a little throwback photos to show how much we have grown together:



All photos presented here are taken before the COVID-19 pandemic.



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Ms Maizatul  
[maizatul@hhq.com.my](mailto:maizatul@hhq.com.my) / +603 2710 3818

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It is distributed for free and can be read on HHQ's or HLP's website at <https://hhq.com.my/> or <https://hlplawyers.com/>

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## EDITORIAL TEAM



Chong Lee Hui



Ankit Sanghvi



Serene Hiew Mun Yi



Amy Hiew Kar Yi



Tan Poh Yee



Hee Sue Ann



Chan Jia Ying

## Contact Us



### **KUALA LUMPUR OFFICE**

OFFICE SUITE 19-21-1, LEVEL 21,  
WISMA UOA CENTRE,  
19, JALAN PINANG,  
50450 KUALA LUMPUR  
T: +603 2710 3818  
F: +603 2710 3820 (Corporate & Real Estate)  
+603 2710 3821 (Dispute Resolution)  
E: [hhqkl@hhq.com.my](mailto:hhqkl@hhq.com.my)

### **PENANG OFFICE**

C-11-2, LORONG BAYAN INDAH 3,  
BAY AVENUE,  
11900 BAYAN LEPAS,  
PULAU PINANG  
T: +604 640 6818  
T: +604 640 6817  
F: +604 640 6819  
E: [hhqpenang@hhq.com.my](mailto:hhqpenang@hhq.com.my)

### **JOHOR OFFICE**

A-2-23 & A-3-23, BLOCK A,  
PUSAT KOMERSIAL BAYU TASIK,  
PERSIARAN SOUTHKEY 1,  
80150 JOHOR BAHRU,  
JOHOR  
T: +607 300 8101  
T: +607 289 7366  
F: +607 300 8100  
E: [hhq@hhqjb.com.my](mailto:hhq@hhqjb.com.my)



### **KUALA LUMPUR OFFICE**

SUITE 32-5, 32ND FLOOR,  
OVAL TOWER DAMANSARA,  
NO. 685, JALAN DAMANSARA,  
60000 KUALA LUMPUR  
T: +603 7732 8862  
F: +603 7732 8812  
E: [hlp@hlplawyers.com](mailto:hlp@hlplawyers.com)