ADVOCATES & SOLICITORS

# In this Issue



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A monthly newsletter by HHQ & HLP

# Message from the Editors

## Dear Readers,

Happy New Year! We hope you've enjoyed the Chinese New Year holidays. May the Year of the Rabbit bring you a wealth of joy, happiness and good health.

This first Issue of 2023 marks our 11th year of sharing legal knowledge with all our readers, and we are looking forward to bring you the latest case updates and insights in the year ahead.

We are pleased to announce that HHQ has officially joined Andersen Global as a member on 1st January 2023. Along with the addition of 10 other new member firms this year, Andersen Global has one of the largest global footprints among multinational, multidisciplinary professional services firms - boasting a presence in over 170 countries and 390 locations.

Our membership with Andersen Global enables us to deliver seamless global service to all our clients, and positions us well for continued growth.

HHQ marked a strong start to the year, as we are ranked by Chambers Asia Pacific Guide 2023 as a Band 3 firm in Real Estate for the second year running.

For the first time in the firm's history, HHQ is recognised by The Legal 500 Asia Pacific 2023 as a Tier 4 Firm in Real Estate and Construction and we are also featured as a Firm to Watch in Banking and Finance.

With this milestone, we are galvanised to continue providing outstanding legal services to our clients and ensure that our lawyers are always empowered to be at the cutting edge of legal practice.

We also congratulate Lam Wai Loon from Harold & Lam Partnership (HLP) for his achievement in being ranked as a Band 2 lawyer in Dispute Resolution for Construction by Chambers Asia Pacific. HLP is also ranked as a Tier 4 firm in both Dispute Resolution and Labour and Employment by The Legal 500 Asia Pacific.

Lam Wai Loon's newly launched book titled "Lam on Construction Claims in Malaysia", co-authored with Serene, Amy and Hui Ying from HLP (resident contributors of Empower) is now available on LexisNexis.

We hope you will gain valuable insight reading this month's issue and we welcome your questions and suggestions at newsletter@hhq.com.my. As always, happy reading and we look forward to a great year of empowerment ahead!

# Andersen Global Caps Another Year of Strong Growth with the Addition of 11 New Member Firms Worldwide

## *Growing Global Footprint Provides Multinational Clients with Independent, Best-In-Class, Multidisciplinary Services*

**SAN FRANCISCO** – Andersen Global, the worldwide leader in tax and legal services, welcomes 11 member firms to its platform, increasing its ability to provide independent, multidisciplinary, borderless service to its global clients. Through its member and collaborating firms, Andersen Global has over 13,000 professionals a presence in over 390 locations in more than 170 countries on six continents, giving it one of the largest global footprints among multinational, multidisciplinary professional services firms.

New member firms of the organization include:

- A&A Tax (Australia)
- Law Firm SAJIĆ (Bosnia and Herzegovina)
- CN Law (Burundi)
- Nimba Conseil (Guinea)
- Saint Lawrence Tax Consultancy (Jordan)
- Unicase (Kazakhstan)
- Halim Hong & Quek (Malaysia)
- Tax & Legal Advisers LLC (Tajikistan)
- ECC Denetim (Turkey)
- MCG Legal (Turkey)
- Intuit Management Consultancy (United Arab Emirates, Singapore, India)

"As a firm, we've taken tremendous strides in the last year to deepen our capabilities across key markets and specialties, including mergers and acquisitions, valuation and global mobility, to become a true one-stop-shop for our multinational clients," said Andersen Global Chairman and Andersen CEO Mark Vorsatz. "These member firms reinforce our global approach, further unify the Andersen brand, and enable us to deliver seamless global service, positioning us well for continued growth."

Andersen Global has grown rapidly since its establishment in 2013. Over the past five years alone, the global organization has expanded into more than 150 countries, averaging more than a deal per week during that time. In 2022 alone, Andersen Global added a new presence or expanded its current footprint in more than 50 new locations and increased its ranks by over 2,000 professionals.

Countries in which Andersen announced an expanded presence in 2022 include:

Africa

Bangladesh, Central African Republic, Chad, Ethiopia, Ghana, Mali, Rwanda, and Tanzania

Americas and the Caribbean

Brazil, the British Virgin Islands, Canada, Guadalupe, Montserrat

Asia and Asia Pacific

Australia, Bangladesh, Indonesia, New Zealand, South Korea, Sri Lanka, Taiwan, and Thailand

Europe

Austria, Belgium, Denmark, Estonia, Finland, France, Iceland, Latvia, Lithuania, Slovakia, Slovenia, Switzerland, and the United Kingdom

Middle East

Pakistan

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Andersen Global is an international association of legally separate, independent member firms comprised of tax and legal profession-als around the world. Established in 2013 by U.S. member firm Andersen Tax LLC, Andersen Global now has more than 13,000 professionals worldwide and a presence in over 390 locations through its member firms and collaborating firms.

# Drafting A Settlement Agreement: A Quick Guide to The Art of Effective Compromise

BY LYNN FOO

## Introduction

When the parties to a dispute reach a form of compromise without the intervention of court or arbitration proceedings, it is important for the parties to have all the terms of agreement recorded in writing in the form of a settlement agreement. Entering into a settlement agreement is usually the best way of reaching a swift resolution.

Negotiating the terms for a settlement agreement can be a tedious, daunting and stressful process. In this article, I have listed out some practical guidelines for the drafting of a settlement agreement and also, to help you/ your company to negotiate the best possible outcome.

## A) Understand What is at Stake

Before you negotiate the terms for settlement, it is prudent to a have a clear understanding of exactly what is at stake.

Some of the key questions for consideration would be:

> *What is being settled and on what basis? Whether the settlement proposal is reasonable? What will happen if you give in or hold your ground? What would be the impact of compromising? What would be the possible outcome?*

Asking yourself these questions with gathered answers/ information would assist you to make better decision for yourself/ your company.

## B) The Key Provisions to include in a Settlement Agreement

### 1. The Parties

The Parties to the settlement agreement should be clearly named and specified. This is usually stated by reference to the name of the person/business and their respective addresses. It is also important for the parties to ensure that the person executing the settlement agreement has the necessary authority to execute the settlement agreement, especially when the party entering into the agreement is a company.

### 2. Scope of Settlement

It is also important for the scope of settlement in the settlement agreement to be set out as clear and well defined as possible. This is to avoid the possibility of any ambiguity or conflict in the future.

As a general rule, you would want to cover, amongst others, the following items:-

a. the subject matter of the dispute;
b. what are the conditions to the settlement (i.e, the settlement sum and due date for payment);
c. obligations of the parties;
d. timeline to comply with the terms;
e. consequences for non-compliance to the settlement terms;
f. tax implication;
g. interest;
h. how the scope of release is defined; and
i. any other details.

### 3. "Governing Law" and "Dispute Resolution" clauses

As with any other agreements, the “Governing Law” and “Dispute Resolution" clauses should also be clearly drafted and unambiguous.

Typically, a “governing law” provision is a provision used in an agreement that specifies which country’s law will apply in the event of a dispute, whereas the “Dispute Resolution” clause will set out which avenue/forum the parties want their disputes to be resolved (i.e. by court or arbitration proceedings). Essentially, the parties involved would need to understand what are the advantages and disadvantages of these forums.

The Malaysian courts will usually endeavour to give effect to the parties’ agreement on how the parties wish to resolve their disputes. Hence, if this is poorly drafted, the parties would end up wasting their time and money arguing on which would be the appropriate forum for the disputes to be resolved, instead of actually resolving their disputes.

### 4. Confidentiality Clause

Many times, the parties to a settlement agreement would want the information contained in the settlement agreement be kept strictly private and confidential by the parties involved. Essentially, having a confidentiality clause would prevent the parties to the settlement agreement from divulging sensitive information and trade secrets to a third party. In this regard, the parties can negotiate the terms of the confidentiality in accordance to the sensitivity of the confidential information, obligation and/or the scope as they deem fit.

### 5. Notice

It is also important for the parties to state clearly on the method of notice to be given or received by the parties under the Settlement Agreement. A notice clause usually specifies how contractual notice should be given, where it should be served and when these notices are deemed to have been properly served.

### 6. Expense/Cost for Preparation of the Agreement

A clause relating to cost/expense arising from the negotiation and preparation of the Settlement Agreement is also fairly important as the parties would probably incur costs such as stamp duty, legal fees, expert fees or fees arising from court, arbitration or adjudication proceedings. It is important for the expenses required by each party to be spelled out clearly in the settlement agreement relating to the preparation, negotiation and execution of the settlement agreement.

### 7. “Entire Agreement” clause

This clause allows the parties to provide certainty on the entirety of the agreement in writing. Having this clause included in the settlement agreement would ensure that no other pre-contractual discussion, agreement (either written or oral) or documents will form part of the settlement agreement, unless otherwise stated. A separate article on the importance of adopting the “Entire Agreement” clause can be found here or in our **September 2021** Empower Newsletter.

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# Case Summary: Protection to Employees Involved in Trade Union Activities

**BY SYED MOHAMED ASHIQ & PANG YI QING**

***Case Summary: Ismail Nasaruddin bin Abdul Wahab v Malaysian Airline System Bhd [2022] 6 MLJ 414***

## Case Facts

1. This case concerns an appeal by an employee to the Federal Court regarding the rights of an employee to participate in trade union activities. It also concerns the protection provided under the Employment Act 1955 ("**EA 1955**"), Industrial Relations Act 1967 ("**IRA 1967**") and Trade Union Act 1959 ("**TUA 1959**") for an employee participating in trade union activities.

2. The employee, in his capacity as the President of his organisation's trade union, had issued a press statement which highlighted the problems faced by his peers and called for his employer to take steps to ensure their welfare and safety. He also called for his employer's CEO to resign for not being able to resolve the issues that were being faced at that time.

3. As a consequence of his issuance of the press statement, the employee was dismissed from his work. The employee proceeded to challenge his dismissal before the Industrial Court.

## The Industrial Court's decision

4. The Industrial Court dismissed the employee's claim on the ground that Sections 4(1) and 5(1) of the IRA 1967, which concerns protection to employees for participating in trade union activities, cannot be relied upon by an employee in cases where the employee was found to be guilty of allegations of misconduct. The employee proceeded to appeal to the High Court against the decision of the Industrial Court.

## The High Court's decision

5. The High Court set aside the Industrial Court's Award on the ground that Section 22 of the TUA 1959 and Sections 4(1) and 5(1) of the IRA 1967 are applicable in this case. Therefore, the employee was protected and permitted to participate in lawful union activities.

6. As the press statement issued was made in relation to the employee's exercise of his duties as a trade union officer, the employee's action could not be labelled as a misconduct warranting dismissal.

7. The employer, being dissatisfied, appealed against the decision of the High Court to the Court of Appeal.

## The Court of Appeal's decision

8. The Court of Appeal then set aside the High Court's decision and decided in favour of the employer.

9. The Court of Appeal held that the employer had firstly succeeded in proving that the employee had, through his actions, committed a gross misconduct warranting dismissal. The Court of Appeal found that the employee had breached the express and implied terms of employment.

10. Further, the Court of Appeal also held that as the issue between the employer and trade union is a trade dispute as defined under the IRA 1967, the parties must adhere to the procedure for settlement of trade disputes as provided under the IRA 1967. This was not adhered to when the employee issued the press statement.

11. The employee, being dissatisfied, sought leave to appeal to the Federal Court against the decision of the High Court.

## The Federal Court's decision

12. The main issues appealed before the Federal Court were:

    a. To what extent is an employee protected in respect of a charge of misconduct by an employer for acts carried out in their capacity as a trade union officer or member?

    b. Whether the dismissal of the employee as the president of his organisations trade union is an act of unfair labour practice?

    c. Whether it is necessary for a trade union officer to first exhaust the dispute faced in accordance to provisions of the IRA before issuance of any press statement on the dispute?

13. The Federal Court held that pursuant to Section 8 of the EA 1955, a contract of service could not be used to contract out the rights of employees to join, participate, or organise trade union activities.

14. Moreover, the Federal Court held that a trade union officer was not obliged to exhaust the trade dispute processes under Sections 18, 19 and 26 of the IRA 1967 before issuing a press statement. The legislation scheme does not prohibit trade unions from issuing press statements as well. Therefore, the employee in the matter was within his right to issue a press statement on the dispute faced by himself and his peers.

15. The Federal Court was also of the view that the press statement released by the employee was not malicious, wholly unreasonable or extraneous. It was also found that the employee did not release the press statement out of personal interest, but under its duty as his organisation's trade union President. Thus, his action did not amount to a misconduct.

16. Based on the above, the Federal Court allowed the appeal and set aside the Court of Appeal's decision.

## Key Takeaways

17. The above decision cements the Court's interpretation of the IRA 1967 and TUA 1959, in particular regarding trade union activities. The provisions relating to union representation and the prohibition of discrimination against workmen in their employment by reason of participating in trade union activities based on the Federal Court decision is squarely in favour and for participation of employees in trade union activities. This is a progress in workers' rights in Malaysia.

18. The Federal Court's decision could also be viewed as a recognition on the importance of trade unions acting as a platform to provide speedy and just settlement of industrial disputes. Moreover, the Federal Court's decision safeguards employee's right to participate in trade union activities.

19. This development is beneficial to both the employer and employee whereby, an employer, in view of the stronger position of trade unions would have a better streamlined avenue to discuss employment and trade disputes with its employees collectively.

20. On the other hand, an employee with grievance or trade dispute may approach the employer together with the trade union without any worry and concern of their status as employees. This promotes better communication and more effective resolution of conflicts between an employer and employee.

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# Federal Court Unanimously Dismissed Purchasers' Notice of Motion for Leave to Appeal to Federal Court

**ALVIN LEONG WAI KUAN & 14 ORS v BLUDREAM CITY DEVELOPMENT SDN BHD AND OTHER APPEALS**

**Coram**: Y.A.A. Tan Sri Datuk Amar Abang Iskandar Bin Abang Hashim, HBSS, Y.A. Dato Rhodzariah Binti Bujang, HMP, Y.A. Dato' Mohamad Zabidin Bin Mohd Diah, HMP. Decision delivered on 04.01.2023.

**Watching Brief:**
Real Estate and Housing Developers' Association Malaysia ("REHDA"): Represented by of Mr. Thoo Yee Huan of Messrs Halim Hong & Quek

**BY THOO YEE HUAN & HEE SUE ANN**

## Brief Facts

The purchasers and the developer have entered into sale and purchase agreements ("SPA") after the Controller has granted extension of time to complete the Project within 42 months to the developer ("1st Extension"). Subsequently, there was a 17-months stop work order ("the SW Order") issued by Majlis Perbandaran Subang Jaya ("MPSJ") as it was discovered that there were cracks on the school building beside the construction site of the Project.

The developer then further applied to the Controller for extension of time to deliver vacant possession from 42 months to 59 months due to the SW Order but the Controller only granted an extension from 42 months to 54 months.

The developer appealed to the Minister and the Minister allowed the further extension from 42 months to 59 months ("2nd Extension").

Unsatisfied with the Minister's decision, the purchasers filed applications for judicial review against the 2nd Extension. The purchasers did not challenge the 1st Extension in the judicial review applications.

## High Court's Decision

The learned judge in the High Court has allowed the judicial review applications on the basis that he was bound by the decision of the Federal Court in ***Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 CLJ 162 ("Ang Ming Lee")***. The learned judge also proceeded to invalidate the 1st Extension despite there being no challenge on the 1st Extension.

## Court of Appeal's Decision

The developer, Minister and Controller then filed an appeal to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the High Court's decision and has distinguished the current case from Ang Ming Lee as the purchasers in the current case did not challenge against the 1st Extension in the judicial review applications. The court is of the view that : -

i. Although the Federal Court in Ang Ming Lee held that Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 is ultra vires the Housing Development (Control and Licensing) Act 1966 ("HDA"), it did not oust the Minister's power to grant extension of time under Section 24(2)(e) of HDA;

ii. The purchasers' right to be heard by the Minister prior to granting the extension of time is not expressly stated in HDA, and shall be determined on a case-by-case basis;
iii. Parliament has granted flexibility to the Minister to grant extension of time under Section 24(2)(e) of HDA, which the Minister in granting the 2nd extension had taken into account relevant considerations which includes:-
    a. Reasonableness, fairness, proportionality and human decency;
    b. Balancing the competing interests of the parties; and
    c. Circumstantial facts revolving around the Project.

## Federal Court's Decision

Unsatisfied with the Court of Appeal's decision, the purchaser then filed a Notice of Motion for leave to appeal to the Federal Court. Two primary questions of law have been orally submitted and argued by the parties' counsel including from the Attorney General Chambers representing the Government whereby involving whether the Minister has power to grant extension of time and whether natural justice need to be observed with purchasers being accorded the right to be heard. Upon hearing the parties, the Federal Court has today unanimously dismissed the motion being not able to satisfy the threshold required under the Court of Judicature Act 1964 and with no order as to costs.

## Commentary

With this refusal to grant leave by the Federal Court, the Court of Appeal decision of this case is now final. It will now bring the closure of the issue whether the Minister has power to grant extension of time based on the circumstances of each case upon taking into account relevant considerations which may include the circumstantial facts revolving around the Project as long as the Minister's decision was arrived by the light of reason, logic, and the exceptional exigencies even without hearing the rights of the purchasers.

Furthermore, there was an expert report justifying the said decision. Even in Ang Ming Lee case, the Apex Court recognises the Minister's discretion and power to grant such extension.

However, the impact of this Federal Court decision may not resolve/assist the pending cases in courts where the extension of time is granted by Controller.

*This case update is an updated version of our case update dated 21 July 2021*

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# Asset Purchase Agreement attracts Nominal Stamp Duty

**BY DESMOND LIEW ZHI HONG**

In the recent case of ***Havi Logistic (M) Sdn Bhd v Pemungut Duti Setem*** **[2022] MLJU 2801**, the High Court held an asset purchase agreement which does not involve transfer of properties or interest legally or equitably attracts nominal stamp duty.

The brief facts of **Havi** ***(supra)*** are as follows:

1. The taxpayer entered into an asset purchase agreement to acquire the following assets from the vendor for a consideration amounting to RM10,378,806.35 ("**Asset Purchase Agreement**"):

    i. Acquired Assets
        b. Computer software;
        c. Computer hardware;
        d. Fittings;
        e. Renovations; and
        f. Plant, machinery and equipment.
    ii. Inventory

2. The Asset Purchase Agreement specifically excluded 'the good will Malaysia Business' of the vendor.

3. The Stamp Office adjudicated the Asset Purchase Agreement with ad valorem stamp duty amounting to RM399,196.00 under Section 21(1) of the Stamp Act 1949 and Item 32(a), First Schedule to the Stamp Act 1949.

4. The taxpayer objected on the basis that the Asset Purchase Agreement attracts nominal stamp duty under Item 4, First Schedule to the Stamp Act 1949.

5. However, the Stamp Office disagreed. The taxpayer paid the stamp duty under protest and appealed to the High Court.

The High Court held that, amongst others:

f. The burden of proof rests on the Stamp Office to provide that the Asset Purchase Agreement should be assessed under Item 32(a), First Schedule to the Stamp Act 1949.

g. In construing the Stamp Act 1949, one must look at the instruments and not at the transactions (see ***Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd*** **[2009] 5 MLJ 348**).

h. The cardinal rule in interpretation of documents – intention of the parties must be gathered from the written agreement itself (see ***Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*** **[2004] 1 MLJ 8**).

i. The subject matter in dispute – goodwill, has been specifically excluded.

j. Thus, the Asset Purchase Agreement clearly fell within the ambit of Item 4 of the First Schedule to the Stamp Act 1949 as there are no properties legally or equitably transferred being transferred.

**Comments**

This case demonstrated that the importance of preparing a well-drafted asset purchase agreement. In asset acquisition transactions, usually the schedule or list of assets

would be the last to be ironed out. However, the drafters must be clear of what are in the list or schedule and set out what are being excluded. Failing which, one may run the risk of ad valorem stamp duty being imposed on the asset purchase agreement (see ***Stanway Limited v Collector of Stamp Duties, Ipoh*** **[1932] 1 LNS 77**).

The crux of this case is "sale of any equitable estate or interest in **any property**" under Section 21 of the Stamp Act 1949 and **NOT** 'goodwill' solely. Any sale of sale of any equitable estate or interest in any property would subject to ad valorem stamp duty. Hence, one must be clear with what are being sold and transferred under the agreement.

Another highlight of this case is where the High Court held that in bringing the Asset Purchase Agreement to tax under Item 32, First Schedule to the Stamp Act 1949, the Stamp Office must specify which sub-item of Item 32, First Schedule to the Stamp Act 1949 and provide reasons and basis for the same, especially when the taxpayer has provided the basis of their objection.

Hopefully, the Stamp Office would specify clearly in the notice of assessment under which item/sub-item, First Schedule to the Stamp Act 1949 in bringing the instrument to tax moving forward.

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# inside OUT


## Launch of 'Lam on Construction Claims in Malaysia'

The successful book launch event was graced by esteemed speakers, Justice Mary Lim, Justice Lee Swee Seng, Professor Kok Fong Chow and attended by industry practitioners. It was certainly an event to remember, and definitely the first of many!


## A Running Start

We started the year healthy! Our lawyers joined the Sunsuria Foodiethon and KL Bar Run 2023 earlier in January. Keeping a healthy body makes for healthier minds and sharper legal eagles!

## Gong Xi Fa Cai!

HHQ ushered in the Chinese New Year with an exhilirating Lion Dance performance, and a heartwarming CNY luncheon with all our staff members.

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