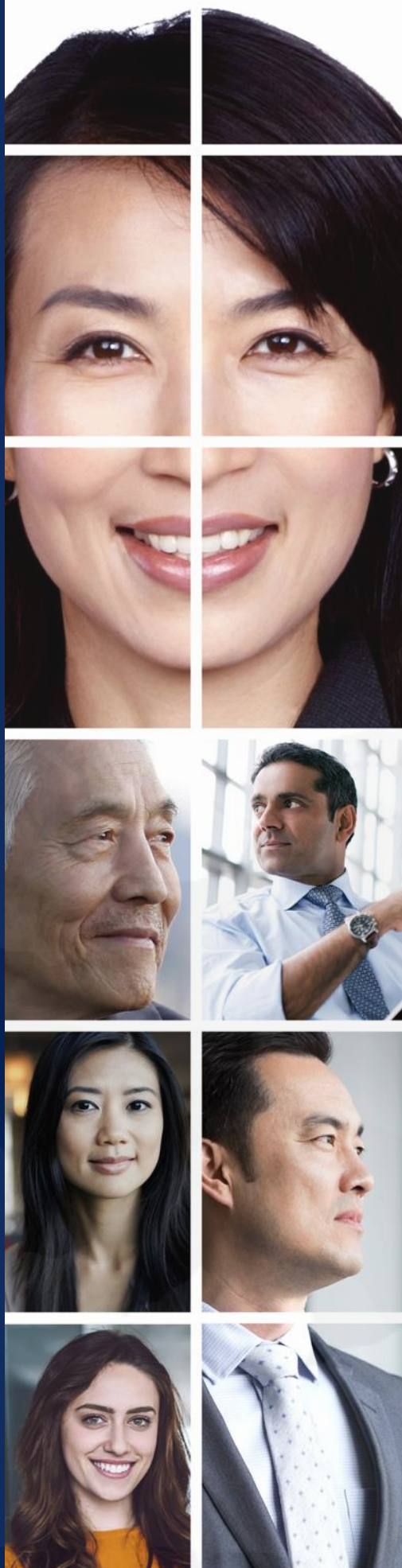
DREW NETWORK ASIA

LEGAL COMPARATIVE GUIDE:

INFRASTRUCTURE AND CONSTRUCTION IN SOUTHEAST ASIA



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OVERVIEW

This publication has been developed through the collaboration of leading ASEAN law firms in Drew Network Asia (DNA). It provides concise answers to practical questions that commonly arise for the different players in the construction and engineering industry in respect of nine major Southeast Asian jurisdictions: Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

Leveraging the deep expertise of experienced practitioners across the region, the guide covers a broad range of issues from the regulatory environment, procurement practices, project structure, risk mitigation, contracting terms and recourse, and even the enforcement of arbitral awards in each covered country.

The common questions across jurisdictions allow the reader to appreciate the contrasting legal approaches as well as market practice. Readers will be able to quickly identify areas of similarities and differences between the jurisdictions, and this will allow them to make more informed decisions when engaging in cross-border transactions.

The astute reader will realise that neither the legal position nor market practice is homogeneous across the different jurisdictions, and there are unique legal principles and local practices in a number of jurisdictions. This state of affairs warrants the need for high quality and experienced legal advisors to navigate the different legal and market landscapes. With our considerable experience and deep pool of talent across 9 ASEAN jurisdictions, the construction and engineering practices of DNA are well placed to assist market players not just in each jurisdiction but as a one-stop shop providing integrated legal services across multiple ASEAN jurisdictions.

CAMBODIA

1. CAMBODIA

1) Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Cambodian laws?

There are no requirements that apply specifically to foreign investors who wish to engage in construction work in Cambodia.

However, foreign parties should be aware of requirements for licenses and permits to carry out various types of construction work in Cambodia. Such requirements include:

(i) Licensing requirements under the 2019 Construction Law for construction, demolition, and innovation work.
(ii) Licensing and registration requirements under the 2019 Construction Law for construction professionals carrying out construction work.
(iii) Registration requirements and regulations under the 2000 Circular on Registration of Architectural and Construction Enterprises, Companies and Foreign Individuals and the 1999 Prakas on Regulation of Architectural and Construction Companies and Enterprises.
(iv) Licensing requirements under the 2020 Prakas on Management of Real Estate Development Business to carry out or undertake real estate development.

The deployment of a foreign workforce in Cambodia is also regulated under Cambodian Labor Law.

Any enterprise that either employs or has plans to employ foreign workers must apply annually for a foreign quota through the Foreign Workers Centralized Management System (FWCMS) of the Ministry of Labour and Vocational Training ("**MLVT**"). The foreign quota system limits the number of foreigners who may work for any given business.

A maximum of 10% of an employer's total workforce may be foreign nationals, and this is limited by "category" of employee. The percentage of each category of workers that may be of foreign nationality is:

(i) 3% of office employees,
(ii) 6% of skilled employees; and
(iii) 1% of unskilled employees.

Employers can also request to increase their work quotas above the standard quota set by the MLVT. Such an employer must manually submit a separate explanatory letter stating a compelling reason for the MLVT to grant an increase in the enterprise's foreign quota. The MLVT may approve these requests on a case-by-case basis.

A business visa is required for foreigners who are working in Cambodia. Unless the service has been suspended and foreign entry into the country is limited, business visas can typically be obtained upon arrival at the Cambodian airport; these are called "Entry Business Visas" and are

valid for one month from a traveler's arrival date. Every foreigner working in Cambodia must also have a work permit, in addition to having a valid business visa. Work permits are issued for one calendar year and are renewable.

2) **What are the various types or forms of construction contracts typically used in Cambodia and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

Cambodian law does not establish a standard form for construction contracts, whether for government or private sector projects. As a result, the structure of construction contracts can vary depending on the specific type of project. However, to ensure validity, these contracts must adhere to essential legal standards, including the competency of the parties involved, mutual offer and acceptance, and a clear intention to enter into an agreement that is not void under Cambodian law.[1]

Additionally, construction contracts should adhere to the specific content requirements as outlined in our response to question 7.

While there is no universally accepted construction contract in Cambodia, many projects utilize model contracts published by the International Federation of Consulting Engineers ("**FIDIC**"). The FIDIC forms are widely recognized and frequently employed in the construction industry, including in Cambodia. These model contracts adhere to international standards and clearly outline the scope of work, as well as the rights, obligations, duties, and liabilities of all parties involved.

We have also observed other contracting arrangements, such as the use of Engineering, Procurement, and Construction (EPC) contracts, which have been used in construction projects like the National Solar Park Project in Cambodia.

3) **What are the procurement methods used in Cambodia, and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

In Cambodia, procurement methods for construction projects can vary depending on whether the project is government-funded, private-sector, or involves international parties.

For government projects, procurement is governed by the Law on Public Procurement issued in 2023. Available procurement methods under the Law on Public Procurement are[2]:

(i) International competitive bidding, which is typically used for high-value contracts and projects involving advanced technology.
(ii) National competitive bidding, which is used for projects where the competition is limited to national bidders.

[1] Article 336 (1) and Article 345 of Cambodian Civil Code
[2] Article 12 and 13 of the Law on Public Procurement

(iii) Limited competitive bidding, which is employed for projects that involve complex technology and require bidders with specific expertise.
(iv) Price consulting, which is used for procurement targets in domestic markets and medium-priced projects.
(v) Price surveys, which is used for procurement targets in domestic markets and applied to low-priced projects.

In the private sector, there is no clear guidance on procurement practices. Therefore, companies typically develop their own procurement methods, which tend to be more flexible. Private companies may directly negotiate with contractors and invite multiple contractors to bid on projects. Additionally, collaborations between the government and private sector via Public-Private Partnerships ("**PPP**") are also possible.[3]

For projects involving international parties, especially those financed by international donors, the most likely procurement method used is International Competitive Bidding, which ensures global standards and competitiveness. Furthermore, companies should generally adhere to requirements, following rules set by international donors or financial institutions.[4]

4) How are construction projects typically structured in Cambodia, and would there be any particular considerations if international parties are involved? How are projects typically financed in Cambodia?

In Cambodia, construction projects typically follow a structured process involving several key stages, including design, production, and property management.[5]

(i) Design stage, which involves planning and designing the project, often with input from architects, engineers, and consultants. This stage may include project organization, procurement or contracting, project planning, budget and budget control, and applying information technology.
(ii) Production stage, which is the actual construction phase, where contractors and subcontractors work to build the project according to the design plans. This stage includes procurement of materials, production planning, quality management, budget review, and adherence to timelines and budgets.
(iii) Property management stage, which involves managing and maintenance of the property to ensure it operates efficiently.

Financing construction projects in Cambodia typically involves a combination of sources, including

(i) International Financial Institutions, where Organizations such as the Asian Development Bank ("**ADB**") and the World Bank may

[3] https://elearning-sop.mef.gov.kh/courses/procurement/lessons/8-procurement-methods-and-arrangements
[4] https://www.pfm.gov.kh/document/publication/2021-03-17/SOP%20on%20Procurement%20For%20all%20Externally%20Financed%20Projects%20Programs%20in%20Cambodia%20Volume%20III.pdf
[5] https://www.researchgate.net/profile/Kannary_Keth/publication/379080245_Identification_of_Workflow_in_Construction_Projects_in_Cambodia_With_and_Without_Building_Information_Modeling_Models_Management_Approaches/links/65fa4543f3b56b5b2d14ef6b/Identification-of-Workflow-in-Construction-Projects-in-Cambodia-With-and-Without-Building-Information-Modeling-Models-Management-Approaches.pdf?origin=scientific-contributions

provide financing for large infrastructure and construction projects in the country. For example, the ADB has been a significant contributor to various infrastructure projects in Cambodia, including roads, irrigation systems, and wastewater management plants.[6] Additionally, the World Bank also supports PPP projects in sectors like clean water supply, sanitation, and waste management. Large-scale infrastructure projects are generally state-led and mostly financed by foreign assistance grants and loans.

(ii) Government Funding and PPP, where some public infrastructure projects may be funded by the Cambodian government or through PPPs. PPP projects, where there is a mix of public and private financing, are common in Cambodia. For example, the Cambodia Sustainable Bond Accelerator (CSBA) program involved a collaboration between the Securities and Exchange Regulator of Cambodia (SERC), the Global Green Growth Institute (GGGI), and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). This initiative was further supported by the Credit Guarantee and Investment Facility (CGIF), a trust fund of the ADB, and GuarantCo, part of the private infrastructure development group.[7]

(iii) Foreign Direct Investment (FDI), where many construction projects in Cambodia are financed through investments from foreign companies, bringing in capital, expertise, and technology. Chinese companies have been particularly active in the Cambodian construction industry, largely through the Belt and Road Initiative (BRI). Key projects include the Phnom Penh to Preah Sihanouk Expressway and the Sihanoukville Special Economic Zone (SSEZ).[8]

(iv) Although less common, developers may explore crowdfunding or other alternative financing methods.[9] Smaller projects may also be self-funded by developers.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Cambodia?

Bid bonds, performance bonds, and advance payment bonds are commonly used to mitigate against potential losses arising from breach under construction contracts in Cambodia.[10]

Performance Security (Performance Bonds) are bonds which may be obtained from the contractor when a contract is signed to ensure that the contractor commences and completes the work according to the contract terms. The amount of this performance security will be specified in the contract's terms and conditions. The performance security will be returned upon the satisfactory completion of the contract, in accordance with the specified conditions.

[6] https://cambodianess.com/article/adbs-infrastructure-projects-contribute-to-development-throughout-the-country
[7] https://gggi.org/cambodias-green-finance-takes-flight-three-local-companies-selected-for-the-sustainable-bond-accelerator-program-phase-ii/
[8] https://marketresearchcambodia.com/foreign-investment-in-cambodian-construction-fuels-the-industry-boom/
[9] https://www.khmertimeskh.com/501547989/collective-effort-crowdfunding-drive-launched-to-improve-infrastructure-in-border-provinces/
[10] https://elearning-sop.mef.gov.kh/courses/financial-management/lessons/11-contract-expenditure-and-other-project-expenditures

Bid Bonds (Bid Security or Bid Guarantee Deposit), also known as a Bid Securing Declaration, are bonds required at the time of bid submission to ensure that only genuine bidders participate in the contract bidding process and to secure a commitment from the bidders to the terms of their bid. After a successful bidder is selected, the bid bonds must be returned to each bidder.

Advance Payment Bonds, which are advance payments made to the contractor or consultant to provide funds for initial materials, investment, or mobilization, as specified in the contract's terms and conditions. These advance payments must be recovered from future payments to the contractor or consultant. When advance payments are given, they should be covered by a bank guarantee provided by the contractor or consultant.

6) Are there are any specific governing laws and/or language requirements for construction contracts in Cambodia?

Under Cambodian law there is no requirement for agreements in general, or construction contracts in particular, to be in any specific language. Nevertheless, Khmer and English are commonly used in Cambodia. However, if the contract were brought to a Cambodian court, the contract would have to be translated into Khmer as a Cambodian court is unlikely to be willing to review an English-language agreement.

It is open for parties to specify the choice of law that applies to the rights and obligations between the parties that arise under construction contracts, including contracts for construction work carried out in Cambodia.

7) Are there any mandatory terms that must be included in construction contracts in Cambodia? If so, what are they?

A construction contract is validly formed when there is an offer, acceptance, and an intention to create legal relations.[11] Additionally, under Cambodia's Construction Law, a construction contract—defined as an agreement between a construction owner and a builder, or between a builder and a subcontractor to carry out building or demolition work—must adhere to specific content requirements.

A construction or demolition contract must be made in writing and include the following minimum clauses[12]:

(i) Identity of contract parties
(ii) Location, size, and type of work
(iii) Contract fee, date, and mode of payment
(iv) Assurance of the contract parties about fulfilling their obligations
(v) Technical requirements and work safety requirements
(vi) Requirements for the supply of construction materials, equipment, tools, and machinery to be used for building or demolition works and for installation on the construction site

[11] Article 336 (1) and Article 345 of Cambodian Civil Code
[12] Article 67, Law on Construction

(vii) Conditions for contract amendment and cancellation
(viii) Insurance or other provisions related to liability for damage caused by work
(ix) Confirmation of compliance of a design document, as the object of the construction or demolition contract, with existing regulations
(x) Work commencement and completion dates, and handover date
(xi) Conditions for force majeure
(xii) Dispute resolution related to the contract.

For construction or demolition contracts for private residential buildings, abusive clauses shall be considered null and void. For example, the following clauses should not be included in such contracts[13]:

(i) A clause requiring the construction owner to mandate the contractor to seek a loan to finance the building work.
(ii) A clause requiring the construction owner to pay the contract fee in advance for the contractor to hand over the construction.
(iii) A clause prohibiting the construction owner or their representative from inspecting the construction site before the payment of the contract fee at each stage and before the handover of the construction.
(iv) A clause requiring the contractor to carry out building or demolition work according to a permit with technical requirements that have significantly changed from those of the original project.
(v) A clause relieving the contractor of obligations to complete the work within the time set in the contract by acknowledging delays, except for force majeure or reasons caused by the construction owner.

8) Is there a specific statute of limitations for construction disputes in Cambodia?

There is no specific statute of limitations for construction disputes in Cambodia. Instead, the extinctive prescription period for tortious acts and general claims applies. The right to demand damages for a tortious act shall be extinguished by prescription upon the expiration of three years from the time the injured party or their legal representative became aware of the right to seek damages, or ten years from the time the tortious act occurred.[14]

The “extinctive prescription” period for general claims is five years, unless otherwise provided by the Cambodian Civil Code or other regulations. This period commences when the claim can be exercised.[15]

Additionally, the period of “extinctive prescription” for demanding compensation for damages due to non-performance is five years from the time the damage occurred.[16]

[13] Article 68 of Law on Construction
[14] Article 765 of Cambodian Civil Code
[15] Article 481 & Article 482 of Cambodian Civil Code
[16] Article 406 of Cambodian Civil Code

9) At what point does the right to terminate arise due to a breach of contract under Cambodia law?

Should one of the parties to a bilateral contract commit a material breach of the contract, the other party may terminate the contract immediately.[17]

A material breach occurs when one party's failure to fulfill the contract prevents the other party from achieving the contract's purpose. This is deemed to occur in any of the following situations[18]:

(i) When, after a failure to perform at the specified time, the non-performing party is given a reasonable period to fulfill the obligation but still fails to do so within that period.
(ii) When a party fails to perform at the specified time, and the contract's purpose cannot be achieved if performance is not made at that time.
(iii) When it becomes impossible to carry out the essential act of performance.
(iv) When the breach is so substantial that it destroys trust between the parties, making further performance impossible.

10) Under the law of Cambodia, what are the available remedies for breach of contract and how are limitations of liability treated?

Under Cambodian Civil Code, if a party fails to perform an obligation, the other party may demand compulsory performance, payment of damages, or termination of the contract.[19]

For Compulsory performance, the non-breaching party may seek an order of compulsory performance from the court to compel the breaching party to fulfill their obligations.

For Damages, monetary compensation or damages are the primary remedies for contractual breaches. The amount of compensation awarded is usually based on the losses suffered by the non-breaching party. Article 403 of the Cambodian Civil Code expressly permits a contract to establish conditions for the payment of damages and the amount to be paid. Liquidated damages clauses are generally enforceable in Cambodia, to the extent that the amount of liquidated damages reasonably correlates to the losses anticipated to result from a breach (as stipulated under Article 401). The court is authorized to decrease the liquidated damages fixed by the parties if they seem punitive, or if they are grossly higher than the amount of damage actually incurred. The court is also authorized to award damages in addition to the liquidated damages provided under the contract if the actual damages exceed the liquidated damages. That said, Cambodian courts have the right to increase or reduce the amount of liquidated damages if the amount of actual damages is either grossly higher or grossly lower than the liquidated damages. In the event a Cambodian court considers the issue of liquidated damages, there is some risk that they may not follow

[17] Article 407 of Cambodian Civil Code
[18] Article 408 of Cambodian Civil Code
[19] Article 390 of Cambodian Civil Code

this clause if the amount of actual damages was significantly higher or lower than the liquidated damages.

For Termination, the non-breaching party may terminate the contract if the breach is material, meaning the contract's purpose cannot be achieved due to the breach.

Limitations of liability that have been properly incorporated into the contract may be given their intended effect. The Cambodian Civil Code does not expressly prohibit limitations of liability. However, it requires that contracts comply with mandatory provisions of law and be consistent with public order and good morals. Any contract that violates these principles is void.[20] That implies that any clause that contradicts mandatory provisions of law, public order, and good morals will not be enforceable.

Additionally, the Cambodian Civil Code prohibits parties from including any clause that seeks to gain excessive benefits by exploiting the other party's economic difficulties, ignorance, or inexperience.[21]

Please also note that under the Prakas on Unfair Contract Clauses, any contract between a business operator and consumers that includes an unfair contract clause involving the business operator abusing the circumstances is also prohibited.[22]

11) How are foreign arbitral or court awards or decisions enforced in Cambodia?

Cambodia is a signatory to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and is obligated to recognize and enforce foreign arbitral awards (subject to conventional technical exceptions). In addition to the New York Convention, Cambodia's Law on Commercial Arbitration provides for the recognition and enforcement of foreign arbitration awards by the Appeals Court of Cambodia.

Although foreign arbitration awards are enforceable pursuant to Cambodia's Civil Procedure Code and the Commercial Arbitration Law of the Kingdom of Cambodia, few foreign arbitration awards have been enforced in Cambodia and enforcement of a foreign arbitration award may be delayed or subject to levels of review or scrutiny not explicitly required under Cambodian law.

Foreign judgments will not be enforced by Cambodian courts unless Cambodia has a reciprocal arrangement with the foreign country where the court is based. At present, we are not aware of Cambodia entering into any reciprocal arrangements with foreign countries on the recognition of foreign judgments; therefore, foreign court judgments are currently not enforceable in Cambodia.

[20] Article 354 of Cambodian Civil Code
[21] Article 351 of Cambodian Civil Code
[22] Article 8 of Article 9 of Prakas on Unfair Contract Clauses

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INDONESIA

2. INDONESIA

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Indonesia laws?**

Yes, Indonesian law requires foreign investors to establish a local presence. To engage in construction activities in Indonesia, foreign investors must establish either:

(i) a foreign construction company representative office ("**BUJKA-RO**") in a joint operation with a qualified national construction company; or
(ii) an Indonesian foreign investment construction company through a capital cooperation (a joint venture) with a qualified national construction company ("**PMA Company**").

Indonesian law requires a BUJKA-RO to form a joint operation ("**JO**") with a qualified national construction services company ("**BUJKN**") as its local partner. The local partner in a JO must: be a national construction company; hold a construction business entity certificate ("**SBU**") with a large qualification and equivalent to the sub-classification of the BUJKA-RO; and be in the form of a private company, a state-owned entity (BUMN), or a region-owned entity (BUMD).

A PMA Company must comply with the 67% foreign shareholding limit (or up to 70% for foreign investors from ASEAN countries). Furthermore, the investors (shareholders) of a PMA Company must meet the following criteria:

(i) If they are local investors, they must: be a BUJKN; hold an SBU; have a large qualification; and engage in the same business activities as the foreign construction company (their joint venture partner).
(ii) If they are foreign investors, they must: be a foreign construction company; hold a certificate in the construction services sector from their country of origin that is equivalent to an Indonesian one under the prevailing laws and regulations; have a large qualification; and engage in the same business activities as the local construction company (their joint venture partner).

Foreign investors must also comply with other requirements such as prioritizing the use of local materials, transfer technology, employ more Indonesians than foreigners at the expert level, and employ Indonesian assistants in the management and technical fields.

2) **What are the various types or forms of construction contracts typically used in Indonesia and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

Indonesian law does not require a specific type of contract to be used, nor does it provide a specific standard form of contract. The contract does not vary according to the risk level or even the type of project (a

government or a private project). According to Indonesian law, the form of a contract follows the delivery system of the construction, including among others, the following: design – bid – build; design – build; engineering – procurement – construction; construction management; and partnership.

However, the above list of types of construction contracts is not exhaustive, so the parties can agree on another type of construction contract or make other adjustments they deem necessary so long as the contract contains the required mandatory clauses under Indonesian law.

Contractors with foreign shareholders or a principal that enter into construction contracts with Indonesian state-owned enterprises usually have their own standard construction or Engineering, Procurement, and Construction ("**EPC**") contracts. It is common for such construction contracts to 'loosely' use provisions of the International Federation of Consulting Engineers ("**FIDIC**") and modify them to conform to their purposes and Indonesian law. It is also common for construction or EPC projects in Indonesia involving foreign companies to use the FIDIC form of contract, including the Red Book (for construction only), the Yellow Book (Design and Build), the Silver Book (EPC/Turnkey), and the Green Book (for small value construction projects).

3) What are the procurement methods used in Indonesia, and would they vary depending on whether these are government or private sector projects or where international parties are involved?

Under the applicable regulations, the method used to procure construction services for a construction project depends on whether the project is a private project (using private funds) or a public project (funded from the state budget).

Indonesian law does not provide a specific procedure for procuring construction services for private projects. The project owner can use any procurement methods (e.g., tender or direct appointment), with procedures set privately by the project owner.

For the procurement of construction services for public projects, the Government of Indonesia provides the following methods:

(i) For construction work service providers: e-purchasing; direct procurement; a direct appointment; a quick tender; or a tender.
(ii) For construction consultancy services: selection; direct procurement; or a direct appointment.

International parties can also be involved in the procurement of construction services for a public project. A tender or selection can be used to involve international parties in the procurement of:

(i) construction work services with a minimum value of IDR 1 trillion;
(ii) construction consultancy services with a minimum value of IDR 25 billion; or
(iii) other goods/services with a minimum value of IDR 50 billion.

Under the relevant presidential regulation, the government also intensified the involvement of local micro-level businesses and cooperatives in the procurement of goods or services. It is required for Ministries, institutions or the government to use at least 40% of its budget to obtain domestic products from micro-level businesses and cooperatives.

Further, in the case of procurement in emergency circumstances such as disasters, a search and rescue mission, or damage to (state-owned) infrastructure, the presidential regulation also allows for the government to directly appoint the goods or services provider which, in its assessment, is capable and satisfies the qualification to implement the goods or services procurement.

4) **How are construction projects typically structured in Indonesia, and would there be any particular considerations if international parties are involved? How are projects typically financed in Indonesia?**

The structure of construction projects in Indonesia usually depends on how they are funded. Under the relevant government regulations, a construction contract can be funded from either state finances or non-state finances.

Construction contracts funded from state finances usually use a standardized contract, while for private projects (funded from non-state finances), the construction contract is drafted according to the parties' agreement.

For construction projects involving foreign parties, particularly those using EPC and turnkey contracts, the structure is typically split into onshore and offshore contracts. The onshore contract covers the civil construction work, while the offshore contract covers the engineering and offshore supply/procurement activities. The contracts are usually split for tax purposes, and to allow foreign businesses to provide design and procure offshore materials without being subject to the licensing requirements under the law. The parties also usually enter into a tripartite coordination agreement to link the onshore and offshore contracts as if the work were performed under one single EPC contract. In our experience, this type of split contract arrangement has also been used in EPC projects tendered by Indonesian state-owned entities. However, in implementing the split contract arrangement, certain tax issues may arise where Indonesian tax laws and regulations differ from other jurisdictions, which may impact the structure of the split contract arrangement. Therefore, further advice should be sought from a local tax specialist on the tax aspects.

On the financing of a project, Indonesian law allows the source of funding to be the government (the central government or regional government), businesses, or the public.

In addition, please note that since 2015, following the issuance of the relevant presidential regulation, some public projects (initiated by the government) are implemented through a Public Private Partnership (*Kerja Sama Pemerintah dan Badan Usaha – "KPBU"*) scheme. This way, the

government can reduce the use of the state budget to fund government projects and have private parties provide resources, including funding.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Indonesia?

Under the relevant government regulation, before providing construction services, construction service providers may be required to submit an advance payment bond, performance bond or maintenance bond.

A performance bond is required to ensure that the contractor will complete the construction work according to the standards agreed to under the construction contract. If the contractor fails to do so, the guarantor (a surety company) will indemnify the project owner.

Indonesian law does not require a performance bond to be conditional or non-conditional. However, in practice, project owners usually require the performance bond to be non-conditional to ease the disbursement of funding in the event of the contractor's default.

Project owners may also require an advance payment bond to be submitted in order to mitigate any potential losses if the contractor cannot complete the work and it results in failure to repay the advance payment. In the event of a default, the surety company will repay the outstanding amount of the advance payment to the project owner.

Another type of security which may be required is a maintenance bond. This bond serves as a guarantee that ensures that the contractor can repair any damage that occurs after the completion of the work. If the contractor fails to repair the damage or deficiency, the surety company will reimburse the cost of repairing the damage up to the maximum value guaranteed.

6) Are there are any specific governing laws and/or language requirements for construction contracts in Indonesia?

Yes. Indonesian construction law requires construction contracts in Indonesia to be governed by Indonesian law and drawn up in the Indonesian language. If a foreign company is party to a construction contract, it must be drawn up in both Indonesian and English, and if a dispute arises, the Indonesian version of the contract will prevail. Given this, the parties to the contract should bear in mind that they must rely on the Indonesian version/translation as the prevailing version.

7) Are there any mandatory terms that must be included in construction contracts in Indonesia? If so, what are they?

Yes. All construction contracts entered into with Indonesian parties must comply with the Indonesian construction law which requires construction work contracts to include provisions on the following:

(i) the identities of the parties;

(ii) the work to be performed (a clear and detailed description of the scope of work), the value of the work, unit prices, the lump sum value, and the time limit for completion;
(iii) the coverage period: the period during which the work and maintenance are the responsibility of the service provider;
(iv) equal rights and obligations of the parties;
(v) the use of construction workers, including the obligation to employ certified construction workers;
(vi) the payment method, including the obligation of the service user to complete payment for the work and provide a payment guarantee;
(vii) default;
(viii) dispute settlement;
(ix) termination of the construction contract;
(x) force majeure;
(xi) building failure, covering the obligations of the construction service provider and service user (e.g., the project owner) in the event of a building failure and the term of their liability for any building failure;
(xii) protection for workers, covering the obligations of the parties in the event of an event causing a loss, accident or death;
(xiii) protection for third parties other than the parties to the contract and workers;
(xiv) the environmental aspects and compliance with the environmental requirements;
(xv) guarantees to cover risks that arise and legal liability to other parties for the construction work or any building failure; and
(xvi) the choice of construction dispute resolution forum.

Further, as explained in Q6 above, construction contracts must be drawn up in the Indonesian language, and in the event of a dispute, the Indonesian language version will prevail. This requirement must also be emphasized and stated in a specific clause of the construction contract.

8) Is there a specific statute of limitations for construction disputes in Indonesia?

The Indonesian construction law does not impose a specific statute of limitation for resolving construction disputes. Therefore, the statute of limitations for construction disputes refer to the general provision of the 30 (thirty) year time limit under Indonesian law. Indonesian law is silent on when the 30-year time limit begins. However, in practice, it starts when the relevant right first arises (after a contract is concluded or a certain right under the contract is triggered).

9) At what point does the right to terminate arise due to a breach of contract under Indonesian law?

Defaults under Indonesian law include:

(i) not performing one's obligations in accordance to the contract or
(ii) delays in performing one's obligations. Indonesian law gives the injured party the right to terminate a contract due to a breach of contract after obtaining a court ruling confirming the breach.

Therefore, in practice, construction contracts governed by Indonesian law usually waive this article so that the contract can be terminated without a court ruling. It is also common for parties to usually agree that the party which intends to terminate the contract must serve the other party prior notice of its intention to terminate the contract.

Also in practice, the parties usually include a separate termination clause specifying the conditions under which a party may terminate the contract, such as if one of the parties is declared bankrupt, goes into liquidation or receivership. It is also common for the right to suspend (and ultimately, terminate) the contract to be triggered by non-payment by the owner of the project according to the contractually agreed payment terms.

10) Under the law of Indonesia what are the available remedies for breach of contract and how are limitations of liability treated?

In practice in Indonesia, a construction contract may contain remedies for a breach of contract. This is in line with the principle of freedom of contract under Indonesian law, according to which, all agreements that are entered into legally apply as law for the parties to them.

For example, if the breach of contract is caused by a defect in a building (it does not meet the standards agreed), as the first recourse, the project owner may ask the contractor to remedy the defect at the contractor's expense. The injured party may also request or pursue monetary compensation to recover a financial loss incurred as a result of the breach.

In the absence of an otherwise enforceable contractual limit on liability, Indonesian law limits the losses or damages that may be claimed by a non-defaulting party to: the actual costs and losses suffered and any profit which would have been enjoyed had there been no default (loss of expected profit); or losses which could have been predicted; and losses directly caused by the default.

Indonesian law is silent on limitations of liability. However, given the freedom of contract principle under Indonesian law, parties are generally free to agree to exclude or limit liability on a contractual basis (for instance, it is generally possible to limit a party's liability for negligence or fault, provided that the limitation of liability clause is sufficiently clear on this point).

11) How are foreign arbitral or court awards or decisions enforced in Indonesia?

Under Indonesian law, arbitral awards are to be enforced by the relevant District Court in response to a petition filed by one of the disputing parties. To enforce the award and issue the relevant documents, the Indonesian courts only rely on the information provided in the award, including among other things, the details of the disputing parties and the petition for relief granted by the arbitral tribunal.

The enforcement of foreign arbitration awards is handled by the Central Jakarta District Court (CJDC). The procedure for enforcing a foreign arbitration award is initiated by the registration of the award with the CJDC by the arbitration tribunal or its proxy accompanied by the required documents.

As for foreign court rulings, Indonesian procedural civil law (*hukum acara perdata*) does not recognize the direct enforcement of foreign court rulings. To enforce a foreign court ruling, a new lawsuit must be filed in the relevant District Court in Indonesia (where the defendant is domiciled). In the new lawsuit, the plaintiff can use the foreign court ruling as the basis of its 're-litigation' suit. The District Court will then determine the evidentiary value of the foreign court's ruling and whether it is enforceable in Indonesia through a binding local court judgment.

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LAOS

3. LAOS

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Lao laws?**

In the Lao People's Democratic Republic ("**Laos**"), foreign investors are subject to the same laws, regulations, and obligations as local investors when engaging in construction activities.

Lao law does not impose restrictions on foreign investment for businesses conducting construction activities, and there is no minimum registered capital requirement for operating a construction business. However, to operate a construction business in Laos, a foreign legal entity or foreign investor must be incorporated via the Ministry of Industry and Commerce ("**MOIC**"), and the following licenses are required:

(i) an Enterprise Registration Certificate issued by the MOIC, constituting the company incorporation license;
(ii) a Construction Permit and a Certificate of Correctness issued by the Ministry of Public Works and Transport ("**MPWT**"), verifying compliance with Lao standards; and
(iii) a Business Operating License issued by MPWT permitting the operation of construction activities, which must meet the following conditions outlined by the MPWT: must have stable and sufficient financing; must employ at least two technical staff members who are graduates in the construction field, and have experience working in a construction business; must be a large enterprise with advanced technology; and other conditions as required by Lao law.

2) **What are the various types or forms of construction contracts typically used in Laos, and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

Under Lao construction law, there are two types of construction agreements: Survey, Design and Construction Supervision Agreements; and Construction Agreements.

It is not uncommon for there to be no standardized contract type between the project owner and the constructor. What is most important is that the agreement clearly outlines the scope of work, detailing the rights and duties of the contractual parties. There are no standard forms provided by the Lao laws.

The choice of contract type depends on several factors, including the risk tolerance of the parties involved, the pricing solutions, their relative negotiating power, and the specific market practices of the trade in question. This implies that the ideal contract type may differ between government and private sector projects based on these variables. In addition, Lao legal frameworks do not clarify or determine which type of contract (local or international) should be employed for construction projects.

Government projects in Laos are generally more regulated and aimed at public benefit, while private sector projects are driven by commercial goals and therefore may be more flexible in their execution.

3) **What are the procurement methods used in Laos and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

In general, employers who work within the public sector or are connected to it in Laos have specific legal obligations under the Lao law:

These employers are generally required to organize public tenders for procurement. This means they must openly invite bids from multiple parties to ensure a fair and transparent selection process.

If public tenders are not conducted, Lao law mandates that they must at least obtain multiple quotations from different suppliers or service providers. This ensures fair competition and prevents favoritism or corruption in the procurement process.

Fundamentally, while public sector entities in Laos must adhere to the local procurement law, large private-sector firms usually operate under their own procurement systems, which might differ from local practices.

Procurement methods do vary between government and private sector projects. While both sectors use similar procurement methods, government projects have distinct regulations, transparency requirements, and procedures compared to private sector projects.

Procurement methods in Laos generally do not differ based on the involvement of international parties. However, some developers may require international parties to partner with a local joint venture in Laos to ensure accountability and manage risks. This practice is more about enhancing local engagement rather than a distinct procurement requirement.

4) **How are construction projects typically structured in Laos and would there be any particular considerations if international parties are involved? How are projects typically financed in Laos?**

Public sector projects in Laos are mainly financed through domestic government resources or international financial support. In addition, various commercial banks and financial institutions offer financial loans to support the development and building of construction projects. These projects may include residential buildings, commercial properties, and infrastructure such as roads and commercial centers. Essentially, these loans are used to cover the costs associated with construction, helping to facilitate the growth and development of the region’s infrastructure and real estate sectors.

If international parties are involved in a construction project in Laos, they must consider various factors, including legal and regulatory compliance, economic and financial aspects, project management, environmental and

social impacts, risk management, legal disputes, and arbitration. By addressing these considerations, they can effectively navigate the complexities of the project and collaborate more successfully with local partners.

5) **What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Laos?**

To ensure the effective performance of construction contracts, Lao law permits the use of various measures, including fund deposits as guarantees, penalties, pledges, mortgages, and guarantees from individuals or legal entities. These measures can be incorporated into the construction agreement between the project owner and the contractor.

6) **Are there any specific governing laws and/or language requirements for construction contracts in Laos?**

In Laos, there are no specific language requirements for construction agreements, and they may be drafted in the language of the parties' choice. Regardless of the language used, the construction agreement must be notarized and registered with the State Assets Management Department (SAMD) in the Ministry of Finance (MOF), to ensure full enforceability of the agreement under Lao law.

Contracting parties can specify their choice of governing law and dispute resolution clause (domestic or foreign arbitration laws) that will apply to the rights and obligations arising under the construction agreement. However, the contracting parties cannot choose foreign governing laws while using Lao arbitration law or the Lao courts to settle the dispute.

7) **Are there any mandatory terms that must be included in construction contracts in Laos? If so, what are they?**

There are no mandatory terms that need to be included in construction contracts in Laos, and they do not require specific terms to be valid. Instead, they follow general contract rules, meaning that a contract is valid if there is an offer, acceptance, consideration, and an intention to create legal relations.

8) **Is there a specific statute of limitations for construction disputes in Laos?**

There is no specific statute of limitations for construction disputes in Laos.

However, under Lao law, the statute of limitations (prescription) for filing a lawsuit regarding a breach of a construction agreement is ten (10) years from the time the plaintiff is aware of the breach.

Please note, that if the parties involved in a case do not raise the statute of limitations (prescription) during the dispute, the court cannot address or consider it on its own. Essentially, it is the responsibility of the litigants

to raise the issue of whether the time limit for filing the lawsuit has expired; otherwise, the court will not take it into account.

9) At what point does the right to terminate arise due to a breach of contract under Lao law?

Under Lao law, if a party fails to perform their contractual obligations, the affected party can demand performance, seek damages, or terminate the contract. The party that fails to perform must compensate for any damages caused unless the breach is due to force majeure.

An innocent party can terminate a contract if the contract itself allows for termination upon certain defaults, the other party breaches a key condition of the contract, or the breach significantly undermines the primary benefit the innocent party was supposed to receive from the contract.

An employer has several valid reasons to terminate the contract if the contractor fails to meet their obligations, whether through poor performance, financial issues, legal violations, or non-compliance with corrective instructions.

10) Under Lao law what are the available remedies for breach of contract and how are limitations of liability treated?

In Laos, when a contract is breached, the most common way to remedy a breach is through monetary compensation or damages. This means that the party who is not at fault (the innocent party) can receive financial compensation for the losses they have incurred due to the breach. The compensation amount is typically determined by the actual financial losses the innocent party has incurred.

Other alternative remedies for breach of a construction contract include:

(i) a court may order the breaching party to fulfil their original contractual obligations if requested by the other party;
(ii) if the contract is flawed due to mistake or misrepresentation, the parties can negotiate or mediate to amend the contract to reflect their true intentions;
(iii) mediation or arbitration can also be used as a flexible and faster alternative to resolve disputes outside of court.

11) How are foreign arbitral or court awards or decisions enforced in Laos?

Foreign arbitration awards can indeed be enforced in Laos, since Laos is a member state of the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). Lao law recognises that foreign arbitral awards made in any member state of the New York Convention are enforceable by the People's Court of the Lao Democratic Republic ("**Lao People's Court**").

Foreign arbitral awards are recognized and enforced by the Lao People's Court upon translation of the award into the Lao language and meeting

the following criteria as prescribed by Lao law: the award was issued in a country which is a signatory to the New York Convention; each of the parties to the arbitration hold nationality of a country that is a party to the New York Convention; the award does not impact the sovereignty of Laos and is not contrary to Lao laws; the award does not adversely impact national security, public order, social order, or the environment of Laos; and the party whom the award will be enforced against has assets located within Laos.

The Lao People's Court will issue a decision as to whether the submitted foreign arbitral award is recognized within thirty (30) days from the date that it has officially received the application and dossier. The People's Prosecutor Organization of Laos will also participate in this review process.

A Foreign Court Decision can indeed be recognized and enforced in Laos. However, the enforcement of a foreign court decision in Laos is not automatic, and the requirements set out in law must be met. At the outset, the foreign court decision must be translated, certified, and legalized. The Lao Court will then consider and decide on recognition in the following cases: the foreign court judgment was issued in a country which is a signatory to an international convention to which Laos is a member (e.g., with the Democratic People's Republic of Korea; the People's Republic of China; and the Socialist Republic of Vietnam); the foreign court judgment does not impact the sovereignty, and is not contrary to the laws, of Laos; and the foreign court judgment does not adversely impact national security, public order, social order, or the environment of Laos.

When the Lao People's Court has considered the matter and made the decision to either recognize or not recognize the decision of the foreign court, the same court must then send the decision to the litigants and the Chief of the Office of The Public Prosecutor. In case the litigants are in foreign countries, the Lao People's Court will send the decision to the MOJ for further processing.

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MALAYSIA

4. MALAYSIA

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Malaysian laws?**

Various legislation and regulations apply to all local and foreign construction industry players. The main pieces of legislation are the Construction Industry Development Board Act 1994, the Quantity Surveyors Act 1967, the Registration of Engineers Act 1967 and the Architects Act 1967.

Under some of the above-mentioned legislation and/or regulations, foreign investors are required to obtain registrations, licences and/or approvals to participate in construction projects. The qualification criteria may differ between locals and foreigners.

There are 2 categories of registration for local and foreign contractors. To qualify for registration as a local contractor, the contractor must have no less than 70% local equity interest and no more than 30% foreign equity interest in the total share capital of the company. Equity interest from ASEAN countries not exceeding 51% of the total share capital of the company can satisfy the local equity requirement for registration as a local contractor.

Higher registration fees apply to foreign contractors. Foreign contractors also have a minimum registration requirement of 3 years and each registration is category and project-specific and cannot be used for non-specified categories or projects. Foreign contractors may also be restricted from participating in certain government-related projects.

2) **What are the various types or forms of construction contracts typically used in Malaysia and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

The types and forms of construction contracts used in Malaysia are mainly dependent on whether it the contract involves a “build-only” or “design-build” concept.

The key difference between the two is that under a “build-only” concept, the contractor is engaged to perform the works according to the design prepared by the employer. Therefore, the contractor will generally not be responsible for any design-related issues such as suitability or sufficiency of the design. The contractor is consequently not required to certify the fitness for occupancy of the works upon completion. Project management is also usually undertaken by the employer or his consultant.

In contrast, under a “design-build” concept, the contractor is engaged to carry out the design and construction of the works, and therefore bears responsibility for both aspects. Project management typically comes under the contractor’s scope as well. This is also commonly known as a “turnkey” concept.

The question as to which concept is suitable for a particular project depends on various factors including factors such as timing, cost, technical and project management expertise of the employer, risk allocation, and so on. For example, a “build-only” concept may be suitable where the employer needs the design to be prepared prior to seeking a tender for the work, or where the employer prefers to have control over the works. On the other hand, a “design-build” / “turnkey” concept may be suitable where the employer seeks the convenience of having to only deal with one party (the contractor) on all aspects of the project, including design, construction and project management.

For a “build-only” model, some of the common standard forms used in Malaysia are PAM forms published by the Malaysian Institute of Architects, IEM forms published by the Institution of Engineers Malaysia, PWD/JKR forms published by the Malaysian Public Works Department and the FIDIC (Red book).

For a “design-build” / “turnkey” model, some of the common standard forms used in Malaysia are the PWD/JKR standard form of design and build contract (Form DB) and the FIDIC (Silver or Yellow books).

Government sector projects usually adopt the PWD/JKR forms, though there are instances where other international or bespoke forms are used.

3) **What are the procurement methods used in Malaysia and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

In Malaysia, there are two main types of procurement methods -the traditional or conventional method; and the design and build or package deal method.

Under the conventional method, the works are divided into various packages, principally the design works portion and the construction works portion and the owner of the project will contract with different parties for each portion - the architects and design team for the former and a main contractor for the latter. The conventional method was used for most government projects in the past.

However, large-scale projects nowadays tend to use the package deal method where one main contractor is responsible for both the design and construction of the project.

Another procurement method commonly used in large-scale government projects is the project delivery partner (“**PDP**”) model where the PDP is responsible for delivering the entire project within a specified timeframe.

4) **How are construction projects typically structured in Malaysia and would there be any particular considerations if international parties are involved? How are projects typically financed in Malaysia?**

The manner in which a project is structured depends on the type of project and whether local participation is a condition for the award of the contract. Where there are diverse parties involved, the choice of structure

will vary depending on the roles of and deliverables from each party. There are also other factors to consider, such as whether it is a government or private sector project, the source of funding and the complexity and/or size of the project.

In recent years, the Malaysian government has entered into projects with Public-Private Partnership structures in relation to construction, operation, management and maintenance of public sector assets and privatization of certain services.

There is no one-size-fits-all financing structure to facilitate construction projects in Malaysia. The corporate structure commonly adopted in construction projects involves the incorporation of a special purpose vehicle, which undertakes all aspects of the construction project, such as project ownership and project management ("**Project Company**"). Under this structure, the Project Company is typically owned either by a single shareholder or multiple shareholders ("**Sponsor(s)**"), which in turn injects funding into the Project Company via equity.

Where equity funding is insufficient, the Project Company will typically raise funds through debt financing. In doing so, the Project Company would either:

(i) issue bonds to be subscribed to by financial institutions/sophisticated investors; or

(ii) obtain loans from financial institutions by way of loan syndication ("**Senior Debt**"). Conventionally, the Senior Debt would cover the full security package, which would include a first-party charge/assignment over the project documents, the land on which the project is situated, insurance related to the project, machinery/equipment used in or assets related to the project, and bank account(s) opened and maintained by the Project Company. The Senior Debt may also be secured by security provided by the Sponsor(s), such as corporate guarantee or third-party charges/assignment over the Sponsor(s)' rights and interests over the project or its assets.

Besides providing third-party security, the Sponsor(s) may in some instances obtain loans on its own or require the Project Company to issue bonds ("**Junior Debt**"), the proceeds of which are channeled to the Project Company as equity. Such Junior Debt is typically secured by charge over the Sponsor(s)'s shares in the Project Company or corporate guarantee. Junior Debt is typically taken out in the situation where the Senior Debt is insufficient to cover the project cost or where the Project Company is required to have certain amount of paid-up capital to undertake the construction project.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Malaysia?

In Malaysia, there are various types of securities for the employer to mitigate against potential losses arising from any breach by the contractor under construction contracts.

An employer may require a performance bond in the form of a bank guarantee from the contractor. The bond value is usually 10% of the contract sum. The bond is usually of an "on-demand" nature so that the bond is payable on demand without the employer having to prove breach of the contract.

Further, an employer may require an advance payment bond where the employer makes an advance payment to the contractor.

The employer may also require an appropriate amount to be retained under each progress payment to the contractor. The rate of retention is usually 10% of the amount certified for payment, submit to a maximum of 5% of the contract sum. Half of the retention sum is usually released upon practical completion and the other half upon making good of all defects under the defects liability period.

Apart from the above, the employer may require that the contractor takes out insurance and that the employer is one of the named beneficiaries under the insurance policy, that the contractor issue a parent company guarantee, or, less commonly, require a personal guarantee from the directors of the contractor company.

The contractor may also be protected by various securities, such as requiring the employer to issue a parent company guarantee, stipulating a prohibition on the use of plans, designs and other documentation prepared by the contractor or any unfixed material and equipment at site until full payment is made, or, less commonly, require a personal guarantee from the directors of the employer company.

6) Are there any specific governing laws and/or language requirements for construction contracts in Malaysia?

There is no specific requirement in Malaysia in relation to governing laws or language for construction contracts.

Where the construction site is in Malaysia, the governing law is usually Malaysian law. Construction contracts for works in Malaysia are also subject to the mandatory provisions of the Construction Industry Payment and Adjudication Act 2012 (CIPAA).

Most construction contracts in Malaysia are in English. Some government contracts may be in Bahasa Malaysia, but this is rare. Where the contract is prepared in more than one language, it usually provides that the English version shall prevail.

7) Are there any mandatory terms that must be included in construction contracts in Malaysia? If so, what are they?

There are no specific mandatory terms that must be included in construction contracts in Malaysia. There will be a valid contract so long as the basic requirements are present, namely, offer and acceptance, consideration, an intention to create legal relations, legal capacity of the parties to enter into the contract and certainty of terms.

8) Is there a specific statute of limitations for construction disputes in Malaysia?

The limitation period for construction disputes in Malaysia is governed by the Limitation Act 1953 ("**the Act**"). The Act is of general application and not specific to construction disputes.

Section 6(1) of the Act provides that actions founded on a breach of contract or on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. Generally, in the event of a breach of contract, the 6-year limitation period accrues from the date the breach occurred; for actions in tort, it accrues when the damage occurred.

The limitation period may be extended in the case of latent damage. Section 6A of the Act provides that where the damage was only discovered and could only reasonably have been discovered either:

(i) less than 3 years before the expiry of the normal 6-year limitation period; or
(ii) after the expiry of the said 6-year period, a plaintiff would have 3 years from the date of such discovery to commence an action for damages, provided that it shall not exceed 15 years from the date when the cause of action accrued.

The limitation period may also be extended in the case of fraud or mistake.

9) At what point does the right to terminate arise due to a breach of contract under Malaysian law?

Well-drafted construction contracts in Malaysia usually provide for specific instances where the employer and/or the contractor may terminate the contract and the steps to be taken in such cases.

For example, the employer usually has the right to terminate the contract where the contractor fails to commence the works, fails to proceed regularly and diligently with the works, persistently fails to comply with the employer's instructions, or suspends or abandons the works with justification.

The contractor may in turn be able to terminate the contract where the employer fails to make payments as required under the contract, interferes with any certification process under the contract or instructs for the suspension of the works beyond the period allowed under the contract.

The contract may also allow either party to terminate on grounds of insolvency of the other party, fraud or corruption.

Where the breach can be remedied, the contract usually requires the non-defaulting party to issue a notice requiring the defaulting party to remedy the breach within a specified period, failing which the non-defaulting party may issue a further notice to terminate the contract.

Where the contract does not contain any specific clauses on termination, a non-defaulting party may then have to consider termination under common law, such as breach of a material or fundamental term, or repudiation of the contract by the defaulting party.

10) Under the law of Malaysia what are the available remedies for breach of contract and how are limitations of liability treated?

Remedies for breach of contract under Malaysian law include monetary compensation and specific relief. It is, however, generally recognized that monetary compensation is the principal remedy for breaches of construction contracts.

Monetary compensation includes damages and losses which arise directly from the breach, and which are not remote or unforeseeable. Loss of profit, business opportunity, reputation and goodwill are generally regarded as indirect or consequential loss and not claimable unless the circumstances of such loss have been made known to the defaulting party prior to entering into the contract.

One party may limit the extent of their liability to the other party in the event of breach of contract provided that the clause pertaining to limitation of liability is expressed clearly and unambiguously, and it is shown that it applies to the specific breach in question. Such clauses will be construed strictly and against the party seeking to rely on it in the event of any ambiguity. Certain liabilities prescribed under statute may not be excluded or limited by contract if it defeats the intent of the legislation.

11) How are foreign arbitral or court awards or decisions enforced in Malaysia?

A foreign arbitral award obtained from any country which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**Convention**") is recognized and enforceable in Malaysia, which is also a signatory to the Convention. It involves making an application to the High Court to register the award as a Malaysian court judgment.

Where the award is obtained from a country which is not a party to the Convention, the party in whose favour the award is made will have to commence an action in the Malaysian Courts and prove their claim in the usual way, although the award may be produced to support the claim.

Foreign court judgments may be registered as a local judgment in Malaysia if the foreign judgment is obtained from a jurisdiction listed under the Reciprocal Enforcement of Judgments Act 1958. Otherwise, the party who obtained the judgment will have to commence an action in

the Malaysian Courts to prove their claim and may produce the foreign judgment in support of the claim.

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MYANMAR

5. MYANMAR

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Myanmar's laws?**

   Foreign companies looking to enter Myanmar's construction sector generally face no stringent restrictions. They can entirely own a construction business in the country. It is optional for foreign investors to acquire permits and licenses from the Myanmar Investment Commission (MIC) to carry out construction activities. Companies must register with the Directorate of Investment and Company Administration (DICA) under the Myanmar Companies Law. Still, some foreign entities may not require registration for providing construction services, depending on the authorities they engage with.

   Contractors need licenses from the relevant authorities like the City Development Committees (eg. Yangon City Development Committee, Mandalay City Development Committee, Naypyitaw Development Committee, etc.) and the Ministry of Construction.

   Foreign engineers need to obtain licenses to work on design and supervision of construction projects in Myanmar. The Ministry of Construction, Ministry of Border Affairs, and City Development Committees oversee engineering services. Registration and licensing are handled by the Myanmar Board of Engineers (MBE), under the Myanmar Professional Regulatory Authority (PRA) within the Ministry of Construction.

   Certain construction projects may also require extra approvals from relevant ministries and city development committees.

2) **What are the various types or forms of construction contracts typically used in Myanmar and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

   In Myanmar, the type or form of construction contracts varies based on factors such as size, investment, and political stability. Directive 41/2018 from the Myanmar President's Office offers guidelines for government agreements, which cover Joint Venture Agreements, Land and Building Leases, Build-Transfer-Operate ("**BTO**") agreements, Procurement, Loans, Public-Private Partnerships, and more.

   In construction, the government uses public-private partnership agreements such as availability payments, Build-Own-Operate ("**BOO**"), Build-Operate-Transfer ("**BOT**"), Build-Transfer-Lease (BTL), BTO, and Operation and Management (O&M). These agreements should include key terms such as investment amounts, conditions precedent, responsibilities, liabilities, and rights of both governments and private partners for effective management.

   These agreements should also detail risk allocation, incentives, dispute resolution, performance indicators, financing, insurance, and terms. It must define minimum performance standards, monitoring processes, termination conditions, amendments, force majeure, taxes, auditing,

changes in law, effective date, contract term, guarantees, and renegotiation terms. Including these terms helps to clarify the roles and responsibilities of the parties involved, aiding in managing the partnership and mitigating risks.

For private sector projects, a broader range of contracts might be utilised, such as unit-price and time-and-material contracts, depending on the project's complexity and risk characteristics.

3) **What are the procurement methods used in Myanmar and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

Myanmar does not have specific procurement laws, but methods of procurement are detailed in Procurement Directives. Directive 1/2022 from the State Administration Council states that Union-level bodies, Ministries, the Nay Pyi Taw Council, and regional governments should use certain tendering methods for procurement. These include requesting for a price proposal, unrestricted and restricted tendering, two-stage tendering and direct procurement.

The directive states that Union-level departments, Union Ministries, the Nay Pyi Taw Council, and regional governments can request price proposals for simple construction work or goods and services readily available in the market if the estimated cost is under MMK 20 million.

The directive permits restricted tendering in certain cases, such as when receiving quality tenders is difficult and the number of tenderers is limited with unrestricted tenders, or for urgent state-owned large construction projects critical to public security or involving high technology, and during natural disasters and emergencies.

If the unrestricted tendering method is not specified in detail, it will include, but is not limited to, requests for price proposals, unrestricted tendering, two-stage tendering, and direct procurement.

The directive does not explicitly distinguish between government and private sector projects or the participation of international entities. However, it specifies that *"[p]urchases abroad may be made due to non-availability in the local market and lack of a dealer authorized by the manufacturer to sell the foreign product locally. Purchases abroad shall be made in accordance with the methods set forth in paragraph*." This suggests that international procurement methods adhere to the same procedures as domestic procurement methods, as long as the conditions for purchasing from abroad are satisfied.

4) **How are construction projects typically structured in Myanmar and would there be any particular considerations if international parties are involved? How are projects typically financed in Myanmar?**

All new construction projects must adhere to Myanmar Government's regulations. Buildings in the Yangon Region need approval from the Yangon City Development Committee before starting and must have a licensed contractor and engineer. High-rise buildings over 62 feet or four

stories need an elevator. In other cities, similar permission is required from the relevant city council.

The Condominium Law 2016 provides guidelines for condominium development in Myanmar. In particular, buildings must have at least six floors and be on collectively owned land. Foreigners can own up to 40% of the units. The law also allows development on state-owned land if it is converted and registered as collectively owned.

The Myanmar National Building Code 2020 outlines extensive guidelines for construction practices, safety standards, and building regulations to ensure buildings and infrastructure are safe, sustainable, and resilient. It addresses structural design, fire safety, electrical systems, and environmental issues.

Myanmar's numerous infrastructure and capital-intensive construction projects are often realized via Public-Private Partnerships (PPP), Joint Ventures, BOT and BOO methods. These approaches enable cooperation between public bodies and private investors to finance and oversee large-scale ventures.

Public sector infrastructure projects are often funded through Foreign Direct Investment (FDI). Additionally, both local and international banks provide loans for larger projects. Sometimes, government funding is available, especially for key national infrastructure initiatives. International development organizations may also offer grants or low-interest loans. Onshore and offshore loans are alternatives, subject to the Foreign Exchange Management Law and criteria set by the Central Bank of Myanmar (CBM).

5) **What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Myanmar?**

In Myanmar, various securities like insurance policies, advance payment, retention money, bid bonds and performance bonds from local and foreign banks are used to mitigate potential losses flowing from contractual breaches.

6) **Are there are any specific governing laws and/or language requirements for construction contracts in Myanmar?**

While Myanmar’s Constitution of 2008 stipulates the Myanmar Language as the official language of the country, no specific laws dictate language requirements for construction contracts. As the Myanmar Contract Act 1872 (“**Contract Act**”) requires mutual consent from both parties, contracts involving foreigners are often in both the Myanmar language and English to ensure clarity for all stakeholders.

7) **Are there any mandatory terms that must be included in construction contracts in Myanmar? If so, what are they?**

All PPP contracts must include key terms such as investment amounts, conditions precedent, responsibilities, rights and obligations of governments and private partners, risk allocation, incentives, dispute

resolution, performance metrics, financing, insurance, term, performance standards, monitoring, termination, extensions, amendments, force majeure, taxes, auditing, changes in law, effective date, contract term, guarantees, and renegotiation.

An arbitration clause can be included in the terms. While there are no specific laws for private sector contracts, the Contract Act stipulates that the elements of a valid contracts are: offer and acceptance, intention to create legal relations, lawful consideration, capacity to contract, free consent, lawful object, certainty and possibility of performance, and not being expressly void. These criteria ensure legal enforceability of contracts in Myanmar.

8) **Is there a specific statute of limitations for construction disputes in Myanmar?**

In Myanmar, there is no specific statute of limitations that applies exclusively to construction disputes. Instead, the applicable limitation period is determined by the nature of the lawsuit, as prescribed under the Limitation Act 1909. For example, in cases involving the specific performance of a contract, legal action must be initiated within three years from the date designated for performance. If no date is specified, the three-year period begins when the plaintiff becomes aware that performance has been refused.

9) **At what point does the right to terminate arise due to a breach of contract under Myanmar law?**

Under Myanmar law, the right to terminate a contract due to breach of contract depends on factors like whether a party has failed to meet its obligations under the contract. Termination can occur for reasons such as fundamental breach of terms, failure to perform contractual obligations in a timely manner, or breaches which impact the contract's purpose. Whether a party has the right to terminate the contract depends on the nature and severity of the breach and the terms of the contract. Typically, the non-breaching party must notify the breach and provide time to remedy it before terminating.

10) **Under the law of Myanmar, what are the available remedies for breach of contract and how are limitations of liability treated?**

Myanmar law does not specify remedies for breach of contract; the available remedies depend on the contract's terms. The Contract Act allows claiming compensation for loss or damage, and courts can grant this. A non-breaching party can also seek specific performance, injunctions, or rescission. Myanmar law permits limitation of liability clauses in contracts if they are reasonable and not unconscionable.

11) **How are foreign arbitral or court awards or decisions enforced in Myanmar?**

The Myanmar Arbitration Law 2016 permits the enforcement of foreign arbitral awards from New York Convention member states under the Civil Procedure Code. However, Myanmar does not yet permit the enforcement of foreign court judgments or decisions.

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PHILIPPINES

6. PHILLPINES

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Philippine laws?**

Under Philippine law, companies engaged in the construction business are required to secure a license from the Philippine Contractors Accreditation Board ("**PCAB**").

There are different PCAB license classifications (i.e. general engineering, general building and specialty) with various categories depending on the financial capacity of the applicant-company and the construction experience of the technical employee who shall oversee and manage the technical aspects of the construction projects. PCAB issues special and regular licenses. A special license is issued for a specific project, while a regular license (1-year validity) has no project restrictions. Foreign companies are qualified to apply for special licenses. With regard to regular license, the Supreme Court, in 2020, has declared void the condition that only corporations with at least 60% Filipino equity participation are qualified to apply for regular license. However, the same has not yet been implemented by PCAB due to lack of implementing rules.

In addition to the PCAB license, foreign investors should also be aware of requirements in doing business in the Philippines and in carrying out the construction works.

Foreign corporations are not allowed to participate in a public bidding process for infrastructure projects initiated by a government agency unless the same is the subject of a treaty, international or executive agreement.

2) **What are the various types or forms of construction contracts typically used in the Philippines and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

There is no specific form of construction contract used in the Philippines. Managing construction risks depends on the bargaining power and the risk appetite of the parties, among others.

In private construction projects, the Construction Industry Authority of the Philippines ("**CIAP**")[25] recommends the use of the CIAP Document 102 or the Uniform General Conditions of Contract for Private Construction which specifies general conditions of contract for the construction of structure or works, reflecting the usages, customs, and best practices in the domestic private construction industry.

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[25] CIAP is the government agency tasked to promote, accelerate and regulate the growth and development of the construction industry.

Foreign-funded construction projects generally use the FIDIC Forms of Contract while government projects follow the Philippine bidding documents issued by the concerned agency.

For large scale infrastructure projects, an Engineering, Procurement and Construction (EPC) contract is the commonly used form in project-financed infrastructure projects, while for projects involving civil and mechanical works, standard construction agreements would suffice.

3) **What are the procurement methods used in the Philippines and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

For government-funded projects, competitive bidding is the general method of procurement. Alternative methods of procurement are allowed in exceptional cases and these are through:

(i) negotiated procurement,
(ii) direct contracting,
(iii) repeat order,
(iv) shopping, and
(v) limited source bidding. For Public-Private Partnership ("**PPP**") Projects, third parties may submit solicited and unsolicited proposals.

Competitive bidding is a procurement method that is open to participation by any interested party and which consists of advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluation of bids, post-qualification, and award of contract. This procurement method is primarily governed by the Government Procurement Reform Act (GPRA) or Republic Act No. ("R.A.") 9184 (RA 9184) and its Implementing Rules and Regulations (GPRA IRR).

Alternative methods of procurement shall be resorted to only in highly exceptional cases. Of the five alternative methods, only the negotiated procurement applies to services. The rest are applicable to procurement of goods or consulting services.

In PPP Projects, third parties may submit solicited and unsolicited proposals. Solicited proposals refer to submissions by the private proponent in response to a public bidding process initiated by a government agency. An unsolicited proposal, on the other hand, refers to a project proposal made by a private party to undertake a PPP Project.

For private sector projects, there are no prescribed procurement methods or specific laws governing procurement.

4) **How are construction projects typically structured in the Philippines and would there be any particular considerations if international parties are involved? How are projects typically financed in the Philippines?**

Please see our responses to numbers 2 and 3.

Construction projects for private parties do not generally follow a typical structure and parties are free to stipulate the terms and conditions. The structuring of such projects varies depending on the preference and needs of the project proponent or the intended construction. It is also common for sub-contractors to further sub-contract other contractors for their contracts. Large-scale construction projects involving key infrastructure are also usually undertaken by a consortium of construction firms which may include foreign construction companies.

A material consideration for international parties, especially contractors, is the availability of the required manpower, supplies, equipment or machinery to perform works in the Philippines. Foreign employees of foreign contractors must secure work visas and work permits. As a result, foreign contractors may have to secure the necessary permits or licenses from various government agencies such as the Bureau of Immigration, Department of Labor and Employment and the Bureau of Customs, among others, in order to employ foreign nationals or to import their supplies, equipment or machinery.

The law does not fix any particular mode of financing of construction projects in the Philippines. However, public-sector infrastructure projects are usually financed by the Philippine Government, through foreign grants (i.e. Official Development Assistance Loans[26]), or a mix of both public and private financing (i.e. Public-Private Partnerships under a Build-Operate-and-Transfer Scheme or a Build-and-Transfer Scheme[27]). There are also instances where banks such as the Development Bank of the Philippines provide project proponents with the required financing for the specific construction project.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in the Philippines?

Several bonds are typically required to be put up by the construction company or a surety in order to mitigate losses of the project proponent in case of breach of contract by the construction company. In particular, CIAP Document 102 provides for three (3) kinds of bonds, namely:

(i) performance bond
(ii) payment bond, and
(iii) guarantee bond.

The performance bond guarantees the good faith of the contractor to execute the work in accordance with the contract, and is posted prior to signing. The performance shall be replaced by the guarantee bond after the work has been completed and accepted by the project owner. The payment bond guarantees the good faith of the contractor to faithfully comply with the Contract in respect of its obligations arising therefore to its workers, sub-contractors, and suppliers arising from the contract until replaced by the guarantee bond. The guarantee bond guarantees the

[26] R.A. 8182.
[27] R.A. 6957.

quality of the materials provided, the equipment installed, and the workmanship of the work performed.

In addition to the aforesaid bonds, the project proponent typically retains a certain amount (usually 5% or 10% of the contract price) from every progress payment to the contractor. This retention amount is released upon final acceptance of the works.

Lastly, for banks involved in project financing, it is a common requirement that banks will hold an all-asset security interest over the assets of the project proponent.

6) Are there are any specific governing laws and/or language requirements for construction contracts in the Philippines?

In the Philippines, there are no specific language requirements for construction contracts which can be drafted in any language that the parties agree on. Construction contracts are usually written in English, which is also an official language in the Philippines. Due to the use of several technical terms in English, Filipino or other local languages are not used in construction contracts.

The forms and solemnities of construction contracts will be governed by the laws of the country in which they are executed.[28] Note, however, that since the improvement/s or building/s will be located in the Philippines, such property and the work involved will be subject to Philippine laws.[29]

7) Are there any mandatory terms that must be included in construction contracts in the Philippines? If so, what are they?

Philippine laws do not provide for any mandatory terms that need to be included in a construction contract, thus the general law on contracts apply. A construction contract is validly formed if the following elements arise:

(i) consent of the contracting parties,
(ii) object certain which is the subject matter of the contract, and
(iii) cause of the obligation which is established. [30]

Mandatory provisions of law are deemed written into contracts, hence, there is no need to expressly stipulate the same in a construction contract. For example, the contractor's lien for the claims of laborers and furnishers of materials in the construction of buildings under the New Civil Code ("**NCC**") is already deemed written into construction contracts and enforceable notwithstanding omission of the same.[31]

Further, as discussed above, CIAP Document 102 applies as a supplement to private construction contracts to remedy the conflict in the

[28] Article 17, New Civil Code of the Philippines (NCC).
[29] Article 16, NCC.
[30] Article 1318, NCC.
[31] Article 2242, NCC.

internal documents of, or to fill in the omissions in, the construction agreement.[32]

With regard to labour regulations and by virtue of the principle that mandatory provisions of law are deemed written into contracts, a Construction Safety and Health Program ("**CSHP**") must be submitted to and approved by the Department of Labor and Employment (DOLE), and the Department of Public Works and Highways (DPWH) if for government construction, for every construction project in the Philippines. A CSHP is a set of detailed rules to cover the processes and practices that shall be utilized in a specific construction project site in conformity with Occupational Safety and Health Standards (OSHS), including the personnel responsible and the penalties for violation thereof.[33]

8) Is there a specific statute of limitations for construction disputes in the Philippines?

There is no specific statute of limitations for construction disputes in the Philippines. Instead, the general NCC provisions on Prescription of Actions apply. Particularly with respect to actions based on written contracts, the action should be brought within ten (10) years from the time the right of action accrues, or when the other party violates the construction contract.[34]

Note that the prescriptive period within which to file an action is interrupted:

(i) when the action is filed in court,
(ii) there is a written extrajudicial demand by the creditor, or
(iii) there is any written acknowledgment of the debt by the debtor.

Assuming that the prescriptive period is interrupted within the original 10-year period, such interruption of the prescriptive period wipes out the period that has elapsed, sets the same running anew, and creates a fresh period for the filing of an action, hence, the claiming party will have a fresh 10-year period within which to file an action.[35]

It is not unusual, however, to see in construction contracts provisions wherein the parties agree to limit the bringing of certain claims within a specified period. In these cases, such provisions shall determine the timeliness of the submissions of the covered claims.

9) At what point does the right to terminate arise due to a breach of contract under Philippine law?

As a matter of practice, the parties to a construction contract usually incorporate an express provision enumerating the grounds when the contract may be rescinded by either party, e.g., events of default.[36]

[32] Werr Corporation International v. Highlands Prime Inc., G.R. Nos. 187543 and 187580, 8 February 2017.
[33] DOLE Department Order No. 013-98; DPWH Department Order No. 129-14.
[34] Article 1144 (1), NCC.
[35] Article 1155, NCC; See also Selerio v. Bancasan, G.R. No. 222442, 23 June 2020.
[36] Golden Valley Exploration, Inc. v. Pinkian Mining Company, G.R. No. 190080, 11 June 2014.

With or without such an express provision, however, Philippine law, which is deemed read into the contract, does provide that in reciprocal obligations, the injured party has the right to rescind the contract in case of substantial breach by the other contracting party.[37] There is substantial breach when the breach defeats the object of the parties in making the agreement.[38]

Finally, CIAP Document 102, which applies as a supplement to private construction contracts, provides for grounds for the owner to terminate the contract, such as:

(i) the contractor is adjudged bankrupt or insolvent;
(ii) the contractor makes a general assignment of its assets for the benefit of its creditors;
(iii) a trustee or receiver is appointed for the contractor or for any of the contractor's property;
(iv) the contractor repeatedly fails to supply, based on the construction schedule, the sufficient number of skilled workers or suitable materials or equipment;
(v) the contractor violates in any substantial way any provision of the contract; and
(vi) the owner elects to abandon the work and terminate the contract.

10) Under the law of the Philippines, what are the available remedies for breach of contract and how are limitations of liability treated?

Under Philippine law, breach of contract generally gives rise to the remedies of specific performance, substitute performance, equivalent performance, and/or damages, as the case may be.[39] In case of reciprocal obligations, the injured party may choose between the fulfilment of the obligation and the rescission of the obligation, with payment of damages in either case.[40]

Unless the disputing parties in a construction agreement entered or enters into an arbitration agreement, the action for specific performance or rescission, and damages, will be brought before the relevant Regional Trial Courts ("**RTC**").

If the disputants, however, entered or enter into an arbitration agreement, their dispute shall be resolved through arbitration. However, Executive Order No. 1008 provides that all construction disputes involving parties who have entered into an arbitration agreement shall be under the original and exclusive jurisdiction of the Construction Industry Arbitration Commission ("**CIAC**"). The Philippine Supreme Court has interpreted this original and exclusive jurisdiction of the CIAC to mean that as long as the parties agree to submit a dispute to voluntary arbitration, even if the CIAC is not referred to therein or the arbitration agreement refers to another arbitral institution or rules, the CIAC will remain to be an alternative forum and either party may still bring the arbitration before it.[41] The mere

[37] Article 1191, NCC.
[38] Cannu v. Galang, G.R. No. 139523, 26 May 2005.
[39] Articles 1165 to 1168, and 1170, NCC.
[40] Article 1191, NCC.
[41] China Chang Jiang Energy Corporation (Philippines) v. Rosal Infrastructure Builders, G.R. No. 125706, 30 September 1996.

existence of an arbitration clause in the construction contract is considered by law as an agreement by the parties to submit existing or future controversies between them to CIAC jurisdiction, without any qualification or condition precedent.[42]

With respect to the claims for damages that a party may have in addition to a claim for specific performance or rescission, it is also common for parties to construction contracts to incorporate a provision on liquidated damages or a fixed amount to be paid by the breaching party (e.g., 1/10th of 1% of the contract price for each day of delay), without need of substantiating such claim for pecuniary loss.

With regard to limitations on liability, parties to a construction contract may stipulate and agree on a limitation or cap on liability, provided that such limitation is not contrary to law, morals, good customs, public order, or public policy.[43]

11) How are foreign arbitral or court awards or decisions enforced in the Philippines?

Foreign arbitral awards and judgements of foreign courts may be enforced by Philippine Courts upon the filing of the appropriate action.

In the case of foreign arbitral awards covered by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the New York Convention ("**Convention Award**"), a petition for recognition and enforcement of the foreign award may be filed with the RTC where the assets to be attached or levied upon is located, where the act to be enjoined is being performed, in the principal place of business or residence in the Philippines of any of the parties, or in the National Capital Judicial Region.[44] The petition must include the original or authenticated copy of the award and the arbitration agreement, proof that the country in which the foreign arbitration award was made is a party to the New York Convention. In such an event where the award and the arbitration agreement are not in English, a translation duly certified by an official or sworn translator or by a diplomatic or consular agent should be filed. Philippine courts are mandated to recognize and enforce the Convention Award unless the other party is able to establish any of the grounds for refusal of recognition and enforcement under Art. V of the New York Convention in an application for refusal of recognition and enforcement filed with the Philippine courts after receipt of the petition for recognition and enforcement,[45] or in a petition for setting aside filed with the courts in the place of arbitration.[46]

In the case of a non-Convention award, Philippine courts may recognize and enforce such foreign award if the foreign country where the foreign award was made extends comity and reciprocity to awards made in the Philippines. Otherwise, Philippine courts shall treat such non-Convention award as a foreign judgment which may be refused recognition and

[42] HUTAMA-RSEA Joint Operations, Inc. v. Citra Metro Manila Tollways Corporation, G.R. No. 180640, 24 April 2009.
[43] Article 1306, NCC.
[44] Rule 13.3, A.M. No. 07-11-08-SC.
[45] Rule 12.2(B) and Rule 12.4, A.M. No. 07-11-08-SC.
[46] Rule 12.5, A.M. No. 07-11-08-SC.

enforcement with a showing that the tribunal which rendered such non-Convention award had no jurisdiction, failed to notify either party, or there is collusion, fraud, or clear mistake of law or fact.[47]

For judgments rendered by foreign courts, the winning party must file a petition for recognition and enforcement of foreign judgment with the relevant Philippine courts. The foreign judgment will generally be recognized and thereafter enforced, provided that there is no evidence of lack of jurisdiction by the foreign court, want of notice to the party therein, collusion, fraud, or clear mistake of law or fact.[48]

With specific respect to awards rendered in CIAC arbitrations (CIAC Award), the same may be enforced by the prevailing party by filing a motion for execution of the final award, unless the same prevailing party has sought recourse against the award. Any party that wishes to prevent execution of the award may do so by alleging and proving at least one of the following grounds:

(i) the award is not yet executory;
(ii) it has timely filed the appropriate case and sought recourse before the Court of Appeals or the Supreme Court, and it is exempt from the posting of an appeal bond on the ground that it is an agency of the government with no distinct legal personality from the former; or
(iii) posting of a surety bond approved by the tribunal with the concurrence of the CIAC.[49]

[47] Section 48, Rule 39, A.M. No. 19-10-20-SC.
[48] Ibid.
[49] Section 18.5, CIAC Revised Rules of Procedure Governing Construction Arbitration, as amended.

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SINGAPORE

7. SINGAPORE

1) Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Singapore laws?

There are no requirements that apply specifically to foreign investors who wish to engage in construction work in Singapore.

However, foreign parties should be aware of requirements for licenses and permits to carry out various types of construction work in Singapore. Such requirements include:

(i) Licensing requirements under the Building Control Act 1989 for general and specialist builders carrying out building works.
(ii) Registration requirements and regulations under the Architects Act 1991 and Professional Engineers Act 1991.
(iii) Building Control Regulations and the Building Control (Accredited Checkers and Accredited Checking Organisations) Regulations
(iv) Licensing requirements under the Housing Developers Rules to carry out or undertake housing development

Bidders who wish to qualify to tender for larger projects, especially public sector projects involving the Singapore Government or a statutory board as employer, will usually need to meet other requirements.

The deployment of foreign manpower in Singapore is also strictly regulated, with serious penalties for breaches. Requirements include those under the Employment of Foreign Manpower Act 1990 for the correct employment passes to be obtained and for the appropriate levies to be paid.

2) What are the various types or forms of construction contracts typically used in Singapore and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?

There is no “one size fits all” approach to risk allocation, as much will turn on factors such as the risk appetite and corresponding pricing solution, relative bargaining power, market practice in that specific trade, and so on.

There are also significant differences between construction contracts in Singapore using local standard forms and more “international” contracts using international standard forms.

Local projects
The majority of construction contracts using local standard forms can usually be grouped into:

(i) “traditional” build-only contracts, and
(ii) “design and build” contracts.

In “traditional” build-only contracts, the project developer directly engages architects, designers, contract administrators and technical consultants/engineers, and then awards a contract (sometimes after a competitive tender process) to the contractor for construction work in accordance with the designs and requirements produced by the employer with the assistance of the consultants. The contractor may then go on to parcel out subcontracts to various suppliers and subcontractors.

In “design and build” contracts, the contractor will be responsible not just for carrying out the construction work, but also for the design and requirements of the contract. This will commonly include an obligation to ensure that the works are fit for purpose. This substantially shifts the risks towards the contractor, and the contractor will correspondingly price for such risks.

Local contracts are generally priced based on either a fixed lump sum basis, where the contractor agrees to carry out his work for a fixed price; or re-measurement (or remeasurable) basis, where the work will be re-valued based on an agreed schedule of rates after construction is completed.

It should be noted that under Singapore law, although this will ultimately depend on an interpretation of the terms, “design and build” contracts can be deemed to be lump sum contracts, such that the contractor will be responsible for doing all that is necessary to achieve what he has contracted to do, without an increase in price.

Popular local private sector standard forms include:

(i) The Singapore Institute of Architects (SIA) Conditions of Contract
(ii) The Real Estate Developers of Singapore (REDAS) Conditions of Contract.

Projects with an international element

On the other hand, large projects with an international element or flavour, such as those on Jurong Island (where many companies in the petroleum and petrochemical industries operate) adopt other contracting models, such as Engineering, Procurement and Construction (“**EPC**”), EPC Management (EPCM), Design Build and Operate/Leaseback, Early Contractor Involvement, Front End Engineering Design (FEED), Operation and Maintenance only, or Consultancy/Services only.

It is common for such projects to use popular international standard forms (or bespoke terms based on these forms) such as:

(i) FIDIC “Rainbow” Suite of Contracts
(ii) JCT Suite of Standard Form Contracts
(iii) American Standard by the American Institute of Architects
(iv) Institution of Chemical Engineers (IChemE) Forms of Contract
(v) New Engineering and Construction (“**NEC**”) Contract

Public Sector contracts

Many public sector projects adopt the Public Sector Standard Conditions of Contract (“**PSSCOC**”), although for certain projects it is quite common

to utilise a bespoke standard form of an employer such as the Land Transport Authority.

The Building and Construction Authority of Singapore is currently facilitating and trialling the use of collaborative contracting models for public sector projects, with an optional module to the PSSCOC or NEC, the 4th edition of the NEC being adopted for use.

3) **What are the procurement methods used in Singapore and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

As discussed in the answer to Q2 above, there is a significant difference in practice between local contracts and projects with an international element.

Employers in the public sector or linked to the public sector are usually required to comply with government procurement rules that require them to conduct public tenders or at least to obtain multiple quotations. They are often required to contract using the PSSCOC, but there are exceptions where the specific requirements or facts justify a departure.

Large entities in the private sector, such as multi-national companies with an office in Singapore, will usually have their own procurement practices.

Generally, there are no special procurement requirements where international parties are involved, although for some developers there is a practice of requiring a local joint venture partner to be present in Singapore for greater accountability and to mitigate risks.

4) **How are construction projects typically structured in Singapore and would there be any particular considerations if international parties are involved? How are projects typically financed in Singapore?**

See answers to Q2 and Q3 above.

The typical method of financing used will vary depending on factors such as the type of project, capex requirements and so on.

Public sector projects are usually funded by the Singapore Government. In recent years, the Singapore Government has launched Singapore Government Securities (Infrastructure) and Green Bonds to finance public sector infrastructure projects including green infrastructure.

Large-scale infrastructure projects are sometimes funded by way of syndicated loans made to a project special purpose vehicle (SPV), with additional financing secured with the project assets and project future cashflow.

Banks and financial institutions in Singapore provide loans to fund construction projects. Singapore is also at the forefront of green financing where preferential rates may be offered to support environmentally friendly or sustainable projects if various requirements are met.

Subject to compliance with requirements of the Housing Developers Rules, housing developers may enter into sale agreements that provide for early payments of up to 20% of the purchase price from purchasers of residential units in private sector residential property projects.

Finally, smaller projects with less heavy capex requirements can be self-funded by developers.

Public Private Partnership (PPP) projects, where there is a mix of public and private financing, are less common in Singapore.

5) **What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Singapore?**

Performance bonds are commonly required for construction projects in Singapore.

There are 2 main types of performance bonds, namely “on-demand” bonds and conditional bonds. The beneficiary of an “on-demand” bond can call for payment without having to prove that the counterparty is in default.

Conditional bonds however require some proof that the conditions stated on the bond are met before payment is made by the financial institution that issued the bond.

These are used to secure performance by the contractor and its compliance with requirements under the construction contract. The bonds therefore cover the risk of potential losses arising from breaches in the form of non-performance or defective performance.

In addition, the employers for larger projects may sometimes require parent company guarantees to be provided by the contractor.

Standard form contracts such as the Public Sector Standard Conditions of Contract provide for the option of a contractor depositing cash to secure the performance of its obligations, but for obvious reasons, this is rarely used in practice.

6) **Are there are any specific governing laws and/or language requirements for construction contracts in Singapore?**

In Singapore, there are no specific language requirements for construction contracts which can be drafted in any language that the parties agree on.

Nevertheless, English is commonly used as it is the official language of business in Singapore.

It is not uncommon for certain construction contracts to have a version in a second, different language, with the governing version being expressly specified.

It is open for parties to specify the choice of law that applies to the rights and obligations between the parties that arise under construction contracts including contracts for construction work carried out in Singapore.

However, construction contracts in the built environment sector, along with related supply contracts for goods and services used in construction, are governed by the Building and Construction Industry Security Of Payment Act 2004 ("**SOPA**"). The SOPA cannot be contractually excluded by contract, and contractual provisions that are inconsistent with SOPA or undermine its intention are void.

The SOPA aims to improve cashflow by providing a low-cost and fast adjudication mechanism to resolve payment disputes. There are certain exceptions which take a construction contract outside of SOPA, such as if it concerns construction work carried on outside of Singapore or very small residential projects (such as renovation works) that do not require building approvals, or if the contract is wholly made orally. There are also fairly complex exceptions relating to terminated contracts.

SOPA has been extended to apply to prefabrication contracts, whether such prefabrication is carried out in or outside of Singapore, for supply of prefabricated components used for construction work in Singapore.

Separately, it is prudent to consider if Singapore statutes that sometimes apply to construction contracts, such as the Sale of Goods Act 1979, the Unfair Contract Terms Act 1977 and/or the Frustrated Contracts Act 1959, are applicable.

7) Are there any mandatory terms that must be included in construction contracts in Singapore? If so, what are they?

There are no mandatory terms that need to be included in a construction contract, and the general rules on the formation of contracts and certainty of terms apply. A construction contract is validly formed where there is offer and acceptance, consideration and intention to create legal relations.[50]

However, a failure to set out the contract in writing may result in the statutory adjudication provisions in the SOPA becoming inapplicable.[51]

Where there is a written contract, certain terms are prohibited and/or would not be enforceable. This includes pay-when-paid provisions and terms seeking to exclude the operation of the SOPA when it is supposed to apply.[52]

It is recommended that construction contracts specify the timelines for any Payment Claims and Payment Responses (up to 21 days after service of the Payment Claim) to be submitted under the SOPA, otherwise shorter timelines will apply by default under the SOPA.

[50] Our ICLG Construction & Engineering Law 2024 update ("**ICLG**") at [1.5].
[51] ICLG at [1.5].
[52] https://www.mondaq.com/real-estate-and-construction/1151056/construction-comparative-guide.

8) Is there a specific statute of limitations for construction disputes in Singapore?

There is no specific statute of limitations for construction disputes in Singapore.

Instead, the general Limitation Act 1959 will apply. A claimant has a period of six years from when the cause of action first accrued to bring claims in contract or in tort. For claims involving latent damage, a claimant may have the benefit of an extended period of three years after it obtains the knowledge required for bringing an action for damages. [53]

Depending on the particular claim in question, the time when the limitation clock starts running can vary. For example, the limitation period for an action for breach of contract in respect of defective work generally runs from the date of practical completion of the project,[54] whereas the limitation period for a claim for non-payment of a progress payment generally runs from when the payment became due and payable.

Limitation periods can also be extended in certain circumstances, such as where there is a fraud or mistake which could not have been reasonably discovered when the cause of action accrued.

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9) At what point does the right to terminate arise due to a breach of contract under Singapore law?

An innocent party who suffers a breach of contract may have the right to terminate where:

(i) the contract clearly and unambiguously states that the innocent party will be entitled to terminate the contract upon the occurrence of a certain event;
(ii) the other party renounces the contract by its words or conduct, by clearly conveying that it will not perform its contractual obligations at all;
(iii) the other party breaches a condition of the contract, with a focus on the nature of the term breached; or
(iv) the other party commits a breach which will deprive the innocent party of substantially the whole benefit he was intended to obtain under the contract. [55]

Most construction contracts will also provide for the employer's right to terminate in situations involving abandonment of the project, failure to commence or proceed with the works with due diligence or expedition, insolvency, corruption and/or failure to comply with a notice to correct breaches under the contract.[56]

[53] ICLG at [3.5]; https://www.legal500.com/guides/chapter/singapore-construction/ at [25].
[54] *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2019] 4 SLR 1075 (SGHC) at [470].
[55] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 at [113]
[56] ICLG at [3.12].

10) Under the law of Singapore what are the available remedies for breach of contract and how are limitations of liability treated?

Monetary compensation or damages are the primary remedies for contractual breaches. The amount of compensation awarded is usually based on the losses suffered by the innocent party. This may sometimes be the cost of cure or the diminution in value, depending on the particular facts and circumstances.

Liquidated damages clauses (commonly agreed for delay in completion) are enforceable provided that the agreed amount is a genuine pre-estimate of the loss likely to be suffered by the innocent party, following the traditional principles in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.

Other remedies include orders of specific performance and injunctions, which are awarded at the discretion of the court and usually when damages are an inadequate remedy.[57]

Limitations of liability which have been properly incorporated into the contract may be given their intended effect unless they are unreasonable (as contemplated in the Unfair Contract Terms Act 1977).[58]

11) How are foreign arbitral or court awards or decisions enforced in Singapore?

Foreign arbitral awards may be enforced in Singapore under the International Arbitration Act 1994.[59] As Singapore is a signatory to the New York Convention 1958 ("**Convention**"), the recognition and enforcement of foreign arbitral awards is relatively straightforward. This generally involves an almost administrative process of authenticating an award and applying to court for leave to enforce, whereupon the award debtor may only raise limited grounds for refusing recognition and enforcement as set out in Article V of the Convention.[60]

As for foreign court decisions, they are generally enforceable in Singapore if they are a judgment under which a sum of money is payable (that is, a "**money judgment**").[61] Enforcement is typically more straightforward where the award or decision is from a jurisdiction that is party to a reciprocal enforcement convention ratified by Singapore and implemented in legislation, such as the Reciprocal Enforcement of Foreign Judgments Act 1959 and the Choice of Court Agreements Act 2016.[62] Foreign money judgments may also be enforced by bringing an action on a debt at common law,[63] which would typically be resolved by summary judgment without needing to go through a full trial.

[57] https://www.lexagle.com/blog-en-sg/breach-of-contract-in-singapore-explained; *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte* [2007] SGCA 39.
[58] ICLG at [3.19]; https://www.whitecase.com/insight-our-thinking/managing-construction-risks-asia-pacific-singapore.
[59] Section 31 of the International Arbitration Act 1994 ("**IAA**"), which applies instead of Chapter VIII of the Model Law: see section 3(1) of the IAA.
[60] ICLG at [4.4].
[61] *DGX v DGY* [2024] SGHC 17 at [6].
[62] ICLG at [4.6].
[63] *Halsbury's Singapore* at [75.209].

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THAILAND

6. THAILAND

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Thai law?**

The Foreign Business Act, B.E. 2542 (1999) ("**FBA**"), which was enacted to restrict foreign involvement in specific business operations, is the main piece of legislation controlling foreign nationals conducting business in Thailand. Under the FBA, a foreign national is defined as a natural person without Thai nationality or a juristic entity with at least half of its shares held by non-Thai nationals or juristic entities. Construction activities are classified and restricted under “List 3” of the FBA (List 1 activities are prohibited to foreign nationals, and List 2 require special authorization), and a Foreign Business License (“**FBL**”) must be obtained from the Department of Business Development ("**DBD**”) prior to engaging in this restricted activity. However, an FBL is exempted for construction of public infrastructure services pertaining to public utilities or transportation requiring the use of special apparatuses, machines, technology or expertise, with minimum capital of THB 500 million from foreign business operators or any service business/activities having a government agency or a state enterprise under the budgetary law as a counterparty to the agreement.

In addition, exceptions from the restrictions of the FBA can be granted as promotional privileges by the Board of Investment or the Industrial Estate Authority of Thailand or, as a temporary measure, in the form of government approval issued by the Thai government. Exceptions can also be provided based on international treaties entered into by Thailand, such as the Treaty of Amity and Economic Relations between Thailand and the United States. Therefore, U.S. corporations and nationals may be eligible for “national treatment,” whereby, with some exceptions, they are treated in the same way as Thai nationals. Other international treaties also provide for exceptions, with conditions. By virtue of these international treaties, together with the FBA, qualified foreign investors may file a request for the issuance of a Foreign Business Certificate (FBC) from the Director-General of the DBD.

Apart from the requirements of the foreign business operators described above, construction businesses must comply with the following licensing requirements for building construction under the Building Control Act, B.E. 2522 (1979) and relevant regulations; and licensing qualifications for engineers under the Engineer Act B.E. 2542 (1999) and relevant regulations.

2) **What are the various types or forms of construction contracts typically used in Thailand and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

The laws do not establish a statutory form of construction contract. Nevertheless, the most common form of contract used for private sector projects in Thailand is the lump sum contract, which involves the building contractor completing the agreed-upon work at a fixed price.

For the public sector projects, the Public Procurement and Supplies Administration Act, B.E. 2560 (2017) (the "**Public Procurement Act**") and its sub-regulations have set out the standard contract form which could not be negotiated.

3) **What are the procurement methods used in Thailand and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

The procurement methods depend upon whether the initiatives are in the private or public sector. Although the procurement method for private sector projects depends on the project's owner, government sector projects are required to adhere to the method and criteria outlined in the Public Procurement Act and its sub-regulations, as construction is classified as "supplies" under the act.

There are 3 procurement methods under the Public Procurement Act as follows:

(i) a general solicitation notification method: an official request for proposals from businesses that meet the criteria set out by the relevant state agency;
(ii) a selection method: a request for proposals issued by a state agency to three or more businesses that meet the criteria set out by that agency, with the exception that if fewer than three businesses meet the criteria, the proposals will still be considered; and
(iii) a specific method: a request for proposals or price negotiations made by state agencies to specific businesses that meet their qualifications, including supply purchases made directly with businesses when the estimated cost is small.

In procurement of construction work for government sector projects, a state agency must first elect to use a general solicitation notification method. The selection method and specific method can be used only to a certain extent with restrictions.

4) **How are construction projects typically structured in Thailand and would there be any particular considerations if international parties are involved? How are projects typically financed in Thailand?**

Typically, private parties may collaborate in the form of joint venture to develop the projects or to engage in public procurement of the government construction projects.

In terms of joint investment with the public sector, Thailand has enacted the Public Private Partnership Act B.E. 2562 (2019) to govern criteria and methods for joint investment between the state agencies and private entities in the large public projects involved in the national infrastructure and public services, such as highways, rail transport, air transport, ports, energy, etc.

Most construction projects are financed by financial institutions.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Thailand?

Generally, a bank guarantee is required for construction projects. In some cases, a parent guarantee will also be required.

There are 3 main securities that are typically required in construction projects, which are:

(i) advance payment bond,
(ii) performance bond and
(iii) defects bond.

With respect to the construction contract under the Public Procurement Act, the contractor is required to provide a guarantee in the following formats to cover potential damages that may result from the contract:

(i) Cash,
(ii) Check or Draft;
(iii) Local bank guarantee;
(iv) Guarantee from licensed finance company or securities finance corporation; or
(v) Thai government bonds.

6) Are there any specific governing laws and/or language requirements for construction contracts in Thailand?

There is no statutory requirement to use Thai law as a governing law as it is a freedom of choice of the parties. Contractual parties may consent to the application of a foreign law as the governing law. However, the Thai courts will recognize foreign law only if it does not violate Thai law in the context of public order or good morals. Thai courts will implement foreign law principles, provided that the parties can demonstrate the foreign law to the court's satisfaction, and it is not in violation of Thailand's public order or good morals.

There is no particular requirement for the agreement's language. The language of the agreement is at the discretion of the parties. If, however, the parties' intentions cannot be determined, the Thai language agreement prevails in the event that the agreement is executed in multiple languages, including the Thai language, and there are discrepancies between the various versions.

On the other hand, for public procurements or contracts, Thai law and language is the default option. However, it is possible for the procurement or contracts to be concluded in English (normally with a Thai translation annexed to the original). Apart from the language of the contract, other alterations (e.g., governing law) are also possible if approved by the authorities involved.

7) Are there any mandatory terms that must be included in construction contracts in Thailand? If so, what are they?

Under normal circumstances, government projects are likely to apply a standard contract form under the Public Procurement Act; the standard forms can also be altered further. For other types, there are no mandatory terms required for construction contracts entered between private parties.

However, in certain specific circumstances, contracts must contain certain items or clauses. For example, residential building construction contract terms are subject to the supervision of the Office of the Consumer Protection Board, which is under the Notifications of the Committee on Contracts re: Business for Construction of Residential Buildings as a Business under Contract Control B.E. 2559. Apart from the construction of the new residential buildings, the renovation of residential buildings is also controlled by the same committee but only to the extent that covers detailed information shown on the payment receipt.

8) Is there a specific statute of limitations for construction disputes in Thailand?

Unless there is a specific law prescribing otherwise, the prescription period under Thai law is ten years, in accordance with the Civil and Commercial Code ("**CCC**").

The statute of limitations for construction disputes may vary for different types of claims under the CCC. For example:

(i) the period of prescription shall be two years for the claim with regard to the following: Claims of merchants, industrial manufacturers, artisans, and those who practice industrial arts for delivery of goods, performance of work, and care of others' affairs, including disbursements, unless the service is rendered for the business of the debtor;
(ii) Claims of those who, without belonging to the classes specified, are engaged in the care of others' affairs or the rendering of services, for the remuneration due to term from business, including disbursement.
(iii) No action may be brought against a contractor after one year has elapsed from the date on which the defect appeared.
(iv) Claims for damages arising from a wrongful act are barred by prescription after one year from the day the wrongful act and the person responsible for making compensation became known to the injured person, or ten years from the day when the wrongful act was committed.

9) At what point does the right to terminate arise due to a breach of contract under Thai law?

In general, the termination of contracts due to breach of contract is practically in accordance with the agreed upon circumstances within the agreement. For example, the common contractual grounds giving an employer the right to terminate a contract are as follows:

(i) Contractor's suspension without valid reason or abandonment of work;
(ii) The contractor not carrying out the work consistently and diligently;
(iii) Refusal to comply with an order requiring the contractor to deliver non-conforming works/goods/failure to correct defects;
(iv) Subcontracting without prior approval from the employer;
(v) Failure to provide contractual security, such as performance obligations.

Under the CCC, construction contracts are deemed to be "hire of work" contracts and can be terminated in various circumstances. Some examples in the CCC include:

(i) "If the contractor does not begin to work in a proper time or delays in proceeding with it contrary to the terms of the contract, or if, without the fault of the employer, he delays in proceeding with it in such a manner that it can be foreseen that the work will not be finished within the agreed period. The employer is entitled to rescind the contract without waiting for the time agreed upon for delivery."
(ii) "If the work is delivered after the time fixed in the contract, or, if no time was fixed, after reasonable time has elapsed, the employer is entitled to a reduction of remuneration or—when time is of the essence—to rescind the contract ."
(iii) "As long as the work is not finished, the employer can terminate the contract on making compensation to the contractor for any injury resulting from the termination of contracts."

10) Under the laws of Thailand, what are the available remedies for breach of contract and how are limitations of liability treated?

For breach of contracts, a party can claim compensation for damages that are proven to have arisen from non-performance, defects, foreseeable damages (e.g., loss of profits), and so on.

The CCC has prescribed the general principle that "When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damage caused thereby."

The detailed claimable compensation is explained further as covering "all such damages as usually arise from non-performance".

Further to compensation arising from non-performance, the creditor is also entitled to claim compensation for damages that arise from special circumstances, such as foreseeable damages (remuneration for making goods, loss of profits, etc.). The CCC stipulates that "The Creditor may demand compensation even for such damage as has arisen from special circumstances, if the party concerned foresaw or ought to have foreseen such circumstances."

The limitation of the liability depends on the fault ratio of the party, in accordance with the CCC provision that reads, "If any fault of the injured

party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depend upon the circumstances, especially upon how far the injury has been caused chiefly by one or the other party. This applies even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury that the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury."

The abovementioned claim for compensation is also subject to default interest.

Contractual penalties for breach of contract are agreeable under Thai law. However, if penalties claimed are disproportionately high, the court may reduce them.

11) How are foreign arbitral or court awards or decisions enforced in Thailand?

In Thailand, foreign arbitral awards are recognized and enforced to the extent that they are governed by a convention, treaty, or international agreement to which Thailand is a party, and to the extent that Thailand is committed to being bound. Thailand is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, an arbitral award made in a member state of the New York Convention can be recognized and enforceable in Thailand through a petition to enforce submitted to the Thai court.

There is currently no legislation in Thailand that addresses the enforcement of foreign court judgments by Thai courts. In addition, Thailand is not a signatory to any convention, treaty, or agreement that would allow a foreign court's judgment to be recognized and enforced in Thailand, which is why they cannot be enforced. The party claiming the application of foreign law is responsible for establishing the existence and content of the foreign law to the satisfaction of a competent Thai court.

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VIETNAM

7. VIETNAM

1) **Are there specific requirements, permits or licenses required from foreign investors engaged in construction under Vietnam laws?**

The requirements, permits, and licenses for foreign entities engaged in construction activities in Vietnam vary depending on their form of engagement, *viz*, via a Vietnamese subsidiary or as a foreign contractor.

Foreign investors can establish 100% foreign subsidiaries in Vietnam to engage in construction activities. For this purpose, the foreign investors must obtain the Investment Registration Certificate and the Enterprise Registration Certificate. The Investment Registration Certificate documents the investment project for establishing the subsidiary in Vietnam, while the Enterprise Registration Certificate records the establishment of the Vietnamese subsidiary.

Alternatively, foreign entities may directly engage in construction projects as foreign contractors in Vietnam. If they do so, they need to obtain a Construction Operation License for each contract they undertake. Foreign contractors may act as general contractors, main contractors, consortium members, or subcontractors.

Foreign contractors are only permitted to conduct construction activities in Vietnam after obtaining a Construction Operation License issued by the competent authority. To obtain such a Construction Operation License, the foreign contractors must meet the following conditions:

(i) Contract award: Must be selected by the project owner or main (sub)contractor;
(ii) Local partnership: Must form a consortium with a Vietnamese contractor or engage a local subcontractor unless no qualified local contractor is available;
(iii) Compliance: Must follow Vietnamese laws and international treaties to which Vietnam is a party.

Once the contract is signed, the foreign contractor must establish an executive office to oversee the performance of the contract and provide notification to the relevant authorities.

2) **What are the various types or forms of construction contracts typically used in Vietnam and which should be adopted to best manage construction risks? Does it vary depending on whether the projects are government or private sector projects?**

In Vietnam, construction contracts are generally classified based on the scope of work; the price determination scheme, or the relationships of contracting parties.

If classified based on their scope of work, there are construction consultancy contracts, contracts on supply of material and equipment, engineering-construction contracts, engineering-procurement contracts, engineering-procurement-construction contracts, turn-key contracts,

contracts on supply of human resources, machines, and equipment, or simple construction contracts (applied for small-scale and simple construction projects).

If classified based on the price determination scheme, there are lump sum contracts, fixed unit price contracts, adjustable unit price contracts, time-based contracts, charge-plus cost-based contracts, and combined price-based contracts.

All of these contract types are applicable to both government/public and private projects. While Vietnamese law provides detailed guidance for implementing these contracts in government/public projects, these guidelines can also be adapted for private projects or adjusted based on the specific needs and preferences of the parties.

Generally, package contracts and fixed-unit price-based contracts are commonly used in Vietnam. However, no single contract type is universally suitable for managing construction risks in all projects. The type of contract used will depend on various factors, including the project's complexity, the investor's risk tolerance, and the desired level of control

3) **What are the procurement methods used in Vietnam and would they vary depending on whether these are government or private sector projects or where international parties are involved?**

Procurement for government projects in Vietnam must strictly adhere to the regulations governing auctions. Various methods are used to select suppliers/contractors, as set out below.

(i) Competitive bidding would open government projects to all eligible bidders. In contrast, limited bidding may alternatively be used to restrict the project to a pre-selected group of bidders.
(ii) Direct appointments of contractors also take place in specific circumstances, such as sole-source procurement or emergency situations.
(iii) For small-value purchases, shopping would be a relatively simple procurement method.
(iv) Direct procurement involves the procurement of additional quantities of goods or services from a supplier who has previously been selected and contracted through competitive bidding or limited bidding within the past 12 months, at a market price that is not higher than the original contract price.
(v) Price negotiation involves direct negotiations with the unique supplier to determine the final price.

An exception to the procurement methods mentioned above applies to projects funded by official development assistance (ODA) or preferential loans from foreign sponsors. In these cases, procurement must comply with the provisions of the relevant international treaties or loan agreements to which the Socialist Republic of Vietnam is a party, if those agreements specify different procurement requirements.

While these methods are also recommended for private sector projects, including foreign-invested projects, they are not mandatory. This flexibility allows private entities to choose the procurement method that best suits their specific needs, even when international parties are involved.

4) How are construction projects typically structured in Vietnam and would there be any particular considerations if international parties are involved? How are projects typically financed in Vietnam?

In Vietnam, construction projects are typically structured in a way that the project owner (developer or investor) contracts to a main contractor who is responsible for the overall construction work.

When international parties are involved, various considerations come into play. The project structure can be in one or more of the following forms: design-bid-build, design-build, and/or joint venture. The regulatory considerations mentioned in Q2 and 3 are also relevant.

Considerations regarding payment and financing, such as payment schedules, milestones, and mechanisms such as progress billing would also be important to secure project financing and managing cash flow throughout the project. There would also need to be sufficient insurance coverage and risk allocation.

The international nature of the project also raises unique concerns, such as tax implications and obligations under treaty agreements. Differences in culture and language may also raise challenges for communication and effective cooperation in a diverse work environment.

Financial sources and structures for construction projects vary depending on whether they are government or private sector initiatives.

(i) Government projects are typically funded through a direct allocation of funds from the government's budget. Projects undertaken by state-owned enterprises usually use their own funds or raise funds through other means. There may be public-private partnerships as well, the government and private entities collaborate to finance and deliver infrastructure projects such as highways, roads and seaports.

(ii) Private construction projects are commonly funded by equity contributions from project owners, loans from foreign sources, such as foreign parent companies or international financial institutions, and/or loans obtained from domestic sources, including commercial banks or other credit institutions.

5) What are the usual types of securities available to mitigate against potential losses arising from any breach under construction contracts in Vietnam?

There are three types of securities commonly used in construction contracts in Vietnam:

(i) The first type of security is performance bonds, which guarantee the contractor's complete and timely performance of the

construction contract. They are the most commonly used type of security used in construction contracts and are typically granted by commercial banks or parent companies. For warranty obligations, employers often accept a warranty guarantee granted by banks as an alternative to retention payments, which are typically 5% of the contract value.

(ii) Alternatively, advance payment guarantees may be used to ensure the return of advance payments if the contractor breaches the contract or fails to complete the respective work. They are also typically granted by commercial banks or parent companies.

(iii) Payment guarantees are used to protect contractors from non-payment by employers or project owners. Commercial banks or parent companies may provide payment guarantees, depending on the employer's reputation and financial standing.

In the government sector, contract performance securities are mandatory for government contracts involving construction work or equipment supply. The law provides detailed guidelines on the value, effective timeline, and release conditions for the contract performance securities. Beside performance bonds, deposits or escrowed amounts could be used for this purpose; however, they are less common due to their impact on cash flow. In addition, advance payment guarantees are required for advances exceeding VND 1,000,000,000 (approximately USD 400,000).

In the private sector, whether to use any securities is totally at the discretion of the parties involved.

6) Are there are any specific governing laws and/or language requirements for construction contracts in Vietnam?

The Construction Law of Vietnam provides that construction contracts in Vietnam must be governed by Vietnamese law and written in the Vietnamese language. For contracts involving international parties, the contract may also be written in a foreign language, such as English, apart from the Vietnamese language. In such cases, the parties are free to agree on the prevailing language of the contract in the event of any inconsistencies.

7) Are there any mandatory terms that must be included in construction contracts in Vietnam? If so, what are they?

Under Vietnamese law, construction contracts must include key terms such as scope of work, quality and technical requirements, project schedule, contract price and payment, contract guarantees, contract adjustments, rights and obligations of the parties, liability for breaches, contract termination, dispute resolution, risk and force majeure, contract settlement, and liquidation. For Engineering, Procurement, and Construction ("**EPC**") contracts, additional provisions on the general contractor's management responsibilities must be included.

For government projects, the law provides templates and detailed guidelines for consultancy contracts, construction implementation contracts, and EPC contracts.

For private sector projects, parties have the freedom to contract based on various principles. The contract should be voluntary, equal, cooperative, and not contrary to law or social ethics. There must also be sufficient capital to make payments according to contract agreements.

For joint venture contractors, a joint venture agreement must be in place. Members of the joint venture must sign and stamp the construction contract, unless otherwise agreed upon by the parties.

8) **Is there a specific statute of limitations for construction disputes in Vietnam?**

While Vietnamese law does not explicitly establish a statute of limitations for construction disputes, the following general timeframes apply.

For arbitration, the claim must be commenced within two years from the date the claimant's legal rights or interests are violated.

For settlement in court, the claim must be commenced three years from the date the claimant knows or should have known that their legitimate rights or interests have been violated.

9) **At what point does the right to terminate arise due to a breach of contract under Vietnamese law?**

Under Vietnamese law, a party, be it the employer or contractor, may unilaterally terminate a construction contract, without compensation for losses caused under the below circumstances:

(i) The employer has the right to terminate the contract when the contractor goes bankrupt, is dissolved, transfers the contract without consent, or fails to perform work for 56 consecutive days, causing a breach of schedule.

(ii) The contractor has the right to terminate the contract when the employer goes bankrupt, is dissolved, transfers the contract without consent, suspends work for 56 consecutive days due to the employer’s fault, or fails to make payments within 56 days of receiving valid payment documents.

Parties may also agree upon additional circumstances that would trigger the termination of contract performance. These terms should be explicitly included in the contract.

Before terminating the contract, a party must provide at least 28 days’ written notice to the other party, clearly stating the reasons for termination. Failure to provide such notice may result in liability for damages caused to the other party.

10) **Under the law of Vietnam what are the available remedies for breach of contract and how are limitations of liability treated?**

In addition to the right to terminate the contract, a party may request specific performance from the other party, requiring them to fulfil their

contractual obligations. This includes rectifying mistakes or deficiencies in performance.

If stipulated in the contract, a penalty may be imposed on the breaching party. The maximum penalty is 8% for private sector contracts and 12% for government sector contracts.

Under Vietnam law, the injured party also has the right to claim compensation from the breaching party, regardless of whether the contract explicitly addresses compensation. Unless otherwise agreed upon by the parties, compensation will cover all damages caused by the breach, including the loss of potential benefits from the terminated contract and any expenses incurred due to the breach. Liquidated damages, pre-determined fixed amounts for damages, are not recognized and applied under Vietnamese legislation.

In case of a dispute and with justified necessity, a court may grant injunctive relief. This includes blocking bank accounts, freezing assets, prohibiting or forcing certain actions, or restricting the obligor's ability to leave the country.

Vietnamese law does not impose any restrictions on limitations of liability agreed upon by the parties.

11) How are foreign arbitral or court awards or decisions enforced in Vietnam?

Foreign arbitral awards and civil court judgments may be recognized and enforced in Vietnam by a competent Vietnamese court based on international treaties or the principle of reciprocity. While Vietnam is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), it has not ratified any similar international treaties for foreign court judgments.

A claimant must submit a petition for recognition and enforcement of a foreign arbitral award or a civil court judgment within 3 years from the effective date of such award/judgment. The petition needs to be filed with the competent court pursuant to the Code of Civil Procedures or via the Ministry of Justice pursuant to an international treaty, if any, to be forwarded to the competent court. A panel of three judges will consider the petition and assess the compliance of the award/judgment with relevant provisions of the Code of Civil Procedures, relevant provisions of Vietnamese law, and international treaties to decide whether to recognize and enforce the award/judgment.

However, there are certain circumstances where civil judgments of foreign courts will not be recognized and enforced in Vietnam. This may be where the judgment does not satisfy the conditions for being recognized provided for in the relevant international treaties, or where the judgment has not taken legal effect as provided for in law of the home country of the court issuing it. Alternatively, the judgment will not be recognized if the debtors or their lawful representatives were absent from the court sessions of the foreign courts because they had not been duly summoned or documents of the foreign courts had not been delivered to

them in a reasonable time period as prescribed in the law of the home country of the foreign court, preventing parties from exercising the right to self-defense.

The judgment will also not be recognised if the foreign court that issued the judgment does not have jurisdiction to settle the case as provided by the Code of Civil Procedures of Vietnam, if the case has been settled in a civil judgment of a Vietnamese court, if before the foreign agency in charge accepted the case, it had been accepted and was being proceeded with by a Vietnamese court, or it had been settled with civil judgment/decision issued by a court of a third country that has been recognized and allowed to be enforced by Vietnamese courts.

If the time limit for enforcement of judgments prescribed in the law of the home country of the issuing court or in Vietnam's law on civil judgment enforcement has been exceeded, or the enforcement of the judgment has been canceled in the home country of the issuing court, the judgment will not be recognized.

Lastly, the recognition and enforcement of the foreign court's judgment will be denied if it is contrary to the basic principles of Vietnamese law.

In addition, Vietnamese courts will not recognize a foreign arbitral award in certain circumstances, as set out below:

(i) First, where the parties of the arbitration agreement do not have the capacity to conclude the agreement according to the law applicable to each party;
(ii) Second, the arbitration agreement is not legally effective according to the law of the country chosen to be applied to or according to the law of where the award is made if the parties have not chosen a law to be applied to the agreement;
(iii) Third, where the judgment debtors were not promptly and conformably notified of the appointment of an arbitrator officer and of procedures for processing the dispute by a foreign arbitrator, or due to other plausible reasons, they could not exercise their procedural rights;
(iv) Fourth, where the foreign arbitrator's award over a dispute has not been requested by any parties or exceeds the request of parties of the arbitration agreement. If the parts of the decision on the matter that are requested can be separated from those that are not requested to be settled by a foreign arbitrator, the decision on the matter requested to be settled may be recognized and enforced in Vietnam;
(v) Fifth, where the foreign arbitrator and/or procedures for settlement of disputes conducted by foreign arbitrator are not conformable to the arbitration agreement or to the law of the country where the foreign arbitrator's award has been made, in case the arbitration agreement does not provide for such matters;
(vi) Sixth, where the foreign arbitrator's award has not taken compulsory legal effect on the parties;
(vii) Seventh, the enforcement of the foreign arbitrator's award has been canceled or terminated by a competent agency of the

country where the award is made or the home country of the law that is applied; and

(viii) Lastly, where, according to Vietnam's law, the dispute shall not be settled according to arbitral procedures, or where the recognition and enforcement in Vietnam of the foreign arbitrator's award are contrary to basic principles of Vietnamese law.

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