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AN ARBITRATION CLAUSE AND THE DEFAULT JUDGMENT IN MALAYSIA: AN UNWARRANTED LESSON IN HUMILITY?

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The Federal Court of Malaysia's decision in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 is a cautionary tale for Malaysian contractors on the interaction between a regularly obtained default judgment for an interim certificate and the effect of a contract where parties agree to submit to arbitration *all* disputes, including disputes on interim certificates.

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1 It is oft said that cash flow is the life blood of the construction industry. Interim certificates to some extent promote this. In many jurisdictions, security of payment legislation has gone far to ensure this cash flow. But ultimately, payment can only be ensured by obtaining and enforcing a judgment of the court on the same.

2 So when a contractor obtains a regular default judgment in respect of interim certificates against an employer, most contractors would probably wager that they would get paid in due course, given that it would be an uphill battle to set aside a regular default judgment on interim payment certificates.

3 However, in a recent judgment of the Federal Court of Malaysia in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd*[2] ("*Tindak Murni*"), had the contractor wagered that he had struck gold in

1 This article is dedicated to the memory of my dear friend Chew Chang Min. He passed away before this article was published. Chang Min was counsel for the respondent in this appeal.
2 [2020] MLJU 232.

obtaining a regular default judgment on three interim payment certificates, he would have lost.

4 It is not uncommon to find arbitration as the mode of dispute resolution in construction contracts. In *Tindak Murni*, this was so.[3]

5 But the appellant plaintiff commenced an action by way of a writ of summons and obtained a regular judgment in default of appearance against the respondent defendant.[4]

6 Surprisingly, the Federal Court of Malaysia found that the presence of an arbitration clause coupled with s 10 of the Arbitration Act 2005[5] "warranted the conclusion that this amounted to a defence on the merits".[6]

7 Given the finding that the default judgment was *regular*, this decision of the Federal Court of Malaysia is not without difficulty. As this is a decision of an apex court of a Commonwealth jurisdiction, it merits closer analysis.

I. The facts

8 Tindak Murni Sdn Bhd ("TM"), as the employer, entered into a building contract with Juang Setia Sdn Bhd ("JS") as the contractor on 1 June 2015. The form of contract was the standard form *Pertubuhan Akitek Malaysia* ("PAM") contract.[7] There are two key clauses:

> (a) clause 30.3(i), which provides that "[u]nless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's certificates by reason of any claims to set-off or counterclaims or allegation of defective works, materials or goods or for any

3 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [42].
4 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [6] and [28].
5 Act 646 (M'sia).
6 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [72(b)].
7 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [7]–[8].

other reasons whatsoever which he may purport to excuse him from making payments of the amount stated to be due in an Interim Certificate"; and

(b) clause 30.3(ii), which provides that "[i]n the event of any disputes or differences as to any rights of the Employer to set off or to any counterclaim or any allegations of defective works, materials or goods or for any other reasons then such disputes or differences shall be referred to an arbitrator for judgment under Clause 34.0".

9 JS started a suit for three unpaid interim certificates for RM2,684,924.55.[8] TM paid up on the sum of RM1,143,149.65 and disputed the remaining amounts.[9]

10 JS issued a writ of summons against TM. As TM failed to enter an appearance on time, JS entered a regular default judgment against TM.[10]

11 TM applied to set aside the default judgment on the basis that TM had valid disputes against JS's claims and disputes under the contract were subject to an arbitration clause.[11]

12 The Registrar of the High Court of Malaya (at Shah Alam) set aside the default judgment on the basis that there was a defence on the merits.[12]

13 JS appealed against the Registrar's decision to the High Court Judge in Chambers.[13] There were two applications before the High Court Judge:[14]

(a) the appeal against the order setting aside the default judgment; and

8 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [14].
9 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [15].
10 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [16].
11 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [17].
12 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [18].
13 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [20].
14 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [20].

(b) TM's application for a stay of proceedings pending arbitration.

14 The High Court Judge upheld the Registrar's decision in setting aside the default judgment and allowed TM's application for a stay of proceedings pending arbitration.[15] In doing so, the High Court found that there was a defence on the merits "in relation to [TM's] contention that there were defects in the work undertaken which precluded recovery of the sum claimed by [JS]" and there was a valid arbitration clause that parties had agreed to be bound by.[16]

15 These decisions were appealed to the Court of Appeal of Malaysia.[17] The Court of Appeal allowed JS's appeal and reinstated the default judgment on the basis that there was no defence on the merits. The court also refused a stay of proceedings pending arbitration.

16 On further appeal, the Federal Court of Malaysia reversed the Court of Appeal's decision, set aside the default judgment, and granted a stay pending arbitration.[18] In doing so, the Federal Court made, amongst others, the following main determinations:

(a) given the present fact scenario, the initial inquiry was whether there was a valid agreement to arbitrate;[19]

(b) the regular default judgment obtained by JS against TM did not change the legal analysis of the initial inquiry;[20]

(c) there was "in point of fact a dispute subsisting between the parties",[21] and under the contract, there is a clause providing that "in the event of disputes relating to the Employer's right to set-off from the interim certificates by reason of defective works, such disputes were mandatorily required to be referred to arbitration";

15 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [21].
16 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [22].
17 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [23].
18 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [75].
19 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [37]–[38].
20 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [48].
21 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [53(b)].

(d) there was no "rational or legal coherence ... drawn between the doctrine of merger and an application to set aside a judgment in default coupled with a stay pending arbitration";[22] and

(e) "Res Judicata is inapplicable in the present context as the merits of the case have not and were not determined by the Contractor simply obtaining a judgment in default, which was sought to be set aside".[23]

17 At first blush, the approach taken by the Federal Court in *Tindak Murni* appears inconsistent with Malaysian case law at the time of the appeal.

II. Defects mandatorily to be referred to arbitration

18 In so far as the Federal Court decided that there was a *good reason* to set aside the default judgment *because* TM could show a defence on the merits due to defects, this would not be controversial.

19 This article, however, deals with the primary finding in *Tindak Murni*, which is that the mere presence of an arbitration clause can amount to a defence on the merits for the purpose of setting aside a regularly obtained default judgment, if the defendant intends to invoke the arbitration clause.

III. The default judgment was regularly obtained

20 The most important starting point in the above analysis of *Tindak Murni* is the finding that the *default judgment was regular* (and indeed this was not disputed by TM).[24]

22 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [64].
23 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [66].
24 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [16]. See also *Juang Setia Sdn Bhd v Tindak Murni Sdn Bhd* [2018] MLJU 975 (Court of Appeal) at [55] and *Juang Setia Sdn Bhd v Tindak Murni Sdn Bhd* [2018] MLJU 229 (High Court) at [7].

21 The Federal Court held at [66] that doctrine of merger and *res judicata* does not apply to a regular default judgment.[25]

IV. *Res judicata*

22 The Federal Court's statement at [66] of *Tindak Murni* did not appear to take into account long-standing authorities on the doctrine of *res judicata* applying to default judgments.

A. Default judgments can give rise to res judicata

23 In *Kok Hoong v Leong Cheong Kweng Mines Ltd*, a decision of the Privy Council sitting on an appeal from the Court of Appeal of the Federation of Malaya, Viscount Radcliffe held that a "default judgment is capable of giving rise to an estoppel *per rem judicatam*. The question is ... what the judgment prayed in aid should be treated as conclusion and for what conclusion it is to stand ..."[26]

24 The principle of *res judicata* affecting a default judgment is also clearly set out in *New Brunswick Railway Co v British and French Trust Corporation Ltd*.[27]

25 This principle has been referred to in other Malaysian cases such as *Cepat Wawasan Group Bhd v Foo Kon Chen*,[28] *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*,[29] *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v Zakaria Bin Husin*,[30] *Anglo-American Corporation Ltd v Chin Pak Soon*[31] and *William Teo's House and Estate Agencies v Chan Eng Swee*.[32] So default judgments *do* give rise to some form of *res judicata*.

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25 See para 16(e) above.
26 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 AC 993 at 1010.
27 [1939] 1 AC 1 at 35 and 38, *per* Lord Wright; at 21–22, *per* Lord Maugham LC.
28 [2013] 8 MLJ 101 at [11]–[12].
29 [1995] 3 MLJ 189.
30 [1985] 2 MLJ 287.
31 [1966] 1 MLJ 267.
32 [1965] 2 MLJ 89. In Singapore, as in England, a default judgment does constitute *res judicata*: see *Neptune Capital Group Ltd v Sunmax Global Capital Fund 1 Pte Ltd* [2016] 4 SLR 1177 at [50]; and *The Law Society of Singapore v Ho Kiang Fah* [2005] SGDSC 6 at [34]. As to the ambit of *res judicata* in respect of a default judgment, see in particular Stuart Sime, "Res Judicata and ADR" (2015) 34(1) CJQ 35 at 37–39.

B. When did res judicata *arise?*

26 It appears from the statement at [66] of *Tindak Murni* that "the Court of Appeal erroneously upheld the judgment in default and wholly disregarded the agreement to arbitrate, *does not afford the Contractor the basis to contend in these appeals* ... that the agreement to arbitrate stands vitiated by reason of the doctrine of merger ..." [emphasis added] that the Federal Court considered that the *res judicata arose* from the Court of Appeal's decision. If so, this author would respectfully disagree. The issue in the appeal before the Federal Court arose out of the default judgment and whether it gave rise to the operations of *res judicata* and merger.

27 The Malaysian Court of Appeal was sitting in its appellate capacity in determining whether or not the default judgment was correctly set aside by the High Court. Although the Court of Appeal had allowed JS's appeal and reinstated the default judgment, thereby disagreeing with the High Court, the doctrine of *res judicata* (in respect of the default judgment) arose when the default judgment was obtained, *not* when the Court of Appeal decided the appeal.

28 It would also appear that the respondent did not appear to make this point in submissions given the reference to the "other submission" by the Federal Court at [61] of *Tindak Murni*.

29 The respondent's "other submission" centred on how the doctrine of merger prevented the arbitration clause from "'severing' a judgment". This "other submission" was a reference to the operation of the doctrine of merger created by the "default judgment" (not the Court of Appeal decision). It therefore does not appear that the respondent made any submission, that the decision of the Court of Appeal resulted in a merger of the cause of action, upon which the respondent was then relying, to defend its appeal before the Federal Court.

30 The upshot of this is that [66] of *Tindak Murni* has now changed the law in Malaysia in respect of *res judicata* applying to default judgments in general.[33]

V. The doctrine of merger

31 If *res judicata did* apply to the default judgment obtained by JS would this have affected the outcome? Very likely, in this author's view.

32 Once the default judgment was entered by JS, the doctrine of merger applied in respect of the original claim (on the three interim certificates[34]) by JS against TM.

33 The doctrine of merger generally operates by "merging" the cause of action that has been pleaded into the judgment, such that there is no longer any *pleaded* independent cause of action that subsists outside the judgment.[35]

34 In England the doctrine of merger is explained in *Republic of India v India Steamship Co Ltd*[36] as a principle where a person "in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment … is precluded from afterwards recovering before any English tribunal a second judgment for the same civil relief in the same cause of action" because the cause of action has "merged" with the judgment and ceased to exist.

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33 See *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [69]: "*Res judicata* as we know and understand, extinguishes a cause of action once a matter has been adjudicated upon its merits. That is not the case here. These appeals relate to a case where judgment was obtained because no appearance was entered. …"

34 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [14].

35 See, *eg*, *Majlis Amanah Rakyat v Mat Nawi bin Awang* [2017] 1 MLJ 500 at [7]; *Malpac Capital Sdn Bhd v Yong Toi Mee* [2017] 1 MLJ 262 at [15]; *Kamarulzaman bin Omar v Yakub bin Husin* [2014] 2 MLJ 768 at [11] (which concerns default judgment) and at [20]; *Leong Yew Chin v Hock Hua Bank Bhd* [2008] 3 MLJ 340 at [53]; *Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30; *Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi* [1998] 4 MLJ 633; *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; *Chan Yuow Seng v Ling Ong Hua* [1995] 2 MLJ 580; and *Bank Bumiputra Malaysia Berhad v Lorrain Esme* [1987] 2 MLJ 633.

36 [1993] 1 AC 410 at 417, *per* Lord Goff of Chieveley.

35 The doctrine of merger has also been explained as part of the umbrella doctrine of *res judicata*. See, *eg*, the oft-cited decision of *Thoday v Thoday*,[37] and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*,[38] where Lord Sumption said that "the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action ..."

36 The doctrine of merger is also part of Singapore law. In *Chia Ah Sng v Hong Leong Finance Ltd*, G P Selvam J said that "when a judgment is pronounced in favour of a claimant, the original claim merges in the judgment and thereupon the original claim is dead".[39]

37 Thus, the doctrine of merger:

(a) is a substantive rule of law;

(b) extinguishes a cause of action once judgment has been given on it;

(c) replaces the original cause of action with rights created by the judgment; and

(d) does not apply to foreign judgments.

38 If the law in Malaysia, prior to the Federal Court's decision in *Tindak Murni*, is to be applied, then the doctrine of merger did indeed apply to the cause of action in respect of the three interim certificates for RM2,684,294.55. What then is the significance of this?

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37 [1964] 1 P 181 at 197–198, *per* Diplock LJ.

38 [2014] AC 160 at 180.

39 *Chia Ah Sng v Hong Leong Finance Ltd* [2000] 3 SLR(R) 941 at [28]. See also, *eg*, *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd* [2000] 3 SLR(R) 769 at [45]; *N M Rothschild and Sons (Singapore) Ltd v Rumah Nanas Rubber Estate Sdn Bhd* [1994] 1 SLR(R) 697 at [12]; *Den Norske Bank AS v Northern Feather Pte Ltd* [1992] 2 SLR(R) 853 at [16]; and *Malaysia Credit Finance Bhd v Chen Huat Lai* [1991] 2 SLR(R) 300 at [17]–[18] on the application of the doctrine to foreign judgments.

39 Once the default judgment was obtained by JS, the claim under the three interim certificates became a judgment debt due and payable, as the cause of action in respect of the three interim certificates merged with the default judgment.

A. Patel v Patel

40 In *Patel v Patel*, in the context of a judgment in default of defence obtained notwithstanding an agreement containing an arbitration clause, Lord Woolf MR (with whom Otton LJ and Ward LJ agreed) stated that "[u]nless there was an application to set aside the default judgment, there was nothing to stay".[40] Otton LJ also held that the default judgment had to be set aside in order to invoke the arbitration clause, and that there is a need to show a defence on the merits in order to set aside the default judgment.[41]

41 Based on the reporting in *Patel v Patel*, it appears clear that the "merits" for the setting aside was *not* based on the presence of an arbitration clause as Lord Woolf MR stated that "[i]n the first affidavit he set out the fact that he required the judgment to be set aside and he then went on to deal with the merits. In the second affidavit he indicated that he wished to stay the proceedings pursuant to the Arbitration Act 1996".[42]

42 So, strictly, the Malaysian Court of Appeal was justified when it considered the appeal, *ie*, whether the default judgment was rightly set aside, *outside* the context of the arbitration agreement and s 10 of the Arbitration Act 2005.[43]

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40 *Patel v Patel* [1999] 3 WLR 322 at 326.

41 *Patel v Patel* [1999] 3 WLR 322 at 327. *Patel v Patel* [1999] 3 WLR 322 has been referred to in the Malaysian Court of Appeal's decision of *Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd* [2012] 4 MLJ 573 for a different proposition, that the right to seek a stay pending arbitration is not lost by making an otiose request for leave to defend and counterclaim when the applicant specifically stated in his affidavit that he intended to seek a stay.

42 *Patel v Patel* [1999] 3 WLR 322 at 324.

43 The Singapore High Court has applied the approach taken in *Patel v Patel* [1999] 3 WLR 322 in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 at [24]–[26]. See also *Maniach Pte Ltd v L Capital Jones Ltd* [2016] 3 SLR 801 at [104] affirming the principles, and *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 at [13]–[14] (in the context of exclusive jurisdiction clauses).

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B. Grafton Isaacs v Emery Robertson

43 The reason for this procedure is perhaps best understood from the principle set out in *Grafton Isaacs v Emery Robertson*.[44] In summary:

> (a) An order made by a court of unlimited jurisdiction must be obeyed until it is set aside.
>
> (b) A failure to comply with the order, even if the person is of the view it is irregular or void, would amount to contempt of court.

44 Therefore, once a regular judgment in default has been obtained from a superior court of the record, the issue of what the proper dispute resolution forum is in respect of the causes of action pleaded *no longer arises, until* the judgment is set aside, and if not set aside, it must be complied with. More importantly, it also means that the *procedure* for challenging that judgment *must be in compliance* with the *procedure for setting aside* judgments, and *not* the procedure for *a stay of proceedings in favour of arbitration*.

45 In Malaysia, this principle has been applied in cases such as *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd*[45] ("The default judgment in this case until set aside is a good and enforceable judgment."), *Wee Choo Keong v MBf Holdings Bhd*[46] ("It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is

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The *presence* of the *default judgment* is what is important. If there *had been* no default judgment granted, then the case of *Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch) ("*Bilta v Muhammad*"), which applied *Patel v Patel* [1999] 3 WLR 322, is illustrative of the consequences. In *Bilta v Muhammad*, the High Court rejected the argument that just because a party to an arbitration agreement failed to make an application for stay under Pt 11 of the Civil Procedure Rules meant that a party had submitted to the court's jurisdiction; this is because Pt 11 does not apply when a party is seeking a stay of court proceedings pursuant to s 9 of the Arbitration Act 1996 (c 23). Note also the Singapore Court of Appeal decision in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 where the Court of Appeal dealt with the issue of whether a default judgment should be granted if there is a *concurrent* application for stay of proceedings.

44 [1985] 1 AC 97 at 101–102, *per* Lord Diplock.

45 [1991] 1 MLJ 100.

46 [1993] 2 MLJ 217.

set aside.") and *Puah Bee Hong v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur*[47] ("We are of the considered view that an order of a superior court such as the High Court, even if it is eg, an order obtained ex parte or a default judgment; until it is set aside, must be obeyed by everyone whether its validity is challenged or not …").

VI. Setting aside a regular default judgment

46 This section looks to the applicable law to determine if the default judgment should have been set aside.

A. Defence on the merits

47 In Malaysia, an applicant must show a defence on the merits by filing an affidavit that shows an arguable or triable issue on the merits. See, *eg*, *Lai Yoke Ngan v Chin Teck Kwee*[48] ("*Lai Yoke Ngan*") at 573–574,[49] applying *Evans v Bartlam*.[50]

48 The following judgment of Lee Hun Hoe CJ in *Fira Development Sdn Bhd v Goldwin Sdn Bhd* ("*Fira Development*") is also instructive:[51]

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the court should act in *Evans v Bartlam* [1937] AC 473 …in these words:
>
> > … The principle obviously is that unless and until the court has pronounced a judgment upon the merits or consent, it is to have the power to revoke the expression

47 [1994] 2 MLJ 601.
48 [1997] 2 MLJ 565.
49 See also *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 and *Hasil Bumi Perumahan Sdn Bhd v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 (which was cited in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [48(iv)]).
50 [1937] 1 AC 473. In Singapore, the principles in *Evans v Bartlam* [1937] 1 AC 473 are also applied: see *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60].
51 *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 at 41.

> of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

49 The Federal Court's holding in *Tindak Murni* at [72(b)] that "the Court of Appeal should have considered the existence of an agreement to arbitrate coupled with section 10 of the Arbitration Act 2005 warranted the conclusion that this amounted to a defence on the merits" clashes with the abovementioned principles.[52]

B. Arbitration agreement as defence on the merits?

50 At the time of the appeal in *Tindak Murni*, *Lai Yoke Ngan* was the controlling test in setting aside a regular default judgment. So why should the presence of an arbitration clause in an agreement constitute *merits* for the purpose of setting aside a regular default judgment in Malaysia?

51 To answer this, *per* the Federal Court at [47]–[48] of *Tindak Murni*, in summary:

> (a) At [47], the Federal Court posed the question of whether the test for granting a stay is different when the other party has, in breach of an arbitration agreement, obtained a default judgment. The four reasons given by the Federal Court as to why the test should not differ are summarised below.
>
> (b) At [48(i)], the Federal Court held that it is bound to apply s 10 of the Arbitration Act 2005 in considering a stay application.
>
> (c) At [48(ii)], the Federal Court stated that as such a default judgment was obtained *in breach* of the arbitration agreement, the party who obtained the default judgment "cannot then rely on its own breach to seek to impugn or subordinate the agreement to arbitrate".

52 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [72(b)]; this is explored further below at para 56.

(d) At [48(iii)], the Federal Court reasoned that condoning such an action would allow parties to breach arbitration agreements with impunity.

(e) At [48(iv)], the Federal Court then considered that the setting-aside application must be considered *at the same time* as the stay applications, and that there was an "essential jurisdictional issue, namely whether the dispute ought to be dealt with by way of litigation or arbitration".

52 These reasons are considered below.

C. Jurisdictional issue?

53 To start, the question posed at [47] of *Tindak Murni* bears careful scrutiny, especially when read together with [48(iv)] and, in particular, the following excerpt:[53]

> ... The Court of Appeal missed an essential *jurisdictional* issue, namely whether the dispute ought to be dealt with *by way of litigation or arbitration*.
>
> This was a relevant consideration even when determining the appeal relating to the setting aside of the judgment in default because the fact of the subsistence of the arbitration agreement, a jurisdictional issue, amounted to a matter warranting further investigation. ...
>
> [emphasis added]

54 The Federal Court is therefore saying that the High Court *overstepped* its jurisdiction and heard a matter it *could* not have heard.

(1) The High Court has jurisdiction

55 Bearing in mind that jurisdiction in the High Courts in Malaysia is *seised* by way of service,[54] and this being a contract claim brought in the High Court of Malaya (at Shah Alam) there could

53 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [48(iv)].

54 There was no allegation of improper service in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232. See also the Malaysian Court of Appeal decision in *Match Plan (M) Sdn Bhd v William D Sinrich* [2004] 2 MLJ 424 at [8].

not have been any jurisdictional issue in the sense, for example, of a Sessions Court having no jurisdiction to hear an admiralty claim.[55]

(2) Arbitration Act does not render proceedings commenced in breach of arbitration agreement void

56 What other *jurisdictional* impediment was there? An arbitration agreement is simply a creature of contract. The Arbitration Act 2005 does not say that any court proceedings commenced in breach of an arbitration agreement is null and void.

57 Under the Arbitration Act 2005, a defendant has an option to apply for a stay of court proceedings, and a stay of court proceedings does not operate automatically without an application. In Singapore, this position is clearly set out in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd*.[56]

58 Indeed, a stay order granted under s 10 of the Arbitration Act 2005 neither dismisses nor strikes out the court action.

59 It also bears highlighting that on the facts, TM brought a *setting-aside* application first on 10 April 2017, which was heard resulting in the judgment in default being set aside on 31 July 2012. TM *then* brought a *stay* application on 10 August 2017. *If the setting-aside application had failed*, there would have been *no proceedings* for which to stay.

(3) Not an ouster of the court's jurisdiction

60 If the presence of the arbitration clause under the Arbitration Act 2005 ousted the *jurisdiction* of the Malaysia courts, the court action would be struck out, not stayed.

55 Courts of Judicature Act 1964 (Act 91) (M'sia) s 24(b).
56 [2005] 1 SLR(R) 168 at [16].

(4) Merger

61 Once JS obtained a regular default judgment against TM, in the context of the three interim certificates, *all* contractual rights of the parties would have merged into the default judgment and this *included* the *contractual* right to have the dispute in respect of the three interim certificates *arbitrated*.

62 The entry of a regular default judgment meant there was no longer any *dispute* to be dealt with in the first place. The only issue was how the default judgment was to be impugned by TM.

63 For completeness, TM was still fully entitled to bring all other matters not dealt with by the default judgment to arbitration. Indeed, the default judgment only enforced the "temporary finality"[57] of the interim certificates which were all subject to final accounting.[58]

VII. A breach of natural justice?

64 The Federal Court then made the following statement in *Tindak Murni* at [69] invoking the principles of breach of natural justice:

> [69] Res judicata as we know and understand, extinguishes a cause of action once a matter has been adjudicated upon its merits. That is not the case here. These appeals relate to a case where judgment was obtained because no appearance was entered. The defects complained of by the Employer were never

57 For example, in the Pertubuhan Akitek Malaysia Agreement and Conditions of Building Contract, Private Edition With Quantities (1998 Ed) ("PAM Contract 1998"), the terms of which are similar to the contract in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232, cl 30.2 provides that "… Upon receipt of the Contractor's details and particulars, the Architect shall issue an Interim Certificate to the Contractor with a copy to the Employer, and the Contractor shall be entitled to payment thereafter within the Period of Honouring Certificates stated in the Appendix. …", and cl 30.8 provides that "No certificate of the Architect shall of itself be conclusive evidence that any work. materials or goods to which it relates are in accordance with the Contract". Nonetheless, the Court of Appeal of Malaysia in *Juang Setia Sdn Bhd v Tindak Murni Sdn Bhd* [2018] MLJU 975 at [41] held that such interim certificates have "temporary finality" and the contractor is entitled to be paid.

58 PAM Contract 1998 cl 30.7.

> heard nor dealt with notwithstanding the arbitration agreement. The principle or doctrine cannot therefore 'bite'. Put another way it is simply inapplicable to the present factual and legal matrix, particularly when the judgment in default is being actively sought to be set aside. *The attempt to stifle the Employer form [sic] having its case heard by way of arbitration, as agreed between the parties amounts to a breach of the fundamental principles of natural justice.* [emphasis added]

65 It is unclear which rule of natural justice[59] had been breached as the Federal Court did not elaborate.

66 This observation by the Federal Court also sits uneasily with the fact that the default judgment was *regular*. If there was indeed a breach of natural justice in obtaining the default judgment, then the default judgment would have been obtained *irregularly* and liable to be set aside *ex debito justitiae*.[60]

67 For completeness, it was not set out in *Tindak Murni* (nor in any decisions of the lower courts) why TM did not enter an appearance.[61]

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59 The rule that the adjudicator must be disinterested and unbiased (as encapsulated in the maxim *nemo judex in causa sua*) and the rule that the parties must be given adequate notice and opportunity to be heard (as encapsulated in the maxim *audi alteram partem*). See, *eg*, *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [43].

60 For example, *Veeravel Metal Sdn Bhd v Greentech Industries Sdn Bhd* [2020] 7 MLJ 342 at [11] and [13].

61 This would have been relevant to the court's exercise of the discretion whether to set aside the default judgment: see *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 ("As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion."); *Vann v Awford* [1986] 1 WLUK 562; (1986) 83 LSG. 1725, *per* Dillon LJ ("It is, as is well known, the practice where an application is made to set aside a default judgment for the defendant who seeks to have the judgment set aside to give an explanation of his reasons for not defending the action and ignoring the proceedings. …"); and *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [44] ("In determining whether it is justified to set aside the default judgment in question, the court would consider, first and foremost, the merits of the defence, although the causes of the defendant's default and the timeliness of the setting-aside application would be taken into account as well.").

VIII. Breach of agreement: failure to arbitrate

68 The Federal Court also stated at [70] of *Tindak Murni*:

> ... This is because the parties had chosen and agreed to arbitration as the sole and exclusive mode of dispute resolution in respect of any dispute or difference arising from this contract. *The breach of this agreement by the Contractor and the subsequent obtaining of a judgment in default* cannot then be said to amount to a subordination of a judgment by an arbitration clause. [emphasis added]

69 Given that the default judgment was *regular*, obtaining the default judgment in "breach of this agreement" appears to be neither here nor there.

70 In other words, the "breach" did not taint the *process* of obtaining the default judgment. That being the case, it is unclear why the simple presence of an arbitration clause would constitute "merits" for the purposes of a setting-aside application, when it merely referred to a *contractual* dispute resolution mechanism.

A. Arbitration agreement per se *as defence on merits for setting aside*

71 The Federal Court then made the following observation at [72] of *Tindak Murni*:

> (b) Even if the appeal relating to the judgment in default was heard first, the Court of Appeal should have considered that the existence of an agreement to arbitrate coupled with section 10 of the Arbitration Act 2005 *warranted the conclusion that this amounted to a defence on the merits.* Accordingly the judgment in default ought to have been set aside and the matter referred to arbitration in accordance with the statutory requirements of *section 10*; [emphasis added]

72 This appears to be the first time that an apex court has decided that the mere existence of an arbitration clause is deemed to be a defence on the merits for the purposes of setting aside a regular default judgment under Malaysian law, and this would

appear to deviate from the positions in other jurisdictions,[62] such as the UK[63] and Singapore.[64]

73 The courts have long, in general, defined merits for the purposes of setting aside a default judgment as being able to show *a triable issue on the merits*:

(a) In *Fira Development*, the court explained that a defence on the merits merely means raising "an arguable or triable issue", though the court also stated that "[a] judgment in default is not a judgment on merits".

(b) In *Hasil Bumi Perumahan Sdn Bhd v United Malayan Banking Corp Bhd*,[65] the court explained that to show a defence on merits, it is necessary to show a defence that is "not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence", and in doing so,

62 Nonetheless, in the Hong Kong decision of *Dah Chong Hong (Engineering) Ltd v Boldwin Construction Co Ltd* [2002] HKCFI 242, Geoffrey Ma J arrived at the same result as the Federal Court of Malaysia in *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 (that the presence of an arbitration agreement was dispositive in setting aside a regular default judgment in the presence of an arbitration clause). However, the doctrine of merger was not cited to the Hong Kong Court of First Instance, although additionally Ma J did find a defence on the merits.

63 In *Patel v Patel* [1999] 3 WLR 322, the English Court of Appeal said that it was necessary to show a meritorious defence, and the relief sought (a stay) will follow once the court was satisfied that there was a meritorious defence. In *Vann v Awford* [1986] 1 WLUK 562; (1986) 83 LSG 1725, Dillon LJ said: "The plaintiffs do not make any claim to reopen certificates: they put forward an ordinary claim for damages, such as I have briefly mentioned, and the court has ample jurisdiction to entertain such a claim for damages, even though it is within an arbitration clause. Indeed, there are innumerable cases of building contracts and commercial contracts where the court entertains a claim notwithstanding that there has been an arbitration clause, either because there is no application for a stay for arbitration or because, for whatever reason, the court refuses a stay."

64 See *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 at [24]–[26]. See also *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 at [13]–[14] (in the context of exclusive jurisdiction clauses). See also *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2012] SGHCR 2 at [22]–[25], where the assistant registrar decided (correctly, in this author's view) that a debt arising out of a PRC judgment in respect of a contract subject to arbitration was outside the scope of the arbitration agreement, as the cause of action in Singapore arose out of the debt created by the PRC judgment and not the underlying contract.

65 [1994] 1 MLJ 312.

the court "must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case".

(c) In *Evans v Bartlam*, the House of Lords said that there must be an "affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence" before the discretion to set aside a regular default judgment would be exercised, and that the "primary consideration is whether he has merits to which the Court should pay heed".[66]

(d) In *Mercurine Pte Ltd v Canberra Development Pte Ltd*,[67] the Singapore Court of Appeal stated at [60] that "... in deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues".

74 Based on case law, an arbitration clause, *simpliciter*, cannot constitute merits for the purposes of setting aside a default judgment.

B. Arbitration agreement: contractual choice of dispute resolution mechanism

75 The presence of an arbitration clause does not, in and of itself, disclose any factual merits. It is merely a *contractual* dispute resolution mechanism. There are logical *limitations* to which this *contractual* choice for dispute resolution can be used to impugn a *regularly obtained* default judgment.

76 If the Federal Court's decision in *Tindak Murni* stands for the proposition that the *mere presence* of an arbitration agreement would constitute defence on the merits, the following questions would then need to be addressed urgently:

(a) How long can a defendant ignore court proceedings before the defendant is deemed to have assented or

66 *Evans v Bartlam* [1937] 1 AC 473 at 480 and 489.
67 [2008] 4 SLR(R) 907.

consented to litigation or would the issue of an implied or deemed assent or consent even be a relevant consideration?

(b) Would executed court enforcement proceedings (relating to the default judgment) affect the analysis?

(c) If the answer is yes to any of the questions above, would this then suggest that an arbitration clause is like any other contractual right, subject to waiver, variation and/or estoppel?

(d) And would it not then suggest that an arbitration clause is, at best, an inchoate contractual right that requires an application to court to trigger, in the presence of a suit already commenced?

(e) Flowing from the above, why then would an inchoate contractual right trump a judgment of a superior court of record?

(f) Further, what if JS had obtained a regular default judgment and had (evidence of) and pleaded an admission in writing by TM in respect of the three certificates? Applying the FC decision in TM, the fact that TM had *admitted* the debt *in writing* would *not* constitute a *demerit* for the purposes of *opposing* a setting-aside application, in the presence of an arbitration agreement.

(g) Indeed, it is unclear if any other factor would even constitute a *demerit* against a respondent (in the presence of an arbitration agreement) in opposing a setting-aside application in court and if so, under what principle?

C. Default judgment in breach of arbitration agreement is an irregular default judgment?

77 By elevating a mere contractual right to arbitrate to a status that is higher than the judgment of a superior court of record, the Federal Court in *Tindak Murni* is implying that a default judgment obtained in breach of an arbitration agreement is *effectively*

irregular, and to be set aside as of right,[68] although in this case the default judgment was in fact regular.[69]

78 This implication is even harder to justify when one considers that the enforcement of an arbitral award still requires court intervention to have the award first registered as a High Court judgment.[70]

79 The conclusion of the Federal Court in *Tindak Murni* therefore gives rise to logical difficulties and raises public policy issues relating to the rule of law as canvassed in *Grafton Isaacs v Emery Robertson*.

IX. Conclusion

80 It is respectfully submitted that a decision upholding the default judgment obtained by JS against TM would not have undermined the arbitral regime in Malaysia in any way.

81 *Tindak Murni*, being a decision of the apex court of Malaysia, has now indelibly changed in Malaysia the applicability of long-standing principles in respect of the doctrines of merger and *res judicata* in respect of default judgments. The case appears to also have changed the law in respect of setting aside a regular default judgment, and similarly altered the legal principles upholding the sanctity of a Malaysian High Court judgment.

82 In *Chee Siok Chin v Attorney General*, Andrew Phang Boon Leong JA stated that:[71]

> It is also axiomatic, commonsensical as well as just and fair that there cannot be a claim by a party for the vindication of legal rights without that party simultaneously fulfilling his or her legal responsibilities. In other words, one cannot claim one's legal rights without fulfilling one's legal responsibilities. The rhetoric of rights is not a licence for the unilateral appropriation of advantages without legitimate reciprocation; indeed, such

68 *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd* [2020] MLJU 232 at [72(b)].
69 See n 25 above.
70 See s 38 of the Arbitration Act 2005 (Act 646) (M'sia).
71 *Chee Siok Chin v Attorney General* [2006] 3 SLR(R) 735 at [117].

> conduct would be *the very antithesis* of the ideal underlying the very concept of rights as legitimately conceived … [emphasis in original]

83 It would not have been unfair to have required TM to justify, on well-developed legal principles, why the court should have exercised a discretion in TM's favour (on grounds apart from the presence of an arbitration clause *simpliciter*) to set aside the regular judgment obtained against it.

84 There appeared no compelling reason to have provided TM with such a drastic remedy, with the unfortunate consequence of overturning *prior*, long-standing principles of Malaysian law that *were* consistent with other jurisdictions having an English common law heritage.

85 If this judgment was intended to burnish Malaysia's credentials to the arbitral community, one must question if it was necessary to have placed so great a sacrifice on the altar of arbitration.

86 Contractors in Malaysia should take note of this case and amend their contracts accordingly, perhaps to make clear that interim certificates may be enforced in the Malaysian courts by way of court process, by applications for summary judgments or interim payments.

87 Contractors in Singapore should exercise extreme circumspection before relying on this case to set aside a regular default judgment obtained from a Singapore court, in respect of interim certificates, arising out of a contract with an arbitration clause.