



MahWengKwai & Associates

ADVOCATES AND SOLICITORS



Speaker
MICHAEL KOH
Partner



Moderator
CAROLYN NG
Senior Associate

Wed 15 April 2026
3:00pm (GMT +8)

mwka.com/talks

MWKA ONLINE TALKS

Calling Performance Bonds: How Developers Can Avoid and Overcome Injunctions



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Our Practice Groups



MWKA Online Talks

- To share knowledge, raise awareness, encourage networking
- For clients, potential clients, in-house counsel
- Recent MWKA Online Talk:
 - 8.4.2026: Strengthening Your Contracts in Uncertain Times: The Force Majeure Clause
- Upcoming MWKA Online Talk:
 - 22.4.2026: Friendly Loans: Lending Money Without Losing It (or your Friendship)

Michael Koh

Partner



- ❖ Partner in our Dispute Resolution departments.
- ❖ Bachelor of Laws (Hons), University of Leeds
- ❖ Admitted to the Malaysian Bar in 2013.
- ❖ Did the Bar Professional Training Course at Nottingham Trent University and a member of the Honourable Society of the Middle Temple.
- ❖ Areas of practice include construction, general litigation, debt recovery, arbitration and adjudication and employment.

Talk Points

- Purpose of a Performance Bond
- Understanding injunction risk when calling on performance bonds
- Legal tests (fraud & unconscionability)
- Case studies: When developers successfully resisted injunctions
- Case studies: Where developers were restrained – lessons learned

The Ultimate Security: Purpose & Nature

The Autonomy Principle



The Legal Stance: Courts refuse to examine disputes in the underlying contract when a bond is called. Payment must be made upon receipt of a valid demand, regardless of protest (*Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko*)

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Purpose of the Bond

The Ultimate Security Mechanism: Shield and Sword



Security Against Default

The bond ensures that the risk of contractor default, insolvency, or abandonment remains heavily mitigated. It secures the contractual obligation up to the point of absolute delivery.



Immediate Cash Flow Allocation

By shifting the immediate financial risk to the contractor pending dispute resolution, it provides the developer with liquid capital to rectify works or cover losses without waiting for lengthy arbitration.

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Understanding the risk of Injunction

Contractor's Pre-Emptive Strike

Section 11, Arbitration Act 2005

Targeting the Bank

Restraining the issuer from releasing the funds.



Targeting the Beneficiary

Restraining the developer from making the call or receiving the proceeds



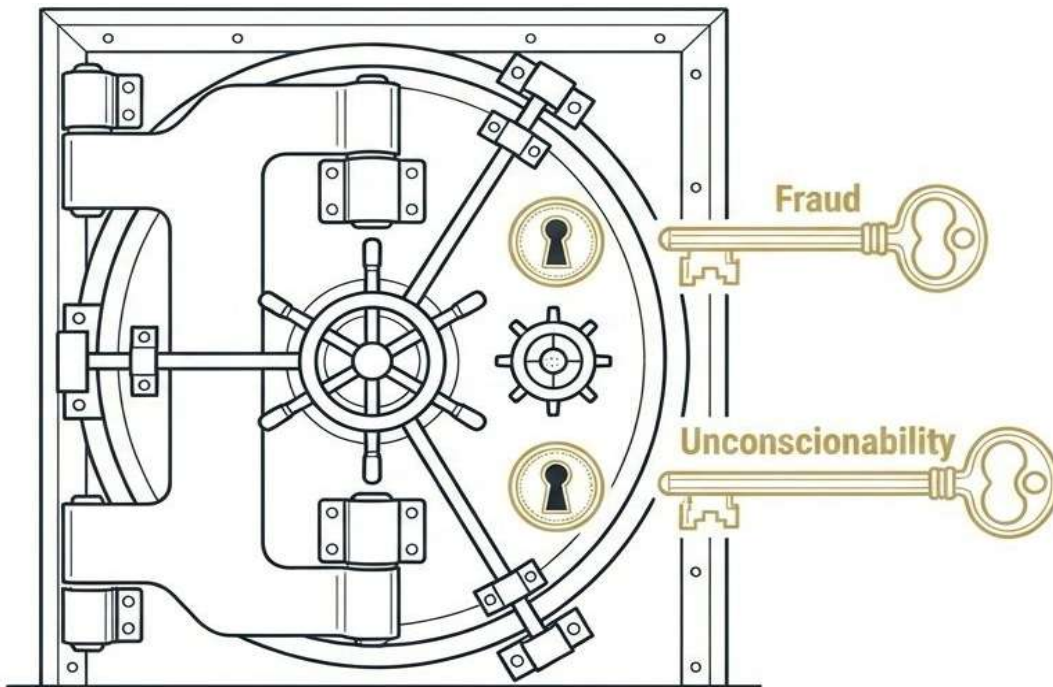
Injunctions freeze the commercial efficacy of the bond. To succeed, the Contractor must bypass the autonomy principle through a narrow legal gateway.

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The Counter-Strike: Injunction Risk

Injunction Against Bond Call



The General Rule

A threatened call on valid on-demand bond will not be restrained merely because the factual basis of the underlying contract is disputed

The Two Exceptions

1. Fraud: Clear evidence of fraudulent demand (e.g., claiming a bond knowing works are 100% complete and defect-free).

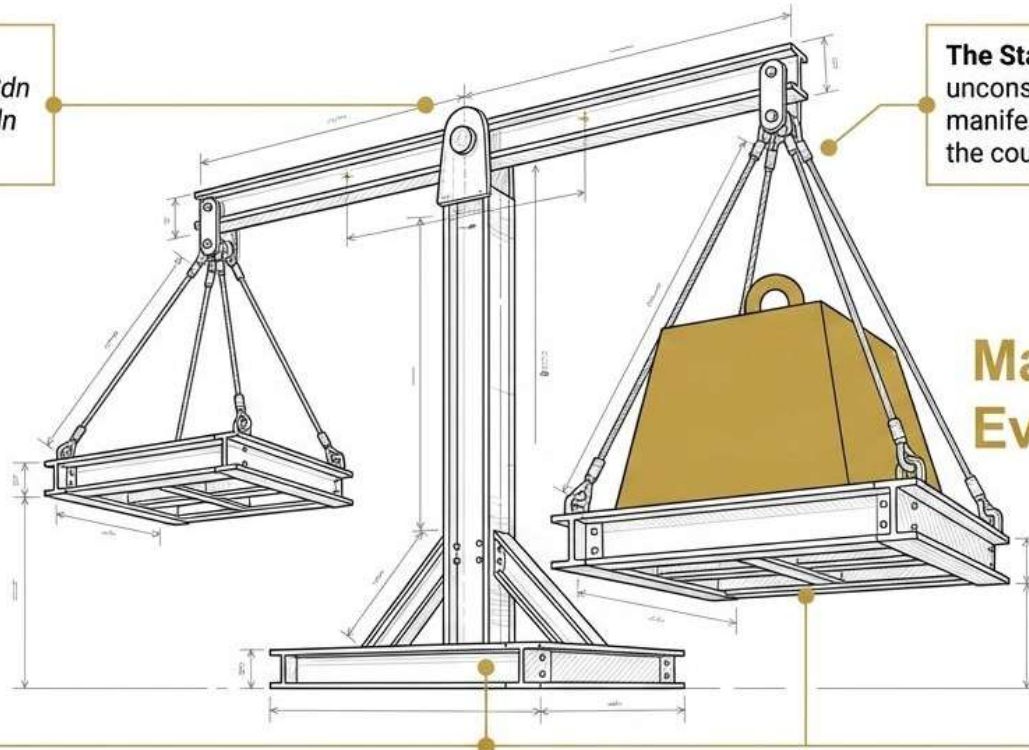
2. Unconscionability: The extended expectation. Conduct that is oppressive, abusive, or in bad faith

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The Legal Test: The Sumatec Standard

The Landmark Case: *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012].



The Standard: Establishing unconscionability requires placing manifest or strong evidence before the court, not bare assertions.

**Manifest
Evidence**

The Test: The applicant must satisfy the threshold of a '**seriously arguable case**' resulting in a '**strong prima facie case.**' Intervention is only allowed with **circumspect** where events or conduct are of such degree as to '**prick the conscience of a reasonable and sensible man.**'

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When Injunction were dismissed

The Shields Holds: Resisting Injunctions in Pure Contractual Disputes

Routine disagreements over time and money belong in arbitration, not injunction hearings.

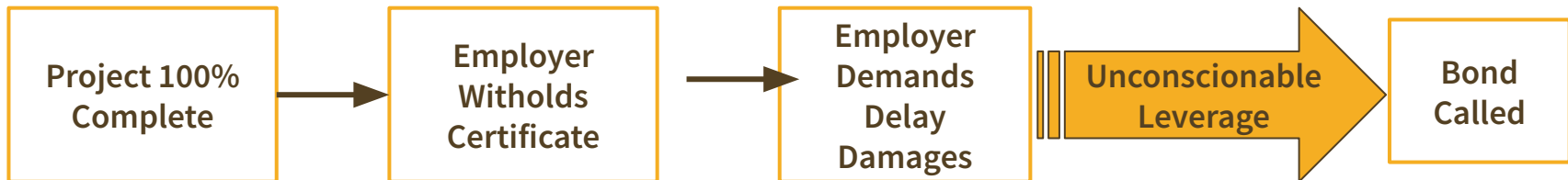
Case	Trigger	Contractor's Defence	Court Ruling
China Construction Yangtze River v TTDI KL Metropolis [2025]	Developer called RM 31M bond citing delay and LAD exposure.	Blamed developer for delays; argued call was 'over- securitisation'.	Injunction Refused. 'Pure contractual disputes' regarding EOT and LAD are exactly what arbitration is for. Calling an unconditional bond where LAD claims exist is commercially neutral, not unconscionable.
Sinohydro Corp v Telekosang Hydro One [2025]	Employer called RM 45M bonds after grating minimal EOT (37 days out of 407 requested).	Project were 99.99% complete; generating revenue; LAD was unjustified.	Injunction Refused. Heavy disputes over LAD and EOT do not amount to a strong prima facie case of unconsonability. The bond servers its exact intended purpose as a risk allocation device.

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When Injunction were allowed

Successful Restraints: Weaponizing the Bond



The Case	Pengerang Refiningv Sinopec Engineering (USD 132M Bond).
The Facts & Motive	The refinery was completed, handed over, and earning revenue. Employer deliberately withheld the approved Performance Test Report to avoid issuing Provisional Acceptance in order to force the contractor to pay USD 132.9M in delay damages.
The Ruling	Injunction granted. Calling a bond when works are physically complete just to engineer leverage for delay damages is highly unconscionable.

When Injunction were allowed

Case Study:Eversendai v Samsung C&T [2023]

Anatomy of an Unconscionable Bond Call

Ulterior Timing & Rushed Process	Manufactured & Illegitimate Claims
● Impending Decision: The bond call was executed a mere 8 days before the Adjudication Decision (AD) was scheduled to be delivered. ● Jumping the Gun: The Defendant issued a unilateral decision on August 9, rushing the process two days before the agreed-upon consultation period (Aug 11-30) even commenced, acting preemptively to frustrate the statutory process.	● Reviving Stale Claims: The call relied heavily on outdated back-charges that were explicitly waived, settled, and released by Supplemental Agreement No. 1 (SA No. 1) effective 27 October 2020. ● Subverting CIPAA: The Defendant utilised claims identical to those already raised and dismissed in adjudication, improperly attempting to negate the impending AD and bypass temporary finality.

The Precedent: The calculated timing to preempt a statutory adjudication decision, combined with reliance on explicitly waived and illegitimate claims, satisfied the high threshold for unconscionability, justifying a complete injunction on the bank guarantee.

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Unconscionability via Over-Securitisation

Definition: Over-securitisation as a result of demanding upon a bond/guarantee is unconscionable.

The Financial Imbalance

RM15.7m The Defendant owed the Plaintiff.

RM8m Defendant's only tangible exposure (un-recouped advance payment).

The RM15.7m owed fully safeguarded the Defendant's actual exposure.

Speculative Claims Rejected

~~**RM73m**~~

The Defendant's RM73m Liquidated Damages (LAD) set-off claim to justify the bond call was rejected by the Court as "arbitrary and speculative."

The High Court Decision

The High Court granted the injunction, ruling it manifestly unfair for the Defendant to call on the RM12.7m Performance Bond and the Advance Payment Guarantee when its actual financial exposure was already fully safeguarded by the RM15.7m it owed the Plaintiff.

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In Gist

Strategic Blueprint: Deploying the Performance Bond

Safe to Call (The Shield)

- Contractor is objectively delaying the project, triggering valid LAD
- Standard disputes over Extension of Time (EOT) validity.
- Contractor abandons the site or faces insolvency.
- CPC/CCC is issued, but specific undertakings, minor works, or safety rectifications are ignored

Rule of Thumb: The demand is commercially neutral and seeks to allocate risk pending arbitration.

Danger Zone (The Misused Sword)

- Calling solely to avoid paying certified Interim Certificates.
- Refusing to use available Retention Sums for minor defects while calling the full bond.
- Deliberately withholding required approvals/signatures to manufacture a breach.

Rule of Thumb: The demand is punitive, retaliatory, or designed to bankrupt the contractor despite substantial performance

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Additional Considerations

Prinsiptek (M) Sdn Bhd v Naza TTDI Sentralis Sdn Bhd (formerly known as Ikhlas Murni Sdn Bhd) [2020] MLJU 2426

Questions?

Upcoming Talks

Date	Topic	Speakers
22 April 2026 (Wednesday)	Friendly Loans: Lending Money Without Losing It (or your Friendship)	Alyssa Dalila & Amir Nizam



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Thank you!

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