



Position Paper 1: Potential for legal liabilities and claims for unpaid wages in the palm oil industry

Introduction

To support the further knowledge and understanding of the *relationship between* palm oil industry stakeholders (the “*Industry*”) and the *communities* that supply workers and the potential risks that may arise to these stakeholders and also those with concerns in the Industry, we present the first of five papers exploring the material risks arising from the current governance, management, supervision and administration of labour to the Industry.

The work set out in this position paper (the “Paper”) does not seek to name specific instances but envisage broad and potential material financial losses and further consequences to the Industry in Indonesia and Malaysia¹ and beyond arising from identified potential legal and financial liabilities arising from material risks in areas of human resource management. The paper is based on research, data and information sources.

Summary

Poor governance, management, supervision and administrative practices and infrastructure of the supply of workers to the Industry, which primarily uses outsourcing arrangements and labour agencies/workers provider companies, and requires the payment of various levies (in the name of local governments) and recruitment fees by layers of agents, both individual and organisations, has led to the identification of many instances of workers being regularly unpaid and under-paid due to failure to make payroll funding available, the likely theft of payroll cash by labour agencies/worker provider company, illegal salary deductions, and ongoing debt bondage.

The workers’ vulnerabilities attached to being a migrant and the enhanced vulnerabilities associated with being undocumented make migrants very prone to be treated unfairly and exploitation in this Industry. Furthermore, a prevalence of child labour and a lack of health and safety precautions potentially causing severe ill-health are also well documented issues affecting workers. The exposure of workers to these situations creates significant potential risks and financial liabilities arising from failure to invest in robust human resource management practices and infrastructure and from failure to put in place safeguards that protect workers from systemic vulnerabilities of a very employer driven Industry.

Audits of specific companies have already raised some of these issues, however there are concerns that the supply chain audit process itself are insufficient and can be prone to corruption and information suppression, thereby compounding the degree to which this prevalent issue is underreported. Furthermore, unlike financial audits, supply chain audits remain confidential with often only a summary made public. Without legal standards governing the content of supply chain and labour audits, no enforcement can be brought against companies or auditors, the latter of whom are often non-governmental organisations making specific enforcement for failure to present a true and fair representation or avoid conflicts of interest additionally complicated.

Fortunately, civil society who serve victims and communities continue to improve and develop their data and research gathering capacity to provide richer ongoing information and evidence about these Industry failings, risks and potential liabilities and increased access to justice mechanisms to provide better methods of pursuing individuals and eventually potentially worker class actions. As the evolution of technology surges ahead, this capability to gather, share, and make sense of vast amounts of data to evidence liability illustrates serious momentum toward transparency.

¹ Due to transparency regimes as prescribed by the Modern Slavery Act and the French Devoir de Vigilance etc... it is very likely that risk and ensuing losses will impact industries beyond Malaysia and Indonesia.

Structure of labour supply to Industry

Across the Industry in both Indonesia and Malaysia, workers (documented and undocumented) primarily provide their labour either directly to plantation corporate entities or via outsourcing and recruitment agencies/workers provider company who identify workers.

Regardless of the structure of the labour supply, the benefit of the labour activities provided by the workers accrues to the corporations owning the plantations. Plantations are tended, pesticides sprayed and harvested. In consideration for their labour, the workers should receive weekly or monthly wages or in certain cases payment is calculated by weight of fruit picked. And in both Indonesia and Malaysia, there are minimum wage provisions provided for by the law².

Wages or payroll are meant to be paid to workers directly by the plantation or payroll is sent to the recruitment agency/workers provider company. Research shows, however, that wages are not always reaching workers, particularly where those workers have entered into arrangements with recruitment agencies/workers provider company.

The contractual arrangements between the plantation entity, recruitment agency/workers provider company and worker may create contradictory legal relationships. But ultimately what is certain, the worker is on the land owned by the plantation working on the oil palm trees owned by the plantation. The fruit harvested and resulting oil palm sold is for the benefit of the relevant plantation business group also.

Certain recruitment agencies, of which there might many layers involved, often unidentified and unregistered pose significant counterparty risk to any palm oil businesses using them. It is understood and has been claimed that the recruitment agencies initially promise to find jobs for individual workers, therefore acting as agents for the worker, in consideration of a fee to that agency (this fee however may instead become debt bondage, leaving workers financially powerless and increasingly vulnerable to further forms of bribery and corruption.) However, once the worker starts their work activities the recruitment business perhaps ceases to act for the workers and acts for the plantation managing the work force and payroll monies and disbursing these wages to workers, the legal basis the recruiters hold any payroll monies is the subject of a separate position paper. In addition, recruiters are responsible for providing information and implementing plantation business and management policies.

Furthermore, in some cases, even when wages from agencies are received by workers, deductions have been made by recruitment agencies that were never agreed to by workers. Hidden costs such as training, provision of safety equipment, medical tests and lodging are often cited as common reasons for salary deductions. The reality is that in cases where levies are payable by the employer, these costs are passed on to employees in the form of salary deductions with very little transparency to workers of the total amount owed and how much has been paid to-date. Poor record keeping and the absence of any digitized payments to workers makes it difficult to document such instances of debt bondage.

In all there exists an arrangement of relationships that are unnecessary complex and complicated but which could be simplified or better governed and administrated. Nonetheless, few office-based workers would accept such an approach to HR management.

² Malaysia's minimum wages policy is decided under the National Wages Consultative Council Act 2011. Under this Act, a tripartite body known as the National Wages Consultative Council is formed to recommend the minimum wages rate to the Government and once approved by the Government, the Minister of Human Resources will make a Minimum Wages Order. In Indonesia, the minimum wages are determined by the governor of each relevant province and by using a formula which calculates the minimum wage by region based the previous year's minimum wage, inflation and economic growth.

Implied contract between worker and plantation owner?

Workers without a written agreement are generally difficult to enforce wage payment or seek redress for other forms of wrongdoing by the plantation owner. Additionally, lack of a written work/employment agreement may cause certain complications to workers to prove that there is an employment relationship between the workers and the plantation owner or outsourcing agency³.

For example, in the case of accidents at work or sickness that is work related, the plantation or outsourcing agency will commonly deflect responsibility stating the absence of a written agreement though this has been successfully challenged⁴.

It is clear that the labour provided accrues benefit to the value of the plantation company and a contract may be implied by performance between the worker and the plantation i.e. their labour is consideration for an unwritten employment contract under Indonesian Manpower Law or implied contract by conduct under Malaysian law⁵.

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Implied or unwritten contract by performance.

It can be strongly argued under the relevant laws that in consideration of their labour they are due wages whether monthly or by weight of fruit picked under an implied or unwritten contract and any other benefits that may accrue by virtue of an implied employer/employee relationship.

Where wages are due to be paid by the recruitment or outsourcing agent on behalf of the plantation owner, it can be argued that while recruitment agencies initially act on behalf of the worker to find them work, once the worker performs their labour for the plantation, then the plantation has entered into an unwritten or implied contract with the recruitment agent acting on their behalf to pay wages, provide governance and discharge the liability between plantation owner and worker.

Left unpaid, wholly or partially (such as after false deductions), this remains the liability of the plantation company. When money is sent to the recruitment agency to discharge the payment of wages to the workers but is instead unlawfully retained by that agency, these are acts which can constitute criminal breach of trust.

3 Law No. 13 of 2003 on Manpower (**Indonesian Manpower Law**) regulates that there are two types of employment agreement: permanent and fixed-term agreement. A permanent employment agreement may be made in writing or verbally. A fixed-term employment agreement must be made in writing only. In the event the employment agreement is made verbally, the respective workers may still be possible to get their protections under the auspices of the Indonesian Manpower Law provided that they can prove and indicate the elements of the employment relationship with the employer (i.e. work available, wage payment, work instruction from the employer to the worker).

4 However in 2014, in the Malaysian decision of *Alamgir v Cass Printing & Packaging Sdn Bhd* [2015] 2 MLJ 270, a foreign worker whose work permit application was pending (i.e. not approved) successfully received damages for his employer's negligence when machinery not in safe working condition caused an injury that required the amputation of the worker's right arm.

5 section 2 of the Malaysian Employment Act 1955 a “contract of service” may be implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee.

Moreover, this breach of trust by the recruitment agencies from the Industry also **remains a continuing liability of the plantation—and company—to the workers if the recruitment agencies are found to be the agents of the plantation.** The employer is not allowed to make deductions from salary under Section 24 of the Malaysian Employment Act 1955 save for exceptions which do not apply to payment of amounts owed by the employee to the recruitment agencies.

As a matter of the relevant law and regulations in Indonesia, the company has the main role to determine the utilization of the recruitment or outsourcing agency. To engage the outsourcing agency, the company must consider the types of work which can be outsourced, namely: (i) the work which will be carried out separately from the main activities, both at the management level and at the operational level, (ii) the work which will be carried out by direct or indirect instruction from the company, (iii) the work is supplemental activities which supports the company's activities as a whole; and (iv) the outsourced work does not affect the main operational activities or production activities directly.

The relevant Indonesian regulations further stipulates the company will be required to submit a report to the authorized institution relating to the types of the works outsourced to the outsourcing agency and the outsourcing agency must subsequently register the outsourcing agreement with the company to the authorized institution. This presents an element of grossly outsized risk to a company.

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Potentially unlawful retention of payroll monies by recruitment/outsourcing agencies and workers provider companies

It is understood from research that workers remain unpaid, perhaps for years, and that it is claimed that the recruitment/outsourcing agencies and workers provider companies are responsible for payment of workers. This description of the relationships and distribution of responsibilities potentially presents the argument that payroll monies are received by recruitment/outsourcing agencies and workers provider companies and retained by these parties perhaps applied for their own use, use by their officers and employees or for some reason retained but due for payment to workers, constituting a criminal breach of trust with the plantation.

Quantum of liability of the Industry for outstanding wages.

The exact quantum of the liability is difficult to estimate, but research of the labour provided to palm oil industry shows many instances of poor or no governance by Industry participants in areas of human resource management giving rise to counterparty risk with recruitment agencies, legal risk and perhaps considerable financial risk. The liability arising from these risks can be conservatively calculated at least by range as both Malaysia⁶ and Indonesia⁷ have minimum wages.

Estimation of quantum of unpaid wages owed to undocumented workers in Malaysia

% of total undocumented workers in industry	Number of migrant workers#	Duration of work (months) owed	Minimum wage (USD)*	Total outstanding wage liability and potential amounts unlawfully retained by recruitment agents (US\$)
10	175,000	3	230	120,750,000
10	175,000	6	230	241,500,000
10	175,000	9	230	362,250,000
10	175,000	12	230	483,000,000
25	437,500	12	230	1,207,500,000

The total number of migrant workers in Malaysia is estimated between 1,750,000 to 2,000,000^{8, 9, 10, 11, 12} and it is believed approximately 50% of undocumented workers provide their labour to the Industry.

* USD230 is the minimum wage in Sabah however it is actually USD250 in other parts of Malaysia.

“unpaid wages owed to 10% of the estimated undocumented workers in Malaysia (meaning 175,000 workers) under the 6yr limitation period would be equal to US\$2,898,800,000.”

Time Limitations for Actions

The estimations above are based on 3, 6, 9 and 12 months but the statutory limitation for contractual breach in Malaysia extends back 6 years from date of breach. In Indonesia, the statutory limitation is 30 years.

For workers in Malaysia owed for 6 years, and there are many who have had children and are grand-parents, even the unpaid wages owed to 10% of the estimated undocumented workers in Malaysia (meaning 175,000 workers) under the 6yr limitation period would be equal to **US\$2,898,800,000**.

For 10%, 6(yrs) x US\$483,000,000 (see highlight above) = **US\$2,898,800,000**

For 25%, 6(yrs) x US\$1,207,500,000 (see highlight above) = **US\$7,245,000,000**

6 Minimum Wages Order 2016 [PU(A) 116/2016]

7 In Indonesia, the minimum wages are determined by the governor of each relevant province and by using a formula which calculates the minimum wage by region based the previous year's minimum wage, inflation and economic growth.

8 <http://www.asianews.it/news-en/Foreign-workers-round-up,-source-of-concern-for-ASEAN-lawmakers-41300.html>

9 <https://www.freemalaysiatoday.com/category/nation/2017/07/27/home-ministry-1-78-million-foreign-workers-in-malaysia/>

10 <https://www.thestar.com.my/business/business-news/2016/05/02/reducing-reliance-on-foreign-workers/>

11 https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2018_25@50.pdf

12 https://www.asienhaus.de/archiv/user_upload/Palm_Oil_Workers_-_Exploitation__Resistance_and_Transnational_Solidarity.pdf

Conclusion

The governance, management, supervision and administrative practices and infrastructure for those providing their manual labour should be as robust as those for office-based employees and for outsourcing human resource it should be as robust as outsourcing IT or other functions.

Currently, this is not the case and the lack of robust practices and infrastructure has created risk and potential financial liability to class action that is now being identified by better ongoing data and intelligence collection. Wages remain unpaid and possibly unlawfully retained by recruitment agencies (potentially leading to money laundering). Enhanced transparency through the work of investigative journalists, supply chains related disclosures pursuant to legislations and the work of CSOs in this space is increasing the likelihood of civil and criminal claims not simply by workers but also other stakeholder groups such as consumers, whose interest in these issues is growing alongside the availability of data.

It is time the Industry invest in reckoning with these poor practices, because professional and comprehensive human resource management techniques are available and implementable. Short-form contracts, payslips, ledger records, registration of recruitment agents, formation of a recruitment panel... are all very well established practices for white collar workers. The risk to stakeholders is material and to some potentially financially unacceptable but they are also avoidable with governance, management and administration.

DISCLAIMER

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