

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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AND THE WINNER IS ...

IN THIS ARTICLE, KUEK PEI YEE EXAMINES THE LAWS AND GUIDELINES GOVERNING PROMOTIONS, CONTESTS AND COMPETITIONS.

You walk onto the stage, you beam at the audience and try not to squint as cameras click and white bulbs flash. You put your hand into the box and pick a token from it, whilst looking into a sea of anxious faces who would have bought numerous tickets hoping to win something. You keep your voice steady as you announce the name of the winner of the Grand Prize. The winner rushes onto the stage, you shake his hand, and you hand him the keys to a brand new car. However, as you turn around, an officer hands you a summons and a big fine. You have been charged for ... gambling! The above scenario is a possibility in view of the gaming laws in Malaysia. Many companies may not be aware of such a contingency and hence, the purpose of this article is to look into this aspect of the gaming laws and guidelines that are in force.

THE LAW

Under sec. 2 of the Common Gaming Houses Act 1953 (Revised 1983) ("Act"), the term "gaming" with its grammatical variation and cognate expressions means the playing of any game of chance and skill for money or money's worth and "lottery" includes any game, method, or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same be held, drawn, exercised, or managed within or without the Federation.

Section 4(1)(h) of the Act provides that any person who conducts in or through any newspaper or periodical publication, or in connection with any trade or business or the sale of any article to the public; any competition in which prizes are offered for forecasts of the result either of a future or past event the result of which is not yet ascertained or generally known; or any other competition success of which does not depend to a substantial degree upon the exercise of skill; shall be guilty of an offence. Based on this provision, it quickly becomes apparent that lucky draws and games in which the winners are determined by chance are prohibited by the gaming laws.

GUIDING THE GAMBLERS

The enforcement of the gaming laws in Malaysia come under the purview of the Minister of Finance ("MOF"). Save for lotteries authorised or licensed under the provisions of the Social and Welfare Services Lotteries Board Act 1950, the Lotteries Act 1952 or any sweepstake promoted by a racing club established in Malaysia on the result of a horse race, it is the policy of the government to refrain from issuing any licences or permits allowing lotteries and games of chance to be conducted in Malaysia.

In the past, companies or businesses intending to organise or conduct promotions, contests or competitions ("promotions etc.") were required to submit an application to the MOF for approval. The methodology or workings of the promotion, contest or competition would be detailed in the application form. The MOF would then consider the applications, and convey their approval or otherwise to the companies or businesses in writing thereafter.

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News Flash : BUDGET 2005 HIGHLIGHTS

The highlights of the 2005 Malaysian Budget announced by the Finance Minister Y.B. Datuk Seri Abdullah Ahmad Badawi (Prime Minister of Malaysia) on 10 September 2004 are as follows –

- The introduction of Goods and Services Tax (“GST”) from 2007. GST will replace the existing sales and service tax and be accompanied by cuts in corporate and personal tax
- Granting of stockbroking licences to five major foreign stockbrokers to operate in Malaysia
- Granting of fund management licences to five global fund managers to operate in Malaysia
- Futures broking companies and venture capital companies permitted to have 100% foreign ownership
- Stockbroking companies which have merger with at least one other stockbroking company permitted to establish up to four additional branches or electronic access facilities
- Limit on number of foreign dealer representatives to be abolished
- Tax exemption on interest derived by non-resident companies from Ringgit-denominated Islamic securities and debentures (excluding convertible loan stocks) approved by the Securities Commission and from securities issued by the Government
- Government will issue treasury bills based on Islamic financing principles
- Employees Provident Fund permitted to increase size of funds placed with local fund management companies including non-bank owned companies
- Interest-in-suspense deemed as special provision for bad debts and allowed as deduction in computation of income tax for financial institutions
- Private institutions of higher learning to be granted exemptions from stamp duty and real property gains tax for mergers until 2006

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Announcement

We are pleased to announce that as of 1 July 2004, Teh Hong Koon and Audrey Choo Pao Lin have been promoted to the position of Senior Legal Assistant at the Firm. We would like to congratulate them on their recent promotion.

MESSAGE FROM THE EDITOR-IN-CHIEF

WE BRING YOU THE 3RD ISSUE OF LEGAL INSIGHTS.

My, my, my ... how time flies. We are already into our third issue of Legal Insights. To many this may not amount to much of an achievement but to me it has been quite a challenge to juggle not only a law practice but a quarterly publication as well. There is definitely a story to tell with this particular issue.

I liken publishing a newsletter or any periodical for that matter, to running a marathon. During a marathon, I am given to understand that for the first few miles, one will be faced with a mental obstacle called the ‘invisible wall’. One needs to break down this ‘invisible wall’, only then can one overcome his mental barrier and be confident of completing the marathon.

After two rather successful issues of Legal Insights, the ‘invisible wall’ appeared rather unexpectedly at my writer’s board. I hadn’t a clue with the scope and focus of the third issue. Self-doubt and apprehension set in. I wondered if the team would be able to scour enough worthy and juicy material for this issue. My fears were however allayed when we recently received some major court decisions. Not only that, the Foreign Investment Committee came up with a new set of guidelines (“FIC Guidelines”) in respect of the acquisition of interests, mergers and take-overs, and the acquisition of property by local and foreign interests. Finally I was at ease, whilst my team scurried and busied themselves, working extra hard to meet the dreaded printer’s deadline.

In this issue, there are several interesting articles. Our feature article written by Kuek Pei Yee, examines the laws governing promotions, contests and competitions in Malaysia. Kok Chee Kheong discusses the FIC Guidelines in a special two part series on pages 4 and 14 respectively. An insight into the Federal Court case of Intelek Timur, in respect of the law on setting aside of arbitral awards, is provided by Audrey Choo on page 6, whilst Maniam Kuppusamy addresses the personal liability of directors and other officers for corporate acts and omissions under the customs laws on page 8. If you happen to be an inventor, Angeline Chin highlights the reasons why you should protect your invention on page 7. We have sacrificed a small column in this issue for the highlights of the 2005 Malaysian Budget, and little sections on selected American cases have also been covered to add a little amusement to your reading pleasure.

Please take the time from your busy schedule to read our articles, contributed by our lawyers. I would like to thank the writers for their contributions, without which Legal Insights would still be a dream. My gratitude also goes out to our Partners whose comments and time are greatly appreciated. I am honoured to have such a brilliant editorial team, who have slogged to get this issue out on time. My sub-editors have been absolutely committed to the aims and scope of Legal Insights and have strived to ensure the accuracy of the contents to this newsletter.

I urge you to contact us with your thoughts and suggestions. Are there certain cases or issues we should be covering? Please let us know how we can serve you better. Your feedback and comments are more than welcomed. Should you have any queries or need assistance or clarification on the contents of our newsletter, do feel free to contact us at et@skrine.com.



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Editor-In-Chief

FEDERAL COURT'S DECISION - HOW FINAL IS FINAL?

Leong Wai Hong examines the right of the Federal Court to re-open and review its own decisions.

The Federal Court (“FC”) has in recent months delivered a series of judgments regarding its jurisdiction to re-open and review its own decisions. On 16 August 2004 the FC dismissed the debtor’s application to re-open and review its decision on **Moscow Narodny Bank Ltd. v Ngan Ching Wen** (2004) 2 CLJ 241.

A similar application to the FC to re-open and review its decision in **Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit @ Sun Yoke Eng** (2001) 1 MLJ 241 was dismissed on 27 August 2004.

The FC’s right to re-open and review its own decision is based on Rule 137 of the Rules of the Federal Court which reads:- “For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

... the FC unanimously held that Rule 137 has legislative effect and that the FC has the inherent jurisdiction to review an earlier decision.

This rule was relied on by the FC in **Chia Yan Tek & Anor v Ng Swee Kiat & Anor**. (2001) 4 CLJ 61 (the “Chia Yan Tek case”) and **MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun** (2002) 3 CLJ 577 (the “MGG Pillai case”) as the jurisdictional basis to re-open and review its own decision. Such a right will undoubtedly raise concern as it surely must be in the public interest that there be finality in litigation particularly in respect of a decision of the FC, the apex court of Malaysia.

On 7 September 2004, the FC in **Dato’ Seri Anwar bin Ibrahim v Public Prosecutor** (the “Anwar bin Ibrahim case”) rejected a preliminary objection by the Attorney General that Rule 137 was *ultra vires* the Federal Constitution and therefore void. All the three judges in the FC unanimously held that Rule 137 has legislative effect and that the FC has the inherent jurisdiction to review an earlier decision.

Although the FC discussed Rule 137 at length in the Anwar Ibrahim case and held that the rule is not *ultra vires*, it did not lay down specific guidelines as the scope and limitations of the rule in its judgment delivered on 15 September 2004. Alauddin Mohd. Sheriff, FCJ cautioned that the rule should be applied in limited circumstances and on a case by case basis.

In the MGG Pillai case, Steve Shim CJ suggested that the rule can only be invoked if the said order was obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. Haidar Mohd. Noor FCJ and Madam Justice Siti Norma Yaakob FCJ did not expound on the scope of Rule 137 but relied on the clear language of Rule 137.

Until the FC fully clarifies the scope of Rule 137, guidance may be obtained from a brief review of the cases where the apex courts in other jurisdictions have exercised similar powers based on their inherent jurisdiction.

In Australia the High Court of Australia (“HCA”), the apex court of Australia, pronounced in **Wentworth v Woollahra Municipal Council & Others** (1982) (43 ALR 240) that “... the circumstances in which this court will re-open judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard.”

The HCA in **Metwally v University of Wollongong** (1985) 60 ALR 68 also stated that “It may be assumed, without deciding, that the court has power to vacate its order of 22 November 1984, notwithstanding that it has been perfected. If such power exists, it must be exercised with great caution, after weighing what might otherwise be irreparable injustice against the public interest in maintaining the finality of litigation ... The present is not a case in which an order was made by mistake or as a result of fraud, or a case in which by some accident or order has been made against a party who was not heard”.

The apex court in England, the House of Lords (“HL”) stated in **R v Bow Street Metropolitan Stipendiary Magistrate and others, ex-parte Pinochet Ugarte (No. 2)** [2000] 1 AC 119 (the “Pinochet case”) that an appeal to the HL will only be reopened where a party, through no fault of its own, has been subjected to an unfair procedure. A decision of the HL will not be varied or rescinded merely because it is subsequently thought to be wrong.

CONCLUSION

What is discernible from the cases discussed above is that the jurisdiction to re-open can clearly be invoked if the irregularity involved the composition of the panel which heard the appeal at the apex court. Such was the situation in the Chia Yan Tek case and the MGG Pillai case, where the judgement of the FC in each case was delivered after one of the judges on the panel hearing the case had retired.

What is discernible ... is that the jurisdiction to re-open can clearly be invoked if the irregularity involved the composition of the panel ... at the apex court.

Similarly in the Pinochet case, the HL set aside its earlier decision on grounds that one of the judges in the majority decision had at the material time been a director of a charitable organisation which was controlled by a party involved in the appeal, thus creating an apparent bias in the Court.

While it is clear from the recent decisions that Rule 137 is not *ultra vires* and the FC has wide powers to re-open and review its earlier decision and make such order as may be necessary to prevent injustice or abuse of the process of the Court, the exercise of such power must be balanced with the need in the public interest to maintain the finality of litigation.

THE NEW FIC GUIDELINES - PART I

In the first of a two-part series, Kok Chee Kheong discusses the FIC's new Guideline on the

INTRODUCTION

As part of the Economic Stimulus Package introduced on 21 May 2003 ("Economic Stimulus Package"), the Government of Malaysia announced that the Guidelines on Acquisition of Assets, Mergers and Take-Overs introduced in 1974 will be replaced by the following -

- Guideline on the Acquisition of Properties by Local and Foreign Interests ("Property Guideline"); and
- Guideline on the Acquisition of Interests, Mergers and Take-Overs by Local and Foreign Interests ("Acquisition Guideline").

Although the Property Guideline and Acquisition Guideline were released on 1 August 2004, they are deemed to have come into force on 21 May 2003 to tie-in with the effective date of the Economic Stimulus Package.

Part IV of the Acquisition Guideline sets out 10 categories of transactions that require approval of the FIC.

The objective of this article is to provide a brief introduction to the Acquisition Guideline and to examine whether it has enhanced Malaysia's ability to attract foreign investment.

TRANSACTIONS REQUIRING FIC APPROVAL

Part IV of the Acquisition Guideline sets out 10 categories of transactions that require approval of the FIC. They include the following -

1. Any acquisition of interest in a local company/business which is RM10 million or more in value, by local or foreign interests;
2. Any acquisition of interest of a local company/business by any means, which results in the transfer of ownership or control to foreign interests;

3. Any acquisition of interest by:-
 - i. any foreign interest of 15% or more of the voting rights of a local company/business OR which results in an increase of voting rights of foreign interests to 15% or more in a local company/business; or
 - ii. any associated or non-associated group of foreign interests, in the aggregate of 30% or more of the voting rights of a local company/business OR which in the aggregate results in an increase of voting rights of foreign interests to 30% or more in a local company/business;regardless of the value of the transaction with the exception of open market acquisitions on Bursa Malaysia for short term holdings;
4. Any acquisition of interest and control of more than 50% of the voting rights in a local company/business by local interests, regardless of the value of the transaction;
5. Any merger or take-over of a local company/business by local or foreign interests;
6. Any proposed joint venture involving two or more parties in a local company;
7. Any control of a local company/business through any form of management agreement, technical assistance agreement or other arrangements;
8. Any charging of shares in a local company to any foreign interest where the value of the loan or market value of the shares is RM10 million or more.

Where a proposal is subject to the approval of the Securities Commission ("SC"), the proposal is required to be submitted only to the SC and not the FIC.

EXEMPTIONS

Part VI of the Acquisition Guideline sets out the transactions that are exempted from the guideline. They include the following -

1. any acquisition by Ministries, Government Departments, the Minister of Finance Incorporated, Menteri Besar Incorporated or the State Secretary Incorporated;

2. any acquisition of interest in manufacturing companies licensed by the Ministry of International Trade and Industry ("MITI) – approval for such acquisitions fall under the purview of MITI;
3. any acquisition of interest in Multimedia Super Corridor (MSC) status companies or companies that have been granted special status by the Ministry of Finance, MITI or other ministries such as International Procurement Centre, Operational Headquarters, Representative Office, Regional Office and Labuan offshore companies;
4. any privatisation project, whether at Federal or state level, insofar as it relates to the companies or parties who are the original signatories to the privatisation contracts. The exemption does not extend to subsequent dealings in such interests.

CONDITIONS OF APPROVAL

An FIC approval is subject to the conditions set out in the Acquisition Guideline, namely equity conditions, share capital conditions and employment conditions.

Equity Conditions

Companies which do not have Bumiputera or have less than 30% Bumiputera equity are required to increase their Bumiputera equity to 30%. This requirement for at least 30% Bumiputera equity is to be applied uniformly unless otherwise stated by the Government. The remaining equity may be held by local interest, foreign interest or both.

With respect to companies that are involved in national interests ... participation by foreign interests is limited to 30%.

With respect to companies that are involved in national interests, such as defence and security and supply of water and electricity, participation by foreign interests is limited to 30%. The Government may impose other conditions such as the issuance of a "golden share" that confers certain veto powers on the Government.

Acquisition of Interests, Mergers and Take-Overs released on 1 August 2004.

Companies that already have 30% or more Bumiputera equity are required to maintain at least 30% Bumiputera equity holding. Similarly companies having 51% or more Bumiputera equity are required to maintain at least 51% Bumiputera equity holding.

Equity conditions may be waived for companies that have incurred losses and are undertaking a debt restructuring exercise. In such event the equity structure will be reviewed three years after FIC's approval letter.

No equity conditions will be imposed on non-licensed manufacturing companies incorporated after 31 July 1998.

Companies that seek listing on the Main Board or Second Board of Bursa Malaysia are required to have 30% Bumiputera equity only upon listing. Companies that apply for listing on the MESDAQ Market are required to comply with the Bumiputera equity stipulated in the Listing Requirements for the MESDAQ Market.

Companies having major foreign-based operations (as defined in the SC's Policies And Guidelines On Issue/Offer Of Securities) that seek listing are not required to comply with the 30% Bumiputera equity condition.

Where a corporate transaction involves an increase in the paid-up capital of a company and results in the dilution of Bumiputera equity, 30% of the new shares must be offered to Bumiputera investors.

Equity conditions imposed, if any, are to be complied with within two years from the date of the FIC's approval letter. The status of compliance must be reported to the FIC at least one month before the deadline for compliance or whenever requested by the FIC. The compliance period may be extended by one year based on the merits of each case.

Share Capital Conditions

A local company owned by foreign interest that has a paid-up capital of less than RM250,000 is required to increase its paid-up capital to at least RM250,000 within six months from the date of the FIC's approval letter.

A local company owned by local interest that has a paid-up capital of less than RM100,000 is required to increase its paid-up capital to at least RM100,000 within six months from the date of the FIC's approval letter.

Employment Condition

Companies are required to use their best endeavours to recruit and train Malaysians so as to reflect the country's population composition at all levels of employment.

APPLICATION PROCEDURE

The onus of submitting an application falls on the purchaser. However the FIC will also accept an application from the vendor.

**... all equity in a company,
other than 30% Bumiputera equity,
may be held by local interest or
foreign interest or both.**

The applicant is fully responsible for the accuracy of the information submitted. A director of the company or any individual authorised by the company is required to submit a statutory declaration to confirm the accuracy of the information provided and to confirm whether the conditions set out in the Acquisition Guideline are complied with and, if not, to undertake compliance within the period to be stipulated in the FIC's approval letter.

The FIC has, in paragraph 21 of the Acquisition Guideline, committed to make a decision within 10 working days of its receipt of a complete application.

CONCLUSIONS

The Acquisition Guideline sets out clearly the transactions that require the approval of the FIC and the conditions to which each approval will be subject.

The application procedure has been streamlined as the number of documents to be filed has been reduced. An application to the FIC is dispensed with where a proposal is subject to the approval of the SC. These changes will reduce bureaucratic red-tape involved in the process.

The commitment of the FIC to make a decision within 10 working days of its receipt of a complete application is a significant reduction of the processing period which had hitherto required six to eight weeks.

Under the Acquisition Guideline, the general rule is that all equity in a company, other than 30% Bumiputera equity, may be held by local interest or foreign interest or both. The requirement under the previous FIC guidelines that 40% of the equity be held by other Malaysians has been dispensed with.

The relaxation of the equity conditions and the streamlining and acceleration of the approval process under the Acquisition Guideline will undoubtedly enhance Malaysia's competitive position in its quest to attract foreign investment in an increasingly competitive international environment.

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Believe it or not!

HONKING HORN CASE NETS A QUARTER MILLION BUCKS.

An automobile driver who was manhandled by a Miami police officer after honking her horn at a car in front of her has been awarded more than \$250,000 by a jury. The jury decided that the accused officer used excessive force in his 1997 arrest of Kim Lee, who said the officer handcuffed her and slammed her head on the trunk after she honked at a car stopped at a green light on a busy Miami street. "It was very easy to tell that this was a typical case of someone who wanted to exercise excessive power just because he carried a badge," one of the jurors said afterwards. "This should not happen again." Lee said she was "overwhelmed" and felt "relief."

*Taken from www.power-of-attorneys.com
Source: Augusta Chronicle, "Arrested for horn
honking, woman awarded \$255,000,"
September 5, 2003*

THE FEDERAL COURT DECISION IN INTELEK TIMUR SDN BHD

One step forwards, two steps backwards in the law on setting aside of Arbitral Awards?

It is an entrenched common law rule that curial interference in an arbitration by the Court must be exercised sparingly. However, the Federal Court's ("FC") recent decision in **Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd** [2004] 1 CLJ 743 indicates that this once "jealously guarded" principle is being blurred in its practical application, notwithstanding the FC's protestations to the contrary.

The FC in *Intelek Timur* reversed the decision of the Court of Appeal below and set aside an arbitrator's award on the basis that there was an error of law apparent on the face of that award. This article will consider the potential effect of this decision of the highest tribunal in the land on an area of law previously thought to be well-settled.

SETTING ASIDE AN AWARD

Pursuant to sec. 24 of the Arbitration Act 1952 ("Act"), an arbitral award may be set aside if the the arbitrator has misconducted himself or the proceedings or where the arbitration or award has been improperly procured.

Under the common law, an award may also be set aside on other grounds, the most relevant for this article being where there is an error of law apparent on the face of the award. This particular ground however, has developed as a limited exception to the generally understood principle that an arbitrator is the sole and final judge of questions of fact and law.

"The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted is now, I think firmly established, viz where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of the latter may very well be doubted, I think it may be considered as established." Williams J. in *Hodgkinson v Fernie* [1857] 3 CBNS 189.

ERROR OF LAW APPARENT ON THE FACE OF THE AWARD

This ground for setting aside has been defined by the Privy Council in the case of **Champsey Bhara Co v the Jivraj Balloo Spinning and Weaving Co** AIR (1923) PC 66 as *"An error of law on the face of the record means ... that you can find in the award or a document actually incorporated thereto ... some legal proposition which is the basis of the award and which you can then say is erroneous."*

The Court is therefore not allowed to go on a frolic of its own behind an award to examine its correctness if there aren't any erroneous propositions of law apparent on the face of the award. The critical word therefore is "on the face of the award".

A Court further cannot interfere when the alleged error concerns a point of law which has been specifically referred for the decision of the arbitrator and which he has decided upon.

If the question is one of the interpretation of a document, which is a question of law, the Courts have held that the document will ultimately bear the meaning that the arbitrator gives to it. The fact that the Court might take a different view of the interpretation of a document does not suffice to have the award set aside. If however it appears on the face of the award that the arbitrator has proceeded illegally by deciding upon evidence which was inadmissible, or upon principles of construction which the law does not countenance, these may be grounds for the award to be set aside.

... this once "jealously guarded" principle is being blurred in its practical application, notwithstanding the FC's protestations to the contrary.

The common law has also developed the following further legal principles in respect of the Court's jurisdiction to set aside awards:-

- a. Such jurisdiction must be exercised with care and responsibility;
- b. The Court does not sit as an appellate court when hearing a setting aside application and is not rehearing the matter on its merits. It is a corollary of this that the arbitrator is the sole judge on the findings of fact and an award cannot be set aside on the ground that the arbitrator has drawn wrong inferences of fact.

THE COURT'S FINDINGS

The FC in the case of *Intelek Timur* affirmed the traditional position that the drawing of wrong inferences of fact was insufficient to warrant the setting aside of an award. It held however, that the arbitrator fell into error in his construction of the determination clause between the parties by failing to direct his mind to the whole clause and was therefore

guilty of erroneously interpreting the clause, and went on to conclude that this amounted to an error of law on the face of the record.

The fact that the Court might take a different view of the interpretation of a document does not suffice to have an award set aside.

In doing so, the FC appears to have equated the issue of the arbitrator's alleged failure to analyse the entire determination clause with an error on the face of the award. The inference raised is that the absence of a legal proposition in an award is tantamount to being an error on the face of that same award. Such an approach is difficult to reconcile with the Privy Council's dicta in *Champsey Bhara Co v the Jivraj Balloo Spinning and Weaving Co* as quoted earlier and which had previously been accepted throughout the common law jurisdictions, including Malaysia.

In this context the Court's omission to state which principle or canon of construction applied by the arbitrator was so unfounded that it simply was not recognised by the law is less than helpful, and raises the possibility that a Court has only to disagree with the construction given to a contract by an arbitrator in order to justify the setting aside of his award.

It has since transpired that the parties in *Intelek Timur* made a further application to the FC to remit the award for the reconsideration of the arbitrator pursuant to sec. 23 of the Act for the arbitrator to construe the determination clause in its entirety, an application which was granted by the Court. Hence, the judgment of the FC in respect of the setting aside application was not enforced by the successful party, and for all intents and purposes was superseded by the later application for reconsideration. Whether this will affect the manner in which our courts apply the decision in *Intelek Timur* remains to be seen.

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TO PATENT OR NOT TO PATENT

Angeline Chin examines instances when one should patent an idea that is a product or process that works.

Malaysians are a clever lot. They have a multitude of ideas and know how things can work better. However, the actual number of ideas that get translated into real marketable products or processes are small. This is because after a substantial amount of time and money have been invested in a product or process, most inventors are not sure how to protect their inventions to prevent others from stealing them. This is the major deterrent, and sadly the primary concern.

In the words of Jose Vidal Martina (inventor and entrepreneur in Lima, Peru of the JVM drill bit): "... *there is no point in my making something new if I don't protect it; it would be a matter of just days for others to copy my product, and then my business would no longer make sense. Obviously, big companies would be able to make my bits at lower cost, distribute them better and leave me with nothing...*".*

PROTECTING THE PRODUCT OR PROCESS

The answer to the question on whether to protect a new product or process is, to patent it if it meets the criteria for patentability. When you patent your product or process, you get:

1. Exclusivity - A patent gives the patent holder ("patentee") the exclusive right to commercially exploit the patented product or process. This covers the whole range of activity from manufacturing and selling to licensing and importing/exporting the product.
2. Enhanced and Stronger Market Position - With exclusive commercial rights, your superior product or process will give you an edge in the market or perhaps even a monopoly since the product or process is a new one.
3. Higher Returns - Investment in the development of the product or process will yield a higher return when commercialized due to the improvement in the product or process. It is an accepted fact that superior products or processes command premium prices.

4. Broader Opportunities - A patentee can exploit his patented product or process by licensing it. The revenue generated from the license via royalties can be substantial depending on the nature of the product or process and the extent of the licensing network. In fact, there are a number of companies that operate purely on licensing out their patents and a foreign company that we know of personally receives in excess of RM1.5 billion/USD400 million worldwide in royalties just for allowing others to make use of its worldwide patents.
5. Increased Negotiating Power - The bargaining power at the negotiating table very often determines the terms and conditions of a commercial transaction. Whether the patentee is an individual or a small company, the fact of patent ownership gives a tremendous amount of leverage during negotiations.
6. Positive Image - Patent rights to products give validity or legitimacy to products which is readily perceived by current or potential business partners and even the end-consumers. This naturally makes the product or process more marketable.

WHEN THERE IS NO PATENT

In view of the benefits of patenting a product, the following points basically address what happens when there is no patent.

1. Patent rights - There remains the possibility that someone else might patent your invention and divert the benefits of that patent away from you. However, once your product or process is marketed, the said product or process will no longer be patentable as one of the criteria for patenting will no longer be fulfilled.
2. Competitors - Without the right to exclusivity, competitors can copy the product or process and put it on the market in a matter of a few days and remove any commercial advantage you may have had over it. Without the patent in hand, there is very little that can be done to prevent this sort of hijacking.

3. Revenue generation - The absence of patent rights means that there is no exclusivity to exploitation rights. Translated into a lack of monopoly of the product or process simply means that you have nothing to offer licensees or potential business partners. Not to mention that you would have to lower the price of your product or process just to compete with your competitors.

CAN YOU AFFORD (NOT) TO PATENT?

The cost of patenting a product in Malaysia includes the following:

- The cost of drafting a suitable specification for the product or process according to the criteria set out by the Patents Act 1986. This cost is a one-time expense and generally can be covered by a budget of RM8,000/USD2,105 to RM10,000/USD2,632.
- The cost of filing the patent application with the Intellectual Property Corporation of Malaysia entails your patent agent's fees (unless you file the application yourself) and the Registrar of Patents' fees (variable depending on the number of claims). Assuming that there are no adverse examination reports and the patent application is accepted for grant, the cost would be in the region of RM4,000/USD1,053 for a patent agent's fees and RM900/USD237 for the Registrar's fees (variable depending on the number of claims).

The perception that patenting is extremely costly is true for the over-ambitious inventor intending to patent the invention worldwide. This is because the cost of patenting in each country will include other costs such as translation costs (a one-time expense for each language) and currency costs.

A proper patent strategy should include identification of the countries where the product or process is to be commercialized and possible staggered payment of costs. With a proper patent strategy, the perception that patenting is extremely costly becomes untrue, especially when measured against the benefits of owning a patent for your product or process.

* extracted from *Case Studies: Vidal's Drill Bits* at <http://www.wipo.int>

PERSONAL LIABILITY FOR CORPORATE ACTS AND OMISSIONS UNDER

The Royal Malaysian Customs & Excise Department (“Customs Department”) is conferred powers to administer several statutes commonly referred to as customs laws. The main statutes are the Customs Act 1967, Excise Act 1976, Sales Tax Act 1972 and Service Tax Act 1975 (collectively “customs laws”).

Each of the customs laws contain provisions that impose both criminal and civil liability on directors and other officers for offences committed by a company and for taxes and duties payable by such company.

CRIMINAL LIABILITY

Section 140(1) of the Customs Act 1967 provides “*Where an offence against this Act or any regulation made thereunder has been committed by a company, ... any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer ... of the company or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.*”

... directors ... who neglect their responsibilities ... may inadvertently subject themselves to criminal sanctions for breach of customs laws by the company.

The Excise Act 1976 (sec. 82(1)), Sales Tax Act 1972 (sec. 45(1)) and Service Tax Act 1975 (sec. 35(1)) contain provisions that are identical or substantially identical to sec. 140(1). Under these provisions, directors and other senior officers of a company are deemed to be guilty of an offence committed by a company if the following elements are established:

1. The company has committed an offence against the relevant customs laws; and
2. The person concerned was a director or officer of that company at the time of commission of the offence by the company.

Once the deeming provision comes into effect, the director or officer may avoid liability by relying on the defence provided for in the relevant provision. To succeed in doing so, he must prove that:

1. the offence was committed without his consent or connivance; and
2. he has exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

To establish the first element of the defence, the director or officer must prove that he did not consent, overtly or tacitly, to the commission of the offence. As regards the second element, whether sufficient due diligence has been exercised is a question of fact which depends on the position held by the person concerned as well as

other circumstances surrounding the commission of the offence. In this regard, the degree of due diligence to be exercised by an external company secretary would, quite rightly, be less than that expected of an executive director of a company.

From the foregoing it can be seen that directors (including nominee directors and non-executive directors) and other officers who neglect their responsibilities as officers of a company may inadvertently subject themselves to criminal sanctions for breach of customs laws by the company.

CIVIL LIABILITY

The customs laws also contain provisions that impose civil liability on the directors to pay the unpaid taxes and duties of a company. Section 22C the Customs Act 1967 *inter alia* provides that -

“Where any customs duty is payable by ... a company, ... the directors of such company ... shall, together with such company ... be jointly and severally liable for the customs duty payable:

Provided that in relation to a company that is being wound up, the directors of such company shall only be so liable where the assets of the company are insufficient to meet the amount due, after paying any sums having priority over the customs duty under the Companies Act 1965 in relation to the application of the assets of the company in such winding up.”

Provisions to similar effect are found in the Excise Act 1976 (sec. 81A), Sales Tax Act 1972 (sec. 26) and Service Tax Act 1975 (sec. 17). It appears from these provisions that once it is established that a company is liable to pay any tax or duty under the relevant customs laws, the directors of that company will be jointly and severally liable to pay the same.

Where a company is being wound-up, the personal liability of directors arises only when the assets of the company are insufficient to settle the taxes and duties payable under customs laws.

It is interesting to note that the customs laws confer powers on the Customs Department to prevent a person from leaving the country without paying taxes and duties under customs laws.

Section 17A of the Customs Act 1967 *inter alia*, provides as follows:

1. Where the Director General has reason to believe that any person is about or is likely to leave Malaysia without paying any customs duties, he may issue to any Director of Immigration a certificate containing particulars of the duties so payable with a request that such person be prevented from leaving Malaysia unless and until he pays all the duties so payable or furnishes security to the satisfaction of the Director General for its payment.
2. Subject to any order issued or made under any written law relating to banishment or immigration, any Director of Immigration who receives a request under subsection (1) in respect of a person shall exercise all measures which may include the removal or retention of any certificate of identity, passport, exit permit or other travel documents in relation to that person as may be necessary to give effect to the request.

And now some news...

Provisions substantially similar to sec. 17A are contained in the Excise Act 1976 (sec. 15A), Sales Tax Act 1972 (sec. 27A) and Service Tax Act 1975 (sec. 18A).

It is clear that sec. 17A of the Customs Act 1967 and the corresponding provisions of the other customs laws purport to confer wide executive powers on the Customs Department and to exonerate the department and its officers from liability for actions carried out *lawfully*. As these provisions were introduced only about half a decade ago, they have yet to be tested in the Malaysian Courts although they offer much scope for potential litigation.

... the Courts should decline to intervene only
in cases where it is satisfied that the Customs
Department has acted lawfully.

As the jurisdiction of the Courts is ousted only in relation to actions that are *lawfully* carried out, it is submitted that the Courts are not precluded from examining the actions taken by the Customs Department to determine whether this criterion has been fulfilled.

It is further submitted that the Courts should decline to intervene only in cases where it is satisfied that the Customs Department has acted lawfully. In coming to its decision the Courts may consider—

- whether the Director General had grounds to believe that the person is about or likely to leave the country without paying taxes and duties under the relevant customs laws;
- the extent to which the Customs Department is obliged to provide details of duty or taxes owing in the certificate to be issued under the relevant provisions;
- whether, in the absence of an admission of liability by the person concerned, it is incumbent on the Customs Department to support its claim with a Court judgment;
- whether such certificate may be issued where there is a bona fide dispute as to the amount of taxes or duties claimed by the Customs Department.

In view of the wide powers given to the Customs Department under these provisions, the potential importance of the Courts' role in discouraging and preventing any abuse of such powers cannot be downplayed.

MANIAM KUPPUSAMY (mnm@skrine.com)

Judge Gopal Sri Ram in his recent decision in the case of **David Kuok Khoon Hin v Rose Kuok Kok Hiang** [2004] 3 CLJ 73, *inter alia*, made the following rulings;

1. When an originating process is withdrawn, all the (interim) orders that have been made under it fall with it. Such orders cease to have any future effect. If a party wishes to have further relief after the withdrawal, the general rule is that he has to apply afresh, either in a new proceedings brought for that purpose or in any remnants of the old proceedings.
2. In the said case, the wife lost her rights under the interim maintenance order when she withdrew her divorce petition. The judge held she would not, therefore, be entitled to seek a variation of a non-existent order.

In view of these rulings it would be prudent for litigants to consider the effect which the withdrawal of a pending case has on the existing interim orders before effecting the withdrawal.

As an alternative to withdrawal, litigants can consider entering a partial consent order to maintain the interim orders made in the course of the proceedings, or the withdrawal of only the specific claim for relief as opposed to the suit.

MANIAM KUPPUSAMY (mnm@skrine.com)

This is interesting!

'JACKASS' SUED BY A REAL JACK ASS

A Montana man has sued media giant Viacom, saying the MTV show "Jackass" plagiarized his name, infringed on the trademark and copyright of his name and defamed his good character. The plaintiff's name is Jack Ass. That's right, that is now his legal name. He changed his name from Bob Craft to Jack Ass in 1997, he says, in order to raise awareness about the dangers of drunken driving. "Jackass," which premiered on MTV in 2000, features a group of guys performing ludicrous and sometimes dangerous stunts. It was made into a movie in 2002. In the suit against Viacom, which owns MTV, Jack Ass claims the conglomerate "is liable for injury to my reputation that I have built and defamation of my character which I have worked so hard to create." This Jack Ass, not to be confused with the TV version, says he changed his name after his brother and a friend were killed in a single-vehicle car accident several years ago. He now works to promote responsible choices and designated-driver programs. He claims that "Jackass" committed "trademark and copyright infringement on my legal name" and on a cartoon character, called Andi Ass, that he created to help spread his message. He's seeking at least \$10 million in damages.

Taken from www.power-of-attorneys.com
Source: CNN.com

IS A THIRD PARTY CHARGOR A SURETY?

Ginlon (M) Sdn. Bhd. v. MBF Finance Bhd. [2004] 2 CLJ 169

The respondent, MBF Finance Bhd., agreed to grant a loan of RM300,000 to Pembinaan Ikhlas-Jae Sdn. Bhd. (“borrower”) against the security of a charge on the appellant’s land (“charge”) and an assignment of certain moneys due to the borrower.

A loan agreement was executed by the borrower and the respondent for a loan of RM250,000 and not RM300,000. The loan agreement did not mention the assignment as one of the securities to be provided. Subsequent to the execution of the loan agreement, the respondent agreed, upon the borrower’s request, to waive the assignment. As a result, the loan was reduced to RM250,000 due to insufficiency of security cover.

The borrower defaulted in the loan and the respondent sought to enforce the charge by applying for an order for sale. The appellant sought a declaration from the High Court that the charge was null and void by virtue of sec. 86 of the Contracts Act 1950 (“Act”) which provides “*Any variance, made without the surety’s consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance*”.

The High Court dismissed the appellant’s application. The appellant then appealed to the Court of Appeal (“CA”). The CA was of the opinion that there was no variance in the terms of the contract with regards to the assignment as the term in respect of the assignment was never in the contract in the first place.

The CA went on to opine that even if the loan agreement had contained the term in respect of the assignment and it was subsequently removed without the consent of the appellant, sec. 86 did not apply as it was not intended to operate so as to affect a charge.

The CA referred to sec. 79 of the Act which states “*A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called “the surety”...*”. The CA referred to sections 253(1) and 271(1) of the National Land Code 1965 (“Code”) and concluded that by a charge, “*the chargor does not guarantee “to perform the promise, or discharge the liability, of a third person in case of his default”. And the remedy under the charge is not against the person of the chargor but against the property charged, that is the remedy of sale or taking possession of the property. Therefore a charge is not a contract of guarantee and the chargor is not a surety*”.

The CA agreed with the observation in **Co-operative Central Bank Ltd v Y & W Development Sdn Bhd [1997] 4 CLJ 170** that a registered charge is not a contract but is a statutory instrument, a dealing which the Code authorises.

This case focused solely on the charge being a statutory instrument under the Code and did not consider the legal effect of the contractual arrangements which are invariably set out in an annexure to the statutory form. In particular, the charge annexure to a third party charge usually includes a provision whereby the chargee undertakes to pay the shortfall in the event that the proceeds of sale of the charged property are insufficient to discharge the full amount owing by the borrower. It is arguable that such an undertaking, which is enforceable against the person of the chargor and not on the charged property which has been disposed, may be a guarantee to which the provisions of the Act, including sec. 86, apply.

Whilst this case has established that a charge is not a guarantee, the issue remains unresolved as to whether an undertaking by a chargee in a charge annexure to pay the shortfall in the amount owing by a borrower tantamount to a guarantee.

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BUDGET 2005 HIGHLIGHTS (cont.)

- Existing companies that relocate manufacturing activities to promoted areas will be granted second round of incentives such as pioneer status and investment tax allowances
- Real Estate Investment Trusts to be exempted from tax on income distributed to unitholders and undistributed income to be taxed at 28%
- Small and Medium Industry Fund 2 for small and medium-sized enterprises and the New Entrepreneurs Fund 2 increased to RM4.5 billion and RM2.0 billion respectively
- Government to establish RM300 million fund as seed capital to encourage commercialisation of agricultural sector
- Companies that produce halal food to be granted investment tax allowance of 100% for 5 years
- Double deduction on expenses for halal certification and quality systems and standards certification
- Tax deduction allowed for zakat paid by companies
- Personal relief for contributions to EPF and takaful and premiums for life insurance increased from RM5,000 to RM6,000
- Tax rebates for purchase of computers by individual tax payers increased from RM400 to RM500
- Tax relief for purchase of books by individual tax payers increased from RM500 to RM700

Extracted from the local newspapers

AND THE WINNING STREAK CONTINUES...

continued from page 1

SELF REGULATION

This procedure of seeking MOF's approval has since been abolished. The MOF is no longer accepting applications and issuing approvals to businesses intending to organise or conduct promotions etc. Instead, a set of guidelines was issued in April 2004, and businesses are now required to abide by these guidelines in undertaking their promotions etc. This essentially means that the businesses now take on the responsibility of ensuring that the promotions etc. are not in contravention of the gaming laws.

COMPLIANCE: GAME OF SKILL VS. LUCK

Promotions etc. in which the winners are determined based solely on their skill, creativity and/or knowledge, would pass the compliance test with flying colours. The element of chance should ideally not feature in any part of promotion etc. at all. (However, the examples in the guidelines do set out limited circumstances in which the element of chance may be present.) Games or contests where everyone gets an equal chance without having to make any payment is considered fair game (pardon the pun). This may include the ever popular lucky draw event held during annual dinner functions.

On the other hand, promotions etc. that involve (a) division of prizes; (b) a game or process determined by drawing lots or chance; or (c) contribution or consideration, whether direct or indirect, by the participants are likely to be prohibited. The gaming laws and the recent guidelines appear to target companies which are attempting to lure the public to buy their products or frequent their shops by holding competitions or "radio jackpots". Such activities which may be as subtle as "scratch-n-win" type of contest or as grand as winning a car based on guesswork or randomly picking tickets (which were heavily promoted and sold) could tantamount to a gambling offence.

As a general guide businesses may refer to the examples set out in the guidelines issued by the MOF. A brief description of some of the examples of promotions etc. that are allowed or otherwise are found in the adjacent column.

THE PRICE OF A CHANCE

Under sec. 4(1)(h) of the Act, anyone found guilty of an offence shall, on conviction, be liable to a fine of not less than RM5,000.00 and not more than RM50,000.00 and shall also be punished with imprisonment for a term not exceeding three years.

In view of the grave consequences, it is strongly recommended that you ensure strict compliance with the guidelines issued by the MOF when organising promotions etc. because in the end, whether or not you succeed in evading the enforcement officers is ... yet another gamble!

PERMITTED CONTESTS AND COMPETITIONS

- Participants answer questions and write a slogan. All entries are examined. If there is a tie, the winner is determined based on the slogan.
- Participants mark the position of an object in a photograph. All entries are examined. The entry with the exact location of the object is the winner. If there is no correct entry, the entry with the mark in the location nearest to the object is the winner.
- Participants answer questions and send in the entries by post within a specified period. Each entry with all the correct answers receives a prize.
- Customers purchasing goods of a particular value are eligible to select a token, card or coupon from a box, or scratch a card. Each eligible customer receives a prize. The value of the prizes is the same or roughly the same. [The element of chance is allowed as it merely determines the prize received by an eligible customer, and not whether the customer would receive a prize at all.]
- Participants attend a photo shoot at a specified time and place. The winners are determined by judges based on a set of criteria.
- Participants display a sticker on their cars. The organiser is to inform the participants of the time and location when they will spot the lucky number (e.g. the 51st car).

NOT PERMITTED CONTESTS AND COMPETITIONS

- Participants answer questions. Entries are picked at random. The entry with all the correct answers receives a prize; or if all entries are examined, and there is a tie, the winner is determined by drawing lots.
- Customers who purchase goods of a particular value are eligible to pick a token, card etc. from a box; or scratch a card. Each eligible customer receives a prize.
- Coupons signifying prizes are inserted into the packaging of goods. Some coupons do not entitle customers to any prizes, i.e. only lucky customers are entitled to prizes.
- The public fill up forms. A number of forms are picked by drawing lots. The persons picked receive prizes.
- Participants predict the outcome of a future competition.
- Participants guess the number of items in a container or the weight of an item on display.
- Participants display a sticker on their cars. The organizers spot the cars at random. The cars displaying the stickers win a prize.

KLRCAs TURF - INTRUSION OR ASSISTANCE?

Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd [2004] 3 CLJ 591

This recent Court of Appeal decision has potentially important implications for arbitrations held under the UNCITRAL Rules and the auspices of the Regional Centre for Arbitration, Kuala Lumpur ("KLRCAs") in connection with the question of whether or not such arbitrations are removed from the jurisdiction of the Courts by operation of sec. 34 of the Arbitration Act 1952.

BACKGROUND TO KLRCAs AND SECTION 34

The KLRCAs was set up in 1978 by the Asian-African Legal Consultative Committee, a United Nations body. The Government of Malaysia gave an assurance that it would fully support the independent functioning of the KLRCAs as an international arbitral institution. This promise of independence has been given statutory effect in sec. 34 of the Arbitration Act 1952 ("Act") which was added to the Act by a 1985 amendment.

... even the very issue of whether sec. 34 is an absolute bar to all injunctive relief in a KLRCAs arbitration was in itself a serious issue to be tried.

The relevant extract from sec. 34(1) provides, "Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur."

The effect of this amendment was to exclude the supervisory jurisdiction of the High Court over arbitrators and arbitrations from the institutionalised arbitrations referred to therein which includes KLRCAs arbitrations.

The case-law on sec. 34 has essentially decided that the statute means what it says.

The first decided case on sec. 34 was the High Court decision of **Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor** [1990] 3 MLJ 183 where the respondent in a KLRCAs arbitration applied to the High Court for an injunction to restrain the

"... the purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision ..."

proceedings on the grounds that the claimants had gone into liquidation. Declining to go into the merits of the respondent's application based on the provisions of the Companies Act 1965, Dr. Zakaria Yatim J. took the view that the plain, clear and precise words in sec. 34 excluded the court from exercising its supervisory function under the Act or under any other written law which would include the Companies Act 1965. Klockner was subsequently followed in **Soilchem Sdn Bhd v Standard Elektrik Lorenz AG** [1993] 3 MLJ 68 where an attempt to set aside a KLRCAs award was dismissed by the High Court Judge who held that sec. 34 excluded the jurisdiction of the Court in respect of KLRCAs arbitrations.

The above decisions were referred to by the Court of Appeal ("CA") in **Sarawak Shell Bhd. v PPES Oil & Gas Sdn Bhd & Ors** [1998] 3 CLJ 275 where, in a KLRCAs arbitration, there had been an attempt to invoke sec. 25(2) of the Act to revoke the authority of the arbitrator or restrain arbitral proceedings based on an allegation of fraud. Stressing the independence and inviolability of KLRCAs arbitrations, Mahadev Shankar JCA stated that Klockner and Soilchem should not be understood to have left open the possibility that the court had some other power to intermeddle in KLRCAs arbitrations whether by way of inherent jurisdiction or at common law or otherwise.

Sarawak Shell was applied by the High Court in **Jati Erat Sdn Bhd v City Land Sdn Bhd** [2002] 1 CLJ 346 in dismissing the application of one party to a KLRCAs arbitration for a Mareva injunction.

THE THYE HIN DECISION

In this latest decision on sec. 34, the CA was faced with an appeal from the decision of the

High Court that upheld the defendant's preliminary objection and dismissing the plaintiff's application for an interim injunction to maintain the status quo of the parties pending the resolution by a KLRCAs arbitration of the disputes that had arisen from a contract of distributorship of motor vehicles. The defendant's preliminary objection was that, pursuant to sec. 34 of the Act, interim relief was not available to the plaintiff as the law under which the relief was sought did not apply to an arbitration held under KLRCAs Rules notwithstanding that the arbitration proceedings had not yet commenced.

... the grant of interim relief pending the outcome of an arbitration held under the KLRCAs Rules was not prohibited by sec. 34 which only excludes interference with the arbitration itself.

The central issue that arose for decision by the CA was whether the grant of injunction sought was proscribed by sec. 34 of the Act. Allowing the appeal, the CA found that the Judge had not followed the steps set out in the landmark CA decision of **Keet Gerald Francis Noel John v Mohd Noor** [1995] 1 CLJ 293, namely (i) whether the facts presented disclosed a bona fide serious issue to be tried; (ii) whether the justice of the case lay in the plaintiff's favour; and (iii) whether there were any 'discretionary considerations' against the grant of the interim injunction sought. The Court took the view that this was an omission on the part of the Judge as even the very issue of whether sec. 34 is an absolute bar to all injunctive relief in a KLRCAs arbitration was in itself a serious issue to be tried. Accordingly, it was not open to the Judge to finally and conclusively conclude, as a preliminary issue, that sec. 34 precluded the grant of the interim injunction sought.

The Court agreed with the views expressed in an article entitled "Issues Related to Arbitrations Conducted under the KLRCAs Arbitration Rules" by Mr. Sundra Rajoo that court intervention, by way of ordering interim measures of protection, is essential in urgent situations particularly when granting relief is beyond the jurisdiction of the arbitral tribunal or where the arbitral tribunal has not been constituted. Mr. Rajoo was of the

IS SECTION 6(3) OF THE LIMITATION ACT 1953 RELEVANT TO BANKRUPTCY PROCEEDINGS?

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787

view that the decision in **Jati Erat Sdn Bhd v City Land Sdn Bhd** [2002] 1 CLJ 346 was unfortunate as it extended the principle of non-interference by the courts in KLRCA arbitrations to situations where the relief sought was merely for interim preservation. This was especially so when Art. 26.3 of the KLRCA Rules specifically provided that a request for interim measures to a judicial authority shall not be deemed incompatible with an agreement to arbitrate. The court may intervene in support of arbitration by granting interlocutory injunctions in line with dicta expressed by Lord Mustill in the House of Lords decision of **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** [1993] 1 All ER 664 :

“the purpose of interim measures of protection... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what the such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.”

Accordingly, the CA held that the grant of interim relief pending the outcome of an arbitration held under the KLRCA Rules was not prohibited by sec. 34 which only excludes interference with the arbitration itself. Sarawak Shell was distinguished on the facts as the attempt in Sarawak Shell to invoke sec. 25(2) of the Act was clearly prohibited by sec. 34.

CONCLUSION

It is apparent that this decision of the CA in **Thye Hin** has made inroads into the consistent position established by case-law built up over the years on sec. 34 vis-à-vis KLRCA arbitrations. The impact of this decision may be far-reaching as the concept of “acting in support” may eventually be construed to be wide enough to encompass some level of judicial intervention in KLRCA arbitrations. It is hoped that the Federal Court would have an opportunity in the near future to examine the law on sec. 34 of the Act.

The appellant obtained a judgment against the respondent on 23 October 1987 for RM2,963,054.86 with interest at 16.5% per annum from 1 December 1985 until the date of realisation. The appellant commenced bankruptcy proceedings against the respondent on 28 March 1996 to recover the judgment sum and interest from 1 February 1986 until 28 March 1996.

Arising from the proceedings, the appellant was granted leave to appeal to the Federal Court (“FC”) on the issue as to whether sec. 6(3) of the Limitation Act 1953 (“LA”) is relevant to bankruptcy proceedings. Section 6(3) of the LA provides *“An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment shall be recovered after the expiration of six years from the date on which the interest became due.”*

The FC approached the issue by framing the following questions in relation to sec. 6(3) –

1. whether a bankruptcy proceeding is an “action” within the meaning of sec. 6(3) as defined in sec. 2 of the same act; and
2. whether the “two limbs” of sec. 6(3) should be read disjunctively or conjunctively.

As regards the *first question*, the FC held that a bankruptcy proceeding is an “action” within the meaning of that definition in sec. 2 as it is a proceeding in a court of law. A bankruptcy proceeding, according to Abdul Hamid Mohamad FJ, is thereof an action and an action upon a judgment within the scope of the first limb of sec. 6(3) of the LA.

Abdul Hamid Mohamad FJ distinguished a bankruptcy proceeding from an execution proceeding in that although the latter is also a proceeding in court, it is a continuation of an existing proceeding to enforce of a judgment under the same rules of court, namely the Rules of the High Court 1980 (“RHC”). Unlike an execution proceeding, a bankruptcy proceeding is commenced under a separate law and rules and the focus is on the judgment debtor rather than the judgment debt, the objective being the appointment of a receiver to assume control of the assets of the debtor.

As regards the *second question*, the Court held that section should be read as a whole and the “first limb” and the “second limb” should be read conjunctively. Therefore, although the limitation period for commencing bankruptcy proceedings is 12

years from the date of a judgment, arrears of interest may only be claimed for six years.

As the appellant had in the bankruptcy notice claimed interest for a period in excess of six years from the date of the judgment, the FC held that the bankruptcy notice was invalid and dismissed the appeal.

In the course of its judgment the FC also opined that Order 46 rule 2(1)(a) of the RHC which imposes an obligation on a party to obtain leave of the Court to issue a writ of execution to enforce a judgment or order where six years or more have lapsed since the date of the judgment or order does not apply to bankruptcy proceedings by reason that a bankruptcy notice or bankruptcy petition is not a writ of execution.

CONCLUSIONS

The most interesting aspect of the **Lim Ah Hee** Case is that the FC declined to follow its earlier decision in **United Malayan Banking Corporation Bhd v Ernest Cheong Yong Yin** [2002] 2 CLJ 413 where bankruptcy proceedings were held to be invalid as the bankruptcy notice had been filed more than six years but within 12 years after the date of judgment based on an interpretation of the “second limb” of sec. 6(3) of the LA.

Arising from this FC decision, the scope of sec. 6(3) may be re-stated as follows:-

1. a bankruptcy proceeding is an action upon a judgment within sec. 6(3) of the LA;
2. an action may be commenced on a judgment within 12 years from the date on which the judgment became enforceable;
3. arrears of interest may only be recovered on a judgment debt for six years from the date the interest became due;
4. following the **Earnest Cheong** Case, the six-year period within which arrears of interest may be recovered commences from the date of judgment.

Based on this FC decision, a judgment creditor is not required to obtain leave of the Court under Order 46 rule 2(1)(a) to commence bankruptcy proceedings against a judgment debtor even if such proceedings are initiated more than six years after the date on which the judgment is obtained. This decision authoritatively resolves the conflicting judicial opinions expressed on this issue by the High Court in **R v Gopal** [1987] 1 CLJ 602 and **Wee Chow Yong t/a Vienna Music Centre v Public Finance Berhad** [1989] 3 MLJ 508.

THE NEW FIC GUIDELINES - PART II

Kok Chee Kheong discusses the FIC's new Guideline on Acquisition of Property by Local and

INTRODUCTION

In Part I of this article, we discussed the Guideline on the Acquisition of Interests, Mergers and Take-Overs by Local and Foreign Interests ("Acquisition Guideline"). We will now discuss the Guideline on the Acquisition of Properties by Local and Foreign Interests ("Property Guideline") which was released simultaneously with the Acquisition Guideline on 1 August 2004. The Property Guideline is deemed to have come into force on 21 May 2003, that is the date on which the Economic Stimulus Package of 2003 took effect.

ACQUISITION BY LOCAL INTEREST

(1) Acquisitions Requiring Notification

The acquisition of property valued at RM10 million and less than RM20 million only requires notification to the FIC if it is acquisition by –

- (a) a Bumiputera interest from other Bumiputera interest or from a non-Bumiputera interest;
- (b) a Bumiputera interest from a non-Bumiputera interest;
- (c) a non-Bumiputera interest from other non-Bumiputera interest;
- (d) a local interest from a foreign interest .

(2) Acquisitions Requiring Approval

Approval of the FIC is required for the acquisition of property by –

- (a) a non-Bumiputera interest from a Bumiputera interest where the property value is RM10 million and above;
- (b) any local interest where the property value is RM20 million and above.

An acquisition referred to in (b) above must be effected through a locally incorporated company and will be subject to the conditions of acquisition discussed below ("acquisition conditions").

PROPERTY TRANSACTIONS BY FOREIGN INTEREST

Subject to the exemptions discussed below, any acquisition of property by foreign interest, including a permanent resident, requires the approval of the FIC.

As a general rule, a foreign interest is only permitted to acquire property valued at more than RM150,000 per unit, without limitation on the number of properties to be acquired. The exceptions to this rule are discussed below.

(1) Acquisition of Residential Unit by Permanent Resident

A permanent resident may acquire residential unit valued at more than RM100,000.

(2) Acquisition of Residential Unit by Manufacturing Company

A local manufacturing company owned by foreign interest may acquire residential unit valued at less than RM150,000 but more than RM60,000 if such unit is for use by the company's employees.

(3) Acquisition of Commercial Unit

A foreign interest who acquires a commercial unit valued at less than RM10 million is not required to incorporate a local company if such unit is acquired for its own use.

(4) Acquisition of Agricultural Land

A foreign interest is permitted to acquire agricultural land which has a value of more than RM250,000 or an area of at least five acres for the following purposes –

- (a) to carry on agricultural activities on a commercial scale using modern or high technology; or
- (b) to carry out agro-tourism project; or
- (c) to carry out agricultural or agro-based industrial activities for production of goods for export.

Such acquisition will be subject to the acquisition conditions but the equity condition may be relaxed where the land is acquired for the purposes described in (c).

(5) Acquisition of Industrial Property

A foreign interest may acquire industrial property without any price limit. Such acquisition must be effected through a locally incorporated company and will be subject to the acquisition conditions.

(6) Acquisition of Property Through Public Auction

A foreign interest may acquire property valued at more than RM150,000 per unit

through a public auction. Such acquisition will be subject to the acquisition conditions.

(7) Transfer of Property

The transfer of property to a foreign interest based on love and affection requires FIC approval and is permitted only among immediate family members, namely individuals having marriage relationship or blood ties (including stepchildren and legally adopted children).

(8) Leasing of Property

The leasing of property by a foreign interest for a tenure of 10 years or more requires approval of the FIC.

(9) Disposal of Property

Disposal of property by a foreign interest to another foreign interest requires approval of the FIC. However the disposal of property valued at less than RM20 million by a foreign interest to a local interest is only subject to notification requirements.

(10) Charging of Property To Foreign Interest

Charging of property, whether by local or foreign interest, to a foreign interest requires approval of the FIC. Approval will only be given if the whole of the loan is utilised for business operations in Malaysia. The FIC has verbally clarified that the charging of property to a foreign bank having a place of business in Malaysia are exempted from this requirement.

REQUIREMENT FOR INCORPORATION OF LOCAL COMPANY

The acquisition of property by foreign interest in the circumstances set out below must be effected through a locally incorporated company and will be subject to the acquisition conditions –

- (a) the acquisition of one unit or more of contiguous properties with a total value of RM10 million or more;
- (b) the acquisition of an entire building or an entire property development project, irrespective of value; and
- (c) the acquisition of land or land with building for redevelopment on a commercial basis.

Foreign Interests in the second part of a two-part series.

ACQUISITION OF PROPERTY BY PUBLIC COMPANY

The acquisition of property by a public company which is financed by cash requires approval of the FIC.

EXEMPTIONS

(1) Exemption from FIC Approval

The following transactions are exempted from the requirement for FIC approval –

- (a) the acquisition by companies having Multimedia Super Corridor (MSC) status of property within the MSC area for their own operations or residence by their employees;
- (b) the acquisition of residential unit under the “Malaysia My Second Home” Programme;
- (c) the transfer of property pursuant to a will and court order;
- (d) the acquisition of industrial property by manufacturing companies licensed by the Ministry of International Trade and Industry for their own manufacturing operations.

(2) Exemption from Acquisition Conditions

The following transactions require FIC approval but are exempted from acquisition conditions –

- (a) the acquisition of residential unit for own use;
- (b) the acquisition by a foreign interest of one or more contiguous properties with a total value of less than RM10 million;
- (c) the acquisition of industrial property by a foreign interest for own manufacturing operations is exempted from equity condition only.

PROHIBITED ACQUISITIONS

A foreign interest is not permitted to acquire –

- (a) all property which is classified as “low cost” and “medium cost” property by the State Authority;
- (b) all properties built on Malay reserve land;
- (c) properties allocated to Bumiputera allocation in any housing development project;

- (d) stall and service workshop; and
- (e) agricultural land developed on the basis of a homestead concept.

ACQUISITION CONDITIONS

The acquisition of property by local and foreign interests will be subject to the following acquisition conditions-

(1) Equity Conditions

Companies which do not have Bumiputera or have less than 30% Bumiputera equity are required to increase their Bumiputera equity to 30%. The remaining equity may be held by local interest, foreign interest or both.

Companies that already have 30% or more Bumiputera equity are required to maintain at least 30% Bumiputera equity holding. Similarly companies having 51% or more Bumiputera equity are required to maintain at least 51% Bumiputera equity holding.

Equity conditions imposed, if any, are to be complied with within two years from the date of the FIC’s approval letter or from the date of commencement of development of the property, whichever is the earlier. The status of compliance must be reported to the FIC at least one month before the deadline for compliance or whenever requested by the FIC. The compliance period may be extended by one year based on the merits of each case.

(2) Share Capital Condition

A local company owned by foreign interest that has a paid-up capital of less than RM250,000 is required to increase its paid-up capital to at least RM250,000 within six months from the date of the FIC’s approval letter.

A local company owned by local interest that has a paid-up capital of less than RM100,000 is required to increase its paid-up capital to at least RM100,000 within six months from the date of the FIC’s approval letter.

(3) Employment Condition

Companies are required to use their best endeavours to recruit and train Malaysians so as to reflect the country’s population composition at all levels of employment.

(4) Property Development Condition

If the property is acquired for development into a housing or commercial project, at least 75% of the total value of building materials and fittings used for the construction project should comprise local materials. The company is required to submit a certification issued by a certified consultant as to the value of local building materials and fittings used within six months after commencement of the construction project and upon completion.

APPLICATION PROCEDURE

The onus of submitting an application falls on the purchaser. However the FIC will also accept an application from the vendor.

The applicant is fully responsible for the accuracy of the information submitted. The purchaser is required to submit a statutory declaration to confirm the accuracy of the information provided and to confirm whether the conditions set out in the Property Guideline are complied with. Where the property is a commercial unit or industrial property and the conditions have not been complied with, the person who signs the statutory declaration is required to undertake compliance with the conditions within the period to be stipulated in the FIC’s approval letter.

Decisions by the FIC on all complete applications will be given –

- (a) within 24 hours for acquisition of residential units, commercial units or industrial units by foreign interest; and
- (b) within 10 working days for other acquisitions.

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SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

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