

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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BIOTECHNOLOGY - DOES THE LAW OF THE JUNGLE APPLY?

In this two-part article, Eow Khean Fatt treks through the biotechnology quagmire with the aim of helping the reader avoid missing the wood for the trees. Part I of this article provides a brief introduction to biotechnology and an overview of the current issues surrounding it.

How do you fancy the idea of molecule-sized robots that when injected in our bodies, will seek out and destroy mutant cells but repair damaged ones? Or what about an American biopharmaceutical company holding the patent for the Met-IL9 gene which renders human beings less susceptible to allergies and asthma? The above is no longer the subject of fiction. We are at the threshold of a new biotech revolution. Are our present laws sufficient to handle this new wave of legal issues arising from biotechnology?

HONESTLY, WHAT'S THE DEAL WITH BIOTECHNOLOGY?

In brief, biotechnology is the application of biological knowledge and techniques to make or modify a product, to improve plants and animals, or to develop microorganisms for specific uses.

There are two broad categories of biotechnology: traditional and modern. Examples of traditional biotechnology processes include fermentation, production of biofertilisers and biocontrol agents, cell and tissue culture. Modern biotechnology involves recombinant biotechnology or genetic engineering such as genomics, bioinformatics, transformation, marker-assisted breeding, diagnostics and vaccine technology.

The potential of biotechnology to humankind are endless. For example, with respect to food production, biotechnology may be used to produce ingredients, vitamins, starter cultures and enzymes for food processing. Scientists are even using biotechnology to produce more nutritional and better tasting food. In the agricultural field, biotechnology is used to produce crops with higher yields, longer storage life, stronger resistance to disease (thereby decreasing the need for pesticides), and better tolerance of poor soils or dry climates. In medicine, biotechnology offers methods of producing vaccines at a lower cost. For the protection of the environment, genetically modified bacteria may one day be used to convert organic wastes to useful products or to clean up oil spills.

Before examining the law governing biotechnology in Malaysia, it would be useful to have a brief overview of some of the topical issues governing the area of biotechnology in order to understand the legal issues that need to be addressed.

BIO-PIRATES

Biopiracy refers to the illegal collection of indigenous plants by corporations who patent them for their own use. Naturally, instances of such actions have resulted in a strong sense of protectionism amongst local communities.

Continue on page 10

CONTENTS

Articles

- 1 Does the Law of the Jungle Apply?
- 3 Dead Men's Suits
- 4 Zen and the Art of IP Maintenance
- 5 Enforcement of Arbitral Awards
- 6 A Relief to a Consumer's Nightmare
- 8 After the Glam and Hype

Case Commentaries

- 9 Ku Pon v. Pemandangan Sinar Sdn Bhd - Publication of Honest But Untrue Statements in the Newspaper

2 Announcements

- 2 Laws that Make You Go Hmm...

11 Memorable Quotes

ANNOUNCEMENTS

The Firm is pleased to announce that as of 1 January 2005, N. Pathmavathy has been appointed a Partner, and Kamil Azman, Kuek Pei Yee, Chew Yu Shen and Tan Joon Ho have been promoted to the position of Senior Legal Assistant.

Laws that make you go hmmm...

CALIFORNIA, USA

- Women may not drive in a house coat.
- No vehicle without a driver may exceed 60 miles per hour.

PHILIPPINES

- Cars whose license plates end with a 1 or 2 are not allowed on the roads on Monday, 3 or 4 on Tuesday, 5 or 6 on Wednesday, 7 or 8 on Thursday, and 9 or 0 on Friday from 7:00 A.M. to 7:00 P.M.

SINGAPORE

- Homosexuals are not allowed to live in the country.
- If you are convicted of littering three times, you will have to clean the streets on Sundays with a bib on saying, "I am a litterer." This will then be broadcasted on the local news.
- Failure to flush a public toilet after use may result in very hefty fines.

UNITED KINGDOM

- Placing a postage stamp that bears the Queen (or King) upside down is considered treason.
- Any boy under the age of 10 may not see a naked manequin.

SWITZERLAND

- It is illegal to flush the toilet after 10 P.M. if you live in an apartment.
- A man may not relieve himself while standing up, after 10 P.M.

AUSTRALIA

- Children may not purchase cigarettes, but they may smoke them.

FRANCE

- No pig may be addressed as Napoleon by its owner.

SOUTH KOREA

- Traffic police are required to report all bribes that they receive from motorists.

SWEDEN

- While prostitution is legal, it is illegal to use the services of a prostitute.

Taken from <http://www.dumblaws.com>

MESSAGE FROM THE EDITOR-IN-CHIEF

HERE'S TO WISHING EVERYONE ALL THE BEST FOR 2005

Although it may sound a little late, I would like to take this opportunity to wish our readers a Happy New Year. Yes, it's a brand new year, a year to look forward to with much anticipation and expectation. Our lives are a flurry with targets, goals and milestones that are being set and created with the hope that more is achieved this year.

Last year came to a tragic end when a major tsunami wrecked havoc in the Indian Ocean and caused massive destruction in more than six countries. The tsunami which struck a day after Christmas is reported to have killed an estimated 220,000 people in more than 11 countries. The undersea earthquake off Sumatra, and the giant waves it triggered have affected lives all over the world. The relief and recovery efforts of people from around the globe, to donate cash, food and medicine; to lend a helping hand; to give support, encouragement and comfort in this moment of loss, need and grief has had a heartening effect on me and reaffirmed my belief in humanity. We can now only pray for those rebuilding their lives from what was left of the devastation. I hope that we will be more alert and prepared, in terms of a suitable tsunami warning system, to avert the recurrence of a similar natural disaster.

We have an interesting collection of articles in this issue. Our lead piece by Eow Khean Fatt introduces the law of biotechnology and related issues pertaining to biological knowledge and techniques. On page 3, Azrina Mohd Isa focuses on limitation periods for causes of action against the deceased. Meanwhile on page 4, Teh Hong Koon encourages companies to conduct intellectual property audits in order to identify and exploit the intellectual property they own. Shemane Chan sheds some light on the statutory regimes governing the enforcement of arbitral awards in Malaysia on page 5, and on page 6, Liang Cheng Jean explains to aggrieved consumers how to seek a 'do-it-yourself' legal redress in a Consumer Claims Tribunal in respect of goods that don't meet their expectations by errant manufacturers.

In addition, we have included a commentary on the ramifications of the publication by newspapers of honest but untrue statements, and highlighted some important post-listing obligations of listed companies under the Main Board Listing Requirements of Bursa Malaysia. And yes once again for amusement pleasure, we have incorporated some rather absurd laws practised in some countries around the world.

The primary aim of our editorial team this year is to add more value to the content of this newsletter. Therefore, we invite you to email us topics of interest that you feel would benefit readers. As always, I would like to thank my outstanding editorial team, who are an inspiring example of what a few creative and enthusiastic individuals can do with a little time and a lot of commitment.

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 mas@skrine.com.



Lee Tatt Boon
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Editor-In-Chief

DEAD MEN'S SUITS

Azrina Mohd Isa considers the limitation provisions in respect of actions by and against deceased persons.

Just as death closes off life, so limitation closes off the right to sue. Although the Limitation Act 1953 ("LA") deals with limitation of actions in general, the Civil Law Act 1956 ("CLA") makes specific provision for different, and shorter, periods of limitation in respect of causes of action by and against deceased persons. In cases involving a tortious claim, sec. 6 of the LA provides *inter alia* that a legal action is to be initiated within six years of the tort.

The CLA provides specifically for the limitation periods in respect of a dependency claim* (i.e. sec. 7 of the CLA) and an action in tort against the estate of a deceased person (i.e. sec. 8 of the CLA). Knowledge of these limitation periods is essential, otherwise a plaintiff may risk his case being dismissed by the court for being commenced out of the time-frame permitted by law.

The doctrine of limitation is ... based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is ... that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

What is the rationale for the imposition of these limitation periods? For this we refer to the following extract of Hashim Yeop A Sani CJ's judgment in **Fong Tak Sing v Credit Corporation (M) Bhd** [1991] 1 MLJ 409.

"The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense."

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest reipublicae ut sit finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts."

Section 7(5) of CLA provides:-

"Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased."

Section 8(3) of CLA provides:-

"No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either:-

- (a) were pending at the date of his death; or
- (b) are taken not later than six months after his personal representative took out representation."

The respective three-year limitation period prescribed for a dependency claim and six months for an action against the estate of deceased person as mentioned earlier are absolute and without exception as reaffirmed by the Federal Court and Court of Appeal in **Kuan Hip Peng v. Yap Yin & Anor** [1965] 1 MLJ 252 and **Lee Lee Cheng v. Seow Peng Kwang** [1960] MLJ 1 respectively. The courts have no power to extend limitation periods prescribed by law.

Now imagine this scenario, vehicle A driven by X collided into vehicle B driven by Y, resulting in the deaths of both drivers. The dependents of X, as recognised under sec. 7(2) of the CLA, intend to sue the estate of Y, to claim damages for their loss. The estate of Y, aware of the fact that X's dependents will be unable to commence an action against them until Letters of Administration or a Grant of Probate has been obtained from Court, decide not to apply for representation, or if they do apply for representation they do not intend to notify X's dependents, hoping that by the time the latter find out, the six months limitation period would have expired thereby barring them to sue Y's estate. What can the dependents of X do?

... Order 15 Rule 6A ... allows the dependents to bring an action against the estate ... even though no Grant of Probate or Letters of Administration has been made... sec. 30 of the Probate and Administration Act 1959 which allows the Court to appoint an administrator ad litem to administer the estate.

Firstly, the dependents may invoke Order 15 Rule 6A of the Rules of High Court 1980 ("RHC"). This provision allows the dependents to bring an action against the estate of the deceased even though no Grant of Probate or Letters of Administration has been issued. Secondly the dependents may invoke sec. 30 of the Probate and Administration Act 1959 which allows the Court to appoint an administrator ad litem to administer the estate. More often than not the Court appoints the Public Trustee (now known as Amanah Raya Berhad), if it is satisfied that no one has come forward to apply for Letters of Administration or a Grant of Probate. The prudent prospective plaintiff will protect his rights by filing a probate caveat under O.71 r.37 of the RHC. This ensures that notice will be given to the caveator to alert him of any relevant Probate or Letters of Administration being granted and thereby enable him to initiate proceedings against the executor or administrator of the estate.

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**In respect of dependency claims, sec. 7(2) of the Civil Law Act 1956 provides that every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.*

ZEN AND THE ART OF IP MAINTENANCE

Teh Hong Koon encourages you to explore your creative energies and unleash yourself from within...

Every business owns intellectual property. Unfortunately many fail to leverage on it. What is even worse is that some do not even know that they own intellectual property like trademark, copyright, industrial design, patent and trade secret. Thus, before you are able to exploit your intellectual property, you must identify the intellectual property that you own. To achieve this, an intellectual property audit must be conducted.

Identify it

An intellectual property audit involves collaboration between the business owner and the intellectual property law specialist in identifying the intellectual property subsisting in or created by the business. The audit will typically involve reviews of business processes, business strategies, legal documents, contracts, products and services. Due to the dynamic business environment, an intellectual property audit should ideally be conducted annually.

The audit will typically involve reviews of business processes, business strategies, legal documents, contracts, products and services.

Register it

Once the relevant intellectual property is identified, the intellectual property must be protected. Intellectual property must be registered by way of registration where possible.

- *Trade mark, industrial design and patent* should be registered with the Intellectual Property Corporation of Malaysia.
- There is no regime for registration for *copyright* but a statutory declaration or affidavit (i.e. a sworn statement) is affirmed to substantiate subsistence and ownership of copyright.
- In relation to *trade secrets*, all employees should be made aware of what is confidential, and of their duty to maintain confidentiality. If confidential information and/or documents are required to be disclosed under certain circumstances, the relevant parties must first enter into a confidentiality agreement.

Protect it

The value of an intellectual property lies in its exclusivity. During the legal life of the intellectual property, the owner of the intellectual property is afforded a certain degree of monopoly, i.e. no one else can use it without his consent. However, the owner must be prepared to enforce his rights against all infringers. The failure to do so would in effect be giving a free licence to the infringers. Over time, the omission to act will erode or completely destroy the value of the intellectual property.

Exploit it

The intellectual property owner must exploit his intellectual property in the market place. In the event the intellectual property owner is not willing or has no resources to exploit the intellectual property, it may be licensed or transferred for valuable consideration.

A licence can be exclusive, sole or non-exclusive. An exclusive licence gives the licensee an exclusive right to exercise the licensed rights in the territory covered by the licence, to the exclusion of all others, including the licensor.

The grant of an exclusive licence should be exercised with much care and consideration, as the success of the licensor's business will depend entirely on the performance of the licensee. If the licensor wishes to exercise the licensed rights himself as well, then a sole licence should be granted instead.

An exclusive licence gives the licensee an exclusive right to exercise the licensed rights in the territory covered by the licence, to the exclusion of all others, including the licensor.

A non-exclusive licence is the most common as the licensor may exercise the rights himself and is free to grant as many licences it as wishes. The cross licensing of intellectual property rights is gaining popularity as it enables business owners who are competing against each other to pool their knowledge and intellectual property to form a bigger and stronger business alliance.

An outright transfer of intellectual property is termed as an assignment. An assignment will effectively transfer all the rights and interests vested in the owner to the assignee. However, the transfer of an intellectual property such as a trade mark, patent and industrial design will not be effective unless the transfer is recorded and there are legal requirements to be observed in relation to such a transfer. Thus, before parties go into negotiations for the transfer of an intellectual property, an intellectual property law specialist should be consulted.

... the transfer of an intellectual property such as a trade mark, patent and industrial design will not be effective unless the transfer is recorded ...

Intellectual property is potentially a bottomless pit of wealth. JK Rowling, the author of Harry Potter amassed a fortune of USD 400 million by exploiting the copyright of the said book, through sales revenues, publishing rights, movies and licensing. The featured films that were released by Warner Brothers took in about USD 1.8 billion worldwide at the box office. Coca Cola's brand value alone is estimated to be USD 83.845 million. British Telecom with a portfolio of more than 15,000 patents is expected to generate an annual income of USD 100 million in the next five years from licensing its technology and intellectual property rights.

Unleash it

As illustrated above, intellectual property can be an income-generating machinery. In order to set the machinery in motion, a business owner must identify what he has, have it registered, protected and exploit it.

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ENFORCEMENT OF ARBITRAL AWARDS

Shemane Chan writes about how arbitral awards may be enforced in Malaysia.

It is a misconception that an arbitral award does not enjoy the same level of enforceability as a court judgment. Provided that the relevant statutory requirements have been satisfied, an arbitral award may be enforced in the same manner and to the same effect as a court judgment. In fact, the enforcement by the Courts of foreign arbitral awards in Malaysia, and of Malaysian arbitral awards in foreign jurisdictions, is more readily available than the enforcement in Malaysia of judgements of foreign courts, and of Malaysian court judgments in foreign jurisdictions. In Malaysia, there are four statutory regimes governing the enforcement of arbitral awards, namely:

- Arbitration Act 1952
- Reciprocal Enforcement of Judgments Act 1958
- Convention on the Settlement of Investment Disputes Act 1966 (“Washington Convention Act”)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (“New York Convention Act”)

The question of which of the above would be applicable would largely depend on where the award is made. The purpose of this article is to provide a brief introduction to the legal framework governing the enforcement of arbitral awards in Malaysia.

ARBITRATION ACT 1952

Local arbitral awards may be enforced by bringing an action on the award* or more commonly, by way of summary enforcement under sec. 27 of the Arbitration Act 1952. Section 27 provides that an arbitral award may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award. Such enforcement is usually straight forward and prompt without any formalities required for a trial.

RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT 1958

Foreign arbitral awards made in some Commonwealth countries may be enforced by registration under the Reciprocal Enforce-

ment of Judgments Act 1958. To qualify for registration, the following requirements must be satisfied:

- the award must be final and conclusive as between the parties,
- a sum of money must be payable thereunder, not being a sum in respect of taxes, fines, penalties or other charges of a like nature; and
- the award must be an award from a country or territory added to the First Schedule of the 1958 Act and it must be given after that country or territory is added to that Schedule.

The reciprocating countries listed in Schedule 1 of the 1958 Act are United Kingdom, Hong Kong, Singapore, New Zealand, Republic of Sri Lanka (Ceylon), India (excluding certain states) and Brunei Darussalam. Those Australian States which were originally listed as reciprocating countries were removed in 1994 under the provisions of sec. 9 of the 1958 Act apparently on the ground that the treatment in respect of enforcement accorded by the Courts in such Australian States to judgments given by the Malaysian Courts was substantially less favourable than that accorded by the Malaysian Courts to judgments of those States.

THE WASHINGTON CONVENTION ACT

The Washington Convention Act provides for the enforcement of awards rendered under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (“Washington Convention”). The Washington Convention established the International Centre for the Settlement of Investment Disputes with the jurisdiction to conduct arbitration in relation to investment disputes between a Contracting State and a national of another Contracting State. As at 3 November 2003, 154 States have signed the Washington Convention.

By virtue of sec. 3 of the Washington Convention Act, an award made by an arbitrator appointed under the Washington Convention will be enforceable in the same manner as if it is a judgment of the High Court in Malaysia. Such awards are not subject to the provisions of the Arbitration Act 1952 or other written law*. As such, the role of the courts is limited to issues involving enforcement only.

THE NEW YORK CONVENTION ACT

The New York Convention Act gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Whilst the Washington Convention Act extends only to awards where a Contracting State is a party to the arbitration, the scope of the New York Convention Act is wider as it provides for the enforcement of awards made in any of its signatory countries. Hence, an award given in any of the signatory states will be enforceable in Malaysia and likewise, an award given in Malaysia will be enforceable in any of the other signatory countries. As at January 2004, there were 134 signatories to the New York Convention.

... ease of enforcement of arbitral awards is one of the factors which has catapulted arbitration to the position of being the preferred mode of resolution of international disputes ...

Section 3(1) of the New York Convention Act provides for the enforcement of a “Convention award” either by action or “in the same manner as the award of an arbitration is enforceable by virtue of sec. 27 of the Arbitration Act 1952”. “Convention award” is defined in sec. 2(1) of the Act to mean “*an award...considered as commercial under the law in force in Malaysia made in pursuance of an arbitration agreement to which the New York Convention applies; and in pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention.*”

CONCLUSION

In conclusion, an arbitral award may be enforced in the same manner as a court judgment. The wide adoption of the New York Convention and the Washington Convention by the international community has made enforcement of arbitral awards in countries other than the one in which the award is made much easier and quicker. It is apparent that such ease of enforcement of arbitral awards is one of the factors that has catapulted arbitration to the position of being the preferred mode of resolution of international disputes: a position which is to be contrasted with the limited scope afforded by Malaysian law for the reciprocal enforcement of court judgments.

*Enforcement by action is an action at common law based on the breach of the implied promise by the parties to perform the award.

* Section 34(1) of the Arbitration Act 1952.

A RELIEF TO A CONSUMER'S NIGHTMARE: A NEW CURE TO SHOPPING

Jean addresses consumers' woes over goods that don't live up to their expectations!

Have you ever gone shopping and returned home to find the item you purchased unsatisfactory, or responded to a compelling advertisement which did not live up to its promise? This is not uncommon with the rise in consumerism and the catchy and enticing advertisements, promotions and "bargain deals" today. Although aggrieved consumers may commence legal proceedings against suppliers who do not live up to their advertisements, this measure is often time consuming and costly when compared to the actual loss sustained.

The Tribunal for Consumer Claims ("Tribunal") established under the Consumer Protection Act 1999 ("the Act") could however be the answer to a buyer's frustrations. Many are not aware that the Tribunal has been established since 15 November 1999 with the primary objective to provide a more efficient, easier and affordable alternative to aggrieved consumers against suppliers who have fallen foul of the Act.

JURISDICTIONAL LIMITS

A claim can only be brought before the Tribunal if it is within its jurisdiction. The claimant seeking to bring a claim must fall within the definition of a "consumer" under sec. 3(1) of the Act, that is, a person who,

- acquires or uses goods or services of a kind ordinarily acquired for a personal, domestic or household purpose, use or consumption; and
- does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of (i) resupplying them in trade; (ii) consuming them in the course of a manufacturing process; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

The total amount in respect of which a Tribunal's award is sought must not exceed RM25,000. In the event that the value of the subject matter claimed exceeds RM25,000, the Tribunal may still determine the claim if there is an agreement in writing between the claimant and respondent. The claimant may also choose to abandon so much of the claim as it exceeds RM25,000 to bring the claim within the Tribunal's jurisdiction but this discharges the person from liability in respect of the amount so abandoned.

The claim must also be based on a cause of action which accrues within three years and must be within the jurisdictional limits of the Tribunal. Section 99 of the Act provides that the Tribunal does not have jurisdiction in any matter where (i) it involves the recovery of land, or any estate or interest in land (does not include fixtures); (ii) the title to any land, or any estate or interest in land, or any franchise, is in question; (iii) a dispute concerning the entitlement of any person under a will or settlement, or on any intestacy (including a partial intestacy), goodwill, any chose in action or any trade secret or other intellectual property; (iv) any tribunal has been established by any other written law to hear and determine claims on the matter which is the subject matter of such claim; and (v) the claim arises from personal injury or death.

The issues in dispute, whether in the initial claim or in the course of hearing, should not have been brought before any court proceedings before the claim is lodged with the Tribunal, unless the claim before the court is withdrawn, abandoned or struck out.

PROCEDURE

The Consumer Protection (The Tribunal for Consumer Claims) Regulations 1999 ("Regulations") sets out the procedures and the forms to be lodged in respect of a claim at the Tribunal. A claim is initiated by lodging four copies of the Statement of Claim in the prescribed form together with a fee of RM5.00 at the relevant Tribunal Registry, claiming for any loss suffered by the consumer on any matter concerning his interests under the Act. The particulars of the claim are to be set out in the Statement of Claim. No more than one claim may be brought in respect of the same matter against the same party. The Statement of Claim will thereupon be processed, registered and returned to the claimant for service on the respondent

Section 119 of the Act provides that no proceedings, award or other document of the Tribunal shall be set aside or quashed for want of form. In addition, in ensuring that cost should not be a detrimental factor for aggrieved consumers, Regulation 27 provides that the cost involved in bringing a claim before the Tribunal will not at any time exceed RM200 to any one party.

Within 14 days from the service of the Statement of Claim by the claimant, the respondent may file four copies of its Statement of Defence and Counter Claim together with a fee of RM5.00 at the relevant Tribunal Registry stating in the appropriate column its reasons for disputing the claim. If the respondent wishes to make a counter claim against the claimant, he may do so by completing the appropriate column in the Statement of Defence and Counter Claim. If a counter claim is filed, the parties have to comply with the procedures in the Regulations that govern the counter claim.

... in ensuring that cost should not be a detrimental factor for aggrieved consumers, Regulation 27 provides that the cost involved in bringing a claim before the Tribunal will not at any time exceed RM200 to any one party.

Regulation 15 provides that service of any prescribed form shall be effected on a person not being a body corporate or firm by leaving the document with the person, tendering the document to that person or sending a pre-paid registered letter to that person at his address for service or last known address. In the case of a body corporate or firm, service shall be effected in the same manner save that it must be served on an appropriate officer of the body corporate or a proprietor of the firm. The President of the Tribunal may order substituted service where he thinks fit.

HEARTACHES

HEARING BEFORE THE TRIBUNAL

The hearing before the Tribunal is open to the public and will be held on the date, place and time as stated on the Notice of Hearing which will be served by the Tribunal on both parties no less than 14 days before the date of hearing. Every party to the claim shall be entitled to attend and be heard at the hearing but neither party may be represented by an advocate and solicitor. A company or an unincorporated body of persons may be represented by its full time paid employee, and a minor or a person under a disability may be represented by his next friend or guardian. The Tribunal may impose such conditions as it considers necessary to ensure that a party to the proceeding is not substantially disadvantaged.

The Tribunal may dispose of a claim in the absence of any party if it is satisfied that the notice of the hearing has been served on that party. However, any award granted in the absence of a party or in lieu of a defence being lodged may be set aside by the Tribunal on the application of the aggrieved party within 30 days after its receipt of the award.

**The hearing before the Tribunal is open to the public ...
Every party to the claim shall be entitled to attend and
be heard at the hearing but neither party may be
represented by an advocate and solicitor...**

At the hearing, the parties shall be entitled to adduce evidence, call any witness or produce any document, record or thing in support of their case. The Tribunal has the powers to, *inter alia*, receive evidence, examine witnesses, require the production of evidence and do all things necessary for the expeditious determination of a claim. The Tribunal may also summon the parties or any other person to attend to give evidence or to produce any document or to assist in its deliberations.

DETERMINATION OF THE CLAIM

The Tribunal shall make its award after the parties have presented their case. Section 112 imposes a duty on the Tribunal to do so without delay and, where practicable, within 60 days from the first day of the hearing. The Tribunal may before making an award, assist the parties to negotiate a settlement of the claim.

An award of the Tribunal may require (i) a party to pay money to any other party; (ii) goods be supplied or resupplied; or (iii) goods supplied or resupplied be replaced or repaired.

Every settlement and award by the Tribunal is final and binding on the parties to the proceedings and shall be deemed to be an order of a Magistrate's Court and be enforced accordingly. A copy of the award shall be recorded at the relevant Magistrate's Court. Non-compliance with a Tribunal's award after 14 days constitutes an offence which

upon conviction is punishable by a fine not exceeding RM5,000 or a term of imprisonment not exceeding two years or both. In addition an offender shall be liable to a fine not exceeding RM1,000 for each day or part of a day during which the offence continues after conviction.

**The number of aggrieved consumers who
have sought redress against errant suppliers from the
Tribunal has shown a marked upward trend
since its inception.**

According to the Ministry of Domestic Trade and Foreign Affairs, 40% of the claims lodged with the Tribunal are settled prior to the commencement of hearing, 20% are settled after negotiations whilst 40% proceed to hearing. Among the examples of claims lodged at the Tribunal are: -

- A claim against a hotel for failing to provide adequate manpower and to deliver the food at the claimant's wedding reception. The Tribunal ordered the hotel to pay the claimant compensation of RM3,500.
- A claim against a furniture company for failing to deliver the furniture on time. The Tribunal ordered the furniture company to refund all sums paid by the claimant and the cost of the hearing.
- A claim against a maid agency for failing to provide a competent maid. The Tribunal ordered the agency to refund all payments made by the claimant.

CONCLUSION

The number of aggrieved consumers who have sought redress against errant suppliers from the Tribunal has shown a marked upward trend since its inception. In 2000, 291 cases were reported to have been lodged with the Tribunal and the number of claims lodged have been escalating with 1,155 claims lodged in 2001, 2,649 claims lodged in 2002 and 4,150 claims lodged in 2003. The rise in popularity of the Tribunal as an alternative to resolving discontentment when one gets the bad end of the bargain may well be an indication that a cure to shopping heartaches has been discovered.

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AFTER THE GLAM AND HYPE

Phua Pao Yii highlights some of the post-listing obligations of listed companies.

Your chauffeur drives you back to your office from the stock exchange. You have just witnessed the successful listing of your company's shares on Bursa Malaysia.

You reflect on events of the recent past. The years of hard work have finally paid off. Your company is now a public listed company. You have gained recognition as a corporate head and are financially set-up for life.

Entering into a transaction is no longer a straightforward task. It will now be necessary to comply with Chapter 10 of the listing requirements and, ... to ascertain ... the 'percentage ratio' ... prescribed in the listing requirements, and ... whether the transaction is a related party transaction...

Although you feel a deep sense of satisfaction as to what you have achieved, there is a disturbing thought gnawing away at the back of your mind. You realise that you can no longer manage the company like a family business as you had in the past. You thumb through the copy of the Main Board Listing Requirements and reflect on some of the additional responsibilities that lie ahead as a director of a listed company.

PERIODIC REPORTING

The affairs of the company, in particular its financial affairs, can no longer be shrouded in mystery. The company is obliged to keep accounting and other records that are sufficient to explain the financial position or operations of the group (Paragraph 8.31).

The company is also required to release quarterly announcements on its financial performance (Paragraph 9.22) which must include the information set out in Part A of Appendix 9B.

In addition to its audited accounts, the company must furnish an annual report to its shareholders and the stock exchange (Paragraph 9.23(a)). The report must contain the information set out in Part A of Appendix 9C, including the audit committee's report, statements on corporate governance and internal controls of the company, the number of meetings attended by each director, a breakdown of the remuneration paid to

directors and, if there is a variation of 10% or more in the profit forecast or projection, an explanation and reconciliation.

TRANSACTIONS

Entering into a transaction is no longer a straightforward task. It will now be necessary to comply with Chapter 10 of the listing requirements and, from the onset, to ascertain (i) the 'percentage ratio' which the value of the transaction bears to certain financial parameters prescribed in the listing requirements, and (ii) whether the transaction is a related party transaction, that is a transaction which involves the interest, direct or indirect, of a director or major shareholder (including a person who was a director or major shareholder within the 12 months preceding the transaction) or a person connected to any of the afore-mentioned persons.

The importance of attending to the above matters cannot be overstated as they will determine the appropriate action to be taken by the company in relation to the transaction, such as whether an announcement and/or circular is to be issued, whether the approval of its shareholders is required, whether it is necessary to appoint an independent adviser and a main advisor and whether there are any interested parties who are precluded from voting on the transaction.

... (the) company is obliged to make timely and accurate disclosure of all material information to the public and to take reasonable steps to ensure that the investing public enjoy equal access to such (material) information.

RECURRENT RELATED PARTY TRANSACTIONS

You have to ascertain whether the trading activities between the listed company and other companies controlled by your family fall within the ambit of "recurrent related party transactions" ("RRPT"), that is recurrent transactions of a revenue or trading nature which are necessary for the day-to-day operations of the listed company. An example of such a transaction would be the purchase of raw materials for the manufacturing activities of the listed company.

If the transactions qualify as RRPTs, it is possible to obtain a mandate (renewable annually) from the company's shareholders to enter into such transactions (Paragraph 10.09). However, you must ensure that the terms of the RRPTs are no more favourable to the companies controlled by your family than those generally available to the public. You remind yourself that an effective mechanism must be put into place to ensure that this requirement is complied with.

You note from the listing requirements that details of these transactions must be disclosed in the annual report (Paragraph 10.09(1)(b)) and be subject to review by the audit committee (Paragraph 15.13(1)(h)).

CONTINUING DISCLOSURE REQUIREMENTS

Now that your company is listed, you must familiarise yourself with the continuing disclosure requirements in Chapter 9 of the listing requirements.

You are aware that your company is obliged to make timely and accurate disclosure of all material information to the public and to take reasonable steps to ensure that the investing public enjoy equal access to such information.

You make a mental note that as a guide, the listing requirements describe information as being material if it is reasonably expected to have a material effect on (a) the price, value or market activities of your company's securities, or (b) the decision of the holder of your company's securities or an investor in determining his choice of action (Paragraph 9.03).

You also note that Part J of Chapter 9 sets out numerous examples of events that warrant an immediate announcement being made. These include any change in directors, audit committee or chief executive officer, any acquisition or disposal of shares that result in (a) another company becoming or ceasing to be a subsidiary of the listed company or (b) the listed company holding 5% or more of the issued capital of another listed company or its holding in another listed company falling below 5%, commencement of winding-up proceedings against or appointment of a receiver and/or manager over any member of the group or

Continue on page 11

PUBLICATION OF HONEST BUT UNTRUE STATEMENTS IN THE NEWSPAPER

Ku Pon & Ors v Pemandangan Sinar Sdn Bhd & Ors [2004] 3 CLJ 466

BRIEF FACTS

The plaintiffs alleged in their Statement of Claim that an article published by the defendants in the Sin Chew Jit Poh newspaper on 25 August 1996 contained various information which was inaccurate and/or false in relation to a kidnapping incident involving several of their family members, and that the defendants were accordingly negligent and had breached their duty of care to the plaintiffs. Due to the article, the plaintiffs submitted that the kidnappers demanded an additional RM3 million ransom, and as they could not meet the demand, the kidnapped victims were never released. The plaintiffs therefore suffered the loss of companionship of the victims. In the alternative, the plaintiffs claimed that the defendants had committed a breach of confidence by publishing the article. In setting out their complaints, the plaintiffs did not allege that the defendants were dishonest or were actuated by bad faith in the publication of the article in any way.

The defendants applied to strike out the plaintiffs' claim for disclosing no reasonable cause of action under Order 18 Rule 19(1)(a) of the Rules of the High Court 1980. The Senior Assistant Registrar dismissed the first and third defendants' application but the second defendant was successful in his application. Both aggrieved parties then appealed to the Judge in Chambers. Their appeals were heard together as they involved identical issues of fact and law.

It is imperative to note that in an application for striking out a claim for no reasonable cause of action, the Court would presume that the facts pleaded in the Statement of Claim are true and determine whether on such facts there is a reasonable cause of action.

DUTY OF CARE

As the plaintiffs' claim did not fall within the usual established category of negligence for misstatement i.e. a claim for negligent misstatement causing economic loss under the Hedley Byrne principle, the Court had to consider whether to create a new duty of care situation to encompass the publication of inaccurate or untrue but honest statements. In doing so, the Court had to consider whether on the given set of facts as pleaded, there was a notional duty of care.

"It is important to distinguish the question whether a notional duty of care exists from the narrower question of whether a factual duty exists in a particular case. A notional duty applies to a general class of relationship and damage. Hence, the key question is whether, in relation to all factual situations within that class a notional duty exists. However powerful the arguments in favour of a duty on the particular facts of the claimant's case, they may be outweighed by counter-arguments relating to the general class of relationship within which the claimant's case falls to be assessed...Once a notional duty of a given scope has been accepted, the question is whether the particular plaintiff comes within the scope of that duty so as to render the damage actionable at his suit. The question becomes one of factual duty." (See paragraphs 7-06 and 7-07 of Clerk & Lindsell on Torts, 18th Edition, 2000.)

In assessing the existence of a notional duty, the elements of foreseeability of damage, the proximity of relationship between the plaintiffs and the defendants and the fairness and reasonableness of

imposing a duty of care (as set out by Lord Bridge in the House of Lords' case of **Caparo Industries plc v Dickman** [1990] 2 AC 605 at 617-618) must be considered. It is only upon the satisfaction that a notional duty of care exists that the Court can then proceed to determine whether there ought to be a factual duty of care.

FORESEEABILITY OF DAMAGE

As the defendants had no control over the kidnappers' actions, the Court declined to hold that the defendants could have foreseen any injury to the plaintiffs. The Court held that no reasonable man could have foreseen that the plaintiffs would be injured by such run of the mill reporting in the newspaper. Unless it was highly probable or very likely, a mere possibility of harm is insufficient where the actions of a third party are concerned. This is to be contrasted with the hypothetical example given by the Court where contract killers on the hunt for their target are assisted by a newspaper reporting of the whereabouts of their target. The Court opined that in such a scenario, any reasonable person would foresee that by such reporting, the target may be killed and the target's spouse would suffer losses.

As the plaintiffs' claim did not fall within the usual established category of negligence for misstatement i.e. a claim for negligent misstatement causing economic loss under the Hedley Byrne principle, the Court had to consider whether to create a new duty of care situation to encompass the publication of inaccurate or untrue but honest statements.

PROXIMITY OF RELATIONSHIP

Proximity of relationship refers to physical, circumstantial or causal proximity (see Deane J in **Sutherland Shire Council v Heyman** [1985] 60 ALR 1). However the Court found that this relationship was not made out on the facts as there were more than four sets of "players" involved and there was a break in the chain of causation from the defendants' acts to the alleged injury suffered by the plaintiffs as *inter alia*, the kidnappers' acts were voluntary and independent of the defendants' acts.

FAIR AND REASONABLE TO IMPOSE A DUTY

Notwithstanding that there may be overpowering arguments in favour of imposing a duty of care on the particular facts of a claim, these may nevertheless be outweighed by counter arguments of public interest and legal policy. In the present case, having weighed the various factors i.e. to prevent the floodgates of litigation; the interest of individuals who may already have the protection of statutes; the factor of public awareness and deterrence against would be offenders; and the freedom of the press which has a social and moral duty to the world at large, the Court concluded that it would not be fair, just and reasonable to impose a duty of care.

Continue on Page 11

THE EXAMINATION OF THE MONSTROUS POTENTIAL AND ELEPHANTINE FUTURE OF BIOTECHNOLOGY CONTINUES...

Continued from page 1

There have been many instances where patents by large MNCs have been challenged. Some of the well-known examples are mentioned below.

Turmeric

A 1995 patent for “Use of Turmeric in Wound Healing” was challenged in 1998 after an investigation instituted by India’s Council of Scientific and Industrial Research (CSIR) which established that the use of turmeric to promote wound healing had been known for generations in India through Ayurvedic medicine. The CSIR challenged the patent on the grounds of “prior art” and produced ancient Sanskrit text to prove it. The ending was a happy one, the patent was withdrawn as the US Patent Office agreed that the invention was not novel.

Neem

The Neem tree is traditionally known in South East Asia (particularly among the Indian community) as a tree of many medicinal values. Patents were granted to a US company for extraction and storage processes of neem seed extracts. The controversy arose because Indian farmers were worried that the patents would prevent them from using neem as a source of homemade pesticide. The Indian government filed a complaint to the US Patent Office for copying an Indian invention which was later withdrawn when the Indian Government realized that the patents were for specific processes and would not prevent the use of neem in traditional ways.

Basmati

Patents were granted to an American company, RiceTec Inc, for novel varieties of basmati rice, their plants and seeds, and a method of breeding and selection so that when cooked, the rice would have the qualities of traditional basmati.

The complaint filed was on the basis that the use of the name ‘basmati’ infringed upon the collective natural heritage of Indian and Pakistani farmers who grow traditional basmati rice, effectively allowing the company to steal the market from Indian traders. Consumers would be misled into buying American rice of Indian origin which could be passed off as possessing the same qualities of basmati rice.

Although a protest was lodged by the Indian government against the use of the basmati name, there was no formal challenge to the patent. The court is still deciding whether the use of the name “basmati” is geographically linked as it has become generic and is used to describe rice varieties in other parts of the world such as Thailand and Uruguay.

MONSTER TOMATOES AND GENETICALLY MODIFIED FOODS

The advent of genetically modified (GM) foods, its benefits and its repercussions, have caused GM foods to be regarded with a mixture of scepticism and enthusiasm in recent years. Presently there are no regulations governing the development and use of GM Organisms (GMOs) in Malaysia. Application for the approval for GM crops or food is strictly voluntary.

According to the Genetic Modification Advisory Committee (GMAC), the Malaysian body responsible for the review and assessment of release of GMOs, only one product to date has received approval, a soybean product.

Regulatory mechanisms for GMOs are governed by the “National Guidelines for the Release of Genetically Modified Organisms into the Environment” (“Guidelines”), launched in 1997 by the Minister for Science, Technology and the Environment.

The Guidelines cover all GMOs (plants, animals, microbes, etc) at all stages of research and development; their use, handling, transboundary movements; and the release and placing in the market of GMOs and products containing GMOs. The Guidelines do not discriminate between imported or locally created GMOs. They were designed to supplement existing regulations for the import of agricultural, food and pharmaceutical products. Implementation of the Guidelines is carried out via existing enforcement mechanisms present in the various Ministries and agencies which are component members of GMAC, including the Ministry of Health, the Ministry of Agriculture, the Quarantine Department and the Department for Food Quality Control. Other members of GMAC comprise representatives from academia, R&D institutions, the Attorney-General’s office and an NGO (the Third World Network).

It is assuring to note that these Guidelines are currently being revised and drafted as a mandatory Biosafety Bill to ensure compliance rather than being on a voluntary basis.

CONCLUSION

It is hoped that this provides an introduction, albeit brief, into the world of biotechnology and the many issues implicated in its application. In the next issue of **LEGAL INSIGHTS**, we aim to provide an explanation of the current legal framework in Malaysia in respect of biotechnology and an overview of various international rulings, as well as the ethical concerns raised in respect of biotechnological advances and the ensuing legal challenges imposed by such concerns.

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NO LIABILITY FOR NEGLIGENCE?

Continued from page 9

ANALYSIS

This case highlights the reluctance of the courts to extend the established ambits of negligence to cover new situations. Whilst the categories of negligence are never closed and the courts can create new duty situations if appropriate, (it is submitted that) this power is exercised very sparingly at common law.

Nevertheless, on an analysis of the issues that were pleaded, the plaintiffs' action is not so much for negligence but is essentially for the publication of the alleged untrue statements which were made by the defendants honestly. In arriving at its decision, the Court considered the case of **Guay v Sun Publishing Co Ltd** [1952] 2 DLR 479. Whilst the Court did not elaborate on this case in its judgment, the case nevertheless illustrates the protection given to publications of untrue but honest statements. In that case, the plaintiff brought an action against the publisher of a newspaper which had published an untrue but honest statement that the plaintiff's husband and three children were killed in a road accident.

The decision of the Court is welcomed as it clarifies that a newspaper cannot be liable for negligence for the publication of honest but untrue statements which allegedly causes damage to a reader.

The plaintiff was awarded \$275 as special damages and \$750 as general damages by the trial judge, for the shock caused to her by the reading of the defendant's report. The British Columbia Court of Appeal by a majority of two to one reversed the trial judge's decision. The Court of Appeal was of the view that the trial judge's decision would impose an intolerable burden on individuals as well as newspapers as "it would practically mean that everyone would have to warrant the accuracy of every word uttered. It seems to be implied in the judgment below and in the respondent's argument here that a higher standard of conduct is imposed on a newspaper than on others. I know of no principle to justify this distinction, and it would be tantamount to judicial legislation to support such a distinction."

The decision of the Court is welcomed as it clarifies that a newspaper cannot be liable for negligence for the publication of honest but untrue statements which allegedly causes damage to a reader.

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(Note: For completeness it must be mentioned that the plaintiffs' claim for breach of confidence was dismissed by the learned Judge on the grounds inter alia, that the plaintiffs never pleaded that they had disclosed the information of the kidnapping incident to the defendants and that there was no confidential quality to information on kidnapping as sec. 13 of Criminal Procedure Code makes it mandatory for anyone possessing such information to report it to the police. The plaintiffs have filed an appeal to the Court of Appeal against the whole of this decision.)

POST-LISTING OBLIGATIONS (CONT...)

Continued from page 8

major associated company, any reorganisation of the group, any scheme of compromise arrangement or reconstruction, any deviation of 10% or more between the profit after tax and the profit forecast or projection or between the unaudited and audited accounts, any corporate proposal that fall within the ambit of Paragraph 19.20 and any material development in relation to such corporate proposals, including variations of terms, receipt of approvals and termination or completion of the proposals.

Your company may, in exceptional circumstances, temporarily withhold disclosing material information. Instances of such circumstances are where disclosure would prejudice your company's ability to pursue its corporate objectives or where facts are in a state of flux and a more appropriate moment for disclosure is imminent (Paragraph 9.05). In such a situation, you must ensure that the strictest confidentiality is maintained (Paragraph 9.06).

You also note that your company is obliged to enquire into and clarify, confirm or deny any rumour or report that contains material information relating to your company (Paragraphs 9.09 and 9.10). Similarly, "unusual market activity" such as unusual price movement, trading activity or both, warrant immediate investigations and if necessary, issue of an appropriate announcement unless such activity arises from material information that has been publicly disseminated (Paragraph 9.11).

Your car arrives at your office and you alight from it. You take a deep breath as you brace yourself to face these new challenges and responsibilities after the glam and hype of the IPO. You are confident that you will prevail so long as you remember at all times to act in the best interests of the listed company and its shareholders and to be transparent in its management. After all, weren't these the lessons that you propounded to your clients when you were a corporate lawyer aeons ago?

PHUA PAO YII (ppy@skrine.com)

Memorable Quotes

Men stumble over the truth from time to time, but most pick themselves up and hurry off as if nothing happened.

Sir Winston Churchill

How far you go in life depends on your being tender with the young, compassionate with the aged, sympathetic with the striving and tolerant of the weak and strong. Because someday in life you will have been all of these.

George Washington Carver

Taken from <http://www.wisdomquotes.com>

Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope.

*Robert F. Kennedy
(1925-1968, American Attorney General, Senator)*

A law is valuable not because it is law, but because there is right in it.

H.W. Beecher

Taken from <http://www.ggreen.com>

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