

LEGAL INSIGHTS

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JAPANESE WINE ... FROM CHINA WITH LOVE (AND CONFUSION)

In a case concerning two competing wines from Japan and China, the Court of Appeal acknowledged the existence of a passing off action and confirmed the ban on phonetic confusion.

In the ongoing Yomeishu trade mark saga, the Court of Appeal in mid 2004 affirmed the decision of the High Court and dismissed the appeal. In **Sinma Medical Products Sdn Bhd v Yomeishu Seizo Co Ltd & Ors** [2004] 4 MLJ 358, the defendant was held to have passed off and infringed the respondents' registered trade mark of three kanji characters in respect of a herbal medicinal wine.

The first respondent was the registered proprietor in Malaysia of the trade mark comprising three kanji characters, the romanised word "Yomeishu" (the Japanese phonetic equivalent of the kanji characters) and a logo for their medicinal wine imported into Malaysia since 1969. It was promoted amongst the Chinese community using pronunciation of the different Chinese dialect, e.g. "Yang Ming Jiu" (in Mandarin). The appellant imported medicinal wine from China and sold using a combination of three kanji characters with the prefix of two kanji characters that made up the word "Chinese". It was referred to as "Chinese Yang Ming Jiu" (in Mandarin) or "Chinese Yomeishu" (in Japanese). The appellant also registered its trade mark.

RECTIFICATION

The appellant raised three matters in their appeal: rectification, infringement and passing off. First, the appellant alleged that the trial judge had wrongly made the order of rectification of the Trade Mark Register to expunge the appellant's registration for CHINESE YANGMINGJIU as the Trade Marks Act 1976 did not confer purely phonetic or aural monopolies but this ground was rejected by the Court of Appeal.

The Court found that the respondents had established the fact that their customers in Malaysia referred to their product, not just as "Yomeishu" but also in Mandarin as "Yang Ming Jiu" and held that the appellant's registered trade mark CHINESE YANGMINGJIU when pronounced in Mandarin is likely to deceive or cause confusion because it sounds identical or similar to the respondents' three kanji characters when pronounced in Mandarin. The Trade Marks Act does not expressly limit the terms "likely to deceive" or "cause confusion" under sec. 14(1)(a) to exclude phonetic confusion; neither is visual similarity an essential precondition for rectification and infringement. The Court was of the view that similar trade marks used in different languages would be deceptive because "the ideas conveyed by the words are the same".

Therefore, the registered trade mark ought not to be in the Register and the rectification was rightfully ordered by the trial judge. The Court held that since the respondents had registered the three kanji characters, they were conferred a monopoly on the same, whichever Chinese dialect it may be pronounced in.

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YOMEISHU OR YANG MING JIU ANYONE?

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INFRINGEMENT

Secondly, the appellant alleged on appeal that there was no infringement as their use of the Chinese characters “Chinese Yang Ming Jiu” merely described the product as ‘Chinese life preserving wine’, since that was the English translation of the Chinese characters, and the characters were not used as a trade mark. The Court rejected this argument as it held that the prominence given to the Chinese characters on the appellant’s products proved a deliberate use of the three Chinese characters by the appellant as a trade mark. The Court also reiterated that the wine imported by the appellant from China into Singapore was actually called “New Lingzhi Chiew” and the appellant deliberately changed the name to “Chinese Yang Ming Jiu” both in Chinese characters and in romanised words.

PASSING OFF

Finally, the appellant alleged there was no passing off as there was no evidence of confusion of the products. However, it was held that a case in passing off could be established if the likelihood of deception is proved.

In overcoming the problem of showing confusion, the 3rd respondent had conducted a radio campaign in order to demonstrate the phonetic confusion between the appellant’s and the respondents’ products. The radio campaign was conducted over the Chinese radio networks and it was done in three Chinese dialects: Mandarin, Cantonese and Hokkien. 121 listeners, all Chinese, responded to the promotion and it was found that 8% of the listeners were actually confused.

The Court affirmed the trial judge’s decision that there was confusion arising from phonetic sounds and from the application of different languages and that the trial judge was correct in deciding there was passing off by the appellant. In any event, proving actual confusion was held to be not necessary in passing off cases and it was a question to be decided by the judge. The Court also applied the principle that in cases where the goods are the same or similar, damage could be readily inferred.

This case is significant in that it confirms that a registered trade mark can enjoy protection even when pronounced in different languages or dialects. A mark consisting of merely kanji, Chinese or even jawi characters can enjoy trade mark protection if the public has come to associate the phonetic pronunciation with the product or service for which the mark is used.

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MESSAGE FROM THE EDITOR-IN-CHIEF

HOPE, CHARITY AND RECOGNITION

It’s difficult to make sense of the recent catastrophes in Asia but they are causing alarm to many in this region. Just as we were coming to terms with our loss after the December 26 tsunami, a magnitude 8.7 earthquake struck near the Indonesian island of Sumatra in March. At least 320 people were killed and hundreds of homes were either damaged or destroyed on Nias, an island off the Sumatran coast. Similar scenes of panic were reported in other Pacific regions, where the nightmare of last year’s tsunami that left more than 300,000 dead or missing, remains fresh. Tremors from the quake, which some reported lasted two minutes, were felt in Indonesia, Malaysia, Singapore, and Thailand. Fate had yet again dealt a cruel and fatal blow on Asia. We can only HOPE and pray that we are spared from further natural disasters.

Whilst we should live in hope, we should not forget our part in CHARITY toward mankind. Since its formation in 1963 the firm has been making charitable donations to needy organisations in the Klang Valley. The caring and giving culture of the firm was inculcated by one of our founding Partners, Mr. John Skrine. When Mr. Skrine was alive, he had impressed upon the firm that if Providence is kind to us, then we must repay its kindness by helping the less fortunate. I am proud to say that the legacy left behind by Mr. Skrine has been carried on throughout the years. Just recently, the firm made a significant cash contribution to Hospis Malaysia, a palliative care centre, to aid in its purchase of two oxygen concentrators for its patients. I am glad the firm plays a meaningful role in caring for the underprivileged. It is important to never lose touch of our ability to act with kindness, mercy and compassion. This is just one of the ways the firm can help build a more humane society.

On a more cheerful note, perhaps with Providence continuing to smile on us, I would like to take the opportunity to mention here that five Partners from Skrine were accorded RECOGNITION and featured in the first edition of the *People at the Peak – The Who’s Who of Malaysia*. The book is a compilation of leading figures from the different strata of Malaysian society. Besides Wong Chong Wah, K. Anantham, Vinayak Pradhan and Janet Looi Lai Heng, I was also given the honour of being acknowledged as one of the top 25 Legal Eagles in Malaysia. (This is certainly a feel good moment for all five of us.) The firm is certainly pleased that five of its personalities made it to the Malaysian top 25 list. The selections were based on independent research conducted by the publishers and an independent advisory panel, in collaboration with, and with cooperation from professional and authoritative bodies in the country. The criteria for selection included being from the top 10 Malaysian law firms, as well as having had the experience of handling cases in the Appellate Courts.

Having said that, I hope you find this issue’s coverage insightful. The articles range in focus and content, and the writers have made an admirable attempt at making the articles as reader friendly as possible. I hope you are pleased with our efforts in this newsletter.

I wish to commend my excellent and dedicated editorial team for their efforts in progressively improving the content of our newsletter, and drawing in juicier articles from the writers. I would also like to thank those who have emailed or called us with feedback. You have indeed been very supportive. Should you have any queries or need assistance or clarification on the contents of this newsletter, please feel free to contact us at mas@skrine.com.



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SEX, LIES AND VIDEODISCS

Kok Chee Kheong and Nurliza Ramli discuss whether a videodisc is an “obscene object” under the Penal Code.

SEX

Copies of a video-compact disc containing sexual scenes between the accused, a former air steward, and various women were found on sale in Malaysia. The former air steward was charged under sec. 292(a) of the Penal Code (“PC”) with making a videodisc containing pornographic scenes with intention of distributing it to the public.

LIES

The accused claimed in his defence that the video tape from which the videodiscs were produced had been recorded for his personal remembrance and had fallen into the hands of other persons while he was shifting houses and that it was these persons who had produced and sold the videodiscs.

The Sessions Court Judge rejected the accused’s defence and said that “the whole story of the missing tape was an after-thought” (*The Star Newspaper*, 18th December 2004). The accused was convicted and sentenced to imprisonment for 18 months.

VIDEODISCS

Section 292(a) *inter alia* renders it an offence for a person to “sell, let to hire, distribute, publicly exhibit or in any manner put into circulation or for any the aforesaid purposes, produce or have in his possession, any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object.”

As the videodisc contained explicit scenes of sexual acts, it can be assumed that the trial judge was satisfied that its contents were obscene within the parameters laid down by Cockburn CJ in **Queen v Hicklin** (1868) 3 QB 360 and adopted by the Malaysian Courts in **Mohamed Ibrahim v Public Prosecutor** (1963) MLJ 289 –

“... the test of obscenity is ... whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character”.

Another essential element for an offence under sec. 292(a) is that the item or material that is “obscene” must be a “book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object”. As a videodisc cannot by any stretch of the imagination be regarded as a book, pamphlet, paper, drawing, painting, representation or figure, the trial judge must have adopted the view that it is to be regarded as “any other obscene object”. Is this view tenable in law?

PASSION RUNNETH OVER IN BOLLYWOOD

Prosecutions, successful or otherwise, have been conducted under the corresponding provision of the Indian Penal Code

for various offences relating to film media.

The subject matter of the prosecutions in **Raj Kapoor v Laxman** AIR 1980 SC 605, **Rosaiah B** 1991 Cri LJ 189 (AP) and **Bobby Art International v Om Pal Singh** AIR 1996 SC 1846, were films. **Jagdish Chavla** 1999 Cri LJ 2563 (Raj) involved the viewing of a videotape containing obscene material.

Although the above-mentioned cases proceeded on the basis that film and videotape fell within the purview of that section, it appears from Ratanlal & Dhirajlal’s Law of Crimes (25th Edition) that the Indian Courts have not been called upon specifically to consider the question whether a film, videotape or videodisc is an “obscene object” for the purposes of that provision.

EXOTIC ASEAN

In **Public Prosecutor v Tee Tean Siong** (1963) MLJ 201, nine persons caught viewing a “blue film” were convicted in the Magistrate’s Court for abetting the offence of exhibiting obscene material under sections 109 and 292(a) of the PC.

Hashim J. reversed the conviction of the Magistrate on grounds that in the absence of other evidence, mere attendance at a show where “blue films” are exhibited does not amount to abetment of the offence of exhibition under sec. 292(a).

In the course of his judgment, the learned Judge opined that it is inappropriate to charge a person having possession of “blue films” under sec. 292(a) but rather, under the Cinematograph Ordinance (replaced by the Film Censorship Act).

In **Lim Hock Thai v Public Prosecutor** [1981] 2 MLJ 212, the accused was caught in possession of two videotapes containing obscene material in Brunei. He was convicted for an offence under sec. 292(a) of the Penal Code of Brunei, which is substantially *in pari materia* with sec. 292(a) of the PC. The accused appealed.

Zimmern J., the appeal judge in the High Court, succinctly summed up the issue as follows - “*Can a videotape be an obscene object within the meaning of an obscene object in sec. 292(a).*” According to the learned judge, “*Under the section for an object to be obscene it has to be so to the sight or upon reading.*”

He rejected the Magistrate’s finding that the tape was obscene. In Zimmern J’s opinion “*What ... was obscene was not the tape but the picture on a television screen reproduced by means of inserting the tape onto a video tape recorder connected to a T.V. set.*”

The appeal judge, adopting Hashim J’s reasoning in **Public Prosecutor v Tee Tean Siong**, further held that “*If publication of “blue films” should not be charged under sec. 292(a) a fortiori neither should video tapes for a film at least can be seen against lighting but a video tape is opaque.*” Zimmern J. also rejected the Solicitor General’s contention that the mischief rule be applied to extend the scope of the provision.

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MORE ON THE FORBIDDEN FRUIT

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Zimmern J's reasoning would apply with equal force to videodiscs and other modern storage medium like DVDs, CD-ROMs, Compact Flash Cards, Secure Digital Cards, computer hard discs, pen drives and thumb drives. In such event, these storage medium cannot be regarded as obscene objects for the purposes of sec. 292(a).

THE SEQUEL

From the cases cited above, it appears that the Indian Courts have proceeded on the basis that films and videotapes fall within the scope of sec. 292(a) even though the issue does not appear to have been specifically determined in those Courts.

On the other hand, the Brunei High Court has categorically ruled that for an object to be "obscene" under sec. 292(a), it must be so to the sight or upon reading and that an object containing obscene material that requires an external device, such as a playback medium, to view its contents does not fall within the section.

The former air steward has filed an appeal against his conviction to the High Court. This presents an opportunity for the parties to present comprehensive arguments on this interesting issue and for the Malaysian Court to make a specific ruling on it. Following the trend of Hollywood box office hits, it may then be appropriate to produce a sequel to this article.

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Note: Our readers may wish to note that sec. 5 of the Film Censorship Act 2002 renders it an offence (amongst others) for a person to have in his possession, custody, control or ownership any film or publicity material which is obscene or against public decency. For the purposes of this legislation, "film" has been defined to include cinematograph film, videotape, diskette, laser disc, compact disc, hard disc and any other record of a sequence of visual images. This provision is wider in scope than sec. 292 of the PC where possession of obscene material is an offence only if it is for the purposes of sale, hire, distribution, public exhibition or circulation.

LEGISLATION UP-DATES

The following legislation came into force recently:-

ACT

- 1) Malaysian Maritime Enforcement Agency Act 2004 (Act 633)
c.i.f. 15 February 2005 [P.U.(B) 67/2005]

AMENDMENT ACTS

- 1) Trustees (Incorporation) (Amendment) Act 2004 (A1219)
c.i.f. 14 February 2005 [P.U.(B) 68/2005]
- 2) Pesticides (Amendment) Act 2004 (A1226)
c.i.f. 3 March 2005 [P.U. (B) 79/2005]
- 3) Constitution (Amendment) Act 2005 [A1239]
c.i.f. 21 March 2005, other than paragraph 5(a) [P.U.(B) 97/2005]
- 4) Federal Agricultural Marketing Authority (Amendment) Act 2004 [A1235]
c.i.f. 31 March 2005 [P.U.(B) 108/2005]
- 5) Communications and Multimedia (Amendment) Act 2004 [A1220]
c.i.f. 1 April 2005 [P.U.(B) 112/2005]
- 6) Weights and Measures (Amendment) Act 2002 [A1180]
c.i.f. 4 April 2005 [P.U.(B) 113/2005]
- 7) Hire-Purchase (Amendment) Act 2004 (A1234)
c.i.f. 15 April 2005 [P.U.(B) 119/2005]

P.U.(A)

- 1) Poisons List (Amendment) Order 2005 [P.U. (A) 42/2005]
c.i.f. 4 February 2005
- 2) Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2005 [P.U. (A) 67/2005]
Deemed to have come into operation on 1 January 2004
- 3) Dental (Amendment of Second Schedule) Order 2005 [P.U.(A) 85/2005]
c.i.f. 4 March 2005
- 4) Anti-Money Laundering (Amendment of First Schedule) Order 2005 [P.U. (A) 111/2005]
c.i.f. 31 March 2005
- 5) Anti-Money Laundering (Amendment of Second Schedule) Order 2005 [P.U. (A) 112/2005]
c.i.f. 31 March 2005
- 6) Anti-Money Laundering (Invocation of Part IV) Order 2005 [P.U. (A) 113/2005]
c.i.f. 31 March 2005

DRAFTING CONSTRUCTION CONTRACTS

“A stitch in time saves nine” - Kamraj Nayagam and N. Pathmavathy on the importance of thoughtful drafting in construction contracts.

A construction or building contract can be loosely defined as an agreement for the construction, repair, renovation or restoration of building or engineering works. It ought to specify what work has to be done by the contractor, where the work is to be done, when this work must be completed, to what standard the work should be done, how the contract is to be administered and how much is to be paid to the contractor by the employer.

The many types of construction contracts include traditional building contracts, engineering contracts, design and build contracts, fee based contracts and build operate and transfer contracts. Although each contract will obviously be unique, broad conceptual types of contract may be identified, and even a contract created specifically to meet the individual requirements of a given situation will inevitably have points of similarity to other contracts.

... any awareness of the workings of construction contracts must of necessity be founded upon a thematic understanding of the various procurement strategies and the underlying forces which drive them.

Nevertheless, such is the complexity of the typical construction contract in the modern age, that any awareness of the workings of construction contracts must of necessity be founded upon a thematic understanding of the various procurement strategies and the underlying forces which drive them.

In general, familiarity with the available standard forms of construction contract, and of the types of construction contract, will enable the prudent Employer to at least ensure that it will achieve the appropriate contractual framework for the physical execution of its desires.

STANDARD FORM CONTRACTS

Standard Form construction contracts provide a basic legal framework identifying the rights, obligations and duties of the parties, establish the ambit of the powers and duties of the contract administrator as well as put in place the administrative procedures necessary for operation of the contract.

The standard form contracts commonly used in Malaysia include the PAM98 form issued under the sanction of the Pertubuhan Arkitek Malaysia, JKR or PWD forms issued by the Public Works Department of Malaysia, CIDB Standard Form of Contract for Building Works issued by the Construction Industry Development Board, IEM forms issued by the Institute of Engineers of Malaysia, FIDIC forms issued by the Federation Internationale des Ingenieurs-Conseils and the ICE forms issued by the Federation of Civil Engineering Contractors.

One of the advantages of most standard forms is that most construction professionals are familiar with their operation, limitations and drawbacks. Such familiarity leads to administrative and cost efficiency. As there is a body of judicial pronouncements accumulated over the years on standard forms, there is some certainty in meaning. Accordingly, there are appreciable savings in time and costs when standard forms are used compared to the costs of drawing up fresh contracts.

The disadvantages include the following. The forms are arrived at by a process of compromise between different parties to those entering the contract, often reflecting other concerns than those of the parties. The judicial pronouncements which have accumulated are often contrary to the previous understanding of those in the industry, which is why it is sometimes best to have a new form of words. In a Malaysian context, the forms used are often from overseas, and may not reflect peculiarities of local law. The dense wording of the standard forms makes them very difficult to amend effectively. Hasty amendments often have unintended and unforeseen consequences, whilst properly considered amendments often involve large amounts of effort.

The creation of any construction contract requires a balancing act between conflicting imperatives. This process starts at the conceptualisation stage, and requires the prospective Employer to be aware of its wishes and intentions before even considering the identity of the Contractor.

Standard Form construction contracts provide a basic legal framework identifying the rights, obligations and duties of the parties, establish the ambit of the powers and duties of the contract administrator ...

The prospective Employer, desirous of maintaining control and certainty, is torn between the shackles of precedent and the pro-active crafting of solutions appropriate to his precise situation. The latter course may amount to no more than the re-invention of the wheel, with all the attendant inefficiency and expense. Hence the attraction of the standard form contract, as outlined above. However, such a contract is unlikely to reflect in full the intentions and concerns of the parties, leading to the temptation to amend the same. Such modification, whether by way of addition, deletion, or revision is not to be undertaken lightly. Arbitrary revisions can create serious problems, as discussed above. As a rule of thumb, revisions to standard form contracts should be kept to a minimum and only implemented after a thorough review.

In conclusion, there is no simple solution to the creation of the perfect construction contract, and this is not to be wondered at, for, as has been observed, major construction projects are the most complex sphere of human endeavour short of warfare. In such a scenario, it is only prudent that those about to embark on such an endeavour should give a commensurate amount of consideration to the preparation of the document which will govern the course of that endeavour.

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FORFEITED DEPOSIT OR LIQUIDATED DAMAGES?

Johor Coastal Development Sdn. Bhd. v. Constrajaya Sdn. Bhd. [2005] 2 AMR 90

This case concerned three legal questions:

- i. whether a deposit needs to be described as such;
- ii. whether a party forfeiting sums other than a deposit is required to prove loss under sec.75 of the Contracts Act 1950 (“the Act”); and
- iii. whether it is possible to contract out of that section.

The Court of Appeal answered the first question in the negative, the second in the affirmative, and declined to consider the third, and possibly most interesting, of the questions.

The facts of the case follow. The Appellant and the Respondent entered into two similar agreements whereby the Respondent was to purchase land from the Appellant as well as construct buildings on the land in accordance with the plans that had been prepared and provided for by the Appellant. The agreements were terminated after the Respondent had made an initial payment of 12% and subsequent payments amounting to approximately 50% of the purchase price under the agreements.

The parties had provided for the possibility of an early termination of the agreements.

Clause 8.2 of the Agreement set out the consequences of the termination of the agreement, stating that in such an event, the Appellant would be entitled to forfeit absolutely all instalments that had been paid previously by the Respondent, including what was termed the First Payment, unless the termination occurred within four months from the date of the Agreement, in which case the Appellant can only forfeit an amount equal to 10 % of the purchase price. In the event of a termination occurring within four months from the date of the Agreement, the Appellant would have to return to the Respondent all instalments previously paid including the First Payment after deducting the amount forfeited.

Clause 16.2 states that the sums stipulated in the Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and that both parties waived any possible objections to the effect that the sums were otherwise than fair and reasonable compensation.

The First Payment was provided for in the Agreement as the sum of RM918,000 – which works out to 12% of the purchase price. By the time the agreements were terminated, the Respondent had made the First Payment and subsequent payments totalling up to 50% of the purchase price, which the Appellant forfeited as the termination was not within four months from the date of the agreements.

The Respondent sought by action in the High Court to recover all the money it had paid to the Appellant and succeeded – the Appellant then appealed to the Court of Appeal.

... whether or not a
deposit is labelled as such
is immaterial ...

In deciding whether the Appellant was entitled to forfeit the money, the Court of Appeal decided that it had to deal with two issues, firstly, whether the 12% First Payment was a true deposit and secondly, whether the Appellant was entitled to keep the entirety of the sums already paid without proof of actual damage.

In relation to the first issue the Court of Appeal noted that the First Payment is not described in the Agreement as a deposit, and went on to quote Hashim Yeop Sani SCJ’s dicta in the case of **Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd** [1987] 2 MLJ 711 to the effect that a deposit is not merely a part payment but is also an earnest money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract. The Court of Appeal also explains why in the circumstances of the case, the sum of 12% of the Purchase Price was not an unusual or extortionate deposit - given the fact that the agreements were not mere sale and purchase transactions of land. As such, when the agreements were construed as a whole, the 12% was a true deposit and was not to be treated as a penalty, and as such was forfeitable. Accordingly, the Appellant succeeded in this part of its appeal.

In relation to the second issue the Court of Appeal referred to the Privy Council

decisions of **Linggi Plantations Ltd v Jegatheesan** [1972] 1 MLJ 89 and **Bhai Panna Sing v Bhai Arjun Singh** AIR 1929 PC 179 and reaffirmed the principle that only a true deposit may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage of the vendor and that any further sum paid towards the balance of the purchase price can only be forfeited upon proof of actual damage. As there was no such proof, the Appellant was not entitled to these monies.

The Court of Appeal then went on to consider the argument of counsel for the appellant that the appellant was entitled to retain the whole of the forfeited sum without proof of damage because of clause 16.2 of the agreement. Counsel for the appellant argued that both parties, by virtue of clause 16.2 of the Agreement, had contracted out of sec.75 of the Act, which essentially prevents a person from recovering *simpliciter* a sum stated as damages in a contract. The Court of Appeal found that the argument by the counsel of the appellant could not succeed because such a submission would entail giving clauses 16.2 and 8.2(b) of the Agreement contradictory meanings, and instead adopted an interpretation of the Agreement which gave effect to both clauses. The Court of Appeal went on to hold that any contradiction between clauses 16.2 and 8.2(b) of the Agreement would have to be read *contra proferentum*, and hence resolved in favour of the Respondent. The Court of Appeal therefore did not feel it necessary to address the issue of whether parties to an agreement can contract out of sec. 75 of the Act.

What has become clear from this case and would be of interest of lawyers drafting future agreements is that whether or not a deposit is labelled as such is immaterial: if on a proper construction of the contract, a sum of money was intended to secure the future performance of the contract, and if the amount is not unusual or extortionate, then the payee would be able to forfeit it in the event of default of such performance by the payer. However, a party seeking to retain other sums already paid to it when a contract is terminated falls within the ambit of sec.75 of the Act and must prove that it has suffered loss.

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FEAR NO MORE?

Have the recent amendments to the Foreign Exchange Administration Rules abolished exchange control barriers in Malaysia? Streisand Beh discusses ...

The foreign exchange administration rules were tightened in 1998 to regulate capital flow and promote financial and economic stability in Malaysia during the Asian financial crisis of 1997.

The rules have since been amended several times by Bank Negara Malaysia (“BNM”) to accommodate the changing economic environment. The latest amendments came into effect on 1 April 2005 with the objective of reducing business costs, improving efficiency of the regulatory delivery system, promoting better risk management options and developing the domestic foreign exchange market. These amendments are discussed below.

Residents without domestic credit facilities ... may now invest any amount abroad in foreign currency.

INVESTMENT ABROAD

Residents without domestic credit facilities (“DCF”) may now invest any amount abroad in foreign currency. Such investments may be funded from the foreign currency funds or conversion of ringgit funds.

A ‘resident’ includes a Malaysian citizen (other than one who is a permanent resident of another jurisdiction and resides abroad), a non-citizen who is a permanent resident of and resides permanently in Malaysia and a body corporate or unincorporate, registered or incorporated or approved by any authority in Malaysia.

DCF’s include any advance, loan, trade financing, hire purchase, factoring, leasing facilities, redeemable preference shares or similar facility, other than:

- trade credit terms extended by a supplier for all types of goods and service
- forward exchange contracts entered into with authorised dealers
- one personal housing loan and one vehicle loan obtained from residents
- credit card and charge card facilities

Resident corporations that have DCFs and have a minimum shareholder’s fund of

RM100,000 and have been operating for at least 1 year, are free to use their foreign currency funds or convert ringgit up to RM10 million, on a group basis, per calendar year for investment in foreign currency assets.

Resident individuals who have DCFs may use their foreign currency funds or convert ringgit up to RM100,000 per calendar year for overseas investments.

Before these changes came into effect, a resident must obtain permission from the Controller of Foreign Exchange (“Controller”) for investments abroad in excess of RM10,000 irrespective whether he has any DCFs.

Resident unit trust management companies may invest abroad up to 30% of the Net Asset Value (“NAV”) of all resident funds, an increase from the previous limit of 10%. Similarly, the maximum amount which resident insurance companies and takaful operators may invest abroad has been increased from 10% to 30% of the NAV of the investment-linked funds marketed by them.

Prior to 1 April 2005, fund/asset managers were only permitted to invest abroad 10% of the funds of resident clients, regardless whether the latter have DCFs. This limit is now removed in respect of resident clients without DCFs and has been increased to 30% for those that have DCFs.

FOREIGN CURRENCY ACCOUNT (“FCA”)

Residents are now permitted to establish FCA with onshore or offshore banks for any purpose, other than retention of export proceeds, without the approval of the Controller. Previously residents were permitted to maintain FCAs only for specific purposes, such as to receive export earnings, facilitate education or employment abroad.

With effect from 1 April 2005, residents without DCFs may convert any amount of their ringgit funds for credit into their FCAs. Resident corporations with DCFs may convert up to RM10 million, on a group basis, per calendar year for credit into their FCAs while resident individuals with DCFs may

convert up to RM100,000 per calendar year for credit into any FCA.

Resident corporations may obtain up to RM50 million credit facilities in foreign currency on a group basis.

The overnight limits previously imposed on FCAs have been abolished except in relation to FCAs maintained for education and employment purposes by residents with DCFs. An overnight limit of USD150,000 has been imposed for FCAs maintained with local banks and licensed offshore banks and USD50,000 for FCAs with overseas banks for the aforesaid purposes. However, the requirement for all export proceeds to be repatriated to Malaysia remains.

FOREIGN CURRENCY CREDIT FACILITIES TO RESIDENTS

The previous limit of RM5 million for foreign currency borrowings by residents has been amended. Resident individuals may now borrow up to RM10 million in foreign currency for any purpose.

Resident corporations may obtain up to RM50 million credit facilities in foreign currency on a group basis. Up to RM10 million equivalent may be used to finance investments abroad.

RINGGIT CREDIT FACILITIES TO NON-RESIDENT CONTROLLED COMPANIES (“NRCC”)

Prior to 1 April 2005, NRCCs were only permitted to borrow from residents up to an aggregate limit of RM50 million per corporate group or on a single entity basis. Residents were required to obtain permission from the Controller to extend ringgit credit facilities exceeding RM50 million in aggregate to an NRCC. An NRCC that borrows in excess of RM50 million is required to comply with a 3:1 gearing ratio between its domestic debt and eligible capital funds. These restrictions have now been removed.

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In the previous edition of Legal Insights, Eow Khean Fatt provided an introduction into biotechnology and the overview of the current legal framework in Malaysia as well as a brief introduction into various international

Patent law provides the main legal framework governing biotechnology. Under the Malaysian Patents Act 1983 (“the Act”), a patent can only be granted if the invention is new, involves an inventive step and is industrially applicable. An invention is also defined under the Act to mean an idea of an inventor which permits in practice the solution to a specific problem in the field of technology. An invention may be or may relate to a product or process.

The Act provides that plant or animal *varieties* or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes are not patentable.

It is crucial to note that the Act does not specifically prohibit the patenting of animals and plants *per se*.

Therefore, in respect of life-forms, essentially, an inventor must prove that he has modified a plant, microbe or animal so that it is different from its natural state and that the modifications are useful. However, as will be seen below, the issue is really not that straightforward. The crucial factor is the issue of morality. Section 31 of the Act excludes inventions if the commercial exploitation of these inventions is contrary to morality or public policy.

There are presently no Malaysian precedents on the patenting of animals and plants. Summarised below is a series of cases mainly in the European context which serve to illustrate the position that has been taken on this issue.

ANIMAL PATENTS

The *Oncomouse* or *Harvard mouse* is a laboratory mouse genetically modified to carry a specific gene (an activated oncogene) which significantly increases its susceptibility to cancer.

Patent applications on the *Oncomouse* were filed back in the mid-1980s in numerous countries including Europe via the European Patent Office (EPO). Article 53(b) of the European Patent Convention (EPC) provides that patents shall not be granted for “*plant or animal varieties or essentially biological processes for the production of plants or animals.*” The said Article goes on to state, “*this provision does not apply to microbiological processes or the products thereof.*”

The EPC also requires that patents shall not be granted on inventions whose exploitation would be contrary to morality or public policy.

The EPO’s Board of Appeal upheld the patent and held that while “*animal varieties*” were excluded from patentability by the EPC, “*animals*” were not. In arriving at its decision, the EPO had to perform a balancing test of the following factors on the issue of morality and public order:

- (i) the possible suffering to animals (here it was the animal’s susceptibility to cancer);
- (ii) the potential and unforeseeable risks to the environment of genetically manipulated animals;

- (iii) the usefulness of the invention to mankind.

As the EPO was of the view that the invention opened the way to needing fewer animals for experimentation, and the invention could be practiced in a way that avoided widespread dissemination of genes, it was concluded that the advantage of providing a tool for use in the fight against cancer outweighed the possible negative factors. Thus the invention was patentable but in an amended form.

HUMAN GENE PATENT

The morality issue was also raised in connection with the patentability of genes in the case of **Howard Florey Research/Relaxin** (1995). In this case the EPO had granted a patent in respect of a human gene DNA fragment which had a particular amino acid sequence. The patent was opposed by the Green Party of the European Parliament on the ground that what was claimed was a discovery rather than an invention and that the grant of a patent for a human gene offends morality or *ordre public*.

The EPO found that the invention was novel since evidence showed that prior to the invention the existence of the form of relaxin specified in the claim was unknown, and as EPO guidelines permit novelty to be recognized for a natural substance which has been isolated for the first time if it had no previously recognized existence.

The attack on the invention on morality rested on three arguments:

- (i) that in order to put the invention into practice one had to take tissue from a pregnant woman and this constituted “*an offence against human dignity*”;
- (ii) the patenting of human genes “*amounts to a form of modern slavery since it involves the dismemberment of women and their piecemeal sale to commercial enterprises*”; and
- (iii) the patenting of human genes is inherently immoral.

On the first ground, the EPO concluded that, as long as the subject from whom human tissue was taken consented to the taking of that tissue, there was nothing immoral in the mere act of taking the tissue since this is a standard practice in medical procedures.

In response to the “*slavery*” argument, the EPO said that there is fundamental misunderstanding of the effects of a patent by the opponents. Since patents relating to human genes do not confer on their proprietors any rights whatsoever to individual human beings no question of slavery arose. On the final argument that the patenting of human genes was immoral since it was tantamount to patenting life, the EPO held that was that all that was being claimed was a particular chemical substance and that –

“*the patenting of a single human gene has nothing to do with the patenting of human life. Even if every gene in the human genome were cloned (and possibly patented) it would be impossible to reconstitute a human being from the sum of its genes.*”

In an apparent counter attack, the EPO raised the fact that since the opponents did not object to the patenting and exploitation of

JUNGLE APPLY?

current issues surrounding this area. In Part II of the article, we hope to provide the reader with an rulings that continue to shape the law governing biotechnology.

other human substances for medical purposes, there could be “*no moral distinction*” between “*the patenting of genes on the one hand and of other human substances on the other*”. This is especially in view of the fact that it is only through gene cloning that many important human proteins have become available in sufficient amounts for medical application.

Finally, the EPO noted that exceptions to the grant of patents for inventions because they were “*immoral*” should only occur “*in those very limited cases in which there appears to be an overwhelming consensus that the exploitation or publication of an invention would be immoral*”. The EPO found that in the present case there was no such overwhelming consensus and the grant of the patent should be upheld.

MORALITY

It is unclear in the Malaysian context what inventions would fall foul under this provision. In the UK and European context, inventions which have been declared as non-patentable (arguably on grounds of morality) include processes for the cloning of human beings, processes for modifying the germ line genetic identity of human beings, the use of human embryos for industrial or commercial purposes, and processes for modifying the genetic identity of animals that are likely to cause them suffering without any substantial medical benefit to man or animal.

PLANT PATENTS

It should be noted that patents could be granted for plants and it is only plant varieties which are excluded from patentability under the EPC and Malaysian Patent law. In taxonomy terms, at the highest level, “*plants*” are grouped into families. Families in turn are divided into genus, and genus are then divided into species. “*Plant*” by itself refers to genera or species whereas a “*plant variety*” generally refers to hybrids and genetic strains within the same species. With this understanding, we can attempt to deal with the issues relating to plant patents.

In the **Ciba Geigy** (1984) case, which involved patent claims for a seed treated with herbicide resistant chemicals, the EPO adopted the definition of “*plant variety*” found in the International Union for the Protection of New Varieties of Plants (“UPOV”) Convention: “*Plant varieties are cultivated varieties, clones, strains and hybrids which can be grown in such a way that they are clearly distinguishable from other varieties, sufficiently homogenous and stable in their essential characteristics.*”

The EPO held that this definition applied to entire plants and propagating materials such as seeds and that chemically treated seeds did not create new plant varieties.

Subsequently, the EPO found in the case of **Lubrizol** (1990) that traditional plant breeding techniques which resulted in plants and seeds did not fall within the definition of “*plant variety*”. The case illustrates that whether or not a (non-microbiological) process is to be considered as “*essentially biological*” has to be judged on the basis of the essence of the invention taking into account the amount of human intervention and its impact on the result achieved. It was held that the claimed process was not “*essentially biological*” because it involved multiplying parent plants by cloning before repeated crossing of the cloned parent lines on a large scale to provide the desired resulting hybrid population. Therefore the EPO allowed the product-by-process claims to the plants and seeds.

In light of these earlier decisions, it was assumed that transgenic plants would also be granted patent protection under the EPC in the Plant Genetic Systems case. However, that was not the case. A transgenic crop plant contains a gene or genes which have been artificially inserted instead of the plant acquiring them through pollination. The inserted gene sequence (known as the transgene) may come from another unrelated plant, or from a completely different species. Plants containing transgenes are often called genetically modified or GM crops.

The attack on the invention on morality rested on ... the patenting of human genes “amounts to a form of modern slavery since it involves the dismemberment of woman and their piecemeal sale to commercial enterprises”...

PLANT GENETICS SYSTEMS (1995)

The Plant Genetic Systems (“PGS”) case involved a patent for a transgenic plant which was herbicide-resistant. The environmental group Greenpeace objected to the grant on the ground that the claimed material constituted an unpatentable plant variety excluded by Article 53(b) of the EPC which essentially disallowed patents for plant varieties. PGS argued that their patent covered plants generically and was not confined to a single variety.

The EPO’s main reason for disallowing the invention was that the procedure could be used to create new ‘varieties’ of plants and that plant varieties were excluded from patentability by the EPC.

NOVARTIS (2000) CASE

A similar reason was used by the EPO to reject an application by the Swiss company Novartis to patent a process for creating transgenic plants containing pathogen-resistant genes, an application which included the plants produced by this process. In the subsequent appeal, the EPO ruled that the exclusion of plant varieties should be interpreted in a narrow sense. It argued that the exclusion of plant varieties from patent protection had a specific function: to allow breeders to continue applying their own procedures for plant variety protection, as defined by the International Union for the Protection of New Varieties of Plants. The EPO considered that the wording of the patent convention, approved in the early 1970s, had been drawn up deliberately to ensure that plants could be protected either through patents or through traditional plant breeders’ rights. It therefore concluded that there had been no intention to exclude plants (or animals) from patent protection as such.

This was a landmark decision for the whole seeds and GM food industry as it lifted the embargo on plant patents. Expectedly, the decision has been criticised by Greenpeace, which campaigns against the patenting of life forms as presumptuous and reprehensible.

Based on the Plants Genetics System and Novartis case, it can be concluded that claims to transgenic plants are acceptable *unless* expressed in plant variety terms or the invention is confined to modifying a particular plant variety.

FINALLY WE'RE OUT OF THE WILDERNESS OF BIOTECHNOLOGY... OR ARE WE?

Continued from previous page

PLANT VARIETIES ACT

On a much less controversial note, as provided under the Act, plant varieties are not patentable. Plant varieties, however, will be protected under the Plant Varieties Act which is not in force yet at the time of writing this article.

The system under the Plant Varieties Act differs substantially from the patent system in that to gain protection, a plant variety must be new, distinct, uniform and stable whereas under the Patent regime, an invention is patentable if it is new, involves an inventive step and is industrially applicable.

Plant variety rights are confined to individual varieties whereas Patents may claim plant genera or species only.

Malaysian plant breeders, being in a country rich in biodiversity should be in a position to take advantage of the Plant Varieties Act as the first step towards maximising their biotechnology potential.

CONCLUSION

Biotechnology in Malaysia is still very much in its infancy. To date, Malaysian courts have not been faced with any issues relating to this area and it remains to be seen how the patent examiners and judges will construe issues such as morality in respect of life-form inventions.

With the increasing significance of biotechnology and the moral expectations from society, ethical and moral debates are bound to arise.

Patent applicant should consider the jurisdictional differences in the interpretations applied by the various patent offices around the world especially European, UK, Australia and US courts, and to frame their patent claims accordingly.

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MORE ON THE FOREIGN EXCHANGE ADMINISTRATION RULES

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HEDGING

Residents are now permitted to enter into forward foreign exchange contracts with licensed onshore banks with regard to foreign currency exposure from permitted overseas investments, committed capital account payments including loan repayments due within 24 months and committed or anticipatory current account transactions, including payments or receipts for export or import of goods or services based on value of such payments or receipts for the preceding 12 months.

Non-residents may enter into similar hedging arrangements with licensed onshore banks in relation to committed flow of funds arising from repatriation of investment proceeds from Malaysia and purchase of ringgit assets in Malaysia.

ACTIVITIES BY APPROVED OPERATIONAL HEADQUARTERS ("OHQ")

In line with the aforementioned liberalisation, an OHQ may now retain any amount of export earnings in FCAs maintained with onshore banks and obtain any amount of ringgit credit facilities from domestic sources. An OHQ may finance its overseas investment

activities, including extension of credit facilities to non-residents, by converting up to RM10 million into foreign currency per calendar year if they have DCFs.

REGISTRATION OF TRANSACTIONS

To facilitate the compilation of statistics on the inflow and outflow of funds, certain transactions are required to be registered with BNM. They are the remittance of funds exceeding RM50,000 equivalent from Malaysia for investment abroad, procurement of foreign currency credit facilities exceeding RM1 million and proposals by residents to enter into forward foreign exchange contracts to hedge current account transactions on anticipatory basis and all transactions under financial account transactions exceeding the equivalent of USD10 million.

CONCLUSION

Although exchange control barriers have not been abolished by the recent amendments to the foreign exchange administration rules, the significant liberalisation of these rules are clear signals to the international community that Malaysia is well on the road to recovery from the last Asian financial crisis. These measures will enhance the country's competitiveness for foreign investment.

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HOOKING UP IN MALAYSIA

Jeannette Tan Lii Shyan gives an insight into the rapidly developing area of communications and multimedia law.

Can you imagine what life would be like if Alexander Graham Bell had never invented the telephone? Without a doubt, the telephone has revolutionised the way in which people communicate and stay connected with others across the globe.

Since then there have been significant technological advances in the development of communications devices, and now at the consumer level, cellular mobile phones, PDAs, blackberries and other such modern technological conveniences proliferate. Indeed it is the increasing consumer demand for bandwidth and innovation that has in some way or another sparked the convergence of previously vertical industries of telecommunications, broadcasting and information technology.

From the perspective of the consumer or user of services and products, 'hooking up' may simply mean subscribing for a fixed-line, and making a telephone call, subscribing for mobile phone services or purchasing prepaid phone cards. However for the provider of such services and products, there are several regulatory requirements that have to be complied with before they can hook up users to their services and products. This article seeks to provide the reader with a brief overview of the regulatory framework governing the communications and multimedia industry in Malaysia.

... principles underlying the CMA ...
 promoting and protecting the interests of consumers...
 ensuring fairness ... promoting self-regulation...
 encouraging the merging of markets,
 competition and innovation ...

COMMUNICATIONS AND MULTIMEDIA ACT 1998

The Communications and Multimedia Act 1998 ("CMA"), which came into force on 1 April 1999, was primarily introduced to address convergence by seeking to establish a regime of industry self-regulation supported by certain regulatory safeguards. Among the numerous basic principles underlying the CMA, the most important are (a) promoting and protecting the interests of consumers; (b) ensuring fairness to all market participants through greater transparency and clarity; (c) promoting self-regulation through industry recommended codes and standards; (d) greater emphasis on process rather than content; and, (e) encouraging the merging of markets, competition and innovation in the industry.

The Malaysian Communications and Multimedia Commission ("MCMC") is the regulatory body that was set up in November 1998 for the purposes of implementing and enforcing the provisions of the CMA, overseeing the regulation of the communications and multimedia industries and their activities in Malaysia, and generally promoting the Government's national policy for the development of such industries. The MCMC functions largely as an independent

body, but is guided by the policy direction of the Ministry of Energy, Communications and Multimedia. The CMA regulates industry players from four broad all encompassing aspects – economic, technical, social and consumer.

ECONOMIC REGULATION

Economic regulation broadly covers licensing, the regulation of competition practices and regulation of interconnection and access among service providers.

Licensing - Under the CMA, the licensing regulations for the communications and multimedia industries have been reformulated to provide prospective service providers with a more comprehensive, efficient and technology neutral licensing regime. The CMA's licensing regime serves to enable licensees to undertake and provide activities that are more market specific and facilitate more effective utilisation of the local network infrastructure.

There are four broad categories of licensable activities under the CMA, namely: (i) Network Facilities Providers ("NFP"), who are the providers of facilities and physical infrastructure such as fixed links and cables, satellite hubs and earth stations; (ii) Network Services Providers ("NSP"), who provide bandwidth and basic connectivity to support various applications, including among others cellular mobile services; (iii) Applications Service Providers ("ASP"), who provide applications and functions to end-users such as IP telephony, public payphone services and internet access services; and (iv) Contents Applications Service Providers ("CASP"), a subset of ASPs who provide broadcasting related services such as satellite broadcasting, subscription broadcasting and terrestrial radio broadcasting.

Each of these four categories of licences is further sub-divided into either an individual or class licence, resulting in a total of 8 different licences. Each category requires a separate licence and entities that intend to provide any one or more of the facilities or services will require the appropriate licence(s). Generally, individual licences are granted for activities, which are more significant in nature and that require greater regulatory control, whereas class licences are granted for activities, which have a more limited or niche purpose and that require lesser regulatory control. The licensing criteria and conditions for individual licences are therefore more stringent if compared to those for class licences.

Competition practices - The CMA promotes competition and innovation within the converging industries, whilst also ensuring that consumers are offered choice, quality and affordability. Generally, the CMA prohibits any conduct or activity by a licensee which has the purpose or effect of substantially lessening market competition. Anti-competitive practices such as rate-fixing, collusion, boycotting of other market players and mandatory tying or linking arrangements in relation to the provision or supply of products, are not allowed.

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HOPPING ON TO THE REITS BANDWAGON

In this article Sharon Barbosa discusses the main changes in the repackaging of property Investment Trusts in Malaysia.

Although recently a hot topic due to the issue by the Securities Commission (“SC”) of the Guidelines on Real Estate Investment Trusts (“REITs Guidelines”) to replace the previous Property Trust Guidelines, real estate investment trusts (REITs) or property trust funds are not a new concept in Malaysia. In fact, Malaysia was the first country in Asia to issue guidelines on property trust funds back in early 1989 while for example, legislation allowing for the establishment of Singapore-based REITs (S-REITs) and Japanese-based REITs (J-REITs) were passed only a decade later in 1999 and in 2000 respectively.

A REIT is defined in the REITs Guidelines as an investment vehicle that invests or proposes to invest at least 50% of its total assets in real estate, whether through direct ownership or through a single-purpose company whose principal assets comprise real estate. Like other unit trusts, investors may purchase units in a REIT and receive dividends as a return for investment in the REIT.

There are currently 15 listed J-REITs and five listed S-REITs with the market capitalisation of USD13 billion as of August 2004 and USD4.85 billion as of March 2005 respectively. In comparison, only four property trusts were formed in Malaysia since 1989 (one of which was delisted in 2002) with a total market capitalisation of USD63 million as at May 2004. So why has Malaysia lagged behind? And what efforts are being taken to get Malaysia on the REITs bandwagon?

The main stumbling blocks to the development of the Malaysian REIT sector were unfavourable tax treatment of Malaysian property trusts, restrictive guidelines governing property trusts and the lack of investor interest as the properties owned by the existing Malaysian trusts were considered undesirable assets and unattractive to institutional investors with the yield being lower than government bonds.

However, the government has recently taken initiatives to promote REITs and this is reflected in the both the 2004 and 2005 Budgets which cumulatively outlined the following tax incentives: -

- (a) exemption from real property gains tax arising from the disposal of any property to a REIT;
- (b) exemption from stamp duty payable on instruments of transfer of real property to a REIT;
- (c) adoption of tax transparency rules where: -
 - (i) income distributed by the REIT is exempted from tax;
 - (ii) investors will be taxed on income distributed by the REIT at their respective tax rates;
 - (iii) non-resident investors will be taxed through a withholding tax of 28%;
 - (iv) undistributed income will be taxed at the REIT level at 28% and when distributed, will be eligible for tax credit in the hands of unit holders.

These initiatives, coupled with the REITs Guidelines issued on 3 Jan 2005, have created a favourable environment for the establishment of REITs. The welcomed REITs Guidelines are a result of the industry’s comments and views submitted in response to two consultation papers issued by the SC in 1999 and 2002.

The main changes brought about by the REITs Guidelines are as follows:-

- (a) the increase of the borrowing limits for a REIT from 30% of the net asset value of the fund to 35% of the total asset value of the fund;
- (b) the requirement for a minimum remaining tenure of 60 years in respect to leasehold property no longer applies provided the lease is registered and any requisite State Authority consent for the transfer obtained before the prospectus is registered;
- (c) real estate acquired by the REIT must still be free from encumbrances at the time of acquisition but a new proviso recognises charges entered by financial institutions, trustees and the management company in relation to the loan facilities extended;
- (d) public offerings of REITs no longer need to be fully underwritten and may be arranged on a minimum level of subscription basis;
- (e) liberalisation on the eligibility requirements for the management companies that manage REITs in particular, the management company no longer needs to be a Malaysian incorporated public company, the increase in the maximum permitted foreign equity from 30% to 49% on an effective basis, the calculation of the bumiputra requirement of at least 30% on an effective basis and there no longer being any requirement for the holding company to have a minimum shareholders funds of RM5 million (for a fund size of RM100 million or less) and RM10 million (for a fund size above RM100 million); and
- (f) the SC has moved from an assessment approach to a declaratory approach where the onus is on applicants to ensure compliance.

WHAT IS HOPED FROM THE DEVELOPMENT OF REITS IN MALAYSIA?

Aside from the obvious enhancement to the economic contribution from the country’s property sector and further portfolio diversification for an investor, it is hoped that REITs, as prospective “purchasers” of properties, will also serve to address the property overhang situation in Malaysia. For example, the Property Market Status Report released by the Valuation and Property Services Department shows a property overhang of shop units of RM666.33 million for the second quarter of 2004.

For property owners, REITs offer a means to realise their capital investment, to redeploy it to other business opportunities and to

trust to Real Estate

hold their investments in a more liquid form.

Unit holders, especially those who were previously unable or reluctant to invest directly in real estate, will get a chance to invest in a professionally managed portfolio of investment-grade real estate properties and receive stable annual yields in the form of dividends.

FURTHER MEASURES WHICH OUGHT TO BE ADOPTED TO ENHANCE REITS IN MALAYSIA

Whether intentional or not, the exemptions in relation to stamp duty and real estate property tax highlighted earlier do not cover transfers and disposals of properties by REITs nor does the stamp duty exemption cover the disposal of shares in a real property company to a REIT. Another glaring omission is that the stamp duty and real estate property tax exemptions do not appear to apply to transfers of real property to the single purpose company held by the REIT to invest in real estate. It is hoped that the regulators will consider and address these issues.

Also, like Singapore, Malaysia may wish to encourage investors to invest in REITs by exempting unit-holders from paying personal income tax on dividends from REITs.

Notwithstanding the above, since the introduction of the REITs Guidelines a number of companies have expressed interest in setting up REITs, notably YTL Corp Berhad, which owns a vast array of properties including the Starhill and Lot 10 shopping centres and the J.W. Marriott Hotel, and Sunway City Berhad, which owns the Sunway Pyramid Shopping Mall and other major properties. The Axis Group, which owns Menara Axis, Axis Business Park and other properties, has obtained the approval of the SC for the listing of the Axis-REIT on the Bursa Malaysia main board. The Axis-REIT is set to be the first Malaysian REIT to be listed since the introduction of the REITs Guidelines.

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A MOVE TOWARDS GREATER SELF-REGULATION

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the MCMC or a registered certifying agency such as SIRIM Berhad, and equally, persons who undertake or conduct activities in a designated skill area (for example, radio operators and electrical safety technicians) must be certified for proficiency in such designated skill area.

CONSUMER & SOCIAL REGULATION

Consumer protection under the CMA covers quality standards, consumer grievances, rate regulation and availability of network/application services throughout Malaysia.

On the social front the MCMC's chief responsibility, as set out in the National Policy Objectives under the CMA, is to "grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity". To achieve this objective, the MCMC monitors and regulates the activities of ASPs and CASPs to ensure compliance with the industry's content standards and codes. Pursuant to the CMA, any content that is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person is prohibited.

A POSITIVE STEP FORWARD

In furtherance of the objective of promoting a self-regulatory regime within the industry, the MCMC has designated and appointed a number of industry forums (including consumer, content, technical standards and access forums) to formulate and implement voluntary industry codes. The MCMC regularly publishes guidelines, discussion papers, codes and other regulatory updates to ensure that service providers (existing and prospective) and consumers alike are kept informed of changes and developments to the legal and policy framework. The enactment of the CMA, establishment of the MCMC and the overall move towards greater self-regulation is certainly a positive step in this rapidly developing industry.

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Interconnection and access - The MCMC has also determined an Access List, which specifies the type of facilities and services that are subject to the access obligations provided under the CMA. The purpose of such an access regime is to ensure that access to facilities and services can be reasonably obtained by NFPs, NSPs and ASPs where necessary.

TECHNICAL REGULATION

Apart from economic regulation, the CMA also establishes certain technical regulations to facilitate the technical interoperability of networks, to optimise and promote the efficient allocation and management of resources within the country, and to ensure the security, safety and integrity of network and applications services. Technical regulation broadly covers spectrum assignments, the regulation of numbering and electronic addressing and the establishment of technical standards.

Spectrum Assignment - There are three types of assignments, namely spectrum assignment, apparatus assignment and class assignment. Such assignments are intended to improve spectrum management in order to ensure that the needs of spectrum users will be met and the benefit derived by the general public from the use of spectrum can be maximised.

Numbering and Electronic Addressing - In line with the objective of efficient resource allocation, the MCMC is charged with the responsibility of developing, managing and administering the national numbering and electronic addressing plans for network and applications services.

Technical Standards - The CMA requires all communications products and equipment (for example, satellite dishes, phone chargers, adaptors, cabling and other accessories) to be in compliance with the technical standards, as prescribed under the Communications and Multimedia (Technical Standards) Regulations 2000 ("Technical Regulations"). Pursuant to the Technical Regulations, communications products and equipment generally require compliance approval certification either from

THE WALLS OF JERICHO

C.K. Kok examines the recent developments in the Malaysian Financial Services Sector.

INTRODUCTION

The ancient city of Jericho was renowned for its heavy fortification which made it virtually impregnable to invasions. Similarly the Malaysian financial services sector has historically been protected against *laissez-faire* competition by stringent licensing and equity requirements.

This article examines the impact of the announcements made by the Prime Minister of Malaysia, Datuk Seri Ahmad Abdullah Badawi, on 22 March 2005 and the follow-up announcements made by Bank Negara Malaysia (“BNM”) and the Securities Commission (“SC”) on 23 and 25 March 2005 respectively on the financial services sector in Malaysia.

THE STOCKBROKING INDUSTRY

Foreign Brokers

The Honourable Prime Minister announced that stockbroking licences will be issued to 5 foreign broking houses, namely JP Morgan, Credit Suisse First Boston, Macquarie, UBS and CSLA Asia Ltd. This liberalisation of foreign equity participation is in line with one of the initiatives under the Capital Market Masterplan.

Local Brokers

The following measures were announced in relation to local broking houses:-

(i) Universal Brokers

A Universal Broker (“UB”) that fulfils specified criteria will be permitted to access the inter-bank market, for its funding requirements, subject to prudential limits and regulations to be imposed by BNM.

This measure will enable an eligible UB to reduce its cost of borrowings and enable it to compete on a level playing field with investment banks that carry on stockbroking business.

ii) Non-Universal Brokers

A Non-Universal Broker (“Non-UB”) that has merged with one other stockbroking company will be permitted to undertake these activities:-

1. Offer a full range of corporate finance services, including submitting corporate proposals to the SC on behalf of their clients if such Non-UB has shareholders funds of at least RM100 million and suitably qualified personnel to undertake these activities;
2. Carry on futures broking activities within the stockbroking entity subject to its obtaining a futures broker’s licence under the Futures Industry Act, 1993 or merging with its existing futures broking subsidiary;
3. Act as sub-underwriter or placement agent in relation to private debt securities.

The extension of permitted activities for qualified Non-UBs will increase competition in the provision of corporate advisory services.

The existing restriction that limits a Non-UB’s operations to four branches and/or electronic access facilities or a combination of both will cease to apply as from 2006 to a Non-UB that fulfills the merger criterion. A qualified Non-UB will thereafter have an unrestricted right to establish branches.

The benefits offered to Non-UBs may lead to further consolidation of the stockbroking industry. The extension of permitted activities for qualified Non-UBs will increase competition in the provision of corporate advisory services.

THE BANKING SECTOR

Investment Banks

The framework for the creation of investment banks (“IB”) to rationalise the activities of merchant banks, stockbroking companies and discount houses within the same group has been finalised by BNM and is expected to be ready for implementation in the second half of 2005. Its broad parameters are:-

1. Scope of Activities

An IB will retain all activities based on the licences held by the group companies prior to the rationalisation. IBs will continue to accept wholesale deposits, conduct lending activities, discount house business and provide a wide range of fee-based activities including financial / corporate advisory services, underwriting, portfolio management and equity brokerage services.

2. Regulatory and Supervisory Framework

Each IB will hold two licences, one issued under the Banking & Financial Institutions Act and the other under the Securities Industry Act. The IBs will be co-regulated by BNM and the SC.

3. Minimum Capital Requirement

An IB that is not part of a banking group must have a minimum capital fund of RM500 million while an IB that is part of a banking group must have a minimum capital fund of RM2 billion on a group basis.

4. Increase in Foreign Equity

The foreign equity participation limit for IBs is increased to 49%.

Each IB will hold two licences ... The IBs will be co-regulated by BNM and the SC.

To minimise cost of rationalisation, the Malaysian Government will grant stamp duty and real property gains tax exemptions for all mergers to create IBs.

The creation of IBs is a fulfilment of Recommendation 3.10 of BNM’s Financial Sector Masterplan. The increase in the limit of foreign participation in IBs offers interesting investment prospects if a single foreign investor is permitted to hold the entire or a significant part of the 49%.

The consolidation of investment banking activities under a single legal entity in the form of an IB offers the prospects of increased efficiencies and lower costs, which

DOES AN UNBORN CHILD HAVE A LEGAL PERSONALITY?

Chin Yoke Teng & Anor [2005] 1 CLJ 819

may ultimately benefit the consumer of such services. However, in the light of the Barings experience where the activities of a single trader caused the demise of a venerable English institution, the need to implement an adequate risk management system within the merged entity cannot be overemphasized.

Rural Branches for Foreign Banks

Foreign-controlled commercial banks will be permitted to establish branches in the rural

The foreign equity participation limit for IBs is increased to 49%.

areas based on an urban-rural branch network formula to be announced by BNM later this year.

CONCLUSIONS

Although the full details of the legislative amendments and guidelines necessary to implement the above measures have yet to be announced, there is no doubt that these measures will result in the further consolidation of the financial services sector.

Existing participants in the affected sub-sectors must also prepare themselves for the challenges that lie ahead as the Walls of Jericho which had once protected them from the onslaught of competition come tumbling down.

KOK CHEE KHEONG (kck@skrine.com)

In the recent case of **Chin Yoke Teng & Anor** [2005] 1 CJL 819, the High Court was asked to consider whether an unborn child has a legal personality to sue.

The action was instituted by the 1st Plaintiff (“P1”), a spinster, against the Defendant for the tort of breach of promise to marry. P1 claimed that the Defendant had after several months of courtship, made a promise to marry her. Based on that promise, she agreed to cohabit with him. Out of this intimate relationship, she conceived the 2nd Plaintiff (“P2”), who was a 30 week-old unborn child at the time of the action. It was contended that P2 has a legal personality and is a “person under disability” under Order 76 rule 3(2) of the Rules of the High Court, 1980 who can sue through P1, its ‘next friend’ in law.

The Defendant admitted that he cohabited with P1 and that he is the father of P2. However, he denied having made any promise to marry P1.

P2’s application for summary judgment was dismissed by the Deputy Registrar. Thereafter, P2 filed an appeal to the Judge in Chambers. At the very outset, the Judge expressed his doubt as to P2’s cause of action, since the alleged breach of promise to marry only concerned P1. However, His Lordship proceeded to deliver an interesting dicta on whether P2 as an unborn child has any legal personality to sue.

PERSON UNDER DISABILITY

Under Order 76 rule 1, a ‘person under disability’ means as ‘a person who is an infant or a patient’. According to the Interpretation Acts 1948 and 1967, an ‘infant’ has the same meaning as a ‘minor’, who is ‘a person who has not attained the age of majority prescribed by the law applicable to him’. A ‘person’ on the other hand, is stated to include ‘a body of persons, corporate or incorporated’.

The Judge considered that when the constitution and the laws speak of a ‘person’ (other than artificial persons e.g. companies and statutory authorities), they mean an existing natural person, an existing human being and not a yet to be born child being or a human foetus in conception. It follows

that an ‘infant’ who is a ‘person under disability’ under Order 76 rule 3(2) must necessarily refer to a child that has been born.

To support his findings, the Judge referred to several cases from other Commonwealth jurisdictions. One of them is the Canadian case of **Dehler v Ottawa Civic Hospital et al** [1979] 25 OR (2d) 748 wherein the Ontario High Court held that :-

“While there can be no doubt that the law has long recognized foetal life and has accorded the foetus various rights, those rights have always been held contingent upon a legal personality being acquired by the foetus upon its subsequent birth alive and until then, a foetus is not recognized as included within the legal concept of “persons”. It is only persons recognized by law who are the subject of legal rights and duties. “Persons are the subjects of rights and duties: ... A person is such, not because he is human, but because rights and duties are attributes. An individual human being, considered as having such attributes is what lawyers call a natural person: Pollock, First Book of Jurisprudence, p. 110...”

In short, the law has set child birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child en ventre sa mere sees the light of day it does not have the rights of those already born.”

In conclusion, the Judge ruled that although an unborn child has life and enjoys certain rights under the laws and is protected by the Penal Code from harm, it has no right to sue. The appeal was thus dismissed with costs.

PRACTICAL IMPLICATIONS

This case is note-worthy as it is the first reported case in Malaysia which discusses about the right of an unborn child or human foetus to institute a legal action. It lays down the following principles :-

- a) an unborn child or human foetus is not a ‘person under disability’ who can sue by a next friend under Order 76 rule 2(3);
- b) the right to sue is contingent upon a legal personality being acquired by the unborn child or human foetus upon its subsequent birth alive.

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