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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

We have now entered into the second quarter of 2011 and the time has come for the publication of our first issue for the year. Our readers will note that we have taken the bold step to give our newsletter a fresh and updated look and in full colour print.

While the look of our newsletter may have changed, we shall nevertheless continue to strive to provide our readers with informative and interesting articles as we have done in the previous issues of our newsletter.

I personally take the opportunity to thank Mr Alex Chan of People 'n Rich-H Sdn Bhd, the father of our Senior Associate Ms Chan Su-Li, who was instrumental in helping us with the new format for LEGAL INSIGHTS.

I would also like to thank our contributors and the members of our Newsletter Editorial Committee for taking the time to put together this issue of our Newsletter despite their busy work schedules.

The year began with another dynamic venture i.e. SKRINE's new Website which was launched on 25 March, 2011. Our website has been redesigned to assist our clients and members of the public who wish to know more about our practice. It is now more user-friendly and provides the users with more information on our lawyers and their practice areas. A selection of articles from the previous issues of LEGAL INSIGHTS is accessible under the Publications tab. We invite our readers to visit our website at **www.skrine.com.**

Our hearts still remember the disastrous earthquake and the devastating tsunami in Northern Japan which caused loss of numerous lives as well as untold damage to one of the most developed nations in the Far East. We extend our sincere condolences and deepest sympathy to our friends, readers and clients from Japan. Our thoughts and prayers are with the people of Japan during these difficult and trying times.

Thank you,

LEE TATT BOON
Editor in Chief
& Senior Partner

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ANNOUNCEMENTS

We are pleased to announce that Audrey Choo Pao Lin, Liang Cheng Jean, Lam Wai Loon and Vijay Raj a/l Balasupramaniam have been admitted as Partners of the Firm as from 1 January 2011. We extend our heartiest congratulation to each of them.

Audrey is primarily responsible for the business development initiatives of our Firm. She is a graduate of the University of Nottingham and was called to the Bar of England and Wales (Lincolns Inn).

Jean is a member of our Corporate Division. She is a graduate of the University of Melbourne. Her main practice areas are mergers and acquisitions, cross-border transactions and foreign investment.

Vijay is a member of our Dispute Resolution Division. He is a graduate of the University of London. His practice areas include commercial, company, insolvency, tort, land and administrative law.

Wai Loon is with our Dispute Resolution Division. His main practice areas are construction and engineering litigation and arbitration. He graduated from the University of London and has served as the Honorary Secretary of the Society of Construction Law (Kuala Lumpur & Selangor) since 2006.

We also extend our heartiest congratulations to Vinayak Pradhan, a Partner of SKRINE, on his appointment as a Commissioner, one among 7, of the Enforcement Agency Integrity Commission (EAIC). The EAIC is a body corporate created by the Act of the same name to deal with complaints of misconduct from the public against any enforcement officer or enforcement agency and to investigate and conduct hearings on such complaints.

LEGAL UPDATE

The Consumer Protection (Amendment) Act 2010 which was featured in the article "MORE PROTECTION FOR CONSUMERS" in LEGAL INSIGHTS Issue 4/2010, has come into force on 1 February 2011 (Ref. P.U.(B) 48/2011).

CLIENTS' FEEDBACK

In an effort to enhance the quality of our legal service for our valued clients, we have created an email address namely: executivecommittee@skrine.com for our clients to provide feedback on matters undertaken by our lawyers. Clients are encouraged to use it to help our lawyers assist you better.

THE SOCIAL NETWORK

After enjoying the movie, Joanna

There is a high probability that by the time you set your eyes on this article, you may have just updated your status on Facebook, twitted about the nasty traffic jam on the road this morning, posted photos of your latest holiday trip on Flickr, drooled over your friend's food pictures on Instagram or checked into the office where you are now seated via Foursquare.

Welcome to the world of social media.

Social media sites ("SMS") like Facebook are a big thing in Malaysia. *Socialbakers.com* reported that as of 7 April 2011, there are 10,011,720 Facebook users in Malaysia alone, which is equivalent to 38.27% of the entire population. Youths between the ages of 18 and 24 form the majority of Malaysian users – 38% – while the youngest group, aged between 13 and 15, make up 7% of its users.

A survey by TNS found that Malaysians spent the most number of hours per week on such sites i.e. 9 hours per week and have the most number of friends on social networking websites like Facebook, with an average of 233 friends each.

> **"Social media is the use of web-based and mobile technologies to turn communication into interactive dialogue"**

Facebook is not the only medium of social media. Wikipedia defines social media as "media for social interaction, using highly accessible and social communication techniques. Social media is the use of web-based and mobile technologies to turn communication into interactive dialogue". This would inevitably include not only Facebook, but Twitter, YouTube, MySpace and Foursquare among others.

Your question now may be, so what has this got to do with me and my Facebook account?

A whole lot if you have an incessant need to openly vent out your frustration about work (i.e. your bosses – which is a huge no-no!), make disparaging comments about someone's looks, status or photo or shudders, post sexually explicit photos of your significant other – after the end of a relationship.

STICKS AND STONES MAY BREAK MY BONES, BUT WORDS WILL NEVER HURT ME

In reality however, words may hurt more than your pride, it may even hurt your wallet.

Comments, photos, videos or articles which are posted on SMS such as Facebook have far-reaching consequences particularly if

... AND THE LAW

Loy explains the law

JOANNA LOY

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you happen to have many friends on your list who are able to easily highlight the content by liking it (which is noticeable from their Facebook profile) and in turn, forwarding it to their friends.

If one is not careful, one may find himself subject to a defamation suit.

In November 2010, Zalina Jaafar filed a defamation suit against a Petaling Jaya City Council member, Mahharul Ismail, and three of his family members, Maisarah, Norsyam and Wan Ikhwan. She claimed that Maisarah and Norsyam had, with malicious intent, posted defamatory words against her, in their postings on Wan Ikhwan's Facebook profile, and thereby caused serious damage to her character and reputation. Amongst others, she is seeking damages of RM10 million as well as an injunction to restrain the defendants from further using defamatory words against her.

> **"The Australian court in 2008 has held that service of legal documents may be done by way of Facebook"**

As recent as last month, a British politician agreed to pay damages for an inaccurate comment he made about a rival on his Twitter account. It is reported that this was the first defamation case in the United Kingdom involving a comment made on Twitter.

The Law on Defamation

Defamation laws seek to protect individuals and corporations who are maligned by false allegations and apply equally to online media as they do to traditional media. Recourse can be found under both civil and criminal laws under the Defamation Act and the Penal Code respectively.

One difficulty with SMS is establishing the identity of the perpetrator. Even if the perpetrator can be found i.e. a Facebook friend, he may argue that the person is not him.

In order to establish a cause of action in defamation, a plaintiff must demonstrate the following elements:

(1) The statement bears defamatory imputations.

This essentially means that the statement, albeit false, malicious or misleading, must be one which is calculated to injure a person's reputation in society and to diminish the willingness of others to associate with him. It is not necessary to show that the defendant intended the words to have a defamatory meaning or that he intended them to be defamatory of the plaintiff (*Rajagopal v Rajan* [1972] 1 MLJ 45).

Defamation can arise from written or spoken words and other forms of expression such as gestures, signs, cartoons and caricatures (*Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu* [1977] 1 MLJ 56).

Thus, any written or spoken words, drawings, videos, photographs or other forms of expression captured on Facebook or YouTube may be defamatory if the elements of defamation are made out.

(2) The statement refers to the plaintiff.

The plaintiff must prove that the defamatory remarks were published of and concern him. It is not necessary for the plaintiff to be identified by name. The defendant will be liable so long as the statement, through some extrinsic facts known to some readers, enable those who know the plaintiff to understand that he was being referred to.

(3) Publication must be made to a third person.

Publication means the defamatory matter was made known to some person other than the person of whom it is written or spoken.

A discourse on criminal defamation falls outside the scope of this article. Suffice to say that one could lodge a police report which may eventually lead to a prosecution, and possibly, conviction of the perpetrator.

Liability of Facilitator

In *Stemlife Bhd v Bristol Myers Squibb (M) Sdn Bhd* [2010] 3 CLJ 251, the plaintiff filed a libel claim against the defendants based on numerous messages, including a hyperlink to an external blog created and posted by the users of the 1st defendant's website forum.

The trial judge, Zabariah Mohd Yusof J, ruled that in order for there to be publication:

(1) there must be some positive overt act on the part of the defendant in disseminating the alleged defamatory remarks or statements; and

(2) the defendant must have control on the circulation of the statements or words complained of.

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THE TAKE-OVER CODE 2010

Kok Chee Kheong highlights the significant changes under the new Take-Over Code

INTRODUCTION

The long awaited new take-over code, the Malaysian Code on Take-Overs and Mergers 2010 ("2010 Code"), came into force on 15 December 2010, replacing the Malaysian Code on Take-Overs and Mergers 1998 ("1998 Code").

The Practice Notes on the 2010 Code and the Guidelines on Contents of Applications relating to Take-Overs and Mergers were issued by the Securities Commission of Malaysia ("SC") at the same time pursuant to Section 377 of the Capital Markets and Services Act 2007 ("CMSA") to replace the practice notes for the 1998 Code and the Guidelines on Offer Documentation and the Format and Contents of Applications respectively.

This article discusses the salient changes introduced under the 2010 Code.

EXTENDED APPLICATION

The 1998 Code applied only to a company which is incorporated under the Companies Act 1965.

The 2010 Code extends the definition of a "*company*" in Section 216(1) of the CMSA to include a real estate investment trust and a foreign incorporated company, where such trust or foreign company is listed on a stock exchange in Malaysia.

In the case of a real estate investment trust, all references in the 2010 Code to the board of directors of the offeree shall refer to the board of directors of the trustee.

MANDATORY OFFER

Both the 1998 Code and the 2010 Code impose an obligation on an acquirer who acquires control of a company to make a mandatory offer to acquire the remaining shares or voting rights in a company.

The 2010 Code makes it clear that this obligation arises irrespective of how the control or acquisition is effected, including by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction.

UNUSUAL MARKET ACTIVITY

To prevent the creation of a false market in an offeree's shares, the 2010 Code requires a potential offeror to announce whether there is a take-over or possible take-over offer where there is untoward movement or increase in the traded volume of shares of an offeree.

If a potential offeror announces that he does not intend to make a take-over offer or that there is no possible take-over offer by him, the potential offeror and all persons acting in concert with him will be prohibited from acquiring voting shares or voting rights in the offeree that will give rise to an obligation to make a mandatory offer under the 2010 Code for a period of 6 months from the date of his announcement.

During the 6-months period, the potential offeror and all persons acting in concert with him will also be prohibited from procuring an irrevocable commitment to acquire shares of the offeree which will in aggregate carry more than 33% of the voting shares or voting rights of the offeree.

The efficacy of these new provisions remains to be seen.

HIGHER THRESHOLD FOR VOLUNTARY OFFERS

Both the 1998 Code and the 2010 Code require a voluntary offer to be conditional upon the offeror receiving acceptances that would result in him holding in aggregate more than 50% of the voting shares or voting rights of the offeree.

The 2010 Code expressly allows the SC to permit a voluntary offer to be conditional upon a higher level of acceptances if the offeror is able to satisfy the SC that he is acting in good faith in imposing such higher level of acceptances.

> **"The 2010 Code extends the definition of a "company" … to include a (listed) real estate investment trust and a (listed) foreign incorporated company"**

This new provision may enable an offeror to make a voluntary offer which is conditional upon the offeror receiving acceptances of 90% of the voting shares or voting rights which are the subject of the offer. If the 90% acceptance level is achieved, the offeror will be entitled to invoke the compulsory acquisition provisions in Section 222 of the CMSA to acquire the voting shares or voting rights of the offerees who have not accepted the offer, thereby resulting in the offeror and the persons acting in concert with him holding all the voting shares or voting rights in the offeree.

Although the SC had on several occasions allowed a voluntary offer under the 1998 Code to be made conditional upon a minimum acceptance level that exceeded 50%, the 2010 Code has removed any doubt that it is possible to adopt this approach.

REPRESENTATION ON OFFEREE BOARD

The 2010 Code permits the offeror and persons acting in concert with him to appoint directors to the board of directors of the offeree if 2 conditions are fulfilled. Firstly, the offeror and persons acting in concert with him must hold more than 50% of the voting shares or voting rights in the offeree before the offer document

KOK CHEE KHEONG

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is dispatched and secondly, the offeror must have obtained the consent of the SC for such appointment.

The 1998 Code did not permit the offeror and persons acting in concert with him to appoint directors to the offeree's board before the despatch of the offer document. Although the SC had in certain instances waived this prohibition under the 1998 Code, the clarification of the legal position under the 2010 Code is welcomed.

PERSONS ACTING IN CONCERT

The 2010 Code also introduces 2 new categories of "*persons acting in concert*", namely –

(1) a company and its directors and shareholders where an agreement, arrangement or understanding exists between the company or its directors and its shareholders which restricts the director or shareholder from offering or accepting a take-over offer for the voting shares or voting rights of the company; and

(2) a person who is a partner of a partnership, that is, where 2 or more persons have a business arrangement and common interest in several companies between them.

SETTLEMENT OF CONSIDERATION

The 2010 Code reduces the settlement period for acceptances received pursuant to a take-over offer from 21 days to 10 days for offers that involve only a cash consideration and to 14 days where the consideration comprises securities or a combination of cash and securities.

VOTING RIGHTS

The 2010 Code prohibits an offeror and persons acting in concert with him from exercising the voting rights attached to the shares received through acceptances of the take-over offer before the consideration is settled in full.

> **"The 2010 Code expressly allows the SC to permit a voluntary offer to be conditional upon a higher level of acceptances"**

On the other hand, the 1998 Code prohibits an acquirer in a mandatory offer from exercising the voting rights attached to the voting shares acquired by him before the offer document is dispatched to the offeree's shareholders.

PARTIAL OFFERS

In a partial offer, both the 2010 Code and the 1998 Code provide that –

(1) the offeror shall accept all acceptances from all offeree shareholders who wish to accept the take-over offer up to the percentage of voting shares or voting rights proposed to be acquired by the offeror; and

(2) where the offeror receives acceptances totalling more than the percentage of voting shares or voting rights offered to be acquired under the offer, the offeror shall accept the voting shares or voting rights in the same proportion from each offeree shareholder to enable the offeror to obtain that percentage of voting shares or voting rights which he has offered to acquire.

The 1998 Code further required an offeror to offer to acquire the same percentage of voting shares from the offeree shareholders. This provision is inconsistent with the afore-mentioned provisions and has been omitted from 2010 Code.

INDEPENDENT ADVISER

The requirement under the 1998 Code for the SC's approval for the appointment of an independent adviser for the offeree is dispensed with under the 2010 Code.

TAKE-OVER VIA ASSETS AND LIABILITIES ROUTE

In recent years, the purchase of the assets and liabilities of a company has become a common method of effecting an indirect take-over of a listed company as the disposal of assets and liabilities only requires the approval of a simple majority of members of the vendor in general meeting.

The 2010 Code does not regulate this method of taking over a company. On 28 January 2011, Bursa Malaysia Securities Berhad amended the Main Market Listing Requirements and the ACE Market Listing Requirements to regulate the "*major disposal*" of assets by a listed company. These amendments are discussed in "*Plugging the "Asset Disposal" Loophole*" in this issue of LEGAL INSIGHTS.

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LEGAL PROFESSIONAL PRIVILEGE

Sharon Chong explains this evidential principle

It is often taken for granted that communications with a professional advisor are confidential, and this is generally the case. However, this assumption conflicts with another common concept, which is that internal correspondences must be disclosed and is subject to inspection in the course of litigation. This article will examine the extent to which communications with legal advisors are privileged from such disclosure.

WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

Legal professional privilege may for practical purposes be divided into advice privilege and litigation privilege. If a communication or document qualifies for legal professional privilege, the privilege is absolute. It belongs to the client and can only be waived by the client. It can be overridden by statute, but it is otherwise absolute. The two categories are of course not mutually exclusive and may overlap.

OBJECT OF LEGAL PROFESSIONAL PRIVILEGE

The object of legal professional privilege is to encourage candour between a client and his lawyer. It is in the public interest that not just that exchanges between a client and his lawyer should be immune from compulsory disclosure but also that any rule so protecting them should be absolute in its term. This is because the client must be sure that what he tells his lawyer in confidence will never be revealed without his consent, otherwise he might hold back half the truth.

> **"Legal professional privilege may … be divided into advice privilege and litigation privilege"**

CHARACTERISTICS OF LEGAL PROFESSIONAL PRIVILEGE

Privilege is absolute and it remains so until waived by the privilege holder. Some of the characteristics of privilege are[1]:

1. The privilege remains after the occasion for it has passed, unless waived -"*once privileged, always privileged*"[2].
2. The privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence.
3. The refusal of the client to waive privilege for any or no reason cannot be questioned or investigated by the court.
4. Save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute.

STATUTORY DUTY OF NON-DISCLOSURE

In Malaysia, these principles are codified in Section 126 of the Evidence Act 1950, which provides that no advocate shall at any time be permitted to disclose any communication made to him by or on behalf of his client for the purpose of his employment unless the client gives his express consent. It also extends to any advice given by him to his client. The Federal Court has recently held that reference may be made to English decisions in applying this provision.[3]

IDENTIFYING THE CLIENT

In the case of an individual, it is straightforward as to whom the client is. However, where the privilege holder is a corporation and as an artificial entity has to function through its human agencies, it is less clear who is entitled to see and have custody of the legal advice rendered by the lawyer. In a corporate context, those who have such "privilege" include but are not limited to the following:

1. A shareholder of the company, except where the shareholder is engaged in hostile litigation with the company.[4]
2. A director of the company who is involved in the management of the company.[5]
3. Financial controller of the company.[6]
4. External auditors of the company who are required by law to oversee the management of the finances of the company. Note that this is limited to circumstances where the legal advice specifically deals with allegations of mismanagement within the company. It is for this purpose that all companies are required by law to employ external auditors who have to submit their independent report annually to the shareholders.
5. Employees who are authorised to act on behalf of the company.[7]

ADVICE PRIVILEGE

Advice privilege arises out of a relationship of confidence between lawyer and client and gives the person entitled to the right to decline to disclose, or to allow to be disclosed, the confidential communication or document in question.

What constitutes legal advice depends on the nature of the advice and the context in which it is given, not on the motive of the client in asking for it. There must be a "*relevant legal context*" in order for the advice to attract legal professional privilege. The privilege does not extend to all solicitor and client communications, but only to those involving legal advice. Taylor LJ in *Balabel v Air India* [1988] Ch 317 said that "*for the purposes of attracting legal advice privilege, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the* ***relevant legal context***".

The House of Lords in the "Three Rivers District"[8] case suggested that in cases of doubt, the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or public law. If it does not, then legal advice privilege would not apply. If it does so relate, then the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege. The test is whether the occasion on which the communication takes place and the purpose for which it takes place is such as to make it reasonable

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to expect the privilege to apply. This test is an objective one.

LITIGATION PRIVILEGE

Litigation privilege applies to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation. Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that in legal proceedings, each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.[9]

In order for litigation privilege to apply, (1) litigation must be in progress or in contemplation, (2) the communications must have been made for the sole or dominant purpose of conducting that litigation, and (3) the litigation must be adversarial, not investigative or inquisitorial.[10]

> **"There must be a "relevant legal context" … for the advice to attract … privilege"**

ADVICE PRIVILEGE VS LITIGATION PRIVILEGE

There are 3 main differences between advice privilege and litigation privilege.

Firstly, the rationale of the two types of privilege is different. Advice privilege is aimed at promoting candour on the part of the client and to protect confidential communications between lawyers and clients. Litigation privilege is concerned with protecting information and materials collected and created for the dominant purpose of litigation.

Secondly, legal advice privilege applies only to lawyer-client communication whereas litigation privilege can extend to communications with a third party and to any document brought into existence for the dominant purpose of being used in litigation.

Thirdly, the protection of legal advice privilege arises from the nature of the lawyer-client relationship and is precisely the same whether litigation is contemplated or not. However, for one to rely on the protection of litigation privilege, the communication must be made for the dominant purpose of litigation.

WAIVER AND EXPRESS CONSENT

Section 126 of the Evidence Act 1950 uses strong language in that no advocate "*shall at any time be permitted*" to disclose such communication "*unless with its client's express consent*". Section 126 permits only one exception when privilege no longer applies, i.e. upon the *express consent* of the client given and directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate. The term "*express consent*" requires an intentional and deliberate act to waive the legal privilege by the privilege holder.[11]

DISCLOSURE TO 'THIRD PARTIES'

A document cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party. A document which is privileged can be recovered if it is in the hands of an opposite party.[12] Even if the document has wrongly been released to the opposite side in discovery proceedings or otherwise, it may be injuncted from use.[13]

COMMUNICATIONS BETWEEN CLIENT AND IN-HOUSE COUNSEL

Section 129 of the Evidence Act 1950 provides that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

The common law dictates that privilege applies to communications between client and paid legal adviser who is not a barrister or solicitor, i.e. in-house counsel.[14] The English Court of Appeal held that "*they are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences...*".

The European Court of Justice had recently in the case of *Azko Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2007] held that legal professional privilege does not extend to written communications between in-house counsel and their clients. The court's main rationale was that the employment relationship of in-house counsel rendered them incapable of providing independent legal advice.

In any event, whether as advocate and solicitor, or corporate counsel, the crucial point is that such communications with the client must be in the capacity of legal advisers, not in any other capacity.

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UNWINDING A WINDING-UP?

A commentary on Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd by Lee Shih

LEE SHIH

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The law allows the Court to exercise its discretion to set aside a Court Order under specific circumstances, for instance, where an Order has been granted in the absence of one party, or where there has been a contravention of a substantial provision of law.

In the case of a winding up Order, the authorities strongly suggest that a Court has no jurisdiction to set aside a winding up Order. Instead, an applicant must apply for a stay of such an Order under the Companies Act 1965 ("the Act"). However, it can be argued that the Court still has some limited jurisdiction to set aside a winding up Order where the Order can be shown to be null and void due to illegality or lack of jurisdiction.

All these principles will be analysed in light of the Court of Appeal decision in *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651 ("*Megah Teknik*"). This decision was affirmed by the Federal Court (unreported judgment dated 13 October 2010 in Federal Court Civil Application No. 02(i)-29-2009).

BRIEF FACTS AT THE HIGH COURT

The Court of Appeal decision arose from a decision of the Kuala Lumpur High Court dismissing an application to set aside a winding up Order.

The petitioning company ("the Petitioner") had presented a winding up Petition against the respondent company ("the Company"). The Company failed to enter an appearance and failed to file an affidavit to oppose the Petition. The Court then made a winding up Order against the Company.

> **"The upshot of Megah Teknik is that … one can only apply to stay a winding up Order"**

Almost a year later, the Company filed an application to set aside the winding up Order on the ground that the winding up Order was made in default as the Company had no knowledge of the winding up proceedings. The Company claimed that it only became aware of the winding up Order when one of its directors had been blacklisted.

In the unreported grounds of judgment (*Miracle Resources Sdn Bhd v Megah Teknik (M) Sdn Bhd* [2008] 1 LNS 362), the High Court held that it was bound by the Court of Appeal decision in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 ("*Vijayalakshmi*"). This decision held that a winding up Order cannot be discharged or rescinded after it had been made and the only remedy was to apply for a stay of the winding up under section 243 of the Act.

The High Court declined to follow other High Court authorities which allowed for the setting aside of a winding up Order.

THE COURT OF APPEAL

The Court of Appeal adopted the approach of the High Court in upholding the decision of *Vijayalakshmi*. It was pointed out in *Vijayalakshmi*, and noted in *Megah Teknik*, that there are no express provisions in the Act or the Companies (Winding up) Rules 1972 ("the Rules") which allow for a setting aside or variation of a winding up Order. This is unlike the English Insolvency Rules 1986 which contain such a provision.

In *Megah Teknik*, the Court of Appeal held that a Court cannot invoke the general provision under the Rules of the High Court 1980 allowing for the setting aside of an Order made in default. This was because the Act set out specific provisions pertaining to winding up, including a stay of a winding up, but the Act was silent on allowing for a setting aside. Hence, the proper remedy in *Megah Teknik* was to apply for a stay under section 243 of the Act or to appeal against the winding up Order.

However, the Court of Appeal did leave the door open for a possible exercise of inherent jurisdiction to set aside a winding up Order under certain circumstances. The Court of Appeal did not explicitly list out these circumstances but adopted the Federal Court decision of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ("*Badiaddin*"). It was held by the Federal Court that there was inherent jurisdiction to set aside an Order where there was a contravention that defied a "*substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.*"

THE FEDERAL COURT

Leave to appeal to the Federal Court against the Court of Appeal decision was allowed. The question of law was whether a winding up Order could be set aside when obtained in the absence of the Respondent company. However, the Federal Court felt it was not proper to address the question as the Petitioner was not present and was not represented by solicitors. While declining to answer the question of law, the Federal Court nonetheless also held that there was no merit in the appeal and dismissed the appeal. Therefore, the Court of Appeal decision in *Megah Teknik* was upheld.

COMMENTARY

The upshot of *Megah Teknik* is that in general, one can only apply

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WITHHOLDING TAX IN MALAYSIA

Chan Su-Li provides a summary of the withholding tax regime in Malaysia

CHAN SU-LI

Su-Li is a graduate of the University of Melbourne, Australia. She is a Senior Associate with the Corporate Division of SKRINE. Her practice areas include mergers and acquisitions, investment and tax advisory services.

In Malaysia, the primary legislation in respect of the imposition of withholding tax is the Income Tax Act 1967 ("ITA").

The term "withholding tax" is not defined in the ITA but refers to a situation where the ITA requires the payer of certain types of payments to withhold or deduct tax at a prescribed rate and to remit the amount of such tax to the Director General of Inland Revenue Board ("DGIR").

In most situations, the withholding tax is imposed on payments to non-residents, as such persons generally do not file tax returns in Malaysia. A statutory obligation is imposed on the payer to deduct or withhold the tax due from the payee. If the payer fails to do so, the amount which he has failed to pay (and the applicable penalty) will be a debt due from him to the Government. The withholding tax regime is designed to minimise the opportunity for non-compliance as the tax is 'withheld' at source.

TYPES OF INCOME SUBJECT TO WITHHOLDING TAX

There are several types of income subject to withholding tax, some of which are as follows:

Contract payments to non-resident contractors

Contract payments made to non-residents in respect of services under a contract are subject to a withholding tax of 10% under Section 107A of the ITA.

For purposes of Section 107A:

(1) A "contract payment" means any payment made for services under a contract to a non-resident contractor or his agent or any person acting on his behalf;

(2) "Services under a contract", in relation to any non-resident contractor, means the performing or rendering of any work or professional service in Malaysia, being work or professional service in connection with, or in relation to, any contract project;

(3) A "contract project" in relation to any non-resident contractor, includes any undertaking, project or scheme, being an undertaking, project or scheme carried on, carried out or performed in Malaysia; and

(4) "Professional service" in relation to any non-resident contractor, includes any advisory, consultancy, technical, industrial, commercial or scientific service.

Where the non-resident has stationed employees in Malaysia who are involved in the contract, a further 3% withholding tax is to be deducted. This 3% is to account for any tax that may be payable by the employees for services rendered in Malaysia in connection with the contract. The 3% withholding tax will apply regardless of any arrangements that may exist for monthly deductions from the salaries of the relevant employees.

The withholding tax under Section 107A is not a final tax. Therefore, on the submission of the relevant returns to the DGIR, the non-resident or his agent in Malaysia can claim a refund of the tax overpaid by withholding, if any.

Interest payments

Section 109(1) of the ITA requires withholding tax to be deducted from interest payments derived from Malaysia and payable to a non-resident. The tax rate payable on interest payments is 15% of the gross amount.

However, certain interest derived by non-residents in Malaysia is not subject to withholding tax and these include the following:

- Interest attributable to a business carried on in Malaysia by the non-resident;
- Interest arising from an approved loan in Malaysia;
- Interest derived by non-resident companies from (i) ringgit-denominated Islamic securities and debentures, other than convertible loan stocks, approved by the Securities Commission, and (ii) interest derived from securities issued by the Government of Malaysia.

Royalty payments

Section 109(1) of the ITA requires withholding tax to be deducted from royalty payments derived from Malaysia and payable to a non-resident. The tax rate payable for royalty payments is 10% of the gross amount.

"Royalty" is defined in Section 2 of the ITA and includes -

(a) any sums paid as consideration for the use of, or the right to use –

(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition.

Special classes of income

Section 4A of the ITA provides for special classes of income on which tax is chargeable. Section 4A, read together with Section 109B of the ITA, means that payments of special classes of income to non-residents are subject to withholding tax at the rate of 10%.

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WEAPONS OF MASS DESTRUCTION

Adzim Amir Hamzah explains the measures taken by the Malaysian Government to curb the proliferation of WMD

Approximately 5 years after the United Nations Security Council ("UNSC") adopted Resolution 1540 on non-proliferation of weapons of mass destruction ("WMD"), Malaysia, a country last elected as a member of the UNSC in 1999, affirmed its commitment to the UNSC's cause by passing its own legislation, the Strategic Trade Act 2010 ("STA"), for the domestic control of strategic items on 6 May 2010.

The STA came into force on 1 January 2011 together with 5 sets of subsidiary legislation.

What is the primary objective of the enactment of STA?

The STA provides a domestic mechanism to control the export, transshipment, transit and brokering of strategic items, including arms and related materials, and other activities that will or may facilitate the design, development and production of WMD and their delivery systems in Malaysia.

> **"The STA provides a domestic mechanism to control the export, transshipment, transit and brokering of strategic items"**

What is WMD?

WMD refers to any weapon designed to kill, harm or infect people, animals or plants through the effect of nuclear explosion or dispersion of the toxic properties of a chemical weapon or the infectious or toxic properties or a biological weapon. WMD also includes the delivery system created, adapted or intended for the deployment of such weapons.

What are the requirements under the STA?

The STA requires any person who is engaged in the export, transshipment, transit or brokering of strategic items or unlisted items to obtain the relevant permit or registration under the STA from the relevant authority. According to the Ministry of International Trade and Industry's website, permits may also be required by intermediaries like cargo agents, carriers, freight forwarders, feeder operators, logistic or service providers.

What are "strategic items" and "unlisted items"?

"Strategic items" are goods and technology which are prescribed as "strategic items" pursuant to Section 7 of the STA and are intended to be controlled under the STA. A comprehensive list of controlled strategic items is contained in the Strategic Trade (Strategic Items) Order 2010.

"Unlisted items" are goods and technology which are not prescribed as "strategic items" but may be used in any activity that supports the development, production, handling, usage, maintenance, storage, inventory or proliferation of any weapon of WMD and its delivery systems.

What are the types of permits and registrations which are available under the STA?

The permits and registrations available under the STA are as follows:

(a) Single permit - for one time export, transshipment or bringing into transit within a specified period;

(b) Bulk permit - for multiple export or transshipment within a specified period for a single country or destination;

(c) Multiple use permit - for multiple export or transshipment within a specified period to multiple countries or destinations;

(d) Special permit - for one time export, transshipment or bringing into transit within a specified period issued on a shipment basis destined to be received by a restricted end-user;

(e) Broker registration - for carrying out brokering of strategic items.

Is there any specific restriction or prohibition under the STA?

The Minister of International Trade and Industry is empowered under the STA to designate an end-user to be a restricted end-user for which a special permit is required and a prohibited end-user to whom all export, transshipment or transit of strategic items or unlisted items are prohibited.

The list of restricted and prohibited end-users, which includes individuals, entities, countries and destinations, can be found in the Strategic Trade (Restricted End-Users and Prohibited End Users) Order 2010.

What are the categories of strategic items listed in the Strategic Trade (Strategic Items) Order 2010?

The Strategic Trade (Strategic Items) Order 2010 divides strategic items into 2 main categories namely:

(a) Military Items – items solely or designed or modified for military purpose, including any part or component thereof. They include the technology necessary for the development, production or use of any military item; and

(b) Dual-use Items – items which are capable of being used for a non-military and a military purpose or in relation to the proliferation of WMD. These items include the technology necessary for the development, production or use of any dual-use item.

Dual-use items are further divided into 10 sub-categories,

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namely, Category 0 – Nuclear materials, facilities and equipment; Category 1 – Special materials and related equipment; Category 2 – Materials Processing; Category 3 – Electronics; Category 4 – Computers; Category 5 – Telecommunications and information security; Category 6 – Sensors and lasers; Category 7 – Navigation and Avionics; Category 8 – Marine; and Category 9 – Aerospace and Propulsion.

When should I start applying for the relevant permit or registration?

The requirements for permits to export, transship or bring into transit of dual-use items under Category 0 (Nuclear materials, facility and equipment) and the special permit required for export, transship or bring into transit of strategic items to restricted end-users and registration for brokering of strategic items is enforced from 1 April 2011. Companies have been given 3 months from 1 January 2011 to comply with these requirements.

"any person who is engaged in the export, transshipment, transit or brokering of strategic items or unlisted items (must) obtain the relevant permit or registration"

The requirements for permits to export, transship or bring into transit all other strategic items (i.e. military items and dual-use items under Categories 1 to 9) will be enforced on 1 July 2011. Application for these permits can be made starting 1 April 2011.

What are the timeframes for application and the validity period of the permits and registration? Can the permits and registration be renewed?

(a) Single-use permit – an application should be made not less than 5 days before the export, transshipment or bringing into transit of such items. The permit is valid for up to 6 months and is not renewable.

(b) Bulk permit and multiple-use permit – an application should be made not less than 2 months before the export, transshipment or bringing into transit of such items. The permit is valid for up to 2 years and can be renewed at least 2 months before expiry.

(c) Special permit – an application should be made not less than 2 months before the export, transshipment or bringing into transit of such items. The permit is valid for up to 1 year and is not renewable.

(d) Broker registration – an application should be made not less than 30 days before carrying out an act of brokering of such items. The registration is valid for up to 1 year and can be renewed at least 14 days before expiry of the registration.

Who is the licensing authority to whom applications for permits should be submitted?

The licensing authority to whom application for permits should be submitted includes the Atomic Energy Licensing Board (for dual-use items under Category 0 and certain dual-use items under Categories 1, 2, 3, 4 and 6), the Malaysian Communications and Multimedia Commission (for dual-use items under Categories 4 and 5), the Pharmaceutical Services Division of the Ministry of Health (for certain dual-use items under Category 1) and the Strategic Trade Controller appointed under the STA (for military items, dual-use items under Categories 7, 8 and 9, and certain dual-use items under Categories 1, 2, 3 and 6).

Where can I find the procedures and documents required for submission of application for permits?

The procedures and documents required for submission of application for permits can be found in the Strategic Trade Regulations 2010.

What are the consequences of engaging in export, transshipment, transit and brokering of strategic items or unlisted items without the requisite permit or registration?

A person who is found guilty of engaging in such activities without the requisite permit or registration can be subjected to a fine ranging from RM5 million to an amount in excess of RM30 million, or a term of imprisonment ranging from 5 years to life imprisonment, or the death sentence. The heftiest penalty may be imposed on the offender where the act results in death of others.

Am I required to keep and maintain the records of the activities relating to strategic items or unlisted items under the STA?

Yes. The STA requires all records and particulars relating to the export, transshipment, transit of strategic items or unlisted items to be maintained for at least 6 years from the end of the calendar year in which the relevant act was carried out.

Are the provisions of STA and the regulations made thereunder unique to Malaysia?

No. The STA, the regulations and the list of strategic items reflect internationally agreed export controls and the Resolution 1540 adopted by the UNSC.

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PLUGGING THE "ASSET DISPOSAL" LOOPHOLE

Melissa Stothard discusses the amendments to the Main Market Listing Requirements on Major Disposals

INTRODUCTION

On 19 March 2010, the Securities Commission ("SC") and Bursa Malaysia Securities Berhad ("Bursa Malaysia") issued a joint consultation paper in respect of the proposed amendments to the Main Market Listing Requirements ("MMLR") and the ACE Market Listing Requirements ("ALR") on the privatisation of listed corporations via the asset disposal route.

The asset disposal route is an indirect method of taking over a listed corporation where the acquirer acquires all, or substantially all, of the assets, rather than the shares, of a listed corporation. Upon the completion of the disposal, the listed corporation would be delisted as it no longer has the level of operations required to maintain its listing status.

There was much debate in this area as it was perceived that there was a loophole in the law in that unlike other forms of privatisation which had higher approval thresholds, a disposal of all, or substantially all, of a company's assets required the approval of only a simple majority of its shareholders present and voting at the company's meeting.

On 28 January 2011, the SC and Bursa Malaysia released their joint-response to the consultation paper and announced that a takeover of a corporation's assets that results in a listed corporation being no longer suitable for listing, would require the approval of 75% of its shareholders. At the same time, Bursa Malaysia introduced amendments to the MMLR and the ALR to give effect to this requirement, which applies to all asset disposals announced on or after that date.

This article discusses the amendments made to the MMLR on the privatisation of a listed corporation via the asset disposal route. Our comments apply equally to the ALR as identical amendments were made to those requirements.

MAJOR DISPOSALS

A new Part F(A) was introduced into Chapter 10 of the MMLR to deal with "Major Disposals". Paragraph 10.02 (eA) of the MMLR defines a "Major Disposal" as a disposal of all, or substantially all, of a listed corporation's assets which may result in the listed corporation being no longer suitable for continued listing on the official list of Bursa Malaysia.

Bursa Malaysia has clarified in the Questions and Answers issued in conjunction with these amendments that a disposal of "substantially all of a listed corporation's assets" refers to a disposal of almost all of its assets, which is so material that upon the completion of the transaction, the listed corporation will trigger (a) the criteria for a cash company under Paragraph 8.03 and Practice Note 16 of the MMLR; or (b) any of the "Prescribed Criteria" referred to in Paragraph 8.04 and Practice Note 17 of the MMLR.

A "cash company" is defined in Paragraph 1.01 of the MMLR as a listed issuer whose consolidated assets consist of 70% or more of cash or short term investments or a combination of both and is deemed by Bursa Malaysia to be a cash company.

The circumstances that will trigger a "Prescribed Criteria" are set out in Practice Note 17 of the MMLR, and include a situation where a listed corporation has disposed of its business or major business, or has an insignificant business or operations.

REQUIREMENTS FOR A MAJOR DISPOSAL

A listed corporation which intends to undertake a Major Disposal must comply with the requirements set out in Paragraph 10.11A(1) of the MMLR. The main requirements are set out below.

Main Adviser

The listed corporation must appoint a main adviser in relation to the Major Disposal. The main adviser must be a Principal Adviser under the SC's Principal Adviser's Guidelines ("Guidelines") and be appointed before the terms of the Major Disposal are agreed upon.

The main adviser is to ensure that the Major Disposal complies with the relevant laws, regulations or guidelines and that all the information required to be disclosed in the announcement and circular are fully disclosed.

> **"The increase in the shareholder approval threshold for a Major Disposal provides greater protection for minority shareholders"**

Independent Adviser

The listed corporation is required to appoint an independent adviser who is a corporate finance adviser under the Guidelines.

The independent adviser is required to comment on the fairness and reasonableness of the Major Disposal and any related proposals in so far as the shareholders are concerned and to advise them as to whether they should vote in favour of the proposed transaction. The independent adviser must take reasonable steps to satisfy itself that it has a reasonable basis to render the afore-mentioned comments and advice.

Additional Disclosure Requirements

The listed corporation will also be required to include the additional information set out in Part I of Appendix 10A and Part J

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of Appendix 10B of the MMLR, in the announcement and circular to its shareholders on the Major Disposal respectively.

Among the additional information to be included in the announcement are the identity of the ultimate offeror (as defined in the Malaysian Code on Take-Overs and Mergers 2010) and a statement as to whether the board of directors intends to seek alternative bids.

The additional information be included in the circular are statements by the board of directors as to (a) whether the Major Disposal is fair and reasonable and in the best interest of the listed corporation; (b) the future plans of the listed corporation and whether it intends to maintain its listing status; and (c) the intended utilisation of the sale proceeds and the time-frame for such use.

Increase in Approval Threshold Requirement

The final and perhaps most crucial of the new requirements in the MMLR is that the approval of a Major Disposal requires the approval in general meeting of at least 75% in value of the shareholders present and voting, in person or by proxy, on the relevant resolution.

CONCLUSION

These recent amendments to the MMLR have brought about a higher level of certainty and clarity to the capital market and have enhanced investor protection. They have been well received by stakeholders in the securities industry. The enhanced disclosure requirements promote greater transparency and enable shareholders to make an informed decision.

The increase in the shareholder approval threshold for a Major Disposal provides greater protection for minority shareholders. With this amendment, Malaysia has the same shareholder approval threshold as New Zealand, Hong Kong and Thailand, which have all raised their threshold for asset disposals from a simple majority to 75%.

These amendments effectively plug the loophole in the "asset disposal" route for the take-over of a listed corporation as shareholders of such entity will now be given the same level of protection as the other methods of taking over or privatising a listed corporation.

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POSTPONEMENT OF A GENERAL MEETING

There may be times when the need arises for the directors of a company to postpone a general meeting after the notice of meeting has been issued to the shareholders of a company.

This situation arose in *Smith v Paringa Mines Limited* [1906] 2 Ch. D 193. One of the issues in this case was that after a notice of general meeting had been issued by the board of directors, certain shareholders of the company commenced legal proceedings against the company, which amongst others, challenged the validity of the constitution of the board which had convened the general meeting.

As the board was of the view that it was impracticable to proceed with the general meeting pending the outcome of the court proceedings, it resolved to postpone the meeting. A notice was issued to the shareholders to inform them of the postponement of the general meeting.

One of the directors disputed the legality of the postponement and published notices in several newspapers to inform the shareholders of the company that the general meeting would proceed as scheduled. A number of shareholders attended the meeting on the scheduled date and passed several resolutions in relation to matters that had been specified in the notice of meeting, including the election and re-election of directors.

The company then sought an injunction to restrain the directors who were appointed at the meeting from acting as directors. The company contended that the board, being vested with the powers to convene a general meeting, had an implied power to postpone the meeting and therefore the notice of postponement was valid.

The court rejected the company's contention and held that as the articles of association did not contain any provision to postpone a meeting, it was not competent for the directors to do so. As the notice of postponement was invalid, the court held that the proceedings at the general meeting were valid.

It is clear from *Smith v Paringa Mines Limited* that the board of directors have no power to postpone a general meeting unless the articles of association confer powers on them to do so. In the absence of such powers, the proper procedure to be adopted to postpone a general meeting is as follows:

- The board of directors must hold the meeting as convened
- Unless the meeting is dissolved or adjourned for want of quorum, the meeting must be proceeded with
- The chairman of the meeting can then adjourn the meeting if he is authorised to do so by the articles of association
- If the chairman is not authorised by articles of association to adjourn the meeting, he should seek consent of the shareholders to adjourn the meeting.

A SECOND BITE OF THE CHERRY

Sharmila Ravindran provides a commentary on Padiberas Nasional Berhad v Zainon Bt Ahmad

INTRODUCTION

The Court of Appeal in a recent unreported decision of *Padiberas Nasional Berhad v Zainon Bt Ahmad & 690 Others* (Appeal No. B-02-374-2008) unanimously overturned the decision of the High Court in allowing a declaration that the Respondents are entitled to retirement benefits pursuant to specific clauses in the Padiberas Employment Handbook ("Handbook") after receiving a pay-out pursuant to a mutual termination under a Voluntary Separation Scheme ("VSS Scheme") offered by Padiberas Nasional Berhad ("Padiberas").

THE BACKGROUND FACTS

On or about 2003, the Respondents, all of whom were employees of Padiberas were invited to apply for a separation package under the VSS Scheme.

Pursuant to the VSS Scheme, the Respondents were informed that the successful applicants would receive a separation package which includes, *inter alia*, basic compensation, salary in lieu of notice, salary in lieu of unutilised leave and medical benefits for a period of one year after termination. The Respondents applied for the VSS Scheme and were successful in their application.

Payments were subsequently made to the Respondents pursuant to the terms of the VSS Scheme.

Some two years after the Respondents ceased employment with Padiberas, the Respondents approached Padiberas for a payment of purported 'retirement/termination benefits' pursuant to a clause in the Handbook.

> **"the clear intention of the VSS Scheme was to bring a complete cessation of the employer-employee relationship"**

Padiberas refused the Respondents' request which resulted in the Respondents commencing a declaratory action against Padiberas in the High Court.

The High Court Judge held that even though there was a mutual termination of the Respondents' employment contracts, the Respondents' right to be paid retirement/termination benefits as stated in Handbook subsists as it was never waived.

THE REVERSAL BY THE COURT OF APPEAL

The Court of Appeal unanimously reversed the decision of the High Court. In coming to that conclusion, the Court of Appeal deliberated on the following issues:

(1) Whether there is a need for an express term in the VSS Scheme waiving the retirement/termination benefits in the Handbook; and

(2) Whether there was an intention by both parties to rescind the Respondents' employment contracts when they embarked on the VSS Scheme.

Is an express waiver necessary?

The Respondents took the position that there must be an express waiver of the rights under the retirement/termination benefits in the Handbook.

The Court of Appeal disagreed with this contention and held that although it was not expressly stated that the VSS Scheme would extinguish the rights and obligations under the Respondents' contracts of employment, the new agreement in the form of the VSS Scheme clearly revealed an intention to rescind the Respondents' employment contracts.

The Court of Appeal applied Section 63 of the Contracts Act 1950 and affirmed the Court of Appeal decision in *Ramli bin Shahdan v Motor Insurers Bureau of West Malaysia* [2006] 2 MLJ 116 when it stated that the mutual termination of the Respondents' contracts of employment by the VSS Scheme brought about a complete rescission of the Respondents' contracts of employment and along with it, the Handbook.

The Court of Appeal also referred to *United Dominion Corp (Jamaica) Ltd v Micheal Miri Shouciar* [1969] 1 AC 340 where Lord Devlin made the following observation:

"if the new agreement reveals an intention to rescind the old, the old goes, and if it does not, the old remains in force and unamended."

Intention of parties

The Court of Appeal pointed out that the clear intention of the VSS Scheme was to bring a complete cessation of the employer-employee relationship between the Respondents and Padiberas.

The termination under the VSS Scheme was a termination upon mutually agreed terms which did not include the retirement/termination benefits payable under the Handbook.

The Respondents would have been in a position to compare and to ascertain that the compensation they would receive under the VSS Scheme did not include what they would have received under the retirement/termination benefits in the Handbook.

In those circumstances, the Court of Appeal came to the conclusion that it is not necessary to insert an express waiver clause in relation to the retirement/termination benefits in the Handbook.

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Effect of acceptance of VSS Scheme

The Court of Appeal made a finding that the Respondents had voluntarily chosen the VSS Scheme which brought about a complete cessation of their employment with Padiberas at the point when the Respondents received the benefits pursuant to the VSS Scheme.

The Court of Appeal made a further observation that it would be wrong to allow the Respondents to again agitate for benefits which were not included in the compensation package under the VSS Scheme. This is because the retirement/termination benefits in the Handbook would only be paid if the Respondents continued their employment with Padiberas. If the Respondents are allowed to do so, it would frustrate the whole purpose of introducing the VSS Scheme.

The Court of Appeal adopted the principle in the case of *AK Bindal v Union of India* [2003] 2 LRI 837 where the Indian Supreme Court made the following observation,

"The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights ..."

CONCLUSION

For employers, this judgment brings welcome confirmation that employees who apply for and are accepted under a VSS Scheme cannot have a second bite of the cherry.

Notwithstanding the *Padiberas* decision and to avoid any doubt as to whether the employee can re-agitate any rights under his contract of employment, it is recommended that an express term be included in a VSS Scheme whereby the employee waives his rights under his contract of employment.

Employers should note that once a contract is terminated by way of mutual agreement pursuant to a VSS Scheme or by way of mutual separation, all rights and obligations under the contract of employment including post-contractual rights and obligations are extinguished. It is therefore important that the employer identifies and states expressly those post-contractual obligations that the employer requires to be saved as a matter of course. These clauses may include clauses on confidentiality, non-solicitation and non-disclosure.

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LEGAL PROFESSIONAL PRIVILEGE

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CAN LEGAL PROFESSIONAL PRIVILEGE BE EXTENDED TO OTHER PROFESSIONALS?

The House of Lords had the opportunity to clarify the law on this issue in the case of *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2002] UKHL 21. Lord Hoffman, delivering the judgment of the apex court opined that the court was bound to hold that legal professional privilege does not apply, at common law, in relation to any professional other than a qualified lawyer; a solicitor or barrister, or an appropriately qualified foreign lawyer, and that it is not open to the court to hold that such privilege applies outside the legal profession, except as a result of relevant statutory provisions.

His Lordship's view is consistent with the policy of legal professional privilege in that the privilege is based not on the legal enforcement of the lawyer's honourable obligations but on the public interest in the client having uninhibited access to legal advice and assistance. This is why it is confined to lawyers and only the Parliament may create any statutory extension.[15]

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Notes:

[1] Lord Taylor CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 503 G-H.
[2] Cockburn CJ in *Bullock & Co v Corry & Co* [1878] 3 QBD 356 followed in the Malaysian High Court case of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445, which was upheld by the then Supreme Court on appeal.
[3] Nik Hashim FCJ delivering the Federal Court judgment of *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 CLJ 405 cited with approval the Singapore Court of Appeal case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals* [2007] 2 SLR 367.
[4] English Court of Appeal case of *Woodhouse and Co (Ltd) v Woodhouse* [1914] 30 TLR 559.
[5] English case of *Re Hydrosan Ltd* [1991] BCLC 418.
[6] Malaysia Federal Court case of *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 CLJ 405.
[7] Singapore Court of Appeal case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals* [2007] 2 SLR 367.
[8] *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48 (HL).
[9] Lord Rodger in *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48 (HL).
[10] *In re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16; Refer also to Lord Scott's comments in Three *Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48 (HL).
[11] The Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 CLJ 405 cited with approval the High Court judgment of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 and the Singapore Court of Appeal case of *Yeo Ah Tee v Lee Chuan Meow* [1962] 1 LNS 210.
[12] *B v Auckland District Law Society* [2003] 2 AC 736 (PC).
[13] Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 CLJ 405.
[14] *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No. 2)* [1972] 2 All ER 353 at 376 (CA), per L Denning, not challenged on appeal to the House of Lords.
[15] *Duchess of Kingston's Case* (1776) 20 St Tr 355.

THE SOCIAL NETWORK... AND THE LAW

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Her Ladyship then held that these elements were not present in the case as the 1st defendant was merely an internet service provider which performed a passive role in facilitating postings on the internet and thus could not be deemed a publisher at common law (*Bunt v Tiley* [2006] 3 All ER 336).

In other words, the mere hosting and facilitation of postings by users on a website forum does not fulfill the criteria of participation in order for there to be publication. In addition, there was no opportunity for the 1st defendant to edit, vet or check the postings authored by the individual users before it was posted on the forum. The fact that the 1st defendant was able to edit the postings after they are put up did not give the 1st defendant an "opportunity" to edit and this did not amount to "control" as envisaged by the authorities.

> **"Defamation laws ... apply equally to online media as they do to traditional media"**

It is possible that the court may come to a different conclusion in a situation where the defendant has active control settings over what is published in his blog or website. For instance, where the comment is set for the host's approval prior to its publication.

VIOLATION OF PERSONAL DATA

More often than not, we do not think twice when we are asked to enter our personal details on SMS and upload our photos online or add new friends (whom we have never spoken to offline!) to our Facebook friends list.

However, the nightmare begins when one finds himself being falsely accused of misdemeanors that he did not commit or finds his personal details misused in identity fraud or blackmail via Facebook. This has been heavily highlighted by the local mainstream media where criminals have been lifting information from Facebook such as addresses, telephone numbers and even photographs for crimes ranging from drug trafficking to blackmail and sexual harassment.

A recent US case illustrates this. A Californian man, George Bronk, admitted using personal information he gleaned from Facebook to hack into women's e-mail accounts, then send nude pictures of them to everyone in their address book. Bronk was arrested in October 2010 and eventually pleaded guilty to seven felonies, including computer intrusion, false impersonation and possession of child pornography.

Although there is no express right to privacy in Malaysia, which compounds the difficulty for a victim to take action against the perpetrator, a person whose privacy has been infringed in the form of hijacking of their personal data, may appeal to certain enforcement agencies to take action against the perpetrator.

Communications and Multimedia Act ("CMA")

Section 211(2) of the CMA prohibits the provision and transmission of content which is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. A person who is found guilty of this an offence shall, upon conviction, be subject to a fine of up to RM50,000.00 or to imprisonment for up to one year or to both.

"Content", as defined in the CMA, includes any sound, text, still picture, moving picture, audio-visual or tactile representation, which can be manipulated, stored, retrieved or communicated.

Further, Section 233 of the CMA renders it an offence to manipulate any network facility or network service or applications service with intent to annoy, abuse, threaten or harass another, to transmit any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character.

The Malaysian Communications and Multimedia Commission may take various actions against a perpetrator, including issuing a notice or warning, barring websites or blogs and initiating investigations based on the provisions of the CMA.

> **"Defamation can arise from written or spoken words and other forms of expression such as gestures, signs, cartoons and caricatures"**

Penal Code

If the abuse of personal data involves the posting of sexually incriminating photos or videos on SMS, the perpetrator may find himself criminally liable under Section 292(a) of the Penal Code for distributing, exhibiting or putting into circulation, an obscene object. This offence is punishable with imprisonment for up to three years or with a fine, or with both.

In *Mohd Rizal Mat Yusuf v PP* [2009] 3 CLJ 798 the Court held that a video compact disc which contained a pornographic recording was an obscene object but quashed Mohd Rizal's conviction on other grounds. It remains to be seen whether the court would extend the scope of the section to cover online postings.

Film Censorship Act

Where the obscene material posted on SMS consists of a sequence of visual images, a perpetrator may find himself prosecuted under Section 5 of the Film Censorship Act for circulating or exhibiting obscene material, which on conviction, is punishable with a fine of up to RM10,000.00, or to a term of imprisonment of up to five years, or to both.

It may be easier to secure a conviction under the Film Censorship Act than the Penal Code as 'film' is defined in this Act to include any record of a sequence of visual images which is capable of being shown as a moving picture.

SO DOES THIS MEAN THE END OF MY FACEBOOK WORLD?

Not quite. Ultimately, one should always bear in mind that everything posted online is in the public domain. One should always err on the side of caution and take precautions to never post sensitive personal information online and never add friends whom one is not acquainted with.

> **"the nightmare begins when one (is) falsely accused of misdemeanors ... or finds his personal details misused in identity fraud or blackmail"**

Self-regulation remains the best solution to combat the invasion of privacy. If it sounds too good to be true, it probably is - and that includes the message from the good-looking stranger who has just dropped you a message in your Facebook inbox.

Oh, and before you lean back and think that you're safe from service of legal process as long as you stay exclusively online and remain physically inconspicuous, think again. The Australian court in 2008 has held that service of legal documents may be done by way of Facebook. It remains to be seen whether such service of legal process will be permitted here eventually.

Now if you'll excuse me, I'd like to get back to checking what that gorgeous hunk who dropped a message in my Facebook inbox has to say.

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UNWINDING A WINDING-UP?

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to stay a winding up Order. In circumstances like *Megah Teknik*, where the winding up Order was obtained in default, this decision suggests that there is no recourse to apply for a setting aside.

However, the Court of Appeal recognised that there would still be circumstances where the Court can exercise its inherent jurisdiction to set aside a winding up Order. Such circumstances could be where there was illegality or lack of jurisdiction. For instance, there may have been breaches in complying with the requirements under the Act and the Rules. Those breaches may have resulted in a respondent company not even having notice of the winding up Petition. Such an argument did not arise in *Megah Teknik* as the procedural requirements had been complied with.

> **"it is submitted that the Court ought to have jurisdiction to set aside a winding up Order"**

There are crucial differences between a stay and a setting aside of a winding up. While a stay of a winding up Order amounts to a total discontinuance of the winding up proceedings, there are several hurdles in applying for such a stay. The interests and views of the creditors, contributories and the liquidators must be taken into account in assessing whether a stay should be granted.

On the other hand, for a setting aside, such a test would not be relevant as the focus would be on whether the winding up Order was granted illegally or with lack of jurisdiction. Further, for a stay, the records with the Companies Commission of Malaysia would still reflect the winding up but that it was now stayed. For a setting aside, there would not have been a valid winding up Order in the first place and the records should not reflect any winding up.

For the reasons discussed above, it is submitted that the Court ought to have jurisdiction to set aside a winding up Order. Echoing the words of Mohd. Azmi FCJ in *Badiaddin,* circumstances may exist where there is a "*real need to set aside the defective order to enable to Court to do justice.*"

It is a pity that the Federal Court in *Megah Teknik* missed out on the opportunity to clarify whether a Court can set aside a winding up Order and the specific circumstances in which it would do so.

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STAMP DUTY ON SERVICE AGREEMENTS

Dato' Philip Chan provides a primer on Stamp Duty (Remission)(No. 4) Order 2010

INTRODUCTION

The Finance Act 2009 introduced various amendments to the Stamp Act 1949 ("Act") including amendments to Item 22(1) of the First Schedule of the Act.

Item 22(1) had hitherto been the head of charge for stamp duty payable on an instrument which is the only or primary security for the payment of annuities or sums of money payable at stated periods.

The amendment expanded the categories of instruments which came within the purview of Item 22(1) to include "loan, services, equipment lease agreement or instrument of any kind".

In respect of an instrument which falls under this head of charge, stamp duty at a rate of 1% is imposed on an instrument which is the only or primary security for any annuity under sub-paragraph (a) of Item 22(1).

> **"the 2010 Order remits the amount of stamp duty ... which is in excess of 0.1% (on any) service agreement described in Paragraph 2(2)"**

Where an instrument is the only or primary security for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, sub-paragraph (b) of Item 22(1) ("Item 22(1)(b)") imposes stamp duty at the *ad valorem* rate of 0.5% of the total amount secured by that instrument.

The amendment to Item 22(1)(b) caused grave concerns within the services sector, including the construction industry, as the new rate of stamp duty could significantly increase the cost of doing business, especially with respect to service agreements that involve large sums of money.

STAMP DUTY (REMISSION) ORDER 2009

To address the concerns raised by the services sector, the Minister of Finance exercised his powers under Section 80(2) of the Act and issued the Stamp Duty (Remission) Order 2009 ("2009 Order").

The 2009 Order remits all duty chargeable under Item 22(1)(b) which exceeds RM50 in respect of any service agreement. The 2009 Order came into effect on 15 September 2009 and expired on 31 December 2010.

STAMP DUTY (REMISSION)(NO. 4) ORDER 2010

On 30 December 2010, the Minister of Finance further exercised his powers under Section 80(2) of the Act and issued the Stamp Duty (Remission)(No. 4) Order 2010 ("2010 Order"). The 2010 Order applies to service agreements entered into on or after 1 January 2011.

Paragraph 2(1) of the 2010 Order remits the amount of stamp duty chargeable under Item 22(1)(b) which is in excess of 0.1% of any sums of money relating to the service agreement described in Paragraph 2(2) of the 2010 Order, that is –

(a) a service agreement entered into by a main service provider with a person other than a Ruler of a State or the Government of Malaysia or of any State or local authority awarding the undertaking (Paragraph 2(2)(a)); or

(b) a service agreement entered into by a main service provider with a sub-provider of service where the person awarding the undertaking to the main service provider is a Ruler of a State or the Government of Malaysia or of any State or local authority (Paragraph 2(2)(b)).

The rationale for imposing the *ad valorem* rate of charge of 0.1% on a sub-service agreement under Paragraph 2(2)(b) of the 2010 Order is that a service agreement relating to an undertaking awarded by a Ruler of a State or the Government of Malaysia or of any State or local authority is exempted from stamp duty.

> **"the 2010 Order remits the amount of stamp duty ... in excess of RM50 (on the service agreements enumerated in Paragraph 2(3))"**

Paragraph 2(3) of the 2010 Order remits the amount of stamp duty chargeable under Item 22(1)(b) in excess of RM50 on any service agreement entered into between –

(a) a main service provider and any sub-provider of service where the person awarding the undertaking to the main service provider is a person other than a Ruler of a State or the Government of Malaysia or of any State or local authority; or

(b) a sub-provider of services and any further sub-provider of services where the person awarding the undertaking to the main service provider is a Ruler of a State or the Government of Malaysia or of any State or local authority.

To be eligible for stamp duty remission under Paragraph 2(3)

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of the 2010 Order, a sub-service agreement or sub-sub-service agreement must state –

(a) the names of the parties and the date of execution of the agreement referred to in Paragraph 2(2)(a) or 2(2)(b), as applicable, of the 2010 Order;

(b) the subject matter of the agreement; and

(c) that the agreement under Paragraph 2(2)(a) or 2(2)(b), as applicable, has been duly stamped at the rate specified in Paragraph 2(1) of the 2010 Order.

> **"The 2010 Order offers further respite to the services sector from the full impact of the ad valorem rate of duty of 0.5%"**

EFFECTS OF THE 2010 ORDER

The 2010 Order increases the stamp duty payable from a maximum sum of RM50 under the 2009 Order to 0.1% of the amount payable under the relevant service agreement. However, the stamp duty payable on sub-service agreements remains unchanged.

Unlike the 2010 Order which had a fixed duration that expired on 31 December 2010, the 2010 Order will remain in force until it is revoked.

CONCLUSION

The 2010 Order offers further respite to the services sector from the full impact of the *ad valorem* rate of duty of 0.5% stipulated in Item 22(1)(b).

As a ministerial order can be revoked or further amended at any time through executive action, the spectre of the unabated rate of stamp duty under Item 22(1)(b) being imposed in future hangs over the services sector in Malaysia like the Sword of Damocles.

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WITHHOLDING TAX IN MALAYSIA

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The 3 categories of income of non-residents which are caught under Section 4A are as follows:

(i) amounts paid in consideration of services rendered by the person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person;

(ii) amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

(iii) rent or other payments made under any agreement or arrangement for the use of any moveable property.

Section 4A income must be derived from Malaysia in order to be chargeable to withholding tax. Section 15A of the ITA provides that Section 4A income shall be deemed to be derived from Malaysia if:

(a) the Government, State Government or local authority is responsible for the payment;

(b) the responsibility for payment lies with a resident; or

(c) the payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

However, in respect of income under Section 4A(i) and (ii), Section 15A shall apply only to the amount attributable to services which are performed in Malaysia.

DOUBLE TAXATION AGREEMENTS

A double taxation agreement ("DTA") is an agreement signed between two countries with the purposes of eliminating, whether wholly or partially, the burden of double taxation (i.e. where the income derived by a person from a source is brought to charge in more than one tax jurisdiction) and to prevent or minimise tax evasion.

Malaysia has entered into more than 60 bilateral DTAs. These DTAs commonly provide for either an exemption or reduction in the prescribed rate for certain types of withholding taxes. For example, the DTA between Malaysia and Singapore reduces withholding tax rate in respect of royalties and technical fees to 8% and 5% respectively. In the event of any conflict between the ITA and a DTA, Malaysian case law has held that the provisions of the DTA will prevail.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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